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

In the Matter of

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

COMMENTS OF XO COMMUNICATIONS, LLC
IN SUPPORT OF PETITION FOR DECLARATORY RULING

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# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.  INTRODUCTION AND SUMMARY</td>
<td>2</td>
</tr>
<tr>
<td>II. DISCUSSION</td>
<td>8</td>
</tr>
<tr>
<td>III. CONCLUSION</td>
<td>20</td>
</tr>
</tbody>
</table>
XO Communications, LLC ("XO"), by its attorneys, hereby provides its comments in support of the Petition for Declaratory Ruling filed by 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 (collectively "Petitioners") in the above-captioned proceeding.1 The Petition presents the following issue: when an interexchange carrier ("IXC") sends traffic using interstate or intrastate tariffed switched access services for termination to a local exchange carrier ("LEC"), is it entitled to claim that the traffic is covered by the Commission’s “intraMTA” rule – and thus not subject to switched access charges – because the traffic originates or terminates with a

1 Petition for Declaratory Ruling 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) ("Petition").
commercial mobile radio service ("CMRS") carrier? As explained herein, the mere fact that the traffic delivered by an IXC to a LEC for termination originates with a CMRS carrier does not entitle the IXC to claim that access charges do not apply to it, even where the IXC can demonstrate that the traffic originated within the same Major Trading Area ("MTA") in which the traffic terminates with the LEC.

I. INTRODUCTION AND SUMMARY

The Petition explains that certain IXCs – namely, Sprint, Verizon, and Level 3 – have brought numerous lawsuits against LECs claiming that access charges billed by the LECs – which the IXCs had paid for many years without dispute – are unlawful where the traffic in question: (1) originated or terminated with a CMRS carrier; and (2) originated and terminated 2 Such CMRS-originated or -terminated traffic will be referred to herein as “intraMTA traffic.” IntraMTA traffic may be interstate or intrastate in nature.

3 As XO notes below, the only current disputes it has with an IXC regarding the application of the intraMTA rule to create an exemption to XO’s otherwise applicable tariffed switched access services apply to traffic delivered by the IXC to XO for termination. See n. 4, infra. Wherever these Comments refer to an IXC’s delivery of traffic to a LEC for termination using the LEC’s tariffed switched access services, however, they should be interpreted to refer equally to the use of the LEC’s switched access services to originate traffic carried by an IXC for which it has an interexchange service customer. Thus, where a calling party places a call to a CMRS customer in a manner that uses LEC exchange access facilities to route the call to an IXC—either through 1+ presubscribed calling or via an IXC access number—the call is not inherently exempt from access charges even if it is physically intraMTA in nature. Rather, at a minimum, the IXC has the burden to demonstrate that the traffic is subject to a reciprocal compensation agreement between the CMRS carrier and the LEC and that its carriage of the traffic as a transiting carrier is contemplated by that agreement. (This includes the burden of demonstrating the traffic is, in fact, physically intraMTA traffic where the agreement does not provide some other method of allocation, such as the use of jurisdictional allocation factors.) Alternatively, if the IXC can demonstrate that the traffic is subject to a separate arrangement between the LEC and the IXC governing such traffic, pursuant to which the LEC agreed to assess something other than tariffed switched access charges for the delivery of such traffic by the IXC to it for termination, then that separate arrangement would, in appropriate cases, control.

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within the same MTA. The Petition raises an issue central to these lawsuits, namely, whether an IXC need not pay tariffed access charges for intraMTA traffic it delivers to a LEC for termination using tariffed switched access services.

As explained herein, if an IXC accepts CMRS traffic and routes that traffic over switched access facilities using switched access services then the IXC is responsible to pay for the switched access services, in the absence of an agreement between a LEC and CMRS carrier that provides for routing intraMTA traffic between them using an IXC essentially as a transit carrier for such traffic. Otherwise, IXCs are responsible for tariffed access charges when they deliver intraMTA traffic to an LEC for termination using the LEC’s tariffed switched access services. Alternatively, if there is an agreement between the IXC and a LEC covering the treatment of intraMTA traffic to the same effect, per the agreement the IXC may not be liable for the applicable access charges, but that depends on the terms of the agreement. Absent such contractual arrangements, the IXC owes access charges for intraMTA traffic that an IXC originates or terminates using the LEC’s tariffed switched access services.

As a general matter throughout the industry, switched access traffic between an IXC and a LEC is carried either on a direct switched access trunk or through the switched access long distance tandem of another carrier, often an incumbent local exchange carrier (“ILEC”).

