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

In the Matter of:	)	
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket 95-185
	)	CC Docket No. 94-54
Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services Providers	)	

COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

The Federal Communications Commission proposes to replace negotiated compensation arrangements between LECs and CMRS providers with a federally imposed "bill and keep" regime. Even on an interim basis, this proposal amounts to a billion dollar give away to CMRS providers at the expense of LEC basic exchange customers.

1. The Commission's "Bill and Keep" Proposal Usurps the Role of the States and Leaves Them To Cope With a Billion Dollar Problem.

Congress chose the states to oversee the interconnection negotiation process for the competitive provision of local exchange services. Under the 1996 Telecommunications Act, the states are responsible for determining if interconnection agreements are in the public interest, and must arbitrate any issues upon which the parties cannot agree. Section 252 guides the states in dealing with compensation rates for interconnection, and that guidance, like the Commission's existing rules, is based upon cost recovery.

Congress' decision to give the states the preeminent role in intrastate interconnection is sound public policy, in part because the interconnection revenues LECs receive from CMRS providers are almost exclusively intrastate. They are factored into the rates -- and the rate design -- for all other intrastate offerings. If it were to adopt a mandatory bill and keep proposal, even on an interim basis, the Commission would not only usurp the states' perogative. It would leave the states with a billion dollar problem to be made up from other intrastate sources.

2. The Commission's Proposal is Based on Flawed Economic Premises.

A 1993 Commission staff analysis estimated LECs' average interconnection costs to be one cent per minute -- ten times the average incremental cost of 0.2 cents per minute that the Commission uses here. (And much closer to USTA's own average cost estimate of 1.3 cents per minute.) Not only does the Commission use the wrong cost measure here, it masks the issue of busy hour costs (which are estimated to be 2.1 cents per minute) by assuming them away and averaging them with costs that are purportedly zero.

The simple fact is that providing interconnection and termination of traffic to CMRS providers causes LECs to incur costs, and it is wrong to give these interconnectors a free ride. Bill and keep is not sensible because the traffic flow between CMRS and LEC networks is very much out of balance (80/20) and it will remain so. CMRS customers are charged for incoming calls and are thus reluctant to publicize their number, and many cellular phones are "off" most of the time to conserve battery life. They are turned on only to make calls. These practices will continue regardless of what is decided in this proceeding.

3. Even if the Commission Could Legitimately Favor One Class of LEC Competitor Over Others, Favorable Interconnection Treatment Will Not Make CMRS Services More Competitive with Local Exchange Service.

Cellular companies charge their customers an average of about 38 cents per minute. Only eight percent of that amount is for LEC interconnection. Thus, if CMRS providers were to pass on every dollar of savings realized from a bill and keep arrangement, the average charge to their customers would go down to about 35 cents per minute. Comparing this price to the flat rate local price typically offered by a LEC, a customer is unlikely to utilize a CMRS service as a full substitute for local exchange service, or even to alter present CMRS calling patterns. And of course, CMRS providers are under no regulatory obligation to pass any of the cost savings along to customers.

The bill and keep proposal is an attempt to pick CMRS providers as the "winners" in the local exchange market before the process Congress envisions even begins. The Commission would give CMRS providers, and only CMRS providers, the power to unilaterally demand bill and keep interconnection arrangements. Ironically, this favorable treatment is of limited utility because the driver of CMRS prices is not LEC interconnection rates. No individual CMRS provider has filed a complaint with the FCC about LEC interconnection rates, and indeed many have expressed preference for negotiated interconnection rather than tariffed terms and conditions. That being said, it is understandable for CMRS providers to support a proposal that gives them something for nothing, particularly a unique and significant advantage on a key term. But that does not mean that a bill and keep proposal is in any way good public policy, even on an interim basis. The Commission should not adopt mandatory federal rules regarding reciprocal compensation nor impose "bill and keep" as a temporary or permanent solution.

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The United States Telephone Association (USTA) hereby submits its initial comments on the above-referenced Notice of Proposed Rulemaking ('"Notice"). USTA is the principal trade association of the local exchange carrier industry, with over 1100 members. The companies who comprise USTA's membership each provide a wide variety of telecommunications services, including local exchange and access services, wireless services, video programming and long distance telecommunications.

INTRODUCTION

Like all other telecommunications providers, USTA's membership is enthusiastic about the opportunities to expand into new markets and grow their businesses under the framework established by the revisions to the Communications Act of 1934 adopted by Congress in the Telecommunications Act of 1996. Certainly one of the important questions to be resolved in conjunction with this transition to a competitive environment for all telecommunications services is the proper pricing of interconnection services, and arrangements for mutual compensation between network providers. Resolution of these issues for the local exchange, through the framework mandated by Congress, requires a cooperative effort on behalf of state regulators, the Commission, and interconnectors.

