The rebundling advocates have utterly failed to demonstrate that elimination of the No-Bundling Rule would serve the public interest. The rebundling advocates neither have challenged the policy of promoting user choice, nor provided evidence that the Rule has had any adverse impact. Indeed, some of these commenters affirmatively acknowledge the substantial benefits that the Rule has provided. As NYNEX observes, "The Commission's CPE unbundling policies have had a very positive effect on the competitive provision of CPE. They have expanded customer choice and fostered the development of new technologies."[14]

B. Elimination of the No-Bundling Rule is Not Necessary to Permit Interexchange Carriers to Offer Packages that Include Transmission Service and CPE

The only public interest claim made by supporters of the Commission's rebundling proposal is that, if the No-Bundling Rule were eliminated, carriers would be able to offer "packages" that include transmission service and CPE.[15] This, they claim, would provide numerous benefits, including: an increased number of options available to consumers;[16]

---

[14] NYNEX Comments at 6; see also MCI Comments at 24 (filed Apr. 25, 1996) ("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.").

[15] See Comments of GTE at 10 (filed Apr. 25, 1996) ("GTE encourages the Commission to amend Section 64.702(e) to allow the packaging of CPE with interstate, interexchange services."); accord Comments of AT&T Corp. at 26; Comments of Excel Telecommunications, Inc. at 5; API Comments at 15-16; Comments of Selvoig Bernstein Cato Institute at 4 (filed Apr. 25, 1996).

[16] See Comments of AT&T Corp. at 28; API Comments at 12; Comments of the Telecommunications Resellers Association at 41 (filed Apr. 25, 1996).

reduced consumer transaction costs;[17] a "single point of responsibility" for services and equipment;[18] "flexibility" to implement new technologies;[19] and the ability of consumers to obtain volume and term discounts.[20]

The rebundling advocates' basic premise is simply wrong. The CPE No-Bundling Rule does not prevent carriers from offering "packages" consisting of transmission service and CPE. The Rule merely requires that -- if a carrier chooses to offer "one-stop shopping" -- it must separately price the service and CPE components, and offer each component on a stand-alone basis. Indeed, there are numerous examples of carrier-provided packages that are now widely available.[21] As ITAA cogently explains, "the unbundling rule disadvantages no one. It does not deny consumers the benefits of one-stop shopping, nor does it preclude any common carrier from providing CPE."[22] Because carriers currently can provide packages that include

---

[17] See, e.g., Florida PSC Comments at 17; Comments of the Louisiana Public Service Commission at 10 (filed Apr. 25, 1996); Comments of Sprint on Sections III, VII, VIII and IX of Notice of Proposed Rulemaking at 28 (filed Apr. 25, 1996) ("Sprint Comments").

[18] See API Comments at 15-16.

[19] See id. at 16.

[20] See id. at 16; see also Comments of General Communication, Inc. at 6 (filed Apr. 25, 1996).

[21] For instance, AT&T's ACCUWAN service package combines AT&T's regulated X.25 packet service with non-regulated CPE, such as routers. See AT&T ACCUWAN Service Description, Part 2 ("With ACCUWAN AT&T assumes total end-to-end responsibility. . . . [T]he service includes the DCE [i.e., premise-based data communication equipment] and routers needed to interface between the LAN and the private line WAN . . . .").

[22] ITAA Comments at 4; see also CERC Comments at 8. Nor does the Rule prevent carriers from providing a "single point of responsibility" for all aspects of a user's

(continued...)

transmission service and CPE, elimination of the No-Bundling Rule is not necessary to achieve any of the benefits advanced by the rebundling advocates.[23]

Elimination of the No-Bundling Rule would neither increase the number of service options available nor lower users' "transaction costs." Under the Rule, a user may purchase service and CPE separately. Alternatively, a user can reduce its transaction costs by delegating responsibility for assembling an integrated solution to a carrier. Because carriers already have the right to offer one-stop shopping, adoption of the Commission's proposal would not lower transaction costs. What adoption of the Commission's proposal would do, however, is allow carriers to require customers to use carrier-provided CPE, thereby limiting users' options.[24]

---

[22](...continued)
communications network. Consistent with the No-Bundling Rule, carriers can -- and do -- offer to serve as a "single point of responsibility" for all aspects of the system. AT&T's ACCUWAN service package offers such all-inclusive service. See AT&T ACCUWAN Service Description, Part 2 (in addition to basic transmission service and network management, "[w]ith AT&T ACCUWAN service all equipment, hardware and software is maintained by AT&T.").

