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

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

WC Docket No. 14-228

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February 9, 2015

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The Commission should deny the Petition because the law requires no clarification. The Commission has said since 1996 – and reinforced in the 2011 USF-ICC Transformation Order – that intraMTA traffic exchanged between LECs and commercial mobile radio service (CMRS) providers is local traffic that is not subject to access charges. There is no exception to the intraMTA rule when the intraMTA wireless traffic is carried by an intermediary carrier, including an interexchange carrier (IXC). And a customer-carrier does not violate the Communications Act of 1934, as amended (“the Act”), by withholding payment of disputed access charges or offsetting previous payments.

In the USF-ICC Transformation Order the Commission rejected a request by the same parties to the present Petition to overturn a long line of Commission precedent and court cases all holding that reciprocal compensation, not access charges, applies to all intraMTA wireless

1 In addition to Verizon Wireless, the Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.


traffic, regardless of whether the traffic is routed through an intermediary carrier like an IXC.\textsuperscript{4} The Commission said "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 of the LEC."\textsuperscript{5} The \textit{USF-ICC Transformation Order} continues: "Similarly, intraMTA traffic is subject to reciprocal compensation regardless of whether the two end carriers are directly connected or exchange traffic indirectly via a transit carrier."\textsuperscript{6} Unhappy with that decision, Petitioners – yet again – ask the Commission to reverse course, this time in the guise of a petition “to clarify the applicability” of the intraMTA rule. There is nothing to clarify. The Commission and the courts have decided this issue – multiple times. The Petition should be denied.

**DISCUSSION**

I. The Commission’s rules and orders prohibit LECs from imposing access charges on intraMTA wireless traffic, and there is no exception for IXC-routed traffic.

From the \textit{First Report and Order}\textsuperscript{7} through the \textit{USF-ICC Transformation Order}, the Commission consistently has forbidden LECs from imposing access charges on IXC-routed intraMTA wireless traffic.

\textsuperscript{4} \textit{USF-ICC Transformation Order} ¶ 1007.

\textsuperscript{5} \textit{Id.}

\textsuperscript{6} \textit{Id.}; see also \textit{id.} ¶ 1007 & n.2133 (citing \textit{Alma Commc’ns Co. v. Missouri Pub. Serv. Comm’n}, 490 F.3d 619 (8th Cir. 2007); \textit{Iowa Network Servs., Inc. v. Qwest Corp.}, 466 F.3d 1091 (8th Cir. 2006) ("INS II"); \textit{Atlas Tel. Co. v. Oklahoma Corp. Comm’n}, 400 F.3d 1256 (10th Cir. 2005)).

A. The First Report and Order forbids LECs from assessing access charges on wireless intra-MTA traffic, including traffic routed by IXC.

In 1996, the First Report and Order distinguished between intraMTA wireless traffic, which it defines as local non-access traffic, and interMTA traffic, which may be subject to access charges.\(^8\) The Commission defined the MTA as the “local service area” for CMRS traffic under Section 251(b)(5).\(^9\) The Commission concluded that traffic that originates and terminates within an MTA is not subject to access charges: “Accordingly, 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.”\(^10\) The First Report and Order defines traffic as local based on where it begins and ends, without regard to whether the traffic is routed in a particular fashion or over a particular carrier.

The First Report and Order explains that LECs have a duty to “establish reciprocal compensation arrangements for the transport and termination of local exchange service.”\(^11\) In accordance with this duty, the First Report and Order explains further that the originating carrier of an intraMTA call will pay reciprocal compensation to the terminating carrier of that call, holding that LECs and CMRS providers “will receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation

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\(^8\) See First Report and Order, ¶ 1043. The Commission explained that the 1996 Act “preserve[d] the legal distinctions between charges for transport and termination of local traffic,” on the one hand, “and interstate and intrastate charges for terminating long-distance traffic” on the other. Accordingly, the First Report and Order concluded that “transport and termination of local traffic” amount to “different services than access service for long distance telecommunications.” Id. ¶ 1033 (emphasis added).

\(^9\) See First Report and Order ¶ 1036.

\(^10\) First Report and Order ¶ 1036.

