Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Petition for Declaratory Ruling Regarding Applicability of the IntraMTA Rule to LEC-IXC Traffic

WC Docket No. 14-228

COMMENTS OF SPRINT CORPORATION AND LEVEL 3 COMMUNICATIONS, LLC

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EXECUTIVE SUMMARY

This Opposition responds to a Petition for Declaratory Ruling filed by a number of local exchanges carriers ("LECs") concerning the “intraMTA rule.” The intraMTA rule governs compensation for calls between LECs and commercial mobile radio service ("CMRS") providers where such calls (at the time they begin) originate and terminate in the same Major Trading Area ("MTA"). The Commission adopted the intraMTA rule in the 1996 Local Competition Order, and it provides, without exception, that intraMTA traffic is subject to reciprocal compensation payments rather than access charges. Petitioners nevertheless argue that the rule should be interpreted as having an exception allowing LECs to impose access charges when an interexchange carrier ("IXC")—an intermediate carrier—transports intraMTA traffic between a LEC and a CMRS provider. There is no merit to this contention, which has been rejected by the courts of appeals that have considered it and by the Commission in the 2011 Connect America Fund Order.

Nor is there merit to Petitioners’ fall-back argument that, even if they are wrong about the scope of the intraMTA rule, it does not apply unless and until an intermediate IXC enters into an interconnection agreement ("ICA") affirming that the intraMTA rule applies to the IXC. This contention turns the intraMTA rule into an exception to a “rule” that does not exist, i.e. that access charges do apply unless negated by agreement. The FCC has never suggested that such a

2 See Alma Commc’ns. Co. v. Mo. Pub. Serv. Comm’n, 490 F.3d 619 (8th Cir. 2007); W. Radio Servs. Co. v. Qwest Corp., 678 F.3d 970 (9th Cir. 2012); Atlas Tel. Co. v. Okla. Corp. Comm’n, 400 F.3d 1256 (10th Cir. 2005); Iowa Network Services, Inc. v. Qwest Corp., 466 F.3d 1091 (8th Cir. 2006); Rural Iowa Indep. Tel. Ass’n v. Iowa Utilis. Bd., 476 F.3d 572, 576 (8th Cir. 2007).
rule exists even for a sub-category of intraMTA calls, and certainly it has never adopted any
regulation to that effect. In short, as is the case with Petitioners’ threshold argument, there is no
basis for this back-up argument.4

Petitioners also contend that even if they are wrong about both the scope of the intraMTA
rule and the need for IXCs to enter agreements to implement the rule, LECs still should not be
required to provide refunds for the unlawful access charges they have collected. This argument
would have merit only if the Commission were changing the intraMTA rule. But 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.

I. In the 1996 Local Competition Order, the Commission provided without exception
that intraMTA traffic is “subject to transport and termination rates under section 251(b)(5), rather
than interstate and intrastate access charges.”5 The Commission then noted that some traffic
carried between an IXC and a LEC—such as long distance toll traffic for which a LEC provided
the IXC exchange access service6—was subject to access charges. Petitioners contend on that

4 Even Petitioner CenturyLink seems to doubt its own arguments as its IXC entity has filed
lawsuits against Verizon ILEC entities requesting a refund of access charges paid for intraMTA
(C.D. Cal. filed Nov. 25, 2014); CenturyLink Commc’ns v. Verizon Delaware, No. 14-cv-01439
(D. Del. filed Nov. 26, 2014); CenturyLink Commc’ns v. Verizon Florida, No. 14-cv-02955
(M.D. Fla. filed Nov. 25, 2014); CenturyLink Commc’ns v. Verizon New Jersey, No. 14-cv-
07318 (D. N.J. filed Nov. 24, 2014); CenturyLink Commc’ns v. Verizon New England, No. 14-
cv-09376 (S.D.N.Y. filed Nov. 25, 2014); CenturyLink Commc’ns, LLC v. Verizon South, Inc.,

5 Local Competition Order ¶¶ 1036, 1043.

6 See id. at ¶ 1034 (“Access charges were developed to address a situation in which three
carriers—typically, the originating LEC, the IXC, and the terminating LEC—collaborate to
complete a long distance call. As a general matter, in the access charge regime, the long distance
caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating
and terminating access service.”) (emphasis added); see also 47 U.S.C. § 153 (20) (“The term
‘exchange access’ means the offering of access to telephone exchange services or facilities for
basis that access charges apply whenever an IXC is involved. But the Eighth, Ninth, and Tenth Circuits all rejected that argument years ago. In *Atlas Telephone*, decided in 2005, the Tenth Circuit rejected the contention that “reciprocal compensation requirements do not apply when the traffic is transported on an IXC network.”\(^7\) In 2007, the Eighth Circuit in *Alma Communications* stated that *Atlas Telephone* and *Iowa Network Services* had “explode[d] the idea that a cell-phone call made and received within a major trading area is transformed into a long-distance call simply by being routed through a long-distance carrier.”\(^8\) And the Ninth Circuit has since agreed, holding in 2012 that the “involvement of an IXC in traffic that otherwise would be local,” i.e., LEC-CMRS intraMTA wireless traffic, did not “convert[] that traffic into ‘non-local traffic’” subject to access charges.\(^9\)

The Petition ignores these circuit court decisions, and does so even though the Commission expressly relied on *Atlas* and *Alma* in the 2011 *Connect America Fund Order*. In that Order, the Commission “clarif[ied] 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.”\(^10\) The

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7 *Atlas Telephone*, 400 F.3d at 1264.
8 *Alma Communications*, 490 F.3d at 625, citing *Iowa Network Services*, 466 F.3d at 1097-98.
9 *Western Radio Services*, 678 F.3d at 987.
10 *Connect America Fund Order ¶ 1007.*
Commission cited *Alma Communications* for the proposition that reciprocal compensation applies to “land-line to cell-phone calls placed to cell phones within the same MTA, even if those calls were routed through a long-distance carrier.”\(^{11}\) The *Connect America Fund Order* thus makes clear beyond dispute that the intraMTA rule applies whether or not an IXC is involved in a call. It also makes clear that the Commission itself has already determined that the intraMTA rule was settled long before 2011—by the time of *Atlas* and *Alma* at the latest. Yet the Petition fails even to acknowledge *Atlas*, *Alma*, or the Commission’s endorsement of those decisions.