[23] API suggests that an integrated solution, such as the ARIES service described in its comments, could not be provided in a manner consistent with the No-Bundling Rule. See API Comments at 12-13 & Attached Statement of Raymond E. Cline, Jr. ("Cline Statement"). In fact, however, the ARIES project is a user-driven collaborative effort that combines carrier-provided satellite communications links and terrestrial broadband service with Asynchronous Transfer Mode ("ATM") and other intelligent CPE. Carriers participating in the ARIES project did not package the associated CPE; rather, the users obtained the equipment directly from independent manufacturers. See Beth Schultz, "Oil Team Hits Gusher: The ARIES Team Pulled Together an ATM Net That Let Companies Collaborate on Oil Exploration," Network World, Mar. 11, 1996, at 14 (noting that 17 separate carriers and vendors provided the ARIES team with the services and products used in the project). Under the No-Bundling Rule, however, a carrier could offer a package consisting of both the transmission service and CPE components of the ARIES service.

[24] As CERC perceptively notes, "it would be impossible for a carrier to put together a bundle of services and equipment that would satisfy every customer. To allow carriers
(continued...)

There is no evidence whatsoever that the No-Bundling Rule has impeded technological development by "hobbling" carriers "from exploring the possibility of a given service with interested customers."[25] As noted above, carriers remain free to work with their customers to develop integrated service/CPE packages. If anything, elimination of the Rule would reduce the level of innovation. As a result of the CPE No-Bundling Rule, users may turn to independent manufacturers to assemble innovative "turnkey" solutions. Were the No-Bundling Rule eliminated, however, many independent manufacturers would have to shift their focus from directly serving the end-user to acting as a vendor for the carriers. In that case, ITAA observes, "the success or failure . . . of any individual CPE provider would not turn on its ingenuity, customer care, or product quality, but instead on its ability to cooperate with carriers . . . ."[26] The end-result would be a decrease in innovation.

Nor has the No-Bundling Rule prevented users from obtaining discounts in return for making term and volume commitments. Indeed, such discounts are becoming increasingly common in the interexchange market. Carriers are free to price CPE at any level they choose. The only restriction is that discounts on either transmission service or CPE may not be limited to those customers that agree to obtain both components from the carrier.

There are only two actions, currently prohibited by the No-Bundling Rule, that carriers would be allowed to take if the Commission were to adopt its proposal. First, if the

---

[24](...continued)
to pick and choose . . . would inevitably result in consumers being forced to choose among packages, none of which represents their ideal." CERC Comments at 6.

[25] Cline Statement at 3.

[26] ITAA Comments at 5.

No-Bundling Rule were lifted, carriers would be able to require their transmission service customers to lease or purchase carrier-provided CPE. As IDCMA explained in its comments, this plainly would reduce consumer choice, while foreclosing a substantial portion of the market to independent manufacturers.[27] Second, carriers could offer deeply discounted or "free" CPE to their transmission service customers. This may sound superficially appealing. In fact, however, allowing such discounts would result in carriers charging higher prices to all their transmission service customers, using the revenue to cross-subsidize CPE, obtaining an artificial competitive advantage over independent CPE manufacturers, and ultimately driving many of these manufacturers from the market. If the Commission wishes to eliminate the No-Bundling Rule it must explain how these results would advance the public interest.[28]

C. Elimination of the No-Bundling Rule Would Not Advance the "Deregulatory" Goals of the Telecommunications Act

A number of commenters suggest that elimination of the No-Bundling Rule would advance the "deregulatory" goals of the Telecommunications Act of 1996 ("Act").[29] While IDCMA supports the Commission's efforts to eliminate unnecessary or counter-productive rules,

---

[27] See IDCMA Comments at 17.

[28] The argument is sometimes made that giving away "free" CPE facilitates the deployment of new services. The desire to promote new service deployment, however, does not provide a basis to permit cross-subsidization of carrier-selected CPE. As an initial matter, consumers have shown a willingness to pay substantial sums for equipment -- such as televisions and personal computers -- needed to access services. In any event, if a carrier concludes that high "up-front" CPE sales prices are deterring service deployment, it can either lease the CPE to users at low monthly rates or provide a credit that users could apply toward the purchase of the CPE of their choice.

[29] See, e.g., Comments of AT&T Corp. at 26 ("The Commission's proposal . . . epitomizes the deregulatory and pro-competitive purpose of the amended Communications Act."); API Comments at 13.

merely labeling the proposal "deregulatory" does not provide a basis for elimination of one of the most effective policies in the history of the Commission.

