failed to include tandem switching costs, which would place the "true" incremental cost of LEC interconnection at $0.006 per minute.[46/] USTA, however, asserts that the incremental cost of LEC interconnection is $0.013 per minute.[47/]

The LECs fail to present a uniform, definable concept of what constitutes their supposed interconnection costs in addition to incremental cost. The widely divergent views of LECs as to their supposed actual incremental cost and other costs incurred in providing CMRS interconnection demonstrates that, absent adoption of bill-and-keep, the Commission would have to engage in administratively complex cost inquiry proceedings to set an interim interconnection rate to the LECs satisfaction. Furthermore, the LEC approach would necessarily require new costing proceedings as supply and demand features of the LEC-to-CMRS interconnection market change over time. Rather, the Commission must adopt interim bill-and-keep as the most administratively and economically efficient solution. The Commission also must confirm that, over the long-term, just and reasonable interconnection means economic, long run incremental cost ("LRIC").[48/]

### 2. Adoption of Bill-and-Keep Will Not Result in a "Wireless Subsidy."

Several LECs argue that bill-and-keep would create a "wireless subsidy" that unjustly discriminates in favor of wireless carriers. According to this argument, by subsidizing

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46/ *See* U S West Comments, at Attachment A, Response to Dr. Gerald Brock by Professor Robert G. Harris, at 13 ("Harris Study").

47/ USTA errs in characterizing the $0.013 figure as an accurate representative of "incremental cost" because it also admits that this figure includes overhead costs *in addition to* incremental cost. *See* Strategic Policy Research, at 9-10, attached to USTA Comments.

48/ *See* Brock Statement, Exhibit A, at 8-10.

wireless interconnection "for free", LECs would be "forced" to recover the "costs" of interconnection from wireline ratepayers, thereby harming universal service. These arguments are without merit.

Establishing bill-and-keep for LEC-to-CMRS interconnection is not a "subsidy."[49/] Current LEC interconnection rates exceed average incremental cost by orders of magnitude. Bill-and-keep will bring LEC-to-CMRS interconnection closer to competitive prices, rather than "subsidize" CMRS service. By charging interconnection rates in existing LEC-to-CMRS interconnection arrangements that are over a thousand percent above average incremental cost, the LECs have been unjustly enriched and have abused their market position for years.[50/]

Adoption of interim bill-and-keep pending a separate universal service proceeding as required by the TCA will introduce pro-competitive and much-needed reform to LEC-to-CMRS interconnection, rather than "subsidize" CMRS providers. Principally, there is strong evidence that LEC landline residential rates are at or above cost, thereby obviating the need for a "universal service subsidy."[51/] In any event, universal service goals are

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49/ Nothing in the Commission's recent review of universal service shows that CMRS is being "subsidized." *See* Universal Service Task Force, *Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms*, *reprinted in* Federal Communications Bar Association, Access Charge Reform Seminar (February 23, 1996).

50/ *See* notes 20-21 *supra.*

51/ In fact, there is ample evidence that residential services are priced at (or even above) their costs, and subsidies to residential ratepayers simply do not exist. *See* Teleport Communications Group, *Universal Service Assurance: a Concept for Fair Contribution and Equal Access Subsidies*, at 5-6 (December 1993) ("Teleport Universal Service Paper") (citing *Local Competition and Interconnection*, Staff Report, at 31 (Illinois Commerce Comm'n,

properly addressed in the Commission's universal service proceeding implementing the TCA.[52/] Furthermore, under the TCA's principle that universal service support obligations should be applied on a competitively neutral basis to all providers of universal service and assuming that the LEC argument that bill-and-keep would adversely impact universal service is true, requiring CMRS providers to continue to pay current LEC interconnection rates would unfairly burden CMRS providers exclusively with supporting this "universal service goal."

### 3. Bill-and-Keep Will Not Result in Access "Arbitrage."

Some LECs also argue that bill-and-keep would encourage arbitrage between zero CMRS interconnection rates and access charge rates paid by IXCs and other telecommunications carriers.[53/] These arguments are based on flawed and groundless assumptions and should not deflect the Commission from adopting a uniform, bill-and-keep interconnection policy for LEC-to-CMRS interconnection.