4 XO is the subject of more than a dozen such lawsuits, all filed by MCI Communications Services, Inc., and/or Verizon Select Services, Inc. (collectively, “Verizon”), all but one of which has been consolidated in the Northern District of Texas as part of multi-district litigation on this issue. To the best of XO’s knowledge, these complaints, and the disputes out of which they arise, relate only to the applicability of access charges to the delivery by the IXC to XO of alleged intraMTA traffic for termination to XO’s end users using XO’s switched access services. The dispute does not relate to XO-originated traffic.

5 See XO Tariff F.C.C. No. 1, § 1, 2d Revised Page 15 (“Switched Access Service” is defined as “[a]ccess to the switched network of an Exchange Carrier [i.e., XO] for the purpose of originating or terminating communications.”)
trunking used for the delivery and receipt of such interexchange traffic is typically distinct from that used for local traffic, even where the ILEC acts as a tandem for both local and long distance traffic. The general, well-established rule is that where an IXC delivers traffic to a LEC for termination using facilities ordered from a LEC’s switched access tariff (whether routed indirectly via the access tandem of another LEC, i.e., jointly provided access, or directly to the terminating LEC), the terms of the terminating LEC’s (or LECs’) access tariff governs the provision of this service, absent a contractual arrangement to the contrary. For the intraMTA traffic specifically at issue in this proceeding, the IXC is routing traffic to XO either directly over facilities purchased from XO’s switched access tariff or via facilities purchased from the tandem provider’s access tariff and then delivered by the tandem provider to XO for transport and end office switching. In the foregoing circumstances, the LEC is providing the IXC with access to its exchange in accordance with its switched access tariff, and the terms of that tariff apply.

6 Where multiple types of traffic are sent over the same trunk, carriers will typically have in place arrangements how to jurisdictionalize the traffic into the separate categories (e.g., declared percentages indicating what portion of the traffic falls into which category). The absence of such arrangements relating to a category of traffic over particular trunk types is strong evidence that the traffic type in question was not contemplated by the parties to be treated separately from the “default” category for traffic sent over that trunk.

7 For nearly 30 years the Commission’s rules have required LECs to follow industry-standard Multiple Exchange Carrier Access Billing (“MECAB”) rules. See, e.g., In the Matter of Access Charge Reform, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004) at ¶ 16 & n. 54 (noting history of Commission rules regarding jointly provided access; when two LECs jointly provide access services to an IXC – i.e., one LEC provides tandem switching and the other provides end office functions – each LEC bills the IXC for the portion of access services it performs).

8 An IXC’s claim that traffic it delivers to XO is, in fact, intraMTA in nature is not readily susceptible to verification. Not only can XO not determine from the call records whether any CMRS-originated traffic the IXC delivers for termination is intraMTA, as far as XO knows, the IXC itself cannot make such a determination either.
XO has an effective tariff on file with the Commission, Tariff F.C.C. No. 1, covering interstate switched access services. Section 5 addresses the provision of “Switched Access Service.” Specifically, Section 5.1 explains that Switched Access Service is available to Carrier Customers for their use in furnishing their services to End Users or other Customers, including carriers; provides a two-point communications path between a Customer’s Premises and an End User or other Customer, including a carrier's Premises. It provides for the use of common terminating, switching and transport facilities. Switched Access Service provides the ability to originate calls from an End User’s Premises location to a Customer’s Premises, and to terminate calls from a Customer’s designated Premises to an End User’s Premises.9

The traffic that IXCs are seeking to exempt from access charges on the grounds that it is supposedly intraMTA in nature is handled by XO pursuant to this tariff, and the services that XO provides to the IXCs fully meet this description of Switched Access Services. Nothing in the tariff contains or suggests an exemption for (or even mentions) intraMTA traffic. XO’s intrastate switched access services are of fundamentally the same nature and, depending upon each individual State’s regulatory requirements, the terms on which XO provides intrastate switched access services are either contained in tariffs on file with the State commissions or in price lists posted on XO’s website.10

