Allowing states to regulate the LEC half of LEC-CMRS interconnection rates would make it impracticable for the Commission to implement its Section 332(c) authority to regulate CMRS interconnection rates and would frustrate the Commission's goal, as set forth by Congress, to develop a seamless, national network.[40] The purpose of this proceeding is to adopt interconnection policies to encourage the development of CMRS. That objective stems from the Commission's mandate in Section 332 to "encourage competition and provide services to the largest feasible number of users."[41] This authority is in addition to the Commission's core mission pursuant to Section 1 to make available a "rapid, efficient, Nation-wide . . . radio communication service with adequate facilities at reasonable charges . . . ."[42] Sprint Spectrum, in particular, would be frustrated in its goal to create a seamless national PCS system if it were forced to forge effective interconnection policies in all the states in which it intends to offer PCS service; scores of other licensees (including virtually all major trading area licensees) also would be subject to this dilemma. To fully implement this statutory authority, the Commission must exercise control over interconnection rates charged by LECs.

Physical inseverability also is present. As explained in our initial comments, a typical CMRS user in the Washington, D.C. market is a jurisdictional nightmare that demonstrates the inseverability of CMRS services: Her CMRS phone is registered in one state, she works in a second state, and she routinely travels through a third state (using CMRS towers in state one or state two). This situation, which is commonplace in the Washington market and other

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[40] *See* H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993); S. Rep. No. 36, 103rd Cong., 1st Sess. 261 (1993).

[41] 47 U.S.C. § 332(a)(3).

[42] 47 U.S.C. § 151.

markets throughout the country, presents substantial problems for those commenters arguing against inseverability.

Pacific Bell replies that the Commission can get out of this jurisdictional fix by simply adopting the landline model on assumptions about origin of traffic.[43] But there are *no* assumptions that a CMRS provider, or the Commission, legitimately can make about a call that comes into a tower in suburban Maryland, other than that the caller is within a defined area surrounding the tower. The phone may be registered in Washington, D.C., but the caller is just as likely to be in Maryland as in Virginia or Washington, D.C. The Commission would be arbitrary and capricious if it declared that, in the above example, the CMRS call originated in Maryland because that is where the call entered the CMRS provider's network. Unlike the landline network, there is no basis for such an assumption, and the Commission cannot base one on thin air. Consequently, the services are physically inseverable.

4. The 1996 Act Does Not Bar The Adoption Of Bill And Keep.

A number of commenters attempt to argue that the 1996 Telecommunications Act prohibits the adoption of bill and keep by any regulator.[44] This argument is spurious.

Section 252(d) is entitled "Pricing Standards" and it contains rules that state commissions will apply in assessing various interconnection charges. Paragraph (2) of Section 252(d) provides that a state commission shall not find charges for transport and termination to be just and reasonable unless they provide for (i) "the mutual and reciprocal

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[43] *See* Comments of Pacific Bell at 3 (assume long-distance traffic that enters network and terminates in same state is intrastate).

[44] Comments of Pacific Bell at 94; Comments of Bell Atlantic at 5-6. We continue to maintain that Sections 251 and 252 are inapplicable at all to CMRS interconnection.

recovery by each carrier of costs associated with the transport and termination" of traffic and (ii) focus on recovery of "additional" (*i.e.,* incremental) costs. A number of commenters cite this language as the reason why the Commission cannot adopt bill and keep.

However, the LEC commenters gloss over subparagraph (B), which contains "rules of construction." Subparagraph (B) states: "This paragraph shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, *including* arrangements that waive mutual recovery (such as bill-and-keep arrangements). . . ."[45] Clearly, this provision permits bill and keep as an arrangement with offsetting reciprocal obligations.[46] That there may be other arrangements, or that some arrangements may not be voluntary, is immaterial to the question whether Section 252 permits bill and keep.[47] The Commission clearly can find that bill and keep is a reasonable means of effectuating a policy of mutual compensation, regardless of whether such a system is voluntary. Consequently, the Commission or a state may adopt bill and keep consistent with the 1996 Telecommunications Act.

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[45] Section 252(d)(2)(B) (punctuation omitted) (emphasis added).

