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

In the Matter of	)	
	)	
Petition for Declaratory Ruling To Clarify	)	WC Docket No. 14-228
the Applicability of the IntraMTA Rule to	)	
LEC-IXC Traffic and Confirm That Related	)	
IXC Conduct Is Inconsistent with the	)	
Communications Act of 1934, as Amended,	)	
and the Commission's Implementing Rules	)	
and Policies	)	

COMMENTS
of
NTCA–THE RURAL BROADBAND ASSOCIATION;
WTA-ADVOCATES FOR RURAL BROADBAND;
THE EASTERN RURAL TELECOM ASSOCIATION;
and
THE NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.

February 9, 2015

TABLE OF CONTENTS

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	)	
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I. INTRODUCTION AND SUMMARY

NTCA–The Rural Broadband Association ("NTCA"), WTA-Advocates for Rural Broadband ("WTA"), the Eastern Rural Telecom Association ("ERTA") and the National Exchange Carrier Association, Inc. ("NECA") (collectively, "the Associations")[1] hereby submit

[1] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities. WTA is a national trade association that represents more than 285 rural telecommunications carriers providing voice, video and data services. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities. ERTA is a trade association representing rural community based

these comments with respect to the *Petition for Declaratory Ruling*[2] filed by the LEC Coalition[3] on November 10, 2014.

The LEC Coalition petition was submitted in response to numerous federal district court lawsuits brought by Sprint[4] and Verizon[5] pursuant to section 207 of the Communications Act (the "Act"). The petition also addressed billing disputes and complaints pursued by Level 3 Communications. These interexchange carriers ("IXCs") seek refunds for switched access charges that they claim to have paid to local exchange carriers ("LECs") for unidentified intraMTA commercial mobile radio service ("CMRS") traffic[6] that the IXCs elected unilaterally and without notice to comingle with access traffic on long-established switched access trunks during unspecified periods. The LEC Coalition petition seeks to clarify the applicability of the

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telecommunications service companies operating in states east of the Mississippi River. NECA is responsible for preparation of interstate access tariffs and administration of related revenue pools, and collection of certain high-cost loop data. *See generally*, 47 C.F.R. §§ 69.600 et seq.; *MTS and WATS Market Structure*, CC Docket No.78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983).

[2] Petition for Waiver of Bright House Networks LLC, the CenturyLink LECs, Consolidated Communications, Inc., Cox Communications, Inc., FairPoint Communications, Inc., Frontier Communications Corporation, LICT Corporation, Time Warner Cable Inc., Windstream Corporation, the Iowa RLEC Group, and the Missouri RLEC Group, WC Docket No. 14-228 (filed Nov. 10, 2014) (*LEC Coalition Petition*).

[3] The LEC Coalition consists of representatives from several local exchange carriers and their parent companies. These companies include CenturyLink LECs; Consolidated Communications, Inc.; Cox Communications, FairPoint Communications; Frontier Communications; LICT Corp; Time Warner Cable Inc.; Windstream Corporation; the Iowa RLEC Group of 108 RLECs; and the Missouri RLEC Group of 31 RLECs.

[4] Sprint Communications Company, L.P. ("Sprint"), the Sprint organization's interexchange carrier operation.

[5] MCI Communications Services, Inc. and Verizon Select Services, Inc. ("Verizon"), the Verizon organization's interexchange carrier operations.

[6] *LEC Coalition Petition* at 5.

intraMTA rule[7] to traffic exchanged between LECs and IXCs and, if so applicable, to confirm that the course of conduct pursued by the IXCs is inconsistent with the Act and the Commission's implementing rules and policies.

