

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)
)
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

BELLSOUTH REPLY COMMENTS

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BELLSOUTH REPLY COMMENTS

BellSouth Corporation, by counsel and on behalf of its affiliated companies (“BellSouth”), hereby responds to comments submitted pursuant to the Commission’s *Further Notice of Proposed Rulemaking*¹ in the above-referenced proceeding.

SUMMARY

Comments filed in this proceeding generally supported the Commission’s proposals to relax or remove existing restrictions on carriers’ bundling of telecommunications services with

¹ *Policy and Rules Concerning the 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, *Further Notice of Proposed Rulemaking*, FCC 98-258 (rel. Oct. 9, 1998) (“*Notice*”).

CPE or enhanced services. Some carriers, however, urged the Commission to adopt its proposals only in piecemeal fashion, *i.e.*, to grant relief to the exclusion of ILECs, or sometimes more narrowly, to the exclusion of the BOCs and their affiliates. This the Commission should not do.

For example, the Commission has already determined that BOCs' Section 272 affiliates will be regulated as nondominant carriers. There is no basis, then, for the assertion that such affiliates should be denied the same bundling relief as any other nondominant carrier.

Arguments that the Commission should take a "wait and see" approach for Section 272 affiliates are nothing more than blatant attempts to use the regulatory process to forestall competition.

Similarly, in other markets in which BOCs or other ILECs are nondominant, the Commission must not subject them to greater bundling restrictions than other carriers. This is particularly true in the residential broadband services market where cable incumbents possess commanding dominance -- which in many markets is soon to be consolidated in the hands of conglomerate AT&T. No reason exists to deny to new entrant ILECs whatever bundling opportunities are afforded those already dominating that market.

Even in markets in which ILECs may retain some market power, disparate bundling relief is not warranted. CLECs are making significant inroads in local service markets pursuant to opportunities created by Section 251 of the Act. They do not need the additional "protection" of disparate bundling rules to gain further marketing advantages.

Nor are bundling prohibitions appropriate if the carrier continues to make the common carrier component of the bundle separately available on nondiscriminatory terms. The *Cellular CPE Bundling Order* instructs that under such circumstances, any alleged market power of the carrier is essentially irrelevant, and bundling should not be denied. Similarly, if a BOC continues to make the local exchange service component of a bundle separately available, the

BOC must be permitted upon Section 271 relief to offer local exchange, CPE, and enhanced service bundles that also include interLATA service. Such a result is compelled by the Commission's previous determination in the *Non-Accounting Safeguards Order* that upon such relief, "BOC[s] will be permitted to engage in the same type of marketing activities as other service providers."

Accordingly, no reason exists to exclude BOCs or other ILECs from any bundling relief granted in this proceeding.

I. Whatever Form of Bundling the Commission Allows Other Nondominant Carriers, It Must Allow the Same Form of Bundling for ILECs' Nondominant Affiliates and Operations.

In the *Notice*, the Commission recited its previous observation that "bundling may present no major societal problems" in circumstances in which the markets for the components of the bundle are "workably competitive."² Carriers deemed by the Commission to be "nondominant" seized upon this observation to argue, in essence, that because the Commission has previously considered interexchange, CPE, and enhanced service markets to be sufficiently competitive, little is left for the Commission to decide: it need only go through the procedural formality of lifting the current prohibition. In contrast, a number of parties expressed concerns that notwithstanding the degree of competition in the relevant markets, sufficient reasons continue to exist for the Commission not to grant nondominant carriers carte blanche freedom to bundle goods and services any way they see fit, particularly if a carrier refuses to provide common carrier services outside of a bundle.³ *Whichever* way the Commission comes out on

² *Notice* at 3-4.

³ *See, e.g.*, Team Centrex at 2, Consumer Electronics Manufacturers Assoc. at 8-9, American Petroleum Institute at 11.

bundling opportunities for nondominant carriers, however, the Commission must not exclude ILECs' nondominant affiliates or operations from the benefits of such opportunities.

A. AT&T's Proposal to Delay Bundling Relief for BOCs' In-Region InterLATA Services Should be Rejected.

AT&T argues that because no BOC currently has authority to provide in-region interLATA service, the Commission should exclude BOCs' Section 272 affiliates from any bundling relief otherwise granted to nondominant carriers.⁴ AT&T's argument makes no sense and should be rejected.

