

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

In the Matter of)	
)	
Petition for Declaratory Ruling To Clarify the)	WC Docket No. 14-228
Applicability 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)	

REPLY COMMENTS OF THE LEC PETITIONERS

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SUMMARY

The record strongly supports issuance of a declaratory ruling to confirm that the “intraMTA rule”—under which intraMTA calls exchanged between local exchange carriers (“LECs”) and commercial mobile radio service (“CMRS”) carriers are subject to reciprocal compensation—does not apply to LEC charges billed to an *interexchange carrier* (“IXC”) when the IXC terminates traffic to or receives traffic from a LEC via tariffed switched access services. Indeed, hundreds of LECs and numerous other entities recognize the disruptive impact caused by a few IXCs’ attempts to upend the entire telecommunications industry’s longstanding understanding of the scope of the intraMTA rule, as well as the pressing need to clarify matters in a way that restores certainty and stability. These parties also validate the factual underpinnings of the Petition as well as the substantive analysis it provides.

In contrast, only four parties oppose grant of the requested relief: Level 3, Sprint, and Verizon (collectively, the “Opposing IXCs”), the three IXCs responsible for commencing the baseless billing disputes and, in the case of Sprint and Verizon, lawsuits that necessitated the filing of the Petition that initiated this proceeding in the first place; and CTIA, the trade association that represents, among others, the CMRS affiliates of Sprint and Verizon. These opponents assert that the intraMTA rule, despite addressing only traffic exchanged between LECs and *CMRS carriers*, “clearly” prohibits LECs from imposing access charges on *IXCs* that voluntarily elect to route traffic via tariffed access services. Remarkably, they advance that position even though, in the 18-plus years since the Commission adopted the intraMTA rule in the *Local Competition Order*, all LECs (including the LEC affiliates of the Opposing IXCs) have consistently imposed access charges on IXCs for *all traffic* (including any intraMTA wireless traffic) routed via the LECs’ tariffed switched access services, and *all IXCs* (including the

Opposing IXCs until very recently) have consistently paid those tariffed access charges, without dispute, in connection with any purported intraMTA wireless traffic routed via tariffed access services. In other words, the Opposing IXCs are asking the Commission to determine that the entire LEC industry (again, including their own affiliated LECs) has been acting unlawfully for nearly two decades and that, over that same lengthy period, they for some reason chose to ignore their supposedly clear right to refuse payment of access charges in connection with any intraMTA traffic routed via LECs' tariffed switched access trunks. That position is not even plausible, let alone persuasive.

Tellingly, no other party—and, conspicuously, no other IXC—joins these few parties in their opposition. And, while the Opposing IXCs and CTIA purport to refute the arguments in the Petition, they do not contest key facts: that they have paid these charges without objection for years; that their LEC affiliates still impose these same charges the Opposing IXCs claim are unlawful; and that the Opposing IXCs have received and continue to receive payments from their customers sufficient to recoup access costs. At the same time, their analysis of the intraMTA rule, the Commission's orders, and court precedent ignores critical distinctions grounded in those facts—including in particular the critical distinctions between LEC-CMRS and LEC-IXC compensation arrangements and between *transit* and *IXC* services.

Accordingly, the Commission should move quickly to issue the declaratory ruling sought in the Petition and thereby end the needless controversy initiated by these IXCs.

TABLE OF CONTENTS

SUMMARY	i
INTRODUCTION	1
DISCUSSION	4
I. THE RECORD CONFIRMS THAT THE PETITION ACCURATELY DESCRIBES THE OPPOSING IXCS' CONDUCT	4
A. The Opposing IXCs Cannot Reconcile Their Legal Arguments with Their Own Conduct or Their Affiliated LECs' Billing Practices.....	5
B. The Opposing IXCs' CMRS Affiliates Apparently Have Chosen—for their Own Convenience—To Route IntraMTA Traffic Through IXCs, Which in Turn Rely on Tariffed Switched Access Services.....	6
C. The Opposing IXCs Already Have Recouped from Their Customers the Costs of Paying Access Charges in Connection with Alleged IntraMTA Traffic, But Still Seek To Recover These “Costs” from LECs with No Apparent Intent of Providing Customer Refunds	8
II. THE RECORD REFLECTS STRONG SUPPORT FOR THE PETITION'S INTERPRETATION OF THE INTRAMTA RULE	9
A. There is No Basis for Interpreting the IntraMTA Rule in a Manner Inconsistent with Its Plain Meaning, as the Opposing IXCs Suggest.....	10
B. Contrary to the Opposing IXCs' Claims, Federal Courts Have <i>Not</i> Adopted the Opposing IXCs' Revisionist Characterization of the IntraMTA Rule.....	14
C. The Record Confirms That the IntraMTA Rule Applies to <i>LEC-IXC</i> Traffic Only to the Extent the Rule Is Effectuated by Express Agreement.....	21
D. The Record Demonstrates That Granting the Petition Would Serve the Public Interest	25
III. THE RECORD CONFIRMS THAT RETROACTIVELY APPLYING THE OPPOSING IXCS' INTERPRETATION OF THE INTRAMTA RULE WOULD CONTRADICT FILED TARIFFS AND OTHERWISE WOULD BE MANIFESTLY UNJUST	28
A. Retroactive Application of Any Reinterpreted IntraMTA Rule Would Run Afoul of Filed Access Tariffs	28
B. Retroactive Application of Any Reinterpreted IntraMTA Rule Would Be Manifestly Unjust.....	30
IV. THE RECORD REFLECTS THAT IXC SELF-HELP VIOLATES THE ACT	33
CONCLUSION.....	36

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REPLY COMMENTS OF THE LEC PETITIONERS

The LEC Petitioners hereby reply to the opening comments submitted in the above-captioned proceeding, which address the Petition for Declaratory Ruling filed by the LEC Petitioners on November 10, 2014 (the “Petition”).¹

INTRODUCTION

The Petition requests that the Commission issue a declaratory ruling to confirm that the “intraMTA rule”—under which intraMTA calls exchanged between local exchange carriers (“LECs”) and commercial mobile radio service (“CMRS”) carriers are subject to reciprocal compensation—does not apply to LEC charges billed to an *interexchange carrier* (“IXC”) when the IXC terminates traffic to or receives traffic from a LEC via tariffed switched access services. The Petition further requests that the Commission declare that the attempts of certain IXCs to misapply the intraMTA rule to avoid paying access charges and to claim entitlement to

¹ The LEC Petitioners consist of Bright House Networks LLC; the CenturyLink LECs; Consolidated Communications, Inc.; Cox Communications, Inc., FairPoint Communications, Inc.; Frontier Communications Corporation; LICT Corporation; Time Warner Cable Inc.; Windstream Services, LLC (f/k/a Windstream Corporation); the Iowa RLEC Group; and the Missouri RLEC Group, as well as affiliated entities identified in Exhibit A to the Petition.

substantial retroactive refunds are inconsistent with the Communications Act of 1934, as amended (the “Act”), and the Commission’s implementing rules and policies.

The record overwhelmingly supports grant of the relief sought in the Petition. Indeed, hundreds of LECs and numerous other entities recognize the disruptive impact caused by a few IXCs’ attempts to upend the entire telecommunications industry’s longstanding understanding of the scope of the intraMTA rule, as well as the pressing need to clarify matters in a way that restores certainty and stability. These parties also validate the factual underpinnings of the Petition as well as the substantive analysis it provides.

In contrast, only four parties oppose grant of the requested relief: Level 3, Sprint, and Verizon (collectively, the “Opposing IXCs”), the three IXCs responsible for commencing the baseless billing disputes and, in the case of Sprint and Verizon, lawsuits that necessitated the filing of the Petition in the first place; and CTIA, the trade association that represents, among others, the CMRS affiliates of Sprint and Verizon. These opponents assert that the intraMTA rule, despite addressing only traffic exchanged between LECs and *CMRS carriers*, “clearly” prohibits LECs from imposing access charges on *IXCs* for traffic routed via tariffed access facilities. Remarkably, they advance that position even though, in the 18-plus years since the Commission adopted the intraMTA rule in the *Local Competition Order*, *all LECs* (including the LEC affiliates of the Opposing IXCs) have consistently imposed access charges on IXCs for *all traffic* (including any intraMTA wireless traffic) routed via the LECs’ tariffed switched access facilities, and *all IXCs* (including the Opposing IXCs, until pursuing billing disputes and/or litigation to the contrary last year) have consistently paid those tariffed access charges, without dispute, in connection with any purported intraMTA wireless traffic routed via tariffed access services. In other words, the Opposing IXCs are asking the Commission to determine that the

entire LEC industry (again, including their own affiliated LECs) has been acting unlawfully for nearly two decades and that, over that same lengthy period, they for some reason chose to ignore their supposedly clear right to refuse payment of access charges in connection with any intraMTA traffic routed via LECs' tariffed switched access trunks. That position is not even plausible, let alone persuasive.

