

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	

**COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.
AND CRICKET COMMUNICATIONS, INC.**

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April 1, 2011

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AND CRICKET COMMUNICATIONS, INC.**

Leap Wireless International, Inc. and Cricket Communications, Inc. (together, “Leap”) submit these comments in response to the Commission’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking regarding reform of the Universal Service Fund (“USF”) and intercarrier compensation (“ICC”) system.¹ The NPRM and Further NPRM offer numerous constructive proposals for much-needed reform. Although long-term, comprehensive reform is critical, Leap strongly supports the Commission’s proposal to take immediate steps to curtail

¹ *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 a 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, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. Feb. 9, 2011) (“*USF/ICC NPRM and FNPRM*”).

arbitrage opportunities in connection with ICC by reducing traffic pumping and phantom traffic. Leap focuses here on those priority items, but Leap also supports the Commission's broader focus on rationalizing ICC and reforming USF in a technologically and competitively neutral manner.

INTRODUCTION AND SUMMARY

The Commission appropriately has centered its reform efforts on proposals that would improve efficiency, accountability, and fiscal responsibility through market-driven policies.² The USF/ICC system for years has been characterized by wasteful inefficiencies, arbitrage, and runaway growth in high-cost funding. The only way to reverse the trend is by taking decisive action to implement fiscally prudent, market-based policies that demand accountability from all participants.

There can be no question that comprehensive reform of the ICC and USF regimes is necessary. But the reality is that comprehensive reform will take several years to implement. In the interim, there are two important fixes that the Commission can and should make that will generate immediate benefits while remaining consistent with a long-term vision of comprehensive reform: (1) combating traffic-pumping schemes by barring revenue-sharing arrangements and creating other triggers for default rules that prevent profiteering, and (2) eliminating phantom traffic by requiring more accurate traffic signaling. These are reasonable interim steps to curb major arbitrage problems and to mitigate harmful and obvious inefficiencies.

Traffic pumping in particular has become a serious problem that costs Leap, and ultimately its subscribers, millions of dollars each year. Traffic pumping generates significant

² *USF/ICC NPRM and FNPRM*, ¶ 10.

access charges through false pretenses and then foists those costs onto other carriers and, ultimately, their subscribers. While the ultimate solution to the problem is to harmonize and reduce ICC rates and thereby eliminate arbitrage opportunities altogether, Leap strongly supports the NPRM's proposed interim steps of implementing default rates where certain triggers are met. As explained below, there is no reason for the Commission to rely on only one trigger. Employing multiple triggers will prevent efforts to evade the Commission's rules while providing predictability and clarity to the industry.

Leap similarly supports the NPRM's proposal to curb phantom traffic. There is no legitimate justification for masking calling party numbers or related call-identifying information. The Commission's proposal to require more reliable signaling information is sound, and the NPRM properly recognizes that the specific signaling information should be based on the particular protocol used. In Leap's view, the signaling requirement should be subject to a feasibility exception so that carriers are not obliged to replace or deploy costly new equipment to comply with these interim rules.

These interim steps to address traffic pumping and phantom traffic are sensible measures to ameliorate serious problems, and implementing them now will in no way interfere with the Commission's long-term reforms. To the contrary, these interim steps pave the way for the permanent reform that the Commission should aggressively pursue. Although these immediate actions should help curb the most pressing arbitrage problems, the system will remain vulnerable to gaming and inefficiency unless and until the Commission follows through with its plans to lower intercarrier compensation rates and harmonize divergent rate structures. The Commission should recognize that, despite its admirable goal of partnering with the states in pursuing reform, it cannot meaningfully eliminate inefficient rate disparities and achieve uniformity by attempting

to incentivize piecemeal reform at the state level. Instead, the Commission should rely on its authority under Section 251(b)(5) to impose a uniform rate scheme for all traffic (whether considered “local” or “toll”) as a matter of federal law, and clarify that CMRS carriers do not owe compensation in the absence of an interconnection agreement.

