

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

In the Matter of)	
)	
Petition for Declaratory Ruling To Clarify the Applicability)	WC Docket No. 14-228
of the IntraMTA Rule to LEC-IXC Traffic and Confirm)	
That Related IXC Conduct Is Inconsistent with the)	
Communications Act of 1934, as Amended, and the)	
Commission's Implementing Rules and Policies)	

COMMENTS OF AT&T SERVICES, INC.

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I. INTRODUCTION

AT&T Services, Inc., on behalf of itself and its affiliates (“AT&T”), respectfully urges the Commission to issue a Declaratory Ruling that promptly and definitively resolves on a nationwide basis the intraMTA issue raised by the *LEC Petition*.¹ Since early 2014, the industry has been embroiled in controversies related to the appropriate compensation regime for intraMTA traffic routed from interexchange carriers (“IXCs”) over exchange access arrangements, when no existing interconnection agreement between the parties governs the exchange of this traffic.²

This controversy has resulted in more than *60 separate lawsuits* in federal district courts throughout the country against hundreds of local exchange carriers (“LECs”). One court has already invoked the primary jurisdiction doctrine and referred issues regarding LEC-IXC intraMTA traffic to the Commission, based on its conclusion that the Commission’s existing rules and orders regarding a LEC’s exchange of intraMTA traffic with CMRS providers do not “expressly appl[y] to compensation between a LEC and an IXC.”³ Additional referrals appear to be a virtual certainty.

Prompt Commission action is also essential because, in light of the tremendous growth of wireless calling, the amount of traffic at issue is enormous, and hundreds of millions of dollars in compensation turn on the application of the Commission’s policies and a proper interpretation of its rules. After paying LECs’ switched access bills for intraMTA traffic for many years, some

¹ Petition for Declaratory Ruling of the LEC Petitioners, WC Docket No. 14-228 (Nov. 10, 2014) (“*LEC Petition*”).

² An intraMTA call is a call between an end-user customer of a LEC and a customer of a wireless or Commercial Mobile Radio Service (“CMRS”) provider that originates and terminates within the same Major Trading Area (“MTA”).

³ *Sprint Commc’ns Co. v. Butler-Bremer Mut. Tel. Co.*, 2014 WL 4980539, **3-5 (N.D. Iowa, Oct. 6, 2014).

IXCs have begun to withhold access charges on this traffic, and if refunds were required, they would clearly involve substantial sums. Because determining the proper level of compensation implicates “the scope and applicability of [the Commission’s] rulings” and is “fraught with policy considerations” that are “best considered by” the Commission,⁴ immediate and definitive Commission action is necessary to resolve controversies over the hundreds of millions of dollars in dispute, to avoid further disruptions to the industry, and to reduce litigation expenses.

As the Commission is aware, AT&T has interests on both sides of the intraMTA dispute. AT&T affiliates include LECs (both incumbent and competitive LECs) and a large IXC. Thus, AT&T’s comments reflect a broad, industry-level perspective on this issue.

II. BACKGROUND

A. IntraMTA Traffic

The Communications Act, as amended by the Telecommunications Act of 1996 (the “Act”) gave competitive LECs (“CLECs”) the right to establish interconnection agreements with ILECs.⁵ In its 1996 *Local Competition Order*, the Commission promulgated its local interconnection rules⁶ and extended the interconnection rules to CMRS providers.⁷ CMRS providers, like CLECs, are entitled to request and establish interconnection agreements with ILECs governing the exchange of local traffic.⁸

At the same time that it promulgated these rules, the Commission also addressed the exchange of traffic that originates and terminates within the same MTA—so-called “intraMTA

⁴ *Sprint Commc’ns*, 2014 WL 4980539, *5.

⁵ *See, e.g.*, 47 U.S.C. §§ 251, 252.

⁶ *See generally* 47 C.F.R. Part 51.

