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December 6, 2010

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

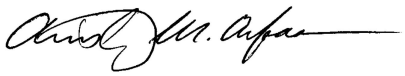
Re: Consolidated Communications Enterprise Services, Inc. v. Omnipoint Communications Inc. d/b/a T-Mobile, *et al.*, Docket No. C-2010-2210014

Dear Secretary Chiavetta:

I have attached for filing in the referenced matter the Preliminary Objections of T-Mobile, together with Notice to Plead and Certificate of Service, for electronic filing in the referenced matter. The Answer and New Matter of Respondents are being electronically filed today under separate cover.

Thank you for your attention to this matter. Please do not hesitate to contact me should you have any questions.

Very truly yours,



Christopher M. Arfaa

Attachments

cc: Norman J. Kennard, Esq.
Charles E. Thomas, III, Esq.

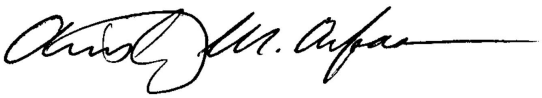
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

CONSOLIDATED COMMUNICATIONS ENTERPRISE SOLUTIONS, INC., Complainant, v. OMNIPOINT COMMUNICATIONS INC. d/b/a T-MOBILE, OMNIPOINT COMMUNICATIONS ENTERPRISES LP d/b/a T-MOBILE, and VOICE STREAM PITTSBURGH LP d/b/a T-MOBILE or such other affiliated entities as are involved in the provision of CMRS service and the delivery of intrastate traffic to CCES, Respondents	Docket No. C-2010-2210014 (*Electronic Filing*)

NOTICE TO PLEAD

TO: **Consolidated Communications Enterprise Solutions, Inc.**

You are hereby notified that, if you do not file a written answer to the attached Preliminary Objections of T-Mobile within **ten (10) days** from service, the assigned Presiding Officer and/or the Commission may to rule upon the Preliminary Objections without additional input. All pleadings, such as an answer to the enclosed Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned attorney for Respondents.



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PRELIMINARY OBJECTIONS OF T-MOBILE

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CONTENTS

Pursuant to 52 Pa. Code § 5.101, respondents Omnipoint Communications Inc. d/b/a T-Mobile, Omnipoint Communications Enterprises LP d/b/a T-Mobile, and Voice Stream Pittsburgh LP d/b/a T-Mobile, on behalf of themselves and their affiliates involved in the provision of CMRS service in Pennsylvania and the delivery of intrastate traffic to complainant Consolidated Communications Enterprise Services, Inc. ("CCES") (collectively, "T-Mobile"), submit the following Preliminary Objections in response to the complaint filed by CCES in the above-captioned proceeding (the "Complaint").[1] T-Mobile respectfully requests that the Complaint be dismissed both for lack of subject matter jurisdiction and for legal insufficiency.

I. INTRODUCTION

1. Complainant CCES is a competitive local exchange carrier (a "competitive LEC" or "CLEC"). Respondent T-Mobile is a provider of mobile wireless telecommunications services known as commercial mobile radio services ("CMRS"). To date, CCES and T-Mobile have been exchanging intraMTA traffic[2] pursuant to a bill-and-keep arrangement, whereby each carrier recovers from its own customers the costs in handling calls originating on its respective network. Congress has determined that such bill-and-keep arrangements are an appropriate method for LECs (like CCES) to meet their statutory reciprocal compensation obligation.[3]

2. CCES dislikes the current reciprocal arrangement, so it has filed this action to compel T-Mobile to pay exorbitant rates for termination of intraMTA calls originating on T-

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[1] The Commission served the Complaint on T-Mobile on November 16, 2010 via certified mail pursuant to 66 Pa. C.S. § 702 and 52 Pa. Code § 153(c).

[2] "IntraMTA traffic" is telecommunications traffic that originates and terminates within the same Major Trading Area, a geographic unit defined by the FCC. Traffic that is originated or received by a CMRS end-user to or from a caller in the same MTA, like wireline "local" traffic, is subject to reciprocal compensation rather than access charges. *See* 47 C.F.R. § 51.701(b)(2).

[3] *See* 47 U.S.C. § 252(d)(2)(B)(i).

Mobile's wireless network, despite the absence of any legal obligation to do so. The Complaint asks the Commission to direct T-Mobile to pay CCES's exorbitant, so-called "reciprocal compensation" rate of $.0192 for terminating traffic supposedly originated by T-Mobile, not only prospectively but "since 2003" (*see* Complaint, ¶¶ 11-12 and ¶ 20).[4] In the alternative, the Complaint asks the Commission either to allow CCES to tariff this rate or to determine the rates, terms and conditions of the parties' exchange of intraMTA traffic.

3. The Complaint should be dismissed for lack of subject matter jurisdiction because the Commission lacks the legal authority to adjudicate the alleged disputes. In the alternative, it should be dismissed for legal insufficiency, either because the Commission lacks the statutory authority to grant the requested relief or because the Complaint fails to state a legally cognizable claim for such relief.

4. ***First,*** the Commission lacks authority under Pennsylvania law to adjudicate this matter. This is not a simple billing dispute. The Complaint asks the Commission to determine the terms and conditions of CMRS-CLEC interconnection. An order granting such relief would not only determine T-Mobile's reciprocal compensation obligations but also regulate the rates, terms and conditions governing T-Mobile's completion of calls from CCES customers to T-

[4] Because this dispute is governed by federal law, the Communications Act's two-year statute of limitations -- 47 U.S.C. § 415 – applies. *See, e.g., AirTouch* v. *Pacific Bell*, 16 FCC Rcd 13502, 13505 n.24 (2001) (This statute bars recovery of intercarrier compensation prior to "two years back from the filing of the complaint."). Thus, T-Mobile is not liable to CCES for charges accrued before November 12, 2008 (two years before the date the Complaint was filed).

Moreover, for many reasons, CCES also is not entitled to recover any intercarrier compensation for the past two years. These reasons become relevant, however, only if the Commission determines it has jurisdiction over the subject matter of the Complaint and authority to grant the relief requested, so T-Mobile will address this matter, if necessary, at a later date.

Mobile's customers. The Public Utility Code clearly exempts CMRS providers from such regulation.[5]

5. ***Second,*** federal law governs a CMRS provider's reciprocal compensation obligations.[6] Moreover, the Federal Communications Commission ("FCC") has reserved to itself the right to determine the existence and extent of a CMRS provider's liability to a CLEC for terminating traffic originated by the CMRS provider.[7] Therefore, the Commission lacks authority to "direct" T-Mobile to pay CCES's invoices.[8]

6. ***Third,*** federal law prohibits this Commission from "confirming" CCES's so-called "reciprocal compensation rate" of $.0192 per minute.[9] The Complaint does not explain how CCES developed this rate,[10] nor does it explain how the Commission can possibly "confirm" this rate as "reasonable compensation" when it is ***over six times higher*** than the rate CCES has most recently proposed to T-Mobile.[11] The FCC has recognized that even

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[5] 66 Pa. C.S. § 102(2)(iv) (The term "public utility" does not include "[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service."). See *infra* ¶¶ 16-19.

[6] 47 C.F.R. § 20.11. See *infra* ¶¶ 20-35.

[7] *See North County Communications Corp. v. MetroPCS California, LLC,* Memorandum Opinion and Order, 24 FCC Rcd 3807 (Enf. Bur. 2009); *North County Communications Corp. v. MetroPCS California, LLC,* 24 FCC Rcd 14036 (2009). See *infra* ¶¶ 36-43.

[8] See *infra* ¶¶ 44-49.

[9] See *infra* ¶¶ 50-54

[10] If, as T-Mobile suspects, this is CCES's intrastate access rate, this CCES proposal is patently unlawful under federal law. *See, e.g., Local Competition Order,* 11 FCC Rcd 15499, 16016 ¶ 1042 (1996) (Traffic that "originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.") (subsequent history omitted).

[11] CCES has proposed a "traffic exchange agreement" that contains a reciprocal compensation rate of less than one-third of a penny ($0.003) per minute. *See* CCES Complaint, Appendix A, Proposed Agreement at 28.

competitive LECs possess a monopoly over call termination, and it appears CCES wants this Commission to sanction its exercise of its monopoly power.[12]

7. More fundamentally, federal law provides that "only that part of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an 'additional cost' to be recovered through termination charges."[13] CCES, while seeking the exorbitant rate of $.0192 per minute, does not allege that it incurs ***any*** additional costs in terminating a minute of T-Mobile's traffic, much less $.0192. This is entirely consistent with the FCC's determinations that LECs using modern digital switching (like CCES) do not incur any additional costs in terminating traffic from other carriers, and that as a result, a LEC's rate for reciprocal compensation should be set at the rate of ***zero***.[14] The Complaint is devoid of

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The Commission should be aware that there are many problems with CCES's proposed agreement. T-Mobile will address those problems if and when necessary.

[12] *See, e.g., ACS of Anchorage*, 22 FCC Rcd 16304, 16304 ¶ 59 (2007) ("[A]ll LECs have monopoly power over the rates that they charge carriers wishing to terminate calls to their end user customers."); *Eighth Access Charge Reform Order*, 19 FCC Rcd 9108 ¶ 17 (2004) ("[I]t is necessary to constrain the ability of competitive LECs to exercise this monopoly power.").

