Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
High-Cost Universal Service Support	)	WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link-Up	)	WC Docket No. 03-109
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION OF METROPCS COMMUNICATIONS, INC. FOR CLARIFICATION AND LIMITED RECONSIDERATION

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SUMMARY

MetroPCS Communications, Inc. ("MetroPCS") is asking the Commission on reconsideration to clarify or modify its rules pertaining to traffic stimulation in a few limited respects in order to prevent profiteers from trying to exploit potential loopholes.

First, MetroPCS seeks a clarification of the definition of an "access revenue sharing agreement" to make clear that an arrangement in which a third party receives compensation for activities which result in traffic stimulation is included whether or not the payment is tied directly to the amount of billings or collections of access charges. Otherwise, traffic stimulators may try to evade the rule by adopting fixed fee arrangements.

Second, the Commission should clarify that the access stimulation definition extends to third party arrangements not only with the terminating LEC, but also with any affiliate of the terminating LEC. This is implied by the current definition, which extends to direct and indirect arrangements, but should be express.

Third, MetroPCS is asking the Commission to clarify the manner in which the 3:1 traffic imbalance ratio will be applied in order to deter foreseeable approaches unprincipled carriers may take to evade this prong of the access stimulation test.

Finally, the Commission is asked to fill a gap in its traffic stimulation rules by applying them to intrastate traffic. Otherwise, there is a gap in the Commission's reforms that will encourage arbitragers to move their traffic pumping schemes to the intrastate access segment of the market.

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PETITION OF METROPCS COMMUNICATIONS, INC.
FOR CLARIFICATION AND LIMITED RECONSIDERATION

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys and pursuant to Section 1.429(a) of the Commission's Rules,[2] hereby respectfully requests that the Commission clarify certain aspects, and to reconsider other aspects, of its *Order*, FCC 11-161, released November

[1] For purposes of this Petition, the term "MetroPCS" refers collectively to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

[2] 47 C.F.R. Section 1.429(a).

18, 2011 in the above-captioned proceedings ("Petition").[3] As set forth in detail below, the Commission's admirable steps to discourage traffic stimulation or traffic pumping are more likely to succeed if the Commission clarifies or revises the rules in limited respects to prevent opportunistic profiteers from exploiting potential loopholes. In support, the following is respectfully shown:

I. INTRODUCTION

MetroPCS previously has congratulated this Commission for crossing the finish line on the first leg of what already has been a decade-long marathon to comprehensively reform *both* the intercarrier compensation system and the universal service fund. The recent *Order*[4] involved significant tradeoffs for all affected carriers, and reflected a careful, well-reasoned balancing of *all* interests after extensive deliberation.[5] MetroPCS was particularly gratified by the significant and long overdue strides the Commission has taken to curb traffic stimulation in both the interstate access and local reciprocal compensation markets. The Commission, in its *Order,* recognized that traffic stimulation is a major form of uneconomic regulatory arbitrage in the current intercarrier compensation regime and, in response, adopted measures to eliminate, or at the very least mitigate, disruptive traffic stimulation from occurring. Specifically, the Commission adopted prophylactic measures: (1) with respect to interstate switched access

[3] This petition is being filed within 30 days following the date of publication of the subject order in the Federal Register, which occurred on November 29, 2011. *See* 76 Fed. Reg. 73830 (Nov. 29, 2011). Thus, the Petition for Clarification and Reconsideration is timely under Sections 1.429(d) and 1.4(b) of the FCC Rules. 47 C.F.R. §§ 1.4(b) and 1.429(d).

[4] *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund,* WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (the "*Order*").

