Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Regarding	)	
Applicability of the IntraMTA Rule to LEC-IXC Traffic	)	WC Docket No. 14-228
	)	
	)	
	)	
	)	

REPLY COMMENTS OF SPRINT CORPORATION AND LEVEL 3 COMMUNICATIONS, LLC

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EXECUTIVE SUMMARY

In our Opposition to the Petition for Declaratory Ruling, Sprint and Level 3 argued that the intraMTA rule adopted in the 1996 *Local Competition Order*[1] provides without exception that intraMTA traffic is "subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."[2] We also pointed out that many years ago several courts of appeals *rejected* Petitioners' argument that there is an implicit exception to the intraMTA rule for IXC-routed traffic. Indeed, in 2007 the Eighth Circuit observed that previous cases "explode[d] the idea that a cell-phone call made and received within a major trading area is transformed into a long-distance call simply by being routed through a long-distance carrier."[3] Moreover, as CTIA wrote in its comments, "[t]he Commission cited these cases favorably in the [*Connect America Fund Order*[4]], noting that its own clarification of the intraMTA rule 'is consistent with how the . . . rule has been interpreted by the federal appellate courts.'"[5]

The comments in support of the Petition mostly ignore these courts of appeals' cases and the Commission's reliance on them. For example, neither AT&T's Comments nor the National Telephone Cooperative Association's ("NTCA's") Comments—both over 15 pages long—even *mentions* either of these decisions or the fact that the Commission found them persuasive in

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, FCC 96-325, 11 FCC Rcd. 15,499 (1996) ("*Local Competition Order*").

[2] *Id.* ¶¶ 1036, 1043.

[3] *Alma Commc'ns Co. v. Mo. Pub. Serv. Comm'n*, 490 F.3d 619, 625 (8th Cir. 2007) (relying on *Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005), and *Rural Iowa Independent Tel. Ass'n v. Iowa Utils. Bd.*, 476 F.3d 572, 576 (8th Cir. 2007)); *see also W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970 (9th Cir. 2012).

[4] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd. 17,663 (2011) ("*Connect American Fund Order*").

[5] *Comments of CTIA The Wireless Association* at 4-5, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*CTIA Comments*").

2011. And those commenters in support of the Petition that *do* address the courts of appeals' precedents offer purported distinctions—specifically addressed below at 4-7—that are both inaccurate and unconvincing.

Like petitioners, some commenters in support maintain that isolated language in the Commission's *Local Competition* and *Connect America Fund* orders supports an exception to the intraMTA rule for IXC-routed traffic. In fact, however, as Sprint and Level 3 explained in our opening comments,[6] those orders taken as a whole clearly establish that the intraMTA rule does not apply to a specific billing relationship—*i.e.*, "LECs' billing of CMRS carriers"[7]—but rather to the entire category of intraMTA *traffic*.[8] The LECs' arguments to the contrary are contradicted by other statements in the same Commission orders upon which they rely.

Rather than addressing the relevant legal authorities, commenters supporting the Petition primarily advance quasi-equitable arguments, essentially suggesting that even if the intraMTA rule *does* apply here under the terms of the Commission's rules and orders, the Commission should find a way *not* to apply it. But those "equitable" concerns are misplaced—the real equitable problem here is that the LECs are seeking to retain unlawfully imposed access charges merely to avoid reductions in their revenue streams. But those LEC revenues reflect unearned and unwarranted *subsidies* that the Commission sought to eliminate from local wireless traffic years ago, and that it intends to phase out from all telecommunications traffic in years to come. The Petition's proposal to formalize the kind of arbitrary regulatory distinctions that the

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[6] *Comments of Sprint Corp. and Level 3 Comm., LLC* at 7-10, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Sprint/Level 3 Comments*").

[7] *Petition for Declaratory Ruling of the LEC Petitioners*, BrightHouse Networks, LLC et al., WC Docket No. 14-228, at 22 (filed Nov. 10, 2014) ("Pet.").

[8] *Sprint/Level 3 Comments* at 9-10.

Commission has worked to eliminate from its intercarrier compensation regime would effect a giant step backwards in intercarrier compensation policy.

The Commission should therefore reject the entire grab-bag of justifications that LEC commenters advance for allowing them to retain access charges imposed on intraMTA traffic even if the Commission finds that those charges were impermissible under the intraMTA rule. In particular, applying the intraMTA rule—which has been well established at least since the clarifying courts of appeals' decisions a decade ago—to the traffic at issue here is not in any way "retroactive." And commenters' other arguments (for not applying the intraMTA rule here even if the Commission reaffirms it yet again) boil down to the bizarre notion that that the Commission should still act as if the LECs' understanding of the rules is *right* directly after finding that such understanding is *wrong*. As set forth in Part II, below, those arguments are entirely meritless.

DISCUSSION

I. FCC and Courts of Appeals' Decisions Make Clear that the intraMTA Rule Contains no Exception for LEC-Routed Traffic.

Our opening comments argued that the central issue presented by the Petition has already been decided—repeatedly: "In the 1996 *Local Competition Order*, the Commission provided without exception that intraMTA traffic is 'subject to . . . section 251(b), rather than interstate and intrastate access charges,'" and "the Eighth, Ninth, and Tenth Circuits" have all confirmed that the "involvement of an IXC in traffic that otherwise would be local" does not convert that traffic into non-local traffic subject to access charges.[9] Verizon's comments make the same point: "From the [*Local Competition Order*] through the [*Connect America Fund Order*], the

[9] *Sprint/Level 3 Comments* at 2-3 (quoting *Local Competition Order* ¶¶ 1036, 1043 and *Western Radio Services*, 678 F.3d at 987).