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July 2, 1992); *Generic Investigation Into IntraLATA Toll Competition Access Rates*, DE 90-002, at 6-7 (New Hampshire Pub. Util. Comm'n, June 10, 1993); Gabel, David, Testimony before the Maine Public Utilities Commission, on behalf of the Commission Advocacy Staff, Docket No. 92-130, at 3 (December 1992)). Indeed, in some states, residential ratepayers are even subsidizing non-residential and non-basic services.

52/ *See* 47 U.S.C. § 254; *see also Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, FCC 96-93 (released March 8, 1996). Furthermore, in those instances where basic residential service rates do not recover their costs, the existing subsidy mechanism which supports only the LEC must be replaced by a competitively neutral subsidy from which all competitors will be able to draw in serving "high-cost" customers. *See* Teleport Universal Service Paper, at 3-4.

53/ *See* Ameritech Comments, at 8; NYNEX Comments, at 34; U S West Comments, at 8, 51-2.

The costs of bidding for CMRS spectrum and establishing advanced wireless telecommunications networks are high. Any telecommunications provider seeking to obtain bill-and-keep interconnection would have to have made such an investment. The costs of doing business as a CMRS operator thus make it unlikely that LEC-to-CMRS interconnection would present a viable "arbitrage" opportunity.[54/]

The LECs have not laid out even the most rudimentary facts upon which a threat of arbitrage might be premised — namely, that interstate access services provided to IXCs and CMRS interconnection are technically and competitively similar. As the Commission correctly acknowledges, there are "significant reasons, including [the Commission's] interest in facilitating the competitive development of CMRS and considerations relating to Part 36 jurisdictional separations rules, that may necessitate differences in regulatory regimes" for CMRS interconnection and interstate access charges.[55/] CMRS operates under a wireless

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54/ Moreover, bill-and-keep is only being proposed as an interim solution. In the future, the termination charge would be based on a standard of forward-looking, long run incremental cost ("LRIC"). The Commission also has given a strong indication that it will undertake consideration of interstate access charge reform in the future. Having accomplished economic pricing of LEC-to-CMRS interconnection under an interim, bill-and-keep policy in the present proceeding and interstate access charge reform in the future, it is very unlikely that "arbitrage" opportunities would present themselves. *See* Brock Statement, Exhibit A, at 13-4.

55/ *See* Notice, at ¶ 77.

technological framework that is separate and distinct from IXC services.[56/] CMRS is subject to different competitive pressures than IXC services.[57/]

Finally, opportunities for "arbitrage" under bill-and-keep simply do not exist. In raising the "arbitrage" claim, the LECs are really asking the Commission for license to engage in strategic pricing by maintaining inflated rates for interconnection provided to cellular and PCS providers. It is counterintuitive for the LECs, as dominant service providers in a mature industry, to seek pricing protections to keep prices substantially above cost.[58/] Indeed, an *ex parte* filed by U S West in this docket demonstrates that the current IXC per minute access charge of $0.0442 is already nearly double the CMRS interconnection charge of $0.0226.[59/] Yet, U S West does not allege that this existing pricing disparity has resulted in ruinous "arbitrage".

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56/ *See Craig O. McCaw and AT&T; For Consent to the transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, Memorandum Opinion and Order, 9 FCC Rcd 5836, 5845-5848 (1994), *aff'd on recon.*, 10 FCC Rcd 11786 (1995) (the Commission found that interexchange services and local cellular services in MSAs and RSAs constitute two separate relevant markets for purposes of competitive analysis).

57/ *See id.*

58/ *See Annual Assessment of CMRS Competition*, at ¶ 78.

59/ *See Ex Parte* Letter from Cyndie Eby, Executive Director-Federal Regulatory, U S West to Mr. William F. Caton, Secretary, Federal Communications Commission, filed in CC Docket No. 95-185 on March 7, 1996, Attachment at 8.

### 4. Bill-and-Keep Is Not an Unconstitutional Taking

Contrary to the LECs' assertions,[60] bill-and-keep is not an unconstitutional taking. Such a claim would not survive court review. *Penn Central* establishes three factors that should be considered in deciding whether there has been a regulatory taking: (i) economic impact of the regulation; (ii) interference with investment-backed expectations; and (iii) character of governmental action.[61] The LECs have failed to prove any of these elements. Traditionally, regulated companies that thought their rates were confiscatory brought these claims under the due process clause of the Fifth or Fourteenth Amendment. Bill and keep is entirely consistent with traditional notions of constitutionality in the context of ratemaking.

