

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of )  
 )  
Petitions of Sprint PCS and AT&T Corp. )  
For Declaratory Ruling Regarding )  
CMRS Access Charges )

WT Docket No. 01-316

DECLARATORY RULING

Adopted: July 2, 2002

Released: July 3, 2002

By the Commission:

I. INTRODUCTION

1. In this declaratory ruling, we respond to a primary jurisdiction referral from the U.S. District Court for the Western District of Missouri in an action styled *Sprint Spectrum L.P. v. AT&T Corp.*<sup>1</sup> In its referral order, the court asked the Commission to decide two questions: (1) “whether Sprint may charge AT&T access fees for use of the Sprint PCS network”; and (2) if so, what rate may reasonably be charged for such services.<sup>2</sup> Based on the rules in effect during the period in dispute – from 1998 to the present – we find that Sprint PCS was not prohibited from charging AT&T access charges, but that AT&T was not required to pay such charges absent a contractual obligation to do so. We believe that the question whether the parties entered into a contract concerning such a payment obligation is not a matter of federal communications law and accordingly appears beyond the scope of the Court’s referral. Moreover, until the Court decides whether there was a contract, it is premature to address the court’s second question regarding the reasonableness of any rate charged. Going forward, we will consider any prospective changes to our rules governing interconnection between Commercial Mobile Radio Service (CMRS) providers and interexchange carriers (IXCs) in our pending *Intercarrier Compensation* proceeding.<sup>3</sup>

<sup>1</sup> See *Sprint Spectrum L.P. v. AT&T Corp.*, Case No. 00-0973-CV-W-5, 2001 WL 1231711 (W.D. Mo. July 24, 2001) (*Primary Jurisdiction Order*).

<sup>2</sup> *Primary Jurisdiction Order* at 11.

<sup>3</sup> *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation NPRM*).

## II. BACKGROUND

2. In 1998, Sprint PCS, a CMRS provider, began sending invoices to AT&T, an IXC, asking that AT&T compensate Sprint PCS for the costs of terminating interexchange traffic bound for Sprint PCS's CMRS customers.<sup>4</sup> Sprint PCS charged AT&T 2.8 cents per minute, the rate in the NECA tariff.<sup>5</sup> AT&T refused to pay.<sup>6</sup> As of September 1, 2001, the amount in dispute exceeded \$60 million.<sup>7</sup>

3. In August 2000, Sprint PCS filed suit in state court in Missouri seeking recovery of the amount allegedly owed by AT&T.<sup>8</sup> Sprint PCS based its action on three separate claims under state law: breach of implied contract, *quantum meruit*, and action on account.<sup>9</sup> AT&T removed the case to the federal district court for the Western District of Missouri, and then requested that the court refer the issues to this Commission under the doctrine of primary jurisdiction. The court granted AT&T's request. In its referral order, the court asked the Commission to decide two questions: (1) "whether Sprint may charge AT&T access fees for use of the Sprint PCS network"; and (2) if so, what rate may reasonably be charged for such services.<sup>10</sup> The court stayed the case until June 24, 2002 and stated that if "the FCC is unable or unwilling to resolve the issues presented by this case within that time, then the court will proceed with the instant litigation."<sup>11</sup>

4. Both parties filed petitions for declaratory ruling on October 22, 2001, and the Commission sought comment on the petitions.<sup>12</sup> In its petition, Sprint PCS asks the Commission

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<sup>4</sup> Sprint PCS Petition for Declaratory Ruling at 2 (filed October 22, 2001) (Sprint PCS Petition).

<sup>5</sup> Sprint PCS Opposition to AT&T Declaratory Ruling at 9 (filed November 30, 2001) (Sprint PCS Opposition). The National Exchange Carrier Association (NECA) files an interstate access tariff on behalf of local exchange carriers that participate in NECA pools. The 2.8 cents represents the per-minute rate that Tier 1 NECA carriers charge IXCs for interstate access service. Sprint PCS claims that this rate is less than the costs it incurs to terminate AT&T's traffic. *Id.*

<sup>6</sup> Sprint PCS Petition at 2.

<sup>7</sup> Sprint PCS Petition at 4; AT&T Petition for Declaratory Ruling at 28 (filed October 22, 2001) (AT&T Petition).

<sup>8</sup> Sprint PCS Petition at 2.

<sup>9</sup> Sprint PCS Petition at 3.

