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August 25, 2003

VIA ELECTRONIC FILING

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

Re: ***Ex Parte***
CC Docket Nos. 96-262, 01-92

Dear Ms. Dortch:

In this letter, US LEC Corp. ("US LEC") provides additional information in support of its Petition for Declaratory Ruling concerning application of CLEC access charges to traffic originating on wireless carrier networks.[1] US LEC also responds to various *ex parte* presentations concerning this petition.[2]

I. NEITHER THE *CLEC BENCHMARK ORDER* NOR THE *SPRINT DECLARATORY RULING* PERMITS IXCS TO AVOID US LEC'S LAWFUL ACCESS CHARGES

A. US LEC's Access Charges Are Deemed Reasonable Under The *CLEC Benchmark Order*

The Commission already has determined that wireline LECs may impose access charges for carrying wireless interexchange traffic and nothing in the *CLEC Benchmark Order* altered that determination. Section 69.5 of the Commission's rules specifies that "carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[3] In

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[1] Petition for Declaratory Ruling of US LEC Corp., CC Docket No. 01-92, filed September 18, 2002 ("Petition").

[2] *See, e.g.* Letter from Jennifer M. Kashatus, Counsel to ITC^DeltaCom to Marlene H. Dortch, CC Docket No. 01-92, April 18, 2003.

[3] 47 C.F.R. § 69.5. Section 69.5 does not require that the IXC literally use the local exchange switching facilities of the carrier. The reference to IXCs that "use local exchange switching facilities" in Section 69.5(b) simply means that the carrier's carrier charges are generally applicable to switched access service. *AT&T*

the *Local Competition Order,* the Commission determined that Section 69.5 extends to use of a telephone company's facilities for cellular interexchange traffic.[4]

In the *CLEC Benchmark Order*, the Commission concluded that:

> CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established. Accordingly, an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal court, without the impediment of a primary jurisdiction referral to the Commission to determine the reasonableness of the rate.[5]

Nothing in the *CLEC Benchmark Order* exempted wireless traffic from this conclusion. To the contrary, the Commission previously has stated expressly that wireline LECs are entitled to recover access from IXCs for transmitting wireless traffic. In 1996, the Commission explained why it thought that wireless carriers should be able to recover access charges in the same manner as LECs:

> In the context of the existing access charge regime, we tentatively conclude that CMRS providers should be entitled to recover access charges from IXCs, ***as the LECs do when interstate inter-exchange traffic passes from CMRS customers to IXCs (or vice versa) via LEC networks.*** We propose to require that CMRS providers be treated no less favorably than neighboring LECs ***or CAPs*** with respect to recovery of access charges from IXCs and LECs for interstate interexchange traffic.[6]

Given that the Commission previously has found that access charges are owed for the use of a wireline carrier's facilities to transmit wireless interexchange traffic, the *CLEC Benchmark Order* would have had to ***explicitly*** exempt wireless traffic. It did not and the IXCs may not argue that, by its silence, the *CLEC Benchmark Order* implicitly does not apply to wireless traffic.

Corporation, et al., v. Bell Atlantic-Pennsylvania, et al., File No. E-95-006 and consolidated files, Memorandum Opinion and Order, FCC 98-321, 14 FCC Rcd. 556, ¶ 32, n. 96 (1998).

[4] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket. No. 96-98, CC Docket No. 95-185, 11 FCC Record 15499, ¶ 1043, n.2485 (1996) ("*Local Competition Order*")

[5] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* Seventh Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶ 60 (2001) ("*CLEC Benchmark Order*").

[6] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers and Equal Access and Interconnection Obligations Pertaining to Commercial Radio Service Providers*, CC Docket Nos. 95-185 and 94-54, Notice of Proposed Rulemaking, FCC 95-505, ¶ 115 (Jan. 11, 1996) (emphasis added) (the "*LEC/CMRS Interconnection Order*").

Nor is there any requirement, whether under federal law or in US LEC's access tariff, that a carrier may provide access service only with respect to its own end-user customers. Indeed, the Commission acknowledged as much in the *LEC/CMRS Interconnection Order* when it suggested that CMRS carriers should be able to recover access charges just as LECs do when transmitting that traffic to IXCs. US LEC's tariff compels IXCs to pay for US LEC's access services regardless of whether the ultimate end user is a US LEC customer.

The Commission has clearly stated that the descending benchmark rate regime is an interim regime that balances the demands of the IXCs for lower CLEC rates and the rights of the CLECs to recover investments made in reliance on then-tariffed rates. The regime is a compromise with a limited life that the Commission established, in part, to provide regulatory certainty to the markets. In establishing the benchmark mechanism, the Commission stated that it wanted to avoid a "flash-cut" to the ILEC rate, finding that such a drastic reduction could harm growing competition.[7] The Commission stated that:

> This transition period is necessary to permit CLECs to adjust their business plans and obtain alternative sources for the substantial revenues of which the benchmark will deprive them -- revenues on which they have previously relied in formulating their business plans because they were not held to the regulatory standards imposed on ILECs.[8]

To exempt originating wireless traffic from the benchmark regime, as certain IXCs have advocated in this proceeding, wholly ignores the directives of the *LEC/CMRS Interconnection* Order and would require the Commission to abolish and then re-write the careful compromises reached in the *CLEC Benchmark Order*, harm growing competition, and undermine regulatory certainty.[9]

B. It Would Be Arbitrary and Capricious for the Commission to Apply the *Sprint Declaratory Ruling* to CLECs Operating Under a CPNP Tariffed Benchmark Access Regime

In response to US LEC's petition, certain IXCs contend that US LEC is attempting to do an "end run" around the *Sprint Declaratory Ruling*.[10] The allegation is easily disproved by fact and law. First, US LEC (and other LECs) billed IXCs for access services for wireless-originated calls for years before the *Sprint Declaratory Ruling*, and before the *CLEC Benchmark Order*.[11] Second, neither the conclusion nor the policies underlying that ruling apply to CLECs or ILECs.

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7 *CLEC Benchmark Order* at ¶ 62.

8 *Id.*

9 The fact that 8YY traffic is involved does not provide any basis for concluding that this traffic is not subject to the CLEC benchmark safe harbor. The Commission specifically determined that 8YY traffic would be subject to benchmark rules pending further rulemaking. *CLEC Benchmark Order* at ¶ 56.

10 *Petitions of Sprint PCS & AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192 (2002) ("*Sprint Declaratory Ruling*").

11 Thus, even if a "new market" refers to a "service market," contrary to AT&T's argument, this is not a "new market" for purposes of applying the *CLEC Benchmark Order*. *See* CC Docket No. 01-92, AT&T Comments at 17 (filed Oct. 18, 2002).