The intraMTA rule was adopted and intended to apply to traffic exchanges between LECs and CMRS carriers. IXCs and other transiting carriers have never been recognized by the Commission as originating carriers eligible to invoke the intraMTA rule and other reciprocal compensation provisions. Moreover, even assuming *arguendo* that the Sprint, Verizon and Level 3 IXC operations had been eligible to invoke the intraMTA rule, these IXCs took none of the actions necessary to meet the cooperation requirements that were incorporated into the intraMTA rule in order to enable it to be implemented. Specifically, neither the IXCs nor the CMRS providers that ostensibly originated such traffic provided any notice to LECs of their traffic comingling, nor did either furnish any information that would have enabled LECs to identify the intermixed intraMTA traffic or estimate the amount thereof. Moreover, the IXCs paid LEC access bills for years without complaint or dispute regarding the alleged inclusion of intraMTA traffic. Therefore, even if the subject IXC operations had been included within the scope of the intraMTA rule, their blatant and unjustified disregard for its cooperation requirements would

[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd. 15499 (1996) ¶ 1036 (*Local Competition Order*); 47 C.F.R. § 51.701(b)(2). The definition of a Major Trading Area ("MTA") can be found in section 24.202(a) of the Commission's rules. 47 C.F.R. § 24.202(a). The default compensation method became "bill-and-keep" as of July 1, 2012. However, even though "bill-and-keep" is available as the default compensation method for intraMTA traffic, IXCs cannot unilaterally act to comingle intraMTA traffic without notice on access trunks, and then refuse to pay access bills containing undisputed charges for access services.

have precluded them from enjoying its benefits, especially the long after-the-fact refunds they now seek.

The Associations' members cooperate with CMRS carriers in exchanging intraMTA traffic in accordance with the Commission's rules and policies, but vigorously oppose, in particular, the refunds sought by IXCs that are neither eligible under, nor compliant with, these rules. In addition, the Associations ask the Commission to declare that the "self-help" activities of certain IXCs that are refusing to pay current invoices containing lawful charges for undisputed access services constitute unjust and unreasonable practices.

II. LEGAL BACKGROUND AND DISCUSSION

Sprint and Verizon have asserted in their federal district court complaints that the Commission's intraMTA rule (a) precludes switched access charges from being assessed upon *any* intraMTA wireless traffic under *any* circumstances, and (b) requires LECs to refund all such charges or their equivalent no matter how or by whom the intraMTA traffic was exchanged with them.[8]

The simplistic Sprint-Verizon theory is an incomplete and erroneous interpretation of the intraMTA rule. In the first instance, the intraMTA rule was developed and implemented by the Commission solely with respect to interconnection and traffic exchanges between *LECs and*

[8] *See, e.g., Sprint Communications Company, L.P. v. Qwest Corporation et al.,* Case No. 0:14-cv-01387, filed May 2, 2014 (amended July 23, 2014) in U.S. District Court for the District of Minnesota; *Sprint Communications Company, L.P. v. Dakota Central Telecommunications Coop., Inc. et al.,* Case No. 4:14-cv-00065, filed June 20, 2014 in U.S. District Court for the District of North Dakota –Northwestern Division; *MCI Communications Services, Inc. and Verizon Select Services, Inc. v. Qwest Corporation et al.,* Case No. 0:14-cv-03385, filed September 5, 2014 in U.S. District Court for the District of Minnesota; *MCI Communications Services, Inc. and Verizon Select Services, Inc. v. 360 Networks (USA) Inc. et al.,* Case No. 3:14-cv-00088, filed June 20, 2014 in U.S. District Court for the District of North Dakota – Southeastern Division. Level 3 has engaged in self-help tactics but has not filed any lawsuits.

CMRS carriers, and has never conferred any reciprocal compensation rights upon IXCs or other transiting carriers. Second, even if IXCs were appropriate third party beneficiaries of the intraMTA rule, the furtive and unforthcoming actions of Sprint and Verizon so grossly violate the prerequisite cooperation obligations that the Commission incorporated into the intraMTA rule as to obviate any claim the IXCs set forth.

A. The IntraMTA Rule Does Not Confer Any Independent Rights on IXCs.

The intraMTA rule does not confer any independent rights or benefits upon IXCs. In Section X of the 1996 *Local Competition Order*[9] in which the rule was adopted, the Commission focused nearly entirely upon interconnection arrangements and exchanges of traffic between LECs and CMRS carriers. At paragraph 1034, the Commission distinguished expressly the reciprocal compensation traffic governed by the intraMTA rule from access traffic carried by IXCs, explaining:

> Access charges were developed to address a situation in which three carriers – typically, the originating LEC, the IXC, and the terminating LEC – collaborate to complete a long distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call.[10]

Having established that access charges were developed to address traffic exchanges between LECs and IXCs, the Commission then elucidated the intraMTA rule. In paragraph 1043 of the Order, the Commission reiterated the intraMTA rule, clearly excluding CMRS traffic carried by IXCs from its scope. The Commission stated:

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[9] *Local Competition Order*, 11 FCC Rcd. 15499 (1996).