Tellingly, no other party—and, conspicuously, no other IXC—joins these few parties in their opposition. And, while the Opposing IXCs and CTIA purport to refute the arguments in the Petition, they do not contest the key facts: that they have paid these charges without objection for years; that their LEC affiliates still impose these same charges the Opposing IXCs claim are unlawful; and that the Opposing IXCs have received and continue to receive payments from their customers sufficient to recoup access costs. At the same time, their analysis of the intraMTA rule, the Commission's orders, and court precedent ignores critical distinctions grounded in those facts—including in particular the critical distinctions between LEC-CMRS and LEC-IXC compensation arrangements and between *transit* and *IXC* services.

Accordingly, the Commission should move quickly to issue the declaratory ruling sought in the Petition and end the needless controversy initiated by these IXCs. Specifically, the Commission should confirm that:

1. Even though intraMTA traffic is non-access traffic in the context of direct billing from a LEC to a CMRS provider, *any* traffic that is routed by means of a LEC's tariffed switched access facilities outside of an interconnection agreement (or other negotiated agreement with the LEC) is subject to access charges—and an IXC's historical payment of such charges without dispute is evidence that the access arrangement was entered into voluntarily.²

² AT&T asks the Commission to ensure that grant of the relief sought in the Petition does not inadvertently facilitate access stimulation and other abuses of the access regime. The LEC Petitioners did not intend such a result in filing the Petition and would not object if the Commission were to qualify any declaration so as to avoid that result.

2. The Commission's prior orders confirm that: (i) absent a LEC's agreement to an alternative billing arrangement, any traffic routed through an IXC and utilizing a LEC's access facilities is access traffic exchanged between the IXC and the originating/terminating LEC and may be treated as such; and (ii) where traffic is routed via an IXC (and, in turn, through a LEC's access facilities) the IXC bears the burden of demonstrating that the LEC has agreed to exempt the traffic from access charges.
3. Where a LEC makes access facilities (*e.g.*, Feature Group D trunks) available pursuant to switched access tariffs, an IXC that orders and routes or receives traffic (even intraMTA traffic) through those access facilities must pay tariffed rates in connection with such traffic if provided, consistent with duly filed tariffs.
4. It is unjust and unreasonable for an IXC to engage in self-help by refusing to pay access charges incurred in connection with unrelated, undisputed traffic in order to award itself a *de facto* refund of payments already made in connection with intraMTA wireless traffic routed via a LEC's access facilities.

DISCUSSION

I. THE RECORD CONFIRMS THAT THE PETITION ACCURATELY DESCRIBES THE OPPOSING IXCS' CONDUCT

The Petition provides a detailed description of the factual circumstances that have given rise to the present controversy over the proper application of the intraMTA rule. Among other things, the Petition observes that this controversy stems directly from the actions of certain IXCs (and, in particular, the Opposing IXCs) and the CMRS affiliates of Sprint and Verizon. The record—including comments filed by the Opposing IXCs themselves—overwhelmingly confirms the accuracy of these observations. Indeed, the Opposing IXCs tacitly accept the Petition's description of key facts with respect to their conduct—even though these facts necessarily undermine the position the Opposing IXCs have taken in this proceeding.

A. The Opposing IXCs Cannot Reconcile Their Legal Arguments with Their Own Conduct or Their Affiliated LECs' Billing Practices

The Petition observes that although the intraMTA rule has existed for more than 18 years, until recently no IXC challenged the widespread industry practice of imposing access charges on *all* traffic routed by IXCs through LEC access trunks—including any intraMTA traffic routed in this fashion.³ The Opposing IXCs do not dispute this characterization or attempt to explain why they consistently remitted access charge payments in connection with purported intraMTA traffic for nearly two decades. Indeed, Sprint and Level 3 acknowledge that these amounts were paid without protest, suggesting only that the relevance of those longstanding voluntary payments should be determined by the courts.⁴

Yet, incongruously, the Opposing IXCs suggest that the intraMTA rule always has precluded LECs from imposing access charges on IXCs in connection with unidentified intraMTA traffic in all cases, and that this has been clear since the adoption of the rule in the *Local Competition Order*.⁵ This position cannot be squared with the Opposing IXCs' own conduct, or with common sense. If the Opposing IXCs (and their CMRS affiliates) truly believed that the intraMTA rule always clearly meant what they now asserts it means, they would not have paid access charges without dispute in connection with such traffic for the past 18 years. As the Northern District of Iowa has noted, the failure of the Opposing IXCs to invoke the intraMTA rule to avoid payments for intraMTA traffic allegedly routed between LECs and

³ Petition at 2.

⁴ Comments of Sprint Corporation and Level 3 Communications, LLC, WC Docket No. 14-228, at 6 (filed Feb. 9, 2015) (“Sprint/Level 3 Comments”).

⁵ *Id.* at 7-8; Comments of Verizon, WC Docket No. 14-228, at 4 (filed Feb. 9, 2015) (“Verizon Comments”).

IXCs “for more than 18 years . . . suggests that the interpretation of the FCC’s ruling that [those IXCs] press[] is not as obvious as [they] contend[.]”⁶

By the same token, the Opposing IXCs do not dispute that their LEC affiliates have adhered to the exact same billing practices they now characterize as unlawful—*i.e.*, they have billed IXCs for all traffic (including any purported intraMTA traffic) delivered via switched access trunks while exchanging intraMTA traffic with CMRS carriers (directly or via local transit providers) via local trunks pursuant to reciprocal compensation arrangements.⁷ Such a consistent—and, to the best of Petitioners’ knowledge, ongoing—course of conduct further undercuts the Opposing IXCs’ claim that the intraMTA rule clearly prohibits LECs from imposing access charges on IXCs in connection with any intraMTA traffic routed over switched access trunks.⁸

B. The Opposing IXCs’ CMRS Affiliates Apparently Have Chosen—for their Own Convenience—To Route IntraMTA Traffic Through IXCs, Which in Turn Rely on Tariffed Switched Access Services

The Petition notes that the CMRS affiliates of Sprint and Verizon apparently made a voluntary decision to route certain intraMTA traffic through their IXC affiliates, even though

⁶ *Sprint Commc’ns Co. v. Butler-Bremer Mutual Tel. Co.*, No. C 14-3028-MWB, 2014 U.S. Dist. LEXIS 141758, at *14 (N.D. Iowa Oct. 6, 2014) (Memorandum Opinion and Order Regarding Defendants’ Motion to Dismiss or Stay).

⁷ Petition at 5, 11.

⁸ Perhaps seeking to divert attention from their own actions, Sprint and Level 3 assert that “CenturyLink seems to doubt its own arguments as its IXC entity has filed lawsuits against Verizon ILEC entities requesting a refund of access charges paid for intraMTA traffic.” Sprint/Level 3 Comments at 2 n.4. But as Sprint and Level 3 well know, CenturyLink’s substantive arguments in the courts have been entirely consistent with those it asserts here as a Petitioner; while defending itself in numerous lawsuits brought by Sprint and Verizon, CenturyLink also filed lawsuits with *contingent* claims against Verizon to protect its interests in the unlikely event that a court or the Commission agrees with the Opposing IXCs. Such conditional filings make perfect sense, in contrast to Sprint’s and Level 3’s unexplained participation in longstanding and continuing billing practices they now characterize as clearly unlawful.

that traffic could (and in some cases should) have been routed through local interconnection trunks pursuant to established LEC-CMRS interconnection arrangements.⁹ The record confirms as much. For example, one coalition of LECs observes that the Opposing IXCs and their CMRS affiliates have acted to obfuscate the true nature of the traffic being routed while unnecessarily and unreasonably shifting additional costs onto LECs.¹⁰

The Opposing IXCs have yet to dispute this characterization of their actions. If anything, their position to date appears to embrace it. Nevertheless, their contentions are unavailing. Sprint and Level 3 suggest that their CMRS affiliates are deliberately routing traffic through IXCs because they deem this the most “cost-effective” manner of routing traffic.¹¹ But routing traffic via an IXC that purchases switched access services intended for interexchange traffic, only to have the IXC claim after the fact that some of the traffic was actually exempt from access charges, is not fairly characterized as “cost-effective traffic routing.” It is gamesmanship. Moreover, the Opposing IXCs’ practice of routing purported intraMTA traffic commingled with interexchange traffic, without any prior notice or agreed-upon methodology for identifying the purported intraMTA traffic, is a recipe for industry confusion and protracted disputes, not efficiency.

The Opposing IXCs’ suggestion that their newly minted interpretation of the intraMTA rule is necessary to promote efficiency¹² also ignores the reality that switched access services remain subject to a tariff-based compensation regime. The Commission has established a multi-

⁹ Numerous LEC-CMRS interconnection agreements mandate the use of local interconnection trunks for this traffic. *See, e.g.*, Petition at 15-16 (citing examples of such agreements).

¹⁰ Comments of Birch Communications, Inc., et al., WC Docket No. 14-228, at 12 (filed Feb. 9, 2015) (“Birch Comments”).

¹¹ Sprint/Level 3 Comments at 14.

