

interconnection to the Incumbent LEC. Currently the CMRS in each market provide interconnection only to and exclusively to the Incumbent LEC and the competing LEC must then pay additional rates for that interconnection as well as be burdened by the added inefficiencies of that interconnection.

From U.S.C 47 Sec. 332(c)(1)(B), the following requirement is dictated:

“(B) 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 title. 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 chapter.”

It is clear from this statement that the Commission has the authority to order any common carrier to interconnect with a CMRS. We shall now demonstrate that a CMRS is a common carrier and that the Commission has the authority to recognize is as such. Thus the Commission has the authority to order the CMRS, acting as a Common Carrier, to interconnect to another common carrier.

There are certain CMRS providers who have announced their intentions to provide their services on a wholesale rather than retail basis. The current cellular CMRS providers sell their services on both a wholesale and retail basis. In both cases, the treatment of the wholesale approach is not well defined. The Respondent argues that under equal protection as it follows from the Common Carrier statutes, any comparable retailer who approaches a common carrier as a CMRS must be granted access on comparable grounds as any other comparable carrier.

Specifically the Act states:

“Sec.3 (a)(2)(49) TELECOMMUNICATIONS CARRIER- The term “telecommunications carrier” means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.”

From the Commissions NPRM WT 96-6⁶, the following indicates that the Commission has already adopted the view that General Wireless Communication Service (“GWCS”) are most likely used for fixed services and thus adjudged as common carriage.

«This is consistent with the approach we took in the 5 GHz Second Report and Order. The record supports the view that the General Wireless Communications Service («GWCS») most likely will be used for fixed services, and, accordingly, we adopted a presumption that GWCS

⁶See WT 96-06 footnote 37.

licensees are fixed common carrier providers. The presumption can be overcome by the applicant. 5 GHz Second Report and Order, 60 Fed. Reg. 40,712, 1995 WL 455952 (FCC) at ¶ 126 (Aug. 9, 1995).»

It is clear, therefore that a CMRS holds itself out as a common carrier in its markets, that the Commission has the authority to so adjudge and determine, and that the Commission has set precedence that such is the case.

The Respondent seeks to have the Commission adjudge that the CMRS when providing its unbundled circuits do so at prices that are fair and equitable. By that the Respondent specifically requests that the costs associated with the prices be those costs and only those costs that relate to the provision of the unbundled elements. In addition that any imputed rate of return on that cost base be also fair and equitable.

The Respondent fears that through the existing monopoly power of the I-LEC and the duopoly power of the CMRS, that pricing may be arbitrary and capricious. This would result in an anti-competitive situation. It has been argued elsewhere that there are significant anti-competitive issues related to tying arrangements and refusals to deal.⁷

Specifically in Section 252(d) of the Act, the pricing standards are discussed:

“(d) PRICING STANDARDS-

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES- Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section-- (A) shall be-- (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit.

(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC- (A) IN GENERAL- For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless-- (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. ...

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES- For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”

⁷See Telmarc Report TR 96-02, *The Telecommunications Act of 1996: Antitrust Issues and The Evolution of Telecommunications*, April, 1996. Specifically therein is discussed the tying arrangement issues and the refusals to deal merely require two elements; the refusal by both CMRSs to negotiate, which has occurred, and the intent by the CMRS in doing so to retain its “monopoly” control, which it is argued is evident on face value.

Thus it is clear from the Act that the CMRS must negotiate if it is adjudged as requested herein, and that such unbundled pricing shall be fair and equitable.

As to a refusal to deal, it may be possible for a CMRS to refuse to sell traffic to a common carrier in the event that such CMRS has "oversold" its capacity to a third party in anticipation of future sales. This is generally termed "warehousing". However, the intent may be otherwise, namely the intent may be to preclude other common carrier from providing service by "locking up" capacity. This concern is especially important in the new PCS license that are provided. In particular, the Commission should adjudge that any CMRS should sell its unbundled capacity on a "first-come-first-served" basis, thus assuring the effective use of spectrum and not permitting the "warehousing" of spectrum.

The Petitioner that the three issues, as further clarified in this Addendum, should be resolved in a timely fashion by the Commission. Specifically, the Petitioner has requested in a previous Petition that

"(i) The Commission, in the matter of BANM, rule that, in the Commonwealth of Massachusetts, the Commission:

(a) Adjudge that the BANM services in the Commonwealth are tantamount: to providing Incumbent LEC services. Pursuant to that determination, BANM should be mandated in the Commonwealth, to unbundle its services, allow co-location, provide interconnection, provide for resale, provide for ready access, and negotiate in a timely fashion;

(b) Direct that BANM provide such elements to COMAV in a timely fashion, and that such elements be provided at fair and equitable terms and rates that reflect pricing of the elements in a fashion that does not create a barrier to COMAV's entry into the local exchange market.

(c) Direct that BANM provide, within sixty (60) days, to both COMAV and the Commission, a written plan for implementing the foregoing requirements. Moreover, the implementation and availability of any and all such elements should be required to be made ready and accessible to COMAV not later than one hundred and twenty (120) days from the submission of that plan.

(ii) The Commission adjudge that the CMRSs in the Commonwealth of Massachusetts are common carriers in their actions and that, pursuant to the Act, the Commission adjudge that the CMRSs provide direct interconnection between the CMRS and any common carrier, not necessarily the I-LEC. Specifically that the Commission rule that the CMRS in the Commonwealth of Massachusetts provide interconnection between itself and the Petitioner, there being no interconnection necessarily required between the Petitioner and the I-LEC.

(iii) The Commission adjudge that any CMRS who sells circuits or other such network elements, whether they be bundled or unbundled, do so in a fair and equitable fashion consistent with the Act, Section 252(d), and the general Common Carriage law, and that the Commission adjudge that no CMRS discriminate against any LEC in the sale of such services. Furthermore, the Commission should adjudge that the sales of such services should be based on non-discriminatory traffic actually offered and delivered and not on discriminatory policies of purchases of traffic by third parties in anticipation of future local common carriage."