In any event, even if the Commission had not already rejected Petitioners’ threshold argument, there would be no basis on which to accept it. Petitioners attempt to recast the intraMTA rule as governing only billing practices between CMRS providers and LECs, but the rule governs *traffic* between those carriers. The *Local Competition Order* speaks of “traffic between an incumbent LEC and a CMRS network”\(^{12}\) and the *Connect America Fund Order* similarly addresses *traffic* exchanged between a LEC and a CMRS provider.”\(^{13}\)

**II.** Petitioners’ first back-up argument is that the intraMTA rule has no force absent the existence of an ICA between a LEC and an IXC providing that intraMTA calls are subject to reciprocal compensation. This argument is contrary to the meaning of the word “rule.” The intraMTA rule provides that intraMTA calls are subject to reciprocal compensation. Parties may nevertheless agree to alternative arrangements—as the Petition belabors even though there is no

\(^{11}\) *Id.* at n.2132.

\(^{12}\) *Local Competition Order* ¶ 1043.

\(^{13}\) *Connect America Fund Order* ¶ 1007.
dispute on that point. In short, however, an ICA is needed to create an exception to the intraMTA rule, not to effectuate the rule itself.

Petitioners repeatedly note the practical problem of distinguishing intraMTA calls carried by IXCs from other calls carried by IXCs to which access charges appropriately apply. But the Commission recognized that problem in 1996 and explained that “traffic studies and samples” should be used to determine what is owed, and reiterated in 2011 “that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples.” The Petition fails to acknowledge that the Commission has twice provided the answer to this practical problem.

Petitioners also invoke the filed rate doctrine. But, as the Eighth Circuit held in Iowa Network Services, declining to apply state access tariffs to intraMTA traffic does not “invalidate” those tariffs but simply determines that the charges in the tariffs “do not apply to the type of traffic at issue.” In fact, the filed rate doctrine undermines Petitioners’ argument because it bars the imposition of charges not authorized by a tariff, but does not bar a customer such as Sprint from seeking a refund of amounts paid in excess of the amounts due under a tariff.

14 Local Competition Order ¶ 1044.
15 Connect America Fund Order n. 2132.
16 Moreover, bill-and-keep rules should apply to all local traffic absent an agreement, because bill-and-keep is the default rule governing reciprocal compensation.
17 466 F.3d 1091, 1097.
18 See, e.g., Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1171 (9th Cir. 2002) (finding that the filed rate doctrine “does not serve as a shield staving off claims against a carrier based on the tariff itself”); Sancom, Inc. v. Qwest Commc’ns Corp., 2008 WL 2627465 (D.S.D. June 26, 2008) (claims that carrier attempted to charge tariff rates for a service not set forth in the tariffs not barred by the filed rate doctrine).
III. Petitioners also contend that even if the Commission rejects their other arguments, they should not be required to pay refunds for access charges they collected unlawfully. But that approach would be permissible only if the Commission were changing the intraMTA rule. In the 2011 Connect America Fund Order, the Commission explicitly ruled that it was clarifying the existing rule, not changing it, and the Commission relied on the 2005 and 2007 decisions in Atlas Telephone and Alma Communications. Moreover, Petitioner CenturyLink was created out of mergers including with Qwest, which was the prevailing party in Iowa Network Services v. Qwest, and successfully advanced the same argument there that Sprint and Level 3 advance here. None of the LECs are entitled to keep the unlawful charges they collected, but in any event it would be manifestly unjust to allow CenturyLink to do so.

There is no merit to the suggestion in the Petition that damage awards would harm the telecommunications industry. Sprint believes that it is owed approximately $160 million from a total of more than 300 LECs. Given the large amount of revenue collected by LECs, there is no reason to think that any significant harm would result from refunds of that size spread over so many LECs. Moreover, Petitioners have not even tried to demonstrate harm.

Petitioners claim that refunds should not be allowed where CMRS providers did not protest the imposition of access charges. But, as Petitioners recognize, that claim implicates state voluntary payment doctrines, which have been raised in some of the federal court complaints; therefore courts are the appropriate fora to determine whether those doctrines limit awards in these cases. Similarly, statutes of limitations are relevant to Petitioners’ complaints that they could be liable for refunds going back many years; again, courts are the appropriate fora for determining what limitations period apply.
DISCUSSION

Sprint, Level 3, and other IXCs have sought to remedy the unlawful imposition of access charges on local wireless traffic, i.e., wireless traffic that originates and terminates within the same Major Trading Area. These access charges represent implicit subsidies for LECs that the Commission eliminated nearly two decades ago when it adopted the intraMTA rule to protect a then-emerging wireless marketplace from the distortive relics of pre-1996 telecommunications regulation. There is no basis for Petitioners’ arguments that LECs should be permitted to keep access charges they received in violation of the intraMTA rule or that the rule should be changed to permit them to impose access charges in the future in the absence of an ICA explicitly providing that the intraMTA rule applies.20

I. The FCC Has Made Clear that Access Charges do not Apply to IntraMTA Calls, Whether or Not an IXC is Involved.

Petitioners contend that the intraMTA rule contains a hidden exception for calls routed through an IXC, but the Commission and the courts of appeals have squarely rejected their arguments.