As an initial matter, proponents of the Commission's rebundling proposal are wrong to suggest that it is deregulatory. Historically, carriers provided CPE as part of their end-to-end network offering, subject to regulation under Title II of the Communications Act. Since adoption of the No-Bundling Rule 16 years ago, however, carriers have been required to separate the provision of CPE from the provision of regulated basic transmission service. As IDCMA explained in its initial comments, the Commission's proposal would allow carriers to provide CPE as part of their regulated transmission service offering, thereby resulting in the reregulation of currently non-regulated CPE.[30]

Even if eliminating the No-Bundling Rule could properly be characterized as "deregulatory," that is no reason to eliminate it. Much as the rebundling proponents may wish otherwise, the Telecommunications Act does not direct the Commission to mindlessly eliminate as many regulations as possible. While Congress sought to eliminate unnecessary regulations, it also directed the Commission to enforce existing regulations -- and even to adopt new regulations -- to further its overriding goal: the promotion of consumer choice in all sectors of the telecommunications market. As the Alabama Public Service Commission notes, rebundling "will harm competition and consumers' choices . . . . [T]he intent of the 1996 Act is . . . not to regress based upon the assumption that competition exists and [that existing regulations] are no longer useful."[31]

---

[30] See IDCMA Comments at 23-24.

[31] Alabama PSC Comments at 11.

Indeed, Congress specifically recognized the need for, and the benefit of, rules requiring CPE unbundling. As both IDCMA and CERC observed,[32] the Telecommunications Act not only preserves the CPE No-Bundling Rule, it directs the Commission to extend its no-bundling policies to all networks that provide multichannel video programming service -- not just those with market power.[33] Parties that support elimination of the No-Bundling Rule in the interexchange market have not made the slightest effort to explain how their position can be reconciled with the clear policy directives adopted by Congress.

II. THE COMMENTS CONFIRM THAT ELIMINATION OF THE NO-BUNDLING RULE WOULD BE UNLAWFUL AND NOT IN THE PUBLIC INTEREST

In its comments, IDCMA demonstrated that adoption of the Commission's proposal to rebundle CPE would have numerous adverse legal and policy consequences.[34] IDCMA also demonstrated that adoption of the Commission's alternate proposal -- modeled on

---

[32] See IDCMA Comments at 20-21; CERC Comments at 10-11.

[33] 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).

[34] In particular, IDCMA argued that the Commission's proposal would violate Section 202 of the Communications Act, see IDCMA Comments at 13-16; deprive consumers of the benefits that only an independent manufacturing sector can provide, see id. at 16-20; impede achievement of the unbundling and interconnection policies embodied in the Telecommunications Act and the Administration's National Information Infrastructure Initiative, see id. at 20-22; make it more difficult to administer the Commission's Part 68 and network disclosure rules, see id. at 24-26; create an "asymmetric" regulatory regime -- in which interexchange carriers could bundle, while local exchange carriers could not -- that, ultimately, would lead to the complete erosion of the No-Bundling Rule, see id. at 26-27; violate the United States' binding international trade obligations, see id. at 28-30; and harm U.S. trade policy, see id. at 30-32.

the rules in place in the cellular market -- would fail to redress most of these shortcomings.[35] The comments filed by CERC and ITAA make many of the same points.[36]

The rebundling advocates completely ignore most of the issues raised by IDCMA. While a number of commenters addressed the international trade law issue, only AT&T contends that permitting interexchange carriers to require customers to purchase carrier-provided CPE would not violate the United States' obligations under the General Agreement on Trade in Services ("GATS"). Moreover, the comments confirm IDCMA's conclusion that adoption of the Commission's proposal would complicate administration of the Commission's network disclosure rules, and would lead to the erosion of the No-Bundling Rule.

A. Adoption of the Commission's Proposal Would Violate GATS and NAFTA

As IDCMA demonstrated in it initial comments, the GATS Telecommunications Annex requires that signatories ensure that common carriers grant service providers the right "to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply [their] services."[37] At this time, the United States' commitment under GATS extends only to enhanced service providers ("ESPs").[38] As part of the North

---

[35] See id. at 39-42.

[36] See CERC Comments at 6-14; ITAA Comments at 4-6.

[37] 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)).

[38] See 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)).

American Free Trade Agreement ("NAFTA"), however, the United States agreed 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."[39]

The Commission's rebundling proposal would allow interexchange carriers to require customers to use carrier-provided CPE, thereby denying ESPs and other end-users the right to interconnect customer-provided CPE. Most of the parties that addressed the GATS issue recognize that this would violate the CPE attachment provision of the GATS Telecommunications Annex.[40] Indeed, AT&T stands alone in suggesting that adoption of the Commission's proposal would be permissible.[41]

AT&T asserts that the United States can satisfy the CPE attachment obligation contained in GATS simply by allowing a competitive interexchange market to exist. In its view, a competitive interexchange market will assure that "if one provider does not offer unbundled components, its competitors will" and that, as a result, ESPs and other users always will be able to attach customer-provided CPE to at least one carrier's network.[42] This argument can not be sustained. As an initial matter, the U.S. interexchange market is not fully competitive.

