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

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In the Matter of	)	
	)	
Interconnection Between	)	CC Docket 95-185
Local Exchange Carriers	)	
And Commercial Mobile	)	
Radio Service Providers	)	

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JOINT REPLY COMMENTS OF SPRINT SPECTRUM AND AMERICAN PERSONAL COMMUNICATIONS

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SUMMARY

Sprint Spectrum and APC urge the Commission to move forward with this crucially important proceeding and to establish an interim bill-and-keep policy for LEC-CMRS interconnection. Without a swift determination of CMRS providers' right to fair and effective interconnection, CMRS providers that now are building their systems will lose the ability to bring fully competitive services to the public.

The record establishes that bill and keep should be adopted. The effectively unrebutted cost testimony demonstrates that the average LEC cost of carrying traffic is near zero. Although the LECs criticize this evidence, they fail to supply a whit of data on their own actual costs. The LECs are the sole parties that have access to the information necessary to prove their own claim. Their decision not to provide that information to the Commission speaks volumes about the accuracy of the new entrants' position. Overall, the arguments raised by the LECs are meritless:

- Bill and keep will not lead to cross-subsidization of CMRS subscribers by LEC customers. The only economic loss the LECs will experience by the adoption of bill and keep will be the ability to exact above-cost monopoly rents from CMRS providers. The likely pattern of a roughly balanced traffic pattern between LECs and PCS providers, as well as less-pronounced peak traffic patterns on PCS systems, should be reflected in the Commission's interim policy to adopt bill and keep.

- Interconnection costs are indeed a significant component of the cost structure of CMRS providers and do, in fact, have a profound effect on the CMRS marketplace and the types of services that CMRS providers will be able to bring to market.

- The cellular experience is useful only as a record of discrimination by major LECs. The new LEC revisionist history that claims that so-called "negotiated" agreements among cellular carriers and LECs did not result in bitter disputes assumes a short institutional memory at the Commission.

- Bill and keep will not discourage investment by competitive access providers, which will have every incentive to construct competitive systems regardless of CMRS interconnection. The LECs' argument to the contrary is interesting only in its premise that interconnection is so profitable that CAPs would structure systems to take CMRS interconnection traffic away from LECs — a premise that validates our position that LECs have, in fact, been profiting from above-cost interconnection.

The LECs go so far as to argue that the Telecommunications Act of 1996 — the most pro-competitive telecommunications legislation in the history of Congress — actually was intended to handcuff the Commission in its efforts to foster competition. This view could not be further from reality. In fact, the Commission has full statutory authority to establish an interim policy of bill and keep and should do so immediately. Finally, the LECs' argument that bill and keep will constitute a "taking" is simply frivolous.

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JOINT COMMENTS OF SPRINT SPECTRUM AND AMERICAN PERSONAL COMMUNICATIONS

The comments filed in this proceeding establish that the Commission now has a crucial opportunity to make a decision reaffirming the public-policy goals that the Commission and Congress have held for new commercial mobile radio services ("CMRS"). New entrants seeking to develop a true competitive environment for the CMRS marketplace were of one voice in urging the Commission to adopt a "bill and keep" system of interconnection as an interim solution.[1/] Sprint Spectrum is licensed to provide personal communications services ("PCS") to more Americans than any company,[2/] and American Personal Communications launched the first commercial PCS service in the United States.[3/] Both are firmly committed to the economic and competitive benefits of a bill-and-keep

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1/ *See, e.g.*, Cox Enterprises Comments at 2; Airtouch Communications Comments at 9; Vanguard Cellular Systems Comments at 1; Western Wireless Corp. Comments at 16; MCI Telecommunications Corp. Comments at 4; New Par Comments at 2; Omnipoint Comments at 1.

2/ Sprint Spectrum L.P. ("Sprint Spectrum"), formerly the Sprint Telecommunications Venture, is a joint venture formed by subsidiaries of Sprint Corporation, Tele-Communications, Inc., Comcast Corporation, and Cox Communications, Inc. Sprint Spectrum was formed to provide nationwide wireless competitive telecommunications services. Sprint Spectrum will offer PCS services through WirelessCo, L.P. and PhillieCo, L.P.

3/ American PCS, L.P. d/b/a American Personal Communications ("APC"), a limited partnership in which American Personal Communications, Inc. is the sole managing general partner and 51 percent equity holder and WirelessCo, L.P. is the limited partner and 49 percent equity holder.

system for interconnection. Based upon our actual marketplace experience, cost planning and market research, Sprint Spectrum and APC believe that a truly competitive PCS service will be impossible without relief from monopoly-level interconnection charges.

