

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

In the Matter of)	
)	
Policy and Rules Concerning)	CC Docket No. 96-61
Interstate, Interexchange Marketplace)	
)	
Implementation of Section 254(g) of the)	
Communications Act of 1934, as amended)	
)	
1998 Biennial Regulatory Review B)	CC Docket No. 98-183
Review of Customer Premises Equipment)	
and Enhanced Services Unbundling Rules)	
in the Interexchange, Exchange Access,)	
and Local Exchange Markets)	

**COMMENTS OF
NETWORK PLUS, INC.**

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Dated: November 23, 1998

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SUMMARY

In its comments, Network Plus demonstrates that market conditions have **not** changed sufficiently to warrant lifting the Federal Communications Commissions (AFCC≡) bundling restrictions on incumbent local exchange carriers (AILECs≡). In addition to maintaining a monopoly over the basic telecommunications services market, ILECs can use control over critical enhanced services to preserve their large market share. By bundling basic telecommunications services with these enhanced services, the ILEC forces consumers to continue to subscribe to the ILEC=s basic telecommunications service despite a consumer=s wish to use a competitor=s service. This abuse and violation of the bundling restrictions by ILECs demonstrates that lifting such restriction on ILECs is **not** in the public interest.

The impermissible bundling of services by ILECs is stifling competition and effectively preventing numerous consumers from obtaining services from competitive carriers. In addition to violating FCC bundling restrictions, the practice of tying the availability of a monopoly controlled service to the purchase of a competitive service violates federal antitrust laws. The FCC must require ILECs to cease this anti-competitive behavior. While Network Plus believes that the bundling restriction should be lifted on non-dominant carriers, Network Plus urges the FCC to continue to impose this restriction on ILECs for the reasons discussed herein.

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Network Plus, Inc. (ANetwork Plus≡), by its counsel, respectfully submits the following comments in response to the Further Notice of Proposed Rulemaking issued in the above captioned proceedings.³

I. INTRODUCTION

Network Plus, founded in 1990, is a communications provider offering switched long distance, data and enhanced telecommunications services. The Company=s customers consist primarily of small and medium-sized businesses located in major markets in the Northeast and Southeast regions. Network Plus also provides international wholesale transport and termination services to major domestic and international telecommunications carriers. As of July 15, 1998, the

³ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Further Notice of Proposed Rulemaking, CC Docket No. 96-61, FCC 98-258, released October 9, 1998 (ANPRM≡).

Company served over 34,000 customers representing in excess of 150,000 access lines and 30,000 toll-free numbers.

Network Plus currently offers local service on a commercial basis in certain New England states and intends to offer local services in its remaining target markets in the Northeast and Southeast regions. The Company also plans to add Internet services to its offerings by the end of 1998. Network Plus has received authorization to provide competitive local exchange services in Connecticut, Florida, Massachusetts, New Hampshire, New York and Rhode Island and has pending applications for local exchange authority in Georgia, Maine, New Jersey, Pennsylvania, Tennessee, and Vermont. Network Plus intends to provide its local services via resale initially, eventually transitioning its customers to the Company's own facilities-based network. The Company also plans to expand its customer base to the work-at-home market and other residential customers.

As explained in detail below, the impermissible bundling of services by incumbent local exchange carriers (AILECs) is stifling competition and effectively preventing numerous consumers from obtaining services from competitive carriers. The Federal Communications Commission (AFCC) must require ILECs to cease this anti-competitive behavior. While Network Plus believes that the bundling restriction should be lifted on non-dominant carriers, Network Plus urges the FCC to continue to impose this restriction on ILECs for the reasons discussed below.

