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

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

CC Docket No. 98-183

COMMENTS OF
KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC"), respectfully submits the following comments in response to the Further Notice of Proposed Rulemaking issued in the above captioned proceedings.³

KMC Telecom, Inc. is authorized to provide, through its subsidiaries, competitive local and long distance services in 17 states, and Puerto Rico, and is operational in eight states (Alabama, Florida, Georgia, Louisiana, North Carolina, Texas, Virginia, and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Melbourne, Florida; Savannah and

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 ("NPRM").

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Augusta, Georgia; Baton Rouge and Shreveport, Louisiana; Greensboro and Winston-Salem, North Carolina; Corpus Christi, Texas; Roanoke, Virginia; and Madison, Wisconsin, and will soon build similar networks in several other cities in the Southeast and Midwest.

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

The Commission established its prohibition on bundling of customer premises equipment ("CPE") with telecommunications service out of a concern that bundling could effectively permit carriers to require consumers to purchase CPE they didn't want because customers would be required to purchase the entire package in order to obtain telecommunications service.⁴ The Commission was also concerned that unless carriers were required to unbundle enhanced from basic services carriers could harm competing enhanced service providers by discriminating against them in provision of basic telecommunications services.⁵

KMC submits that these concerns 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 CPE or enhanced services because customers have a choice of service provider. 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

⁴ *Computer II Final Decision*, 77 FCC 2d at 443, n. 52.

⁵ *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone & Telegraph Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995).

customer may move to another service provider. Similarly, these carriers lack the ability to harm competition by discriminating in provision of basic telecommunications services.

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.

KMC 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 Commission 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.

KMC further believes that the Commission should base its policies developed in this docket on the dominant or non-dominant status of the entity in question, not on whether the market is competitive. While the Commission has found that the CPE market is competitive⁶ and that interexchange market is substantially competitive,⁷ the local exchange market is far from competitive. By any measure, incumbents have the overwhelming share of the local service market.⁸ KMC submits that it would constitute unnecessary regulation to continue the ban on

⁶ *NPRM*, n. 33.

⁷ *MPRM*, n. 34.

⁸ Collectively, CLECs captured 5.1% of the business market for local telecommunications services in 1997. *United States Competitive Local Markets*, Strategis Group (1998). In 1996 the CAP/CLEC share of nationwide local service revenues, including local

bundling by non-dominant providers of local exchange service merely because the local service market is not fully competitive. This would impose unnecessary burdens on competitive service providers and perversely penalize them because incumbent LECs continue to enjoy market power.

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, KMC urges the Commission to determine that non-dominant providers of either interexchange or local exchange service may offer CPE and enhanced services on a bundled basis with telecommunications service.

II. INCUMBENT LECS SHOULD NOT BE PERMITTED TO BUNDLE

While non-dominant carriers are not able to engage in the conduct that caused the Commission to adopt its bundling prohibition, incumbent LECs are able to do so. As noted, incumbent LECs continue to control the overwhelming share of the local service market.⁹ And, to the extent there is competition it is mostly in commercial markets. As a practical matter, residential consumers do not have a choice of local service provider and business customers only occasionally do. Therefore, bundling of CPE and enhanced services with local service could

exchange and access services, was 1%. Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data (rel. Nov. 1997).

⁹ *Id.*

effectively permit incumbent LECs to force customers to purchase the CPE or enhanced services in order to obtain telecommunications service. Similarly, incumbent LECs could harm competition in the CPE and enhanced services markets by discriminating against competitors in provision of basic telecommunications service because competitors must rely on incumbent LECs to obtain telecommunications service.

Moreover, permitting incumbent LECs to bundle would raise a host of difficulties. If permitted to bundle it would be virtually impossible to assure that incumbent LECs are not subsidizing the provision of CPE and enhanced services with telecommunications revenues. Unless the Commission or state regulators are prepared to embark on price regulation of CPE and enhanced services it will be impossible for regulators to know that the package price does not constitute a subsidy of the CPE or enhanced services component. Thus, bundling by incumbent LECs would for all practical purposes require the reregulation of CPE and enhanced services effectively ending the Commission's long standing policy that those services should be deregulated and threatening the benefits that deregulation has achieved.¹⁰ Accordingly, the Commission should continue to apply the bundling prohibition to incumbent LECs.