The FCC has further recognized that bill-and-keep is an effective way to control this LEC monopoly power over call termination. *LEC/CMRS Interconnection NPRM*, 11 FCC Rcd 5020, 5055 ¶ 75 (1996) ("[A] bill-and-keep arrangement . . . would preserve the primary role of negotiations between the parties in reaching interconnection arrangements, but would limit the LEC's ability to exercise its market power, while simultaneously creating an incentive for it to negotiate a satisfactory rate expeditiously.")

[13] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16025 ¶ 1057 (1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)

[14] *See Virginia Arbitration Cost Order*, 18 FCC Rcd 17722, 17877 ¶ 391, 17903-04 ¶¶ 463-65, 17911-13 ¶¶ 484-89 (2003); *Virginia Arbitration Compliance Filing Order*, 19 FCC Rcd 1259, 1269 ¶ 30 (2004) ("To avoid any confusion on this matter, we reiterate that Verizon may *not* include end-office switching or end-off trunk port costs in its reciprocal compensation rates. We therefore set the Meet-Point A reciprocal compensation rate at zero ($0.00)."") (italics in original; underscoring added); *Further Virginia Arbitration Cost Compliance Filing Order*, 20 FCC Rcd 5279, Appendix A, No. 1.A.I (2005) (Local traffic termination rate: "$0.000000 per MOU.").

any factual allegation that would permit even an inference that CCES incurs ***any*** additional costs when it terminates T-Mobile's traffic, much less $.0192 per minute. CCES's request that the Commission "confirm" its so-called "reciprocal compensation rate" is therefore legally insufficient.

8. ***Fourth***, federal law prohibits the use of tariffs to impose traffic termination rates on CMRS providers.[15] Therefore, the Commission cannot grant CCES's request for permission to set its wireless-traffic termination rate via tariff.[16]

9. ***Fifth***, state and federal law independently prohibit the Commission from granting CCES's indirect request for an order compelling T-Mobile to enter into a compensation agreement. Federal law provides that the existence and extent of T-Mobile's obligation to enter into such an agreement is a matter for the FCC, and the Pennsylvania Public Utility Code exempts CMRS providers from Commission regulation.[17]

10. ***Sixth,*** the Commission lacks authority to establish a reciprocal compensation rate in this proceeding. Although the FCC has suggested that state commissions may determine CLECs' "reasonable compensation" rates for terminating CMRS traffic pursuant to available state-law procedures other than tariffing, Pennsylvania law does not provide a non-tariff

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Federal appellate courts, in affirming PUC orders that have also directed LECs to use bill-and-keep in the absence of additional cost evidence, have held that under federal law, "if no additional costs are incurred, there is nothing to pay." *Ace Telephone* v. *Koppendrayer*, 432 F.3d 876, 881(8th Cir. 2005), *aff'g Investigation into Reciprocal Compensation Rates*, 2003 Minn. PUC LEXIS 99 (Sept. 24, 2003), *recon. denied*, 2003 Minn. PUC LEXIS 144 (Dec. 24, 2003).

[15] 47 C.F.R. § 20.11(d).

[16] See *infra* ¶¶ 55-57.

[17] See *infra* ¶¶ 58-62.

mechanism for setting a local exchange carrier's rates.[18] Furthermore, the Public Utility Code expressly excludes CMRS providers from PUC regulation.[19] Therefore, the Commission lacks statutory authority to establish the rates for termination of traffic exchanged between CLECS and CMRS providers.[20]

* * *

11. As the California Public Utilities Commission recently observed, absent a prior FCC determination that the CMRS provider is required to pay cash compensation in addition to the in-kind compensation provided by a bill-and-keep arrangement, it serves no purpose for a state commission to determine a CLEC's rate for terminating a CMRS provider's traffic.

> [I]t would certainly be unwise to proceed with a consideration of this application without a clear commitment from the FCC to use the results of California's regulatory efforts and a determination that MetroPCS is liable for payment to North County.[21]

Here, it would be not only unwise for the Commission to entertain CCES's requests in contravention of federal and state authority – it would be unlawful.

12. It is important to emphasize that dismissal of the Complaint as required by state and federal law will not leave CCES without a remedy. While state commissions in general do

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[18] *See* 66 Pa. C.S. §§ 1302 (public utilities must tariff their rates), 1303 (public utilities may not charge rates other than tariffed rates); 1308 (PUC review of voluntary changes to tariffed rates); 1309 (tariffed rates fixed on complaint pursuant to PUC investigation).

[19] 66 Pa. C.S. § 102(2)(iv) (The term "public utility" does not include "[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service."). See *infra*, ¶¶ 16-19.

[20] See *infra* ¶¶ 63-65.

[21] *Application of North County Communications*, Application 10-01-003, Decision Dismissing Application Without Prejudice Due To Pendancy [sic] Of Federal Proceedings (Cal. P.U.C. issued June 7, 2010) slip op. at 16 ("*NCC California Decision*") (a copy of this decision is attached hereto as Attachment A).

not have the authority to enforce FCC rules, and this Commission in particular does not have authority to set CCES's termination rate in this proceeding, the FCC certainly possesses such authority. In the end, the fundamental mistake CCES has made is that it filed its Complaint in the wrong forum.

II. THE COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION OR, ALTERNATIVELY, FOR LACK OF LEGAL SUFFICIENCY

A. THE COMMISSION MAY DISMISS A COMPLAINT WITHOUT A HEARING PURSUANT TO PRELIMINARY OBJECTIONS

13. Section 703 of the Pennsylvania Public Utility Code allows the Commission to dismiss a complaint without a hearing if it determines such a hearing "is not necessary in the public interest."[22] The Commission's Rules of Administrative Practice and Procedure thus permit the filing of Preliminary Objections seeking dismissal of a complaint for legal insufficiency or lack of subject matter jurisdiction.[23]

14. "[T]he Commission must act within, and cannot exceed its jurisdiction."[24] Thus, a preliminary objection under 52 Pa. Code § 5.101(a)(1) challenging the Commission's subject matter jurisdiction will be sustained, and the complaint dismissed, where the Commission lacks statutory authority to adjudicate the alleged dispute.[25]

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[22] 66 Pa. C.S. § 703(b).

[23] *See* 52 Pa. Code §§ 5.101(a)(l), 5.101(a)(4).

[24] *Agron Vata v. Philadelphia Gas Works*, Docket No. C-2009-2149960, 2010 WL 3418411 (Pa. P.U.C. August 18, 2010) (citing *City of Pittsburgh v. Pennsylvania Pub. Util. Comm'n*, 157 Pa. Super. 595, 43 A.2d 348 (1945)).

[25] *See e.g., id.* (complaint dismissed for lack of subject matter jurisdiction where Commission lacked statutory authority to adjudicate disputes over validity and enforceability of municipal utility's liens).

15. A preliminary objection challenging the legal sufficiency of a complaint before the Commission is analogous to the preliminary objection (in the nature of demurrer) authorized by the Pennsylvania Rules of Procedure. For the purpose of testing the legal sufficiency of the challenged pleading, a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, and every inference deducible from those facts. The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer. Therefore, the preliminary objection will be sustained if the factual allegations of the complaint are legally insufficient to establish the complainant's right to the requested relief.[26]

B. THE COMMISSION LACKS JURISDICTION UNDER STATE LAW TO DETERMINE THE INTERCONNECTION OBLIGATIONS OF CMRS PROVIDERS

16. The Complaint asks the Commission to determine T-Mobile's reciprocal compensation obligations when delivering traffic to CCES for termination (Complaint, ¶¶ 20, 33, Request for Relief 2). It also asks the Commission to determine the terms and conditions of T-Mobile's provision of call termination services when CCES delivers traffic to T-Mobile for termination (Complaint, ¶ 21). As argued below, the Complaint must be dismissed because federal law reserves such determinations to the FCC. However, a more immediate problem is that the Commission lacks jurisdiction under Pennsylvania law to regulate CMRS providers.

17. The Commission is a "legislative creation," and "any powers [it] exercises must be found in the expressed words of the enabling statute or by strong and necessary implication when required for its expressed powers." [27] The Pennsylvania Supreme Court has emphasized

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[26] *Marinoff v. Bell Telephone Co. of Pennsylvania* 75 Pa. P.U.C. 489, 491, 1991 WL 474858 (1991); *Agron Vata v. Philadelphia Gas Works*, Docket No. C-2009-2149960, 2010 WL 3418411 (Pa. P.U.C. August 18, 2010).

[27] *Fairview Water Co. v. Pennsylvania Pub. Util. Comm'n*, 509 Pa. 384, 391, 502 A.2d 162, 165-66 (1985).

that "[t]he grant of power by the legislature to an administrative commission must be precise. 'The power and authority must be conferred by legislative language clear and unmistakable. A doubtful power does not exist. Such tribunals are extrajudicial. They should act within the strict and exact limits defined.' "[28]

18. Here, Pennsylvania law does not authorize the Commission to regulate CMRS providers, either by complaint or otherwise. Section 501 of the Public Utility Code authorizes the Commission to supervise and regulate "public utilities."[29] Similarly, sections 701-703[30] empower the Commission to adjudicate complaints against a "public utility."[31] However, the term "public utility" does not include "[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service."[32] Accordingly, the Pennsylvania Supreme Court has held that since CMRS providers are "[c]learly . . . excluded from the definition of public utility," they are "not regulated by the Public Utility Commission."[33] The decisions of the Commonwealth and Superior Courts are in accord.[34] Indeed, the Commission itself has confirmed that CMRS providers are "completely exempt" from Commission regulation[35] in a variety of contexts.[36]

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[28] *Process Gas Consumers Group v. Pennsylvania Pub. Util. Comm'n*, 511 Pa. 88, 96, 511 A.2d 1315, 1319 (1986) (citation omitted).