This request was based upon a refusal to deal by Bell Atlantic NYNEX Mobile, BANM. The statement of facts in that case are as follows:

1. *On December 21, 1995 COMAV met with BANM at the BANM facilities in Bedminster, NJ. At that time COMAV requested certain unbundling of BANM facilities that could allow COMAV to provide local exchange services in a competitive fashion in the Commonwealth of Massachusetts and other markets in the New England areas.⁸*
2. *On January 12, 1996 COMAV forwarded to BANM the specifics of the request and detailing the unbundling elements requested.*
3. *On March 4, 1996 the Respondent held a conference call BANM. In that conversations the Respondent reiterated and reestablished their request, indicated that the Respondent viewed BANM as an Incumbent LEC, and informed the BANM representative that, time being of the essence, a request for determination of BANM's position was required. BANM so agreed to provide the Respondent with an answer by March 8, 1996 at 5 PM EST or sooner.*
4. *The Respondent did transfer to BANM on March 5, 1996 the letter request in Exhibit 2, reiterating the conversation, reiterating the request, and specifying its position under the 1996 Act. The Respondent indicated further specific reliance on BANM's good faith performance. By March 8, at 5 PM EST, there was no response from BANM.*
5. *On March 9, 1996 the Respondent filed a Petition with the Commission effective March 15, 1996.⁹ The Respondent then filed as required the Petition on BANM and*

⁸The specifics of the requests and the specifics of the Petitioner's's position are contained in the Initial Petition Filing by COMAV with the Commission on March 15, 1996.

⁹See COMAV Petition dated March 15, 1996. This has been filed with the Commission and has been discussed with the Commission. The Petition specifically requests that BANM, being effectively an Incumbent LEC, and as a CMRS, under the jurisdiction of the FCC, be mandated to provide the services as specified in the 1996 Act.

its owners, Bell Atlantic and NYNEX. The letter of the specific filing on BANM was forwarded.

6. *On March 11, 1996 BANM forwarded a response to the Respondent. The response by BANM reiterates its position of refusing to provide any such services requested, further denies the position of the Complainant with regards to the 1996 Act, and reiterates its position that it will continue to sell reseller type access under the terms as attached in the correspondence.¹⁰*
7. *BANM is a fully owned and operated subsidiary and affiliate of Bell Atlantic and NYNEX.¹¹ In Massachusetts BANM is the immediate successor of NYNEX Mobile Communications Company, NMCC, a wholly owned and operated subsidiary of NYNEX.*
8. *NYNEX and Bell Atlantic are per se Incumbent Local Exchange Carriers.¹²*
9. *For the purpose of local exchange carrier service provision in Massachusetts, BANM holds itself out as and is an affiliate of NYNEX and Bell Atlantic. Furthermore BANM may hold itself as one and the same with NYNEX and Bell Atlantic and is perceived in the market as one and the same.¹³ BANM further provides in its markets services that are identical to and of the same form as local exchange services. BANM is one and the same as the parent companies in the markets in which the Respondent hereby files, namely, the Commonwealth of Massachusetts, specifically an Incumbent Local Exchange Carrier.¹⁴*
10. *The 1996 Act mandates that Incumbent Local Exchange Carriers have the duties of, amongst several; interconnection, unbundled access, resale, co-location.¹⁵*

(1) Interexchange Services

¹⁰The Petitioner notes that BANM requires the provision of the Petitioner's Business Plan as an integral part of selling the service. The Petitioner has noted elsewhere, including its Petition of March 15, 1996, that compliance with such a request would put BANM in a position of having pricing and competitive information of a competitor and that such a request is a potential "per se" violation of the Antitrust Laws. In addition, the sale of a bundled service may also be a violation of such statutes, through bundling or tying agreements, since it compels a potential competitor to purchase a bundle of services, despite the ability of the competitor or new entrant, if it were able to purchase an unbundled set of services, and provide their own operational and sales elements, that the competitor could effectively provide the same or similar services, at lower prices.

¹¹The 1996 Act, Sec. 3 Definitions (a)(2) (33).

¹²The 1996 Act, Sec 251(h)(1).

¹³The 1996 Act, Sec. 601(d).

¹⁴The Petitioner maintains that this is under The 1996 Act, Sec. 251(h)(1) and the Complaint is specifically not evoking the use of Sec. 251(h)(2).

¹⁵The 1996 Act, Sec. 252(c).

1. *Sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs to provide interconnection and nondiscriminatory access to unbundled network elements, respectively, to "any requesting telecommunications carrier." In relevant part, "telecommunications carrier" is defined in section 3(44) of the 1934 Act, as amended, as "any provider of telecommunications services." Because interexchange services are a type of "telecommunications services," which are defined in section 3(46) as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," we conclude that carriers providing interexchange services are "telecommunications carriers." Thus, we believe that interexchange carriers may seek interconnection and unbundled elements under subsections (c)(2) and (c)(3), respectively.*

The Respondent has argued this above.

2. *With respect to section 251(c)(2), however, we believe the statute imposes limits on the purposes for which any telecommunications carrier, including interexchange carriers, may request interconnection pursuant to that section. Section 251(c)(2) imposes an obligation upon incumbent LECs to provide requesting carriers with interconnection where the request is for the "transmission and routing of telephone exchange service and exchange access." "Telephone exchange service" is defined in section 3(47) of the 1934 Act, as amended, as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange," or "comparable service[s]." According to this definition, interexchange service does not appear to constitute a "telephone exchange service." We seek comment on this interpretation.*

The Respondent has argued this above.

3. *Interexchange service would not appear to qualify as "exchange access" either. Some have argued that our interpretation is also consistent with other provisions of section 251, such as section 251(g), and with Congress's focus on the local exchange market. We seek comment on our tentative conclusion.*

The Respondent has argued this above.

4. *It follows from the above definition of "exchange access" that a telecommunications carrier may request cost-based interconnection.... such a requirement would exclude competitive access providers that currently interconnect with incumbent LECs in order to offer competing exchange access transport services, not telephone exchange service.*

The Respondent has argued this above.