Local exchange carriers ("LECs"), not surprisingly, were just as unanimous in their opposition to bill and keep.[4] In unusually vivid terms, the LECs' desperate, 100-page missives ran the gamut from polemics arguing that the Telecommunications Act of 1996 (the "1996 Act") — the most pro-competitive telecommunications legislation in the history of Congress — actually was intended to handcuff the Commission in its efforts to foster competition; to factually inaccurate arguments that bill and keep would be unfair based on outdated cellular traffic patterns; and finally to frivolous constitutional "takings" claims. It is predictable that the same LECs that had enjoyed the longest-running government-conferred monopoly in U.S. telecommunications history would raise any argument to stop any decision that could expose them to emerging competition.

Just as predictably, LECs have urged the Commission to stop this crucially important proceeding. They claim that "negotiated" interconnection agreements will be sufficient for new PCS entrants. As APC's own interconnection agreement with Bell Atlantic demonstrates convincingly, however, this assertion is simply false. A LEC with bottleneck control over virtually 100 percent of telephone subscribers in a PCS licensee's service area has particularly disproportionate bargaining power over a PCS entrant at the time of launch because the PCS provider cannot begin service without an interconnection agreement. If the Commission does not intervene, scores of new entrants will be prevented from launching competitive services. The Commission must act in this docket, and it must act quickly.

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[4] *See, e.g.*, NYNEX Comments at 25; Bell Atlantic Comments at 2; Bell South Comments at 18; Pacific Bell Comments at 11; US West Comments at 24.

The LECs' efforts should not intimidate the Commission from adopting bill and keep as an interim solution for LEC-CMRS interconnection. Its adoption will not, contrary to the LECs' chicken-little arguments, destroy our telecommunications system as we know it.[5/] What it will do is align precisely with the Commission's regulatory goals. It will be a simple, manageable and economically efficient system by which the real costs of interconnection will be reflected in LEC-CMRS agreements. Bill and keep is the sole economically rational solution and the only option that will foster the Commission's goals.

As the Bureau has requested, these reply comments will be brief and will not repeat our arguments in favor of an interim bill-and-keep policy. We will address, first, certain of the LECs' policy arguments against bill and keep. Second, we will address various parties' legal arguments opposing preemption of CMRS interconnection, misinterpreting the 1996 Act and claiming that an interim bill-and-keep policy would be unconstitutional.

[5/] At the nadir of the LECs' arguments, they actually claim that bill and keep interconnection — as an *interim* solution, and even limited to CMRS providers — would defeat the system of universal service in the United States and encourage competitive local carriers to build systems that avoid low-income subscribers. This proposition is so self-evidently absurd that it scarcely requires rebuttal.

I. LEC ARGUMENTS AGAINST BILL AND KEEP DO NOT UNDERMINE ITS STATUS AS THE ONLY FAIR AND EFFICIENT INTERIM SOLUTION FOR LEC-CMRS INTERCONNECTION.

The initial comments support the Commission's conclusion that bill and keep is the economically efficient solution for an interim LEC-CMRS interconnection policy. The comments enable the Commission to find that: (1) the Brock analysis, which was based on the LECs' own data and which was not rebutted in the initial comments, demonstrates that the average cost of traffic is only $0.002 per minute; (2) LEC-CMRS traffic patterns have the potential to be roughly in balance, as APC's current traffic patterns demonstrate; (3) LECs can recover any costs from their own subscribers; and (4) a bill-and-keep system would eliminate super-competitive interconnection rates that the LECs now concede are above-market, thus increasing consumer welfare. The LECs' arguments to the contrary do nothing to alter the conclusion that bill and keep is the rational interim solution.

The LECs uniformly criticize the evidence of the cost of interconnection supplied by new entrants. But despite their submission of lengthy, argumentative reports that take issue with our figures, the LECs do not supply credible cost documentation to establish that their costs are higher than we have demonstrated. The LECs are the sole parties that have access to the information needed to prove their own claim that interconnection does not approach a near-zero cost. Their decision not to provide that information speaks volumes. The message is not that the new entrants' cost arguments are incorrect; to the contrary, the LECs' silence suggests that new entrants are, in fact, correct. True interconnection costs are extremely small, perhaps near the associated administrative costs, and therefore bill and keep is the economically efficient and fair solution.[6]