<sup>10</sup> *Primary Jurisdiction Order* at 11.

<sup>11</sup> *Primary Jurisdiction Order* at 12-13. The court subsequently extended the stay until July 24, 2002.

<sup>12</sup> *Sprint PCS and AT&T File Petitions For Declaratory Ruling On CMRS Access Charge Issues*, WT Docket No. 01-316, Public Notice, DA 01-2618 (rel. Nov. 8, 2001). After some initial confusion about the scope of this proceeding, the parties agreed that they would litigate the reasonableness of Sprint PCS's proposed rates in a separate proceeding if the Commission held that CMRS carriers are entitled to impose access charges. See *Joint Submission of AT&T and Sprint PCS* (filed February 26, 2002). Based on our determination in this Declaratory Ruling that Sprint PCS is not entitled to collect access charges from AT&T unless the court finds that there is an implied-in-fact contract with a payment obligation, there is no need for further proceedings as to the reasonableness of the disputed rates at this time. All citations herein to a party's "Comments" refer to initial comments filed on November 30, 2001, and all citations to a party's "Reply" refer to reply comments filed on December 12, 2001. Parties filing comments and reply comments are listed in Appendix A.

to find that there is no federal law or Commission policy that bars Sprint PCS from recovering its call termination costs from AT&T.<sup>13</sup> Sprint PCS also asks us to find that AT&T's refusal to pay access charges to Sprint PCS is unreasonably discriminatory under section 202(a) of the Communications Act of 1934, as amended (the Act), and unjust and unreasonable under section 201(b) of the Act.<sup>14</sup> In its petition, AT&T asks the Commission to find that CMRS carriers should continue to recover their costs from their end users, not by imposing access charges on IXCs.<sup>15</sup> If CMRS carriers are permitted to impose access charges, AT&T asks that those charges be capped at the reciprocal compensation rate for local traffic and assessed only prospectively.<sup>16</sup>

### III. DISCUSSION

#### A. Existing Rules on CMRS Access Charges

##### 1. Background

5. In its petition, Sprint PCS states that "the Commission has squarely ruled that CMRS providers may recover from interexchange carriers their cost of terminating long distance traffic."<sup>17</sup> Sprint PCS bases this statement on the 1994 *CMRS Equal Access NPRM*, where the Commission noted that it had previously decided (in the 1987 *Cellular Interconnection Order*) that "cellular carriers are entitled to just and reasonable compensation for their provision of access."<sup>18</sup> Sprint PCS takes the position that, under the Commission's existing policy of forbearing from regulation of CMRS rates, it is permitted to impose charges on IXCs subject only to the section 208 complaint process.<sup>19</sup> It also argues that any departure from that policy constitutes retroactive rulemaking.<sup>20</sup> CMRS carriers unanimously support the interpretation of

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<sup>13</sup> Sprint PCS Petition at 5-7.

<sup>14</sup> Sprint PCS Petition at 8-11.

<sup>15</sup> AT&T Petition at 17-20.

<sup>16</sup> AT&T Petition at 24-28. "Reciprocal compensation" refers to the compensation mechanism that governs the exchange of traffic covered by section 251(b)(5) of the Act, typically local voice traffic. 47 U.S.C. § 251(b)(5). Section 252(d)(2) requires reciprocal compensation to be based on the "additional costs" of terminating traffic that originates on the network of another carrier, 47 C.F.R. § 252(d)(2), and the Commission has interpreted this provision to require reciprocal compensation rates based on forward-looking economic costs. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16023, ¶ 1054 (1996) (subsequent history omitted).

<sup>17</sup> Sprint PCS Petition at 6.

<sup>18</sup> See *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Notice of Proposed Rulemaking, 9 FCC Rcd 5408, 5447 (1994) (*CMRS Equal Access NPRM*) (citing *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, Declaratory Ruling, 2 FCC Rcd 2910, 2915 (1987) (*Cellular Interconnection Order*)).

<sup>19</sup> See Sprint PCS Opposition at 1-8 (citing *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1480, ¶ 179 (1994) (*CMRS Second Report and Order*)).

