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December 10, 2015

Ex Parte

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

Re: *In re Petition for Declaratory Ruling Regarding Applicability of the IntraMTA Rule to LEC-IXC Traffic*, WC Docket No. 14-228

Dear Ms. Dortch:

On December 8, 2015, along with Keith Buell of Sprint, Curtis Groves of Verizon, and Joe Cavender of Level 3 Communications, I met with Stephanie Weiner of the Chairman's Office, David Gossett of the Office of General Counsel, Deena Shetler, Pam Arluk, Victoria Goldberg, Matt DelNero, Rhonda Lien, Joseph Price, and Doug Slotten of the Wireline Competition Bureau, and Peter Trachtenberg of the Wireless Telecommunications Bureau. Janette Luehring and Amy Clouser from Sprint participated in the meeting by phone, as did Amy Richardson, counsel to Sprint. We distributed three documents: (1) the Public Notice the Commission issued on December 10, 2014, concerning the captioned Declaratory Ruling proceeding; (2) an excerpt from the Commission's 2011 *USF/ICC Transformation Order*; and (3) excerpts from key appellate decisions.

We urged the Commission to act quickly and make clear that the district court's recent decision in *In re intraMTA Switched Access Charges Litigation*, Civ. No. 3:14-MD-2587-D (MDL No. 2587) (N.D. Tex. Nov. 17, 2015), conflicts with the Commission's intercarrier compensation reform efforts. The declaratory ruling petition in this proceeding is ripe for decision, and the Commission should once and for all reiterate that there is no exception to the intraMTA rule and that all intraMTA wireless traffic is subject to the reciprocal compensation regime for all carriers in the call path, regardless of whether it is carried by an intermediary carrier, including an IXC.

Since 1996, the Commission's "intraMTA rule" has held ***all*** traffic between wireless carriers and local exchange carriers (LECs) that begins and terminates within a major trading area is subject to the Commission's reciprocal compensation regime "*rather than*" the access charge regime. *Local Competition Order*, 11 FCC Rcd 15,499, ¶ 1036 (1996). In the *USF-ICC*

Transformation Order in 2011, the Commission reinforced that intraMTA traffic exchanged between LECs and commercial mobile radio services (CMRS) providers is local traffic not subject to access charges. There is no exception to this rule, regardless of whether the traffic is carried by an intermediary carrier. The *USF/ICC Transformation Order* made this clear, rejecting the argument that a so-called "IXC exception" provides that access charges rather than reciprocal compensation applies if an interexchange carrier transports the call. 26 FCC Rcd 17,663, ¶¶ 41, 1007 (2011).

In fact, in that order the Commission rejected a request by the same parties to the present Petition to overturn a long line of Commission precedent and court cases all holding that reciprocal compensation, not access charges, applies to all intraMTA wireless traffic, regardless of whether the traffic is routed through an intermediary carrier like an IXC.[1] The Commission said "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."[2] It continues: "Similarly, 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."[3]

But although the Commission answered the question in 2011 and made clear over the petitioners' objections that there is no exception to the intraMTA rule, the petitioners did not like that answer. So in addition to filing their petition here, they blurred the issue before a district court. There, the judge—who did not experience the many years in which this played out at the Commission, including the industry negotiations that preceded the *USF/ICC Transformation Order*—bought the petitioners' arguments and decided incorrectly that the intraMTA rule somehow does have an exception for calls routed by IXCs, and that *both* the reciprocal compensation regime *and* the access charge regime apply to intraMTA calls. Thus, for example, under the district court's determination—which binds hundreds of carriers—a terminating LEC is entitled to receive both a reciprocal compensation payment from a wireless carrier and access charges from an IXC for the same call. This results in *more* intercarrier compensation for local wireless-to-wireline calls than for long-distance calls, whether wireless-to-wireline or wireline-to-wireline. This conflicts with the case law and with the Commission's efforts to unify intercarrier compensation rates and reduce opportunities for arbitrage.

