

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

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In the Matter of )

Petitions of US LEC Corp. and T-Mobile USA, )  
Inc., *et al*, for Declaratory Ruling Regarding )  
Intercarrier Compensation for Wireless Traffic )

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CC Docket No. 01-92

**COMMENTS OF AT&T CORP.**

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nothing to do with the right of ILECs to recover access charges from IXCs for specific services actually provided in transiting traffic between a CMRS carrier's network and the network of an IXC. The question presented by US LEC's petition is whether a CLEC, by inserting itself between the CMRS carrier and the ILEC tandem switch, can impose an *additional* access charge on IXCs priced at the full amount of the Commission's maximum benchmark rate – notwithstanding the fact that the CLEC in that situation provides no new access service or functionality. The answer to that question is plainly no.

As the Commission made clear in its recent *CMRS-IXC Access Charge Declaratory Ruling*, CMRS carriers have no authority under the Communications Act or any Commission rule or order unilaterally to impose access charges on IXCs.<sup>1</sup> Unable to impose access charges on the IXCs directly, some CMRS carriers have now joined with certain CLECs in an attempt to recover access charges from IXCs indirectly through the CLEC. Under this arrangement, the CMRS carrier, instead of routing its interexchange traffic directly to an ILEC tandem switch as was done in the past, routes its interexchange traffic to a CLEC, which in turn routes the CMRS traffic back to the ILEC tandem switch for delivery to the IXCs. Although the CLEC provides no additional access functionality or value under this arrangement, it then seeks to collect a duplicative access charge from the IXC above and beyond the tandem switching and related charges imposed by the ILEC. Further, directly contrary to Commission precedent and industry practice, the CLECs assert a right to collect the full amount of the maximum CLEC benchmark rates fixed in the Commission's *CLEC Access Charge Order*<sup>2</sup> for their role in transiting traffic

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<sup>1</sup> *Petitions of Sprint PCS & AT&T Corp. for Decl. Ruling Regarding CMRS Access Charges, Declaratory Ruling*, 17 F.C.C. Rcd. 13192, ¶¶ 9-12 (2002) (“*CMRS-IXC Access Charge Declaratory Ruling*”).

<sup>2</sup> *Access Charge Reform*, Seventh Report & Order, 16 FCC Rcd. 9923 (2001) (“*CLEC Access Charge Order*”).

between the CMRS carrier and the IXC. In so doing, the CLECs treat the situation as if the CMRS carrier were an end-user customer of the CLEC – rather than another common carrier – and the CLEC – rather than the CMRS carrier – were the carrier which provides the local switching and local “loop” functions.

By injecting itself between the CMRS carrier and the ILEC tandem switch, the CLEC provides no additional access functionality or value. Thus, in most of the instances at issue in this proceeding, the CMRS carrier provides all of the local access functions (*i.e.*, local switching and local “loop” transport) and, under long-standing industry practice, recovers all its costs through usage charges directly from its own end-user customers, while the ILEC provides the tandem switching and tandem transport functions and collects its charges for those access functions from the IXCs in accordance with its access tariffs. The sole effects of this arrangement are to impose additional and duplicative access charges on IXCs, and to evade the *CMRS-IXC Access Charge Declaratory Ruling*. For these reasons, the Commission should make clear that CLECs cannot attain *any* access charges from IXCs in this context.

The only instance in which a CLEC should be permitted to charge an IXC for providing access services in connection with traffic originating or terminating on a CMRS carrier’s network is where the CLEC actually *replaces* the ILEC in performing an access function normally performed by the ILEC. In that limited situation, the CLEC stands in the shoes of the ILEC, and it should have the same – but no greater – right to charge for the particular access functions that the CLEC actually provides to the IXCs and that do not duplicate access services that are still being provided by the ILEC at rates no greater than those the ILEC charges. For example, if the CLEC provides the tandem switching function instead of the ILEC, the CLEC should be permitted to charge the IXC for tandem access switching, or if the CLEC provides a

toll-free database query instead of the ILEC, it should be permitted to charge for that particular access service. The Commission should make clear, however, that the CLEC, like the ILEC, cannot charge the IXCs for access service functions that it does not in fact provide.<sup>3</sup> In particular, CLECs should not be permitted to charge for the local loop or local switching functions that are performed by the CMRS carrier. And CLECs obviously should not be permitted to charge the full maximum CLEC benchmark access rate, which plainly has no application to the very limited transiting functions at issue in this case, but should instead be limited to the rate the ILEC would have charged for the replaced transiting functions.