5. *Section 251(c)(3) appears to limit the purposes for which telecommunications carriers may request access to unbundled network elements only in the sense that such carriers must seek to provide a "telecommunications service" by*

means of such elements. As discussed above, interexchange service is a "telecommunications service." Thus, we tentatively conclude that carriers may request unbundled elements for purposes of originating and terminating interexchange toll traffic, in addition to whatever other services the carrier wishes to provide over those facilities.

The Respondent has argued this above.

(2) Commercial Mobile Radio Services

1. *We next seek comment on whether interconnection arrangements between incumbent LECs and commercial mobile radio service (CMRS) providers fall within the scope of section 251(c)(2). As indicated below in the discussion of section 251(b)(5), we also seek comment on the separate but related question of whether LEC-CMRS transport and termination arrangements fall within the scope of section 251(b)(5).*

2. *With respect to section 251(c)(2), because the obligations of that section, and of section 251(c) generally, apply only to incumbent LECs, we tentatively conclude that CMRS providers are not obliged to provide interconnection to requesting telecommunications carriers under the provision of section 251(c)(2). CMRS providers are not encompassed by the 1996 Act's definition of "incumbent local exchange carrier" discussed above.*

3. *LEC-CMRS interconnection arrangements may nonetheless fall within the scope of section 251(c)(2) if CMRS providers are "requesting telecommunications carrier[s]" that seek interconnection for the purpose of providing "telephone exchange service and exchange access." CMRS are within the definition of "telecommunications services" in section 3(46) of the 1934 Act, as amended, because they are offered "for a fee directly to the public." Similarly, CMRS providers are within the definition of "telecommunications carrier[s]" in section 3(44) because they are "provider[s] of telecommunications services." The phrase "telephone exchange service" is arguably broad enough to encompass at least some CMRS. "[T]elephone exchange service" is defined as either "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service[s]." We seek comment on which if any CMRS, including voice-grade services, such as cellular, PCS, and SMR, and non-voice-grade services, such as paging, fit this definition. In commenting, parties should address any past Commission statements that bear on the matter*

4. *If CMRS providers seeking interconnection from incumbent LECs fall within the purview of section 251(c)(2), or of section 251(b)(5), there arises the question of the relationship between section 251 and another recent addition to the 1934 Act that also addresses interconnection between CMRS providers and other common carriers, section 332(c). Although we seek comment on the relationship of the two provisions in this proceeding, we note that LEC-CMRS interconnection*

pursuant to section 332(c) is the subject of its own ongoing proceeding in CC Docket No. 95-185, which the Commission initiated prior to the enactment of the 1996 Act. We also note that we sought comment in that proceeding generally on the issue of the interplay of section 251 and section 332(c) and have received extensive comments.

The Respondent is especially concerned as to the Commissions stand on this section. The Respondent had taken the position in WT 96-6 that all CMRSs are effectively Local Exchange Carriers.

The Respondent argues that the local CMRS which is controlled by and holds itself out as an agent, affiliate, associate, or in some estoppel fashion an entity of the Incumbent Local Exchange Carrier, and acting in such a fashion that its services are themselves telephone exchange services, is by its actions and perforce of its representations an entity of the Incumbent Local Exchange Carrier and thus is subject to the terms of the 1996 Act thereto. Specifically, the Respondent is requesting that Bell Atlantic NYNEX Mobile be required, under the 1996 Act, to unbundle, as required by the Act, and specifically as petitioned herein.

The Respondent seeks to demonstrate that the unbundling requirements of the 1996 Act apply directly to the Incumbent CMRS, namely the CMRS that holds itself out to be the affiliate of the Incumbent LEC in the market. Specifically, the Respondent argues that the Bell Atlantic NYNEX Mobile entity has held itself out as an affiliate of the parents, namely Bell Atlantic and NYNEX. That as doing so they have incurred the same duties as the Incumbents per se.

The 1996 Act defines a Local Exchange Carrier as described earlier. The 1996 Act does not preclude a CMRS from being a LEC, however it leaves to the Commission the ability to so define. In fact the Commission in WT 96-6 suggest that such is the case and that being a LEC is in common law determined by how one presents oneself to the market rather than the "bright line" test of whether one owns a license, even if such ownership of the license is not put to use.¹⁶ The Respondent recognizes the concern for the inter-state transport portended by the availability of spectrum but this is a use by a customer and will undoubtedly be more difficult to manage by regulation.

The telephone exchange service is merely the ability to interconnect one user with another. The 1996 Act does not delimit this to wire or wireless applications. The definition includes the terms "same exchange area" and "connected system of telephone exchanges". As a term of art, the Respondent seeks to bring to the attention of the Commission the fact that with the current wireless technology the exchange function is performed in the BTS or cell

¹⁶See COMAV and Telmarc Response to WT 96-6. The Respondents argue that the CMRS is in effect also a LEC and that such a distinction may be valid on as regards to the management and administrative control of RF regulations and that the LEC actions are market driven and not regulatory driven.

site and not only in the separate MSC or mobile switching Center. The Respondent has addressed this issue in its presentation to the Commission in WT 96-6.

The 1996 Act defines "Exchange Access" and the coverage of LEC status is also covered under the application of use of this term.

The Respondent then further argues that there is no distinction between a CMRS and a LEC in its ability to perform the exchange function or the exchange access function.

The 1996 Act, Section 251, defines the Incumbent Local Exchange Carrier as¹⁷:

"(h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER-

(1) DEFINITION- For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i)

(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS- The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section. (i) SAVINGS PROVISION- Nothing in this section shall be construed to limit or otherwise affect the Commission's under section 201."

