Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling To Clarify the Applicability of the IntraMTA Rule to LEC-IXC Traffic and Confirm That Related IXC Conduct Is Inconsistent with the Communications Act of 1934, as Amended, and the Commission's Implementing Rules and Policies	)	WC Docket No. 14-228

REPLY COMMENTS
OF
NTCA–THE RURAL BROADBAND ASSOCIATION
WTA-ADVOCATES FOR RURAL BROADBAND
THE EASTERN RURAL TELECOM ASSOCIATION
and
THE NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.

I. INTRODUCTION AND SUMMARY

NTCA–The Rural Broadband Association ("NTCA"), WTA-Advocates for Rural Broadband ("WTA"), the Eastern Rural Telecom Association ("ERTA") and the National Exchange Carrier Association, Inc. ("NECA") (collectively, "the Associations")[1] submit their

[1] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities. WTA is a national trade association that represents more than 285 rural telecommunications carriers providing voice, video and data services. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities. ERTA is a trade association representing rural community based telecommunications service companies operating in states east of the Mississippi River. NECA is responsible for preparation of interstate access tariffs and administration of related revenue pools, and collection of certain high-cost loop data. *See generally*, 47 C.F.R. §§ 69.600 et seq.; *MTS and WATS Market Structure*, CC Docket No.78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983).

reply comments with respect to the *Petition for Declaratory Ruling*[2] (Petition) filed by the LEC Coalition[3] on November 10, 2014. Comments on the Petition were filed February 9, 2015 (references to filed comments discussed herein will note the filing party; in absence of other information those citations will refer to comments filed on or about February 9, 2015).

In their initial comments herein, the Associations showed: (a) that the intraMTA rule was adopted to address traffic exchange arrangements between commercial mobile radio service (CMRS) providers and local exchange carriers (LECs), and has focused upon such CMRS-LEC relationships without ever previously being extended or interpreted by the Commission to allow its invocation directly by IXCs and other transiting service providers; and (b) that, even if they had been eligible to invoke the intraMTA rule, the IXCs currently pursuing lawsuits and disputes (Sprint, MCI Verizon and Level 3) would not be entitled to its benefits during the lengthy pre-2014 period when they wholly failed to provide the timely notice and information (*e.g.*, cell site, sampling and/or traffic study data) necessary to satisfy the implementation requirement that parties cooperate to identify, measure and/or estimate their intraMTA traffic.

In addition to the Associations, many other LEC entities (both incumbent LECs and competitive LECs) have supported the relief sought by the Petition. Whereas individual legal theories have differed somewhat, the LEC industry has been unanimous in its conclusions: (a) that IXCs and other transiting carriers are not eligible to claim the benefits of the intraMTA rule

[2] Petition for Waiver 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) (*LEC Coalition Petition*).

[3] The LEC Coalition consists of representatives from several local exchange carriers and their parent companies. These companies include CenturyLink LECs; Consolidated Communications, Inc.; Cox Communications, FairPoint Communications; Frontier Communications; LICT Corp; Time Warner Cable Inc.; Windstream Corporation; the Iowa RELC Group of 108 RLECs; and the Missouri RLEC Group of 31 RLECs.

(for a variety of reasons including the differences between the access and reciprocal compensation regimes[4]; the Section 251and 252 interconnection agreement rules[5]; and the filed rate doctrine and related tariff requirements[6]); and (b) that, even if they had been eligible to invoke the intraMTA rule directly, the surreptitious and non-cooperative course of action elected by the litigating IXCs precludes retroactive damages or refunds (for a variety of legal and equitable reasons, including state voluntary payment doctrines[7] and the option to enter into implied contracts in fact and other alternative compensation arrangements[8]).

II. DISCUSSION

A. THE COMMISSION SHOULD PROMPTLY ISSUE THE REQUESTED DECLARATORY RULING.

As a LEC, an IXC and a CMRS provider, AT&T is an entity with substantial corporate interests on all sides of the pending intraMTA litigation and disputes. The Associations support AT&T's request that the Commission promptly issue a clear declaratory ruling that removes uncertainty and terminates a controversy that affects nearly the entire telecommunications industry.[9] They agree with AT&T that substantial volumes of traffic and amounts of intercarrier compensation are already in dispute, and that the potential financial impacts upon the telecommunications industry continue to grow every day.[10] Regardless of any clarification or interpretation that the Commission determines to adopt prospectively, the Associations urge it to

[4] *See, e.g.*, Multi-State Small Local Exchange Carrier litigants at 10-16.