A. LEC Customers Will Not Subsidize CMRS Providers Under A Bill-and-Keep Framework.

Certain commenters claim that bill and keep would ultimately result in inappropriate cross-subsidization of CMRS services by landline ratepayers.[7] They claim LEC end users should not shoulder the burden for LEC interconnection costs because they are not the cost-causative customer. For example, BellSouth argues that under bill and keep, LECs would cross-subsidize the costs of terminating mobile-to-land traffic by charging higher prices for landline-originated calls terminated on CMRS networks to the detriment of LEC customers.[8]

In economic terms, the only deprivation the LECs are experiencing is the ability to recover above-cost monopoly rents from CMRS providers. For the past decade, CMRS providers and their customers have subsidized the returns of LECs by paying monopoly rents for the privilege of terminating traffic to LEC subscribers; meanwhile, LEC subscribers have

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[6] The LECs point out that the Brock figures are based on nine-year-old information. But all the information on which Dr. Brock relied was based on digital switching identical to that used by LECs today. Because the local telephone industry enjoys declining costs, it is likely that costs are *lower* today rather than higher and that Dr. Brock's estimates are conservative. Consistent with this view of declining costs, the LECs' own expert in this docket testified before the Massachusetts Department of Public Utilities within the past 10 months that a cost methodology study utilized since 1989 "remains valid" and would not need to be recalibrated for current costs. *See* Attachment A to Comments of SBC Communications, Inc. at 7-8 (Testimony of Dr. Jerry Hausman representing Cellular One).

[7] *See* BellSouth Comments at 27-28; Pacific Bell Comments at 52-53.

[8] *See* BellSouth Comments at 27. Indeed, one LEC makes the outrageous claim that the telephone bill of every subscriber in the United States would rise by 50 cents per month to make up for lost CMRS interconnection revenues under a bill and keep system. U.S. West Comments at 26. Given the evidence on file in this docket demonstrating the tiny amount of cost that actually is represented by interconnection, this claim is simply incredible. And any such cost surely would be included in rate base by state regulators.

paid nothing to CMRS providers for the same privilege of termination. More fundamentally, a bill-and-keep system would not cause the LECs to absorb the minimal costs of interconnection, as state commissions adopting bill and keep have noted. For example, when adopting an interim bill and keep mechanism, the Washington Utilities and Transportation Commission specifically found that "incumbents will not be financially harmed by adopting bill and keep on an interim basis."[9] LECs could include the minimal costs that could result from a bill-and-keep system in their ratebase, as numerous LECs do now under co-carrier bill-and-keep arrangements, as an expense of terminating traffic on a co-carrier's network. The benefit of bill and keep is that it will prevent them from extracting above-cost amounts from the CMRS providers that must, under current conditions, depend entirely upon LECs for access to virtually 100 percent of wired phones.

The LEC argument also is based on the premise that traffic will be overwhelmingly lopsided in favor of CMRS-LEC calls. This apparently was the case in the past with cellular, but it is not likely to be the case when PCS has matured as a nationwide service. APC's experience of a roughly even traffic ratio demonstrates that LEC-CMRS traffic patterns have the potential to be in approximate balance. Any CMRS-LEC interconnection rate structure established by the Commission should reflect and promote this potential for traffic balance. Bill and keep is the only efficient mechanism that can accomplish that goal. If the LEC does incur material costs over time, state commissions surely would enable LECs

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[9] *See* Washington Utilities & Trans. Comm'n v. U S West Communications, Inc., 1995 Wash. UTC LEXIS 47, *75 (Washington Utilities and Transportation Comm'n, 1995) ("[b]ill and keep is not a system of interconnection 'for free.' Bill and keep is compensatory. There is a reciprocal exchange of traffic in which each company receives something of value"); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, 1995 Cal. PUC LEXIS 788, * 28, 165 P.U.R. 4th 127 (Cal.Public Utilities Comm'n, 1995) ("bill and keep will not interfere with 'investment-backed expectations' since it offers some compensation and allows for the local exchange market to open").

to recover those costs from subscribers. And because the Commission would adopt bill and keep as an interim measure, the Commission could review actual circumstances when PCS has reached maturity and then could alter the rate structure.

Arguments that bill and keep would require LEC customers to subsidize interconnection incorrectly assume that only CMRS customers benefit from interconnection. An interconnected landline-to-mobile or mobile-to-landline call benefits both landline and mobile parties. In a landline-to-mobile call, LEC subscribers clearly benefit from being able to communicate with the persons they were trying to reach. LEC subscribers realize similar benefits when they *receive* a call, a fact that also forms the foundation for current universal service policies. Yet, for the past decade, CMRS customers alone have paid for calls involving mobile phones, while LEC customers, though benefiting from the same calls, have not. Consider APC's current interconnection arrangement. Since APC became operational, APC has had to pay Bell Atlantic to terminate calls on the Bell Atlantic network. These costs were passed on to APC's customers, while Bell Atlantic customers have paid nothing to terminate calls on APC's network. Moreover, because the traffic flow is roughly equal, bill and keep means that Bell Atlantic's customers will not be subsidizing interconnection costs any more than APC's customers.