AT&T simply ignores that the Commission has already determined that upon approval of a BOC's Section 271 application and entry into the interLATA market through a Section 272 affiliate, the affiliate will be regulated as a nondominant IXC.⁵ The basis of that determination was that the BOC's affiliate, as a new entrant in the interstate, domestic, interLATA services market, would not have the ability to raise and sustain prices in that market above competitive levels by restricting its output. In other words, the BOC's affiliate will have the same market characteristics as any other interexchange carrier considered by the Commission to be nondominant. AT&T has offered no basis for discriminatory application of bundling relief among such carriers.

Instead, AT&T merely seeks to erect another procedural hurdle to prevent BOCs from competing with it on fair and equal terms. The Commission, having made the prospective determination that BOC affiliates will be regulated as nondominant carriers, need not wait until *after* a Section 271 application is approved, and *after* the Commission "has gained practical

⁴ AT&T at 15.

⁵ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LECs Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756 (1997) ("*BOC Nondominant Order*").

experience with the implementation of Sections 271 and 272,”⁶ and *after* another proceeding to address bundling proposals in the context of this passage of time, in order to grant BOCs and their affiliates the same market opportunities as any other nondominant IXC. AT&T’s blatant attempt to continue to utilize regulatory processes in anticompetitive ways to maintain unfair competitive advantages should be squarely rejected.

B. The Commission Should Afford to ILECs in All Markets in Which They Are Nondominant the Same Relief the Commission Adopts for Nondominant Carriers Generally.

In the *Notice*, the Commission proposed recognizing different “categories of carriers” as a possible qualification upon which to base a lifting of bundling restrictions only for certain carriers.⁷ Yet, the appropriate analysis in which the Commission should engage has *not* to do with the “category” into which a carrier falls, but with the degree of power a carrier might possess in a particular market.⁸ Thus, the Commission should make clear that in markets in which an ILEC does not possess market power, the ILEC will not be subject to bundling restrictions any more onerous than those applicable to other carriers that do not possess market power.

The need for such equal treatment is particularly compelling as BOCs and other ILECs attempt to crack the market for residential broadband services. Presently, the residential broadband market is tightly controlled by dominant, incumbent providers. As one commenting party observed:

⁶ AT&T at 15.

⁷ *Notice* at ¶ 29.

⁸ Analysis of market power in relevant markets is appropriate in circumstances in which a carrier does not otherwise make the telecommunications service component of a bundle separately available on nondiscriminatory terms. As discussed in BellSouth’s Comments and *infra* at page

[Eighteen] of the largest cable companies, and many small ones, are building from that base to launch significant related service roll-outs. . . .

[C]able systems are rolling out cable modem service in 40 states, and cable systems offering high-speed data services now pass 19 million homes [and are projected to] pass 39 million homes over the next two years. One operator has reported that it provides an increasing number of broadband services to approximately 5 million customers in 17 states. By the end of this year, it is anticipated that cable modems will reach 700,000 users. By contrast, it is estimated that high-speed DLS [*sic*] systems will reach only 25,000 users.⁹

Moreover, this overwhelming control and dominance in the broadband services market is about to become even more concentrated in the hands of the most powerful telecommunications conglomerate in the nation. As Ameritech points out, AT&T's recent mergers "have effectively combined the country's No. 1 long distance provider (AT&T) with the #1 cellular service provider (McCaw), the No. 1 CLEC (Teleport), and the No. 1 cable service provider (TCI)."¹⁰ Indeed, AT&T's proposed \$48 billion merger with TCI will give it direct control of cable facilities, and a dominant broadband position, to 20.9 million homes. TCI affiliates add another 13.2 million to this total.¹¹ AT&T's unprecedented accumulation of the leading position in long distance, international, and wireless service markets will serve only to further protect AT&T's acquired dominance in the residential broadband service market.

12, a carrier's alleged market power in the telecommunications market is not material when the telecommunications service is separately available.

⁹ Next Level Communications at 5-6 (citations omitted).

¹⁰ Ameritech at 13.