Claims that a regulation rises to the level of a regulatory taking are difficult to prove. As the Supreme Court has stated:

> Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another . . . . Our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.[62]

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60/ *See* Ameritech Comments, at 9; Bell Atlantic Comments, at 8; BellSouth Comments, at 20; GTE Comments, at 13-4; PacBell Comments, at 84-86; U S West Comments, at 49-53.

61/ *Penn Central Transportation Co. v. United States*, 438 U.S. 104 (1978) ("*Penn*

The argument that a LEC will be subject to substantial economic harm misapplies the case law, which generally requires that property be rendered worthless, or virtually worthless, for a taking to exist.[63/] Obviously this is not the case here because the LEC can continue providing all the services it now provides and its termination of traffic for a competitor will have no effect on other uses of its facilities.

As to the second element, interference with investment-backed expectations, courts are clear that the mere loss of anticipated profits does not constitute a taking. As the Supreme Court stated:

> [L]oss of future profits — unaccompanied by any physical property restriction — provides a slender reed upon which to rest a takings claim . . . . the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.[64/]

The argument that bill and keep interferes with a LEC's expectations under state law carry little weight in the face of these cases. The cost to a LEC of a bill and keep arrangement is low, less than the cost of adding the capability to monitor traffic that would be required under some alternative compensation scheme. Moreover, as the LEC's competitors attract more customers, the benefit to the LEC of being able to terminate calls on competing

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63/ *See Connolly*, 475 U.S. at 223; *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992); *see also Penn Central*, 438 U.S. at 136.

64/ *Andrus v. Allard*, 444 U.S. 51, 66 (1979). Similarly, the Court has stated that:

> [T]he property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.

*Lucas*, 112 S.Ct. at 2899.

networks on a reciprocal bill-and-keep basis will keep pace with any increased cost of terminating calls that originate on competing networks.

The decision of the U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") in the expanded interconnection proceeding does not support the proposition that bill and keep is unconstitutional.[65/] Expanded interconnection involved a government mandated physical invasion of LEC property, which always must be compensated.[66/] Conversely, bill and keep requires the LEC to provide a service (termination of calls) that it already provides to other LECs, and that it is obligated to provide as a common carrier. Because there is no physical invasion here, the analogy to expanded interconnection fails.

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65/ *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

66/ *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

### C. The Commission Has Exclusive Jurisdiction to Implement a Bill-and-Keep Policy Framework for LEC-to-CMRS Interconnection.

The Commission must seize the opportunity to promote CMRS competition by swiftly establishing a uniform bill-and-keep policy for all LEC-to-CMRS interconnection in this proceeding. The Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") and the Telecommunications Act of 1996 (the "TCA") vest the Commission with ample jurisdictional authority to achieve such a result.

#### 1. The Commission Should Abrogate Existing LEC-to-CMRS Interconnection Contracts.

As Comcast demonstrated in its comments, interconnection negotiations may be proper provided that a bill-and-keep arrangement is available.[67/] With respect to specific interconnection rates charged by ILECs with market power, however, the Commission should require that these rates be tariffed. As the Notice correctly recognizes, only "*[i]n the absence of market power* or other distortions, [may] efficient forms of interconnection . . . develop through private negotiation."[68/]

The Commission must reject PacBell's contention that the Commission is prohibited from abrogating existing LEC-to-CMRS interconnection contracts.[69/] It is true, under the *Sierra-Mobile* doctrine, that a carrier may not unilaterally abrogate an existing contract.[70/]

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67/ *See* Comcast Comments, at 25-6.

68/ *See* Notice, at ¶ 11 (emphasis added).

69/ PacBell Comments, at 96.

70/ *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 337-8 (1956) ("*Sierra-Mobile*").

The Commission may nevertheless abrogate an existing intercarrier contract where abrogation is in the public interest.[71] It is the Commission's duty to abrogate existing LEC-to-CMRS contracts to remedy illegally high rates charged by LECs to cellular carriers in intercarrier contracts.[72]

### 2. The Budget Act Vests the Commission With Exclusive Jurisdiction Over Rates, Terms and Conditions of LEC-to-CMRS Interconnection.

The Commission possesses ample jurisdictional authority under the Omnibus Budget Act Reconciliation Act of 1993 (the "Budget Act") to establish in this proceeding a federal bill-and-keep policy governing all LEC-to-CMRS interconnection rates. LECs and state commissions in comments and various *ex parte* filings in this docket have failed to submit any evidence to contradict this conclusion.[73]

In a series of jointly filed *ex partes*, for example, Bell Atlantic and PacBell argue that the Budget Act does not give the Commission jurisdiction to establish bill-and-keep over

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71/ *See Sierra*, 350 U.S. at 355.

