52. A third commonly employed alternative would be to allocate shared costs and overheads among all services based on some specified allocator. For example, shared costs and overheads could be allocated among services uniformly in proportion to each service's LRIC or direct costs, or could be apportioned based on some measure of usage.[67] The advantages of these allocators are that they are relatively simple to administer and result in full recovery of all shared and overhead costs. A principal drawback of this approach, however, is that it may have undesirable effects on demand for particular services. More specifically, such allocators do not minimize the distortions in demand caused by divergences between price and LRIC, and may induce inefficient investment by incumbents and entrants. In addition, or in the alternative, we could limit the permissible overhead loading factor a LEC could collect from an interconnecting CMRS provider to the overhead loading factor that the LEC uses for some comparable service or services that compete with CMRS offerings.[68]

53. A fourth approach would be to allow incumbent carriers such as LECs to employ the "efficient component pricing rule" (ECPR) proposed by economist William Baumol and others.[69] Under this approach, an incumbent carrier that sells an essential input service, such as interconnection, to a competing network would set the price of that input service equal to "the input's direct per-unit incremental cost plus the opportunity cost to the input supplier of the sale of a unit of input."[70] The ECPR essentially guarantees that the incumbent will recover not only all of its overheads, but also any profits that it would otherwise forego due

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[67] *Compare* United Kingdom Office of Telecommunications, *A Framework for Effective Competition: A Consultative Document on the Future of Interconnection and Related Issues*, ¶ 4.32 (Dec. 1994).

[68] In our *Virtual Collocation Order*, we reaffirmed that, in the context of expanded interconnection, LECs may include no more than uniform overhead loadings in their interconnection rates unless they provided justification for a greater loading factor. *Expanded Interconnection with Local Telephone Companies*, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5189 (1994) (*Virtual Collocation Order*), *pet. for review pending*. Furthermore, in our *Virtual Collocation Overhead Prescription Order*, we specified that LECs may recover overhead loadings on their virtual collocation charges as long as these loadings do not exceed the lowest overhead loadings assigned to their comparable DS1 and DS3 services. *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, Report and Order, 10 FCC Rcd 6375, 6406-07 (1995) (*Virtual Collocation Overhead Prescription Order*).

[69] *See* William J. Baumol, *Some Subtle Issues in Railroad Deregulation*, 10 Int'l J. Trans. Econ. 341 (1983); William J. Baumol & Gregory Sidak, *Toward Competition in Local Telephony* (1994); William Baumol & Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. on Reg. 173 (1994).

[70] William Baumol & Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. on Reg. at 178.

to the entry of the competitor. Proponents of the ECPR argue that the ECPR creates an incentive for services to be provided by the least-cost provider and that it makes the incumbent indifferent between selling an input service to a competitor or a final service to an end user. Critics, however, have shown that these properties only hold in special circumstances.[71] On the other hand, some express concern that the ECPR may inhibit beneficial entry.[72] In addition, because the ECPR would permit an incumbent carrier to recover its opportunity costs, including any monopoly profits in the sale of the final service, the use of this rule may prevent competitive entry from driving prices towards competitive levels. These arguments cast significant doubts on claims that the rule will yield efficient outcomes. Finally, as an administrative matter, it would be difficult for a regulatory agency to determine the actual level of a carrier's opportunity cost.

54. Finally, we might adopt an approach that permits a range of permissible rates (and implicitly of overhead allocations). We note, for example, that the Commission has repeatedly expressed concern about preventing cross-subsidies. Some economists have defined the following alternative tests for cross-subsidy: (1) the price of each individual service, and of any group of services, must be less than the stand-alone cost of that service (*i.e.*, the cost of providing that service alone but no other services); or (2) the revenue from each service and from all subsets of services must exceed the incremental cost of the service or the subset of services.[73] According to these definitions, if either of the two tests is satisfied, there is no cross-subsidy. This test effectively requires that the revenues generated by any group of services that share a common facility recover at least the incremental cost of that facility. We seek comment on this theory, and on whether it reduces the range of acceptable prices, and hence, implicitly, the range of acceptable allocation schemes.

55. We seek comment on the foregoing approaches to determining rate levels, how they might apply in the context of LEC-CMRS interconnection, the extent to which they are administratively feasible, and how they will affect rates for other services including intrastate services. We also seek comment on how these LEC-CMRS interconnection rate levels could affect telecommunications network subscribership and universal service. We also ask parties to address the extent to which these approaches could be implemented in the context of the specific pricing options discussed in the following section.

(3) Practical Considerations Regarding Cost-Based Pricing

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[71] *See, e.g.*, Jean-Jacques Laffont & Jean Tirole, *Access Pricing and Competition*, 38 Eur. Econ. Rev. 1673 (1994).

[72] Jean-Jaques Laffont and Jean Tirole, "Creating Competition Through Interconnection: Theory and Practice," MIT Mimeo at 3 (1994).

[73] William J. Baumol, John C. Panzar & Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* 351-56 (1982).

56. LEC-CMRS interconnection rates could be based on a specific demonstration of the costs of providing service, much as we do for establishing rates for new services under our price cap rules. The new services test requires price cap LECs to demonstrate that the rates for a new service recover the direct costs of that service plus a reasonable share of overhead loadings.[74] We seek comment on whether we should provide guidance with respect to such a cost showing similar to our interpretation of the new services test in the *Video Dialtone Reconsideration Order*.[75] In addition, we seek comment on how we should deal with overhead loadings and whether we should employ any of the alternative approaches discussed in the previous section. We also note that similar cost justification requirements could be enforced by state commissions.

57. The approaches described in the preceding paragraph have a number of advantages, in that they result, at least in theory, in cost-based rates for particular services. On the other hand, these approaches have the disadvantage, typically, of requiring contentious, and time-consuming administrative proceedings to resolve the complex issues raised by cost studies.

c. Pricing Options

(1) Interim Approach

58. Any significant delays in the resolution of issues related to LEC-CMRS interconnection compensation arrangements, combined with the possibility that LECs could use their market power to stymie the ability of CMRS providers to interconnect (and may have incentives to do so), could adversely affect the public interest. We tentatively conclude that it will better serve the public interest to give providers some degree of certainty, within a short time, that reasonable interconnection arrangements will be available. Some of the alternatives described below may approximate the results of cost studies, and thus provide most of the advantages of the theoretical model described above, but avoid the main disadvantages -- administrative costs and delays.

59. Accordingly, we tentatively conclude that an interim pricing approach should be adopted that could be implemented relatively quickly and with minimal administrative burdens on CMRS providers, LECs, and regulators. We plan to move forward expeditiously so as to have an interim pricing approach in place in the near term. Below, we discuss our

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[74] 47 C.F.R. § 61.49(g)(2). *See Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 244, 339-47, paras. 205-223 (1994) (*Video Dialtone Reconsideration Order*).