[5] While MetroPCS applauds the Commission's efforts, MetroPCS is disappointed that the Commission reconsidered on its own motion certain aspects of the *Order* as they relate to CMRS-LEC interconnection and MetroPCS remains concerned that the delay in effectiveness of the rules may lead to traffic stimulation. *See* MetroPCS *Ex Parte* filed December 21, 2011 in this proceeding.

traffic; and (2) with respect to intraMTA LEC-CMRS traffic. While these measures will go a long way to mitigating historical arbitrage, MetroPCS is concerned that there are possible ambiguities which unprincipled arbitrators might seek to exploit. In order to assure that the Commission's efforts do not result in continued or modified traffic stimulation, MetroPCS urges the Commission to reconsider and/or clarify a few aspects of its new regulations pertaining to traffic stimulation in order to prevent traffic stimulators from exploiting potential loopholes in the Commission's proposed rules.[6]

II. BACKGROUND

The Commission correctly concluded that interstate access stimulation is a major problem in the current intercarrier compensation regime, finding that "the record confirms the need for prompt Commission action to address the adverse effects of access stimulation and to help ensure that interstate access rates remain just and reasonable."[7] The Commission found that uneconomic access stimulation occurs when "a [local exchange carrier] with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls," and such arrangement inflates or stimulates the access minutes terminated to the LEC, and "the LEC then shares a portion of the increased access revenues resulting from the increased demand with the "free" service provider, or offers some other benefit to the "free" service provider."[8] The Commission held that "the combination of significant increases in switched access traffic with unchanged access

[6] Traffic stimulation is like a balloon, unless the Commission constrains all ways it can occur, efforts to "squeeze" it in one area will merely result in it "popping" up elsewhere.

[7] *Order* at para. 662.

[8] *Id.* at para. 656. To the knowledge of MetroPCS, traffic pumping has moved far beyond the traditional forms of chat lines and free conference calling services. Some schemes involve the delivery of streaming audio services (e.g., radio broadcasts) which generate open lines of communication and inordinate call lengths. In other instances, unscrupulous profiteers appears to be using auto-dialers to generate traffic solely for the purpose of triggering terminating compensation obligations (and shared revenue).

rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable under Section 201(b) of the Act."[9] Thus, the Commission "adopt[ed] revisions to [its] interstate switched access charge rules to address access stimulation."[10]

As part of its revisions, the Commission adopted a two factor test to identify when a LEC is engaged in traffic stimulation and therefore must refile its interstate tariffs at rates that are presumptively consistent with the Act. The first factor may be satisfied by evidence demonstrating that the LEC has met either of the following: "the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year."[11] This prong is designed to identify particular traffic patterns which historically have been indicative of a traffic pumping scheme.

The second factor is that the LEC must have entered into an access revenue sharing agreement with a third party. The Commission defined an access revenue sharing agreement as an arrangement in which a rate-of-return LEC or competitive LEC

> has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless or form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.[12]

[9] *Id.* at para. 657.

[10] *Id.* at para. 656.

[11] *Id.* at para. 667.

[12] *Id.* at para. 669.

The Commission held that a "complaining carrier may rely on the 3:1 terminating-to-originating traffic ratio and/or the traffic growth factor for the traffic it exchanges with the LEC as the basis for filing a complaint," and that such a showing "will create a rebuttable presumption that revenue sharing is occurring and the LEC has violated the Commission's rules."[13] The LEC would then "have the burden of showing that it does not meet both conditions of the definition."[14] If the LEC is unable to make such a showing, it will have to refile its tariff in accordance with the Commission's rules, which the Commission anticipates will result in significantly decreased access stimulation revenues.[15]

In addition, the Commission adopted separate measures to eliminate, or mitigate, traffic stimulation in the local reciprocal compensation market. The Commission did so by adopting bill-and-keep as the end point for intercarrier compensation reform. Of particular importance to MetroPCS as a wireless carrier, the Commission adopted a prompt transition to a bill-and-keep regime for the exchange of intraMTA LEC-CMRS traffic.[16] The Commission found "a greater need for immediate application of a bill-and-keep methodology in [the non-access] context to address traffic stimulation."[17] The Commission correctly noted that the record demonstrates "a significant and growing problem of traffic stimulation and regulatory arbitrage in LEC-CMRS

[13] *Id.* at para. 699.

[14] *Id.*

[15] *Id.* at para. 679.