\(^11\) Id. ¶ 1045.
for certain traffic that they transmit and terminate to other carriers.”

The First Report and Order does not identify comparable obligations for LECs or CMRS providers to enter compensation arrangements with intermediary carriers.

Under the First Report and Order, therefore, when an IXC routes intraMTA wireless traffic between a LEC and a CMRS provider, the IXC may not be assessed access charges, and it is not required to enter a reciprocal compensation agreement with either the LEC or the CMRS provider. By contrast, when an IXC receives or delivers interMTA traffic – traffic that does not originate and terminate within a single MTA – the IXC may be subject to access charges.

The Petitioners read too much into one statement in the First Report and Order, which the Petitioners quote out of context. Because in this one instance the Commission said, “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,” the Petitioners assert that this statement exempts from the intraMTA rule traffic carried by IXCs. But the Commission’s statement merely reflects that “certain interstate interexchange service” traffic between LECs and CMRS carriers routed by IXCs may be subject to access charges. As the Tenth Circuit later held in Atlas, “The sweep of [this language] is limited to a narrow range of interstate interexchange traffic,” and it provides “no support” for the view that intraMTA wireless traffic routed by an intermediary carrier is subject to access charges.

12 Id.
13 Id. ¶ 1043.
14 See Petition at 13.
15 First Report and Order ¶ 1043 (emphasis added).
16 Atlas, 400 F.3d at 1267 (emphasis added).
B. The federal courts have confirmed that the intraMTA rule prohibits access charges on IXCs that route intraMTA wireless traffic.

Since 2005, the Eighth, Ninth, and Tenth Circuit courts of appeals all have confirmed that reciprocal compensation -- and not access charges -- applies to intraMTA wireless traffic regardless of whether an intermediary IXC is involved.

1. Tenth Circuit.

In its 2005 *Atlas* decision, the Tenth Circuit upheld a state commission’s arbitration decision that reciprocal compensation governed the exchange of intraMTA wireless traffic between LECs and CMRS providers even when that traffic was routed by an intermediary IXC.\(^{17}\) Upholding a Oklahoma utilities commission decision,\(^{18}\) the Court highlighted the Commission’s language in the First Report and Order 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.*”\(^{19}\)

*Atlas* did not merely confirm that LECs had a duty to enter reciprocal compensation agreements with requesting CMRS providers regarding intraMTA wireless traffic routed by an IXC. It recognized, as well, 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.

2. Eighth Circuit.

The Eighth Circuit reached the same conclusion in several decisions. First, in its 2006 *INS II* decision,\(^{20}\) the court held that intraMTA traffic is considered local traffic, and that access

\(^{17}\) See id. at 1261.

\(^{18}\) Id. at 1260.

\(^{19}\) *Atlas*, 400 F. 3d at 1266 (quoting First Report and Order ¶ 1036) (emphasis added).

\(^{20}\) See *INS II*, 466 F.3d 1091.
charges cannot be imposed on intermediary carriers that route that traffic. \(^{21}\) Several LECs had sued a transit carrier, Qwest, which — like in the situation the Petitioners now complain about — routed the intraMTA wireless traffic in question over trunks “designed to carry only long distance calls.” \(^{22}\) Although the LECs argued that Qwest was subject to access charges and that the *First Report and Order* exempted IXC-routed traffic from the definition of intraMTA wireless traffic, \(^{23}\) the Iowa Utilities Board (IUB) rejected their arguments and held that Qwest was “‘providing an indirect connection for *local* traffic’” \(^{24}\) and could not be assessed tariffed access charges for providing this connection as an intermediary carrier, even though it was also a long-distance carrier. \(^{25}\) The district court and the Eighth Circuit upheld this determination. \(^{26}\)

Then in 2007, the Eighth Circuit reaffirmed *INS II* in two decisions. In *RIITA*, it upheld another IUB order prohibiting LECs from imposing tariffed access charges on Qwest when Qwest provided an indirect connection for LEC-CMRS intraMTA wireless traffic. \(^{27}\) And in *Alma*, the Eighth Circuit affirmed an arbitration order requiring a LEC to pay reciprocal compensation to a CMRS provider for 1+ dialed intraMTA wireless traffic originating on its

\(^{21}\) See id. at 1097-98 (“In this case, the calls originate and terminate within the same local MTA; therefore, they are considered to be ‘local’ calls.”).