[75] In that order, we clarified, *inter alia*, that the LECs would be expected, in the video dialtone context, to include in direct costs a reasonable allocation of other costs that are associated with shared plant used to provide video dialtone and other services. *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 345-46, paras. 217-21.

tentative conclusion that a bill and keep approach (zero rate for termination of traffic) should apply with respect to local switching facilities and connections to end users, with the exception of dedicated transmission facilities linking the two networks. We also set out a number of alternative approaches. Our preferred approach or the alternative options could be adopted as interim solutions for some limited period of time. We seek comment on whether such an approach should apply for a prescribed time period, whether months or years, or until the occurrence of a specific triggering event. With respect to our preferred approach and each of the alternative options discussed below, we ask parties to address whether some combination of these options should be made available, and on the implementation costs for carriers, as well as the speed with which such options could be implemented. In particular, we seek comment on the extent to which modifications would be required in the network to implement such options (*e.g.*, to collect information necessary for billing and collection), the cost of such modifications, and who should bear such costs. We also solicit parties' analysis of the relevant administrative burdens on the Commission caused by the various options, and the ease with which these options can be enforced. Finally, we seek comment on any changes to our approaches that would be necessary or advisable if LECs and CMRS providers were to change current arrangements for recovering costs from end users.[76]

(a) Tentative Conclusions

60. *Bill and Keep*. We tentatively conclude that a "bill and keep" arrangement represents the best interim solution with respect to terminating access from LEC end offices to LEC end-user subscribers, and with respect to terminating access from equivalent CMRS facilities to CMRS subscribers. Under bill and keep arrangements, neither of the interconnecting networks charges the other network for terminating the traffic that originated on the other network, and hence the terminating compensation rate on a usage basis is zero. Instead, each network recovers from its own end-users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network. Bill and keep arrangements yield results that are equivalent to the networks charging one another incremental cost-based rates for shared network facilities if the incremental cost of using such facilities is equal to (or approximates) zero for both networks. We note that several states, including California, Connecticut, Texas and Pennsylvania, have implemented bill and keep

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[76] For instance, CMRS subscribers currently pay the cost of airtime for terminating calls. The prospect has been raised that CMRS providers might change this practice, so that LEC customers who originate calls to CMRS subscribers would pay those costs. If information is made available to the LEC customer regarding the price of the call before the call is placed, this arrangement, called "sender pays," should foster economic efficiency because the party who expects to pay for a telephone call makes the decision whether to complete the call based on his or her consideration of whether the value of the call exceeds the price. Adoption of such an arrangement might well affect LEC-CMRS interconnection rate issues. For instance, if the LEC, rather than the CMRS provider, collects revenues reflecting the costs of terminating airtime, that might well affect the appropriate interconnection rates.

arrangements, at least on an interim basis. We tentatively conclude that, as an interim solution, such bill and keep arrangements should cover both peak and off-peak time periods.

61. Bill and keep arrangements appear to have a number of advantages, especially as an interim solution. First, such arrangements are administratively simple and would require the development of no new billing or accounting systems.[77] Second, the bill and keep approach prevents incumbent LECs that possess market power from charging excessively high interconnection rates. Third, according to proponents, a bill and keep approach is economically efficient if either of two conditions are met: (1) traffic is balanced in each direction, or (2) actual interconnection costs are so low that there is little difference between a cost-based rate and a zero rate. Proponents of bill and keep submit that condition (2) is satisfied in the case of LEC-CMRS interconnection because they allege that the average incremental cost of local termination on LEC networks is approximately 0.2 cents per minute.[78]

62. In view of these advantages, we tentatively conclude that, for terminating access between the end office (or equivalent CMRS facilities) and the end-user subscriber, a bill and keep arrangement applied to both peak and off-peak periods represents the best interim solution. We also tentatively conclude that a requirement that LECs and CMRS providers not charge one another for terminating traffic from the other network would not violate any party's legal rights. Specifically, we believe that a bill and keep requirement would not deprive either LECs or CMRS providers of a reasonable opportunity to recover costs they incurred to terminate traffic from the other's network, because these costs could be recovered from their own subscribers. We seek comment on these tentative conclusions. We also seek comment on the effect that a bill and keep approach is likely to have on traffic flows between LEC and CMRS networks: is this approach likely to lead to more balanced traffic flows, or will it create incentives to perpetuate or exacerbate existing traffic imbalances between LEC and CMRS networks?

63. *Transport Costs between the CMRS and LEC Networks.* Brock's analysis of bill and keep appears not to consider the costs associated with the physical transmission circuits connecting CMRS MTSOs with LEC end offices. Transmitting calls between CMRS and

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[77] *See, e.g., Ex Parte* Letter from Randall S. Coleman, Vice President for Regulatory Policy and Law, CTIA to Regina Keeney, Chief, Common Carrier Bureau, Federal Communications Commission, Attachment at 1, December 8, 1995.

[78] *Id.* at 1. *See also ex parte* letter from Robert F. Roche, CTIA, to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 94-54, December 8, 1995, Gerald W. Brock, *The Economics of Interconnection: Incremental Cost of Local Usage* (April 1995) (Brock Paper No. 3). Brock acknowledges that this is an average figure. He states that "[b]ecause the cost is determined by the use [of] peak capacity, the actual cost per minute is much higher at the peak and is zero at the off-peak." He estimates the cost of peak usage at 2.1 cents per minute during the busiest hour of each business day.

LEC networks can be accomplished through the use of dedicated facilities between CMRS MTSOs and LEC end offices, or through dedicated facilities between CMRS MTSOs and LEC tandem switches. When tandem switches are used, additional tandem-switched transport, consisting of tandem switching and transmission over common transport facilities, is used to transmit traffic between LEC tandem switches and LEC end offices. These facilities are generally provided by LECs. With respect to dedicated transport facilities, cost causation principles suggest that the costs of such facilities be recovered from the cost-causer through flat rates. With respect to shared facilities used to provide tandem-switched transport, cost-causation principles suggest traffic-sensitive cost recovery, at least during peak periods.

64. LECs' existing interstate access tariffs include flat rates for dedicated transport (entrance facilities and direct-trunked transport) that we have concluded, in general, are reasonably cost-based.[79] Similar charges are included in many LEC intrastate access tariffs. These tariffed charges could be applied to CMRS providers relatively rapidly, with virtually no additional administrative proceedings. Moreover, we believe that the dedicated transport facilities used to connect LEC and IXC networks are similar or identical to the facilities connecting LEC and CMRS networks. Accordingly, we tentatively conclude that, when LECs provide the dedicated transmission facilities between CMRS MTSOs and LEC networks, they should be able to recover the costs of those facilities from CMRS providers through appropriate dedicated transport rates found in their existing access tariffs. We seek comment on this tentative conclusion.

65. We also seek comment on whether and how LECs should recover from CMRS providers the costs of tandem switching and common transport between tandem switches and end offices, in cases where such LEC-provided facilities are used. The LECs' interstate access tariffs include usage-sensitive charges for tandem-switched transport, as do many state tariffs. Should these tandem-switched transport charges be applied to CMRS providers? Should such charges apply to all minutes, or only to traffic during peak periods?

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[79] *See Transport Rate Structure and Pricing*, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992), *first recon.*, 8 FCC Rcd 5370 (1993), *second recon.*, 8 FCC Rcd 6233 (1993), *third recon.*, 10 FCC Rcd 3030 (1994), *fourth recon.*, FCC 95-404 (released Sept. 22, 1995), *pets. for review pending*. *See also Local Exchange Carrier Switched Local Transport Restructure Tariffs*, 9 FCC Rcd 400 (Com. Car. Bur. 1993).

(b) Other Options

66. While we tentatively conclude that the proposals outlined above would lead to LEC-CMRS interconnection arrangements that best serve our public interest objectives during an interim period, we also seek comment on a number of alternative approaches. We seek comment on the relative costs and benefits of our proposals and these options. We also invite parties to suggest other alternatives or combinations of these options that would advance our public interest objectives and that could be implemented rapidly and with minimal administrative costs.