[16] Initially, the CMRS/LEC transition to bill-and-keep was to be immediate. *Id.* at para. 995. The Commission later, ostensibly on its own order, reversed its decision to immediately apply a bill-and-keep to all intraMTA LEC-CMRS traffic. Rather, the Commission delayed the bill-and-keep transition for intraMTA LEC-CMRS traffic exchanged pursuant to an existing interconnection agreement to July 1, 2012. *See Order on Reconsideration* (WC Docket No. 10-90), FCC 11-189 released December 23, 2011. The Commission retained the immediate transition to a bill-and-keep regime for intraMTA LEC-CMRS traffic not exchanged pursuant to an existing interconnection agreement. While the immediate transition for some of the traffic will curb some of the reciprocal compensation traffic stimulation, to the extent traffic pumpers already have existing agreements, they will be incented to engage in traffic pumping at an accelerated pace before the July 1, 2012 effective date.

[17] *Order* at para. 995.

non-access traffic."[18] Indeed, MetroPCS repeatedly has demonstrated that traffic stimulation is an escalating problem that has moved from simple arbitrage to wide-scale fraud. What started as a cottage industry where LECs with unjustifiably high rates encouraged customers of other carriers to call, has morphed into an enterprise where carriers and other parties are going to alarming lengths, such as using auto-dialers, third party "customers," and streaming audio services to generate fraudulent high-cost traffic. The Commission correctly found that "addressing the traffic stimulation problem in reciprocal compensation is more urgent for LEC-CMRS traffic, and the bill-and-keep methodology we adopt today should eliminate the opportunity for parties to engage in such practices in connection with such traffic."[19]

Thus, the Commission's *Order* includes long needed mechanisms to decrease traffic stimulation activities in both the interstate access and reciprocal compensation contexts. However, the Commission's *Order* neglects to address traffic stimulation in the intrastate access context which is a matter of concern because MetroPCS has already started to see access stimulation in this segment of the market.[20] MetroPCS, therefore, urges the Commission to adopt regulations on reconsideration that will immediately address intrastate access traffic stimulation. In addition, MetroPCS also is concerned that the Commission's definitions are ambiguous in some respects and may lead to unnecessary confusion as to what qualifies as traffic stimulation, as well as potential mischief from traffic stimulators who are attempting to evade the Commission's new regulations. Thus, the Commission should clarify its revenue sharing agreement definition and the manner in which the 3:1 traffic imbalance component of the access

[18] *Id.*

[19] *Id.*

[20] Since intrastate access rates are generally higher than interstate access rates, states with multiple MTAs no doubt will experience an immediate explosion of traffic pumping in this market segment.

stimulation is applied. Only when all of these issues are addressed can the Commission have comfort that its traffic stimulation rules will have their intended result.

III. THE LEGAL BASIS OF THIS PETITION

A petition for reconsideration is appropriate if it is based on new evidence, changed circumstances, or if reconsideration is in the public interest.[21] MetroPCS is an "interested person" eligible to petition for reconsideration and clarification of the new construction requirements and the other auction rules challenged herein.[22] MetroPCS has been a very active participant in the Commission's intercarrier compensation proceedings over the past ten years, filing substantial comments, reply comments and *ex partes*, as well as meeting on numerous occasions with Commission staff. Moreover, MetroPCS will be directly adversely affected if the rules are not changed. As a consequence, MetroPCS has standing to submit this petition for clarification and reconsideration.[23]

As noted in detail below, the limited clarifications and reconsideration of the rules requested here by MetroPCS meets the public interest requirement as contemplated by Section 1.429(b)(3). The Commission also has stated that "[r]econsideration is warranted . . . if the petitioner cites material errors of fact or law or presents new or previously unknown facts and circumstances which raise substantial or materials questions of fact that were not considered and that otherwise warrant [the] review of [the] prior action."[24] Clarification and reconsideration of the cited rules also is justified under this standard.

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[21] *In the Matter of Numbering Resource Optimization*, Fourth Order on Reconsideration, 22 FCC Rcd 8047 at para. 5 (rel. Apr. 26, 2007).

[22] *Cf.* 47 C.F.R. Section 1.429(a).

[23] 47 C.F.R. Section 1.106(b)(1) ("any party to the proceeding, or any other person whose interests are adversely affected by an action taken by the Commission … may file a petition requesting reconsideration of the action").

[24] *Lancaster Communications, Inc.*, 22 FCC Rcd 2438 at para. 20 (rel. Feb. 7, 2007).

