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EX PARTE OR LATE FILED

October 3, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20006
STOP CODE: 1170

Re: Ex Parte Communication in GN Docket Nos. 93-252 & 94-54

Dear Mr. Caton:

On behalf of Comcast Cellular Communications, Inc., and pursuant to Section 1.1206(a)(2) of the Commission's Rules, notice is hereby given of the attached written *ex parte* communication regarding the above-referenced proceedings. An original and two copies of this transmittal letter and the attached *ex parte* communication are being filed with the Secretary's office.

Respectfully submitted,

Comcast Cellular Communications, Inc.

Leonard J. Kennedy
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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20006
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Re: Ex Parte Communication — GN Docket Nos. 93-252 & 94-54.

Dear Mr. Caton:

Comcast Cellular Communications, Inc. ("Comcast"), by its attorneys, hereby submits this *ex parte* letter in the above-captioned proceedings.[1] This *ex parte* letter addresses Federal Communications Commission ("Commission") jurisdiction over commercial mobile radio services ("CMRS") and interconnection for CMRS providers, including the terms and conditions of interconnection between local exchange carriers ("LECs") and CMRS providers.[2] Comcast demonstrates herein that the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") vested the Commission with exclusive rate and entry jurisdiction over CMRS, including wholly intrastate CMRS offerings, as well as interconnection between LECs and CMRS providers for exchange of traffic.

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[1] Pursuant to Section 1.1206(a)(1) of the Commission's rules, 47 C.F.R. § 1.1206(a)(1), the original and two copies of this *ex parte* letter have been filed contemporaneously with the FCC's Secretary's office.

[2] *See* McCaw Cellular Communications, Inc., Petition for Clarification, in GN Docket No. 93-252, at 2, 5 (filed May 19, 1994) (McCaw argues that the Commission possesses authority over the nature and scope of interconnection requirements, and should clarify that states lack authority to mandate interconnection).

I. BACKGROUND

The Communications Act of 1934 created a dual regulatory structure for interstate and intrastate wireline and wireless communications. Section 2(a) of the Act confers upon the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio . . . ."[3] Under this jurisdictional mandate, the Commission is empowered to regulate common carriers engaged in interstate communications. Section 2(b) limits Commission jurisdiction "with respect to [] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications . . . ."[4]

In 1987, the Commission held that it has "plenary jurisdiction," based on Sections 2(a) and 201 of the Act, over the physical plant used in interconnecting cellular facilities to LEC facilities.[5] Because the interstate and intrastate components of cellular interconnecting facilities were found to be inseparable, Section 2(b) did not limit the Commission's jurisdiction. The Commission declined, however, to assert jurisdiction over the intrastate costs and charges for physical interconnection, finding that they are divisible between the interstate and intrastate jurisdictions.[6]

Similarly, the Commission further held that it has exclusive jurisdiction over the allocation of NXX codes because they are used to make both intrastate and interstate calls.[7] The Commission exercised its jurisdiction under Section 2(a) to require that the terms and conditions of LEC-to-cellular interconnection be negotiated in good faith. The Commission interpreted Section 202 of the Act to require good faith negotiation and found that interconnection negotiations could not be separated into interstate and intrastate components.[8]

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[3] *See* 47 U.S.C. § 152(a).

[4] *See* 47 U.S.C. § 152(b).

[5] *See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory ruling, 2 FCC Rcd 2910, 2912 (1987) ("*LEC-to-Cellular Interconnection Order*").

[6] As explained in the discussion below, however, the Commission has jurisdiction over intrastate cellular common carriers under the Budget Act and existing case law.

[7] *See id.*

[8] *See id.*

In enacting the Budget Act in 1993, Congress amended Section 332 of the Communications Act and reclassified all existing mobile services as either CMRS or private mobile radio services ("PMRS").[9] One of the main purposes of the Budget Act is to foster the nationwide growth of wireless telecommunications by establishing a uniform federal regulatory framework for all mobile services. In this regard, amended Section 332 displaces state rate and entry regulation authority over CMRS providers, as well as PMRS providers.[10] Thus, the Budget Act eliminated state substantive regulatory jurisdiction over what formerly would have been called "wireless common carrier services."[11] Because Section 2(b) is without force, regulation of CMRS is solely a federal or interstate concern. Interconnection policies for CMRS, in other words, are based on exclusive federal jurisdiction which does not necessitate or permit state regulation thereof.

The "Jurisdictional Void" Theory. Some parties have advocated that Section 332 created a "jurisdictional void" in which neither the Commission nor state authorities has jurisdiction over intrastate CMRS rates and interconnection.[12] According to the jurisdictional void theory, neither the Federal government nor the states has regulatory authority over intrastate CMRS rates, thereby, resulting in a "jurisdictional void," because Section 332 preempts state authority over intrastate CMRS rates but does not expressly authorize the Commission to regulate intrastate CMRS rates. We do not agree that the jurisdictional void theory has any legal validity.

"Bill and Keep" Mutual Compensation. In implementing the interconnection provisions of the Budget Act, the Commission directed LECs to make interconnection available to CMRS and PMRS providers at just and reasonable rates, and on nondiscriminatory terms and conditions.[13] At that time, the Commission applied its pre-

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[9] *See* 47 U.S.C. § 332(d).

[10] Section 332 does not displace state authority, however, over terms and conditions of CMRS and PMRS. *See* 47 U.S.C. § 332(c)(3).

