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

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

Lisa R. Youngers
XO COMMUNICATIONS, LLC
13865 Sunrise Valley Drive
Herndon, VA 20171
Telephone: (703) 547-2258

Thomas W. Cohen
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN LLP
3050 K Street, NW
Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Facsimile: (202) 342-8451

Attorneys for XO Communications, LLC

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

XO Communications, LLC (“XO”), by its attorneys, hereby submits its reply comments
responding to other parties’ comments on 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

I. INTRODUCTION AND SUMMARY

The record overwhelmingly supports grant of the Petition. The few commenters who
oppose the Petition present nothing that undercuts the arguments supporting a grant. As

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”). All citations
herein to comments on the Petition in the above-captioned proceeding will be in the form
“Comments of Party.”
discussed herein, while Sprint, Level 3, and Verizon (the “Opposing Interexchange Carriers (‘IXCs’)”) raise a handful of points against the Petition, those points are wholly insufficient to justify giving them a pass to use local exchange carriers’ tariffed switched access services for purportedly intraMTA traffic without cost.\(^2\)

It is especially telling that AT&T, which is both the largest interexchange carrier (“IXC”) and local exchange carrier (“LEC”) in the country, declines to join the position of the Opposing IXCs. Rather, AT&T makes clear that, for nearly two decades, the industry understood full well that the intraMTA rule did not automatically exempt IXCs from access charges when they carried intraMTA traffic and delivered it to a LEC for termination.\(^3\) AT&T’s comments leave no doubt either as to the state of law or what consistent industry practice has been regarding intraMTA traffic delivered by IXCs to LECs for termination (with the notable exception of the Opposing IXCs’ recent actions).\(^4\) Accordingly, for the reasons set out here and in XO’s opening comments, the Commission should grant the Petition and confirm that when an IXC terminates traffic to or receives traffic from a LEC via tariffed switched access services, the fact that it may

\(^2\) See Comments of AT&T at 8 & n. 22, at 10. As with XO’s opening comments, the term “intraMTA traffic,” as used in these reply comments, refers to CMRS-originated or -terminated traffic that originates within the same Major Trading Area (“MTA”) in which the traffic terminates. IntraMTA traffic may be interstate or intrastate in nature.

\(^3\) Wherever these Reply 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.

\(^4\) For example, AT&T explains that in 1996, the Commission adopted an intraMTA rule that applied only to intercarrier compensation between a CMRS provider and a LEC: “The Commission held that such intraMTA traffic is ‘local’ traffic subject to reciprocal compensation as between the LEC and the CMRS provider. However, in accordance with Section 251(g) of the Act, the Commission expressly preserved existing access arrangements between LECs and IXCs.” See Comments of AT&T at 3.
be intraMTA traffic does not exempt the traffic from access charges. Rather, any exemption only arises either from a reciprocal compensation agreement between the LEC and CMRS provider that expressly contemplates using an IXC as a transit carrier or from a separate agreement between the LEC and IXC making such traffic subject to compensation other than access charges.

Assuming for the sake of argument that the Commission denies the Petition and concludes that IXCs delivering intraMTA traffic using a LEC’s tariffed switched access services are not subject to lawfully tariffed access charges when they do so, the record makes clear that the Commission should apply any such ruling prospectively only in light of the long and consistent industry practice that access charges applied to such traffic carried by IXCs and to avoid manifest injustice. Similarly, if the Petition is denied, the Commission should also clarify that IXCs have the burden of proving that any alleged intraMTA traffic for which they seek an exemption from access charges is, as a matter of fact, intraMTA traffic.

II. THE RECORD MAKES CLEAR THAT ANY AMBIGUITY REGARDING THE SCOPE OF THE INTRAMTA RULE IS A RECENT FICTION CREATED BY THE OPPOSING IXCS

In its comments, XO explained that, for almost twenty years after the Local Competition Order, the Opposing IXCs paid access charges on any intraMTA traffic they delivered using tariffed switched access services. The Opposing IXCs now claim they need not pay access charges.