IV. THE DEFINITION OF "ACCESS STIMULATION" SHOULD BE CLARIFIED

As noted above, the *Order* wisely adopted rules to reduce uneconomic access stimulation.[25] The Commission recognized that certain local exchange carriers ("LEC") with high switched access rates ("High Priced Terminating Carriers") were entering into arrangements with third parties ("Traffic Stimulators") to inflate, stimulate or pump traffic as a form of arbitrage.[26] In taking this action, the Commission recognized that access stimulation arrangements can take a variety of forms, and purposefully adopted a broad definition of access stimulation. Thus, the definition is not only limited to direct, express, written agreements between the High Priced Terminating Carriers and the Traffic Stimulators. Rather, the definition extends to express and *implied* as well as written or *oral* arrangements.[27] The definition also includes arrangements that not only result in a net payment to the Traffic Stimulator, but also to its "affiliates."[28] And, the definition includes arrangements that would "directly or indirectly" give rise to payment. The clear purpose of these expansive elements of the definition was to make sure that it captured the broad variety of schemes that had been and could be put in place to artificially pump traffic to High Priced Terminating Carriers. The Commission certainly was justified in adopting such a broad definition as experience shows that arbitragers are quick to exploit gaps in the intercarrier compensation system in order to create arbitrage opportunities.

There are, however, two aspects of the definition of "access stimulation" that should be clarified to make sure that the Commission's effort to eliminate all uneconomic arbitrage

[25] See *Order* at Section XI.

[26] While this originally manifested itself through free services offered using access revenues (e.g., free international calling, free conference calling), it has now morphed into LECs sharing revenues with illegitimate customers who use auto-dialers solely for the purpose of triggering terminating compensation payments and sharing a portion of the proceeds.

[27] FCC Rule Section 61.3(aaa)(1).

[28] *Id*.

schemes is successful. First, the Commission must clarify that its access stimulation definition will be broadly construed so that the prohibited arrangements are not limited solely to those in which the revenue payment is directly "based on the billing or collection of access charges" but rather includes other circumstances when payment is being made for the purpose of traffic stimulation. Absent clarification, Traffic Stimulators and High Priced Terminating Carriers may try to craft revised payment schemes and claim that they do not fit squarely into the Commission's definition of access stimulation. For example, a terminating LEC might claim that it is permissible to make a non-variable payment because the amount is not strictly tied to access billings or collections. This should not be permitted when the arrangement at its core is designed to stimulate traffic. Second, the Commission must make clear that the definition of access stimulation includes arrangements that involve not only a terminating carrier which is a CLEC, but also any "affiliate" of that CLEC. Without this clarification, traffic pumpers might believe that it is permissible for a revenue sharing payment to be made by an affiliate of the LEC, rather than the LEC themselves. Obviously, the relevant consideration should be whether a net payment is being made to stimulate traffic to the LEC. As discussed in detail below, both of these clarifications fall within the scope of the original rules when read in their proper context and making them will prevent traffic stimulation activities from continuing under a difference guise. While the Commission could clarify these points in the context of disputes, the better course is for the Commission to clarify its intent so as to discourage gamesmanship before it occurs.[29]

[29] MetroPCS believes that such situations already are covered by the Commission's existing language, and only submits this clarification request out of an abundance of caution.

A. The Phrase "based on the billing or collection of access revenues" Must be Clarified

A simple illustration will demonstrate the basis of the MetroPCS concern that unscrupulous High Priced Terminating Carriers and Traffic Stimulators may try to evade the access stimulation definition by seizing upon the requirement that such arrangements be "based on the billing or collection of access revenues." Consider a situation in which a High Priced Terminating Carrier and a Traffic Stimulator have a long-standing arrangement in which the Traffic Stimulator receives a percentage of the switched access revenue generated by numbers assigned to the Traffic Stimulator by the High Priced Terminating Carrier. This is a classic traffic pumping arrangement that would fall squarely within the definition of "access stimulation." However, because the long operating history of these two parties will have resulted in a measurable income stream, the participants could easily convert the arrangement to a fixed monthly payment, unaffected directly on a going-forward basis by the "billing or collection of access charges from interexchange or wireless carriers."[30] Neither, the substance of the arrangement or the public harms identified by the Commission will have changed, but a technical argument can be made that the new arrangement does not satisfy the letter of the definition.