[11] *Cf. People of State of California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986) (the Court reversed pre-Budget Act Commission order preempting state regulation of purely intrastate radio common carrier services provided on FM subcarrier frequencies as not within its non-common carrier Title III jurisdiction over radio non-common carriers).

[12] *See* Cellular Resellers Association ("CRA"), Petition for Reconsideration, in PR Docket No. 94-105, at 6 (filed June 19, 1995) ("CRA Petition").

[13] *See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, GN Docket No. 92-525, 9 FCC Rcd 1411 (1994) ("*CMRS Second Report and Order*").

Budget Act analysis regarding state jurisdiction of interconnection for intrastate services.[14] As demonstrated herein, however, the analysis used for wireline preemption does not apply to CMRS because Congress amended Sections 2(b) and 332 to eliminate traditional preemption analysis with regard to CMRS.

A central component in the development of a nationwide wireless "network of networks" is mutual compensation for interconnection between LECs and CMRS providers.[15] To ensure that interconnection arrangements between CMRS providers and incumbent LECs reflect the benefit each network provides the other and promote competition, it is necessary that rates for termination of one another's traffic be mutually compensatory. Under mutual compensation, LECs are required to compensate CMRS providers for the reasonable costs incurred by CMRS providers in terminating traffic that originates on LEC networks. CMRS providers, as well, are required to provide compensation to LECs for reasonable costs incurred by LECs in terminating traffic that originates on CMRS networks.[16]

Comcast strongly urges the Commission's adoption of a "bill-and-keep" approach to mutual compensation. Under a bill-and-keep approach to mutual compensation, LECs and CMRS providers do not charge each other for terminating one another's traffic. As a result, both LECs and CMRS providers have an incentive to become more efficient and to reduce costs, as well as maximize their outgoing traffic relative to their incoming traffic.[17]

A federal interconnection policy requiring mutual compensation based on a bill-and-keep model will serve larger public interest goals. A bill-and-keep model will reduce opportunity for monopoly abuse by incumbent LECs that have exclusive access to all landline customers. As the Commission correctly recognized in the *Interconnection and Resale Notice*, LEC investment in CMRS is a significant factor in finding "anticompetitive

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[14] The Commission also initiated CC Docket No. 94-54 to determine, *inter alia*, whether to establish a CMRS-to-CMRS interconnection requirement. *See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 5408 (1994) ("*Equal Access and Interconnection Notice*"); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Notice of Proposed Rulemaking, CC Docket No. 94-54 (released April 20, 1995) ("*Interconnection and Resale Notice*").

[15] *See* H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 261 (1993) ("House Report").

[16] *See CMRS Second Report and Order*, 9 FCC Rcd at 1498; *see also* 47 C.F.R. § 20.11.

[17] *See* Dr. Gerald W. Brock, *Interconnection and Mutual Compensation with Partial Competition*, attached to Comments of Comcast Corporation, Appendix, *in* CC Docket No. 94-54 (filed September 12, 1994) ("Brock Paper").

animus" behind denial of an interconnection request.[18] A bill-and-keep model also more closely approximates LEC cost of interconnection, and encourages competitive development without enmeshing the Commission in protracted cost proceedings.[19] Accordingly, for the reasons discussed below, Comcast concludes that the Commission has and should exercise its ample jurisdiction over CMRS to require bill-and-keep arrangements for interconnection between LECs and CMRS providers.

II. DISCUSSION

The jurisdictional void theory is contrary to a plain reading of the Budget Act, its legislative history and existing case law. Furthermore, to the extent that nondiscriminatory access by CMRS providers to LEC networks is essential to the development of a nationwide wireless "network of networks," the Commission must exercise its jurisdictional authority under the Budget Act, which extends to CMRS services irrespective of their physically intrastate nature, to ensure that LEC rates for CMRS interconnection are just, reasonable and nondiscriminatory. Thus, the Commission has jurisdiction to adopt a "bill-and-keep" approach to mutual compensation for interconnection between LECs and CMRS providers.

A. The Plain Meaning of Sections 332 and 2(b) Vests the Commission With Sole Jurisdiction Over All Commercial Mobile Radio Services

The regulatory framework established by the Budget Act for all mobile services evidences the Commission's exclusive jurisdiction over interstate and intrastate services, including interconnection arrangements among CMRS providers and LECs. Review of the revised statute makes plain that, contrary to the "jurisdictional void" theory, the Budget Act expands, rather than eliminates, Commission jurisdiction over intrastate rates for mobile services.[20]

1. Section 2(b). The Budget Act places intrastate CMRS interconnection rates under the Commission's exclusive jurisdiction by its amendments to Section 332(c) and the dual jurisdictional framework set forth in Sections 2(a) and 2(b) of the Act. Section 2(a)

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[18] *Interconnection and Resale Notice*, at ¶ 43.

[19] *See* Brock Paper, at 24-5; *see also* Gerald W. Brock, *Incremental Cost of Local Usage*, prepared for Cox Enterprises and filed in CC Docket No. 94-54 (March 16, 1995).

