Getting Wireless Carriers Wired for Less: An Argument for Federal Regulation of LEC-CMRS Interconnection Agreements

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GETTING WIRELESS CARRIERS WIRED FOR LESS: AN ARGUMENT FOR FEDERAL REGULATION OF LEC-CMRS INTERCONNECTION AGREEMENTS

In 1993, Congress enacted legislation that significantly transformed the regulatory treatment of mobile telephone services. Section 6002 of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") amended section 332 of the Communications Act of 1934 (the "1934 Act") to preempt state regulation of entry into the wireless market and state regulation of rates charged by wireless service providers. In addition, section 6002 of the Budget Act granted the Federal Communications Commission (FCC) authority to regulate interconnection between commercial mobile radio service (CMRS) providers and other common carriers.

4. "Commercial mobile radio service" is identical to "commercial mobile service," which section 332(d)(1) of the 1934 Act, as amended, defines as "any mobile service . . . that is provided for profit and makes interconnected service available . . . to the public." 47 U.S.C. § 332(d)(1). Section 332(d)(2) defines "interconnected service" as "service that is interconnected with the public switched network." Id. § 332(d)(2). FCC regulations implementing the Budget Act define CMRS in essentially the same manner. See 47 C.F.R. § 20.3 (1996). CMRS providers include cellular, personal communications service (PCS), and most specialized mobile radio (SMR) and paging providers. See Implementation of Sections 3(n) and 332 of the Communications Act, 9 F.C.C.R. 1411, 1450, 1454-55, 1460-61 (1994) (second report and order), summarized in 59 Fed. Reg. 18,493 (1994) [hereinafter CMRS Second Report and Order]. PCS is a new, digital wireless service that the FCC defines broadly as "[r]adio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks." 47 C.F.R. § 24.5. The FCC defines SMR as "radio system in which licensees provide land mobile communications services (other than radio location services) in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this part, Federal Government entities, and individuals." 47 C.F.R. § 90.7. SMR is thus a two-way radio telephone service, similar in operation to cellular...
Less than three years later, Congress enacted the Telecommunications Act of 1996 (the "1996 Act"), which significantly amended the 1934 Act and sought to establish a "pro-competitive, de-regulatory national policy framework" for the U.S. telecommunications industry. One of the most far-reaching objectives of the 1996 Act is the opening of local exchange markets to competition. Congress sought to achieve this goal by imposing on incumbent local exchange carriers (LECs), which tradition-
ally operated in a monopolistic environment, a number of duties, including the duty to interconnect with any telecommunications carrier that requests interconnection with the LEC’s network. Under the 1996 Act, incumbent LECs must negotiate in good faith with all requesting telecommunications carriers to reach agreement on the terms of interconnection. If parties are not able to agree on terms of interconnection, then the 1996 Act provides that a party may request arbitration of unresolved terms by a state commission.

The 1996 Act, therefore, presented the Commission with a dilemma: whether the 1996 Act, which broadly governs interconnection between telecommunications carriers and LECs, applies to LEC-CMRS interconnection, thus granting jurisdiction over

lowing a caller to place a long-distance call by means of a separate long-distance telephone provider, such as AT&T or MCI. In sum, a LEC is a company that offers local telephone service, such as Bell Atlantic or Ameritech.

10. See, e.g., MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.3.2, at 149 (1992).
11. See 47 U.S.C.A. § 251(c); see also infra notes 136-41 and accompanying text (describing duties imposed on LECs).
13. 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 1996 Act], provided telephone exchange service in such area; and (B) [complied with certain FCC regulations].” Id. § 251(b)(1). Congress also provided that the FCC may designate other LECs as incumbent LECs if such LECs (1) occupy a “comparable” position in the telephone exchange market as an incumbent LEC defined in section 251(h)(1); and (2) such treatment is “consistent with the public interest.” Id. § 251(h)(2). The FCC subsequently defined an incumbent LEC in accordance with section 251(h)(1). See 47 C.F.R. § 51.5. Incumbent LECs are Regional Bell Operating Companies (RBOCs), such as Bell Atlantic or Ameritech, or independent telephone companies, such as GTE, that historically held a monopoly license to provide telephone exchange service within a defined geographic area. See, e.g., KELLOGG ET AL., supra note 10, § 3.3.2, at 149. The term “Local Access and Transport Area” (LATA) includes the service area granted to an incumbent LEC. See United States v. Western Elec. Co., 569 F. Supp. 990, 994-95 (D.D.C. 1983) (noting that “the purpose of the establishment of the LATAs is . . . to delineate the areas in which the various telecommunications companies [i.e., incumbent LECs] will operate”); see also KELLOGG ET AL., supra note 10, § 4.8, at 227-28 (defining LATA).
14. Although the definition of “telecommunications carrier” provided in the 1996 Act does not include specifically CMRS providers, see 47 U.S.C.A. § 153(44), the FCC broadly defined the term to include CMRS providers in regulations promulgated to interpret the 1996 Act. See 47 C.F.R. § 51.5.
16. See id. § 252(b)(1).
arbitration proceedings to state commissions, or whether section 332 of the 1934 Act reserves jurisdiction over LEC-CMRS interconnection for the FCC. On April 19, 1996, the Commission initiated a rulemaking, which included a request for comments on the LEC-CMRS interconnection issue,¹⁷ to implement the local competition provisions of the 1996 Act.¹⁸

On August 8, 1996, the FCC released its First Report and Order in the interconnection proceeding.¹⁹ In Section X of the Interconnection Order, the Commission concluded that sections 251 and 252 of the 1996 Act apply to LEC-CMRS interconnection.²⁰ The Commission, however, acknowledged section 332 as an alternative basis for jurisdiction over LEC-CMRS interconnection and reserved the option of revisiting this jurisdictional question in the future.²¹

This Note discusses the alternative bases for jurisdiction over LEC-CMRS interconnection. The Note argues that section 6002 of the Budget Act granted the FCC jurisdiction over LEC-CMRS interconnection and that the FCC's jurisdiction remained intact after Congress's enactment of the 1996 Act. This Note also considers factors that support the assertion of federal jurisdiction in this area. First, LECs subjected CMRS providers to discriminatory treatment for many years in the area of interconnection. This treatment existed despite regulatory oversight by state public utility commissions. Moreover, several states promulgated regulations that discriminated against CMRS providers. Second, although CMRS providers have negotiated substantially more favorable interconnection agreements since the 1996 Act, some


¹⁸. See id. at 14,228-29.


²⁰. See Interconnection Order, supra note 19, at 16,005.

²¹. See id.
LEC}s continue to subject CMRS providers to discriminatory treatment. Finally, recognizing FCC jurisdiction to regulate LEC-CMRS interconnection will further Congress’s stated policy goals of promoting interconnection between LECs and CMRS providers, fostering the development of a national wireless infrastructure, and furthering the goal of a procompetitive telecommunications regulatory framework.

In light of the past and current experiences of CMRS providers at the state level, this Note argues that the FCC should assert its jurisdiction over LEC-CMRS interconnection and regulate LEC-CMRS interconnection agreements. This Note also proposes one solution: federal arbitration of LEC-CMRS interconnection agreements.

THE IMPORTANCE OF LEC-CMRS INTERCONNECTION

By definition, all CMRS providers interconnect with the public switched network. CMRS providers must interconnect with the public switched network so that a wireless customer can place a call to a landline, i.e., nonwireless customer, or vice versa. Because there are many more wireline phones than

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22. The FCC defines CMRS as a mobile service that is “(1) provided for profit . . . ; (2) An interconnected service; and (3) Available to the public.” 47 C.F.R. § 20.3 (1996). “Interconnected service” is a service that is “interconnected with the public switched network . . . that gives subscribers the capability to communicate to or to receive communication from all other users on the public switched network.” Id.

23. The FCC regulations define “interconnection” as “the linking of two networks for the mutual exchange of traffic.” 47 C.F.R. § 51.5. The Eighth Circuit recently upheld this interpretation of “interconnection.” See Competitive Telecomms. Ass’n v. FCC, 117 F.3d 1068, 1071-73 (8th Cir. 1997). Interconnection in the LEC-CMRS context thus simply involves a physical connection between a LEC’s network and a CMRS provider’s network so that calls can be exchanged between the two networks. See id. at 1073.

24. The term “landline” refers to the “provision of telephone service by wire or ‘wireline’ service.” Mobiletel, Inc., 11 F.C.C.R. 19,098, 19,106 (1996). The FCC thus uses the terms “landline” and “wireline” interchangeably. See id. “The term ‘wireline’ describes a system in which the connections between individual customers and central offices are made by wires, as opposed to alternative technologies such as radio links.” Mobiletel, Inc. v. FCC, 107 F.3d 888, 892 n.1 (D.C. Cir. 1997). This Note uses the term “landline” interchangeably with the term “wireline.”

mobile phones, a substantial majority of calls made by wireless subscribers are routed through the public switched network via a LEC. The LEC interconnecting a CMRS provider to the public switched network thus controls a "bottleneck" in the completion of most telephone calls to or from mobile phone users.

The FCC has recognized that LEC-CMRS interconnection is essential to the provision of wireless telecommunications since the early stages of its regulation of cellular telecommunications. In a 1994 rulemaking order implementing the Budget

lar subscriber places a call, the handset transmits the call to the nearest base station antenna, which locates the center of the cell from which the subscriber placed the call. See United States v. Western Elec. Co., 890 F. Supp. 1, 3 (D.D.C. 1995), vacated as moot, 84 F.3d 1452 (D.C. Cir. 1996); HUBER, supra, at 4.2 n.6. The antenna transmits the call either by telephone wires or by microwave to the Mobile Telephone Switching Office (MTSO), which is the central switch for the cellular provider serving that customer. See HUBER, supra, at 4.2 n.6. If the call is to another cellular customer of that provider, then the cellular provider routes the call directly via its own switch; if the call is to a wireline number, then the MTSO delivers the call to the LEC switch, which then routes the call over the public switched network. See id.

26. See Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 9 F.C.C.R. 5836, 5855 (1994) (memorandum opinion and order) (noting AT&T claims that 99% of cellular calls are to landline phones); William Newman, Reality Check on Bill & Keep, CELLULAR BUS., Feb. 1997, at 78, 80 (stating that approximately 98% of outgoing cellular calls terminate on the wireline network).

27. See HUBER, supra note 25, at 4.9-10.

28. Similarly, if the CMRS subscriber's call is a long-distance call, then the LEC generally routes the call to the subscriber's chosen long-distance provider. See Western Elec., 890 F. Supp. at 3-5. This interconnection arrangement also creates a "mobile bottleneck" because the LEC controls an essential step in the routing of most long-distance cellular calls. See id. at 4 ("[T]he Mobile Bottleneck gives the local companies (usually the Regional [Bell Operating] Companies) the ability to control a part of virtually every interexchange cellular call . . . ."); see also SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1491-92 (D.C. Cir. 1995) (recognizing the existence of a "mobile bottleneck" for cellular long-distance calls).

Act, the FCC emphasized that "commercial mobile radio service interconnection with the public switched network will be an essential component in the successful establishment and growth of CMRS offerings."

Interconnection Charges

LECs impose charges on CMRS providers for interconnection with the public switched network. LECs apply these charges primarily on a "minute of use" basis for LEC transport and termination of calls originated by wireless customers, although many LECs also impose flat rate fees for use of their wireline facilities. "Transport" involves the transmission of telecommunications traffic from the point of physical interconnection between the two carriers to the LEC switch that serves the called party. "Termination" encompasses the remaining portion of


30. CMRS Second Report and Order, supra note 4, at 1499. The Commission also noted:

From the perspective of customers, the ubiquity of such interconnection arrangements will help facilitate the universal deployment of diverse commercial mobile radio services. From a competitive perspective, the LECs' provision of interconnection to CMRS licensees at reasonable rates, and on reasonable terms and conditions, will ensure that LEC commercial mobile radio service affiliates do not receive any unfair competitive advantage over other providers in the CMRS marketplace.

Id. This last sentence refers to the FCC's decision to award two cellular licensees in each market area: one to the wireless affiliate of the incumbent LEC serving that market and the other to an independent cellular operator. See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of FCC Cellular Communications Systems Rules, 86 F.C.C.2d 469, 476, 483 (1981) (report and order), reprinted in 46 Fed. Reg. 27,665 (1981) [hereinafter Cellular Report], modified, Cellular Reconsideration Order, supra note 29; HUBER, supra note 25, at 4.5-6.