KMC submits that prohibiting bundling by incumbent LECs but permitting it for non-dominant carriers would not be inequitable for incumbent LECs. Due to their possession of market power, the Commission applies to incumbent LECs a range of regulation that it does not apply to CLECs. Thus, incumbent LECs are subject to economic and rate regulation, to tariffing requirements, separations, and other regulations that are necessary to address incumbent LECs's

¹⁰ Permitting non-dominant carriers to bundle CPE and enhanced services would not, as a practical matter, constitute a reregulation of CPE and enhanced services because non-dominant carriers are for the most part not subject to extensive economic or rate regulation.

market power. By contrast, the Commission has recognized that competitive LECs do not possess market power and there is no need to subject them to such regulation.¹¹ The 1996 Act also applies special obligations on incumbent LECs that are not applicable to CLECs. KMC submits that permitting competitive LECs to bundle CPE and enhanced services with telecommunications, but not allowing incumbent LECs to do so, would be no more than another instance of this asymmetric regulatory approach necessitated by the need to exercise regulatory oversight over incumbent's LECs potential anti-competitive exercise of market power. Thus, this approach would not be unfair to incumbent LECs since it is attributable to the incumbent LEC's continued possession of market power. At the same time, this would end the application of unnecessary regulation to non-dominant carriers.

III. IMPLEMENTATION ISSUES

Application of Part 68 and Network Disclosure Rules. In the *NPRM*, the Commission asked for comment on how CPE bundling would affect the Commission's Part 68 rules.¹² The Commission asked how the demarcation point between telephone company communications facilities and terminal equipment as defined in Section 68.3 of the Commission's rules would change if CPE and telecommunications service were bundled together at a discount.¹³

¹¹ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, Report and Order, CC Docket Nos 96-262, 94-1, 91-213, and 95-72, 12 FCC Rcd 15982, para. 363 (1997) ("*Access Reform Report and Order*").

¹² *NPRM*, para. 19.

¹³ *Id.*

KMC submits that CPE bundling would not, and should not, have any impact on the Commission's Part 68 terminal equipment registration program or on the demarcation point. In essence, the Commission only proposed in this proceeding, and should only permit, a price bundling, not a technical bundling of CPE and telecommunications service. The Commission should affirm in this proceeding that a technical bundling of CPE and telecommunications service is not permitted and that equipment manufacturers and carriers must continue to comply with Part 68. This will assure, for example, that equipment continues to be connectable to the network through standard plugs and jacks. Further, price bundling should not have any impact on the demarcation point. Presumably, carrier provision of CPE on an unbundled basis has not caused any practical difficulties in ascertaining the demarcation point and, accordingly, neither should offering the same equipment on a price bundled basis cause any practical difficulties. To the extent necessary, the Commission could clarify in this proceeding that any CPE provided by a telecommunications carrier as part of a price bundled service offering shall, for purposes of application of Part 68, be considered to have been provided by the customer. This will assure that there is no regulatory confusion concerning location of the demarcation point.

Calculation of Universal Service Contributions. In the *NPRM*, the Commission asked for comment on the basis upon which to allocate revenue between telecommunications service and CPE when priced as a package for purposes of calculating a carrier's universal service contribution.¹⁴ KMC recommends that the Commission allow carriers that are permitted to bundle to use any reasonable allocation method and that it not prescribe any allocation method. KMC believes that this would be the least burdensome approach for carriers that are permitted to

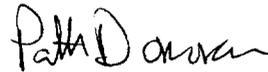
¹⁴ *NPRM*, para. 18.

bundle CPE and enhanced services with telecommunications. At the same time, if necessary, the Commission could investigate individual company allocation practices on a case-by-case basis to assure that carriers are making reasonable allocations. Thus, this approach would impose the least regulatory burdens while permitting effective enforcement of telecommunications carriers' obligations to contribute to universal service programs.

IV. CONCLUSION

For these reasons, KMC requests that the Commission 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 incumbent LECs.

Respectfully submitted,



Russell M. Blau
Patrick Donovan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7500

Dated: November 23, 1998

Counsel for KMC Telecom Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November 1998, copies of the foregoing Comments of KMC Telecom, Inc. were served by hand delivery to the parties on the attached service list:

257189.1



Candise M. Pharr

VIA HAND DELIVERY

ITS
1231 20th Street, N.W.
Washington, DC 20554

VIA HAND DELIVERY

Magalie Roman Salas, Esq. (original + 4 copies)
Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, DC 20554

VIA HAND DELIVERY

Janice M. Myles (1 + disk)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 539-A
Washington, DC 20554

VIA HAND DELIVERY

Michael Pryor
Deputy Chief, Policy & Program Planning Division
Federal Communications Commission
1919 M Street, N.W. - Room 530-H
Washington, DC 20554

VIA HAND DELIVERY

Carol Matthey
Deputy Chief, Policy & Program Planning Division
Federal Communications Commission
1919 M Street, N.W. - Room 544
Washington, DC 20554