⁷ *See In re Implementation of the Local Competition Provisions of the Telecomm. Act of 1996*, 11 FCC Rcd 15499 ¶ 1041 (1996) (“*Local Competition Order*”) (subsequent history omitted); *see also* 47 C.F.R. §§ 51.700, *et seq.*

⁸ *Id.*

traffic.” The Commission held that such intraMTA traffic is “local” traffic subject to reciprocal compensation as between the LEC and the CMRS provider.⁹ However, in accordance with Section 251(g) of the Act, the Commission expressly preserved existing access arrangements between LECs and IXCs.¹⁰ In its 2011 *USF/ICC Transformation Order*, as part of its prospective reform of intercarrier compensation arrangements, the Commission again addressed intraMTA traffic exchanged between LECs and CMRS providers, and addressed certain disputes regarding the exchange of traffic and the associated compensation arrangements between CMRS providers and LECs.¹¹

Accordingly, it is generally undisputed that, when LECs and CMRS providers directly exchange intraMTA traffic, compensation for such traffic is governed by reciprocal compensation arrangements. However, as explained in more detail below, LECs and IXCs now dispute the appropriate type of compensation when an IXC acts as an intermediary between CMRS providers and LECs and it is the IXC that exchanges intraMTA wireless traffic with the LEC using access trunks purchased from the LECs’ tariffs.

For many years and continuing today, when IXCs handle intraMTA traffic, they typically route such traffic over access trunks ordered from LECs’ access tariffs. The intraMTA traffic is thus usually commingled with IXCs’ long distance traffic. As the Commission recognized in both its 1996 and 2011 orders, in these circumstances, it may be difficult or impossible for the

⁹ *Id.* ¶ 1042.

¹⁰ 47 U.S.C. § 251(g); *see Local Competition Order*, ¶ 1043. Paragraph 1043 states in relevant part: “Based on our authority under section 251(g) [of the 1996 Act] to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS [wireless] providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, **and are assessed such charges for traffic that is currently subject to interstate access charges.**” (Emphasis added.)

¹¹ *In re Connect America Fund*, 26 FCC Rcd 17663 ¶¶ 976, 980-81, 988 & n.2132 (2011) (“*USF/ICC Transformation Order*”) (subsequent history omitted).

LEC, using its own information, to identify intraMTA traffic that is routed over the access trunks.¹² Moreover, neither IXC's nor wireless carriers have typically provided LECs with timely, accurate and verifiable data (or factors) that would allow LECs to determine or estimate the level of intraMTA traffic delivered over access trunks. Accordingly, for years, in the absence of a specific interconnection agreement that governs the exchange of and compensation for intraMTA traffic, LECs have billed IXC's switched access charges on both the IXC long distance traffic and the commingled intraMTA traffic routed over access trunks. For years, up until last year, IXC's paid those access charges billed on intraMTA traffic without dispute.

B. The IXC Lawsuits

In the Spring of 2014, one IXC, Sprint Communications Company, L.P. ("Sprint"), began to send dispute letters to LECs industry-wide, asserting that it was not required to pay access charges for intraMTA traffic routed between an IXC and a LEC under any circumstances. Instead, Sprint asserted that intraMTA traffic must be charged local "reciprocal compensation rates," even when the intraMTA traffic is routed over long distance "Feature Group D" access trunks that are purchased from a LEC's state or federal switched access tariffs. Having paid switched access charges with respect to intraMTA traffic routed over long distance access trunks from the advent of the switched access charge regime in 1985 until the Spring of 2014, Sprint claimed, for the first time, in 2014, that it is entitled to a refund of the access charges it previously paid to LECs.

In May 2014, Sprint began filing lawsuits in federal courts throughout the country against a large number of LEC defendants. In early September 2014, Verizon's IXC affiliates, MCI Communications Services, Inc. and Verizon Select Services Inc. (collectively "Verizon"), began

¹² *Local Competition Order* ¶ 1044; *USF/ICC Transformation Order*, n.2132.

filing similar lawsuits. All told, Sprint and Verizon have filed over 60 separate federal lawsuits (collectively, the “IXC Lawsuits”) against hundreds of LECs, including AT&T ILECs and CLECs and many small rural carriers.

In the IXC Lawsuits, Sprint and Verizon seek refunds of switched access charges that they have paid to LECs in carrying intraMTA traffic: (1) originated by CMRS callers to LECs, and (2) originated on LEC networks to be terminated to CMRS customers. All of the traffic at issue was routed over access facilities that the IXCs purchased from the LECs’ tariffs. Sprint and Verizon allege that, under the FCC’s *Local Competition Order* and the *USF/ICC Transformation Order*, this traffic is subject only to reciprocal compensation, not access charges. In the IXC Lawsuits, Sprint and Verizon do not allege that they have established any alternative compensation arrangements with the LECs that call for local reciprocal compensation rates or that would allow the intraMTA traffic at issue to be measured and billed at local rates.