---

[39] North American Free Trade Agreement, H.R. Treaty Doc. No. 159, art. 1302(2)(a), 103d Cong., 1st Sess. (1993). No party, other than IDCMA, addressed the effect on the Commission's proposal of the far broader undertaking entered into by the United States in the NAFTA. See IDCMA Comments at 30.

[40] See, e.g., Comments of Pacific Telesis Group at 11; Florida PSC Comments at 19; Sprint Comments at 28-29. For this reason, many of these commenters support the Commission's alternate proposal. As demonstrated below, however, the alternate proposal also would violate GATS and NAFTA. See infra § III.

[41] See Comments of AT&T Corp. at 27-28 n.33.

[42] Id. at 27.

Indeed, as the Commission now recognizes, certain critical segments of the interexchange market -- such as the market for analog private line service -- are not competitive at all.[43] If the CPE No-Bundling Rule were eliminated, there would be no assurances that any carrier would make these services available on an unbundled basis.[44] As a result, users of these services might not have the ability to attach customer-provided CPE.

In any event, AT&T's approach is completely inconsistent with the plain language of both the GATS Telecommunications Annex and NAFTA. An early draft of the Telecommunications Annex required that signatories ensure general access to "public telecommunications transport networks and services."[45] However, at the insistence of the United States,[46] language was included in the Annex that expressly provides the right to attach CPE to "any public telecommunications transport network or service."[47] The NAFTA parties subsequently adopted nearly identical language.[48] The Commission's rebundling proposal

---

[43] See Notice at ¶ 40.

[44] AT&T fails to explain what would happen if all U.S. carriers decided to bundle CPE. Presumably, the Commission would be required to designate a "carrier of last resort" that would be obligated to make unbundled service available. This would create market uncertainty and impose yet more administrative burdens on the Commission.

[45] Draft of the General Agreement on Trade in Services, Telecommunications Annex, at ¶ 12 (reprinted in American Bar Association, Uruguay Round Trade Negotiations: Where Do We Go From Here? at Tab S (1991)).

[46] See U.S. Delegation to the Group of Negotiations on Services, Suggested Amendments to the Draft Annex on Access to and Use of Public Telecommunications Transport Networks and Services at 3 (Sept. 17, 1991) (reprinted in INSIDE U.S. TRADE - Special Report (Sept. 20, 1991)).

[47] GATS Telecommunications Annex, § 5(b) (emphasis added).

[48] See NAFTA art. 1302(1) ("Each Party shall ensure that persons of another Party have

(continued...)

would violate these provisions by permitting a carrier to deny service to ESPs and other users that sought to deploy their own CPE.[49] The fact that another carrier might allow attachment of CPE would not remedy the carrier's violation.

B. Adoption of the Commission's Proposal Would Result in Significant Administrative Burdens and Lead to the Complete Erosion of the No-Bundling Rule

In its comments, IDCMA demonstrated that adoption of the rebundling proposal -- in which interexchange carriers could bundle CPE, while local exchange carriers could not -- would require the Commission to expend substantial resources to determine precisely when a carrier could, and could not, bundle.[50] The comments support this contention.

---

[48](...continued)
access to and use of any public telecommunications transport network or service . . . ." (emphasis added)). In a recent case, the D.C. Circuit emphasized that NAFTA, "as a treaty approved by Congress, is 'the supreme Law of the Land,'" and therefore is binding on the FCC. Channel 51 of San Diego v. FCC, No. 95-1128 (D.C. Cir. Mar. 29, 1996) (quoting U.S. Const., art. VI).

[49] AT&T also asserts that GATS does not bar a carrier from requiring a customer to purchase carrier-provided CPE because the customer would retain its right to "attach[] any CPE that is technically-compliant under Part 68." Comments of AT&T Corp. at 28 n.33. If AT&T is suggesting that a customer can exercise its GATS right of attachment by purchasing a carrier-provided service/CPE package, discarding the carrier-provided CPE, and attaching its own CPE, its position is untenable. Requiring a customer to purchase unwanted CPE in order to obtain transmission service plainly would constitute imposition of an impermissible "condition on access to and use of public telecommunications transport networks" in violation of Section 5(e) of the Telecommunication Annex, GATS Telecommunications Annex, § 5(e). Cf. GATT Panel Rept., EEC Import Regime for Bananas, GATT Doc. DS38/R, at 145, ¶ 146 (11 Feb. 1994) (a member country may not impose a requirement that an entity first purchase a designated product before being allowed to exercise a right granted under GATT).

[50] See IDCMA Comments at 26-27.