9 XO Tariff F.C.C. No. 1, § 5.1, 4th Revised Page 65. See also n. 5, supra (tariff definition of “Switched Access Service”). “Customer” is defined to include “Interexchange Carriers (IXCs), End Users, and other carriers or providers that originate or terminate Toll VoIP-PSTN Traffic, or otherwise exchange Toll VoIP-PSTN Traffic with the Company.” Id. § 1, 3rd Revised Page 13.
10 All such switched access services, whether interstate or intrastate, are referred to herein as “tariffed switched access services.”
These comments and the Petition assume that the intraMTA traffic at the center of this controversy was delivered using tariffed switched access services in a manner consistent with traffic that the IXC does not dispute is subject to tariffed access charges. These comments and the Petition also assume that the intraMTA traffic at issue was not routed to the IXC pursuant to an agreement between the LEC and either a CMRS carrier or an IXC that expressly contemplated that access charges would not apply to intraMTA traffic delivered by the IXC to the LEC. Indeed, where XO has a reciprocal compensation agreement with a CMRS provider, that agreement contemplates either a direct exchange of traffic between XO and the CMRS provider or the use of a tandem transit provider as an intermediary (either an ILEC or third-party tandem provider). Where the traffic is routed through a tandem, the traffic is exchanged using trunks over which local traffic with other LECs (including CMRS providers) is exchanged. In such cases, the tandem switch is entered into the Local Exchange Routing Guide (“LERG”) as a local switch. By contrast, IXC switches are not listed in the LERG. Moreover, call records for traffic delivered from an IXC using tariffed switched access services contain a Carrier Identification Code (“CIC”) attributable to the specific IXC which the LECs use to identify, bill,

11 This is true for all traffic which an IXC has claimed to XO is not subject to tariffed access charges because the traffic is intraMTA traffic.

12 Whether any such contract allows for the IXC to avoid access charges on identified intraMTA traffic is a matter individual contract interpretation and of no direct relevance to the issues raised in the Petition. See Petition at 27 (the only arguable instance in which an IXC can avoid access charges where they send traffic over tariffed switched access services is with “an agreement establishing the specific rates, terms, and conditions under which such traffic would be exchanged outside of the access regime”).

13 In some such cases, the parties agree that those same trunks may also be used to exchange landline intraLATA interexchange traffic, but in all such cases of which XO is aware, the parties agree to a mechanism (such as traffic factors) by which the traffic will be allocated between local traffic subject to reciprocal compensation and interexchange traffic subject to access charges.
and/or route access traffic to switched access customers. Records for traffic exchanged through a local tandem, i.e., through a local transit provider, by comparison, contain an Operating Carrier Number (“OCN”) which is attributable to the LEC (which can be a CMRS provider) that originated the traffic.14

For the traffic addressed by the Petition, the IXCs simply declare that some of the traffic they have been sending is intraMTA and, despite the IXCs’ use of the LEC’s tariffed switched access services to deliver and terminate the traffic to the LEC’s end users, they assert that the traffic is consequently not subject to access charges under Commission’s “intraMTA rule.” In short, the IXCs claim that, where they deliver traffic to a LEC for termination to its end user in the same MTA where the traffic originates with the end user customer of a CMRS carrier, that the traffic is exempt from access charges, no matter what tariff or contract otherwise applies as between the IXC and the LEC and regardless of whether the IXCs use the LEC’s switched access services for the purpose.

This claim is contrary to the manner in which the intraMTA rule has been applied. The cases that the IXCs apparently rely upon, including the Commission’s own 1996 Local Competition Order15 establishing the intraMTA rule and its 2011 USF/ICC Transformation Order, do not support their position. Rather, it has always been the case that the intraMTA rule

14 See In the Matter of Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (subsequent history omitted) (“USF/ICC Transformation Order”) at ¶ 724 & nn. 1251-52 (discussing CICs, OCNs, and their use in carrier information exchange and billing). As the Commission explained, CICs are used in connection with switched access services (see also 47 C.F.R. § 69.2(vv)), while OCNs are “used in billing records to identify a local telecommunications provider.”

applies to the exchange of intraMTA traffic between a LEC and a CMRS provider pursuant to a reciprocal compensation agreement. Nothing prevents a LEC and CMRS carrier from agreeing to exchange intraMTA traffic through an IXC. But unless they have such an agreement – or unless the IXC has a separate agreement with the LEC which provides that intraMTA traffic is subject to something other than access charges – when an IXC delivers traffic to or receives traffic from a LEC by means of tariffed switched access services over the LEC’s exchange access facilities, access charges apply.16

II. DISCUSSION

The intraMTA rule has never been applied to exempt an IXC from access charges for intraMTA traffic that the IXC delivers to the LEC for termination to the called party end user. Rather, it is a rule focused on whether CMRS providers are subject to LEC access charges for intraMTA traffic exchanged with the LEC. The intraMTA rule, which was established in the Local Competition Order, is predicated on the Commission’s basic conclusion that “CMRS providers are telecommunications carriers and, thus, LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers.”17 The Commission went on to explain that “traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the

16 For purposes of resolving the Petition, the Commission should assume that the terms of the applicable LEC tariff, or any applicable contract between the LEC and IXC, covers the traffic. The question of whether and how the intraMTA rule might apply in unusual cases where traffic is delivered via switched access facilities but where for some reason neither a tariff nor a contract expressly applies is not raised by the Petition.