Bill and keep is administratively and economically efficient because, as revealed by the Brock study, interconnection costs are so minimal that the costs of measuring them likely would approach the costs of terminating traffic. This estimate, which is based on the LECs' own data and remains the sole reliable cost measure in this docket, establishes that the average incremental cost of termination on LEC networks is $0.002 per minute.[10] Some

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[10] Gerald W. Brock, *The Economics of Interconnection: Incremental Cost of Local Usage* (April 1995).

commenters wrongly claim that this estimate is too low because it represents an average cost and ignores costs for peak periods.[11] Contrary to these assertions, the Brock study did, in fact, take peak costs into account. Rather than veil the impact of peak costs, the Brock study takes into account the higher actual cost per minute at the peak but correctly finds that the overall rate, when averaged with off-peak costs, is minimal.

It is this average cost upon which the Commission should rely in resolving questions of interconnection compensation. Compensation tied exclusively to peak costs would overcompensate the LECs because much of the LEC system is not traffic-sensitive. Moreover, the CMRS-LEC interconnection traffic cannot be assumed to be a cost-causer of traffic-sensitive facilities because there is not necessarily any link between this traffic and the peak periods of the LEC networks. Absent evidence demonstrating such a link, a CMRS-LEC compensation rate based on peak costs would enable LECs to over-recover the costs of their facilities, since they would recover peak costs from actual peak users as well as peak costs from CMRS providers. Thus, there is no justification to require CMRS providers to pay the LEC for "peak" costs when the LEC must engineer its system to carry peak-load capacity for purposes of its own subscriber service.

This analysis finds support in APC's actual experience, which shows that LECs and the Commission must rethink the concept of peak calling periods in the PCS context. Calling patterns on APC's system are far more evenly spread throughout the day than is the case with cellular calls. Equally important, the less dramatic "peaks" that APC's system experiences are, in fact, both less than and different from LEC peak periods (weekdays before and following the lunch hour) and cellular peak periods (weekday morning and

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[11] *See, e.g.*, Comments of Ameritech at 9; Comments of BellSouth at 26.

evening rush hours). Thus, as PCS expands, there will be fewer clearly defined peak periods resulting in CMRS peak traffic becoming even less important in driving network costs.

B. Interconnection Charges Are Indeed A Significant Component In the Cost Structure of CMRS Providers.

Several commenters argue either that interconnection charges do not impede the ability of CMRS providers to compete in the local loop or that CMRS providers are inhibited from competing because of high airtime charges rather than high interconnection rates. Both claims assume incorrectly that interconnection charges are not a significant component in the cost structure of CMRS providers.[12/]

These commenters err because they vastly underestimate the impact of interconnection rates on the retail prices PCS providers are able to charge their customers. Thus, Bell Atlantic estimates that even if its interconnection rate was zero under a bill and keep system, CMRS retail rates would only be reduced by 3 percent.[13/] Similarly, GTE argues bill and keep will not affect the imbalance of LEC-CMRS traffic because the average LEC-CMRS interconnection charge is less than 10 percent of the average rate CMRS providers charge their customers.[14/] But APC's experience shows that these claims are simply wrong and that its ability to offer consumers competitive rates would benefit substantially by a mutual

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12/ *See* U S West Comments at 16; USTA Comments at 4; Bell Atlantic Comments at 11.

13/ *See* Bell Atlantic Comments at 11.

14/ *See* GTE Comments at 20 n.27.

compensation scheme which utilizes bill and keep. Under APC's off-peak rate, for example, interconnection charges make up almost one-third of the charge to consumers.[15]

These comments simply set up a straw man — that CMRS offerings competitive with the local loop would use existing airtime charges — and then set out to disprove their own erroneous premise. Of course a LEC replacement strategy that relied upon a typical CMRS peak rate of 30 cents per minute would be difficult to sustain even without an interconnection charge; the average LEC subscriber would not accept a $120 monthly phone bill for basic service. Current CMRS offerings and those that we expect will fully exploit the competitive potential of PCS will have entirely different pricing strategies. If above-market monopoly rents continue to be extracted from CMRS providers, these systems and pricing strategies will never emerge. The signal the Commission sends with this rulemaking will influence the network design and construction decisions of PCS providers, and an unfavorable decision would mean that the network capacity is unlikely to be present to allow meaningful competition. In contrast, a favorable decision will promote development of systems that can offer a service competitive with parts of landline service.