72/ *See Amendment of the Commission's Rules Relative to Allocation of the 849-851 MHz/894-896 MHz Bands*, Memorandum Opinion and Order, 6 FCC Rcd 4582, 4583 (1991) (conditions grant of GTE Airfone's licenses on finding that prior contracts with airlines "may inhibit the development of a competitive air-ground service"); *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, 5207 (1994) (adopts a "fresh look" policy limiting charges a LEC may impose on certain customers who want to terminate long-term LEC special access arrangements).

73/ *See* Ameritech Comments, at 11; BellSouth Comments, at 34-6; Comments of the California Public Utilities Commission, at 17-8 ("CPUC Comments"); Comments of the Connecticut Department of Public Utility Control, at 4-7 ("CTDPUC Comments"); Comments of the National Association of Regulatory Utility Commissioners, at 8-10 ("NARUC Comments"); Comments of the New York State Department of Public Service, at 14 ("NYDPSC Comments"); PacBell Comments, at 97-100; U S West Comments, at 60-1.

"intrastate" LEC-to-CMRS interconnection rates.[74/] In so arguing, Bell Atlantic and PacBell overlook the central legislative facts that undermine their entire world picture: In enacting the Budget Act in 1993, Congress amended Section 2(b) of the Communications Act of 1934 to eliminate state jurisdiction over rates, terms and conditions of LEC-to-CMRS interconnection and to place all such matters within the exclusive, plenary federal jurisdiction of the Commission. While Section 2(b) traditionally "fences off" from Commission jurisdiction and reserves to the states authority over "intrastate" matters,[75/] Congress expressly amended Section 2(b) to except Section 332 and matters thereunder from the boundaries of state authority.[76/] Bell Atlantic and PacBell do not address Section 2(b) because, if they did, their entire theory would fall apart.

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74/ *See Ex Parte* Letter from Michael K. Kellogg, Counsel for Bell Atlantic and PacBell, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 95-185, on February 26, 1996, at 3-4 ("Bell Atlantic/PacBell *Ex Parte I*"); *Ex Parte* Letter from Michael K. Kellogg, Counsel for Bell Atlantic and PacBell, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 95-185, on March 13, 1996, at 8-10 ("Bell Atlantic/PacBell *Ex Parte II*").

75/ *See* 47 U.S.C. § 152(b); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

76/ Section 2(b), as amended, provides that "*Except as provided in . . . [S]ection 332,* nothing in this Act shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications]." 47 U.S.C. § 152(b) (emphasis added). The legislative history of Section 2(b) bolsters this interpretation:

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

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

By referencing Section 332 in Section 2(b), moreover, the Budget Act vests the Commission with exclusive jurisdiction over all aspects of CMRS, including LEC-to-CMRS interconnection. As Comcast demonstrated in its comments and in previous *ex partes*, the Budget Act specifically delegated jurisdiction over interconnection to the Commission through Section 332(c)(1)(B).[77] Section 332(c)(1)(B) provides that:

> 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.

The plain meaning of the first sentence of this provision is that the FCC has authority to order *all* common carriers to establish physical interconnection with CMRS providers, upon request, and pursuant to Section 201 of the Act.

Section 332(c)(1)(B) must therefore be read in light of Section 201 of the Act. Section 201 authorizes the Commission to order all common carriers "engaged in interstate or foreign communication by *wire or radio*" to establish physical interconnections, upon request, at just, reasonable and nondiscriminatory rates.[78] Keeping in mind that the Budget Act eliminated state jurisdiction over matters concerning CMRS jurisdiction by excepting Section 332 from Section 2(b), therefore, Section 332(c)(1)(B) read in conjunction with

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77/ *See* Comcast Comments, at 26-34; *Ex Parte* Letter from Leonard J. Kennedy, Counsel for Comcast Cellular Communications, Inc., to William F. Caton, Secretary, Federal Communications Commission, filed in GN Docket No. 93-252 & CC Docket No. 94-54, on October 15, 1995.

78/ *See* 47 U.S.C. § 201 (emphasis added).