[10] *Id.* ¶1034. (internal citations omitted).

> Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges *unless it is carried by an IXC*, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges. Based on our authority under Section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that is not currently subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.[11]

In summary, the Commission focused on the traffic exchanged between LECs and CMRS carriers, determining that the traditional geographic demarcations utilized in LEC/IXC access processes still applied when wireless traffic was exchanged between LECs and IXCs, but that the new alternative methodology would be applied when wireless traffic was exchanged between LECs and CMRS carriers because of the different geographic boundary markers employed in wireless licensing.

The Commission raised these issues again in the 2011 *USF/ICC Transformation Order*.[12] There, in the context of interconnection obligations, the Commission clarified that the scope of section 20.11 of the rules is coextensive with the scope of the reciprocal compensation requirement of section 251 of the Act. The Commission reiterated the reciprocal compensation/ access construct established in paragraph 1043 of the *Local Compensation Order*, stating:

> To bring the 20.11 and Section 251 obligations in line, we first harmonize the scope of the compensation obligations in section 20.11 and those in Part 51. We accordingly conclude that section 20.11 applies only to LEC-CMRS traffic that, since the *Local Competition First Report and Order*, has been subject to the reciprocal compensation framework under section 251(b)(5) of the Act. Thus, section 20.11 does not apply to access traffic that, prior to this Order, was subject to section 251(g).

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[11] *Id.* ¶1043. (emphasis added) (internal citations omitted).

[12] *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ¶ 990 (*USF/ICC Transformation Order*).

The Commission then proceeded to clarify in paragraph 1007 of the *USF/ICC Transformation Order* that the intraMTA rule means that all traffic exchanged between a LEC and a CMRS provider that originates and terminates within the same MTA is subject to reciprocal compensation "regardless of whether the two end carriers are directly connected or exchange traffic indirectly via a transit carrier."[13] In the immediately preceding paragraph 1006, however, the Commission declared unequivocally that "[w]here a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules."[14]

It is clear from both the Commission's 1996 adoption of the intraMTA rule and its 2011 clarification thereof that the intraMTA rule was clearly and explicitly adopted and then modified to deal with two-party reciprocal compensation arrangements for interconnection and traffic exchange between LECs and CMRS carriers. The Commission's focus in the intraMTA rule portion of the 1996 Order was entirely upon the LEC-CMRS relationship, and no mention was made of IXCs with respect to the intraMTA rule other than to note that CMRS traffic can be subject to access charges when it is carried by an IXC. Even where the 2011 Order mentioned that intraMTA traffic could be exchanged indirectly via a transit carrier, it did so entirely within the context of a LEC/CMRS arrangement (or a state commission or court requirement) to extend their bilateral interconnection and traffic exchange arrangement to include indirect routing via an IXC.[15]

[13] *Id.* at 381.

[14] *Id.* at 380. (internal citation omitted).

[15] *Id.* ¶ 1007.

In stark contrast, IXCs and other transiting carriers have no unilateral or independent rights to invoke the intraMTA rule or to enjoy its benefits. Rather, the Commission has established that IXCs and other transiting carriers are not originating carriers entitled to invoke the intraMTA rule or other reciprocal compensation rules. In harmonizing section 20.11 of the rules with section 251 of the Act in the 2011 Order, the Commission reiterated that the 1996 Order's distinctions between reciprocal compensation and access charge treatment of CMRS traffic remained in effect (including the holding that CMRS traffic could be subject to access charges when carried by an IXC). Finally, whereas CMRS carriers can enter into traffic exchange arrangements with LECs that include the exchange of traffic indirectly via an IXC or other third party transiting carrier, the Commission has never indicated or even hinted that IXCs themselves had the right to demand such arrangements, much less to establish them unilaterally and without notice to LECs by comingling intraMTA traffic on access trunks.