¹² *Id.*

year phase-down of terminating access charges, but it authorized continued charges for terminating access services during that transition. And, at least for the time being, the Commission has preserved the originating access regime.¹³ Thus, if the Opposing IXCs originate or terminate intraMTA traffic using tariffed access services, they will be subject to access charges. Of course, access charges can be avoided if their CMRS affiliates rely on bill-and-keep arrangements with LECs and exchange traffic over local trunks, as many CMRS providers do today (and, indeed, as Sprint's and Verizon's CMRS affiliates often do), consistent with the Commission's rules and precedent.¹⁴

C. The Opposing IXCs Already Have Recouped from Their Customers the Costs of Paying Access Charges in Connection with Alleged IntraMTA Traffic, But Still Seek To Recover These “Costs” from LECs with No Apparent Intent of Providing Customer Refunds

The Petition notes that the Opposing IXCs have paid both terminating and originating access charges for years in connection with alleged intraMTA traffic and do not dispute that they have charged their retail and wholesale customers long-distance charges sufficient to cover the cost of access charges.¹⁵ By seeking to compel LECs to refund amounts already recovered, the Opposing IXCs are in fact merely seeking an undeserved windfall with no public benefit.

At the same time, the Petition notes that the spate of litigation instigated by the Opposing IXCs has imposed substantial costs and unanticipated risks on LECs.¹⁶ The record confirms as much. For example, AT&T observes that the “industry-wide impact of the intraMTA disputes is likely hundreds of millions of dollars,” with the financial impact continuing to “grow each

¹³ See *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, at ¶ 801 & Fig. 9 (2011) (“*USF/ICC Transformation Order*”).

¹⁴ See 47 C.F.R. § 51.705(a); *USF/ICC Transformation Order* ¶ 806.

¹⁵ Petition at 5.

¹⁶ *Id.* at 6.

day.”¹⁷ In addition, a group of rural LECs performed a revenue impact analysis based on a sample of switched access data and intraMTA factors from Sprint and Level 3 for 24 rural LECs throughout the midwestern and western United States, demonstrating that the financial impact on rural LECs would be significant and would undermine the objectives underlying the Commission’s intercarrier compensation reforms.¹⁸ The Opposing IXCs themselves acknowledge the substantial costs that their behavior is forcing LECs to bear. Notably, Sprint and Level 3 acknowledge that “the amounts at issue are large” and potentially “in excess of hundreds of millions of dollars”¹⁹

In other words, the Opposing IXCs: (i) acknowledge that their payment of access charges has not harmed them because they have recovered the costs of those payments from their customers but (ii) seek to shift these nonexistent “costs” onto LECs simply because they have developed a revisionist interpretation of the intraMTA rule. The Commission should not countenance the Opposing IXCs’ attempt to obtain double recovery at the expense of LECs and their customers.

II. THE RECORD REFLECTS STRONG SUPPORT FOR THE PETITION’S INTERPRETATION OF THE INTRAMTA RULE

The record reflects strong support for the Petition and the interpretation of the intraMTA rule set forth therein. Hundreds of parties agree that the intraMTA rule simply was not meant to

¹⁷ Comments of AT&T Services, Inc., WC Docket No. 14-228, at 7 (filed Feb. 9, 2015) (“AT&T Comments”).

¹⁸ Comments of The Concerned Rural LECs, WC Docket No. 14-228, at 10-14 (filed Feb. 9, 2015).

¹⁹ Sprint/Level 3 Comments at 28. The Opposing IXCs have yet to demonstrate (*e.g.*, by traffic studies, call routing data, etc.) the extent of intraMTA traffic they claim to have exchanged. Regardless, even if they could present such information, that would not change the outcome of how the intraMTA rule was intended to apply and how it should continue to be applied.

apply to the exchange of traffic between LECs and IXC. Indeed, the Opposing IXCs and CTIA are the only parties that advocate a divergent interpretation of the intraMTA rule. Their interpretation is inconsistent with the plain language of the rule, related Commission orders, and relevant judicial precedent.

A. There is No Basis for Interpreting the IntraMTA Rule in a Manner Inconsistent with Its Plain Meaning, as the Opposing IXCs Suggest

The Petition explains that the intraMTA rule established in the *Local Competition Order* governs compensation obligations between LECs and *CMRS providers* but does not preclude LECs from imposing access charges on *IXCs* to the extent they transmit intraMTA traffic via tariffed access facilities.²⁰ That order makes clear that the Commission sought to preserve its “existing practice” under which intraMTA traffic “carried by an IXC” was subject to access charges.²¹ Sprint and Level 3 attempt to dismiss this language by characterizing it as an insignificant “snippet,”²² while Verizon suggests without foundation that it has been “quote[d] out of context.”²³ But there simply is no basis for ignoring this language, which Petitioners quoted *in context* (given that the Commission was directly addressing the scope of the intraMTA rule).

²⁰ Petition at 12-13.

²¹ *Id.* (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, at ¶ 1043 (1996) (“*Local Competition Order*”) (emphasis added)). Sprint and Level 3 attempt to muddy the waters by selectively quoting from paragraph 1043 of the order. See Sprint/Level 3 Comments at 16. But as the full paragraph makes clear: (i) prior to the adoption of the order, traffic between LECs and CMRS carriers generally was not subject to access charges *unless carried by an IXC*; and (ii) this general rule applied in “most” (but not all) cases because access charges also applied where CMRS carriers effectively acted as interstate IXCs, as in some roaming contexts.

²² Sprint/Level 3 Comments at 15.

²³ Verizon Comments at 4.

The Opposing IXCs likewise urge the Commission simply to ignore relevant language from the *TSR Wireless Order*; Sprint and Level 3 again assert that the language is a “snippet” that should be disregarded,²⁴ and Verizon again suggests that it is taken out of context (in this case, because the order principally addresses other matters).²⁵ As the Petition notes, the *TSR Wireless Order* explicitly states that “LEC-originated traffic that originates and terminates within the same MTA” and is exchanged with a CMRS provider “falls under our reciprocal compensation rules if carried by the incumbent LEC, *and under our access charge rules if carried by an interexchange carrier.*”²⁶ The Opposing IXCs provide no valid basis for ignoring this language—which is the only Commission guidance with respect to the intraMTA rule that is directly on point.

While disregarding highly relevant language in the Commission’s orders, the Opposing IXCs simultaneously seek to read *non-existent* language into the Commission’s rules and precedent. As the Petition notes, the plain text of Section 20.11(d)—which implements the intraMTA rule with respect to LEC-terminated CMRS traffic—prohibits LECs from using tariffs to impose reciprocal compensation charges on *CMRS carriers*,²⁷ but does not address *IXCs* or in any way prohibit LECs from enforcing their tariffed switched access charges against *IXCs*.²⁸ Yet, the Opposing IXCs suggest—without any foundation whatsoever—that this rule somehow exempts IXCs from paying tariffed access charges after availing themselves of LECs’ access

²⁴ Sprint/Level 3 Comments at 18.

²⁵ Verizon Comments at 9.

²⁶ See *TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166, at ¶ 31 (2000) (“*TSR Wireless Order*”) (emphasis added).

²⁷ 47 C.F.R. § 20.11(d).

²⁸ Petition at 27-28.

services. There is no basis for ignoring the categorical distinctions reflected in the rule in this fashion.

The Petition similarly notes that Section 51.703(b)—which implements the intraMTA rule with respect to LEC-originated CMRS traffic—provides that “[a] LEC may not assess charges on any other telecommunications carrier for Non-Access Telecommunications Traffic that originates on the LEC’s network.”²⁹ The Opposing IXCs argue that, because an IXC is a “telecommunications carrier,” this rule precludes a LEC from imposing access charges on IXCs.³⁰ But they ignore the fact that the rule extends only to “Non-Access Telecommunications Traffic”—a term that encompasses intraMTA traffic only to the extent “exchanged *between a LEC and a CMRS provider*,” and that explicitly *excludes* access traffic exchanged between a LEC and an IXC.³¹ By the same token, Sprint and Level 3 repeatedly emphasize that the intraMTA rule focuses on “traffic,” rather than “billing practices,” but they again ignore the key limitation in the text of the rule and the Commission’s orders—namely, that the intraMTA rule applies only to traffic exchanged *between* a LEC and CMRS provider.³² In short, Section 51.703(b) by its plain terms does not preclude LECs from imposing access charges on IXCs in connection with intraMTA traffic.

The Opposing IXCs’ interpretation of the *USF/ICC Transformation Order* is flawed for much the same reason. As the Petition explains, that order resolved certain disputes that had arisen in applying the intraMTA rule but did not purport to alter the scope of the rule or to upset

²⁹ *Id.* at 28-29.

³⁰ Sprint/Level 3 Comments at 18 (emphasis eliminated).

³¹ 47 C.F.R. §§ 51.703(b) and 51.701(b)(2).

³² *E.g.*, Sprint/Level 3 Comments at 4 (emphasizing language in the *Local Competition Order* and *USF/ICC Transformation Order* that refers to “traffic” but ignoring text limiting the rule to traffic “exchanged between a LEC and CMRS provider”).

the industry’s longstanding understanding of the rule’s inapplicability to LEC-IXC billing arrangements.³³ Nevertheless, the Opposing IXCs repeatedly emphasize that order’s clarification that “intraMTA traffic is subject to reciprocal compensation regardless of whether the two end carriers are directly connected or exchange traffic indirectly via a transit carrier,”³⁴ and suggest that this language is a clear statement confirming that the intraMTA rule extends to LEC-IXC traffic. What the Opposing IXCs overlook is that the *USF/ICC Transformation Order* addresses only the LEC-CMRS relationship, and the language they cite encompasses only those cases in which IXC facilities are used in the context of that relationship to route LEC-CMRS traffic in a *transit* capacity (*i.e.*, where LECs and *CMRS carriers* have entered into an agreement to exchange non-access traffic and agree to use IXC facilities to indirectly interconnect their networks on a clearly defined basis).