Section 201 of the Act operates as an exclusive grant of jurisdiction to the Commission to regulate all LEC-to-CMRS interconnection. LEC-to-CMRS interconnection is thereby "federalized" and, for interconnection purposes, is brought within the Commission's exclusive, plenary interstate jurisdiction under Section 201 of the Act.[79/]

The Bell Atlantic/PacBell *ex partes* provide no reasoned argument to contradict this conclusion. Rather than employing the traditional tools of statutory analysis and reading the text of Section 332,[80/] Bell Atlantic/PacBell *Ex Parte II* argues that, because various Commission decisions would have to be overruled, the Budget Act must not have vested the Commission with exclusive jurisdiction over all LEC-to-CMRS interconnection rates. The decisions Bell Atlantic and PacBell cite are wholly unpersuasive. First, Bell Atlantic and PacBell contend that, in order to conclude that the Budget Act "federalized" CMRS, the Commission's statement in the *CMRS Second Report and Order* that "revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates" would have to be overruled.[81/] Bell Atlantic and PacBell fail to mention that it is precisely

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79/ For the convenience of the parties and Commission staff, Comcast has provided a chart, attached hereto, as Exhibit C, displaying the proper statutory analysis and the evolution of the Commission's jurisdiction over mobile and wireline services.

80/ While legislative history is "undoubtedly one of the 'traditional tools' . . . of statutory analysis, [the] primary interpretive tool[] is the language of the statute itself." *See American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1568 (1987) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that '[t]he starting point of a statute is the language itself.'"), quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978)).

81/ 9 FCC Rcd 1411, 1480 (1994).

the statutory issue regarding Commission jurisdiction over CMRS that *is* currently the subject of pending reconsiderations of the *CMRS Second Report and Order*.[82/]

Bell Atlantic and PacBell further state the Commission has concluded in the *Louisiana PSC Rate Regulation Order* that Section 332(c)(3)(A) only covers rates charged by CMRS providers to subscribers, not LEC-to-CMRS interconnection agreements.[83/] In actuality, the Commission stated in that Order that:

> Louisiana's regulation of the interconnection rates [charged] by landline telephone companies to CMRS providers *appears* to involve rate regulation only of landline companies, not the CMRS providers, and thus does not *appear* to be circumscribed in any way by Section 332(c)(3). Section 332 does not disturb state jurisdiction over intrastate LEC rates.[84/]

In any case, the Commission has invited comment on whether to reconsider this decision.[85/] Finally, Bell Atlantic and PacBell rely on a Commission decision finding that LEC-to-cellular interconnection rates are "severable" under the Budget Act.[86/] Bell Atlantic

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82/ *See* McCaw Cellular Communications, Inc., Petition for Clarification, at 5, filed in GN Docket No. 93-252, on May 19, 1994; MCI Telecommunications Corp., Petition for Clarification and Partial Reconsideration, at 14, filed in GN Docket No. 93-252, on May 19, 1994. In any case, the Commission is not barred from overruling past precedents when it decides that a previously declared rule is no longer sound or appropriate. *See New York Tel. Co. v. FCC*, 631 F.2d 1059, 1065 (1980) (citing K. Davis, *Administrative Law Treatise*, § 17.07, at 526-28 (1958)).

83/ Bell Atlantic/PacBell *Ex Parte II*, at 8 (citing *Petition on Behalf of the Louisiana Public Serv. Comm'n for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana*, 10 FCC Rcd 7898, 7908 (1995) ("*Louisiana PSC Rate Regulation Order*").

84/ *See Louisiana PSC Rate Regulation Order*, at ¶ 47 (emphasis added).

85/ Notice, at ¶ 112 n.162.

86/ *LEC-to-Cellular Interconnection Order*, 2 FCC Rcd at 2912.

and PacBell fail to explain, however, how this declaratory ruling can be controlling on a subsequently enacted *federal statute*.[87/]

### 3. The Telecommunications Act of 1996 Does Not Alter the Commission's Exclusive, Plenary Federal Jurisdiction Over All LEC-to-CMRS Interconnection Rates Under the Budget Act.