This potential loophole can easily be closed by the Commission. On reconsideration, the Commission need merely clarify that any arrangement between a LEC and a third party that results in the generation of switched access traffic to the LEC and provides for the net payment of consideration of any kind to the third party will be deemed by the Commission to be "based upon the billing or collection of access charges," regardless of the manner in which, or the formula by which, the consideration is calculated. This simple clarification will prevent parties

[30] A High Priced Terminating Carrier could elect to absorb any collection risk associated with access billings as another way to funnel money to the Traffic Simulator in a manner unrelated directly to access traffic volume.

to prior access stimulation arrangements, and parties to new arrangements, from attempting to sidestep the Commission's rules by restructuring or crafting their payment mechanisms.

Notably, this clarification will not serve to sweep in legitimate arrangements. The arrangements encompassed by the clarified definition still will be those relating to traffic stimulation. Other net payment arrangements not related to traffic generation will not meet this definition. Further, since an arrangement also must trigger either the 3:1 traffic imbalance or 100% growth factor test in order to be deemed traffic stimulation, the clarification sought by MetroPCS will not result in an overly inclusive definition.

B. Arrangements with Affiliates of High Priced Terminating Carriers Must be Covered by the Commission's Rules

As earlier noted, the access stimulation definition expressly provides that it encompasses not only arrangements where a LEC makes net payments to another party, but extends to "a net payment to the other party (*including affiliates*)."[31] This reference to affiliates is important because parties to traffic pumping schemes have been known to set up affiliated shell companies to conceal access stimulation schemes and their economic effect. The same consideration requires clarification that the definition of access stimulation encompasses arrangements involving payments not only by the High Priced Terminating Carriers, but also affiliates of such LECs.

This requested clarification falls well within both the letter and spirit of the current rule. The rule makes clear that it applies to arrangements resulting in payments both "*directly or indirectly*,"[32] which should be interpreted by the Commission to include payments involving

[31] FCC Rules Section 61.3(aaa)(1)(i) (emphasis added).

[32] *Id.* (emphasis added).

affiliates of the LEC.[33] MetroPCS raises the point out of an abundance of caution since the rule makes an explicit reference to "affiliates" with respect to the "other party," but does not explicitly do so with respect to the LEC. Again, MetroPCS fears that an unscrupulous LEC may seize upon this fact to craft a semantic argument that the rule only reaches to arrangements to which the LEC is a party and not to those involving the LEC's affiliates. The clarification sought by MetroPCS will avoid gamesmanship of this nature.

A final clarification of the rules also would reduce the prospect of controversies with regard to the definition of access stimulation. MetroPCS notes that the word "affiliate" is not specifically defined in Section 61.3 of the rules. However, the term "affiliate" is specifically defined in the Communications Act as follows:

> The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.[34]

MetroPCS assumes that the Commission plans to apply the statutory definition of affiliate in this instance. However, since the legal term affiliate can be used to describe a variety of relationships between two entities in different contexts, for the avoidance of doubt, the Commission should clarify that the statutory definition of affiliate will be used in interpreting the access stimulation definition.

[33] To the extent that any such affiliate arrangement is unrelated to the delivery of traffic (e.g., such as the sale of CPE), this clarification will not come into play because the traffic pattern should not change nor would such payment be based on traffic. However, to the extent the arrangement is for the originations of traffic, such arrangement with an affiliate should be swept into the traffic stimulation rules.

[34] 47 U.S.C. Section 153(1).

V. THE COMMISSION SHOULD CLARIFY THE MANNER IN WHICH THE 3:1 TRAFFIC IMBALANCE COMPONENT OF THE ACCESS STIMULATION DEFINITION IS TO APPLY

In keeping with comments made by MetroPCS and others,[35] the *Order* recognizes that an imbalanced traffic flow can be an important indicator of a disruptive traffic stimulation scheme. For example, chat lines and free conference call lines, which the Commission specifically identifies as prime examples of services that stimulate high volumes of traffic,[36] are essentially one-way services; the numbers devoted to these services generate a high volume of inbound calls, but rarely are used to generate outbound calls. This leads to a significant traffic imbalance. Thus, the Commission wisely included within the test for access stimulation a criterion that the LEC have "an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month." MetroPCS supports this test and again commends the Commission for adopting it. MetroPCS asks, however, that the Commission clarify the 3:1 test in two respects in order to make sure that it works properly as traffic stimulation activities evolve over time.