On the basis of the foregoing, IXCs are not presently entitled to invoke the intraMTA rule on their own behalf, and consequently have no independent right under that rule to pay reciprocal compensation (or, after July 1, 2012, to receive bill-and-keep treatment) for intraMTA traffic they exchange with LECs over access trunks. Therefore, the claims of the IXCs must be rejected.

B. The IntraMTA Rule Includes an Essential Cooperation Requirement That Has Not Been Met Here.

Even if Sprint and Verizon had been eligible to invoke the intraMTA rule of their own accord, they would not be entitled to refunds or other relief with respect to the subject intraMTA traffic because they wholly failed to comply with the cooperation element embodied in the intraMTA rule. The cooperation prerequisite is not merely a formality or an administrative

convenience, but rather is functionally necessary to implement the intraMTA rule and enable the parties exchanging traffic to comply with it. Absent the cooperation of those with critical cell site, traffic study and/or sampling information, LECs cannot determine reliably which traffic flowing over access trunks is subject to access charges and which traffic is covered by the intraMTA rule. The notion that an IXC can assume the mantle of a CMRS carrier to invoke the intraMTA rule, and further self-declare without verification which traffic is subject to that treatment, runs counter to the manner in which the intraMTA rule can operate.

When the intraMTA rule was adopted in 1996, the Commission made it clear that substantial CMRS carrier cooperation and coordination would be necessary to implement it because the mobility of wireless users makes it impossible for LECs to determine whether a wireless call originated or terminated at a cell site located inside or outside the relevant MTA. That condition has not changed as wireless technology has developed and become more prevalent in the intervening 15 years. In fact, since 1996, the implementation of digital technology and wireless-wireless and wireline-wireless number portability have made it virtually impossible for a LEC to determine by itself and without the cooperation of the other carriers involved: (a) whether the other party to its customer's call is a wireless or wireline user; (b) if the call is exchanged indirectly via an IXC or another transiting carrier, the identity of the LEC or CMRS carrier on the other end of the call; and (c) whether a call involving a wireless user is originating or terminating at a location inside or outside the relevant MTA. The proposition that the intraMTA rule can be invoked by a non-CMRS provider, such as an IXC, without prior coordination and cooperation that would enable traffic identification, ignores not only the intent of the rule but also the fundamental inability of parties without originating and terminating cell

site or other location information to implement it with any reasonable expectation of accurate call accounting.

Indeed, the Commission recognized even *prior* to the implementation of local number portability that LECs cannot reliably or accurately distinguish intraMTA traffic from interMTA traffic, and that substantial CMRS cooperation is, therefore, necessary and required. In paragraph 1044 of its *Local Competition Order*, the Commission stated:

> CMRS customers may travel from location to location during the course of a single call, which could make it difficult to determine the applicable transport and termination rate or access charge. We recognize that, using current technology, it may be difficult for CMRS providers to determine, in real time, which cell site a mobile customer is connected to, let alone the customer's specific geographic location. This could complicate the computation of traffic flows and the applicability of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges. We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating of any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.[16]

By 2011, the task of identifying intraMTA calls, or estimating the amount or percentage of intraMTA traffic, had been made even more difficult and complicated by number portability, which blurs further the lines of geographic designations and underlying technology. And when intraMTA wireless traffic is comingled by IXCs with wireline and wireless access traffic (including interMTA traffic) on access trunks, the supposed ability of LECs (which are not privy to the crucial origination or terminating wireless location data) to determine the identity of calls

[16] *Local Competition Order* ¶1044 (internal citations omitted).

crumbles. Even if a LEC *was* able to "guesstimate" that some of the traffic intermixed on an access trunk was intraMTA traffic, a LEC would not know which CMRS carriers to contact or how much to bill each of them.[17] When presented with these difficulties, the FCC stated in Footnote 2132 of the *USF/ICC Transformation Order*:

> Although Vantage Point questions whether the intraMTA rule is feasible when a call is routed through interexchange carriers, many incumbent LECs have already, pursuant to state commission and appellate court decisions, extended reciprocal compensation arrangements with CMRS providers to intraMTA traffic without regard to whether a call it routed through interexchange carriers. Further, while Vantage Point asserts that it is not currently possible to determine if a call is intraMTA or interMTA, the Commission addressed this concern when it adopted the rule. *See* [paragraph 1044 of the *Local Competition Order*] (stating that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples).[18]

