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VIA ELECTRONIC MAIL

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20054

Re: In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers - WC Docket No. 07-135

Dear Chairman Martin:

On June 28, 2007, the Commission issued a *Declaratory Ruling* announcing its intention to issue a *Notice of Proposed Rulemaking* ("*NPRM*") to consider rule changes addressing "traffic pumping" schemes by incumbent local exchange carriers ("ILECS") which are designed to inflate terminating access charge revenues.[1] Subsequently, both AT&T and Qwest filed letters supporting the prompt issuance of the contemplated *NPRM*, and encouraging the Commission to broaden the proposed rulemaking proceeding to make sure that abusive traffic pumping activities of competitive local exchange carriers ("CLECs") also were investigated and addressed. MetroPCS Communications, Inc. ("MetroPCS") agrees with AT&T and Qwest that the *NPRM* should address both ILECs and CLECs. In addition, MetroPCS asks that the *NPRM* address similar schemes affecting local termination charges by ILECs and CLECs because the traffic pumping problem is not limited to situations involving access charges. Finally, MetroPCS believes that the Commission, in addition to exploring the solutions proposed by AT&T and Qwest, should consider other approaches, such as a self-effectuating traffic imbalance solution.

MetroPCS strongly supports having the Commission consider in a rulemaking proceeding the terminating access charge issues which have been the focus of so much recent attention.[2] However, the issues in the forthcoming *NPRM* should be framed even more

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[1] *See Establishing Just and Reasonable Rates for Local Exchange Carriers, (WC Docket No. 07-135),* Declaratory Ruling and Order, DA 07-2863 (Wireline Comp. Bur., rel. June 28, 2007) (the *Declaratory Ruling*).

[2] *See In the Matter of Investigation of Certain 2007 Annual Access Tariffs,* Order Designating Issues for Investigation, WC Docket No. 07-184, WCB/Pricing, No. 07-10, DA 07-3738 (rel. Aug. 24, 2007);

broadly than suggested by the Commission in the *Declaratory Ruling* and by AT&T and Qwest in their recent letters. Potential traffic pumping abuses are not limited solely to the ILEC and CLEC access charges market, but also can occur with respect to local termination charges. Terminating carriers may set local terminating compensation charges at high levels and then taking deliberate steps to inflate the traffic volume artificially and thereby generate excessive local terminating compensation payments. For example, if an ILEC or CLEC offers or provides service to free "chat lines," many calls that are generated can turn out to be "local" calls that are subject to local terminating compensation rates rather than interexchange calls that are subject to access rates. In the case of CLECs, the rates imposed for local terminating compensation can be largely unregulated. This creates a powerful financial incentive for CLECs to set terminating compensation rates at artificially high levels, and to pursue business plans purposefully designed to generate single directional traffic. This creates the same problems identified by AT&T and Qwest in the access charge market.

For example, MetroPCS is now involved in a complaint proceeding in which a CLEC has stipulated that the local traffic balance is nearly 100% - 0%, meaning that the CLEC is terminating large volumes of traffic that are originated by MetroPCS subscribers, but is originating virtually no traffic directed to MetroPCS.[3] This situation exists because the CLEC is largely in the business of servicing free "chat lines," or other customers which generate high volumes of inbound calls, but no outgoing calls. The situation is exacerbated because the CLEC recently sought to increase its termination rates unilaterally without conducting a cost study and without any regulatory oversight. Not surprisingly, many carriers have refused to honor the CLEC's bills, and as a consequence further litigation has ensued.[4]

2007 Annual Access Tariff Filings, WCB/Pricing No. 07-10, Order, DA 07-2862 (Wireline Comp. Bur., rel. June 28, 2007).

[3] *North County Communications Corp., Complainant v. MetroPCS California, LLC, Defendant,* File No. EB-06-MD-007. It is not the intention of MetroPCS to litigate the merits of the North County/MetroPCS complaint case in a rulemaking proceeding. However, just as the ongoing litigation cases involving access charges have pointed out an industry-wide traffic pumping problem meriting attention in a rulemaking proceeding, the controversy between North County and MetroPCS raises local terminating compensation issues that deserve to be addressed on a broader scale. Out of an abundance of caution, MetroPCS is serving a copy of this letter on counsel to North County and the Commission in the complaint proceeding so that there can be no surprise or *ex parte* concern.

[4] *See North County Communications Corp. v. A+ Wireless, Inc DBA Advantage Wireless – CA (OCN 822A) et. al,* Case No. 06-CV-1542, Third Amended Complaint for Declaratory Relief, Quantum Meruit, and Enforcement of Tariff, United States District Court for the Southern District of California, filed March 21, 2007.