With regard to USF reform, the Commission should ensure that high-cost support is awarded based on an actual demonstration of need; the Commission should not simply presume that historic subsidy levels are proper or justified, particularly in light of the new revenue streams that are available to facilities-based broadband providers. Moreover, the only fiscally prudent, market-driven method to fund infrastructure deployment in unserved and underserved areas is to embrace whichever technology is the most efficient means to bring high-quality service to high-cost areas. Any reforms thus must be competitively and technologically neutral. Wireless carriers, which may have lower cost structures, often will provide the most efficient solutions for reaching unserved and underserved areas, and they should have the opportunity to obtain funding and provide needed services on the same terms and conditions as other carriers.

DISCUSSION

I. THE COMMISSION SHOULD ACT SWIFTLY TO PREVENT TRAFFIC PUMPING

In Leap’s experience, access stimulation or “traffic pumping” has become a serious problem. Today, free chat lines and free conference platforms generate massive one-way traffic flows, and often are based in rural locations precisely in order to reap high access fees. Rate-of-return carriers in rural areas that participate in traffic pumping schemes in effect are exploiting high access rates under false pretenses. While the chat line and conference services claim to be “free,” in reality they generate substantial terminating access charges and simply seek to pass those costs on to other carriers and end users. The costs of traffic pumping activities on Leap’s

network are borne by Leap and ultimately must be recovered from consumers, most of whom do not use these services. Leap's business model historically has focused on lower-income consumers who often cannot afford or qualify for services from other wireless providers, and traffic pumping creates additional economic hurdles that Leap must overcome in order to provide low cost, high quality service to consumers.

Leap recently commissioned a report to analyze the scope and costs of traffic pumping on its network. The report determined that, for Leap's June 2010 billing cycle, traffic pumping represented an estimated 16 percent of total domestic ICC charges for the month. These charges were dominated by a small number of LECs and chat lines or conference services: the top ten operating company numbers that appeared to be engaging in traffic pumping represented 91 percent of the total traffic pumping cases, and the top ten terminating phone numbers represented 38 percent of all traffic pumping cases. In addition, the traffic-pumping business model, which relies on exploiting regulatory loopholes, generates significant disputes between those who seek to pass unjustified costs onto others and the targets of those endeavors. Traffic-pumping disputes have forced Leap to expend significant resources on litigation and other efforts to resolve those disputes. The ongoing nature of these disputes drains resources that Leap otherwise would devote to operating its business, and generates additional costs that ultimately are passed onto end users. The Commission's *North County* decision³ exacerbates the problem by failing to clarify whether compensation is owed in the absence of a contract, and by leaving CMRS carriers subject to a potential patchwork of state requirements.

³ *North County Communications Corp. v. MetroPCS California LLC*, Order on Review, File No. EB-06-MD-007, 24 FCC Rcd 14036 (2009).

The NPRM proposes a number of potential “triggers” that would result in modified access charge rules where traffic pumping appears to be occurring.⁴ In Leap’s view, the NPRM offers several good proposals, but there is no reason to rely on only one trigger. The Commission’s principal suggestion—that the existence of a revenue-sharing arrangement constitutes a trigger—is a sound one. Revenue-sharing arrangements in the context of tariffed access charges are inherently suspect and are unlikely to be employed for legitimate reasons. A revenue-sharing trigger thus makes eminent sense. However, a revenue-sharing trigger can be evaded: if a traffic pumper becomes a CLEC or is acquired by a CLEC, then the revenue-sharing arrangement would disappear even though the access stimulation remained. Revenue sharing triggers also can be very difficult to administer because determining whether revenue sharing is occurring may require discovery obtained through an adversarial proceeding. For this reason, the Commission should employ other triggers that would apply to single-firm conduct in conjunction with a revenue-sharing trigger.