The court's conclusion that both reciprocal compensation and access charges apply to the same calls goes beyond the relief requested by the LECs that filed the petition for declaratory ruling. In that proceeding, the LECs requested the Commission to declare that, when an IXC is involved in an intraMTA call, the LEC is entitled to receive access charges *rather than* reciprocal compensation. But it became apparent in the court proceeding that the Commission's

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[1] *USF/ICC Transformation Order* ¶ 1007.
[2] *Id.*
[3] *Id.; see also See id.* ¶ 1007 & n.2133 (citing *Alma Commc'ns Co. v. Missouri Pub. Serv. Comm'n*, 490 F.3d 619 (8th Cir. 2007); *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006) ("*INS II*"); *Atlas Tel. Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005)).

determinations and multiple court decisions had firmly established that reciprocal compensation applies to calls between wireless carriers and LECs whether or not an IXC is involved in the call. For that reason, the request made in the pending petition for declaratory relief—that LECs receive access charges *rather than* reciprocal compensation when an IXC is involved in an intraMTA call—is not viable.

The district court reached its holding by distinguishing the Commission's statements and the courts' decisions on the ground that, while establishing that reciprocal compensation is due on intraMTA calls, including calls handled by IXCs, those decisions do not explicitly say that access charges are not *also* due for the same calls. *See, e.g.*, slip op. 20 (distinguishing *Alma* on the ground that, while it held that "a [LEC] *and the cell-phone provider* must share 'reciprocal compensation' …, "the court did not address whether the LEC could charge *the IXC* access charges"); *id*. at 23-24 (distinguishing the *USF/ICC Transformation Order* on the ground that, although "the FCC affirmed, without exception, that all traffic routed to or from a CMRS provider that, at the beginning of a call, originates and terminates within the same MTA is subject to reciprocal compensation, it was referring to compensation between a CMRS [*sic*] and a LEC," the Commission "did not address IXCs or any aspect of the compensation permitted between LECs and IXCs").

The district court's conclusion that a LEC is entitled to *both* reciprocal compensation *and* access charges for the same call is even more infirm than the LECs' request for access charges *rather than* reciprocal compensation in the pending proceeding at the Commission. The court's fundamental error was its failure to understand that the reciprocal compensation regime and the access charge regime do not apply to the same call. Thus, the court's essential conclusion that the Commission did not "explicitly supersede" the access charge regime is wrong. With respect to intraMTA calls, the Commission explicitly superseded the access charge regime in the 1996 *Local Competition Order* by determining that reciprocal compensation applies to those calls. And in the *USF/ICC Transformation Order*, the Commission clarified that reciprocal compensation rather than access charges apply whether or not an IXC is involved. Most explicitly, in ¶ 1007 of that Order the Commission addressed the LECs' argument that an intraMTA call involving three carriers "is subject to access charges, not reciprocal compensation," and flatly rejected it, stating 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." The court also failed to recognize that the first section in the Commission's access charge rules, 47 C.F.R. § 69.1(d) provides that the access charge rules are "superseded" by the rules set out in 47 C.F.R. part 51 subpart H—which includes the intraMTA rule (47 C.F.R § 51.701(b)). In short, the Commission has made clear that intraMTA calls are subject to the reciprocal compensation regime, not the access charge regime, regardless of whether an IXC is involved.

We explained that the district court erred in other ways as well, but emphasized the court's fundamental error of thinking that the reciprocal compensation regime *supplements* the access charge regime. It *superseded* it when it decided to apply the reciprocal compensation regime to intraMTA calls in 1996 and reiterated that conclusion in 2011.

As noted above, we also explained that the decision is flatly contrary to the policies underlying the Commission's adoption of the intraMTA rule in particular and its reform of the

intercarrier compensation rules in general. Moreover, the decision leaves carriers such as Verizon and Level 3, which act as both LECs and IXCs, in the untenable position of being whipsawed.

In addition, there is no good reason as a matter of policy to increase the amount of intercarrier compensation because an IXC is involved. In the case of a wireless-to-wireline call, for example, the wireless provider is responsible for carrying the call to the LEC, and it should not matter whether an intermediary carrier (even if that intermediary carrier acts as an IXC on interexchange toll calls) or the wireless carrier itself carries the traffic. And as we pointed out, the Commission has twice explained that the parties should resolve the practical problem of distinguishing intraMTA calls from other calls by conducting traffic studies.[4]

We urged the Commission to again make clear that the intraMTA rule applies without exception and that calls that are subject to reciprocal compensation are not also subject to access charges. The Commission should resolve this industry-wide matter by denying the declaratory ruling petition and reiterating that the intraMTA rule applies without exception to all traffic, regardless of whether an intermediary IXC or other carrier is involved in routing.