67. *Bill and Keep for Off-Peak Usage Only.* Brock acknowledges that "[i]f interconnection charges are imposed, they should be assessed at the long run incremental cost of adding capacity."[80] He also acknowledges that "the true cost for peak period usage is much greater than the cost for off peak usage . . . [which] may be near zero,"[81] and that the cost for peak period usage is much higher than the average incremental cost of local usage, which he estimates to be 0.2 cents ($0.002) per minute.[82] In light of Brock's comments, we seek comment on whether a bill and keep approach should be limited to off-peak traffic, with charges assessed for peak-period traffic. We seek comment on what charges should apply for peak period traffic under this approach. For instance, we seek comment on whether some subset of existing access charges should apply, or whether an incremental capacity cost for peak-period traffic should be developed. We also seek comment on the peak periods for both LEC and CMRS networks, and the appropriate period for a peak capacity charge. In addition, we seek comment on whether charging different prices for peak and off-peak traffic has any disadvantages and whether it is likely to result in a shift in the peak period. In addition, we seek comment on the potential administrative costs and complexity involved in this approach.

68. *Subset of Access Charges.* To the extent that LEC-CMRS interconnection arrangements are similar to the interconnection arrangements between LECs and IXCs or other access customers, the rates for LEC-CMRS interconnection could be based on a subset

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[80] *Ex parte* letter from Robert F. Roche, CTIA to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 94-54, December 8, 1995, Gerald W. Brock, *The Economics of Interconnection: Price Structure Issues in Interconnection Fees* (April 1995) (Brock Paper No. 1). Brock later asserts that "[i]n a competitive communications market, . . . we should expect to see interconnection charges based on the cost of capacity required to terminate traffic." *Id.* at 4.

[81] *Ex parte* letter from Robert F. Roche, CTIA, to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 94-54, December 8, 1995, Gerald W. Brock, *The Economics of Interconnection: Interconnection and Mutual Compensation With Partial Competition*, (April 1995), at 13 (Brock Paper No. 2).

[82] Brock Paper No. 3 at 3.

of the LECs' existing interstate access charges (or comparable rates from their intrastate access tariffs).[83] As noted above, LECs could charge existing local transport rates for the transmission facilities that they provide to link LEC and CMRS networks. Similarly, LECs could charge CMRS providers existing local switching rates for minutes of use originating on CMRS networks and terminating on LEC networks. We do not envision that the LECs would charge CMRS providers the carrier common line (CCL) charge. The CCL charge, in essence, represents a subsidy from LECs' interstate access customers to reduce the subscriber line charges (SLC) paid by end-user subscribers for loop facilities that are dedicated to their use. We do not believe that such a subsidy should be imposed on CMRS providers. Under this alternative, we are also inclined not to permit LECs to charge CMRS providers the transport interconnection charge (TIC), given that the extent to which the TIC recovers transport-related costs is unclear. We seek comment on what subset of access charges should apply if we select this option as an interim compensation mechanism. We also seek comment on whether per-minute access charges should be converted into peak-sensitive capacity charges (either per-peak minute or flat-rate) in the context of LEC-CMRS interconnection, and, if so, on how to do so. In addition, we seek comment on whether the LECs' access charges would be an appropriate framework for LEC-CMRS interconnection once our Access Reform proceeding is completed.[84]

69. *Existing Interconnection Arrangements Between Neighboring LECs.* In the alternative, LEC-CMRS interconnection arrangements could be based on existing arrangements between neighboring LECs. We seek comment on whether LECs should be required to disclose publicly the terms of their interconnection arrangements with neighboring LECs and to offer CMRS providers comparable arrangements. This option could help ensure that CMRS providers receive interconnection on terms and conditions that are at least as favorable as neighboring LECs. Neighboring LECs generally are larger and more established than CMRS providers and thus more likely to have been able to negotiate reasonable interconnection arrangements. We ask parties for comment on this option. In particular, we ask parties to describe existing arrangements between neighboring LECs and to comment on whether these arrangements would be workable in the context of other forms of LEC-CMRS interconnection.

70. *Existing Interconnection Arrangements Between LECs and Cellular Carriers.* Another possibility would be to apply the same rates, terms, and conditions in existing LEC-

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[83] As of August 1995, the average level for price cap LECs of access rates was: local switching -- 0.95 cents per minute, tandem switched transport -- 0.19 cents per minute, and transport interconnection -- 0.68 cents per minute. USTA Compendium and Roll Up, 1995 Price Cap Tariff Review Plan, August 1995. *See also* FCC, Com. Car. Bur., Industry Analysis Div., *Monitoring Report*, CC Docket No. 87-339, Table 5.11 (May 1995) (average traffic sensitive charge per access minute since August 1995 was 1.9 cents per minute)

[84] As noted above, we intend to address major reforms to our access charge rules in the upcoming Access Charge Reform NPRM.

cellular interconnection arrangements to broadband PCS providers, or to other categories of CMRS providers. Like the previous option, this option could help ensure that CMRS providers would receive interconnection on terms and conditions that are at least as favorable as cellular carriers. We seek comment on whether cellular carriers, like neighboring LECs, are better established than broadband PCS providers and thus are more likely to have negotiated reasonable interconnection arrangements.[85] We ask the parties to describe existing interconnection arrangements between LECs and cellular carriers and to comment on whether these arrangements could be extended to other forms of LEC-CMRS interconnection.

71. *Intrastate Interconnection Arrangements Between LECs and New Entrants.* In a few states, LECs have filed tariffs providing for interconnection arrangements with competing wireline providers of local exchange service. For example, in Illinois, Ameritech offers reciprocal compensation rates of 0.5 cents per minute of use for end-office termination and 0.75 cents per minute of use for tandem termination.[86] In Michigan, Ameritech offers a reciprocal compensation rate of 1.5 cents per minute for a local switched termination.[87] In New York, NYNEX recently proposed rates for terminating traffic of 1.3 cents per minute, in addition to a flat rate interconnection charge.[88] Similarly, the Maryland Public Service Commission recently approved, on an interim basis, an MCI Metro tariff under which the carrier is charging 2.24 cents per minute for terminating local calls that originate on other carriers' networks.[89] In California, Pacific Bell and MFS Communications reached an interconnection agreement providing for a reciprocal call termination rate of 0.75 cents per minute for local calls.[90]

72. We invite parties to comment on the various state approaches described above, in particular on whether CMRS providers should be eligible for these offerings or whether there is any technical or economic basis for distinguishing CMRS from wireline interconnection. We also ask parties to provide us with other relevant information about state regulations in

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[85] Interconnection arrangements may be particularly beneficial in cases where the cellular carrier is affiliated with the LEC. On the other hand, some commenters have suggested that a LEC could negotiate a high interconnection rate with its cellular affiliate, since its shareholders would not care which entity was accruing the profit.

[86] *Ex parte* letter from J.G. Harrington, Counsel for Cox Enterprises, Inc., to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, October 19, 1995, attachment, "State by State Status of Compensation and Interconnection," at 3.

[87] *Id.*

[88] *Id.* at 4.

[89] *Id.* at 3.

[90] *See* Letter from Alan F. Ciamporcero, Vice President, Pacific Telesis, to Reed Hundt, Chairman, Federal Communications Commission, dated November 21, 1995.

this area, and to comment on the extent to which state actions in wireline-wireless interconnection may serve as a model for LEC-CMRS interconnection. We note that, as part of broader initiatives to remove the statutory or regulatory barriers to entry into the local telephone market, several states have initiated proceedings, and in some cases adopted interim or permanent rules, governing interconnection arrangements between LECs and competing local carriers. We ask parties to comment on these state regulations and on the relative costs and benefits of various approaches states have taken in this area.

