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

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	)	CC Docket No. 98-183
	)	
1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets	)	

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To: The Commission

COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments on the Further Notice of Proposed Rulemaking released on October 9, 1998 in the above-captioned proceeding.[1] The FNPRM proposes that restrictions on bundling CPE and enhanced services with basic interstate telecommunications services should not apply to non-dominant carriers. CompTel supports removing these restrictions for non-dominant carriers, and in addition urges the FCC to clarify that non-dominant carriers are free to include local services in bundled packages of CPE, enhanced services, and/or basic interstate services. Doing so will foster increased competition and benefit consumers by enabling them to

[1] Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the communications Act of 1934, as amended; and 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, CC Docket Nos. 96-61 & 98-183, Further Notice of Proposed Rulemaking, (released October 9, 1998), FCC 98-258 ("FNPRM").

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purchase innovative and attractively priced packages of telecommunications equipment, enhanced services, and basic services while ensuring that carriers cannot act anticompetitively.

I. The Commission's Restrictions on Bundling Should Be Modified To Allow Carriers to Bundle Basic Services With Respect To Which They Are Non-Dominant With CPE and Enhanced Services

CompTel believes that deregulation is in the public interest under most circumstances because it reduces the regulatory burdens that prevent carriers, particularly smaller ones, from competing as vigorously as possible. Freed of the regulatory burdens associated with the Commission's bundling restrictions, carriers would be better able to create innovative and attractively priced packages of services and products. By enabling carriers creatively to bundle basic local and interstate services with respect to which they are non-dominant with CPE and enhanced services, the Commission would encourage them to strive to provide services and equipment of the type, in the quantity and at the price that the public wants, which is the essence of competition.

When the Commission first adopted its restriction against bundling of CPE with basic interstate services, the markets for CPE and basic interstate services were not competitive. The Commission found that under such circumstances, the continued bundling of telecommunications services with CPE could force customers to purchase unwanted CPE in order to obtain necessary transmission services.[2] The Commission explained that:

> "In regulated markets characterized by dominant firms, there may be an incentive . . . to use bundling as an anti-competitive marketing strategy, e.g., to cross-subsidize competitive by

[2] *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final decision, 77 FCC 2d 384, 443 n.52 (1980) ("*Computer II Final Decision*").

> monopoly services, that restricts both consumer freedom of choice as well as the evolution of a competitive marketplace."[3]

The Commission recognized, however, that the bundling restrictions would not have been necessary had the markets for CPE and basic interstate services been sufficiently competitive.[4]

Since that time, healthy competition has developed in both the markets for CPE and for basic interstate services. The Commission has repeatedly found that there is meaningful competition in the CPE market.[5] Similarly, the market for basic interstate services is competitive, and the Commission often has held that "non-dominant carriers lack[] the incentive and ability to engage in conduct that might be anticompetitive or otherwise inconsistent with the public interest."[6]

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3 *Id.*

4 *Id.*

5 *See, e.g.*, FNPRM, ¶12 & n.33, *citing Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd 8961, 9122 (1995) ("competition today is a fact in both the customer-premises equipment and the long-distance market"); *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services*, 8 FCC Rcd 3891, 3891 (1993) ("The CPE market has been very competitive for a number of years and there are many suppliers available to provide CPE") (citations omitted).

6 *Bell Operating Company Provision of Out-Of-Region Interstate, Interexchange Services*, 11 FCC Rcd 18564, ¶4 (1996). *See also, e.g., Streamlining the International Section 214 Authorization Process and Tariff Requirements*, Report and Order, 11 FCC Rcd 12884, ¶24 (1996) ("[I]f we have already determined that a carrier is non dominant on a route, then by definition we have found that carrier to lack sufficient market power to engage in anticompetitive conduct.); *Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, ¶24 (1996) ("[T]he Commission has previously found that market forces effectively discipline nondominant carriers even in the absence of a dominant carrier."); *Competition in the Interstate Interexchange Marketplace*, 10 FCC Rcd 4562, ¶16 (1995) ("AT&T may include in its contract-based tariffs only those services that are subject to further streamlined regulation. These are services that we have determined are subject to substantial competition and <u>for which AT&T lacks market power</u>. As such, these services are not likely to be provided in an anticompetitive manner, whether as part of a contract-based tariff, or otherwise.")(emphasis added).