Congress, through the Telecommunications Act of 1996, has concluded that the terms and conditions of interconnection should be developed through negotiated arrangements and not imposed by regulators. To the extent that regulatory oversight is needed, the legislated framework contemplates that state regulators should exercise primary authority over intrastate interconnection arrangements. This is particularly appropriate in the case of interconnection and compensation arrangements between LECs and Commercial Mobile Radio Service Providers (CMRS), where the vast majority of the traffic is intrastate in nature. Accordingly, this Commission must recognize that mandatory federal rules which preclude negotiated arrangements, unreasonably discriminate in favor of CMRS providers, or require parties and/or states to adopt a specific interconnection pricing methodology, even on an interim basis, would be fundamentally inconsistent with the intent of Congress.[1]

While the Notice is quite thorough in its treatment of various pricing methodologies, Notice, paras. 42-58, and requests comment on a number of approaches for pricing interconnection services, Notice, paras. 66-81, USTA's comments do not propose a single "best" solution, mindful of the fact that Congress has directed that these questions are to be addressed by the parties engaged in negotiations, who may determine to implement a variety of solutions. Cf. Notice, para. 24 (noting different solutions approved by various state commissions). USTA's members intend to work cooperatively with LEC competitors, state regulators and with the Commission to fulfill this Congressional mandate, including the list of LEC obligations set forth in Sections 251 and 252. To the extent this Notice and the comments submitted in response represent a thorough discussion of many issues which will be faced in this process, the record developed will be helpful.

Unfortunately, this Notice also demonstrates that LEC competitors have apparently already begun the drumbeat of accusations that telephone companies have "regularly opposed attempts by

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[1]Congress requires that the Commission adopt regulations to implement the interconnection section of this law by August 1996. Section 251 (d). Given this time frame, it makes little sense to consider further any proposals for an "interim plan," to be implemente at about the same time as the Commission adopts more comprehensive interconnection rules.

CMRS providers to enter the market as full-fledged competitors to the landline network." Comments of AT&T Wireless on Request of US West for Limited Waiver of Section 22.903, February 2, 1995, at 3, n.7 (citing the Notice, paras. 2, 27). Nothing could be further from the truth. LECs are complying with existing FCC requirements, are participating in the numerous state commission proceedings concerning local competition, and actively supported the federal legislation which eliminated all barriers to competitive local entry. But pricing of interconnection arrangements and mutual compensation for CMRS providers must be dealt with comprehensively, including the collective responsibility of all telecommunications providers to maintain universal service. See Telecommunications Act of 1996, Section 254(b)(4). It is with this understanding that USTA makes the following comments on the proposals set forth in this Notice.[2]

I. The Notice Is Apparently Premised on Two Goals, Neither of Which Requires Action By the Commission

The Notice is apparently premised on two goals: 1) addressing alleged abuses of market power by incumbent LECs, or at least the theoretical possibility that such abuses would occur; and 2) reducing the cost of certain inputs utilized by CMRS providers, with the hope that passing on those cost reductions in the form of lower rates for CMRS services will lead to greater penetration into the local exchange services market. Even apart from the fact that Congress has mandated a particular regime to address these issues, see Section II. infra, there are no grounds for Commission action in either of these two areas.

LECs have negotiated numerous interconnection arrangements with CMRS providers which are satisfactory to both parties, and which comply with the requirements adopted in the

[2]The following comments therefore oppose many of the Commission's tentative conclusions, particularly that the Commission has authority to mandate a "bill and keep" arrangement, and that such a "bill and keep" arrangement will not violate LECs' legal rights. Even so, USTA is not unmindful of the importance of affording just and reasonable interconnection elements to LEC competitors. And, as the Notice details in paras. 42-59, the question of developing appropriate prices for these elements in a competitive environment is a difficult economic issue, with no simple, easy answers.

Commission's CMRS Second Report and Order.[3] The Notice recites no formal complaints or other evidence, and in fact states that "most LECs and cellular carriers say they are satisfied with the current process." Notice, para. 83. LECs also face competition for interconnection customers from other access providers. As the already strong CMRS industry continues to grow even stronger at phenomenal rates, and as the ability to interconnect becomes more important in the modern telecommunications marketplace, competition for the volume of interconnection services needed by CMRS providers will continue to put pressure on LEC prices for interconnection. See Notice, para. 8; see Attachment A, Rohlfs, Shooshan and Monson, "Bill-and-Keep: A Bad Solution to A Non-Problem," Strategic Policy Research ("SPR Study"), at 21.

CMRS providers' ability to compete for customers of local exchange services is not hampered by existing interconnection policies. Interconnection is not a significant component in the cost structure of CMRS providers. Accordingly, providing CMRS providers with free interconnection on an interim basis will do little in the way of increasing the penetration of their service as a substitute for local exchange service. At best, it will provide a small discount to CMRS subscribers, at the expense of LEC subscribers. At worst, it will operate in the aggregate as a billion dollar giveaway to the CMRS industry.

A. Present Interconnection Policies Providing for Negotiated Arrangements, Subject to State Oversight, Are Sufficient to Ensure that CMRS Providers Obtain Interconnection At Just and Reasonable Rates.