[29] 66 Pa. C.S. § 501(b).

[30] *Id.* § 701-703.

[31] *See id.* § 701.

[32] *Id.* § 102(2)(iv) (relating to definition of "Public Utility").

[33] *Crown Communications v. Zoning Hearing Bd.*, 550 Pa. 266, 273, 705 A.2d 427, 431 (1997).

[34] *See, e.g., Bell Atlantic – Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, 763 A.2d 440, 499 (Pa. Commw. 2000) ("an entity engaged in wireless communications exclusively, *i.e.* any person not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service is ***not within the definition of public utility subject to PUC jurisdiction***"), *vacated in part on other grounds sub nom. MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Comm'n*, 577 Pa. 294, 844 A.2d

19. Since the Complaint asks that the Commission regulate the interconnection, call termination and reciprocal compensation obligations of a carrier that is "completely exempt" from Commission regulation, it must be dismissed for lack of subject matter jurisdiction.

C. THE EXISTENCE AND EXTENT OF T-MOBILE'S OBLIGATION TO COMPENSATE CCES, IF ANY, IS GOVERNED EXCLUSIVELY BY FEDERAL LAW

20. CCES asserts (without citing to any supporting authority) that there has been "no federal preemption of the Commission's ability to address the subject matter of this complaint" (Complaint, ¶ 24). This is incorrect. Congress in 1993 amended the Communications Act so as to enable the FCC to establish a "Federal regulatory framework" for all mobile wireless services, and, in 1996, Congress federalized all aspects of interconnection and intercarrier compensation.

1239 (2004) (emphasis added); *Aronson v. Sprint Spectrum, L.P.*, 767 A.2d 564, 572 (Pa. Super. 2001) ("[T]he Commonwealth ***does not regulate*** Sprint Spectrum.") (emphasis added).

[35] *In re Omnibus Budget Reconciliation Act of 1993, Docket Nos.* L-00950104; M-00950695, Tentative Order, 1998 WL 842357 at *8 (Pa. P.U.C. Sept. 18, 1998), *published at* 28 Pa. Bull. 6309 (Dec. 24, 1998).

[36] *See, e.g., Passarell v. AT&T Wireless Servs., Inc.*, 98 Pa. PUC 389, 2003 WL 23484584 (Aug. 14, 2003) (dismissing complaint concerning rate and billing matters of CMRS provider for lack of jurisdiction); *Aronson v. Sprint Spectrum, L.P.*, 767 A.2d 564, 569 (Pa. Super. 2001) ("[U]nless a provider of cellular service is 'otherwise a public utility,' it does not become a regulated public utility under this Commission's jurisdiction merely because it provides cellular service to the public for compensation. . . . [T]hus, Sprint Spectrum, L.P. is not a 'public utility' within the meaning of the Code . . . . [T]he complaint *sub judice* must be dismissed for lack of jurisdiction.") (quoting Commission order); *Electronic Transaction Auditing of Telephone Customer Proprietary Information*, Doc. No. L-00970123, 29 Pa. B. 5564 (1999) ("Cellular, PCS, and switched packet systems, including the internet, carry an increasing share of voice communications. While the FCC, with authority based on the federal Communications Act, may have jurisdiction to regulate all these modes of communication, ***we do not.***") (emphasis added); Tentative Order, *In re Implementation of the Omnibus Budget Reconciliation Act of 1993*, Docket Nos. L-00950104, M-00950695, 1998 WL 842357 Pa. PUC Sept. 18 1998) (PUC does not regulate PCS services); Order, *In re Implementation of the Omnibus Budget Reconciliation Act of 1993*, Docket Nos. L-00950104, M-00950695, 1995 WL 944903 (Pa. PUC June 16, 1995) (recognizing deregulation of cellular services); *See also* 52 Pa. Code § 63.162 ("wireless carriers are exempt from [the Commission's universal service fund regulations] under 66 Pa. C.S. § 102(2)(IV) (relating to definitions)").

21. **The 1993 Budget Act and the FCC's Implementing Part 20 Rules.** Historically, under the Communications Act of 1934, the FCC possessed exclusive jurisdiction over interstate telecommunications services, while state commissions possessed exclusive jurisdiction over intrastate services[37] – unless there was a conflict, in which case the FCC could preempt the states under the conflict preemption doctrine.[38] Congress fundamentally changed this historical division of regulatory authority over wireless services in the Omnibus Budget Reconciliation Act of 1993.[39]

22. In this 1993 Act, Congress amended sections 2(b) and 332(c) of the Communications Act to revise the way in which "commercial mobile services" are regulated.[40] Congress took this action so the FCC could "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[41] One of the findings Congress explicitly made was that "State regulation can be a barrier to the development of competition in this [wireless] market" and that as a result, a "uniform national policy is necessary and in the public interest."[42]

23. The 1993 amendments changed in three ways the historic line of demarcation between federal and state authority over mobile wireless services:

> (1) Congress expanded FCC authority over wireless to include not only interstate wireless traffic but also intrastate wireless traffic. Congress accomplished this by adding section 332 to the opening

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[37] *See* 47 U.S.C. § 152(a)-(b).

[38] *See, e.g., Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986).

[39] *See* Omnibus Budget Reconciliation Act of 1993, PUB. L. NO. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

[40] The FCC immediately began using the phrase, commercial mobile radio service (CMRS), rather than the statutory phrase, commercial mobile service (CMS).

[41] H.R. CONF. REP. NO. 103-213, at 490 (Aug. 4, 1993).

[42] *See* S.1134, Title IV, § 402(13) (June 22. 1993), *incorporated by reference in* H.R. CONF. REP. NO. 103-213 at 481.

clause of section 2(b) of the Act, which had the effect of exempting wireless traffic from section 2(b)'s general prohibition of the FCC exercising regulatory authority over intrastate traffic.[43]

As a result, the FCC and the states now share regulatory authority over intrastate wireless, while the FCC continues to possess exclusive authority over interstate wireless services. In other words, the historical distinction – the FCC controls interstate services while PUCs control intrastate services – no longer applies to wireless services, as Congress expressly extended the FCC's plenary authority over all wireless services;

(2) Congress reduced state authority over intrastate wireless services by prohibiting states from regulating CMRS entry or rates[44]. This action had the effect of giving the FCC exclusive authority over CMRS entry and rates, including entry and rates pertaining to intrastate wireless services;[45] and

(3) While states still possess regulatory authority over intrastate wireless "other terms and conditions," exercise of that authority must be consistent with the terms and conditions the FCC establishes for wireless services, as only the FCC was given the Congressional mandate to establish a "Federal regulatory framework" for CMRS.

24. In sum, any regulation that the FCC adopts for wireless necessarily applies to all wireless services – including intrastate wireless services. As the federal courts have confirmed, "[b]ecause Congress expressly amended section 2(b) to preclude State regulation of entry of and rates charged by Commercial Mobile Radio Service (CMRS) providers, *see* 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the [FCC] has the authority to issue the rules of special concern to the CMRS providers."[46]

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[43] *See* 47 U.S.C. § 152(b); H.R. CONF. REP. NO. 103-213 at 497.

[44] 47 U.S.C. § 332(c)(3)(A).

[45] *See Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1441 (1994) ("*Second CMRS Order*").

[46] *Iowa Utilities Bd.* v. *FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *aff'd in part and rev'd in*

25. The FCC, in its 1994 *Second CMRS Order*, adopted its Part 20 rules to implement the 1993 Act.[47] One of the rules the FCC adopted was Rule 20.11, which included at the time two paragraphs only:

> (a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. Complaints against carriers under section 208 of the Communications Act, 47 U.S.C. 208, alleging a violation of this section shall follow the requirements of Sec. 1.711-1.734 of this chapter, 47 CFR 1.711-1.734.
>
> (b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.
>
> (1) A [LEC] shall pay reasonable compensation to a [CMRS] provider in connection with terminating traffic that originates on facilities of the [LEC].
>
> (2) A [CMRS] provider shall pay reasonable compensation to a [LEC] in connection with terminating traffic that originates on the facilities of the [CMRS] provider.

26. The FCC basically did two things in adopting Rule 20.11: (1) it codified its 1986 "Policy Statement on Interconnection of Cellular Systems," and its 1987 Interconnection Declaratory Order;[48] and (2) it expanded a LEC's duties, previously limited to cellular carriers only, to all wireless (or CMRS) carriers. The FCC adopted this Rule because incumbent LECs were still refusing to provide the type of interconnection that wireless carriers desired and still refusing to provide reciprocal compensation. As the FCC explained in 1996:

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part on other grounds sub nom. AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999); *see also Unified Intercarrier Compensation NPRM*, 16 FCC Rcd 9610, 9640 ¶ 84 (2001).