Finally, the Commission should also grant T-Mobile's petition for declaratory ruling, but *only* if it applies T-Mobile's proposal to all carriers, not just CMRS carriers. T-Mobile argues that small ILECs are increasingly seeking to impose access charges by tariff on CMRS carriers when they are indirectly interconnected through an RBOC tandem, and the Commission should make clear that such ILECs should negotiate reciprocal compensation arrangements with a default rule of bill-and-keep. Adopting such a rule only for CMRS carriers, however, would exacerbate the existing competitive imbalance, because the CMRS carriers' IXC competitors would have to pay access charges to terminate the same calls. Indeed, T-Mobile's petition is another vivid example of why the Commission should eliminate the more fundamental disparity that currently exists in the Commission's rules – *i.e.*, that CMRS carriers are entitled to terminate any call within a Major Trading Area (MTA) subject to the Section 251(b)(5) reciprocal compensation rules, while IXCs must pay access charges to terminate interLATA intraMTA calls.

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<sup>3</sup> See, e.g., *Bell Atl. Tel. Cos.*, Order, 6 FCC Rcd. 4794 (1991) (holding that ILECs cannot charge IXCs for access functions that they do not provide on calls originating or terminating on CMRS carrier's networks) (“*Access Charge Limitation Order*”).

## II. FACTUAL BACKGROUND

### A. Under Existing Access Arrangements And Commission Precedent, Carriers Are Permitted To Recover Access Charges Only For Functions That They Actually Provide to IXCs.

Historically, CMRS carriers have connected their local wireless networks directly to the wireline networks of the ILECs, and long distance calls originating on the CMRS carrier's network have been routed by the CMRS carrier through an ILEC tandem switch to the appropriate IXC. Similarly, long distance calls terminating on the CMRS carrier's network have been routed by the IXC through an ILEC tandem switch to the CMRS carrier's network. For providing transiting service between the CMRS carrier and the IXC, the ILEC has been permitted to charge the IXCs only for those access services that the ILEC actually performs. In particular, the ILECs have charged IXCs only for tandem switching and tandem switched transport functions that the ILEC actually provides on long distance calls originating or terminating on the CMRS carrier's network. In addition, the ILECs have charged IXCs for toll-free database queries on 8YY calls originated by the CMRS carrier's end-user customers.<sup>4</sup>

The Commission has consistently rejected attempts by ILECs to charge IXCs for local access functions on calls from CMRS end users when the ILEC did not actually provide the functions. For example, in *Bell Atlantic Telephone Companies*, the Commission rejected Bell Atlantic's attempt to impose carrier common line ("CCL") charges on IXCs for calls originating or terminating on wireless networks of cellular or other radio common carriers ("RCCs") because "the RCC's network, not the LEC's common line facilities, provides the connection

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<sup>4</sup> Because virtually all CMRS carriers have made their own arrangements for the transmission of long distance calls originated by their end-user customers, AT&T believes that nearly all of the long distance traffic originated by the customers of CMRS carriers that is delivered to IXCs through an access tandem is toll-free 8YY traffic.

between the ILEC switch and the end user.”<sup>5</sup> Pointing out that “[t]he Commission has held on numerous occasions that an RCC is a common carrier and not an end user,”<sup>6</sup> and in particular, “that RCCs are not end users for application of access charges,”<sup>7</sup> the Commission held that the ILEC could not treat the RCC as if it were an end user for the purpose of assessing access charges on IXCs.<sup>8</sup> Rather, the Commission held that ILECs may only charge IXCs for those particular access functions that the ILEC actually provides to the IXC in transiting traffic between the CMRS carrier and the IXC.<sup>9</sup>

As a result of this well-established Commission precedent, the ILECs “do not receive compensation from the IXC for portions of access provided by CMRS providers.”<sup>10</sup> In particular, the ILECs do not charge the IXC for the CCL or the local switching element on calls originating from CMRS networks because in such circumstances those functions are provided by the CMRS carrier.<sup>11</sup> The ILECs only charge IXCs for those tandem switching and transport functions that the ILEC actually provides on long distance calls originating or terminating on the CMRS carrier’s network, and, where applicable, for toll-free 8YY database queries performed by the ILEC. As US WEST explained in comments to the Commission, when its network is used to

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<sup>5</sup> *Access Charge Limitation Order* ¶ 4.

<sup>6</sup> *Id.* ¶ 8.

<sup>7</sup> *Id.* ¶ 9.