32. The FCC defines "transport" as "the transmission and any necessary tandem switching of local telecommunications traffic . . . from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party." 47 C.F.R. § 51.701(c) (1996).
the call: switching of the traffic on the LEC switch and delivery of the call to the called party's telephone. By collecting transport and termination costs, therefore, an LEC recovers the costs of completing a call originated by another carrier.

The rates charged by LECs for transport and termination of traffic handed over by CMRS providers are a significant factor in determining the growth of the wireless industry because interconnection charges constitute a significant part of wireless carriers' operating expenses. In 1996, MTA-EMCI, a Washington telecommunications consulting firm, estimated that wireless carriers paid $1.3 billion annually in interconnection fees. Prior to the 1996 Act, LECs, as monopoly providers of wireline telephone exchange service in most areas, frequently used their greater bargaining power to impose higher transport and termination rates on CMRS providers than those offered to wireline carriers. If LECs can obtain such discriminatory interconnection rates in interconnection agreements negotiated or arbitrated pursuant to the 1996 Act, then they can continue to hinder the development of the wireless industry.

33. The FCC defines "termination" as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." Id. § 51.701(d).

34. See Young, supra note 31, at 65 (noting that interconnection fees constitute approximately 13% of operating expenses for a cellular carrier in a top 30 market); HUBER, supra note 25, at 4.16 (stating that "[i]nterconnection costs are typically 10 to 20 percent of mobile carrier's operating expenses").

35. See Young, supra note 31, at 65. MTA-EMCI estimated that annual interconnection fee payments by CMRS providers to LECs will decline to $1.1 billion by 2005 due to reforms introduced by the 1996 Act. See id.

36. See infra notes 238-41 and accompanying text.

Mutual Compensation

The principle of mutual or reciprocal compensation\(^{38}\) is also important to the continued development of the wireless industry. Mutual compensation entails the payment of transport and termination charges by each interconnecting carrier for traffic originating on its network and handed over to the other carrier.\(^{39}\) In essence, under mutual compensation, “compensation flows in both directions between interconnecting networks.”\(^{40}\)

LECs traditionally have entered into interconnection agreements with other LECs that provide for mutual compensation for traffic exchanged between the carriers.\(^{41}\) Prior to the 1996

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38. The terms “mutual compensation” and “reciprocal compensation” are synonymous. See Interconnection Order, supra note 19, at 16,045 n.2634.

39. The FCC defines a reciprocal compensation arrangement as “one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier’s network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.” 47 C.F.R. § 51.701(e) (1996).

40. Interconnection Order, supra note 19, at 16,045 n.2634.


Traditionally, LECs have entered into contracts to establish mutual compensation rates for LEC-LEC interconnection. See Competition for Local Exchange Service, Decision 95-12-056, 1995 WL 767891, at *34 (Cal. P.U.C. Dec. 20, 1995) (citing comments filed by GTE California, Inc.). In the past 10 years, however, LECs have entered into “bill-and-keep” arrangements under which each LEC terminates traffic delivered to it by the other LEC without any monetary compensation between the LECs. See RCC Reconsideration Order, supra, at 2372 (noting that “BellSouth has been developing new compensation agreements with ITCs [independent telephone companies, i.e., non-RBOC LECs] whereby each carrier recovers the costs of the facilities it provides, and mutual compensation is eliminated”). Today, LECs commonly incorporate bill-and-keep into interconnection agreements with other LECs. See Interconnection Order, supra note 19, at 16,049 (citing comments arguing that bill-and-keep is a common practice between incumbent LECs); Electric Lightwave, Inc., 167 Pub. Util. Rep. 4th (PUR) 30, 73 (Or. P.U.C. 1996) (noting that bill-and-keep is the “dominant practice” in agreements between “adjacent LEC exchanges in Oregon and throughout the nation”).
Act, however, LECs rarely entered into mutual compensation interconnection agreements with CMRS providers.\footnote{See Interconnection Order, supra note 19, at 16,010 (summarizing commenters’ contentions that mutual compensation should apply to arrangements between CMRS providers and LECs); HUBER, supra note 25, at 4.18 (noting that only a “few [Bell Operating Companies] have entered into agreements that provide for reciprocal compensation”); Paul G. Madison, Commercial Mobile Radio Carriers Are Entitled to Compensation for Call Termination, 4 COMMLAW CONSPECTUS 79, 80 (1996) (noting that “other than possibly some cellular carriers, CMRS carriers are not being compensated by the LECs for call termination”).} As a result, CMRS providers traditionally paid LECs transport and termination charges for traffic originated on the wireless network, but could not recover the costs they incurred in terminating calls that originated on the wireline network. By refusing to enter reciprocal compensation interconnection agreements with CMRS providers, LECs discriminated against CMRS providers, deprived CMRS providers of a significant stream of revenues,\footnote{43. Under LEC-CMRS interconnection agreements in effect in 1996 prior to renegotiation under the Act, wireless carriers paid annual interconnection fees of about $1.3 billion. See Young, supra note 31, at 65. Assuming industry estimates that approximately 20% of wireless traffic is land-to-mobile (i.e. terminates on wireless networks), see id., and assuming that under mutual compensation, LECs and CMRS providers would charge symmetrical rates by refusing to provide mutual compensation to wireless carriers, LECs deprived CMRS providers of approximately $325 million in annual revenues (LEC’s received revenues of $1.3 billion from transport and termination fees for terminating 80% of LEC-CMRS traffic; therefore, CMRS providers should receive one quarter of this amount, or $325 million, for terminating 20% of LEC-CMRS traffic).} and thus hindered the ability of wireless providers to offer telephone service competitive with wireline telephone service.

THE STATUTORY AND REGULATORY FRAMEWORK GOVERNING
LEC-CMRS INTERCONNECTION

The propriety of the Commission’s determination in the Interconnection Order that sections 251 and 252 govern LEC-CMRS interconnection must be examined in the context of the statutory and regulatory framework that existed prior to enactment of the 1996 Act. This Note now discusses the Commission’s jurisdiction over LEC-CMRS interconnection before and after the Budget Act of 1993.
The Statutory and Regulatory Framework Prior to the Budget Act

The Communications Act of 1934: The Interstate/Intrastate Dichotomy

The 1934 Act creates a dual regulatory structure for interstate and intrastate telecommunications.\textsuperscript{44} Section 1 of the 1934 Act authorizes the creation of the FCC for the purpose of "regulating interstate and foreign commerce in communication by wire and radio."\textsuperscript{45} Title II of the 1934 Act authorizes the FCC to regulate common carriers\textsuperscript{46} engaged in interstate communications.\textsuperscript{47} Section 201(a) imposes a duty on every common carrier to interconnect with other carriers if the Commission finds such interconnection is in the public interest.\textsuperscript{48} In addition, section 201(b) requires that common carriers charge "just and reasonable" rates for services provided pursuant to section 201(a).\textsuperscript{49}

Section 2(b) of the 1934 Act, however, specifically-withholds jurisdiction from the Commission with regard to intrastate services, subject to a number of exceptions.\textsuperscript{50} Section 301 of the 1934 Act\textsuperscript{51} is the most significant of these exceptions, granting the FCC plenary authority to manage the radio spectrum and issue radio licenses.\textsuperscript{52} Section 301 serves as the basis of the

\textsuperscript{45} 47 U.S.C. \S 151 (1994).
\textsuperscript{46} See supra note 5.
\textsuperscript{48} Section 201(a) states: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio . . . , in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers . . . ." 47 U.S.C. \S 201(a).
\textsuperscript{49} Id. \S 201(b).
\textsuperscript{50} That section provides:

Except as provided in [enumerated sections of Title 47 of the U.S. Code], nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio . . . .

\textsuperscript{Id.} \S 152(b).
\textsuperscript{51} Id. \S 301.
\textsuperscript{52} See Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 430 n.6 (1963)
FCC's authority to regulate the issuance of cellular and other mobile service licenses.\textsuperscript{53} Notwithstanding these exceptions to section 2(b), Congress has limited the FCC's jurisdiction to regulation of interstate or foreign communications.\textsuperscript{54} The FCC, therefore, traditionally has limited its regulation of LEC-CMRS interconnection rates to interconnection related to interstate communications.\textsuperscript{55}

\textit{FCC Regulation of LEC-Cellular Interconnection Prior to the Budget Act}

From the earliest stages of its regulation of cellular telephony, the FCC recognized that cellular systems "must be fully interconnected with the public landline telephone network."\textsuperscript{56} In 1981, prior to awarding the first cellular radio construction permits in 1982,\textsuperscript{57} the Commission made its first attempt at devel-


\textsuperscript{55} See CMRS Second Report and Order, \textit{supra} note 4, at 1497-98. An "interstate communication" is any communication that originates in one state and terminates in another. See 47 U.S.C.A. § 153(22) (West Supp. 1997).

\textsuperscript{56} 1975 Cellular Order, \textit{supra} note 29, at 954-55.

opining a LEC-cellular interconnection policy. The Cellular Report recognized that LECs should permit cellular systems to interconnect to the wireline network in the same manner as a LEC end-office switch because cellular system operators are common carriers rather than LEC customers. The FCC noted that the parties should negotiate the particular terms and conditions of interconnection. With respect to interconnection rates, the FCC declared that LECs should provide interconnection "upon terms no less favorable than those offered to the cellular systems of affiliated entities or independent telephone companies." On reconsideration, the FCC affirmed that LECs have a duty "to provide reasonable interconnection to cellular systems," including interconnection in an identical manner as that provided to wireline cellular systems.

The FCC clarified its reasonable interconnection policy in 1986, stating that a "cellular carrier should be permitted to choose the type of interconnection, Type 2 or Type 1, and [LECs] should not refuse to provide the type of interconnection requested." The FCC also introduced a good faith negotiation stan-

59. An "end-office switch" is a switch that directly connects customer telephone lines into the wireline network and thus routes telephone traffic at the first and last stages of most telephone calls. See, e.g., Union Tel. Co. v. Wyoming Pub. Serv. Comm'n, 833 P.2d 473, 475, 483 (Wyo. 1992) (describing the role of an end-office switch in a LEC's traditional arrangement with cellular carriers and illustrating a typical end-office interconnection agreement).
60. See Cellular Report, supra note 30, at 496.
61. See id.
62. Id.
63. Cellular Reconsideration Order, supra note 29, at 81.
64. See id. at 81-82. The FCC licensed two cellular systems in each market. See supra note 30. A wireline cellular system is the system operated by an affiliate of the incumbent LEC in a given market. See supra note 30.
65. Policy Statement, supra note 29, at 10,838. The FCC provided the following definition of Type 1 and Type 2 interconnection:

Under Type 1 interconnection, the telephone company owns the switch serving the cellular network and, therefore, performs the origination and termination of both incoming and outgoing calls. Under Type 2, the cellular carrier owns the switch, enabling it to originate outgoing calls and to terminate incoming calls. There are two forms of Type 2 interconnection, Type 2A and Type 2B. Type 2A service is interconnection to a local telephone company tandem [switch] similar to that used by an end office. Type 2B involves interconnection at an end office to a high usage interoffice trunk.
standard, noting "we must leave the terms and conditions to be negotiated in good faith between the cellular operator and the telephone company."\textsuperscript{66} The FCC declined to establish any policy with respect to interconnection rates, noting that "in view of the fact that cellular carriers are engaged in the provision of local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal concern."\textsuperscript{67}

In May of 1986, the Supreme Court issued a decision in \textit{Louisiana Public Service Commission v. FCC},\textsuperscript{68} which emphasized the limits of the Commission's jurisdiction over intrastate matters. The Court held that the dual regulatory system established by Congress in sections 1 and 2(b) of the 1934 Act generally prohibited the FCC from regulating intrastate communications.\textsuperscript{69} The Court stated that section 2(b) "fences off from FCC reach or regulation intrastate matters."\textsuperscript{70} The Court noted, however, one exception: the FCC may preempt state regulation of intrastate communications where it is "not possible to sepa-
rate the interstate and intrastate components of the asserted FCC regulation.\textsuperscript{71}

Following \textit{Louisiana Public Service Commission}, the FCC released a declaratory ruling that more precisely determined the Commission’s jurisdiction with respect to LEC-cellular interconnection.\textsuperscript{72} The Commission determined that it had plenary jurisdiction over three aspects of LEC-cellular interconnection: (1) the physical plant used in interconnection of cellular carriers;\textsuperscript{73} (2) the allocation of NXX codes\textsuperscript{74} to cellular carriers;\textsuperscript{75} and (3) the conduct of negotiations between the two parties.\textsuperscript{76} On this last point, the FCC mandated that LECs conduct interconnection negotiations in good faith.\textsuperscript{77}

On the important issue of interconnection rates, the FCC determined that “the actual costs and charges for the physical


Subsequent to \textit{Louisiana Public Service Commission}, the FCC has authority to regulate intrastate communications in only two circumstances: (1) where Congress has overridden the dual regulatory system by “unambiguously granting the FCC authority over intrastate telecommunications matters or by directly modifying section 2(b),” or (2) where the “impossibility” exception applies. \textit{Iowa Utils. Bd.}, 1997 WL 403401, at *6.