\(^{22}\) *Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 856, 915 (S.D. Iowa 2005) (“INS District Court Order”).

\(^{23}\) See id.

\(^{24}\) Id. at 867 (quoting the IUB order).

\(^{25}\) See id.

\(^{26}\) Id. at 878 (“Since the traffic at issue is classified as ‘local’, access charges are no longer available under the 1996 and the FCC’s interpretive and implementing decisions); *INS II*, 466 F.3d at 1097-98 (“In this case, the calls originate and terminate within the same local MTA; therefore, they are considered to be ‘local’ calls.”).

\(^{27}\) See *Rural Iowa Indep. Tel. Ass’n v. Iowa Utilities Bd.*, 476 F.3d 572, 573-75 (8th Cir. 2007) (“RIITA”).
network and terminating on the CMRS provider’s network via an intermediary IXC,\textsuperscript{28} reasoning that all intraMTA calls are “local” under the Commission’s rulings.\textsuperscript{29}

3. \textit{Ninth Circuit.}

The Ninth Circuit has since followed suit. In \textit{Western Radio Servs.}, it reversed an arbitration decision that held LEC-CMRS intraMTA wireless traffic routed by an IXC was subject to access charges rather than reciprocal compensation.\textsuperscript{30} The Court held that the “involvement of an IXC in traffic that otherwise would be local” — by virtue of being LEC-CMRS intraMTA wireless traffic — did not “convert[] that traffic into ‘non-local traffic’” subject to access charges.\textsuperscript{31} Like the Eighth and Tenth Circuits, the Ninth Circuit reasoned that the Commission’s regulations defined local traffic based on whether it “originates and terminates” within a single MTA, irrespective of the presence of any intermediary carrier.\textsuperscript{32}

C. The \textit{USF-ICC Transformation Order} reaffirmed that LECs may not impose access charges on IXC\textit{s that transit traffic between a LEC and a CMRS carrier within an MTA.}

In the \textit{USF-ICC Transformation Order}, the Commission left no doubt 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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} See Alma Commc‘ns, 490 F.3d 619 (8th Cir. 2007).
\item \textsuperscript{29} See \textit{id.} at 626-27.
\item \textsuperscript{30} See \textit{Western Radio Servs. Co. v. Qwest Corp.}, 678 F.3d 970 (9th Cir. 2012).
\item \textsuperscript{31} \textit{id.} at 987; see also \textit{id.} at 987, 990 (noting that the ICA adopted by the arbitrator “provides that ‘local traffic’ is subject to reciprocal compensation arrangements while ‘non-local traffic’ is subject to access charges under a separate tariff,” and holding that the ICA violated the act in “(1) defining ‘non-local traffic’ as including intra-MTA traffic carried by an IXC, and (2) exempting such ‘non-local traffic’ from reciprocal compensation”).
\item \textsuperscript{32} \textit{id.} at 989-90 (quoting 47 C.F.R. § 51.701(b)(2)).
\end{itemize}
\end{footnotesize}
point located outside that MTA or outside the local calling area of the LEC.”33 The USF-ICC Transformation Order continues: “Similarly, intraMTA traffic is subject to reciprocal compensation regardless of whether the two end carriers are directly connected or exchange traffic indirectly via a transit carrier.”34

The USF-ICC Transformation Order thus reaffirmed that wireless traffic originating and terminating within a single MTA is non-access traffic, regardless of the path the traffic takes between origination and termination. Like the First Report and Order, the USF-ICC Transformation Order defines the compensation regime for intraMTA wireless traffic with reference to the origin and termination of the traffic and states that intraMTA traffic is subject to the reciprocal compensation regime even when the end carriers responsible for that compensation are connected indirectly via another carrier.35 Accordingly, the USF-ICC Transformation Order preserved a regime in which an IXC engaged in routing intraMTA wireless traffic cannot be subject to access charges, and in which this rule does not depend on whether the IXC has entered into an interconnection agreement for reciprocal compensation with either the originating or terminating carrier.