6 For purposes of these Reply Comments, XO assumes that the Opposing IXCs have actually sent material amounts of intraMTA traffic over tariffed switched access services. In fact, while claiming that the amounts of such traffic are substantial, Opposing IXCs...
charges on intraMTA traffic they deliver to LECs for termination simply because it originates with a CMRS provider, despite the IXCs’ use of tariffed switched access services. Their decades' long behavior prior to this abrupt change in position, however, demonstrates the disingenuousness of their claims. Indeed, despite the claims of Sprint and Level 3 that appellate decisions as much as ten years ago made it “crystal clear” that access charges did not apply to LEC termination of intraMTA traffic IXCs delivered, the Opposing IXCs continued to pay those charges for nearly another decade. And, in XO’s experience and that of numerous commenters, virtually all IXCs continued to pay such access charges for at least several years after the Commission’s 2011 *USF/ICC Transformation Order*, which reiterated the intraMTA rule.

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7 See Comments of Sprint and Level 3 at 27. See also *Alma Communications Co. v. Missouri Public Service Comm’n*, 490 F.3d 619 (8th Cir. 2007) (“Alma Communications”), and *Atlas Telephone Co. v. Oklahoma Corp. Comm’n*, 400 F.3d 1256 (10th Cir. 2005) (“Atlas Telephone”).


9 See, e.g., Comments of Birch Communications, Inc. *et al.* at 9 n. 28 (Sprint and Verizon paid until initiating their recent complaints); Comments of Comments of the Michigan Local Exchange Carriers at 3-4 (discussing how IXCs opposing access charges for intraMTA traffic paid until just before initiating litigation in 2014). XO believes that this sustained practice of payment without protest by the Opposing IXCs may well constitute a bar (in the nature of estoppel or waiver) to any claims for refunds of access charges for intraMTA traffic that the Opposing IXCs may have paid. In the instant proceeding, however, the significance of the Opposing IXCs’ decades of payment is not to work a formal estoppel, but rather to underscore that industry practice was and is (with the recent exception of the Opposing IXCs) fully consistent with XO’s interpretation of the intraMTA rule being narrowly focused on traffic arrangements and payment obligations between LECs and CMRS carriers, not between LECs and IXCs.
Such payments by the IXCs are inexplicable if the USF/ICC Transformation Order reiterated, as the Opposing IXCs’ claim, confirmed the interpretation of the intraMTA rule that Opposing IXCs now urge the Commission to adopt while denying the Petition.

The record in this proceeding confirms the accuracy of XO’s description of industry practice. Most significantly, AT&T’s comments make clear that, as both a LEC and IXC, respectively, it has billed and has paid (and continues to bill and pay) access charges for intraMTA traffic delivered by an IXC to a LEC for completion using tariffed switched access services, absent an agreement to contrary.\(^\text{10}\) AT&T describes this as “consistent industry practice,”\(^\text{11}\) a point on which numerous commenters agree.\(^\text{12}\) As AT&T explains, in the absence of an agreement contemplating use of IXC as an intermediate carrier for intraMTA traffic and lacking information to identify intraMTA traffic as such, a LEC may properly bill switched access charges on intraMTA traffic according to the terms and conditions of the LECs’ switched access tariffs.\(^\text{13}\)

In its comments, Verizon attempts to reduce the requirement of an agreement to exempt intraMTA traffic from normal tariffed access charges to an absurdity. Verizon states that “[i]ntraMTA wireless traffic does not originate or terminate on the networks of the IXCs that route it, but Petitioners do not explain how these IXCs could enter reciprocal arrangements with the LECs that terminate this traffic.”\(^\text{14}\) Verizon’s challenge is a red herring. XO’s point is not that IXCs must enter into reciprocal compensation agreements with LECs to qualify for an

\(^{10}\) Comments of AT&T at 10.

\(^{11}\) See id. at 8.

\(^{12}\) See, e.g., Comments of Birch Communications, Inc. et al. at 3.

\(^{13}\) See Comments of AT&T at 10-11.