¹¹ See, *Application of AT&T Corporation, Transferee, and Tele-communications, Inc. (TCI), Transferor, for FCC Consent to Transfer of Control Pursuant to Section 310(d) of the Communications Act, as amended, of Licenses and Authorizations Controlled by TCI or its Affiliates or Subsidiaries*, CC Docket No. 98-178, Application at 8.

Given such overwhelming dominance by AT&T and other cable incumbents, it would make no sense whatsoever for the Commission to adopt a regulatory scheme that insulates the dominant providers from effective competition by those who could otherwise challenge that dominance. Indeed, already ILECs labor under the handicap of unnecessary regulatory burdens that are foreign to AT&T's and others' broadband services. For example, ILECs' attempts to enter the broadband services market are subject to "dominant" carrier pricing, tariffing, and Section 214 requirements even though cable operators are by far the dominant providers of these services. Similarly, the ban on BOCs' provision of interLATA broadband services prevents the development of full-scale broadband service competition, serving the interests only of the entrenched and dominant incumbents. In the instant case, the Commission must avoid exacerbating the backward effects of these policies that oppress the market challengers to the sole benefit of the ensconced incumbents by ensuring, at a minimum, that ILECs are subject to no greater restrictions on bundling opportunities in their introduction of new broadband services than are those whose market strongholds the ILECs are seeking to break.

Furthermore, permitting ILECs to bundle broadband services with associated CPE will provide tangible public interest benefits. As BellSouth noted in its original comments, bundling CPE with communications services can help customers overcome economic and psychological barriers to decisions to purchase new services.¹² Overcoming these barriers can, in turn, drive deployment of the underlying service to a much broader base of customers, lowering the service's average fixed costs. Next Level confirms that the need for such bundling flexibility presents itself squarely in the context of ILECs' residential broadband offerings. Next Level manufacturers specialized CPE that facilitates carriers' delivery of a full array of advanced

¹² BellSouth at 11-12.

services over existing copper plant, but which would cost several hundred dollars for the consumer. As Next Level observes, however, allowing ILECs to bundle their broadband transmission services with such CPE would be entirely consistent with the Commission's past recognition of bundling as "an efficient promotional device which reduces barriers to new customers and which can provide new customers with CPE and ... service more economically than if [bundling] were prohibited."¹³

Because of these public interest benefits attributable to bundling, the Commission must ensure that in the broadband services market or in any other market in which ILECs are not dominant, the ILECs are not subject to any greater restrictions on bundling than are any other nondominant providers.

II. Even Where an ILEC Retains Market Power, Bundling Relief is Appropriate Particularly if the Common Carrier Component of the Bundle Remains Separately Available.

Seizing upon the suggestion in the *Notice* that the Commission might consider adopting disparate rules for different types of carriers (with the implicit suggestion that ILECs would be deemed to be dominant for all purposes), a number of parties attempted to build arguments that bundling relief would be appropriate for all carriers *except* ILECs. These attempted arguments fall short, however, because they alternately misunderstand the objective of the Commission's bundling restrictions or neglect to consider the impact of the continued availability of the common carrier component separate from an ILEC's bundled offering. In these respects, parties' oppositions to bundling relief for ILECs fail and must be rejected.

¹³ Next Level at 4, quoting *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4030 (1992) ("*Cellular CPE Bundling Order*").

A. Much of the Opposition to Bundling by ILECs is Based on a Misperception of the Purpose of the Commission's Bundling Restrictions.

As the Commission made clear when it originally adopted its bundling restrictions, its purpose was to facilitate growth and development of emerging competition in CPE and enhanced service markets. In pursuing these goals, the Commission applied its rules evenly to all carriers. As the record in this and other proceedings amply demonstrate, both of those markets are now robustly competitive and the Commission's objective has been attained. Rather than congratulating the Commission on a job well done, however, a number of parties seek to ascribe to the Commission's rule a new purpose never intended by the Commission. That is, they would have the Commission begin applying its bundling rules solely against ILECs to give themselves an unfair advantage in winning customers away from ILECs in the local exchange market. The Commission should avoid fostering such aberrant effects that would result from piecemeal removal of the current restrictions.