Many commenters expressed views regarding whether and, if so, how the No-Bundling Rule would apply to the Bell Operating Companies ("BOCs") as they enter the interexchange market. Some commenters asserted that the Rule should continue to apply to the BOCs so long as they enjoy dominant power in their local exchange markets.[51] Others claimed that, as they enter the interexchange service market, the BOCs should be subject to the same rules as other non-dominant interexchange carriers.[52] If the Commission chooses to modify the No-Bundling Rule, it must first resolve these difficult issues.

IDCMA also warned that the inevitable result of such an asymmetric regulatory regime would be the gradual erosion of the No-Bundling Rule. Here, again, the comments give credence to IDCMA's views. For example, SBC argues that if bundling is allowed in the interexchange market, it also should be allowed in the local exchange market.[53] Other commenters seek to further erode the No-Bundling Rule by asking the Commission to allow carriers to bundle enhanced services with transmission service.[54]

Adoption of the rebundling proposal also would complicate the Commission's efforts to implement the universal service provisions of the Telecommunications Act. The

---

[51] See Comments of Excel Telecommunications, Inc. at 5-6; MCI Comments at 26.

[52] See NYNEX Comments at 6; Bell Atlantic Comments on Sections III, VII, VIII and IX at 6-7 (filed Apr. 25, 1996) ("Bell Atlantic Comments"); USTA Comments at 3-4.

[53] See Comments of SBC Communications Inc. at 7 (filed Apr. 25, 1996).

[54] See Comments of AT&T Corp. at 30 (requesting a supplemental NPRM proposing to permit interexchange carriers to bundle basic services and enhanced services); MCI Comments at 22 n.33 (presuming that adoption of the proposal would lift the ban on enhanced service bundling).

comments submitted in CC Docket No. 96-45[55] indicate widespread agreement that carriers should only be required to use revenues derived from the provision of basic transmission service to fund the universal service program.[56] If interexchange carriers were permitted to offer CPE as part of their regulated service, however, the Commission would be obligated to develop procedures to disaggregate CPE revenues from transmission service revenues in order to ensure that only transmission service revenue is used to fund universal service. This would further complicate implementation of Congress' directive to ensure that each carrier makes "equitable" contribution to universal service.[57]

C. Adoption of the Commission's Proposal Would Allow Interexchange Carriers to Evade the Network Disclosure Rules

As IDCMA observed in its comments, adoption of the Commission's rebundling proposal would allow a carrier to incorporate additional CPE within its regulated network offering.[58] This would shift the network boundary, thereby altering the interface subject to the Commission's network disclosure requirements. As a result, IDCMA warned, it would be far more difficult for independent manufacturers to obtain information necessary to develop CPE that could interoperate with the carriers' transmission services.

---

[55] See Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45 (rel. Mar. 8, 1996).

[56] See, e.g., Comments of AT&T Corp., CC Docket No. 96-45, at 8 (filed Apr. 12, 1996) (In setting the universal service contribution mechanism, "[a] surcharge on all retail telecommunications services, both interstate and intrastate, creates a fair, simple and efficient recovery mechanism.") (emphasis added).

[57] See Telecommunications Act § 101 (to be codified at 47 U.S.C. § 254(d)).

[58] See IDCMA Comments at 26.

The comments confirm this concern. MCI suggests that, if the Commission were to allow bundling, a carrier could offer a package that "incorporates proprietary technologies that could not be made available other than in a bundle."[59] In other words, the Commission's proposal would allow a carrier to provide an end-to-end solution, including proprietary interfaces, without making any network disclosure. As U S WEST recognizes, such an outcome would adversely affect the ability of consumers to obtain the CPE that best meets their needs. Absent sufficient network disclosure rules, U S WEST observes, "such 'bundling' would result in the development of proprietary common carrier transmission systems, accessible only by those customers who agreed to purchase the specific CPE permitting such access."[60] In order to avoid this result, U.S. West -- as well as NYNEX and the Ad Hoc Telecommunications Users Committee -- urge the Commission to ensure that the disclosure rules require carriers to continue to disclose information necessary to develop CPE that can interoperate with its transmission service -- regardless of where the boundary of a bundled network offering may be.[61]

The better solution, IDCMA believes, is to preserve the current, clearly defined network boundary between regulated service and non-regulated CPE, and to continue to require carriers to disclose information regarding the network interface. If the Commission decides to permit bundling, however, adoption of the U S WEST/NYNEX/Ad Hoc approach would be

---

[59] MCI Comments at 24 n.37.

[60] U S WEST, Inc. Comments at 8.

[61] See U S WEST, Inc. Comments at 9; NYNEX Comments at 7; Comments of The Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc., and the Prudential Insurance Company of America at 13 (filed Apr. 25, 1996).

necessary to allow independent manufacturers some opportunity to develop products that can interoperate with carrier-provided transmission service.