The Commission must reject the argument advanced by several LECs and state commissions that the Telecommunications Act of 1996 prevents the Commission from establishing a uniform federal bill-and-keep policy for LEC-to-CMRS interconnection as defective on its face.[88/] These parties point to nothing in the interconnection provisions of the TCA that in any way removes the plenary authority already vested in the Commission over LEC-to-CMRS interconnection by the Budget Act. Rather, at a minimum, the TCA

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87/ The argument that the rates for LEC-to-CMRS interconnection are "severable" is likewise unavailing. *See, e.g.*, Ameritech Comments, at 13; NARUC Comments, at 8-9; BellSouth Comments, at 32-3; CTDPUC Comments, at 7-11; PacBell Comments, at 92-3. The so-called "inseverability" requirement stems from the Supreme Court's holding in *Louisiana PSC* that, in order to preempt state regulation, it must be impossible to sever the intrastate and interstate portions of the service to be regulated, and the state regulation must conflict with a valid federal purpose. 476 U.S. at 372-376. Because the Budget Act federalizes CMRS, however, the Commission need not even reach the preemption issue and, therefore, need not make a finding that LEC-to-CMRS interconnection is "inseverable" to establish a uniform, federal bill-and-keep requirement. Even if the Commission did have to address "inseverability", however, the Budget Act's and the Commission's federal interest in the rapid deployment of CMRS nationwide would suffice. The U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") has held that "[t]he key to [FCC] jurisdiction is the nature of the communication itself rather than the physical location of the technology." *See New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (D.C. Cir. 1980) ("*New York Telephone*") (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-9, 88 S.Ct. 1994, 2000-2001 (1968); *General Tel. Co. v. FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888, 90 S.Ct. 173 (1969)); *see also MCI v. FCC*, Case No. 95-70751 (9th Cir. January 31, 1996).

88/ *See* Ameritech Comments, at 12; BellSouth Comments, at 32; CPUC Comments, at 20-1; CTDPUC Comments, at 13-4; GTE Comments, at 42-3; NARUC Comments, at 5-7; PacBell Comments, at 92-100.

expands the Commission's authority over interconnection under Sections 2(a) and 201 which already existed upon enactment.

According to the LECs and state commissions, Section 252 of the TCA binds all parties seeking interconnection from LECs to engage in private negotiations to obtain interconnection from LECs.[89/] The states have the authority to arbitrate any irreconcilable disputes between the parties to an interconnection negotiation. Because the Commission allegedly has no role in interconnection negotiations, according to this argument, unless a state fails in its role as arbitrator, the Commission lacks jurisdiction to establish a uniform bill-and-keep policy for all LEC-to-CMRS interconnection.[90/] The Bell Atlantic/PacBell *Ex Parte II* states even more strongly that "[t]here is no way out of the [TCA] short of running roughshod over Congress's new Section 251/252 regime."[91/]

Nevertheless, these parties do not provide a shred of evidence that the TCA limits the Commission's pre-existing jurisdictional authority under the Budget Act. Their interpretation of the TCA is also without merit. The interconnection negotiations specified in Section 252 do not bind the Commission's existing authority under the Budget Act to establish LEC-to-CMRS interconnection policies. The statutory language of the first clause of Section 252(a) is permissive, rather than mandatory:

> Upon receiving a request for interconnection . . . , an incumbent local exchange carrier *may* negotiate and enter into a binding agreement with the requesting

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89/ *See* NARUC Comments, at 5-6; PacBell Comments, at 92-96.

90/ *See id.*

91/ *See* Bell Atlantic/PacBell *Ex Parte II*, at 1.

> telecommunications carrier . . . without regard to the standards set forth in [the interconnection provisions] set forth in subsections (b) and (c) of section 251.[92]

There is no mandatory prohibition against the Commission establishing a uniform LEC-to-CMRS interconnection requirement pursuant to its authority under the Budget Act. If Congress had intended to make interconnection negotiation mandatory, it would have used the verb "shall" rather than "may", just as it did in the second clause of Section 252(a): "The agreement *shall* include a detailed schedule of itemized charges for interconnection . . . . [and] *shall* be submitted to the State. "[93] Interconnection negotiations specified under Section 252 are thus permissive and voluntary, rather than mandatory.[94]

NYNEX incorrectly argues that the provisions of Section 252 requiring that state commissions arbitrate interconnection disputes and that the Commission intercede only if a state fails in its responsibilities "leave no room" for Commission jurisdiction over LEC-to-CMRS interconnection rates.[95] Section 252 simply provides that:

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92/ *See* 47 U.S.C. § 252(a)(1).

93/ *See id.*

94/ Congress states in the legislative history that Section 252's interconnection negotiation provision is intended:

> to provide that any party may ask the State to participate during a *voluntary* negotiation period in the mediation of the agreements. *Agreements arrived at voluntarily* do not need to meet the requirements of [the interconnection provisions set forth in] new [S]ection 251(b) and (c).

