BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.  20554

In the Matter of)
)
Developing a Unified Intercarrier Compensation Regime)
)
Connect America Fund)
)
Petition for Declaratory Ruling to Clarify 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)

CC Docket No. 01-92
WC Docket No. 10-90
WC Docket No. 14-228

COMMENTS OF THE TEXAS TELEPHONE ASSOCIATION

The Texas Telephone Association ("TTA"), a trade association that represents incumbent local exchange carriers ("ILEC") — including many small ILECs and cooperatives —in Texas, hereby submits these comments pursuant to the Commission’s Public Notice in the above-referenced proceedings\(^1\) and in support of the Petition for Declaratory Ruling filed by the LEC Petitioners.\(^2\) Member company, GTE Southwest Incorporated d/b/a Verizon Southwest, opposes these comments and does not support this filing.


\(^2\) Petition for Declaratory Ruling To Clarify 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, WC Docket No. 14-228 (filed Nov. 10, 2014) ("Petition").
The majority of TTA’s members each serve fewer than 5,000 customers, and one-third of these companies are member-owned cooperatives. For decades, these companies have relied — and have built their billing practices — upon the settled principle that when an IXC purchases services from a LEC’s access tariff, the resulting traffic will be billed as access traffic in accordance with the tariff in the absence of an alternative agreement between the LEC and the IXC. The Commission’s intraMTA rule — which governs permissible charges for “local” traffic exchanged between LECs and CMRS carriers within a Major Trading Area (“MTA”) — did not alter that principle, and for nearly two decades after the rule was promulgated no carrier suggested otherwise.

Recently, however, a small number of IXCs — Sprint, Verizon, and Level 3 — have begun to assert for the first time that the intraMTA rule exempts an IXC from paying access charges on any traffic that the IXC carries when completing a call between a LEC customer and a CMRS customer located within the same MTA. These IXCs claim that this exemption applies even if the IXC routes the traffic under an access tariff, provides no notice to the LEC that some of the traffic should be treated differently, and provides no means by which the LEC may identify — or even estimate — the amount of such traffic being routed by the IXC through the LEC’s access facilities.3 Relying on this novel and unprecedented interpretation of the intraMTA rule, these IXCs further claim they are entitled to retroactive refunds of tens or hundreds of millions of dollars in access charges on such traffic.

3 See, e.g., Sprint’s Memorandum in Opposition to the Small LECs’ Motion to Dismiss, Sprint Comm. Co. L.P. v. Qwest Corp., et al., Civil Action 0: 14-cv-01387-MJD-LIB, at 5, n.5 (D. Minn. Sept 5, 2014) (arguing Sprint has no duty to identify intraMTA traffic to LEC when Sprint routes intraMTA traffic over LEC’s access facilities).
As the Petition explains, Sprint and Verizon have filed dozens of lawsuits against hundreds of LECs across the country (including TTA’s members) seeking such refunds, while Level 3 (and Sprint, in some cases) has in some cases simply helped itself to unlawful “offsets” from undisputed access charges. The Petition explains how some IXCs are attempting to leverage these unreasonable claims to coerce LECs into accepting the IXCs’ preferred means of handling IXC-carried intraMTA traffic going forward, including the use of IXC-developed traffic-allocation factors.

It is critical that the Commission grant the relief requested in the Petition by confirming that when an IXC transmits LEC-CMRS traffic under a LEC’s access tariff, tariffed access charges apply to that traffic. Under the intraMTA rule, CMRS providers are entitled to arrange with a LEC for non-access treatment of intraMTA traffic, and they may use IXCs or other intermediate carriers as part of that arrangement. But there is not, nor has there ever been, any rule allowing IXCs, in the absence of a specific agreement, to originate or terminate non-access traffic by ordering facilities and services from access tariffs and then to unilaterally refuse to pay for such traffic under the tariff’s terms. To the contrary, such a rule not only would be unworkable but also would fly in the face of the Communications Act, decades of settled law, established industry practices, and basic common sense.