\textsuperscript{72} \textit{See RCC Interconnection Ruling, supra} note 41.

\textsuperscript{73} \textit{See id.} at 2912.

\textsuperscript{74} “An NXX code is the first three numbers in a typical seven digit telephone number. Each NXX code includes a block of 10,000 telephone numbers. The function of the code is to instruct switches to communicate with other switches in the processing of a call.” \textit{Id.} at 2918 n.32. CMRS providers must obtain NXX codes to provide subscribers with telephone numbers for their mobile telephones. \textit{See id.}

\textsuperscript{75} \textit{See id.}

\textsuperscript{76} \textit{See id.} at 2912-13.

\textsuperscript{77} \textit{See id.} at 2913. The Commission justified preemption of state regulation in this area by stating:

\textit{[W]e find that the conduct of interconnection negotiations cannot be separated into interstate and intrastate components. Good faith cannot be quantified and allocated according to relative interstate and intrastate use. Furthermore, any state regulation which permits departures from our good faith requirement could severely affect interstate communications by preventing cellular carriers from obtaining interconnection agreements and consequently excluding them from the nationwide public telephone network.}

\textit{Id.} at 2912-13.
interconnections of cellular systems are suited to dual intrastate and interstate regulation” because “it is possible to divide the actual interstate and intrastate costs of cellular interconnection.” The FCC thus emphasized that its “jurisdiction is limited to the actual interstate cost of interconnection.” Exercising this jurisdiction, the Commission stated that LECs should observe the principle of mutual compensation and that interstate rates for switching and physical interconnection should be cost-based. Finally, the Commission expanded this reasonable interconnection standard to include interconnection between LECs and all radio common carriers (RCCs), not just cellular carriers.

On reconsideration of the RCC Interconnection Ruling in 1989, the FCC reaffirmed this reasonable interconnection standard and clarified that the mutual compensation requirement applied only to interstate interconnection.

Prior to the Budget Act, therefore, the FCC asserted jurisdiction over interstate LEC-RCC interconnection rates and ordered mutual compensation with respect to such interconnection. The FCC apparently recognized that it lacked jurisdiction to regulate intrastate interconnection rates or to impose mutual compensation on intrastate LEC-RCC interconnection.

78. Id. at 2912.
79. Id.
80. Switching is one of the components of transport and termination. See supra notes 32-33 and accompanying text.
81. See RCC Interconnection Ruling, supra note 41, at 2915.
82. The FCC defines a “radio common carrier” as a “telecommunications carrier that provides radio communications services but is not engaged in the business of providing landline local exchange telephone service.” 47 C.F.R. § 22.99 (1996).
83. See RCC Interconnection Ruling, supra note 41, at 2913.
84. See RCC Reconsideration Order, supra note 41. In the RCC Interconnection Ruling, the Commission failed to state expressly that the mutual compensation requirement applied only to interstate interconnection. See RCC Interconnection Ruling, supra note 41, at 2915. On reconsideration, the FCC noted that “in the instant proceeding, we are only concerned with mutual compensation between telephone companies and cellular carriers for interstate switching costs.” RCC Reconsideration Order, supra note 41, at 2372.
The Budget Act of 1993

Section 6002 of the Budget Act amended section 332(c) of the 1934 Act and substantially reconfigured the regulatory treatment of wireless services. By enacting section 6002, Congress intended to achieve regulatory parity in the field of wireless services. The Budget Act amended section 332(c) to classify all wireless services that operate for profit and provide interconnected service as CMRS providers. Two provisions of section 332(c), as amended by the Budget Act, arguably expand the FCC's jurisdiction in the context of LEC-CMRS interconnection and warrant further discussion.

Section 332(c)(1)(B)

Section 332(c)(1)(B), as amended, provides that:

Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this 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 [Act].

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86. See H.R. Rep. No. 103-111, at 259 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 586 ("This section amends section 332(c) to provide that services that provide equivalent mobile services are regulated in the same manner.").
87. As amended by the Budget Act, section 332(c)(1)(A) now provides that "[a] person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this [Act]." 47 U.S.C. § 332(c)(1)(A) (1994). Section 332(d)(1) defines "commercial mobile service" as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Id. § 332(d)(1). In the Joint Explanatory Statement accompanying the Budget Act, the Conference Committee stated that "[t]he intent of [section 332(c)(1)(A)], as modified, is to establish a Federal regulatory framework to govern the offering of all commercial mobile services." H.R. Conf. Rep. No. 103-213, at 490 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1179.
89. Id. Section 201 requires common carriers engaged in interstate communications
Section 332(c)(1)(B) states that the Commission has authority to regulate LEC-CMRS interconnection pursuant to section 201.90 Although section 332(c)(1)(B) represents an expansion of the Commission's authority with respect to LEC-CMRS interconnection, the extent of this expansion is not entirely clear.

Three interpretations of section 332(c)(1)(B) are plausible. First, the section simply may authorize the FCC to order interstate LEC-CMRS interconnection upon any reasonable request by a CMRS provider but not grant the FCC authority to regulate LEC-CMRS interconnection rates.91 The FCC, however, already has this authority under section 201; such an interpretation thus renders section 332(c)(1)(B) superfluous and should be disfavored.92

Second, the section can be interpreted to authorize the FCC to require interstate LEC-CMRS interconnection without the necessity of providing an opportunity for a hearing and a finding that interconnection is "necessary or desirable in the public interest."93 Section 201(a), however, imposes this "finding" requirement,94 and section 332(c)(1)(B) states expressly that inter-
connection shall be made "pursuant to the provisions of section 201." This interpretation thus is mired in a contradiction.

Third, section 332(c)(1)(B) can be interpreted to extend FCC jurisdiction to the regulation of intrastate LEC-CMRS interconnection. This interpretation is consistent with the second sentence of section 332(c)(1)(B): "Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this [Act]." This sentence implies that section 332(c)(1)(B) expands the Commission's jurisdiction in the limited realm of LEC-CMRS interconnection, but does not modify the Commission's jurisdiction with respect to other types of interconnection.

The Budget Act's legislative history supports this interpretation. With regard to section 332(c)(1)(B), the House Budget Committee Report stated: "The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network." This language suggests that Congress granted the FCC broad authority to "promote" LEC-CMRS interconnection.

Under this interpretation of section 332(c)(1)(B), the FCC has authority to require just and reasonable intrastate LEC-CMRS

95. Id. § 332(c)(1)(B).
96. Furthermore, an axiom of statutory construction is that, "where possible, provisions of a statute should be read so as not to create a conflict." Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986).
97. Cellular Telecommunications Industry Association (CTIA) and several CMRS providers, including Cox Enterprises, Inc. (Cox), Comcast Corp. (Comcast), and AirTouch Communications, Inc. (AirTouch) advocated this position in the LEC-CMRS Interconnection proceeding. See Interconnection Order, supra note 19, at 16,002-03; see also Memorandum from Thomas Krattenmaker on behalf of AirTouch to William F. Caton, Acting Secretary, FCC 4-7 (Mar. 20, 1996) (on file with the FCC in CC Docket No. 95-185) [hereinafter Krattenmaker Memorandum] (arguing that the Budget Act revisions of the Communications Act eliminated the "interstate/intrastate jurisdictional dichotomy" with respect to CMRS).
99. See Krattenmaker Memorandum, supra note 97, at 5; Letter from Werner K. Hartenberger & Laura H. Phillips, Counsel for Cox Enterprises, Inc., to William F. Caton, Acting Secretary, FCC 3 (Feb. 28, 1996) (on file with the FCC in CC Docket No. 95-185).
interconnection rates because the provision directs the FCC to order LEC-CMRS interconnection "pursuant to section 201," which in turn authorizes the FCC to ensure that interconnection rates are "just and reasonable." The text and legislative history of section 332(c)(1)(B) thus support the view that Congress intended the Commission to have jurisdiction to regulate LEC-CMRS interconnection rates, without regard to the interstate or intrastate character of the interconnection.

*Section 332(c)(3)(A)*

Section 332(c)(3)(A), subtitled "state preemption," preempts explicitly state and local governments from regulating CMRS rates and from entering into the CMRS market. This section states, in pertinent part:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the *entry* of or the *rates charged* by any commercial mobile service or any private mobile service, except that this provision shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

A literal reading of the term "charged by" suggests that it preempts state regulation of intrastate interconnection rates charged by CMRS providers to other carriers, including rates charged by CMRS providers to LECs for transport and termination of LEC-originated traffic. The FCC indicated that it supported this interpretation of the provision and repeated its

102. Id. § 201(b); see Krattenmaker Memorandum, supra note 97, at 4-5.
104. Id. (emphasis added).
105. See Interconnection Order, supra note 19, at 16,002-03 (citing comments submitted by CTIA); Letter from Phillip L. Verveer & Jennifer A. Donaldson, Wilkie, Farr & Gallagher, to Karen Brinkmann, Special Counsel for Local Competition, Common Carrier Bureau, FCC 2, 7 (Oct. 27, 1995) (on file with the FCC in CC Docket No. 94-54) [hereinafter Verveer Letter].
106. See CMRS Second Report and Order, supra note 4, at 1499 (stating that the Budget Act "preempts state regulation of interconnection rates of CMRS providers").
position in a notice of proposed rulemaking it issued later that year.\textsuperscript{107} The FCC’s interpretation is consistent with the legislative history of section 332(c)(3). The House Budget Committee Report stated the purpose of this provision is “[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.”\textsuperscript{108} A broad interpretation of the preemptive reach of section 332(c)(3) would prevent any attempt by states to prohibit CMRS providers from charging LECs for the cost of transporting and terminating wireline-originated calls and thus would foster the growth of the wireless industry.

The FCC subsequently acknowledged, however, that section 332(c)(3) does not preempt state regulation of intrastate interconnection rates charged by LECs.\textsuperscript{109} Section 332(c)(3) thus does not provide authority for FCC jurisdiction of all aspects of LEC-CMRS interconnection, even under the FCC’s interpretation of this provision.

An alternative interpretation, and one more faithful to the text of the entire section and its legislative history, is that Congress enacted section 332(c)(3)(A) to preempt state regulation of wireless service rates charged by CMRS providers to their retail customers.\textsuperscript{110} First, a sentence within the section provides that

\begin{itemize}
  \item 110. See Interconnection Order, supra note 19, at 16,004-05 & n.2423 (citing comments filed by Pacific Telesis, US West, BellSouth, and the Pennsylvania P.U.C.); Letter from Michael K. Kellogg, Counsel for Bell Atlantic Corp. and Pacific Telesis Group, to William F. Caton, Acting Secretary, FCC 8-9 (Mar. 13, 1996) (on file with the FCC in CC Docket No. 95-185) [hereinafter Kellogg Mar. 13 Letter]; Kellogg Feb. 26 Letter, supra note 91, at 4 (arguing that the language of section 332(c)(3)(A) refers to “the amount charged by CMRS providers to their subscribers, rather than the amount CMRS providers pay for interconnection”); see also Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service, 10
the FCC must allow states to regulate CMRS if the state demonstrates "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates."\(^{111}\) This language suggests that Congress intended to restrict the reach of the term "charged by" to rates charged to wireless subscribers.\(^{112}\) Second, the House Budget Committee Report accompanying the bill states: "Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on ... commercial mobile services."\(^{113}\) This language suggests that Congress intended the provision to apply only to rates charged by CMRS providers for their wireless services. This narrow interpretation of the scope of section 332(c)(3)'s preemption language does not grant the FCC authority to regulate intrastate LEC-CMRS rates.