III. SUPPORTERS OF THE COMMISSION'S ALTERNATE PROPOSAL HAVE FAILED TO RECOGNIZE ITS SERIOUS DEFICIENCIES

The Commission's alternate proposal would allow interexchange carriers to provide bundled interexchange service/CPE packages, provided that they continue to give customers the option of obtaining unbundled interexchange service on a non-discriminatory basis. Although more than a dozen commenters expressed support for this proposal, none provides more than the most cursory analysis of the complex legal, economic, and policy issues.[62] Indeed, nearly all advocates of the alternate proposal devoted less than two pages to this issue.[63]

---

[62] As with the Commission's principle proposal, the comments do not demonstrate that the alternate proposal would provide any benefit that currently cannot be obtained in a manner that is consistent with the No-Bundling Rule. See supra § I. Moreover, supporters of the alternate proposal have failed to address numerous issues raised by this approach. For example, no supporter of the alternate proposal addressed the question of whether the alternate proposal is lawful under Section 202 of the Communications Act. Compare IDCMA Comments at 39-40. Nor did any of these parties seek to reconcile the inconsistency between this approach and the unbundling policy expressed by Congress in Section 304 of the Telecommunications Act. Compare id. at 20-21. And no commenter sought to assess the effect of the Commission's proposal to eliminate tariffing in the interexchange market on the agency's ability to enforce the requirement that carriers offer unbundled basic transmission service on a non-discriminatory basis.

[63] See Comments of Frontier at 7-8; Comments of General Communication, Inc. at 5-6; Comments of GTE at 10-11; USTA Comments at 3-4; Comments of Pacific Telesis Group at 11-12; NYNEX Comments at 5-7; Bell Atlantic Comments at 5-7; Comments of SBC Communications at 6-8; Comments of the Telecommunications Resellers Association at 40-42; Comments of the Tennessee Attorney General at 5-6 (filed Apr. 25, 1996); Comments of LDDS WorldCom at 17-19 (filed Apr. 25, 1996); The Office of the Ohio Consumers' Counsel's Initial Comments on Regulatory Forbearance for Tariff Filing Requirements at 8-9 (filed Apr. 25, 1996).

In contrast, IDCMA, CERC, and ITAA provided well-reasoned justifications for their opposition to the Commission's alternate proposal.[64] Most of the objections to the Commission's primary proposal also apply to the alternate proposal. A few, however, warrant special comment. IDCMA and ITAA noted that, because interexchange carriers retain at least a degree of market power, they are able to sustain prices for interexchange service at levels that are at least modestly above cost.[65] Given that the cost of CPE accounts for only a small portion of the total cost of a services/CPE solution, they further explained, a modest increase in the prices of transmission service would generate a sufficient amount of revenue to allow a carrier to provide "free" CPE to their transmission service customers.[66] The end-result, as ITAA perceptively noted, is that "customers that do not buy a bundle of CPE and service [would] be forced to subsidize customers that do."[67] At the same time, independent manufacturers -- who lack the ability to engage in cross-subsidization -- would be placed at an insurmountable competitive disadvantage.

The comments filed by the supporters of the alternate proposal do not address -- much less attempt to disprove -- the plausibility of the scenario described by IDCMA, CERC, and ITAA. To the contrary, the fact that most rebundling advocates prefer the alternate proposal proves that IDCMA's fears are well-founded. If supporters of the alternate proposal believed that the interexchange market is truly competitive, they would be confident that, if consumer

---

[64] See IDCMA Comments at 39-42; CERC Comments at 12-14; ITAA Comments at 4-5.

[65] See IDCMA Comments at 18 n.44; ITAA Comments at 5 n.7.

[66] See IDCMA Comments at 41.

[67] ITAA Comments at 4-5; see also CERC Comments at 13.

demand for unbundled services existed, carriers would provide it. The fact that most of the rebundling advocates believe it is necessary for the Commission to require carriers to provide an unbundled option means that these parties believe that interexchange carriers retain at least a degree of market power.

If interexchange carriers retain a degree of market power, however, then merely imposing a requirement that carriers offer an unbundled transmission service option is not adequate to preserve competition in the CPE market. Even if carriers complied with this requirement, they could still use their market power to engage in the very conduct -- supra-competitive pricing of interexchange service and cross-subsidization of CPE -- that IDCMA, CERC, and ITAA predicted. This would reduce competition and decrease user choice.[68]

Advocates of the alternate proposal also assume -- without providing analysis -- that requiring carriers to offer an unbundled transmission service option would be sufficient to satisfy the United States' obligation under GATS and NAFTA to allow ESPs and other users to attach CPE to the network. As explained above, however, the alternate proposal would allow a carrier to use revenue from its transmission service to provide customers with "free" CPE. As a practical matter, this approach would inhibit ESPs and other users from purchasing and