The *Sprint Declaratory Ruling* was the result of a request to clarify the legal obligations of a particular carrier-to-carrier relationship based on a narrow set of facts. At no time was the telecommunications industry, ILECs and CLECs alike, put on notice that this narrow set of facts might be applied to them. In contrast, the *CLEC Benchmark Order* was issued after an arduous rulemaking and considerable analysis that weighed the competing interests at stake, *i.e.*, CLECs' and IXCs'. The Commission may not re-balance those interests and re-write the *CLEC Benchmark Order* by applying the *Sprint Declaratory Ruling* in a manner that would alter the legal framework established by 47 C.F.R. § 69.5 and the *CLEC Benchmark Order*. Therefore, IXCs cannot avoid US LEC's lawful access charges by improperly invoking the *Sprint Declaratory Ruling.*

The narrow ruling requested by Sprint PCS was whether it, as a CMRS provider, could compel IXCs to pay access charges.[12] In response to that request, the Commission made a limited determination concerning access charges imposed by CMRS providers that are subject to mandatory detariffing. The ruling did not establish—overtly or implicitly—a general policy that IXCs, absent a contract, may decline to pay access charges to other carriers providing access services to complete wireless calls. The IXCs' hopes notwithstanding, the *Sprint Declaratory Ruling* did not declare unlawful the numerous LEC tariffs that impose access charges for services rendered to IXCs when delivering wireless traffic to them. To the contrary, the Commission found that under Type 1 interconnection, "the telephone company owns the switch serving the cellular network . . . [t]herefore, it performs the origination and termination of both incoming and outgoing calls."[13] This finding supports a CLEC's, and indeed an ILEC's, right to charge the IXC. LECs providing Type 1 interconnection bill and collect end office and tandem access charges via tariff for long distance traffic originating with wireless end users.[14] Indeed, even ITC^DeltaCom and AT&T, in their capacity as CLECs, impose access charges for wireless calls.[15] Their actions, through their filed tariffs, speak far louder than the hyperbolic rhetoric they espouse in this proceeding. Nothing in the *Sprint Declaratory Ruling* requires CLECs to contract with IXCs in order to receive compensation for access services performed in delivering wireless traffic to the IXCs.

The underlying basis for the *Sprint Declaratory Ruling* also clearly shows that the contract requirement does not apply to wireline LECs. The Commission found that even though it is lawful for CMRS carriers to provide, and attempt to collect for, access services provided to IXCs, nothing in the Commission's rules compels IXCs to pay CMRS carriers. Because CMRS

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[12] CLECs had no notice that the Commission might intend the *Sprint Declaratory Ruling* to limit or modify the established right of wireline LECs to tariff and collect access charges for wireless traffic carried over their networks. The Commission did not seek comments from affected parties as to whether this new policy could, or should, apply to this additional class of carriers, *i.e.* ILECs and CLECs, and thus has no evidentiary record upon which to base any decision that the *Sprint Declaratory Ruling* could possibly be applied to them. It would be arbitrary and capricious for the Commission to interpret the *Sprint Declaratory Ruling* to apply to wireline LECs when that far exceeds the notices regarding the *Sprint* proceeding, the scope of the ruling requested by Sprint, and the text of the ruling issued by the Commission.

[13] *Sprint Declaratory Ruling* at ¶ 11, n. 36.

[14] *See* Ameritech Tariff FCC No. 2, § 2.4.8.; *In the Matter of Bell Atlantic Telephone Companies,* DA 91-890, Order, 6 F.C.C.R. 4794, ¶ 11 (Type 1 connections justify an additional switching charge).

[15] AT&T Communications Tariff FCC No. 28, § 4.6.4; ITC^DeltaCom Communications, Inc., Tariff FCC No. 4, § 3.2.2.1.8.

carriers cannot file tariffs, the Commission determined that in order to collect access charges, CMRS carriers must have a contract with the IXC.[16]

A second basis for the ruling was the fact that CMRS carriers have never operated under the "calling party's network pays" ("CPNP") regime that governs wireline LECs' access arrangements.[17] These were not marginal considerations; they formed the very foundation of the decision in the *Sprint Declaratory Ruling* that CMRS providers may compel IXCs to pay access charges only by contract.

In contrast, US LEC (as well as ILECs and other CLECs) provides services both under the CPNP regime *and* pursuant to tariff. Either of these factors alone would make the *Sprint Declaratory Ruling* inapplicable to CLECs, but both of them together make that Ruling entirely irrelevant to the issues raised in US LEC's petition. The Commission has determined that IXCs must pay a CLEC's tariffed access charges that comply with the Commission's benchmark rules. Neither the *CLEC Benchmark Order* nor the *Sprint Declaratory Ruling* establishes an exception to this rule for wireless traffic.

The Commission may not adopt a post-hoc rationalization to extend the *Sprint Declaratory Ruling* to wireline LECs. But even if it could, there is absolutely no principled rationale why the ruling could be extended solely to prohibit CLEC access charges for wireless traffic. If, as the IXCs argue, the *Sprint Declaratory Ruling* affects access charges imposed by wireline LECs for wireless traffic, then that ruling must affect all wireline LECs, not just CLECs. It would be discriminatory, arbitrary, and capricious to extend that ruling solely to wireline CLECs. ILECs charge IXCs for transport and tandem access via tariff when IXC-bound wireless traffic is routed through the ILECs' facilities. If the ILEC tandem charge is lawfully applied to wireless traffic (and no IXC argues in this proceeding that it is not), then clearly application of the CLEC's charges are also lawful for the same exact wireless minute of use. The IXCs' discriminatory application of the *Sprint Declaratory Ruling* reveals that their true objective is simply economic, not a valid interpretation of the *Sprint Declaratory Ruling*.[18]

C. US LEC Is Entitled To Access Charges Whether the Access Arrangement Is Jointly or Solely Provisioned

Under standard industry practice, LECs may provision access service jointly, or a LEC may solely provide an access service using the facilities and services of other carriers. The regulatory framework governing LEC access charges has traditionally given them considerable discretion in fashioning these arrangements. Whether the access services US LEC provides are characterized as jointly provided by US LEC and the CMRS carrier, or solely provided by US LEC, US LEC is entitled to collect its lawfully tariffed access charges for the service it provides IXCs.

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16 *Sprint Declaratory Ruling* at ¶¶ 9, 10, 14.

17 *Id.* at ¶ 14.

18 After all, an IXC that terminates a CMRS-originated call collects toll revenue from its customer, but does not pass along the portion of the toll revenue that constitutes originating access.

US LEC's FCC tariff states that services may be provided "through the use of facilities and/or services acquired from another carrier."[19] Thus US LEC may either (1) contract to use the facilities of a CMRS carrier to provide access services to the wireless end user or (2) utilize meet point billing arrangements (in any form acceptable to the CLEC and CMRS carrier) with the CMRS carrier to jointly provision access service to the wireless end user. CLECs are not required to list participating or concurring carriers. Thus, neither US LEC nor any other CLEC with such arrangements is required to tariff this aspect of the service, and the tariffed offering is not unlawful because it did not do so.[20]

Under the sole provider access arrangement, US LEC may contract with other carriers to use their facilities in its provision of access service. For example, US LEC may use a SONET ring leased from Verizon as an input in its access services provided to IXCs. Similarly, US LEC may use the facilities of a CMRS carrier as an input in its access services provided to IXCs. Nothing in the *Sprint Declaratory Ruling* prohibited wireline LECs from utilizing CMRS facilities in this manner. Moreover, nothing in the *CLEC Benchmark Order* limited CLECs to using solely their own facilities in the provision of access services.