C. The Experience of Cellular Carriers is Insufficient to Accurately Assess the Value of Negotiated Interconnection Agreements with Emerging CMRS Providers.

Some LEC commenters argue that LEC-CMRS negotiations have produced fair and nondiscriminatory interconnection arrangements which satisfy most cellular carriers.[16]

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[15] APC indicates the current APC/Bell Atlantic interconnection agreement artificially inflates APC's costs by at least 3.1 cents per minute, depressing usage and effectively assuring that APC's services cannot be substituted for Bell Atlantic's landline offerings. *See* APC Separate Comments at 6.

[16] *See* U S West Comments at 6; SBC's Comments at 15; NYNEX Comments at 14.

They claim the record is devoid of any evidence that LECs have forced CMRS providers to pay monopoly rents or required any other discriminatory arrangements. To support their conclusions, these commenters point to the claimed lack of CMRS complaints filed against LECs.[17] Essentially, the argument is that there is no evidence that regulatory intervention or reform is necessary to ensure the development of CMRS.

This completely revisionist history of the actual course of cellular-LEC interconnection negotiations assumes a short institutional memory at the Commission. In fact, the same LECs that now raise this argument denied effective interconnection to cellular carriers over the course of the initial years of that service's launch, provoking the Personal Communications Industry Association (then known as Telocator) to file a three-inch-thick volume documenting the reluctance and outright refusal of the regional Bell companies to provide effective interconnection to their non-wireline cellular competitors.[18] Any lack of

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[17] *See* SBC Comments at 16; USTA Comments at 6; Bell Atlantic at 9.

[18] *See* Telocator Network of America's Cellular Interconnection Report and Request for Further Relief (Rep. No. CL-379, filed October 6, 1986). The cellular industry submitted hundreds of pages of abuses — ranging from flat-out denial of interconnection (which the Commission had explicitly barred) to gross discrimination between LEC-owned cellular operators and independent cellular operators (also expressly prohibited), to LEC-imposed limits on certain kinds of interconnection, to schemes that imposed excessive expenses on cellular carriers. For example, Southwestern Bell opposed the Commission's interconnection principles with cellular carriers by engaging in discriminatory conduct designed to benefit wireline affiliates; it insisted on discriminatory and onerous compensation for Type 2 systems, including non-traffic sensitive access charge elements and no mutuality. *Id.* at Appendix F. As another example, New England Telephone imposed terms that made Type 2 interconnection effectively unavailable for cellular carriers — those terms included imposing charges on the cellular carriers for both terminating and originating traffic on the same basis that interexchange carriers paid access charges. *Id.* at Appendix D. Further, Northwestern Bell ignored the Commission's directive that cellular companies receive NXX Codes on the same basis as independent telephone companies — in Minneapolis, for example, Northwestern Bell proposed a $10,000 nonrecurring NXX Code charge for the non-wireline carriers, despite the fact that it did not impose any NXX charges on independent telephone companies. *Id.* at Appendix G. The Telocator petition is filled with other similar examples.

formal complaints does not establish that LEC-cellular interconnection agreements always were fair. Rather, the Commission relied on a vague standard of "reasonableness" that it did not have the resources to enforce on a case-by-case basis. Moreover, high interconnection charges were not inconsistent with the business plan of many operators in the duopoly cellular market, who had neither the incentive nor the technological capacity to mount a competitive challenge to the wireline network; this pattern obviously will not continue in the highly competitive, multiple-licensee PCS marketplace.

Finally, intervention is necessary to ensure a competitive market because PCS providers do not have the bargaining leverage to demand fair interconnection rates from LECs. USTA argues that CMRS providers have sufficient bargaining leverage merely because they possess substantial financial resources and carry significant levels of traffic.[19/] However, neither financial resources nor high traffic levels negate the fact that LECs, as gatekeepers to the existing infrastructure, can exact excessive interconnection rates.[20/] New PCS carriers, virtually by definition, do not have a captive customer base to which LECs will demand access. Regardless of any PCS carrier's financial resources, if that PCS carrier cannot obtain access to the LEC's bottleneck facilities and captive subscriber base at fair

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[19/] *See* USTA Comments at 8.

[20/] In other contexts, the Commission and Congress has recognized that monopoly power over an essential service cannot be adequately overcome by mere financial strength. *See, e.g.*, 47 U.S.C. § 548; 47 C.F.R. § 73.1000 (video program access requirements).

rates, it simply cannot launch its service. Any argument that LECs and PCS providers stand on equal footing in an interconnection negotiation is absurd.