*See* Joint Explanatory Statement of the Committee of Conference, *reprinted in* 142 Cong. Rec. H1107, H1110 (daily ed. January 31, 1996) (emphasis added) ("TCA Conference Report").

95/ *See* NYNEX Comments, at 3-7. It is even further off the mark for the Bell Atlantic/PacBell *Ex Parte II* to conclude that, under Section 252, "[t]he Commission's job []

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction . . . and *shall assume the responsibility* of the state commission under this section with respect to the proceeding or matter *and act for* the State commission . . . . In a case in which the state fails to act . . . , the proceeding by the Commission . . . and any future juridical review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act.[96/]

This simply means that, in difficult cases where state arbitration breaks down, a party may seek recourse to the Commission and the federal courts. The Commission "assumes the responsibility of" and "acts for" the State in such cases. Nowhere does the statute state that the sum total of the Commission's jurisdictional role is limited to "policing" state action or that the Commission is "left no room" to regulate LEC-to-CMRS interconnection.[97/]

The provisions of Section 251 of the TCA also support the conclusion that the TCA amplifies rather than reduces the Commission's existing authority over interconnection matters. Section 251(d)(1)-(2) authorizes the Commission, not the states, to "complete all actions necessary" to establish regulations regarding all of the interconnection,

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is essentially one of amplification and policing . . . Beyond that, the Commission has no appropriate role." *See* Bell Atlantic/PacBell *Ex Parte II*, at 4.

96/ *See* 47 U.S.C. § 252(e)(5)-(6) (emphasis added).

97/ Congress stated in the legislative history that Section 252(e) is intended to "provide[] a specific timetable for State action, provide[] Commission authority to act if a State does not, and preserve[] State authority to enforce State law requirements in agreements approved under this section." *See* TCA Conference Report, 142 Cong. Rec. H1111. Thus Congress does not intend Section 252(e) to limit the Commission's role in interconnection matters *only* "to act if a State does not." Rather than taking away Commission jurisdiction under the Budget Act, Section 252(e) amplifies the Commission's enforcement role "to act if a State does not."

unbundling and compensation duties imposed upon LECs and ILECs by Section 251. Thus, Section 251 makes the Commission, not the states, the principal policy maker.

Section 251(d)(3) further expands the Commission's jurisdictional role by enhancing its existing preemptive authority. Section 251(d)(3) provides that the Commission may preempt any state interconnection regulation that: (i) is inconsistent with the Commission's regulations; *or* (ii) substantially prevents implementation of the Commission's interconnection regulation. This significantly broadens the Commission's preemptive authority beyond the limits of *Louisiana PSC*, which authorized the Commission to preempt state regulation only if: (i) it is possible to separate the intrastate and interstate portions of the service; and (ii) the state regulation is consistent with the federal purpose.[98/] Unlike *Louisiana PSC*, however, Section 251(d)(3) does not require a finding that the Commission determine it impossible to separate the interstate and intrastate portions of telecommunications in order to preempt state regulation. Furthermore, unlike *Louisiana PSC*, the Commission may preempt state regulation *either* if it is inconsistent with the federal statute or Commission interconnection goals *or* if it would *substantially prevent implementation* of the federal statute or the Commission's interconnection goals.

Section 251(i) also requires a finding that the Commission's exclusive jurisdiction over all LEC-to-CMRS interconnection rates, terms and conditions is amplified, rather than limited, by the TCA's interconnection provisions. Section 251(i) states that: "Nothing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201." Section 251(i) is a rule of statutory construction incorporated into

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98/ *See* 476 U.S. at 372-376.

the statutory framework by Congress to guide the reader in interpreting the TCA.[99/] Even if it were not clear from the plain language of Section 251(i) that Congress intended the interconnection provisions of the TCA to amplify rather than reduce existing Commission jurisdiction under Sections 201 and 332(c)(1)(B), the legislative history is unequivocal:

> New subsection 251(i) makes clear the conferees' intent that the provisions of new section 251 are *in addition to, and in no way limit or affect, the Commission's existing authority* regarding interconnection under section 201 of the Communications Act.[100/]

Accordingly, the TCA gives the Commission ample authority, in conjunction with its pre-existing exclusive jurisdiction under the Budget Act, to establish a uniform bill-and-keep interconnection policy governing all rates, terms and conditions regarding interconnection between LECs and CMRS providers.