<sup>8</sup> *Id.*

<sup>9</sup> See also *Texcom, Inc. v. Bell Atl. Corp.*, Mem. Op. & Order, 16 FCC Rcd. 21493, ¶ 12 (2001), *recon. denied*, 17 FCC Rcd. 6275 (2002) (ILEC cannot assess CCL charges on IXCs when ILEC is only transiting traffic between a CMRS carrier and an IXC).

<sup>10</sup> Reply Comments of Pacific Bell, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, at 77 (filed Mar. 25, 1996)

<sup>11</sup> See Comments of NYNEX, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, at 45-46 (filed Mar. 4, 1996) (“The Commission has already determined that ILECs may not charge IXCs for Carrier

provide “CMRS-IXC transit functions,” the ILEC’s access charges to the IXCs are limited to

two rate elements – transport (from the IXC POP to the CMRS POP) and tandem switching – to reflect the actual use of its network. US WEST’s IXC transit charges do not include other rate elements like local switching and carrier common line charges because the costs associated with those charges are not incurred in performing the transit function.<sup>12</sup>

**B. Recent Attempts By Sprint PCS And Other CMRS Carriers To Impose Access Charges On IXCs.**

In contrast to wireline local carriers, CMRS carriers generally charge their local end-user customers usage (“airtime”) charges both when they make and when they receive calls, and this practice extends to long distance calls.<sup>13</sup> Because both the CMRS carrier and the IXC receive a direct financial benefit from the completion of long distance calls, until very recently the uniform industry practice has been for CMRS carriers to recover their network usage costs directly from their own end users and to keep that revenue as full compensation for the costs they incurred to originate or terminate long distance calls – a procedure known in the industry as “bill-and-keep.”<sup>14</sup> CMRS carriers use the bill-and-keep procedure rather than impose access charges on

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Common Line charges [on] calls involving CMRS providers and may not charge the Local Switching Element on Type 2 connections (where CMRS providers offer this function”).

<sup>12</sup> Comments of US WEST, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, at 64 (filed Mar. 4, 1996) (emphasis in original). See also Comments of Pacific Bell, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, at 38 (filed Mar. 4, 1996); Comments of BellSouth, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, at 38 (filed Mar. 4, 1996); Comments of Pacific Bell, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, at 105 (filed Mar. 4, 1996) (both confirming that where the ILEC provides a transiting service between a CMRS carrier and a IXC, the ILEC charges the IXC only for the particular access service functions that are actually provided by the ILEC).

<sup>13</sup> *CMRS-IXC Access Charge Declaratory Ruling* ¶¶ 14, 15.

<sup>14</sup> Bill-and-keep is an arrangement where carriers, rather than charging each other for access services, recover their costs directly from their own end users. See 47 U.S.C. § 252(d)(2)(B).

IXCs.<sup>15</sup> Likewise, IXCs do not bill CMRS carriers for long distance calls that are originated by the CMRS carrier's customers and handed off by the CMRS carrier to the IXC for termination.

In 1999, Sprint PCS, seeking to obtain additional revenues from AT&T, began sending invoices to AT&T for access charges for every AT&T long-distance call originated or terminated by Sprint PCS's customers. When this matter was presented to the Commission, it issued a declaratory ruling holding that Sprint PCS had no authority under the Communications Act or any Commission rule or order unilaterally to impose access charges on IXCs.<sup>16</sup> Although the Commission did not completely foreclose the possibility that a CMRS carrier and an IXC could reach an agreement for the IXC to pay such access charges under state law,<sup>17</sup> the Commission rejected every argument advanced by Sprint PCS that CMRS carriers had a right to collect access charges from IXCs under federal law.<sup>18</sup>

**C. The Arrangement Between US LEC And CMRS Carriers Regarding The Routing of Interexchange Traffic.**

Not having reached an agreement with IXCs regarding access charges and, therefore,

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<sup>15</sup> *CMRS-IXC Access Charge Declaratory Ruling* ¶¶ 14-15.

<sup>16</sup> *Id.* ¶¶ 7-12.

<sup>17</sup> *Id.* ¶¶ 12-15. On this question, the Commission found that there was “no written agreement or any express contract between AT&T and Sprint PCS” for the payment of access charges, and, while deferring the possible existence of an implied contract to the referring court, the Commission offered the court “two important observations regarding the regulatory regimes applicable to IXCs and CMRS carriers” that rendered such an implied contract highly unlikely. *Id.* ¶¶ 12, 14-15.

