

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY.....	1
ARGUMENT.....	3
I. THE COMMENTS CONFIRM THAT PERMITTING WIRELESS CARRIERS TO IMPOSE ACCESS CHARGES ON IXCS WOULD CONSTITUTE A REPUDIATION OF THE 1996 ACT'S DEREGULATORY OBJECTIVES.....	3
II. THERE IS NO INCONSISTENCY BETWEEN AT&T'S VIEW THAT THE PREVAILING BILL AND KEEP SYSTEM SHOULD BE RETAINED IN THE CMRS CONTEXT AND THE POSITIONS ADVOCATED BY AT&T IN THE UNIFIED INTERCARRIER COMPENSATION PROCEEDING.	9
III. THE CMRS CARRIERS CONTINUE TO MISCONCEIVE THE LEGAL QUESTION BEFORE THE COMMISSION.	13
A. AT&T's Petition Argues That Sprint PCS's Attempt To Charge For Access Constitutes An Unjust And Unreasonable Practice.	13
B. The Commission's Prior Decisions Do Not Resolve The Issue In Dispute.	14
C. Sprint PCS's Claim That The Commission May Only Rule On A Prospective Basis In This Case Is Groundless.	17
IV. THE COMMENTS CONFIRM THAT THE INDUSTRY PRACTICE FOR YEARS HAS BEEN BILL AND KEEP.....	22
V. SPRINT PCS'S COMMENTS EFFECTIVELY CONCEDE THAT A CMRS CARRIER'S ACCESS CHARGES SHOULD BE NO HIGHER THAN THE RATES IMPOSED BY THE CMRS CARRIER ON THE PREDOMINANT ILEC IN THE STATE TO TERMINATE THE ILEC'S LOCAL TRAFFIC.....	25
VI. IT WOULD BE GROSSLY UNFAIR TO IMPOSE A RETROACTIVE PAYMENT OBLIGATION ON IXCS.....	30
VII. AT&T HAS NOT WAIVED ITS RIGHT TO CHALLENGE THE SPECIFIC LEVEL OF SPRINT PCS'S ACCESS RATES IN AN APPROPRIATE PROCEEDING.	32
A. As The Party Seeking To Impose A Non-Tariff Payment Obligation On AT&T, Sprint PCS Has The Burden Of Proving That Its Rates Are Reasonable.	33
B. Sprint PCS's Claim That AT&T Was Required To Challenge The Specific Level of Sprint PCS's Access Rates In This Declaratory Ruling Proceeding Is Both Frivolous And A Bad-Faith Violation Of The Procedure Agreed To By The Parties And Announced By The Enforcement Bureau.	37
CONCLUSION	42

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

In the Matter of

AT&T CORP.

295 North Maple Avenue
Basking Ridge, N.J. 07920

Petitioner,

v.

SPRINT SPECTRUM, d/b/a SPRINT PCS

6160 Sprint Parkway
Overland Park, KS 66211

Respondent.

WT Docket No. 01-136

REPLY COMMENTS OF AT&T CORP.

Pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, and the Commission's Public Notice of November 8, 2001 (DA 01-2618), Petitioner AT&T Corp. ("AT&T") submits the following reply comments.

INTRODUCTION AND SUMMARY

The comments vividly confirm that the Commission should grant AT&T's petition for declaratory ruling and deny Sprint PCS's petition in its entirety. *First*, none of the commenters presents any substantial response to AT&T's demonstration that permitting CMRS carriers to impose access charges on IXCs, rather than directing them to abide by the industry's prevailing bill and keep practice, would constitute a significant retreat from the deregulatory objectives of the 1996 Act and of the Commission's policies. In particular, although the commenters present a number of alternative proposals for regulation of CMRS access rate levels, no commenter

seriously denies that adoption of a CMRS access regime would necessitate regulation of CMRS access rates.

Given the strong congressional policy in favor of deregulation of the telecommunications industry, the proponents of imposing a new regulatory regime on CMRS-IXC interconnection bear the heavy burden of demonstrating that imposition of such a compensation mechanism is necessary. This is particularly true given that the existing industry end-user-pays system permits wireless carriers to recover all of their costs, leads to optimal utilization of wireless services, and requires no regulatory intervention. Far from putting forth a compelling argument in favor of substituting an unregulated system with a regulated one, the CMRS carriers' arguments in support of Sprint PCS's proposal are insubstantial. In particular, the CMRS carriers' claims that IXCs receive a "windfall" under the existing end user pays system are economically naive. IXCs participate in a cut-throat market and are simply incapable as a matter of economics of capturing excess profits. Thus, the interexchange rates recovered by AT&T and other IXCs reflect the access costs avoided by IXCs when terminating calls to wireless carriers. The CMRS carriers' alternative claim – that they need access payments to compete with the wireline ILECs – is even less substantial. There is absolutely no evidence to show that CMRS providers, whose sales have been growing exponentially, have encountered any difficulty in marketing their services. Moreover, as Sprint Corp. has been quick to argue when explaining why CLECs should be limited to charging ILEC access rates but CMRS carriers should not, CMRS is not at present a substitute for wireline local exchange service. *See* AT&T Comments at 23 (quoting Sprint filings).

Second, the comments filed in this proceeding uniformly confirm AT&T's assertion that, at the time Sprint PCS began unilaterally billing for access, the uniform industry practice for

15 years had been a *de facto* bill and keep system, whereby wireless carriers recovered all of the costs they incurred in terminating calls from their end users. Indeed, the comments reveal that even today, only three wireless carriers of the hundreds of CMRS providers bill for access (the other two beginning to do so only recently), and that none of the major IXCs (other than perhaps Sprint PCS's IXC affiliate) has agreed to pay such charges. These facts alone show that Sprint PCS acted unreasonably when it unilaterally sought to charge captive IXCs for access, and that AT&T did not engage in an unreasonable practice in refusing to pay.

Third, none of the commenters presents a serious response to AT&T's argument that, if the Commission were to authorize a shift towards an access charge regime for CMRS-bound interexchange traffic, the Commission should impose that change on a purely prospective basis. As AT&T explained in its comments and as discussed below, permitting Sprint PCS alone to recover as much as \$80-100 million for access, when no other wireless carrier billed for access and when Sprint Corp. did not have to pay for access when terminating calls to unaffiliated wireless carriers (including AT&T Wireless), would be grossly unfair. Sprint PCS simply cannot explain why it would be fair to require AT&T to pay Sprint PCS for access for past periods when Sprint Corp. was never billed by AT&T Wireless for access during the same timeframe.

ARGUMENT

I. THE COMMENTS CONFIRM THAT PERMITTING WIRELESS CARRIERS TO IMPOSE ACCESS CHARGES ON IXCS WOULD CONSTITUTE A REPUDIATION OF THE 1996 ACT'S DEREGULATORY OBJECTIVES.

In its petition for declaratory ruling, AT&T demonstrated that the *de facto* bill and keep compensation mechanism is a critical part of the deregulatory regime governing CMRS rates and that the Commission would have no choice but to regulate CMRS rates if, as Sprint PCS

requests, CMRS carriers are permitted to charge IXCs for access. As AT&T explained, the prevailing industry bill and keep practice permits wireless carriers to recover all of their costs, promotes optimal utilization of CMRS services, and requires no regulatory oversight on the part of either the Commission or the state commissions. AT&T Pet. at 18-19. By contrast, because terminating carriers inevitably have a monopoly over access to their own end users, competition is simply unable to restrain access charges – which means that importation of access charges to the CMRS context would necessarily require imposition of a system of regulation of CMRS access rates. *Id.* at 7-10; *see also In the Matter of Access Charge Reform*, Seventh Report & Order, 16 FCC Rcd. 9923, ¶¶ 31-32 (2001) (“*CLEC Access Charge Order*”) (describing terminating access monopoly problem and “acknowledg[ing] that the market for access services does not appear to be *structured* in a manner that allows competition to discipline rates”). As AT&T stated in its petition in these proceedings (at 3):

If . . . the Commission were to permit Sprint PCS unilaterally to replace this bill and keep system with a system of access charges, it would necessarily trigger, both for the Commission and for every state commission, the duty to engage in pervasive regulation of CMRS carriers’ access rates. . . . Adoption of Sprint PCS’s position would thus entail a significant step backwards – the repudiation of an effective deregulatory, market-based system of end-user charges that has thus far prevailed in the industry, and the institution of constant regulatory scrutiny by federal and state regulators to attempt to prevent the abuse that marks wireline access.

Notably, although this point was a prominent component of AT&T’s petition, Sprint PCS completely ignores the argument. By contrast, some of its CMRS cohorts suggest that no regulation of CMRS access rates would be necessary because CMRS *end users* have competitive alternatives. *See, e.g.,* CMS at 4; Leaco at 4; Salmon PCS at 15; Western Wireless at 7. But this is nonsense. As both the Commission and Sprint have recognized, even where the *end user market* is competitive, the *market for access charges* is still plagued by the termination

monopoly problem – which means that failure to regulate access charges will lead to unrestrained abuses of captive IXCs (and attendant rises in long distance prices). *See CLEC Access Charge Order* ¶ 38 (noting that access market involves “two distinct customer groups”: the IXCs, who “are subject to the monopoly power that [terminating carriers] wield over access to their end users” and end users, who, “unlike IXCs, . . . have competitive alternatives in the market in which they purchase . . . access service”); *see also* AT&T Pet. at 9 & n.4 (citing numerous Sprint Corp. pleadings filed with the Commission strongly advocating that competition cannot restrain the access charge market); *id.* at 22-23 & n.11 (same). In short, contrary to the blithe assurances of some CMRS carriers, introduction of access charges to the CMRS market would inevitably necessitate regulation of CMRS rates.