Use of the bundling rules to create further disparate opportunities for CLECs in local markets is inappropriate. Already, CLECs are taking advantage of the opportunities afforded them under Section 251 of the Communications Act to compete only for the most profitable customers and customer segments. They do not need the additional "protection" of more restrictive bundling rules for ILECs to be competitive in local markets.

Indeed, the record shows that CLECs are achieving substantial inroads in local markets and are signing up new customers at growth rates that are multiples of those of ILECs.¹⁴ Even more recently, the Commission's own Local Service Competition Report shows that CLECs' "revenues ... continue to increase rapidly ... doubl[ing] [in 1997] to \$3 billion" while ILECs'

¹⁴ See, e.g., Bell Atlantic at 3-6.

revenues grew “at a much less rapid pace.”¹⁵ Similarly, the Association of Local Telecommunications Services (ALTS) recently announced that CLECs had succeeded in taking about 2-3% of market share from ILECs to date and set an objective of 25% within five years.¹⁶ Disparate application of bundling rules is not necessary to foster such local service competition.

A variation of the foregoing errant argument that the Commission should apply its rules disparately simply to facilitate CLEC marketing is the novel assertion that bundling should be denied to ILECs because their alleged power in enhanced service markets gives them unfair advantages in the local exchange markets.¹⁷ In particular, the complaint is that unless the Commission prohibits bundling by ILECs, customers of CLECs will be unable to obtain voice mail service (VMS) because some ILECs do not sell their VMS services independent of their local exchange offerings.

This argument is nonsensical on its face. First, the Commission has long recognized that the enhanced service market is extremely competitive. Indeed, that determination forms the basis of the Commission’s longstanding policy not to regulate enhanced services. There has been no showing that the Commission’s prior assessments are inaccurate. In fact, the present record again confirms that there are numerous alternatives to ILEC enhanced services, including VMS.¹⁸ Consequently, as a practical matter, ILECs do not have the ability to force customers to buy an “unwanted” local exchange service simply to obtain a desired enhanced service.

¹⁵ *Local Competition*, Industry Analysis Division, Common Carrier Bureau, FCC (rel. Dec. ___, 1998) at 1.

¹⁶ *ALTS Members Set Sights on 25% Local Market Share by 2003, Tout New York as Competition 'Road Map'*, 49 TR 6 (Dec. 7, 1998).

¹⁷ *See*, Network Plus, Inc. at 14.

¹⁸ Bell Atlantic at 9-10.

Nor is there any validity to the implicit collateral assertion that ILECs are in any manner obligated to provide VMS or other enhanced services on equal terms to all potential customers. Enhanced services are not common carrier offerings and are therefore not subject to Section 202 or other nondiscrimination requirements. Accordingly, ILECs have no obligation to make enhanced services available to customers of other CLECs at all, much less to provide the services on the same terms and conditions regardless of the customer's choice of local exchange provider or local exchange options. In short, bold assertions of enhanced service market power do not withstand even simple scrutiny and provide no basis for denying ILECs the opportunity to bundle basic and enhanced services.

B. Other Opposition to Bundling by ILECs is Deficient for Failing to Consider the Impacts of the Continued Availability of the Common Carrier Component of an ILEC's Bundled Offerings.

As the Commission acknowledged in the *Notice*, the current blanket prohibition on CPE bundling precludes two different forms of bundling practices.¹⁹ First, it prohibits "pure" bundling, or the practice of offering identifiable and discrete telecommunications service and CPE components together solely as a unified singular product. Second, the rule also prohibits "mixed" bundling, *i.e.*, the practice of offering telecommunications service and CPE together at a packaged discount, while continuing to offer the telecommunications service separately on nondiscriminatory terms.

Notwithstanding this recognition in the *Notice*, many parties tended to elide over the distinction. Consequently, many of those arguing against any bundling relief for ILECs appear to have based their arguments solely on notions of "pure" bundling, since that also tended to be the nature of the bundling relief they advocated for themselves. In so doing, however, these

¹⁹ *Notice* at ¶ 1.

parties failed to present any basis for denying ILECs the opportunity, at a minimum, to engage in “mixed” bundling. Indeed, to the contrary, ILECs and others showed that “mixed” bundling should be permitted regardless of the market power of an ILEC.