17 Local Competition Order, ¶ 1041.
parties’ locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.”

At the same time, the Commission noted that “the new transport and termination rules [i.e., the 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.”

The Commission, in adopting the intraMTA rule, thus was effectively “continuing” the existing practice and the existing access charge regime. Indeed the Commission specifically noted that “[u]nder our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC,” and explained that the new rule was being adopted under its authority in Section 251(g) of the Communications Act, as amended, to preserve the existing access charge regime. Significantly, the Commission said nothing about IXCs not being subject to access charges when they deliver calls to LECs using tariffed switched access services. Rather, the Commission’s “new rule” was articulated in the Local Competition Order as being “pursuant to section 251(b)(5),” which (during the relevant period) did not apply to access charges. The new rule provided that “a LEC may not charge a

18 Local Competition Order, ¶ 1043.
19 Id. (emphasis added)
20 Id. (emphases added)
21 Id. See 47 U.S.C. § 251(g).
22 In 2011, the Commission brought interstate and intrastate switched access charges within the scope of Section 251(b)(5) and created a multi-year glide path from the then current regime to a bill and keep framework. See USF/ICC Transformation Order, ¶¶ 762-764. However, at the same time, the Commission created a new category of traffic under Section 251(b)(5), Access Reciprocal Compensation traffic, which encompassed switched access traffic and was and is distinct from “local” reciprocal compensation traffic. See 47 C.F.R. §51.701(a) (“Effective
CMRS provider or other carrier for terminating LEC-originated traffic” subject to reciprocal compensation.\textsuperscript{23} The intraMTA rule extends reciprocal compensation to traffic exchanged \textit{between LECs and CMRS providers} that is originated and terminated within an MTA.

The IXCs erroneously contend the issue raised by the Petition has already been decided in their favor. Sprint, for example, claims in a November 26, 2014, letter filed in this docket that “the Commission has already decided that intraMTA calls are subject to reciprocal compensation rather than access charges in all circumstances, including when an interexchange carrier ("IXC") connects the CMRS provider and the LEC.”\textsuperscript{24} For this sweeping claim, Sprint relies on one

\begin{quote}
December 29, 2011, compensation for telecommunications traffic exchanged between two telecommunications carriers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access, is specified in subpart J of this part. The provisions of this subpart apply to Non-Access Reciprocal Compensation for transport and termination of Non-Access Telecommunications Traffic between LECs and other telecommunications carriers.”) \textit{See also id.} §51.903(h) (“Access Reciprocal Compensation means telecommunications traffic exchanged between telecommunications service providers that is interstate or intrastate exchange access, information access, or exchange services for such access, other than special access.”) \textit{and compare 47 C.F.R.} §251(g). Section 251(g) of the Act, added as part of the 1996 Telecommunications Act, “required LECs to continue ‘provide[ing] exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)’ previously in effect ‘until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.’” \textit{USF/ICC Transformation Order}, ¶ 763. The Commission’s regulations for Access Reciprocal Compensation are the superseding mechanism anticipated in Section 251(g) of the Act but, to be sure, they preserved tariffed switched access services provided to IXCs in the guise of Access Reciprocal Compensation as distinct from Non-Access Reciprocal Compensation which includes traffic exchanged between LEC and CMRS carriers to which the intraMTA rule applies.
\end{quote}