[47] *See Second CMRS Order*, *supra* n.45.

[48] *See Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 R.R.2d 1275, FCC 86-85, 1986 FCC LEXIS 3878, Appendix B, (March 5, 1986); *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910 (1987), *on recon.*, 4 FCC Rcd 2369 (1989) ("*Interconnection Declaratory Order*").

> Based on the extensive record in the LEC-CMRS Interconnection proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules.[49]

27. **The 1996 Act and the FCC's Implementing Part 51 Rules**. In 1996, Congress "federalized" interconnection and intercarrier compensation.[50] As the U.S. Supreme Court held in affirming the FCC's authority to adopt governing rules that states must follow (including for intrastate traffic):

> But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.[51]

28. While Congress empowered state commissions to arbitrate interconnection disputes (at least so long as one of the parties was an ILEC), it required PUCs to apply federal law in arbitrating these disputes and specified that federal (vs. state) courts would hear all appeals of arbitration orders.[52] In contrast, Congress decided not to provide a remedy for

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[49] *Local Competition Order*, 11 FCC Rcd 15499, 16043 ¶ 1094 (1996). It bears noting that while Rule 20.11 uses the term, LECs, CLECs did not exist at the time, so the term was intended to apply to incumbent LECs.

[50] *See Illinois Bell* v. *Global NAPS*, 551 F.3d 587 594 (7th Cir. 2006) (The 1996 Act "directly controls intrastate issues that were once the exclusive province of the states. To that extent, the Act federalizes these local interconnection issues."); *MCI* v. *Bell Atlantic-Pennsylvania*, 271 F.3d 491, 509 (3d Cir. 2001) ("[W]ith the 1996 Act, Congress federalized the regulation of competition for local telecommunications service. The Act preempted the regulation of interconnection agreements and of the terms on which a CLEC can provide competitive local service.").

[51] *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366, 380 n.6 (1999) (italics in original).

[52] *See* 47 U.S.C. §§ 252(c), 252(e)(4), 252(e)(6).

disputes between competitive carriers (such as CCES and T-Mobile) – and for such disputes, Congress did not empower state regulators to enforce federal law.[53]

29. Congress adopted several additional provisions in the 1996 Act of relevance to interconnection and intercarrier compensation, including:

- It subjected all traffic terminated by a LEC to the reciprocal compensation regime[54] – with a temporary grandfather provision for access charges;[55]
- It imposed the reciprocal compensation obligation on LECs only, and not on wireless carriers;[56]
- It established a federal standard for reciprocal compensation if the rate is in dispute – the "additional cost" standard;[57] and
- It further recognized that bill-and-keep is an acceptable way for LECs to meet their reciprocal compensation duty.[58]

30. The FCC, in its 1996 *Local Competition Order*, adopted numerous rules, in Part 51, to implement the 1996 Act. Some of the rules of relevance that the FCC adopted include:

- LECs cannot impose access charges on wireless intraMTA traffic;[59]

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[53] While CCES complains it "lacks any bargaining power" in dealing with T-Mobile (Complaint, ¶ 19), it neglects to point out that the reverse is also the case – namely, T-Mobile lacks any bargaining power in dealing with CCES. In not adopting a dispute resolution process for disputes involving two competitive carriers, Congress obviously determined that standard interconnection arrangements should govern in this situation unless both competitive carriers agree to use different arrangements.

[54] *See* 47 U.S.C. § 251(b)(5).

[55] *See id.* § 251(g).

[56] *See id.* §§ 153(26), 251(b)(5); *see also Local Compensation Order,* 11 FCC Rcd at 15517 ¶ 34, 15994 ¶ 1004.

[57] *See* 47 U.S.C. § 252(d)(2)(A)(i). There is a reason this "additional cost" standard applies to ILECs only: Congress developed this standard for use in § 252 arbitrations, and it decided that these arbitrations should be used only when an ILEC is a party. There is no reason to believe, however, that a different standard should be used with CLECs (and, in fact, the FCC applied this standard in Rule 51.711(b)). Indeed, to allow a CLEC to receive more than its additional costs of termination would permit the CLEC to both receive implicit subsidies in contravention of the Act and allow the CLEC to exercise its monopoly power over call termination.

[58] *See* 47 U.S.C. § 252(d)(2)(B)(i).

[59] *See* 47 C.F.R. § 51.701(b)(2). In taking this action, the FCC specifically invoked its statutory

- The statutory "additional cost" standard limits LECs to recovering their traffic sensitive costs of end office switching;[60] and
- Rule 51.711(b), which governs how intercarrier compensation will be developed in disputes between two competitive carriers (like a CLEC and a wireless carrier), specifies that the rate shall be based on "forward-looking costs" – the same standard used with ILECs.

31. Also of importance, the FCC amended Rule 20.11 by adding a new paragraph (c), so as to make clear these Part 51 rules also apply to the interconnection between a LEC and a wireless carrier. Rule 20.11(c) provides:

> Local exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51 of this chapter.

The FCC explicitly noted that the terms "reciprocal compensation" in the 1996 Act and "mutual compensation" in Rule 20.11 are "synonymous," as both "mean that compensation flows in both directions between interconnecting networks."[61]

32. As CCES has recognized,[62] by adding Rule 20.11(c), the FCC made clear that Rule 20.11 must be read and applied in light of the requirements in the 1996 Act and the Part 51 rules. Consequently, among other things:

- Bill-and-keep is an acceptable arrangement for a LEC like CCES to meet its reciprocal/mutual compensation obligation;
- The term "reasonable compensation" in Rule 20.11(b), which the FCC did not define in the original version of the Rule, must now be determined by

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authority to revoke the section 251(g) access charge exemption from reciprocal compensation for intraMTA traffic. *See Local Competition Order,* 11 FCC Rcd at 16016 ¶ 1043; *ISP Remand Order,* 16 FCC Rcd 9151, 9173-74 ¶ 47 (2001).

[60] *See* 47 C.F.R. 51.701(b)(2); *Local Competition Order*, 15 FCC Rcd at 16024 ¶ 1057 (1996).

[61] *Local Competition Order,* 11 FCC Rcd at 16044 ¶ 1094 n.2633.

[62] *See* CCES Letter to T-Mobile, at 1 (Dec. 23, 2009) ("It is clear that Part 51 of the [FCC's] rules are applicable to traffic exchanges between Consolidated and T-Mobile."), Appendix A to CCES's Complaint.

the statutory "additional cost" standard and the FCC's implementing "only end-office switching traffic sensitive costs" standard; and

- The FCC affirmed in Rule 20.11(e) that two competitive carriers (like a CLEC and CMRS carrier) cannot invoke the section 252 arbitration procedure.

33. **The FCC's 2005 *T-Mobile Order*.** The FCC entered this order in response to a petition that T-Mobile had filed. T-Mobile filed its petition because some LECs were beginning to exercise their monopoly over call termination by filing intraMTA tariffs where LECs set unilaterally the rates that wireless carriers supposedly were to pay – rates that were inflated because they bore no relationship to the LEC's actual costs of termination. The problem arose because wireless carriers could not reciprocate (by filing their own tariffs), as FCC rules prohibited wireless carriers from filing tariffs.[63] The FCC granted T-Mobile's petition on a prospective basis.[64]

34. This order is important because the FCC added the fourth and fifth paragraphs to Rule 20.11. In Rule 20.11(d), the FCC prohibited all LECs (including CLECs) from using their tariffs to impose compensation obligations on wireless carriers:

> Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon [CMRS] providers pursuant to tariffs.

Under this Rule, the FCC explained, "in the absence of a request for an interconnection agreement, no compensation is owed for termination."[65]

35. In Rule 20.11(e), the FCC clarified that in disputes between ILECs and wireless carriers, ILECs could file arbitration petitions against wireless carriers:

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[63] *See* 47 C.F.R. § 20.15(c).

[64] *See T-Mobile Order,* 20 FCC Rcd 4855 (2005).

[65] *Id.* at 4864 n.57.

> An incumbent [LEC] may request interconnection from a [CMRS] provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A [CMRS] provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. Once a request for interconnection is made, the interim transport and termination pricing described in Sec. 51.715 of this chapter shall apply.

However, consistent with the regulatory framework established by Congress, the FCC confirmed in Rule 20.11(e) that CLECs, unlike ILECs, may not invoke the section 252 arbitration procedure.

36. **The FCC's *NCC v. MetroPCS* Enforcement Proceeding**. The *NCC v. MetroPCS* enforcement proceeding began with NCC, a CLEC, filing a formal complaint with the FCC's Enforcement Bureau against MetroPCS, a CMRS provider, under section 208 of the Communications Act.[66] The complaint charged MetroPCS with violations of the Act and various FCC regulations.[67] A principal issue in the FCC complaint proceeding was whether, in declining to pay the charges that NCC unilaterally sought to impose, MetroPCS violated FCC Rule 20.11(b)(2), which provides that "[a] commercial mobile radio service provider shall pay

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[66] 47 U.S.C. § 208.

