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

Petition For Declaratory Ruling Concerning The Bundling Of Local Telephone Service With Long Distance Service	)))))	CG Docket No. 03-84

COMMENTS OF THE
PROMOTING ACTIVE COMPETITION EVERYWHERE COALITION

The Promoting Active Competition Everywhere ("PACE") Coalition, through counsel, hereby files its comments in the above-referenced proceeding in response to the Commission's March 27, 2003 Public Notice, DA 03-867.

I. INTRODUCTION AND SUMMARY

The PACE Coalition is comprised of 16 competitive local exchange carriers that provide a variety of telecommunications services to business and residential consumers throughout the country.[1] Each of the PACE Coalition companies offers a form of bundled local exchange and long distance service, among other services, and as a result, the member companies have an important interest in the Commission's resolution of this primary jurisdiction referral from the United States District Court for the Middle District of Florida.[2]

In the Public Notice, the Commission requested interested parties to comment on the following three issues:

(1) whether the state claims set forth by Petitioner in the complaint are preempted by the Communications Act giving exclusive

---

1 PACE Coalition members include: ACCESS Integrated Networks, Inc.; ATX Communications, Inc.; Birch Telecom; BizOnline.com, Inc. d/b/a Veranet Solutions; BridgeCom; DataNet Systems; Ernest Communications; IDS Telcom LLC; InfoHighway Communications; ITC^DeltaCom, Inc.; Granite Telecommunications; MCG Capital Corporation; MetTel; Microtech-Tel ; Momentum Business Solutions Inc.; nii communications; and Z-Tel Communications, Inc.

2 *Thorpe v GTE Corporation*, et al., No. 8:00 CV-1231-T-17TBM (M.D. Fla. June 21, 2000). Docket No. 56, (Feb 8, 2002) (Order).

jurisdiction to the Federal Communications Commission;

(2) whether local telephone service providers may provide local service only to their customers, or must, by virtue of their filed tariff rates or otherwise, bundle local service with long distance service, even where a customer has no need for long distance service; and

(3) if long distance service is not required to be bundled with local service in all events, is the practice of bundling these services a violation of the Communications Act.[3]

In response, the PACE Coalition first notes that the filed tariff doctrine bars the Petitioner's state law claims. Second, telecommunications carriers must provide service according to their stated tariffs and related product descriptions. Third, nothing in the Communications Act precludes a telecommunications carrier from bundling long distance service with local service. Each of these items are described below.

II. THE STATE LAW CLAIMS SET FORTH BY PETITIONER IN THE COMPLAINT ARE PREEMPTED BY THE COMMUNICATIONS ACT GIVING EXCLUSIVE JURISDICTION TO THE FEDERAL COMMUNICATIONS COMMISSION

The federal Communications Act empowers the Commission to regulate "interstate and foreign communications by wire and radio."[4] The interstate "long distance" service that forms the basis of Petitioner's claim without question falls squarely within this Commission's exclusive jurisdiction.

Historically, the FCC regulated interstate services through its authority to ensure that a carrier's interstate tariff(s) were just, reasonable and nondiscriminatory.[5] These federal tariffs preempted state law claims of the type asserted by the petitioners pursuant to the "filed tariff doctrine." Under the filed tariff doctrine, end users are bound by the terms of their filed

---

3 Petition at 5-6.

4 47 U.S.C. § 152(a).

5 47 U.S.C. §§ 201(b), 203.

tariff even if they have never seen the tariff, and even if the consumers had been promised service under different rates, terms, or conditions.[6] As the Seventh Circuit Court of Appeals has stated:

> A tariff filed with a federal agency is the equivalent of a federal regulation .... And since the federal regulation defines the entire contractual relationship between the parties, there is no contractual undertaking left over that state law might enforce. Federal law does not merely create a right; it occupies the whole field, displacing state law.[7]

Thus, federal law and the Commission's regulations preempt state actions of the type asserted by the Petitioner.

This federal preemption remains true even under the Commission's detariffing regime, which took effect in 2001.[8] Although the FCC has used its forbearance authority to "detariff" interstate telecommunications services, the FCC retains continuing exclusive jurisdiction over the rates, terms, and conditions of interstate service under the Communications Act and related regulations, and carriers providing interstate telecommunications service must comply with all Commission detariffing rules. Just as the Commission's tariffing regulations preempted state law claims, the Commission's detariffing regulations "occup[y] the whole field, displacing state law."[9] As a result, there should be no doubt that the Petitioners state law claims remain preempted, even under the Commission's detariffing rules.

---

6 *See e.g., Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002).

7 *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir. 1998).

8 *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Order, CC Docket No. 96-61 (Nov. 2000).