Because there is meaningful competition in both the CPE and basic interstate services markets, the current restriction against bundling CPE with basic interstate services is no longer necessary in the public interest with respect to non-dominant carriers. As the Commission explained when it adopted its bundling restrictions:

> "If the markets for components of the commodity bundle are workably competitive, bundling may present no societal problems so long as the consumer is not deceived concerning the content and quality of the bundle. The bundle either survives a market test or it does not, and competing vendors find it in their self-interest to make information available to consumers making this choice. . . . [I]n many real-world, non-regulated, workably competitive markets, there exist sustainable markets for both bundled and unbundled commodities. In such cases, consumers decide individually whether the benefits of packaging exceed the potential benefits of buying the components of a bundle individually."[7]

CompTel wholeheartedly agrees. A carrier does not have the incentive or ability to engage in anticompetitive behavior by cross-subsidizing CPE sales with revenue from basic interstate services with respect to which it is non-dominant, or vice versa, because both markets are competitive. In fact, the bundling restrictions actually impede competition under current circumstances, because carriers are not free to create innovative and attractively priced bundles of CPE and basic services, which reduces consumer choice.

CompTel fully agrees with AT&T's assertion that the rationale underlying the elimination of the CPE bundling restriction applies with equal force to the enhanced services bundling restriction.[8] The market for enhanced services, like the market for CPE, is competitive. Consequently, there are no relevant differences between the CPE and enhanced services markets

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7 *Computer II Final Decision*, 77 FCC 2d at 443 n.52.

8 FNPRM at ¶37.

for the purposes of the Commission's bundling restrictions. A carrier that is non-dominant with respect to the service to be bundled does not have the incentive or ability to engage in anticompetitive behavior by cross-subsidizing its enhanced services through bundling. Therefore, the Commission should lift the restriction on bundling enhanced services with basic services to the same extent that the CPE bundling restriction is lifted.

CompTel submits that no empirical data on the level of competition in the basic services, enhanced services or CPE markets are necessary to support a conclusion that the Commission's restrictions on bundling should be lifted with respect to non-dominant carriers.[9] By definition, a non-dominant carrier does not have the incentive or ability to act anticompetitively. This simple truth is fundamental to many of the Commission's policies, and nothing could be gained by examining empirical data with respect to the level of competition in specific markets when determining whether to lift the Commission's bundling restrictions. Adopting a different standard than the traditional dominant/non-dominant distinction solely for the purposes of unbundling would defeat the purposes of this rulemaking by needlessly complicating the Commission's rules. Similarly, no empirical data on the competitiveness of the CPE market are necessary, because the Commission has already found that this market is competitive. Furthermore, the enhanced services market is unquestionably competitive, and the Commission has not asked, and does not need, evidence regarding the level of its competitiveness.

For the same reasons, CompTel does not believe that there would be any anticompetitive effects from allowing carriers to include local services in bundled packages of

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[9] *Id.* at ¶13.

CPE, enhanced services, and/or basic interstate services, so long as the carriers are non-dominant with respect to all of the services to be bundled.[10] Even though local exchange markets are not yet competitive, new local entrants are non-dominant and, therefore, they do not have the incentive or ability to engage in anticompetitive behavior for the reasons given above. Further, clarifying that non-dominant local entrants can include local services in bundled packages along with CPE, enhanced services, and basic interstate services would enable them to compete more effectively against entrenched incumbent local carriers and, therefore, would be pro-competitive in the public interest.