A. The Commission has concluded that the reciprocal compensation regime applies to all intraMTA calls, regardless of billed party.

In its 1996 Local Competition Order, the Commission stated—without exception—that the reciprocal compensation regime of section 251(b)(5), rather than access charges, applies to.

19 Connect America Fund Order ¶ 738.

20 Petitioners err in contending that Sprint has engaged in unlawful self-help. See 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, at 20-21 (2014) (“Pet.”). Sprint has not generally withheld payments to LECs to account for past overcharges, but rather has been withholding only payments for current overcharges, except where LEC tariffs permit withholding for past overpayments.
intraMTA calls. Specifically, paragraph 1036 of the *Order* straightforwardly 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), rather than interstate and intrastate access charges.”\(^{21}\) And in Paragraph 1043, the Commission reiterate[d] that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties’ locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5) [setting forth the reciprocal compensation regime], rather than interstate or intrastate access charges.\(^{22}\)

Each call involved in this proceeding is “traffic to or from a CMRS network that originates and terminates within the same MTA,”\(^{23}\) as defined based on the parties’ locations at the beginning of the call. These intraMTA calls are thus “subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.”\(^{24}\)

In the face of this broad rule, Petitioners assert—without legal support of any kind—that the intraMTA rule does not govern intraMTA traffic, but instead “governs LECs’ billing of CMRS carriers for the exchange of intraMTA wireless calls pursuant to reciprocal compensation agreements or similar agreements.”\(^{25}\) Petitioners thereby attempt to transform a rule that applies to an entire category of calls—*i.e.*, “traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties’ locations at

\(^{21}\) *Local Competition Order* ¶ 1036.

\(^{22}\) *Id.* ¶ 1043.

\(^{23}\) *Id.* ¶ 1036.

\(^{24}\) *Id.* ¶ 1043.

\(^{25}\) Pet. at 22.
the beginning of the call)"— into a rule that instead applies to a specific category of billing relationship—i.e., “LECs’ billing of CMRS carriers.”

But the LECs’ “interpretation” of the intraMTA rule finds no support in the Commission’s Orders. In a series of decisions beginning in 1996, the Commission has repeatedly set forth the intraMTA rule without so much as mentioning billing parties, let alone limiting the rule’s reach to the LEC-CMRS billing relationship. Specifically, in the 1996 Order itself, the Commission stated that the rule governs “traffic to or from a CMRS network that originates and terminates within the same MTA,” and then, in almost the same words, reiterated that the Rule governs “traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA.” Also in 1996, the Commission adopted rules defining “local telecommunications traffic” as “telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates within the same Major Trading Area.” Like the Local Competition Order, the Commission’s original rule thus addressed an entire category of traffic.

In its 2011 Connect America Fund Order, the Commission confirmed this point with unmistakable clarity. First, the Commission “clarif[ied] 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

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26 Local Competition Order ¶ 1043.
27 Pet. at 22.
28 Local Competition Order ¶ 1036.
29 Id. at ¶ 1043.
MTA or outside the local calling area of the LEC.”31 In addition, in response to a LEC argument, the Commission also expressly recognized that intraMTA calls had already been subject to reciprocal compensation arrangements “without regard to whether a call is routed through interexchange carriers.”32 The Commission then cited Alma Communications for the proposition that reciprocal compensation applies to “land-line to cell-phone calls placed to cell phones within the same MTA, even if those calls were routed through a long-distance carrier.”33 The Commission did not dispute the Eighth Circuit’s conclusion in that case that Atlas Telephone and Iowa Network Services had “explode[d] the idea that a cell-phone call made and received within a major trading area is transformed into a long-distance call simply by being routed through a long-distance carrier.”34 In 2011, the Commission also amended its rules to specifically designate intraMTA wireless traffic as “Non-Access Telecommunications Traffic.”35 In short, the Connect America Fund Order and accompanying changes to the rules leaves no room for the Petitioners’ interpretation of the intraMTA rule as applying only to certain billing arrangements.

**B. The courts have repeatedly rejected Petitioners’ claim that the intraMTA rule does not apply to IXC-routed traffic.**

The courts of appeals endorsed the straightforward reading of the intraMTA rule set forth above long before the FCC clarified it in 2011—and none has agreed with Petitioners. Indeed, in

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31 Connect America Fund Order ¶ 1007.
32 Id. at n.2132.
33 Id.
34 Alma Communications, 490 F.3d at 625, citing Iowa Network Services, 466 F.3d 1097-98.
35 47 C.F.R. § 51.701(b)(2) (2011) (emphasis added) (defining “Non-Access Telecommunications Traffic” as “Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area”).
the *Connect America Fund Order*, the Commission specifically noted that its “clarification [was] consistent with how the intraMTA rule has been interpreted by the federal appellate courts,” citing three decisions arriving at the same conclusion.\(^{36}\)

First, the Tenth Circuit’s 2005 *Atlas Telephone* decision found that the “mandate expressed” in the intraMTA Rule “is clear, unambiguous, and on its face admits of no exceptions.”\(^{37}\) The court emphasized that “nothing in the text” of the Commission’s regulations “provides support for the [LECs’] contention that reciprocal compensation requirements do not apply when the traffic is transported on an IXC network.”\(^{38}\) In short, the Tenth Circuit authoritatively rejected the argument advanced by Petitioners a decade ago.