Under the joint provisioning option, MECAB guidelines specifically provide that carriers may jointly provision access services using a single bill, single tariff method. This method is defined as:

> The billing company agrees to prepare a single access or interconnection bill based upon their rate structure. Usage data is transmitted from the recording point for input into the billing system. The billing company renders a bill to the customer for all portions of the service. The other providers render a bill to the billing company for that portion of the service they provide. The customer remits payment to the billing company. The billing company remits payment to the other providers.[21]

US LEC and the CMRS carrier may jointly provision access services using the single bill, single tariff method. US LEC, as the billing carrier, is entitled to collect the access charges under its lawful tariff. This single bill, single tariff method predates the *Sprint Declaratory Ruling*, and is not modified or revoked in that ruling. When CMRS carriers may not file tariffs, and when IXCs refuse to contract with CMRS carriers for access services, it is only natural for CMRS carriers to seek compensation for services through other available, lawful means. The refusal of IXCs to enter into contracts with CMRS providers at reasonable rates cannot be ignored in this analysis. In the *Sprint Declaratory Ruling,* the Commission relied in part on the right of CMRS carriers to charge and collect for access services. The Commission apparently did not foresee that IXCs would refuse to negotiate contracts but continue to use the services and keep the portion of the toll revenue that otherwise would be paid as originating access. If an IXC

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19 US LEC Corp. FCC Tariff No. 1, § 1.

20 47 C.F.R. Section 61.23(d).

21 *Multiple Exchange Carrier Access Billing*, § 4.3.1.2 (Issue 7, Feb. 2001).

objects to paying the benchmark safe-harbor rate, it may negotiate lower than benchmark rates for the wireless-originated calls with either the CLEC or directly with the CMRS carrier.

In sum, whether US LEC is characterized as the sole provider of access services (using the facilities of other carriers as inputs in its service) or jointly providing access services with the CMRS carriers, US LEC is entitled to be paid its conclusively reasonable benchmark rate.

D. IXCs Have Taken No Steps To Eliminate Their Liability to Pay US LEC's Tariffed Rates

The IXCs have not submitted any evidence to show that they have taken any steps to refuse wireless originated calls from CLECs. Therefore, IXCs are bound by US LEC's tariff and the "constructive ordering doctrine."[22] Under that doctrine, an IXC is deemed to have "ordered" a CLEC's access services when: (1) the IXC is interconnected in such a manner that it can expect to receive access services from the CLEC; (2) the IXC fails to take reasonable steps to prevent the receipt of the access services;[23] and (3) the IXC does in fact receive such access services.[24] IXCs can claim no harm when they have done nothing to limit their liability for access charges for wireless traffic and have accepted the benefits of their 8YY customers being able to receive calls from both wireline and wireless callers – for which they bill their customers.[25]

Under *Total*[26] and the *CLEC Benchmark Order,* blocking traffic is not available as a self-help mechanism.[27] However, the IXC can reduce its costs by establishing its own direct connections or reduced-rate contracts with the CMRS provider. These options, which some IXCs have implemented, provide marketplace solutions to any IXC concerns. US LEC's access arrangements are not the result of a market dysfunction, or the exercise of market power by a CLEC requiring regulatory intervention; rather, the market dysfunction is the result of the power of the IXCs—apparently relying on the *Sprint Declaratory Ruling*—to refuse to contract with CMRS providers. The same prohibition on blocking traffic that prevents the IXCs from refusing to complete calls renders the CMRS providers powerless to bring the IXCs to the negotiating

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[22] *See Access Charge Reform*, 14 FCC Rcd 14221, ¶ 188 (FCC 1999), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[23] For example, in *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 ¶ 6 (Comm. Car. Bur. Rel. July 16, 1999), MGC brought a complaint in the FCC against AT&T for unpaid originating access charges. Although AT&T continued to accept the traffic, AT&T argued that it had no obligation to pay MGC's tariffed rates because of a letter it sent MGC giving notice that AT&T thought that MGC's rates were excessive and it would not pay them. The FCC found that a mere letter was equivocal, and held that it was insufficient to relieve AT&T of its duty to pay at MGC's tariffed rates. *Id.*, ¶¶ 4, 10. There is no indication that IXCs have attempted to block these toll-free calls, directed CLECs to stop sending the calls, or notified its toll-free service customers that it will not transmit calls from certain customers. Quite simply, IXCs have taken no steps to eliminate their obligation to pay for the access services that they accept from CLECs.

[24] *Advamtel, LLC, et al. V. AT&T Corp.*, 118 F.Supp. 2d, 680 685 (E.D.Va. 2000).

[25] Arguably, IXCs have been unjustly enriched by collecting toll revenue from their customers—which plainly has an originating access element built into it—and then refusing to pay that originating access to the proper LEC.

[26] *Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. AT&T Corporation*, 16 FCC Rcd 5726 (2001).

[27] *AT&T Corporation v. Federal Communications Commission,* 317 F.3d 227, 331-332 (DC Cir. Jan. 24, 2003).

table. US LEC has complied with the rules established in the *CLEC Benchmark Order* and by doing so provides services to the IXC at an FCC-approved rate. For those IXCs that want a lower rate, the proper method of achieving that goal is direct connection and contracting – whether with US LEC (to avoid ILEC tandem and other charges) or with the CMRS carrier. IXCs may not refuse to pay US LEC's conclusively lawful access rate for the services US LEC provides to complete wireless interexchange traffic.

E. CLECs May Charge One Full Benchmark Rate

In response to US LEC's Petition, IXCs raise the specter of a number of competitive carriers participating in providing access to an IXC for a single call and each charging the full benchmark rate for that single call.[28] US LEC's Petition did not seek a ruling that multiple CLECs may each charge the full benchmark rate when providing joint access service for a single minute of use. More importantly, there is absolutely no indication in the record that any CLECs are participating in such a "daisy chain," or that any wireless carriers would allow it. For its part, US LEC's access arrangements do not result in charging IXCs more than one full benchmark rate. Therefore, a ruling limited to the facts presented by US LEC's petition would not result in a finding that competitive carriers as a group may charge more than one full benchmark rate for a single call. Moreover, if the Commission has any concern about such a "daisy chain" scenario, it may, in granting US LEC's petition, specify that an IXC may only be charged the benchmark rate once, regardless of the number of competitive carriers, wireline or wireless, involved in the call.

The IXCs also complain that when an ILEC and CLEC jointly provision access service to a wireless end user, it is "unfair" for the IXC to be charged both the ILEC's rate and the CLEC benchmark rate.[29] This IXC complaint is not confined to wireless traffic, and therefore it would be inappropriate for the Commission to address this dispute in this proceeding.[30] Again, there is a simple market solution adopted by some of US LEC's IXC customers – direct connection to the CLEC.[31]

Competition in both the local exchange market and access markets will not materialize overnight. During the transition period to full competition, the predominant access arrangement necessarily will involve both a CLEC and ILEC providing portions of access service. This is due in part to the fact that many IXCs choose for a variety of reasons not to connect directly with CLECs. IXCs generally base their interconnection decisions on network efficiency parameters, including minimum traffic thresholds. Thus, until those parameters are met, an IXC may

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[28] *See, e.g.*, CC Docket No. 01-92, *Ex Parte Presentation of ITC^DeltaCom Communications, Inc.* (Apr. 17, 2003).

[29] *See, e.g.*, CC Docket No. 01-92, Reply Comments of AT&T Corp. at 5-7 (Nov. 1, 2002).