<sup>20</sup> Sprint PCS Opposition at 5.

our precedent offered by Sprint PCS.<sup>21</sup>

6. In response to these arguments, AT&T argues that none of the decisions relied on by Sprint PCS states that IXCs must pay access charges to CMRS carriers.<sup>22</sup> WorldCom notes that the 1987 *Cellular Interconnection Order*, which forms the cornerstone of the CMRS carriers' argument, addresses only CMRS interconnection with local exchange carriers (LECs), and is silent on the issue of CMRS-IXC interconnection.<sup>23</sup> AT&T and WorldCom state that the only time the Commission specifically addressed the question of IXC payment of access charges to CMRS carriers was in the *LEC-CMRS Interconnection NPRM*.<sup>24</sup> At that time, the Commission proposed allowing CMRS carriers to impose access charges on IXCs, but it also raised concerns about potential exercise of market power by CMRS carriers.<sup>25</sup> Because the Commission did not adopt this proposal, the IXCs state that CMRS carriers have no authority to impose access charges on IXCs.

## 2. Discussion

7. Sprint PCS is correct that neither the Communications Act nor any Commission rule prohibits a CMRS carrier from attempting to collect access charges from an interexchange carrier. In 1994, in the *CMRS Second Report and Order*, the Commission addressed the question of which Title II requirements it should impose on CMRS carriers. The Commission decided that the market for retail CMRS services was sufficiently competitive that it was not necessary to regulate the retail rates of CMRS carriers, or to require (or permit) CMRS carriers to file tariffs for retail services.<sup>26</sup> The Commission also decided temporarily to forbear from requiring or permitting the filing of tariffs for interstate access services offered by CMRS carriers.<sup>27</sup> In a detariffed, deregulated environment such as this one, carriers are free to arrange whatever compensation arrangement they like for the exchange of traffic.<sup>28</sup> Thus, for example, Sprint PCS

<sup>21</sup> See, e.g., Nextel Partners Comments at 1-3; Rural Cellular Association Comments at 2-3; Salmon PCS Comments at 3-7; Verizon Wireless Comments at 3-6; Verizon Wireless Reply at 2-3.

<sup>22</sup> AT&T Comments at 9-12; AT&T Reply at 15-17.

<sup>23</sup> WorldCom Comments at 7.

<sup>24</sup> AT&T Comments at 11-12; WorldCom Comments at 5-6 (citing *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020 (1996) (*LEC-CMRS Interconnection NPRM*)).

<sup>25</sup> *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd at 5074-76, ¶¶ 115-17.

<sup>26</sup> *CMRS Second Report and Order*, 9 FCC Rcd at 1480, ¶ 179.

<sup>27</sup> *Id.* The Commission did, however, preserve its authority to regulate CMRS carriers under sections 201, 202, and 208 of the Act. *Id.* at 1478-79, ¶¶ 175-76.

<sup>28</sup> See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20761, ¶ 54 (1996) (*Detariffing Second Report and Order*) ("Eliminating tariff filings by nondominant interexchange carriers will prevent such carriers from refusing to negotiate with customers based on the Commission's tariff filing and review processes. As a result, carriers may become more responsive to customer demands, and offer a greater variety of price and service packages that meet their customers' needs."); see also *Orloff v. Vodafone AirTouch Licenses LLC d/b/a Verizon Wireless*, File No. EB-01-MD-009, Memorandum Opinion and Order, FCC 02-144 (rel. May 16, 2002) (finding that a CMRS carrier's practice of

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and AT&T could agree that AT&T would pay Sprint PCS for the traffic exchange, that Sprint PCS would pay AT&T for the exchange, or that neither party would pay anything.

8. That Sprint PCS may *seek* to collect access charges from AT&T does not, however, resolve the question whether Sprint PCS may *unilaterally impose* such charges on AT&T. There are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract. As noted above, CMRS access services are subject to mandatory detariffing, and it is therefore undisputed that Sprint PCS could not have imposed access charges on AT&T pursuant to any tariff. Consequently, we need only consider whether Sprint PCS can impose access charges on AT&T pursuant to Commission rules or a contract between the parties.