In this regard, Leap believes that the Commission should implement a ratio-based trigger that would be useful to identify potential access stimulation.⁵ Traffic pumping involving reciprocal compensation rates that apply to the exchange of traffic between CMRS providers and LECs is indeed increasing, and a significant divergence between the amount of a LEC’s terminating traffic and its originating traffic is a strong indicator of potential traffic pumping. A ratio of 3:1 provides generous leeway for legitimate fluctuations in traffic, and there is an overwhelming likelihood that traffic variation that reaches a 3:1 ratio is the product of traffic

⁴ *USF/ICC NPRM and FNPRM*, ¶¶ 659-675.

⁵ *Id.*, ¶ 672.

pumping. This ratio is consistent with the approach that the Commission implemented to identify ISP-bound dial-up traffic, a regime that has been effective in curbing arbitrage.⁶

Leap also agrees that other triggers are valuable and can be implemented in a manner that is reasonably targeted to identifying likely traffic pumping without penalizing normal growth or traffic fluctuation. Objective triggers such as spikes in traffic relative to a base period or unusually high mean talk times also may be useful. The key is that the Commission should employ multiple means to reduce the likelihood of evasion. Once an applicable trigger is met, the Commission should establish a low default rate, as it did when it addressed arbitrage in the dial-up Internet context.⁷ As discussed below, one of the principal defects in the current ICC system is the variation and complexity of rates and rate structures. An easy solution in the context of illegitimate conduct like traffic pumping is to establish a rule providing that, once a trigger is met, rates default to bill-and-keep or, in the alternative, a maximum of \$.0007. Any higher access rate for a one-way traffic flow in this context would make no sense, and would result in a rate that might well be too high to deter many traffic-pumping schemes. In any event, the default rule that applies once a trigger is met should be a predictable, uniform rate that is low enough to remove economic incentives to engage in traffic pumping.

Leap also urges the Commission to apply this solution not only to the exchange of interexchange traffic that is subject to access charges but also to the exchange of “local” traffic that is subject to reciprocal compensation. Although Leap has not entered into many intercarrier compensation agreements with traffic pumpers, the transaction costs of dealing with such carriers (through litigation, state PUC proceedings, etc.) have been quite high. There is no

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98; CC Docket No. 99-68, 16 FCC Rcd 9151, ¶ 79 (2001).

⁷ *Id.* ¶¶ 78, 85.

reason for the Commission not to extend any solution developed for access traffic to local traffic. In addition, Leap and other wireless carriers believed that the Commission's *T-Mobile Declaratory Ruling* decided the issue that no compensation obligation arises in the absence of an interconnection agreement;⁸ however, the Commission's recent decisions in the North County complaint against MetroPCS suggested that this is still an open issue. The Commission should include within its interim reforms a clear determination that, consistent with its decision in the *T-Mobile Declaratory Ruling*, no compensation is owed in the absence of an interconnection agreement.

II. THE COMMISSION SHOULD IMPOSE TRAFFIC-SIGNALING REQUIREMENTS TO CURB PHANTOM TRAFFIC

The Commission also should promptly implement its proposed solution for phantom traffic. There is no legitimate justification for intentionally disguising or altering identifying information other than as a means to avoid paying intercarrier compensation. Requiring all traffic to contain the calling party number or charge number, and prohibiting stripping or alteration of call signaling information, are easy and obvious solutions to the problem of phantom traffic.⁹ The Commission's proposal that the required signaling information vary based on the protocol by which the information is carried also appropriately recognizes the technical and practical differences among the protocols.¹⁰

In addition to the few limited exceptions identified by the Commission,¹¹ the Commission also should provide an exception when transmission of the required signaling

⁸ See *T-Mobile, et al., Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005).

⁹ *USF/ICC NPRM and FNPRM*, ¶ 626.

¹⁰ *Id.*, ¶¶ 627-630.

¹¹ *Id.*, ¶ 633.

information is not feasible based on the network technology that a carrier employs at the time of the call. When the Commission implements its broader rules, carriers may need to make substantial changes to their networks to comply with and take advantage of long-term reforms. But the rationale underlying the interim steps to address phantom traffic and traffic pumping is that they are relatively easy to implement. Carriers thus should not have to replace existing facilities or deploy costly new equipment to comply with these interim rules.