[5] *See, e.g.*, South Dakota Telecommunications Association at 7-9.

[6] *See, e.g.*, Birch Communications, Inc. *et al*. at 8-10.

[7] *See, e.g.*, Wisconsin State Telecommunications Association at 6-8.

[8] *See, e.g.*, Minnesota Telecom Alliance at 12-14.

[9] AT&T at 7.

[10] *Id.*

declare that the previous absence of authorization for IXCs to invoke directly the intraMTA rule, as well as the wholly non-cooperative course of dealing elected by Sprint, MCI Verizon and Level 3, preclude the grant of any retroactive damages or refunds for traffic exchanged prior to the initiation of the pending litigation and disputes. As AT&T has indicated, the potential for hundreds of millions of dollars in litigation costs and potential damages is hindering investment.[11] Removal of the possibility of substantial refunds will greatly reduce incentives for continuing the current multi-district litigation, encourage the industry to implement fair and equitable future intraMTA arrangements for the remainder of the intercarrier compensation transition, and allow all affected carriers to re-focus their efforts and resources more completely on their transition to the coming IP world.

B. ANY DECLARATORY RELIEF ALLOWING IXCS TO INVOKE THE INTRAMTA RULE MUST BE PROSPECTIVE ONLY.

The Associations agree with AT&T that the Commission should not grant any declaratory relief that retroactively up-ends what AT&T correctly characterizes as "consistent industry practice" during the nearly 18 years between the adoption of the intraMTA rule in the 1996 *Local Competition Order*[12] and the initial Sprint dispute notices in the Spring of 2014.[13]

As the Commission has recently indicated in its *Symmetrical VoIP Declaratory Ruling*, retroactive relief may be granted in agency adjudications, but not where manifest injustice results from reliance that is reasonably based on settled law contrary to the rule established in the

[11] *Id.* at 7-8.

[12] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd. 15499 (1996) (*Local Competition Order*).

[13] AT&T at 10.

adjudication.[14] As detailed in the initial comments of the Associations, the intraMTA rule has focused solely and entirely upon interconnection arrangements and traffic exchanges between LECs and CMRS providers, and has never conferred any independent rights or benefits upon IXCs (Association comments at 5-8). In its 1996 *Local Competition Order* where it adopted the intraMTA rule, the Commission not only distinguished between the two-carrier situation subject to reciprocal compensation and the three carrier, "IXC-in-the-middle" arrangement subject to access charges,[15] but also noted that "most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC."[16] Between 1996 and 2011, the various appellate court decisions that interpreted the intraMTA rule focused upon the CMRS-LEC relationship, and did not find any independent grant of rights to IXCs and other transiting carriers.[17] Subsequently, when the Commission clarified the intraMTA rule in its 2011 *USF/ICC*

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[14] *Connect America Fund, Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 10-90, CC Docket No. 01-92, Declaratory Ruling, FCC 15-14 (rel. Feb. 11, 2015) ¶¶ 41-42 (*Symmetrical VoIP Declaratory Ruling*).

[15] *Local Competition Order* ¶ 1034.

[16] *Id.* ¶ 1043.

[17] IXC commenters cite several cases in alleged support of their positions. *E.g.*, Verizon at 4-7; Sprint and Level 3 at 3-4, 10-12; XO at 16-17. However, those cases are not dispositive to the issue at hand, which involves traffic delivered voluntarily by interexchange carriers over access trunks without any prior arrangement, agreement or identification. In both *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619 (8th Cir. 2007) and *Atlas Telephone Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005), LECs and CMRS carriers were exchanging traffic pursuant to agreements, and the courts merely found in the context of those agreements that involvement of an intermediary IXC did not disrupt agreed-upon obligations of the LEC and CMRS parties. In *Alma*, for example, the court held that IXC-routed traffic was subject to the reciprocal compensation agreement and indicated that in the absence of such an agreement, standard access charge practices would be presumed to apply. *See id.* at 621. In *Atlas* the court specified its decision was rendered "[u]nder the terms of the interconnection agreements" between the LEC and CMRS carriers. *See id.* at 1260. A more recent case, *Western Radio Services Co. v. Qwest Corporation*, 678 F.3d 970 (2012), also involved an interconnection agreement dispute between a CMRS provider and a LEC, and dealt with IXC transiting service solely in the context of the CMRS-LEC agreement. None of these cases support claims by IXCs to invoke the intraMTA rule independently.