[30] *See Id.* at 5, *quoting*, CC Docket No. 01-92, Comments of Sprint Corporation at 6 (Oct. 18, 2002) ("Nothing in that . . . *Order* [CLEC Benchmark Order] remotely suggests that the ceiling benchmarks adopted therein are presumptively reasonable in instances where the CLEC is performing only a part of the access function.") The FCC is addressing this issue in the CLEC Access Charge proceeding, and that proceeding is the more appropriate forum in which to address the issue.

[31] Letter from Wanda Montano (Vice President-Regulatory Affairs, US LEC Corp.) to Marlene H. Dortch (FCC Secretary), filed August 25, 2003, at 6. (Noting that IXCs may establish direct connections to the CLEC so that ILEC facilities are bypassed entirely.)

connect with a CLEC via an ILEC's transit arrangements. Additionally, the IXC controls whether a direct connection is implemented. A CLEC has no power, market or otherwise, to force an IXC to connect directly with it. The latest generation of Interconnection Agreements from Verizon and BellSouth require CLECs and third parties to connect directly if there is more than a "T1's worth of traffic" between those parties. To date, however, even this ILEC attempt to contractually force such direct IXC-CLEC interconnections have failed.

It is inevitable in this transition to full competition that an IXC might pay multiple carriers for access services. The "duplicate and unnecessary function" and "faux carrier" arguments of IXCs are little more than a frontal assault on the pro-competitive goals of the Act. In the 1996 Act, Congress correctly made the choice that the public interest would be best served by facilities-based competition in the provision of local telecommunications services. The fact that CLECs and ILECs will charge for access services provided to IXCs is inherent in the Act and not a ground for finding US LEC's arrangements unlawful. Both the ILEC and CLEC incur costs to provide transport and switching services to IXCs. The reason IXCs incur charges from both carriers is due to the IXC's decision of where, and with which carrier, to interconnect. If the IXC chooses not to connect directly to the CLEC, then for calls originating with a CLEC's customers, its access traffic will be switched twice, once by the CLEC and once by the ILEC. It is no different than an IXC being charged two switching charges under, for example, a meet-point billing arrangement provided by an RBOC and an independent LEC. Where the IXC hands-off or receives independent LEC traffic at an RBOC tandem rather than the independent LEC's switch, the IXC pays two switching charges. Similarly, unless and until IXCs connect directly with CLECs, they will incur two switching charges. During the transition, however, the Commission should not penalize CLECs for the fact that they are building out networks, but should promote it.

II. THE COMMISSION MAY NOT ISSUE A DECLARATORY RULING WITH RETROACTIVE EFFECT THAT CLEC BENCHMARK RATES AND TARIFFS DO NOT APPLY TO TRAFFIC ORIGINATING ON WIRELESS NETWORKS

The current state of the law is that IXCs are not excused from paying CLECs' tariffed benchmark rates because traffic happens to originate from a wireless caller. However, even if the Commission were now to determine (erroneously) by declaratory ruling that IXCs are not required to pay the full CLEC benchmark rate for wireless traffic, any such determination may only be implemented prospectively by notice and comment rulemaking.

As explained in the attached Memorandum of Law, the prohibition under the Administrative Procedures Act against retroactive rulemaking applies to interpretive rulings.[32] Thus, for example, "[a]n agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning."[33] As explained in Section I, by their terms, neither the *CLEC Benchmark Order* nor the *Sprint Declaratory Ruling* permit IXCs to avoid paying lawfully tariffed CLEC access

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[32] *Health Insurance Assn. of America v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

[33] *Caruso v. Blockbuster-Sony Music Entertainment Center*, 193 F.3d 730, 737 (3d Cir. 1999) at 737, quoting Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, § 6.10 at 283 (1994).

charges for wireless traffic. Therefore, in order to reach the result advocated by certain IXCs, the FCC would have to reinterpret both orders.

The courts have distinguished between primary and secondary retroactivity.[34] An agency may not give interpretative rulings a primary retroactivity effect, *i.e.*, an agency may not issue a decision interpreting a rule that has the effect of altering the legal consequences of past actions. Under the current CPNP and benchmark regime, IXCs are bound by CLECs' tariffs to pay access charges for the origination of traffic from all end users, including wireless. Therefore, the Commission may not now issue an interpretive ruling that the CPNP regime did not previously apply to wireline LECs' access services used to complete wireless interexchange traffic. In particular, there is no supportable basis for a conclusion that access charges may be assessed only with respect to end users served by the LEC assessing the access charges; indeed, the *LEC/CMRS Interconnection Order* states just the opposite. Nor is there any basis to conclude that access charges may only be assessed by wireline LECs for wireline traffic. That would constitute a totally new requirement under the CPNP regime that may only be given prospective effect after notice, comment, and rulemaking.

From the time they established the access arrangements in question (pre-*Sprint Declaratory Ruling* and pre-*CLEC Benchmark Order)*, and continuing today, US LEC and other CLECs have operated in a CPNP regulatory environment under which LECs may impose access charges on IXCs via tariff. In fact, the Commission described the state of the law prior to adopting the benchmark rules as "the Act and our rules require IXCs to pay the published rate for tariffed CLEC access service, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable."[35] There is absolutely no basis in any prior Commission order for any conclusion that carriers operating in a tariffed CPNP regime, including wireline LECs, may not compel IXCs to pay for one subset of traffic -- that originating on wireless networks. Therefore, the most obvious conclusion, even before the *CLEC Benchmark Order*, was that IXCs must pay CLECs' tariffed charges for this traffic.

Nor is there any basis for interpreting existing precedent to find that LECs may only assess charges for access service with respect to their own end user customers. The record of this proceeding establishes the IXCs' admission that ILECs may apply a tandem access charge for traffic originating on CMRS or CLEC networks. This fact alone demonstrates that under the existing CPNP regime there is no precedent limiting access charges to situations where the carrier charging for access is also serving the end user customer. Any such requirement would also constitute a new rule establishing an entirely new regime requiring prior notice and comment.

Further, an agency may not give retroactive effect to an interpretation of an existing rule if the parties have relied on a different, equally reasonable, interpretation of the rule, particularly where, as here, the result of such retroactive application would alter the past legal consequences

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[34] *See,. e.g.*, *Bowen v. Georgetown University Hospital*, 488 U.S. 204, at 219-220 (1988) (Scalia, J. concurring) ("*Georgetown Hospital*"), *U.S. Airwaves, Inc. v. FCC,* 232 F.3d 227, 233 (D.C. Cir. 2000) ("*U.S. Airwaves*"), *Celtronix Telemetry, Inc. v. FCC,* 272 F.3d 585, 589 (D.C. Cir. 2001) ("*Celtronix*").