73. *Measured Local Service Rates.* With respect to rates that recover the costs of shared facilities whose costs vary in proportion to capacity, we seek comment on whether interconnection rates should be set at some fixed percentage of the measured local service rates that LECs currently charge their local customers. For example, if a LEC currently charges its own measured local service customers 5 cents per minute, it could charge an interconnecting CMRS provider half that amount -- 2.5 cents per minute. This option essentially would assume that the existing measured service rates are cost-based, and that the LEC's cost in terminating a call placed by a CMRS customer is one-half (or some other percentage) of the cost of both originating and terminating a call placed by a LEC customer to another LEC customer. Under a variant of this option, if a LEC does not offer measured local service, or if few LEC customers select such service, an imputed per-minute rate could be derived by dividing the LEC's monthly local service rate by the average customer's number of local minutes originated per month. Both the basic option and the variant discussed here have the appeal of facilitating competition between CMRS providers and LECs, by ensuring that CMRS providers never pay more for interconnection than LECs charge for a complete call. A disadvantage of these options is that they would not necessarily result in cost-based interconnection rates.

74. *Uniform Rate.* We also seek comment on whether a presumptive uniform per-minute interconnection rate should be established for all LECs and CMRS providers. Such a rate could be developed from generic, forward-looking studies of LEC network costs.[91] We invite parties to submit any such studies into the record of this proceeding. A second option would be to develop such a rate based on one or more (or an average) of the state policy decisions cited in the preceding paragraph. Interconnection rates that have been ordered or accepted by state commissions range between 0.5 cents to 2.4 cents per minute, with a median of around one cent per minute. A third possibility would be to set such a uniform rate based on the average level of LECs' interstate access charges.[92] For example, the per-

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[91] *See, e.g.*, Robert M. Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policy and Institutional Change* (FCC, OPP Working Paper Series No. 24, Nov. 1988) at 47 (assuming that marginal cost of local telephone service is one cent per minute); Comcast *Ex Parte* Presentation, CC Docket No. 94-54, March 27, 1995 ("Incremental Cost of Local Usage," by G. Brock) (estimating average incremental cost of local usage of LEC networks, using digital technology, to be 0.2 cents per minute).

[92] *See supra* para. 77.

minute rate for terminating traffic interconnected at an end-office (exclusive of flat-rate charges for circuits connecting LEC and CMRS networks and per-minute charges for tandem switched transport) could be set based on the average level of LECs' interstate local switching charges, but not transport interconnection charges or carrier common line charges. We seek comment on the advantages and disadvantages of establishing a uniform interconnection rate level, whether establishing such a uniform rate would be lawful, the basis on which such a rate might be set, and the practical problems of implementing such a rate scheme. We also seek comment on whether such a rate, instead of being a presumptively lawful rate, should be a prescription, and on what showing a carrier would need to make to charge a different rate. In the alternative, we seek comment on whether carriers should apply different interconnection rate levels in different geographic areas that they serve.[93]

75. *Bill and Keep Until a Satisfactory Rate Is Developed.* Finally, we seek comment on whether a bill and keep arrangement should be imposed on a LEC pending the negotiation of a satisfactory interconnection arrangement between the LEC and a CMRS provider or the approval of other cost based charges. If the negotiations were to break down, a reasonable basis for resolving the dispute might be the imposition of a rate equal to the lowest of: (1) existing interconnection arrangements between the LEC and neighboring LECs; (2) intrastate interconnection arrangements between the LEC and new entrants; or (3) a subset of LEC interstate access charges for terminating traffic. A LEC would be allowed, however, to demonstrate that the lowest of the charges described above does not provide the LEC with a reasonable opportunity to recover all the costs incurred in terminating CMRS traffic on the local landline network, and some overhead costs. This approach would preserve the primary role of negotiations between the parties in reaching interconnection arrangements, but would limit the LEC's ability to exercise its market power, while simultaneously creating an incentive for it to negotiate a satisfactory rate expeditiously. We also seek comment on whether CMRS providers would have an incentive to negotiate under this approach.

(2) Long Term Approach

76. We seek comment on what the long-term approach to interconnection pricing should be, whether one of the interim options outlined above should be the permanent methodology, or whether interconnection rates should be based on a specific demonstration of the cost of providing service, much as we require for establishing rates for new services under our price cap rules. We believe that, in the long term, pro-competitive LEC-CMRS interconnection arrangements should be developed that advance our public interest objectives. First, these arrangements should give efficient incentives regarding both consumption and investment in telecommunications services. To this end, prices should be reasonably cost-

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[93] Compare the zone density pricing system, initially adopted in *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7451-57, ¶¶ 172-84 (1992) (*Special Access Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *recon.*, 8 FCC Rcd 7341, *vacated in part and remanded sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (1994), *reaffirmed on remand in pertinent part*, 9 FCC Rcd 5154, 5192-5200 (1994).

based. Cost-based prices could be derived through cost studies, or could be based on potentially reasonable proxies in lieu of developing rates based on complete cost justifications, possibly including one or more of the interim approaches described above. Moreover, over time, we believe that price cap regulation and increasing competition will force interconnection rates toward cost. Ultimately, markets may become sufficiently competitive that cost-based interconnection prices should result without any regulatory intervention.

77. Second, functionally equivalent forms of network interconnection arguably should be available to all types of networks at the same prices, unless there are cost differences or other policy considerations that justify different rates. Thus, in the long run, if LECs provide essentially similar interconnection services to CMRS providers and to IXCs, then it may well be in the public interest for the rates in LEC-CMRS interconnection arrangements not to differ from the rates for LEC-IXC interconnection -- *i.e.*, access charges. We acknowledge, however, that there may be significant reasons, including our interest in facilitating the competitive development of CMRS and considerations relating to the Part 36 jurisdictional separations rules, that may necessitate differences in regulatory regimes. We also recognize that current interstate access charges are problematic, and in the near future we intend to initiate a comprehensive proceeding to reform the access charge regime. We also seek comment on the impact of each of the pricing options on universal service considerations. Finally, we note that substantially different prices for similar forms of interconnection raise the possibility that parties could seek to deflect traffic from a more costly form of interconnection to a less costly form. We invite comment on the implications of this possibility, including methods to prevent such traffic deflection.

(3) Symmetrical Compensation Arrangements

78. We tentatively conclude that LEC-CMRS interconnection rates should be symmetrical -- that is, LECs should pay CMRS providers the same rates as CMRS providers pay LECs. Most existing interconnection arrangements between LECs and competing wireline providers of local exchange service require that interconnection rates be symmetrical.

79. We recognize that symmetrical interconnection rates have certain disadvantages. Asymmetrical, cost-based rates have the benefit of providing each of the carriers (and, if passed through to them, their customers) incentives to use resources such as interconnection commensurate with the actual cost of those resources. LEC networks and CMRS networks use different technologies that may have different costs. (Moreover, even different LEC networks that use similar technologies, as well as different CMRS networks, may have different cost characteristics from one another.) If interconnection rates were fully cost-based, then a LEC might pay a CMRS provider different interconnection rates than the CMRS provider would pay the LEC.