\textsuperscript{23} \textit{Local Competition Order}, ¶ 1042

\textsuperscript{24} \textit{See, e.g.}, Letter of Christopher Wright, Harris, Wiltshire, & Grannis LLP, Counsel to Sprint Communications Co., L.P., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-228, at 1, November 26, 2014 (arguing the Commission should decline the primary jurisdiction referral underlying the Petition).
paragraph and two footnotes of the *USF/ICC Transformation Order.* But an examination of the plain language of the Commission’s statements and the authorities to which the Commission refers (several federal appellate decisions) does not support Sprint’s conclusion. Specifically, the Commission’s discussion does not support an IXC exemption from access charges when intraMTA traffic is delivered to a LEC using normal tariffed switched access services, rather than a method specifically contemplated by a CMRS-LEC reciprocal compensation arrangement or a separate agreement between the LEC and IXC that removes the traffic from treatment under the LEC’s switched access tariff. In short, the Commission’s discussion in the *USF/ICC Transformation Order* on which Sprint relies does not provide that access charges never apply to IXCs delivering and terminating intraMTA traffic using the LEC’s switched access services. To the contrary, the Commission’s discussion is more consistent with the conclusion that tariffed switched access charges *do* apply to such traffic, absent a contract expressly to the contrary.

Paragraph 1007 of the *USF/ICC Transformation Order* responds to a request for clarification regarding treatment of intraMTA traffic that is routed outside the applicable LEC local calling area and/or the relevant MTA before being terminated within the MTA, specifically when “completing a call to a CMRS provider requires a LEC to route the call to an intermediary carrier outside the LEC’s local calling area.” The Commission resolved the question by concluding “that the intraMTA rule means that all traffic *exchanged* between a LEC and a CMRS provider that originates and terminates within the same MTA, as determined at the time the call is initiated, is subject to reciprocal compensation regardless of whether or not the call is, prior to termination, routed to a point located outside that MTA or outside the local calling area

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25 Specifically, paragraph 1007 and nn. 2132 and 2133, discussed below.  
26 *See USF/ICC Transformation Order,* ¶ 1007.
of the LEC.” The Commission was responding to a specific question whether the intraMTA rule applied to outbound landline-originated traffic exchanged indirectly between a LEC and a CMRS provider where the exchange point is outside of the MTA or whether, in such cases, the LEC could impose access charges on the CMRS provider. The Commission was not addressing the question of whether a LEC could impose access charges on an IXC delivering intraMTA traffic to the LEC using tariffed switched access services. Based on its long-standing principle that the jurisdiction of a call is based on its endpoints, the Commission unremarkably determined that intermediate routing of an intraMTA call to a location outside the MTA (or the LEC’s local calling area) did not change the nature of the intraMTA end-to-end call or the compensation obligations between the LEC and CMRS provider. But it begs the underlying question to invest the Commission’s statement in paragraph 1007 with more significance than that, especially to interpret it as altering the intraMTA rule articulated in the Local Competition Order, which as noted above, preserved the existing access charge regime under which “traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC.”

The appellate authorities cited by the Commission in reaching its conclusion in paragraph 1007 similarly reinforce the conclusion that the Commission was not rewriting the intraMTA rule in 2011 to extend to traffic delivered by an IXC to a LEC for termination using the LEC’s tariffed switched access services simply because a CMRS provider originated the call. In citing these court cases, the Commission notes that “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 is routed through

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27 Id. (emphasis added).
28 Local Competition Order, ¶ 1043 (emphasis added).
interexchange carriers.”29 This statement reveals that the Commission understands such an extension is not automatic but is voluntary or, as the cases cited reveal, otherwise contained in an interconnection agreement between the LEC and CMRS provider, i.e., as a result of State commission arbitration. And, indeed, the cases the Commission cites involve reciprocal compensation arrangements that expressly provided for routing intraMTA traffic through interexchange carriers, which is not the scenario raised by the Petition.30 There is no question that in a voluntary or arbitrated interconnection agreement between a LEC and a CMRS provider, the parties may agree that, as between themselves, no access charges apply to intraMTA calls routed via an IXC. But the fact that two local carriers – a LEC and a CMRS provider – may agree to such arrangements as between themselves says nothing about the application of switched access tariffs to IXCs who are not parties to or affected by such interconnection agreements.31

*Alma Communications* involved an appeal of a State commission decision establishing an arbitrated interconnection agreement between a LEC and a CMRS provider. The State commission required the interconnection agreement to contain terms requiring the LEC and CMRS carrier to pay each other reciprocal compensation for intraMTA calls they exchange and