In reiterating these requirements, the Commission considered and rejected the very argument the Petitioners now advance. A group of Missouri LECs – nearly all of whom are among the Petitioners – argued that IXCs are responsible for paying carriers originating and terminating access charges.36 In response, the Commission concluded, as noted above, that

33 USF-ICC Transformation Order ¶ 1007.
34 Id.
35 See id.
36 See Letter from Sylvia Lesse, Counsel to Missouri Companies, to William F. Caton, Acting Secretary Federal Communications Commission, Unified Intercarrier Compensation, CC Docket No. 01-92; Wireless Access Charges, WT Docket No. 01-316 (Mar. 22, 2002), cited
intraMTA wireless traffic is not subject to access charges, regardless of how it is routed. In support of its statement that intraMTA wireless traffic is subject to reciprocal compensation even when the end carriers are connected “indirectly via a transit carrier,” the Commission held that its ruling was “consistent with how the intraMTA rule ha[d] been interpreted by the federal appellate courts,” citing to three of the federal circuit court decisions discussed above.

Petitioners nevertheless rely on a single line of dicta in a Commission order from 2000, *TSR Wireless*, which they claim states that LEC-originated intraMTA wireless traffic routed by an IXC is subject to access charges. The cited line appears in a discussion of whether 47 C.F.R. § 51.703(b) prohibits LECs from charging paging carriers for “wide area calling” services. In a wide area calling service, a paging carrier pays a LEC to reduce the costs the LEC’s end-users pay the LEC when they dial the paging carrier, so that what would otherwise be a toll call for the LEC’s end-users will cost the same as a local call. *TSR Wireless* held that these agreements did not violate Section 51.703(b), which “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.”

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37 *USF-ICC Transformation Order* ¶ 1007 & n.2130 (“It is the IXC, not the LEC, that carries the call, bills the customer, and has responsibility for paying the originating and terminating [carriers] for their origination and termination services.”).

38 See *USF-ICC Transformation Order* ¶ 1007 n.2133.

39 See *TSR Wireless*, ¶¶ 30-31.

40 *TSR Wireless*, ¶¶ 30-31.

41 *TSR Wireless* ¶ 31.

42 *Id*. 

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In its decision, the Commission said that under Section 51.703(b), “LEC-originated traffic that originates and terminates within the same MTA” and is exchanged with a CMRS provider “falls under our reciprocal rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier.”\(^43\) The Commission then explained, “This may result in the same call being viewed as a local call by the carriers and a toll call by the end-user.”\(^44\) The Petitioners nevertheless have seized on this one line in *TSR Wireless*, taken it out of context, and tried to use it to erase nearly twenty years’ worth of Commission precedent.

As the Tenth Circuit held 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.”\(^45\) In other words, *TSR Wireless* reasoned that intraMTA wireless calls carried by an IXC may be viewed as long-distance from the perspective of end-users, not carriers. This observation does not alter the fact that a LEC may not charge an IXC, a carrier, access charges when the IXC routes intraMTA wireless calls.

II. The prohibition against imposing access charges on IXCs that route intraMTA wireless traffic comes from the Commission’s rules, not agreements.

The Petitioners argue that LECs can impose tariffed access charges on IXCs that route intraMTA wireless traffic unless an interconnection agreement provides otherwise. They assume that if a LEC has not entered an interconnection agreement that addresses the compensation arrangement for intraMTA calls routed by an IXC, the LEC may impose tariffed access charges

\(^43\) *Id.*

\(^44\) *Id.*

\(^45\) *ATLAS*, 300 F.3d at 1267.
on the IXC for originating or terminating that traffic. The Commission’s regulations and orders forbidding access charges on IXC-routed intraMTA wireless traffic, however, do not condition this ban on the existence of an interconnection agreement or a request for reciprocal compensation.