[20] *See* McCaw Cellular Communications, Inc., Reply Comments, in PR Docket No. 94-105 (filed March 3, 1995) ("McCaw Reply Comments").

gives the Commission exclusive jurisdiction over all interstate telecommunications.[21] Section 2(b) "fences off"[22] from Commission jurisdiction all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[23] Under the Supreme Court's interpretation of Section 2(b) in the pre-Budget Act *Louisiana PSC* decision, the Commission is denied jurisdiction over all aspects of intrastate telecommunications that are severable from the interstate portion or do not conflict with a Federal policy.[24]

Notably, in *Louisiana PSC* the Commission argued that it had authority under Section 220 of the Act to preempt state depreciation regulations. In rejecting this argument, the Court noted that the main clause in Section 2(b) — ". . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" intrastate telecommunications — is a "rule of statutory construction . . . . [that] presents its own specific instructions regarding the correct approach to the statute which applies to how we should read [Section] 220."[25]

The Budget Act, however, amended Section 2(b) and supersedes *Louisiana PSC* with regard to state jurisdiction over intrastate CMRS by establishing a direct limitation on the main clause of Section 2(b), which *Louisiana PSC* termed a "rule of statutory construction." The adverbial clause limiting the main clause of Section 2(b), as most recently amended by the Budget Act, provides:

> *Except as provided in sections 223 through 227 of this title, inclusive and Section 332* . . . , nothing in this chapter shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications].[26]

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[21] *See* 47 U.S.C. § 152(a).

[22] *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

[23] *See* 47 U.S.C. § 152(b).

[24] *See Louisiana PSC*, 476 U.S. 372-376.

[25] *See Louisiana PSC*, 476 U.S. at 373, 376-7 n.5.

[26] *See* 47 U.S.C. § 152(b) (1995) (emphasis added).

Accordingly, the plain language of Section 2(b) of the Act, as amended by the Budget Act, reserves exclusive jurisdiction over all matters involving CMRS, without regard to their former characterization as intrastate, to the Commission. Stated somewhat differently, Section 2(b)'s reservation of jurisdictional authority over intrastate common carrier telecommunications to the states and discussed in *Louisiana PSC* has been eliminated.[27] The Supreme Court found in *Louisiana PSC* that the Commission's decision to override Section 2(b) had no legal foundation in the Communications Act of 1934, as it read at that time prior to the Budget Act, but that Congress could, however, provide such a foundation.[28] In enacting the Budget Act in 1993, Congress did precisely what the Supreme Court in *Louisiana PSC* found lacking in 1986 — it provided a specific Congressional delegation of authority to the Commission to regulate CMRS.

By amending Section 2(b) to associate Section 332 with the provisions of the Act governing pole attachments, TRS requirements, and telemarketing, therefore, the Budget Act vested the Commission with full jurisdiction over CMRS.[29] To the extent that the

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[27] *See, e.g.*, McCaw Reply Comments, at 5-6; GTE Service Corporation, *Ex Parte*, in PR Docket No. 94-105 (filed March 3, 1995) ("GTE *Ex Parte*").

[28] *See id.*, 476 U.S. at 373-4.

[29] In amending Section 2(b) in 1978 to except from the "statutory rule of construction" amendments to the pole attachment provisions in Section 224 of the Act, moreover, Congress stated that the amendment:

> modifies existing [S]ection 2(b) . . . which limits the jurisdiction of the Commission over connecting carriers to [S]ections 201 through 205 of . . . the [A]ct. Since [the amended pole attachment provision] would give the Commission CATV pole attachment regulatory authority over connecting communications common carriers otherwise exempt from the provisions of the 1934 [A]ct . . . , a conflict arises between the limitation on the Commission's jurisdiction of [S]ection 2(b) and its duty to regulate under proposed new [S]ection 224 . . . . [The amendment to Section 2(b)] removes this conflict by removing the jurisdictional limitations of [S]ection 2(b) as they would otherwise apply to proposed [S]ection 224.

In addition, when Congress enacted the telephone relay service ("TRS") provisions by adding new Section 225 to the Communications Act (as part of the Americans with Disabilities Act of 1990) and the telemarketing fraud provisions by adding new Section 228 to the Communications Act (in the Telephone Consumer Protection Act of 1991), a reference to these provisions was introduced into Section 2(b) to remove any limitations on the

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adverbial clause in Section 2(b) regarding the Act's pole attachments, TRS, telemarketing and CMRS provisions flatly nullifies the Court's direction in *Louisiana PSC* that the main clause of Section 2(b) be a "rule of statutory construction" specifying that no other provisions of the Act be construed to give the Commission jurisdiction over intrastate telecommunications, the conclusion that Section 2(b) vests the Commission with jurisdiction over CMRS, without regard the prior *Louisiana PSC* distinction between interstate and intrastate severability, is further bolstered.

2. **Section 332**. In addition to the amendments to Section 2(b), the statutory framework established in Section 332, as amended by the Budget Act, grants the Commission authority to regulate all interstate and "intrastate" aspects of CMRS. In other words, Section 332 has "federalized" CMRS services such that the notion of an "intrastate" or "local" portion of the service has no effect on the Commission's jurisdiction.[30] A reading of Section 332 according to canons of statutory interpretation as expressed in *Louisiana PSC*, and other cases cited herein, support this conclusion.

As the Supreme Court explained in *Louisiana PSC*, "the best way of determining whether Congress intended the regulations of an administrative agency to

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[29] (...continued)
Commission's jurisdiction over the substantive provision's subject matter. *See* Americans With Disabilities Act of 1990, Pub. L. No. 101-336, Title IV, § 401(a), *reprinted in* 1990 U.S.C.C.A.N., 104 Stat. 327, 366-369 (1990); Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, *reprinted in* 1991 U.S.C.C.A.N., 105 Stat. 2394 (1991); Statement of President Upon Signing TCPA, *reprinted in* 1991 U.S.C.C.A.N. 1979 (the President states that he "signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices . . . . [and the] flexibility to adapt its rules to changing market conditions.").