<sup>18</sup> *Id.* ¶¶ 7-11. Among other things, the Commission pointed out that, although it had “tentatively concluded” in its 1996 *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd. 5020, ¶ 116 (1996) (discussed in US LEC Pet. at 4-6), that CMRS carriers should be able to recover access charges from IXCs for the completion of interexchange calls, the Commission had “never adopted” that tentative conclusion, with the result that CMRS carriers presently have no right unilaterally to impose access charges on IXCs. *CMRS-IXC Access Charge Declaratory Ruling* ¶ 9.

unable to collect access charges directly from IXCs,<sup>19</sup> some CMRS carriers have now allied themselves with various CLECs in an attempt to collect access charges from IXCs indirectly. These arrangements take two forms. In the by far most common scenario, the CMRS carrier, rather than routing long distance traffic directly to the ILEC tandem switch as it had previously done, now reroutes its toll-free (8YY) long distance traffic to one of a number of CLECs in exchange for a fee or commission on any access charges thereby generated for that CLEC. Under that arrangement, a CLEC receives the traffic from the CMRS carrier and then reroutes the CMRS traffic back to the ILEC tandem switch for delivery to the IXCs.

Although that CLEC has provided no additional access functionality or value under this arrangement, it then attempts to charge additional access fees to the IXC above and beyond the access fees being charged by the ILEC. Further, in direct violation of Commission precedent and industry practice regarding the collection of access charges by LECs on interexchange calls originating or terminating on the networks of CMRS carriers, the CLEC then attempts to charge the IXCs not for the access functions, if any, that it actually provided in transiting traffic from the CMRS carrier's network to the ILEC tandem switch, but for the *full amount* of the Commission's *maximum* CLEC benchmark access rate – as if the call had been originated or terminated by one of the CLEC's own end-user customers rather than by the end-user customer of another common carrier.

In the less common scenario, the CLEC actually replaces the ILEC in providing the tandem function. In other words, whereas CMRS carriers had previously routed their traffic to IXCs via an ILEC tandem, in this less-common scenario the CMRS carrier routes its traffic to a CLEC, which in turn routes the traffic directly to the IXC, performing any necessary 8YY

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<sup>19</sup> See *CMRS-IXC Access Charge Declaratory Ruling* ¶ 9 (stating that AT&T has no express agreements to pay access charges to CMRS carriers).

database query.<sup>20</sup> Although CLECs in *this* arrangement have provided solely tandem switching, tandem transport, and 8YY query functions, they nevertheless have sought to impose the full CLEC benchmark rate for this traffic – a rate that reflects local switching, local loop, and originating functions that are in fact performed by the CMRS carrier, not the CLEC.

**III. WHERE A CLEC INSERTS ITSELF BETWEEN THE CMRS PROVIDER AND THE ILEC TANDEM, IT IS PROVIDING NO GENUINE ACCESS FUNCTION AND SHOULD NOT BE PERMITTED TO CHARGE THE IXC FOR ACCESS.**

In the vast majority of cases, the CLECs involved in the arrangements at issue in this proceeding merely insert their switch between the CMRS provider and the ILEC tandem. Whereas without the CLEC's involvement, the call would go straight from the CMRS provider to the ILEC tandem, the CMRS carrier now routes the same calls to the ILEC tandem via a CLEC switch. Because no intermediate switching by a LEC is necessary to route traffic from the CMRS carrier to an ILEC tandem, the majority of CLEC-CMRS arrangements at issue in this proceeding merely create additional charges for IXCs by inserting an unnecessary middleman. It is plain that neither IXCs nor CMRS end users<sup>21</sup> attain any benefits from these arrangements, and IXCs should not have to pay for such charges.

In light of the lack of telecommunications benefit from these arrangements, it appears that they are merely an attempt to evade the *CMRS-IXC Access Charge Declaratory Ruling*. As the Commission made clear, carriers may only “impose charges on another carrier” through one of three ways: “(1) Commission rule; (2) tariff; or (3) contract.”<sup>22</sup> In light of the mandatory detariffing of CMRS access services, the only means (other than a contract) that could provide a

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<sup>20</sup> See *supra* n. 4 & accompanying text.

<sup>21</sup> Notably, CMRS carriers are not themselves end users. See *supra* 5-6; *infra* nn. 28-29 & accompanying text. As such, the CLECs do not provide an access service in connecting the CMRS carriers to the ILEC switch.

<sup>22</sup> *CMRS-IXC Access Charge Declaratory Ruling* ¶ 8.