1. Present Negotiated Interconnection Arrangements Do Not Violate the Mutual Compensation Rule

It appears that an important premise of the Commission's tenative conclusions are "disturbing reports," that LECs are not currently complying with the existing requirement for mutual compensation between wireline LECs and cellular carriers. See Separate Statement of

[3] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1497-98 (1994)("CMRS Second Report and Order").

Commissioner Susan Ness, at 1; see also Notice, para. 81 ("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.").

This is a misrepresentation of the Commission's mutual compensation requirement. The mutual compensation requirement adopted by the Commission in the CMRS Second Report and Order specifies that "LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities. Commercial mobile service providers, as well, shall be required to provide such compensation to LECs in connection with mobile-originated traffic terminating on LEC facilities." CMRS Second Report and Order, 9 FCC Rcd at 1498, para. 232.; see Notice, para. 27.

The mutual compensation standard thus requires mutual recovery of costs - it does not specify that the net result of the arrangement must be that LECs compensate CMRS providers by remitting direct cash payments.[4] Rather, LECs and CMRS providers may negotiate mutually acceptable terms whereby the LEC compensates the CMRS provider for terminating LEC-originated traffic through a reduction in the rate it would otherwise charge the CMRS provider for terminating CMRS-originated traffic. For example, rather than an arrangement whereby the LEC charges the CMRS provider 4 cents per minute, while a CMRS provider charges the LEC 2 cents per minute. the parties may choose an arrangement whereby the LEC charges the CMRS provider 2 cents per minute, and the CMRS provider does not charge the LEC for terminating LEC-originated calls. Neither arrangement violates the mutual compensation rule.

Negotiated mutual compensation arrangements may also take note of the fact that CMRS providers charge their subscribers for originating calls on their networks (as well as for terminating

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[4]Indeed, if cash payments were required by mutual compensation, a bill and keep system could be found to be inconsistent with the mutual compensation requirement.

calls), while LECs generally assess no extra charges on their subscribers who call a CMRS subscriber. CMRS providers are thus better able to recover their costs of interconnection directly from their subscribers, while LECs simply cannot under the current regulatory regime.[5] The mutual compensation standard of mutual cost recovery does not preclude the parties from considering this fact in negotiating interconnection arrangements.[6] Finally, the per-minute interconnection rate negotiated between the parties may represent other services of value provided by LECs to CMRS providers, e.g. operator services, SS7 connectivity, favorable trunking arrangements, directory assistance, etc. This may explain why the Notice identifies no report, allegation or comment stating that CMRS providers are not recovering their costs - only allegations that " wireless providers are required to pay the LECs for delivering calls which originate on mobile phones ... LECs pay wireless carriers nothing." Statement by Thomas E. Wheeler, President, CTIA, December 1995. In fact, LECs do not "pay wireless carriers nothing," wireless carriers receive interconnection at just and reasonable rates through arrangements, negotiated by the CMRS provider, which permit them to recover any costs associated with terminating calls on the CMRS network.

The Notice notes that CMRS providers may file complaints under Section 208 of the Act if a LEC discriminates in providing interconnection to mobile service providers. Notice, para. 81. Similarly, CMRS providers could file a Section 208 complaint for alleged violations of the mutual

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[5]Notably, LECs are not free to alter the rates they charge their own subscribers. These rates are subject to extensive regulation, while the rates for CMRS providers are by law unregulated. See 47 U.S.C. § 332(c). Similarly providing for recovery of LECs'costs must recognize that LECs' costs reflect regulatory obligations to provide universal service which are not imposed on CMRS providers or other competitors.

[6]As discussed below, see Section III, infra, the Notice is therefore incorrect to conclude that a bill and keep requirement would not deprive LECs of an opportunity to recover costs incurred to terminate traffic originating on the CMRS network, since LECs could recover the costs from their own subscribers. Notice, para. 62. Were recovery under "bill and keep" to require that LECs begin imposing charges on the recipient of a CMRS call to reflect the additional cost of the CMRS traffic or recover the costs from other network users, such recovery would prove to be impossible, particularly where state commissions have frozen local rates. Such a "bill and keep" requirement would likely be considered confiscatory.

compensation rule, since that rule stems from the LECs' common carrier obligation to interconnect with other carriers under Section 201, 47 U.S.C. § 201; see, e.g., CMRS Second Report and Order, 9 FCC Rcd at 1497.[7]

Although the Notice requests comment on whether the complaint procedure is inadequate, Notice, para. 81, neither the Notice nor the present record provides any evidence that any complaints have even been filed. Moreover, the allegations made by the parties cited in the Notice, paras. 26-30 include no explanation of why the complaint procedure is inadequate to address any actual rule violations. Nor is there any evidence that state regulatory commission's complaint proceedings are inadequate to resolve issues. We agree with the Commission that reports of possible violations of the mutual compensation rule are "disturbing," particularly where these reports either missrepresent the rule at issue or are factually incorrect.