Many of the asserted ills attributed to ILEC bundling, even if true, would be neutralized by the continued separate availability of the ILEC’s telecommunications service component. Indeed, most of the criticism levied at bundling by ILECs derives from assertions of continued market power and the knee-jerk allegation of the opportunity to “exploit” that market power through bundling. As other parties showed,²⁰ however, the Commission’s own precedent in the *Cellular CPE Bundling Order*²¹ instructs that alleged market power is effectively rendered irrelevant if the carrier continues to offer the common carrier component of the bundle on separate nondiscriminatory terms. Accordingly, arguments against bundling by ILECs that make no attempt to address the impact of the separate availability of the common carrier component carry no analytical value and should be rejected outright.

Only MCI attempts to leap this hurdle, but it, too, falls flat. Indeed, MCI appears to have done little more than to reassert in the bundling context many of the same arguments asserted by it and others without success in the *BOC Nondominant Order*²² and the *CMRS Safeguards Order*.²³ In both instances, the Commission rejected the speculative parade of horrors as a showing of need for stringent regulatory burdens on BOCs or other ILECs. In each case, the Commission chose instead to rely on existing accounting, cost allocation, price cap and other

²⁰ Ameritech at 4, Bell Atlantic at 3; GTE at 14-15; Next Level at 4.

²¹ *Cellular CPE Bundling Order*, 7 FCC Rcd 4029 (1992).

²² 12 FCC Rcd 15756 (1997).

²³ *Amendment of the Commission’s Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services; Implementation of Section*

regulatory tools and incentives, on statutory obligations and opportunities under Sections 251 and 252 of the Act, and on prevailing antitrust principles and laws to combat alleged opportunities for abuse. The Commission should do no worse here. As long as ILECs remain subject to the foregoing constraints and the ILECs' common carrier component remains separately available, the Commission need not and should not prevent "mixed" bundling by ILECs.

That an ILEC's local exchange component would remain separately available is also enough in itself to negate arguments that BOCs or their affiliates should not be permitted to bundle local exchange service with bundles of interexchange service, CPE, and enhanced services upon achieving Section 271 relief.²⁴ In addition, however, denial of these opportunities to BOCs would be directly contrary to the intent of Congress as recognized by the Commission in the *Non-Accounting Safeguards Order*.²⁵

Section 271(e) of the Act presently prohibits the "big three" IXC's from jointly marketing resold BOC local exchange services and interLATA services, including "bundling" those services. That is, these carriers are prohibited from, "among other things, providing a discount if a customer purchases both interLATA services and BOC resold services, conditioning the purchase of one type of service on the purchase of the other, and offering both interLATA services and BOC resold services as a single combined product."²⁶ This prohibition will expire,

601(d) of the *Telecommunications Act of 1996*, 12 FCC Rcd 15668 (1997) ("*CMRS Safeguards Order*").

²⁴ MCI at 14, 17.

²⁵ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*").

²⁶ *Id.* at 22039 (emphasis added).

however, on February 8, 1999. At that point, all IXCs presumably will be permitted to engage in the foregoing marketing activity.

In comparison, BOCs are also presently prohibited from marketing or selling an affiliate's interLATA service. Upon Section 271 authorization within a state, however, this "restriction ... is no longer applicable, and the BOC will be permitted to engage in the *same type of marketing activities as other service providers.*"²⁷ This includes "marketing or selling [interLATA] services in combination with local exchange services."²⁸ The Commission having so determined that BOCs will be able to engage in the same marketing activities as other service providers, including bundling, there is no room for the assertion that such bundling relief should be denied to BOCs in this proceeding. Arguments to that effect must be rejected.

CONCLUSION

Whatever form of bundling opportunities the Commission allows other nondominant carriers, it must allow the same form of bundling for ILECs' nondominant affiliates and

²⁷ *Id.* at 22046 (emphasis added).

²⁸ *Id.*

operations. Even if an ILEC retains market power, however, bundling relief is appropriate particularly if the common carrier components of ILECs bundles remain separately available on nondiscriminatory terms.

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CERTIFICATE OF SERVICE

I, Karen S. Bullock, do hereby certify that I have this 23rd day of December, 1998, served all parties to this action with the foregoing BELLSOUTH REPLY COMMENTS, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid addressed to the parties as set forth on the attached service list.



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