CMRS carrier with a right to charge IXCs for access would be a Commission rule.<sup>23</sup> However, as the Commission painstakingly made clear, “no Commission rule . . . enables [a CMRS carrier] unilaterally to impose access charges on AT&T.”<sup>24</sup> CMRS carriers, desiring to avoid the costs of negotiating an agreement with IXCs, have therefore decided to create these arrangements to reap access charges that they desire – but cannot attain without an agreement, as decided in the *CMRS-IXC Access Charge Declaratory Ruling*.<sup>25</sup>

Assuredly, any carrier may appeal an order of the Commission with which it disagrees – and, indeed, several CMRS carriers have appealed the portion of the *CMRS-IXC Access Charge Declaratory Ruling* stating that they have no right to charge an IXC for access without an agreement. However, what carriers *cannot* do is to use maneuvers, like this one, in order to evade a Commission holding and permit CMRS carriers unilaterally to impose unilaterally and indirectly on IXCs charges that the Commission has precluded the CMRS carriers.

Moreover, any access function provided by CLECs operating under this type of arrangement simply duplicates the functions performed by others. As discussed more fully below, the local switching and “loop”-type functions of access are provided by the CMRS carrier, not the CLEC. By contrast, the ILEC already provides – and bills IXCs for – tandem switching on these calls. Any additional tandem charge – let alone the full benchmark rate CLECs in fact seek to recover – is duplicative and unnecessary and should not be imposed on IXCs.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* ¶ 9. *See also id.* ¶¶ 9-11 & accompanying notes (dismissing all potential sources for Commission rule entitling CMRS carriers to receive access charges).

<sup>25</sup> CMRS carriers enter into such arrangements because, as AT&T has reason to believe, the CLECs share with CMRS carriers a portion of the access charges recovered from IXCs on these calls.

**IV. WHERE A CLEC REPLACES THE ILEC IN PROVIDING THE TANDEM SWITCHING OR OTHER ACCESS FUNCTION, THE CLEC SHOULD ONLY BE PERMITTED TO CHARGE THE ILEC RATE FOR ACCESS FUNCTIONS THAT ARE ACTUALLY PERFORMED BY THE CLEC.**

There is one limited exception to the foregoing discussion. Where the CLEC actually *replaces* the ILEC in performing an access function normally performed by the ILEC for traffic originating or terminating on the network of a CMRS carrier, the CLEC should be permitted to charge the IXC in the same manner as the ILEC for the particular access functions actually performed by the CLEC. For example, if the CLEC performs the tandem access switching function in place of the ILEC, the CLEC should be permitted to charge the IXC for tandem access switching. Similarly, if the CLEC, rather than the ILEC, provides the toll-free database query on 8YY long distance calls, it should be permitted to charge the IXC for that specific service. However, this exception should apply only where the CLEC *replaces* the ILEC, and not where the CLEC is merely providing a duplicative functionality, and the CLEC should only be permitted to recover for those *particular* access functions that it performs in place of the ILEC.

Only in the limited situation posited above is the CLEC “performing the traditional role of a local exchange provider in providing access service to the IXC.”<sup>26</sup> In that limited instance, the CLEC stands in the shoes of the ILEC, and it should have the same – but no greater – right to charge for access services that the ILEC would have if it were providing the same access service. In particular, the CLEC, like the ILEC, should be permitted to charge only for the specific access functions that it actually provides to the IXCs and that do not duplicate access services that are still being provided by the ILEC. However, the CLEC, like the ILEC, should be prohibited from charging the IXCs for access service functions that it does not provide. In particular, the CLEC should not be permitted to charge for the carrier common line, local switching or other functions

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<sup>26</sup> US LEC Pet. at 2.

that are performed by the CMRS carrier. Nor should the CLEC be permitted to charge the IXC's for any access functions that continue to be provided by the ILEC, such as tandem switching and transport.

US LEC's further contention (at 3, 9) that it should be able to charge the full "benchmark rate" whenever it handles any call that originates or terminates on a CMRS carrier's network should be emphatically rejected as directly contrary to Commission policy and precedent. The Commission's maximum benchmark rates for CLEC access charges were designed for the situation where the CLEC provides the full range of switched access services on calls originated or terminated by the CLEC's own end-user customers, including the use of carrier common line, local end office switching and interconnection, and tandem switching and transport.<sup>27</sup> The maximum CLEC benchmark rates were plainly not intended to apply where a CLEC is merely providing a transiting function between a CMRS carrier and the IXCs (or between the CMRS carrier and the ILEC tandem switch), where the CMRS carrier provides all of the carrier common line and local end office switching functions. Rather, in that situation, Commission policy and precedent make clear that a LEC, whether a CLEC or an ILEC, providing a transiting function between two carriers can charge only for those access service functions that it actually provides.