Many LECs, including the AT&T LECs, that have been named as defendants in the IXC Lawsuits, have filed motions to dismiss the IXC Lawsuits outright under Fed. R. Civ. P. (“Rule”) 12, based upon several different theories, including the application of the “filed rate doctrine,” which requires carriers to bill and collect at the rates contained in their filed tariffs for services provided under those tariffs.¹³ In the alternative, many LECs (including the AT&T LEC defendants) have asked the courts to stay the IXC Lawsuits and to refer the controlling legal

¹³ See, e.g., 47 U.S.C. § 203(a) (“Every common carrier . . . shall . . . file with the [FCC] and . . . keep open for public inspection schedules showing all charges for itself and its connecting carriers[.]”); *id.* § 203(c) (“No carrier . . . shall engage or participate in any such [interstate wire or radio] communication unless schedules have been filed and published in accordance with the provisions of this [Act] and with the regulations made thereunder; and no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect[.]”); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990) (under the filed rate doctrine, “the rate of the carrier duly filed is the only lawful charge,” and “[d]eviation from it is not permitted upon any pretext.”).

issues to the Commission under the primary jurisdiction doctrine.¹⁴ As noted above, on October 6, 2014, the U.S. District Court for the Northern District of Iowa referred the substantive issues in the case that Sprint had filed in that Court to the Commission under the primary jurisdiction doctrine.¹⁵ To date, this is the only court that has ruled on any of the LECs' Rule 12 motions.

On September 19, 2014, CenturyLink filed a petition before the Joint Panel on Multidistrict Litigation ("JPML") asking the Panel to transfer all of the IXC Lawsuits to one federal district court and consolidate the cases for pre-trial proceedings.¹⁶ On November 10, 2014, the LEC Petitioners (including CenturyLink) filed the LEC Petition with the Commission, asking it to issue a declaration that an IXC is required to pay access charges when the IXC terminates traffic to or receives traffic from a LEC via the LEC's tariffed switched access services.

On December 16, 2014, the JPML issued an order transferring 28 of the IXC Lawsuits to the U.S. District Court for the Northern District of Texas for consolidated pretrial proceedings.¹⁷ The JPML later issued conditional transfer orders transferring the other IXC Lawsuits to the same court.¹⁸ AT&T expects that all of the IXC Lawsuits will be consolidated in the Northern

¹⁴ *In re StarNet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004) (allowing "a federal court to refer a matter extending beyond the conventional experiences of judges or falling within the realm of administrative discretion to an administrative agency with more specialized experience, expertise, and insight.").

¹⁵ *Sprint Commc'ns*, 2014 WL 4980539, **3-6 (N.D. Iowa, Oct. 6, 2014).

¹⁶ Motion of CenturyLink Affiliates for Transfer of Actions, *In re: IntraMTA Switched Access Charges Litig.*, MDL No. 2587 (J.P.M.L., filed Sept. 19, 2014) [Dkt. # 1].

¹⁷ Transfer Order with Simultaneous Separation and Remand of Certain Claims, *In re: IntraMTA Switched Access Charges Litig.*, MDL No. 2587 (J.P.M.L., filed Dec. 16, 2014) [Dkt. # 316].

¹⁸ Conditional Transfer Order (CTO-1), *In re: IntraMTA Switched Access Charges Litig.*, MDL No. 2587 (J.P.M.L., filed Dec. 30, 2014) [Dkt. # 332]; Conditional Transfer Order (CTO-2), *In re: IntraMTA Switched Access Charges Litig.*, MDL No. 2587 (J.P.M.L., filed Jan. 7, 2015) [Dkt. # 334]; Conditional Transfer Order (CTO-3), *In re: IntraMTA Switched Access Charges Litig.*, MDL No. 2587 (J.P.M.L., filed Jan. 28, 2015) [Dkt. # 378].

