June 18, 2015

Ex Parte

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: Petition for Declaratory Ruling Regarding Applicability of the IntraMTA Rule to LEC-IXC Traffic, WC Docket No. 14-228

Dear Ms. Dortch:

The United States Telecom Association (USTelecom) respectfully asks the Federal Communications Commission (Commission or FCC) to resolve promptly the above-referenced LEC Petition1 by clarifying that LECs may lawfully collect access charges from interexchange carriers (IXCs) for intraMTA traffic commingled with ordinary long distance calls (without being separately identified as intraMTA traffic) that the IXCs exchange over tariffed switched access facilities.2 The Commission is uniquely qualified to address the issues raised in the LEC Petition, which require interpretation of FCC regulations and policy adopted under federal law.3 Moreover, given the large number of related lawsuits pending in federal district courts and the estimated hundreds of millions of dollars at stake,4 the issues raised here should be addressed as soon as possible.

1 Petition for Declaratory Ruling of the LEC Petitioners, WC Docket No. 14-228 (filed Nov. 10, 2014) (LEC Petition). USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks. USTelecom member Verizon opposes the LEC Petition and takes no part in this filing.

2 USTelecom also agrees with AT&T and the LEC Petitioners that the Commission should avoid issuing any declaratory relief that inadvertently could facilitate access stimulation and other abuses of the access regime. See Comments of AT&T Services, Inc., WC Docket No. 14-228, at 11-13 (filed Feb. 9, 2015) (AT&T Comments); Reply Comments of the LEC Petitioners, WC Docket No. 14-228, at 3 n.2 (filed Mar. 11, 2015).

3 At least one court agrees. See Sprint Commc’ns Co. v. Butler-Bremer Mut. Tel. Co., 2014 WL 4980539, at *5 (N.D. Iowa 2014) (Sprint v. Butler-Bremer) (“whether the same ‘reciprocal compensation’ requirement that applies between a LEC and a CMRS should apply between a LEC and an IXC is not just a matter of ‘interpretation’ of FCC rulings, but a determination of the scope and applicability of FCC rulings, which requires agency expertise”).

No one disputes that intraMTA traffic exchanged between LECs and CMRS providers is subject to reciprocal compensation. At issue here is the regulatory treatment of the compensation relationship between LECs and IXCs for a narrow category of traffic: intraMTA traffic that is exchanged between LECs and IXCs over long distance trunks purchased as tariffed switched access. Typically, IXCs that handle intraMTA traffic exchange such traffic over tariffed switched access facilities, where it gets commingled with long distance traffic. Of that commingled traffic, CMRS traffic is rarely, if ever, identified. As a result, LECs have routinely billed IXCs access charges for routing all commingled IXC traffic exchanged over access trunks. This compensation structure between LECs and IXCs predates the intraMTA rule, and was expressly preserved by the FCC in the Local Competition Order.

The Commission should clarify that the intraMTA rule governs only LEC-CMRS relationships and billing arrangements.

In adopting the intraMTA rule, the Commission expressly sought to protect CMRS providers from having to pay access charges when they exchange traffic with a LEC within an MTA, which is the “local service area” for CMRS. Consistent with that purpose, the Commission explained that the new intraMTA rule “should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.” Thus, the Commission’s original intent, stated contemporaneously with its adoption of the intraMTA rule, was to ensure that CMRS providers are not required to pay access charges for transport and termination of local intraMTA traffic. No Commission order suggests that the same protection was intended for IXCs, nor has the

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5 AT&T Comments at 3.

6 See Comments of the Alaska Telephone Association, WT [sic] Docket No. 14-228, at 3 (filed Mar. 10, 2015); see also AT&T Comments at 15 (explaining there is “no feasible way for the LEC to identify and exclude the intraMTA traffic” for purposes of billing IXCs for using their access facilities).

7 See AT&T Comments at 3-4. LECs and IXCs may, however, agree to exchange such traffic pursuant to a negotiated alternative billing arrangement. See, e.g., Sprint/Level 3 Comments at 4 (conceding that parties may agree to alternative arrangements other than reciprocal compensation for intraMTA calls).