As the Commission has held "on numerous occasions," a CMRS carrier "is a common carrier and not an end user."<sup>28</sup> Accordingly, CMRS carriers cannot be treated by the LEC as an

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<sup>27</sup> *CLEC Access Charge Order* ¶ 55 & n. 126.

<sup>28</sup> *Access Charge Limitation Order* ¶ 8. See also *Long-Term Number Portability Tariff Filings*, Mem. Op. & Order, 14 FCC Rcd. 11883, ¶ 111 ("CMRS providers . . . are carriers, not end users"); *FCC Policy Stmt. on Interconnection of Cellular Systems*, 51 FR 10838-01, ¶ 2 (1986) ("A cellular system operator is a common carrier, rather than a customer or end user"); *Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report & Order, 86 F.C.C.2d 469, ¶ 56 (1981) ("A cellular system operator is a common carrier and not merely a customer").

end-user customer for the purpose of assessing access charges.<sup>29</sup> When either an ILEC or a CLEC is inserted between the CMRS carrier and the long distance networks of the IXCs, therefore, the LEC is only providing a transiting function between two common carriers rather than a complete access service, and the LEC can only charge for those particular access service functions that it actually provides to the IXC.<sup>30</sup> Any other rule would result in unreasonable duplicative and unnecessary access charges.<sup>31</sup>

Accordingly, the Commission has squarely held that ILECs cannot charge carrier common line charges when traffic originates on a CMRS network, because the CMRS carrier is providing loop functionality.<sup>32</sup> For that reason, where an ILEC routes to an IXC traffic that originates from a wireless network, the ILEC *only* charges the IXC for tandem switching charges and for performing the 8YY database dip, but does *not* charge IXCs for local switching and loop functionalities.<sup>33</sup> When the CLEC replaces the ILEC in routing traffic to the IXC that originates from a CMRS carrier, it likewise does not provide local switching and loop functionalities and should, like the ILEC, be limited to charging the rate charged by ILECs for tandem switching and/or the database dip. Indeed, given that this Commission expressly made clear in the *CLEC*

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<sup>29</sup> *Access Charge Limitation Order* ¶ 9 (“RCCs are not end users for the application of access charges”); *Long-Term Number Portability Tariff Filings*, 14 FCC Rcd. 11883, 11934 (¶ 110) (same).

<sup>30</sup> *Access Charge Limitation Order* ¶ 4 (holding that ILECs cannot charge IXCs for access functions that they themselves do not provide on interexchange calls that originate or terminate on a CMRS carrier’s network).

<sup>31</sup> *See, e.g., Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 86 F.C.C.2d 469, ¶ 56 (1981) (“interconnection arrangements [for wireless carriers] should . . . be reasonably designed so as to minimize unnecessary duplication of switching facilities and the associated costs”).

<sup>32</sup> *See, e.g., Access Charge Limitation Order* ¶ 4 (ILECs cannot assess carrier common line charges against IXCs on calls originating or terminating on the network of a CMRS carrier because the connection between the end user and the local switch is provided by the CMRS carrier).

*Access Charge Order* (¶ 55 & n.126) that the benchmark rate includes *numerous* functions, including but not limited to “(1) common line charges; (2) local switching; and (3) transport,” permitting CLECs to charge the *maximum* benchmark rate where it is solely providing such a more limited set of functions would contravene the very precedent upon which US LEC seeks to rely.

The magnitude of the difference between the benchmark rate that US LEC proposes to charge IXCs for the transiting function and the rates that are charged by the ILECs for the same access functions is enormous. While the Commission’s maximum benchmark rate for CLEC access was 2.5 cents per minute (“cpm”) for the first year and 1.8 cpm for the second year,<sup>34</sup> the rates charged by the ILECs for all interstate tandem switching and associated transport functions are only 0.15349 cpm.<sup>35</sup> For this reason, the Commission should find that the access rate charged by the CLEC for the tandem access functions must be no higher than the rate currently charged by the ILEC for the same access functions. Similarly, where the CLEC performs the toll-free database query in place of the ILEC, the CLEC should be permitted to charge no more than the rate of the competing ILEC for that service.

Limiting the rates charged by CLECs for traffic originating or terminating on the networks of CMRS carriers to the level of the rates charged by the competing ILEC for the same access service functions is both necessary and appropriate to ensure fairness and to avoid distortions in the competitive process. As the Commission found in its *CLEC Access Charge Order*, each CLEC has “a series of bottleneck monopolies over access” to end users that are

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<sup>33</sup> See *supra* n.4 & accompanying text.