[30] In the *Land Mobile Services* docket, for example, the Commission exercised exclusive jurisdiction over specialized mobile radio ("SMR") systems finding that wireless SMRs operate "without regard to state boundaries or varying local jurisdictions" and on a "nation-wide basis." *See An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz*, Memorandum Opinion and Order, Docket No. 18262, 51 F.C.C.2d 945, 972-3 (1975) ("*Land Mobile Services*"), *aff'd sub nom., National Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 646-7 (D.C. Cir. 1976) ("*NARUC*"). In 1982, Congress codified the Commission's finding in *Land Mobile Services* by amending Section 301 of the Act to "make clear that the Commission's jurisdiction over radio communications extends to intrastate as well as interstate transmissions" of all private land mobile radio services ("PLMRS"). *See* H.R. Rep. No. 97-765, 97th Cong., 2d Sess., at 31-2 *reprinted in* 1982 U.S.C.C.A.N. 2237 (citing *Fisher's Blend Station Inc. v. Tax Comm'n of Washington State*, 297 U.S. 650, 655 (1936) ("all radio signals are interstate by their very nature"). In the interests of regulatory parity, the Budget Act expands the Title III jurisdictional rule that private mobile services "are interstate by their very nature" to *all* commercial mobile radio services as well.

displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[31] The statutory design of Section 332(c)(3)(A), which preempts state authority over rate and entry regulation of CMRS "[n]otwithstanding sections 152(b) and 221(b) of this title . . .",[32] shows that states are preempted from regulating intrastate CMRS rates and entry "notwithstanding" and, therefore, "without regard" to any residual jurisdiction a state may claim under Section 2(b) of the Act.[33] This provision also authorizes the Commission to approve or reject state petitions to grandfather existing CMRS rate regulation or apply for new CMRS rate regulation.

By preempting state rate and entry authority over CMRS, Section 332 implicitly reserves to the Commission jurisdiction to "occupy the field" of CMRS regulation. In *Louisiana PSC*, the Supreme Court stated that "the critical question in any pre-emption analysis is always whether Congress intended that *federal regulation supersede state law*."[34] If a federal statute expressly authorizes an administrative agency to preempt state regulation, moreover, then the administrative agency is vested, by definition, with jurisdiction to regulate the underlying subject matter that the statute authorizes the agency to preempt.[35] The *Louisiana PSC* Court's observation that "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State"[36] further supports the conclusion that Section 332 implicitly authorizes the Commission to regulate CMRS.

The forbearance provisions of Section 332(c)(1)(A) further evidence that the overall design of the statute is to vest jurisdiction over CMRS with the Commission. By

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[31] *See id.*, 476 U.S. at 374.

[32] *See* 47 U.S.C. § 332(c)(3)(A).

[33] *See* GTE *Ex Parte*, at 2.

[34] *See id.* 476 U.S. at 369 (emphasis added) (citing *Rice et al. v. Santa Fe Elevator Corp.*, 331 U.S. 218 1947)).

[35] *See id*; *see also FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (a preemption clause in the ERISA statute "is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relates [to]' an employee benefit plan governed by ERISA"); *Gade v. Nat'l Solid Wastes Management Ass'n.*, 112 S.Ct. 2374, 2384-5 (1992) (OSHA provision authorizing Secretary of Labor to approve or reject state hazardous waste removal regulations based on statutorily specified conditions "assumes that the State loses the power to enforce all of its occupational safety and health standards once approval is withdrawn. The same assumption of exclusive federal jurisdiction in the absence of an approved state plan is apparent . . . ."); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994).

[36] *See Louisiana PSC*, 476 U.S. at 374.

authorizing the Commission to forbear from enforcing any provision of Title II, except Sections 201, 202 and 208, Section 332(c)(1)(A) places with the Commission the responsibility to determine whether enforcement of any common carriage regulation is necessary "to ensure that the charges, practices, classifications, or regulations for or in connection with [CMRS] are just and reasonable and are not unjustly or unreasonably discriminatory."[37]

Furthermore, Section 332(c)(1)(C) directs the Commission to conduct "annual reports" reviewing competitive market conditions with respect to CMRS. As part of the statutorily required public interest finding, the Commission must make prior to specifying a provision for forbearance, Section 332(c)(1)(C) requires the Commission to consider whether forbearance or enforcement of a provisions "will promote competitive market conditions" for CMRS providers. By bestowing to the Commission sole responsibility for identifying the "competitive market conditions" to determine whether regulation is necessary to ensure just, reasonable and nondiscriminatory rates, Section 332(c)(1)(C) contemplates Commission authority to regulate CMRS, without regard to interstate or intrastate jurisdictional boundaries. Section 332(d), moreover, expressly states that the statutory definitions of the phrases "commercial mobile service" and "private mobile service" are to be "specified by regulation by the Commission," and that the statutory phrases "interconnected service" and "public switched network" are to be "defined by regulation by the Commission."[38] By delegating to the Commission the authority to define what constitutes CMRS, PMRS and "interconnected service," Congress exhibits that intent as required by *Louisiana PSC* "that Federal regulation supersede state law."[39] Accordingly, the statutory framework established by Sections 2(b) and 332, as amended by the Budget Act, demonstrate Congress's delegation to the Commission of exclusive authority to regulate CMRS providers.