2. Negotiated Interconnection Arrangements Are Preferred by Parties And Do Not Require Federal Intervention

The issue here is not whether LECs should be required to tariff their interconnection arrangements or otherwise make them publicly available, see Notice, para.82. The Telecommunications Act of 1996 provides that interconnection arrangements may be submitted to state regulators for approval, and made them publicly available. Telecommunications Act of 1996, Section 252(e). LECs members will comply with appropriate state commission regulations requiring interconnection arrangements to be publicly disclosed. Rather, the issue is whether there is a need for federal intervention in the negotiation process. There is no need for federal intervention. The Commission's apparent belief that "the status quo is problematic," see Separate Statement of Commissioner Rachelle B. Chong at 1, is belied by the Notice itself - "most LECs and cellular

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[7] LECs take these obligations extremely seriously. LECs are well aware that the Commission's forfeiture authority provides for substantial penalties for common carrier violations. See 47 U.S.C. § 503(b)(2)(B). Carriers may be required to pay damages for violations of the common carrier obligations of the Communications Act. See 47 U.S.C. § 206.

carriers say they are satisfied with the current process." Notice, para. 83.

CMRS carriers prefer negotiated arrangements to tariffs because it permits them to develop unique arrangements which meet their needs and minimize their interconnection costs. See, e.g., Comments of CTIA, CC Docket 94-54 (September 12, 1994), at 20-21(noting the advantages of negotiated arrangements, and stating that "[u]niform tariffing requirements necessarily restrict the ability of LECs and CMRS providers to adapt to changing market and technological conditions"); Notice, para. 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 . . .[and] argue that contractual negotiation is superior to tariffed interconnection, because it permits the greater flexibility needed to respond rapidly to changing interconnection needs." Notice, para. 83; see also ex parte letter from Michael W. Bennett, Director Federal Regulatory, SBC Communications, Inc., December 8, 1995 (providing evidence that negotiations permit CMRS providers to negotiate unique interconnection arrangements to best suit their network needs and minimize their interconnection charges)("SBC December 1995 ex parte").

Of course, CMRS providers might also prefer that the Commission intervene to give those parties additional bargaining leverage, see, e.g., Notice, para. 28 (wireless providers suggest, inter alia, that the Commission require LECs to compensate CMRS carriers at symmetrical rates, for a percentage of the fixed line rates charged to CMRS carriers, and to recognize the greater leverage that large CMRS providers have compared to smaller firms). But there is no evidence that such intervention is necessary. In fact, the evidence suggests that many CMRS providers possess substantial financial resources and carry significant levels of traffic such that they possess ample bargaining leverage.[8]

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[8]Many CMRS providers not only possess substantial financial resources, but are affiliated with large providers of other telecommunications services, e.g. AT&T/McCaw, Sprint Telecommunications Venture, Bell Atlantic/NYNEX Mobile, AirTouch/USWest. The PCS industry collectively bid over $8 billion for PCS licenses (bid amounts which were determined

As noted in the SBC December 1995 ex parte, Southwestern Bell Mobile Services (SBMS) has been able to obtain satisfactory interconnection arrangements with other LECs in the many areas where it provides CMRS services.[9] To the extent that regulatory oversight of these negotiations may at all be needed, recently enacted legislation addresses these concerns. The legislation provides that any telecommunications provider negotiating interconnection arrangements with incumbent LECs may request that a state Commission mediate the negotiations, and can even submit open issues to their state commission for arbitration. Telecommunications Act of 1996, Section 252(a)(2); Section 252(b). Additionally, the Commission already has rules in place which prohibit unreasonable discrimination between requesting CMRS providers. See CMRS Second Report and Order, para. 234; see also Telecommunications Act of 1996, Section 252(i)(Local exchange carriers shall make available any interconnection service provided under an agreement approved under this section, to which it is a party, to any other requesting interconnector on the same terms and conditions). Thus, there is simply no need for a federally mandated "interim" plan to protect CMRS providers regarding negotiated interconnection arrangements.

B. Commission Intervention is Not Necessary to Promote the Development of CMRS as a Competitive Provider of Local Exchange Services

There are several indications in the Notice that the Commission is not merely attempting to ensure that CMRS providers are able to obtain just and reasonable rates for interconnection, but to engineer interconnection rates which facilitate the evolution of CMRS service offerings as a substitute for traditional landline local exchange services. See, e.g., Notice, para. 1-3. The Notice states "our interest in facilitating the competitive development of CMRS" may justify different

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on the basis of existing interconnection policies). The Commission has also noted the substantial resources of the cellular industry, relative to PCS. See, e.g. Separate Statement of Commissioner Andrew Barrett, GEN Docket 90-314, Memorandum Opinion and Order, FCC 94-144 (June 13, 1994) (noting that cellular entities have a cumulative revenue stream of approximately $10-12 billion dollars and are experiencing customer growth of up to 40%).

[9] SBMS also has negotiated arrangements with access providers other than the incumbent LEC, e.g. Teleport in Boston. See SBC December 1995 ex parte, at 4.

treatment of CMRS interconnection from other forms of functionally equivalent interconnection. See Notice, para. 77. This approach represents "industrial policy" of the worst sort - public policy which sends distorted economic signals, and inserts governmental preferences for market preferences.[10] Any action to eliminate barriers for CMRS competition with traditional LECs must avoid discriminating against other potential competitors. The only appropriate method to achieve these goals is to adopt comprehensive guidelines governing interconnection, as specified in Section 251(d)(1), and to quickly address other issues related to local competition.