In 2007, the Eighth Circuit reached the same conclusion, relying substantially on *Atlas*.\(^{39}\) There, the LEC argued that “FCC rules governing reciprocal compensation do not include calls made from a local exchange carrier’s customer to a cell phone that are routed through a long-distance provider.” But the Eighth Circuit—quoting the *Atlas* court’s observation that the intraMTA Rule is “clear, unambiguous, and on its face admits of no exceptions”—disagreed. Moreover, the court held that its earlier decision in *Iowa Network Services* “explodes the idea that a cell-phone call made and received within a major trading area is transformed into a long-distance call simply by being routed through a long-distance carrier.”\(^{40}\)

No court of appeals has arrived at a contrary conclusion, and indeed additional appellate authority comes out the same way. In *Rural Iowa Independent Telephone Association v. Iowa*
Utilities Board, 476 F.3d 572, 576 (8th Cir. 2007), the Eighth Circuit rejected LEC arguments that an Iowa Utilities Board (“IUB”) decision prohibiting LECs from imposing access charges on an IXC for intraMTA calls violated the intraMTA rule, “noting that [it had] already upheld the sum and substance of the IUB decision in the related case of [Iowa Network Services].” And in Western Radio Services Co. v. Qwest Corp., the Ninth Circuit similarly rejected the argument that the intraMTA rule does not apply to IXC-routed traffic, relying on Atlas, Alma, and the Connect America Fund Order. In that case, an interconnection agreement between a LEC and a CMRS provider “exempt[ed] intra-MTA, interexchange traffic from reciprocal compensation where an IXC is involved.”

The court concluded that the agreement violated the intraMTA rule, holding that “the involvement of an IXC” did not “alter[] the parties’ obligation to pay reciprocal compensation for telecommunications traffic that originates and terminates within the same MTA.”

The LECs make no meaningful effort to address any of these appellate cases. Instead, they seek to brush these decisions aside by rehashing the flawed argument that the current dispute can be “distinguished” on the ground that it concerns LEC-IXC billing, while these prior decisions resolved billing disputes between LECs and CMRS providers. That argument is both irrelevant and wrong. It is irrelevant because the court of appeals’ fundamental holding—that the intraMTA rule “admits of no exceptions”—applies regardless of who happened to challenge the rule. And it is wrong because Iowa Network Services and Rural Iowa did, in fact, address

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41 Western Radio Servs., 678 F.3d at 988.
42 Id.
43 See Pet. at 7-8.
LEC-IXC disputes. Moreover, as noted above, the particular IXC in both cases, Qwest, merged with one of the Petitioners here, CenturyLink. In other words, in both cases, the entity in Sprint and Level 3’s position in this dispute was one of the Petitioners, which twice prevailed before the Eighth Circuit on the same argument that Sprint and Level 3 advance here.

The district court case of 3 Rivers Telephone Cooperative v. U.S. West Communications, No. 99-cv-80 (CSO), 2003 WL 24249671 (D. Mon. Aug. 22, 2003), also involved Qwest acting as an IXC. Qwest there had stopped paying access charges for intraMTA wireless calls that it received from CMRS providers and delivered to the LECs. The LECs sued, arguing that the intraMTA rule as set forth in the Local Competition Order was “inapplicable to the type of traffic at issue in this case.” The court rejected that argument, finding that “the reciprocal compensation scheme applies to CMRS traffic that originates and terminates in the same MTA, regardless of whether it flows over the facilities of other carriers along the way to termination.” In sum, contrary to Petitioners’ arguments, the courts have repeatedly rejected the claim that the intraMTA rule does not apply to IXC-routed traffic.

C. Sound regulatory policy requires rejecting Petitioners’ claim that the intraMTA rule does not apply to IXC-routed traffic.

In addition to lacking legal support, Petitioners’ argument for IXC-routed traffic from the intraMTA rule makes no sense as a matter of regulatory policy. Rather, applying the intraMTA

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44 The LECs claim that Iowa Network Services regarded “compensation between [an] intermediary transit carrier . . . and CMRS carriers.” Pet. at 7 n.22. The case in fact involved a dispute between a LEC and Qwest, which at the time was an IXC, regarding intraMTA calls routed over “access service trunks.” Iowa Network Servs., 466 F.3d at 1095.

45 3 Rivers, 2003 WL 24249671 at *12.

46 Id. at *18.
rule to the entire category of traffic—regardless of billed party—is the only sensible regulatory option.

First, it is undisputed that a CMRS provider may deliver intraMTA calls to a LEC at any technically feasible point and the LEC may not impose access charges.\textsuperscript{47} There is simply no reason a LEC should be entitled to impose access charges if the CMRS provider hires a third party, including an IXC, to deliver the calls—the LEC does the same task whether or not a third party is involved. It would be arbitrary to apply different compensation regimes to different kinds of billing relationships when the type of traffic and the LEC’s role is identical.

But the LECs’ metamorphosis of the intraMTA rule would be worse than arbitrary—as a matter of incentives, it would be downright harmful. An efficient regulatory regime should leave telecommunications providers free to choose the most cost-effective manner of routing traffic. By applying different compensation regimes to the same traffic on the basis of the carriers involved, the LECs’ proposal would discourage efficient transit and promote regulatory arbitrage. For CMRS providers, use of an IXC as an intermediate carrier is often more efficient than directly connecting to a LEC. If IXC-routed calls were subject to terminating access charges, the CMRS provider would avoid using the IXC and instead pursue the less effective means of reaching LEC subscribers directly—and would do so regardless of whether the CMRS provider or the IXC were to pay those access charges.

Similar arbitrage concerns would apply to LEC routing decisions as well. Regulation should not encourage LECs to route traffic to CMRS networks inefficiently—but an IXC exception to the intraMTA rule would provide LECs an incentive to collect originating access charges by needlessly routing calls through an IXC.

\textsuperscript{47} 47 C.F.R. §§ 20.11; 51.703(b).
D. None of Petitioners’ arguments supports an exception to the intraMTA rule for IXC-routed calls.