Hence, both the 1996 *Local Competition Order* and 2011 *USF/ICC Transformation Order* recognized that only CMRS carriers possess the originating and terminating cell site information necessary to distinguish intraMTA calls from interMTA calls, and that only CMRS carriers have the initial call data needed to prepare the traffic studies and/or traffic samples necessary to negotiate traffic factors that can be used to estimate the portion of intraMTA traffic intermixed with interMTA and other access traffic. In stark contrast, the mobility of CMRS users, digital technology, and number portability have made it virtually impossible for LECs by themselves to reliably identify or estimate comingled intraMTA traffic. The Commission's responses to these informational disparities clearly and effectively incorporate a cooperation

[17] Even in the rare instances where CMRS carriers complete the optional Jurisdictional Information Parameter ("JIP"), the location information provided is predominately that for the mobile switching office location rather than the cell site location, and hence does not indicate reliably whether a wireless call is an intraLATA call or an interLATA call. This is yet another example of the absence of the requisite cooperation to implement the intraLATA rule.

[18] *USF/ICC Transformation Order* n.2132 (internal citations omitted).

requirement into the intraMTA rule. In fact, such a cooperation requirement constitutes the only way that the rule can be efficiently and equitably implemented.

Initially, this cooperation requirement focused upon CMRS carriers invoking the intraMTA rule. At the very minimum, CMRS carriers were obligated to provide information that is within their sole possession (such as originating and terminating cell sites data for claimed intraMTA calls, traffic studies and/or samples), and which could be reviewed and verified by LECs as the parties negotiated appropriate traffic factors or other arrangements to estimate the amount of intraMTA traffic comingled with interMTA and other traffic. Self-declarations or unilateral characterizations of traffic as intraMTA, by contrast, are wholly inconsistent and functionally incompatible with proper implementation of the intraMTA rule.

When IXCs inject themselves into this process or are injected by certain CMRS carriers, the cooperation requirement becomes critically important due to the increased difficulty of reliably identifying or estimating the intraMTA traffic and properly billing for it (including treating it on a bill-and-keep basis). If, for any reason, IXCs like Sprint and Verizon are deemed eligible to invoke the intraMTA rule, they bear the same cooperation obligation as their CMRS customers. Regardless of whether they are corporately affiliated with their CMRS customers, the IXCs are in privity with them and have access to cell site, traffic study, and sampling information: (a) that is in the sole possession of the CMRS carriers; (b) that is needed to identify or estimate intraMTA traffic; and (c) that is unobtainable by the LEC without the cooperation of either the CMRS provider or the IXC. In addition, IXCs that elect to comingle intraMTA traffic with access traffic on access trunks must be required to notify affected LECs that they are doing so – either via an appropriate advance notice or at the very least by disputing or complaining about an early access bill that contains charges for unidentified intraMTA traffic (rather than

paying such access bills for years without dispute or complaint regarding the now alleged inclusion of charges for intraMTA traffic). Inasmuch as LECs do not possess any of this information, it must be furnished by the CMRS carrier or its IXC transiting service provider in compliance with their obligation to cooperate.[19]

If the IXCs and/or CMRS carriers had complied with their cooperation responsibilities, intraMTA traffic issues and problems would have been identified and resolved at an early date, and the current disruptive litigation and potential liabilities would have been avoided.

Therefore, the Commission is respectfully requested to hold or declare that no CMRS carrier, IXC or other entity may claim the benefits of bill-and-keep arrangements (or other reduced reciprocal compensation) for intraMTA traffic, much less seek damages or refunds from a LEC under the intraMTA rule for intraMTA traffic that they claim was unlawfully, erroneously or otherwise improperly billed by the LEC, unless and until they have complied with their obligations to cooperate with the LEC to identify, measure or estimate the intraMTA traffic exchanged with the LEC.