9 Local Competition Order at ¶ 1036, 1043. See also 47 C.F.R §§ 20.11, 51.700 et seq.

10 Local Competition Order at ¶ 1043 (further explaining that “most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC”) (emphasis added). Accord, TSR Wireless, LLC, et al., v. U.S. West Communications, Inc., et al., 15 FCC Rcd 11166 ¶ 31 (2000) (explaining that intraMTA traffic “falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier”) (citations omitted).
Commission expressly or otherwise extended the reach of the intraMTA rule to the LEC-IXC billing relationship. Moreover, the only court to address the specific legal question at issue here opined that “neither the FCC’s 1996 Local Competition Order nor its 2011 Connect America Fund Order expressly applies to compensation between a LEC and an IXC for intraMTA calls.”11 We therefore see no basis for the Commission to find that the intraMTA rule was intended to apply to LEC-IXC billing arrangements.

The Commission should find that IXCs consented to pay access charges, and thus are bound by that choice.

Nothing in the Act or the Commission’s rules precludes parties from exchanging traffic under negotiated arrangements. Even if the intraMTA traffic at issue could have been exchanged subject to reciprocal compensation, the Commission need not determine that reciprocal compensation was the sole option for exchange of such traffic. The IXCs’ failure to claim entitlement to reciprocal compensation for the exchange of this traffic under the intraMTA rule or any other theory for so long leads to the inevitable conclusion that the IXCs long understood this traffic to be subject to the LECs’ switched access service tariffs, and that they acceded to the terms of those tariffs accordingly.12 The Commission therefore should not condone the IXCs’ unilateral decision, without the agency’s prior consent, clarification, or change in policy, to stop paying access charges for traffic exchanged with LECs over tariffed access facilities.

The Commission should find that allowing refunds would be unjust, inequitable, and contrary to the public interest.

The IXC litigants are advocating for a new interpretation of the intraMTA rule that is contrary to the purpose of what the rule was intended to achieve. And they are doing so after years of acceding to a compensation regime that clearly applies to traffic that IXCs exchange over LEC tariffed access facilities. On these bases alone, the Commission could decline to compel any refund of paid access charges, which would be enormously disruptive to settled industry practices and expectations.13

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11 *Sprint v. Butler-Bremer* at *4 (further noting that the relied-upon federal appellate decisions “do not involve interpretation or policy analysis of FCC regulations regarding payment arrangement between LECs and IXCs.”) (emphasis in original).

12 See *Reply Comments of the National Cable & Telecommunications Association*, CC Docket No. 01-92, WC Docket Nos. 10-90, 14-228, at 2 (filed Mar. 11, 2015) (“Having bought and received those tariffed services, the IXCs were, and are, required to pay for them at the tariffed rate.”).

13 We thus agree with parties asserting that retroactive relief under these circumstances would not be warranted under well-established legal standards. *See, e.g., AT&T Comments* at 14 (explaining that where an agency would be substituting “new law for old law that was reasonably clear,” retroactivity must be denied to protect settled expectations) (citations omitted); *Reply Comments of the LEC Petitioners*, WC Docket No. 14-228, at 28-33 (filed Mar. 11, 2015) (explaining that retroactive application of the IXCs’ interpretation of the intraMTA rule “(i) would contradict Section 204(a)(3) of the Act and the ‘filed rate’ doctrine and (ii) otherwise would be ‘manifestly unjust’”.)
Should the Commission find that IXCs are entitled to reciprocal compensation arrangements under the intraMTA rule (despite its stated intent to protect only CMRS providers from paying access charges to send and receive local intraMTA traffic), it should apply that finding on a prospective-only basis. To do otherwise would be to invite years of protracted litigation and to expose hundreds of LECs to liability they could not have predicted. Moreover, it would be appropriate for the Commission to give guidance on the extent to which any damages are recoverable, taking into account, among other things, whether IXCs have already collected long distance fees from their customers to cover their access costs (and thus refunds would amount to double recovery), and how parties should attribute commingled traffic, rather than leaving these questions open for individual courts to apply state laws with inconsistent results.

The intraMTA rule, as originally adopted, is simply not applicable to LEC-IXC billing arrangements. Even if it were, the IXCs’ complaints come too late; parties who sit on their rights should not be rewarded with the extraordinary relief the IXCs seek. By confirming that the intraMTA rule does not compel that intraMTA traffic exchanged between LECs and IXCs be subject to reciprocal compensation, the Commission can put to rest this contrived controversy that serves as a distraction to the larger effort underway to transition all intercarrier compensation to a bill-and-keep regime.

Please include this ex parte letter in the above-identified proceeding.

Sincerely,

Diane Griffin Holland
Vice President, Law & Policy