The Notice states that the Commission's goal is to create or replicate market-based incentives, and that functionally equivalent services should be available to all classes of consumers at the same prices, unless there are cost differences or policy considerations that justify different rates. Notice, para. 4. This premise is consistent with the market-based framework of negotiated interconnection arrangements contemplated in the Telecommunications Act of 1996. However, in a market-based regulatory system, there is no meaningful policy basis other than cost differences, which would justify different rates charged to commercial telecommunications carriers.[11] Policy goals such as "facilitating the competitive development" of one class of competitors, see Notice, para. 17, have no meaning in a market-based system. Having enacted into law a market-based system, where the regulator's function (primarily state regulators in this case) is simply to prevent distortions in the market-based system, Congress implicitly precludes the states or the Commission from enacting rules which favor certain classes of competitors based on "public policy" considerations unrelated to cost.

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[10]Governmental preferences, in addition to distorting market signals, also have the risk that the award of such preferences may be determined by political considerations. See, e.g. Separate Statement of Commissioner Ervin S. Duggan, GEN Docket 90-314, 9 FCC Rcd 1337, 1377 (1993).

[11]Congress and the Commission have long recognized that there may be a policy basis for different rates charged to entities who do not compete in the marketplace, but provide valuable public services, e.g. educational institutions and health care providers. See, e.g., Telecommunications Act of 1996, Section 254(h).

Giving wireless competitors, as a class, preferential treatment would create marketplace distortions. The economist on which the Commission relies for its "bill and keep" proposal states that the interconnection rules governing traffic to and from LEC networks should not be dependent on technology and should apply to both wireline and wireless services. Notice, para. 32, citing Brock-Comcast paper at 2-6. One of the most severe distortions which could occur would be for other types of telecommunications providers to engage in arbitrage, and redirect their traffic through the facilities of their wireless affiliates. Free LEC interconnection would also inhibit market entry by providers seeking to provide competitive access services to CMRS providers. Similarly, interconnection charges cannot be addressed without also considering the process for eliminating the subsidies embedded in many LEC rates, and establishing a separate, explicit mechanism to ensure universal service, as contemplated by legislation. Telecommunications Act of 1996, Section 254. Regulators cannot consider interconnection of CMRS local competitors in a vacuum.

USTA supports the development of regulatory policies which intelligently facilitate the transition to a competitive local exchange market. For example, USTA is on record in support of reforming the pricing of interstate access services to eliminate barriers to competition created by economically incorrect pricing signals. See, e.g., Comments of USTA, CC Docket 94-1, Second Further Notice of Proposed Rulemaking (December 11, 1995)(USTA advocates changes to current access charge rules to permit economic pricing). Many USTA members, or their affiliates, are CMRS providers. USTA recognizes that these CMRS providers may evolve into robust competitors for local exchange services, and supports this evolution.[12] Consistent with recently enacted legislation, USTA agrees that regulatory barriers to this evolution should be eliminated.

However, there is no basis for targeted regulatory action to facilitate the development of one type of competitor, particularly CMRS providers, who are seen by many analysts to already have unique advantages in this regard. See, e.g., Investor's Business Daily, February 21, 1996, at A8;

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[12] Additionally, LECs are experiencing competition in the local exchange service market from a variety of other industries - interexchange providers, cable television providers, and competitive access providers.

New York Times, February 26, 1996, at D1. As explained in greater detail in the attached SPR Paper, the wireless business is healthy and growing quickly. See SPR Paper at 14-20. Moreover, the Commission's proposal ignores the fact that providing CMRS providers with free interconnection eliminates only about 8-10% of the cost of a minute of wireless usage. See SPR Paper at 12; see also Letter from CTIA President Thomas E. Wheeler to The Hon. Reed Hundt, November 20, 1995, at 2 ("approximately 10 percent of the cost of an incremental 35 cent minute of wirelss usage is payment to the LEC"). As SPR explains, the robust growth of the cellular industry is impossible to reconcile with the premise that these interconnection charges constitute a burden to the CMRS industry. Rather, the price of CMRS service is largely unrelated to interconnection charges. SPR Paper at 12.

1. The Commission Should Not Distort Market Signals Regarding Entry Into the Local Exchange Services Market

The Commission's goals with respect to interconnection should not go beyond ensuring that all parties requesting interconnection can obtain such interconnection on just, reasonable and non-discriminatory terms. To the extent that the cost structure of CMRS services is such that CMRS is not yet a viable competitor for traditional LEC services even where CMRS providers are obtaining reasonable, cost-based interconnection rates, attempting to adjust the interconnection input to that cost structure because of cost burdens unrelated to interconnection, e.g. auction price of a PCS license, cost of relocating incumbent microwave users, costs of obtaining tower space for cell sites, does not represent coherent public policy or economically sound regulation.[13]