[19] Cooperation as a condition precedent to the execution of a rule is not an unusual phenomenon. For example, the inherent need for cooperation among interconnecting carriers is reflected in the Rural Transport Rule. 47 C.F.R. § 51.709. The rule provides that where a rate for non-access reciprocal compensation did not exist as of December 2011, a state commission "shall establish initial rates for the transport and termination of Non-Access Telecommunications Traffic that are *structured consistently with the manner that carriers incur those costs . . . .*" 47 C.F.R. § 51.709(a)(emphasis added). The determination of the manner in which carriers incur costs envisions the exchange of information and settlement of standards prior to the rendering of an invoice. The rule further limits cost recovery to the "proportion of that trunk capacity used by an interconnect carriers to send non-access traffic that will terminate on the providing carrier's network." 47 C.F.R. § 51.709(b). Together, the entire protocol requires the provision of information by the carriers to determine the boundaries of compensation."

C. The IntraMTA Rule Cannot Apply Unless The Relevant Traffic Is Identified Accurately Or Otherwise Measured In A Reasonable Manner.

It is essential that good faith compliance with the intraMTA rule be enforced. Association members cannot accurately identify and bill – or even reliably estimate – intraMTA and interMTA traffic, as well as other reciprocal compensation and access traffic, without the originating or terminating cell site information and traffic study and sampling information that is generated or collected by, and under the sole control and possession of, CMRS carriers, and that is essential for accurate identification or estimation of intraMTA and other traffic.

Equitable traffic exchange and accurate intercarrier billing is most efficiently and effectively accomplished via the two-party LEC-CMRS interconnection and traffic exchange arrangements contemplated by the Commission in its 1996 and 2011 Orders, rather than via the various access trunk comingling schemes. At the present time, very little discovery or settlement negotiations having taken place in the pending IXC lawsuits and disputes, and most LECs still have not been able to determine accurately the identity of the particular CMRS carriers whose intraMTA traffic may have been exchanged with them, nor the amounts of such traffic for each particular CMRS carrier that have been exchanged over each particular IXC's access trunks.[20] In fact, there have been preliminary indications that some CMRS carriers may change IXC terminating carriers frequently to take advantage of pricing differentials in much the same way that some toll carriers regularly change least cost routing providers.

[20] Whereas there are preliminary indications that the Sprint and Verizon IXCs carry intraMTA traffic of their CMRS affiliates, there are also preliminary indications that the Sprint IXC also carries traffic of unaffiliated CMRS carriers and that Verizon's CMRS affiliate also uses Level 3 for transiting purposes.

It should be clarified, however, that the required traffic identification should in no way be reliant on or otherwise triggered by litigation. Rather, for the same reasons the Commission urged interconnection arrangements to be renegotiated between December 2011 and July 2012,[21] CMRS providers seeking to invoke the intraMTA rule by means other than direct interconnection should have notified LECs in advance of their intent to use third party IXCs for transit of such traffic, and arranged for the accurate identification and estimation of such traffic. As the LEC Coalition explains,

> [N]one of the IXCs involved in these disputes has entered into agreements with LECs through which traffic sent over access facilities, including the traffic at issue here, could be exempted from access charges and billed on some alternative basis. To the contrary, the lawsuits initiated by Sprint and Verizon and the demands made by Level 3 and Sprint all involve situations where the traffic did not have to be routed via an IXC at all, and where the imposition of access charges was an entirely avoidable result of voluntary decisions made by CMRS carriers and the IXCs they relied on regarding how to route intraMTA traffic.[22]

As a result of the utter lack of cooperation, and resulting traffic and carrier identification difficulties and volatilities, many LECs have not been able to exercise their rights under section 20.11(f) of the rules to demand interconnection negotiations and agreements with the unidentified and apparently frequently changing CMRS carriers exchanging intraMTA traffic with them over access trunks. Many other LECs that had negotiated interconnection and traffic exchange arrangements with CMRS carriers as directed by the Commission in late 2011 and early 2012 have come to realize that certain CMRS intraMTA traffic did not actually decrease over the years, but rather was shifted covertly to IXC access trunks, and that their months of negotiation efforts were largely wasted.

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[21] *USF/ICC Transformation Order* ¶¶ 1322-1323.

[22] *LEC Coalition Petition* at 30.