[67] *See North County Communications Corp. v. MetroPCS California, LLC,* Memorandum Opinion and Order, 24 FCC Rcd 3807, 3807 ¶ 1 and 3809-10 ¶ 7 (Enf. Bur. 2009) ("*MetroPCS Bureau Order*"). Count I of NCC's Complaint alleged that MetroPCS violated Rule 20.11(b) by failing to pay NCC for terminating traffic originated on MetroPCS's network. Count II of the Complaint alleged that MetroPCS violated section 251(b)(5) of the Act and FCC Rule 51.301 by failing to negotiate and execute a written interconnection agreement with NCC in good faith. Counts III and V of the Complaint alleged that MetroPCS violated sections 201(b) and 202(a) of the Act, respectively, by refusing to enter into a written interconnection agreement with NCC that included terms for reciprocal compensation. Count IV of the Complaint alleged that MetroPCS violated FCC Rule 51.715 by refusing to enter into an interim interconnection agreement with NCC.

reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider."[68]

37. In denying four of NCC's five claims,[69] the Enforcement Bureau found, *inter alia*, that MetroPCS acted reasonably and in good faith in declining to pay the unilateral charges that NCC sought to impose and that MetroPCS honestly believed were too high.[70] The Enforcement Bureau also found that MetroPCS did not violate the Act by failing to negotiate and execute a written interconnection agreement with NCC that included terms for payment of a comparable rate that MetroPCS pays other carriers for like termination services.[71]

38. The Enforcement Bureau dismissed without prejudice NCC's remaining claim that MetroPCS violated FCC Rule 20.11(b) by failing to pay NCC for terminating traffic that originated on MetroPCS's network.[72] Having found that all the traffic at issue was intrastate,[73] the Enforcement Bureau determined that the FCC should postpone consideration of NCC's claim until after the relevant state commission – in that case, the California Public Utilities Commission – decided "in the first instance" what constitutes "reasonable compensation" under FCC Rule 20.11(b) "via whatever procedural mechanism it deems appropriate under state

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[68] 47 C.F.R. § 20.11(b)(2).

[69] The Enforcement Bureau denied Counts II, III, IV, and V of NCC's complaint (described *supra* n.67) for failure to allege a violation of applicable law. *See MetroPCS Bureau Order*, 24 FCC Rcd at 3807 ¶ 2. These denials were not challenged by MetroPCS or NCC on review by the full FCC and therefore are final. *North County Communications Corp. v. MetroPCS California, LLC*, 24 FCC Rcd 14036, 14038 ¶ 8 (2009) ("*MetroPCS Review Order*").

[70] *MetroPCS Bureau Order*, 24 FCC Rcd at 3816 ¶ 20.

[71] *Id.* at 3814-15 ¶ 16.

[72] *Id.* at 3814 ¶ 15.

[73] *Id.* at 3808 ¶ 5 & n.12. CCES alleges that the traffic that is the subject of this dispute is intrastate. (Complaint, ¶ 10.) T-Mobile is unable to determine accuracy of this allegation at this stage of the litigation. While allegation is presumed true for purposes of these preliminary objections, T-Mobile reserves the right to contest the issue at a later time in the event the Complaint is not dismissed.

law."[74] However, the Enforcement Bureau clarified that it was making "no determination . . . as to whether [FCC Rule] 20.11 imposes obligations to pay compensation in the absence of an agreement, and if so, on what terms, or alternatively, whether the obligation under [FCC Rule] 20.11 is a mandate that the parties must enter into an agreement to a reasonable rate of compensation."[75]

39. MetroPCS and NCC both appealed the Enforcement Bureau's decision to the full FCC asking (in part) that the FCC reverse the decision and remand the proceeding back to the Enforcement Bureau with instructions that the Enforcement Bureau (as opposed to the California PUC) set a reasonable rate and determine liability (if any) based on that rate.[76] Alternatively, MetroPCS requested that the FCC provide guidance to the California PUC on how to determine a reasonable compensation rate.[77]

40. On review, the FCC affirmed its Enforcement Bureau's decision in all substantive respects[78] and reiterated that in determining "reasonable compensation" for NCC's termination of MetroPCS's intrastate, intraMTA traffic, "the California PUC may employ whatever non-tariff procedural mechanism it deems appropriate under state law, as long as such mechanism

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[74] *Id.* at 3811 ¶ 9.

[75] *Id.* at 3814 ¶ 15 n.55; *see also North County Communications Corp. v. Cricket Communications Inc.* 2010 WL 2490621, *5 (D. Ariz. June 16, 2010) ("To date, the FCC has not made any findings that commercial mobile radio service providers' failure to compensate local exchange carriers constitutes an unreasonable practice in violation of § 201(b).") (citing *North County Communications Corp. v. California Catalog & Technology,* 594 F.3d 1149, 1160 (9th Cir.2010), *cert. denied,* 79 U.S.L.W. 3110, 2010 WL 3321384 (Nov. 29, 2010)).

[76] *MetroPCS Review Order,* 24 FCC Rcd at 14040 ¶ 11.

[77] *Id.*

[78] *Id.* at 14040-41 ¶ 12.

affords interested parties an opportunity to be heard prior to the determination of the rate.[79] Significantly, the FCC reiterated the Enforcement Bureau's conclusion that the California PUC's task was limited to determining NCC's rate and that the FCC retained jurisdiction for itself to decide whether MetroPCS had failed to pay "reasonable compensation" under Rule 20.11 after the state commission set the rate.[80]

41. MetroPCS filed a petition for judicial review of the *MetroPCS Review Order* in the United States Court of Appeals for the District of Columbia Circuit.[81] Oral argument was held and the case submitted on October 14, 2010.

42. Just before MetroPCS filed its petition for review, NCC filed an application with the California PUC for approval of a rate for termination of intrastate, intraMTA traffic originated by CMRS providers.[82] MetroPCS and others moved for dismissal of the application on jurisdictional grounds or, in the alternative, for the application to be held "in abeyance." On June 7, 2010, the California PUC issued a decision dismissing the application without prejudice

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[79] *Id.* at 14041 ¶ 14. The FCC did modify one procedural aspect of the Bureau's decision—instead of dismissing without prejudice NCC's remaining claim regarding whether MetroPCS violated FCC Rule 20.11(b), the FCC decided to hold the claim in abeyance pending the state commission's determination of a reasonable compensation rate. *Id.* at 14044-45 ¶ 22. The FCC also declined to grant MetroPCS's alternative request that the FCC give guidance on how to determine a reasonable compensation rate because it believed "the California PUC [to be] fully equipped to determine a reasonable termination rate under the specific circumstances presented." *Id.* at 14044 ¶ 21.

[80] *Id.* at 14045 ¶¶ 23-24; *see North County Communications Corp. v. California Catalog & Technology d/b/a CTT Telecoms*, 594 F.3d 1149, 1157 (9th Cir. 2010) (FCC's decision in *NCC v. MetroPCS* establishes that FCC is the "proper forum" for a CLEC's claims premised on 47 C.F.R. § 20.11(b) once the CLEC has met the "predicate procedural requirement[]" of having its reasonable compensation rate established), *cert. denied,* 79 U.S.L.W. 3110, 2010 WL 3321384 (Nov. 29, 2010).

[81] *MetroPCS California, LLC v. FCC*, No. 10-1003 (D.C. Cir.) (docketed Jan. 8, 2010).

[82] *Application of North County Communications Corp. of California for Approval of Default Rate for termination of Intrastate, IntraMTA Traffic Originated by CMRS Carriers*, Application 10-01-0003 (Cal. P.U.C.) (filed Jan. 6, 2010).

due to the pendency of the federal proceedings.[83] The California PUC characterized the FCC's determinations as follows:

> Read in its entirety, the *MetroPCS Review Order* indicates that the FCC will not review any "reasonable rate" determination reached by this Commission, but leaves unchanged the *Bureau Merits Order*'s reservation to the FCC of the right to determine whether MetroPCS has any liability at all towards North County for call termination, or whether the FCC will use the rate set by this Commission in any way.[84]

43. Given this uncertainty, the California PUC determined that it was "not prudent to proceed with consideration of [NCC's] application until the resolution of the appeal to the D.C. Circuit and a determination of liability by the FCC."[85] First, it made "no sense to proceed" with the matter during the pendency of the judicial review proceeding. The decision of the court might lead to a resolution of the matter and, in any event, would "likely shed light on the many jurisdictional issues that the parties have raised in the FCC proceeding and in this proceeding, as well." [86] Second, in light of the state's current budget constraints and prior experience in investing administrative resources in proceedings that were later rendered irrelevant by FCC actions, the California PUC found that "it would certainly be unwise to proceed with a consideration of [NCC's] application without a clear commitment from the FCC to use the results of California's regulatory efforts and a determination that MetroPCS is liable for payment to North County.[87] The commission therefore dismissed NCC's application without prejudice,

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[83] *NCC California Decision, supra* n.21 (a copy of this decision is attached hereto as Attachment A).

[84] *Id.* at 7.

[85] *Id.* at 16.

[86] *Id.* at 15-16.