The harm in this local termination context is the same as in the access charge context: windfall profits that violate the core principles that intercarrier compensation charges be fair, reasonable and cost-based. Just as the Commission identified such arbitrage as against the public interest in the Internet service provider ("ISP") context, the Commission needs to undertake action to preclude traffic pumping in all circumstances where it arises, not just when access charges are implicated.[5] If the Commission does not deal with this aspect of the problem, carriers engaged in traffic pumping in the access market will be incented to change their focus to use local termination charges as a vehicle for traffic pumping, and this Commission then will have to deal with the issue all over again.[6]

While MetroPCS supports widening the inquiry to all telecommunications carriers, MetroPCS is less certain that the remedy proposed by AT&T and Qwest is necessarily the best approach.[7] The approach recommended by AT&T and Qwest would have the Commission outlaw various "kick-back" schemes in which a CLEC or ILEC shares revenue with, or has a financial interest in, an originating carrier. MetroPCS is concerned that regulations based upon the financial relationship of an ILEC or a CLEC with its customers may be hard to identify and police.[8] MetroPCS respectfully submits that it would be better to address traffic pumping schemes by having carriers automatically earn reduced compensation when the amount of traffic they originate is grossly out of balance with the amount of traffic they terminate rather than have to rely on self certification and enforcement actions by the Commission. A terminating carrier can readily ascertain whether the mix of inbound and outbound traffic with a particular carrier is grossly out of balance. This approach also is better because it is self-effectuating, allows the Commission

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[5] *See* discussion *infra* at p.4-5.

[6] The Commission originally tried to deal with CLEC arbitrage by capping CLEC access rates. However, as demonstrated by AT&T and Qwest, the CLEC Access Order will not prevent CLECs from engaging in the exact same kind of traffic pumping schemes as the ILECs. Accordingly, MetroPCS submits that the Commission should look to the very end and make sure that it has eliminated the ability of all telecommunications carriers to engage in traffic pumping schemes. Also, the regime proposed by Qwest and AT&T will not work well in a reciprocal compensation regime where there are no tariffs which means the certification mechanism proposed by AT&T and Qwest would not work.

[7] MetroPCS also is not seeking to discourage the Commission from exploring the traffic pumping remedies that are proposed by AT&T and Qwest. MetroPCS would simply like the forthcoming *NPRM* to explore other possible solutions as well.

[8] MetroPCS also is not sure that the sharing of revenue *per se* violates the Communications Act of 1934, as amended (the "Act"), in all instances. As the Commission knows, it has not determined that all access revenue-sharing arrangements are unlawful. *See AT&T Corp., Complainant v. Jefferson Telephone Co., Defendant,* 16 FCC Rcd 16130 (rel. Aug. 31, 2001). While MetroPCS is not certain that revenue sharing is necessarily illegal in all instances, it does believe that all traffic pumping arrangements - - where carriers are incented to engage in schemes to artificially inflate their traffic to earn excessive compensation - - are against the public interest and should be stopped.

to use its enforcement resources for other issues where the Commission's rules may not be self enforcing, and removes the economic incentive for carriers to practice arbitrage through business plans purposefully designed to generate inflated terminating compensation or terminating access fees.

There is precedent for the approach suggested by MetroPCS in the *ISP Remand Proceeding*[9] where the Commission was faced with situations in which CLECs were engaged in regulatory arbitrage. As the Commission explained:

> Traditionally, telephone carriers would interconnect with each other to deliver calls to each other's customers. It was generally assumed that traffic back and forth on these interconnect networks would be relatively balanced. Consequently, to compensate interconnecting carriers, mechanisms like reciprocal compensation were employed, whereby the carrier whose customer initiated the call would pay the other carrier the costs of using its network.[10]

However, the traditional reciprocal compensation system broke down when CLECs began generating "large volumes of traffic that is virtually all one-way."[11] When traffic between carriers "flows exclusively in one direction", it creates "an opportunity for regulatory arbitrage" which leads to "uneconomic results."[12] Specifically, the terminating carrier has an incentive to "seek out customers ... with high volumes of incoming traffic that will generate high reciprocal compensation payments."[13] CLECS may offer these in-bound-only customers "below cost retail rates subsidized by intercarrier compensation."[14] This "undermines the operation of competitive markets."[15]

In the *ISP Remand Proceeding*, the Commission addressed the problem by limiting the amount of terminating compensation a CLEC could receive when the traffic was grossly imbalanced. Specifically, a bill-and-keep regime was imposed with a transition rate for

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[9] *See Implementation of the Local Competition Provisions in the Telecommunications Act, Intercarrier Compensation for ISP-bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (the *"ISP Remand Proceeding"*).

[10] *Id.* at para. 20 (2001).

[11] *Id.* at para. 2

[12] *Id.* at paras. 20-21.

[13] *Id.* at para. 68.

[14] *Id.*

[15] *Id.* at para. 71.

CLEC compensation capped at $0.0007 per minute of use.[16] The effect of this remedy was to reduce or eliminate the incentive for carriers to pursue business plans purposely designed to artificially inflate – or pump up – the traffic they terminated. This approach was also self effectuating which removed the need for the Commission or state commissions to be involved in these disputes which at the time the *ISP Remand Proceeding* was undertaken were widespread.[17]

In view of the approach taken in the *ISP Remand Proceeding,* the public interest would best be served by exploring a similar rate-based approach to solving the traffic pumping problem that is arising in both the access charge and terminating compensation regimes. Consequently, MetroPCS respectfully requests that the *NPRM* that is in process by the Commission be broadly crafted to explore this possible approach as well.

Respectfully submitted,

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[16] *Id.* at paras. 77-79. In addition, the Commission adopted a rebuttable presumption that traffic delivered to a carrier . . . that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation mechanism as set forth in this Order.

[17] Self effecting solutions also minimize the need or desire for carriers to engage in self help, such as trying to reduce traffic to other carriers.