II. BUNDLING RESTRICTIONS MUST CONTINUE TO BE IMPOSED ON ILECs

In this proceeding, the FCC will examine whether market conditions have changed sufficiently to warrant lifting [] restrictions on the bundling of CPE and enhanced services with basic

telecommunications services.⁴ In this vein, the FCC seeks comment on the extent to which the continued application of bundling restrictions is no longer in the public interest as a result of meaningful economic competition.⁵ In these comments, Network Plus will show that market conditions have **not** changed sufficiently to warrant lifting the bundling restrictions on ILECs. In addition to maintaining a monopoly over the basic telecommunications services market,⁶ ILECs can use control over critical enhanced services to preserve their large market share. By bundling basic telecommunications services with these enhanced services, the ILEC forces consumers to continue

⁴ *NPRM* at para. 3. Bundling is the sale of different goods and/or services together in a single package.

⁵ *Id.* at para. 4.

⁶ *E.g.* In its response to the Second CCB Survey on the State of Local Competition, Bell Atlantic reported the total local lines it has provided to other carriers and the total lines it has in service, as of June 30, 1998. The number of total local lines Bell Atlantic provided other carriers (Total Service Resale and UNE), as a percentage of its total lines in service, is: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland - 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. *Id.* Of the total lines Bell Atlantic provided other carriers, 12.3% were UNEs. *Id.*

to subscribe to the ILEC=s basic telecommunications service despite a consumer=s wish to use a competitor=s service. This abuse and violation of the bundling restrictions by ILECs demonstrates that lifting such restriction on ILECs is **not** in the public interest.

A. Bundling Restrictions Prevent Anticompetitive Behavior

The FCC places restrictions on the bundling of enhanced services and telecommunications services.⁷ These restrictions on bundling prevent carriers from offering distinct goods and/or services *only* on a bundled basis.⁸ The FCC prohibited bundling Aout of a concern that carriers could use such bundling in an anticompetitive way.⁹ The restriction on bundling prevents a carrier from requiring a customer that wants to purchase basic telecommunications services from being forced to also purchase an enhanced service.¹⁰ In its *NPRM*, the FCC correctly points out that A[n]ot only would those customers be forced to buy a product they may not want, but other companies trying to sell≡ the competitive product could be unfairly deprived of customers.¹¹

When the FCC adopted its bundling restrictions, there was not local exchange competition and the goal of the restrictions was to prevent monopolization of enhanced services. Now that the local exchange market is open to competition, bundling can be used to exert market power for telecommunications services as well. A carrier may require a customer that wants to purchase just the enhanced service to also purchase basic telecommunications services. Thus, the customer is

⁷ *NPRM* at para. 1.

⁸ *NPRM* at para. 2.

⁹ *Id.*

¹⁰ *Id.*

forced to buy the telecommunications service from a carrier it does not want service from in order to obtain the enhanced service. Meanwhile, other carriers are precluded from offering those customer competitive telecommunications services. Competition can be, and will be, brought to a halt as the monopolistic carrier bundles its competitive telecommunications services to its monopoly controlled enhanced service.

¹¹ *Id.*

B. By Violating Bundling Restrictions, ILECs Are Engaging in Anticompetitive Behavior with Grave Results for Consumers

As mentioned, Network Plus is currently operating as a local exchange carrier in certain states and has successfully marketed its services to consumers who want better priced, quality local service customized to their specific needs. Unfortunately, due to impermissible bundling by ILECs, customers have been unable to subscribe to Network Plus services if they rely on voice messaging service (VMS) provided by the ILEC. When Network Plus customers switch over to Network Plus network, their VMS is terminated by the ILEC.¹² In addition to terminating consumers, ILECs such as Southern New England Telephone Company (SNET) contact the consumer who has authorized a change in local service provider to actively persuade the consumer to remain with the ILEC by informing the consumer that leaving SNET will result in termination of VMS. As a result of these tactics and others, consumers withdraw their authorization. Many consumers consider VMS a critical service and have come to rely on VMS in assisting their business and/or personal needs. Thus, these consumers cannot switch local service providers if it means they will lose VMS.

¹² Some ILECs require the consumer to cancel VMS prior to switching local exchange carriers.