9. We find that there is no Commission rule that enables Sprint PCS unilaterally to impose access charges on AT&T. In the *LEC-CMRS Interconnection NPRM*, the Commission specifically addressed the question whether CMRS carriers should be able to impose access charges on IXC's for calls that are exchanged through LEC facilities. The Commission tentatively concluded that CMRS carriers should be able to recover access charges from IXC's for the completion of interexchange calls in the same manner as LECs and competitive access providers (*i.e.*, by setting a rate to be paid by the IXC.)<sup>29</sup> The Commission noted, however, that some form of price regulation might be necessary if it adopted this tentative conclusion because CMRS carriers "may have some market power over IXC's that need to terminate calls to a particular CMRS provider's customer."<sup>30</sup> The Commission has never adopted a final decision adopting or implementing this tentative conclusion, nor has it resolved the question of the appropriate form of price regulation for CMRS access charges. Accordingly, our rules do not enable Sprint PCS unilaterally to impose access charges on AT&T.<sup>31</sup>

10. We disagree with Sprint PCS that the forbearance policy adopted in the *CMRS Second Report and Order* enables Sprint PCS to impose unilaterally whatever rate it wishes,

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granting concessions to customers that "haggled" was not unreasonably discriminatory given the competitive nature of the market). Even in a deregulated, detariffed environment, however, certain regulatory requirements continue to apply, *e.g.*, truth-in-billing rules. *See* 47 C.F.R. §§ 64.2400, *et seq.*

<sup>29</sup> *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd at 5074-76, ¶ 116 ("In the context of the existing access charge regime, we tentatively conclude that CMRS providers should be able to recover access charges from IXC's, as the LECs do when interstate interexchange traffic passes from CMRS customers to IXC's (or vice versa) via LEC networks."). The Commission's tentative conclusion was limited to situations in which the IXC and the CMRS carrier are indirectly interconnected and exchange traffic through a LEC. *Id.* at 5074-75, ¶¶ 115-116.

<sup>30</sup> *Id.* at 5075-76, ¶ 117. The Commission asked, for example, whether CMRS providers should impose access charges that mirror those of the LECs with which they connect, or impose their own access charges. *Id.* It also asked whether to retain the policy of forbearing from regulating CMRS providers' access charges. *Id.*

<sup>31</sup> In contrast, the Commission's rules affirmatively require LECs to pay reciprocal compensation to CMRS carriers. *See* 47 C.F.R. § 20.11(b)(1). Section 69.5(b) of the Commission's rules enables local exchange carriers to impose access charges on IXC's, but CMRS carriers do not provide service subject to Part 69 of the Commission's rules because their access services are detariffed and the rates are not regulated. *See CMRS Second Report and Order*, 9 FCC Rcd at 1480, ¶ 179.

subject only to AT&T's right to file a complaint under section 208 of the Act. Our policy of forbearing from regulating CMRS access rates means that we will not regulate rates pursuant to the tariffing process set forth in sections 203, 204, and 205 of the Act.<sup>32</sup> Our forbearance policy does not, however, mean that a detariffed carrier unilaterally can impose a charge merely by billing an IXC, as Sprint PCS has attempted to do here. This interpretation of the *CMRS Second Report and Order* is consistent with our general policies on detariffing, which are premised on the expectation that carriers will establish a contractual relationship with customers to whom they sell service.<sup>33</sup> Even in a competitive situation, where the customer has a choice of carriers, a contract is beneficial to both the carrier and the customer because it makes clear the rights and obligations of both parties. A contract is particularly important in the case of terminating access services because, as Sprint PCS acknowledges, CMRS carriers possess market power with respect to termination of calls to their subscribers.<sup>34</sup>

11. We also do not agree with Sprint PCS's argument that the 1987 *Cellular Interconnection Order* entitles it to collect access charges in the absence of an agreement with AT&T. The *Cellular Interconnection Order* established a principle of "mutual switching compensation" between CMRS carriers and LECs.<sup>35</sup> The Commission stated that "the principle of mutual switching compensation should apply to Type 2 but not Type 1 service. Cellular carriers and telephone companies are equally entitled to just and reasonable compensation for their provision of access, whether through tariff or by a division of revenues agreement."<sup>36</sup> This statement regarding compensation for the "provision of access" clarified how the mutual switching compensation principle would apply to Type 1 and Type 2 interconnection, and the mechanism for compensation when it does apply (tariff or agreement). Following the *CMRS Second Report and Order*, tariffs no longer were available to CMRS carriers; therefore compensation is available only through an agreement.<sup>37</sup>

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<sup>32</sup> 47 U.S.C. §§ 203-205.

<sup>33</sup> See AT&T Reply Comments at 15 n.6 (citing *CLEC Access Charge Order*, 16 FCC Rcd at 9925, ¶ 3); see also *In the Matter of Wireless Consumers Alliance, Inc.*, WT Docket No. 99-263, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17033, ¶ 21 (2000) (*Wireless Consumers Alliance*) ("Rather than file tariffs to establish the legally effective rates (and other terms and conditions) for their offering, CMRS carriers enter into service contracts with their customers."); *Detariffing Second Report and Order*, 11 FCC Rcd at 20763-64, ¶¶ 57-58.