A. **A LEC cannot assess tariffed access charges on an IXC that routes intraMTA wireless traffic regardless of whether the IXC has an interconnection agreement with the LEC.**

Although the Act places a duty on LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications, and Commission regulations require LECs to establish these arrangements for intraMTA wireless traffic with “any requesting telecommunications carrier,” the absence of an interconnection agreement or request for reciprocal compensation does not entitle a LEC to impose access charges on intraMTA wireless traffic. To the contrary, as explained above, the Commission’s rules and orders unconditionally prohibit imposing access charges on intraMTA wireless traffic.

The Commission has followed this rule in addressing what compensation applies in the absence of an interconnection agreement or a request for such an agreement. For instance, if a CMRS provider has not requested an interconnection agreement with a LEC for intraMTA wireless traffic, “no compensation is owed for termination” at all. Similarly, if a carrier has no interconnection agreement, it will still benefit from 47 C.F.R. § 51.703(b)’s requirements that

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46 See Petition at 25-27.
48 47 C.F.R. § 51.703(a).
LEC's may not charge other carriers for LEC-originated intraMTA wireless traffic – and thus access charges may not be imposed.\(^{50}\)

The Petitioners acknowledge that non-IXC transit carriers may route intraMTA wireless traffic “in the absence of a reciprocal compensation agreement” and not be subject to access charges.\(^{51}\) This concession is fatal to their argument. It demonstrates that the existence of an interconnection agreement or request for reciprocal compensation is not a prerequisite for applying the Commission’s rule prohibiting access charges on intraMTA wireless traffic.

Petitioners’ suggestion that this demonstration is limited to non-IXCs is arbitrary and unsupported by law or logic. Furthermore, the courts that have held that LECs cannot impose access charges on intraMTA wireless traffic routed by intermediary IXCs have not linked that conclusion to the existence of LEC-CMRS or LEC-IXC interconnection agreements electing reciprocal compensation.\(^{52}\)

The Petitioners also ignore that, before 2011, a reciprocal compensation arrangement was defined as an arrangement for the termination of traffic that “originates on the network facilities

\(^{50}\) See TSR Wireless ¶ 28. Contrary to the suggestions of the Petitioners, Petition at 25 n.68, this portion of TSR Wireless applies to IXCs that route intraMTA wireless traffic. The Commission concluded that the “argument that the benefits of section 51.703(b) of the Commission’s rules are available only through a section 252 agreement process is incorrect.” TSR Wireless ¶ 28. This language does not limit its application to any particular class of carriers, just as 47 C.F.R. § 51.703(b) does not limit its application to any such class, instead precluding charges “on any telecommunications carrier.”

\(^{51}\) Petition at 16; see also N. Cnty. Commc’ns Corp. v. MetroPCS California, LLC, Order on Review, 24 FCC Rcd 14036, ¶ 6 (2009) (recognizing that bill-and-keep arrangements may govern LEC-CMRS traffic in the absence of an interconnection agreement). In a similar vein, CMRS providers may not charge IXCs access in the absence of an agreement to that effect. See Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges, Declaratory Ruling, 17 FCC Rcd 13192, ¶ 9 (2002).

\(^{52}\) See W. Radio Servs. Co., 678 F.3d at 987-90; RIITA, 476 F.3d at 576-77; Alma, 490 F.3d at 624-26; INS II, 466 F.3d at 1094-98; Atlas, 400 F.3d at 1264-68.
of the other carrier.”53 IntraMTA 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.

The T-Mobile Order is consistent with this reasoning. T-Mobile held that the Commission’s rules in 2005 did not “explicitly preclude” LECs from imposing access charges via state tariffs on terminating CMRS providers that had not requested reciprocal compensation.54 T-Mobile prohibited these charges in the future, however, and amended the Commission’s regulations to allow LECs to request interconnection with CMRS providers.55 The T-Mobile Order amended the Commission’s rules “in order to make clear [its] preference for contractual arrangements for non-access CMRS traffic” between LECs and CMRS providers.56 In their contractual arrangements with one another, LECs and CMRS providers can allocate the cost of paying intermediary IXCs that route intraMTA wireless traffic even though those IXCs are not subject to access charges or reciprocal compensation with respect to this traffic.