This states that any entity such as NYNEX or Bell Atlantic is a per se Incumbent Carrier. The Respondent then argues that Bell Atlantic and NYNEX hold themselves out, using the same name, representations, technical support, and through interlocking Boards and Directorates exhibit control over the cellular subsidiaries so as to be one and the same entity. Thus, the Respondent argues, that for the sake of the 1996 Act, BANM is an entity of the Incumbent Carrier and thus is itself, being indistinguishable from the Incumbent Carriers in name and essential operational functionality, covered under this clause. Furthermore, the Respondent argues that (h)(2) allows for the Commission to readily

¹⁷See 1996 Act, Title I, Part II, Section 251, (h)(1)-(2).

extend the definition of Incumbent to the Incumbent's CMRS. In fact, the petitioner argues that it is essential that the Commission do so in a timely fashion.

From Section 601 of the 1996 Act, the CMRS which is an affiliate of the RBOC LEC may represent itself or have itself represented by the RBOC, namely the Incumbent LEC. Specifically the 1996 Act states¹⁸:

"(d) COMMERCIAL MOBILE SERVICE JOINT MARKETING- Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intra-LATA telecommunications service, inter-LATA telecommunications service, and information services."

The Respondent asks the Commission to observe that this action places the CMRS of the Incumbent in the same position as the Incumbent. This is an extension of estoppel.¹⁹ The limitations of Sections 271 and 272 are important but they merely add further weight to the Respondents request.²⁰

The Respondent has argued that BANM is *pari passu* an Incumbent LEC. The 1996 Act, Section 251, further requires that for any Incumbent LEC that there is a duty to unbundle, amongst other duties attending thereto, and that unbundling be provided as per the from the 1996 Act.

The Respondent thus argues that the above portion of the 1996 Act applies to BANM and that the procedures for negotiation and arbitration apply. The Respondent has indicated that it has sent a petition for a request to the carrier, namely BANM. It has attempted to negotiate with that carrier but to no avail.

¹⁸See 1996 Act, Title VI, Sec. 601 (d).

¹⁹The extension of estoppel in this case is based upon the principle that the CMRS may not allege it is not an affiliate of the Incumbent since by its actions it holds itself out to be the case. The Respondent seeks remedies under the 1996 Act that allow it to have the Incumbent CMRS to be held to the same standard as the Incumbent per se, and that the Incumbent CMRS has held itself out as an affiliate by name of the Incumbent. In effect, the Respondent argues that under *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448, 458, that the party, in the case the Respondent, is entitled to the same rights, namely remedies under the incumbent clause of the 1996 Act, as if the fact that the Incumbent CMRS was indeed the Incumbent LEC.

²⁰See the 1996 Act, Section 271(a)(3): "(3) INCIDENTAL INTERLATA SERVICES- A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g)) originating in any State after the date of enactment of the Telecommunications Act of 1996. ...", and Section 271(g), "(g) DEFINITION OF INCIDENTAL INTERLATA SERVICES- For purposes of this section, the term 'incidental interLATA services' means the interLATA provision by a Bell operating company or its affiliate...(3) of commercial mobile services in accordance with section 332(c) of this Act and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section; ...", and Section 272 (a)(2), "(2) SERVICES FOR WHICH A SEPARATE AFFILIATE IS REQUIRED- The services for which a separate affiliate is required by paragraph (1) are...(B) Origination of interLATA telecommunications services, other than-- (i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g);..."

The Respondent has submitted a re-request for services under the new 1996 Act to Bell Atlantic NYNEX Mobile for the services requested. The Respondent, based upon prior experience as stated herein, does not expect a reply that is in the affirmative. As such, it is the Respondent's request that the Commission be prepared to execute the remedies under Section 252 of the Act and other appropriate legal bases for arbitration specified in the 1996 Act referred to explicitly above and elsewhere

The Respondent hereby argues that the CMRS is itself a Local Exchange Carrier and further that it holds itself out to be as such in the market. The delivery of telecommunications services, be they by wire or by wireless, are in effect the same services. They are the same as viewed by the consumer of these services even if they are implemented in a fashion that is different from the perspective of the provider. Standard wire based telephony is the same as cellular and is the same as any wireless based telephony.

Standard telephone service is the provision of voice and/or data communications in a fashion so that it may be delivered in a national network. The delivery of switched telecommunications can now be achieved via the existing telephone network, which is a monopoly, protected by the 1934 Federal Communications Act. There are new and innovative forms of technology that can and do deliver the same service. Cellular is one that has been in operations for over ten years and is a service and market controlled by eleven dominant players; the seven RBOCs (excluding Air Touch), GTE, McCaw (AT&T), Sprint, and Air Touch. A third alternative as approved by the FCC in its Fifth Report and Order dated July 15, 1994, namely, "PCS", or Personal Communications Services.

PCS provides, at a minimum, the ability of any new entrant to deliver toll grade quality voice services in a seamless interoperable nation network. This service or product offering is the provision, at a minimum, of voice grade service. It is the same as the service offered by the current Local Exchange Carriers, LEC, and is the same that could be potentially offered by the existing cellular carrier.²¹

This states that PCS, and other wireless means for telephony, are nothing more than "plain old telephone service". It clearly has the potential of providing telephone service at a more competitive price than a wire based service. It is totally cross elastic with a wire based service. Namely, the consumer cannot differentiate with either offering other than possibly through the extra mobility afforded by PCS. In essence, PCS makes wire and wireless telephone service a simple commodity, indistinguishable to the consumer solely on the basis of the technology. The distinguishing feature will most likely be the price and only

²¹In McGarty, 1990 [1], the references being detailed at the end of this filing, the demonstration is made that the networks as evolved with wireless can be constructed in a fully open and distributed fashion. It was in this paper that the concept of commodification was first presented.

the price, as it is with all commodities. PCS allows for the commodification of local exchange service.²²

PCS, cellular, and wire based local exchange services are indistinguishable from the perspective of the buyer. Therefore, PCS can and should compete with the LEC and the wire based service.