First, the Commission should make clear that a carrier cannot defeat the 3:1 traffic imbalance standard merely by offsetting a one-way business plan in one discrete line of business that generates high volumes of inbound traffic against a separate and distinct one-way business plan in a different discrete line of business that generates high volumes of outbound traffic only. A real world example in which MetroPCS was directly involved serves to demonstrate the point. As the Commission is aware, MetroPCS was involved in an extended controversy with CLEC North County Communications Corp. ("North County") arising out of North County's chat line services, which MetroPCS had identified as a local reciprocal compensation traffic pumping

[35] See, e.g., Comments of MetroPCS filed April 1, 2011 at p. 6-14.

[36] *Order* at para. 656

scheme.[37] Notably, although North County admitted that nearly 100% of the traffic from its chat line service was inbound to North County, North County nonetheless claimed that, overall, its inbound and outbound traffic was balanced. It made this claim based upon the fact that another component of the North County business was to serve telemarketers, which generated high volumes of outbound traffic and little or no inbound traffic.[38]

The important point here is that the distinct outbound telemarketing traffic of North County did not in any way mitigate the uneconomic effect of the high volume of the inbound chat line traffic that MetroPCS was being asked to pay for at an exorbitant termination rate. Indeed, the North County business model resulted in uneconomic traffic stimulation in two directions: inbound chat line traffic to garner intraMTA reciprocal compensation payments and outbound telemarketing to garner originating access payments. The Commission's goal should be to deter all uneconomic traffic stimulation business plans, even if they are crafted as two distinct one-way models. For example, to do so, in applying the 3:1 ratio, local reciprocal traffic should be considered separately from interstate access, and interstate originating access should be considered separately from intrastate access traffic. By doing so, the Commission would eliminate the ability of carriers to evade the Commission's traffic imbalance test.

Second, the Commission should clarify that there may be instances in which the traffic imbalance threshold will be deemed to be met when there is a 3:1 or greater imbalance in the traffic exchanged between a terminating carrier and another complaining carrier, even if the terminating carrier's overall traffic mix on an aggregate basis with all other carriers is more balanced. The Commission's access stimulation rules clearly contemplate that a complaining

[37] The MetroPCS/North County controversy is cited throughout the *Order* and motivated the Commission to take a series of steps to curb traffic stimulation in the wireless reciprocal compensation market. *See, e.g., Order* at paras. 977, 983, 985.

[38] *See* North County Order on Review, 24 FCC Rcd 14036 at para. 3 (2009).

carrier can make a *prima facie* case of traffic imbalance based on its own traffic exchange pattern with the terminating carrier.[39] However, the language in the 3:1 imbalance rule appears to suggest that the ultimate determination of imbalance will be based upon the terminating carrier's overall traffic mix with all other carriers, not merely upon the bilateral exchange ratio with the complaining carrier.[40]

It is a matter of concern that MetroPCS could experience a severe traffic imbalance with a particular carrier that would not meet the definition of access stimulation because the imbalance does not exist on an aggregate basis. For example, MetroPCS has reason to believe that some Traffic Stimulators were buying multiple MetroPCS phones and using them in connection with auto-dialers to generate high volumes of calls to certain LECs with high termination rates, presumably to take maximum advantage of a revenue sharing scheme.[41] MetroPCS, like all flat-rate, unlimited usage carriers, is particularly susceptible to schemes of this nature. Schemes which generate a serious traffic imbalance between one originating carrier and the terminating LEC can be pernicious whether or not the terminating LEC happens to meet the 3:1 imbalance test considering its traffic as a whole with all of the carriers with which it exchanges traffic. The risk is particularly great for flat-rate unlimited use carriers whose customers are prime targets of the cost shifting that motivates Traffic Stimulators.[42]

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[39] *Order* at para. 675.

[40] MetroPCS reaches this conclusion because the language in Section 61.43(aaa)(1)(ii) of the rule is framed in general terms, and appears to refer to the terminating carrier's overall ratio of traffic, not the ratio with the terminating carrier. If this was not the Commission's intent, the rule should be clarified.