Commission consistently has forbidden LECs from imposing access charges on IXC-routed intraMTA wireless traffic," and "the Eighth, Ninth, and Tenth Circuit Courts of appeals have all confirmed that reciprocal compensation—and not access charges—applies to intraMTA wireless traffic regardless of whether an intermediary IXC is involved."[10] CTIA likewise writes that "[s]ince 1996, the Commission's rules have provided unequivocally that intraMTA traffic" is not subject to access charges; that the *Connect America Fund Order* "clarifi[ed]" that this rule "included traffic exchanged via an IXC;" and that "[s]everal federal appellate courts have concluded that the Commission's precedent admits of no exceptions to the rule that intraMTA CMRS traffic is subject to reciprocal compensation."[11]

A. Commenters in support of the Petition almost entirely ignore the relevant courts of appeals' precedents and the Commission's reliance on them in the *Connect America Fund Order*.

The overwhelming majority of comments in support of the Petition simply ignore the courts of appeals' decisions in *Atlas*, *Alma*, *Iowa Network Services*, and *Western Radio*, as well as the Commission's citation of most of those opinions in *Connect America Fund*. Extensive comments from entities including AT&T, NTCA, and the Concerned Rural ILECs, to take just a few examples, make no mention of these cases at all.

To the limited extent that LEC commenters do attempt to distinguish the circuit precedents, those attempts are unconvincing. XO Communications, for example, argues that the *Alma* court was "simply wrong" in concluding that the Commission had "not ruled" that the intraMTA contained an exception for IXC-routed traffic—but even "assuming *arguendo* it is the case that there is no clear mandate from the FCC that access charges are due" on such traffic,

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[10] *Comments of Verizon* at 2-5, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Verizon Comments*").

[11] *CTIA Comments* at 2-4.

"resolving the Petition gives the Commission the opportunity to provide one."[12] Plainly, however, claiming that the Eighth Circuit was "wrong" is not a distinction, but merely a disagreement with the decision, and in fact there *is* a "clear mandate" from the FCC that access charges are *not* due. Indeed, as set forth in our opening comments, the Commission cited *Alma* in 2011 for the proposition that reciprocal compensation applies to "land-line to cell-phone calls placed to cell phones within the same MTA, even if those calls were routed through a long-distance carrier."[13] XO thus not only *disagrees* with the Eighth Circuit's decision in *Alma*, but also *discounts* this Commission's reliance on *Alma* in the *Connect America Fund Order*.

Moreover, while XO also attempts to distinguish *Alma* on the ground that it "involved an arbitrated interconnection agreement," XO simply ignores *Iowa Network Services*. There, the Eighth Circuit upheld the district court's finding "that the Act and the FCC's interpretive and implementing decisions have eliminated access charges, or tariffs such as INS seeks to impose, for local traffic."[14] And the court applied that finding to Qwest—the predecessor of Petitioner CenturyLink that was similarly situated in that case to Sprint and Level 3 here[15]—even though (1) the parties had no agreement in place regarding this traffic,[16] and (2) Qwest had *paid* access charges for years before disputing those charges as a violation of the Commission's intraMTA rule.[17] Thus, while the LECs now argue that Sprint, Level 3, and others should not benefit from

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[12] *Comments of XO Comm., LLC In Support of Petition for Declaratory Ruling* at 14 n.33, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*XO Communications Comments*").

[13] *Sprint/Level 3 Comments* at 10 (quoting *Connect America Fund Order* ¶ 1007).

[14] *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091, 1095 (8th Cir. 2006).

[15] *See Iowa Network Services v. Quest Corp.*, 363 F.3d 683, 687 (8th Cir. 2004) (explaining that Qwest transported calls "received from a CMRS provider and handed off to INS for delivery to and termination at" an ILEC customer).

[16] *Id.* at 688.

[17] *Id.*

the intraMTA rule in the absence of an agreement, one of the petitioners (CenturyLink) has already done precisely that.

The Commenting LECs[18] do attempt to distinguish *Iowa Network Services*, arguing that that "there was no party [under the facts of that case] acting as an IXC."[19] They further claim that "[i]n *INS*, the . . . courts found that Qwest, the intermediate carrier in the case, was *not* acting as an IXC."[20] But that argument completely misses the point here. First, the *Iowa Network Services* decision did not turn on the kind of intermediary *carrier* involved, but rather on the kind of *traffic* at issue. Specifically, the IUB in that case had ruled that "the tariffs at issue in this case did not apply to the type of *traffic* involved in this dispute,"[21] and the Eight Circuit agreed that "INS's tariff is not applicable" to the "*traffic* in this case."[22] Second, the *Iowa Network Services* court did *not* find that Qwest was not an IXC there, but only pointed out that Qwest was not acting as a "traditional" IXC because Qwest was not carrying "[i]nterexchange traffic" as IXC's traditionally had done.[23] Instead, as noted above,[24] in *Iowa Network Services* Qwest was transporting intraMTA calls "received from a CMRS provider and handed off to INS for delivery to and termination at" an ILEC customer. That is exactly the kind of call at issue here—intraMTA CMRS-LEC calls that are *routed* via an IXC network before termination in the

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[18] *See Comments of Birch Communications, Inc.*; *Granite Telecommunications*; *Hypercube Telecom LLC*; *Sage Telecom Communications, LLC*; *Telscape Communications, Inc.*; *U.S. TelePacific Corp.*; *and Xchange Telecom LLC*, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Commenting LECs*").