District of Texas Multidistrict Litigation (the “MDL”), and that most, if not all, of the defendant LECs will urge the MDL court to stay the litigation and either refer the controlling legal issues to the Commission or await the Commission’s decision on the *LEC Petition*.

III. DISCUSSION

A. The Commission Should Issue a Prompt Declaratory Ruling that Definitively Resolves the IntraMTA Issue on a Nationwide Basis.

The Commission should act promptly and issue a clear declaratory ruling to “remov[e] uncertainty” and to “terminat[e]” the industry-wide “controversy”¹⁹ regarding the appropriate methods of compensation for intraMTA traffic exchanged between LECs and IXC’s in the absence of an interconnection agreement that governs such traffic.

There can be no doubt that this is an issue of crucial importance that affects nearly the entire telecommunications industry – including hundreds of large and rural incumbent LECs, many competitive LECs, virtually all IXC’s, and wireless carriers. As noted above, over *sixty* different litigation proceedings have already been filed against hundreds of LECs.

There is also no doubt that enormous volumes of traffic and massive amounts of intercarrier compensation are now subject to dispute. CMRS traffic continues to grow in absolute volume and the number of American homes that use only wireless telephones also continues to grow.²⁰ Based on the amounts disputed to date, the industry-wide impact of the intraMTA disputes is likely hundreds of millions of dollars. The potential financial impact on the telecommunications industry continues to grow each day. Continuing uncertainty over the

¹⁹ 47 C.F.R. § 1.2.

²⁰ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13135, Seventeenth Report, 29 FCC Rcd 15311, ¶¶ 70-74, 86 (2014).

ultimate outcome of intercarrier compensation disputes of this magnitude would hinder investment.²¹

The Commission alone has the experience and expertise with telecommunications policy and with the industry's intercarrier billing practices to provide nationwide resolution of this industry-wide dispute. Because this dispute concerns the proper application of the Commission's rules, in making its ruling, the Commission should give effect to consistent industry practice over the years implementing the Commission's rules, and avoid the disruption and manifest injustice associated with retroactively upending that practice.²² The Commission should also confine its ruling narrowly to resolving the intraMTA issue in dispute and avoid overly broad declarations that could have unintended and harmful consequences in other intercarrier compensation contexts.

B. The Commission Should Promptly Clarify Whether Its Rules Categorically Bar Access Charges On IntraMTA Traffic Exchanged By IXCs and LECs (as IXCs Contend) Or Whether The Commission's Rules Permit Access Charges To Be Assessed In The Absence of An Interconnection Agreement And Information Necessary To Properly Bill IntraMTA Calls (As LECs Contend).

Based on the *LEC Petition*, and the various court filings made to date, there is a clear divide in the industry as to how to interpret the Commission's existing rules and orders relating to intraMTA traffic.

²¹ *USF/ICC Transformation Order*, 26 FCC Rcd 17663, ¶ 9.

²² As noted above, LECs have for many years consistently billed IXCs access charges for both the ordinary long distance traffic and the commingled intraMTA traffic carried between the parties over access trunks that the IXCs purchased from the LECs' access tariffs. LECs billed access charges on the traffic because, without another mechanism (such as an intraMTA factor) provided to measure or estimate the volumes of intraMTA traffic, LECs had no way to know if such traffic was being sent and thus had no means to identify and exclude this traffic from billing of ordinary long distance traffic that is subject to switched access charges. Until very recently, IXCs have paid these billed access charges on intraMTA traffic. Because some IXCs are claiming a right to refunds of charges they paid, most LECs are facing a risk that, if these IXCs' positions were ultimately vindicated in court, they could be required to issue substantial refunds.

On the one hand, LECs contend that the Commission’s existing intraMTA rules apply only to intercarrier compensation between LECs and CMRS providers, and do not apply to intercarrier compensation between a LEC and an IXC when the IXC routes intraMTA traffic to and from the LEC using the LEC’s tariffed access services.²³ Under this view, the Commission’s rules provide CMRS providers and IXCs with mechanisms to have intraMTA traffic between LECs and IXCs billed as reciprocal compensation: the LEC and CMRS provider that uses IXCs to handle intraMTA traffic should come to terms on an interconnection agreement that expressly specifies that intraMTA traffic exchanged by the LEC and any IXC acting as an intermediate carrier on behalf of a CMRS provider is subject to reciprocal compensation rates, even when such traffic is carried over access trunks purchased by the IXC from the LECs’ access tariffs.²⁴ The agreement would also specify the type (and frequency) of information that would be provided to the LEC to enable it to identify or otherwise exclude intraMTA traffic from the ordinary long distance traffic. The LECs contend that, in the absence of such an agreement and such identifying information, the Commission’s rules do not bar the LECs from billing switched access charges on intraMTA traffic – indeed, the LECs’ valid and lawful tariffs require that the intraMTA calls be billed as switched access.