Perhaps recognizing the fatal flaw in the assertion that introduction of access charges will not require regulation, other wireless carriers admit that rate regulation *would* be required if access charges are introduced in order to ensure that the monopoly abuses that have occurred in the CLEC access charge context are not permitted to afflict the CMRS market. These carriers attempt, however, to mitigate this (correct) admission by asserting that rate regulation would be easy. *See, e.g.,* CTIA at 8-9 (advocating *CMRS Access Charge Order* benchmark); Verizon Wireless at 13 (advocating multi-factor test for evaluating reasonableness of rates). This attempt, however, fails because it is both irrelevant and wrong.

First, AT&T’s principal point is not that regulation is difficult, but that it is undesirable. Basic economic theory dictates that, wherever possible, it is preferable to rely on the market rather than regulation, because only a market-driven compensation system sends the correct price signals to consumers. As AT&T explained in its petition (at 18):

The bill and keep system in the IXC-CMRS context likewise promotes efficient network utilization and carrier selection by ensuring that the correct economic

signals will be sent. Because end users will bear the full economic costs of their selection of a high-priced access provider, end users will have an incentive to choose an efficient CMRS carrier. Similarly, if wireless service is in fact more costly to provide than wireline local exchange service – and Sprint PCS has not provided any evidence that supports such an allegation – requiring end users to bear the full costs of their selection of a CMRS carrier enables the end user to assess whether the added benefits of mobility justify the higher cost of the service.

By contrast, a regulated access charge mechanism of cost recovery cannot produce these appropriate incentives.¹ As the Commission has recognized, the allocation of common costs on which any regulation of access rates would depend is inherently arbitrary. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, ¶ 39 (2001) (“*Intercarrier Compensation NPRM*”). Moreover, even if it were possible for the Commission to determine the precise portion of a CMRS carrier’s costs that are properly attributable to interexchange call termination, so long as those costs are recovered from IXCs in the form of access charges, the fact that IXCs charge nationally averaged rates would mean that the correct pricing signals would not be sent. Just as in the CLEC context, when an IXC “spread[s] the cost of terminating access rates among all of its end users,” *CLEC Access Charge Order* ¶ 11, the impact of high CMRS access charges would not be limited to those customers who call CMRS end users but, instead, would be spread to all end users, including those who never place calls to CMRS customers. *See also id.* at ¶ 31 (“IXCs have little or no ability to create incentives for their customers to choose CLECs with low access charges”). Accordingly, imposing access charges on IXCs would not create the incentives that will lead to proper utilization levels. Only by leaving in place the industry’s prevailing end-user-pays system of cost recovery will consumers receive accurate pricing signals.

¹ This is especially true if CMRS providers are allowed to charge above-cost prices for access.

Significantly, both Congress and the Commission have acknowledged that deregulation, wherever possible, is preferable to regulation. Indeed, Congress's express objective in passing the 1996 Act was to promote reliance on market forces. *In the Matter of 2000 Biennial Regulatory Review*, 15 FCC Rcd. 20008, ¶ 1 (2000) ("The major purpose of the 1996 Act is to establish 'a pro-competitive, deregulatory national policy framework' designed to make available to all Americans advanced telecommunications and information technologies and services 'by opening all telecommunications markets to competition.'") (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess., at 113 (1996)). The Commission itself has likewise stated its preference, whenever possible, to use deregulated or unregulated market forces to restrain telecommunications carriers' charges,² including, in particular, wireless charges: "as a matter of Congressional and Commission policy, there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation.'" *In the Matter of Southwestern Bell Mobile Sys.*, Mem. Op. & Order, 14 FCC Rcd. 19898, ¶ 9 (1999). By granting Sprint PCS's request, the Commission would necessarily repudiate the unregulated end user pays system in favor of the regulatory access charge regime – thereby undermining the deregulatory objectives of both Congress and the Commission.³

² See, e.g., *CLEC Access Charge Order* ¶ 45 ("Our orders addressing ILEC access charges have consistently stated our preference to rely on market forces as a means of reducing access charges."); *In the Matter of Access Charge Reform*, Fifth Report & Order, 14 FCC Rcd. 14221, ¶ 247 (1999) (stating that the Commission "strongly prefer[s] to rely upon a marketplace solution . . . to constrain CLEC access rates" but acknowledging that a marketplace solution may not work in the access market) ("*Fifth Access Charge Order*").

³ This repudiation would be very unfortunate, as IXC-CMRS interconnection is the only market in which bill and keep has arisen without regulatory intervention. See AT&T Pet. at 4 (citing *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report & Order, 11 FCC Rcd. 15499, ¶¶ 1112, 1118 (1996)).

Sprint PCS offers only one possible justification for repudiating the *de facto* bill and keep system long prevalent in the CMRS market in favor of the flawed access charge regime historically used in some (but not all)⁴ other telecommunications markets – *i.e.*, that CMRS carriers need to receive access charges in order to compete with the ILECs. But, as AT&T has shown, there is no evidence of such a problem. AT&T Comments at 23-24. Indeed, far from it – the phenomenal growth of CMRS thoroughly undercuts such a claim. *Id.*

The only other justification offered by the CMRS carriers for repudiating the unregulated bill and keep system is the claim that IXC-imposed access charges are necessary to prevent IXCs from recovering an alleged “windfall.” As AT&T has already shown, however, AT&T Comments at 20-21 (citing *Report in Response to Senate Bill 1768 & Conference Report on H.R. 3579*, Report to Congress, 13 FCC Rcd. 11810, ¶ 28 (1998), and *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report & Order, 16 FCC Rcd. 7418, ¶ 22 (2001)), and as various CMRS carriers admit when they (inconsistently) argue that cost reductions enjoyed by competitive carriers must be passed on to consumers as a matter of economics, *see, e.g.*, CTIA at 6; Western Wireless at 7, any claim that AT&T would over-recover or otherwise earn a supra-normal profit is contrary to both economics and logic. IXCs set their rates with the reasonable expectation that they would not have to pay for access on calls to CMRS customers. The reality is that the only entity that could receive a windfall in this dispute is Sprint PCS, which seeks to recover access charges from AT&T when its parent corporation, Sprint Corp., did not pay other wireless carriers, including AT&T Wireless, for access, WorldCom at 12; *see also, infra*, at 25 (demonstrating that Sprint PCS likely already recovers all of its costs from end users).

⁴ As Qwest notes, the Commission has not consistently applied the access charge regime in all

Second, the CMRS carriers substantially understate the difficulty of setting an appropriate access charge by regulatory fiat. In this very proceeding, carriers have suggested several different standards for the rates (if any) that would be appropriate if the Commission were to take the ill-advised step of importing access charges to the CMRS market. *See, e.g.*, AT&T Pet. at 24-27 (advocating reciprocal compensation rates, if any access charges are permitted); CTIA at 8-9 (advocating *CLEC Access Charge Order* benchmark unless bill and keep is adopted as the unified intercarrier compensation regime); Sprint PCS at 9-11 (advocating TELRIC-based rates, but with the NECA Tier I tariffed rates as the default); Verizon Wireless at 13 (advocating multi-factor test for evaluating reasonableness of rates); WorldCom at 11-13 (advocating reciprocal compensation rates if access charges are permitted). Others suggest that the reasonableness of rates should be determined in drawn-out complaint proceedings. *See, e.g.*, Nextel at 5; RCA at 4. Given the complete absence of any record evidence as to the level of CMRS carriers' costs, the Commission's lack of experience regulating CMRS rates, and the inherent difficulty of allocating a carrier's common costs between end user services and access, the CMRS carriers' claims that regulation of their access rates would not prove burdensome to the Commission are highly exaggerated.

II. THERE IS NO INCONSISTENCY BETWEEN AT&T'S VIEW THAT THE PREVAILING BILL AND KEEP SYSTEM SHOULD BE RETAINED IN THE CMRS CONTEXT AND THE POSITIONS ADVOCATED BY AT&T IN THE UNIFIED INTERCARRIER COMPENSATION PROCEEDING.

Sprint PCS claims that "the policy arguments that AT&T makes in its declaratory ruling petition are flatly inconsistent with its position in the [*Unified Intercarrier Compensation*] rulemaking docket." Sprint PCS Comments at 6. To support this claim, Sprint PCS weaves together from AT&T's *Intercarrier Compensation* Comments a "quotation" that combines

markets. *See* Qwest at 11-12 (ISP-bound traffic); *id.* at 10 (discussing various kinds of traffic).

snippets of AT&T statements separated by over 40 pages. *See id.* In fact, there is no inconsistency between AT&T's positions. Although AT&T, like many IXCs and other commenters, has opposed the Commission's proposal to replace access charges in the *wireline* context with a bill and keep system, none of the reasons offered by AT&T for rejecting bill and keep in the wireline context applies to the very different economic, regulatory, and historical conditions of IXC-CMRS interconnection.

First, AT&T argued that in the wireline context a shift to a bill and keep regime would not enable either the FCC or the state commissions to avoid regulation, because the end user market for wireline local exchange service is not competitive. Accordingly, the Commission has no choice but to regulate; the only question is whether the Commission would need to regulate the access charges assessed against IXCs or the charges assessed against end users for termination. *See AT&T Intercarrier Compensation Comments* at 26-30 (filed August 21, 2001). As explained by AT&T in the *Intercarrier Compensation* proceedings:

Because they control the bottleneck local telephone facilities over which virtually all telephone calls travel, the BOCs and other incumbent LECs that serve more than 90 percent of the nation's local telephone consumers – and, in most localities, *all* consumers – have substantial market power over consumers. That is why incumbents' retail charges to consumers must be regulated, and the level of local competition sufficient to do away with end-user rate regulation cannot be expected under any realistic near-term, or even mid-term, scenario. . . .

A [bill and keep] rule would shift the costs of termination from the calling party's carrier to direct billing of called party end users. Unless the Commission regulated end user charges in such a [bill and keep] regime, incumbent LECs could exploit their market power over end users by charging supra-competitive rates for termination (whether charged separately from existing end user charges or reflected in increases to existing end user charges). Incumbent LECs could also exploit their market power by using termination charge rate design to favor their long distance, information service, and advanced service affiliates at the expense of competing providers.