<sup>34</sup> Sprint PCS Reply at 12 ("[E]very carrier possesses an effective monopoly in the provision of the call termination function to called parties that it serves.").

<sup>35</sup> *Cellular Interconnection Order*, 2 FCC Rcd at 2915, ¶ 45.

<sup>36</sup> *Cellular Interconnection Order*, 2 FCC Rcd at 2915, ¶ 47. Type 1 and Type 2 interconnection are forms of interconnection offered to CMRS carriers by LECs. "Under Type 1 interconnection, the telephone company owns the switch serving the cellular network. Therefore, it performs the origination and termination of both incoming and outgoing calls. Under Type 2, by contrast, the cellular carrier owns the switch, enabling it to originate outgoing calls and terminate incoming calls. Hence, the Type 2 carrier incurs the switching costs for these origination and termination functions. *Id.* at 2915, ¶ 46.

<sup>37</sup> Sprint PCS's reliance on the 1994 *CMRS Equal Access NPRM* is equally misplaced. The *CMRS Equal Access NPRM* merely restated the principle adopted in the *Cellular Interconnection Order*. See *CMRS Equal Access NPRM*, 9 FCC Rcd at 5447, ¶ 93. The Commission did not elaborate on the relationship between the forbearance

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12. There being no authority under the Commission's rules or a tariff for Sprint PCS unilaterally to impose access charges on AT&T, Sprint PCS is entitled to collect access charges in this case only to the extent that a contract imposes a payment obligation on AT&T. While it is preferable for carriers to memorialize such contracts in a written agreement, the parties here agree that there is no written agreement or any express contract between AT&T and Sprint PCS. Nevertheless, the law recognizes – as has the Commission – that an agreement may exist even absent an express contract.<sup>38</sup>

13. Turning to the question whether there was such an agreement here, we believe that it is an issue that should be resolved by the Court. We interpret the Court's primary jurisdiction referral as seeking our input on the federal communications law questions related to this dispute. Because the existence of a contract is a matter to be decided under state law,<sup>39</sup> we defer to the court to answer this question.<sup>40</sup>

14. We offer the court two important observations regarding the regulatory regimes applicable to both IXCs and CMRS carriers during the period in dispute. First, CMRS carriers have never operated under the same calling party's network pays (CPNP) compensation regime as wireline LECs. Under a CPNP regime, LECs are compensated for terminating calls by the carrier of the customer that originates the call, not by the customer receiving the call. In contrast, since the advent of commercial wireless service, and continuing today, CMRS carriers have

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decision in the *CMRS Second Report and Order* and the mutual switching compensation principle adopted in the *Cellular Interconnection Order*.

<sup>38</sup> *Detariffing Second Report and Order*, 11 FCC Rcd at 20764, ¶ 58, n.169. An implied-in-fact contract is “founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding.” *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996) (citing *Baltimore and Ohio R. Co. v. United States*, 261 U.S. 592, 597 (1923)). By contrast, an agreement implied-in-law is “a ‘fiction of law’ where a ‘promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress.’” *Id.* A contract “implied-in-law” is an equitable remedy that is equivalent to an award of *quantum meruit*.

<sup>39</sup> See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15014, 15057, ¶ 77 (1997) (“[W]e note that the [Communications Act] does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the *Second Report and Order*, consumers may have remedies under state consumer protection and contract law as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.”); see also *Ting v. AT&T*, 182 F. Supp.2d 902, 938 (N.D. Cal. 2002) (state law contract claims not preempted in a detariffed environment).

