BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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	)	
	)	
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. 98-183**

To: The Commission

COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

AMERICAN PETROLEUM INSTITUTE

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EXECUTIVE SUMMARY

Elimination of the bundling restrictions furthers the Commission's complementary goals to: (i) benefit consumers by enabling them to take advantage of innovative and attractive packages of telecommunications equipment, enhanced services and telecommunications services while ensuring that carriers are unable to act anticompetitively to harm consumers; (ii) foster increased competition in the markets for CPE, enhanced services, and telecommunications services; and (iii) eliminate any existing regulatory requirement that no longer make since in light of current technological market and legal conditions.

Given the needs of large corporate and institutional users for high level coordination and integration in their services and associated CPE, these users tend to seek system-wide customer specific solutions. The benefits of individualized, integrated solutions cannot be realized due to the Commission's bundling restrictions. Benefits of an integrated package include: (i) a single point of responsibility, control, and billing for all services and facilities; (ii) cost savings due to volume purchases and long-term commitments; and (iii) the flexibility to choose from new services and technologies. To the extent the bundling restriction precludes the development of an integrated package, it stifles the service and marketing innovations that both the Commission and national policy favor and large telecommunications users seek.

Since the adoption of the bundling prohibition, both CPE and business services markets have become increasingly competitive. The enhanced services market has grown considerably as well. The maturation of these markets eliminates the underlying rationales

for the bundling prohibition. Given these changed conditions, API submits that the continued unqualified application of both CPE and enhanced services bundling restrictions is no longer necessary. Further, removing the bundling restrictions would be consistent with the Commission's statutory obligation, as part of its biennial review of regulations, to eliminate or modify regulations that are no longer necessary.

The major caveat and safeguard is that bundling cannot be mandatory or exclusive. Stand-alone "basic" services must continue to be offered by carriers. The "ala carte" option cannot be eliminated. The Commission must be prepared to exercise its enforcement authority to ensure the availability of stand-alone basic services.

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To the Commission:

COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute ("API"), by its undersigned attorneys, hereby respectfully submits these comments in response to the Further Notice of Proposed Rule Making ("Further Notice") released by the Federal Communications Commission ("Commission") on October 9, 1998 in the above-captioned proceeding.[1] API urges the

[1] 63 Fed. Reg. 205 (Oct. 23, 1998) ("*Further Notice*").

Commission to eliminate the prohibition against the bundling of customer premises equipment ("CPE") and enhanced services with the services of non-dominant interexchange carriers ("IXCs"), if certain safeguards are set to thwart anticompetitive conduct.

I. PRELIMINARY STATEMENT

API is a national trade association representing approximately 300 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products, and natural gas. Among its many activities, API acts on behalf of its members as spokesperson before federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the API's Information Systems Committee. The Telecommunications Committee evaluates and develops responses to state and federal proposals affecting telecommunications facilities used in the oil and gas industries. API member companies are large purchasers of CPE and other telecommunications equipment, as well as Intranet and other enhanced services. Accordingly, API is pleased to submit these comments on the Commission's CPE and enhanced service bundling proposals.

II. THE OVERARCHING PUBLIC INTEREST IS TO PROVIDE THE OPTION OF INTEGRATED EQUIPMENT AND SERVICES PACKAGES

A. Bundling Will Promote Much-Needed Flexibility in the Telecommunications Marketplace

API strongly supports the Commission's proposal to eliminate the bundling restrictions. From the perspective of corporate users, elimination of the bundling restrictions is one of the preeminent deregulatory initiatives the Commission could undertake. Fundamentally, the bundling restriction is a regulatory dinosaur. It is antithetical to the increasing demand for end-to-end to responsibility for various communications requirements such as point of sale transaction processing, or underlying business application.

Service categories, such as "basic" and "enhanced," may still be relevant to regulators and of particular interest to carriers committed to preserving the benefits of regulation, but the distinctions are irrelevant to users. The principal issue for users is what combination of transport and switching, network management tools, and CPE will best support a particular business application or telecommunications requirement. Whether the elements of these packaged offerings are tariffed or detariffed, basic or enhanced, or offered by an Internet service provider ("ISP"), systems integrator or an IXC are not primary concerns for users. Rather, the critical questions are how is the underlying business application or telecommunications requirement best satisfied (*e.g.*, on a stand-

alone or bundled basis), and which entities can best deliver the complete package or stand-alone elements.