Recognizing the importance of VMS to consumers and knowing that ILECs are not currently required in many states to resell VMS, Network Plus attempted to negotiate an arrangement with Bell Atlantic whereby a retail customer who chooses to convert their local exchange service to Network Plus could continue to subscribe to Bell Atlantic VMS. Bell Atlantic could continue to bill the subscriber directly for VMS, and for any other enhanced services that the customer chose to buy from Bell Atlantic.¹³ Bell Atlantic responded to Network Plus' proposal by refusing to provide VMS to a consumer *unless that consumer purchases local service from Bell Atlantic* (see letter from Bell Atlantic to Network Plus attached as Exhibit A). Therefore, the consumer who wants to continue to receive VMS must continue to purchase the Bell Atlantic's local service, preventing the customer from reaping the benefits of services and prices offered by competitive carriers.

ILECs such as Bell Atlantic *only* offer VMS to consumers that subscribe to their local exchange service. Thus, consumers cannot obtain the service individually, apart from the ILEC telecommunications service. This impermissible bundling of enhanced and basic telecommunications service is not only stifling the growth of competition, but depriving consumers of choice. ILECs cannot have it both ways. If they claim that VMS is an enhanced service and not subject to resale, then ILECs cannot bundle the service with telecommunications service to the detriment of the market and consumers.

It is interesting to note that Bell Atlantic offers a tariffed basic telecommunications feature that provides consumers with the capability to automatically transfer callers to enhanced services such as voice mail for call answering. Not only are these basic features unavailable for resale from the

¹³ While Network Plus maintains that voice messaging service is a telecommunications service under the Telecommunications Act of 1996 (the Telecommunications Act), these comments reflect the current treatment of VMS by ILECs and the FCC.

ILEC, but they only function with ILEC VMS. The result is that customers of CLECs cannot take advantage of basic services, such as call answering, from the ILEC without subscribing to the ILEC=s enhanced services.

III. THE FCC SHOULD REMEDY DISCRIMINATION AGAINST CONSUMERS WHO CHOSE COMPETITIVE CARRIER SERVICES BY ENFORCING ITS BUNDLING RESTRICTIONS AND REQUIRING ILECS TO SELL ENHANCED SERVICES INDIVIDUALLY

The reevaluation of the bundling rules provides the FCC with the opportunity to remedy one of the most serious anticompetitive bundling practices in operation today B discrimination by ILECs, such as Bell Atlantic and SNET,¹⁴ who refuse to make VMS available to customers that chose to subscribe to competitive telecommunications services of Network Plus and other competitive local exchange carriers (ACLECs). The ILECs have been abusing their control of VMS and violating bundling restrictions in the process.¹⁵

¹⁴ As briefly mentioned above, SNET has a so-called Aneutral team of agents that contact customers who have authorized a switch of local exchange carrier from SNET to a competitive carrier such as Network Plus. Apparently, these agents notify the customer that their voice mail service will be terminated upon switching to the new local exchange carrier. This pro-active marketing by SNET is solely the result of improper use of CLEC proprietary provisioning information by the ILEC retail sales organization.

¹⁵ Many business consumers are Asold enhanced services such as voice mail under a Atrial plan. Often times the consumer receives the trial service without written consumer approval. These consumers may overlook the related charges to this trial service due to non-specific billing descriptions such as Acall answering on their bill. The continued appearance of such service

features on the consumers bill results in a trigger mechanism for the ILEC. When processing a consumer=s local carrier change request, these features serve to trigger some ILECs to contact the consumer threatening termination of enhanced features.

A substantial and growing number of business and residential telecommunications customers do purchase true VMS as part of their telephone service. As noted, many of these consumers consider VMS a critical service to their business. To date, the FCC has not required ILECs to offer VMS for resale to CLECs.¹⁶ ILECs offer VMS for resale in a few states,¹⁷ but in most jurisdictions ILECs are refusing not only to allow resell of VMS but are refusing to provide VMS as a separate enhanced product to customers of competitive carriers under any terms or at any price.¹⁸ As soon as consumers discover that the ILEC will cancel their VMS and that the CLEC is unable to provide VMS that includes Station Message Detail Indicator (ASMDI≡),¹⁹ many VMS

¹⁶ Although it has not filed any formal comments, Network Plus supports the pending petition filed by the Telecommunications Resellers Association for a declaratory ruling from this FCC that voice messaging services are telecommunications services and consequently must be made available for resale. *Petition of the Telecommunication Resellers Association for a Declaratory Ruling That Voice Messaging Services are Telecommunications Services That Must Be Made Available for Resale at Wholesale Rates Pursuant to Section 251(c)(4) of the Communications Act of 1934, as Amended* (March 5, 1998). The comments of Network Plus in this proceeding address an additional, or alternative, remedy in urging the FCC to require ILECs to offer VMS directly to CLEC customers.

