June 20, 2003

By Electronic Filing
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Petition For Declaratory Ruling Concerning The Bundling of Local Telephone Services With Long Distance Service, CG Docket No. 03-84

Dear Ms. Dortch:

The New Jersey Division of Ratepayer Advocate ("Ratepayer Advocate") submits the following reply comment in response to the comments filed by the parties[1] in the above referenced proceeding on June 5, 2003.

With the exception of the Ratepayer Advocate and Sprint, all other commenters suggest that bundling of local and long distance is not a violation of the Communications Act of 1934[2] or bundling is permitted by the Communications Act. The Ratepayer Advocate reiterates its position that any practice that precludes a customer for selecting only local service by choosing "PIC-NONE" on its line is in fact a violation of the Communications Act . Such a result, as noted in our June 5th comment, is a violation of Section 201(b) and Section 202(a) of the Communications Act. Section 201(b) provides:

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[1] Nine (9) comments were received in response to the Public Notice and these are:

American Telephone and Telegraph Corporation (AT&T).
Worldnet Telecommunications, Inc. (Worldnet).
MCI Worldcom Network Services, Inc. (MCI).
Promoting Active Competition Everywhere Coalition (PACE Coalition).
SBC Communications Inc. (SBC).
CBeyond Communications, LLC and PAC-West Telecomm, Inc and US LEC Corp(Cbeyond).
Verizon Florida (Verizon).
Sprint Corporation (Sprint).
New Jersey State Division of Ratepayer Advocate (RPA).

[2] Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*. (hereinafter "Communications Act").

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.
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> Section 202(a) of the Communications Act provides:
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> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

The forced bundling of local and long distance services is an unjust and unreasonable practice. A customer who wants local service only cannot be denied the option to select no long distance carrier, i.e. "PIC-NONE."

The Ratepayer Advocate is troubled by the other commenters disregard of consumers right to choose only the services they want and their uniform position and support for forcing customers to purchase bundles which may contain services consumers do not want. This is directly at odds with and conflicts with the intent of the Telecommunications Act of 1996 which was intended to give more choice, lower prices and technical innovation to consumers. The lockstep action of carriers that forces consumers to take bundled services has the direct effect of raising the price consumers must pay to get telephone service. While this may be beneficial to carriers by forcing the average bill to increase, such actions are detrimental to consumers who want only a plain old telephone service. In order to achieve their objective, the other commenters suggest that no Communications Act issues exist and make the following specific statements on bundling:

- Pace Coalition - bundling is not prohibited; no obligation to offer stand alone service.[3]
- MCI - bundling is not a violation of the Communications Act.[4]
- Verizon – no violation of the Communication Act if customer is made to subscribe to an interexchange carrier.[5]

[3] Pace Coalition Comments at 4-5.

[4] MCI Comments at 7-9.

[5] Verizon Comments at 8-9.

- Worldnet – forcing customers to buy local and long distance is fully consistent with the Communications Act and the FCC should not require "Local Only" service.[6]

- Cbeyond – no requirement to provide "Local Only" service and no restriction on bundling in the Communications Act.[7]

- SBC – bundled service offering are permitted under the Communications Act and the FCC should not evaluate whether carriers can offer local and long distance as a bundled service offering.[8]

- AT&T – FCC should decline to address what limits the Communications Act imposes on LEC bundling of local and long distance and reject petitioner's state claims on preemption grounds.[9]

Sprint, the lone carrier, affirmatively states that voluntary bundles do not violate the Communications Act, and the FCC should declare that forced bundling should not be required.[10] However, Sprint does urge the FCC to reject petitioner's state claims on preemption grounds.[11]

Six of the commenters ask and urge the FCC to reject petitioner's state claims as preempted under the filed-rate doctrine and suggest that doing so avoids addressing the bundling issue.[12] The Ratepayer Advocate submits that this is a deliberate attempt to divert attention away from core issue that a consumer has the right to decline selecting an interexchange carrier and the right to select "PIC-NONE."

The Ratepayer Advocate reiterates that under FCC precedent, local exchange service customers have had the option of electing local service only with the option to decline presubscribing to a long distance carrier by selecting "PIC-NONE." A customer who elects "PIC-NONE" option is usually assessed a nominal non-recurring charge by the LEC. This practice reflects the fundamental right of a customer to only receive services that the customer affirmatively wants and orders. See *United Artists Payphone Corporation vs. New Telephone and AT&T Co.*[13] and the *Ascom Communications, Inc vs. Sprint Communications Co*[14]. The filed-rate doctrine is not implicated in this issue