Id. at 26-27 (citations & footnotes omitted). By contrast, the market for wireless local exchange service is vigorously competitive, *see* AT&T Pet. at 10-11, so the Commission can continue to avoid all regulation of CMRS rates by maintaining the current system of end user charges, *see, supra*, at 3-7.

First, AT&T argued that in the wireline context a shift to a bill and keep regime would not enable either the FCC or the state commissions to avoid regulation, because the end user market for wireline local exchange service is not competitive. Accordingly, the Commission has no choice but to regulate; the only question is whether the Commission would need to regulate the access charges assessed against IXCs or the charges assessed against end users for termination. *See* AT&T *Intercarrier Compensation* Comments at 26-30 (filed August 21, 2001). As explained by AT&T in the *Intercarrier Compensation* proceedings:

allows IXCs to maintain greater control over the end-to-end quality of long distance calls than would a [bill and keep] rule. . . . IXCs today control what transport trunks they will order and use, which allows the IXC to maintain network efficiency and call quality. Adoption of [bill and keep] would give incumbent LECs unilateral control over such decisions on the originating end, thus dramatically increasing incumbent LECs' ability to degrade the quality of their long distance competitors' calls through the sizing of transport trunks and other means.

AT&T *Intercarrier Compensation* Comments at 48-49. But, while bill and keep provides the *means* to discriminate by degrading the quality of long-distance service, it does not provide a *motive* for such discrimination. Unlike the wireline context, wireless carriers have no motive to degrade an IXC's long-distance service because (1) wireless consumers would assume that if calls are dropped or do not go through the fault lies with the CMRS carrier, not the IXC; and (2) the fact that there is no equal access for wireless carriers (as compared to landline carriers) means that wireless carriers already have a monopoly over the provision of originating long distance service to their customers and thus would have nothing to gain by providing inferior

interconnection to IXCs on terminating calls. In short, CMRS providers lack both the incentive and the practical ability to use bad practices to inhibit competition in the long distance market.

Third, AT&T argued that it would be impossible in the wireline context to achieve a uniform bill and keep access system because states exclusively regulate the level of intrastate access rates. As AT&T has pointed out, “intrastate access charges are a very substantial portion of total intercarrier compensation payments, and it would therefore be impossible to achieve a unified [bill and keep] approach to intercarrier compensation unless and until the states also agreed to abandon [calling party network pays],” *id.* at 4, and it would be unlikely that the states would agree to abandon calling party network pays in the wireline context, *id.* at 5. By contrast, because states are prohibited from regulating any wireless rates, including intrastate rates, *see* 47 U.S.C. § 332(c)(3), the Commission has the unique ability to achieve uniformity in the wireless market.

Fourth, AT&T argued that, in the wireline context, there is a significant risk that, “to the extent that some new entrants’ targeting of end-users with terminating traffic, in fact, reflects arbitrage, adopting [bill and keep] would at most replace one set of inefficient incentives (*i.e.*, to win customers who primarily terminate calls) with another set of inefficient incentives (*i.e.*, to win customers who primarily originate calls).” *AT&T Intercarrier Compensation Comments* at 31. However, bill and keep in the wireless context has not, and will not, lead to such regulatory arbitrage because wireless end users pay per minute airtime charges, *see, e.g., In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking, 14 FCC Rcd. 12673, ¶ 2 (1999) (“*Calling Party Pays CMRS NPRM*”), and because federal law already prohibits the placing of certain kinds of calls to wireless numbers (*e.g.*,

telemarketing calls), *see* 47 C.F.R. § 64.1200(a)(1)(iii); *see also* AT&T *Intercarrier Compensation* Comments at 54.

III. THE CMRS CARRIERS CONTINUE TO MISCONCEIVE THE LEGAL QUESTION BEFORE THE COMMISSION.

Sprint PCS and its CMRS brethren continue to argue that no Commission order squarely precludes them from charging IXCs for access and that, in the absence of an existing rule, Sprint PCS has the right to bill IXCs and to collect on the bills that it has submitted. Indeed, Sprint PCS argues that the Commission, which deliberately chose to proceed through a declaratory ruling mechanism, is unable to assess Sprint PCS's past behavior in this proceeding but may rule only on a prospective basis. Each of these arguments seriously misconceives the applicable law and the Commission's procedures.

A. AT&T's Petition Argues That Sprint PCS's Attempt To Charge For Access Constitutes An Unjust And Unreasonable Practice.

AT&T's petition argues that any attempt by a CMRS carrier to charge for access is unjust and unreasonable under Section 201(a), 47 U.S.C. § 201(a), and, even if not, that Sprint PCS's particular rates are unjust and unreasonable in that they exceed the rates Sprint PCS charges the ILECs for terminating local calls. AT&T argued that it was unreasonable for Sprint PCS to seek to recover its call termination costs from AT&T, a captive IXC, rather than its own end users. In particular, AT&T argued that both industry practice, as well as sound regulatory policy considerations, compel the conclusion that it is unjust and unreasonable for CMRS carriers to depart from the prevailing bill and keep system by imposing access charges on IXCs.

As explained more fully in AT&T's comments (at 5-7), resolution of Sprint PCS's affirmative case in the district court, as well as AT&T's defense to that case and AT&T's Section 201 counterclaim, depend on the reasonableness of Sprint PCS's rates. *Sprint Spectrum*

L.P. v. AT&T Corp., — F. Supp. 2d —, —, 2001 WL 1231711, *6 (W.D. Mo. July 24, 2001) (attached to AT&T Pet. as Exh. A) (“*Referral Order*”) (“[T]he Court fails to see how Sprint may ultimately obtain relief in this matter without a determination as to the reasonableness of the rates for Sprint’s services that AT&T has utilized.”). Thus, if Sprint PCS’s unilateral attempt to force IXCs to pay it for access was unjust and unreasonable, as AT&T and other commenters have argued in this proceeding, Sprint PCS cannot recover the amounts that it billed AT&T. The fact that the Commission had not stated in explicit terms that CMRS carriers were barred from charging IXCs for access is irrelevant: it is well-settled both that the Commission may declare that a rate *previously charged* was unlawful and unreasonable and that such a ruling precludes the carrier from enforcing the unreasonable rate against its customer, even for past service. *See, e.g., In the Matters of AT&T Corp. & Sprint Corp. v. Business Telecom, Inc.*, Mem. Op. & Order, 16 FCC Rcd. 12312, ¶ 12 (2001) (stating that Commission has authority to rule on the reasonableness of rates already charged) (“*BTI Order*”).⁵

B. The Commission’s Prior Decisions Do Not Resolve The Issue In Dispute.

Astonishingly, some CMRS carriers, *see, e.g.*, Salmon PCS at 5; Verizon Wireless at 3-4, suggest that the fact that the Commission has forborne from regulating CMRS rates, *e.g.*, by detariffing CMRS carriers, somehow means that CMRS carriers are utterly free to bill whomever they wish. Even where the Commission forebears from regulating rates, it has made clear that it remains available, as it must, to ensure that carriers do not violate Section 201(a) by engaging in

⁵ That the *BTI Order* was issued in a formal complaint proceeding is of no moment. As the Commission has made clear, the decision as to whether to utilize formal complaint procedures or informal declaratory ruling procedures is within its discretion. *See In the Matter of County of Los Angeles, et al*, Order, 16 FCC Rcd. 2227, ¶ 3 (2001); *In the Matter of Nova Cellular West, Inc. v. Airtouch Cellular*, Order, 15 FCC Rcd. 14973, ¶ 3 (2000); *Fifth Access Charge Order* ¶ 187 (1999). Indeed, as discussed below, *see, infra*, at 19-20, the Commission has often issued declaratory rulings regarding past practices.

unjust and unreasonable practices or charging unjust and unreasonable rates. *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report & Order, 9 FCC Rcd 1411, ¶¶ 178, 186 (1994) (detariffing CMRS carriers but ruling that Sections 206 through 209 of the Act remain available to redress violation of Sections 201 or 202), *reconsideration granted on other grounds, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act*, Order on Reconsideration, 10 FCC Rcd. 1568 (1994). The Commission's previous decision to forebear from regulating CMRS rates thus does not free Sprint PCS to engage in whatever practices it decides to adopt on a given day or to charge whatever prices it deems advantageous to it – and cannot serve as a justification for Sprint PCS's unreasonable attempt to recover from captive IXCs costs that under industry practice and sound policy have been, and should be, recovered from the CMRS carriers' end users.⁶

Attempting to evade the fact that under uniform industry practice neither IXCs nor CMRS carriers could have reasonably expected that IXCs would be liable for access charges in the CMRS context, Sprint PCS and other CMRS carriers continue to cite the same set of inapposite Commission orders which AT&T distinguished in its comments – none of which concludes that IXCs have a legal obligation to pay CMRS carriers for access. As AT&T demonstrated in its comments (at 8-12 & n.6), none of the orders relied upon by Sprint PCS and the other CMRS carriers held that a CMRS carrier had the right to charge IXCs, rather than end users, for access. Indeed, as WorldCom points out, the Commission orders cited by Sprint PCS “were made prior to the *LEC/CMRS Interconnection NPRM*. The Commission was aware of all of them when it stated that it had never addressed whether IXCs should remit access charges to

⁶ Indeed, the Commission's decisions make clear that the Commission expected carriers in a detariffed environment to *negotiate* for payment, not to seek to *impose* a payment obligation through a lawsuit. *See, e.g., CLEC Access Charge Order* ¶¶ 3, 5.

CMRS providers with which they interconnect indirectly. Accordingly, the Commission necessarily viewed those earlier statements as addressing other matters.” WorldCom at 6.

