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## FCC ELIMINATES BUNDLING RESTRICTIONS, EXPLAINS UNIVERSAL SERVICE EFFECTS

**G**rowing competition in telecommunications markets has eroded the key rationale for various legacy regulations, prompting the FCC to modify or repeal longstanding rules. Thus, the FCC has reduced restrictions on the bundling of telecommunications services with consumer premises equipment (“CPE”) for sale at discounted prices and clarified carriers’ prerogatives to bundle “basic” telecommunications services with “enhanced” services.

In its *Computer II Order*, the FCC found that the market for CPE was competitive but the markets for many telecommunications services were not. To prevent anticompetitive tying arrangements, the FCC prohibited carriers from bundling telecommunications services with CPE, requiring that carriers offer the latter only on a deregulated, nontariffed basis. The *Computer II Order* adopted a similar regime for enhanced services (or “information services”): BOCs were forbidden to provide enhanced services except through separate subsidiaries that obtained access to the BOCs’ transmission facilities at the same tariffed rates available to BOC competitors. Later, the FCC removed the separate subsidiary requirement but required BOCs — like all carriers — to sell transmission to enhanced service affiliates only on the same terms available to competitors.

The FCC recently revisited these aspects of the *Computer II Order*. In a March 30 order (“*Bundling Order*”), the FCC

(1) eliminated the *Computer II* restrictions on common carriers’ ability to offer consumers bundled packages of telecommunications services and CPE at discounted prices and (2) clarified that carriers may bundle enhanced and basic telecommunications services.

In the *Bundling Order*, the FCC now has permitted nondominant interexchange carriers — including long distance affiliates of BOCs and other incumbent LECs where those affiliates are nondominant — to offer bundled packages of long distance service and CPE. The FCC concluded that “both the CPE market and the interstate, domestic, interexchange market are sufficiently competitive such that it is extremely unlikely that interexchange carriers could engage in anticompetitive behavior” if allowed to bundle CPE and telecommunications service. Given the competitiveness of these two markets, bundling restrictions were no longer “necessary in the public interest,” and therefore were ripe for repeal under section 11 of the Communications Act, 47 U.S.C. § 161. Indeed, the FCC determined that nondominant interexchange carriers should be permitted to offer interexchange service and CPE on a bundled basis without offering the interexchange service independently.

The *Bundling Order* also allows LECs to bundle CPE and local exchange services. The *Order* recognizes that incumbent LECs still hold market power in many regions but

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concludes that the 1996 Act's local competition provisions substantially mitigate the risk of anticompetitive bundling. Thus, "the consumer benefits of bundling outweigh the risk that incumbent LECs can use [their] power to harm competition." For example, according to incumbent LECs, many customers decline to use new services because those services require the purchase of expensive new CPE; bundling would allow carriers to include the necessary equipment in the price customers paid for the service itself, and therefore might spur usage.

The *Bundling Order* next clarified that every carrier is "permitted to bundle basic telecommunications service and enhanced service at a single, discounted price." Nothing in *Computer II*, the FCC explained, prevented nondominant carriers from bundling basic and enhanced services "[a]s long as they comply with the requirement to make their underlying transmission capacity for the enhanced service available on nondiscriminatory terms." Dominant carriers, too, may offer bundled services, but only if they continue to offer basic service separately, at tariffed prices.

Finally, the FCC acknowledged that bundling could create confusion as carriers seek to calculate their obligations to the federal universal service fund. Carrier contributions are based on end-user telecommunications revenue, and are not influenced by revenues associated with CPE or enhanced services. Bundling would blur the distinction between those revenues that impact universal service obligations and those that do not. The FCC opted not to institute any particular allocation scheme, and instead announced that it would evaluate carriers' decisions case by case, "in an audit or enforcement context." The FCC did, however, establish two "safe harbor" approaches: First, carriers may report revenues for a bundled service based on the price at which they offer the basic telecommunications service when it is sold separately from the CPE or enhanced service. Second, carriers may "elect to treat all bundled revenues as telecommunications service revenue."

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