\(^{14}\) Comments of Verizon at 13.
exemption from access charges. As a general rule, IXC acting as such are not entitled to enter into reciprocal compensation agreements with LECs. The point, more broadly, is either that (1) a LEC-CMRS agreement may specifically contemplate use of IXC as transit carrier for intraMTA traffic (as explained in the Atlas Telephone and Alma Communications cases), in which case the LEC will not assess access charges against the IXC, or (2) a LEC-IXC agreement may provide that access charges will not apply when the IXC delivers intraMTA traffic to the LEC for termination. Neither of these is a (non-access) reciprocal compensation agreement between the LEC and IXC.

In short, the record confirms what XO explained in its initial comments: when IXC use a LEC’s tariffed switched access services to deliver a call, including an intraMTA call, tariffed switched access charges apply. The rule is not, as Sprint and Level 3 claim to the contrary, that

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15 See Local Competition Order at ¶¶ 190-91. As used herein, the term “reciprocal compensation” refers to that type of compensation which the current FCC rules designate as “Non-Access Reciprocal Compensation.” See Comments of XO at 9-10, n. 22 (discussing the distinctions between Access Reciprocal Compensation and Non-Access Reciprocal Compensation in the wake of the USF/ICC Transformation Order). Only in highly unusual circumstances would any traffic an IXC carries “originate or terminate” on the IXC’s own network. An IXC picks up traffic from one carrier (typically a LEC), carries it to the area where it terminates, and hand it off to another carrier (again, typically a LEC). As such, it is not the IXC that would enter into reciprocal compensation arrangements with the LECs for this traffic. Any such arrangement in the case of intraMTA traffic would be between the LEC and the CMRS carrier originating it. If a CMRS carrier hands off traffic to an IXC for onward delivery, without any agreement between the CMRS carrier and the terminating LEC, then that traffic is, indeed, subject to access charges if terminated using the LEC’s tariffed switched access services.

16 See Comments of XO at 13-17.

17 Verizon asserts that a LEC and CMRS provider cannot agree as to what an IXC delivering traffic to the LEC for termination will pay. See Comments of Verizon at 15. While that may be true, the LEC and CMRS provider can certainly agree between themselves that the LEC will not assess access charges on the IXC if it is used for routing intraMTA traffic between them.
access charges do not apply to traffic delivered by an IXC absent an exception.\textsuperscript{18} This contention is baseless. The exact opposite is true: access charges apply to traffic delivered using tariffed switched access services, absent an agreement to the contrary.\textsuperscript{19}

\section*{III. THE LEGAL AUTHORITIES PROFFERED BY THE OPPOSING IXCS FAIL TO WARRANT THE RELIEF THEY SEEK}

In its opening comments, XO explained that the intraMTA rule as established in the 1996 \textit{Local Competition Order} did not extend to compensation owed by an IXC to a LEC for traffic delivered by the IXC to a LEC for termination using the LEC’s tariffed switched access services, and that the 2011 \textit{USF/ICC Transformation Order} did not rewrite or extend the intraMTA rule to reach such situations.\textsuperscript{20} An IXC using a LEC’s tariffed switched access services does not get a free pass simply because a CMRS provider originated the call, whether or not the call begins and ends in the same MTA. XO also demonstrated that the appellate cases the Commission cited in the \textit{USF/ICC Transformation Order} reinforced this conclusion, as those cases applied to the

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\textsuperscript{18} See Comments of Sprint and Level 3 at 20-22. Verizon recognizes that the Opposing IXCs seek an exemption from the otherwise applicable access charge regime, when it claims that “the reciprocal compensation obligations established by Section 251(b)(5) for intraMTA wireless traffic supplant the traditional access charge regime to the extent that IXCs are involved in routing this traffic.” See Comments of Verizon at 5. However, while Verizon does not turn reality inside out in the way that Sprint and Level 3 do, it still distorts the reality that although routing via an IXC may not change what a CMRS carrier owes a LEC for intercarrier compensation, it does expose the IXC to access charges absent a contractual arrangement with the LEC to the contrary.