[35] *CLEC Benchmark Order* at ¶28.

of the parties' past actions,[36] or "impose new duties with respect to transactions already completed." US LEC's position was buttressed by this Commission's 1996 proposed rule-making on the rights of CMRS carriers and the Commission's rationale for the proposed rule:

> In the context of the existing access charge regime, we tentatively conclude that CMRS providers should be entitled to recover access charges from IXCs, ***as the LECs do when interstate interexchange traffic passes from CMRS customers to IXCs (or vice versa) via LEC networks.*** We propose to require that CMRS providers be treated no less favorably than neighboring LECs ***or CAPs*** with respect to recovery of access charges from IXCs and LECs for interstate interexchange traffic.[37]

This guidance, together with the Commission's prior interpretation of Rule 69.5 in the *Local Competition Order*, shows that US LEC's interpretation of the rules is reasonable. Therefore, it would be unreasonable, per se, to require the CLECs to do exactly the opposite, *i.e.*, provide lawfully tariffed access services to IXCs without compensation, and to apply that rule retroactively. Moreover, because US LEC has collected access charges from IXCs for this traffic in reliance on prior orders, adopting the IXCs' preferred outcome would unlawfully "impose new duties" on US LEC "with respect to transactions already completed." In sum, the Commission may not reinterpret its prior orders and find that US LEC's conclusively reasonable access rates do not apply to access services provided to complete wireless interexchange traffic. To do so would be to adopt unlawfully a legislative interpretation with primary retroactive effect.

Nor may an agency interpret a rule without giving adequate notice.[38] Nothing in the *Sprint Declaratory Ruling* docket provided CLECs notice that the CPNP regime or CLEC benchmark rules could be reinterpreted to exclude wireless originated traffic. Moreover, even if the CLEC benchmark rules could be found to be ambiguous as to whether they establish an exclusion for wireless traffic, which they are not and do not, "the cases are clear that a *post hoc* agency interpretation of an ambiguous regulation should not be enforced retroactively against a regulated party who adopted and applied an alternate reasonable interpretation of the regulation during the period between the initial promulgation of the ambiguous regulation and the later agency interpretation."[39] Therefore, even if the *CLEC Benchmark Order* was ambiguous (it was not), because US LEC's interpretation of the Order was reasonable, the Commission may only clarify the ambiguity prospectively.

In addition, the Commission must balance the impact of a retroactive ruling on the parties involved. For IXCs, a ruling that they must pay CLEC access charges under current rules and should continue to do so would mean no more than that they must pay the otherwise lawful and

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[36] *Georgetown Hospital,* 488 U.S. at 219 (Scalia, J. concurring); *Celtronix*, 272 F.3d at 588.

[37] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers and Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, CC Docket Nos. 95-185 and 94-54, Notice of Proposed Rulemaking, FCC 95-505, ¶ 115 (Jan. 11, 1996) (emphasis added).

[38] 5 U.S.C. § 706.

[39] Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 Admin L. Rev. 161, n. 134.

"conclusively reasonable" rates for the access services they have been receiving for wireless originated calls—for which they presumably have been paid by their customers. On the other hand, a retroactive ruling changing the rules could have a materially adverse impact on CLECs by upsetting the carefully crafted balance from the *CLEC Benchmark Order*, harming competition, and creating regulatory uncertainty. Therefore, a consideration of the relative impact on affected parties requires a determination that the CLEC tariffed benchmark rates apply to wireless traffic through the end of the transition period established in the *CLEC Benchmark Order*.

In contrast, a secondary retroactive effect is one that affects prior transactions but only on a going forward basis.[40] An agency may give an interpretive ruling a secondary retroactive effect, but only to the extent it would be reasonable to do so.[41] Here, the Commission should not give such a secondary retroactive effect to US LEC's tariffs so that IXCs are not bound by them going-forward for several reasons.

First, the Commission should retain the ability of CLECs to bind IXCs by tariff, subject to Commission review, as the best policy approach. Further, US LEC cannot stress strongly enough that the *Sprint Declaratory Ruling*, even if it were not inapplicable by its own terms to a CLEC's access arrangements, was a late and very recent arrival on the regulatory scene. The *Sprint Declaratory Ruling* was adopted five years after the *Local Competition Order* established a LEC's right to receive access charges for providing access services to complete wireless interexchange traffic and a little over one year after the *CLEC Benchmark Order*. As such, the *Sprint Declaratory Ruling* effectively had no precedent and it would be particularly inappropriate—and unreasonable--for the Commission to now treat it as significantly amending the preexisting tariffed CPNP benchmark regime, even on a prospective basis, especially since that ruling did not even purport to do apply to CLECs and was not the result of an APA rulemaking.

In substance, it appears that the *Sprint Declaratory Ruling* is based on the Commission's flirtation with bill-and-keep—the *Ruling* says as much.[42] The Commission may not chip away at intercarrier compensation, drifting ever-closer towards bill-and-keep, unless it completely abandons the compromise and regulatory certainty it adopted in the *CLEC Benchmark Order* for only one subset of traffic, wireless. The Commission has not officially adopted bill-and-keep as the compensation framework of choice for all intercarrier arrangements, and it should not do so here. Indeed, the Commission has not yet reached a decision in the Intercarrier Compensation Proceeding that has been pending for more than two years. The notice of proposed rulemaking in that proceeding was issued on April 27, 2001, and specifically provided that it was examining "what comes next." That is, the Commission made clear that the compromise adopted in the *CLEC Benchmark Order* would be permitted to run its course and any new intercarrier compensation regime would only be implemented upon the conclusion of the transition period

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[40] *See, e.g.*, *Georgetown Hospital*, 488 U.S. at 219-220 (Scalia, J. concurring) (discusses examples of "secondary" retroactivity.).

[41] *Id.* at 220; *Celtronix*, 272 F.3d at 589 ("Under our authority to set aside rules that are arbitrary and capricious, we review such rules to see whether they are reasonable, 'both in substance *and in being made retroactive*'"), quoting *U.S. Airwaves, Inc.*, 232 F.3d at 233.

[42] *Sprint Declaratory Ruling* at ¶ 20.

established in the *CLEC Benchmark Order*.[43] Even within the framework of that proceeding, the Commission did not provide any administrative notice that it contemplated a result like the *Sprint Declaratory Ruling*.[44] Nor did any of the Parties in that docket raise this issue.[45] The Commission has no evidentiary record upon which to base the application of the *Sprint Declaratory Ruling* to CLECs, and such a record is required for a decision changing the status quo with such wide-ranging consequences.

In fact, because the Commission has not formally established bill-and-keep as the default compensation framework, there is no legal or policy basis for the Commission to determine now that carriers operating in a CPNP regime may not recover tariffed access charges for wireless traffic. It would be flatly unlawful for the Commission to impose a bill-and-keep regime on CLECs on the basis of the *Sprint Declaratory Ruling* because it would preclude CLECs' (but not ILECs') recovery of tariffed access charges on a CPNP basis for wireless calls. Even if it were not otherwise unlawful, it would be unreasonable to do so, and, therefore, the Commission may not do so even on a prospective basis as a permissible secondary retroactive effect. Instead, the Commission must complete its *Intercarrier Compensation Proceeding* in order to establish any billing scenario that differs from the CLEC benchmark, for any class of traffic or service.

III. THE APPLICATION OF CLEC BENCHMARK RULES TO WIRELESS ORIGINATED CALLS IS THE BEST POLICY APPROACH

A. Provision of Access Service By CLECs for Wireless Calls Furthers the Goals of the Communications Act.

Congress and the Commission have adopted policies designed to encourage competition for local exchange and exchange access services. The 1996 Act was intended to create new opportunities for competing access providers by opening the local exchange market to competition.[46] One of the Commission's goals in implementing its access charge regime is to promote competition.[47] Promoting competition in the local exchange and access markets are interrelated goals. The ILECs have previously retained monopoly control in both markets. The entry of facilities-based CLECs promotes competition in both markets. The CLEC can provide an alternative to local exchange service from the ILEC for the end user. Likewise, the CLEC can provide an access service alternative for both end users and local exchange carriers that serve these end users.