Nor did IXCs like Sprint and Verizon request interconnection agreements with RLECs during the many years that they sent traffic over access trunks and paid resulting access charges specified in RLEC tariffs. With no good faith attempt to identify the existence of intraMTA traffic or negotiate an interconnection agreement with respect thereto, it is at best premature for any carrier wishing to take advantage of the FCC's intraMTA rule to do so when necessary steps to invoke the rule have not been followed.[23]

D. In Light of the IXCs' Course of Conduct, All Claims for Retroactive Relief in These Circumstances Should Be Barred; the Commission Must Not Countenance Self-Help.

The efforts of IXCs to invoke after-the-fact the rights and benefits of an intraMTA rule to which they are not inherently entitled not only contravenes basic administrative law principles,[24] but also disregards the fact that IXCs like Sprint and Verizon long failed to provide any of the cooperation required by the intraMTA rule. Should the Commission determine, for any reason, to expand the scope of the intraMTA rule to allow IXCs and other transiting service providers to invoke the rule unilaterally, it should do so only prospectively.

Under no circumstances should any IXC be allowed to obtain damages or refunds for any access charges that it has previously paid to LECs without dispute or complaint for unidentified intraMTA traffic that it exchanged over access trunks without advanced notice to or cooperation with the LECs. In addition to the fact that IXCs are not currently entitled to invoke the intraMTA

[23] *Id.* at 31. The LEC Coalition also notes that CMRS carriers chose not to avail themselves of alternative arrangements (e.g., ICAs with the relevant LECs providing for the exchange of intraMTA traffic over local trunk groups or via identified and mutually approved transit arrangements).

[24] As the IXCs should be well aware, agencies are required to follow their own rules. *Service v. Dulles*, 354 U.S. 363 (1957).

rule and, in any event, have wholly disregarded its cooperation requirements, state laws regarding voluntary payments[25] and implied contracts[26] also preclude refunds.

In addition to lack of notice and cooperation, clawbacks and refusals to pay undisputed amounts of current bills by IXCs fly counter to the purposes of the intraMTA rule. While the rule was established to provide consistent treatment between local calls using different technologies, the IXCs' conduct here has only served to disrupt the entire LEC industry and add uncertainty to well-established intercarrier compensation practices.

Particularly while the section 207 lawsuits brought by Sprint and Verizon are pending in the courts and while the current related issues are before the Commission in this proceeding, it is a wholly unjust and unreasonable practice for any IXC to attempt to avoid or evade these processes by trying to collect its desired "damages" or "refunds" outside these legal processes by refusing to pay undisputed portions of its current access bills. As indicated repeatedly above, IXCs could have avoided the present litigation, *inter alia*, by objecting to bills containing apparent charges for intraMTA traffic at the time they began comingling it. They must be forbidden from now refusing to pay bills containing undisputed charges for interMTA and other access traffic in order to short circuit the legal processes made necessary by their earlier disregard for the eligibility and cooperation elements of the intraMTA rule.

[25] The Voluntary Payment Doctrine is a rule followed in some states which holds that an entity that has knowledge of all material facts and makes a payment voluntarily cannot later recover it on the ground that it was under no legal obligation to make the payment.

[26] An implied in fact contract is an actual and effective contract that is created by the conduct of the parties, and that is a true contract equivalent in all respects to a contract expressed orally or in writing.

III. CONCLUSION

For the reasons discussed above, the Associations support the LEC Coalition Petition for Declaratory Ruling to clarify the applicability of the intraMTA rule to LEC-IXC traffic. In particular, the Associations request that the Commission hold or declare:

(a) that IXCs are not presently eligible to invoke the intraMTA rule and its benefits;

(b) that CMRS carriers and any other entities invoking the intraMTA rule are required to cooperate with LECs to identify, measure or estimate the amounts of intraMTA traffic comingled with other traffic, and do not qualify for reciprocal compensation (or bill-and-keep) treatment, damages or refunds or other benefits unless and until they have provided the information necessary to satisfy this cooperation requirement; and

(c) that no retroactive relief such as that sought by the IXCs for amounts already paid voluntarily will be granted, and that self-help tactics, including "claw-back" schemes, are flatly inconsistent with both Commission rules and policy.

Respectfully submitted,

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