\textsuperscript{19} Sprint and Level 3 argue that, as a policy matter, CMRS providers should be able to route intraMTA traffic as they please. See Comments of Sprint and Level 3 at 14. To the extent Sprint and Level 3 argue that an agreement between a CMRS provider and a LEC to exchange intraMTA traffic may contemplate any variety of routing options, including use of an IXC as a transiting carrier, XO would agree. However, XO disagrees that a unilateral choice by a CMRS provider to route such traffic in a manner contrary its agreement with the LEC nonetheless confers the benefits of the agreement on the CMRS carrier (and an IXC to whom it routes the traffic).

\textsuperscript{20} Comments of XO at 8-12.
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compensation owed between a CMRS provider and a LEC pursuant to arbitrated interconnection agreements that specifically contemplated use of an IXC as a transit carrier.\(^\text{21}\)

In their comments, the Opposing IXCs rely heavily on these same cases -- *Alma Communications, Atlas Telephone, and INS* -- but raise no new arguments regarding them that XO failed to anticipate.\(^\text{22}\) Accordingly, in response to the Opposing IXCs discussion of these cases, XO refers the Commission to the discussion of those cases in its opening comments.\(^\text{23}\)

\(^{21}\) See id. at 12-17, discussing USF/ICC Transformation Order, ¶ 1043 n. 2132; Alma Communications, supra; Atlas Telephone, supra; and Iowa Network Services, Inc. v. Qwest Corp., 466 F.3d 1091 (8th Cir. 2006) ("INS").

\(^{22}\) See Comments of Sprint and Level 3 at 10-13; Comments of Verizon at 5-7. See also Comments of CTIA at 4-5. (The Comments of CTIA are effectively an abbreviated version of the Comments of Sprint and Level 3, and XO effectively responds to them in its references to the Comments of Sprint and Level 3.) XO notes that it does not dispute that CMRS providers are entitled to (non-access) reciprocal compensation arrangements for intraMTA traffic exchanged with LECs, and nothing in its comments or reply comments should be so construed.

\(^{23}\) In its Comments, XO discussed why the opinion in *INS, supra*, fails to support the Opposing IXCs’ position, even though the court there did rule that, in the circumstances addressed there, the IXC (Qwest) did not owe access charges. See Comments of XO at 14, n. 33. Sprint and Level 3 cite an unreported district court case in their comments, *Rivers Telephone Cooperative, Inc. v. U.S. West Comm’s Inc.*, 2003 WL 24249671 (D. Mont. 2003) ("3 Rivers"), that found U.S. West (Qwest) did not owe intrastate access charges for intraMTA traffic when it acted as an intermediate carrier because the Commission had so decided in the *Local Competition Order*. See Comments of Sprint and Level 3 at 13. *3 Rivers* relied upon an unreported 2002 Southern District of Iowa decision. See *Iowa Network Services, Inc. v. Qwest Corp.*, 2002 WL 31296324 (S.D. Iowa 2002). That decision, however, was later reversed and remanded and, after further review, resulted in the *INS* case discussed in XO’s comments. In that case, the district court found, in contrast to *3 Rivers, but incorrectly*, that there had been no FCC determination of whether IXCs as general matter had to pay access charges for delivering intraMTA traffic to LECs. See *Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 890 (S.D. Iowa 2005). The Eighth Circuit concluded the same in *INS* on appeal. *INS*, 466 F.3d at 1097. In fact, as XO explained in its comments, the district and appellate courts were wrong in concluding the Commission had not ruled on the matter – the Commission left no doubt to the limited scope and applicability of the intraMTA rule established in the *Local Competition Order*. See XO Comments at 14, n. 33. For these
Sprint and Level 3 also rely on *Western Radio Services Co. v. Qwest Corp.* 678 F.3d 970 (9th Cir. 2012) (“Western Radio Services”). But *Western Radio Services* lends no more support to the arguments of the Opposing IXCs than *Alma Communications* or *Atlas Telephone*. Like those two cases, *Western Radio Services* was addressing compensation as between a CMRS provider and a LEC when an IXC acted as an intermediate carrier. The case contrasted the compensation owed by the CMRS provider (reciprocal compensation) with that owed by the IXC. The latter, not the former, is the scenario raised by the Petition. In particular, the Ninth Circuit explained that