D. Bill and Keep Will Not Discourage Investment And Competition By Competitive Access Providers Or Provide Other Unfair Market Advantages.

Certain LECs make the remarkable argument that a bill-and-keep system under which no landline provider will be permitted to exact above-cost interconnection fees from CMRS providers actually will discourage investment by the LECs' emerging wireline competitors.[21] The argument, essentially, is that competitive carriers will seek to build out large-scale geographic systems only if they can be assured of obtaining lucrative interconnection revenues from CMRS carriers. Though we find noteworthy that certain LECs are concerned that their *competitors* will not have sufficient incentives to construct competing networks, ultimately, this argument is entirely baseless.

The success and growth of competitive access providers and alternate local telephone companies such as Teleport and Metropolitan Fiber Services, for example, demonstrate that competitive carriers will have every economic incentive to serve as great a number of subscribers as possible, regardless of CMRS interconnection. The potential for CMRS interconnection revenue will be a side benefit of growth by competitive carriers, not a reason in itself for growth. In fact, the truly interesting aspect of this argument is its apparent premise that interconnection is so profitable, and costs are so high, that competitive carriers will structure multi-billion-dollar investments to attempt to take CMRS interconnection business away from the LECs. This premise validates our position that LECs have been

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[21] *See* Bell Atlantic Comments at 7; Pacific Bell Comments at 6; SBC Comments at 9.

profiting from demanding above-cost interconnection for years and are simply attempting to perpetuate an inefficient and unfair market condition.

It should be noted here, in response to a related argument,[22] that there is no "market" to which CMRS providers can turn for interconnection services. Even in cities where competitive landline carriers exist, those carriers do not have access to the millions of LEC residential subscribers that can be reached only by interconnecting with the LEC. A claim that there is any available alternative other than the LEC for CMRS interconnection ignores the realities of the current and near-term marketplace.

Finally, the much-vaunted LEC preoccupation with "long-distance arbitrage" — the potential for interexchange carriers ("IXCs") to avoid LEC access charges by routing calls to subscribers through affiliated wireless carriers — provides no basis for the Commission to avoid bill and keep. The potential for such "arbitrage" resulting from the Commission's decision here is extraordinarily slight for numerous reasons. *First*, if the Commission does wish to ensure that IXCs do not "funnel" their long-distance traffic through wireless affiliates or subsidiaries, it can simply prohibit that behavior; it need not permit that concern to influence its choice of an interim interconnection system. There is no legitimate linkage between the potential for "arbitrage" and a fair and effective interconnection policy — access charges and interconnection charges exist to serve two distinct policy goals; access charges are not cost-based, while interconnection charges should not reflect above-market costs. *Second*, we are dealing here with a proposed *interim* solution for LEC-CMRS interconnection; if any "arbitrage" issues do arise, the Commission can respond to them in

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[22] SBC Comments at 17 (arguing CMRS providers have numerous alternatives to the LECs for local interconnection); USTA Comments at 4 (arguing LECs face competition for interconnection customers from other access providers).

due course.[23] Any concern on this score is simply premature because the PCS networks on which such LEC fears are based have not yet been built. *Third*, wireless penetration is nowhere near a level that would permit this genre of "arbitrage," and LECs can cite no hard evidence from other countries with higher penetration rates indicating that any such "arbitrage" exists or is likely to develop. Overall, any impact of CMRS success upon LEC access charges can be dealt with effectively if it ever actually arises rather than now, when this impact exists only as a vague and unproven apprehension on the part of LECs.

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[23] Moreover, the Commission has made it clear that it intends to drive access charges more toward costs. It thus is likely that any incentive for arbitrage in the emerging CMRS marketplace would be significantly diminished.

II. THE COMMISSION HAS FULL AUTHORITY UNDER THE COMMUNICATIONS ACT TO PREEMPT STATES AND ORDER BILL AND KEEP, AND SECTION 251 DOES NOT TRUMP THAT AUTHORITY.

Over the past two and a half years, Congress has transformed our Nation's communications laws: it created a class of wireless carriers called "CMRS providers"; it established a federal regulatory framework for CMRS providers; it directed the Commission to hold auctions for numerous CMRS licenses; and, in a law that was designed to promote competition, it has defined the interconnection obligations of incumbent LECs. The challenge facing the Commission is to integrate, in a coherent and sensible way, the many provisions Congress has adopted over the past 30 months. The Commission has the ability, given the provisions in the 1993 Budget Act and in the 1996 Act, and in light of the deference accorded the Commission under *Chevron*, to formulate a coherent policy that advances the goal of promoting competition set forth in the *Notice*.[24] Though the 1996 Act represents a fundamental change in communications law, it does not alter the *Notice*'s conclusion that the Commission has authority to regulate LEC-CMRS interconnection rates.