Although section 332(c)(3)(A) does not preempt expressly state regulation of transport and termination rates charged by LECs to CMRS providers generally, the provision appears to preempt state-authorized rates charged by LECs to CMRS providers that constitute barriers to entry.\(^{114}\) Entry barriers presumably would exist if interconnection or transport and termination rates were so high as to inhibit the offering of commercial wireless service.\(^{115}\) Section 332(c)(3)(A), therefore, grants the FCC jurisdiction to regulate LEC intrastate interconnection and transport and termination rates only when such circumstances exist.

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F.C.C.R. 7842, 7853 (1995) (report and order) (equating section 332(c)(3) preemption with "end-user rates").


114. See 47 U.S.C. § 332(c)(3)(A) (proscribing state regulation of "entry" into wireless service); LEC-CMRS Interconnection NPRM, supra note 37, at 5030 (noting that in the CMRS Second Report and Order the FCC "declined to preempt state regulation over the rates for intrastate interconnection, unless the charge for the intrastate component of interconnection was so high that the price effectively precluded interconnection").

115. The Commission recognized that the actions of several state public utility commissions prior to the 1996 Act "may constitute CMRS entry or rate regulation preempted by section 332." Interconnection Order, supra note 19, at 16,006-07.
Amendment of Section 2(b) of the 1934 Act

Section 6002 of the Budget Act also amended section 2(b) of the 1934 Act.\textsuperscript{116} In general, section 2(b) denies the FCC jurisdiction over intrastate communications: "[T]his provision fences off from FCC reach or regulation intrastate matters—indeed, including matters 'in connection with' intrastate service."\textsuperscript{117} Section 2(b), however, lists a number of provisions of the 1934 Act that are exceptions from this sweeping denial of jurisdiction.\textsuperscript{118} The Budget Act amended section 2(b) to provide that section 332 is one of these excepted provisions. The Budget Act thus removed the restriction on FCC jurisdiction over intrastate communications pursuant to section 332 and extended the Commission's jurisdiction to include regulation of intrastate LEC-CMRS interconnection rates.\textsuperscript{119}

FCC Regulation of LEC-CMRS Interconnection Since the Budget Act

Shortly after the enactment of the Budget Act, the FCC initiated rulemaking to implement the provisions of the Act.\textsuperscript{120} In an order released in March 1994, the Commission addressed many of the issues relating to LEC-CMRS interconnection.\textsuperscript{121} The Commission adopted many of the requirements that it had applied earlier to LEC-RCC interconnection in the RCC Inter-

\begin{footnotes}
\textsuperscript{116} See Pub. L. No. 103-66, § 6002(b)(2)(B)(i), 107 Stat. 312, 396 (1993). Section 2(b) of the 1934 Act, as amended, states: "Except as provided in . . . section 332 . . . , nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b).
\textsuperscript{118} Currently, sections 223 through 227 (inclusive), 301, 332, and Title VI of the 1934 Act, as amended, are excepted from jurisdictional limitation of section 2(b). See 47 U.S.C. § 152(b).
\textsuperscript{119} See Krattenmaker Memorandum, supra note 97, at 6-7; see also supra notes 68-71 and accompanying text (discussing Louisiana Public Service Commission).
\textsuperscript{121} See CMRS Second Report and Order, supra note 4.
\end{footnotes}
connection Ruling,122 thus extending the reach of these provisions to encompass interconnection between LECs and all CMRS providers.123 The Commission thus mandated LECs "to provide reasonable and fair interconnection for all commercial mobile radio services."124 This mandate included a duty to negotiate interconnection agreements in good faith.125 The FCC also stated three requirements of reasonable interconnection. First, the FCC imposed a mutual compensation requirement "under which LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities."126 Second, the Commission required that "LECs shall establish reasonable charges for interstate interconnection provided to commercial mobile radio service licensees."127 Third, the FCC required LECs to provide any form of interconnection requested by a CMRS provider that the LEC offered to other carriers, absent a showing by the LEC of technical or economic infeasibility.128

The FCC determined expressly that it did not have jurisdiction over LEC intrastate interconnection rates,129 rejecting implicitly arguments that section 332(c)(1)(B) or section 332(c)(3)(A) extended the Commission's jurisdiction to regulate intrastate interconnection rates charged by LECs.130 In a later

122. See supra notes 72-83 and accompanying text.
123. See CMRS Second Report and Order, supra note 4, at 1497-98 ("We see no distinction between a LEC's obligation to offer interconnection to [cellular] licensees and all other CMRS providers . . . .").
124. Id.
125. See id.
126. Id. at 1498 (codified at 47 C.F.R. § 20.11(b)(1) (1996)). By its express terms, the requirement does not restrict mutual compensation to interstate services. By refraining from including an "interstate" qualification, the FCC may have intended to extend implicitly its mutual compensation requirement to include intrastate LEC-CMRS interconnection, even though it declined expressly to assert jurisdiction over intrastate LEC-CMRS rates. See infra note 129 and accompanying text. This Note argues that it had authority to impose mutual compensation for intrastate interconnection and regulate interstate LEC-CMRS interconnection rates pursuant to sections 201 and 332(c)(1)(B) in tandem. See supra notes 97-102 and accompanying text.
127. CMRS Second Report and Order, supra note 4, at 1498.
128. See id.
129. See id.
130. The Commission, however, indicated its belief that section 332(c)(3)(A) preempts state regulation of interconnection rates charged by CMRS providers to other
section of the order, the FCC acknowledged that Congress's amendment of section 2(b) permitted the Commission to preempt state intrastate regulation of CMRS notwithstanding *Louisiana Public Service Commission,*¹³¹ but the Commission surprisingly failed to recognize this amendment as an opportunity to extend its jurisdiction to intrastate LEC-CMRS interconnection rates. The FCC thus missed its first opportunity to exercise the jurisdictional authority that Congress granted the agency in the Budget Act.

The 1996 Act

The 1996 Act opened local telephone markets to competition by removing state and local barriers to entry into telecommunications markets.¹³² Although heralded as a "de-regulatory" statute,¹³³ the 1996 Act in fact created an extensive regulatory framework governing interconnection to the public switched network.¹³⁴ Sections 251 and 252 of the 1996 Act established a "new model for interconnection"¹³⁵ founded on negotiation and arbitration of interconnection agreements.

Section 251 imposes interconnection obligations on three tiers of telecommunications carriers. First, section 251(a)(1) requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."¹³⁶ Second, section 251(b)(5) obligates all LECs to establish reciprocal compensation arrangements with interconnecting carriers.¹³⁷ Finally, section 251(c) imposes additional

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¹³¹ See *CMRS Second Report and Order,* supra note 4, at 1500; see also supra notes 105-07 and accompanying text (discussing the preemption of state regulation of CMRS interconnection rates).

¹³² See *CMRS Second Report and Order,* supra note 4, at 1506.

¹³³ "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C.A. § 253(a) (West Supp. 1997).


¹³⁷ See *id.* § 251(b)(5).
obligations on incumbent LECs. 138 Section 251(c)(1) imposes a duty on all incumbent LECs to negotiate reciprocal compensation interconnection agreements in good faith in accordance with new section 252 139 of the amended 1934 Act. 140 In addition, section 251(c)(2) requires incumbent LECs to interconnect with any requesting telecommunications carrier at any technically feasible point within the LEC's network, and "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 141

These interconnection obligations—interconnection on just and reasonable rates, terms, and conditions; good faith negotiation; and reciprocal compensation—closely resemble the elements of the reasonable interconnection standard established by the FCC in the CMRS Second Report and Order. 142

The provisions of section 252 govern procedures for the negotiation and, if necessary, arbitration of interconnection agreements with incumbent LECs. 143 Section 252(a)(1) permits incumbent LECs to negotiate binding interconnection agreements with requesting telecommunications carriers without regard to the obligations in section 251(b) or (c). 144 Aside from negotiation, section 252 provides for two alternative means of obtaining resolution of interconnection disputes: mediation and arbitration. Section 252(a)(2) offers negotiating carriers the option of mediation of disputes by state commissions. 145 Section 252(b) permits either party negotiating an interconnection agreement to request arbitration of unresolved issues by a state commission, but only during a window of time beginning on the 135th day after the incumbent LEC received the request for negotiation. 146

138. See id. § 251(c).
139. See id. § 252.
140. See id. § 251(c)(1).
141. Id. § 251(c)(2)(D).
142. See supra notes 121-28 and accompanying text.
144. See id. § 252(a)(1).
145. See id. § 252(a)(2). The term "State commission" relates to the state agency that has jurisdiction over intrastate telecommunications, which is usually a state public utility commission. See id. § 153(41).
146. See id. § 252(b)(1). The party requesting arbitration must petition the state commission "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation." Id.
Section 252 also provides standards applicable to state arbitrations. Among other requirements, state commissions must ensure that: (1) interconnection rates are based on cost;\textsuperscript{147} (2) transport and termination rates are based on “a reasonable approximation of the additional costs of terminating such calls;”\textsuperscript{148} and (3) agreements comply with FCC regulations interpreting section 251.\textsuperscript{149}

The 1996 Act also provides that state commissions must approve all interconnection agreements, whether adopted by voluntary negotiation or arbitration.\textsuperscript{150} If the parties have negotiated an interconnection agreement, then the state commission must approve the agreement unless it finds one of two circumstances exist: the agreement discriminates against a telecommunications carrier not a party to the agreement,\textsuperscript{151} or the agreement “is not consistent with the public interest, convenience, and necessity.”\textsuperscript{152} If the state commission arbitrated the agreement, however, then the state commission may only approve the agreement if it meets the requirements of section 251 and the pricing standards of section 252(d), which require cost-based rates for interconnection and for transport and termination.\textsuperscript{153}

The 1996 Act, therefore, establishes two different paths for obtaining an interconnection agreement. The parties may negotiate an agreement at any time, without regard to the interconnection and cost-based pricing obligations of section 251.\textsuperscript{154} Alternatively, after 135 days of attempted negotiation, a party may request an arbitration.\textsuperscript{155} Arbitrated agreements must comply with the interconnection, reciprocal compensation, and pricing requirements of section 251.\textsuperscript{156} The 1996 Act, therefore, provides incentives for LECs to impose rates unrelated to costs on CMRS providers in negotiated interconnection agreements, uti-

\textsuperscript{147} See id. § 252(c)(2), (d)(1)(A)(i).
\textsuperscript{148} Id. § 252(d)(2)(A)(ii).
\textsuperscript{149} See id. § 252(c)(1).
\textsuperscript{150} See id. § 252(e)(1).
\textsuperscript{151} See id. § 252(e)(2)(A)(i).
\textsuperscript{152} Id. § 252(e)(2)(A)(ii).
\textsuperscript{153} See id. § 252(e)(2)(B).
\textsuperscript{154} See supra note 144 and accompanying text.
\textsuperscript{155} See 47 U.S.C.A. § 252(b)(1).
\textsuperscript{156} See id. § 252(c)(2), (d), (e)(2)(B).
lizing their greater bargaining power with respect to CMRS providers.\textsuperscript{157} If a CMRS provider fails to accept such rates, then LECs may delay CMRS providers the opportunity to obtain reciprocal compensation\textsuperscript{158} by stalling negotiations.\textsuperscript{159}

\textit{FCC Interpretation of the 1996 Act: The Interconnection Order}

The FCC's Interconnection Order,\textsuperscript{160} released in August 1996, promulgated rules mandated by the 1996 Act to interpret section 251\textsuperscript{161} and provided the FCC's interpretation of sections 251 and 252. The Commission stated that these sections "establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers."\textsuperscript{162} The Commission concluded, therefore, that "[i]t is consistent with the broad authority of these provisions to hold that we may apply sections 251 and 252 to LEC-CMRS interconnection."\textsuperscript{163}

The FCC viewed sections 251 and 252 "as creating parallel jurisdiction for the FCC and the states."\textsuperscript{164} Under this interpretation of the 1996 Act, Congress granted the FCC authority to establish implementing rules governing interstate and intrastate interconnection, but granted state commissions authority to establish interstate and intrastate interconnection rates.\textsuperscript{165} Remarkably, the FCC reached this conclusion even though "these sections [251 and 252] do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to

\begin{itemize}
\item[157.] The FCC and numerous authorities have recognized that LECs possess significantly greater bargaining power than wireless carriers in the negotiation of interconnection agreements. \textit{See}, \textit{e.g.}, \textit{Interconnection Order}, \textit{supra} note 19, at 16,041; \textsc{Peter W. Huber et al., The Geodesic Network II: 1993 Report on Competition in the Telephone Industry} 4.11 (1992); Comments of U.S. Dept of Justice (May 16, 1996) (on file with the FCC in CC Docket No. 96-98), \textit{available in} 1996 WL 393041, at *7 [hereinafter DOJ Comments].
\item[158.] As of September 1996, the vast majority of LEC-CMRS interconnection agreements did not provide mutual compensation. \textit{See} Young, \textit{supra} note 31, at 65.
\item[159.] \textit{See} DOJ Comments, \textit{supra} note 157, at *7.
\item[160.] \textit{See} Interconnection Order, \textit{supra} note 19.
\item[161.] \textit{See} 47 U.S.C.A. § 251(d)(1).
\item[162.] Interconnection Order, \textit{supra} note 19, at 16,005.
\item[163.] \textit{Id}.
\item[164.] \textit{Id.} at 15,544.
\item[165.] \textit{See} \textit{id.} at 15,544-45.
\end{itemize}
the states." By adopting this vision of "parallel jurisdiction," the FCC ceded jurisdiction over the arbitration of interconnection agreements to the states: "we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters." Under the FCC's interpretation of the 1996 Act, state commissions may set both interstate and intrastate LEC-CMRS interconnection rates in arbitration proceedings.