¹⁷ See, e.g. Florida (*see Petition by MCI Telecommunications Corporation for arbitration with United Telephone Company of Florida, Arbitration Order, Dkt. No. 961230-TP, Order No. PSC-97-0294-FOF-TP, 26* (March 14, 1997)); Minnesota (*see Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with USWest Communications, Inc., Docket No. P-422 et al., at 27* (December 2, 1996)).

¹⁸ The California Commission recently modified its decision to require resale of VMS and ordered Pacific Bell and GTE California to Amake voice mail services available to end users of a [CLEC] when the end-user=s service is provided on a resold line of the [ILEC].≡ Pacific Bell and GTE tariffs should permit the end user or the CLEC acting as the agent of the end user to order the services, which must be the same in functionality and price as voice mail services provided to the ILECs retail customers. (*Order Instituting Rulemaking on the Commission=s Own Motion into Competition for Local Exchange Service* (Rulemaking 95-04-043), Decision 97-08-076 (August 15, 1997), *modified*, Decision 98-10-020 (October 8, 1998).

¹⁹ SMDI provides a message signal (*i.e.*, stutter dial tone or message light) that is essential to many customers.

customers lose interest in Network Plus or switch immediately back to the ILEC, despite the fact that the customer prefers Network Plus= customer service, competitive rates and telecommunications service.

A. The FCC Should Continue to Impose Its Bundling Restrictions on ILECs

The fundamental purpose of the bundling restriction is to protect consumers from being compelled to purchase inefficient or otherwise unattractive services that they would not choose to purchase in a fully competitive market. Any element of service important to consumers B basic service or enhanced B that is effectively controlled by a small number of providers is susceptible to anticompetitive bundling practices. The FCC rules prohibit an ILEC with market power in the provision of basic local service from requiring customers to purchase enhanced services as part of their basic service. The FCC must also recognize that some ILECs possess dominant, or even monopolistic, market power in the provision of certain enhanced services, such as SMDI-capable VMS. It is unclear whether the FCC bundling rules prohibit ILECs from requiring the customer to purchase basic service in order to obtain a desired enhanced service, even though such a practice produces the same anticompetitive effects. If the FCC=s bundling restrictions do not already extend to such scenarios, then the FCC must strengthen its bundling restrictions against ILECs to prohibit ILECs from bundling any service that it maintains market control over.

Indeed, the Bell Atlantic position (*see* letter attached as Exhibit A) clearly demonstrates the ILEC strategy of provisioning enhanced services at non-profitable prices where the ILEC can utilize its monopolistic power to control basic telecommunications services. As Bell Atlantic states, without legal requirement to do so, the ILEC will disconnect customers of their enhanced services if that customer selects CLEC basic telecommunications services. Since the administrative, operational and cost burdens to providing a customer with VMS has already been incurred by the ILEC, the objective of the ILEC can only be to hinder and prevent CLEC market entry.

Consumers should be able to obtain enhanced services individually, apart from the competitive telecommunications services. When the FCC's bundling rules emerged from the *Computer II Final Decision*²⁰ in 1980, consumers had few, if any, alternatives for the provision of basic local service. Therefore, the FCC had little cause to formulate rules to protect consumer choice in a competitive LEC market that did not exist. Eighteen years later, the bundling restriction must continue to be imposed on ILECs to prevent anticompetitive efforts of forcing a consumer to subscribe to ILEC basic telecommunications service in order to obtain VMS.