Transformation Order, it indicated that it was not changing the dividing line between section 20.11 reciprocal compensation traffic and traffic that was access traffic prior thereto.[18] Whereas the Commission noted that a LEC and CMRS carrier could elect (as part of a CMRS-LEC interconnection agreement or traffic exchange arrangement) either to exchange traffic directly or to do so indirectly via a transiting carrier,[19] it declared unequivocally in the adjoining paragraph that a transiting carrier like an IXC is "not considered the originating carrier for purposes of the reciprocal compensation rules," such as the intraMTA rule.[20]

Hence, there is nothing in the Commission orders adopting and clarifying the intraMTA rule that offers any indication that IXCs and other transiting carriers were ever previously intended, much less made eligible, to invoke the rule. The proof in the pudding is the behavior of IXCs, like Sprint and MCI Verizon themselves. Whereas the footnotes to the sections of the *Local Competition Order* wherein the intraMTA rule was discussed and adopted show active participation by the predecessors of Sprint and MCI Verizon,[21] both of these large and sophisticated companies appear to have exchanged intraMTA traffic with LECs over access trunks for as many as 18 years without ever claiming that reciprocal compensation applied to the traffic and without ever disputing until 2014 access bills that may have included charges for comingled intraMTA traffic.

Even if the intraMTA rule had authorized IXCs to request and establish IXC-LEC arrangements for intraMTA traffic, Sprint, MCI Verizon and Level 3 have never made the least

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[18] *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ¶ 990. (*USF/ICC Transformation Order*).

[19] *Id.* ¶ 1007

[20] *Id.* ¶ 1006.

[21] *Local Competition Order* n. 2357 (Bell Atlantic/NYNEX Mobile), 2359 (Nextel), 2451 (NYNEX), 2453 (Nextel), 2467 (Sprint), 2493 (MCI0, 2494 (Sprint Spectrum/APC).

effort to comply with the cooperation requirement that is necessary to implement the rule. As detailed in the *Local Competition Order*, the Commission recognized from the outset that only CMRS carriers had direct access to the originating and terminating cell site information necessary to distinguish intraMTA from interMTA wireless traffic, and required carriers exchanging intraMTA traffic to cooperate in its identification and measurement, including estimation from traffic studies and samples.[22]

Between 1996 and 2011, cooperation became even more critical as number portability made it increasingly impossible for LECs to estimate the nature and location of traffic on the basis of telephone numbers, and as some CMRS-LEC traffic exchange arrangements allowed intraMTA traffic to be routed indirectly via IXCs. When confronted at the time of its 2011 *USF/ICC Transformation Order* with the increasing inability of LECs to identify or estimate intraMTA traffic, the Commission reiterated and re-emphasized its cooperation requirement.[23]

Yet, notwithstanding the Commission's adoption and reiteration of this cooperation requirement, Sprint, MCI Verizon and Level 3 never notified the LEC members of the Associations until 2014 that these IXCs were comingling and exchanging intraMTA traffic over access trunks; never provided any traffic studies, samples or other information that would have helped these LECs to identify, measure or estimate the amount of intermixed intraMTA traffic; and never disputed or otherwise complained about any charges for intraMTA traffic in their monthly access bills.

Sprint and Level 3 note the Commission's 1996 and 2011 "traffic studies and samples" statements, and assert that the LEC Coalition Petition "fails to acknowledge that the Commission has twice provided the answer to this practical problem" of distinguishing intraMTA calls carried

[22] *Id.* ¶ 1044.

[23] *USF/ICC Transformation Order* at n. 2132.

by IXCs.[24] MCI Verizon likewise declares that the "Commission has offered a straightforward method to distinguish types of MTA calls: traffic studies," and claims that such traffic studies can be done with or without an interconnection agreement.[25] What is utterly stunning is the manner in which these three litigating IXCs point to aspects of the Commission's cooperation requirement without the slightest acknowledgement that it was **their obligation** to provide the referenced traffic studies and samples, or at least the originating and terminating cell site and/or other call identification information in the possession of their CMRS customers and affiliates that was necessary to perform and verify such traffic studies and samples. LECs do not have access to this information,[26] and because of the way that the litigating IXCs have interposed themselves without notice between the LECs and various CMRS providers, LECs have no information exchanges with the CMRS providers whose traffic is being comingled and often are unable to identify them reliably.[27] Hence, as between LECs and IXCs, IXCs are the only parties that have commercial and/or affiliation relationships (*i.e.*, privity) with the CMRS providers whose traffic they have been comingling, and therefore are the only parties with ready and effective access to the cell site, traffic study, sampling and other call identification information needed to implement to intraMTA rule.