If the intent is to create a competitive alternative to the local loop and, simultaneously, to expand the telecommunications services offered, then PCS offers a significant alternative means to do so. Experimental efforts to date have indicated that the consumer does not necessarily view PCS as a separate service offering. If priced competitively, and positioned competitively, the consumer views PCS as a displaceable alternate to the wire based telephone.²³

The "Market" for PCS, and other similar wireless based services, including but not necessarily limited to cellular, is the same as the "Market" for the LEC based services of today. The "Market" for cellular is the same as the PCS "Market". There is no material or other observable or measurable difference in the offering of PCS and wire based service and the markets for both are the same. The consumer may choose between the two.²⁴

Wireless, in general, enables the commodification of voice services and establish the possibility for any new entrant to sell the same service to the consumer, with the consumer purchasing the commoditized service solely on the basis of price. PCS allows for the total cross elasticity of supply to the consumer of telephone service. It is argued that the service offered by the dominant entity or the RBOC LEC is fully displaceable by PCS and that as such competes with the LEC in its primary market.²⁵

New entrants into the PCS business do not face economies of scale in capital plant that have been faced by prior entrants, thus justifying the prior monopoly position of the LEC. PCS entrants, by means of outsourcing, can also obtain all support and sales services at marginal prices and thus each Local Service Operator, LSO, does not have a scale economy in the operations and sales sides of the business. Thus there are no economies of scale in the PCS business and the justification for any monopoly player is no longer valid on economic principles.

²²Telmarc Telecommunications, Inc., NPRM Comments to the FCC, November 9, 1992.

²³Telmarc Quarterly Report, July 1, 1993, which details extensive market research in this area.

²⁴The Court, in *United States v. E.I. duPont de Nemours & Co. (Cellophane)*, 351 U.S. 377 (1956), introduced the concept of cross elasticity to determine the market. Although there is no true market measure at this time, extensive market research indicates that there is anticipated to be great cross elasticity as defined by the Court in the aforementioned.

²⁵In the decision of *Telex Corp. v. IBM Corp.*, 367 F. Supp. 258, 355-356 (N.D. Okla. 1973), the Tenth Circuit Court ruled that IBM had monopolized the market on the basis of the sale of peripheral products that were commodifiable in the terms in which we use herein.

It has been shown that new entrants have the ability to establish capital plant in such a way as to have marginal capital and average capital be almost the same at very small market penetrations, less than 0.5%. Thus there are de minimis scale economies in capital plant. In addition there may be scale in support and operating services, but by outsourcing, and using the economy scope of a third party, such as an ISSC or EDS or CSC (as did NEXTEL), an entrant may purchase such service at the margin. Thus any new entrant may see entry costs all at the margin.²⁶ This implies that there is no natural monopoly. In fact this implies that competition may be quite significant.

Competition in the PCS market, for voice amongst other services, will be commoditized and the consumer choice will be made on the basis of price, if such is possible. Choice on price for the consumer is Pareto optimal.

With the aforementioned characteristics, the product or service offering will be based upon price. New entrants will compete primarily on price, and their prices will reflect their costs. The consumer welfare is always maximized by maximizing choice while also minimizing price. Price could be so minimized in this market by having full competition and clearing the market on a fully competitive price basis.²⁷

The changes to the Act have taken from the states the authority to regulate CMRS. However, the Respondent does so bring to the attention of the Commission that fact that the Act does so delimit the Commission in the event that the CMRS does effectively act as a local exchange carrier. Section 252 treats the control exerted over Common Carriers by the Commission and the States. What the Respondent argues is the States have regulatory control over disaggregators as per the authority under the 1996 Act Sec. 252 (e), wherein the States have the authority over intra-state interconnection and that a disaggregator is not a per se CMRS and is an intra-state LEC

It is the fact that the State PUCs are delimited in the case of CMRS, and a CMRS is defined in the context of holding a license for the transmission of RF energy from the Commission. Other carriers, specifically Local Exchange Carriers who are Common Carriers may and most likely be subject to the State. The regulation is exclusive in its terminology, excluding all but a CMRS, namely a license holder.

Moreover the Respondent requests that the Commission rule on the issue of this NPRN, but if the Commission does not rule, that the Respondent may take this to the State PUC pursuant to this above referred section.

²⁶McGarty, 1994 [1], and Telmarc Quarterly Report to the FCC, April 1, 1994

²⁷McGarty, 1993 [2] discusses the competitive aspects of fully competitive markets versus monopoly and duopoly markets. It is shown that in the current monopoly market the price is twice what it could be for telephone service in a competitive market. This fact has been borne out in the IEC market where long distance rates have been halved in the last ten years.

(3) Non-Competing Neighboring LECs

1. *By definition, such LECs provide "telephone exchange service and exchange access."... We seek comment on which of the above interpretations is correct. To the extent a party advocates the latter interpretation, we also seek comment on the implications, if any, for the CMRS discussion.*

The Respondent has no comment.

3. Resale Obligations of Incumbent LECs

a) Statutory Language

1. *We seek comment generally on the application of this section....*

The Respondent has no comment.

b) Resale Services and Conditions

1. *We also seek comment on what limitations, if any, incumbent LECs should be allowed to impose with respect to services....*

2. *We seek comment on the meaning of the language that "a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.....*

3. *We note that states have adopted various policies regarding resale of telecommunications services.*

The Respondent has no comment.

c) Pricing of Wholesale Services

(1) Statutory Language

1. *The requirement in section 251(c)(4) that incumbent LECs offer services at "wholesale rates" is elaborated in section 252(d)(3),*

The Respondent has no comment.

(2) Discussion

1. *We seek comment generally about the meaning of the term "wholesale rates" in section 251(c)(4).*

The Respondent has no comment.

(3) Relationship to Other Pricing Standards

1. *We seek comment on the relative advantages and detriments of this and other alternatives as either federal policies or policies that individual states could adopt.*

The Respondent has no comment.

4. Duty to Provide Public Notice of Technical Changes

1. *We seek comment on the relationship between sections 273(c)(1) and (c)(4), which detail BOCs' disclosure requirements "to interconnecting carriers . . . on the planned deployment of telecommunications equipment," and section 251(c)(5), which addresses disclosure requirements for all incumbent LECs.*

The Respondent has no comment.