USTA's LEC members have no incentive to be "intransigent" when it comes to the introduction of local competition, See Notice, para. 30 (citing Comments of Cox Communications). USTA supports economically meaningful efforts to eliminate regulatory, legal, and pricing barriers

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[13]As discussed in Section IV, infra, such distortion is particularly inappropriate given the extensive analysis and investment undertaken by other local exchange competitors, e.g. IXCs and CAPs, who have recently announced that they are negotiating interconnection arrangements and have made public announcements regarding extensive entry into the local exchange services market. See, e.g., News Release of AT&T, February 8, 1996.

to entry. Free interconnection, even on an interim basis, for one class of providers is not necessary to eliminate such barriers for CMRS providers, and is inconsistent with the goals of the Notice because it will send distorted signals to other non-CMRS competitors. See, e.g., Notice, para. 10 ("[P]roper pricing will send economically efficient signals to firms to decide whether the costs of interconnection in a particular case or less or greater than the benefits of interconnection").

2. Federal Regulation of Interconnection Costs Does Not Address the Main Barriers Preventing CMRS Services From Becoming Substitutes for Local Exchange Services.

To the extent that Commission is concerned with the pricing of PCS services, first indications are that such services will be priced competitively with cellular. And so, as with cellular, free interconnection for PCS providers would not substantially reduce their retail prices. The price charged by CMRS providers to end users is generally not dependent upon interconnection costs. See, e.g., Sprint Spectrum Pricing Guide (copy attached) (offering rates of between 31 and 25 cents per minute for calls placed between 7am and 9pm, regardless of whether the call is to a landline phone or not. Sprint Spectrum in fact adds on a landline connection charge of 10 cents per call). The growth of CMRS providers is more closely linked to organizational constraints on how fast each firm can increase the supply of its services than to its interconnection costs. See SPR Paper at 12; see also ex parte presentation of Page Call, Inc. (April 12, 1995)(proportions of the costs of a broadband PCS project are approximately 30% for the license, 40-50% for equipment and labor and 20-30% interest and financing costs).

One very real barrier for wireless competitors was the lack of available spectrum. See SPR Paper at 21. This barrier has been eliminated by the Commission's own actions of allocating spectrum and awarding licenses through pro-competitive auctions. The PCS auctions raised substantial revenues from potential local exchange competitors (who formulated their business plans based on existing interconnection guidelines). Technology itself has played a significant role in increasing capacity and will continue to do so. In the long term, CMRS will compete even more effectively with LECs as increased capacity due to the entry of PCS technology puts downward pressure on the cost of retail wireless services.[14]

II. The Commission's Regulation of LEC-CMRS Interconnection Should Recognize the Jurisdictional Limitations on its Authority to Regulate Local Service Arrangements, Particularly Those Limitations Specified in Recently Enacted Legislation.

The Notice requests comment on three proposed options for how to implement Commission objectives with respect to LEC-CMRS interconnection: 1) a federal policy framework, non-binding on states; 2) a mandatory federal policy framework with a set of general parameters, but permitting states a wide range of choices with respect to implementing specific elements, and 3) a set of specific federal requirements which places specific requirements on state action regarding interconnection rates. Notice, para. 108-110. The Commission concludes that it has sufficient authority to implement these options, including its proposal that a bill and keep interconnection arrangement be adopted on an interim basis. Notice, para. 111. The essential premise of the Commission's tentative conclusion is that federal action may be necessary to ensure reasonable interconnection is provided to CMRS providers and that state regulation does not preclude free entry of CMRS providers. Additionally, the Commission believes that preemption may be warranted because it is impossible to meaningfully sever the interconnection services which permit CMRS providers to offer intrastate services from the interconnection and reciprocal compensation arrangements which permit CMRS providers to offer interstate services. Notice, para. 111.

As discussed above, there is no need for Commission action specific to CMRS providers. The Commission, of course, will implement rules and policies with respect to interconnection obligations of incumbent LECs, as part of the proceedings contemplated by the Telecommunications Act of 1996. However, the Commission may not legally adopt rules or policies which either direct states to establish particular rules or prevent states from establishing rules to govern LEC-CMRS interconnection. Most importantly, the Commission also may not legally adopt any such rules which

[14] If the PCS auctions are any indication of whether PCS licensees expect to be able to obtain interconnection at just and reasonable rates, under the present framework, PCS licensees are considerably optimistic.

prohibit parties from taking actions permitted under the legislation.

A. Recently Enacted Telecommunications Legislation Precludes Mandatory Federal Guidelines Regarding the Negotiation of Interconnection Arrangements and/or the Terms and Conditions for Reciprocal Compensation for Transport and Termination of Traffic.

In a recent Further Notice, the Commission requests comment on the effect of the recently enacted Telecommunications Act of 1996 on the tentative conclusions reached in the Notice. See Further Notice, CC Docket No. 95-185 (February 16, 1996). The 1996 Act amends the Communications Act of 1934 to add new Sections 251 and 252, which provide a comprehensive plan for determining what interconnection obligations are owed by incumbent LECs to potential competitors requesting interconnection, including issues regarding the negotiation and pricing of interconnection services, and the appropriate roles of state and federal regulators in overseeing this process. Enactment of these Sections has a significant effect on the conclusions and options outlined in the Notice. Congress clearly intends that parties may privately negotiate interconnection arrangements, with participation by state commissions. Telecommunications Act of 1996, Section 252(a)(1) and (2). The Commission may not make a particular pricing methodology binding on states or on telecommunications providers.