80. On the other hand, symmetrical compensation rates would be administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective networks. Moreover, symmetrical rates could reduce LECs' ability to use their bargaining strength to negotiate an excessively high termination charge that CMRS providers would pay LECs and an excessively low termination rate that LECs pay CMRS providers. Setting asymmetric, cost-based rates might require evaluating the cost structure of non-dominant carriers, which would be complex and intrusive. Accordingly, we tentatively conclude that interconnection arrangements should include symmetrical compensation rates, at least during an interim period. We seek comments on the foregoing analysis. Commenters should discuss any other reasons why symmetrical or asymmetrical compensation rates would be in the public interest and the relative merits of these approaches. We also seek comment on whether we should revisit our existing policy of forbearing from regulating CMRS providers' rates in order to enforce our interim policies with respect to the rates CMRS providers charge to LECs.

81. In addition, we note that, according to a number of parties, many LECs do not now pay any compensation to CMRS providers for LEC-originated traffic that terminates on their networks, and that some LECs even impose charges on CMRS providers for such traffic. Such conduct would appear to violate our existing mutual compensation requirement. We seek comment on whether such violations are occurring and what methods could and should be used to enforce this requirement. In the *CMRS Second Report*, we stated that CMRS providers may file complaints, under Section 208 of the Act, if a LEC violates the requirement that they charge the same rates to CMRS providers for interstate interconnection as they charge other mobile service providers.[94] Is this avenue for obtaining remedies sufficient, or should we institute some other procedure or other mechanism to ensure that LECs comply with our existing rules? For example, should we require LECs to report to us on the amounts of compensation they are paying to CMRS providers for traffic that originates on LEC networks and terminates on CMRS networks? Are alternative dispute resolution procedures necessary?

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[94] *CMRS Second Report*, 9 FCC Rcd at 1498, para. 233.

C. Implementation of Compensation Arrangements

1. Negotiations and Tariffing

a. Positions of the Parties

82. LECs are currently required to engage in good faith contractual negotiations over CMRS interconnection arrangements.[95] In the *Equal Access and Interconnection NPRM and NOI*, we sought comment on whether LECs should be required to take any further action, such as: (1) filing tariffs specifying their CMRS interconnection offerings; (2) filing their contractual agreements regarding interconnection with CMRS providers for public inspection; or (3) including a "most favored nation" clause in all CMRS interconnection agreements to guarantee that no CMRS provider received more favorable terms than others.[96]

83. Most LECs, AT&T, and established cellular carriers, as well as some SMR, paging, and PCS providers, support the existing requirement that LECs engage in good faith negotiations over interconnection with CMRS providers.[97] They argue that contractual negotiation is superior to tariffed interconnection, because it permits the greater flexibility needed to respond rapidly to changing interconnection needs. Although many acknowledge that the process of individually negotiating cellular interconnection agreements initially was difficult, they contend that the relevant parties now have more experience, and most LECs and cellular carriers say they are satisfied with the current process. These cellular carriers now maintain that the process has produced: (1) lower rates than tariffing, due to savings on the administrative costs of tariffing; (2) service arrangements better tailored to particular interconnection needs than would have been possible under a tariffed rate structure; and (3) adequate protection against LEC discriminatory conduct.[98]

84. Prospective local entrants such as MCI and smaller, less established CMRS providers, as well as GSA and several state commissions, argue that LECs should be

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[95] *Id.* at 1497-98, para. 230.

[96] 9 FCC Rcd at 5457, paras. 119-120.

[97] AT&T Comments at 12-13; Ameritech Comments at 3; Bell Atlantic Comments at 13-14; BellSouth Comments at 5-9; GTE Comments at 37-45; NYNEX Comments at 11-12; Pacific Bell Comments at 12; SW Bell Comments at 63; CBT Comments at 2; SNET Comments at 12; Rochester Comments at 8; AirTouch Comments at 12; Alltel Comments at 7-8; McCaw Comments at 23; Vanguard Comments at 21; New Par Comments at 21-22; Western Comments at 7; Dial Page Comments at 6; E.F. Johnson Comments at 6; Geotek Comments at 10; OneComm Comments at 20; RAM Mobile Data Comments at 7; AMTA Comments at 13-14; CTIA Comments at 21; OPASTCO Comments at 5; PCIA Comments at 11; Rural Cellular Comments at 9; PageNet Comments at 8; APC Comments at 4-5; Columbia PCS Comments at 5.

[98] *See, e.g.*, CTIA Comments at 15-22 and Reply at 9-10.

required to file CMRS interconnection tariffs.[99] They agree with the Commission's observation that tariffing is an established mechanism for ensuring that carriers with market power do not express it in rates, terms, and conditions that are unreasonable or unreasonably discriminatory. They contend that tariffing would counter the LECs' incentives to hinder the development of competition from new CMRS services, such as PCS, particularly in cases where the LECs are not structurally separate from their own wireless affiliates. The California PUC also argues that interconnection tariffs would reduce the opportunity for LECs to favor their affiliates in the wireless market. Nextel contends that opponents of tariffing want to deny new entrants that opportunity to secure the same favorable interconnection agreements that the incumbent cellular carriers have already negotiated.[100] Point argues that small cellular carriers have little bargaining power *vis a vis* LECs in "good faith" negotiations, and that a tariffing requirement would aid smaller carriers.[101]

85. MCI challenges claims that a tariffing requirement would be administratively burdensome and lead to increased litigation. First, MCI claims that the resources the LECs currently devote to tariffing -- including a host of interconnection tariff filings in the states -- are sufficient to handle the filing of CMRS contract tariffs for both existing and new arrangements. Second, MCI maintains that the publication of tariffs would provide greater assurances to CMRS carriers that they have been offered reasonable terms and conditions of interconnection, comparable to those offered other similarly situated parties, thereby diminishing their incentive to litigate.[102] Third, MCI counters the argument that tariffs are overly rigid by suggesting that the Commission use the flexible contract tariffs mechanism described at Section 61.55 of the Commission's rules.[103] MCI asserts that contract tariffs provide parties with the flexibility to negotiate individual interconnection agreements, and yet ensure that the terms negotiated are generally available. MCI claims that contract tariffs would give the Commission greater ability to supervise interconnection arrangements, but would not require the tariffing of contract details. MCI declares that, by giving CMRS providers more information, it would enable them to negotiate more economically and technically efficient interconnection agreements. Finally, MCI submits that the Section 208 complaint and alternative dispute resolution processes are not satisfactory substitutes for LEC interconnection tariffs.[104]

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[99] *See, e.g.*, GSA Comments at 4-6 and Reply at 7-9; California PUC Comments at 3; New York DPS Comments at 4; MCI Comments at 11-12, Reply at 6; GCI Reply at 3; PRTC Comments at 2-3; Point Comments at 5; Nextel Comments at 15; Time Warner Reply at 7.

[100] Nextel Reply at 11.

[101] Point Comments at 5.

[102] MCI Reply at 9.

[103] *Id.* at 7-8 (citing 47 C.F.R. § 61.55).

[104] MCI Reply at 9.