The FCC promulgated numerous implementing regulations under its "parallel jurisdiction" for state commissions to follow in the course of arbitrating or approving interconnection agreements pursuant to sections 251 and 252. Among other provisions, the regulations impose requirements for reciprocal compensation, transport and termination rates set at "forward-looking economic costs," and renegotiation of nonreciprocal LEC-CMRS interconnection agreements.

Although the FCC ceded its rate-setting authority to the state commissions, it acknowledged that section 332 provides an alternative basis for jurisdiction over LEC-CMRS interconnection, stating: "We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time."

Furthermore, the FCC noted that its decision to proceed under sections 251 and 252 did not indicate any interpretation of whether the 1996 Act repealed its section 332 jurisdiction over

166. Id. at 15,544.
167. Id.
168. See id. at 15,544-45.
170. 47 C.F.R. § 51.705. The Eighth Circuit subsequently vacated this section. See Iowa Utils. Bd., 1997 WL 403401, at *9 & n.21. "Forward-looking economic costs" excludes embedded costs, which are costs that carriers have incurred in the past for equipment, etc. 47 C.F.R. § 51-505(d).
171. See 47 C.F.R. § 51.717.
172. See Interconnection Order, supra note 19, at 16,005. The FCC hinted, however, that such jurisdiction would arise under section 332(c)(3) by stating: "We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS providers from other carriers." Id. at 16,006.
LEC-CMRS interconnection.\textsuperscript{173} Finally, the FCC noted that it "preserve[d] the option to revisit this determination in the future . . . . [i]f the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable, and nondiscriminatory."\textsuperscript{174} Notwithstanding this weak effort to preserve the option of asserting section 332 jurisdiction in the future, the FCC missed its second opportunity to exercise jurisdiction over intrastate LEC-CMRS interconnection by holding that sections 251 and 252 apply to LEC-CMRS interconnection.

**FCC Authority to Regulate LEC-CMRS Interconnection Subsequent to the 1996 Act**

Contrary to the Commission's decision in the Interconnection Order, the FCC has authority to regulate intrastate LEC-CMRS interconnection, even after the 1996 Act. The Budget Act expanded the FCC's jurisdiction to reach intrastate aspects of LEC-CMRS interconnection,\textsuperscript{175} and the 1996 Act did not repeal this jurisdictional authority.\textsuperscript{176}

The FCC's jurisdiction over LEC-CMRS interconnection derives from three statutory provisions. First, the Commission has plenary jurisdiction over interstate aspects of interconnection, including LEC-CMRS interconnection, pursuant to section 201.\textsuperscript{177} The FCC thus has jurisdiction to regulate interstate interconnection rates charged by LECs to CMRS providers, and the Commission has asserted this jurisdiction on numerous occasions.\textsuperscript{178} Second, section 332(c)(1)(B), in conjunction with section 201, expands federal jurisdiction into the area of intrastate LEC-CMRS interconnection.\textsuperscript{179} Third, by amending section 2(b) of the 1934 Act to recognize section 332 as an exception

\begin{footnotes}
\item[173] See id. at 16,005.
\item[174] Id. at 16,006.
\item[175] See infra notes 177-82 and accompanying text.
\item[176] See infra notes 183-99 and accompanying text.
\item[178] See, e.g., CMRS Second Report and Order, supra note 4, at 1498; RCC Interconnection Ruling, supra note 41, at 2911.
\item[179] See supra notes 97-102 and accompanying text.
\end{footnotes}
to that provision, the Budget Act removed the barrier to federal regulation of intrastate LEC-CMRS interconnection rates pursuant to section 332.180 Although Congress did not preempt expressly state regulation of intrastate LEC-CMRS interconnection when it enacted section 332(c)(1)(B), as it did for retail CMRS rates by enacting section 332(c)(3),181 Congress delegated the FCC authority to preempt state regulation of LEC-CMRS interconnection rates.182

Moreover, because Congress did not repeal section 332 when it enacted the 1996 Act, the FCC retains the intrastate authority delegated to it by Congress in the Budget Act.183 Congress may repeal a statute either expressly or by implication.184 The 1996 Act did not expressly repeal any provision of section 332. On the contrary, two sections of the 1996 Act reveal Congress’s intent not to alter the FCC’s section 201 or 332 jurisdiction. First, section 253(e) of the Communications Act, as amended by the 1996 Act, states that “[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers,”185 indicating that Congress recognized the continued vitality of section 332. In addition, section 251(i) provides

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180. See supra notes 116-19 and accompanying text.
181. See supra notes 110-13 and accompanying text.
182. Numerous parties that advanced this argument before the FCC argued that section 332 granted the FCC exclusive jurisdiction over LEC-CMRS interconnection. See Interconnection Order, supra note 19, at 16,002-03. Two state commissions, however, have indicated that the FCC and state commissions have concurrent jurisdiction. See Re Establishment of Local Exchange Competition and Other Competitive Issues, No. 95-845-TP-COI, 1997 WL 120529, at *14 (Ohio P.U.C. Feb. 20, 1997) (commenting that “[i]nterconnection and compensation arrangements between LECs and cellular carriers are subject to FCC and [Ohio] Commission rules”); Re Cost of Providing Telecommunications Service, Order No. 96-283, 1996 WL 694711, at *14 (Or. P.U.C. Nov. 1, 1996) (stating that “LEC-CMRS compensation issues must . . . be addressed at the federal level or in arbitration proceedings conducted under the [1996] Act”).
that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201," thus declaring Congress's intent that the Commission retain its jurisdiction over interconnection issues.

The Supreme Court stated the "cardinal rule" governing repeal by implication in *TVA v. Hill:* "repeals by implication are not favored." The Court noted that, "[i]n practical terms, this 'cardinal rule' means that '[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable," moreover, "the intention of the legislature to repeal must be clear and manifest."

Applying this rule to the 1996 Act, sections 251 and 252 repeal section 332 only if Congress expressed a "clear and manifest" intention to repeal section 332 or if these provisions are irreconcilable. Neither proposition is supportable in this case. The legislative history does not reveal an intent to repeal section 332. To the contrary, the legislative history suggests that Congress enacted the 1996 Act as the second part of its reform of the 1934 Act: the Budget Act reformed regulation of the wireless industry, and the 1996 Act extended regulatory reforms of the entire communications industry. The 1996 Act also contains a reference

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186. *Id.* § 251(i).
188. *Id.* at 189 (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974)).
191. Indeed, the extensive legislative history of the 1996 Act does not evidence any intent to repeal provisions of the Budget Act, despite the fact that Congress passed the Budget Act only three years earlier and thus presumably was aware of the existence of that statute.
192. In hearings on legislation leading up to the 1996 Act, Representative Fields commented:

"Last year we began the process of building a national telecommunications infrastructure when we adopted a regulatory framework for wireless telecommunications services built on the same concepts contained in H.R. 3636. Today we are taking the next step in the process of crafting a national telecommunications policy as we turn our attention to the other sectors of the telecommunications industry."
to section 332,\(^{193}\) indicating that Congress intended section 332 to remain intact after the enactment of the 1996 Act.\(^{194}\) In addition, section 601(c)(1) of the 1996 Act clearly states: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."\(^{195}\)

Furthermore, the 1996 Act and the Budget Act are not irreconcilable. The jurisdiction granted to the FCC by section 332 applies exclusively to CMRS service and LEC-CMRS interconnection issues.\(^{196}\) The 1996 Act, however, applied to interconnection with LECs in general.\(^{197}\) Arguably, either statute can govern LEC-CMRS interconnection. The rule of statutory construction that a specific statutory provision takes precedence over a subsequent, general statute resolves this conflict.\(^{198}\) Following this rule, section 332, which governs the narrow field of LEC-CMRS interconnection, takes precedence over sections 251 and 252 of the 1996 Act, which apply generally to interconnection between LECs and telecommunications carriers.\(^{199}\) The FCC, as the administrative agency granted authority to imple-

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194. See Laurens Fed. Sav. & Loan Ass'n v. South Carolina Tax Comm'n, 365 U.S. 517, 523 (1961) (stating that it "would be difficult to think of less apt circumstances for the finding of an implied repeal" when Congress passed two closely-related acts within a year of each other).


196. See supra notes 79-102 and accompanying text.


198. See Traynor v. Turnage, 485 U.S. 535, 551 (1988). "[W]hen two statutes are capable of co-existence,' we must conclude that the earlier, more specific provisions . . . were neither expressly nor implicitly repealed by the later, more general provisions . . . ." Id. (citation omitted) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

199. This approach is also consistent with the rule of statutory construction that, "where possible, provisions of a statute should be read so as not to create a conflict." Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986).
ment the 1934 and 1996 Acts, may resolve this conflict in light of its considerable expertise in this field and its extensive knowledge of the CMRS industry.

The Eighth Circuit's recent decision in *Iowa Utilities Board v. FCC* provides support for this interpretation of the FCC's present authority. In that case, a number of state commissions and incumbent LECs challenged the authority of the FCC to issue the pricing rules contained in the Interconnection Order relating to interconnection, transport and termination, and other services. After the consolidation of numerous appeals and the subsequent assignment to the Eighth Circuit, the court vacated the pricing rules, concluding that the FCC lacked jurisdiction to issue rules governing intrastate telecommunications. After noting that "section 2(b) 'fences off' intrastate matters from FCC regulation," the court determined that "the FCC's interpretation of the Act does not demonstrate an unambiguous grant of intrastate authority to the FCC required either to jump over or pass through section 2(b)'s fence."