On the other hand, certain IXCs have contended that the Commission’s intraMTA rules should be construed as a categorical and self-executing prohibition on LECs’ imposition of switched access charges on all intraMTA traffic, including when routed over switched access trunks. The IXCs assert that the Commission’s 1996 *Local Competition Order* and its 2011

²³ As noted, the district court that recently referred the intraMTA issues to the Commission has agreed with this view. *Sprint*, 2014 WL 4980539, *4 (finding that the Commission’s existing rules and orders regarding a LEC’s exchange of intraMTA traffic with CMRS providers do not “expressly appl[y] to compensation between a LEC and an IXC.”).

²⁴ See, e.g., *LEC Petition* at 23-24 (arguing that the Commission’s existing intraMTA rules create a “default right” that must be effectuated via an interconnection agreement).

USF/ICC Transformation Order both unambiguously held that access charges can never imposed on intraMTA traffic either when exchanged directly or indirectly.

AT&T's own LECs (both incumbent and competitive LECs), consistent with longstanding industry practice, have billed IXCs switched access charges on both long distance traffic and any commingled intraMTA traffic routed over access trunks in the absence of an interconnection agreement that provides for reciprocal compensation for the intraMTA portion of this traffic. To date, AT&T's IXC affiliate has paid switched access charges on intraMTA traffic that was routed over access trunks. AT&T thus has interests on both sides of the intraMTA dispute. Because of the uncertainty and large amounts of compensation at stake, AT&T's primary position is simply that the Commission should resolve the intraMTA dispute one way or another, as quickly as possible.

While the Commission should issue a prompt ruling, whichever interpretation of its rules it decides to adopt, it should (1) avoid any retroactive ruling that would upend consistent industry practice, and (2) avoid any broad declaratory rulings that might have negative consequences in other contexts apart from this intraMTA dispute.

- 1. If The Commission Adopts the LEC Position That The Commission's Orders and Rules Do Not Establish a Self-Executing Categorical Prohibition on Access Charges on IntraMTA Traffic Delivered Over Access Trunks, It Should State Clearly What Is Required To Effectuate Those Orders And Rules As They Relate To Compensation For IntraMTA Traffic, And Should Avoid Broad Declarations That Could Have Unintended Consequences In Other Contexts**

The LEC Petitioners contend that the Commission should reject the IXCs' view that the Commission's existing orders and rules create a self-executing, categorical prohibition on their collection of access charges from IXCs for intraMTA traffic. Instead, they contend, the intraMTA rule provides that reciprocal compensation rates apply to intraMTA traffic when (1) a LEC and a CMRS provider have an interconnection agreement providing that reciprocal

compensation rates apply when the CMRS provider uses an IXC as an intermediary carrier for intraMTA traffic (even if the traffic is routed by the IXC over access trunks) and (2) the parties have agreed on information (such as intraMTA factors) to be provided to the LEC that is timely, sufficient and reliable enough to enable the LEC to identify and bill the intraMTA traffic at reciprocal compensation rates. If it adopts this position, the Commission would then also declare that, in the absence of such an agreement and such information, the LEC may properly bill switched access charges on intraMTA traffic according to the terms and conditions of the LECs' switched access tariffs.²⁵

Such a ruling would be consistent with general industry practices over the last 19 years. Moreover, such an approach would avoid the potential disruption to the industry that would occur if carriers had to issue refunds for past periods, and undertake the burdensome process of retroactively attempting to develop information that would accurately identify intraMTA traffic carried over access trunks in past periods.

