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FEDERAL COMMUNICATIONS COMMISSION
COMMUNICATIONS REGULATORY DIVISION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

**Reply Comments of the
Information Technology Association of America**

The Information Technology Association of America (“ITAA”) hereby replies to the comments submitted in response to the Commission’s *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.¹ As explained below, ITAA is strongly opposed to the suggestion made by several of the incumbent local exchange carriers (“ILECs”) that dominant carriers should be permitted to bundle local telecommunications services with information services.

¹ See *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*, FCC 98-258, CC Docket Nos. 96-61, 98-183 (rel. Oct. 9, 1998) (“Notice”).

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I. THE COMMISSION SHOULD NOT PERMIT DOMINANT CARRIERS TO BUNDLE LOCAL TELECOMMUNICATIONS SERVICES WITH INFORMATION SERVICES

GTE and the Bell Operating Companies (“BOCs”) stand virtually alone in asserting that dominant carriers should be allowed to bundle basic telecommunications services with information services.² In support of this proposal, the ILECs advance five basic arguments.

They claim that:

- the Telecommunications Act of 1996 created a “presumption” that the Commission’s No-Bundling Rule is unnecessary;
- increasing competition in the local telecommunications market has eliminated the risk that bundling would harm competition in the information services market;
- experience with CPE bundling in the cellular CPE market provides ample precedent for allowing ILECs to bundle information services;
- “regulatory symmetry” requires that, if the Commission allows non-dominant interexchange carriers to bundle, the agency also must allow ILECs to do so; and
- requiring ILECs to offer an unbundled telecommunications-only option would be sufficient to preserve consumer choice.

² As applied to information services, the Commission’s rules impose three distinct unbundling obligations on the ILECs. First, an ILEC may not require a basic telecommunications customer to purchase an ILEC-provided information service (“physical unbundling”). For example, an ILEC could not require a Digital Subscriber Line (“DSL”) customer to purchase an ILEC-provided Internet access service. Second, an ILEC that provides an information service must offer the underlying transmission capacity on a stand-alone, tariffed basis (“component unbundling”). For example, if an ILEC provides a broadband Internet access service, it must unbundle the underlying DSL service and make it available at tariffed rates. Finally, an ILEC may not offer a “special discount” to customers that purchase both a telecommunications service and an information service from the carrier (“price unbundling”). Rather, the ILEC must separately price each service. Thus, an ILEC could not offer a discount only to customers that purchase both an ILEC DSL service and an ILEC Internet access service. The ILEC commenters ask the Commission to lift only the price unbundling requirement.

As demonstrated below, *none* of these purported justifications provides a basis for permitting ILECs to bundle local telecommunications services with information services.

A. Permitting the ILECs to Price Bundle Would Not Advance the “Deregulatory” Goals of the Telecommunications Act

U S West contends that “Section 11 of the Communications Act establishes a presumption that regulation is not necessary and should be eliminated.”³ On this basis, the carrier further asserts that the Commission must eliminate all bundling restriction unless a “compelling need” for these regulations can be demonstrated.⁴ While ITAA is in favor of eliminating counterproductive or unnecessary regulations, U S West’s argument has no statutory basis.

To be sure, the Telecommunications Act of 1996 requires the Commission to periodically review its rules and eliminate any provisions found to be unnecessary.⁵ The statute, however, does not direct the Commission to mindlessly eliminate regulations. Nor does it create a presumption that all existing rules are unnecessary. Rather, Congress directed the Commission to measure the continued need for a particular regulation based on an objective consideration of whether “meaningful economic competition” has rendered a particular provision unnecessary.⁶ Given the absence of significant competition in the local exchange market, elimination of the bundling restriction for ILECs would be inappropriate under Section 11 of the Act.

³ *U S West Comments* at ii, 3.

⁴ *Id.* at 4.

⁵ *See* 47 U.S.C. § 161(a)(2).

⁶ *Id.*

B. The State of Local Competition Does Not Provide a Basis for Eliminating the No-Bundling Rule

In their comments, SBC, Ameritech, and Bell Atlantic suggest that competition in the local telecommunications market created by the Telecommunications Act has eliminated their ability to engage in anticompetitive conduct against unaffiliated ISPs.⁷ Accordingly, these carriers suggest that they should be permitted to bundle local telecommunications services and information services. The Commission should reject this argument.

As recognized by America Online (“AOL”), the ISP Consortium, and the Commercial Internet Exchange Association (“CIX”), the ILECs are not subject to effective competition.⁸ Although the Telecommunications Act of 1996 was intended to foster competitive entry into the local telecommunications market, the incumbent carriers have been largely successful in frustrating the statute’s market-opening provisions. Indeed, in the almost three years since the 1996 Act was enacted, not one of the BOCs has satisfied the statute’s competitive checklist. The ILECs also have raised obstacles to competitive entry by restricting collocation opportunities, refusing to engage in sub-loop unbundling, and failing to provide competitors with nondiscriminatory access to facilities and services. As a result, the ILECs still control over 95 percent of all local service revenues and over 97 percent of all switched access lines.⁹

⁷ See *SBC Comments* at 4; *Ameritech Comments* at 10; *Bell Atlantic Comments* at 3.

⁸ See *Comments of America Online* at 8, 10 (“*AOL Comments*”); *Comments of the Internet Service Provider’s Consortium* at 5, 6 (“*ISP Consortium Comments*”); *Comments of the Commercial Internet Exchange Association* at 2, 3 (“*CIX Comments*”).

⁹ See *Local Competition Report*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, at 1 (Dec. 1998).