Congress's intent to invest the Commission with exclusive authority over CMRS is also manifest in the provisions in the Budget Act that provide the states with an opportunity to petition for rate regulation authority. The Commission has sole authority over CMRS, unless and until a state files a petition for rate regulation authority and the Commission approves it.[40] The Commission also has sole discretion to "grant or deny" any state petition for authority to regulate the rates of CMRS providers. These provisions grant the Commission exclusive authority to decide whether a state has sufficiently proven either that market conditions with respect to CMRS fail to adequately protect intrastate CMRS

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[37] *See* 47 U.S.C. § 332(c)(1)(A)(i).

[38] *See* 47 U.S.C. § 332(d).

[39] *See id.*, 476 U.S. at 369.

[40] 47 U.S.C. § 332(c)(3)(A).

subscribers from discriminatory or unjust and unreasonable rates or that CMRS is a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State."[41] Even if a state has sufficiently justified grant of a petition for rate regulation authority, the duration of such authority may be limited "as the Commission deems necessary."[42] In either case it is the Commission, using rules it adopted pursuant to its implementation of the Budget Act, that is required to assess any state petitions.

B. Exclusive Commission Jurisdiction Over CMRS Is Supported by the Legislative History.

The legislative history further supports the conclusion that the Budget Act confers upon the Commission exclusive jurisdiction over interconnection between LECs and CMRS providers because the Commission retains exclusive jurisdiction over CMRS.[43] The legislative history shows Congressional intent to vest the Commission with exclusive jurisdiction over intrastate CMRS rate and entry regulation.

The preemption provisions of Section 332:

> . . . foster the growth and development of mobile services that, *by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.*[44]

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[41] 47 U.S.C. § 332(c)(3). This provision (and the Commission's rules) plainly contemplate that a state demonstrate that CMRS service has replaced or has become a substitute for a substantial number of landline telephone subscribers before a petition could be granted. *See* 47 C.F.R. § 20.13, State Petitions for authority to regulate rates.

[42] 47 U.S.C. § 332(c)(3)(A).

[43] The statutory framework of the Budget Act expressly authorizes the Commission to assert jurisdiction over all aspects of CMRS. A review of the legislative history is helpful, however, Even so, it must be remembered that, while legislative history is "undoubtedly one of the 'traditional tools' . . . . of statutory analysis, [the] primary interpretive tool[] is the language of the statute itself." *See American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1568 (1987) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that '[t]he starting point of a statute is the language itself.'"), quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978)).

[44] *See* H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 260 (1993) (" House Report") (emphasis added).

The House Report's conclusion, therefore, evidences the legislature's view of CMRS as a jurisdictionally interstate service "without regard to state lines" and without regard to their physically intrastate or local nature.

In adopting the Senate's amendment of Section 2(b) to reserve exclusive interstate jurisdiction over matters involving CMRS, without regard to their physically intrastate nature, the full Committee explained in the Conference Report that:

> [t]he Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act *to clarify that the Commission has the authority to regulate commercial mobile services.*[45]

This discussion further reinforces the interpretation that the Budget Act's amendment to Section 2(b) gave the Commission jurisdiction over CMRS rates and entry without regard to their intrastate nature.

C. The Plain Meaning of Amended Sections 332 and 2(b) Gives the Commission Exclusive Jurisdiction Over Interconnection Between CMRS Providers and LECs

The preceding review of the Budget Act and its legislative history also confirms the Commission's sole authority over interconnection between CMRS providers and LECs. The Budget Act expands the Commission's jurisdiction to occupy the field, rather than maintaining prior Congressionally-imposed limits on Commission jurisdiction over intrastate rates for mobile services. Accordingly, the Commission need not *preempt* to regulate the entire interconnection arrangement between a LEC and CMRS provider because, in explicitly endowing the Commission with exclusive jurisdiction over CMRS providers, Congress also authorized the Commission to regulate the entire scope of rates and conditions of interconnection between LECs and CMRS providers.

It is incontrovertible that both Congress in establishing the CMRS category of services in the Budget Act and the Commission in implementing the Budget Act have found commercial mobile radio services to form an interstate and nationwide wireless communications network. The legislative history of the interconnection provisions of Section 332 states, for example, that Congress "considers the right to interconnect an important one and one which the Commission shall seek to promote, since interconnection serves to

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[45] *See* H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 494, 497 (1993) ("Conference Report") (emphasis added).

enhance competition and advance a seamless national network."[46] Defining the market for CMRS, moreover, the Commission observed that the "direction is away from a 'balkanized view'" that sees cellular, SMRs, paging, *etc.*, competing in separate markets" and noted that ownership concentration and service offering expansion is moving the majority of the wireless industry toward nationwide geographic markets.[47]

CMRS networks form an interstate, nationwide wireless "network of networks." Consequently, the rates and conditions of interconnection between landline LECs and CMRS providers by means of a bill-and-keep model of compensation, for example, are essential to the rapid and competitive buildout of nationwide wireless networks, and subject to exclusive determinations by this Commission. Under the Budget Act, the Commission possesses exclusive jurisdiction over mutual compensation between LECs and CMRS providers, and all other issues regarding rates, terms and conditions[48] of interconnection between such providers. Furthermore, because the Budget Act expressly grants the Commission sole authority to define by regulation the statutory terms "interconnected service" and "public switched telephone network" ("PSTN"), Section 332(d) shows that Congress intended to grant the Commission the authority to regulate interconnection between CMRS providers and LECs — the historically acknowledged gatekeepers to the PSTN.[49] Accordingly, the Budget Act and legislative history show that the Commission is unconditionally delegated authority to regulate rates and conditions of interconnection between LECs and CMRS providers.