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[6] Worldnet Comment at 5-7.
[7] Cbeyond Comments at 7-9.
[8] SBC Comments at 2.
[9] AT&T Comments at 13-14.
[10] Sprint Comments at 7.
[11] Sprints Comments at 7. The Ratepayer Advocate notes that with the exception of SBC and Cbeyond, the other carrier assert that the filed-rate doctrine and preemption require rejection of the petitioner's state claims.
[12] Pace, Worldnet, MCI, Sprint, and Verizon all rely upon the filed-rate doctrine. AT&T relies upon the filed-rate doctrine and preemption. On preemption, AT&T relies on the FCC's *Access Charge Order*,12 FCC Rcd 15982 (1977).
[13] *See* 8 FCC Rcd. 5563 (1993).
[14] 15 FCC Rcd. 3223 (2000).

because (1) the PIC NONE for an interexchange carrier involves a matter within the exclusive jurisdiction of the FCC and (2) refusal to permit a customer to select "PIC-NONE" is inconsistent with FCC precedent and otherwise violates the Communications Act.

Even on the issue whether state law issues are preempted by the filed-rate doctrine, the filed-rate commenters are advocating an overly broad and questionable position. Clearly, local service is an intrastate communications service which under Section 2(b) of the Communications Act, states have jurisdiction.[15] States have the right to tell carriers that they must provide a "Local Only" service option to customers as well as requiring PIC NONE option for toll, an intrastate service, and long distance service. As noted in our initial comments, in the FCC's *Toll Dialing Parity Order*, 11 FCC Rcd. 19392, the FCC carved out a role for states to impose upon LECs certain presubscription methodologies as it pertains to intraLATA services.[16] Under New Jersey statutes governing public utilities, local service is a "Protected telephone service" which the Legislature has declared must be available on a non-discriminatory basis and remain affordable.[17]

As a result, the Ratepayer Advocate believes that the bundling issue is resolvable under the Communications Act without a need to analyze or apply the filed-rate doctrine. Clearly, the filed-rate doctrine is no longer applicable to long distance service since the FCC detariffed long distance and its reach with respect to other issues is far less than clear. This is not the proceeding to address the appropriate reach of the filed-rate doctrine and any further clarification of the application of the filed-rate doctrine should occur in some other proceeding.

A number of commenters focus their comments on the recurring charge for Primary Interexchange Carrier Charge (referred to as "PICC") which the FCC regulations permit to be assessed on end-users who do not select a presubscribed interexchange carrier ("PIC").[18] These commenters assert that the petition should be denied to the extent the petitioner is challenging the recurring PICC charge.

The Ratepayer Advocate submits that resolution of the recurring PICC charge issue in a way cures what we see as a violation of the Communications Act, the unjust and unreasonable practice of mandatory bundling of local and long distance including the misrepresentation to customers of the availability of "PIC-NONE," and denial to customers of a "Local Only" service option by not permitting such customers to select "PIC-NONE."[19] The petitioner in this case was told that she must have a long distance carrier. This is untrue and contrary to FCC precedent.

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[15] See 74 U.S.C. §152.

[16] RPA Comments at 4.

[17] See *N.J.S.A.* 48:2-21.16(a)(2); *N.J.S.A.* 48:2-21-16; *N.J.S.A.* 48:2-2118(a)(1).

[18] Verizon Comments at 7-8; AT&T Comments at 12; Pace Comments at 4; Cbeyond Comments at 5-6..

[19] The Ratepayer Advocate submits that the filed-rate doctrine doesn't preclude or foreclose the FCC from re-examining whether the FCC rules which permit a recurring PICC charge to customers who decline subscribing to a long distance carrier should remain in place. Consumers who have a second line are

In this regard, NASUCA commented on the increased incidences of misrepresentation to consumers by carriers in its reply comment filed on June 17, 2003 in the matter of *Implementation of the Subscriber Carrier Selection Changes Provisions Of the Telecommunications Act of 1996*. CC Docket No. 94-129. NASUCA stated as follows:

> It is accordingly not surprising, and experience confirms, that solicitations frequently omit key and material terms, particularly regarding price, and at times affirmatively misrepresent and distort key and material terms, particularly regarding price, and at times affirmatively misrepresent and distort key and material terms, particularly regarding price, to the surprise and detriment of consumers. Often, there is classic consumer fraud. Given the incentive, it is appropriate for the Commission to seek to improve the quality of the understanding between the person doing the soliciting and the person being solicited.

In view of the foregoing, the Ratepayer Advocate submits that GTE Telephone Company's practice of bundling local and long distance is inconsistent with the rights of consumers to affirmatively select and order the services they want to subscribe to and otherwise violates the Communications Act. The Ratepayer Advocate respectfully asks that the FCC reject the other commenters' requests to dismiss the petition and that the FCC issue a declaratory ruling consistent with the Ratepayer Advocate's comment and reply comment.

Respectfully Submitted,
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RATEPAYER ADVOCATE

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already paying higher Subscriber Line Charges on that second line. It may be appropriate for the FCC to revisit this whole issue in a separate proceeding.