86. Several CMRS providers, as well as AT&T, Ameritech, and SW Bell, support requiring LECs to make the interconnection agreements that they negotiate with CMRS providers available for public inspection.[105] SW Bell asserts that the same benefits that tariffs provide by publicly disclosing available terms and conditions would be provided by a less burdensome filing requirement in combination with a "most favored nation" clause. SW Bell also suggests that contracts be filed locally, near the relevant market area, with the state regulatory agency. AT&T agrees that this requirement would facilitate the monitoring of LEC interconnection agreements with other carriers. PCIA states that it would inhibit discrimination while preserving flexibility and minimizing regulatory burdens. PCIA also asks that the requirement not include a filing fee and that state filing requirements be deemed sufficient to satisfy this federal requirement. Finally, PCIA asks that contracts not be required to include any information about the particular CMRS provider involved so as not to disclose any competitively sensitive information about that carrier.[106] Parties, primarily LECs, opposing this filing requirement, regard it as an unwarranted burden in terms of adding delay, administrative cost, and reducing the LECs' flexibility.[107]

87. A number of LECs, as well as MCI and PCIA, oppose requiring interconnection contracts to include a "most favored nation" guarantee, because such a guarantee is already provided by statutory requirements against unreasonable discrimination,[108] and would spawn litigation because such guarantees are difficult to interpret and they require discovery to determine compliance.[109] BellSouth alleges that it would limit flexibility, because a LEC willing to compromise on one feature in return for a customer's compromise to forgo a different feature, could be forced by the customer to provide the second feature because other customers had received it.[110] Supporters of a most favored nation clause, including SW Bell and several CMRS providers, argue that it would be less burdensome and inflexible than

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[105] AMTA Comments at 13-14; AT&T Comments at 13; Ameritech Comments at 3; Columbia PCS Comments at 5-7; Comcast Comments at 5-8; Cox Comments at 4-8, 12; Dial Page Comments at 6; GCI Reply at 3; GO (formerly Columbia PCS) Reply at 4-5; Point Comments at 6; RAM Mobile Data Comments at 7-8; Rural Cellular Comments at 9; SW Bell Comments at 64-65 (it might be preferable to file contracts locally with state regulators); UTC Reply at 5-6.

[106] PCIA Comments at 12-13.

[107] APC Comments at 5-6; Bell Atlantic Comments at 15 n.12; BellSouth Comments at 11; CBT Comments at 2-3; GTE Comments at 45; McCaw Comments at 23-24; NYNEX Comments at 12 n.13; SNET Comments at 12-13; Waterway Comments at 8-9.

[108] APC Comments at 5; Ameritech Comments at 3; BellSouth Comments at 11; CBT Comments at 3; GTE Comments at 44-45; NYNEX Comments at 12 n.13; PCIA Comments at 12; Rochester Comments at 9; SNET Comments at 13; Waterway Comments at 9.

[109] GTE Comments at 44 and Reply at 36; MCI Reply at 7-8; PCIA Comments at 12.

[110] BellSouth Comments at 11.

tariffing, but a useful safeguard against discrimination by providing an additional recourse against such conduct.[111] Although Cox supports the proposal to require LECs to file interconnection contracts with the Commission and to include a "most favored nation" clause in the contracts, it contends that these requirements are still not sufficient to prevent against unreasonable arrangements resulting from negotiations. Thus, Cox also proposes that the Commission establish a mechanism for prompt review of LEC interconnection rates upon request of a CMRS provider, which would ensure that the LEC unbundled its network sufficiently and did not include excessive overhead loadings in its rates. Cox states that its proposal preserves the flexibility of a contract-based system, while ensuring that LECs do not stifle competition.[112]

b. Discussion

88. As discussed above, we believe that some involvement in the formation and administration of interconnection arrangements between LECs and CMRS providers would help to counter possible abuses of market power and would help ensure that these arrangements are efficient and advance the public interest.[113] We also have addressed the types of compensation arrangements that we believe would best serve the public interest.[114] We seek more detailed comment on the type of involvement that would be optimal in light of our views on the compensation arrangements. In particular, we ask parties to comment on the interrelationship of the procedural issues addressed in this section to the substantive policy options regarding compensation arrangements discussed above. Some of the substantive options discussed above might make some procedural approaches infeasible, or could make certain protections unnecessary.

89. In considering how to implement our policies regarding interconnection arrangements, we seek to promote arrangements that foster competition and advance economic efficiency and our other goals. We also desire to enable LECs and CMRS carriers to respond rapidly and flexibly to changing interconnection needs. We seek comment on whether an open process in which a LEC and a CMRS provider freely discuss and negotiate a wide variety of interconnection options is preferable to a process whereby the LEC presents the CMRS provider with a limited choice of preset interconnection options. There may be a

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[111] Cox Comments at 12; McCaw Comments at 23-24; New Par Comments at 21-22; Nextel Comments at 16-17; OneCom Comments at 20; RAM Mobile Data Comments at 7-8; Rural Cellular Comments at 9; SW Bell Comments at 64-65.

[112] Comcast Comments at 9; Cox Comments at 7-13. *Accord*, New Par Comments at 22 (LECs must not charge CMRS providers for elements or services that (i) are not needed or wanted by the interconnecting CMRS carrier or (ii) are not charged to interconnecting landline LECs).

[113] *See* paras. 8-14, *supra*.

[114] *See* paras. 59-81, *supra*.

useful purpose in some level of intervention to prevent abuse of market power or unreasonable discrimination. This may be particularly critical in cases in which the parties are unable to negotiate a satisfactory agreement, but may also be valuable as a "backstop" measure even when parties can reach agreement, to prevent unreasonable discrimination against other parties or anticompetitive collusion that might disadvantage consumers.

90. If LECs and CMRS providers were to negotiate interconnection arrangements consistent with the compensation framework discussed above, the public interest would be served while avoiding the need for intervention. As discussed above, however, we believe that optimal compensation arrangements are unlikely to result from purely private negotiations. At least for the near future, there is likely to be an imbalance in negotiating power between the incumbent LECs, which currently possess monopoly power in local exchange markets, and new CMRS providers seeking to enter such markets. The LECs may seek to impose unduly high interconnection rates or other unreasonable conditions that could reduce CMRS entry. Moreover, there is a significant risk that LECs may not offer new CMRS carriers interconnection agreements that are as financially advantageous as those that large and incumbent CMRS providers have already secured. Finally, in cases where LECs and CMRS providers compete directly against one another, there is a significant risk that LECs and CMRS providers could engage in collusive behavior and voluntarily agree to arrangements that would not advance the public interest. Thus, participation in the process by regulators may be warranted for some period of time.

91. An alternative would be a requirement that voluntarily-negotiated interconnection contracts be filed publicly. Such public filing -- either at the Commission (pursuant to Section 211)[115] or at state commissions -- could reduce the LECs' ability to engage in unreasonable discrimination among CMRS providers, although we recognize that such a procedure would not necessarily ensure that arrangements will comply with the substantive standards discussed above. We also seek further comment on possible ways to minimize the burden of such disclosure and protect the confidentiality of LECs' and CMRS providers' proprietary data, while still obtaining disclosure of enough information to advise new entrants about rates, terms, and conditions. Finally, we seek comment on whether filing at a regulatory agency is necessary if the carriers themselves were required to make publicly available relevant, specified information about the agreement upon request.

92. As noted above, even public disclosure of negotiated agreements may not be sufficient to prevent anticompetitive behavior by LECs possessing market power and to ensure that interconnection compensation arrangements are structured in an optimal manner. A more forceful approach would be to require that interconnection arrangements be filed as tariffs. The tariff process is a well-established mechanism for regulatory commissions to protect the public interest by rejecting unreasonable provisions in carriers' offerings. On the other hand, tariffing requirements could entail administrative costs.

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[115] 47 U.S.C. § 211.