In fact, many of these orders do not address access charges at all but, instead, address reciprocal compensation between LECs and CMRS carriers. For example, while Sprint PCS cites to the *Cellular Interconnection Reconsideration Order* for the proposition that it has a right to impose access charges from IXCs, that order addressed the question of mutual (or reciprocal) compensation between LECs and CMRS carriers. *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, Mem. Op. & Order on Reconsideration, 4 FCC Rcd. 2369, ¶ 27 (1989). In that order, the Commission was making clear that LECs could not demand that CMRS carriers pay them for interconnection while refusing to pay CMRS carriers’ interconnection costs. *Id.*⁷ Second, as the Commission noted in the *Cellular Interconnection Reconsideration Order*, the BOCs sought to treat CMRS carriers as customers or end users, rather than as “co-carriers.” *Id.* ¶ 28. In making clear that that one-way relationship was inappropriate, the Commission was not required to decide (and did not decide) whether CMRS carriers could charge for access (and did not so). Additionally, the Commission left the door open to the possibility of bill and keep in the very order from which Sprint PCS repeatedly quotes. *Id.* ¶¶ 21, 29 (describing proposed BellSouth bill and keep structure and stating that the Commission was “prepared to consider the unique circumstances of a carrier's operations,”

⁷ Interestingly, that asymmetrical and unequal result is precisely the result that Sprint PCS seeks here. *See, infra*, at 32.

including the compensation structure suggested by BellSouth). *See also* AT&T Comments at 8-12 (explaining why none of the orders cited by Sprint PCS are apposite).⁸

C. Sprint PCS’s Claim That The Commission May Only Rule On A Prospective Basis In This Case Is Groundless.

Sprint PCS alternatively argues that the Commission’s ruling in this proceeding may only be prospective. Sprint PCS appears to assume that a declaratory ruling proceeding constitutes a rulemaking, rather than an adjudication, under the Administrative Procedure Act (“APA”). Because an agency’s rules may generally have only prospective effect, *See* Sprint PCS Comments at 5 n.19 (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)), Sprint PCS claims that a holding “that Sprint PCS is precluded from recovering from AT&T access charges during a period of time that Sprint PCS’s rates were not regulated would constitute unlawful retroactive rulemaking.” *Id.* at 5. Sprint PCS’s argument is frivolous.

Contrary to Sprint PCS’s mistaken belief, both the APA and the Commission’s rules make clear that a declaratory ruling is an adjudication rather than a rulemaking. Section 554(e)

⁸ As AT&T made clear in its initial comments (at 19 n.11), *In the Matter of Total Telecommunications Services v. AT&T Corp.*, Mem. Op. & Order, 16 FCC Rcd. 5726 (2001), is completely inapt. At its core, *Total Telecommunications* stands for the proposition that, even where a carrier engages in a sham transaction in order to try to get higher rates than it is otherwise entitled to receive, the lawful rates that would have prevailed *absent the illegality* will continue to apply. In other words, the IXC’s legal obligation is determined without reference to the illegality. In *Total*, the Commission concluded “that a reasonable access charge is the fee that Atlas would have charged AT&T for terminating traffic directly . . . had Total [the sham entity] never existed” and “granted AT&T’s request for relief as against Complainants such that Total may not charge AT&T access fees in any amount exceeding the amount that Atlas would have charged AT&T for the same services.” *Id.* ¶ 38. Additionally, the Commission required Atlas to repay AT&T for tandem switched transport that AT&T received where, “[b]ut for its unlawful relationship to Total, Atlas would not have charged AT&T anything at all for tandem switched transport to Total.” *Id.* ¶ 40. By contrast, AT&T’s position here is that Sprint’s unreasonable practice was the billing itself; if one considers the situation absent that practice, the prevailing “rate” is zero. Thus, while AT&T has challenged the ruling that it owes anything to Total or to Atlas, the reasoning of *Total Telecommunications* does not change the fact that Sprint

of the APA, the section of the APA dealing with adjudication, is the section of the APA that authorizes an “agency, with like effect as in the case of other orders, and in its sound discretion” to “issue a declaratory order to terminate a controversy or remove uncertainty.” Similarly, the Commission’s regulation authorizing the filing of petitions for declaratory ruling explicitly cites Section 554 as authority for the regulation – not Section 553, the APA’s rulemaking provision. *See* 47 C.F.R. § 1.2.

As the D.C. Circuit has stated, “[i]n adjudication, retroactivity is the norm.” *Motion Picture Assoc. of Amer., Inc. v. Oman*, 969 F.2d 1154, 1155 (D.C. Cir. 1992) (addressing administrative proceeding). Indeed, it is well settled that an agency adjudication that announces “new applications of law, clarifications, and additions” may properly be retroactive in effect. *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1553-54 (D.C. Cir. 1993).⁹ Accordingly, Sprint PCS’s claim that this declaratory ruling proceeding may be used *solely* to establish a prospective rule is baseless.

PCS must prove – and cannot prove – that it had a right to charge for access and that AT&T was legally obligated to pay those charges.

⁹ This situation presents an even stronger claim for retroactivity than that of *Verizon Telephone Cos. v. FCC*, in which the D.C. Circuit concluded that the Commission properly gave retroactive effect to a new rule that was *directly contrary* to a previously-stated rule made in the same proceedings:

Because the object of the LECs’ reliance was neither settled (but rather was perpetually enmeshed in litigation) nor ‘well-established,’ we are skeptical that retroactive liability would actually impose a manifest injustice. In light of the ongoing legal challenges . . . , whatever reliance the LECs placed on those rulings was something short of reasonable for purposes of the retroactivity analysis.

269 F.3d 1098, 1111 (D.C. Cir. 2001) (giving retroactive effect to Commission ruling that LECs’ *past* practice of charging fees on certain payphone providers was unreasonable under Section 201(b)). Here, Sprint PCS asserts that it relied on a *tentative* conclusion never adopted by the Commission in the face of both a well-established practice of bill and keep and AT&T’s (and other IXCs’) consistent challenge to Sprint PCS’s right to charge for access – making “whatever reliance” made by Sprint PCS “something short of reasonable.”

In fact, “[t]he Commission has frequently issued declaratory rulings to resolve disputes with respect to the lawfulness of *actual or proposed* carrier actions.” *In the Matter of AT&T Petition to Rectify Terms & Conditions of 1985 Annual Access Tariffs*, Declaratory Ruling, 3 FCC Rcd. 5071, ¶ 7 (1988) (“*Access Tariffs Declaratory Ruling*”). Thus, in a proceeding to which Sprint’s long distance affiliate was a party, the Commission recently determined in a declaratory ruling proceeding the *past* rights of IXCs to refuse access service, despite the fact that the Commission deemed *future* actions regarding CLEC access charges to be covered by the *CLEC Access Charge Order*:

In this declaratory ruling, we respond to a primary jurisdiction referral from the U.S. District Court for the Eastern District of Virginia in an action styled *Advantel LLC v. AT&T Corp.* In its January 5, 2001 referral orders, the district court asked the Commission to determine (1) whether any statutory or regulatory constraints prevent an IXC from refusing access service, and (2) if not, what steps an IXC must take to effectuate such a refusal. The generally applicable rules that we promulgated in our recent *CLEC Access Reform Order* provide the answers to these questions as they may arise in the future. However, because the same questions exist in connection with the parties’ *past* dealings, we discuss below the *requirements of the Communications Act as it applied in the past* to the carriers currently before the district court. We stress, however that the principles set forth in this declaratory ruling are *exclusively retroactive in application*: the parties’ future dealings are subject to the recent rulemaking order.

In the Matter of AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues, Declaratory Ruling, FCC 01-313, 2001 WL 1262603, ¶ 1 (Oct. 22, 2001) (emphasis added) (“*CLEC Access Charge Declaratory Ruling*”). That case, like this one, involved a collection action against an IXC for access charges, in which the district court referred questions to the Commission for decision under the primary jurisdiction doctrine. The Commission initiated a declaratory ruling proceeding to address the court’s referral and issued a declaratory ruling regarding the rights of IXCs to decline to order a CLEC’s services during the past periods covered by the court complaint.

In this regard, Sprint PCS's complaint that AT&T's petition relies heavily on "policy arguments" is bizarre. Sprint PCS Comments at 4; *see also* CTIA at 4. Whether a particular practice or rate is "unjust" or "unreasonable" – and thus whether it violates § 201(b) of the Act – is *primarily* a question of policy. *See, e.g., Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995) ("[A]gency ratemaking is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise.'" (quoting *United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983))). That is precisely why district courts routinely refer such issues to the Commission for resolution. *See Hi-tech Furnace Sys. v. FCC*, 224 F.3d 781, 784 (D.C. Cir. 2000) (affirming Commission ruling referred under primary jurisdiction after "the district court concluded that Hi-Tech's complaint required a determination of the reasonableness of Sprint's revised tariff"); *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 631 (6th Cir. 1987) ("The district court was clearly correct in concluding that the claims based on section 20(b) of the Communications Act are within the primary jurisdiction of the FCC. Section 201(b) speaks in terms of reasonableness, and the very charge of Count I is that the defendants engaged in unreasonable practices. This is a determination that 'Congress has placed squarely in the hands of the [FCC].'" (alteration in original). *Cf. Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (acknowledging that "a claim . . . that the phone companies charge unreasonably high rates and also engage in rate discrimination . . . [is] squarely within the FCC's jurisdiction" but concluding that the plaintiffs had forfeited their Communication Act claims).