9 *Id.*

III. THE COMMUNICATIONS ACT DOES NOT OBLIGATE CARRIERS TO OFFER "STAND-ALONE" LOCAL SERVICE

Nothing in the Communications Act or in the Commission's rules obligates a telecommunications carrier to provide (or prohibits a telecommunications carrier from providing) stand-alone local service. Similarly, neither the Act nor the Commission's rules obligates a telecommunications carrier to provide stand-alone long distance service, or any other type of interstate or international service. Rather, telecommunications carriers define their own service offerings. The petitioner identifies no such provision of the Act or FCC regulation because none exists.

Moreover, even when a consumer purchases a stand-alone local service offering, interstate functionality is part and parcel of the service. For example, PACE Coalition member Z-Tel, a CLEC, offers its subscribers a "No-PIC" option for all of its local subscribers. However, while that option prevents a local customer from originating 1+ interexchange calls, that customer can still utilize the telephone for interstate purposes – such as making toll-free 8XX calls, originating interstate collect calls, and receipt of interstate calls. In addition, the consumer still can make long distance calls by virtue of the "dial-around" functionality (*i.e.*, 10-10-XXX) that is part of every phone line. Since the line has interstate capabilities, it is appropriate that federal interstate access charges apply to use of that line. All of this interstate functionality falls within the sole province of the FCC.

Even in instances where a consumer neither makes nor receives interstate telephone calls over a local line, the consumer is responsible for paying the costs associated with interstate call functionality. A portion of the costs associated with every "local loop" is assigned to the FCC's interstate jurisdiction, because all loops are designed for both intrastate and interstate use (regardless of the end user's actual usage pattern). Local exchange carriers are permitted to recoup a federal Subscriber Line Charge ("SLC") to recover the interstate portion of

the local loop, even in cases where a consumer makes no interstate calls. The Commission has explained the SLC as follows:

> The Subscriber Line Charge is a fee that you pay to your local phone company that connects you to the telephone network. Local telephone companies recover some of the costs of telephone lines connected to your home or business through this monthly charge on your local telephone bill. Sometimes called the federal subscriber line charge, this fee is regulated and capped by the FCC, not by state Public Utility Commissions. It is not a tax or a fee charged by the government. The money received from the subscriber line charge goes directly to local telephone companies. To ensure that all Americans can afford at least a minimal level of basic telephone service, the FCC will not allow phone companies to charge more than $6.00 for a single line.[10]

Thus, even in cases where an end user buys a stand-alone local product, certain interstate charges regulated by the FCC apply, even if the consumer neither makes nor receives long distance calls.

IV. BUNDLING LOCAL SERVICE AND LONG DISTANCE SERVICE IS NOT PROHIBITED UNDER THE COMMUNICATIONS ACT

Bundling of long distance with local service does not constitute a *per se* violation of section 201(b) of the Act. Section 201(b) of the Act declares unlawful any unjust or unreasonable "charge, practice, classification, or regulation" by a carrier in connection with communication service.[11] Generally speaking, a telecommunications carrier's action only violates section 201(b) in cases where a carrier's actions violate a Commission rule or order. As noted above, however, nothing in the Act or the FCC rules remotely suggests that a telecommunications carrier faces a *per se* restriction on bundling local and long distance service, and petitioners point to no such authority. Accordingly, a carrier's decision to bundle local and long distance service, without more, does not violate section 201(b)'s proscription against unjust and unreasonable practices.

---

10 http://www.fcc.gov/cgb/consumerfacts/charges.html

11 47 U.S.C. § 201(b).

Finally, it is worthy to note that telecommunications carriers offer bundled local and long distance offerings because large numbers of consumers demand them. Competitive carriers, such as the members of the PACE Coalition, were among the earliest carriers to offer bundled local and long distance products. The popularity of these competitive offerings with consumers has led incumbent carriers, such as Verizon, to respond with their own bundled offerings. The PACE Coalition concedes that some customers may prefer a stand-alone, unbundled product; however, in the Coalition's collective experience, consumers as a general matter prefer the convenience of a single, integrated offering.

V. CONCLUSION

Consistent with the foregoing, any Commission order adopted in this proceeding should find that: (1) the Communications Act and the Commission's rules bar the petitioner's state law claims; (2) nothing in the Communications Act or in the Commission's rules obligates a telecommunications carrier to provide (or prohibits a telecommunications carrier from providing) stand alone local service; (3) the mere act of bundling local and long distance service does not violate the Communications Act or the Commission's rules.

Respectfully submitted,

Genevieve Morelli
Michael B. Hazzard
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, DC 20036-2423

Counsel to the PACE Coalition

June 2, 2003