As the Commission has explained, *transit* service typically is offered via commercially negotiated interconnection agreements rather than tariffs; more specifically, “[t]ransiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier’s network.”³⁵ The contractual relationship is between the two, indirectly connected carriers, and “[t]he intermediary (transiting) carrier then charges a fee for use of its facilities.”³⁶ In contrast, *transport* service is “tariffed exchanged access service.”³⁷ It involves service provided directly by the LEC to the IXC—its carrier-customer—and it is the IXC that compensates the LEC (not the other way around). As the *USF/ICC Transformation*

³³ *USF/ICC Transformation Order* ¶¶ 976-1008.

³⁴ *See* Verizon Comments at 8 (citing *USF/ICC Transformation Order* ¶ 1007).

³⁵ *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, at ¶ 120 & n.341 (2005).

³⁶ *Id.*

³⁷ *USF/ICC Transformation Order* ¶ 1311 n.2366.

Order makes clear, “transit refers to non-access traffic, whereas tandem switching and transport apply to access traffic.”³⁸

Critically, the Opposing IXC’s are not providing *transit* service within the scope of a LEC-CMRS interconnection arrangement when they rely on a LEC’s tariffed access services. The provision of such transit services by IXC’s would require the establishment of agreements between the relevant LEC’s and the IXC’s acting as transit providers that spell out the details of how indirect interconnection would be accomplished—*i.e.*, what facilities would be used, where points of interconnection would be located, how intraMTA traffic would be distinguished from other traffic for billing purposes, how each carrier-party would be compensated, etc. Here, the Opposing IXC’s are acting wholly outside the confines of any applicable interconnection arrangements but attempting to take advantage of rules that apply only to transit carriers acting within the scope of such arrangements. There is no basis for allowing IXC’s to recharacterize the traffic they route in a manner that is at odds with existing law and longstanding Commission policy—not to mention existing LEC-CMRS interconnection arrangements (including agreements that call for intraMTA traffic to be terminated through interconnection trunks).

B. Contrary to the Opposing IXC’s Claims, Federal Courts Have *Not* Adopted the Opposing IXC’s Revisionist Characterization of the IntraMTA Rule

The Opposing IXC’s argue that the federal courts have endorsed their flawed interpretation of the intraMTA rule and the Commission’s related orders.³⁹ But the Opposing IXC’s analysis is superficial and unpersuasive; they merely recite overly generalized language disconnected from the actual facts, records, and holdings of these cases.⁴⁰ Indeed, as explained

³⁸ *Id.* ¶ 1311.

³⁹ Sprint/Level 3 Comments at 10-13; Verizon Comments at 5-7.

⁴⁰ *Id.*

below, the cases cited by the Opposing IXCs are either inapposite or consistent with the position that the intraMTA rule permits LECs to impose access charges on IXCs where IXCs route traffic via tariffed access services. Notably, on October 6, 2014, the Northern District of Iowa agreed that the federal appellate decisions on which Sprint relies “do not involve interpretation or policy analysis of FCC regulations regarding payment arrangements between LECs and IXCs.”⁴¹

I. Atlas, Alma, and Western Radio

The Opposing IXCs cite *Atlas*,⁴² *Alma*⁴³ and *Western Radio*⁴⁴ for the proposition that it is unlawful for LECs to impose tariffed access charges on IXCs that route intraMTA traffic. But these cases merely hold that LECs must pay reciprocal compensation to *CMRS providers* that terminate LEC-originated intraMTA traffic, even when the LECs choose to route traffic through an IXC.⁴⁵ These cases do not stand for the proposition that the LEC may not assess access charges on IXCs for intraMTA traffic, as the relevant courts clearly understood that access charges are part and parcel of the overall compensation scheme.⁴⁶

And none of these cases holds that LECs may not impose access charges on an *IXC* acting as such—particularly outside of a LEC-CMRS interconnection arrangement. To the contrary, these cases actually *support* the LEC’s right to impose access charges on IXCs that

⁴¹ *Sprint Commc’ns*, 2014 U.S. Dist. LEXIS 141758, at *11.

⁴² *Atlas Telephone Co. v. Oklahoma Corp. Comm’n.*, 400 F.3d 1256 (10th Cir. 2005).

⁴³ *Alma Commc’ns Co. v. Missouri Public Service Comm’n.*, 490 F.3d 619 (8th Cir. 2007).

⁴⁴ *Western Radio Services v. Qwest Corp.*, 678 F.3d 970 (9th Cir. 2012).

⁴⁵ *Atlas, Alma* and *Western Radio* arose from appeals of state commission determinations in arbitrations of interconnection agreements between rural LECs and wireless carriers. Significantly, IXCs were not parties to these arbitrations or the resulting interconnection agreements.

⁴⁶ *Western Radio*, like the *Atlas* and *Alma*, involved a dispute between LECs and CMRS providers over interconnection agreement language and simply relied on those two cases in concluding that LECs must compensate CMRS providers for LEC-originated intraMTA calls delivered by IXCs. *See Western Radio*, 678 F.3d at 987-89.

exchange intraMTA traffic with LECs in this fashion. For example, in *Alma*, T-Mobile had affirmatively argued for the right to compensate the LEC “indirectly” through fees paid to IXCs, which would then pay access charges to the terminating LEC.⁴⁷ The court ultimately approved this compensation arrangement, noting that “[w]hen the cell-phone to land-line call goes through an interexchange carrier, T-Mobile pays the interexchange carrier both for the interexchange carrier’s services *and for the fee the terminating local exchange carrier charges to deliver the call.*”⁴⁸

The same overall compensation framework was presented to the court in *Atlas*. As with *Alma*, the focus was solely on LECs payments to CMRS providers in connection with LEC-originated intraMTA traffic. The *Atlas* court held that LECs must pay reciprocal compensation to CMRS providers for LEC-originated intraMTA traffic terminated on a CMRS network, even

⁴⁷ T-Mobile Consolidated Response to Plaintiffs’ Cross-Motion for Summary Judgment, at 2-3, *Alma Commc’ns Co. v. T-Mobile USA, Inc.* (W.D. Mo. 2006), available at 2006 WL 1382348. T-Mobile explained that when “T-Mobile [] delivers its intraMTA calls to a long distance carrier Plaintiffs [the LECs] classify as an IXC (e.g., AT&T, formerly AT&T and SBC), T-Mobile will compensate Plaintiffs indirectly through the fees [T-Mobile] pays the ‘IXC,’ which then pays the terminating LEC.” *Id.* at 2 n.3. The LECs’ briefing to the district court similarly explained that the fees that T-Mobile paid the IXC to carry the traffic to the LECs were “sufficient to cover the IXC’s cost of paying terminating access to the [LECs],” which the IXCs paid “pursuant to [LECs’] exchange access tariffs.” Plaintiffs’ Suggestions in Support of Summary Motion for Summary Judgment, at 14-15, available at 2006 WL 6406867, *Alma Commc’ns. Co. v. T-Mobile USA, Inc.* (W.D. Mo. 2006).

⁴⁸ *Alma*, 490 F.3d at 622 (emphasis added). The record in *Alma* makes clear that the terminating “fee” referred to by the court is the access charge imposed by the LEC on the IXC pursuant to the LEC’s access tariffs.

if routed by an IXC.⁴⁹ But *Atlas* left undisturbed the LECs' ability to impose originating access charges on the IXC in connection with those same calls.⁵⁰

By approving compensation arrangements for intraMTA traffic that include both reciprocal compensation (between LECs and CMRS providers) and access charges (between LECs and IXCs), these cases demonstrate that the reciprocal compensation and access charge regimes *can* be simultaneously applied to the same "traffic," contrary to the assertions of the Opposing IXCs.⁵¹ *Atlas* confirms that the Commission, in the *TSR Wireless Order*, had acknowledged this very point by stating that intraMTA traffic falls under the reciprocal compensation regime if carried by an incumbent LEC, but "*under our access charge regime if carried by an interexchange carrier,*" which could result in the same call being treated as a local call between carriers but a toll call by the end user.⁵² The court noted that "[a]fter making this comment, the Commission unequivocally stated that the LEC was required to deliver relevant

⁴⁹ *Atlas Tel. Co. v. Corp. Comm'n of Okla.*, 309 F. Supp. 2d 1299, 1310 (W.D. Okla. 2004) (*Atlas I*), *aff'd* 400 F.3d 1256 (10th Cir. 2005).

⁵⁰ The court had been informed of the continuing access charges. There, LECs complained that the arbitration order would require them to incur additional costs in transporting intraMTA traffic over long distances to reach the interconnection point with the wireless carriers. The wireless carriers responded that the LECs would in fact not incur those costs because they would reap originating access charges from the IXCs and the IXCs would assume the transport costs as these were long distance calls originated by the IXCs customers. Joint Brief of Appellees Cingular Wireless, AT&T Wireless Services, Inc. and Sprint Spectrum, L.P. d/b/a Sprint PCS, at 37-38, *available at* 2004 WL 2445478, *Atlas Telephone Co. v. Oklahoma Corp. Comm'n.* (10th Cir. 2005) (noting that LECs will continue to receive originating access charges from IXCs while paying reciprocal compensation to the wireless carriers for landline to wireless calls).