93. We tentatively disagree with the position taken by some of the commenting parties that any tariffing requirement would automatically preclude flexible interconnection arrangements. We note that, even in a contractual environment, one party might inflexibly present a limited number of options and refuse to negotiate alternatives; by contrast, even under a tariffing requirement, parties can cooperatively negotiate provisions in a flexible manner. Such provisions can later be incorporated as tariffed options. Thus, tariffed interconnection arrangements need not be "one size fits all." For example, in the *Interexchange Order*,[116] we adopted rules permitting IXCs to offer services pursuant to individually negotiated contracts, but allowed AT&T, then considered a dominant interexchange carrier, to offer contract rates only for services found subject to substantial competition and accorded streamlined regulation.[117] Such tariffs, consisting of certain specific information required by our rules, must be made generally available to similarly situated customers and do not require cost support. In the *Second Further Notice of Proposed Rulemaking* in the LEC price cap performance review proceeding, we invited comment on whether the rules should be changed to allow price cap LECs to offer contract-based tariffs when a service is subject to substantial competition and accorded streamlined regulation.[118]

94. The major difference we see between non-tariffed arrangements and arrangements subject to a contract tariff process is that, in the latter case, the regulator has additional mechanisms to protect against terms that may be unreasonable or unreasonably discriminatory, such as issuing an order for investigation pursuant to Section 205 of the Act. We seek comment on the costs and benefits of amending our rules to permit the use of contract tariffs to implement LEC-CMRS interconnection arrangements. We also seek comment on whether a different form of contract tariffing for LEC-CMRS interconnection would better serve the public interest. For instance, should a special notice period apply to LEC-CMRS interconnection contracts? Should some level of cost showing be required for LEC-CMRS interconnection contracts, unlike contract tariffs generally?

95. In sum, we tentatively conclude that information about interconnection compensation arrangements should be made publicly available in order to foster competition and to advance the public interest. As to what form this information should take -- tariff, public disclosure or other approach -- we seek comment from parties as to the costs and

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[116] *Competition in the Interexchange Marketplace*, 6 FCC Rcd 5880, 5897 (1991); *see* 47 C.F.R. § 61.5(m).

[117] Of course, we have recently determined that AT&T should be classified as a non-dominant carrier with respect to the interstate, domestic, interexchange market. *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427 (released Oct. 23, 1995).

[118] *Price Cap Performance Review for Local Exchange Carriers*, Second Further Notice of Proposed Rulemaking, CC Docket No. 94-1, FCC 95-393 (released Sept. 20, 1995).

benefits of each option, keeping in mind the goals of promoting economic efficiency through competition and negotiating flexibility.

2. Jurisdictional Issues

a. Statutory Background

96. In the 1993 Budget Act,[119] Congress fundamentally changed the regulatory framework for CMRS. The statutory plan that Congress adopted clearly indicates its intention to promote an economically vibrant and competitive nationwide market for commercial mobile radio services. In addition to providing more spectrum and authority to assign the spectrum rapidly through auctions, Congress also expressed its preference for rapid deployment of wireless technologies.[120] As the House Report states: "The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[121] Pursuant to this Congressional directive, we found, in the *CMRS Second Report*, that nationwide commercial mobile radio service would likely stimulate nationwide economic growth and job creation, as well as the health of the U.S. economy. We also concluded that nationwide development of CMRS would upgrade the nation's telecommunications infrastructure and help ensure access by all Americans to the nation's information superhighway.[122]

97. A number of provisions in the Communications Act of 1934, as amended, *inter alia*, by the 1993 Budget Act, are relevant to the extent of our jurisdiction over LEC-CMRS interconnection. Section 1 declares that the purpose of the Act is "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ."[123] Section 2(a) grants the Commission jurisdiction over all interstate communication by wire or radio, while Section 2(b) generally reserves to the states jurisdiction over

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[119] *See supra* ¶ 20 & n.13.

[120] Budget Act, § 6002(a), amending Section 309 of the Communications Act; *see Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, Report and Order, 10 FCC Rcd 7486, 7496-97 (1995).

[121] House Report on H.R. 2264 at 261 (1993).

[122] *CMRS Second Report*, 9 FCC Rcd at 1419-22.

[123] 47 U.S.C. § 151.

intrastate communication service by wire or radio of any carrier.[124] In the 1993 Budget Act, Congress added an exception to Section 2(b), so that the section now provides:

> Except as provided in sections 223 through 227, inclusive, *and section 332*, and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, service, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . . (Emphasis added.)

Section 332(c)(3), also added in 1993, provides in relevant parts:

> Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service. . . . Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service . . . . If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary . . . .

Section 332(c)(1)(B) provides:

> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

b. Positions of the Parties

98. Many wireless carriers argue that the Commission can and should establish uniform policies governing all LEC-CMRS interconnection. McCaw argues that, to ensure the continued development of a seamless national wireless infrastructure, there needs to be a

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[124] These provisions generally have been interpreted "to define a national goal of the creation of a rapid and efficient phone service, and to enact a *dual* regulatory system to achieve that goal." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986)(emphasis added).

single set of rules for physical interconnection and interconnection compensation. New Par states that, to avoid hindering the rapid deployment of CMRS technologies, the Commission must now clarify that, with respect to the basic principles of CMRS interconnection, federal policy preempts all inconsistent state regulation. Columbia PCS asserts that it will be increasingly difficult to ascertain the jurisdictional nature of traffic given the automatic roaming capabilities that are being developed. These parties contend that, at a minimum, the Commission should declare that the principles of reciprocal compensation and "good faith" negotiations apply to intrastate as well as interstate traffic.[125]

99. Century Cellnet maintains that the Commission's fundamental holding that CMRS providers are co-carriers, and as such are entitled to reasonable interconnection following good faith negotiations, applies without regard to the jurisdictional nature of the traffic. While Century states that the levels of compensation for intrastate traffic may generally be left to the states, it insists that, even there, the Commission would have authority to take action if the compensation levels set served to impede interstate interconnection.[126] PCIA states that both the *CMRS Second Report* and the Commission's implementing regulations affirmatively specify that mutual compensation is required, without differentiating between interstate and intrastate traffic.[127] PCIA contrasts this to other sections of the rules and order which explicitly apply only to interstate aspects of interconnection. It concludes that mutual compensation is an inherent part of reasonable interconnection and good faith negotiations, which are solely within the Commission's jurisdiction.[128]

100. Both Cox and Comcast strongly argue that the Commission has exclusive jurisdiction over the rates and terms of both interstate and intrastate interconnection between CMRS providers and LECs pursuant to the 1993 Budget Act amendments to Section 332(c) and 2(b) of the Act.[129] Cox and Comcast state that before these amendments, the

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[125] *See, e.g.*, APC Comments at 4; Columbia PSC Comments at 5-7; McCaw Comments at 25-26; New Par Comments at 21-22; Nextel Reply Comments at 13; PCIA Comments at 14; Century Cellnet Reply Comments at 17.

[126] Century Cellnet Reply Comments at 17.

[127] PCIA Comments at 14-15 (citing *CMRS Second Report*, 9 FCC Rcd at 1498 ¶ 232 and App. A at 1520 (codified at 47 C.F.R. § 20.11(b)).

[128] PCIA Comments at 14-15.