[87] *Id.* at 16.

stating that it could be refiled after action by the D.C. Circuit and the FCC. The California PUC also noted that the CMRS providers could renew their motions concerning jurisdictional issues at that time.[88]

D. FEDERAL LAW PROHIBITS THIS COMMISSION FROM ENTERING AN ORDER REQUIRING T-MOBILE TO PAY CCES'S INVOICES

44. The Complaint requests that the Commission "confirm" that CCES's purported "reciprocal compensation rate" of $.0192 is "lawfully applied to T-Mobile's traffic" (Complaint, ¶¶ 12, 20) and then "direct T-Mobile to pay to CCES the outstanding balance due as well as all future invoices" (Complaint, ¶ 20, *id.* at p.7). (*See* Complaint, ¶ 12.) It further claims that T-Mobile has violated FCC Rule 20.11(b) by not paying the rate that CCES has set unilaterally (*see id.*, ¶¶ 26, 29). The Commission lacks either subject matter jurisdiction to adjudicate CCES's claims or legal authority to grant the relief requested.

45. The Commission cannot apply or enforce FCC Rule 20.11(b) in this complaint proceeding.[89] As an initial matter, as argued above, the Public Utility Code does not authorize the Commission to regulate CMRS providers. Furthermore, state commissions have the authority to enforce FCC rules only if Congress or the FCC delegates such authority to the states. While Congress has delegated to state commissions the authority to enforce certain FCC rules in the context of section 252 arbitration, such authority does not apply here, because neither CCES nor T-Mobile is an incumbent LEC.

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[88] *Id.* The grounds for the California PUC's dismissal of NCC's application – essentially, considerations of prudential ripeness – is not among the permissible grounds for preliminary objections. *See* 52 Pa. Code § 5.101(a). Therefore, T-Mobile may raise the issue at a later time.

[89] Also completely baseless is CCES's assertion that sections 251-52 of the Act give the Commission jurisdiction over its Complaint (*see* Complaint, ¶ 23). Section 252 does give the Commission the authority to arbitrate disputes involving incumbent LECs, and in such an arbitration it must enforce section 251. *See* 47 U.S.C. §§ 252(b)(1), 252(c)(1). However, neither party here is an incumbent LEC.

46. There is a substantial question whether the FCC could, as a matter of law, delegate to state commissions the authority to enforce its Rule 20.11(b).[90] But in any event, the FCC has been very clear that it has ***not*** delegated to state commissions the authority to enforce its Rule 20.11(b):

> We make no determinations at this time as to whether rule 20.11 imposes obligations to pay compensation in the absence of an agreement, and if so, on what terms, or alternatively, whether the obligation under rule 20.11 is a mandate that the parties must enter into an agreement to a reasonable rate of mutual compensation.[91]

47. The FCC also made clear that it – and it alone – would decide whether a wireless carrier has violated its Rule:

> [U]nless and until what constitutes reasonable compensation for North County's termination of intrastate traffic originated by MetroPCS is determined, the Commission cannot determine whether or to what extent MetroPCS has violated its duty under rule 20.11(b)(2) to pay such compensation.[92]

Indeed, it is for this very reason that the FCC did not dismiss NCC's complaint under Rule 20.11(b), but instead converted the complaint into an informal complaint so it could retain jurisdiction over the dispute.[93]

48. As the California PUC has explained, the *MetroPCS Review Order* reserves to the FCC the right to determine whether a CMRS provider has "any liability at all" towards a CLEC for call termination.[94] Therefore, this Commission lacks jurisdiction either to determine that

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[90] *See, e.g., USTA* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004).

[91] *MetroPCS Bureau Order*, 24 FCC Rcd at 3814 n.55.

[92] *Id.* at 3811 ¶ 9.

[93] *See MetroPCS Review Order*, 24 FCC Rcd at 14046 ¶ 25.

[94] *NCC California Decision*, *supra* n.21, slip op. at 7; *accord North County Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149, 1157 (9th Cir. 2010) (the *NCC v. MetroPCS Enforcement Proceeding* established that the FCC is the "proper forum" for a CLEC's claims premised on

CCES's "reciprocal compensation rate" is "lawfully applied" to T-Mobile's intraMTA traffic or to direct T-Mobile to pay that rate.[95]

49. This Commission could enter an order directing T-Mobile to pay CCES's invoices only if it concluded that T-Mobile had violated FCC Rule 20.11(b). Because it is clear that the FCC has not delegated to any state commission the authority to determine liability under Rule 20.11(b), it necessarily follows that that this Commission cannot, as a matter of law, enter the order CCES seeks.[96]

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47 C.F.R. § 20.11(b) once the CLEC has met the "predicate procedural requirement[]" of having its reasonable compensation rate established), *cert. denied,* 79 U.S.L.W. 3110, 2010 WL 3321384 (Nov. 29, 2010).

[95] The subject matter of this dispute is different from that of the interconnection compensation disputes recently decided by the Commission in *Palmerton Telephone Co. v. Global NAPS South, Inc.*, Docket No. C-2009-2093336, 2010 WL 1259661 (Pa. P.U.C. Mar. 16, 2010), and *Core Communications, Inc. v. AT&T Communications of PA, LLC*, Docket Nos. C-2009-2108186 and C-2009 2108239, 2010 WL 3617207 (Pa. P.U.C. Sept. 8, 2010). In *Palmerston Telephone v. Global NAPS,* the Commission held that it had subject matter jurisdiction to adjudicate a dispute between a CLEC and an ILEC regarding the payment of intrastate access charges for the termination of interexchange Voice-over-Internet-Protocol ("VoIP") traffic. In *Core Communications v. AT&T,* the Commission held that it had jurisdiction to decide a similar dispute over intrastate access charges between two CLECs. In each case, the Commission's holding rested several factors not present in this case: (a) both parties were operating in Pennsylvania pursuant to Commission certification and subject to Commission regulation; (b) the charges at issue were tariffed intrastate access rates for the termination of interexchange traffic; and (c) the FCC had not specifically reserved to itself the right to determine such disputes. None of these factors is present here: (a) T-Mobile is a CMRS provider operating in Pennsylvania pursuant to FCC licenses and, as argued above, is expressly exempt from Commission regulation pursuant to 66 Pa. C.S. § 102(2)(iv) (relating to definition of "Public Utility"), *see supra* ¶¶ 16-19; (b) the charges at issue are compensation for intraMTA traffic (*see* Complaint, ¶ 10), which is not subject to access charges under federal law, *see* 47 C.F.R. § 51.701(b)(2); and (c) as argued above, the FCC has expressly reserved to itself the right to determine CMRS providers' obligations to pay the compensation at issue, *see supra* ¶¶ 36-43.

[96] Even if state commissions had jurisdiction to enforce FCC Rule 20.11, the Complaint's demand that T-Mobile be "directed" to pay past charges would fail to state a cognizable claim. It is clear that no private right of action exists to recover damages caused by alleged violations of the rule. *See, e.g., North County Communications Corp. v. California Catalog & Technology d/b/a CTT Telecoms,* 594 F.3d 1149 (9th Cir. 2010), *cert. denied,* 79 U.S.L.W. 3110, 2010 WL 3321384 (Nov. 29, 2010).

E. FEDERAL LAW PROHIBITS THIS COMMISSION FROM "CONFIRMING" CCES'S "RECIPROCAL COMPENSATION" RATE OF $$.0192/MINUTE

50. CCES asks the Commission to "confirm that its reciprocal compensation rate is lawfully applied to T-Mobile's traffic" (Complaint, ¶ 20(a)). Specifically, CCES claims that the Commission should "confirm" its proposed "reciprocal compensation rate of $0.0192," and it further asserts this rate is "reasonable" (*id.*, ¶¶ 12, 19). CCES, however, never explains how it developed its proposed rate of $.0192/minute, nor does it allege that this rate is based on the additional cost to CCES of terminating T-Mobile's traffic as required by federal law. Given its statement – "The telecommunications traffic which is the subject of this dispute is intrastate switched access traffic" (Complaint, ¶ 22) – T-Mobile suspects CCES's proposed rate is CCES's rate for intrastate access.

51. This Complaint claims to involve intraMTA traffic (*see* Complaint, ¶ 10). The FCC has been very clear that LECs (like CCES) may not apply access charges to intraMTA traffic. FCC Rule 51.701 provides:

> (a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.
>
> (b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means: * * * (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in Sec. 24.202(a) of this chapter.

52. As the FCC stated in its order adopting Rule 51.701:

> [T]raffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges. * * * We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and

> termination rates under section 251(b)(5), rather than interstate or intrastate access charges.[97]

53. Since federal law prohibits CCES from imposing any access charges on T-Mobile for the exchange of intraMTA traffic, the Commission must reject CCES's request that it "confirm" that CCES's rate of $.0192/minute is properly applied to intraMTA traffic.

54. Furthermore, to the extent the Complaint asks the Commission to set the $.0192/minute rate as CCES's "reciprocal compensation rate," it must be dismissed as legally insufficient. The FCC has held that "only that part of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an 'additional cost' to be recovered through termination changes."[98] The Complaint is devoid of any allegation that the $.0192/minute rate demanded by CCES reflects the additional cost of terminating T-Mobile's traffic. This is not surprising. The FCC has held that LECs using modern digital switching (like CCES) do not incur any additional costs in terminating traffic from other carriers, and that as a result, a LEC's rate for reciprocal compensation should be set at the rate of ***zero***.[99]

F. FEDERAL LAW PROHIBITS THIS COMMISSION FROM PERMITTING CCES TO USE ITS TARIFFS TO IMPOSE ITS TERMINATION RATE ON T-MOBILE

55. In the alternative to "confirming" its claimed "reciprocal compensation rate," "CCES requests that the Commission allow it to establish a tariff for the exchange of intrastate, intra-MTA traffic" (Complaint, ¶ 33). This request must be dismissed for legal insufficiency because federal law precludes the use of tariffs to impose reciprocal compensation rates on CMRS providers.