In addition, we advised the Commission that it is not necessary for it to resolve all the issues raised in the petition for declaratory ruling or the court proceeding. Most if not all of those additional issues—such as application or statutes of limitations or state voluntary payment rules—are better resolved by the courts than the Commission. But only the Commission can provide an authoritative interpretation of its intraMTA rule. And because the Commission already has decided the issue, it can provide its authoritative interpretation quickly, while addressing other issues will necessarily lead to undesirable delay.

Sincerely,

/s/ Christopher J. Wright

Christopher J. Wright
Counsel to Sprint Communications Co., L.P.

cc:

Stephanie Weiner
David Gossett
Deena Shetler
Pam Arluk
Victoria Goldberg
Joseph Price
Matt DelNero
Rhonda Lien
Doug Slotten
Peter Trachtenberg

Attachments.

[4] *See USF/ICC Transformation Order* n. 2132, *citing Local Competition Order* ¶ 1044.

Attachment 1

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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DA 14-1808

Released: December 10, 2014

WIRELINE COMPETITION BUREAU SEEKS COMMENT ON PETITION FOR DECLARATORY RULING REGARDING APPLICABILITY OF THE INTRAMTA RULE TO LEC-IXC TRAFFIC

CC Docket No. 01-92
WC Docket Nos. 10-90, 14-228

Comment Date: February 9, 2015
Reply Comment Date: March 11, 2015

The Wireline Competition Bureau (Bureau) seeks comment on a petition for declaratory ruling filed by 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 Corporation, the Iowa RLEC Group, and the Missouri RLEC Group (collectively "Petitioners") on November 10, 2014.[1] Petitioners request 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."[2] Petitioners also ask the Commission to "declare that the attempts of certain IXCs to misapply the intraMTA rule to avoid paying access charges and to claim entitlement to substantial retroactive refunds are inconsistent with the Communications Act of 1934, as amended (the 'Act'), and the Commission's implementing rules and policies."[3]

Pursuant to section 1.419 of the Commission's rules, 47 C.F.R. § 1.419, interested parties may file comments and reply comments in **WC Docket No. 14-228** on or before the dates indicated above.[4] Comments may be filed on paper or by using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

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[1] Petition for Waiver 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 Corporation, the Iowa RLEC Group, and the Missouri RLEC Group, WC Docket No. 14-228 (filed Nov. 10, 2014) (Petition). *See id.* at 1-2 nn.2-11 for a complete list of petitioners.

[2] *Id*. at 2 (emphasis in original).

[3] *Id*.

[4] Although the issues raised in the Petition may be related to matters at issue in CC Docket No. 01-92 and WC Docket No. 10-90, parties are requested to make filings only in WC Docket No. 14-228 for administrative and public convenience.

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

    - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

    - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

    - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[5] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

For further information, please contact Victoria Goldberg, Pricing Policy Division, Wireline Competition Bureau, at (202) 418-7353 or Victoria.Goldberg@fcc.gov.

- FCC -

[5] 47 C.F.R § 1.1200 *et seq*.

Attachment 2

2011 FCC CONNECT AMERICA FUND ORDER

Executive Summary, ¶ 41:

"… Finally, we affirm that all traffic routed to or from a CMRS provider that, at the beginning of a call, originates and terminates within the same MTA, is subject to reciprocal compensation, without exception."

§ D. IntraMTA Rule

¶ 1004:

"The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule."

¶ 1007:

"In a further pending dispute, some LECs have argued that if completing a call to a CMRS provider requires a LEC to route the call to an intermediary carrier outside the LEC's local calling area,[2129] the call is subject to access charges, not reciprocal compensation, even if the call originates and terminates within the same MTA.[2130] One commenter in this proceeding asks us to affirm that such traffic is subject to reciprocal compensation.[2131] 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.[2132] Similarly, 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.[2133]"

Fn. 2129:
"This occurs when the LEC and CMRS provider are "indirectly interconnected," i.e. when there is a third carrier to which they both have direct connections, and which is then used as a conduit for the exchange of traffic between them."