An example of a highly desired, sophisticated bundled offering is the very small aperture terminal (" VSAT") network offered by Hughes Network Services. This is a "private" satellite telecommunications service bundled with VSAT terminals, network management, help desk services, management traffic reports, and maintenance on both equipment and services. This service has been selected by a variety of firms in the retail industry for point of sale transaction processing and ancillary services. It is widely used by API member companies.

A more universally available, sophisticated bundled offering is High Speed Internet Access provided by cable companies and other users of high speed cable modems. For approximately $40.00 per month, consumers and small businesses can access the underlying transport and the Internet. By purchasing the modem separately, customers can further reduce the amount of the lease.

Perhaps the most significant benefit of bundling is the ability of customers, large and small, to deploy new technology and to look to the carrier, systems integrator or ISP to manage both the CPE and the service. For example, a user may wish to upgrade its call center operations with the latest call processing systems, but does not have the in-house staff or expertise to manage the technology. Further, the Information Services or Telecommunications Department wants to avoid, at all costs, the perennial problem of

managing multiple vendors. A bundled offering may or may not be the least expensive option, as compared to the separate procurement of the service and call center technology, but the value of the bundled offering with end-to-end accountability may be worth more than the incremental cost.

B. Bundling Will Eliminate Current Migration Penalties Imposed on Large Users

There is important economic benefit that elimination of the bundling restrictions will yield. Corporate customers, both Fortune 100 and much smaller, avail themselves of the opportunity to acquire all of their interexchange services from a single carrier to maximize overall savings. An emerging technology, that may or may not succeed or may take several years to gain widespread acceptance, is ("Internet Protocol") IP-based Intranet for corporate data communications. Presently, many large corporations acquire frame relay service from carriers to support these requirements. Over the past 3 to 5 years, users have migrated this traffic from private line to frame relay. The migration to IP-based Intranet offerings could well be the next major transition for corporate data requirements. One widely respected expert predicts that IP-based networks are the wave of the immediate future and emphasizes that virtually all the investment in new regional, national and international networks is being made in fiber-based IP networks.[2]

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[2] Dr. John A. McQuillan, "*The Internet Gold Rush,*" Business Communications Review, Sept. 1998, at 10 (stating that "IP is the convergence layer, not just for data, but for voice

With the bundling restriction, this migration is burdened with significant economic penalties. Foremost, the aggregate discount for the end-user under its customer-specific services arrangement will be adversely impacted. Typically, either a minimum monthly or minimum annual commitment is in place and/or the end user"s "total spend" with the carrier determines the rates for the various services being provided. Typically, as a customer's total spend increases, the customer can move into a better pricing tier. Because the "enhanced" IP-based service cannot be bundled with the regulated "basic" services, the migration to the preferred IP-based technology would trigger a potentially significant economic penalty -- the rates of the balance of the "basic" services in the customer-specific services agreement will increase. In addition, transaction costs are incurred to renegotiate a customer-specific "basic" services agreement and negotiate a standalone contract for the "enhanced" service. Elimination of the bundling restriction will eliminate these significant economic penalties.

While it is sometimes unclear whether the major carriers want to offer bundles of services and equipment, users clearly want the availability of this option in today's marketplace. Moreover, it is not clear whether highly aggregated offerings will be broadly accepted. However, with the emergence of new carriers and the convergence of various technologies, the bundling restrictions can seriously impede economic efficiency. While user choice is unnecessarily restricted today, the continuation of this restriction could pose

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and other traffic").

significant burdens in the near-term, impede the emergence of IP-based carriers, and retard economic efficiency.