The protection of CLECs from anticompetitive bundling practices is arguably even more important now than the bundling concerns of the FCC in *Computer II* in view of the Telecommunication Act's goal of a fully competitive local exchange telecommunications market. While in 1980 the protection of alternative CPE and enhanced service providers held little prospect of fostering increased competition for basic local service, the protection of CLECs today during their ongoing emergence into local exchange market promises to benefit *both* the local services market and the enhanced services market. Therefore, the FCC should continue to impose its bundling restrictions on ILEC and prohibit ILECs from discriminating against customers of other CLECs in their offering of critical enhanced services.

B. The ILECs Have No Justification For Refusing Consumer Who Want to Purchase VMS Independent of any other ILEC Service

²⁰ *Computer II Final Decision*, 77 FCC2d 384.

The result, if not the primary objective, of the ILECs' VMS bundling practice is to suppress competition in the local exchange market by refusing to provide an important independent service to customers who would otherwise choose a different LEC carrier. Senator Ted Stevens recently observed that ILECs are manipulating the classification of VMS as an enhanced service to frustrate competition for telecommunications services.²¹

ILECs have been unable to offer any compelling legitimate justifications for their refusal to sell VMS in a nondiscriminatory fashion. After being rebuffed in its attempts to obtain VMS for resale, Network Plus recently asked Bell Atlantic to permit Network Plus customers to subscribe to and/or to maintain Bell Atlantic VMS accounts after switching to a competitive carrier. Network Plus even offered to discuss arrangements under which it would bill VMS charges on behalf of Bell Atlantic. Bell Atlantic rejected all suggestions. Bell Atlantic's only justification for its discrimination against CLEC customers was that, because VMS is a relatively low-priced enhanced service, there is neither a legal requirement nor a good business case for BA to take on the administrative, operational, and cost burdens associated with offering voice mail service to end users who do not receive BA local exchange service. (see Bell Atlantic letter attached as Exhibit A). To the contrary, the provision of VMS to Network Plus customers is both technically and economically feasible for ILECs. But for the anticompetitive effects of VMS bundling, the provision of VMS to Network Plus customers would be profitable for Bell Atlantic,²² particularly when Network Plus is willing to discuss

²¹ *The Internet And The Telecommunications Act of 1996*, Senator Ted Stevens, Harvard Journal on Legislation, 35 Harv. J. on Legis. 5, 28 (Winter 1998).

²² In Massachusetts, Bell Atlantic charges business customers \$12 per month for VMS. (Complaint of RCN Telecom Service of Massachusetts, Inc., Order, D.T.E. 97-101, 4 (Massachusetts, 1998). This price is almost as much as the price for Bell Atlantic local service plan for residential customers.

the assumption of administrative responsibilities and costs associated with the provision of VMS to its customers.

IV. IN ADDITION TO THE FCC BUNDLING RESTRICTIONS, BELL ATLANTIC'S PRACTICE OF TYING BASIC TELECOMMUNICATIONS WITH VMS VIOLATES FEDERAL ANTITRUST LAW

Bell Atlantic's admitted practice of tying the availability of voice mail services to the purchase of basic local exchange service is a practice long condemned under the antitrust laws. The Supreme Court has found such tying arrangements unlawful *per se* because they inevitably decrease competition without any counterbalancing pro-competitive benefits.²³

²³ *United States v. Microsoft Corp.*, 1998B2 Trade Cases & 72,261 (D.D.C. 1998) (1998 WL 614485 at 7).

Bell Atlantic's practice of conditioning the availability of voice mail upon the purchase of a second and distinct product, basic local exchange service, represents a quintessential unlawful tying arrangement because Bell Atlantic is using its recognized power over voice mail to induce customers to purchase basic local service, which customers would prefer to purchase as a separate service from a different competitive provider, a CLEC. The fact that Bell Atlantic and other ILECs have traditionally bundled these two products is not a defense. With the emergence of competition in the local exchange market, consumers now desire to take advantage of this competition by purchasing basic local service as a separate service.²⁴ At the same time, consumers do not wish to forego voice mail service. However, under Bell Atlantic's tying program, consumers have a *Hobson's Choice*: they must forego voice mail if they wish to take advantage of competitive basic local service, or they must purchase both services from the incumbent. But this choice is no choice at all. Any consumer who desires voice mail will purchase local service from the ILEC, as long as the two services are linked.

