

October 13, 2010

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: *Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135*

Dear Ms. Dortch:

CTIA and many of its member companies met recently with Commission staff and Commissioner legal advisers regarding rates for intraMTA wireless-originated and CLEC terminated traffic, and stimulation schemes regarding this traffic, and urged the Commission to act quickly to address traffic pumping. In some of those meetings we were asked to address the Commission's ability to resolve these issues in a broader traffic pumping order issued in this docket. The Commission can, and should, proceed with this approach. IntraMTA wireless-CLEC traffic was specifically addressed in the Commission's 2007 notice of proposed rulemaking in this docket, making resolution of these issues in a broader traffic pumping order appropriate. *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989 (2007) ("*Traffic Pumping NPRM*").

The Administrative Procedure Act (APA) requires that the Commission provide fair notice and an opportunity for all interested parties to comment prior to issuing a new rule. 5 U.S.C. § 553. Courts have interpreted the APA to require that the Commission's final rules not "stray[] too far from the description contained in the initial notice." *Council Tree, et al. v. FCC*, 2010 U.S. App. LEXIS 17667, *35-36 (3d Cir. Aug. 24, 2010) (citations omitted). A notice that does not contain the text of a proposed rule must be "sufficient to fairly apprise interested parties of all significant subjects and issues involved." *NVE Inc. v. Department of Health & Human Services*, 436 F.3d 182, 191 (3d Cir. 2006) (citation omitted).

With respect to intraMTA wireless traffic, the *Traffic Pumping NPRM* satisfies this standard. The Commission expressly identified and asked for comment on potential solutions to all traffic stimulation practices in the NPRM. See *Traffic Pumping NPRM* ¶ 11 ("[W]e initiate a rulemaking proceeding to examine whether our existing rules governing the setting of tariffed rates by LECs provide incentives and opportunities for carriers to increase access demand endogenously. . .we tentatively conclude that we must revise our tariff rules so that we can be confident that tariffed rates remain just and reasonable even if a carrier experiences or induces significant increases in access demand."). The Commission's concerns about traffic pumping applied with equal force to intraMTA wireless traffic (*i.e.*, local or reciprocal wireless compensation traffic) and the *Traffic Pumping NPRM* expressly sought comment on these issues:

Other Intercarrier Issues. Finally, while the previous sections have addressed stimulation in the context of access charges, we are also interested in understanding the full breadth

of possible traffic stimulation activities. We, therefore, *invite parties to address whether carriers are adopting traffic stimulation strategies with respect to forms of intercarrier compensation other than interstate access charges*. We ask parties to identify situations in which this is occurring and to explain the physical provisioning and compensation arrangements that make these strategies work. Parties should also address what remedies may be available to the Commission to address such activities.

Traffic Pumping NPRM ¶ 38 (emphasis added) (citation omitted). The omitted citation in this paragraph of the NPRM is to a September 2007 letter from MetroPCS to then Chairman Martin, which highlighted the traffic pumping problems, and potential problems with intraMTA wireless traffic terminated by CLECs. *Traffic Pumping NPRM* ¶ 38 n.69 (citing Letter from Carl Northrop, MetroPCS, to Chairman Kevin Martin, FCC, WC Docket No. 07-135, at 2 (Sept. 7, 2007) (discussing ILEC and CLEC traffic pumping “kick-back” schemes and why these schemes are also a problem for wireless carriers terminating local or intraMTA traffic to LECs)). The 2007 MetroPCS letter cited in the *Traffic Pumping NPRM* also cited to MetroPCS’ then-pending complaint regarding these issues with a particular LEC.

In comments on the *Traffic Pumping NPRM*, parties did in fact discuss the traffic pumping and other problems associated with intraMTA wireless-CLEC traffic. *See, e.g.*, Comments of MetroPCS Communications, WC Docket No. 07-135, at 2 (Dec. 17, 2007); Reply Comments of CTIA at 3-4, 7-10 (Jan. 18, 2008); Reply Comments of Leap Wireless International, WC Docket No. 07-135, at 3 (Jan. 17, 2008). Then, following the Commission’s decision in *North County Communications Corp. v. Metro PCS California*, Memorandum Opinion and Order, 24 FCC Rcd 3807 (2009) (“*North County Order*”),¹ which declined to establish federal pricing rules for intraMTA wireless traffic, parties once again engaged in a robust exchange regarding intraMTA wireless traffic in this docket. *See, e.g.*, Letter from Donna Epps, Verizon, to Marlene Dortch, FCC, WC Docket No. 07-139 (March 26, 2010); Letter From Stephen Goodman, North County Communications, to Marlene Dortch, FCC, WC Docket No. 07-139 (June 15, 2010); Letter from Michael Hazzard, Pac-West, to Marlene Dortch, FCC, WC Docket No. 07-139 (Sept. 10, 2010) (attaching a Pac-West complaint filed against Verizon Wireless and others regarding intraMTA wireless-CLEC traffic in California); Letter from Scott Bergmann, CTIA, to Marlene Dortch, FCC, WC Docket No. 07-139 (Sept. 13, 2010). Multiple parties have also put the *North County Order* on the record in this docket.

¹ The full Commission subsequently upheld this part of the Enforcement Bureau’s *North County Order*. *See North County Communications Corp. v. Metro PCS California*, Order on Review, 24 FCC Rcd 14036 (2009).

Therefore, the Commission is on firm ground with respect to APA notice and comment requirements. The Commission can, and should, address intraMTA wireless-CLEC traffic in an order that follows from the *Traffic Pumping NPRM* in this docket. As CTIA has demonstrated in previous filings, traffic pumping schemes are proliferating across the country and Commission action in this area cannot wait for comprehensive intercarrier compensation reform. Consistent with the National Broadband Plan's recommendations, the Commission should take "interim steps to address ... access stimulation and to curtail business models that make a profit by artificially inflating the number of terminating minutes."² If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Scott K. Bergmann

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² National Broadband Plan at 145, Rec. 8.1.