[46] *Accord,* Comments of Comcast at 42; Comments of Cox at 45 n.92.

[47] Since Section 252 permits state commissions to impose interconnection rates, terms and conditions in the event of negotiation impasse, it cannot be argued, as some LECs have suggested, that all mutual recovery arrangements must be voluntary. Accordingly, the Commission could impose a bill and keep arrangement consistent with Sections 252(d).

B. The Commission's Bill-and-Keep Proposal Does Not Constitute a Taking of Property.

Some commenters have argued that implementing the Commission's bill-and-keep policy would constitute an unconstitutional taking of property.[48] There are at least three glaring errors in this argument, and the first is a threshold factual error. The Commission stated in the *Notice* that LECs would be free to recover from their subscribers the costs of terminating traffic going to those subscribers. No commenter disputes that, if that statement is true, then there is no taking. Instead, the commenters waste their efforts attacking a different regulatory proposal. They argue that, if they were not given the opportunity to recover these costs from their subscribers, then there would be a taking. While even that argument suffers from the other two errors discussed below, the most basic point is that the Commission has *not* proposed a scheme where the LECs must abide by bill and keep and yet are forbidden to recover the costs of terminating traffic from their subscribers.

Nor is it valid for the LECs to argue that the bill-and-keep proposal constitutes a taking because there may be some other regulatory adjustments necessary in order for them to charge their customers for the costs of terminating CMRS calls to those customers. The proposed bill-and-keep policy is clear: For calls between LECs and CMRS providers, each side must look to its own customers to recover the cost of terminating traffic. If regulatory adjustments are necessary to implement that policy on the LEC side, the LECs should put forward specific proposals to accomplish that end. Nothing in the Constitution gives parties a right to freeze a regulatory status quo simply because it may take some effort to change that status quo.

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[48] *See* Pacific Bell Comments at 79-87; Bell Atlantic Comments at 8-9; U S West Comments at 49-53.

Besides the fundamental factual problem with their constitutional argument, the LECs make a second error in contending that the Commission's bill-and-keep proposal allows them no compensation for their service in terminating calls from CMRS customers to their customers. Under the Commission's bill-and-keep proposal, LECs receive the *reciprocal* right to terminate calls onto CMRS systems *without charge from the CMRS provider*. In other words, the proposed bill-and-keep system is a system of reciprocal rights and obligations, so that each side of the transaction receives, as part of the "payment" for its obligation to terminate traffic, a reciprocal right to terminate traffic for free on the other's network. No LEC commenter attempts to demonstrate that it is confiscatory to afford LECs a right to terminate traffic for free on CMRS networks in exchange for their services in terminating calls from CMRS networks. Indeed, such a showing would be impossible even under the assumptions advanced by the LECs.

A third and final point is that, as one LEC forthrightly acknowledges,[49] the Supreme Court has squarely rejected the argument that the Constitution requires a "piecemeal" examination of a regulatory regime.[50] Regulation of utilities is constitutional under the Fifth Amendment so long as the "overall impact" or "overall effect" of the regulation still permits the utilities to earn a nonconfiscatory rate of return on their investment properties.[51] No LEC has even attempted to argue that this minor adjustment to the Commission's overall regulatory scheme will lead to a rate of return that is confiscatory for even one LEC. Indeed, such a proof would likely be impossible given the

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[49] U S West Comments at 51 & n.123.

[50] *See* Duquesne Light Co. v. Barasch, 488 U.S. 299, 313 (1989).

[51] *Id.* at 310-14.

current rates of return enjoyed by LECs as well as the safety mechanisms (*e.g.*, the low formula adjustment mechanisms, judicial review of state rate orders, etc.) that are in place to protect LECs against confiscatory rates of returns.

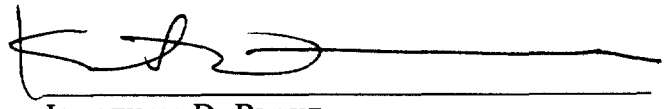
* * *

We urge the Commission to adopt a bill-and-keep system for interim LEC-CMRS interconnection and to act quickly.

Respectfully submitted,

SPRINT SPECTRUM

AMERICAN PERSONAL COMMUNICATIONS



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