The Notice concludes that the Commission has the authority to adopt any one of three options, two of which would impose mandatory guidelines on a state commission's approval of interconnection arrangements. See Notice, para. 111. Where Congress has designated that state commissions have primary authority over such issues as determining whether the prices of interconnection, or the terms of a reciprocal compensation arrangement are just and reasonable, there is no authority for the Commission to place limits on state commission's discretion to determine such matters. Section 252 of the Telecommunications Act gives state commissions primary responsibility for determining whether negotiated interconnection arrangements should be approved, Section 252(e) and provides that the Commission shall only act if a State commission fails to carry out its responsibilities, Section 252(e)(5). Accordingly, for the Commission to adopt mandatory rules binding on State commissions would thwart Congressional intent by impeding State commissions from exercising their duties to review negotiated agreements under Section 252(e), or to determine the just and reasonable rate for the interconnection of facilities and equipment and the transport and termination of traffic, pursuant to Section 252(d).

The Telecommunications Act of 1996 also specifically provides that, in adopting regulations to implement Section 251, the Commission may not preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers which is consistent with the requirements of this section and does not substantially prevent implementation of the requirements and purposes of the legislation. Section 251(d)(3). There is no factual evidence to support the position that state regulation in this area is substantially preventing implementation of the purposes of the legislation or otherwise obstructing the Commission's exercise of its statutory powers. The Notice in fact notes that states share the goal of promoting the development of CMRS, and that states' public utility commissions have begun to develop their own policies governing interconnection arrangements. Notice, para. 107. Additionally, in many cases states are taking other actions with respect to local competition, including regulatory changes to promote the development of substitutable competitive services. Accordingly, the Commission may not, and should not, preempt state activity in this area..

B. Even Apart from Recent Telecommuncations Legislation, the Notice Presents No Basis for Lawfully Preempting State Regulation of LEC-CMRS Interconnection.

1. Federal preemption of state regulation of LEC-CMRS Interconnection and Compensation Arrangements Would Be Contrary To Congressional Intent

Arguments that Section 332 of the Omnibus Budget Reconciliation Act of 1993,[15] reserves to the Commission jurisdiction to "occupy the field," see Notice, para. 101 (reciting arguments raised by Cox and Comcast) are merely wishful thinking. The best evidence of Congressional intent is the

[15]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 392 (1993)("1993 Budget Act").

express statutory language. Section 332(c)(1), the most direct statement by Congress on interconnection in the 1993 Budget Act, expressly limits the Commission's jurisdiction to responding to a request for interconnection; it does not suggest that the Commission should prescribe rates for interconnection in lieu of what parties might otherwise negotiate. Section 332(c)(3), concerning state preemption, contains an ambiguity with respect to whether it concerns state regulation of CMRS providers, or CMRS services.[16] However, neither construction in any way supports the argument that Section 332 was intended to grant the Commission authority to regulate LEC interconnection services provided to CMRS providers.

One construction of Section 332, that Section 332(c)(3)(A) concerns state or local goverment regulation of CMRS providers, must recognize, as BellSouth noted, that a separate provision of the Budget Act preempts state regulation of market entry or the rates charged by CMRS providers. Notice, para. 106. If federal preemption of LEC-CMRS interconnection arrangements was intended, the legislation would have included language such as "the rates charged by or the rates charged to" CMRS providers. Id., citing ex parte letter from Ben G. Almond, Executive Director- Federal Regultory, BellSouth, to William F. Caton (December 7, 1995).

The accurate construction of the statute's meaning is that Congress intended to preempt state regulation of the rates charged for any commercial mobile service. Elsewhere in the same section, Congress provides that nothing shall prohibit a state from "regulating the other terms and conditions of commercial mobile services," and that states may petition for authority to regulate "the rates for any commercial mobile service." 47 U.S.C. § 332(c)(3)(A) (emphasis added). Congress also provides similar treatment for regulations concerning "the rates for any commercial mobile service"

[16]Section 332(c)(3)(A) provides, in relevant part, that "[n]otwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." Either Congress meant to preempt regulation of CMRS providers, and left out the word "provider," or Congress intended to preempt regulation of the rates charged for any commercial mobile service, and mistakenly included the word "by" instead of "for." The remainder of Section 332, discussing commercial mobile services, suggests this latter meaning is the most likely construction.

which exist at the time of enactment. 47 U.S.C. § 332(c)(B) (emphasis added). This distinction is particularly important, because it demonstrates that Congress intended to preclude state regulation only of commercial mobile services. But interconnection services offered by LECs are not mobile services. See 47 U.S.C. § 153(n)(Providing, in relevant part, that "mobile service" means "a radio communication service carried on between mobile stations or receivers and land stations"). Accordingly, Congress did not intend for Section 332 to preempt state regulation of these interconnection services.[17]

This reading of the statute is consistent with the fact that Section 332 expressly preempts rate regulation and market entry barriers separately from its treatment of interconnection. The text of the interconnection section expressly provides that no expansion of the Commission's jurisdiction is intended. Clearly, Congresss intended no more than to afford the Commission authority to eliminate state regulation of entry barriers and rates for CMRS services. Congress did not intend for federal regulation to "occupy the field," and preclude state regulation of LEC services offered to CMRS providers. See Notice, para. 101 (reciting arguments raised in ex parte letters from the attorneys for Cox and Comcast).