As discussed above, Commission precedent, appellate decisions, and sound policy all support that the intraMTA rule applies to an entire category of traffic, as opposed to specific billing arrangements. None of the authorities cited by Petitioners supports a contrary result.

First, Petitioners seize on a snippet of language from the Commission’s 1996 Order. Specifically, Petitioners claim “the Commission [in adopting the intraMTA rule] preserved its ‘existing practice’ under which intraMTA traffic ‘carried by an IXC’ was subject to access charges.” That is incorrect.

Paragraph 1043 does speak of the Commission’s “existing practice,” under which some traffic “carried by an IXC” was subject to access charges. But, in context, there is no plausible way to understand that passage as mandating access charges for intraMTA traffic.

Paragraph 1043 states in full:

As noted above, CMRS providers’ license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs’ local service areas. We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the 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. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some “roaming” traffic that transits incumbent LECs’ switching facilities, which is subject to interstate access charges. Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that

currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.\textsuperscript{49}

The fact that “most traffic between LECs and CMRS providers is \textit{not} subject to interstate access charges \textit{unless} it is carried by an IXC” does not mean that \textit{all} traffic between LECs and CMRS providers that \textit{is} carried by an IXC \textit{is} subject to interstate access charges—the one just does not follow from the other. What \textit{does} follow from the Commission’s statement is this: \textit{some} traffic that IXC's transported between LECs and CMRS providers was subject to interstate access charges in 1996, as was some interstate roaming traffic carried by CMRS providers. That statement is unremarkable. IXC's often transported wireless toll interMTA calls and CMRS providers sometimes transported (or handed off to an IXC) toll interMTA calls. Paragraph 1043 as a whole makes the unexceptionable point that to the extent such interMTA calls were subject to access charges in 1996, the Commission was not altering that state of affairs by implementing the intraMTA rule.\textsuperscript{50}

The LECs also argue that 47 C.F.R. § 20.11(d)—which governs CMRS-LEC interconnections—and 47 C.F.R. § 51.703(b)—which defines intraMTA calls as “non-access telecommunications traffic”—imply exceptions to the intraMTA rule for IXC-routed traffic. In support, they cite to the Commission’s decision in \textit{TSR Wireless, LLC v. U.S. West}.

\textsuperscript{49} \textit{Local Competition Order} ¶ 1043 (footnotes omitted).

\textsuperscript{50} See \textit{Alma Commc’ns Co. v. Mo. Pub. Servs. Comm’n}, No. 05-cv-4358 (NKL), 2006 WL 1382348, at *7 (W.D. Mo. May 19, 2006), \textit{aff’d}, 490 F.3d 619 (8th Cir. 2007) (“Paragraph 1043 has no impact on intrastate calls or interstate calls originating and terminating within the same MTA. Such calls are instead governed by Paragraph 1036’s provision 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), rather than interstate and intrastate access charges.’”); \textit{3 Rivers}, 2003 WL 24249671, at *18 (“Further, the Court is not persuaded by Plaintiffs’ argument that the last sentence of paragraph 1043 ‘carved out an exception’ ‘that preserves the access charge system for wireless calls that were subject to access charges prior to the 1996 Act (such as the calls at issue).’”).
Communications, Inc., 15 FCC Rcd 11166 (2000), but fail to address subsequent Commission and judicial authority that is fatal to their claim.

Section 20.11(d) provides that “Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.” Because this regulation “says nothing about IXCs,” the LECs conclude that IXC-routed traffic must be exempt from the intraMTA rule. But the simple statement in § 20.11(d) that LECs cannot require CMRS providers to pay access for non-access traffic does not even purport to address the question of what traffic counts as “non-access” in the first place. Instead, this passage contemplates that other regulations, like the intraMTA rule, will perform that function. No canon of construction supports Petitioners’ argument that the scope of one regulation should limit the reach of a second regulation where the two regulations do not conflict at all.

The LECs encounter the same issue with 47 C.F.R. § 51.703(b), which they argue “is intended only to preclude an originating LEC from assessing originating access charges for intraMTA traffic on a CMRS carrier.” Section 51.703(b) provides that “A LEC may not assess charges on any other telecommunications carrier for Non-Access Telecommunications Traffic that originates on the LECs’ network.” First, by its own terms, this regulation applies to LECs’ relationships with “any other telecommunications carrier,” which plainly includes IXCs as well as CMRS providers. Moreover, like § 20.11(d), this provision complements the intraMTA rule

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51 47 C.F.R. § 20.11(d).
52 Pet. at 27.
53 Id. at 28.
rather than substituting for it, as § 20.11(d) does not purport to define what constitutes “non-access” traffic.

The LECs nonetheless argue that the Commission’s *TSR Wireless Order* indicates that § 51.703(b) “does not apply . . . outside of the direct relationship between the LEC and CMRS carrier.” That proceeding involved the application of the Commission’s intercarrier compensation rules to one-way paging carriers. The paging carriers (TSR and Metrocall) claimed section 51.703(b) prohibited the LECs from charging paging carriers for delivering LEC-originated traffic. When the Commission agreed, the LECs argued—as here—that “even if section 51.703(b) requires LECs to deliver LEC-originated traffic to complainants without charge, [carriers] may only obtain that benefit by engaging in the section 252 agreement process.” The Commission rejected that claim, holding that the argument that the “benefits of section 51.703(b) of the Commission’s rules are available only through a section 252 interconnection agreement process is incorrect.”