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[46] *See* House Report at 261.

[47] *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, First Report, FCC 95-317, at ¶¶ 59, 63-4 (released August 18, 1995).

[48] The Budget Act's use of the phrase "terms and conditions" to delimit the scope of state authority not otherwise preempted is different from the phrase "terms and conditions" of interconnection. In preserving state authority over "terms and conditions" of CMRS, the Budget Act refers to "such matters as customer billing information and practices and billing disputes and other consumer protection matters." *See* House Report, at 261. The Commission retains exclusive jurisdiction, however, to ensure that "terms and conditions" of interconnection between LECs and CMRS providers are just, reasonable and nondiscriminatory and in furtherance of the public interest. *See* 47 U.S.C. §§ 151, 154(i), and 201. The Commission, accordingly, retains exclusive jurisdiction to ensure the availability of "terms and conditions" of interconnection between LECs and CMRS providers on a just, reasonable and nondiscriminatory basis.

[49] *See* 47 U.S.C. § 332(d).

D. In Other Contexts, the Commission Has Exercised Jurisdiction Over Intrastate Rates and Conditions of Interconnection.

Under existing court and Commission precedent, the Commission has exercised exclusive jurisdiction over interconnection rates and mutual compensation, irrespective of whether mutual compensation is primarily or entirely restricted to intrastate facilities traffic. In light of the Budget Act's elimination of *Louisiana PSC*-type preemption, existing case law overwhelmingly supports the conclusion that the Commission possesses exclusive jurisdiction over rates, terms and conditions for "intrastate" interconnection between CMRS providers and LECs.

The *ARCOnet* proceeding is illustrative.[50] In the 1980s, Atlantic Ritchfield ("ARCO") operated a private microwave communications network, licensed by the Commission under Part 94 of the Rules, that provided voice and data transmission among its corporate offices nationwide, including a point-to-point microwave link between its corporate offices in Dallas, Texas and its main research facility in Plano, Texas.[51] When ARCO began to experience problems in interconnecting and accessing the public switched telephone network from the Plano node of ARCOnet, it canceled its contract for Direct-Inward Dialing ("DID") trunk service to its Plano research facilities that had been provided by GTE, the landline LEC certified by the Texas PUC to serve the Plano exchange area.[52] Instead, ARCO decided to access the PSN by interconnecting the Plano-to-Dallas link of the ARCOnet with Southwestern Bell Company ("SBC"), the LEC certificated by the Texas PUC to serve the Dallas local exchange. After SBC provided ARCOnet with interconnection to the PSN, GTE filed a cease and desist petition before the Texas PUC and prevailed. The Texas PUC concluded that SBC had violated Texas law by "directly or indirectly providing service to areas certified to another utility without first obtaining a certificate of convenience and necessity" and gave SBC six months to discontinue service to ARCOnet.[53]

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[50] *See Atlantic Richfield Co.; Petition for Emergency Relief and Declaratory Ruling with Respect to Registered Terminal Equipment and Private Microwave Interconnection to Telephone Service of Southwestern Bell Telephone Company*, Memorandum Opinion and Order, 59 Rad. Reg. 2d (P&F) 417 (Com. Car. Bur. 1985) ("*ARCOnet Bureau Order*"); *aff'd on app. for review*, Memorandum Opinion and Order, 3 FCC Rcd 3089 (1988) ("*ARCOnet Reconsideration Order*"), *aff'd sub nom.*, *Public Utility Com'n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) ("*ARCOnet*").

[51] *See ARCOnet Bureau Order*, 59 Rad. Reg. 2d at 418.

[52] *See id.*

[53] *See id.*, 59 Rad. Reg. 2d (P&F) at 419.

On October 26, 1983, ARCO petitioned the Commission to invalidate the Texas PUC order requiring SBC to disconnect ARCOnet from the PSN. ARCO claimed that, contrary to the Texas PUC's conclusion that the dispute was largely local in nature and separable from the development of interstate communications, and that ARCOnet was an integral part of a nationwide telecommunications network over which passed both interstate and intrastate communications.[54] In preempting the Texas PUC order, the Commission indicated that "[w]hether facilities or services are interstate or intrastate for regulatory purposes is determined by the nature of the communications which pass through them and not the location of the facilities."[55] In affirming the Bureau's decision on application for review by state regulators, the Commission reiterated that, in cases where federal and state regulation conflict, to avoid the impractical and inefficient result of requiring duplicate networks and equipment for interstate and intrastate use, federal interconnection policies must prevail for dual-use equipment and facilities.[56]

In the *Bell System Tariff Offerings*, moreover, the Bell System had refused to interconnect local loop facilities with MCI's interstate private line network, arguing that local distribution facilities were entirely intrastate, "strictly of a local nature" and, therefore, "subject to state and local regulation exclusively."[57] In rejecting the Bell System's argument, the Commission held that it has exclusive jurisdiction over rates, terms and conditions associated with interconnection of intrastate facilities when the local facilities are "an essential link in [] interstate and foreign communications services."[58]

The Commission has asserted exclusive jurisdiction over rates terms, and conditions of physically intrastate facilities interconnected to interstate facilities in a number

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[54] *See id.*

[55] *See id.*

[56] *See ARCOnet Reconsideration Order*, 3 FCC Rcd at 3091 n.15.