Finally, Sprint PCS's claim that AT&T has changed its position during these proceedings is nonsense. AT&T has consistently argued *both* that it is an unjust and unreasonable practice for Sprint PCS to charge IXCs for call termination *and* that the law in this area was sufficiently

unclear and policy-laden that the Commission was the appropriate body to rule on the questions raised by Sprint PCS's actions. In its briefs before the district court, AT&T made clear that the Commission had issued a tentative ruling regarding CMRS-IXC access charges, but that the Commission had not yet ruled on whether CMRS carriers could charge IXCs for access. *See Suggestions In Support Of Motion Of AT&T Corp. For Referral Of Issues To The FCC Under the Doctrine Of Primary Jurisdiction And For Dismissal Or A Stay Of Proceedings Pending The Referral, Sprint Spectrum, L.P. v. AT&T Corp.*, Civil Action No. 00-00973-CV-W-5, at 6-7 (W.D. Mo. April 2, 2001). Contrary to Sprint PCS's spurious allegations, AT&T made clear to the court that the ultimate conclusion of whether CMRS access charges are appropriate depended critically upon policy decisions uniquely appropriate for the Commission:

The question whether to impose access charges on long distance providers is a question of telecommunications policy that is best resolved in the first instance by the FCC. . . . In Sprint PCS's view, it provides a service to AT&T by terminating calls delivered by AT&T and AT&T should thus compensate Sprint PCS for this "service." An alternative, equally plausible view is that AT&T and Sprint PCS equally benefit from their mutual interconnection, and each should recover its costs directly from its own end user customers. Clearly, which of these views constitutes better telecommunications policy is a matter Congress vested within the discretion of the FCC.

Id. at 11. Thus, AT&T has consistently argued that Sprint PCS's charges are contrary to both long-standing industry practice and Commission policy and, therefore, constitute an unjust and unreasonable practice.¹⁰

¹⁰ Finally, in the event that the Commission rules that Sprint PCS may recover access charges from AT&T and that its rates are not capped at the rate it charges the ILECs for terminating local exchange traffic, the Commission would then need to proceed to address in a formal complaint proceeding whether Sprint PCS's particular rates are unreasonably high and whether Sprint PCS has violated Section 254(k). *See, infra*, at 32-42.

IV. THE COMMENTS CONFIRM THAT THE INDUSTRY PRACTICE FOR YEARS HAS BEEN BILL AND KEEP.

The comments reveal at least one significant area of agreement between the parties. For the first fifteen years in which CMRS carriers provided service, no CMRS carrier charged IXCs for access. Indeed, even since 1998, when Sprint PCS first unilaterally demanded access charges from IXCs, the vast majority of wireless carriers have not billed for access. Sprint PCS Comments at 2; CMS at 5; Cingular at 4; CTIA at 6; Leaco at 5; Nextel at 2-3; Qwest at 12; RCA at 1; Verizon Wireless at 6-7; WorldCom at 9. As WorldCom notes (at 9), from the universe of “hundreds of CMRS providers,” it has only received access charge bills from *three*. Various carriers offer explanations for why this *de facto* bill and keep regime arose in the CMRS market, but the reasons are ultimately irrelevant. This uniform and longstanding industry practice establishes that AT&T did not act unreasonably when it refused to pay Sprint PCS’s access invoices. AT&T Comments at 18-19.

Sprint PCS’s (and a few other carriers’) unsupported assertion that IXCs used their alleged market power to force CMRS carriers to adopt bill and keep by refusing to pay for access when CMRS service began is baseless. It is undisputed that *no* CMRS carrier even attempted to bill *any* IXC for access until 1998 – 15 years after CMRS carriers began providing service – and IXCs could hardly have refused to pay bills that were never issued. In fact, Sprint PCS’s sole support for its claim that IXCs historically refused to pay access charges addresses solely *LEC* refusals to pay *reciprocal compensation* (as it must, given that the statement was made in 1996). *Local Competition Order* ¶ 1094 (cited in Sprint PCS Comments at 2 n.6).¹¹

¹¹ WorldCom also puts to rest Sprint PCS’s unsupported and incorrect assertion that AT&T somehow “caused” WorldCom to cease paying Sprint PCS for access. As WorldCom makes clear (at 9), while it may have inadvertently paid a small number of bills, it has consistently, from 1999, when it first was billed, to date, maintained, independently of AT&T, that it has no

A number of other CMRS carriers claim that they did not bill IXCs for access because they allegedly lacked the capability to bill for access and did not terminate sufficient interexchange traffic to make it worthwhile to invest the time and money to acquire the means to bill for access, and suggest that the fact that they did not bill IXCs did not reflect any understanding regarding compensation. For example, Verizon Wireless claims that the reason why CMRS providers have not billed for access is “that CMRS providers have had to resolve a variety of technical and administrative issues to be able to bill IXCs,” including lack of “experience with the Carrier Access Billing System (‘CABS’) necessary to bill for access.” Verizon Wireless at 6-7.¹² This claim is highly implausible, to say the least. Verizon Wireless is a large and sophisticated carrier that terminates millions of interexchange minutes, and thus had millions of dollars to gain by billing for access. Given these incentives, it simply strains credulity that it took Verizon Wireless three years longer than Sprint PCS to resolve “technical” and “administrative issues” related to billing for access. It is far more plausible that Verizon Wireless’s delay in billing for access resulted from the fact that until the legal dispute between

legal obligation to pay Sprint PCS for access. Thus, no major IXC unaffiliated with Sprint PCS pays Sprint PCS for access.

¹² See also Cingular at 4 (stating that CMRS carriers have not billed for access because “CMRS carriers have not always been able to identify calls from individual IXCs, and thus bill them for terminating access”); Nextel at 3 (stating that CMRS carriers have only recently gotten the incentive to bill because the increased willingness of consumers to use their wireless phones and to receive incoming calls “have presented CMRS carriers with reasons they may not have had before to pursue the collection of access charges from IXCs to reflect the usage of wireless networks by interexchange customers”); Salmon PCS at 7-8 (stating that CMRS carriers “chose to forgo access payments for a time because CMRS carriers did not have the level of traffic to justify placing the mechanisms in place to effectively measure and bill interexchange access traffic”).

Sprint PCS and AT&T became public, it had not occurred to Verizon Wireless that it might have the right to obtain lucrative access payments from IXCs.¹³

Given the industry practice of not charging for access, it is difficult to see how Sprint PCS could have reasonably expected payment for access and, therefore, how any contract for AT&T to pay for access could be implied. *See, e.g., Southwestern Bell Tel. Co. v. United Video Cablevision of St. Louis, Inc.*, 737 S.W.2d 474, 476 (Mo. Ct. App. 1987) (rejecting *quantum meruit* claim because “[t]he facts in the instant case, as found by the trial court, indicate neither an expectation of payment nor an awareness of such expectation. . . . It was known throughout the industry that no charge was ever made for services rendered through the ENterprise 9800 system, the cost thereof being absorbed by Bell as a business expense. The cost here sought to be recovered from United Video has similarly been written off as a business expense. . . . No request for such payment was made of United Video for eight months after the commencement of the work. Indeed, the installation of underground cable was eighty to eighty-five percent completed before the first bill was received. None of the other utilities performing the same locate and mark services as required by the statute demanded such payment.”). While this is an issue that the district court will have to address, the evidence of the industry’s practice demonstrates that AT&T did not engage in an “unreasonable practice” when it refused to pay Sprint PCS’s access bills.

Finally, the fact that the vast majority of wireless carriers do not bill for access, even today, strongly suggests that an award of access charges to Sprint PCS would indeed result in a double recovery. It is undisputed that most wireless carriers, including such large carriers as Cingular and Voicestream, have never charged for access but, instead, have recovered their

¹³ Unlike the IXC access context, CMRS carriers have sought throughout their history to

termination costs from their end users. These carriers' end user charges must therefore be sufficient to cover the carriers' costs of terminating interexchange calls. The fact that Sprint PCS's rates are in fact quite comparable to those of Voicestream and Cingular, who do not charge for access,¹⁴ strongly suggests that Sprint PCS's end user rates already fully compensate it for its call termination costs and that it is only trying to bolster its profits through the windfall it would receive from billing IXCs for access.

V. SPRINT PCS'S COMMENTS EFFECTIVELY CONCEDE THAT A CMRS CARRIER'S ACCESS CHARGES SHOULD BE NO HIGHER THAN THE RATES IMPOSED BY THE CMRS CARRIER ON THE PREDOMINANT ILEC IN THE STATE TO TERMINATE THE ILEC'S LOCAL TRAFFIC.

In its petition for declaratory ruling (at 26), AT&T demonstrated that, if the Commission were to rule that CMRS providers are entitled to impose access charges on IXCs, the Commission should "make clear that CMRS carriers cannot charge IXCs more for access than they charge the predominant ILEC in the state for terminating local exchange traffic." In support of this position, AT&T explained that "the Commission's rules [] require the state commissions to establish the reciprocal compensation rates for the transport and termination of local exchange traffic using a TELRIC methodology," *id.*, and pointed out that the Commission has previously found that "'transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions,'" *id.* (citing *Local Competition Order* ¶ 1033). Accordingly, requiring wireless carriers to charge no more than the reciprocal compensation rate established by a given state commission would ensure that wireless carriers would recover their

receive reciprocal compensation from LECs.

¹⁴ A comparison can be made by reviewing the rate plans found at each of these carriers' web sites: www.sprintpcs.com; www.voicestream.com; and www.cingular.com.

costs of providing access, while preventing such carriers from extracting “supra-normal” profits from captive IXCs. None of the commenters provides any basis for rejecting AT&T’s proposal.

Remarkably, a few wireless carriers¹⁵ (although, notably, not Sprint PCS) argue that the Commission should permit them to charge *more* than a TELRIC-based access rate – even though the TELRIC methodology itself provides for a profit. *See Local Competition Order* ¶¶ 685, 699 (explaining that TELRIC provides a “normal” profit); AT&T Pet. at 24-26 & n.13 (same). Not surprisingly, not one of those carriers offers a principled reason why CMRS carriers should be permitted to extract supra-normal profits from captive IXC customers – for none exists. CMRS carriers are in a competitive market, and TELRIC-based prices best replicate the prices that would prevail in a competitive market.