<sup>34</sup> See *CLEC Access Charge Order* ¶ 52; 47 C.F.R. § 61.26(c).

<sup>35</sup> See, e.g., BellSouth Telecommunications Tariff FCC No. 1, § 6.8; Verizon Telephone Companies Tariff FCC No. 1, § 6.9.

connected behind the CLEC's switch,<sup>36</sup> such that it is "necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs" from the IXCs.<sup>37</sup> Because in a competitive market the CLEC would be able to charge no more than the prevailing market price being charged by the incumbent access provider,<sup>38</sup> the only effective way to replicate a competitive market is to limit the CLEC's access rates to the level of the access rate charged by the ILEC serving the same local market for the same service. Moreover, if the Commission were to allow CLECs to charge a higher rate in this context, it would condone attempts by CMRS carriers and CLECs to circumvent the Commission's *CMRS-IXC Access Charge Declaratory Ruling* by collecting access charges from IXCs indirectly when they could not do so directly.

For these reasons, US LEC is wrong when it claims that its rates in this context – which match the maximum CLEC benchmark rate that the CLEC may charge when originating calls *from an end user* – are presumptively reasonable. As described above, the rates are far beyond what an ILEC would charge for *the exact same service*. Notably, in the *CLEC Access Charge Order* (¶ 22), the Commission assessed the reasonableness of CLEC access charges – and found them to be *unreasonable* – by comparing them to ILEC access charges. As the Commission stated in that *Order* (¶ 37), "it is highly unusual for a competitor to enter a market at a price

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<sup>36</sup> *CLEC Access Charge Order* ¶ 30.

<sup>37</sup> *Id.* ¶ 39. See also *id.* ¶ 34.

<sup>38</sup> See *id.* ¶ 45 ("new entrants typically price their product at or below the level of the incumbent provider"), ¶ 59 (limiting CLEC access rates to the level of the competing ILEC "bring[s] them toward the model of a competitive market, in which new entrants can successfully enter only at or below the prevailing market price"). *Accord AT&T Corp. v. Business Tel., Inc.*, 16 FCC Rcd. 12312, ¶ 54 (2001) ("in a properly functioning competitive market, CLECs would charge no more for their access services than do the ILECs with which they compete"); *id.* ¶ 31 ("according to fundamental economic principles, in a properly functioning competitive market, the access rates of [a CLEC's] primary access competitors would have been a substantial factor in [the CLEC's] setting of its own access rates").

dramatically above the price charged by the incumbent, absent a differentiated service offering.”

Although the Commission established a series of declining maximum “benchmark” rates in its *CLEC Access Charge Order* in an effort to soften the financial hardship to CLECs that might result from an immediate “flash-cut” to the competing ILEC access rate, the rationale for those benchmark rates has no application to the situation posited by US LEC because the CLEC transiting role at issue in this case is a new service and not a service that any CLEC has come to rely upon. The benchmark rates established in the Commission’s *CLEC Access Charge Order* have no application where a CLEC enters a new market.<sup>39</sup> As the Commission explained, the benchmark rates are not to be applied to “present[ ] CLECs with the opportunity to enter additional markets in a potentially inefficient manner through reliance on tariffed access rates above those of the competing ILEC.”<sup>40</sup> This policy is directly applicable here because US LEC proposes to provide a connection between a CMRS carrier and an IXC that does nothing more than, at most, either duplicate or displace the very limited tandem access services and toll-free database queries that had been provided by the competing ILEC. CLECs should not be permitted to inflate the access charges imposed on IXCs merely by arranging with a CMRS carrier to substitute themselves for the ILEC in the connection between the CMRS carrier and the IXC.

**V. THE COMMISSION SHOULD GRANT T-MOBILE’S PETITION AS TO ALL CARRIERS, NOT JUST CMRS CARRIERS, AND IT SHOULD ELIMINATE THE EXISTING REGULATORY DISPARITIES BETWEEN CMRS CARRIERS AND IXCS.**

T-Mobile asserts that CMRS carriers generally do not have enough traffic to justify

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<sup>39</sup> *CLEC Access Charge Order* ¶ 58; 47 C.F.R. § 61.26(d).