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[97] *Local Competition Order*, 11 FCC Rcd at 16014 ¶ 1036, 16016 ¶ 1043.

[98] *Local Competition Order*, 11 FCC Rcd at 16025 ¶ 1057. See *supra* ¶¶ 29-32.

[99] *See supra* n.14.

56. CCES asserts that the FCC has "precluded ***incumbent*** local exchange carriers from publishing tariffs that establish the rate for wireless reciprocal compensation" (Complaint, ¶ 27 (emphasis added)), clearly hoping to give the Commission the impression that FCC rules permit ***non***–incumbent LECs (like CCES) to do so. This is misleading. FCC Rule 20.11(d) prohibits ***all*** LECs, including CLECs like CCES, from using tariffs: "***Local exchange carriers*** may not impose compensation obligations for traffic not subject to access charges upon [CMRS] providers pursuant to tariffs."[100]

57. FCC Rule 20.11(d) is binding on this Commission.[101] Therefore, the Commission must reject CCES's request that it be permitted to impose wireless termination charges through its tariffs.

G. STATE AND FEDERAL LAW PROHIBIT THIS COMMISSION FROM DIRECTING T-MOBILE TO ENTER INTO AN INTERCONNECTION AGREEMENT WITH TERMS UNILATERALLY DETERMINED BY CCES

58. The Complaint asserts that "[o]ther commissions" have concluded that they have the authority to "compel" CMRS providers to enter into agreements with CLECs for the payment of terminating compensation. (Complaint, ¶ 32.) Although the Complaint does not directly request that the Commission force T-Mobile to enter into such an agreement, the quoted

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[100] 47 C.F.R. § 20.11(d) (emphasis added).

[101] Pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2, "state law is nullified to the extent it . . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]'" *First Fed. Savings & Loan Ass'n v. de la Questa*, 458 U.S. 141, 153 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Therefore, "[t]he statutorily authorized regulations of [a federal] agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (); *see also MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d at 517 ("The interconnection agreement must comply with the Act and with FCC regulations; if the approved agreement, containing the state commission's interpretations of the law, conflicts with the legal interpretations in the FCC regulations, the FCC interpretation must control under the Supremacy Clause and under the plain language of the Act.").

assertion, followed by a request for "[a]lternative[]" relief in paragraph 33, implies such a request. It is clear that the Commission lacks authority to grant such relief.

59. ***First***, any attempt by a state commission to force a CMRS provider to enter into a compensation arrangement with a CLEC would contravene federal law. As argued above, the FCC long ago held that CMRS providers are not subject to the reciprocal compensation requirements of section 251(b)(5) of the Act,[102] and its rules therefore do not extend the obligation to enter into reciprocal compensation arrangements to CMRS providers.[103] Later, in the *T-Mobile Order*, the FCC amended FCC Rule 20.11 to allow ***incumbent*** LECs – but ***not*** competitive LECs such as CCES – to invoke the negotiation and arbitration provisions of section 252 of the Act.[104] Most recently, the FCC has reserved to itself the determination of a CMRS provider's compensation obligations under FCC Rule 20.11, including the obligation to enter into any particular mutual compensation arrangement.[105] Therefore, state commissions lack jurisdiction to impose such obligations on CMRS providers.[106]

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[102] *Local Competition Order*, 11 FCC Rcd at 15996-97 ¶¶ 1005-1008 (holding that CMRS providers will not be classified as LECs and are not subject to the obligations in section 251(b)(5)).

[103] *See* 47 C.F.R. § 51.703(a) ("Each ***LEC*** shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.") (emphasis added).

[104] *See* 47 C.F.R. § 20.11(e) ("An ***incumbent*** local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act.") (emphasis added).

[105] See *supra* ¶¶ 36-43(discussing the *NCC v. MetroPCS Enforcement proceeding*). *See also NCC California Decision*, *supra* n.83, slip op. at 7 (FCC has reserved to itself the right to determine whether under FCC Rule 20.11 a CMRS provider has "any liability at all" towards a CLEC for call termination); *accord North County Communications Corp. v. California Catalog & Technology*, 594 F.3d at 1157 (the *NCC v. MetroPCS Enforcement Proceeding* established that the FCC is the "proper forum" for a CLEC's claims premised on 47 C.F.R. § 20.11(b) once the CLEC has met the "predicate procedural requirement[]" of having its reasonable compensation rate established).

[106] The Complaint cites the decision of the New York Public Service Commission in *Complaint of Xchange Telecom, Inc. Against Sprint Nextel Corp. for Refusal to Pay Terminating Compensation*, N.Y.

60. ***Second***, the Commission lacks authority under Pennsylvania law to force CMRS providers to enter into interconnection agreements. By requiring a CMRS provider to enter into such an agreement, the Commission would necessarily determine not only the rates, terms and conditions of the CLEC's termination of traffic originated by the CMRS provider, but also the rates, terms and conditions of the CMRS provider's termination of traffic originated by the CLEC. As argued above, the Public Utility Code expressly denies such regulatory authority to the Commission.[107]

61. ***Third,*** even if the FCC had not reserved to itself the right to determine CMRS-CLEC compensation obligations, which it has, and even if the General Assembly had authorized the Commission to regulate CMRS providers, which it has not, CCES's request that the Commission compel T-Mobile to enter into an "agreement" to pay terminating compensation would have to be rejected. CCES admits, as it must, that FCC Rule 20.11 governs the parties' traffic termination compensation obligations. (Complaint, ¶ 29.) The FCC has already rejected the argument that FCC Rule 20.11 expands the scope of the rules requiring incumbent LECs to

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P.S.C. Case 07-C-1541, Order issued Feb. 4, 2010 (the "*N.Y. Xchange Order*"), as support for the proposition that a state commission may "compel an agreement" and set compensation rates between CMRS providers and CLECs. (Complaint, ¶ 32 & n.6.) The New York commission's decision was based on the erroneous conclusion that federal law authorized state commissions to compel CMRS providers to negotiate compensation agreements with CLECs. The Complaint fails to note that several CMRS providers (including T-Mobile) have petitioned for reconsideration of that decision on that ground, among others. The Complaint also fails to disclose that the decision is the subject of a wireless provider's federal lawsuit against the New York commission for declaratory and injunctive relief. *See Sprint Spectrum et al. v. Brown et al.*, S.D.N.Y. Docket No. 2:10-cv-04370 (complaint filed June 2, 2010). Shortly after the filing of the federal lawsuit, the New York commission solicited further comments on the rehearing petitions and extended the date for compliance with the order until after those petitions are decided. *See* N.Y. P.S.C. Case 07-C-1541, Notice Requesting Comments, issued June 21, 2010. The federal action has been stayed pending disposition of the rehearing petitions.

[107] See *supra* ¶¶ 16-19.

negotiate interconnection agreements to reach CMRS providers.[108] Furthermore, CCES's baseless allegations of lack of good faith notwithstanding, the FCC has ruled that a disagreement over the use of bill-and-keep does not mean the wireless carrier is acting in bad faith or violating federal law.[109] Indeed, the FCC has found that the availability of bill-and-keep is an important means of curbing the LEC's inherent monopoly power. [110] The FCC's implementation of federal law is binding on state commissions.[111]

62. Therefore, to the extent the Complaint requests that the Commission compel T-Mobile to enter into an agreement that would dictate the rates, terms and conditions of its termination of calls to its wireless subscribers, it must be dismissed for lack of subject matter jurisdiction.

H. THIS COMMISSION LACKS AUTHORITY UNDER STATE OR FEDERAL LAW TO ESTABLISH A RECIPROCAL COMPENSATION RATE FOR TRAFFIC EXCHANGED BY THE PARTIES

63. The Complaint requests in the alternative that the Commission "determine the appropriate intercarrier compensation that should be applied between the parties for both past and future intrastate, intraMTA traffic." (Complaint ¶ 21.)[112] This request must be dismissed for lack of subject matter jurisdiction or, in the alternative, for legal insufficiency because the

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[108] *MetroPCS Bureau Order*, 24 FCC Rcd at 3815 ¶¶ 17-18.

[109] *Id.* at 3816-17 ¶ 20.

[110] *LEC/CMRS Interconnection NPRM,* 11 FCC Rcd 5020, 5055 ¶ 75 (1996) ("[A] bill-and-keep arrangement . . . would preserve the primary role of negotiations between the parties in reaching interconnection arrangements, but would limit the LEC's ability to exercise its market power, while simultaneously creating an incentive for it to negotiate a satisfactory rate expeditiously."); *cf.* wishing to terminate calls to their end user customers."); *Eighth Access Charge Reform Order*, 19 FCC Rcd 9108 ¶ 17 (2004) ("[I]t is necessary to constrain the ability of competitive LECs to exercise this monopoly power.").

[111] *See supra* n.101.

[112] This request does not appear in the Complaint's formal demand for relief.

Commission lacks the legal authority to set LEC intercarrier compensation rates outside a tariff review proceeding or an interconnection arbitration, neither of which may be used to set a CLEC's rate for terminating intraMTA traffic originated by a CMRS provider. Furthermore, to the extent the Complaint requests that the Commission set T-Mobile's terminating compensation rate as well as CCES's, it must be dismissed for the additional reason that the Public Utility Code has exempted CMRS providers from Commission regulation.