C. Obligations Imposed on "Local Exchange Carriers" by Section 251(b)

1. *Section 251(b) imposes certain specified obligations on all "local exchange carriers." "Local exchange carrier" is defined in section 3(26) as "any person that is engaged in the provision of telephone exchange service or exchange access."²⁸ Section 3(26) excludes from the definition persons "engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term." We seek comment on whether, and to what extent, CMRS providers should be classified as LECs and the criteria, such as wireless local loop competition in the LEC's service area by the CMRS provider, that we should use to make such a determination. We seek comment on whether and how a Commission determination that CMRS providers be granted flexibility to provide fixed wireless local loop service should affect the determination of whether CMRS providers should be included in the definition of local exchange carrier. We also seek comment on whether we may classify a CMRS provider as a LEC for certain purposes but not for others. For example, could we treat a CMRS provider as a LEC for purposes of providing resale but not for providing number portability? We also request that commenters discuss whether we may classify some classes of CMRS providers as LECs, but not others, such as those that are not competing with LECs. For example, in considering whether to classify certain CMRS providers as LECs, should we distinguish between CMRS providers that offer cellular service from those that offer only paging services?*

²⁸ 1996 Act. sec. 3, § 153(a)(44).

The ability to offer a local exchange service in a competitive manner depends upon any new entrant being able to collect together five elements; user connection, switch interconnection, billing, customer care, and sales. How these are obtained are dependent upon each user. The user connection may be obtained via the unbundled connection capability purchase from the I-LEC, from the deployment of the purveyor's own fiber network, from air time purchased from a third party, or from a wide variety of means. Namely, as we have already argued, there is a multiplicity of means available for the purveyor and these means may be owned and constructed by the purveyor or they may be provided as products from some other third party. The switch interconnection is the ability to have access to any and all other purveyors to assure universal interconnectivity. We shall focus on this latter element in a later section.

We can now proceed with a detailed analysis of the product offered and how they may be purchased from other players, especially dominant market player, or the monopoly player in the market. At the heart of this analysis is the argument that there are clear and evident tying arrangement present. As we have argued, the following facts are self evident:

- i. Local Exchange Services is the product being provided to the customer.*
- ii. Local Exchange Service can be provided by the agglomeration of such "operational components" or "products" as air time, I-LEC/CMRS interconnection (namely the interconnection between the CMRS switch and the I-LEC switch), I-LEC interconnection which is the direct interconnection to the I-LEC switch no matter what the source of the interconnection, billing, customer service, network management, sales, switching, local interconnection, and other elements as may be required.*
- iii. The competing player in this market may provide the product by delivering several of the "operational components" directly themselves and by obtaining some of the missing operational components from the monopoly Incumbent LEC.*
- iv. The 1996 Act mandates that the I-LEC unbundle amongst other requirements.*
- v. The 1996 Act removes the Antitrust protection from the I-LEC.*
- vi. The Incumbent LECs have monopoly control of the Local Exchange market.*
- vii. The Incumbent LEC has, through its holding company, directly or through interlocking agreements, overt control over the CMRS which is related to it.*

(i) Tying Arrangements Defined

To quote from the Court in *Kodak*.²⁹

“A tying arrangement is “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.” *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Such an arrangement violates 1 of the Sherman Act if the seller has “appreciable economic power” in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969).”

A tying arrangement exists only when a producer of a desired product sells it only to those who also buy a second product from it.³⁰ Consider the arrangement made by the CMRS. If a local exchange carrier who is not the I-LEC desires to enter the local exchange market by purchasing air time from the CMRS, then the CMRS may tie with the air time such services as network management, customer service, engineering services and other such services. In addition the CMRS generally ties together the interconnection between the switch of the CMRS and the switch of the I-LEC. The latter is a separable set of product offerings and the forced tying arrangement we argue is a per se violation. The Court has ruled in *Jefferson Parish Hospital v. Hyde* that when “forcing” occurs with a company that has “market power” that such is unlawful.

The elements of an illegal tying arrangement have been articulated by the Court in *Jefferson Parish Hospital v. Hyde*. Specifically the claims for a successful claim are:³¹

- i. *the tie must affect more than a de minimis amount of interstate traffic;*
- ii. *where the tying arrangement is not expressed, buyers must in fact have been coerced into buying the tied product as a condition of buying the tying product;*
- iii. *the two products must be separate;*
- iv. *the defendant must have economic power in the tying market;*
- v. *there must not be any valid business justification for the tied sale.*

We shall now go through each of these elements in turn for the case of the I-LEC and CMRS relationship.

(a) *Interstate Traffic*

²⁹See *Eastman Kodak Company v. Image Technical Services, Inc. et al.* (June 8, 1992).

³⁰Areeda & Kaplow, p. 704.

³¹Ross, p. 285.

The issue of interstate traffic is a forgone conclusion in the case of telecommunications. The overall product that is to be sold is local exchange service combined with inter-exchange carrier service. Since the I-LEC is by definition a monopoly player in all markets in which it acts it has the market power and in view of the CMRS it is a duopoly player in an interstate market. The specificity of the interstate issue has been joined and resolved by the Congress and is stated in U.S.C. 47 Section 332

(b) *Coercion*

The contracts with the CMRS explicitly require the purchase of the tied elements. Namely, if one were to go to any existing CMRS provider the service offered is that of the air time plus the I-LEC interconnection. As we shall argue, these are clearly two separate products and in fact there should be no reason that the CMRS should in any way refuse to connect to the competitive the C-LEC. The refusal is a barrier to entry to the C-LEC. It is argued that that refusal is a *per se* violation.

(c) *Separate Products*

In *Kodak* the Court ruled that products or services are separate when there is sufficient consumer demand to justify firms providing one item without the other.³² Let us consider the products being offered. For the CMRS they are:

Air Time: This is the provision of access to the cell transport facility allocated on a block of trunk voice channels which can be readily allocatable by the switch software. This allocations is common practice in all MTSO or MSC trunk routing software. The air time is the provision of end to end trunk circuits.