30 See, e.g., text accompanying nn. 35 and 37, infra.

31 The IXCs seeking to avoid their access charge obligations as described in the Petition do not assert that access charges do not apply as a result of any interconnection agreements between the affected LECs and CMRS providers; they seek an exemption from access charges by virtue of the alleged intraMTA nature of the traffic, not based on the application of any LEC-CMRS or LEC-IXC contracts.
terms specifically providing for the routing of intraMTA traffic through an IXC. The issue in
that case was whether reciprocal compensation applied between the LEC and CMRS carrier, not
whether access charges applied as between a LEC and an IXC, which is the distinct issue
presented in the Petition. Indeed, to the extent that Alma Communications is relevant, it is
noteworthy that the appellate court in laying out the facts explained that “[w]hen the cell-phone
to land-line traffic goes through an interexchange carrier, T-Mobile pays the interexchange
carrier both for the interexchange carrier's services and for the fee the terminating local exchange
carrier charges to deliver the call.” This is significant because, at a minimum, by paying the
IXC to handle the CMRS-originated intraMTA traffic T-Mobile was using the IXC as a transit
carrier as specifically contemplated in the arbitrated agreement (as described by the Court), not

32 Alma Communications at 623-24.
33 The Eighth Circuit in Alma Communications did refer to an earlier decision, Iowa
Network Services, Inc. v. Qwest Corp., 466 F.3d 1091 (8th Cir. 2006) (“INS”), which the court
characterized as holding “that an intermediary carrier was not required to pay access charges for
cell-phone to landline calls originating and terminating within a major trading area.” See Alma
Communications at 625. See also USF/ICC Transformation Order, n. 2133 (citing INS as being
consistent with the proposition that intraMTA traffic is subject to reciprocal compensation
between a CMRS provider and a LEC “regardless of whether the two end carriers are directly
connected or exchange traffic indirectly via a transit carrier”). However, the Eight Circuit in INS
noted in that case that it was upholding a decision of the Iowa Utilities Board where, according
to the Board and Court, there was no clear FCC precedent: “In the absence of a clear mandate
from the FCC or Congress stating how charges for this type of traffic should be determined, or
what type of arrangement between carriers should exist, the Act has left it to the state
commissions to make the decision, as long as it does not violate federal law and until the FCC
rules otherwise.” INS, 466 F.3d at 1097. XO submits that the Court was wrong in concluding
the Commission had not ruled otherwise, as the limited scope and applicability of the intraMTA
rule established in the Local Competition Order was clear and expressly stated “traffic between
LECs and CMRS providers is not subject to interstate access charges unless it is carried by an
IXC,” which by definition would be, using the INS Court’s terminology, an intermediate carrier.
But in any event, assuming arguendo it is the case that there is no clear mandate from the FCC
that access charges are due unless parties agree otherwise, resolving the Petition gives the
Commission the opportunity to provide one.

34 Alma Communications at 622.
as an IXC. That is not the scenario raised by the Petition. Moreover, while the decision is not entirely clear on the nature of “the fee the terminating local exchange carrier charges to deliver the call,” the Court may actually have been referring to the payment of access charges by the IXC to the terminating LEC even though the calls in question were intraMTA calls, rather than the relay of reciprocal compensation charges.

At best, for the IXCs, Alma Communications is simply inapposite to resolving the Petition since it involved an arbitrated interconnection agreement addressing the routing of LEC-originated intraMTA traffic through an IXC. Alma had explained to the Court that for “‘historical and regulatory reasons,’ Alma does not send any of its calls to T-Mobile through a transiting carrier, but instead sends all traffic bound for T-Mobile through a long-distance carrier.” 35 It thus appears that the issue presented in Alma Communications was essentially the same as that addressed by the Commission in paragraph 1007 of the USF/ICC Transformation Order, where (as discussed above) the LEC claimed it had no choice but to send intraMTA traffic through an IXC. The Court noted that, even in the context of an arbitrated interconnection agreement, “Alma would like land-line to cell-phone calls to be treated as long-distance calls, so that Alma would not have to pay reciprocal compensation to T-Mobile [when originating intraMTA calls] and so Alma can collect access compensation from the long-distance providers.” 36 The Court disagreed that Alma could ignore its arbitrated reciprocal compensation agreement with the CMRS provider and found the LEC-originated intraMTA traffic in question subject to the agreement. The Petition, however, does not purport to overrule the terms of any interconnection agreement between a LEC and a CMRS provider. To the contrary, the Petition

35 Id.
36 Id. at 623.
seeks to affirm that, in the absence of such an agreement, normal tariffed switched access charges apply to traffic that an IXC delivers to a LEC using normal tariffed switched access services.