Because ILECs retain market dominance in the voice mail services market and because there is little competitive threat to this dominance in the near term, due to the expense of entering this market, ILECs have a strong economic incentive to leverage their control of the voice mail market to insulate themselves from competition in the more competitive market for local exchange service.

Incumbents can readily achieve this leveraging by tying the availability of voice mail to the purchase of basic local service. If permitted to tie these two independent services together, incumbents will

²⁴ *Klamath Lake Pharm. Ass'n. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1289 (9th Cir. 1983) (Products that function together and are sold in combination may still be >separate= if consumers would prefer to buy them individually at the price necessary to market them separately.≡).

effectively preserve their dominance not only in the voice mail market, but also in the second newly competitive basic local services market. Such monopoly leveraging is anticompetitive and unlawful under federal antitrust laws.²⁵

In summary, there can be no doubt that incumbent local exchange carriers have a strong economic incentive to leverage their power in the voice mail market to preserve their dominant share of the local services market, and Bell Atlantic's admitted practice of linking the two services will accomplish this purpose unless the incentive is removed by the Commission.²⁶

²⁵ *E.g.*, *Great Western Directories, Inc. v. Southwestern Bell Telephone Co.*, 63 F.3d 1378, 1386 (5th Cir. 1995) (local telephone companies are able to leverage their control of directory listing information (ADLI) into the competitive telephone directory market). In this case, Southwestern Bell raised its price for DLI to independent telephone directory competitors for the purpose of raising production costs to a level that would drive its low-margin competitors from the market. *Id.* at 386; *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

²⁶ *See, Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997).

V. NON-DOMINANT CARRIERS SHOULD BE PERMITTED TO BUNDLE CPE AND ENHANCED SERVICES WITH TELECOMMUNICATIONS SERVICE

Network Plus submits that the concerns that led to the adoption of bundling restrictions are not applicable to non-dominant providers of telecommunications services. By definition, non-dominant carriers lack the market power that would enable them to engage in the conduct that provided the basis for the bundling prohibition. These carriers cannot compel customers to purchase unwanted services because customers have a choice of service provider in the services provided by CLECs since ILECs do not have monopoly on any distinct good or service.. If a customer does not like the terms and conditions under which a service is offered, including any bundling of CPE or enhanced services, the customer may move to another service provider. Discriminatory conduct by non-dominant carriers intended to disadvantage competitors will be ineffectual since the competitor can choose another service provider. Accordingly, the underpinnings that supported adoption of the bundling prohibition are not applicable to non-dominant carriers and it should be eliminated for them.

Network Plus does not believe that there is any basis for distinguishing between non-dominant providers of interexchange and local exchange service for purposes of application of the bundling prohibition. Non-dominant carriers lack the ability to engage in the type of conduct that was of concern to the FCC regardless of whether they are providing interexchange service or local exchange service. Accordingly, the prohibition should be removed for non-dominant providers of both local exchange and interexchange service.

In addition, permitting bundling by non-dominant carriers could benefit consumers by enabling these carriers to create useful service packages that would increase the range of choices available to consumers. Permitting packages of services can enable carriers to offer consumers

reduced prices that reflect savings in transaction costs in that it would not be necessary for carriers to provide for separate provision, marketing, and billing of services.

Accordingly, Network Plus urges the FCC to determine that non-dominant providers of interexchange and non-dominant providers of local exchange service may offer CPE and enhanced services on a bundled basis with telecommunications service.

VI. CONCLUSION

Network Plus respectfully requests that the FCC continue to impose bundling restrictions on ILECs and to order ILECs to offer voice messaging service to all consumers who request such service. Network Plus further requests that the FCC permit non-dominant providers of interexchange and local exchange service to bundle CPE and enhanced services with telecommunications service and that it continue to prohibit bundling by ILECs.

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EXHIBIT A