Rather than offer a principled argument to support their claim that they should be permitted to extract supra-normal profits from captive IXCs, these CMRS providers can do no more than point out that the Commission’s rules permit wireline ILECs to charge more for exchange access than for transport and termination of local traffic. These carriers ignore, however, that the Commission permitted LECs to charge above-cost prices for access for the admitted purpose of maintaining subsidy flows to wireline local exchange service providers that were deemed necessary in order to keep local exchange rates (which are often capped by regulation) artificially low, and on which wireline local exchange carriers had come to depend. *In the Matter of Access Charge Reform*, Sixth Report & Order, 15 FCC Rcd. 12962, ¶¶ 21-23 (2000), *aff’d in part, rev’d in part on other grounds*, *Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (2001). By contrast, there is absolutely no possible justification for requiring IXCs to subsidize CMRS end user rates, especially when those rates are unregulated and subject

¹⁵ Salmon PCS at 18-20; Verizon Wireless at 12-13.

to vigorous competition and where there has been no historical dependence of CMRS carriers on such subsidies.¹⁶

By contrast to these other CMRS providers, “Sprint PCS agrees with AT&T that as a general rule, CMRS call termination prices should be based on the TELRIC cost methodology.” Sprint PCS Comments at 10 (agreeing with AT&T that TELRIC “best replicates the prices that would be charged by carriers subject to competitive market pressures and best ensures an efficient utilization of the service in question”). Sprint PCS “also agrees with AT&T that if a CMRS provider proves ‘in a TELRIC rate case against the incumbent LEC’ that it is entitled to a higher rate for reciprocal compensation, the CMRS carrier should be able to use the same cost-based rate for its access charges.” *Id.* (quoting AT&T Pet. at 27). As Sprint PCS puts it, the dispute between the parties in the event the Commission were to rule that CMRS carriers are permitted to charge IXCs for access is over the “surrogate” rate that CMRS carriers may charge where they have chosen not to submit a cost study to the state commission.

Contrary to Sprint PCS’s claims, where a CMRS carrier has failed to prove to the state commission that its termination costs exceed those of the ILEC, the CMRS carrier’s access rates should be limited to the rate it is permitted to charge the ILEC for termination of local traffic. When a CMRS carrier has submitted a cost study to a state commission in an effort to prove that its termination costs exceed those of the ILEC and that cost study has been rejected by the state

¹⁶ Verizon Wireless claims that the TELRIC based reciprocal compensation rates are inappropriate for access because the transport and termination rates reflect the costs of the network elements that are used for the interconnection, whereas access is a service. Verizon Wireless at 13. This argument is incomprehensible. To the extent there is a difference between the costs of providing a “service” and the costs of providing “facilities,” those costs would presumably be limited to the costs of performing billing and associated functions, costs incurred by provider of local transport and termination as well. In any event, transport and termination of local exchange traffic is just as much a service as access, because in both instances it is the provider’s responsibility to deploy and provide sufficient network facilities to complete the call.

commission, it should be obvious that the CMRS carrier should not be permitted nevertheless to impose on IXCs rates that the state commission applying TELRIC prohibited the CMRS carrier from charging the ILEC. Indeed, Sprint PCS does not appear to contest this point. *See* Sprint PCS Comments at 10 (seeking permission to charge “surrogate” rate only where “no TELRIC cost study is available”).

The same result should apply where the CMRS carrier has chosen – for whatever reason – not to submit a TELRIC cost study to the state commission.¹⁷ As the Commission reiterated to Sprint PCS in its May 9, 2001 letter on this subject, the Commission’s rules since 1996 have afforded local carriers, including CMRS carriers, the opportunity to charge an ILEC more to terminate calls from the ILEC than the ILEC would be permitted to charge the CMRS carrier, so long as the carrier proves to the satisfaction of the state commission on the basis of a TELRIC cost study that the CMRS carrier’s costs of termination exceed those of the ILEC. *Letter Re: Cost-Based Terminating Compensation For CMRS Providers*, Letter to Charles McKee, 16 FCC Rcd. 9597, 9598-99 (2001). Furthermore, as many of the CMRS carriers in this proceeding admit, the number of local calls they terminate far exceeds the number of interexchange calls that they terminate.¹⁸ *See, e.g.*, Salmon PCS at 7-8. Thus, if in fact a CMRS carrier incurs materially higher termination costs than does the ILEC, the Commission’s rules give the CMRS

¹⁷ Sprint PCS’s reference to situations where “no TELRIC cost study is available” is simply a euphemism. The only reason such a study would not be “available” is because the CMRS carrier chose not to create one.

¹⁸ Indeed, for USF purposes the Commission’s rules assume as a safe haven that only 15% of a CMRS carrier’s traffic is interstate. *See In the Matter of Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9892, ¶¶ 11, 24 (2001); *In the Matter of Federal-State Joint Board on Universal Service*, Mem. Op. & Order, 13 FCC Rcd. 21252, ¶ 13 (1998).

provider a strong incentive to submit a cost study to the state commission proving the CMRS carrier's entitlement to an asymmetrical compensation rate.¹⁹

The Commission's rules thus ensure that the rate charged by a CMRS provider to terminate the ILEC's local calls is an excellent surrogate for the CMRS carrier's costs of call termination. If a CMRS carrier has chosen not to seek a higher rate from the state commission, it must be because the CMRS carrier has determined that the fairly limited costs of submitting such a study exceed the additional revenue the CMRS carrier could expect to recover, either because the CMRS carrier knows that it cannot prove that its costs exceed those of the ILEC, or because the CMRS carrier believes that the cost differential is minimal. In either case, the fact that Sprint PCS is content to charge the ILEC-based reciprocal compensation rates for terminating local traffic makes it unreasonable for Sprint PCS to seek to charge IXCs a higher rate for terminating the far smaller amount of interexchange traffic that traverses its network.²⁰

In stark contrast to the state-approved reciprocal compensation rate for CMRS carriers, there is absolutely no record evidence of any kind to justify the reasonableness of the "surrogate" proposed by Sprint PCS: "the access charge rate set forth in the NECA tariffs for Tier I incumbent LECs," which Sprint PCS says is currently 2.8 cents. Sprint PCS Comments at 9 n.34.²¹ Although Sprint PCS asserts that 2.8 cents is "less than Sprint PCS's call termination costs," *id.* at 9-10, Sprint PCS does not produce one iota of evidence to support that claim.

¹⁹ This is particularly true if, as Sprint PCS claims, its termination costs are 14 to 44 times higher than the ILEC's. *See, infra*, at 30.

²⁰ Requiring CMRS carriers such as Sprint PCS to actually prove that their termination costs are higher than the ILEC's as a precondition to charging more than the ILEC rate is entirely fair to the CMRS carriers. This is the same rule that applies when Sprint PCS seeks to charge more than the ILEC rate for terminating local calls, and is the same hurdle AT&T itself must overcome as a CLEC where its termination costs are higher than the ILEC's.

Notably, while Sprint PCS states that “it has completed” cost studies for New York and Florida that produced rates higher than 2.8 cents, those cost studies have not been accepted as valid by any independent adjudicator, and Sprint PCS does not attach those studies to its comments.²²

Indeed, there is good reason to be suspicious of the reliability of those studies. Sprint PCS claims that those supposedly TELRIC based studies yielded call termination costs in New York of \$0.039 a minute (3.9 cents a minute), and in Florida of \$0.066 a minute (6.6 cents). By contrast, Bell Atlantic’s reciprocal compensation rate in New York averages to \$0.0028 a minute (.28 cents a minute) and BellSouth’s rate in Florida is \$0.0015 a minute (.15 cents a minute). Whatever one might think about the plausibility of Sprint PCS’s claim – which it has never backed up with evidence – that its call termination costs are higher than those of a wireline carrier, it is highly unlikely, to say the least, that its call termination costs are 14 to 44 times those of the ILEC, which explains why no state commission has ever accepted those figures.²³

VI. IT WOULD BE GROSSLY UNFAIR TO IMPOSE A RETROACTIVE PAYMENT OBLIGATION ON IXCS.

In its petition for declaratory ruling (at 28), AT&T demonstrated that “if the Commission decides to shift from a bill and keep approach to one in which CMRS carriers are permitted to assess charges on IXCs, fundamental fairness dictates that the Commission make clear that such charges may be assessed only prospectively.” Far from undermining that conclusion, the comments vividly confirm that it would be grossly unfair to require IXCs such as AT&T to pay

²¹ For intrastate access Sprint PCS uses the generally even higher RBOC intrastate access rates as a surrogate.

²² Even if its costs were higher, Sprint PCS has given no indication of how much of those costs it is already recovering from its end users in airtime charges.

²³ For example, Sprint PCS’s end user rates are not 14 to 44 times the price of a corresponding wireline equivalent.

such charges retroactively for the period prior to the issuance of the Commission's declaratory ruling in this case.

To begin with, as discussed above, the comments confirm AT&T's assertion in its petition that the uniform industry practice prior to the time that Sprint PCS began demanding payment from AT&T was one of bill and keep. Thus, for the first 15 years in which wireless services were offered, no wireless carrier sought to recover its costs from captive IXCs, rather than its end users. Indeed, until recently Sprint PCS was the only CMRS provider billing for access, and even today, only three wireless carriers out of hundreds do so. *See, supra*, at ___.

In addition, throughout the period of this dispute, the Commission's Orders conspicuously stopped short of permitting CMRS providers to assess access charges on IXCs. AT&T Comments at 10-12. Indeed, just a few months ago the Commission sought comment on the question "whether CMRS carriers are entitled to receive access charges, or some additional compensation, for interexchange traffic terminating on their networks." *Intercarrier Compensation NPRM* ¶ 94. The Commission thus not only has continued to view the legal question at issue as unresolved, but in issuing two separate NPRMs addressing this question (one in 1996, the other in 2001) the Commission has indicated that it believes that, in the absence of a rule, CMRS carriers would not be entitled to such charges.