Fn. 2132
In a letter filed on Oct. 21, 2011, Vantage Point Solutions alleged "difficulties associated with the implementation of intraMTA local calling" between LECs and CMRS providers, and, while not advocating repeal of the rule, urged the Commission to "proceed with substantial caution" when "handling the rating and routing of intraMTA calls" that involve an interexchange carrier. … We find that the potential implementation issues raised by Vantage Point do not warrant a different construction of the intraMTA rule than what we adopt above. Although Vantage Point questions whether the intraMTA rule is feasible when a call is routed through interexchange carriers, many incumbent LECs have already, pursuant to state commission and appellate court decisions, extended reciprocal compensation arrangements with CMRS providers to intraMTA traffic without regard to whether a call is routed through interexchange carriers. *See, e.g.*, *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619, 623-34 (8th Cir. 2007) (noting and affirming arbitration decision requiring incumbent LEC to compensate CMRS provider for costs incurred in transporting and terminating 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); *Atlas Telephone Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005). Further, while Vantage Point asserts that it is not currently possible to determine if a call is interMTA or intraMTA, Vantage Point Oct. 21, 2011 Ex Parte Letter at 2-3, the Commission addressed this concern when it adopted the rule. *See Local Competition First Report and Order*, 11 FCC Rcd at 16017, para. 1044 (stating that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples).

Fn. 2133
See Sprint Nextel Section XV Comments at 22-23 (arguing that the Commission should reaffirm that all intraMTA traffic to or from a CMRS provider is subject to reciprocal compensation). This clarification is consistent with how the intraMTA rule has been interpreted by the federal appellate courts. *See* *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619 (8th Cir. 2007); *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006); *Atlas Telephone Co. v. Oklahoma Corp. Commission*, 400 F.3d 1256 (10th Cir. 2005).

Attachment 3

Excerpts from Key Appellate Cases

Atlas Telephone Co. v. Oklahoma Corp. Comm'n, 400 F.3d 1256, 1260, 1264 (10th Cir. 2005)

"The CMRS providers maintained that, regardless of the presence of the IXC, the telecommunications exchange referenced above is subject to the reciprocal compensation obligations found in § 251(b)(5) of the Act. … In contrast, the RTCs maintained that traffic passing through an IXC is subject to the access charge, or long-distance calling, regime.

…

… We hold that … [n]othing in the text of [the FCC's rules] provides support for the RTC's contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network."

Iowa Network Services, Inc. v. Qwest Corp., 466 F.3d 1091, 1096-97, 1097 (8th Cir. 2006)

"In this case, the calls originate and terminate within the same local MTA; therefore, they are considered to be 'local' calls. According to the FCC's ruling, because these calls are 'local,' they are to be governed by reciprocal compensation arrangements. The rulings of the district court and the IUB are consistent with this ruling; thus, they do not violate federal law.

…

… INS repeatedly argues that the actions of the district court and the IUB nullify its federal tariffs. We disagree with INS's characterization. The IUB did not invalidate INS's tariffs; it simply stated that the charges as set out in INS's tariffs do not apply to the type of traffic at issue in this case. This determination does not mean that the tariff does not apply to interstate or foreign traffic. The tariff is still enforceable for traffic as specified in 47 U.S.C. §§ 202, 203. Because the traffic in this case is 'local,' and therefore covered by 47 U.S.C. §§ 251, 252, INS's tariff is not applicable."

Alma Communications Co. v. Missouri Public Service Comm'n, 490 F.3d 619, 625, 627 (8th Cir. 2007)

"… *Iowa Network Services II* thus explodes 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."

Western Radio Services Co. v. Qwest Corp., 678 F.3d 970, 987, 988, 990 (9th Cir. 2012)

"Thus, the issue is whether the involvement of an IXC in traffic that would otherwise be local converts that traffic into 'non-local traffic.'

…

We conclude that the arbitrator, PUC, and district court erred in determining that the involvement of an IXC altered the parties' obligation to pay reciprocal compensation for telecommunications traffic that originates and terminates within the same MTA.

…

… Thus, regardless of how the FCC may originally have interpreted the significance of the involvement of an IXC in the transport and termination of an otherwise local call, the FCC's subsequent changes to the relevant regulation, confirmed by its recent report and order, make plain that the involvement of an IXC has no effect on the obligations of LECs and CMRS providers to pay reciprocal compensation for traffic 'that, at the beginning of the call, originates and terminates within the same Major Trading Area....' 47 C.F.R. § 51.701(b)(2). Accordingly, like the Tenth and Eighth Circuits, we reject the contention that such traffic is somehow 'transformed into a long-distance call simply by being routed through a long-distance carrier.' *Alma,* 490 F.3d at 625."