[19] *Id.* at 7.

[20] *Id.*

[21] 466 F.3d at 1097 (emphasis added).

[22] *Id.* (emphasis added).

[23] 363 F.3d at 689.

[24] *See supra* n.15.

same MTA where they originated. It thus makes no sense to suggest that Qwest in *Iowa Network Services* was not acting as an IXC as relevant to this proceeding.

In sum, as set forth in our opening comments, the overwhelming weight of both Commission and courts of appeals' precedents indicates that the intraMTA rule contains no exception for IXC-routed traffic. Parties supporting the Petition largely ignore that precedent, and certainly fail to distinguish it convincingly.

B. Additional snippets of Commission orders selectively quoted by Petition supporters do not establish an exception to the intraMTA rule for LEC-IXC billing relationships.

Some LECs argue in their comments that language in the *Local Competition Order* and the *Connect America Fund Order* indicates that the Commission did not anticipate the intraMTA rule applying to LEC-IXC billing. But LEC arguments for an IXC exception are inconsistent with other statements in the same Commission orders upon which they rely.

Like petitioners, NTCA highlights carefully selected language from paragraph 1034 of the *Local Competition Order* in support of its argument for an exception to the intraMTA rule. There, the Commission found that section "251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area," and not to "long-distance call[s]" handled by an IXC.[25] NTCA claims that this provision proves that the Commission viewed *all* calls handled by IXCs as beyond the scope of the reciprocal compensation regime, and therefore beyond the scope of the intraMTA rule itself. But that is not what the Commission said. While the cited paragraph plainly excludes "long-distance calls" from reciprocal compensation, it does not suggest that IXC-routed *intraMTA* calls should also be excluded from the reciprocal compensation regime. Indeed, just two paragraphs later, the Commission defined

[25] *Local Competition Order* ¶ 1034.

MTAs as "the local service area" for wireless traffic "for the purposes of applying reciprocal compensation obligations under section 251(b)(5)."[26] Thus, under the *Local Competition Order* the intraMTA traffic at issue in this dispute is plainly not "long-distance traffic" subject to access charges. It is "local" wireless traffic, and is subject to reciprocal compensation "rather than interstate and intrastate access charges" under the intraMTA rule.[27]

Some commenters also argue that the reciprocal compensation regime applies only to local carriers and not intermediary carriers.[28] As discussed above, at 7-8, this is the exact argument that was rejected in the *Iowa Network Services* line of cases that were cited with approval by the FCC in the *CAF Order*.

Some LECs also maintain that the Commission's 2011 *Connect America Fund Order* supports the claim that the Commission excluded IXCs as potential beneficiaries of the intraMTA rule. Specifically, these LECs argue that the intraMTA rule, as set forth in the *Connect America Fund Order*, applies only to "traffic *exchanged between* a LEC and CMRS providers that is originated and terminated within an MTA," and that IXC-routed intraMTA

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[26] *Id.* ¶ 1036.

[27] *Id.* ¶¶ 1034, 1036; *see also id.* ¶ 1033 ("Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act"); *Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, Order on Remand and Report and Order, FCC 01-131, 16 FCC Rcd. 9,151 ¶ 24 (2001) ("*2001 ISP Remand Order*") at 24 ("In the Local Competition Order, the Commission determined that the reciprocal compensation provisions of section 251(b)(5) applied only to what it termed 'local' traffic rather than to the transport and termination of interexchange traffic.").

[28] *See, e.g.*, *Comments of Multi-State Small Local Exchange Carrier Litigants* at 10-11, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Multi-State Small LECs Comments*") (arguing that reciprocal compensation provisions do not apply to IXCs); *Comments Illinois RLECs* at 10, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Illinois LECs Comments*") (claiming that reciprocal compensation applies "solely between the two local carriers involved in the end user traffic").

traffic is not "exchanged between" a LEC and a CMRS provider.[29] But that interpretation of the intraMTA rule cannot be correct, because, in the very same sentence, the Commission concluded that indirectly connected traffic is "exchanged between" a LEC and a CMRS provider:

> We therefore clarify that the intraMTA rule means that all traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same MTA, as determined at the time the call is initiated, is subject to reciprocal compensation *regardless of whether or not the call is, prior to termination, routed to a point located outside that MTA or outside the local calling area of the LEC. Similarly, intraMTA traffic is subject to reciprocal compensation regardless of whether two end carriers are directly connected or exchange traffic indirectly via a transit carrier*.[30]

Thus, traffic is "exchanged between" a LEC and CMRS provider so long as it originates on one of either a LEC or CMRS network and terminates on the other, and routing through an intermediary carrier like an IXC does not cause intraMTA traffic to fall outside the scope of the intraMTA rule.