[41] The other Commission rule which amplifies this problem in the wireline interexchange market is the rate averaging rule which requires all long distance rates to be averaged as opposed to particularly focused on the costs imposed on the wireline carrier. This is not a problem for wireless carriers as the Commission has forborn from applying this rule to such carriers.

[42] Customers of post-paid carriers who pay metered rates are less likely to place an inordinate number of calls with long average call lengths.

To address this concern, MetroPCS asks the Commission to clarify that a terminating LEC may overcome a *prima facie* case of traffic imbalance based upon the complaining carrier's own traffic data only with clear and convincing evidence that the carrier-to-carrier data is not indicative of a traffic stimulation scheme directed at the complaining carrier.[43]

VI. THE COMMISSION SHOULD REVISE ITS RULES TO PROHIBIT TRAFFIC STIMULATION VIA INTRASTATE ACCESS, INCLUDING INTRASTATE, INTERMTA, TRAFFIC

The *Order* does not specifically address traffic stimulation in the intrastate access context.[44] The Commission explicitly states that it is adopting revisions to its interstate switched access charge rules to address access stimulation.[45] While the Commission did seek to address traffic stimulation in the local intraMTA market by moving to a bill-and-keep regime[46] for LEC-CMRS non-access traffic, this still leaves a significant gap with respect to intrastate access traffic, as well as intrastate, interMTA CMRS traffic. This gap is especially problematic since the rates for intrastate access are generally higher than interstate rates. This has already led to some carriers starting to stimulate traffic in the intrastate exchange context. Accordingly, this gap must be rectified by the Commission.

MetroPCS operates in several states which encompass multiple MTAs, including California, Texas, Florida, and Pennsylvania, among others, and is concerned that current traffic

[43] If the Commission does not want to go this far, at a minimum, it should limit the balance to like kinds of traffic (e.g., unlimited, measured, etc.). It is more likely that a High Priced Terminating Carrier will target a subsegment of the market and try to balance it with other one-way traffic in another segment. Just like the Commission should segment the traffic of the High Priced Terminating Carrier, it should likewise prevent it for the originating carrier as well.

[44] Of course, to the extent that the *Order* adopts a bill-and-keep regime for intraMTA traffic exchanged between CMRS carriers and LECs, traffic stimulation will be deterred. However, in most instances, a single state encompasses multiple MTAs (*See* Attachment A), which means that there can indeed be intrastate, interMTA traffic that is not addressed by the local reciprocal compensation bill-and-keep rule for CMRS carriers. *See* discussion, *infra.*

[45] *Order* at para. 662.

[46] *Id.* at para. 995.

stimulation schemes to which it is subject will not be addressed by either the interstate access stimulation rule or the wireless intraMTA bill-and-keep rule.[47] Continuing to allow traffic stimulation in the intrastate access charge marketplace would not serve the public interest. And, creative arbitragers certainly will move to exploit this loophole by shifting their intraMTA and interstate traffic pumping schemes to the intrastate, interMTA market. The Commission must close this potential loophole immediately, as the Commission's concerns with traffic stimulation in the interstate access and reciprocal compensation markets apply equally to intrastate access stimulation. Indeed, "an agency rule [is] arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem."[48] In this case, allowing traffic stimulation in the intrastate access market to continue and expand is a critical problem that the Commission did not adequately consider in its *Order*. The Commission must expect existing traffic pumpers to try to salvage their arbitrage business. By not closing this loophole, the Commission will no doubt see a significant rise in intrastate access stimulation complaints as some of its other rules become effective.

The Commission correctly notes that it has the authority to regulate intrastate access traffic exchanged between LECs and CMRS providers under Section 332 of the Act, and does regulate such traffic with respect to the ultimate transition of all traffic to bill-and-keep.[49] While such intrastate access rates will be capped by the Commission as of January 1, 2012, this cap is not sufficient to ensure that traffic stimulation activities will not occur with respect to intrastate access traffic because there is a substantial difference between intrastate and interstate

[47] Indeed, MetroPCS already has seen such scenarios occur in California.

[48] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)

[49] *Order* at para. 779.

access rates. Indeed, the Commission's entire transition plan is premised on the finding that intrastate rates are too high and must move down over time.