Field Service: These are the costs allocated to the servicing of cells and the switch of the I-CMRS provider.

Network Management: This is the management associated with the provision of the CMRS services.

The CMRS will bundle the interconnection, as follows into this product.

I-LEC Interconnection: This is the connection from the CMRS switch trunk side to the I-LEC line side. There is no functional reason why this cannot be terminated on the C-LEC switch. The reason provided by the I-LEC is that it would allow for IEC access to the C-LEC and thus avoid the payment of access fees

³²Ross, p. 289.

We bundle these three elements into an airtime fee for service. In addition to these the CMRS provides the following products. It should be noted that the CMRS also provides line item costing and pricing for these demonstrating that they exist and are separable.

Billing: This is the full bill service from tape collection at the switch, issuance of the bill, provisioning of the switch, and collections process.

Customer Service: This is the provision of all incoming customer service calls.

Sales: This is the sales, set, provisioning, collections and other functions.

Administration: This is the overhead management of the system in addition to the normal operations of the business. It may not generally have any relation to the delivery of any products provided.

Planning, R&D, Overhead: These are general overheads related to the service that may be related to new services and products that the CMRS may offer but would have no relation to general air time.

(d) *Economic Power of Incumbent*

It is beyond a doubt that the incumbent has economic power. As a duopoly player aligned with the monopolist player this is without a doubt. The cartel formed by the A and B band cellular providers who are for the most part the I-LEC affiliates or agents is prima facie proof of this power.

(e) *Business Justifications*

There are no viable business justifications for the bundling of such services. It can be argued that the 1996 Act recognized that unbundling and other similar requirements are a necessary step for the I-LECs to be allowed entry to the IEC market.

2. Resale

1. *We seek comment on what types of restrictions on resale of telecommunications services would be "unreasonable" under this provision...*

The Respondent has no comment.

3. Number Portability

The Respondent has no Comments on this Section.

4. Dialing Parity

The Respondent has no Comments on this Section.

5. Access to Rights-of-Way

The Respondent has no Comments on this Section.

6. Reciprocal Compensation for Transport and Termination of Traffic

Prices charged can be used as a barrier to entry and a per se violation of the antitrust laws. The issue of separate products and the prices applied thereto is key to the understanding of the pricing mechanism in the antitrust sense.

(i) *The Products and The Prices*

We have introduced the following set of distinct products that can be provided;

Wireless Connection: This is composed of the air time as measured by the cell and switch capital costs, the field service costs and the network management costs.

I-LEC Interconnection: This is measured by the cost of a trunk from the MSC to the I-LEC Switch and the related access fees charged for interconnection by the I-LEC.

Billing: This is the preparation of the bill and its associated collection process. The "bill" is a physical product that can be purchased on a per customer basis.

Customer Service: This is the delivery of a customer service system and ancillary support necessary to support customer inquiries.

Sales: This is the delivery of the customer and may include the delivery of the terminal, portable, or otherwise.

Overhead: These are all of the non-allocated costs that are incurred.

The costs are generally presented as fixed costs plus variable costs. We have shown elsewhere that the Wireless Connection, the I-LEC connection, billing, customer service and sales can all be obtained on a marginal basis and that there are thus de minimis fixed costs and thus de minimis scale. Therefore, we have in the case of the CMRS business an

Average Total Cost equal to the Average Variable Cost, which is approximately equal to the Marginal Cost.³³

Specifically, in the referenced papers by the author, values of these costs have been presented. In addition, the author has demonstrated, herein and elsewhere, that the AVC for the Wireless Connection, which we shall call air time although it includes some other variable costs, is less than 20% of the sum of all AVC elements. Sales is over 20% of the sum of all AVC, billing and customer service is about 20% and the remaining costs are overhead and access fees for interconnection

The questions that we ask are two:

- i. Does the CMRS sell itself air time at a price that is below the AVC?*
- ii. Does the CMRS sell airtime at a price that is dramatically above AVC?*

The counter to these questions are also asked concerning the cost of interconnection to the I-LEC regarding access fees. Specifically

- i. Does the I-LEC sell itself interconnection at a price that is below the AVC?*
- ii. Does the I-LEC sell interconnect at a price that is dramatically above AVC?*

(ii) Price Discrimination

Price discrimination exists when a seller provides its product to two buyers in such a fashion that one sale has a different rate of return than the other. Namely, one buyer is discriminated against by being forced to sustain a higher rate of return to the seller than another. As has frequently been noted, in a purely competitive business wherein the good being market is a commodity there should be no price discrimination. Let us consider the issue of air time.

In the ideal world after the PCS licenses, there will be two 800 MHz cellular carriers, six PCS carriers, namely three at 30 MHz bandwidth and three at 10 MHz bandwidth, and an SMR carrier. This is a collection of at least nine providers of air time. We have also argued that air time is a separable product, that it is in essence a commodity, namely there is generally no discernible difference in the market other than price, and thus one would anticipate the evolving of a commodity market that is competitive for airtime.³⁴

³³McGarty, 1993-1994 papers on access. The author derives the detailed costing model for all of these elements.

³⁴It should be noted that NextWave, the dominant winner in the C Band PCS auctions proposes to be solely a purveyor of airtime on a wholesale basis.

Let us consider a simple market case. Let us assume that there are two sellers of local exchange service and let us further assume that the service is composed of agglomerating the products of: airtime, interconnect, billing, customer service, and sales. This is a simple case of five products being blended together to deliver the overall product to the customer.

Let us further assume that there are costs related to these products for each provider. Namely:

- A_k = *Airtime for supplier k.*
- I_k = *interconnect for supplier k.*
- B_k = *billing for supplier k.*
- C_k = *customer care for supplier k.*
- S_k = *sales for supplier k.*

Then the supplier has an assumed rate of return of R_k . The price to the consumer, P_k is given by:

$$P_k = (A_k + I_k + B_k + C_k + S_k) (1 + R_k)$$

Thus if Supplier 2 is the most efficient supplier and its airtime is priced at commodity rates, then all things being equal the price of Supplier 2 should be lower than the price of supplier 1.