US LEC's experience has demonstrated how market entry by CLECs can facilitate competition. US LEC currently has over 12,000 business customers. It has recorded double digit

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[43] *CLEC Benchmark Order* at ¶ 45 ("For at least one additional year, CLECs will be permitted to continue to tariff this [ILEC benchmark] rate, even if we decide to move other access traffic to a bill-and-keep regime.")

[44] *See,* WT Docket No. 01-316, *Sprint PCS and AT&T Files Petitions for Declaratory Relief on CMRS Access Charges Issues*, Public Notice, DA-01-2618 (Nov. 8, 2001) (Commission noted it was seeking Comment on issues raised in the AT&T and Sprint PCS Petitions and recited the issues. None of the issues even remotely invoked the propriety of CLECs recovering access charges for CMRS traffic).

[45] In fact, no CLECs filed Comments in the proceeding.

[46] *CLEC Benchmark Order* at ¶ 21.

[47] *CLEC Benchmark Order* at ¶ 8.

growth for the last eight quarters. US LEC provides an average of four products per customer including local, long distance, Internet and data services. Perhaps the greatest testament to the functionality and quality that US LEC provides to its customers is its 99% customer retention rate and the fact that all its customers abandoned their last telecommunications provider. US LEC is clearly providing services and service quality that its customers found lacking in their prior service providers. US LEC is providing exactly the type of facilities-based local exchange competition that the 1996 Act contemplated.

US LEC also provides access service to IXCs for traffic originating with CMRS providers. A number of wireless carriers have chosen to connect to US LEC for the purpose of providing the bridge from their wireless networks to IXC networks for toll-free traffic. US LEC's customers include Verizon Wireless, AT&T Wireless, T-Mobile Communications, Cricket Communications, Nextel, Telecorp, Alltel and United States Cellular ("US Cellular"). US LEC began its service to wireless carriers in 1997.

US LEC provides connectivity from the CMRS carrier's network to multiple networks, including those of ILECs and to IXCs. US LEC provides numerous benefits to CMRS providers in addition to outstanding service quality, including competitive pricing; network upgrades and technical assistance; 800 database revenue functions, revenue, billing and collection; inter-carrier billing and collection services; network management services; access to the public switched telephone network; excellent customer service; and direct trunking arrangements.

As the Commission has recognized, the competitive provisioning of access services provides many benefits.[48] The Commission has observed that:

> broader access competition should exert downward pressure on tandem-switched transport rates, while fostering more efficient provisioning of these services by new competitors and LECs. Competition also should encourage innovation and investment in new technologies and could offer increased network reliability through route diversity and redundancy . . . . All of these benefits should contribute to economic growth--by enabling IXCs to use more efficient transport arrangements, by fostering better, more reliable, and more rationally priced access services, as well as by creating new market opportunities for interconnectors.[49]

Certain IXCs have chosen to connect directly to US LEC (thereby bypassing the ILEC's switches altogether). These cases demonstrate that US LEC can and does provide the access service that ILECs monopolized in the past. In other cases, in which an IXC has not yet chosen direct connection to US LEC, the company still provides a tandem function. Under either scenario, US LEC is offering a competitive alternative to the ILEC's tandem functionality and such competition should be encouraged and promoted, not discouraged. As the Commission has

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[48] *Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II*, CC Docket No. 91-141, Third Report and Order, FCC 94-118, 9 FCC Rcd. 2718, ¶ 25 (1994) ("*Expanded Interconnection Order*").

[49] *Expanded Interconnection Order* at ¶ 25.

determined, competitive alternatives for tandem switching and transport provide "significant public benefits."[50]

B. CMRS Carriers Are Entitled to Choose Indirect Interconnection with IXCs

Section 251(a) of the Act imposes on telecommunications carriers the obligation to interconnect, directly or indirectly, with the facilities and equipment of other telecommunications carriers.[51] The Commission has determined that CMRS carriers are telecommunications carriers and, therefore, are subject to Section 251(a)(1)'s requirements.[52] Section 251(a)(1)'s duty to interconnect is central to the Communications Act and achieves important policy objectives.[53] Thus, if CMRS carriers desire to connect their networks directly with US LEC's in order to access the networks of IXCs, there is no basis to deny CMRS providers the right of such indirect interconnection to IXCs. Any contrary ruling by the Commission would be anti-competitive. If the Commission rules in this docket that CMRS interconnection to the PSTN through CLEC networks is a "duplicate and unnecessary function," it would be a direct assault on the 1996 Act because it would provide incentives for CMRS carriers to interconnect solely with ILECs. It is not an overstatement to say that such a ruling would start the Commission down a slippery slope because the argument just as easily applies to any CLEC network or service. Each and every LEC network or service that duplicates the ILEC's is "unnecessary" if one is satisfied that the ILEC's comparable network or service is sufficient. However, the 1996 Act decided otherwise.

If CMRS carriers are not permitted to choose the landline carrier to which they will interconnect based upon the services, pricing, and other advantages offered by the competing LECs, then the Commission is allowing IXCs to throttle competition in the access market. The Commission will be deciding that the Nation's network architecture should be petrified in stone as CMRS-ILEC-IXC. CMRS carriers are entitled to competitive choices and CLECs are entitled to compete for that business, even if the ILEC also offers it. IXCs have their own choices. The IXC can deploy its own facilities to the CMRS switch or it may negotiate with the CMRS provider to compensate it for transporting the call to its POP. The marketplace provides a way for IXCs to address any situation where the IXC may find the ILEC's or CLEC's rates unreasonable, and there is no need for the Commission to intervene to aid IXCs.

C. Precluding the Ability of CLECs to Recover Access Charges Would Give IXCs Further Disincentive to Negotiate with CMRS Providers

In the *Sprint Declaratory Ruling*, the Commission plainly did not contemplate that IXCs would be excused from any responsibility for access charges on wireless calls. Instead, the Commission contemplated that IXCs and CMRS providers would negotiate agreements to address the issue of access charges. The Commission stated:

> IXCs and CMRS carriers remain free to negotiate the rates, terms and conditions under which they will exchange traffic. Given the

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50 *Expanded Interconnection Order* at ¶ 25.
51 47 U.S.C. § 251(a)(1).
52 *Local Competition Order* at ¶ 993.
53 *CLEC Benchmark Order* at ¶ 92.

> 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.[54]

The Commission may have hoped that the *Sprint Declaratory Ruling* would provide incentives for CMRS providers and IXCs to negotiate agreements, but that is not what has transpired. Instead, IXCs have seized upon the order in an attempt to limit their liability to pay access charges for wireless calls while, at the same time, still collecting those amounts from their own customers. By requiring CMRS providers to enter into contracts with IXCs in order to receive access charges, the Commission established a preference for bill-and-keep. As with any bill-and-keep interconnection scenario, the IXC, or any other carrier, will choose the location closest to its switch as its desired point of interconnection. This increases the financial responsibility of the other carrier and minimizes the financial responsibility of the IXC. Thus, it is to the IXC's advantage to have the CMRS provider deliver the call as close as possible to the IXC's POP. This is why the IXC would prefer that the call be transported to the ILEC tandem. The IXC will forego a direct connection with the CMRS provider and utilize the ILEC tandem if the access charges it has to pay to transport the call via the ILEC tandem are less than the cost of a direct connection. Likewise, the IXC does not want the CMRS provider to use a CLEC to provide part of the access service because the CLEC does not need an interconnection agreement, or a direct connection with the IXC, to charge the IXC access charges.