---

[68] A number of commenters noted that the alternative approach has been used in the cellular CPE market, see, e.g., Comments of Bell Atlantic at 5-6; MCI Comments at 24 n.37; U S WEST, Inc. Comments at 7-8. None of these parties, however, attempted to demonstrate why -- notwithstanding the differences between the cellular and the interexchange services markets -- the Commission's bundling policies in the cellular market provide an appropriate model for the interexchange model. Compare IDCMA Comments at 40-41.

attaching user-provided CPE to the network. Adoption of the alternate proposal, therefore, also would violate the binding obligations undertaken in GATS and NAFTA.[69]

Even if adoption of the alternate proposal were permissible under GATS and NAFTA, however, it should be rejected. As IDCMA demonstrated in its initial comments, adoption of this proposal would harm U.S trade policy.[70] Carriers in several countries have attempted to obtain an unfair competitive advantage by offering bundled service/CPE packages at the same price as the underlying transmission service. The U.S. Government has devoted substantial efforts to convince foreign carriers to eliminate this practice, thereby opening foreign markets for U.S. manufacturers. It is wholly unrealistic to believe that the United States could continue to challenge this practice abroad if the Commission were to allow it to be reintroduced in the United States.

---

[69] Cf. GATT Panel Rept., Follow-up on the Panel Report "European Economic Community-Payments and Subsidies Paid to Processors and Producers of Oil Seeds and Related Animal-Feed Proteins", GATT Doc. DS28/R, at 63-64, ¶ 81 (31 Mar. 1992) (member country may not take measures that render GATT rights "meaningless" by eliminating the economic benefit of exercising the right).

[70] See IDCMA Comments at 31-32.

CONCLUSION

As an administrative agency, the Commission has the right to alter long-established policies. When it does so, however, it must base its decision on the record before it. In the present case, the parties supporting elimination of the No-Bundling Rule in the interexchange market have not provided any adequate justification for their position. In contrast, IDCMA, CERC, and ITAA have demonstrated that allowing interexchange carriers to bundle CPE would be unlawful, reregulatory, and contrary to the public interest. The Commission simply cannot abandon one of the most successful policies in its history on the basis of the record before it.

Respectfully submitted,

Herbert E. Marks
Jonathan Jacob Nadler
Adam D. Krinsky

Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

Counsel for the
Independent Data Communications
Manufacturers Association

May 24, 1996

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

RECEIVED
APR 25 '96

In the Matter of	)	
	)	
Policy and Rules Concerning	)	
the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	

JUL 24 1996
DC - DOCKET

COMMENTS OF THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

The Information Technology Association of America ("ITAA"), by its attorneys, hereby submits the following comments in response to the Notice of Proposed Rulemaking ("Notice") which the Commission issued in the above-captioned proceeding on March 25, 1996.[1] In Section VIII of the Notice, the Commission has solicited comment on whether nondominant interexchange carriers should be permitted to bundle customer-premises equipment ("CPE") with interstate, interexchange services.[2] As set forth more fully below, ITAA urges the Commission not to relax its longstanding prohibition against bundling.[3] The bundling of equipment and service will inevitably inflate the prices of

---

[1] See Policy and Rules Concerning the Interstate, Interexchange Marketplace/ Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking, CC Docket No. 96-61, FCC 96-123 (released Mar. 25, 1996) [hereinafter "Notice"].

[2] See id. at ¶ 88.

[3] See 47 C.F.R. § 64.702(e) (1995).

interexchange services, restrict the healthy competition which now characterizes the CPE marketplace, and therefore disserve the public interest.

I. INTRODUCTION AND INTEREST OF ITAA

ITAA is the principal trade association of the Nation's information technology industries. Together with its twenty-five affiliated regional technology councils, ITAA represents more than 9,000 companies throughout the United States. ITAA's members provide the public with a wide variety of information products, software and services. Chief among these, at least from the Commission's perspective, are network-based enhanced services. The enhanced services furnished by ITAA's member companies are used by business, government, and residential consumers, and include such diverse offerings as credit card authorization, computer-aided design and manufacturing, database retrieval, electronic data interchange, gateways, information management, payroll processing, transaction processing, voice mail, and other remote access data processing services.

ITAA's member companies take full advantage of today's vibrant, fully competitive CPE market. In delivering their services to their customers, ITAA's members employ a vast array of CPE, ranging from the most basic to the most sophisticated. Today's highly competitive CPE marketplace enables ITAA's member companies to acquire innovative, state-of-the-art equipment from a large number of suppliers at reasonable, market-driven prices. ITAA is therefore troubled by the Commission's proposal to eliminate a cornerstone of today's competitive CPE marketplace, i.e., the prohibition against bundling CPE and basic transmission service.