The Eighth Circuit reached the opposite conclusion, however, with regard to LEC-CMRS interconnection. The court stated:

Because Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by Commercial Mobile Radio Service (CMRS) providers, see 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of

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203. See id. at *2. The pricing rules refer to 47 C.F.R. § 51.501-.515, .601-.611, .701-.717 (1996), excluding § 51.515(b). See id. at *9 n.21.
204. See id. at *2.
205. See id. at *9.
207. Id. at *6.
special concern to the CMRS providers . . . but only as these provisions apply to CMRS providers. 208

The court thus recognized that section 332 provides the FCC with intrastate authority over LEC-CMRS interconnection rates, and that this authority remains in full force after the 1996 Act. 209 Significantly, this holding dispels the arguments advanced by the Regional Bell Operating Companies (RBOCs) that the 1996 Act removed the FCC's authority to regulate LEC-CMRS interconnection rates. 210

The Inseverability Exception Alternative

As an alternative to the jurisdictional argument discussed above, the FCC may assert jurisdiction over intrastate LEC-CMRS interconnection under the inseverability doctrine recognized by the Supreme Court in Louisiana Public Service Commission v. FCC. 211 Under this doctrine, the FCC may exercise jurisdiction over intrastate matters when it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation." 212

In the context of LEC-CMRS interconnection, the FCC can assert that the costs of interstate and intrastate interconnection are not severable given the nature of mobile telephony. 213 The
FCC tentatively reached this conclusion when it last considered the matter in 1996:

We note that much of the LEC-CMRS traffic that may appear to be intrastate may actually be interstate, because CMRS service areas often cross state lines, and CMRS customers are mobile. For example, if a cellular customer from Richmond travels to Baltimore and then places a call to Alexandria, the call might appear to be an intrastate call, placed from a Virginia telephone number to another Virginia number, but would in fact be interstate because the call originates in Maryland and terminates in Virginia. Service areas defined as “local” in wireless providers’ rate structure do not coincide with LEC “exchanges”... subject to state authority, and often cross state lines. This is true of many existing cellular providers, and is even more likely to be true with respect to PCS licensees in major trading areas (MTAs).214

Because LECs or wireless carriers cannot determine the exact location of the sender or recipient of a telephone call, the carriers cannot always determine whether the call is interstate or intrastate.215 This problem is unique to mobile communications, where handsets or pagers are portable and travel across state lines.216 Because the FCC has licensed CMRS services with service areas that do not conform to state boundaries, this problem has grown in recent years.217 The

214. LEC-CMRS Interconnection NPRM, supra note 37, at 5073 (footnote omitted).
215. See supra note 55.
216. See Comments of the Personal Communications Indus. Ass’n 12 (Apr. 12, 1996) (on file with the FCC in CC Docket No. 96-45) [hereinafter PCIA Comments] (“At present, CMRS licensees do not separate their costs and revenues on an inter-state/intrastate basis, and in many cases there is no practical way to do so.”) (emphasis added); Krattenmaker Memorandum, supra note 97, at 13.
217. See Krattenmaker Memorandum, supra note 97, at 14; PCIA Comments, supra note 216, at 11 (stating that “many [CMRS] calls begin as intrastate calls and become interstate calls, or vice versa, as the call crosses and re-crosses state lines”).
218. See Krattenmaker Memorandum, supra note 97, at 13-14; Verveer Letter, supra note 105, at 12. For example, the FCC issued PCS licenses for service areas based upon MTAs and Basic Trading Areas (BTAs). See 47 C.F.R. §§ 24.102, 24.202 (1996). These service areas do not conform to state boundaries. See PCIA Comments, supra note 216, at 11; Comments of Vanguard Cellular Sys., Inc. 6 (Apr. 12, 1996) (on file with the FCC in CC Docket No. 96-45) [hereinafter Vanguard Comments].
issue also arises when cellular service providers operate multistate service areas.\textsuperscript{219}

On at least two prior occasions, the FCC reached the opposite conclusion, holding that interstate and intrastate LEC-CMRS interconnection costs are severable.\textsuperscript{220} Events, however, have overtaken those earlier decisions.\textsuperscript{221} Moreover, the FCC's recognition of an inseverability problem is consistent with the House Budget Committee's determination that "mobile services . . . by their nature, operate without regard to state lines."\textsuperscript{222}

The remainder of this Note discusses considerations that support the FCC's exercise of its section 332 jurisdiction.

CONSIDERATIONS FAVORING THE EXERCISE OF FEDERAL JURISDICTION OVER LEC-CMRS INTERCONNECTION

Discriminatory Treatment of CMRS Providers Prior to the Interconnection Order

Prior to the Interconnection Order, LECs had established a history of discriminatory practices against wireless carriers.\textsuperscript{223}

Similarly, the FCC issued certain SMR licenses for service areas based upon "Economic Areas." See 47 C.F.R. § 90.681. These areas generally include parts of two or more states. See PCIA Comments, supra note 216, at 11; Vanguard Comments, supra, at 6; see also 47 C.F.R. § 90.7 (defining "Economic Area").

\textsuperscript{219} See Vanguard Comments, supra note 216, at 6.

\textsuperscript{220} See CMRS Second Report and Order, supra note 4, at 1498; RCC Interconnection Ruling, supra note 41, at 2912.


\textsuperscript{223} In a statement released with the Interconnection Order, Commissioner Chong observed:

CMRS providers have suffered past discrimination at the hand of the LECs and by certain state commissions with regard to interconnection matters. Today's record is replete with examples of LECs that have significantly overcharged CMRS providers for past interconnection. Further, in violation of our rules, our record reflects that in some cases, LECs have refused to pay CMRS providers for calls terminated by LECs on the
A 1987 study commissioned by the Antitrust Division of the U.S. Department of Justice determined that several of the RBOCs offered wireless providers interconnection of inferior quality or charged CMRS providers interconnection rates unrelated to the cost of providing service. In 1994, the House Judiciary Committee issued a report that noted: "Since divestiture [of AT&T], the RBOCs have been found to have committed a number of anticompetitive acts, including impeding competition in . . . cellular telephone services . . . . These experiences highlight the propensity of various RBOCs to exploit their monopoly power and indicate the continuing limitations of Federal and State regulatory capabilities." As recently as 1997, the FCC issued a decision ordering a LEC to provide Type 2 intercon-
connection to a paging company after the LEC repeatedly refused to provide this type of interconnection. 229

Past discriminatory practices by LECs generally fell into one of two categories: (1) refusal to provide reciprocal compensation; and (2) charging CMRS providers discriminatory rates for interconnection or other services.

Refusal to Provide Reciprocal Compensation

Historically, most LECs refused to compensate CMRS providers for terminating calls to wireless subscribers even though, like LECs, CMRS providers incurred costs in terminating traffic. 230 This practice contrasted starkly with the mutual compensation agreements between LECs. 231 LECs justified this practice by insisting CMRS providers were end-users rather than common carriers. 232 Using this rationale, LECs in many cases billed wireless carriers for the costs they incurred in delivering calls to the CMRS providers. 233 Under these arrangements, LECs passed the entire cost of LEC to CMRS calls onto wireless carriers and forced wireless carriers to bear the entire cost of CMRS to LEC calls.

Numerous state commissions endorsed these practices, denying CMRS providers reciprocal compensation. 234 State commissions justified these actions by stating that reciprocal compensa-

230. See Interconnection Order, supra note 19, at 16,010, 16,039; HUBER, supra note 25, at 4.18; HUBER ET. AL., supra note 157, at 4.11 n.53; Madison, supra note 42, at 80.
231. See supra notes 41-42 and accompanying text.
232. See HUBER, supra note 25, at 4.18; HUBER ET. AL., supra note 157, at 4.11 n.53.
233. See HUBER, supra note 25, at 4.18; HUBER ET. AL., supra note 157, at 4.11 n.53.
tion would increase LEC costs and thus raise local telephone rates,\(^235\) or that wireless subscribers received the benefits of LEC-to-CMRS traffic and thus should pay for termination of such calls.\(^235\) State commissions continued to reject reciprocal compensation even after the FCC promulgated regulations in 1994 requiring mutual compensation.\(^237\) These state actions reflected the willingness of some state commissions to treat CMRS providers in a discriminatory manner.

**Discriminatory LEC-CMRS Rates**

In addition to refusing to provide reciprocal compensation, LECs customarily charged higher interconnection rates to CMRS providers than to other carriers. On average, LECs charged CMRS providers interconnection rates of approximately three cents per minute,\(^238\) compared to rates of approximately one cent per minute for other wireline carriers.\(^239\) State commis-

\(^{235}\) See CyberTel, 94 Pub. Util. Rep. 4th (PUR) at 126; Re Regulation of Cellular Radiotelephone Utils., 36 Cal. P.U.C.2d at 497; Florida LEC-CMRS Order, supra note 234, at *19. The Florida Public Service Commission reached this conclusion after acknowledging that termination of calls by CMRS providers results in LEC cost savings. See Florida LEC-CMRS Order, supra note 234, at *18-19.


\(^{238}\) See Interconnection Order, supra note 19, at 15,927 (citing comments submitted by CTIA, a trade organization representing many cellular providers, stating the nationwide average LEC-CMRS interconnection rate); Young, supra note 31, at 65 (estimating that the 1996 national average rate for Type 2A interconnection was 2.86¢ per minute). Some LEC interconnection rates were significantly higher. For example, the average Type 2A rates charged by NYNEX and Pacific Bell exceeded 4¢ per minute, see id., and the average Type 1 rates charged by Bell Atlantic and NYNEX exceeded 9¢ per minute. See id.

\(^{239}\) See LEC-CMRS Interconnection NPRM, supra note 37, at 5054 (stating that the median termination rate charged by LECs to competing wireline carriers is approximately 1¢ per minute); Newman, supra note 26, at 78 (noting that LEC costs are less than 1¢ per minute); see also Interconnection Order, supra note 19, at 15,927 (citing a CTIA survey of LEC-LEC interconnection agreements in 18 states
sions, which generally regulated these LEC-CMRS interconnection rates, approved such rates in some instances because CMRS providers did not contribute to state universal service funds.

State commissions and incumbent LECs adopted other practices that discriminated against wireless providers. Many LECs charged CMRS providers substantial fees for activation of NXX codes, while at the same time charging other LECs significantly lower fees or no fee at all. Some state commissions approved LEC tariffs imposing such charges, even though these charges discriminated against CMRS providers.

that revealed interconnection rates significantly below the $0.03 per minute average LEC-CMRS rate).

240. See HUBER, supra note 25, at 4.15.

241. See Interconnection Order, supra note 19, at 15,925-26 (commenting that CMRS providers in New York could pay an interconnection rate of less than $0.01 per minute if they complied with state universal service obligations; otherwise, the rate was $0.026 per minute).

"Universal service" broadly refers to the system that subsidizes basic local telephone service and provides local telephone service to low-income households at subsidized rates. See Riley K. Temple, Universal Service and the 1996 Act, in 14TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS 87, 92-94 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 465, 1996). The FCC operates a Universal Service Fund that subsidizes LECs "whose costs exceed[] the national average." Id. at 94. In addition, states operate separate universal service funds to subsidize the cost of providing low cost telephone service to residential customers by LECs within each state. See id. at 95. States require LECs and competing wireline providers to contribute to universal service funds. See id.

242. For example, some Florida LECs failed to flow through interconnection rate reductions to CMRS providers, although a state commission order required such reductions. See Florida Second LEC-CMRS Order, supra note 237, at *9.

243. For a definition of an NXX code, see supra note 74.

244. See Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Decision 96-12-067, 1996 WL 752451, at *7 (Cal. P.U.C. Dec. 20, 1996) ("[W]e conclude that Pacific [Bell]'s practice of charging code opening fees to cellular carriers and other CMRS providers is unacceptable since such charges are discriminatory."); Florida Second LEC-CMRS Order, supra note 237, at *14 (summarizing testimony stating that no LECs in Florida impose NXX code activation fees on other LECs); Harry E. Young, Interconnection Update: BIG Savings, CELLULAR BUS., Nov. 1996, at 26, 26 (stating that LECs charged CMRS providers fees significantly higher than those charged to other LECs).

245. See, e.g., Florida Second LEC-CMRS Order, supra note 237, at *14-15 (approving tariffed rates for NXX charges for CMRS providers after reviewing evidence that LECs did not impose such charges on other wireline carriers).
Treatment of CMRS Providers Subsequent to the Interconnection Order

Acting on numerous petitions to stay the FCC Interconnection Order, the Eighth Circuit stayed the effective date of the Order on September 27, 1996. On November 1, 1996, the Eighth Circuit lifted the stay with regard to three provisions affecting LEC-CMRS interconnection, including the “fresh look” provision, which authorizes CMRS providers to renegotiate nonreciprocal interconnection agreements without penalty. Subsequently, many CMRS providers entered into negotiations with LECs to renegotiate their existing nonreciprocal interconnection agreements.

As a result of these negotiations, many CMRS providers obtained or will obtain one of their prime objectives with respect to interconnection—reciprocal compensation. In addition, CMRS providers have obtained interconnection rates considerably below the nationwide average rate that existed prior to the 1996 Act. Yet significant problems remain.

First, not all LEC-CMRS interconnection agreements entered into subsequent to the 1996 Act have achieved symmetry in reciprocal compensation rates. Following the Eighth Circuit’s


248. See Harry E. Young, Interconnection Negotiations, CELLULAR BUS., June 1997, at 60, 60.

249. See id. at 64-66; supra notes 38-43 and accompanying text.

250. See Young, supra note 248, at 66; see also Telephony, COMM. DAILY, July 9, 1997, available in 1997 WL 3945895 (noting that PriCellular may obtain interconnection rate reductions of more than 60% in New York following renegotiation of its agreement).

decision in *Iowa Utilities Board v. FCC,* 252 which affirmed the FCC's regulation requiring symmetrical reciprocal compensation rates with respect to LEC-CMRS interconnection. 253 LECs may no longer impose such agreements on CMRS providers. 254 *Iowa Utilities Board,* however, does not enable CMRS providers that entered into nonsymmetrical agreements prior to that decision to renegotiate them. 255

Second, review of LEC-CMRS interconnection agreements approved by state commissions since the Interconnection Order suggests that LECs have used their greater bargaining power 256 to negotiate transport and termination rates significantly above additional or incremental cost. 257 In the Interconnection Order, the FCC presented an extensive analysis of incremental cost data for interconnection services and concluded that the "additional costs" of transport and termination should approximate .2¢-.4¢ per minute for end-office switching 258 and .15¢ per minute for tandem switching 259 if required by the agreement that provides for nonsymmetrical reciprocal rates between Ameritech Illinois and Southwestern Bell Mobile Systems, Inc. (SBMS), a cellular service provider, for the first three years of the agreement; Young, supra note 248, at 64 (observing that nonsymmetrical rates exist in recently approved LEC-CMRS interconnection agreements in California).