III. THE CPE AND ENHANCED SERVICES MARKET ARE COMPETITIVE

In the *Computer II Final Decision*, the Commission recognized that, "[i]f markets for components of [a] commodity bundle are workably competitive, bundling may present no major societal problems so long as the consumer is not deceived concerning the content and quality of the bundle." [3] With respect to the Commission's first requirement that the markets be "workably competitive," API respectfully submits that the Commission has previously determined that both the CPE and IXC service are competitive.[4]

In terms of adverse competitive impact, the Further Notice is overly narrow in one major respect. The Commission focuses upon interexchange carriers and manufacturers of CPE. Over and above the consideration of ISPs, the Commission must take into account the growing impact of outsourcing companies and system integrators such as EDS, Systemhouse, Perot Systems, and IBM. The role and impact of outsourcing organizations

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[3] *Amendment of the Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 20828, Final Decision, 77 FCC 2d 384, 398 n.10 (1980) (*Computer II Final Decision).*

[4] *Further Notice* at 12; *See also Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254 (g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, ¶ 88 (1996) (*Detariffing Notice*).

in telecommunications and information systems is growing.[5] While the ability of these entities to provide and manage telecommunications services as successfully as they have managed data centers remains an open question, it is very possible that these entities could emerge as the principal providers of advanced data communications networks as a result of their expertise in managing data systems, displacing carriers and equipment providers as the principal interface with users for managing sophisticated integrated offerings. Indeed, traditional network services could simply be resold or managed by these entities with little need or demand for direct interaction between the user organization and the traditional telecommunications carrier.

More appropriately, the Commission should recognize that these entities may play a crucial role in the bundled services environment and thereby enhance the degree of competition. In this light, the traditional antitrust competitive analysis of the products being offered in all likelihood understates the current and future competition in the market for bundled services.

In the *Detariffing Notice,* the Commission correctly reached the tentative conclusion that, "in light of the development of substantial competition in the markets for CPE and interstate, interexchange services, it was unlikely that nondominant interexchange carriers could engage in the type of anticompetitive conduct that led the

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[5] Michael Finneran, "*Outsourcing - Do It Right or Don't Do It,*" Business Communications Review, Sept. 1998, at 22 (stating that "in the past decade, outsourcing has grown from being a profitable sideline for accounting, data processing, and telecommunications firms into a multibillion dollar business").

Commission to prohibit the bundling of CPE with the provision, *inter alia*, of interstate, domestic, interexchange services."[6] This conclusion still holds true today as there are no dominant IXCs; AT&T is nondominant in both the domestic and international markets.[7] Moreover, AT&T has divested itself of its network equipment and CPE manufacturing operations, and the number of long distance carriers has tripled since the implementation of the bundling restrictions.[8] The enhanced services market is competitive, as well. Some of the largest ISPs are not affiliated with AT&T, such as UUNET which is part of MCI/Worldcom and BBN which is owned by GTE. Moreover, there are hundreds of smaller ISPs.

A. Retaining the Bundling Prohibition Will Require the Commission to Draw Increasingly Fine Distinctions in a Period of Rapid Technological Change

"A revolution in technology is sweeping the globe and transforming the way we communicate and the way we live. Developments and improvements in technology are

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[6] *Further Notice* at 12 (citing *Detariffing Notice at* 7185-86).

[7] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, FCC 95-427, 11 FCC Rcd 3271 (1995); *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, FCC 96-209, 11 FCC Rcd 17963 (1996).

[8] *Second 1998 Trends in Telephone Service*, Report, Industry Analysis Division, (rel. July 1998), at 37 (stating that the number of long distance carriers more than tripled from 1986-1996).

occurring at a pace that was inconceivable even a few short years ago."[9] As Chairman Kennard has recognized, technological growth and development is fast-paced and wide-spread. To meet the needs of this rapid change, the Commission should shed antiquated rules that do not address the convergent nature of today's marketplace.