For instance, as the diagram provided by ITC demonstrates,[55] when a call is routed solely through the ILEC tandem, absent an agreement with the CMRS carrier, ITC does not pay any access charges on the call until it reaches the ILEC tandem. In short, refusing to establish a direct connection with the CMRS provider permits IXCs to avoid paying for the access services necessary to complete interexchange calls, calls for which the IXC is compensated by its end users. IXCs now get a free ride for CMRS traffic and under the *Sprint Declaratory Ruling* they have no incentive to negotiate or enter into an agreement with CMRS providers because to do so would end that free ride. The Commission would merely exacerbate this evasion problem by denying CLECs the right to provide access service on these calls and be paid according to the Commission's own benchmark rates.

IV. CERTAIN PARTIES' ANI ALLEGATIONS ARE BASELESS

US LEC also takes this opportunity to respond to the baseless allegations that it strips automatic number identification ("ANI") from wireless calls. Some carriers claim that US LEC sought to defraud carriers by stripping ANI off the wireless calls. Nothing could be further from the truth. Much was made in September of 2002 of the allegations by ITC^DeltaCom that US LEC stripped the ANI from calls allegedly to "hide" the fact that US LEC was providing access services for wireless traffic. However, as the Commission well knows, there was no truth to those claims and ITC has dropped the allegations that US LEC stripped, removed, or blocked

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[54] *Sprint Declaratory Ruling* at ¶ 21.

[55] *See, e.g.,* Letter from Jennifer M. Kashatus, Counsel to ITC^DeltaCom to Marlene H. Dortch, CC Docket No. 01-92, June 26, 2003.

ANI or calling party number ("CPN"). In fact, in the vast majority of circumstances, US LEC was transmitting the ANI, and in those few instances in which it was not, it was not receiving the ANI from the wireless carrier because the wireless carrier had determined, for its own engineering or other business reasons, to use Multi-Frequency ("MF") trunking instead of Signaling System 7 ("SS7") enabled trunking. Moreover, the implication that US LEC had to "hide" the fact that its access service carried wireless traffic is ludicrous. Each month US LEC sends (and before the *Sprint Declaratory Ruling*, sent) IXCs millions of minutes of traffic with ANI announcing to the world that the call is wireless. Because the Commission has never suggested that CLECs may not recover access charges for wireless traffic—in fact, many would say that the Commission has implicitly sanctioned the recovery of those access charges, there would be no reason for CLECs to disguise wireless traffic.

US LEC's wireless carrier customers connect to the US LEC network over trunk groups that use one of two different signaling protocols, SS7 or MF. US LEC configures its trunk groups and switches to use whatever protocol its wireless carrier customers choose.

When a wireless carrier sends a toll-free call to US LEC via SS7 trunks, the call's SS7 signaling profile, or data packet, includes both the "charge party number," or the ANI, and the CPN. There is no dispute that when US LEC is connected to a wireless carrier over a trunk group configured for SS7 signaling, US LEC receives the ANI and CPN data from the wireless carrier, and provides that same information to IXCs. US LEC's call detail records conclusively establish that wireless originated toll-free traffic (in minutes of use, "MOUs") is transported to IXCs with signaling data showing that the calls originated on a wireless network. US LEC first used SS7 signaling for wireless originated toll-free traffic in March 2001 when a wireless carrier requested the new feature. Thus, not later than March 2001, IXCs received from US LEC the identifying information that SS7 signaling protocol provides for each call, including whether the call originated as a wireless call. SS7 signaling is now used for about 85% of the trunk groups carrying toll-free traffic from wireless carriers to US LEC.

On the other hand, some wireless carriers have chosen for a number of reasons to connect to US LEC's network over trunk groups utilizing MF signaling. For example, one wireless carrier considers MF signaling more reliable than SS7 for call completion. Certain other wireless carriers have also found that SS7 has a higher risk of call completion failure. Nor is US LEC the only local exchange carrier that connects to wireless carriers using MF signaling. For instance, BellSouth still offers MF signaling to wireless carriers in its current tariff.[56]

One wireless carrier chose to establish its MF trunk groups because of its prior experience with problems completing toll-free calls over SS7 trunk groups. Another wireless carrier decided to connect to US LEC over MF trunk groups because it felt that the added functionality that SS7 signaling provided was valuable to it only for inbound calls, and since its connections to US LEC were outbound only, it did not want to pay the additional expense for that functionality.

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[56] *See* BellSouth FCC Tariff No. 1.

With two exceptions, none of US LEC's wireless carrier customers' MF trunk groups provides either ANI or CPN to US LEC. When the wireless carrier customers do not provide ANI and CPN over an MF trunk group coming into the US LEC switch, US LEC cannot pass that absent data onto IXCs. In short, US LEC does not strip the ANI. If the wireless carrier provides ANI to US LEC, then US LEC provides it to the IXC. The lack of ANI is simply a function of the use of the MF trunk groups.

Conclusion

The Commission should grant US LEC's Petition and clarify that CLECs' tariffed benchmark rates apply to wireless originated calls.

Respectfully submitted,

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MEMORANDUM OF LAW

A. A Rule May Not Be Applied Retroactively if the Rule Would Alter the Past Legal Consequences of a Past Action

1. *Bowen v. Georgetown University Hospital*

In *Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988), the Supreme Court held that the Department of Health and Human Services ("HHS") may not promulgate retroactive legislative rules to implement the Medicare Act. In so holding, the Court held that a court may not uphold an agency's retroactive legislative rule in the absence of an "express" Congressional grant of retroactive rulemaking power, even "where some substantial justification for retroactive rulemaking is present. . . ."[57] In a concurring opinion in *Georgetown Hospital,* Justice Scalia found that the APA independently confirms the judgment reached by the majority.

The D.C. Circuit has applied Justice Scalia's reasoning in *Georgetown Hospital* in its review of challenges to retroactive agency rules. Justice Scalia reasoned in *Georgetown Hospital* that since pursuant to § 551(4) of the APA, the term "rule" is defined as "the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency," "the only plausible reading of the italicized phrase [(*i.e.*, the phrase "and future effect")] is that rules have legal consequences only for the future."[58] Moreover, Justice Scalia pointed to § 551(4)'s inclusion in the definition of the term "rule" "the approval or prescription *for the future* of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."[59] Justice Scalia reasoned that the phrase "for the future" in the latter part of the definition repeats in a more particularized context the prior requirement that rules be "of future effect."

Justice Scalia further distinguished between impermissible primary retroactivity (which would alter the *past* legal consequences of past actions) and "secondary retroactivity" (for example, "[a] rule with exclusively future effect (taxation of future trust income) can unquestionably *affect* past transactions (rendering the previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA."[60]) Justice Scalia found that "[a] rule that has unreasonable secondary retroactivity – for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary' or 'capricious' and thus invalid."[61] Justice Scalia emphasized that "[i]t is erroneous, however, to extend this "reasonableness' inquiry to purported rules that not merely affect past transactions but change what was the law in the past.