A. The Telecommunications Act of 1996 Did Not Divest the Commission of Authority Over LEC-CMRS Interconnection Rates.

1. The 1996 Act Does Not Repeal Section 332's Exclusive Grant To The Commission Of Authority To Regulate Interconnection Rates Charged By CMRS Providers.

The *Notice* correctly concludes that the Commission has authority to regulate CMRS-LEC interconnection rates. Section 332(c) gives the FCC exclusive authority over rates

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[24] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

charged by CMRS providers.[25] That grant of authority stems from Congress's intent to vest in the hands of federal regulators control over the rates charged by CMRS providers.[26] Congress wanted to end the practice of individual states exercising control over rates charged by a service that is fundamentally federal in nature.[27] Though some commenters disagree over whether Congress decided to completely "federalize" regulation of every aspect of CMRS,[28] the Commission should not be distracted by that debate but should focus on the only conclusion relevant here: Section 332(c) vests authority over all rates charged by CMRS providers in the Commission.

Against this clear statutory language that denies states authority to regulate rates charged by CMRS providers,[29] several commenters argue in essence that Section 251 of the 1996 Act, *sub silentio*, repeals Section 332(c).[30] The Commission must reject this argument. Standard tools of statutory construction demonstrate that the authority vested in the Commission by Section 332(c) remains and coexists with the provisions in Section 251.

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[25] *See, e.g.*, Comments of Comcast at 24; Comments of Cox at 37.

[26] See 47 U.S.C. §332(c)(3).

[27] *See, e.g.*, Comments of Cox at 37.

[28] *Compare* Comments of Pacific Bell at 97-99 and Comments of NYNEX at 42 *with* Comments of Comcast at 27.

[29] Section 323(c)(3)(A) states:

> "[N]o state or local government shall have any authority to regulate the entry of or the rates charged by any [CMRS provider] . . . ."

[30] *See, e.g.*, Comments of BellSouth at 32; Comments of Pacific Bell at 95.

One major canon of statutory construction is that repeal by implication is strongly disfavored.[31] The bias against implied repeal is stronger here, where the prior congressional declaration is of recent vintage. As a consequence, no party can argue that Congress was not aware of the existing obligations, or that Congress "meant" to repeal a provision of law, but simply "forgot." Instead, the Commission is obligated to give full force and effect to Section 332(c) along with other provisions of the Communications Act.

Another canon of statutory construction is that the specific overrules the general.[32] Section 332(c), which was added by the 1993 Budget Act, establishes the specific regulatory treatment of CMRS providers. This section details a federal regime for regulating the rates charged by CMRS providers. Various commenters seek to evade these specific provisions by arguing that Section 251, which governs the interconnection practices of "telecommunications carriers," should control CMRS providers.[33] However, this interpretation, in addition to resting on a claim of implied repeal of Section 332(c), also suffers the defect of elevating a general statutory provision over a specific provision. To illustrate the problem with that approach, the Commission must recognize that there is strong disagreement on what constitutes a "telecommunications carrier": the LECs no doubt will argue that this term necessarily includes CMRS providers, but that this same broad term does *not* include interexchange carriers. This dispute, which the Commission does not have to resolve here, underscores the value for the Commission in relying on the specific provisions

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[31] *See* Demby v. Schweiker, 671 F.2d 507, 512 (D.C. Cir. 1981); Palmore v. Superior Court of the District of Columbia, 515 F.2d 1294, 1307 (D.C. Cir. 1977), *vacated on other grounds*, 429 U.S. 915 (1976).

[32] Detweiler v. Pena, 38 F.3d 591, 594 (D.C. Cir. 1994); Federal Trade Commission v. Manager, Retail Credit Co., Miami Branch Office, 518 F.2d 988, 993 (D.C. Cir. 1975).

[33] *See, e.g.*, Comments of Pacific Bell at 93, 95-97; Comments of SBC at 6-8.

in the Communications Act whenever possible. In this proceeding, Section 332(c) controls: that Section, with its specific provisions on the regulatory treatment of CMRS providers, establishes Commission authority over CMRS-LEC interconnection rates and takes precedence over the more general provisions contained in Section 251.

