Curtis L. Groves
Assistant General Counsel
Federal Regulatory and Legal Affairs

1300 I Street, NW, Suite 500 East
Washington, DC 20005
Phone 202.515.2179
Fax 202.336.7922
curtis.groves@verizon.com

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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition for Declaratory Ruling To Clarify Applicability of the IntraMTA Rule to LEC-IXC Traffic, WC Docket No. 14-228

Dear Ms. Dortch:

On June 8, 2017, Joe Cavender of Level 3, Keith Buell of Sprint, Christopher Wright of Harris, Wiltshire, and Grannis (representing Sprint), and I met with Jay Schwarz, Wireline Advisor to Chairman Pai. Janette Luehring from Sprint participated in the meeting by phone, as did Amy Richardson of Harris, Wiltshire, and Grannis, counsel to Sprint.

Consistent with our earlier advocacy,[1] we asked the Commission to deny the declaratory ruling petition, reiterate that the intraMTA rule applies without exception to all intraMTA traffic exchanged between local exchange carriers and wireless carriers, and reaffirm that intraMTA wireless traffic is not subject to access charges—regardless of whether an intermediary interexchange carrier or other provider is involved in routing, and regardless of the facilities on which the traffic is routed.

The Commission has long held there is no exception to the intraMTA rule. The Commission has since 1996 held all traffic exchanged between wireless carriers and local exchange carriers that begins and terminates within an MTA is local traffic subject to reciprocal compensation and not access charges.[2] It reaffirmed this holding in 2011, confirming this rule

[1] *See*, *e.g.*, Verizon Ex Parte Letter from Curtis L. Groves to Marlene H. Dortch, FCC, WC Docket No. 14-228 (May 30, 2017); Sprint Ex Parte Letter from Christopher J. Wright, Counsel, to Marlene H. Dortch, FCC, WC Docket No. 14-228 (Apr. 26, 2017).

[2] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15,499, ¶ 1036 (1996).

applies regardless of whether the traffic is carried by an intermediary carrier.[3] When it did, the Commission cited approvingly three federal circuit courts of appeals that have confirmed the intraMTA rule prohibits access charges on IXCs that route intraMTA wireless traffic.[4] But given the lingering dispute and the recent district court decision that conflicts with the Commission's precedent and its efforts at intercarrier-compensation reform,[5] the Commission should reconfirm its rule.

The declaratory ruling should apply retroactively. Because declaratory rulings are agency adjudications that do not change the Commission's rules, they normally apply retroactively.[6] The exception—where retroactivity would result in a manifest injustice—does not apply here. As the DC Circuit found in another case involving disputed intercarrier-compensation charges, "a mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct."[7] And here, at least until the district court's mistaken decision, there has been no lack of clarity, although the LECs have tried for at least 15 years to create one.[8]

Applying the declaratory ruling retroactively is fair. Not only have the LECs that improperly billed Verizon, Sprint, and Level 3 switched access charges been on notice for years that intraMTA traffic is not subject to access charges, they also have received from us reliable intraMTA traffic factors, based on a rigorous process to identify intraMTA traffic. This process begins with call detail records (CDR) that document the details of the calls at issue. Working with a third-party vendor, we identified calls that went to and from certain LECs. We determined whether these calls were CMRS originated or terminated. Once we determined a call was CMRS on one end, we then determined whether the calls originated and terminated in the same MTA. We and the third-party vendor used information including the Jurisdiction Information Parameter (JIP), calling and called numbers, and Location Routing Numbers (LRN) along with certain industry information to make these determinations. Once we were able to identify the wireless originated or terminated intraMTA calls that we exchanged between these LECs, we calculated a "Percent Local Wireless" factor that we provided the LECs. We calculated these factors and provided them to the LECs each month. We first provided the factors in 2014, and we developed and calculated them using the same rigorous process going back to at least 2012.

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[3] *Connect America Fund*, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, ¶¶ 41, 1007 (2011) ("*Connect America Fund Order*").
[4] *See id.*, ¶ 1007 & n.2133 (citing *Alma Commc'ns Co. v. Missouri Pub. Serv. Comm'n*, 490 F.3d 619 (8th Cir. 2007); *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006); *Atlas Tel. Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005)). *See also Western Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970 (9th Cir. 2012).
[5] *See In re intraMTA Switched Access Charges Litigation*, Civ. No. 3:14-MD-2587-D (MDL No. 2587) (N.D. Tex. Nov. 17, 2015) *attached to* The CenturyLink LECs Ex Parte Letter from Yaron Dori, Counsel, to Marlene H. Dortch, FCC, WC Docket No. 14-228 (Nov. 20, 2015).
[6] *Qwest Services v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) (quoting *Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332, 372 U.S. App. D.C. 133 (D.C. Cir. 2006)).
[7] *Id*.
[8] *See*, *e.g.*, Letter from Sylvia Lesse, Counsel to Missouri Companies, to William F. Caton, Acting Secretary Federal Communications Commission, *Unified Intercarrier Compensation*, CC Docket No. 01-92; *Wireless Access Charges*, WT Docket No. 01-316 (Mar. 22, 2002), cited in *Connect America Fund Order* ¶ 1007 & n.2130.

The intraMTA rule applies—and access charges do not apply—regardless of how the traffic is routed. The Commission's intercarrier-compensation rules depend on the jurisdiction of the traffic, not on the facilities used to deliver it. In fact, nearly all switched traffic is commingled with different types of traffic, no matter what facilities providers use to deliver that traffic. Local traffic is commingled with non-local traffic. VoIP traffic is commingled with non-VoIP traffic. Interstate traffic is commingled with intrastate traffic. And intraMTA traffic is commingled with interMTA traffic. This is standard practice in the industry. And it's why the industry has developed factors to deal with commingled traffic, like the Percent Interstate Usage (PIU) factor and the Percent VoIP Factor (PVU). In fact, because some *interMTA* traffic is inevitably commingled and routed on local trunks, the industry has developed *interMTA factors* for that traffic, which the LECs accept (and in fact are generally calculated at the LECs' insistence). So the LEC Coalition's call for a new rulemaking proceeding to develop new mechanisms for routing commingled TDM traffic is a call to reinvent the wheel.[9] The mechanisms—traffic studies and factors—are already well-established. Nor is there anything untoward about commingling. It would be cost-prohibitive and impractical to re-route traffic to avoid commingling, which explains why the industry hasn't done it.

Very truly yours,

Copies: Jay Schwarz

[9] Letter from Matthew A. Brill, Counsel, to Marlene H. Dortch, FCC, WC Docket No. 14-228 (June 5, 2017).