Even if the intraMTA rule applies to the compensation between a LEC and an IXC that chooses to route intraMTA traffic through LEC access facilities — which it does not — the Commission must not permit large, sophisticated IXCs who paid access charges on such traffic without dispute for nearly 20 years to impose retroactive refund liability on hundreds of

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4 See Petition at 5-6.
5 Petition at 39.
LECs, including small LECs, who acted in good faith in accordance with settled law. The administrative burdens associated with identifying commingled intraMTA traffic and calculating the resulting refunds — as the IXCs claim they are entitled to — would be daunting, particularly for small LECs like the majority of TTA’s members. In combination with the refunds themselves, the cost of retroactive liability likely could be crippling, and imposing such liability therefore would be manifestly unjust.

I. THE COMMISSION SHOULD CONFIRM THAT THE INTRAMTA RULE DOES NOT APPLY TO TRAFFIC THAT IXCs CHOOSE TO ROUTE THROUGH ACCESS FACILITIES.

The intraMTA rule provides that “traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5) (i.e., reciprocal compensation), rather than interstate and intrastate access charges.” CMRS providers can, and typically do, effectuate their right to avoid access charges on intraMTA traffic by entering into interconnection agreements with LECs that specify how intraMTA traffic should be routed or otherwise accounted for. For instance, the carriers may agree that intraMTA traffic will use specified connections, or that an estimate of intraMTA traffic will be calculated using an agreed-upon factor applied to all traffic exchanged between the carriers.

The Commission’s 2011 Transformation Order clarified that CMRS providers retain their right to exchange intraMTA traffic with LECs on a reciprocal compensation basis ______________________________________

6 This assumes arguendo that such an accounting is even possible, presumably with data provided by IXCs. As the Petition explains, LECs have no way of independently identifying traffic that originates from, or that is terminating to, an intraMTA cellular customer. See Petition at 19 n. 52.

7 See Petition at 3, 15-16.

8 See Petition at 15-17.
even if the traffic is exchanged through an IXC or other intermediate carrier, but the
*Transformation Order* did not disturb the existing understanding that the intraMTA rule’s
requirements apply only to the billing arrangements *between LECs and CMRS providers.* And
nothing in the *Transformation Order* changed the fact that the intraMTA rule does not confer
any rights on IXCs *as such* to avoid paying access charges for services the IXC purchases from
the LEC under an access tariff.

As the Petition explains, the intraMTA rule has never been understood to override
the longstanding principle that services purchased under a tariff may — and indeed, must — be
billed in accordance with the tariff. Rather, the Commission made clear that the intraMTA rule
was intended to essentially maintain the status quo with respect to LEC-CMRS billing
arrangements. In the *Local Competition First Report & Order*, the Commission explained that
the goal of the intraMTA rule was to ensure that “CMRS providers continue not to pay interstate
access charges for traffic that currently is not subject to such charges,” but that traffic carried by
IXCs that “currently [was] subject to interstate access charges” would remain subject to access
charges. This is consistent with the way the rule was understood throughout the industry for
the next 18 years: CMRS providers have a right to exchange intraMTA traffic with a LEC on a
reciprocal compensation basis, but traffic purchased under an access tariff would continue to be
treated like any other access traffic.

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9 *See Connect America Fund et al., Report and Order and Further Notice of Proposed
Rulemaking, 26 FCC Rcd 17663, at ¶ 1007 (2011) ("Transformation Order").*

10 *See Petition at 27-28.*

11 *See 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, 11 FCC Rcd 15499 at ¶ 1043(1996) ("Local
Competition First Report and Order").*
Accepting the IXCs’ distortion of the intraMTA rule would require one to believe that the *Local Competition First Report & Order* created an unprecedented and unremarked-upon exception to the filed rate doctrine, which provides that both carriers and their customers are bound by the terms of a tariff for any services purchased under it.\(^{12}\) Section 204(a)(3) of the Communications Act further implements this principle by providing that access tariffs are “deemed lawful” once they become effective, and that any challenge to an effective tariff can have only prospective effect.\(^{13}\) The IXCs nevertheless maintain that they are entitled under the intraMTA rule to order services and facilities from a LEC’s access tariff and then demand refunds of access payments — even years after the IXCs paid such charges without dispute — on grounds that the traffic is “non-access” traffic, regardless of any tariff terms forbidding non-access use. Neither the Commission nor any court has ever suggested the *Local Competition First Report & Order* effected such a radical change to settled law and practice.