Petitioners nonetheless seize on a snippet of the *TSR Wireless* decision relating to TSR’s argument that one of the LECs, U S West, was required to provide “wide area calling or similar services without charge.” “Wide area calling” services permit end users to pay “local” rates rather than toll rates when they make what would ordinarily be toll calls to the paging carrier. TSR claimed that “51.703(b) prohibits U S West from charging for ‘wide area calling’

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55 Pet. at 28.
56 See, e.g., *TSR Wireless* ¶ 18.
57 *Id.* at ¶ 27.
58 *Id.* at ¶ 28.
59 *Id.* at ¶ 30.
service.” The Commission disagreed, reasoning: “Section 51.703(b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users.” The Commission further explained:

Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. Such traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier. This may result in the same call being viewed as a local call by the carriers and a toll call by the end-user. For example, to the extent . . . [that a U S West facility] . . . is situated entirely within an MTA . . . U S West must deliver the traffic to TSR’s network [over that facility] without charge. However, nothing prevents U S West from charging its end users for toll calls completed over [the same facility].

Here, Petitioners emphasize the sentence “[s]uch traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier.” Clearly, however, that sentence had nothing whatsoever to do with the issue that the Commission was addressing in this part of TSR Wireless, i.e., whether U S West could charge for wide area calling services consistent with section 51.703(b). The Tenth Circuit explained this point in Atlas: “It is clear to us that the FCC made this seemingly incongruous comment in the context of discussing the effect on LEC customers. After making this comment, the Commission unequivocally stated that the LEC was required to deliver relevant calls free of charge to the CMRS provider, but was not precluded from charging its own customers for toll calls.” In short, as the Tenth Circuit recognized, the sentence Petitioners emphasize is the Commission equivalent of dicta, and simply cannot bear the weight that

60 Id. (internal citation omitted)
61 Id. at ¶ 31.
62 Id. at ¶ 31-32. (internal citations omitted).
63 Atlas, 300 F.3d at 1267.
Petitioners place on it here. And that is particularly true because, as discussed above, both the courts and the Commission have (since TSR Wireless was decided in 2000) repeatedly held that the intraMTA rule contains no exception for IXC-routed traffic, finding that intraMTA calls are subject to reciprocal compensation rather than access charges “without regard to whether a call is routed through interexchange carriers.”64

Finally, Petitioners rely on a single outlying district court decision on whether to refer the matter to the FCC for the proposition that this present dispute should be “distinguishing[d]” from the intraMTA rule because it governs “service arrangements between LECs and IXCs,” and not “service arrangements between LECs and CMRS providers.”65 Again, however, that argument is inconsistent with the intraMTA rule as set forth by the Commission itself. The rule applies to “all” intraMTA “traffic,”66 and not to a certain subset of “payment arrangements between LECs and CMRS providers.”67 That rule is entitled to deference from the courts so long as it is consistent with the statute, and Petitioners make no claim that the statute mandates a different result.

II. Petitioners’ Fall-Back Argument—that the Rule that Access Charges do not Apply to IntraMTA Calls Carried by IXCs Must be “Effectuated Through an Agreement”—is Incorrect.

The Petition for Declaratory Ruling is, rather oddly, primarily devoted to Petitioners’ fall-back argument that the Commission’s intraMTA rule merely “Creates a Default Right That Must

64 Connect America Fund Order ¶ 1007 & n.2132.
66 Connect America Fund Order ¶ 1007.
67 Pet. at 7.
Be Effectuated Through an Agreement Between a CMRS Carrier and a LEC.”\textsuperscript{68} But that argument is, on its face, precisely backwards. The Commission’s rule creates a default rule that parties may contract around—but in the absence of a specific agreement in derogation of the rule, the rule naturally applies. Petitioners’ contrary argument lacks any foundation in logic or in law.

\textbf{A. The rule that intraMTA calls are not subject to access charges is the “default rule.”}

Petitioners argue that in the absence of an interconnection agreement explicitly creating an exemption from tariffed access charges, access charges apply.\textsuperscript{69} Petitioners contend that while the “intraMTA rule creates a default right” not to pay access charges on intraMTA traffic, IXCs must still “bear the burden of demonstrating that the LEC agreed to exempt [a] portion of the IXC’s traffic from switched access charges and that the IXC complied with the conditions of such an exemption.”\textsuperscript{70} Petitioners fundamentally misunderstand the relevant principles and precedents.

First, as a logical matter, Petitioners’ argument relegates the rule to the status of an exception—the rule provides a “right” only if it is “effectuated.”\textsuperscript{71} But if the Commission’s rule is that access charges do not apply—and, again, that is the rule, as petitioners’ fall-back argument itself assumes—then that is necessarily the default. As a general matter, LECs cannot impose access charges on intraMTA traffic unless they enter an agreement to the contrary with specific customers. In other words, the exception is that parties may contract around the rule, such that a CMRS carrier or an IXC could agree to pay access charges to a LEC for intraMTA

\vspace{1em}\textsuperscript{68} \textit{Id.} at 23.

\textsuperscript{69} \textit{Id.} at 22-26.

\textsuperscript{70} \textit{Id.} at 22-23.

\textsuperscript{71} \textit{Id.} at 23.
calls. Of course, if Petitioners believe that such agreements exist they should be produced and their effect determined.

Petitioners emphasize an array of Commission decisions standing for the undisputed proposition that whatever the default intercarrier compensation rules may be, carriers are generally free to contract around them. For example, in the *T-Mobile Declaratory Ruling*, the FCC both expressed its preference that carriers enter interconnection agreements and allowed LECs to compel negotiation and arbitration with CMRS providers for ICAs. But the Commission did not address what rule should apply absent an agreement. Moreover, the Commission did amend 47 C.F.R. § 20.11 “to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariff.” Similarly, in *TSR Wireless*, the Commission indicated that “requesting carriers, including CMRS carriers, may agree to forgo rights established by . . . the Commission’s rules, for instance, in return for other consideration from the ILEC.” Finally, as Petitioners note, the Commission’s *Connect America Fund Order* does indicate that carriers should generally be free to negotiate arrangements and rates that vary from any applicable compensation rules. But the clear upshot of these Commission pronouncements is that the parties may contract around “applicable compensation rules”—but if they fail to do so, then of course those rules apply by default.