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99/ *See Louisiana PSC*, 476 U.S. at 373, 376-7 n.5 (the Supreme Court describes the "savings clause" of Section 2(b) as a "rule of statutory construction . . . . [that] presents its own specific instructions regarding the correct approach to the statute which applies to how we should read [the substantive framework of Title II]). Bell Atlantic and PacBell also repeatedly fault a dutiful interpretation of the TCA for constructing a "statutory maze". Bell Atlantic/PacTel *Ex Parte II*, at 1, 10. Contrary to Bell Atlantic and PacBell's objections, however, reading the entire text of a law is one of the primary duties of faithful and complete statutory construction. *See, e.g. Crandon v. U.S.*, 494 U.S. 152, 158 (1990) (the Supreme Court looks to "design of statute as a whole"); *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) statutes should be interpreted so as not to render one part inoperative); *see also* 2A Sutherland Stat. Const. § 46.05 (statutes are "passed as a whole and not in parts or sections") and § 46.06 ("A statute should be construed so that effect is given to all its provisions").

100/ *See* TCA Conference Report, 142 Cong. Rec. at H1110.

## III. INTERCONNECTION FOR ORIGINATION AND TERMINATION OF INTERSTATE INTEREXCHANGE TRAFFIC.

Recovery of access charges from IXCs by CMRS providers for terminating interstate interexchange traffic on CMRS networks is an appropriate issue to be resolved in conjunction with the long-term interconnection issues proposed by the Commission in this Notice. This issue should, therefore, be deferred until a later phase of this proceeding.

## IV. THE BILL-AND-KEEP PROPOSAL SHOULD APPLY TO ALL CELLULAR, PCS AND ESMR LICENSEES.

None of the parties raises any serious opposition to application of the Notice's interconnection proposals to cellular, PCS and ESMR licensees. The Commission should therefore adopt this approach.

## V. CONCLUSION

Comcast believes that the Commission should adopt its tentative proposal to establish a uniform, bill-and-keep policy for LEC-to-CMRS interconnection. Immediate adoption of bill-and-keep will help "make wireless an economically viable way to compete for all customers."[101/] The LECs provide only rhetoric, not principle, in their effort to dissuade final Commission action; they should not be permitted to delay this important decision.

Existing LEC-to-CMRS interconnection arrangements are illegal and must be remedied by adopting bill-and-keep and implementing it now. ILECs must not be permitted to continue charging CMRS providers interconnection rates that are over a thousand percent above their actual incremental costs. That is, plain and simple, monopoly abuse of bottleneck facilities, and operates to the detriment of wireless competition and enhanced public access to advanced technologies.

The Commission tentatively concluded that bill-and-keep is justified because the incremental cost of LEC interconnection is nearly zero. ILEC claims that bill-and-keep denies them the ability to recover all "network costs" is outrageous and symptomatic of the kind of piling-on in which ILECs will engage unless the Commission uses a firm hand to set things right. The Commission must confirm, over the long term, that just and reasonable interconnection means economic, long run incremental cost ("LRIC").

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101/ *See* Comcast Corporation, Press Release, December 15, 1995 (quoting Comcast President, Brian L. Roberts).

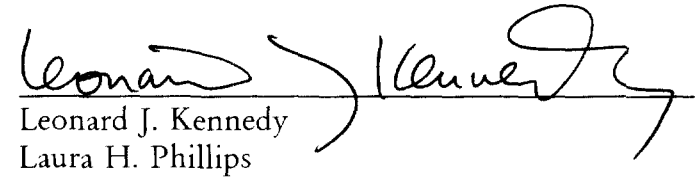
The Commission has plenary jurisdiction over LEC-to-CMRS interconnection, and overwhelming public policy justification to adopt an interim bill-and-keep regime. Nothing in the 1996 Telecommunications Act undercuts this jurisdiction or this policy rationale; on the contrary, the Congressional commitment to promote competition and to empower the Commission to remove barriers to competition compels this result.

As one company in an industry that has invested billions in wireless competition and intends to invest billions more, an industry that still faces substantial economic and governmental hurdles to achieving its true potential, an industry that promises to make a major contribution toward breaking the bottleneck that the ILECs control, Comcast urges the Commission to take one of the single most important steps in its power to promote a

competitive "network of networks" — the Commission should adopt an interim bill-and-keep rate for LEC-to-CMRS now.

Respectfully submitted,

**COMCAST CORPORATION**



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