Under the terms of the Ameritech-SBMS agreement, during the first three years SBMS must compensate Ameritech at a rate higher than that paid by Ameritech to SBMS. See *Ameritech Illinois,* 1996 Ill. PUC Lexis 336, at *5-*6. Only after July 1, 1999, does the mutual compensation arrangement achieve rate symmetry. See id. at *6.

252. Nos. 96-3321 et al., 1997 WL 403401 (8th Cir. July 18, 1997).

253. See id. at *9 n.21.


255. The FCC "fresh look" provision only permits renegotiation of nonreciprocal interconnection agreements. See id. § 51.717.

256. See supra note 157.


258. See Interconnection Order, supra note 19, at 15,905-07, 16,026-27 (codified at 47 C.F.R. § 51.513(c)(2), .707(b)(1)). The FCC noted that "the most credible evidence in the record suggests that the actual forward-looking economic cost of end-office switching is closer to 0.2 cents ($0.002) per minute of use." See id. at 16,030. End-office switching is the principal component of "termination." See supra note 33.

259. See Interconnection Order, supra note 19, at 15,910-11 (codified at 47 C.F.R. § 51.513(c)(5)). Tandem switching is a substantial component of "transport" where a CMRS provider interconnects at a LEC's tandem switch. See supra note 32. The
LEC-CMRS interconnection configuration.\textsuperscript{260} According to the FCC, therefore, transport and termination "additional costs" should approximate .2\textcent{}-.55\textcent{} per minute.\textsuperscript{261} Numerous negotiated LEC-CMRS interconnection agreements resulted in transport and termination rates significantly in excess of these rates, however.\textsuperscript{262}

FCC also concluded that dedicated transport costs are reflected approximately by existing LEC tariffed rates. See Interconnection Order, \textit{supra} note 19, at 15,909 (codified at 47 C.F.R. § 51.513(c)(3)).

\textsuperscript{260} The FCC concluded that state commissions may set interim transport and termination rates on the basis of either LECs' actual additional costs, measured according to economic cost studies, or these "default proxies." See \textit{Interconnection Order, supra} note 19, at 15,891-92 (codified at 47 C.F.R. § 51.705(a)). In \textit{Iowa Utilities Board}, the Eighth Circuit vacated the FCC's pricing provisions, including sections 51.513 and 51.705, holding that section 2(b) removed the FCC's jurisdiction with respect to intrastate rate regulation. See Iowa Utilities Bd. v. FCC, Nos. 96-3321 et al., 1997 WL 403401, at *9 & n.21 (8th Cir. July 18, 1997). The FCC's analysis of data regarding the costs of transport and termination, however, remains valid. See \textit{id}.

\textsuperscript{261} If a CMRS provider interconnects its MTSO with a LEC at the LEC's tandem switch rather than at an end-office switch, the LEC incurs tandem switching costs in addition to end-office switching costs to complete a call. See \textit{Interconnection Order, supra} note 19, at 15,910-11. A LEC's interconnection costs will thus vary according to where the wireless carrier interconnects with the LEC, hence the .2\textcent{}-.55\textcent{} per minute range of estimated costs.

The FCC affirmed its cost estimates with regard to end-office transport and termination costs on reconsideration of this aspect of the Interconnection Order. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 13,042, 13,045 (1996) (order on reconsideration), \textit{reprinted in part} in 61 Fed. Reg. 52,706 (1996). Moreover, these cost estimates have gained validity from recent LEC-CMRS interconnection agreements that established rates within this expected range. See, e.g., \textit{In re Joint Application of Bell Atlantic-New Jersey, Inc. and Vanguard Cellular Systems, Inc. for Approval of an Interconnection Agreement under Section 252(e) of the Telecommunications Act of 1996, No. T097030162, 1997 WL 312600, at *2 (N.J.B.P.U. May 28, 1997) (establishing transport and termination rates of .3\textcent{}-.5\textcent{} per minute depending on the interconnection configuration); Re Bell Atlantic-New Jersey, Inc., No. T097020077, 1997 WL 185147, at *2 (N.J.B.P.U. Apr. 2, 1997) (establishing an end-office termination rate of .3\textcent{} per minute and a rate of .5\textcent{} per minute for termination at a tandem switch).}

\textsuperscript{262} See, e.g., Request by BellSouth Telecommunications, Inc. for Approval of Interconnection Agreement with Vanguard Cellular Financial Corp., No. 970228-TP, 1997 WL 374350, at *20 (Fla. P.S.C. June 11, 1997) (setting an end-office termination rate of 1.75\textcent{} per minute for traffic interconnected with BellSouth in Tennessee); Re Vanguard Cellular Financial Corp., No. 97-027, 1997 WL 295239, at *6 (Me. P.U.C. Apr. 15, 1997) [hereinafter Maine Vanguard Agreement] (providing for a Type 2A interconnection rate of 1.5\textcent{} per minute). Type 2A interconnection involves interconnection at a LEC's tandem switch. See \textit{supra} note 65.
Even though most interconnection agreements negotiated since the 1996 Act include symmetrical reciprocal compensation, LECs derive significant benefits from obtaining high interconnection rates because traffic between wireline and wireless networks is unbalanced. According to many industry sources, LEC-CMRS traffic flows are substantially unbalanced: more than eighty percent of LEC-CMRS traffic originates on the wireless network and terminates on the wireline network. With this substantial imbalance of traffic flows, LECs have a financial and competitive interest in negotiating high interconnection rates. Recent decisions suggest that some LECs have taken advantage of their market power to achieve rates significantly higher than FCC-estimated costs.

Third, in numerous interconnection agreements, LECs negotiated Type 2A interconnection rates equal to, or greater than, Type 1 interconnection rates, even though there is clear evi-

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263. See Young, supra note 248, at 64-66.
264. See LEC-CMRS Interconnection NPRM, supra note 37, at 5027 ("LECs typically terminate many more calls that originate from the cellular network than an interconnecting cellular network terminates LEC-originated calls. . . . Because of this imbalance, LECs clearly would benefit competitively from maintaining high, even if symmetrical, interconnection charges.") (emphasis added). LECs, therefore, “may seek to impose unduly high interconnection rates or other unreasonable conditions that could reduce CMRS entry.” LEC-CMRS Interconnection NPRM, supra note 37, at 5062.
265. See, e.g., Jason Meyers, The Interconnection Schism, TELEPHONY, Mar. 18, 1996, at 14, 14 (noting claims by the United States Telephone Association, the leading LEC trade association, that LECs terminate CMRS-to-LEC calls 94% of the time); Newman, supra note 26, at 80 (stating that approximately 82% of residential cellular calls are outgoing); Young, supra note 31, at 65 (stating that presently 80% of LEC-CMRS traffic originates on the wireless network, but estimating that the figure will fall to 60% by 2006).
266. See, e.g., Request by BellSouth Telecommunications, Inc. for Approval of Interconnection Agreement with Vanguard Cellular Financial Corp., No. 970228-TP, 1997 WL 374350, at *20 (Fla. P.S.C. June 11, 1997) (noting that BellSouth achieved an end-office interconnection rate of 1.75¢ per minute in one agreement, more than four times the FCC's high-end estimate of .4¢ per minute); Young, supra note 248, at 64 (presenting data on interconnection rates in recently approved interconnection agreements which reveal that Type 2A termination rates approved in Los Angeles and Seattle are more than double FCC-estimated costs).
267. See, e.g., Request for Approval of Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. with Palmer Wireless, Inc., No. 970260-TP, 1997 WL 377371, at *19 (Fla. P.S.C. June 19, 1997) (providing for an identical rate of 1.586¢ per minute for Type 1 and Type 2A interconnection in South Carolina);
idence that Type 2A interconnection is less costly for LECs to provide.\textsuperscript{268} Moreover, CMRS providers favor Type 2A interconnection.\textsuperscript{269} These negotiation results suggest that LECs are using their greater bargaining power to negotiate Type 2A interconnection rates considerably above cost.

Fourth, some LECs persist in refusing to compensate paging carriers for terminating calls on paging networks, and in fact are imposing charges on paging carriers for calls originating on the wireline network.\textsuperscript{270} This practice persists more than three years after the FCC mandated mutual compensation for all CMRS providers, including paging companies.\textsuperscript{271} These practices are similar to those of many LECs with regard to cellular carriers prior to the 1996 Act.\textsuperscript{272} Due to the passage of the 1996 Act, however, such discriminatory practices also violate the reciprocal compensation requirement of section 251(b)(5) and FCC regulations implementing the 1996 Act.\textsuperscript{273}

Maine Vanguard Agreement; supra note 262, at *6 (providing a Type 1 rate of .8¢ per minute and a Type 2A rate of 1.5¢ per minute).

268. See Bowles v. United Tel. Co., File No. E-96-04, 1997 WL 383651, at *2 (F.C.C. July 11, 1997) (citing RCC Reconsideration Order, supra note 41, at 2373); see also supra note 65 (defining Type 1 and Type 2 interconnection).

269. See supra note 65.

270. See, e.g., Reply Comments of the Paging and Narrowband PCS Alliance of the Personal Communications Indus. Ass'n 2-3 (June 27, 1997) (on file with the FCC in CC Docket No. 96-98); Letter from Cathleen A. Massey, AT&T Wireless Servs., Inc., et al., to Regina M. Keeney, Chief, Common Carrier Bureau, FCC 1-2 (Jan. 30, 1997) (on file with the FCC in CC Docket No. 96-98).

271. See supra note 126 and accompanying text.

272. See supra notes 230-33 and accompanying text.

273. See 47 U.S.C.A. § 251(b)(5) (West Supp. 1997); 47 C.F.R. § 51.703(b) (1996); see also Letter from Regina M. Keeney, Chief, Common Carrier Bureau, FCC, to Cathleen A. Massey, AT&T Wireless Services, Inc. (Mar. 3, 1997), available in 1997 WL 117463, at *2 (noting that "section 251(b)(5) . . . prohibits LECs from charging CMRS carriers to terminate traffic that originates on the LECs' networks").

Two state commission arbitration decisions recently recognized that paging companies may collect transport and termination costs from LECs. See Application of Cook Telecom, Inc., for Arbitration Pursuant to Section 252 of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Pacific Bell, Decision 97-05-095, 1997 WL 383634, at *2-*3 (Cal. P.U.C. May 21, 1997); In re Petition of AT&T Wireless Servs., Inc. for Arbitration of an Interconnection Agreement with US West Communications, Inc., Pursuant to 47 U.S.C. § 252(b), No. F-421/EM-97-371, 1997 Minn. PUC LEXIS 118, at *28 (Minn. P.U.C. July 30, 1997). Whether LECs will modify their practices as a result of these decisions is unclear.
Fifth, at least one state commission has ordered that cellular service providers may not renegotiate existing interconnection agreements with incumbent LECs, even though the FCC promulgated a "fresh look" rule in the Interconnection Order, and the Eighth Circuit removed its stay of this rule on November 1, 1996. This state commission ruling prevents cellular service providers in Louisiana from renegotiating existing nonreciprocal interconnection agreements, and thus prevents these carriers from obtaining reciprocal compensation until their existing interconnection contracts expire.

Finally, FCC Commissioner Chong recently identified additional unfair practices by LECs toward CMRS providers, including refusing to give wireless carriers interconnection rates approved by state commissions in arbitrations and refusing to pay symmetrical reciprocal compensation rates. The continuing discriminatory LEC treatment of CMRS providers since the passage of the 1996 Act warrants FCC exercise of its jurisdiction to regulate both intrastate and interstate LEC-CMRS interconnection.