[129] *See Ex Parte* Letter from Werner K. Hartenberger, Leonard J. Kennedy and Laura H. Phillips, Counsel for Cox Communications, to Mr. William F. Caton, Secretary, Federal Communications Commission, filed October 16, 1995 ("Cox Memorandum"); *Ex Parte* Letter from Leonard J. Kennedy, Laura H. Phillips and Peter A. Batacan, attorneys for Comcast Cellular Communications, Inc., to William F. Caton, Acting Secretary, Federal Communications Commission, filed October 19, 1995 ("Comcast Memorandum").

Commission was denied jurisdiction over intrastate telecommunications that were severable from the interstate portion or did not conflict with a federal policy, as required under *Louisiana PSC*.[130] They contend, however, that the Budget Act amended Sections 332(c) and 2(b) and superseded *Louisiana PSC* with respect to state jurisdiction over intrastate CMRS rates. Moreover, Cox and Comcast argue that Section 2(b), as amended, dictates that the substantive provisions of Section 332 determine the Commission's jurisdiction over CMRS, and that this section grants the Commission sole authority to regulate all interstate and intrastate rate and entry aspects of CMRS.[131] According to Cox and Comcast, Congress inserted a reference to Section 332 (giving the Commission authority over CMRS) into Section 2(b)'s initial clause, which provides exceptions to Section 2(b)'s general exclusion of the Commission's jurisdiction over intrastate telecommunications. Cox and Comcast argue that 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) . . .", shows that states are preempted from regulating intrastate CMRS rates and entry without regard to any residual jurisdiction a state may claim under Section 2(b) of the Act.[132] In addition, Cox notes that, although Section 332 does allow states to regulate "other terms and conditions" of CMRS, the legislative history indicates that this phrase refers to customer billing information and practices and billing disputes and other consumer protection matters, not mutual compensation or other matters relating to reasonable and nondiscriminatory interconnection, over which the Commission retains jurisdiction.[133] Comcast also cites the language in the legislative history of Section 332 which states that the preemption provisions of Section 332 are intended to "foster the growth and development of mobile services that by their nature, operate without regard to state lines" as support for the proposition that CMRS is a jurisdictionally interstate service.[134]

101. Cox and Comcast argue that Section 332, by preempting state rate and entry authority over CMRS, reserves to the Commission jurisdiction to "occupy the field" of substantive CMRS regulation.[135] In addition, they submit that Section 332(c)(1)(A), which authorizes the Commission to forbear from enforcing any provision of Title II (with certain exceptions) that the Commission determines are not necessary to ensure that the charges and classifications for CMRS are nondiscriminatory, Section 332(c)(1)(C), which directs the

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[130] *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 372-376 (1986)("*Louisiana PSC*").

[131] Cox Memorandum at 4-5, Comcast Memorandum at 7-8.

[132] *See* 47 U.S.C. § 332(c)(3)(A). Cox Memorandum at 6, Comcast Memorandum at 9.

[133] Cox Memorandum at 6 (citing H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 260).

[134] Comcast Memorandum at 11-12 (citing H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 260).

[135] Cox Memorandum at 7; Comcast Memorandum at 9.

Commission to conduct "annual reports" reviewing competitive market conditions regarding CMRS, and Section 332(d), which delegates to the Commission the authority to define key terms relating to CMRS, confirm that the overall design of the statute is to vest the Commission with jurisdiction over CMRS.[136] These parties add that the Commission's jurisdiction is also supported by Section 332(c)(3)(A), which they contend grants the Commission sole authority over CMRS unless and until a state files a petition for rate regulation authority and the Commission approves such a petition.[137]

102. Comcast contends that a review of the Budget Act and legislative history also confirms the Commission's sole authority over interconnection between CMRS providers and LECs, because these provisions emphasize the interstate and nationwide nature of the wireless communications network, and because the rates and conditions of interconnection to landline LEC networks are essential to the rapid and competitive buildout of the wireless network.[138] Furthermore, Comcast states that, because the Budget Act expressly grants the Commission sole authority to define 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 -- historically known as the gatekeepers to the PSTN.[139]

103. Moreover, Cox and Comcast claim that, even if the purpose of the Budget Act amendments were not clear, the Commission and the courts have consistently held that jurisdiction over telecommunications services is to be determined by the nature of the communications, rather than the physical location of the facilities.[140] Because CMRS is part of an interstate "network of networks," Cox argues that CMRS calls are inherently interstate and thus subject to exclusive Commission jurisdiction, regardless of any local or intrastate

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[136] Cox Memorandum at 7-8, Comcast Memorandum at 9-10.

[137] Cox Memorandum at 8, Comcast Memorandum at 9.

[138] Comcast Memorandum at 12-13.

[139] Comcast Memorandum at 13 (citing 47 U.S.C. § 332(d)).

[140] Cox Memorandum at 9-11; Comcast Memorandum at 15-17 (citing Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C. 2d 413, 417 (1974)(Commission has exclusive jurisdiction over rates, terms and conditions associated with interconnection to intrastate facilities when local facilities are an essential link in interstate and foreign communications services); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981)(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)); Comcast Memorandum at 14 (citing Public Utility Com'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989)(where federal and state regulation conflicts, to avoid duplication of networks and equipment for interstate and intrastate use, federal interconnection policies must prevail)).

aspects of LEC-CMRS interconnection rates.[141] Thus, Cox and Comcast conclude that the Commission's conclusion in the *CMRS Second Report* that Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates is inaccurate and that this statement must be clarified to conform with the Commission's actual exclusive jurisdiction to adopt uniform federal policy governing the rates, terms and conditions associated with CMRS interconnection.[142]

104. Willkie Farr and Gallagher ("Willkie Farr") also submitted a memorandum supporting the argument that the policy goals and preemption provisions of Section 332 provide the Commission with the authority, if not the obligation, to preempt state regulation of LEC-CMRS interconnection compensation rates.[143] Specifically, Willkie Farr argues that, in revising Section 332, Congress intended to promote a uniformly-regulated, efficient and competitive CMRS market, and thus it charged the Commission with implementing regulatory policies to achieve these goals.[144] Willkie Farr submits that the language of Section 332(c)(3)(A), which clearly prohibits state regulation of the rates charged by CMRS providers and CMRS entry, "by its very nature" comprehends intrastate interconnection compensation charges negotiated between LECs and CMRS providers, because the rates charged by CMRS providers for completing LEC traffic are rates charged by a CMRS provider.[145] Willkie Farr adds that states may not directly or indirectly impede entry, either entirely or partially, such as through added cost or delay, by their regulation of LEC-CMRS interconnection compensation rates.[146] Willkie Farr contends that Congress' action to preempt entry regulation for mobile services represents a fundamental shift in policy from Section 2(b) of the Act, and that, under a strict reading of Section 2(b), states no longer "retain jurisdiction over purely intrastate calls notwithstanding the economic effect such state jurisdiction might have on the interstate market."[147] As an alternative basis for preemption, Willkie Farr argues that, under the exception to Section 2(b) of the Act, the Commission may preempt state regulation that would negate the legitimate exercise of the Commission's

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[141] Cox Memorandum at 9-11.

[142] Cox Memorandum at 12; Comcast Memorandum at 17-19.

[143] *Ex parte* Letter from Philip L. Verveer and Jennifer A. Donaldson to Ms. Karen Brinkmann, Special Counsel for Local Competition, Common Carrier Bureau, Federal Communications Commission, dated October 27, 1995 ("Willkie Farr Memorandum").

[144] *Id.* at 4-6.

[145] *Id.* at 7.

[146] *Id.*

[147] *Id.* at 7 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1500 (D.C. Cir. 1984)).