In light of the uniform and longstanding practice that prevailed in the industry, as well as the Commission's conspicuous failure to issue a rule requiring compensation, AT&T and other IXCs set their rates based on the reasonable expectation that they were not obligated to pay access to CMRS providers. Because an IXC has no way of retroactively increasing its rates to its end users, any ruling holding that AT&T or other IXCs have a duty to pay access to Sprint PCS for periods prior to the issuance of a declaratory ruling would be patently unfair and arbitrary.

The gross unfairness of any retroactive liability holding is particularly great given the fact – which Sprint PCS does not dispute – that during the entire period in which AT&T Wireless was a part of the AT&T corporate family (which is the vast majority of the period covered by this dispute), and apparently continuing today, AT&T Wireless never billed Sprint Corp. for access. Similarly, the vast majority of other wireless carriers never billed Sprint Corp. for terminating calls terminated by those CMRS providers. Sprint is thus seeking here a wholly one-sided and arbitrary windfall: the Sprint corporate family would recover from AT&T tens of millions of dollars for terminating long distance calls destined to Sprint PCS customers, whereas the AT&T corporate family would receive nothing for providing the same precise benefit to Sprint Corp.²⁴ A more unfair result can hardly be imagined.²⁵

VII. AT&T HAS NOT WAIVED ITS RIGHT TO CHALLENGE THE SPECIFIC LEVEL OF SPRINT PCS'S ACCESS RATES IN AN APPROPRIATE PROCEEDING.

Finally, Sprint PCS suggests that, in the event that the Commission were to rule that Sprint PCS has a right to charge IXCs for access, AT&T has somehow waived its right to challenge the specific level of Sprint PCS's rates, even though Sprint PCS acknowledges that AT&T specifically pled an "unreasonable rate" claim under Section 201(b) in the district court. Sprint PCS Comments at 8. According to Sprint PCS, "the complainant [here AT&T] bears the burden of establishing that the challenged rate is unreasonable," yet AT&T allegedly "makes no

²⁴ Although AT&T presumably has a larger share of the interexchange market than Sprint, that fact is irrelevant. One must assume that the same percentage of each carriers' calls terminate on wireless networks. Thus, measured as a per-line or per-customer cost – the only relevant measure in a competitive market – both carriers received the same benefit from the other's wireless affiliate, yet only Sprint will receive compensation if the rules are changed retroactively.

²⁵ Even if the Commission could order Sprint Corp. to pay AT&T Wireless for access services provided since, AT&T Corp., which is now a separate corporation, would receive none of the payments.

attempt whatsoever in its petition to demonstrate that the access charges that Sprint PCS has been assessing are unreasonable.” *Id.* at 9. Sprint PCS thus asks the Commission “to dismiss this AT&T claim for failure to meet its burden of proof.” *Id.* at 9.

Sprint PCS’s claim that AT&T has waived its right to challenge the specific level of Sprint PCS’s rates in the event that its petition is denied is baseless. First, Sprint PCS is simply incorrect when it states that the burden is on AT&T to prove that Sprint PCS’s rates are unreasonable. As the district court correctly concluded, Sprint PCS, as the entity seeking to recover payment from AT&T, has the burden of proving that its nontariffed rates are reasonable. Second, as Sprint PCS well knows, the parties mutually agreed, under the auspices of the Enforcement Bureau, to bifurcate AT&T’s potential separate challenge to the specific level of Sprint PCS’s rates from the industry-wide consideration of the preliminary legal issues raised in AT&T’s petition, and AT&T proposed this bifurcation in order to avoid significant and potentially wasteful expenditures of resources by both Sprint PCS and the Commission. That Sprint PCS would now claim that by following a procedural format adopted by the Commission for the sensible resolution of this dispute AT&T has somehow waived its claim that Sprint PCS’s particular rates are unreasonable is both startling and unconscionable.

A. As The Party Seeking To Impose A Non-Tariff Payment Obligation On AT&T, Sprint PCS Has The Burden Of Proving That Its Rates Are Reasonable.

This proceeding has its genesis in a district court lawsuit brought by Sprint PCS against AT&T for collection of amounts invoiced by Sprint PCS for terminating interexchange calls originated by AT&T. Sprint PCS’s invoices are nothing more than Sprint PCS’s demands for payment, and the rates reflected on those invoices are nothing more than rates that Sprint PCS unilaterally set. Those rates were not the product of any agreement with AT&T, nor were they

established by any regulator. In these circumstances, it is well settled – as both the District Court recognized and as Sprint PCS understood when it drafted its complaint – that Sprint PCS, as the entity seeking to impose a legal obligation on AT&T to pay Sprint PCS’s demanded payments, has the obligation to prove that the rates it is seeking are reasonable.

Sprint PCS’s reliance on Commission decisions arising in the context of *tariffed* rates are simply inapposite. Sprint PCS Comments at 9. As the Commission is well aware, rates in a validly filed and effective tariff enjoy a legal presumption of reasonableness. *See, e.g., CLEC Access Charge Declaratory Ruling*, ¶ 16 (Oct. 22, 2001); *BTI Order* ¶ 9; *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecomms. Act. of 1996*, Report & Order, 12 FCC Rcd. 2170, ¶ 19 (1997). Accordingly, when a carrier sues to collect on a tariff, the carrier is not required to prove the reasonableness of its rates as part of its affirmative case, nor is the unreasonableness of the rate a defense. *See, e.g., Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 491 (2nd Cir. 1998) (affirming grant of summary judgment to AT&T “because the filed rate doctrine requires AT&T to charge rates and collect payments in accordance with the applicable filed tariff”). Instead, a claim that a tariffed rate is unreasonable is a counterclaim as to which the defendant-counterclaimant has the burden of proof.

By contrast, rates that are not contained in a tariff and that have never been agreed to as a matter of contract enjoy no legal presumption of reasonableness, and the party seeking collection of those rates thus must prove that the rates are reasonable. Indeed, no party in a commercial setting is permitted to sue another to recover a price to which the other side never agreed, and then force the defendant to prove that the demanded payment would be unreasonably high. Thus, as AT&T established at great length in its comments, it is well-settled that each of the three state law claims brought by Sprint PCS below required Sprint PCS to prove, as an element

of its claim, that its rates are reasonable, which is presumably why Sprint PCS's complaint specifically alleged that fact. AT&T Comments at 5-6.

Sprint PCS's quotation of the District Court's statement that the reasonableness of Sprint PCS's rates "is clearly a fact that must be proven" is highly misleading. Sprint PCS Comments at 8. As made evident by the ellipsis in the middle of Sprint PCS's quotation, Sprint PCS's quotation is highly selective, omitting a number of sentences of the court's analysis. In fact, as a complete reading of the court's analysis demonstrates, the court recognized that the burden would be on *Sprint PCS* to prove that its rates are reasonable, and that in the absence of a determination that Sprint PCS's rates are in fact reasonable Sprint PCS would not be entitled to recover. The District Court's complete analysis was as follows:

As Sprint acknowledges, however, it is not asking the Court simply to enforce an existing written agreement. There is no tariff that has been filed which serves as the basis for Sprint's allegation that AT&T owes it upwards of \$11.8 million. Instead, Sprint seeks recovery based on a theory of quantum meruit and an implied contract. Given these facts, the Court would agree that it would perhaps be within its province to pass upon the question of whether such an implied contract exists, *but the Court fails to see how Sprint may ultimately obtain any relief in this matter without a determination as to the reasonableness of the rates for Sprint's services* that AT&T has utilized. In Sprint's own claim for "action on account" Sprint alleges that its rates are "reasonable." *This* is clearly a fact that must be proven and one which the FCC is in a better position than the Court to evaluate.

Referral Order, 2001 WL 123177 at *4 (emphasis added). The court's statement that "*this*" is a fact that must be proven was clearly a reference to Sprint PCS's own allegation in its complaint that its rates are reasonable – an allegation on which Sprint PCS would have the burden of proof. The court's holding that Sprint PCS could not obtain relief without a determination that its rates are reasonable also recognizes that the reasonableness of Sprint PCS's rates is an essential part of Sprint's affirmative case.

Indeed, even if Sprint PCS's rates had been set forth in a tariff, and even had AT&T brought a complaint under Section 208 of the Act challenging the reasonableness of the rates, it would still have been *Sprint PCS's* burden to produce the evidence to show that its rates are justified. Because a carrier is the sole possessor of the evidence relating to its costs of providing service, its revenues, and other relevant evidence, the Commission's rules make clear that once the complainant has set forth a *prima facie* case, the carrier, not the customer, has the burden of coming forward with evidence regarding the carrier's cost and other evidence of reasonableness. *See MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1415 (D.C. Cir. 1995) (concluding that it would be "absurd" to "require the complaining IXC to establish the rate that would have produced only a reasonable rate of return" because "[i]f the LEC, with its superior information, could not (or did not) accurately establish such a rate, then it seems obvious that the IXC could not (or should not be expected to) establish such a rate from the outside looking in"); *BTI Order* ¶ 46 ("Before addressing BTI's cost-based defense, we reject BTI's contention that, as the parties seeking relief in this proceeding, Complainants bear the burden of showing that BTI's costs did *not* justify its rates, rather than BTI bearing the burden of showing that its costs *did* justify its rates. Because BTI had exclusive possession of the information needed to assess its own costs, and BTI pled cost-justification as an affirmative defense, BTI bears the burden of proving the cost-basis of its access rates."); *In the Matter of General Plumbing Corp. v. New York Tel. Co.*, 11 FCC Rcd. 11799, ¶ 19 (1996) ("Since GPC has met its burden of establishing a *prima facie* case [under Section 201(b)], . . . the burden of persuasion shifts to NYT.").