**II. NO CHANGE TO THE SETTLED APPLICATION OF THE INTRAMTA RULE COULD OR SHOULD BE APPLIED RETROACTIVELY.**

Even if the Commission were to determine that, going forward, IXCs should automatically be exempt from paying any access charges on intraMTA traffic even when the IXC routes that traffic through access facilities, it would be manifestly unjust to apply that requirement retroactively, as the IXCs are attempting to do.

\(^{12}\) *See, e.g.*, *AT&T v. Central Office Telephone*, 524 U.S. 214, 222-23 (1998) (“The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.”).

\(^{13}\) 47 U.S.C. § 204(a)(3).
Both the Commission and the courts have recognized that a new rule may not be applied to past events when doing so would cause “manifest injustice.” In this regard, the D.C. Circuit has stated that “whether to permit retroactive application of an agency decision ‘boil[s] down to ... a question grounded in notions of equity and fairness.’” The D.C. Circuit has set out a non-exclusive list of factors affecting the “manifest injustice” determination:

1. whether the particular case is one of first impression,
2. whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law,
3. the extent to which the party against whom the new rule is applied relied on the former rule,
4. the degree of the burden which a retroactive order imposes on a party, and
5. the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Here, each of these factors weighs heavily against the IXCs’ attempt to apply their radical revision of the intraMTA rule retroactively. The U.S. District Court for the Northern District of Iowa, in referring the IXCs’ assertions to the Commission under the doctrine of primary jurisdiction, recognized that the IXCs’ claims present questions of first impression. As is detailed in the Petition, the IXCs’ newfound interpretation of the intraMTA rule represents an abrupt departure from nearly 20 years of settled industry practice, including the billing practices

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14 Communications Vending Corp. of Arizona, Inc., et. al. v. Citizens Communications Co., et. al., 17 FCC Rcd 24201, 24214 (2002) (citing Verizon Telephone Companies v. FCC, 269 F.3d 1098, 1109 (DC Cir. 2001)).

15 Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services are Exempt From Access Charges, 19 FCC Rcd 7457, 7471 (2004) (quoting Cassell v. FCC, 154 F.3d 478, 486 (D.C. Cir. 1998)).

16 Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074, 1081 (D.C. Cir. 1987) (quoting Retail Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C.Cir.1972)).

followed by some of these IXCs’ own LEC affiliates. Carriers have for years relied on these settled billing practices. Retroactively reversing them and requiring LECs to issue refunds to IXCs would be unjustified and would impose a massive administrative burden on LECs, which would have to audit years of records and somehow determine what proportion of an IXC’s access traffic should have been treated as intraMTA.

Moreover, this burden — in addition to the financial burden of the refunds themselves — would be especially devastating to smaller LECs, which have fewer resources and less of a financial cushion than others. Similarly, allowing IXCs to unilaterally — and unlawfully — engage in self-help by applying “offsets” to undisputed access charges in order to “recover” charges allegedly assessed on intraMTA traffic could seriously harm LECs’ finances, particularly those of smaller LECs that may be more vulnerable to sudden revenue losses. The industry has functioned well under the existing understanding of the intraMTA rule for nearly two decades, and accordingly there is no public interest in insisting that any new interpretation be applied retroactively.

CONCLUSION

For all the reasons set forth herein and in the Petition, the Commission should issue a declaratory ruling confirming that when an IXC purchases services from a LEC’s access tariff, the resulting traffic will be billed as access traffic in accordance with the tariff in the absence of an alternative agreement between the LEC and the IXC. The intraMTA rule never altered this fundamental principle of communications law, and the Commission must not allow a few large IXCs to rewrite history in the face of practices that have been relied upon throughout the industry for nearly two decades.

18 Petition at 5 & n.5, 15-17.
Respectfully submitted,

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