Acknowledging the clarity of the Commission's finding that IXC-routed calls fall within the scope of the intraMTA rule, some LECs argue that "[e]ven where the 2011 Order mentioned that intraMTA traffic could be exchanged indirectly via a transit carrier, it did so entirely within the context of a LEC/CMRS arrangement (or a state commission or court requirement) to extend their bilateral interconnection and traffic exchange arrangement to include indirect routing via an

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[29] *XO Communications Comments* at 10; *see also Multi-State Small LECs Comments* at 10-11; *Commenting LECs Comments* at 6; *Comments of Concerned Rural LECs* at 5, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Concerned Rural LECs Comments*"); *Comments of Alexicon Telecommunications Consulting* at 3, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Alexicon Comments*"); *Comments South Dakota Telecommunication Association* at 6-7 & n.13, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*South Dakota LECs Comments*").

[30] *Connect America Fund Order* ¶ 1007 (finding that this clarification is consistent with how the intraMTA rule has been interpreted by the federal appellate courts) (internal citations omitted) (emphasis added).

IXC."[31] But the *Order* makes clear that the rule applies to "all" intraMTA "traffic"—regardless of who bills whom.[32] If the Commission wanted to exclude IXC billing from the scope of the rule, it certainly could have done so. But with the issue of indirectly routed intraMTA traffic squarely before it, the Commission chose to maintain the breadth of the rule, which plainly subjects "all" intraMTA traffic to reciprocal compensation rather than access charges.[33]

C. An IXC exception would be inconsistent with longstanding wireline competition policy and inherently arbitrary.

Not only do the Commission's orders fail to support an IXC exception to the intraMTA rule, but such an exception would thoroughly undermine the FCC's sound policy goals. The 1996 Act requires telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[34] As the Commission noted in the *Local Competition Order*, the rationale behind requiring indirect interconnection is to allow "telecommunications carriers . . . to provide interconnection pursuant to section 251(a) . . . based upon their most efficient technical and economic choices."[35] The addition of an IXC exception to the intraMTA rule, however, would discourage efficient routing, as it would plainly privilege direct over indirect interconnection.[36] By incentivizing LECs to connect wireless calls to IXCs,

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[31] *See, e.g.*, Comments of NTCA–The Rural Broadband Association; WTA-Advocates for Rural Broadband; The Eastern Rural Telecom Association; and The National Exchange Carrier Association, Inc. at 7, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*NTCA Comments*"); *see also XO Communications Comments* at 15.

[32] *Connect America Fund Order* ¶ 1007 & n.2133.

[33] *Id.* ¶ 1000.

[34] 47 U.S.C. § 251(a)(1).

[35] *Local Competition Order* ¶ 997; *see also id.* ¶ 1039 (recognizing that "Many alternative arrangements exist for the provision of transport between the two networks").

[36] *See, e.g.*, *Sprint/Level 3 Comments* at 14; *CTIA Comments* at 7.

an IXC exception would also encourage the regulatory "arbitrage" and "competitive distortions"[37] that intercarrier compensation reform sought to remedy.[38]

Equally important, access charges are not—contrary to LEC claims—fair recoupment for services rendered.[39] To the contrary, they are regulatory anachronisms—"above-cost" and "implicit subsidies" that place "actual and potential competitors . . . at a market disadvantage," thereby reducing economic welfare because those subsidies are ultimately "paid by consumers and businesses everywhere in the country."[40] And while the Commission has decided to phase out access charges slowly with respect to certain traffic, it eliminated them from local wireless traffic in 1996. In light of this solid progress toward a "rationaliz[ed]" intercarrier compensation scheme,[41] it makes no sense for the Commission to take a clear rule barring access charges for wireless traffic and carve out an arbitrary exception to it for a narrow sub-category of that traffic. But that is precisely the step backwards demanded by the LECs on this petition.

Finally, it bears note that the LECs' own stated "practical" justifications for an IXC exception expose that exception as arbitrary. The LECs claim that identifying intraMTA traffic can be a chore, and, along the same lines, point out that IXCs deliver intraMTA traffic to LECs using facilities that also carry access traffic.[42] But the Commission has already determined that

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[37] *Connect America Fund Order* ¶ 9.

[38] *Sprint/Level 3 Comments* at 7; *see also infra* at 17.

[39] *See, e.g.*, *Commenting LECs Comments* at 7, 12.

[40] *Connect America Fund Order* ¶¶ 648, 857 & n.1653; *see also Access Charge Reform Price Cap Performance Review for Local Exch. Carriers Transp. Rate Structure & Pricing End User Common Line Charges*, First Report and Order, FCC 97-158, 12 FCC Rcd. 15982, ¶¶ 32, 35 (1997) ("*Access Charge Reform Order*").

[41] *Access Charge Reform Order*, 12 FCC Rcd. 15982 ¶¶ 14, 36, 53 (1997); *see also Connect America Fund Order* ¶¶ 736-739.

[42] *See, e.g.*, *NTCA* at 14; *Comments of Wisconsin State Telecommunications Association* at 5, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*WSTA Comments*"); *Concerned Rural LECs* at 9;

this claimed inconvenience of complying with the law does not excuse the LEC from such compliance.[43] Moreover, the Commission has already suggested a convenient solution: "calculat[ing] overall compensation amounts by extrapolating from traffic studies and samples" to overcome hurdles in identifying intraMTA traffic.[44]

II. The Commission Should Reject Commenters' Claims that the LECs Should be Allowed to Keep Access Charges Imposed on intraMTA Traffic Even if Those Charges were Unlawful.