In light of these conditions, ITAA agrees with AOL, CIX, and the ISP Consortium that the ILECs retain both the ability and incentive to leverage their monopoly control over the local exchange to harm competition in the information services market.¹⁰ Until effective competition takes root in the local market, the Commission should maintain its pro-competitive policies with respect to information services, including the restriction on ILEC bundling of local telecommunications services with information services.

C. The Unique Conditions that Justified the Commission's Decision to Permit Cellular CPE Bundling Are Not Present in the Local Exchange Market

Several of the ILECs claim that the Commission's decision to permit cellular carriers to bundle wireless service with CPE provides ample precedent for permitting ILECs to bundle local telecommunications services with information services.¹¹ These carriers fail to recognize, however, that the unique market conditions that justified the Commission's decision to authorize bundling in the cellular context are not present in the local exchange market.

To be sure, the cellular market was not fully competitive when the Commission authorized cellular carriers to offer wireless service and CPE on a bundled basis. That market, however, was significantly more competitive than today's local telecommunications market. Indeed, at the time cellular bundling was authorized, the cellular market was a duopoly in which facilities-based carriers competed vigorously with each other and numerous resellers.¹² By

¹⁰ *See Id.*

¹¹ *See Bell Atlantic Comments at 4, 10; Ameritech Comments at 4, 8; SBC Comments at 6; BellSouth Comments at 6.*

¹² *See In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4029 (1992).

contrast, the ILECs have retained a virtual monopoly in the local telecommunications market. As a result, bundling by the ILECs presents a far greater risk of anticompetitive conduct than was present in the cellular context.

The Commission's decision to permit bundling also relied on the unique structure of the cellular CPE market. Most cellular CPE is sold by independent retailers who also act as agents for the cellular carriers that service their area. These retailers typically offer CPE produced by several different manufacturers. Given these conditions, the Commission believed that bundling would allow independent retailers to assemble packages that combine *customer-selected* CPE with transmission service; the Commission did not believe that bundling would permit cellular carriers to dictate their customers' choice of equipment.

The structure of the local telecommunications market is markedly different. A customer typically cannot purchase local exchange service from independent vendors. Rather, the customer's only point of contact for local telephone service is the incumbent carrier. If permitted to bundle, the ILECs would have a far greater ability than their cellular counterparts to use this market power to affect adversely competition in adjacent, non-regulated markets. To avoid this anticompetitive result, the Commission should retain the No-Bundling Rule for the ILECs.

D. The Communications Act Does Not Require Uniform Bundling Rules for All Carriers

The ILECs claim that "regulatory symmetry" requires that, if the Commission allows non-dominant interexchange carriers to bundle, the agency also must allow ILECs to do

so.¹³ Contrary to these carriers' apparent belief, however, the Communications Act does not require the Commission to treat all carriers identically. Rather, the Act directs the Commission to eliminate any rules that it determines are "no longer in the public interest as the result of meaningful economic competition."¹⁴

Consistent with this congressional directive, the Commission's decision regarding bundling in the local exchange market should be based on the agency's assessment of the competitive conditions present in the market and the public interest benefits of allowing bundling. Plainly, the level of meaningful competition in the local exchange market differs from that in the interexchange market. Under the statute, this difference could provide a basis for the Commission to adopt different rules to govern bundling by ILECs and interexchange carriers.

E. Requiring ILECs to Offer an Unbundled Telecommunications Service Option is Inadequate to Protect Consumers

Several of the ILECs also argue that they should be allowed to bundle local telecommunications service with information services as long as they make the telecommunications service included in the package available to consumers on a stand-alone basis.¹⁵ In *theory*, this approach would preserve the ability of a consumer to purchase a telecommunications service from an ILEC and combine it with an information service purchased

¹³ See *Bell Atlantic Comments* at 14; *SBC Comments* at 7; *U S West Comments* at 9; *BellSouth Comments* at 11; *GTE Comments* at 15.

¹⁴ 47 U.S.C. § 161.

¹⁵ See *Bell Atlantic Comments* at 13; *Ameritech Comments* at 19; *U S West Comments* at 7; *BellSouth Comments* at 7.

from an unaffiliated provider. In *reality*, however, this approach would have the same effect as permitting ILECs to offer all services on a bundled basis.

Perhaps the best way to illustrate the competitive risks posed by the ILECs' bundling proposal is to consider an ILEC's combined offering a Digital Subscriber Line ("DSL") service and an Internet access service. Under the Commission's current rules, the ILEC would be required to price these services separately: the carrier, for example, could charge \$40 per month for the DSL service and \$20 per month for the Internet access service. A customer would have the freedom to choose to purchase one or both of these services from the ILEC.

If price bundling were allowed, however, the ILEC would be free to offer the telecommunications service and information service for a single price. Because they have market power, an ILEC would have the ability to raise the price of the DSL service offered on a stand-alone basis above cost. For example, the ILEC could charge \$55 per month for the stand-alone DSL service and \$60 per month for the combined DSL and Internet access offering. An economically rationale consumer confronted with these offerings would not purchase the ILEC's \$55 per month DSL service and then pay another \$20 a month to an independent provider for Internet access service. Instead, the consumer would purchase the bundled offering from the ILEC to take advantage of the "discounted" Internet access service. The end result would be no different than if the Commission allowed the ILEC to require its customers to purchase both regulated and non-regulated offerings.

CONCLUSION

For the foregoing reasons, the Commission should reject the ILECs' proposal to permit dominant carriers to bundle local telecommunications services with information services. Instead, the Commission should require the ILECs to continue to comply with the rules requiring the separation of regulated telecommunications and competitive information services.

Respectfully submitted.

INFORMATION TECHNOLOGY ASSOCIATION
OF AMERICA

By:



Jonathan Jacob Nadler
Brian J. McHugh
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 626-6838

Counsel for the Information
Technology Association of America

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