If however, Supplier 1 controls the airtime, and if Supplier 1 sells itself airtime at a rate that is equal to or above the AVC, but sells Supplier 2 airtime at a rate that is dramatically higher than it sells it to itself, then, although there is no per se violation, there is price discrimination. Namely, the Supplier 1, who perforce of market power due to its duopoly presence, is allowed for the interim to sell airtime at disproportionately higher rates, does so with the intent of controlling the market.

It should also be made clear that Supplier 1 may, if it so chooses, to be a purveyor of air time only and thus reap adequate returns on its investment. It, however, wants to reap larger returns by selling the consumer the bundled product at higher prices even though a competitor Supplier 2 could deliver lower costs on all other elements, except airtime, since Supplier 2 does not have an FCC license.

We can define the situation better as follows. If P is the price, we define E as the excess costs. Then:

$$P_k = (A_k + E_k) (1 + R_k)$$

If Supplier 2 is much more efficient than Supplier 1 in providing all but the air time element, then:

$$E_2 \ll E_1$$

But the Supplier 1 charges airtime to itself at a dramatically lower rate than it charges Supplier 2. Specifically:

$$A_1 \ll A_2$$

Then clearly the consumer will be forced to pay the excess charge for airtime, which would accrue to Supplier 1 as excess oligopoly rents.

Recall that Section 2 of *Clayton*, namely the *Robinson Patman Act*, states:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them..."

Recall also that this regulates consistency of prices and not consumer welfare. In this above example, however, consistency of prices, through the aggregation effect, also maximizes consumer welfare. In fact it does not material disadvantage the supplier of airtime who may still reap an adequate return on their air time investment. It does, however, drive from the market the producers of "excess" product elements that can more efficiently be provided by alternative suppliers. It allows for the ultimate commoditization of airtime. We shall return to this later.

(iii) *Predatory Pricing*

Predatory pricing generally means that the competitor sells its product at artificially low prices. Generally it is illegal for a firm to sell below cost where the intent is to drive competitors out of the market or to ensure that competitors do not enter the market. Competition should drive prices to the margin and this is what one would expect in a market wherein true competition exists. In the local exchange market we are starting with a monopoly situation and we are seeking to allow new entrants.

We shall focus on two elements in this business from two competitors. The two competitors are the I-LEC and the CMRS. In all markets the CMRS is affiliated with the

I-LEC and that affiliation has been allowed to be more closely affirmed under Section 601 of the 1996 Act. In effect, the author has argued elsewhere that the relationship can be viewed within the context of the law of Agency and it can be seen that the Incumbent's CMRS is acting as one and the same with the I-LEC. Thus they are indistinguishable in the market and have *pari passu* equal power.

From the I-LEC, the product that we will concern ourselves with is the switch interconnection product. For the CMRS perspective, the product is airtime.

Predatory pricing has been analyzed by the use of the Areeda-Turner test. Specifically the test states:

- i. If the Price offered by the competitor to the market is greater than the Average Total Cost then there is no issue of predatory pricing.*
- ii. If the Price offered by the competitor to the market is greater than the Average Variable Costs then there is no predation.*
- iii. If the Price offered by the competitor to the market is less than the AVC then the price is predatory and it is unlawful.*

We now want to consider the two cases. However we must remember that the price of the bundled product, namely LEC service, is the sum of the prices of the separate products that are combined to offer that end product.

(iv) I-LEC and Access

As we shall demonstrate latter in this paper, the I-LEC sells interconnection. It also sells interconnection to other parties. First it sells interconnection to the inter-exchange carriers, "IEC"s. They pay a significantly higher price than all other entities.

Let us assume that the price that the I-LEC charges the customer is the sum of the price for the interconnection plus all other prices. Namely, the price to the customer is the sum of the two product prices:

$$P_C = P_I + P_O$$

where P_I is interconnection price and P_O is all other prices. Let us assume that C_I is the cost of interconnection and C_O is the cost of all other elements. We shall assume that these costs are the AVC costs. The question is, can the I-LEC charge the customer for the LEC service a price that reflects a predatory rate, whereby we define a predatory rate as one where:

$$P_1 \ll C_1$$

How can this be achieved. Quite simply. If the I-LEC charges the IEC a Price for Interconnect as follows:

$$P_{LIEC} \gg C_1$$

Thus the I-LEC makes up for losses in the local exchange area to ensure a sustainable monopoly position, by charging much higher interconnection prices in the interexchange area. This is a cross-subsidy scheme that ensures that the interexchange market subsidizes the monopoly position of the local exchange market. We have argued elsewhere that the I-LEC charges should reflect the totality of the I-LEC and should not select subsidies, costs from other competitors or any other market pricing distortion. We shall return to this latter.³⁵ We argue, however, that interconnection is predatory and falls in the collection of Class 3 Areeda-Turner violations.

(v) *CMRS and Airtime*

The argument on predatory pricing for an I-LEC does not apply to the CMRS. We cannot argue that the bundled offering is priced at below costs. Unlike the I-LEC case where there is a "back-door" subsidy to allow below AVC and allegedly Marginal costs pricing, there is no similar argument here for the CMRS. Notwithstanding that observation, we do argue that the tying arrangements are themselves per se violations.

b) **Statutory Language**

1. The Respondent has no Comments on this Section.

c) **State Activity**

1. The Respondent has no Comments on this Section.

d) **Definition of Transport and Termination of Telecommunications**

1. *We seek comment on whether "transport and termination of telecommunications" under section 251(b)(5) is limited to certain types of traffic. The statutory provision appears at least to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing LEC in the same local service area as well as traffic passing between LECs and CMRS providers. We seek comment on whether it also encompasses telecommunications traffic passing between neighboring LECs that do not compete with one another.*

³⁵See McGarty, "Access...", 1994. That paper demonstrates the LEC's access AVC and shows that there is Areeda-Turner problems.