B. **The primary jurisdiction referral invoked by the Petitioners misstates the law.**

Petitioners invoke a recent order by the U.S. District Court for the Northern District of Iowa, which referred to the Commission “the question of whether compensation between LECs and IXCs for [intraMTA wireless traffic] is subject to reciprocal compensation or filed tariffs.”57 The Iowa district court referred this question after concluding (1) that the First Report and Order

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54 See T-Mobile ¶ 9.
55 See id. ¶¶ 14-16.
56 Id. ¶ 14.
and the *USF-ICC Transformation Order* apply only to compensation arrangements between LECs and CMRS providers, not LECs and IXCs, and (2) that the federal court decisions cited in the *USF-ICC Transformation Order* address compensation arrangements between LECs and CMRS providers, not LECs and IXCs.\(^58\)

The referral order misstates the law. The Iowa district court appears to have accepted the LECs’ premise that if IXCs routing intraMTA wireless traffic have not entered an agreement for reciprocal compensation with a LEC, then the LEC may impose tariffed access charges. But the court simply got it wrong. As discussed above, the Commission’s rules and orders define the intercarrier compensation regime for intraMTA wireless traffic so that intermediary IXCs that route this traffic are neither subject to access charges nor required to enter reciprocal compensation agreements. Most recently, the *USF-ICC Transformation Order* rejected the argument that intermediary IXCs must pay access charges when they route intraMTA wireless traffic. And the Eighth, Ninth, and Tenth Circuit decisions that addressed this issue came to the same conclusion. The orders and case law explicitly prohibit access charges on intermediary IXCs that carry wireless intraMTA traffic, and the absence of any discussion of reciprocal compensation arrangements between IXCs and LECs for intraMTA traffic in those orders and court decisions demonstrates that the existence of these arrangements is not a prerequisite for application of the Commission’s rule prohibiting the imposition of access charges on this traffic.

C. **Third-party interconnection agreements and tariffs cannot displace Commission rules.**

The Commission’s rules would void a state or federal tariff purporting to authorize access charges on IXCs when they route intraMTA wireless traffic. Federal law preempts state law where “compliance with both federal and state regulations is a physical impossibility” or when

\(^{58}\) See Sprint Commc’ns, 2014 WL 4980539 at *4.
the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”59 Because the Commission’s rules forbid LECs from imposing access charges on IXCs that route intraMTA wireless traffic, contrary state tariffs must yield to those rules.60 Moreover, federal tariffs contrary to the Commission’s regulations are void from when they are issued.61 So the Petitioners assertion that LEC-CMRS interconnection agreements could exempt IXCs from these tariffs – but only when they do so “explicitly”62 – cannot succeed.

Furthermore, a LEC-CMRS agreement could not dictate how a third-party IXC like Verizon must be compensated, and the Petitioners do not cite authority to support their assertion that it could.63 An agreement between two parties does not bind a third. To the extent that a LEC and a CMRS provider enter an agreement regarding how traffic may be transited via third party carriers, that agreement establishes rights and obligations as between the LEC and the CMRS provider, not the transit carrier, and it has no bearing on the transit carrier’s compensation.

III. The question of refunds should be left to the courts.

A Commission ruling that LECs may not impose access charges on IXCs for routing intraMTA wireless traffic would reaffirm existing law. To the extent that the Verizon and Sprint

59 Ting v. AT&T, 319 F.3d 1126, 1135-36 (9th Cir. 2003).


61 See, e.g., Global NAPs, Inc. v. F.C.C., 246 F.3d 252, 260 (D.C. Cir. 2001) (“the tariff, on its face, violated the plain meaning of the FCC’s tariff regulations and therefore was unlawful from the date of issuance”).

62 See id. at 25.

63 See Petition at 25.
litigation raises any question regarding retroactivity, that question should be left to the courts. The Commission typically does not involve itself in weighing the equities of private disputes.\textsuperscript{64} Regardless, refunding the improper charges would be fair and would not work a “manifest injustice.”\textsuperscript{65} There is no rule that improper charges must be disputed contemporaneously or that they must be withheld.