2. Section 332(c)'s Reference To "Rates" Should Not Be Artificially Narrowed.

As demonstrated above, standard statutory analysis leads to the conclusion that the Commission — and the Commission alone — has authority to regulate rates charged by CMRS providers. Yet several LEC commenters seek to create a distinction in the statutory language by finding two definitions in the term "rates" — one that refers to "rates" charged by CMRS providers to subscribers, the other that refers to "rates" charged by CMRS providers for interconnection. They argue that this distinction means that though the 1993 Budget Act denies states authority over subscriber "rates," it does not deny states authority over CMRS interconnection "rates."[34]

This search for a statutory distinction fails. For one, the statutory language in Section 332(c)(3)(A) contains no such distinction. But despite that, commenters point to other language in Section 332(c) for support that Congress meant "rates" to refer to only rates charged to subscribers. A review of other provisions in Section 332(c) and throughout the Communications Act, however, shows that "rates" is a broad term that Congress uses to refer to charges to subscribers *and* charges to other carriers. For example, Section 251(c) uses the

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[34] *See, e.g.*, Comments of Pacific Bell at 98-99; Comments of BellSouth at 35.

term "rates" at least four times and *in every instance* the term refers to charges to other carriers and *not* charges to subscribers.[35]

What the Commission should conclude from this statutory analysis is that Congress uses the term "rates" to refer to all charges, classifications, and practices of carriers, whether the charges are applied to subscribers or interconnecting carriers.

3. The Commission Has Authority To Regulate The LEC Half Of LEC-CMRS Interconnection Rates, And Sound Policy Dictates That Authority Should Be Exercised.

Clearly, the Commission stands alone in its authority to regulate the interconnection rates charged by CMRS providers to LECs. However, several commenters argue against the Commission asserting authority over interconnection rates charged by LECs to CMRS providers. An understanding of the federal policy objectives at stake here, as well as the regulatory disconnect that would result if the Commission failed to assert complete authority over LEC-CMRS interconnection rates, requires the Commission to exercise the full extent of its authority over both elements of CMRS-LEC interconnection rates. This conclusion is based on policy and legal reasons.

First, a number of commenters cite the Commission's recent *Louisiana PSC* decision[36] that states have authority over LEC interconnection charges to CMRS

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[35] *See* Section 251(c)(2) ("duty to provide . . . interconnection with the local exchange carrier's network . . . on *rates*, terms, and conditions that are just"); Section 251(c)(6) ("The duty to provide, on *rates*, terms, and conditions that are just, reasonable, and nondiscriminatory, for actual collocation . . . ."); Section 251(c)(4) ("duty . . . to offer for resale at wholesale *rates* any telecommunications service"); Section 251(c)(3) ("duty to provide, to any requesting telecommunications carrier . . . access to network elements on an unbundled basis . . . on *rates*, terms, and conditions that are just").

[36] Petition On Behalf Of The Louisiana Public Service Comm'n For Authority To Retain Existing Jurisdiction Over Commercial Mobile Service Offered Within The State Of Louisiana, 10 F.C.C. Rcd. 7898 (1995).

providers.[37] We agree with numerous commenters that the *dictum* cited by these commenters need not and should not be followed here, or that this decision should be reversed because it is both bad policy and an unwise diminution in Commission authority.[38] The Commission can hardly be required, even under the most rigid views of *stare decisis*, to have decided the interconnection obligations of CMRS providers across the country in one dispute that was not a subject of broad industry or public comment. The decision is bad regulatory policy because if it stands, then the same transaction (negotiation of rates for interconnection) between LECs and CMRS providers will be regulated at two different levels. The result will be a regulatory whip-saw that cuts away at any chance for CMRS providers to have regulatory predictability. Instead, such a system would encourage "regulatory arbitrage" in which parties attempt to play the federal rules on one side of an arrangement against the state rules on the other side of *the same arrangement*. That result would not be sustainable over the long term and could severely damage the prospects of CMRS providers to obtain efficient and fair interconnection rates in a timely fashion.

Second, though the Communications Act generally recognizes the duality of federal and state regulation, the Supreme Court has held that duality should not be tolerated in all circumstances. In *Louisiana Pub. Serv. Comm'n* v. *Federal Communications Comm'n*, the Court adopted the inseverability doctrine in recognition that preemption is warranted when interstate and intrastate services are inseverable and state regulation impedes the ability of the Commission to exercise its statutory authority.[39] Both elements are present here.

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[37] *See, e.g.*, Comments of BellSouth at 34-35; Comments of Pacific Bell at 97-99.

[38] *See, e.g.*, Comments of Cox at 42 n.84; Comments of Comcast at 38.

[39] 476 U.S. 355, 375 (1986).