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[24] Sprint and Level 3 at 5.

[25] MCI Verizon at 16.

[26] The Concerned Rural ILECs explained, "[T]here is no industry standard methodology for distinguishing intraMTA wireless traffic that is commingled with other types of access traffic on access trunks," and cautioned that even NPA/NXX fails to account for mobility of numbers. Reliance on JIP is similarly hazardous and unhelpful, since originating JIP is "rarely, if ever, passed in SS7 signaling and there the calling NPA/NXX field in the call record does not indicate whether the number has been ported between a wireline and wireless carrier." Concerned Rural ILECs at 10.

[27] These difficulties are further complicated by the apparent practice of some CMRS providers to shift their traffic frequently among different IXCs in order to take advantage of pricing differences for transiting services.

Consequently, it was the obligation of the litigating IXCs under the Commission's cooperation requirement to provide the information necessary to distinguish the intraMTA traffic that they elected to comingle on access trunks – an obligation they wholly disregarded. Therefore, even if IXCs had been eligible to invoke the intraMTA rule directly, the litigating IXCs would not be able to do so or to obtain retroactive damages or refunds because they wholly failed to comply with the cooperation requirement necessary to activate and implement it.

Filed comments evidence a unified position on this issue. As ITTA observed, "[A]lthough Verizon and Sprint have filed dozens of lawsuits . . . they have for years engaged in the very same billing practices through their LEC operations that they now contend are unlawful."[28] The Concerned Rural ILECs drew upon the nature by which the IXCs delivered traffic, asserting that IXCs should not be entitled to refunds for services they voluntarily ordered, and which were provided to them.[29] They explained: "IXCs ordered Feature Group D access trunks from LECs under tariffs that specify the service is to be used for access traffic, routed traffic over those trunks, and paid the tariffed rates without dispute."[30]

The inequity of ordering retroactive relief was characterized as an egregious measure concerning the circumstances. ITTA highlighted, "[t]hese IXCs not only paid both terminating and originating access charges for years in connection with this alleged intraMTA traffic, but also presumably recovered the costs associated with those payments from their own retail and wholesale customers."[31] This potential windfall to the IXCs was identified by others, who noted that the IXCs had waited 18 years to dispute the traffic, and that it would be unlikely the IXCs

[28] ITTA at 3.

[29] Concerned Rural ILECs at 7.

[30] *Id*. at 8.

[31] ITTA at 3.

would pass savings or refunds to their customers or other consumers.[32] Although the Rural Associations did not develop the estimates of financial impact, Moss Adams, representing a group of ILECs, illustrated the compelling adverse impacts that would be visited upon carriers if retroactive relief were granted.[33] Especially in light of those figures, which reach into the millions of dollars across the industry and represent a sum that would devastate broadband and other network infrastructure deployment and maintenance plans, the Commission should reject soundly any calls for refunds. As AT&T notes, the Commission "must balance retroactivity 'against the mischief of producing a result which is contrary to a statutory design or legal or equitable principles.'"[34]

III. CONCLUSION

For the reasons discussed above and in their initial comments, the Associations support the LEC Coalition Petition for Declaratory Ruling so as to clarify the applicability of the intraMTA rule to LEC-IXC traffic. In particular, the Associations request that the Commission hold or declare:

(a) IXCs are not presently eligible to invoke the intraMTA rule and its benefits;

(b) CMRS carriers and any other entities invoking the intraMTA rule are required to cooperate with LECs to identify, measure or estimate the amounts of intraMTA traffic comingled with other traffic, and do not qualify for reciprocal compensation (or bill-and-keep) treatment, damages or refunds or other benefits unless and until they have provided the information necessary to satisfy this cooperation requirement;

[32] Concerned Rural ILECs at 2, 3 and 7.

[33] *Id.* at 11.

[34] AT&T at 13, 14 (internal citation omitted).

and

(c) no retroactive relief such as that sought by the IXCs for amounts already paid voluntarily will be granted, and that self-help tactics, including "claw-back" schemes, are flatly inconsistent with Commission rules and policy.

Respectfully submitted,

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