<sup>40</sup> Sprint PCS also has advanced a *quantum meruit* argument under Missouri law in the pending litigation. *Quantum meruit* is premised on the notion that a party receiving service would be unjustly enriched if it were not required to pay for that service. Although we defer to the court to address this state law claim, we note that an award of *quantum meruit* would require the court to establish a value (*i.e.*, set a rate) for the service provided in the past. We note that there is a substantial question whether a court may award *quantum meruit* or other equitable relief under state law without running afoul of section 332(c)(3)(A). 47 U.S.C. § 332(c)(3)(A); see, e.g., *Bastien v. AT&T Wireless*, 205 F.3d 983, 986 (7<sup>th</sup> Cir. 2000) (“If Bastien’s complaint in fact raises regulatory issues preempted by Congress, then the claims would fail as a matter of law since they are couched in terms of two state law actions.”); *Gilmore v. Southwestern Bell Mobile Services*, 156 F. Supp.2d 916, 925 (N.D. Ill. 2001) (state law claim based on unjust enrichment preempted under section 332(c)(3)(A)).

charged their end users both to make and to receive calls. Until 1998, when Sprint PCS first approached AT&T and other IXCs about payment for terminating access service, all CMRS carriers recovered the cost of terminating long distance calls from their end users, and not from interexchange carriers.

15. Second, there is a benefit to customers of both IXCs and CMRS carriers when CMRS carriers terminate IXC traffic.<sup>41</sup> Because both carriers charge their customers for the service they provide, it does not necessarily follow that IXCs receive a windfall in situations where no compensation is paid for access service provided by a CMRS carrier. Nor do we believe that terminating access charges to CMRS carriers are necessarily imputed in IXCs' retail rates. The fact that the industry practice for 15 years has been for CMRS carriers to recover costs from their end users, together with the highly competitive nature of the interexchange market, makes it unlikely that an IXC that does not pay access charges to CMRS carriers somehow "overcharges" its customers.

## **B. Section 201(b) and 202(a) Claims Against AT&T**

### **1. Background**

16. Sprint PCS takes the position that it may charge AT&T any reasonable rate because the Commission has deregulated CMRS rates and no longer requires (or even permits) CMRS carriers to file tariffs.<sup>42</sup> Based on its contention that the rates it seeks to impose on AT&T are reasonable, Sprint PCS argues that AT&T's refusal to pay violates sections 201(b) and 202(a) of the Act.<sup>43</sup> Specifically, Sprint PCS alleges that AT&T's refusal to pay the charge imposed by Sprint PCS is an unreasonable practice under section 201(b) because Sprint PCS provided service to AT&T and AT&T does not have discretion to "pick and choose" which terminating carriers it will pay.<sup>44</sup> Sprint PCS also alleges that AT&T's failure to pay access charges imposed by CMRS carriers, while it pays similar charges imposed by wireline LECs, is unreasonably discriminatory and therefore violates section 202(a).<sup>45</sup> Sprint PCS states that the Commission's recent decisions requiring IXCs to pay access charges imposed by CLECs support this position.<sup>46</sup>

17. In response, AT&T and WorldCom argue that customers cannot be held liable under sections 201 and 202, even customers that are carriers.<sup>47</sup> AT&T points out that Sprint

<sup>41</sup> See *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9624-25, ¶ 37.

<sup>42</sup> Sprint PCS Petition at 6; see also 47 C.F.R. § 20.15(c); *CMRS Second Report and Order*, 9 FCC Rcd at 1480, ¶ 179 ("We also will temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service.").

<sup>43</sup> 47 U.S.C. §§ 201(b), 202(a).

<sup>44</sup> Sprint PCS Petition at 9-10.

<sup>45</sup> Sprint PCS Petition at 8-9.

<sup>46</sup> Sprint PCS Petition at 8, 10 (citing *Total Telecommunications v. AT&T*, File No. E-97-003, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001)).

<sup>47</sup> AT&T Comments at 13-18; WorldCom Reply at 5-6.

PCS's long-distance affiliate has taken this same position in response to complaints filed by CLECs for non-payment of access charges.<sup>48</sup> AT&T argues that the Commission's decision in *Total Telecommunications* is inapposite because it holds only that an IXC must pay the rate that would have applied in the absence of the unlawful conduct.<sup>49</sup> In this case, AT&T argues, Sprint PCS's decision to bill AT&T for access is unlawful and the rate that would apply in the absence of this behavior is zero.

## 2. Discussion

18. We need not address Sprint PCS's claims under sections 201(b) or 202(a) at this time. Until the court determines the respective obligations of the parties, in particular whether AT&T has any obligation to pay Sprint PCS under a contract, the Commission has no basis on which to assess whether AT&T is subject to sections 201(b) or 202(a) in these circumstances and, if so, whether its actions violate those statutory provisions.