If the Commission adopts this approach, however, and generally agrees with the position advocated by the LEC Petitioners, it should take care to limit its declaratory ruling to the context of this specific intraMTA dispute. In certain respects, the *LEC Petition* asks for rulings that are potentially quite broad in scope and that could have dangerous and harmful collateral effects in other factual circumstances that are not similar to this dispute.

²⁵ CMRS providers may use IXCs as intermediaries to deliver intraMTA traffic commingled with other long distance traffic because such arrangements are efficient – which is why such practices are used by certain CMRS providers across the industry. In addition, there will be a *de minimus* amount of intraMTA traffic routed over access trunks due to the difficulty that even CMRS providers sometimes have in properly determining the jurisdiction of CMRS traffic. If the Commission takes this approach, then it should also make clear that LECs' interconnection obligations to CMRS providers necessarily extends to indirect interconnection through IXCs and their delivery of intraMTA traffic across access trunks. To the extent any changes are necessary in LEC access tariffs to effectuate these practices, then the Commission should make clear the changes that LECs must make in their access tariffs.

For example, the *LEC Petition* asks the Commission to make declaratory rulings that “any traffic” – not just intraMTA traffic – routed through an IXC and using a LEC’s access facilities is categorically switched access traffic, and an IXC must pay access charges on any and all traffic routed over access trunks, regardless of the specific terms of the LEC’s tariffs or the terms of Commission rules and orders.²⁶ Such a ruling would be subject to abuse.

As the Commission is aware, unscrupulous LECs have consistently engaged in arbitrage and other activities designed to exploit the Commission’s intercarrier compensation system.²⁷ In particular, LECs engaged in “access stimulation” have charged excessive rates for large volumes of access services, and they then rely on filed switched access tariffs to contend that IXCs have no option but to pay the access rates, because the traffic flowed over access trunks that the IXC ordered.²⁸ Although the Commission’s 2011 rules sought to address and curtail access stimulation,²⁹ some LECs have not only continued to engage in access stimulation, they have done so in violation of the Commission’s rules, contending that IXCs are barred from contesting the LECs’ charges because the calls were completed over the LECs’ facilities and are thus subject to the LECs’ access tariffs. Likewise, another LEC has knowingly increased its rates above the caps set forth in the Commission’s *USF/ICC Transformation Order*,³⁰ but then contended that IXCs cannot challenge the LECs’ charges because IXCs knowingly ordered the service and are subject to the terms of the LECs’ access tariffs.

²⁶ *E.g.*, *LEC Petition* at 8-9.

²⁷ *See, e.g.*, *USF/ICC Transformation Order* ¶¶ 9, 33, 649, 656-57.

²⁸ The IXCs are in fact required to order the access trunks for the interexchange calls (local calls being subject to interconnection agreements) because IXCs are generally precluded from blocking traffic that is to be routed to LECs engaged in access stimulation.

²⁹ *USF/ICC Transformation Order* ¶¶ 656-700.

³⁰ *Id.* ¶¶ 798-801.

Unless the Commission limits the declaratory rulings to the context of intraMTA disputes, then these unscrupulous LECs could try to rely on the declaratory rulings proposed in the *LEC Petition* to improperly obtain access charges under their tariffs. Accordingly, the Commission should limit its relief in this proceeding to the specific intraMTA dispute. Further, if the Commission adopts the LEC Petitioners' position on the intraMTA issue, the Commission should also make clear that the LEC must comply with requirements of its access tariff (specifically including, but not limited to, the requirement that calls be routed to an end user's premises, with an end user that pays a fee for tariffed interstate telecommunications service) and that the LEC's access tariff must comply with other FCC rules, such as the Commission's access stimulation rules, its CLEC access charge rules, and its transitional access service pricing rules.³¹

2. If The Commission Adopts The IXC Position That Access Charges May Not Be Assessed On IntraMTA Traffic Delivered Over Access Trunks Even In The Absence Of An Interconnection Agreement, It Should Make Clear That The Ruling Applies Only Prospectively And That The Consistent Industry Practice Of Billing And Paying Access For That Traffic In The Past Did Not Violate The Rules And Provides No Basis For Liability Or Refunds.

If the Commission were to agree with IXCs and hold that its orders and rules create a self-executing prohibition against billing access charges (even without an applicable interconnection agreement) to IXCs for intraMTA traffic, then the Commission should apply such a ruling only prospectively, and only to the extent that the IXC/CMRS provider submits sufficient information to verify the intraMTA traffic.