Further, this dispute presents the “common situation” in which one group of carriers contests the propriety of the charges assessed by another group.\textsuperscript{66} A refund will impose no unreasonable burden on the Petitioners. The Commission has offered a straightforward method to distinguish types of intraMTA calls: traffic studies.\textsuperscript{67} The Petitioners admit this can be done and is done in interconnection agreements, but they provide no support for the claim that it cannot be done without an interconnection agreement.\textsuperscript{68}

Petitioners have presented no valid reason to block the application of the Commission’s regulations and orders in effect when the LECs improperly imposed access charges.

\textsuperscript{64} Cf. Applications of Verestar, Inc. (Debtor-In-Possession) for Consent to Assignment of Licenses to SES Americom, Inc., Memorandum Opinion, Order and Authorization, 19 FCC Rcd 22750, ¶ 16 (2004) (“It is long-standing Commission policy not to involve itself with private contract disputes.”); Loral Corp. Request For a Declaratory Ruling Concerning Section 310(b)(4) of the Communications Act of 1934, et al., Memorandum Opinion and Order, 12 FCC Rcd 24325, ¶ 13 (1997) (“We have consistently declined to involve ourselves with commercial disputes.”).


\textsuperscript{66} See Universal Service Reform Recon Order, ¶ 15.

\textsuperscript{67} See USF-ICC Transformation Order ¶ 1007 n.2132.

\textsuperscript{68} See Petition at 17, 26 & n.70.
IV. Neither a refusal to pay improper access charges, nor withholding funds to offset improper past charges, violates the Act.

As this Commission has “repeatedly held . . . an allegation by a carrier that a customer has failed to pay charges specified in the carrier’s tariff fails to state a claim for a violation of the Act,” including section 201(b), “even if the carrier’s customer is another carrier.”69 This rule stems from the fact that the Act generally governs a carrier’s obligations to its customers, and not vice versa. Thus, although a customer-carrier’s failure to pay another carrier’s tariffed charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a claim at the Commission … for breach of the Act itself.”70 Accordingly, the Commission has stated that “a failure to pay tariffed access charges does not constitute a violation of the Act.”71

This rule applies equally to withholding money in order to offset past payments and to withholding money at the time a payment is requested. A customer-carrier may choose not to pay access charges for many reasons, including the view that the billed traffic was not subject to the underlying tariffs.72 The reason for a customer-carrier’s decision not to pay tariffed access charges has no bearing under the Commission’s reasoning for barring carrier claims alleging violations of Section 201(b): the Act governs obligations between carriers and customers, and carriers may not bring claims that a customer has breached the Act.73

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69 All Am. Tel. Co., et al., v. AT&T, Memorandum Opinion and Order, 26 FCC Rcd 723, ¶ 10 (2011).
70 Id.
71 Id. ¶ 12.
72 See, e.g., id. (customer-carrier refused to pay charges it believed “outside the contours of [the carrier’s] tariffs”).
73 At any rate, a customer-carrier that withholds payment to offset improper past charges does not “receive or accept . . . valuable consideration as a rebate or offset against [tariffed] charges,” as the Petitioners’ contend. 47 U.S.C. § 503(a); Petition at 37. The customer-carrier receives no consideration from the carrier: the carrier gives nothing of value to the customer-
Similarly, the withholding of payments for charges imposed under tariffs at issue in this litigation does not violate the duty of good faith under Section 251(c)(1). IXC’s that withhold payment are not engaged in negotiations; they are engaged in unilateral action. At any rate, to find that withholding payments for charges imposed under tariffs gives rise to a claim under Section 251(c)(1) would undo the Commission’s law under Section 201(b). Moreover, withholding is in no way comparable to the examples of bad faith actions outlined in 47 C.F.R. § 51.301(c). These examples illustrate that a carrier acts in bad faith, typically, when it refuses to disclose information and when it makes requests that if granted would violate the law or lead the other party to forfeit its basic legal rights. As the Commission has made clear, if a customer-carrier withholds payment for tariffed charges, the carrier holding the tariff may file an action in court to recoup those charges.

carrier. This fact is apparent enough from the present dispute, where the Petitioners dispute the purported “rebate or offset,” which they never offered.

74 See id.
CONCLUSION

For these reasons, the Commission should deny the Petition.

Respectfully submitted,

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February 9, 2015
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