II. THE COMMISSION SHOULD NOT RELAX OR ELIMINATE ITS PRO-CONSUMER, PRO-COMPETITIVE UNBUNDLING REQUIREMENT

In the Notice, the Commission acknowledges that the unbundling of regulated communications service and unregulated CPE has proven to be of significant value to consumers.[4] The Notice, nonetheless, proposes to eliminate the unbundling rule as it applies to nondominant interexchange carriers. In support of this proposal, the Notice suggests that the level of competition in the interexchange market renders the rule against unbundling unnecessary as a safeguard against anticompetitive conduct.[5] The fundamental difficulty with the Commission's proposal is that it fails to appreciate the central role that unbundling has played -- and will continue to play -- in ensuring a competitive CPE marketplace. It also understates the threat that bundling would pose to the continuing health of that market.

From a consumer's perspective, the Commission's unbundling rule has been an unqualified success. If there ever were a Commission policy, the benefits of which are empirically and undeniably verifiable, it is the Commission's prohibition of bundling. In the years since bundling was prohibited, consumers have benefitted from the proliferation of new, innovative, and competitively priced CPE. Today's dynamic CPE market has produced a cornucopia of equipment from which consumers are able to choose.

Given the many benefits of unbundling, ITAA is at a loss to understand why the Commission appears to be intent on abandoning unbundling as the cardinal principle underlying today's competitive CPE marketplace. ITAA is particularly perplexed because

---

[4] See Notice at ¶ 86.

[5] See id.

the unbundling rule disadvantages no one. It does not deny consumers the benefits of one-stop shopping, nor does it preclude any common carrier from providing CPE. In purpose and effect, the unbundling rule benefits everyone by placing all CPE providers on a level playing field.

Bundling, by contrast, will harm consumers. By definition, bundling limits consumer choice. Moreover, given the imperfect state of competition in the interexchange market,[6] bundling will create problems for consumers and producers of CPE. Although the Notice downplays the adverse impact which interexchange carriers could have on the CPE marketplace, ITAA fears that the carriers will use their ability to bundle CPE to the detriment of consumers. Rather than run this risk, the Commission should err on the side of consumers and retain its prohibition against bundling.

Not being manufacturers, the interexchange carriers will use bundling to help market their interexchange services and to preserve or increase their market share. Bundling will not make interexchange carriers more efficient. Bundling will not reduce their costs of providing service. Rather, bundling will be used solely to acquire new customers. To obtain new customers, carriers will offer CPE at discounts, at a loss, or even for free. The costs of such bundling will ultimately be passed through to, and borne by, consumers in the form of

---

[6] AT&T, MCI and Sprint continue to collectively control the bulk of the market. As of the close of 1995, the three carriers accounted for approximately 82 percent of the interexchange market measured by revenues. This figure has decreased slowly over time. It was approximately 84 percent at the end of 1994. But such development has not changed the concentrated nature of the market. See Common Carrier Bureau, Industry Analysis Division, Long Distance Market Shares: Fourth Quarter 1995, at Table 6 (Mar. 1996).

higher service charges. Moreover, customers that do not buy a bundle of CPE and service will be forced to subsidize customers that do.[7]

The Commission's proposal to require carriers to continue to offer service on an unbundled basis does not eliminate this problem.[8] Even if not required to do so by the Commission, carriers will continue to offer service unbundled from CPE rather than exclude themselves from that market segment. The fundamental point remains that all consumers, both those who purchase bundled CPE and those who purchase unbundled CPE, will pay higher prices for service than they otherwise would if the Commission retained its unbundling requirement.

The bundling of services and equipment would also undermine consumer choice in the CPE market. In creating bundled packages, carriers will inevitably work with a discrete number of CPE suppliers. The success or failure, then, of any individual CPE provider would not turn on its ingenuity, customer care, or product quality, but instead on its ability to cooperate with carriers in creating discounted packages (and eventually boosting a carrier's profits). Carriers also could manipulate their interface and other operating

---

[7] The fact that the Commission has determined that interexchange market is "substantially competitive," see Notice at ¶ 86, does not mean that carriers lack the ability to raise service charges above competitive levels. Market power is a matter of degree. Although an individual IXC in a "substantially competitive" market might not be able to maintain prices at levels substantially above cost, it undoubtedly could sustain prices at levels modestly above cost. Because the cost of CPE accounts for only a small fraction of the cost of a services/CPE package, modest increases in the price of services would be sufficient to fund deep discounts in CPE prices. In a "substantially competitive" market, carriers have a strong incentive to adopt this strategy in order to promote the sale of higher priced services.

[8] See Notice at ¶ 89.