As noted above, MetroPCS already has seen evidence of traffic stimulation within the intrastate access marketplace. Moreover, and most importantly, MetroPCS is certain that intrastate traffic stimulation activities will increase materially due to the steps the Commission has taken to eliminate traffic stimulation in the interstate access and local reciprocal compensation markets. Traffic pumpers are arbitrage experts and are quite adept and have not hesitated to exploit omissions, or loopholes, in the Commission's rules. Providing such profiteers with the potential opportunity to continue to exploit the Commission's intercarrier compensation regime via intrastate traffic stimulation activities – which the Commission has condemned in the interstate and reciprocal compensation contexts – would go against the Commission's stated determination to reduce arbitrage.

The record evidence clearly establishes that traffic pumpers move quickly to exploit arbitrage opportunities, which is why access stimulation morphed into reciprocal compensation stimulation. For instance, the Commission noted that is was adopting a bill-and-keep regime for all LEC-CMRS traffic, not only LEC-CLEC traffic, even though "the record reflects that LEC-CMRS intraMTA traffic stimulation is growing most rapidly in traffic terminating by competitive LECs."[50] The Commission took this step due to its concern that "absent any measure to address traffic stimulation for intraMTA LEC-CMRS traffic, incumbent LECs that sought revenues from access stimulation may quickly adapt their stimulation efforts to wireless reciprocal compensation." The Commission must expect the same to occur with respect to intrastate access. Even if traffic stimulation in the intrastate access market has not been a focus

[50] *Id.* at para. 995.

of prior concern, the Commission should nonetheless anticipate and stop such arbitrage. Not only is this good public policy, but it also will conserve scarce Commission resources by relieving the Commission from having to address this problem in a separate rulemaking or multiple complaint proceedings. Thus, the Commission must take similar measures to prevent traffic stimulators from shifting their activities from the interstate access stimulation and reciprocal compensation markets to the intrastate access and interMTA markets.

Revising its rules to discourage traffic stimulation activities in the intrastate access market would help further "reduce some of the inefficient incentives enabled by the current intercarrier compensation system, and permit the industry to devote resources to innovation and investment rather than access stimulation and disputes."[51] The Commission should change its new rules to include both interstate and intrastate traffic, and the separate rate caps that apply to CLECs and rate of return LECs with respect to interstate access stimulation should apply to intrastate access stimulation as well, subject, of course, to the bill-and-keep regime that applies to CMRS-LEC intraMTA traffic.

In sum, the Commission noted in the *Order* that traffic stimulation schemes "involve service providers exploiting loopholes in our rules and ultimately cost consumers hundreds of millions of dollars."[52] This Commission should not allow similar loopholes to be exploited via its revised intercarrier compensation reforms. A revision to incorporate prohibitions against traffic stimulation in the intrastate access context would certainly be in the pubic interest, as it would eliminate traffic stimulation schemes that currently are occurring in the context of intrastate access, as well as prevent future schemes from being exploited in the intrastate access context. Thus, the Commission should modify its rules to allow interexchange carriers and

[51] *Id.* at para. 701.

[52] *Id.* at para. 649.

wireless providers to file intrastate access stimulation complaints, in addition to interstate access stimulation complaints, to eliminate, or at the very least, mitigate, traffic stimulation activities.

VII. EXPEDITED ACTION IS REQUESTED

MetroPCS urges the Commission to clarify and modify its traffic stimulation rules as requested in this petition *as soon as possible*. The relief MetroPCS is seeking is narrowly drawn and, if granted, will serve to better fulfill the worthy Commission goal of discouraging disruptive and uneconomic arbitrage. In the absence of prompt relief, the traffic pumping activities that already have survived too long in the intercarrier compensation market will be perpetuated. The public interest will be served by expeditious Commission action to close the potential loopholes identified by MetroPCS.

VIII. CONCLUSION

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission clarify and/or reconsider certain of its rules relating to access stimulation. In doing so, the Commission would eliminate gaps that exist that could potentially undermine its extensive findings relating to the dangers of access stimulation, and similar arbitrage.

Respectfully submitted,

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Attachment A

The 51 major Trading Areas (MTAs)