<sup>40</sup> *CLEC Access Charge Order* ¶ 58.

establishing interconnection trunks directly to small ILECs (Type 2A interconnection). Instead, they interconnect indirectly with these small ILECs through the RBOC tandem (Type 2B interconnection). In such situations, T-Mobile asserts, CMRS carriers and small ILECs traditionally have exchanged traffic on a bill-and-keep basis. *See* T-Mobile Petition at 2-4. According to T-Mobile, however, small ILECs are increasingly attempting to replace such arrangements unilaterally by filing “wireless termination tariffs,” which would impose much higher access charges for the termination of calls originating on the CMRS network. *Id.* at 4-7. T-Mobile seeks a declaratory ruling that such “wireless termination tariffs” are unlawful, and that the small ILECs should be required to negotiate, rather than set termination terms unilaterally (with a default rule of bill-and-keep). *See id.* at 7-13.

T-Mobile is correct that small ILECs should not be entitled unilaterally to impose access charges on carrier that interconnect indirectly, but that is a problem that affects *all* carriers, not just CMRS carriers. Accordingly, the Commission should grant T-Mobile’s petition *only* if T-Mobile’s proposed rule is applied to all carriers, both CMRS and wireline. Indeed, limiting such relief to CMRS carriers would do more harm than good, because the resulting rule would simply exacerbate the competitive advantage that the Commission’s current rules give CMRS carriers at the expense of wireline competitors. Under the current rules, all LEC-CMRS interconnection within a Major Trading Area (MTA) is governed by the section 251(b)(5) reciprocal compensation regime, even if the calls would otherwise be deemed interexchange or interLATA calls subject to access charges.<sup>41</sup> Granting T-Mobile and other CMRS carriers the relief requested in T-Mobile’s petition would further exacerbate the substantial competitive

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<sup>41</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report & Order, 11 FCC Rcd. 15499, ¶ 1036 (1996), *aff’d in part & vacated in part, sub nom Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part & rev’d in part, sub nom AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

imbalance: CMRS carriers like T-Mobile could obtain indirect interconnection with small ILECs at the RBOC tandem and terminate calls on a bill-and-keep basis throughout the MTA, while wireline carriers obtaining the same indirect interconnection would in most cases pay the small ILECs access charges.

In this regard, T-Mobile's petition is yet another vivid illustration of the increasingly urgent need to eliminate the existing disparities in intercarrier compensation for wireless and wireline carriers. Because MTAs are frequently much larger than LATAs, there are many instances in which CMRS carriers can obtain interconnection and termination at cost-based reciprocal compensation rates (or bill-and-keep), while their wireline IXC competitors must pay traditional, inflated access charges. This is increasingly intolerable, because as the Commission itself has recognized, CMRS carriers now compete directly with wireline interexchange carriers.<sup>42</sup> Indeed, T-Mobile's petition is typical of recent efforts by CMRS carriers to obtain additional exemptions and other special treatment to ensure that, to the maximum extent possible, they can obtain access at cost-based rates or bill-and-keep while their IXC competitors pay access charges.

There is no principled reason why CMRS carriers should be permitted to complete intraMTA calls at either cost-based rates or bill-and-keep, while their wireline competitors must pay access charges to complete the same intraMTA calls. This regulatory disparity is increasingly distorting competition and must be eliminated. The Commission has already established a comprehensive rulemaking to review all of its intercarrier compensation rules,

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<sup>42</sup> See, e.g., *Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking & Report & Order, 17 FCC Rcd. 3752, ¶ 11 (2002) ("the growth of [wireless] appears to be causing a significant migration of interstate telecommunications revenues from wireline to mobile wireless providers").

including LEC-CMRS intercarrier compensation and its relationship to access charges.<sup>43</sup> Acting within that docket, the Commission should promptly issue rules eliminating the existing disparities between CMRS carriers and IXCs with respect to the termination of calls within an MTA.

## VI. CONCLUSION

For the foregoing reasons, the Commission should deny US LEC's petition for declaratory ruling and find that a CLEC that merely inserts itself between a CMRS carrier and an ILEC tandem switch has provided no additional access functionality and is not entitled to collect any access charges from the IXCs. Where the CLEC actually *replaces* the ILEC and provides particular access functions previously provided by the ILEC on connections between the CMRS carrier and the IXC (*i.e.*, tandem switching and, if applicable, the 8YY database query), on the other hand, the Commission should permit the CLEC to charge only for the specific access functions actually performed by the CLEC and not duplicated by the ILEC, and the Commission should limit the CLEC's charges for those functions to the amounts that would have been charged by the competing ILEC for the same transiting service. Finally, the Commission should also grant T-Mobile's petition for declaratory ruling, but *only* if it applies T-Mobile's proposal to all carriers, not just CMRS carriers.

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<sup>43</sup> See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, ¶¶ 90-92 (2001).

Respectfully submitted,

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October 18, 2002

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served, by the noted methods, the 18th day of October, 2002, on the following:

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