Like the Petition for Declaratory Ruling itself, the comments supporting the Petition propose a scattershot array of justifications for allowing LECs to retain access charges imposed on intraMTA traffic even if the Commission finds that those charges were impermissible under the intraMTA rule. The Commission should reject these arguments.

A. There is a *presumption* of retroactive application for the results of agency adjudication and that presumption applies here.

AT&T and a number of other commenters arguet even "if the Commission were to agree with [the] IXCs and hold that its orders and rules create a self-executing prohibition against billing access charges," applying this rule "retroactively" would be "improper."[45] According to AT&T, this is true regardless of "whether a declaration that access charges" do not apply "is

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Commenting LECs at 11; *see also Sprint/Level 3 Comments* at 23-24 (addressing feasibility of traffic studies).

[43] *Connect America Fund Order* ¶ 1007 & n.2132 (noting that "the Commission addressed this concern when it adopted the [intraMTA] rule.").

[44] *Local Competition Order* ¶ 1044; *see Connect America Fund Order* at 1007 & n.2132.

[45] *Comments of AT&T Services, Inc.*, at 13-14, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*AT&T Comments*"); *see also Commenting LECs Comments* at 13; *Multi-State Small LECs Comments* at 21-22; *Concerned Rural LECs Comments* at 7-8; *NTCA Comments* at 16-17.

deemed to be a new rule or a clarification."[46] AT&T's argument is internally incoherent and wrong.

AT&T's argument is incoherent because it first *assumes* that the Commission "agree[s]" with Sprint, Level 3, and other IXCs that the Commission's *existing* "orders and rules create a self-executing prohibition against billing access charges"[47]—but then argues that a "Commission ruling" to that effect would "substitute new law for reasonably clear old law."[48] This makes no sense. If the Commission *agrees* with the IXCs that its "orders and rules" bar the imposition of access charges on intrMTA traffic, then that is obviously *not* "new law, and there was *not* "reasonably clear old law" to the contrary.

Moreover, AT&T's argument fundamentally misapprehends the law governing prospective versus retrospective application of agency decisions. As the Commission recently held in no uncertain terms, "retroactivity is the norm in agency adjudications."[49] Accordingly, as set forth in our opening comments,[50] courts start with a "presumption of retroactivity for adjudications" that may be overcome only by a showing of "manifest injustice."[51] Manifest injustice, in turn, results only from "reliance that is 'reasonably based on settled law contrary to the rule established in the adjudication.'"[52]

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[46] *AT&T Comments* at 14.

[47] *Id.* at 13.

[48] *Id.* at 14.

[49] *Connect America Fund Developing a Unified Intercarrier Compensation Regime*, Declaratory Ruling, WC Docket No. 10-90, CC Docket No. 01-92, FCC 15-14 (rel. Feb. 11, 2015) ("*VoIP Symmetry Order*").

[50] *Sprint/Level 3 Comments* at 27.

[51] *Qwest Services Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007).

[52] *VoIP Symmetry Order* ¶ 41 (quoting *Qwest*, 509 F.3d at 540).

In the *VoIP Symmetry Order* released on February 11, 2015, the Commission *rejected* the same retroactivity arguments—also advanced by AT&T—that AT&T makes here. And it did so in a case involving facts that were more favorable to AT&T than those at issue here. In the *VoIP Symmetry Order*, the Commission explained that "prior to the [*2011 Connect America Fund Order*]… there was *no* precise Commission interpretation of how prior access charge precedent[s] applied to VoIP that the Commission . . . singled out and disavowed" in 2011.[53] But there were "older Commission precedent[s]" setting forth criteria for what constitutes "end-office switching that [were] not all met" in the VoIP symmetry context.[54] Still, the Commission explained, the "collectivity" of the "language of the rule, the limits of . . . prior decisions, and the ongoing disputes" regarding the application of the rule, taken together, "reveal[ed] a lack of clarity regarding how the issue here ultimately would be resolved," *not* a clear contrary rule.[55] This analysis applies here as well—at most, the LECs and their supporters point to snippets of "older Commission precedent[s]"[56] to support their claim that access charges should apply to intraMTA traffic. But as set forth in our opening comments and above, *see supra* at 4-7, the language of the relevant statutory provisions and rules, the Commission's analysis in the *Connect America Fund Order*, and the courts of appeals' precedents on which that order relied all thoroughly undermine that claim.[57]

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[53] *VoIP Symmetry Order* ¶ 43.

[54] *Id.* ¶ 43.

[55] *Id.* ¶ 46.

[56] *Id.* ¶ 43.

[57] *Sprint/Level 3 Comments* at 7-13.