So long as the bundling prohibition is retained, the Commission will be forced to draw increasingly fine distinctions at a time when the lines between different categories are increasingly blurred. Indeed, the Commission has already recognized that "[c]omplex communications technologies such as frame relay blur the line between corporate and private carriage."[10] The Commission's task in drawing these lines is made even more difficult given its limited resources and the pace of technological advances and the convergence of service offerings. Most recently, in its *Notice of Inquiry on the Deployment of Advanced Telecommunications Services*, the Commission stated that "[a]t some point, it may distort the performance of the market to have separate regimes of regulation for competitors in a converging market."[11] In today's IXC, CPE, and enhanced

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[9] Remarks of William E. Kennard, Chairman, Federal Communications Commission, at the Regulators Breakfast, ITU Plenipotentiary Conference, Minneapolis, Minnesota (Oct. 13, 1998).

[10] *Independent Data Communications Manufacturers, Inc. Petition for Declaratory Ruling that AT&T's InterSpan Relay Service is a Basic Service; and AT&T Petition for Declaratory Ruling that all IXCs be Subject to the Commission's Decision on the IDCMA Petition*, Memorandum Opinion and Order, DA 95-2190, 10 FCC Rcd 13717, ¶52 (rel. Oct. 18, 1995) (*Frame Relay Order*).

[11] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,*

services marketplace, bundling restrictions have reached the point of distorting market performance. Given the competitive markets, the Commission no longer needs to exercise regulatory oversight. To retain the bundling prohibition in these circumstances is to retain a regulatory role designed to shield certain market participants from the effects of competition. Such regulatory activity distorts the operation of those markets and ensures that the Commission and the courts, not the marketplace, will decide how consumers will be served. Such a result is inconsistent with both the Commission's public interest conclusions and the 1996 Act.

IV. THE REQUIREMENT FOR UNBUNDLED BASIC SERVICES WILL CONTINUE FOR THE FORESEEABLE FUTURE

The major caveat or precondition for elimination of the bundling restriction is that telecommunications service providers remain obligated to provide telecommunications services on a stand-alone basis. "A la carte" telecommunications services must remain available. Making basic services available only on a bundled basis is antithetical to the procompetitive objective of this proceeding. Basic transmission networks must be transparent and non-proprietary, and cannot impede the development of other equipment and services.

Notice of Inquiry, CC Docket No. 98-146, FCC 98-187, ¶ 4 (rel. Aug. 7, 1998).

While stand-alone pricing is a relatively straightforward principle, it could be subverted by the adoption of proprietary standards or protocols that strongly favor or promote a carriers' particular product and services' offerings. For example, a basic services carrier should not be able to undermine other providers which use the generally accepted IP protocol by modifying its network to require a less popular IP protocol. This is particularly true for dominant local exchange carriers. API is not suggesting that the Commission immerse itself in standards setting processes or attempt to promulgate comprehensive regulations to ensure "open" systems and protocols. Rather, the Commission must remain vigilant and be in a position to exercise its substantial enforcement authority to minimize abuses by carriers with respect to their attempts to impose proprietary standards, services or equipment in the marketplace. This is an inevitable, residual regulatory obligation which the Commission must assume and maintain for the foreseeable future.

VI. CONCLUSION

Removal of regulatory supports can be a difficult and often controversial process. Players who enjoy regulatory protection tend to oppose de-regulatory efforts. Rather than operate in a fully competitive market, they would prefer to operate in a market distorted by regulatory constraints, including competitive barriers, so long as they obtain some benefit from those distortions.

Nonetheless, the gradual dismantling of the current regulatory structure is envisioned by the 1996 Act, which clearly enunciated a "pro-competitive, de-regulatory national policy framework."[12] The Commission's Further Notice, proposing to eliminate the bundling prohibition, which is appropriate given the current competitive conditions, furthers the transition to a competitive, de-regulated telecommunications industry and is consistent with national policy.

WHEREFORE THE PREMISES CONSIDERED, the American Petroleum Institute urges the Federal Communications Commission to adopt its proposal to eliminate the bundling prohibition in the interexchange market provided that end users and consumers retain the option to purchase bundled items separately.

Respectfully submitted,

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[12] See S. Conf. Rep. No. 230, 104th Cong., 2nd Sess, 1 (1996).

CERTIFICATE OF SERVICE

I, Cassandra L. Hall, hereby certify that I have served a copy of the foregoing "Comments" of the American Petroleum Institute on this 23rd day of November, 1998, upon the following parties via hand-delivery.

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