⁵¹ *See* Sprint/Level 3 Comments at 9-10; *see also* Comments of CTIA, WC Docket No. 14-228 at 6-7 (filed Feb. 9, 2015) (suggesting that the FCC's rules "do not appear to contemplate that the same traffic could be subject to one compensation regime with respect to one carrier and a different compensation regime with respect to another") ("CTIA Comments"). CTIA's suggestion is in direct conflict with the wireless carriers' successful advocacy in these cases.

⁵² *Atlas*, 400 F.3d at 1267 (citing *TSR Wireless Order*).

calls free of charge to the CMRS provider, but was not precluded from charging its own customers for toll calls.”⁵³ The *Atlas* court thus agreed with the CMRS carriers that the *TSR Wireless Order* stands for the proposition that Petitioners assert here—“that the access charge and reciprocal compensation schemes are not mutually exclusive.”⁵⁴ Notably, Sprint’s CMRS affiliate was one of the parties to *Atlas*, although it makes arguments wholly inconsistent with that advocacy in this proceeding.⁵⁵

2. *INS, RIITA and 3 Rivers*

Recognizing that none of the cases discussed above actually involves IXC billing (or IXC parties), the Opposing IXCs cite another line of cases—*INS, RIITA and 3 Rivers*—that they claim do involve LEC-IXC disputes. The Opposing IXCs argue that these cases undermine Petitioners’ contention that LEC-IXC compensation should be afforded different treatment than LEC-CMRS compensation. But these cases do not involve intermediate carriers’ acting as *IXCs*. Indeed, the court in *INS* took pains to show that the relevant intermediate carrier, Qwest, was *not* acting as an IXC—a critical determination because the court recognized that “there exists within the reciprocal compensation rules an exception for IXCs.”⁵⁶ The same conclusion is equally applicable to *RIITA*, which grew out of the same Iowa Utilities Board proceeding as *INS*.⁵⁷

⁵³ *Id.*

⁵⁴ Joint Brief of Appellees Cingular Wireless, AT&T Wireless Services, Inc. and Sprint Spectrum, L.P. d/b/a Sprint PCS, at 37-38, *available at* 2004 WL 2445478, at 25-26, *Atlas Telephone Co. v. Oklahoma Corp. Comm’n.* (10th Cir. 2005).

⁵⁵ Sprint’s comments are filed in the name Sprint Corporation, the ultimate corporate parent of the various Sprint CMRS entities. Thus, for Sprint now to contend that the Tenth Circuit “authoritatively rejected” Petitioners’ argument “a decade ago,” *see* Sprint/Level 3 Comments at 11, rings particularly hollow, even apart from Sprint’s apparent decision to continue to pay these access charges and ignore this ostensibly authoritative pronouncement for the next nine years.

⁵⁶ As stated by the lower court:

Similarly, in *3 Rivers*—the other case involving Qwest cited by the IXC⁵⁸—Qwest, again, was not acting as an IXC. In that case, Qwest sought to avoid payment of access charges only to the extent it was not acting as an IXC, but instead as a transit provider. As fully recounted in the court’s decision and in a previous opinion in the same case, Qwest stopped paying originating access charges only after it “ceased to act as [the] designated intra-LATA carrier for all of [the rural LECs’] subscribers.”⁵⁹ But Qwest continued to pay terminating access charges in connection with its own long-distance customers’ calls.⁶⁰

These cases highlight a fundamental flaw in the Opposing IXCs’ argument—their failure to distinguish between intermediary carriers that act as traditional transit providers and

“The regulatory classification of Qwest is, however, pertinent as there exists within the reciprocal compensation rules an exception for IXCs. Thus, to determine whether Qwest is liable for access charges under the IXC exception to the intraMTA rules, it is necessary to decide whether Qwest is acting as an ‘incumbent LEC’ or as an ‘interexchange carrier’ in the circumstances giving rise to this action The Court finds that the [Iowa Utilities] Board’s determination that Qwest is not acting as an IXC with respect to the traffic at issue is consistent with federal law.”

Iowa Network Servs. v. Qwest Corp., 385 F. Supp. 2d 850, 871-77 (D. Iowa 2005), *aff’d* 466 F.3d 1091 (8th Cir. 2006) (collectively *INS*). The clear implication of the court’s observation is that if Qwest *had* been acting as an IXC, the IUB would have approved access charges.

⁵⁷ *Rural Iowa Indep. Tel. Ass’n v. Iowa Utils. Bd.*, 476 F.3d 572, 576 (noting that *INS* dealt with the same dispute). As described in the *INS* case, upon which the Opposing IXCs heavily rely, there exists an “IXC exception” to the intraMTA rule that permits imposition of access charges on the IXC when it is acting as an IXC, rather than a mere transiting carrier. *INS*, 385 F. Supp. 2d at 872.

⁵⁸ Sprint/Level 3 Comments at 13.

⁵⁹ *3 Rivers Tel. Coop., Inc. v. U.S. West Commc’ns, Inc.*, No. CV 99–80–GF–CSO, 2003 WL 24249671, at *3 (D. Mont. Aug. 22, 2003).

⁶⁰ *Id.* (noting Qwest’s argument that it was not liable for access charges in its role as a transit carrier). In *3 Rivers*, Qwest was making the same economic argument that it (through its successor-in-interest, CenturyLink) is making here. If a carrier is acting simply as a transiting carrier, it is receiving no revenue from any end-user customer to provide revenues to pay LEC access charges. Qwest conceded in *INS*, and similarly argued in *3 Rivers*, that where the intermediate carrier acts as an IXC, as Verizon, Sprint and Level 3 are doing here, access charges are lawful and appropriate.

intermediary carriers, such as Sprint, Level 3 and Verizon, that act as traditional IXC. The key difference, acknowledged in *INS* and *3 Rivers*, is that transit carriers, unlike IXCs acting as such, do not receive compensation from customers of long-distance services.⁶¹ Thus, in *3 Rivers*, the court stated that Qwest (then U.S. West) “is not the end-user’s long distance carrier and therefore lacks the ability to receive any compensation through billing for that call, [and] no benefit accrues to U.S. West for which it should be asked to pay charges to an independent local telephone company.”⁶² Similarly, *INS* holds that the intraMTA rule does not apply where the intermediate carrier acts as an IXC and is compensated by the long-distance customer—as are the Opposing IXCs here.⁶³

This discussion shows that the actual rulings in the cases heralded by the Opposing IXCs thoroughly undermine their position. Not only do these cases not address LEC-IXC compensation, the record presented to the courts demonstrates that access charges are and routinely have been imposed on IXCs for any intraMTA traffic routed via tariffed access facilities. Moreover, viewed through the lens of cases like *INS*, *Alma*, and *Atlas*, which the IXCs stress were cited by the Commission in the *USF/ICC Transformation Order*, that order’s “clarification” of the intraMTA rule with respect to IXC-routed intraMTA traffic comes into sharp focus. The *USF/ICC Transformation Order* simply clarified that LECs must compensate CMRS providers through reciprocal compensation for terminating intraMTA calls, even when

⁶¹ In *INS*, Qwest explained that it was not the end-to-end long distance carrier for any CMRS provider and received compensation for its transiting services of about \$0.0025 per minute, far below the cost of access (\$0.0114 per minute) that *INS* and the terminating LECs (\$0.092 per minute) sought to impose. *INS*, 385 F. Supp. 2d at 874.

⁶² *3 Rivers Tel. Coop., Inc. v. U.S. West Commc’ns., Inc.*, 125 F. Supp. 2d 417, 419 (D Mont. Dec. 11, 2000) (*3 Rivers I*), *rev’d and remanded on other grounds*, 45 F.App’x. 698 (9th Cir. 2002) (reversing for failure of the trial court to apply the filed-rate doctrine and interpret LEC tariffs).

⁶³ *INS*, 385 F. Supp. 2d at 874.

routed by an IXC and even when the call is 1+ dialed. LECs may not avoid compensating CMRS providers by suggesting that they should obtain terminating access charges from the IXC. This was the controversy resolved by *Alma* and *Atlas*, and was the issue presented to the Commission by a group of Missouri rural LECs, as Verizon’s comments note.⁶⁴

3. *Fitch v. Public Util. Com’n. of Texas*

The Opposing IXCs also are incorrect in asserting that no court of appeals has agreed with the Petition’s interpretation of the intraMTA rule.⁶⁵ In fact, the Fifth Circuit, in *Fitch v. Public Utils. Comm’n. of Texas*, upheld a Texas Public Utility Commission arbitration ruling that access charges are applicable to LEC-originated intraMTA calls placed on a 1+ dialing basis.⁶⁶ A central dispute in that case involved “the introduction of a third-party IXC that switches and transports calls between the LEC and the CMRS provider’s network facilities.”⁶⁷ The Public Utility Commission of Texas found that “[I]n order to complete 1+ calls between carriers, IXCs are subject to originating and terminating access charges (exchange access), instead of the FCC’s reciprocal compensation regime.”⁶⁸ This finding was sustained by the Fifth Circuit.⁶⁹

C. The Record Confirms That the IntraMTA Rule Applies to LEC-IXC Traffic Only to the Extent the Rule Is Effectuated by Express Agreement

The Petition notes that the Commission’s determination in the *Local Competition Order* that intraMTA calls “between a LEC and a CMRS provider” are “subject to reciprocal

⁶⁴ As noted in Verizon’s comments, a group of Missouri rural LECs presented the issue to the Commission in an *ex parte* notice. Verizon Comments at 8.