### C. Prospective Application of Existing Rules

19. In addition to questions presented by the district court regarding our present policy on CMRS access charges, the pleadings filed in response to the declaratory ruling petitions raise a number of issues that relate either to the prospective treatment of CMRS-IXC interconnection or to issues beyond the scope of those presented for Commission resolution in the primary jurisdiction referral.<sup>50</sup>

20. Our order today clarifies requirements under our *existing* rules.<sup>51</sup> Suggestions for changes to those rules will be addressed in our pending *Intercarrier Compensation* proceeding. Our goal in the *Intercarrier Compensation* proceeding is to move toward a unified compensation regime that eliminates the opportunity for arbitrage due to different regulatory treatment of

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<sup>48</sup> AT&T Comments at 15, 17.

<sup>49</sup> AT&T Reply at 17, n.8 (citing *Total Telecommunications*, 16 FCC Rcd at 5742-43, ¶ 38).

<sup>50</sup> See, e.g., AT&T Wireless Reply at 5-9 (advocating unified bill-and-keep regime); Missouri Independent Telephone Group Comments at 11-18 (raising issues regarding applicability of access charges to intra-MTA calls to CMRS providers); Qwest Comments at 3-5 (advocating unified bill-and-keep regime); Verizon Wireless Comments at 11-15 (requesting that the Commission establish a zone of reasonableness for CMRS access charges); Western Wireless/Voicestream Reply at 7-10 (advocating the filing of CMRS access tariffs).

<sup>51</sup> Accordingly, we reject Sprint PCS's suggestion that we have engaged in retroactive rulemaking. Sprint PCS Opposition at 5 (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219 (1988)). As explained above, it is not the case that the forbearance policy established in 1994 enabled CMRS carriers to impose access charges on IXCs in the absence of an agreement. Our approach in this case – addressing a pending dispute through a declaratory ruling based on existing rules and policies – is entirely consistent with our approach in other cases arising out of primary jurisdiction referrals. Furthermore, as AT&T argues, a declaratory ruling proceeding is an adjudication, not a rulemaking under the Administrative Procedure Act (APA). AT&T Reply at 17-19. The Commission rule that authorizes us to issue declaratory rulings specifically cites the adjudication provision of the APA as its source of authority. See 47 C.F.R. § 1.2 (citing 5 U.S.C. § 554). Under appropriate circumstances, the Commission also resolves primary jurisdiction referrals through the formal complaint process under section 208. See *Primary Jurisdiction Referrals Involving Common Carriers*, Public Notice, 15 FCC Rcd 22449 (2000).

different types of traffic.<sup>52</sup> At that time we will address CMRS carriers' requests to be placed on equal footing with wireline carriers, whether through bill-and-keep or some other compensation mechanism.

21. In the interim, IXCs and CMRS carriers remain free to negotiate the rates, terms and conditions under which they will exchange traffic. Given the mutual benefit that CMRS and IXC customers realize when CMRS carriers terminate calls from IXCs, we anticipate that these negotiations will be conducted in good faith and prove fruitful for both sets of carriers. To the extent that carriers encounter problems with this regime, we encourage them to raise any concerns in the pending *Intercarrier Compensation* proceeding so that we may consider those concerns in any future compensation regime we may adopt.

#### IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 201, and 332 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 201, and 332, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petitions for Declaratory Ruling filed by AT&T and Sprint PCS are DENIED to the extent set forth herein.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

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<sup>52</sup> *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9611-12, ¶ 2 (“We are particularly interested in identifying a unified approach to intercarrier compensation – one that would apply to interconnection arrangements between all types of carriers interconnecting with the local telephone network, and to all types of traffic passing over the local telephone network.”).

**Appendix A**  
**WT Docket No. 01-316**

**Comments**

AT&T  
Cellular Mobile Systems of St. Cloud  
Cellular Telecommunications Industry Association  
Cingular Wireless  
Choteau Telephone Company, *et al.*  
Leaco Cellular  
Missouri Independent Telephone Company Group  
Missouri Small Telephone Company Group  
Nextel Communications  
Nextel Partners  
Oklahoma Rural Telephone Companies  
Qwest Communications International  
Rural Cellular Association  
Salmon PCS  
Sprint PCS  
United States Telephone Association  
Verizon Wireless  
Western Wireless  
WorldCom

**Reply Comments**

Arch Wireless  
AT&T  
AT&T Wireless  
Nextel Communications  
Nextel Partners  
Northcoast Communications  
Rural Cellular Association  
Sprint PCS  
Verizon Wireless  
Western Wireless/Voicestream Wireless  
WorldCom