USF and ICC reform as a general matter require comprehensive reform. But there should be consensus in favor of taking relatively non-controversial interim steps that redress major arbitrage problems and that can be implemented with straightforward rules. Such interim steps are not a substitute for broader reform, but the proposed solutions will not impede or impact the long-term rules that will follow, regardless of the form that those rules ultimately will take.

III. ICC REFORM SHOULD FOCUS ON LOWER, MORE UNIFORM ACCESS CHARGES

While the proposed measures to address traffic pumping and phantom traffic will be beneficial, the long-term solution to these and other arbitrage problems depends on comprehensive ICC reform. Leap supports the Commission's long-term goals to rationalize the ICC rate structure. The major problems with the ICC system are that charges are too high and vary too much based on artificial factors. The patchwork rate structure must end, and the Commission should focus on lowering access charges to cost-based levels and making charges more uniform across jurisdictions and traffic types.

The current disparities among jurisdictions and traffic types create enormous inefficiencies. Such disparities create frequent regulatory disputes and litigation and continually spur arbitrage schemes, such as the recent proliferation of traffic pumping. As long as telecommunications traffic is subject to arbitrary rate distinctions, such problems will persist.

As the Commission suggests in the NPRM, one way to harmonize rates is a uniform federal system under Section 251(b)(5) of the Communications Act¹² that does not distinguish between local and access traffic. As the NPRM properly recognized, Section 251(b)(5)'s reference to "telecommunications" is not limited to particular services or by geographic constraints, and thus grants the Commission authority to regulate intrastate as well as interstate rates.¹³ In an era where communications will be dominated by broadband networks and IP-enabled services (which are national and often global in scope), historical geographic distinctions will cease to have meaning, making a federal approach to intercarrier compensation indispensable. The breakdown of traditional jurisdictional categories is particularly apparent in the wireless context. The Commission understandably would like to collaborate with the states to achieve a uniform system, but the reality is that the Commission lacks adequate tools to induce states to reform intrastate access charges. As recent history has shown, many states have exhibited a preference for maintaining inflated access charges as a means of propping up artificially low rates for wireline local telephone service. Genuine reform thus is likely to require preemption of state authority over intercarrier compensation rates.

As discussed below, the Commission should reexamine legacy high-cost USF mechanisms with a critical eye, and by the same token it should be skeptical of the notion that reductions in access charges warrant dollar-for-dollar replacement with new explicit support.¹⁴ In today's competitive marketplace, government revenue guarantees for ILECs (but not their competitors) are inappropriate. Just as high-cost outlays should be based on empirical evidence of need, an ILEC should be required to demonstrate that it lacks other means (such as increased

¹² 47 U.S.C. § 251(b)(5).

¹³ *USF/ICC NPRM and FNPRM*, ¶¶ 513-516.

¹⁴ *See, e.g., id.*, ¶¶ 585-602.

end user charges and revenues from other communications services) before any “make whole” funding is provided in response to long-overdue access charge reductions. At a minimum, the Commission should reject any proposal to provide recovery funding on a dollar-for-dollar basis. Any recovery instead should be based on transparent criteria and hard evidence that lack of additional subsidies would cause harm to consumers.

IV. THE COMMISSION’S TRANSITION TO A BROADBAND-FOCUSED SUBSIDY MECHANISM SHOULD BE COMPETITIVELY NEUTRAL AND FISCALLY RESPONSIBLE

Finally, Leap agrees that USF support should eventually transition to a broadband-focused mechanism that reflects the increasing migration from narrowband, voice-centric networks to converged broadband networks that support a range of IP-enabled services. The NPRM appropriately recognizes the increasingly essential role of broadband services for American consumers and businesses.¹⁵ Supporting broadband networks and services will advance important policy goals by increasing broadband availability and adoption.