⁶⁵ See Sprint/Level 3 Comments at 10.

⁶⁶ 261 F.App’x. 788 (5th Cir. 2008).

⁶⁷ *F. Cary Fitch d/b/a Fitch Affordable Telecom Petition for Arbitration Against SBC*, Order Approving Arbitration Award with Modification, at 3-4, PUCT Docket No. 29415 (filed Dec. 19, 2005)

⁶⁸ *Id.*

⁶⁹ *Fitch*, 261 F.App’x. at 794.

compensation obligations under Section 251(b)(5)”⁷⁰ means only that a CMRS carrier is *entitled*—but not *required*—to negotiate an appropriate reciprocal compensation agreement with a LEC.⁷¹ The Petition further notes that “a CMRS carrier can avoid access charges under the intraMTA rule”—as many carriers have—“by entering into an appropriate agreement with the relevant LEC.”⁷² Such agreements are necessary for the parties to establish identifiable routing of intraMTA traffic and/or to agree upon appropriate factors for accurate billing.⁷³ Notably, the cases on which the Opposing IXCs rely recognize that transiting carriers must enter into agreements with LECs to take advantage of the intraMTA rule.⁷⁴ In the absence of such an agreement, an IXC must pay tariffed access charges on any intraMTA traffic it transmits, consistent with well-established industry understanding and practice.

An outright prohibition on tariffed access charges has never been extended to IXCs, either by the Commission or by any reviewing court.⁷⁵ As a consequence, *assuming arguendo* that an IXC somehow could leverage the intraMTA rule to preclude LECs from imposing access charges on intraMTA traffic routed via LEC access trunks (a right that the IXC does *not* have under established law), the IXC necessarily would need to effectuate that supposed right through a contractual arrangement with the LEC—and not by surreptitiously commingling intraMTA

⁷⁰ *USF/ICC Transformation Order* ¶ 1003 (citing *Local Competition Order* ¶ 1036).

⁷¹ Petition at 23.

⁷² *Id.* at 25.

⁷³ *Id.* at 25-26.

⁷⁴ *See, e.g., RIITA*, 476 F.3d at 576 (describing historical dispute and noting that the question was whether INS and Qwest should be required to engage in “the negotiation/arbitration process set forth in sections 251 and 252 of the Act” and enter into an interconnection agreement, not whether a transiting provider could unilaterally dictate economic terms).

⁷⁵ *See, e.g., Local Competition Order* ¶ 191 (an IXC may not request interconnection under Section 251(c)(2) “solely for the purpose of originating or terminating its *interexchange traffic*”) (emphasis in original).

traffic with ordinary access traffic. In other words, even if the intraMTA rule could apply in the LEC-IXC context (which it cannot, as a matter of law), it would not be self-effectuating; instead, it would need to be implemented through a separate agreement between the carriers.⁷⁶ Although Verizon blithely suggests that no such agreement is needed,⁷⁷ it fails to address contrary precedent⁷⁸ or to grapple with the practical question of how a LEC (or, indeed, an IXC) would be able to identify the intraMTA traffic at issue in the absence of such an agreement.⁷⁹

There is strong record support for the position set forth in the Petition, although commenters vary in describing precisely how such an arrangement should be characterized. For example, some commenters appear to suggest that, to the extent IXCs are permitted to invoke the intraMTA rule at all, they might or must do so in accordance with the rules governing local interconnection agreements.⁸⁰ Petitioners and other LECs do not agree that an arrangement

⁷⁶ Such an agreement would not be a Section 251/252 “interconnection agreement” *per se*, but rather an example of a more general “traffic exchange” agreement treating certain, specially identified traffic differently for purposes of intercarrier compensation.

⁷⁷ *See* Verizon Comments at 11.

⁷⁸ *See, e.g., RIITA*, 476 F.3d at 576.

⁷⁹ Verizon seizes upon the Petition’s acknowledgement that non-IXCs (*e.g.*, other LECs) may serve a transiting function with respect to LEC-CMRS traffic. Verizon Comments at 12. But the fact that *non-IXCs* sometimes may transit traffic in this fashion without incurring access charges does not imply that *IXCs* may do so, and certainly does not establish that any IXC has actually transmitted any material amount of such traffic in the past.

⁸⁰ *See, e.g.*, Comments of the Washington Independent Telecommunications Association, WC Docket No. 14-228, at 6 (filed Feb. 9, 2015) (suggesting IXCs’ “self-help behavior violates Section 251(c)(1) and the obligation to negotiate the terms of interconnection in good faith”); Comments of the Illinois RLECs, WC Docket No. 14-228, at 11 (filed Feb. 9, 2015) (“Absent an effort to qualify itself to carry local traffic and to establish local interconnection, an IXC that is not the subject of the [intraMTA rule] may not seek to benefit from it.”); Comments of NTCA—The Rural Broadband Association, WTA—Advocates for Rural Broadband, The Eastern Telecom Association, and The National Exchange Carrier Association, Inc., WC Docket No. 14-228, at 16 (filed Feb. 9, 2015) (noting that “IXCs like Sprint and Verizon [did not] request interconnection agreements

directly between IXCs and LECs regarding IXC-routed intraMTA traffic would be an interconnection agreement subject to those rules.⁸¹ Regardless, there is widespread agreement that some form of explicit arrangement would be needed—which is all that is relevant to the Commission’s disposition of the Petition, given that the Opposing IXCs’ claim that they can unilaterally grant themselves exemptions from access charges is plainly wrong.

This approach does not render the intraMTA rule a mere “exception,” as Sprint and Level 3 suggest.⁸² Again, the core function of the intraMTA rule is to establish intercarrier compensation obligations in agreements between CMRS providers and LECs; nationwide there are hundreds if not thousands of such agreements in place, and it is reasonable to assume that essentially all of them make clear that no access charges apply to intraMTA traffic exchanged directly between two such carriers, or, as indicated by the discussion of *INS* and *3 Rivers* and the other cases noted above, exchanged between two such carriers using a transit provider. In those situations, the intraMTA rule is no mere “exception”—it is fundamental. The only “exception” here is generated by the Opposing IXCs’ effort to *extend* the intraMTA rule to what is plainly a very different situation—routing intraMTA traffic through an IXC using tariffed switched access

with RLECs during the many years that they sent traffic over access trunks and paid resulting access charges specified in RLEC tariffs”) (“Rural Associations Comments”).

⁸¹ See, e.g., Comments of XO Communications, LLC, WC Docket No. 14-228, at 17 (filed Feb. 9, 2015) (departure from assessing access charges on IXC-routed traffic “requires an agreement – either with an IXC or a CMRS provider – to which the LEC is a party”); Comments of the South Dakota Telecommunications Association, WC Docket No. 14-228, at 8 (filed Feb. 9, 2015) (“Nothing in the related statutes or rules suggest it is appropriate for an IXC to claim a right to reciprocal compensation, and certainly there can be no reasonable basis to make any such claim if the carrier has never requested or pursued negotiations for a reciprocal compensation arrangement with the [relevant] ILECs.”). Although IXCs may not enter into interconnection agreements to obtain reciprocal compensation instead of access charges for originating or terminating their traffic (*Local Competition Order* ¶ 191), interconnection agreements presumably would be enforceable to the extent they exist and govern the treatment of intraMTA traffic.

⁸² Sprint/Level 3 Comments at 21.

services, rather than directly, or via a transit carrier, to a LEC pursuant to an interconnection agreement. As explained above and discussed further below, when they do so, they are subject to access charges. But even assuming *arguendo* this rule were to be changed prospectively, it bears emphasis that IXCs must negotiate with the affected LECs and reach a voluntary agreement to avoid paying access charges in connection with traffic routed via access trunks, and various steps would need to be taken to effectuate the rule in the specific context of intraMTA traffic routed over LEC access trunks. Stated differently, this approach reflects that parties may need to take certain concrete measures to effectuate their rights, in the same way that interconnection rights under Section 251 are not an “exception” merely because they require negotiation to be fully effectuated. Notably, these steps would not impose onerous burdens on IXCs; they merely preclude IXCs from *unilaterally* abrogating the access charge regime in its entirety and without the knowledge of affected LECs.

D. The Record Demonstrates That Granting the Petition Would Serve the Public Interest

In addition to buttressing the legal arguments set forth in the Petition, the opening comments demonstrate that granting the relief sought in the Petition would serve the public interest by encouraging CMRS providers and their IXC affiliates to: (i) make more rational and efficient routing decisions (to the extent that they are actually sending intraMTA traffic over tariffed switched access services today); and (ii) negotiate and implement effective LEC-CMRS interconnection arrangements.