**Policy Considerations Favoring Federal Regulation of LEC-CMRS Interconnection Agreements**

Consideration of the various policies underlying the 1934 Act, the Budget Act, and the 1996 Act provides additional support for the assertion of federal jurisdiction over LEC-CMRS interconnection. These statutes encompass three policies that the FCC would further by exercising its section 332 authority.

First, Congress has emphasized repeatedly the importance of interconnection of telecommunications carriers to achieve "a rapid, efficient, Nation-wide, and world-wide wire and radio
communication service... at reasonable charges.\textsuperscript{279} Interconnection between networks and carriers is a prerequisite for nationwide communication.\textsuperscript{280} Congress recognized this necessity in the 1934 Act by authorizing the FCC to require common carriers “to establish physical connections with other carriers.”\textsuperscript{281} Congress reaffirmed the importance of interconnection when it amended section 332(c) of the 1934 Act by enacting the Budget Act in 1993.\textsuperscript{282} The House Budget Committee report accompanying the bill stated: “The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.”\textsuperscript{283} Interpreting this legislation, the FCC concluded that “commercial mobile radio service interconnection with the public switched network will be an essential component in the successful establishment and growth of CMRS offerings.”\textsuperscript{284}

Moreover, this federal policy of promoting interconnection is interwoven with the requirement that common carriers provide service at “just and reasonable” rates.\textsuperscript{285} The FCC recently stated:

The availability of interconnection cannot, however, be divorced from its price. Interconnection that is priced too high can be the marketplace equivalent of no interconnection. An interconnection obligation is undermined if the charges imposed for interconnection are excessive, and society will not enjoy the benefits [of competition and a seamless network].\textsuperscript{286}

\begin{itemize}
  \item \textsuperscript{279} 47 U.S.C. § 151 (1994).
  \item \textsuperscript{280} See LEC-CMRS Interconnection NPRM, supra note 37, at 5024-25.
  \item \textsuperscript{281} 47 U.S.C. § 201(a).
  \item \textsuperscript{282} See Pub. L. No. 103-66, sec. 6002(b)(2)(A)(iii), § 332(c), 107 Stat. 312, 393 (codified as amended at 47 U.S.C.A. § 332(c) (West Supp. 1997)).
  \item \textsuperscript{283} H.R. REP. No. 103-111, at 261 (1993), \textit{reprinted in} 1993 U.S.C.C.A.N. 378, 588. This statement suggests that Congress granted the FCC broad authority to promote LEC-CMRS interconnection.
  \item \textsuperscript{284} CMRS Second Report and Order, supra note 4, at 1499.
  \item \textsuperscript{285} 47 U.S.C. § 201(b); see also \textsuperscript{id.} § 151 (establishing the objective of communication service “at reasonable charges”).
  \item \textsuperscript{286} LEC-CMRS Interconnection NPRM, supra note 37, at 5025.
\end{itemize}
The regulatory regime governing interconnection thus should further Congress's stated policy of promoting interconnection at just and reasonable rates.

Second, Congress and the FCC have expressed a strong desire to promote nondiscriminatory treatment of telecommunications carriers. Section 202 of the 1934 Act expressly prohibits "unjust or unreasonable discrimination in charges [or] practices." The 1996 Act enacted section 251(c), which specifically requires incumbent LECs to provide interconnection on rates, terms, and conditions that are nondiscriminatory. Similarly, the FCC has advocated the principle of nondiscriminatory LEC-CMRS interconnection for many years.

Third, by amending section 332 via the Budget Act, Congress espoused a policy of promoting the development of a national wireless communications network. The House Budget Committee's report stated that one of the purposes of section 332 is "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." Congress thus recognized the unique interstate characteristics of wireless communications and expressed a strong interest in promoting the growth of this industry.

By asserting its authority to regulate LEC-CMRS interconnection, the FCC would further each of these policies. First, because CMRS providers commonly operate service areas that encompass more than one state, if a CMRS provider needs to arbitrate an interconnection agreement pursuant to sections 251 and 252, then it will be subjected to multiple arbitration proceedings. This system is likely to place a financial burden on wireless providers operating in multistate service areas, to subject them

289. See, e.g., Policy Statement, supra note 29, at 10,838.
292. See supra notes 218-19 and accompanying text.
293. See Interconnection Order, supra note 19, at 16,252 n.7 (separate statement of Comm'r Chong) (noting that a PCS provider in the Washington-Baltimore MTA could be subjected to six state arbitration proceedings).
to regulatory delay, and to hinder the progress of LEC-CMRS interconnection and the growth of the wireless industry.\textsuperscript{294} Furthermore, because \textit{Iowa Utilities Board} vacated the federal pricing regulations,\textsuperscript{295} multiple state arbitrations may subject CMRS providers to different interconnection rates in each state.\textsuperscript{296} By exercising its section 332 jurisdiction, the FCC could impose a federal arbitration procedure for interconnection arbitrations involving CMRS providers operating multistate service areas.\textsuperscript{297} Under federal arbitration, a wireless provider could resolve interconnection agreements with LECs in its entire service area in one proceeding before the FCC or an FCC-appointed arbitrator. Such action would reduce the CMRS providers' costs of obtaining arbitration and thus promote LEC-CMRS interconnection and development of the wireless communications network.

The Eighth Circuit's decision to vacate the FCC pricing rules will also increase interconnection rates obtained by CMRS providers in arbitration proceedings in states that decline to follow the FCC's cost methodology.\textsuperscript{298} By exercising its section 332 jurisdiction to reestablish its pricing rules with respect to LEC-CMRS interconnection, however, the FCC would enable CMRS providers to obtain interconnection rates based on forward-looking costs in every state.

\textsuperscript{294} See id. at 16,252-53 (separate statement of Comm'r Chong).

\textsuperscript{295} See Iowa Utils. Bd. v. FCC, Nos. 96-3321 et. al., 1997 WL 403401, at *9 & n.21 (8th Cir. July 18, 1997); see also discussion supra note 260.

\textsuperscript{296} This would occur even if the CMRS provider interconnects with the same LEC in each state.

\textsuperscript{297} Commissioner Chong hinted at such an alternative in her separate statement accompanying the Interconnection Order:

\begin{quote}
I have concerns that the state-by-state arbitration process may pose undue burdens on, or otherwise hinder the growth of, the CMRS industry. If it does, I would not hesitate to invoke our Section 332 jurisdiction if I believe that the framework we impose today is having adverse impacts on the CMRS industry.
\end{quote}

Interconnection Order, \textit{supra} note 19, at 16,253 (separate statement of Comm'r Chong).

\textsuperscript{298} Most states, however, may defer to the forward-looking cost methodology adopted by the FCC even though it is no longer binding. \textit{See State Regulators Say Appeals Court Decision Won't Hurt Competition}, COMM. DAILY, July 22, 1997, available in 1997 WL 3946234.
As discussed above, some CMRS providers have failed to obtain cost-based rates in numerous negotiated interconnection agreements.\(^{299}\) This phenomenon is primarily a result of the operation of section 252(a)(1), which permits incumbent LECs to negotiate interconnection agreements without regard to many of the requirements of section 251 or FCC regulations implementing section 251.\(^{300}\) Under its section 332 authority, the FCC may extend regulation to negotiated LEC-CMRS interconnection agreements and require that such agreements also comply with the cost-based pricing methodology that applies to arbitrated interconnection agreements. Such action would ensure nondiscriminatory treatment of wireless providers.

**A Proposed Solution: FCC Arbitration of LEC-CMRS Interconnection Agreements**

By exercising its section 332 jurisdiction to regulate all aspects of LEC-CMRS interconnection, the FCC could eradicate many of the problems that CMRS providers have experienced since the 1996 Act.\(^{301}\) Asserting this authority, the FCC could promulgate regulations requiring federal arbitration of LEC-CMRS interconnection disputes.\(^{302}\) The FCC would require negotiation or arbitration of LEC-CMRS interconnection agreements under a system substantially similar to that provided in sections 251 and 252,\(^{303}\)

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299. *See supra* notes 256-66 and accompanying text.  
300. *See supra* notes 144-49 and accompanying text.  
301. *See supra* notes 251-78 and accompanying text.  
302. Alternatively, the FCC may limit federal arbitration to disputes involving CMRS providers operating in multistate service areas. *See supra* notes 292-93 and accompanying text. The FCC alluded to the possibility of replacing the section 251 and 252 regulatory scheme with an alternative purely federal system in the Interconnection Order:  
   Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates.  
303. For example, the federal arbitration would follow section 252(b)'s procedural time limitations. *See* 47 U.S.C.A. § 252(b) (West Supp. 1997); *supra* note 146 and accompanying text.
but with the FCC or an FCC-appointed arbitrator replacing the role of the state commission. To provide rules governing these arbitrations, the FCC would reissue the interconnection regulations, including the pricing rules that the Eighth Circuit recently vacated in *Iowa Utilities Board.*

This proposed system has the benefits of: (1) consistency with the 1996 Act to the maximum extent possible; (2) consistency of arbitration decisions for CMRS providers with multistate service areas; (3) nondiscriminatory treatment of CMRS providers; and (4) simplification of arbitration procedures for CMRS providers with service areas that span more than one state.

First, this federal arbitration scheme is consistent with the arbitration procedures imposed by section 252 of the 1996 Act and with Congress's expressed preference for negotiation of interconnection agreements, with the important distinction that the FCC or a FCC-appointed arbitrator would conduct any arbitration proceedings. By adopting a scheme consistent with sections 251 and 252, the FCC would not provide CMRS providers with any advantage over other carriers seeking to interconnect with incumbent LECs.

Second, federal arbitration would yield consistent arbitration outcomes for CMRS providers operating in multistate service areas. Under a federal arbitration system, all interconnection disputes involving the same CMRS provider could be resolved in one consolidated proceeding. Federal arbitration would reduce significantly the costs of arbitration for these wireless carriers. PCS providers would be the primary beneficiaries of this system because many PCS service areas span more than one state. Federal arbitration thus would encourage investment in this nascent industry.

Third, a federal arbitration system would ensure that CMRS providers receive nondiscriminatory treatment. By imposing a requirement that negotiated interconnection agreements comply with principles of reciprocal compensation and cost-based pricing,
the FCC could prevent LECs from using their greater bargaining power to obtain interconnection rates significantly above cost.\(^{308}\)

Fourth, this proposal would reduce significantly the regulatory burden on CMRS providers whose service areas span more than one state.\(^{309}\) Under a federal arbitration scheme, such CMRS providers could obtain interconnection agreements through one arbitration proceeding before a federal arbitrator, reducing the financial burden of multiple arbitration proceedings.

**CONCLUSION**

By enacting the Budget Act in 1993, Congress substantially transformed the regulatory regime governing CMRS providers in an effort to promote the growth of this developing sector of the telecommunications industry. Section 332, as amended by the Budget Act, bestowed the FCC with jurisdiction over intrastate LEC-CMRS interconnection. Congress did not repeal section 332 when it enacted the 1996 Act; therefore, the FCC’s authority with respect to LEC-CMRS interconnection remains intact. By failing to exercise this jurisdiction in the Interconnection Order, the Commission missed an opportunity to provide all CMRS providers with reciprocal, cost-based interconnection rates and to further Congressional policies promoting interconnection, nondiscriminatory treatment of carriers, and development of a national wireless infrastructure.

Although the FCC has failed to assert its jurisdiction over LEC-CMRS interconnection pursuant to section 332, the Commission still has authority to act. The Eighth Circuit’s recent *Iowa Utilities Board* decision, which recognized that the Budget Act expressly modified section 2(b) of the Communications Act and expanded the Commission’s jurisdiction with respect to LEC-CMRS interconnection, may embolden the Commission to exercise this jurisdiction in the future.

Although CMRS providers have not yet concluded renegotiation or arbitration of all pre-1996 Act nonreciprocal interconnection agreements, a review of renegotiated agreements indicates that

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308. *See supra* notes 256-66 and accompanying text. Alternatively, the FCC regulations could provide that CMRS providers can waive this requirement.

309. *See supra* notes 292-97 and accompanying text.
CMRS providers still cannot obtain interconnection at fair, cost-based rates in many instances. The FCC, therefore, should exercise its section 332 jurisdictional authority to regulate intrastate LEC-CMRS interconnection. This Note proposes that one solution is for the FCC to take over the role of arbitrating and approving LEC-CMRS interconnection agreements. Federal arbitration of LEC-CMRS interconnection disputes would further Congress’s stated goals of facilitating interconnection between networks and promoting the growth and development of wireless communications.

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