The Act requires that reciprocal compensation arrangements apply to the "transport and termination of telecommunications" between LECs. 47 U.S.C. § 251(b)(5). The regulations extend this duty to telecommunications traffic exchanged between LECs and CMRS providers. 47 C.F.R. § 20.11(b), (c). In the regulation addressing the scope of the transport and termination pricing rules, the FCC distinguishes between traffic exchanged between a LEC and a CMRS provider and traffic exchanged *between a LEC and a non-CMRS provider*. See 47 C.F.R. § 51.701(b). In the former situation, reciprocal compensation applies to all traffic exchanged “that, at the beginning of the call, originates and terminates within the same Major Trading Area . . . .” *Id.* § 51.701(b)(2). In the latter situation, reciprocal compensation applies to all traffic exchanged *except* “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access . . . .” *Id.* § 51.701(b)(1). *Traffic carried by an IXC, which is access-based rather than reciprocal-compensation-based, falls within this regulatory exception to the reciprocal compensation rules.*

reasons, the unreported 3 Rivers case was in error and so does not support denial of the Petition.

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24 Sprint and Level 3 also cite an Eighth Circuit opinion issued the year after *INS* which relies heavily on the *INS* case. See Comments of Sprint and Level 3 at 11-12, *discussing Rural Iowa Indep. Tel. Ass’n v. Iowa Utils. Bd.*, 476 F.3d 572 (8th Cir. 2007). There the court noted that it had “already upheld the sum and substance of the IUB decision [it was reviewing] in the [INS] case.” *Id.* At 576. Accordingly, XO’s earlier discussion showing that *INS* does not support Sprint and Level 3 applies here as well. See Comments of XO at 14, n. 33. See also n. [19], supra.

25 *Western Radio Services*, 678 F.3d at 988 (underlined emphases added).
Thus, *Western Radio Services* recognizes that, as between IXCs and LECs, access traffic is still access traffic, and that *intraMTA* traffic is not subject to access charges when exchanged between CMRS providers and LECs. But the court’s determination was narrow in scope. As was the case in *Alma Communications* and *Atlas Telephone*, *Western Radio Services* was limited to what CMRS providers and LECs have to pay each other when exchanging intraMTA traffic, and did not address what IXCs have to pay LECs for their role in delivering such traffic for termination. Indeed, *Western Radio Services* concludes that the USF/ICC Transformation Order and the Commission’s restatement of the reciprocal compensation rule in 2001 make plain that the involvement of an IXC has no effect on the obligations of LECs and CMRS providers to pay reciprocal compensation for traffic “that, at the beginning of the call, originates and terminates within the same Major Trading Area . . . .” 47 C.F.R. § 51.701(b)(2). Accordingly, like the Tenth and Eighth Circuits [*i.e.*, the *Alma Communications* and *Atlas Telephone* opinions], we reject the contention that such traffic was subject to access charges.

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26 Sprint and Level 3 argue that there is an important difference in the present controversy between “traffic” and “parties,” and that any party carrying intraMTA traffic is exempt from access charges. In other words, if intraMTA traffic is subject to reciprocal compensation payments between a CMRS provider and a LEC, intraMTA traffic must also be subject to the same reciprocal compensation regarding payments between an IXC carrying the traffic and a LEC to which the IXC delivers the traffic for termination. See Comments of Sprint and Level 3 at 10-11. Unfortunately for Sprint and Level 3, this is simply not what the intraMTA rule provides. Their claim ignores the fact that a single circuit-switched “call” may take on a different character depending on which entity is carrying it and how it is exchanged. For example, an end user may place a local (or long distance) telecommunications services call over its selected telephone company to reach the dial-up ISP or other information services provider; when that occurs, the same call constitutes information services as between the end use and the information service provider. Where the dial-up call is a long distance call (*e.g.*, to an ISP’s toll-free number), the IXC must pay originating and terminating access charges, even though the call is information services traffic as well. Similarly, an individual intraMTA call can be subject to reciprocal compensation between a CMRS provider and a LEC (if exchanged directly between the LEC and the CMRS provider) or subject to access charges between an IXC and a LEC (if delivered by the IXC to the LEC for termination using the LEC’s tariffed switched access charges).
is somehow “transformed into a long-distance call simply by being routed through a long-distance carrier.” *Alma*, 490 F.3d at 625.27

This case, like the others, was dealing with payments between CMRS carriers and LECs, not payments between IXC and LECs.