In Atlas Telephone, the Tenth Circuit reached a conclusion similar to that in Alma Communications, namely that the CMRS provider and LEC were required to pay each other reciprocal compensation when intraMTA traffic was routed through an IXC because of an existing agreement. The case did not address a dispute between an IXC and a LEC over access charges. Rather, it tackled the question of whether, where the State commission in an arbitrated agreement had addressed intraMTA traffic to be routed through an IXC, *i.e.*, Southwestern Bell, reciprocal compensation between the CMRS provider and LEC applied. The court explained: “Under the terms of the interconnection agreements, the CMRS providers were not required to establish physical connections with the RTC [i.e., ‘rural telephone company’ or rural ILEC] networks, although the agreements do not preclude such connections. Rather, telecommunications traffic could be routed through an interexchange carrier (‘IXC’), Southwestern Bell Telephone Company (‘SWBT’),”37 and “the originating network bears the cost of transporting telecommunications traffic across SWBT’s network to the point of interconnection with the terminating network.”38 Thus, Atlas Telephone does not present the scenario set forth in the Petition, namely whether access charges may be assessed on an IXC when the CMRS provider voluntarily chooses to route intraMTA traffic to a LEC through an

37 Atlas Telephone, at 1260 (emphasis added).

38 Id. at 1260-61. See also id. at 1261, where the Court explains that, under the reciprocal compensation agreements in that case, the “originating network is then required to compensate the terminating network for terminating the call.”
IXC rather than, as in *Atlas Telephone*, within the scope of a reciprocal compensation agreement between the LEC and the CMRS provider.

In sum, the appellate decisions cited by the Commission in footnotes 2132 and 2133 of the *USF/ICC Transformation Order*, and relied upon by Sprint, are irrelevant to the issues raised by the Petition. The cases did not address the issues raised by the Petition: the compensation an IXC owes a LEC when it delivers intraMTA traffic to a LEC for termination using the LEC’s tariffed switched access services in the absence of an agreement between the LEC and the IXC (or between the LEC and the CMRS provider) that provides for such exchange outside the access charge regime. Nor do those cases suggest that the Commission had somehow already ruled that access charges categorically would not apply in such a case. The *USF/ICC Transformation Order* indicates that these cases are consistent with the proposition that intraMTA traffic subject to reciprocal compensation *may* be routed through an intermediate carrier, such as a transit provider or an interexchange carrier, but it does *not* state that an IXC is *never* responsible for access charges on intraMTA traffic that is routed through an IXC. The Commission did not make that statement for a simple reason: in the *Local Competition Order* it had already explained the default position that where intraMTA traffic is routed through an IXC, existing Commission practice subjects the IXC to access charges.

Departure from this principle is certainly possible, but it requires an agreement – either with an IXC or a CMRS provider – to which the LEC is a party. Otherwise, the LEC’s switched access tariffs apply to the IXC. This outcome, decided almost twenty years ago by the Commission, is consistent with the regulatory framework of the reciprocal compensation regime.

39 Indeed, *Alma Communications* and *Atlas Telephone* both involved reciprocal compensation agreements between a CMRS provider and a LEC that expressly provided for intraMTA traffic to be routed through an IXC.
The reciprocal compensation regime is agreement-based, particularly with respect to CMRS providers and LECs, and thus with regard to local, \textit{i.e.}, intraMTA, traffic exchanged between them. Thus, for example, Section 20.11 of the Commission’s Rules provides that LECs will allow CMRS carriers to interconnect upon reasonable request, that CMRS providers and LECs are free to enter into reciprocal compensation arrangements that differ from the default provision of the rule, and that \textit{non-access} compensation obligations for intraMTA traffic cannot be imposed by ILEC tariff.\footnote{See 47 C.F.R. §§20.11(a), (b), and (d).}