In the *VoIP Symmetry Order*, the Commission also explained that AT&T could show neither a departure from settled law nor the reasonable reliance on such law that would be necessary for a finding of "manifest injustice."[58] The Commission concluded:

> Declaratory rulings are adjudicatory matters, in which retroactivity is presumed, and clarifying the law and applying that clarification to past behavior are routine functions of adjudications. Accordingly, we reject the contention that the clarification adopted in this declaratory ruling is a change in rule or a change in interpretation that can only be applied prospectively.[59]

Again, these conclusions are even more warranted here. This is a declaratory ruling proceeding in which "retroactivity is presumed," and there is no new rule here that can only be applied prospectively. In fact, while AT&T argues in the retroactivity section of its comments that applying the intraMTA rule to bar the application of access charges to the disputed traffic would "substitute new law for reasonably clear old law,"[60] AT&T itself makes precisely the opposite argument on the merits. Specifically, AT&T acknowledges a "clear divide in the industry as to how to interpret the Commission's existing rules and orders relating to intraMTA traffic," and states that "[b]ecause of the uncertainty" surrounding the current rule the Commission "should resolve the intraMTA dispute one way or another, as quickly as possible."[61] It simply makes no sense to argue that there is existing "uncertainty," a "clear divide in the industry," and an issue as to which the Commission could properly go "one way or another," while *also* maintaining that the "old law" was so clear that a mere clarification would create "unfair surprise."[62]

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[58] *Connect America Fund Order* ¶ 46-48.

[59] *Id.* at 48 (internal citations omitted).

[60] *AT&T Comments* at 14.

[61] *Id.* at 8, 10.

[62] *Id.* at 14-15 (quoting *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012)).

Finally, the Commission's *VoIP Symmetry Order* also rejected the "unfair surprise" standard that AT&T "dr[e]w from *Christopher v. SmithKline*" both in that case and here.[63] The Commission first explained that, "[a]s a threshold matter, we are not persuaded that *Christopher v. SmithKline's* discussion of 'unfair surprise' is the appropriate standard here because that case dealt with questions of deference to an agency interpretation expressed in a brief, not the retroactivity of a decision an agency reaches in adjudication."[64] The Commission then noted that *Christopher v. SmithKline* was further distinguishable because recent disputes about the application of access charges cannot be compared to the settled, "decades-long" application of 60-year old Fair Labor Standards Act rules at issue in that case. Finally, the Commission found that because it was not *changing* "[its] rules or [its] interpretation of them" in the *VoIP Symmetry Order*—but merely *clarifying* those rules—"*Christopher v. SmithKline* [was] inapplicable."[65] The same points apply here: *Christopher v. SmithKline* does not provide the relevant standard; the Commission is not *changing* the intraMTA rule, but only *clarifying* its application in a particular context.

In sum, the retroactivity arguments advanced here by AT&T are inconsistent with AT&T's own acknowledgment of its "uncertainty" surrounding the application of the intraMTA rule,[66] and with the Commission's rejection of these arguments in the *VoIP Symmetry Order*. The Commission should reject the arguments again here.

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[63] *VoIP Symmetry Order* ¶ 49; *see* AT&T Comments at 14-15.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 8-10.

B. The Commission should reject arguments that carriers seeking the benefit of the intraMTA rule must jump through multiple hoops.

The Petition argued that even if the intraMTA rule creates a "default right" that access charges do *not* apply to intraMTA calls, the burden is on carriers seeking the benefit of the rule to "demonstrat[e] that the LEC" agreed to its application.[67] That is incorrect—as Verizon correctly points out in its comments, "[t]he Commission's regulations and orders forbidding access charges on IXC-routed intraMTA wireless traffic . . . do not condition this ban on the existence of an interconnection agreement or request for reciprocal compensation."[68] Comments supporting the petition nonetheless offer a number of variations on the theme that even if the LECs are *wrong* about what the default rule is, the Commission should act like they are *right* unless CMRS carriers and IXCs satisfied all manner of unwritten requirements. These arguments are meritless.

1. The default rule is the default rule.

As a threshold matter, it bears emphasis that *all* of these arguments that the Commission should not apply the intraMTA rule—even if it agrees with Sprint, Level 3, and other parties opposing the Petition that the rule has been in place at least since the *Atlas* and *Alma* decisions of nearly a decade ago—fundamentally misunderstand the nature of the Commission's intercarrier compensation default rules. As set forth in our opening comments, "if the Commission's *rule* is that access charges do *not* apply," then that is "necessarily the default," and parties must contract around that default if they do not wish to be subject to it.[69] The fact that carriers *may* contract

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[67] Pet. 22-23.

[68] *Verizon Comments* at 11.

[69] *Sprint/Level 3 Comments* at 21-22.

around the Commission's intercarrier compensation rules if they wish does not, of course, mean that the rules do not apply *unless* there is such a contract.[70]

2. There are no "conditions precedent" to the operation of the Commission's intercarrier compensation rules.

A number of commenters in support of the Petition argue that carriers must satisfy certain implied "conditions precedent" to get the benefit of what Petitioners call the "default right" created by the intraMTA rule.[71] In these comments, perhaps the most common refrain is that carriers must "effectuate" the intraMTA rule through a reciprocal compensation agreement or it does not apply.[72] This argument, however, is particularly puzzling in light of Petitioners' own acknowledgment that the Commission's *TRS Wireless* decision specifically restricts "LECs' ability to charge originating access charges in connection with 'local' traffic" even absent "negotiation of a LEC-CMRS ICA."[73]

A number of commenters propose a second "condition precedent" to application of the intraMTA rule—an implied obligation of "cooperation" purportedly requiring carriers seeking application of the intraMTA rule to take ill-defined steps before it can apply.[74] NTCA makes the most detailed version of this argument,[75] but still offers only vague suppositions about what this

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[70] *Id.* at 22 (internal quotations omitted).

[71] *See* Pet. at 23; *Sprint/Level 3 Comments* at 23.