Preemption of state authority to regulate LEC interconnection services would clearly not be sustainable under the Lousiana PSC standard, which requires that the Commission act within the scope of its congressionally delegated authority, and when state policies stand as an obstacle to Congressional objectives. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986)

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[17]A Willkie Farr and Gallagher memorandum attempts to slide Commission authority in the back door by arguing that the provision preempting state authority over CMRS rate regulation encompasses state regulation of the rates charged by CMRS providers for terminating LEC-originated calls. See Notice, para. 104, citing ex parte letter from Philip L. Verveer and Jennifer A. Donaldson to Karen Brinkmann (October 27, 1995)("Willkie Farr Memorandum"). As interconnection is not a mobile service, Section 332 does not apply to interconnection services offered by LECs. Even if the Commission finds that interconnection services offered by CMRS providers are mobile services, the clear intent of Section 332 is to preempt state regulation of the rates CMRS providers charge to their mobile customers - it was never intended to govern rates charged by carriers to each other.

(federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority)("Louisiana PSC"). Congress has in fact indicated that its purpose and objective is to give primary oversight authority over interconnection and compensation arrangements between LECs and their competitors to states, and has granted the Commission only residual authority. Since these interconnection services are primarily intended to facilitate competition for local services, Congress sensibly provides that states should oversee the transition to competition in the local service market, where traffic is almost entirely intrastate, and for which states have regulatory authority.

2. There is No Evidence that State Policies are Impeding Congressional Objectives

While the FCC has the authority to preempt the states when Congress so intends, preemption is, and should be, an action of last resort. Preemption should be limited to those extreme cases where state policies are entirely at odds with federal policy objectives, e.g., where Congress has eliminated state authority, or where compliance with both state and federal rules is technically impossible. But there is no evidence that state action is impeding the achievement of Congressional objectives. In fact, the Notice expresses support for a federal "bill and keep" plan on the basis that many states have adopted such plans. Notice, para. 60. While the Commission may be concerned that some state regulators may come to different conclusions than the Commission when deciding matters of telecommunications policy, see Notice, para. 24, that fact is not a basis for preemption. State regulatory actions must in fact be impeding federal goals. Louisiana PSC, 476 U.S. at 369(preemption supportable when state regulation stands as an obstacle to the accomplishment of and execution of the full purposes and objectives of Congress"); Id., at 374(where Congress has denied the Commission power to require states to follow FCC depreciation practices, the FCC may not nevertheless confer power on itself, even to take action which it thinks will best effectuate a federal policy). There is no factual evidence which would support preemption.

3. The Commission Does Not Have Authority Under Section 332 to Preempt State Regulation of LEC-CMRS Interconnection as a "Barrier to Entry."

The Notice states that the Commission's preemption authority could be based on the language of Section 332 of the Communications Act which explicitly preempts state regulation, to the extent that such regulation precludes (or effectively precludes) entry of CMRS providers. See Notice, paras. 111, 113. The Commission should not base a preemption decision on the argument that state regulation of LEC-CMRS interconnection constitutes a "barrier to entry."

Even if Section 332 could be construed, consistent with Sections 251 and 252, to justify preemption of state policies regarding LEC-CMRS interconnection, there is no evidence that state policies preclude or are effectively precluding entry of CMRS providers. In fact, the Notice cites comment by representatives of state commissions that they intend to impose additional obligations when local conditions warrant. See Notice, para. 105 (citing NARUC Comments at 3). And clearly, Sections 251 and 252 will facilitate local market entry, not impede it.

4. The Issue of Severability is Irrelevant Where Congress Has Specified the Appropriate Scope of Jurisdictional Authority

The Notice requests comment on the inseverability of interconnection rate regulation, noting that preemption may be warranted when interstate and intrastate services are inseparable, and state regulations make it impracticable for the Commission to exercise its statutory powers. Notice, para. 112, n. 159, citing Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n.4 (1986)("Louisiana PSC"). The system of state and federal telecommunications regulation in this country is based upon the ability to distinguish intrastate traffic from interstate traffic. Mobile traffic creates no unique challenges to this abiltiy. More importantly, the question of inseverability comes into play only when state regulation of such services would impede the Commission's exercise of its statutory power. Telecommunications Act of 1996 delegates primary regulatory authority over interconnection arrangements between LECs and their competitors to state commissions. See Section II.A., supra. Accordingly, questions regarding the proper classification of LEC-CMRS