It bears emphasis that, to the extent regulatory arbitrage or inefficient routing are concerns in this context,⁸³ CMRS carriers are directly responsible for causing such problems. The opening comments confirm that the Opposing IXCs and their CMRS affiliates have played a

⁸³ *Id.* at 14.

significant role in creating the uncertainty underlying the ongoing intraMTA disputes by (according to them) routing purported intraMTA traffic via LEC access trunks instead of relying on local trunks under LEC-CMRS interconnection arrangements (many of which already exist). As some commenting LECs observe, this practice both obfuscates the true nature of the traffic being routed and unnecessarily and unreasonably shifts additional costs onto LECs.⁸⁴

Granting the Petition would encourage CMRS providers to enter into effective LEC-CMRS interconnection arrangements and then utilize these arrangements to exchange intraMTA traffic with LECs. Significantly, such arrangements can—and frequently do—call for the use of local interconnection facilities for the exchange of intraMTA traffic. Nevertheless, there is significant potential for confusion and unnecessary costs where CMRS providers do not utilize these facilities and instead route their originated intraMTA traffic through IXCs.⁸⁵ And allowing CMRS providers to route traffic through IXCs (and, by extension, LEC access facilities), instead of through the facilities specified in LEC-CMRS interconnection arrangements, undermines the regime established in Section 251 and 252 of the Act.

In contrast, adopting the Opposing IXCs’ interpretation of the intraMTA rule would encourage inefficiency by shielding IXCs and their CMRS affiliates from the costs of their routing decisions. There is no legitimate basis for Sprint and Level 3’s claim that an expanded intraMTA rule is necessary to allow CMRS providers “to choose the most cost-effective manner

⁸⁴ Birch Comments at 12.

⁸⁵ It is particularly egregious for a company like Sprint to claim to route its CMRS calls through its IXC affiliate when a local interconnection option may be available, and then to insist that it should not have to pay access charges when it was the entity in control of how those calls were routed. Among other things, such practices undermine the effectiveness of existing interconnection arrangements and the Commission’s broader interconnection policies, which increasingly are important in the aftermath of the *USF/ICC Transformation Order*.

of routing traffic.”⁸⁶ CMRS providers will be able to choose an efficient means of routing their traffic regardless of how the intraMTA rule is interpreted and applied; indeed, as noted above, they are free to take advantage of the Commission’s bill-and-keep mandate in exchanging traffic with LECs (directly or via transit providers).⁸⁷ What they cannot do is rely on an IXC to route traffic via tariffed access services and then expect the IXC to avoid paying the tariffed charges. Equally unavailing is CTIA’s assertion that granting the Petition “could lead to arbitrage and inefficient routing, because it would create incentives for LECs to send CMRS-bound intraMTA traffic to IXCs so they can collect access charges.”⁸⁸ LEC-originated calls are routed to IXCs as a result of 1+ dialing by end users. Again, the problem of which CTIA complains is being caused by the prospect of CMRS carriers’ routing their traffic through IXCs (and those carriers’ improper efforts to grant themselves exemptions from access charges) instead of negotiating and implementing efficient and effective interconnection arrangements or utilizing the interconnection agreements already in place with some LECs. In any case, concerns regarding access stimulation or similar abuses of the access regime can be readily addressed via the Commission’s access stimulation rules.⁸⁹

Similarly, adopting the Opposing IXCs’ interpretation of the intraMTA rule would validate refusals by the Opposing IXCs and their CMRS affiliates to properly identify the nature of the traffic being routed over LEC access facilities. As the Wisconsin State Telecommunications Association observes, IXCs “are in the best position to determine whether the call that is received from a LEC is being terminated to a CMRS carrier or whether the call

⁸⁶ Sprint/Level 3 Comments at 14.

⁸⁷ See 47 C.F.R. § 51.705(a); *USF/ICC Transformation Order* ¶ 806.

⁸⁸ CTIA Comments at 7.

⁸⁹ See 47 C.F.R. § 61.26(g).

being delivered to the LEC was originated by a CMRS carrier.”⁹⁰ Yet, as AT&T notes, “neither IXCs 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.”⁹¹

III. THE RECORD CONFIRMS THAT RETROACTIVELY APPLYING THE OPPOSING IXCS’ INTERPRETATION OF THE INTRAMTA RULE WOULD CONTRADICT FILED TARIFFS AND OTHERWISE WOULD BE MANIFESTLY UNJUST

The Petition explains that even if the Commission were inclined to adopt the interpretation of the intraMTA rule advocated by the Opposing IXCs, it still would be improper to retroactively apply that interpretation because doing so: (i) would contradict Section 204(a)(3) of the Act and the “filed rate” doctrine and (ii) otherwise would be “manifestly unjust.”⁹² The record contains strong support for both positions. While the Opposing IXCs predictably seek to demonstrate that the retroactive application of their interpretation would be appropriate, their arguments are unavailing.

A. Retroactive Application of Any Reinterpreted IntraMTA Rule Would Run Afoul of Filed Access Tariffs

The Petition explains that LEC switched access tariffs, by their terms, apply to all traffic routed by or through access facilities, including Feature Group D trunks, to an end user,⁹³ and that these tariffs (and their treatment of access trunk traffic as access traffic) are deemed lawful

⁹⁰ Comments of the Wisconsin State Telecommunications Association, WC Docket No. 14-228, at 5 (filed Feb. 9, 2015).

⁹¹ AT&T Comments at 4.

⁹² Petition at 32-33.

⁹³ *See, e.g.*, The FairPoint Telephone Companies, Tariff F.C.C. No. 1, § 6.7.6 (providing that for calls originated or terminated over Feature Group D facilities, “the measured minutes are the chargeable access minutes”).

once they become effective under Section 204(a)(3) of the Act.⁹⁴ As a result, the reasonableness of the terms of such tariffs can be challenged only on a prospective basis, and any remedies against carriers charging lawful rates later found unreasonable must be prospective only.⁹⁵ Similarly, the Petition explains that IXCs are precluded from prevailing based on an argument that a LEC owes a duty inconsistent with the terms of its filed tariff.⁹⁶

The record confirms that because the Opposing IXCs ordered service under filed and effective access tariffs, they may not now seek retroactive relief in the form of refunds.⁹⁷ The Opposing IXCs, which remitted payment under the terms of such tariffs for years without complaint, cannot now claim that those tariffs do not apply to the traffic at issue.⁹⁸

⁹⁴ Petition at 22-23.

⁹⁵ *See, e.g., ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002) (noting that once an agency deems a rate “lawful,” refunds are thereafter impermissible as a form of retroactive ratemaking).

⁹⁶ *Id.*; *Am. Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214, 223-24 (quoting 47 U.S.C. § 203(c) to note that carriers may not “‘extend to any person any privileges or facilities in [interstate] communication, or employ or enforce any classifications, regulations, or practices affecting such charges’ except those set forth in the tariff”).

⁹⁷ As the Illinois RLECs observe, “[t]elecommunications tariff charges are determined by the type of service requested and purchased from the tariff, not the type of traffic for which a customer uses the service.” Comments of the Illinois RLECs, WC Docket No. 14-228, at 7-8 (filed Feb. 9, 2015). Thus, as SDTA notes, “[b]y ordering switched access trunks from the defendant LECs and routing its traffic over those trunks, Sprint [and the other Opposing IXCs] undertook an obligation to pay the switched access rates established by the filed tariffs” and are “not entitled to a refund as a matter of law.” Comments of the South Dakota Telecommunications Association, WC Docket No. 14-228, at 19 (filed Feb. 9, 2015). ITTA agrees that the filed rate doctrine “prohibits carriers and their customers from departing from the terms of a filed tariff, such that any attempt by an IXC to obtain refunds for charges assessed pursuant to the applicable tariffs would be barred.” Comments of ITTA – The Voice of Mid-Size Communications Companies, WC Docket No. 14-228, at 5 (filed Feb. 9, 2015).

⁹⁸ The Opposing IXCs also mischaracterize the filed rate doctrine in arguing that it *supports* their refund claims. For example, Sprint and Level 3 assert that the filed-rate doctrine permits courts to interpret the terms of tariffs and whether or not they apply to a given set of facts. *See* Sprint/Level 3 Comments at 5 & n.18. But the fact that the Opposing IXCs

B. Retroactive Application of Any Reinterpreted IntraMTA Rule Would Be Manifestly Unjust

The Commission has recognized that while “[r]etroactivity is the norm in agency adjudications,”⁹⁹ new applications and interpretations of legal requirements should not be applied retroactively if, as is the case here, such a retroactive application would result in a “manifest injustice.”¹⁰⁰ Whether an expansion or reinterpretation of the intraMTA rule could be applied retroactively therefore is “a question grounded in notions of equity and fairness.”¹⁰¹ The Commission has explained that “manifest injustice” results from reliance that is “reasonably based on settled law contrary to the rule established in the adjudication.”¹⁰² That plainly would be the case here.