[72] Pet. at 23; *see also Commenting LECs Comments* at 5, n.10; *Multi-State Small LECs Comments* at 15; *South Dakota LECs Comments* at 7-8; *Illinois LECs Comments* at 6.

[73] Pet. at 25 n.68; *see also supra* at 5(discussing the *Iowa Network Services* case's rejection of an ICA requirement).

[74] *See, e.g.*, *NTCA Comments* at 8-13 & n.19; *Comments of Minnesota Telecom Alliance* at 10-12, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Minnesota Telecom Alliance Comments*"); *Multi-State Small LECs Comments* at 8; *Concerned Rural LECs Comments* at 7-8; *Commenting LECs Comments* at 10; *Comments of TCA* at 3, WC Docket No. 14-228 (filed Feb. 6, 2015) ("*TCA Comments*").

[75] *See NTCA Comments* at 8-13 & n.19.

"obligation" requires. NTCA suggests, for example, that "[a]t the very minimum" CMRS carriers were "obliged"—at some indeterminate time in the past—"to provide information that [was] within their sole possession (such as originating and terminating cell sites data for claimed intraMTA calls, traffic studies and/or samples)" for review "by LECs as the parties negotiated appropriate traffic factors or other arrangements to estimate the amount of intraMTA traffic commingled with interMTA and other traffic."[76] In addition, NTCA argues, "IXCs that elect to commingle intraMTA traffic with access traffic on access trunks must be required to notify affected LECs that they are doing so—either via an appropriate advance notice or at the very least by disputing or complaining about an early access bill that contains charges for unidentified intraMTA traffic."[77] NCTA thus proposes certain (past) steps "at a minimum" or "at the very least," but does not appear at all certain as to precisely what its rule would require.

That is not perhaps surprising, because NCTA also does not appear to know where these purported conditions precedent come from. NCTA provides a lengthy quotation from the *Local Competition Order*,[78] but that passage says nothing about CMRS carriers providing "information within their sole possession" to LECs or about IXCs providing "advance notice" of "comming[ling]." Rather, as set forth in our opening comments, this passage in the *Local Competition Order* merely envisions that the parties would rely on "traffic studies" to "calculate overall compensation amounts."[79] The fact that the Commission provided for traffic studies back

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[76] *Id.* at 12.

[77] *Id.* at 12-13; *see also Commenting LECs Comments* at 10-11 (arguing that while the "best source for [the data necessary to identify intraMTA calls] is the CMRS provider," an intermediary carrier can be required to pay access charges if it fails to provide the data) (quoting *Pet'n of Cavalier Tel.* 18 FCC Rcd. 25,887, 25,911-14 ¶¶ 42-43 (2003)).

[78] *Id.* at 10 (quoting *Local Competition Order* ¶ 1044).

[79] *Sprint/Level 3 Comments* at 23.

in 1996 rebuts the claim that the "commingling" of traffic prevents application of the intraMTA rule[80]—but does not in any way indicate a "condition precedent" to the application of the rule. Indeed, it bears emphasis that no amount of "cooperation" by CMRS providers or IXCs would have enabled those carriers to avoid the present dispute, because the LECs *continue*, even in the face of clear circuit law to the contrary,[81] to insist that access charges apply to the traffic at issue here. "Cooperation" would not change that fact.

Finally, while NTCA claims that *Connect America Fund* provides support for a "condition precedent" here, the footnote NTCA cites merely *envisions* that traffic studies would permit carriers to distinguish intraMTA from interMTA traffic,[82] as opposed to *requiring* such studies as a precondition to applying the intraMTA rule. And, again, it bears emphasis that the LECs cannot reasonably accuse other carriers of failing to "cooperate" while *also* continuing to insist that access charges apply here.

C. The Commission should reject arguments based on LEC tariffs and the filed rate doctrine.

Like Petitioners, a number of commenters in support of the Petition argue that LEC tariffs bar application of the intraMTA rule here. These arguments add little to those presented by the Petition and should be rejected.

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[80] *See, e.g*, *XO Communications Comments* at 19; *see also AT&T Comments* at 15; *WSTA Comments* at 5; *Comments of Moultrie Independent Telephone Company* at 2, WC Docket No. 14-228 (filed Feb. 6, 2015) ("*MITCO Comments*").

[81] *Sprint/Level 3 Comments* at 10-13.

[82] *NCTA Comments* at 11 (citing *Connect America Fund Order* n.2132).

First, some commenters suggest that "retroactive" refunds of unlawful access charges would be inconsistent with the filed rate doctrine.[83] But that is exactly backwards—as the Ninth Circuit explained in *Verizon v. Covad*, "to recoup overpayments" that are *not* lawfully due under tariffs "is to *enforce* the filed rates."[84] And to the extent that the Commission finds that the intraMTA rule bars application of access charges here, those charges are plainly *not* due under the tariffs. Accordingly, the filed rate doctrine *favors* the recovery of unlawful overpayments here. For the same reason, the argument that the filed rate doctrine prohibits refunds for calls billed pursuant to tariff is wrong.[85] The intraMTA rule *prohibits* billing access charges under LEC tariffs for the calls at issue here, so refunds are entirely consistent with the tariffs. And the federal courts have repeatedly so held[86]—a fact as to which commenters supporting the Petition offer no rebuttal.