Here, AT&T has easily set forth a *prima facie* case. AT&T argued, and *Sprint PCS admits*, that a CMRS carrier's access rates should not exceed its TELRIC-based costs of termination, and that those costs equal the CMRS carrier's costs of terminating local exchange

calls. AT&T Pet. at 24-27; Sprint PCS Comments at 10. Sprint PCS admits that its rates of 2.8 cents a minute for interstate traffic far exceed the only market indicia to which AT&T could have pointed: the ILECs' reciprocal compensation rates for transport and termination.²⁶ Indeed, Sprint PCS's access rates far exceed the rates it itself charges the ILECs for terminating local calls. Sprint PCS claims that its higher rates are justified by the allegedly higher costs of terminating calls on a wireless network, notwithstanding the fact that it has yet to convince a single state commission of this fact. Sprint PCS is the only entity with knowledge of its costs, and under the Commission's rules, if Sprint PCS wants to defend its rates on the basis of costs it is Sprint PCS's burden to produce evidence of those costs.

Thus, if anything, the absence of evidence in the record regarding Sprint PCS's costs would require the Commission to hold that Sprint PCS's rates are unlawful. In any event, AT&T did not waive its right to bring a claim that Sprint PCS's rates are unlawfully high in the event its petition for declaratory ruling is rejected.

B. Sprint PCS's Claim That AT&T Was Required To Challenge The Specific Level of Sprint PCS's Access Rates In This Declaratory Ruling Proceeding Is Both Frivolous And A Bad-Faith Violation Of The Procedure Agreed To By The Parties And Announced By The Enforcement Bureau.

The Commission's rules designate the Enforcement Bureau as the entity within the Commission "responsible for enforcement of the Communications Act and other communications statutes, Commission orders and Commission authorizations," by, *inter alia*, "[r]esolv[ing] complaints, including complaints filed under section 208 of the Communications Act, regarding acts or omissions of common carriers," "[p]roviding information regarding pending complaints, compliance with relevant requirements and the complaint process," and "coordinating enforcement matters including market and consumer enforcement matters, with

²⁶ Sprint PCS's rates also concededly exceed the RBOCs' interstate access rates.

other federal, state and local government agencies.” 47 C.F.R. §§ 0.111(a)(1), (17), (20). The Commission has thus instructed parties to a litigation that has been referred to the Commission to contact the Enforcement Bureau and obtain guidance from the Bureau as to the appropriate vehicle by which to present the referred issues to the Commission’s attention for resolution. *Primary Jurisdiction Referrals Involving Common Carriers*, Public Notice, 15 FCC Rcd. 22449, 22449 (2000) (“Generally, primary jurisdiction referrals in cases involving common carriers are appropriately filed as formal complaints with the Enforcement Bureau pursuant to section 208 of the Communications Act of 1934, as amended. There may be circumstances, however, in which this approach may not be appropriate. Accordingly, parties to a case in which a primary jurisdiction referral has been made are strongly encouraged to contact the Chief of the Market Disputes Resolution Division of the Enforcement Bureau for guidance before filing any pleadings or otherwise proceeding before the Commission in such referral.”).

Consistent with these instructions, soon after the District Court issued its *Referral Order* on July 24, 2001, AT&T submitted to the Enforcement Bureau a copy of the relevant portions of the district court record. Following that submission, the Enforcement Bureau invited AT&T and Sprint PCS to attend a status conference at the Commission’s offices on August 28, 2001. The purpose of that status conference was, *inter alia*, to address the procedure that the parties would utilize in submitting the dispute to the Commission for resolution (specifically, whether the parties would file formal complaints or informal petitions for declaratory ruling). Meron Decl. ¶¶ 3-4 (attached as Exh. B).

At that status conference, and consistent with prior discussions with Sprint PCS, AT&T put forward a proposal that the Commission adopt a bifurcated procedure for addressing the issues submitted to the Commission by the Court. *Id.* ¶ 6. AT&T explained that the issues

submitted to the Commission could usefully be divided into three categories: (1) whether CMRS carriers are permitted to charge IXCs for access at all; (2) if so, whether those rates should be capped based on a specific benchmark; and (3) if, CMRS carriers are permitted to impose access charges and those charges are not capped by reference to a single benchmark, whether Sprint PCS's particular rates are reasonable. AT&T explained that the first two questions raised industry-wide issues of law and policy that did not require resolution of disputed issues of fact, and that, therefore, in AT&T's view it made sense for the Commission to deal with those questions through petitions for declaratory ruling. AT&T pointed out, by contrast, that the third question – whether Sprint PCS's specific rates are reasonable – would require resolution of contested issues of fact that would require confidentiality and that implicated only Sprint PCS's particular rates, and that this issue could only be resolved through a formal complaint process, with the attendant right of discovery. *Id.*

AT&T further pointed out that the litigation of a formal rate case challenging Sprint PCS's rates would impose significant burdens on the parties and require expenditure of significant Commission resources. *Id.* ¶ 7. In particular, if AT&T were to file a complaint against Sprint PCS's rates, Sprint PCS would have to undertake the burden of completing a TELRIC cost study for each state in which it provides service,²⁷ and would have to do so in a very short time frame.²⁸ The Commission, for its part, has never conducted a rate investigation

²⁷ Sprint PCS's position is that its costs vary considerably between states. *See* Sprint PCS Comments at 10 n.35.

²⁸ The Commission's rules require that the defendant "attach copies of all affidavits, documents, data compilations and tangible things in the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer" with its answer, which is due 20 days from service of the complaint. 47 C.F.R. § 1.724(g). The Enforcement Bureau interprets this rule to mean that the defendant's cost study is due at that time. *See, e.g., BTI Order* ¶ 47 & n. 136.

of a CMRS carrier, and adjudication of such a rate case, which would necessitate a review of the CMRS carrier's entire cost of service (for purposes of allocating common costs), would be very burdensome. Yet, as AT&T explained, these significant burdens would all be for naught if the Commission were to rule either that CMRS carriers should not be permitted to charge for access at all, or if the Commission were to adopt a fixed rate cap (such as the CMRS carrier's state-approved reciprocal compensation rate). *Id.*

In order to avoid a significant and potentially wasteful expenditure of resources, AT&T therefore proposed that the Commission adopt a bifurcated procedure for addressing the referred questions. In particular, AT&T suggested that the parties first present the general industry-wide legal and policy questions (categories 1 and 2 above) to the Commission through petitions for declaratory rulings. If the Commission's resolution of these legal and policy questions left open the need to address the reasonableness of Sprint PCS's particular rates, then one or the other of the parties would file a Section 208 complaint to resolve those issues. Significantly, although Sprint PCS framed the specific questions somewhat differently, Sprint PCS readily agreed to the bifurcated proposal, which relieved it of the obligation to conduct cost studies. Subsequently, the Enforcement Bureau staff contacted the parties and informed them that the Commission had decided to direct the parties to submit their positions through petitions for declaratory rulings, to be filed at a date of the parties' choosing. *Id.* ¶¶ 8-10.

Given these discussions, and Sprint PCS's agreement to the utilization of a bifurcated procedure, it is simply outrageous that Sprint PCS would now claim that AT&T was required in its petition for declaratory ruling to submit evidence of the unlawfulness of Sprint PCS's particular rates. AT&T specifically pled an unreasonable rate counterclaim in the district court and asked the court to refer that claim to the Commission. It is well-settled that a waiver, to be

valid, must be informed and voluntary. Here, AT&T relied on Sprint PCS's agreement with AT&T's procedural proposal and on the Commission's instruction that the parties proceed with petitions for declaratory ruling, rather than formal complaints, in not challenging the specific level of Sprint PCS's rates at this juncture. *Id.* ¶ 11. AT&T has clearly not waived its right to challenge Sprint PCS's particular rates in a complaint proceeding if such action becomes appropriate in light of the Commission's ruling on AT&T and Sprint PCS's petitions.

Indeed, the Commission itself could not possibly have thought that AT&T would litigate a rate case against Sprint PCS through a permit-but-disclose declaratory ruling mechanism. As the Commission is well aware, declaratory ruling proceedings do not provide for any documentary discovery, interrogatories, or depositions. Nor do they involve hearings or oral arguments. Moreover, because they are industry-wide proceedings, they raise additional difficulties with respect to the protection of highly sensitive cost data. That is why the Commission's orders make clear that declaratory ruling procedures are inappropriate vehicles for the resolution of disputes that turn on contested issues of fact. *Access Tariffs Declaratory Ruling* ¶ 7 (1988) ("A petition for declaratory ruling can, and frequently should, be used as a substitute for a Section 208 complaint *if the facts are undisputed*" (emphasis added)); *see also Fifth Access Charge Report* ¶ 187 (1999) ("The presence or absence of factual disputes is a significant factor in deciding whether a declaratory ruling is an appropriate method for resolving a controversy.").

For these same reasons, it would be a blatant violation of due process for the Commission to rule that, by complying with the Commission's instruction that it file a declaratory ruling petition rather than a complaint, AT&T had forfeited its right to pursue a rate case in the event of an adverse ruling on its petition. No customer can possibly litigate a rate case against a carrier without the benefit of discovery and a relatively formal adversary process, since the customer

would otherwise have no way to obtain evidence of the carrier's relevant cost and revenue data. AT&T specifically pled an unreasonable rate case in its complaint, and it has not waived the right to pursue that case by complying with the Commission's procedural instructions.²⁹

CONCLUSION

For the foregoing reasons, AT&T's petition for declaratory ruling should be granted and Sprint PCS's petition for declaratory ruling should be denied.

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²⁹ In addition to its Section 201 counterclaim, AT&T has also pled a Section 254(k) counterclaim, which AT&T likewise has not waived. See AT&T Ans., 9-10 (Counterclaim Claim III), *Sprint Spectrum L.P. v. AT&T Corp.*, Docket No. 4-00-00973-HFS (W.D. Mo.).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Comments of AT&T Corp. was served, by the noted methods, the 12th day of December, 2001, on the following:

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The undersigned also certifies that a copy of the foregoing Reply Comments of AT&T Corp. was served, by Federal Express next day delivery, the 12th day of December, 2001, on the following:

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