In sum, the cases cited by the Opposing IXC do not justify the relief they seek – an automatic exemption from access charges when an IXC delivers intraMTA traffic to a LEC for termination. Rather the Commission should declare that access charges apply when an IXC uses tariffed switched access services to deliver such traffic absent an agreement to the contrary, either between the IXC and the LEC or between the CMRS provider and the LEC.28

IV. ASSUMING ARGUENDO THE COMMISSION RULES THAT ACCESS CHARGES ARE NOT DUE FOR INTRAMTA TRAFFIC DELIVERED BY AN IXC TO A LEC, THAT RULING SHOULD BE PROSPECTIVE ONLY

For the foregoing reasons, the Petition should be granted. But even assuming for the sake of argument that the Commission were to deny the Petition, the public interest requires that any exemption from access charges for IXC delivering intraMTA traffic have only prospective application. This result is required because of the uniform industry understanding of the limited scope of the intraMTA rule over the last two decades. The Opposing IXC try to suggest that prospective-only application is unwarranted, but the facts support the outcome XO, and the

27 *Western Radio Services*, 678 F.3d at 989-990 (emphasis added).

28 As the Minnesota Telecom Alliance convincingly explains, even if there were an exemption for IXC under the intraMTA rule that did not require an express contract with a LEC, the IXC would remain free to contract with LECs to the contrary. *See* Comments of Minnesota Telecom Alliance at 12-14. The Minnesota Telecom Alliance goes on to explain that in such a regulatory environment, by choosing to use a LEC’s tariffed switched access services to deliver intraMTA traffic, an IXC has effectively chosen such an alternative arrangement under which it agrees to pay access charges.
Petition, advocates. The Opposing IXCs’ own behavior in paying the charges for a generation after the intraMTA rule was adopted -- before just recently assuming their current view -- is reason enough to limit to prospective application a decision that would clearly be contrary to long-standing industry practice.

Tellingly, AT&T agrees that were the Commission to deny the Petition, it should do so prospectively only because of the significant impact on LECs who billed and collected access charges in good faith. AT&T explains: “Because it would have been impossible for LECs to bill intraMTA traffic as subject to reciprocal compensation, it would be manifestly unjust for the Commission to apply an IXC-favorable ruling retroactively, and thereby subject LECs to retroactive refund claims that would likely total to hundreds of millions of dollars.” XO concurs.

V. ASSUMING ARGUENDO THE COMMISSION RULES THAT ACCESS CHARGES ARE NOT DUE FOR INTRAMTA TRAFFIC DELIVERED BY AN IXC TO A LEC, THE COMMISSION SHOULD MAKE CLEAR THAT IXCS CARRY THE BURDEN OF PROVING TRAFFIC IS INTRAMTA

Assuming arguendo that the Commission were to conclude that IXCs delivering intraMTA traffic to LECs using tariffed access services are not subject to access charges, there is still the question of determining what traffic is intraMTA traffic. The record here will not support a specific answer to that question in any given case, but the Commission should make

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29 See Petition at 31-35.
30 Comments of AT&T at 14-15.
31 Id. at 15; see also id. at 2, 14 (discussing magnitude of impact of a retroactive change from industry understanding of the rule). The Comments of AT&T in particular and the record in general effectively rebut the predicate of the position of Sprint and Level 3 that there should be a retroactive recovery of access charges paid if the Commission denies the Petition because “there has never been an access-charge exception for intraMTA calls transported by an IXC, there is no basis for LECs to keep charges that were collected in violation of the long-standing rule.” See Comments of Sprint and Level 3 at 4.
clear where the burden of proof lies. The record confirms that to the extent that intraMTA traffic is delivered over tariffed switched access services, it is often mingled with other traffic, plainly subject to access charges, on the same facilities.32 XO explained in its comments that 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 how to identify the traffic that is intraMTA traffic or to allocate the traffic delivered by the IXC into a portion subject to access charges and a portion exempt from them, the IXC should have the burden to prove the traffic to which it claims the intraMTA rule applies is actually intraMTA traffic.33