While enabling broadband support and reducing legacy high-cost support are important goals, the Commission must pursue them in a technologically and competitively neutral manner. The central focus of high-cost support should be on promoting the deployment of high-quality services to high-cost areas in the most efficient way. Competitive and technological neutrality promotes entry, increases competition, and incentivizes efficient deployment of facilities by rewarding carriers that can deliver services at lower costs per “line.” Wireless carriers, which often have lower cost structures, in many situations will be able to provide the most efficient broadband deployment solutions. Any reform effort that is genuinely grounded in a market-based approach and that seeks to promote competition and efficiency cannot exclude or

¹⁵ *Id.*, ¶¶ 3-4.

disadvantage a class of providers that may be best positioned to reach unserved and under-served consumers at the lowest cost.

For this reason, although Leap appreciates the Commission's interest in establishing a Mobility Fund¹⁶ to support wireless infrastructure, Leap believes that it is unwise and inconsistent with the Commission's reform principles for wireless carriers to be cordoned off and limited to a separate funding mechanism. The Commission should consider developing a cost model to determine efficient support levels and then allow any carrier (whether wireline or wireless) to compete for customers and any associated per-line support, thus making subsidies truly portable. Alternatively, if the Commission authorizes only one Connect America Fund ("CAF") provider per unserved area,¹⁷ wireless carriers should have an equal opportunity to become that provider. If the Commission's goal is to support deployment of the most efficient technologies available to deliver affordable, high-quality broadband service, then wireless carriers should be fully eligible to participate in the CAF on the same footing as other carriers.

For these reasons, a right of first refusal for ILECs should be rejected out of hand.¹⁸ Such a built-in preference would unjustifiably skew subsidies in favor of incumbent carriers, whether or not they have demonstrated a need for funding or shown that they are the most efficient provider. Such favoritism would elevate individual competitors' interests over the public interest. Indeed, such an approach would simply cement the legacy inefficiencies that have caused much of the bloat in the system without examining whether alternative carriers or platforms would make better use of scarce funds.

¹⁶ See *id.*, ¶¶ 19, 21; see also *Universal Service Reform, Mobility Fund*, WT Docket No. 10-208, Notice of Proposed Rulemaking, 25 FCC Rcd 14716 (2010).

¹⁷ See *USC/ICC NPRM and FNPRM*, ¶¶ 281-283.

¹⁸ See *USC/ICC NPRM and FNPRM*, ¶¶ 431-447.

By the same token, if the Commission implements reverse auctions, the design must not favor ILECs. For example, the definitions of geographic areas should be competitively neutral, and not based on any particular provider's service territory. A geographic area that, for example, tracks ILEC study areas would give incumbents insurmountable advantages through a definition that bears no relationship to the goals of increasing deployment to unserved and underserved areas. Whether the Commission selects census blocks or any other metric, it should ensure that its chosen geographic area is neutral and does not favor any particular competitor.

Perhaps most importantly, the Commission cannot achieve meaningful reform without recognizing that legacy high-cost support should not continue to be provided based on assumptions of need, rather than demonstrated need. At this point, there is little reason to assume that legacy support levels are appropriate or justified. High-cost funding is not tied to the affordability of a carrier's rates, and thus is often excessive. Moreover, many high-cost support recipients have developed multiple, independent revenue streams—including voice, broadband, and in some instances advanced video services—and any evaluation of need should take a comprehensive look at ETCs' overall revenue opportunities. To achieve the Commission's stated goals of implementing market-based, fiscally responsible reforms, the Commission must link any high-cost outlays to demonstrated, empirical evidence that such outlays are necessary and efficient to achieve broadband deployment.

CONCLUSION

Leap is pleased to join the Commission's call for comprehensive reform of the USF and ICC system. The Commission should take immediate steps to reduce traffic pumping and eliminate phantom traffic. It also should implement long-term reforms that are competitively and technologically neutral, and fiscally sound. The Commission ultimately must lower and harmonize access rates, and reduce the size of high-cost funding.

Respectfully submitted,

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