[57] *See Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 418 (1974) ("*Bell System Tariff Offerings*"), *aff'd sub nom.*, *Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974).

[58] *See Bell System Tariff Offerings*, 46 F.C.C.2d at 417 (citing *Telerent Leasing Corp.*, Memorandum Opinion and Order, Docket No. 19808, 45 F.C.C.2d 204, 220 (1974), *aff'd sub nom.*, *North Carolina Util. Comm'rs*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (the Commission exercised exclusive jurisdiction over interconnection of customer premises equipment to the nationwide switched public telephone network); *United Dep't of Defense, et al.*, 38 F.C.C.2d 803 (Review Board, 1973), *aff'd* FCC 73-854 (the Commission asserted exclusive jurisdiction over Dial Restoration Panel ("DRP") equipment that was part of a nationwide defense communications system even though the facilities were used in part for transmission of intrastate communications)).

of other contexts. In *Lincoln Telephone*, the Court of Appeals for the District of Columbia affirmed a Commission decision ordering Lincoln Telephone to provide interconnection of local exchange facilities to MCI's Execunet services.[59] The Court of Appeals rejected the state's argument that the Commission lacked jurisdiction over Lincoln Telephone because all of the company's facilities were located within the State.[60] The Court of Appeals found that:

> The courts . . . have never adopted such a narrow view of the Commission's jurisdiction. Rather, those facilities or services that substantially affect provision of interstate communication are not deemed to be intrastate in nature even though they are located or provided within the confines of one state.[61]

The Commission has jurisdiction, therefore, over rates, terms and conditions of interconnection, even if physically intrastate, when the facilities or services at issue substantially affect provision of interstate communications.[62]

In the context of competitive access providers ("CAPs"), the Commission's Office of General Counsel ("OGC") has ruled that CAP facilities "are interstate services subject to federal regulation pursuant to Section 2(a) . . . even though the facilities are

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[59] *See N-Triple-C, Inc.*, 74 F.C.C.2d 196 (1979), *MCI Telecommunications Corp.*, 68 F.C.C.2d 1553 (1978), *recon. denied*, FCC 78-884 (1979); *Lincoln Tel. & Tel. Co.*, 72 F.C.C.2d 724 (1979, *aff'd*, *Lincoln Tel. & Tel. Co.* , 659 F.2d 1092 (D.C. Cir. 1981) ("*Lincoln Telephone*").

[60] *See Lincoln Telephone*, 659 F.2d at 1109.

[61] *See Lincoln Telephone*, 659 F.2d at 1109 n.85 (citing *Idaho Microwave, Inc. v. FCC*, 328 F.2d 556 (D.C. Cir. 1964); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1044-1048 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir..), *cert denied.*, 429 U.S. 1027 (1976)).

[62] Although *Bell System Tariff Offerings* and *Lincoln Telephone* are *pre-Louisiana PSC* decisions, the holding that the Commission possesses exclusive jurisdiction to order interconnection to intrastate facilities remains valid and survives *Louisiana PSC*. In a post-*Louisiana PSC* case affirming a Commission decision to preempt state regulation of BOC enhanced Centrex services, the Court of Appeals stated that "[e]ven if Centrex were a purely intrastate service, the FCC might well have authority to preemptively regulate its market if — as would appear here — it was typically sold in a package with interstate services." *See Illinois Bell Tel. Co. v FCC.*, 883 F.2d 104, 113 n.7 (D.C. Cir. 1989); *see also California Interstate Tel. Co. v. FCC*, 1 Rad. Reg. 2d 2095, 2099 (D.C. Cir. 1964); *Petition of the Continental Telephone Company of Virginia for a Declaratory Ruling that it is not Fully Subject to the Commission's Jurisdiction Under the Communications Act of 1934*, 2 FCC Rcd 5982, 5984 (Com. Car. Bur. 1987); *Declaratory Ruling on Application of Section 2(b)(2) of the Communications Act of 1934 to Bell Operating Companies*, 2 FCC Rcd 1750 (1987).

located entirely within a single state."[63] OGC also affirmed that "interstate services provided over facilities located within a state's boundaries are subject to federal jurisdiction." [64] Accordingly, the *ARCOnet*, *Bell System Tariff Offerings*, *Lincoln Telephone* and OGC proceedings show that the location of interconnection facilities entirely within the boundaries of one state does not bar the Commission's assertion of jurisdiction over rates and conditions of interconnection of interstate services to those facilities. Of course, the Budget Act confers exclusive authority upon the Commission to regulate the rates and conditions associated with interstate and "intrastate" interconnection facilities of LECs and CMRS providers and does not, therefore, rely upon past court and Commission case law.

E. The Commission Must Correct the Jurisdictional Error in the *CMRS Second Report and Order*.

Several parties in seeking clarification or reconsideration have questioned the Commission's jurisdictional findings in the *CMRS Second Report and Order*. In contrast to the "jurisdictional void" theory, McCaw and MCI urge the Commission to clarify that it retains exclusive jurisdiction with regard to mutual compensation between LECs and CMRS providers regardless of the degree of physically intrastate facilities involved. Comcast supports such clarification.