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73 *Id.* at ¶ 14.
74 *TSR Wireless* ¶ 28 n.97 (emphasis added).
75 See Pet. at 24.
76 *Connect America Fund Order* ¶ 978.
B. There is no merit to Petitioners’ efforts to circumvent the default rule.

Petitioners offer little explanation for why they think carriers must enter into negotiated agreements to get the benefit of what Petitioners themselves call the “default right” created by the rule that intraMTA traffic is not subject to access charges. Indeed, Petitioners acknowledge that TSR Wireless specifically restricts “LEC’s ability to charge originating access charges in connection with ‘local’ traffic” even absent “negotiation of a LEC-CMRS ICA.”

Petitioners suggest that when CMRS providers hire IXCs to deliver calls to the LEC, the “commingling” of “intraMTA traffic with other traffic routed over LECS’ access facilities” justifies upending the default rule. But the Commission has repeatedly answered Petitioners’ concern that it is difficult to distinguish intraMTA calls carried by IXCs from calls to which access charges may lawfully be imposed. The FCC understood this issue in 1996, and indicated in the Local Competition Order that “traffic studies and samples” should be used to determine how much is owed. In the 2011 Connect America Fund Order, the Commission expressly addressed the LEC claim that the intraMTA rule may not be “feasible when a call is routed through interexchange carriers,” and concluded that “potential implementation issues . . . do not warrant a different construction of the intraMTA rule” when the “call is routed through interexchange carriers” because the “parties may calculate overall compensation amounts by extrapolating from traffic studies and samples.” The Commission has thus addressed and

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77 See Pet. at 23.
78 Id. at 25 n.68.
79 Id. at 26. Such “commingling” may occur on IXCs’ “Feature Group D” trunks. See Pet. at 31.
80 Local Competition Order ¶ 1044.
81 Connect America Fund Order ¶ 1007 n.2132.
82 Id.
clearly rejected Petitioners’ claim that traffic delivered by IXCs should be treated differently for practical reasons.\(^83\) And, indeed, Petitioners themselves appear aware of this fact, because while they imply that “commingling” might support different treatment for IXC traffic, they stop short of advancing any real legal argument that that is the case.

Petitioners also offer variations on the theme that purportedly “unreasonable conduct” by IXCs\(^84\) justifies a requirement that the intraMTA rule must be “effectuated” through ICAs before it may be applied to IXC traffic. One version of this claim is that “[b]y routing traffic to LECs in the absence of a request to establish reciprocal or mutual compensation,” a carrier “accept[s] the terms of otherwise applicable tariffs.”\(^85\) Like many of Petitioners’ arguments, however, this claim proves upon closer inspection to be neither here nor there. There is no dispute here about the “terms” of Petitioners’ tariffs. Rather, the question is whether the charges set forth in those tariffs apply to the intraMTA traffic at issue here. As the Eighth Circuit held in *Iowa Network Services*, the IUB’s order declining to apply state access tariffs to intraMTA traffic there did not “invalidate” those tariffs in any way—it “simply stated that the charges as set out in INS’s tariffs do not apply to the type of traffic at issue in this case.”\(^86\) The same is true here. Sprint and Level 3 “accept” the “terms” of “applicable” tariffs—they merely maintain that tariffed access charges are not applicable under the Commission’s intraMTA rule.

Petitioners also suggest—while again stopping short of advancing actual legal arguments in support—that the fact that IXCs allegedly “chose to pay tariffed access charges” for intraMTA

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\(^83\) Petitioners’ claim is further undermined by the Commission’s clear rule that a CMRS provider may deliver intraMTA calls to a LEC at any technically feasible point and the LEC may not impose access charges. 47 C.F.R. §§ 20.11; 51.7-03(b).

\(^84\) Pet. at 26.

\(^85\) Id. at 27 (quoting *T-Mobile Declaratory Ruling* ¶12).

\(^86\) 466 F.3d at 1097.
traffic for “years without dispute” justifies continuing to impose these unlawful charges.\textsuperscript{87} Petitioners have made more detailed versions of quasi-contractual “voluntary payment” or “implied contract” arguments before the courts.\textsuperscript{88} Whether before the Commission or in court, however, Petitioners’ quasi-contractual arguments entirely lack merit. Notably, while Petitioners’ tariffs do not entitle them to impose access charges in the face of the intraMTA rule, those tariffs are relevant here because “implied contract” claims are inconsistent with the filed rate doctrine. As the Eighth Circuit noted in \textit{Iowa Network Services}, “[u]nder the [filed rate] doctrine, once a carrier’s tariff is approved . . . the terms of the . . . tariff are considered to be ‘the law’ and to therefore ‘conclusively and exclusively enumerate the rights and liabilities’ as between the carrier and customer.”\textsuperscript{89} Or as the Ninth Circuit put it, “to recoup overpayments is to \textit{enforce} the filed rates.”\textsuperscript{90} Accordingly, the filed rate doctrine bars the imposition of charges not authorized by tariff—but, as the federal courts have recognized, the doctrine does \textit{not} bar a customer (like Sprint and Level 3) from seeking a \textit{refund} of amounts paid in response to billings beyond the scope of the tariffs.

\textsuperscript{87} Pet. at 31.

\textsuperscript{88} Indeed, these arguments are more properly addressed to the courts. As Petitioners’ recognize, \textit{see} Pet. at 31, n.82, disputes concerning whether “voluntary payment” limits liability are governed by state voluntary payment rules; similarly, implied contract claims are subject to state contract law. The courts are best equipped to construe these bodies of state law.