As the Supreme Court held decades ago, whether a new standard announced in adjudication can be applied retroactively is a basic question of equity, and the agency must balance retroactivity "against the mischief of producing a result which is contrary to a statutory

³¹ See 47 C.F.R. 61.26; *id.* § 51.901-919.

design or legal and equitable principles.”³² Under this standard, when there is “a substitution of new law for old law that was reasonably clear,” agencies are required to “deny retroactive effect.”³³ If the new interpretation is a clarification of existing law, there is a presumption of retroactivity, but even then the presumption may be overcome if retroactivity would lead to “manifest injustice.”³⁴

Here, retroactivity would be inappropriate regardless of whether a declaration that access charges are improper is deemed to be a new rule or a clarification. Given that the industry practice for years was that, absent an interconnection agreement providing for reciprocal compensation for this traffic, LECs would bill, and IXC's would pay, switched access charges on intraMTA traffic routed over access trunks, a Commission ruling to the contrary would substitute new law for reasonably clear old law. If the prior law had been merely ambiguous, or in the IXC's favor, then IXC's presumably would not have paid LEC's hundreds of millions of dollars of access charges on such intraMTA traffic for nearly twenty years. A retroactive application of access charges to intraMTA traffic exchanged between IXC's and LEC's over access trunks would create precisely the “unfair surprise” the Supreme Court recently condemned in *Christopher v.*

³² See *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)) (“Whether to give retroactive effect to new rules adopted in the course of agency adjudication is a difficult and recurring problem in the field of administrative law . . . [and i]n deciding whether to grant or deny retroactive force to newly adopted administrative rules, reviewing courts must look to the standard established by the Supreme Court in *SEC v. Chenery* . . .”).

³³ *Verizon Telephone Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001); see also *Qwest Services Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007).

³⁴ *Qwest*, 509 F.3d at 539 (quoting *AT&T Corp. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)) (“we have drawn a distinction between agency decisions that ‘substitut[e] ... new law for old law that was reasonably clear’ and those which are merely ‘new applications of existing law, clarifications, and additions.’ The *latter* carry a presumption of retroactivity that we depart from only when to do otherwise would lead to ‘manifest injustice’” (quoting *Verizon*, 269 F.3d at 1109) (emphasis added)).

*SmithKline Beecham Corp.*³⁵ Permitting substantial liability to be imposed retroactively based on such a sudden “clarification” would “seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”³⁶

But even if a Commission ruling in the IXCs’ favor were a clarification of existing law, a presumption of retroactivity would be overcome in the circumstances here because there would be “manifest injustice” if the LECs were required to refund access charges they previously billed for intraMTA traffic routed over access trunks and commingled with other long distance traffic. As described above, until the Spring of 2014, LECs and IXCs operated under the industry practice of paying tariffed access charges for all intraMTA traffic routed between an IXC and a LEC using the LEC’s access arrangements, because there was no feasible way for the LEC to identify and exclude the intraMTA traffic. Because it would have been impossible for LECs to bill intraMTA traffic as subject to reciprocal compensation, it would be manifestly unjust for the Commission to apply an IXC-favorable ruling retroactively, and thereby subject LECs to retroactive refund claims that would likely total to hundreds of millions of dollars.

In addition to denying retroactive effect, the Commission should, in adopting a ruling for prospective application, be even more explicit that IXCs/CMRS carriers should provide LECs with timely and verifiable information on the level of intraMTA traffic. In particular, if the Commission adopts the IXC position, it should require an express mechanism – such as an intraMTA traffic “factor” – for the parties to identify intraMTA traffic separate from other traffic exchanged between the parties over the LEC’s access facilities. Use of such a factor would build on the established use of factors in other contexts, and would properly require the parties that possess the relevant information for billing (here, IXCs and/or CMRS providers) to bear the

³⁵ *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

³⁶ *See also id.* at 2168.

burden of compiling and providing the appropriate data, subject to verification according to industry standards, such as through audits or other processes.

IV. CONCLUSION

For the reasons stated above, the Commission should expeditiously enter a declaratory judgment resolving the intraMTA issue on a uniform, nationwide basis.

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Respectfully Submitted,

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