The statutory regime regarding reciprocal compensation with LECs stems from Section 251(b)(5) of the Act and is effectuated through requests for interconnection and negotiation of a contract with the LEC. By contrast, a LEC’s switched access tariff applies to all interexchange traffic that an IXC sends to the LEC for termination using tariffed switched access services, although a LEC can reach an agreement with the IXC to establish different arrangements. The Commission in the \textit{USF/ICC Transformation Order} notes that, indeed, “many incumbent LECs have already, pursuant to state commission and appellate court decisions [\textit{e.g.,} those discussed above], extended reciprocal compensation arrangements with CMRS providers to intraMTA traffic without regard to whether a call is routed through interexchange carriers.”\footnote{\textit{USF/ICC Transformation Order}, n. 2132.} But saying that CMRS and LEC providers “may” extend or even “have” extended such arrangements is a far cry from saying that those arrangements are automatically in place. The Commission, in response to the Petitions, should affirm that LECs need not do so, and (more fundamentally) that when traffic is delivered to them by IXCs using tariffed switched access services, absent an agreement to the contrary, access charges apply.
Significantly, as the Petition notes, the IXCs, which now claim they need not pay access charges on intraMTA traffic simply because it originates or terminates with a CMRS Provider, in fact paid access charges on such traffic delivered using tariffed switched access services for almost twenty years after the *Local Competition Order*. Not only does this behavior demonstrate the disingenuousness of their claims, but the IXCs continued to pay for more than seven years after the federal appellate cases cited above – which they now claim support their position of non-payment. And in at least XO’s experience, virtually all IXCs continued to pay such access charges for at least several years after the *USF/ICC Transformation Order* was released in 2011. Thus, were the Commission to reverse course and deny the Petition, it would act contrary to two decades of IXCs’ uniform compliance with and affirmation of the applicability of switched access service tariffs to this traffic.42 Rather than do so now, especially as the access charge regime is being phased out per the *USF/ICC Transformation Order*, the Commission should grant the Petition.

Finally, even if the Commission concludes – which XO submits it should not – that no express arrangement either between LEC and CMRS provider or agreement between an IXC and LEC is necessary to exempt the IXC from tariffed switched access charges for intraMTA traffic, that would still not resolve any dispute in favor of the IXCs. Even if IXC-delivered intraMTA traffic is not subject to access charges in theory, it remains difficult to implement that view in practice – because as far as XO is aware, there is no way, based on available data in call detail and similar records, to accurately identify which calls are intraMTA and which are not. (The

42 XO concurs in the Petition’s call that, should the Commission decide to relieve IXCs from their duty to pay access charge when they deliver traffic LECs using tariffed switched access services merely because the traffic is intraMTA in nature – rather than only where an agreement between the LEC and IXC or between the LEC and a CMRS provider provides to the contrary – it would be unjust to apply the decision retroactively. *See* Petition at 31-35.)
IXCs have certainly never offered any cogent explanation of how they supposedly identify such calls.) To aid the resolution of disputes in these circumstances, the Commission should establish a rebuttable presumption that when traffic is delivered by an IXC to a LEC by means of tariffed switched access services, it is interexchange traffic subject to access charges. In the absence of an agreement or arrangement between the LEC and the IXC to identify or allocate such traffic (e.g., by means of traffic studies or agreed traffic factors), the IXC should have the burden to prove (through clear and convincing evidence) that the traffic to which it claims the intraMTA rule applies to is, in fact, intraMTA traffic in nature and not, for example, roaming traffic.\footnote{As an illustration, if an end user with a wireless telephone number beginning in “202” or “301” or “703” is roaming in a distant location and calls back to Washington, D.C., and the call is routed via an IXC, normal call records will erroneously suggest, based on a simple comparison of the originating and terminating numbers, that the call is intraMTA in nature. XO notes, however, that the Jurisdictional Indicator Parameter (“JIP”), where present, may very well indicates the first point of switching on the public switched telephone is distant from the terminating market, even if the CMRS end user’s telephone number is from the same local area as the terminating LEC serving the called party.} This should especially be the case when a CMRS provider in the same MTA has a reciprocal compensation arrangement in place with the LEC by which it has agreed to send traffic originating with its subscribers to the LEC over local facilities through a local tandem provider and the CMRS provider ordinarily does so.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the Petition and issue a declaratory ruling confirming that when an IXC terminates traffic to or receives traffic from a LEC via tariffed switched access services, the fact that it may be intraMTA traffic does not categorically exempt the traffic from access charges. Rather, such an exemption would only

\footnote{As an illustration, if an end user with a wireless telephone number beginning in “202” or “301” or “703” is roaming in a distant location and calls back to Washington, D.C., and the call is routed via an IXC, normal call records will erroneously suggest, based on a simple comparison of the originating and terminating numbers, that the call is intraMTA in nature. XO notes, however, that the Jurisdictional Indicator Parameter (“JIP”), where present, may very well indicates the first point of switching on the public switched telephone is distant from the terminating market, even if the CMRS end user’s telephone number is from the same local area as the terminating LEC serving the called party.}
exist where a reciprocal compensation agreement between the LEC and CMRS provider or a separate agreement between the LEC and IXC so provides.

Respectfully submitted,

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