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57 *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-209 (1988) ("*Georgetown Hospital*").
58 *Id.* at 216.
59 *Id.* at 216-218.
60 *Id.* at 219-220.
61 *Id.* at 220 (internal cite omitted).

Quite simply, a rule is an agency statement 'of future effect,' not 'of future effect and/or reasonable past effect.'"[62]

2. The Rule Against Retroactive Rulemaking Applies to Interpretive Rules as Well as to Legislative Rules

The D.C. Circuit has held that the prohibition against retroactive rulemaking applies equally to interpretive rules. Applying the reasoning set forth in Justice Scalia's concurring opinion in *Georgetown Hospital,* the D.C. Circuit held in *Health Insurance Assn. of America v. Shalala* that "interpretive rules, no less than legislative rules, are subject to *Georgetown Hospital's* ban on retroactivity. The Administrative Procedure Act's definition of a 'rule' – 'the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...,' draws no distinction between rules that 'interpret' law and rules that 'prescribe' law: both must be of 'future effect."[63] Accordingly, in the *HIAA* case, the D.C. Circuit emphasized that "the conclusion that the rules at issue here are interpretive does not in itself legitimate their application to prior transactions."[64]

Thus, the general prohibition against retroactive rulemaking applies whether the FCC adopts an interpretive rule "clarifying" or amending the access charge benchmark rules or adopts a legislative rule (following notice and comment proceedings) amending the benchmark rules.

3. A Secondarily Retroactive Rule (a Rule with Future Effect that Affects Past Transactions) is Valid Only to the Extent Reasonable Both in Substance and in Being Made Retroactive

In *U.S. Airwaves v. FCC*,[65] disappointed bidders at auction for electromagnetic spectrum for the provision of personal communications services ("PCS") petitioned for review of FCC orders that changed the financial terms applicable to the companies that purchased the licenses, in effect giving the C-block licensees a windfall. The disappointed bidder, who had submitted bids in the original auction but dropped out without obtaining a license, claimed that it would have bid more had it known that financial terms more favorable than those announced at the time of the auction would later be offered to winning bidders.

The D.C. Circuit upheld the FCC orders that changed the financial terms applicable to companies that had purchased personal communications services PCS licenses, finding that the rules were only secondarily retroactive (*i.e.*, rules with exclusively future effect that affect past transactions). Citing Justice Scalia's *Georgetown Hospital* concurring opinion, the D.C. Circuit held that "[a] secondarily retroactive rule is valid only to the extent that it is reasonable—both in substance and in being made retroactive."[66]

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62 *Id.*
63 *Health Insurance Assn. Of America v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) ("*HIAA*").
64 *Id.*
65 232 F.3d 227 (D.C. Cir. 2000)
66 *Id.* at 233.

Applying the arbitrary and capricious standard to the FCC's rules, the D.C. Circuit determined that although the FCC's changes to financial terms applicable to companies that purchased the licenses were "secondarily retroactive," the FCC had adequate reasons for adopting them, and reasonably balanced competing goals of fairness to losing bidders with the needs of the market and with the public interest.[67]

Similarly, in *Celtronix Telemetry, Inc. v. FCC*,[68] the court held that a legislative rule could be applied to a previously issued license because the application of the grace period rule involved only 'secondary retroactivity.'[69] (The Court found that "[t]he Commission indisputably intended its new grace period rule to apply to payment delays occurring after the rule's adoption but in connection with previously issued licenses."[70]) In so holding the court found that "[u]nder our authority to set aside rules that are arbitrary and capricious, we review such rules to see whether they are reasonable, 'both in substance *and in being made retroactive*.'"[71] The licensee (Celtronix) argued that the new grace period rule violated the APA which limits "rules" to agency prescriptions of "future effect."

In considering Celtronix's argument, the D.C. Circuit noted that, "According to Justice Scalia, a retroactive rule forbidden by the APA is one which "alter[s] the *past* legal consequences of past actions." The D. C. Circuit also applied the Supreme Court's test set forth in *Landgraf v. USI Film Products* for determining what sort of retroactivity is subject to the longstanding presumption against retroactive statutes: "In [*Landgraf*], the Court said that retroactivity occurred where a statute 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'"[72] Applying these criteria to the facts, the D.C. Circuit in *Celtronix* that

> It seems impossible to characterize the rule change here as "alter[ing] the past legal consequences" of a past action. It altered the *future* effect of the initial license issuance, to be sure, but that could not be viewed as "past legal consequences." Nor could the change be said to impair rights possessed by Celtronix when it acted, as it could have had no grace period rights before it "acted" to acquire the license, and any payment delay covered by the new rule, i.e., any delay not already excused, necessarily occurred after the rule change. If the rule could be viewed as "impos[ing] new duties" at all (in the sense of making the duty to pay installments more stringent), it would run afoul of *Landgraf's* concept *only* if it imposed them with regard to a "transaction[ ] already completed."[73]

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67 *Id.* at 235-236.

68 272 F.3d 585 (D.C. Cir. 2001).

69 The petitioner, Celtronix, was awarded a license in 1994. The agency subsequently issued a new 'grace period' rule that forced license holders to choose from among three options if they fell behind in making payments for their licenses. Celtronix fell behind in payments, and chose the option of giving up its license. Celtronix then appealed the FCC's grace period rules, arguing that the FCC impermissibly gave the grace period rule retroactive effect.

70 *Id.* at 588.

71 *Id.* at 589, *quoting, U.S Airwaves, Inc.*, 232 F.3d at 233.

72 *Id.* at 588, *quoting*, *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

73 *Id.*

The court found that while "the grace period change may have altered the value of the rights Celtronix acquired by its winning bid and commitment to make the required payments . . . . [t]his sort of retroactivity—characteristic of a rule having exclusively 'future effect' but affecting the desirability of past transactions—has become known as 'secondary retroactivity.'"[74] Under the court's "authority to set aside rules that are arbitrary and capricious, we review such rules to see whether they are reasonable, 'both in substance *and in being made retroactive.*'"[75]

The court held that the new grace period rule was reasonable both in substance and in being made retroactive.

B. An FCC Rule (Either Legislative or Interpretive) Purporting to Retroactively Amend the Access Charge Benchmark Rules Would Alter the Past Legal Consequences of US LEC's Past Actions

In the case of the access charge benchmark rules, the effect of a retroactive interpretation of or amendment to the rule to exclude wireless traffic would be an example of prohibited primary retroactivity, in contrast to the facts in *Celtronix* and *U.S. Airwaves* in which the rules were only secondarily retroactive. Even if such a change to the rules could be construed to be secondarily retroactive, (which it cannot), the retroactive effect would be unreasonable, arbitrary, and capricious. Further, because for all the reasons explained in the letter to which this memorandum is attached it would be arbitrary and capricious for the Commission to determine based on the *Sprint Declaratory Ruling* or otherwise that benchmark rules do not apply to wireless originated calls, if Commission now wishes to (through "interpretation" or by amendment) to exclude wireless traffic from benchmark rules, it may only do so prospectively.

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[74] *Id.* at 589, *citing, Georgetown Hospital*, 488 U.S. at 219-20 (Scalia, J. concurring)

[75] *Id.* (emphasis in the original), *quoting, U.S. Airwaves*, 232 F.3d 227, 233.