The record establishes that LECs have reasonably based their behavior on settled interpretations of the intraMTA rule. As noted above, the fact that the entire telecommunications industry has treated the intraMTA rule as inapplicable to LEC-IXC traffic for nearly two decades justifies LECs’ reliance on that settled understanding. And the Opposing IXCs concede that they themselves have acted in accordance with this industry consensus by paying tariffed access charges without dispute, notwithstanding their purported transmission of intraMTA traffic via LECs’ access services. Accordingly, it is clear that accepting the IXCs’ interpretation of the

paid access charges for years under those tariffs demonstrates that they themselves interpreted the tariffs to apply and estops them from espousing a contrary interpretation at this late date.

⁹⁹ See *Connect America Fund*, Declaratory Ruling, FCC 15-14, WC Docket 10-90, at ¶ 41 (Feb. 11, 2015).

¹⁰⁰ See *Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Co.*, 17 FCC Rcd 24201, at ¶ 33 (2002).

¹⁰¹ *Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services are Exempt From Access Charges*, 19 FCC Rcd 7457, 7471 (2004) (quoting *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998)).

¹⁰² See, e.g., *Verizon Tel. Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2011).

intraMTA rule would amount to “an abrupt departure from well established practice” and, more fundamentally, a change of law¹⁰³—making retroactive application of that interpretation inappropriate.¹⁰⁴

AT&T notes that whether a new standard can be applied retroactively turns on the balance of equities.¹⁰⁵ Here, as AT&T recognizes, applying a new interpretation of the intraMTA rule in a manner that results in retroactive refunds would lead to inequitable results. First, IXCs would be given a windfall of hundreds of millions of dollars, based on: (i) their recovery of access fees from their customers; and (ii) their use of LECs’ access services for years without paying anything of value in return (if refunds were made). This result would be particularly egregious given that, over an 18-plus year period, IXCs generally and the Opposing IXCs in particular did nothing to mitigate the alleged damages that they now claim to have suffered. Even now, they continue to route traffic in the same manner they always have, using tariffed access services rather than seeking to transmit any intraMTA traffic via local trunk groups. Thus, retroactive application of any rule change would be particularly inappropriate in this case given the nature of the IXC’s own conduct.¹⁰⁶

The Petition also makes clear that LECs would be severely burdened not only by the amount of the refunds potentially at issue but also by the massive administrative undertaking that would be required to identify the affected charges applicable to historical traffic flows.¹⁰⁷ The

¹⁰³ See Section II, *supra*.

¹⁰⁴ See *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (noting relevant factors in determining whether retroactive application of new rule results in manifest injustice).

¹⁰⁵ AT&T Comments at 13-14.

¹⁰⁶ See Rural Associations Comments at 16-17.

¹⁰⁷ Petition at 37.

Michigan LECs agree that “retroactive application would not only create a substantial refund liability, but also [would] be an enormously complex and disruptive exercise.”¹⁰⁸ Sprint and Level 3 assert that the “practical problem of distinguishing intraMTA calls carried by IXCs from other calls carried by IXCs” is easily addressed through the use of “traffic studies and samples.”¹⁰⁹ Similarly, Verizon characterizes the use of traffic studies as a “straightforward method to distinguish types of intraMTA calls”¹¹⁰ But the Opposing IXCs fail to explain why, if the use of such traffic studies were such a “straightforward method,” they have not provided such studies to LECs as a basis for avoiding access charges. Moreover, the Opposing IXCs ignore that the Commission orders suggesting the use of “traffic studies and samples” do so within the context of *LEC-CMRS* interconnection arrangements. Thus, for example, in the *Local Competition Order*, the Commission determined that it was not necessary for “LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected” because traffic studies instead could be used to classify traffic.¹¹¹

Even in that context, the traffic study approach has proven to be far from straightforward, and in fact has been extraordinarily difficult to develop and implement. And, as the Petition notes, *nothing* comparable exists to facilitate LECs’ ability to bill reciprocal compensation rather than access charges to an IXC for intraMTA traffic (assuming the LEC were obliged to do so) where the IXC commingles such traffic with all other traffic routed over tariffed access facilities. There is no industry-standard method of distinguishing intraMTA wireless traffic that is

¹⁰⁸ Comments of The Michigan Local Exchange Carriers, WC Docket No. 14-228, at 4 (filed Feb. 8, 2015).

¹⁰⁹ Sprint/Level 3 Comments at 5.

¹¹⁰ Verizon Comments at 16.

¹¹¹ *Local Competition Order* ¶ 1044.

commingled with access traffic.¹¹² Industry-standard practice has *always* been for LECs to bill for access charges and for IXCs to pay such charges for traffic—including CMRS traffic—routed through tariffed switched access facilities.¹¹³

Thus, as the Texas Telephone Association agrees, each relevant factor in the “manifest injustice” analysis “weighs heavily against the IXCs’ attempt to apply their radical revision of the intraMTA rule retroactively.”¹¹⁴ The Commission should act accordingly if it ultimately accepts the Opposing IXCs’ strained interpretation of the intraMTA rule. And if the Commission elects to make any prospective adjustments to longstanding billing practices regarding IXC-LEC traffic, it must do so in a way that accounts for the many practical obstacles outlined above.

IV. THE RECORD REFLECTS THAT IXC SELF-HELP VIOLATES THE ACT

The Petition describes how some IXCs have helped themselves to *de facto* refunds by withholding payment for unrelated and undisputed tariffed access services purchased from many different LECs.¹¹⁵ As the Petition notes, this “claw-back withholding” has the potential to create significant disruptions in the telecommunications industry and the ability of LECs to provide connectivity to end-user customers—particularly if these tactics are adopted by other IXCs.

¹¹² Indeed, such a method is unnecessary and inappropriate, as CMRS carriers generally are, or should be, encouraged to establish direct local connections with LECs so as to benefit from bill-and-keep or, at most, to interconnect with LECs indirectly and pay an intermediate transit carrier (without paying access charges to LECs).

¹¹³ This includes even physically local wireline traffic. For example, if a local landline end user in Dallas dials an “800” number for a vendor’s call center that also happens to be located in Dallas, the wireline LEC charges full access charges (as well as special charges for the “800” functionality), notwithstanding the fact that the call physically begins and ends in the same local calling area.

¹¹⁴ Comments of The Texas Telephone Association, WC Docket No. 14-228, at 7 (filed Feb. 9, 2015).

¹¹⁵ Petition at 35-39.

Accordingly, it remains critical that the Commission act quickly to confirm that those tactics are inconsistent with the requirements of the Act and the Commission's implementing rules and policies.

Tellingly, Sprint and Level 3 make no effort to rebut Petitioners' assertions that these self-help tactics are inconsistent with Sections 201(b) and 251(c)(1) of the Act (to the extent that IXCs are contending Section 251(c)(1) or its implementing rules would apply).¹¹⁶ Instead, they assert in a perfunctory manner that Sprint has not withheld access charge payments to award itself *de facto* refunds in connection with past overpayments, while remaining silent as to Level 3's conduct. No further explanation is provided.

In any event, the Commission need not resolve the nature of Sprint's conduct in order to issue the declaratory ruling requested by Petitioners; rather than asking the Commission to adjudicate any particular dispute, Petitioners have asked the Commission only to clarify that it would violate the Act if an IXC were to engage in claw-back withholding. Thus, the Commission need not resolve at this stage whether Sprint and Level 3 actually have engaged in such conduct.

In contrast to the silence of Sprint and Level 3, Verizon attempts to justify the self-help tactics in which some IXCs have engaged. More specifically, Verizon asserts that the Commission has held that a carrier-customer's failure to pay tariffed access charges does not, in and of itself, constitute a violation of the Act.¹¹⁷ But the Petition acknowledges as much,¹¹⁸

¹¹⁶ As noted above, *see* Section II.C, *supra*, Petitioners and other LECs do not agree that an arrangement directly between IXCs and LECs regarding IXC-routed intraMTA traffic would be an interconnection agreement subject to Section 251(c)(1) of the Act and Section 51.301(c)(5) of the Commission's rules.

¹¹⁷ Verizon Comments at 17.

¹¹⁸ *See* Petition at 37 n.101.

while demonstrating that additional conduct in this context constitutes independent violations of the Act. More specifically, an IXC acts unjustly and unreasonably where it:

- does not simply refuse to pay access charges covered by current and unpaid bills, but withholds payment of *undisputed, unrelated* amounts in order to “claw back” payments that already have been made;
- exploits its *carrier* status and the Commission rules requiring LECs to route IXC traffic without interruption in a deliberate attempt to shift significant costs onto LECs;
- uses these escalating costs in an attempt to coerce affected LECs into accepting “allocation factors” and other terms of interconnection that those LECs otherwise would not have accepted—a “bad faith” practice that also violates Section 251(c)(1) of the Act and Section 51.301(c)(5) of the Commission’s rules where those provisions apply; and/or
- attempts to effect an illegal rebate of tariffed charges previously paid—a result that also is prohibited by Section 204 of the Act.

Verizon makes no attempt to address these points or to explain why they do not constitute violations of the Act, independent of a carrier-customer’s simple refusal to pay a bill.

Particularly in light of the mounting impact of claw-back withholding on LECs’ ability to fund continuing operations and satisfaction of universal service commitments, the Commission should promptly declare such tactics unlawful.

CONCLUSION

For the reasons set forth herein and in the Petition, the LEC Petitioners reiterate their request that the Commission clarify its intercarrier compensation policies in a manner consistent with the Petition.

Respectfully submitted,

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