\textsuperscript{89} 466 F.3d at 1097, quoting \textit{Evans v. AT&T Corp.}, 229 F.3d 837, 840 (9th Cir. 2000).

\textsuperscript{90} \textit{Verizon Del., Inc. v. Covad Commc’ns Co.}, 377 F.3d 1081, 1090 (9th Cir. 2004) (emphasis added).
III. If the Commission Rejects Petitioners’ Reading of the IntraMTA Rule, it Should not Permit the LECs to Keep the Proceeds from Unlawful Access Charges.

Petitioners argue that even if the Commission disagrees with their understanding of the intraMTA rule and rejects their argument that carriers must enter ICAs to benefit from the “default right” created by the rule, the Commission should—and indeed must—allow Petitioners to retain the fruits of unlawfully imposed access charges. Specifically, Petitioners claim that permitting carriers to obtain “retroactive refunds” of those charges would be “inconsistent with Commission precedent [and] . . . foreclosed by Section 204(a)(3) of the Act.” Petitioners’ arguments are incorrect.

Petitioners first claim that requiring reimbursement would be inconsistent with the “filed rate” doctrine. As discussed above, however, the filed rate doctrine supports Sprint and Level 3’s position, not that of Petitioners. Again, the argument here is that (1) Petitioners’ tariffs simply do not apply to the traffic at issue; (2) the filed rate doctrine affirmatively bars the imposition of charges not authorized by tariff, including assessing access charges on the traffic at issue here; and (3) the filed rate doctrine does permit customers like Sprint and Level 3 to seek refunds of amounts paid beyond the scope of the tariffs.

Petitioners’ argument under 47 U.S.C. § 204(a)(3)—which provides that tariffs are “deemed lawful” once they become effective—equally lacks substance. The argument here is that, under federal law—the intraMTA rule—Petitioners’ tariffs do not apply to the traffic at issue. Accordingly, it is beside the point whether they are “deemed lawful” or not. They are

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91 See Pet. at 31.
92 Id.
93 See supra at 25.
lawful where they apply, but they cannot lawfully apply here because that would violate the intraMTA rule.

Petitioners also maintain that a Commission ruling here that the intraMTA rule applies whether or not an IXC is involved would unfairly expose Petitioners to retroactive liability, and that any such “abrupt departure from well established practice” would “have to be prospective only.” But first, applying the Commission’s intraMTA rule here is fully consistent with “well established practice.” And second, Petitioners entirely misunderstand the law governing retrospective application of adjudicatory decisions. It is hornbook law that the default rule is to give retroactive effect to such determinations. Courts start with a “presumption of retroactivity for adjudications,” and that presumption may be overcome only by a showing of “manifest injustice.” To raise the specter of “manifest injustice” and justify prospective-only application, an adjudicative determination must make “new law” that “upset[s] settled expectations.”

Those expectations must be ones on which a party might “reasonably place reliance.” Here, Petitioners cannot demonstrate that the intraMTA rule represents “new law”—again, to the contrary, the rule has been settled at least since the Atlas and Alma decisions of nearly a decade ago. And even if the rule confirmed by those cases had not been crystal clear, certainly Petitioners could not have reasonably relied on the contrary rule. Applying the intraMTA rule

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94 See Pet. at 31, 34.
95 See supra at 7-13.
96 Verizon Telephone Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001).
97 Qwest Services Corp. v. FCC, 509 F.3d 531, 539 (D.C. Cir. 2007) (internal quotations omitted).
98 Id. at 539-40 (internal quotation and citation omitted).
99 Id. at 540 (emphasis added).
100 See supra at 10-12.
without exception involves the application of settled law. In any event, it cannot reasonably be said to involve the substitution of “new law for old law that was reasonably clear” because neither the Commission nor an appellate court had come close to clearly saying that the intraMTA rule does not apply when an IXC is involved. Moreover, it bears repeating that Qwest, the predecessor of Petitioner CenturyLink, argued and won cases advancing the argument Sprint and Level 3 advance here. It would be manifestly unjust to allow CenturyLink to avoid liability by feigning surprise to learn of cases that Qwest won.

Finally, Petitioners’ unsubstantiated statements suggesting catastrophic consequences from applying the intraMTA rule here are entirely unconvincing. As an initial matter, there is no doctrine permitting carriers to keep overcharges if these overcharges are substantial. In any event, while the amounts at issue here are large, they are far from a magnitude that could remotely unsettle the industry—recovery of unlawful access charges, even in excess of hundreds of millions of dollars, would still amount to no more than a tiny percentage of LEC revenues. Nor would the “administrative undertaking” required to identify the affected charges need to be particularly “massive.”

Again, as discussed above, the Commission has recognized since 1996 that this may be done through traffic studies, and numerous such studies have been conducted over the years by dozens of carriers with little fanfare or upheaval. Moreover, the

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101 *Qwest*, 509 F.3d at 539.

102 Of course, the presumption of retrospective application is tempered somewhat by statutes of limitations limiting how far back liability extends. The courts, however, are the appropriate forum for determining what limitations periods apply.

103 *See, e.g.*, Pet. at 34.

104 *Id.*
actual calculation of damages should be conducted under the supervision of the district courts in which Sprint and Verizon have brought claims.\textsuperscript{105}

CONCLUSION

For these reasons, the Commission should deny the Petition.

Respectfully submitted,

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\textsuperscript{105} Again, it bears emphasis that CenturyLink has now filed a lawsuit advancing the same claims for recoupment of improperly assessed access charges against Verizon that Sprint pursues against CenturyLink and other LECs here and in court. \textit{See supra n.4}.