Second, the claim that carriers must dispute unlawfully imposed access charges following procedures established by tariff also ignores the fundamental fact that the tariffs do not apply.[87] As repeatedly set forth in our opening comments,[88] our argument is: "(1) Petitioners' tariffs simply do not apply to the traffic at issue; (2) the filed rate doctrine affirmatively *bars* the

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[83] *See, e.g.*, *Concerned Rural LECs Comments* at 8; *Comments of Texas Telephone Association* at 6, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Texas Telephone Association Comments*"); *Illinois LECs Comments* at 7-8.

[84] *Verizon Del, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1090 (9th Cir. 2004) (emphasis added).

[85] *See, e.g.*, *Commenting LECs Comments* 7-9; *Concerned Rural LECs Comments* at 8; *Comments of ITTA - The Voice of Mid-Size Communications Companies* at 6, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*ITTA Comments*").

[86] *See Sprint/Level 3 Comments* at 5 & n.18 (citing cases).

[87] *Commenting LECs Comments* at 12-13 ("[T]he Commenting LECs' tariffs provide for a dispute resolution process" that "neither Sprint nor Verizon" followed).

[88] *See Sprint/Level 3 Comments* at 25-26.

imposition of charges not authorized by tariff, including assessing access charges on the traffic at issue here; and (3) the filed rate doctrine *does* permit customers like Sprint and Level 3 to seek refunds of amounts paid beyond the scope of the tariffs."[89] Point (1) is the most fundamental—because, despite the fact the LECs billed the IXCs under their tariffs, the LECs' tariffs do not apply here and, therefore, the dispute-resolution provisions of those tariffs likewise do not apply.

D. The Commission should leave the LECs' quasi-contractual "voluntary payment" and "implied contract" claims to the courts.

A number of commenters suggest that state "voluntary payment" doctrines bar refunds of unlawfully imposed access charges.[90] Commenters also claim that carriers like Sprint and Level 3 should not be able to obtain refunds because they impliedly agreed to depart from the Commission's intraMTA rule by voluntarily routing traffic over access trunks without requesting reciprocal compensation or identifying intraMTA traffic,[91] and because they have "unclean hands."[92] These quasi-contractual defenses to claims for refunds under the intraMTA rule implicate complex bodies of state law, and the Commission should leave them to the courts.[93] To the extent that the Commission does consider these arguments, however, it should hold that they are inconsistent with the filed rate doctrine.[94]

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[89] *Id.* at 26.

[90] *See, e.g.*, *Multi-State Small LECs Comments* at 19-20; *Concerned Rural LECs Comments* at 7-8; *WSTA Comments* at 6; *South Dakota LECs Comments* at 9.

[91] *See, e.g.*, *Minnesota Telecom Alliance Comments* at 13-14.

[92] *Initial Comments of Eastex Telephone Cooperative, Inc and Big Bend Telephone Company, Inc.* at 2, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*Eastex Comments*").

[93] *See Sprint/Level 3 Comments* at 24-25.

[94] *Id.* (explaining that the filed rate doctrine bars the imposition of charges not authorized by tariff, but does not bar refunds of amounts paid in response to billings beyond the scope of the tariffs).

E. There is no merit to "the-sky-is-falling" claims that the financial impact of applying the intraMTA rule here requires limiting the rule to prospective application.

Some commenters suggest that the financial effects of applying the intraMTA rule here would have severe consequences. For example, some LECs argue that lower LEC revenues would threaten their investment plans.[95] While the amounts at issue here are significant, they are a tiny percentage of LEC revenues, and "far from a magnitude that could remotely unsettle the industry."[96] Moreover, as Sprint and Level 3 set forth in their opening comments, there is no FCC doctrine permitting carriers to keep unlawful access charges even if those overcharges are substantial.[97]

The rural LECs predictably argue that rural consumers would be especially harmed by applying the intraMTA rule here. As the rural LECs acknowledge, however, some of the "shortfall" generated by returning unlawful access charges would be "made up . . . from CAF ICC support," and the shortfall "numbers on their own" thus do "not sound devastating."[98] But, the rural LECs caution, even a modest "shortfall" would "place significant upward pressure on intrastate" access rates—and that would "likely exacerbate the problem of access arbitrage."[99] In fact, however, the possibility of increased access arbitrage from minor increases in intrastate access rates misses the real arbitrage problem here. As CTIA explains in its comments, failing to apply the intraMTA rule will "lead to arbitrage and inefficient routing, because it would create

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[95] *See, e.g.*, *Comments of NineStar Connect* at 4-5, WC Docket No. 14-228 (filed Feb. 9, 2015) ("*NineStar Comments*"); *Ronan Telephone* at 4.

[96] *Sprint/Level 3 Comments* at 28.

[97] *Id*.

[98] *Concerned Rural LECs Comments* at 12-13.

[99] *Id.* at 13.

incentives for LECs to send CMRS-bound intraMTA traffic to IXCs *so that they can collect access charges.*"[100] Moreover, as CTIA points out, "subject[ing] more traffic to the access charge regime, as opposed to the reciprocal compensation regime," is "contrary to the Commission's stated goal of transitioning all traffic" ultimately to bill-and-keep.[101]

CONCLUSION

For these reasons, the Commission should deny the Petition.

Respectfully submitted,

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[100] *CTIA Comments* at 7 (emphasis added).

[101] *Id.*