CompTel strongly disagrees with IDCMA's argument that even carriers which lack market power could force their customers to purchase CPE as part of a bundle.[11] By definition, a carrier that lacks market power does not have the incentive or ability to raise the price of its basic service to the extent necessary to support below-cost pricing of its CPE through cross-subsidization. As soon as the carrier raised the price of its basic service, consumers would choose other carriers offering lower prices. This is particularly true where the CPE market is also fully competitive, because consumers would also be able to choose other CPE suppliers. Consequently, IDCMA's argument is completely without merit, and the Commission should not be concerned that non-dominant carriers could engage in anticompetitive behavior.

The Commission should likewise not be overly concerned about the risks of long-term contracts in a fully competitive market, because other carriers restrain such behavior by

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10 *Id.* at ¶26. Similarly, CompTel does not see any public interest reason for preventing carriers from including international services in bundled service packages so long as they are not dominant for such international services. *Id.* at ¶23.

11 *Id.* at ¶13.

offering preferable contract terms.[12] CompTel urges the Commission not to underestimate the ability of competition to restrain potential anticompetitive behavior by non-dominant carriers, nor of consumers to protect themselves in fully competitive markets. No regulation is necessary to prevent the speculative harm that IDCMA postulates.

CompTel believes that the Commission can avoid regulation of CPE by permitting packaging of CPE and transmission services, but continuing to require that CPE and common carrier services be treated, for regulatory purposes, as different products subject to different regulatory regimes.[13] The Commission could require all carriers offering bundled packages of CPE and transmission services to tariff the common carrier services, and use the tariff rate to determine the amount due for universal service contributions. The Commission could also use the tariff rate to detect potential cross-subsidization: the tariff rate is presumptively lawful so long as it exceeds average variable costs.[14]

CompTel urges the Commission not to require carriers offering packages of CPE and basic interstate services with respect to which they are non-dominant to continue to offer separately unbundled, interstate, domestic interexchange services.[15] This safeguard is unnecessary, and non-dominant carriers in competitive markets would most likely continue to offer separately unbundled, interstate, domestic interexchange services for competitive reasons. Moreover, the worst thing the Commission could do is lift its restrictions on bundling in order to simplify its regulations only to add new safeguards, which would only complicate its rules.

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12 *Id.*

13 *Id.* at ¶17.

14 *Id.* at ¶18.

15 *Id.* at ¶21.

II. The Commission Should Retain its Restrictions on the Bundling of Basic Services With Respect to Which Carriers are Dominant With CPE and Enhanced Services

CompTel respectfully submits that the Commission should not allow carriers to bundle basic services with respect to which they are dominant (*e.g.*, the local exchange service offered by an ILEC) with CPE or enhanced services. Carriers that are dominant with respect to a bundled service could potentially use their market power to subsidize their CPE or enhanced service offerings, which would distort competition in both the basic services and the CPE or enhanced services markets.

CompTel also submits that for the purposes of the Commission's restrictions on bundling, there are no relevant differences between the types of services at issue: If a carrier is dominant with respect to any service to be bundled, including local services, it could use its market power to cross-subsidize CPE or enhanced services that are bundled with that service as part of a package.[16] For this same reason, the Commission should not allow a BOC and its section 272 affiliates to bundle CPE or enhanced services with local exchange services where the BOC is dominant.[17] In sum, CompTel opposes any proposal which would allow a carrier to bundle CPE or enhanced services with any service with respect to which it is dominant.[18]

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16 Conversely, if a carrier is non-dominant with respect to all of its service offerings, it would not have the incentive or ability to cross subsidize its CPE through a bundled package.

17 *Id.* at ¶¶24-26.

18 *See, e.g.*, FNPRM at ¶¶24-27.

CONCLUSION

For the reasons stated above, CompTel appreciates and supports the FCC's efforts, and urges the FCC to eliminate its bundling restrictions with respect to all non-dominant carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICES

I, Mary E. Bernsten, hereby certify that on this 23rd day of November, 1998, I caused true and correct copies of the foregoing **COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION** to be served via hand delivery upon those persons listed below.

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