This is simple practicality. Before intraMTA traffic can be treated differently than other traffic, such as interMTA traffic or normal landline long distance traffic, there has to be a way to identify it. There is no self-effectuating way to do this retroactively – or prospectively for that matter.34 Since IXCs are delivering the traffic to LECs, the burden naturally falls upon them to

32 See, e.g., Comments of AT&T at 15; Comments of Minnesota Telecom Alliance at 9-10. See note 6, supra (noting that XO does not concede that the IXCs have actually delivered any material amount of intraMTA traffic). To the extent that intraMTA traffic has been commingled, XO submits that this occurred because the IXCs understood that it, like the traffic it was intermingled with, would be treated as interexchange traffic subject to access charges.

33 See XO Comments at 19-20.

34 Verizon’s contention that the Commission has sanctioned the unilateral use of traffic studies for this purpose is without foundation. See Comments of Verizon at 16 (“the Commission has offered a straightforward method to distinguish types of intraMTA calls: traffic studies”). The fact that it might be possible to conduct traffic studies to identify such traffic – and XO is somewhat skeptical, given that, as far as XO is aware, no standard call signaling parameter identifies the location of the relevant cell site – does not undermine the requirement that the nature and use of such studies would need to be agreed to in advance between the IXC and the LEC, not imposed after the fact.
demonstrate what portion (if any) is intraMTA traffic. Looking backwards – if any decision to exempt intraMTA traffic from access applied retroactively – which it should not – IXCs should be required to demonstrate as a factual matter that the traffic for which they seek an exemption was, in fact, intraMTA traffic, rather than merely project backwards from any current traffic studies they might create.\textsuperscript{35} Going forward, the Commission should make clear that parties should be required to enter into agreements to apply a reasonable measurement solution.\textsuperscript{36} Traffic studies may be one such method, but the method that will be used should be left to agreement among the parties. At bottom, however, if the Commission determines that, prospectively, access charges do not apply to intraMTA traffic an IXC delivers to LECs for termination – which, again, it should not – the Commission must be “explicit that IXCs/CMRS

\textsuperscript{35} Ultimately, whether the evidence proves that traffic is intraMTA in nature and eligible for an exemption from access charges, assuming such an exemption applies, is a matter for the fact finder in any given adjudication. Here, what matters is that – if there is an exemption applicable to IXCs against paying access charges on intraMTA traffic delivered to a LEC for termination – the Commission declare that the IXCs bear the burden of proof to prove traffic it claims is intraMTA traffic is, in fact, intraMTA in nature.

\textsuperscript{36} The Concerned Rural LECs and other commenters point out that verifying traffic as intraMTA is virtually impossible. See Comments of The Concerned Rural LEC at 8-9; Comments of NTCA \textit{et al.} at 10; Comments of the Minnesota Telecom Alliance at 11. The Comments of NTCA \textit{et al.} also underscore the experience of many LECs that that there has been no cooperation by IXCs to make accurate and/or acceptable measurement possible. See Comments of NTCA \textit{et al.} at 8-9; Comments of Minnesota Telecom Alliance at 9-10.
carriers should provide LECs with timely and verifiable information on the level of intraMTA traffic.”

VI. CONCLUSION

For the foregoing reasons and those contained in the initial comments of XO, 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, access charges absent an agreement to the contrary.

Respectfully submitted,

XO COMMUNICATIONS, LLC

Lisa R. Youngers  
XO COMMUNICATIONS, LLC  
13865 Sunrise Valley Drive  
Herndon, VA  20171  
Telephone:  (703) 547-2258

Thomas W. Cohen  
Edward A. Yorkgitis, Jr.  
KELLEY DRYE & WARREN LLP  
3050 K Street, NW  
Suite 400  
Washington, D.C.  20007  
Telephone:  (202) 342-8400  
Facsimile:  (202) 342-8451

Attorneys for  
XO Communications, LLC

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37 See Comments of AT&T at 15.