In the *CMRS Second Report and Order*, the Commission exercised its statutory authority to forbear from applying Section 203 of the Act to require CMRS providers to tariff their rates.[65] In reaching this conclusion, the Commission observed that "revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates."[66] This is an incorrect jurisdictional statement that must be clarified.

As discussed above, the Budget Act extends to the Commission exclusive jurisdiction over local or "intrastate" CMRS services and rates, regardless of the physically intrastate nature of the facilities, because CMRS is part of an interstate network.[67] The Commission and courts have consistently held, moreover, that jurisdiction over

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[63] *See* Letter from Renee Licht, Acting General Counsel, Federal Communications Commission, to Leonard J. Kennedy, Attorney for Hyperion Telecommunications, Inc. (September 3, 1993).

[64] *See id.*

[65] *See CMRS Second Report and Order*, 9 FCC Rcd at 1479-1480.

[66] *See id.*, 9 FCC Rcd at 1480.

[67] *See* 47 U.S.C. §§ 152(b), 332(c)(3)(A).

communications services is to be determined by the nature of the communications, not the physical location of facilities. Thus, even a CMRS call carried between two points in Sacramento, California, on entirely physically intrastate facilities is jurisdictionally an interstate communication, subject to federal regulation.[68]

In *Bell System Tariff Offerings*, the Commission advised AT&T and the Bell System that their proposal unilaterally to enforce state interconnection tariffs against MCI for the interconnection of MCI's private line facilities:

> was in conflict with the statutory scheme of the Communications Act since the facilities to be offered are to be used for the transmission of interstate communications and are therefore subject to the [tariff] filing requirements of Section 203 of the Act.[69]

In *Lincoln Telephone*, the Court of Appeals upheld the Commission's exercise of its residual authority contained in Section 154(i) to require Lincoln Telephone to make interconnection available to MCI's interstate private line network on a *tariffed* basis.[70] The Court found it particularly persuasive that, because Lincoln Telephone and MCI were "bitter rivals who are at loggerheads," the Commission reasonably "perceived the need for close supervision and took the necessary course of action" in requiring Lincoln Telephone to file an interstate tariff setting forth the charges and regulations for interconnection.[71]

The *CMRS Second Report and Order*'s conclusion that the Commission lacks jurisdiction to regulate local CMRS rates is, therefore, contrary to the Budget Act and case law explaining when services become jurisdictionally interstate. Because the Budget Act gives the Commission exclusive jurisdiction over CMRS and CMRS is part of the interstate public switched telephone network, the Commission has exclusive jurisdiction over CMRS. Given that interconnection between LECs and CMRS providers is vital to the deployment of CMRS networks, the Commission possesses exclusive jurisdiction over rates, terms and conditions of interconnection.

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[68] *See New York Telephone v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980).

[69] *See Bell System Tariff Offerings*, 46 F.C.C.2d at 424.

[70] *See Lincoln Telephone*, 659 F.2d at 1109.

[71] *See id.*

Under *Bell Systems Tariff Offerings* and *Lincoln Telephone* and contrary to the conclusions in the *CMRS Second Report and Order*, the Commission retains exclusive jurisdiction under Sections 154(i), 152(b) and 332(a) of the Act to require LECs to tariff rates, terms and conditions for interconnection to CMRS facilities. Absent regulation against it, a LEC will have the incentive and ability freely to discriminate against CMRS providers seeking interconnection to the local exchange. The need to ensure CMRS providers nondiscriminatory access to LEC essential bottleneck facilities, therefore, is a necessary and sufficient predicate for the Commission to exercise its exclusive jurisdiction to require the tariffing of LEC interconnection rates, terms and conditions to CMRS providers. As an interstate service offering, CMRS-LEC interconnection presumably would be under a federal tariff. Were the Commission to adopt mutual compensation with a zero (0) interconnection charge or another administratively simple mutual compensation model, it could proceed by adopting the policy and allow carrier-to-carrier agreements, pursuant to the policy.

III. CONCLUSION

Accordingly, Comcast urges the Commission to clarify that it possesses exclusive jurisdiction over all commercial mobile radio services. By amending Sections 2(b) and 332 of the Communications Act in 1993, Congress expressly delegated to the Commission sole authority to regulate CMRS services. The Budget Act plainly shows that Congress has eliminated the dual regulatory framework generally applied to other common carriers pursuant to Sections 2(a) and 2(b) of the Act. In federalizing all commercial mobile radio services, Congress also made plain that the Commission has exclusive authority to regulate rates, terms and conditions with regard to the entire interconnection arrangement between CMRS providers and LECs. The Congressional grant of exclusive jurisdiction to the Commission also means that commercial mobile radio services and facilities, including rates, terms and conditions for interconnection arrangements between LECs and CMRS providers, that were formerly "fenced off" from Commission jurisdiction as intrastate or

local pursuant to pre-Budget Act Section 2(b) and Louisiana PSC, have been brought within the ambit of the Commission's exclusive jurisdiction by the Budget Act. Furthermore, Comcast urges the Commission to reject the "jurisdictional void" theory as contrary to Congressional intent to establish an interstate, nationwide wireless "network of networks."

Respectfully submitted,

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