64. The FCC has indicated that a state commission may determine a CLEC's reasonable compensation rate for terminating intraMTA CMRS traffic using "whatever non-tariff procedural mechanism it deems appropriate ***under state law***."[113] However, there Pennsylvania law provides no "non-tariff procedural mechanism" that would allow the Commission to set such a rate.[114] Furthermore, no federal statute or regulation provides such authority. The "reciprocal compensation" provision of section 251 of the Act imposes obligations on LECs, not CMRS providers.[115] Moreover, unlike incumbent LECs, competitive LECs cannot invoke section 252's

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[113] *MetroPCS Review Order*, 24 FCC Rcd at 14041 ¶ 14 (emphasis added).

[114] *See* 66 Pa. C.S. §§ 1302 (public utilities must tariff their rates), 1303 (public utilities may not charge rates other than tariffed rates); 1308 (PUC review of voluntary changes to tariffed rates); 1309 (tariffed rates fixed on complaint pursuant to PUC investigation). The Complaint asserts that the Commission has jurisdiction over the subject matter of the Complaint pursuant to sections 1301 and 1304 of the Public Utility Code. (Complaint, ¶ 23.) This is clearly incorrect. Section 1301 requires public utilities' rates to be just and reasonable. 66 Pa. C.S. § 1301. Section 1304 prohibits public utilities from unreasonable rate discrimination. *Id.* § 1304. Neither provision authorizes the setting of rates outside a tariff review proceeding.

[115] 47 U.S.C. § 251(b)(5); *see MetroPCS Bureau Order*, 24 FCC Rcd at 3814-15 ¶ 16 ("Section 251(b)(5) imposes a duty to establish reciprocal compensation only upon LECs. Moreover, the Commission has stated unequivocally that CMRS providers will not be classified as LECs and are not subject to the obligations of section 251(b). Therefore, as a CMRS provider, MetroPCS is not subject to the obligations arising directly from section 251(b) itself . . . .") (footnotes and internal quotation marks omitted); *accord North County Communications Corp. v. California Catalog & Technology*, 594 F.3d at 1156 ("§ 251(b)(5) provides for the duties of local exchange carriers, not even mentioning CMRS providers").

arbitration procedures when they fail to reach a voluntary interconnection agreement with a CMRS provider.[116]

65. As argued above, the Commission is a "legislative creation," and "any powers [it] exercises must be found in the expressed words of the enabling statute or by strong and necessary implication when required for its expressed powers."[117] Therefore, in the absence of a tariff, an agreement, a Pennsylvania statute, or a provision of federal law granting the Commission the authority to set a non-tariffed intercarrier compensation rate for CMRS-CLEC traffic, CCES's request for such relief must be dismissed for lack of subject matter jurisdiction or, in the alternative, for lack of legal sufficiency.

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[116] *See* 47 U.S.C. § 252 (discussing only agreements with ILECs); 47 C.F.R. § 20.11(e) (permitting only ILECs to invoke the section 252 process against CMRS providers).

[117] *Fairview Water Co. v. Pennsylvania Pub. Util. Comm'n*, 509 Pa. 384, 391, 502 A.2d 162, 165-66 (1985).

III. CONCLUSION

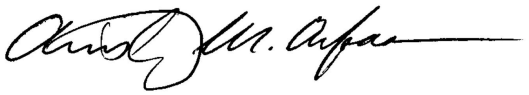
WHEREFORE, for all of the foregoing reasons, T-Mobile respectfully requests that the Commission enter an order—

1. Dismissing the Complaint filed by CCES at Docket No. C-2010-2210014 in its entirety; and

2. Granting such other relief as the Commission deems just and proper.

Dated: December 6, 2010

Respectfully submitted,



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Counsel for Respondents

ATTACHMENT A

Decision 10-06-006 June 3, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of North County Communications Corporation of California (U5631C) for Approval of Default Rate for Termination of Intrastate, IntraMTA Traffic Originated by CMRS Carriers.	Application 10-01-003 (Filed January 6, 2010)

DECISION DISMISSING APPLICATION WITHOUT PREJUDICE DUE TO PENDANCY OF FEDERAL PROCEEDINGS

1. Summary

This decision dismisses Application 10-01-003 without prejudice. This is the most appropriate course of action at this time because of two factors: 1) the decision of the Federal Communications Commission, that has led to this application, is currently under appeal before the United States Court of Appeal for the District of Columbia (D.C. Circuit), and 2) the Federal Communications Commission has not indicated that it would use the results of this Commission's deliberations in resolving the dispute between North County Communications Corporation of California and MetroPCS California, LLC.

Following a decision by the D.C. Circuit and a commitment by the Federal Communications Commission to the use of a rate determined reasonable by this Commission, North County Communications Corporation of California may reapply for resolution of this matter.

Since the Commission has decided to dismiss the application without prejudice at this time, the Commission will not address the merits of the

application. Furthermore, the Commission will not address at this time the motions claiming that the Commission lacks jurisdiction because the dismissal of the application renders these arguments moot. Parties may, however, refile these motions for dismissal or renew their arguments if and when this matter comes before the Commission again.

2. Background

The instant application of North County Communications Corporation of California ("North County")[1] comes before this Commission after 3.5 years of proceedings before the Federal Communications Commission ("FCC").

Since the nature of this dispute is complex and shaped by federal telecommunications policies, a brief review is in order before detailing the complex procedural background that has brought us to this point.

In 2005, the FCC pre-empted state Commissions from pricing interconnection services between a wireless carrier and a local exchange carrier ("LEC") through tariffs, stating:

> Going forward [from February 17, 2005], however, we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff. In addition, we amend our rules to clarify that an incumbent LEC may request interconnection from a

[1] Application of North County Communications Corporation of California (U5631) for Approval of Default for Termination of Intrastate, IntraMTA Traffic Originated by CMRS [Commercial Mobile Radio Service, i.e. wireless service] Carriers ("Application").

> CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act.[2]

In the *T-Mobile Order,* the FCC set firm procedures for resolving disputes between wireless carriers and incumbent LECs concerning compensation for interconnection services:

> In light of our decision to prohibit the use of tariffs to impose termination charges on non-access traffic, we find it necessary to ensure that LECs have the ability to compel negotiations and arbitrations, as CMRS providers may do today. Accordingly, we amend section 20.11 of our rules to clarify that an **incumbent LEC** may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act. A CMRS provider receiving such a request must negotiate in good faith and must, if requested, submit to arbitration by the state commission. In recognition that the establishment of interconnection arrangements may take more than 160 days, we also establish interim compensation requirements under section 20.11 consistent with those already provided in section 51.715 of the Commission's rules. Interim compensation requirements are necessary for all the reasons the Commission articulated in Local Competition First Report and Order.[3]

Under the FCC's nomenclature, North County is not an incumbent LEC; rather, it is a non-incumbent or competitive local exchange company. As the emphasis in the above quotation makes clear, the FCC has only set a procedure for resolving interconnection disputes between wireless carriers and incumbent LECs. The FCC has not taken action concerning disputes between wireless

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[2] *T-Mobile et al, Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, Declaratory Ruling and Report and Order (T-Mobile Order),* 20 FCC Rcd. 4855 (2005) at ¶9.

[3] *Id.* at ¶16, emphasis added, footnote omitted.

carriers and non-incumbent LECs, which is the very situation that confronts us in this proceeding.

In summary, the regulatory issues concerning the interconnection of wireless carriers and LECs are shaped by FCC action that has pre-empted the states from setting tariffs on interconnection services, but the FCC has not set a clear path for resolving interconnection disputes between wireless carriers and non-incumbent LECs like North County.

2.1. Procedural History in the Federal Jurisdiction

The facts leading to the dispute are fairly simple. As part of its business, North County terminates calls to "chat rooms," where callers can talk to one another. Some of this traffic comes from MetroPCS California, LLC ("MetroPCS"). North County desires compensation from MetroPCS for handling this traffic.

In a typical situation between a wireless carrier and a LEC, an interconnection agreement determines what is owed. In the situation before us, however, there is no interconnection agreement between MetroPCS and North County.

Despite the absence of an interconnection agreement, North County began billing MetroPCS for the termination of calls sometime in 2003. MetroPCS has not paid North County any money. MetroPCS claims that a "bill and keep" arrangement exists by default, whereby neither party pays the other for traffic

termination. Between August 2005 and June 2006, MetroPCS and North County attempted unsuccessfully to negotiate an interconnection agreement [4]

On August 24, 2006, North County filed a complaint against MetroPCS before the FCC pursuant to section 208 of the Communications Act of 1934.[5]

On March 30, 2009, the FCC's Enforcement Bureau released the *Bureau Merits Order* that, among other things, directed North County to come to this Commission for the determination of a reasonable rate as compensation for the termination of calls received from MetroPCS.

The *Bureau Merits Order*, however, did not commit the FCC to finding that MetroPCS had any liability to pay anything to North County. Specifically, the *Bureau Merits Order* states:

> We make no determinations at this time as to whether rule 20.11 imposes obligations to pay compensation in the absence of an agreement, and if so, on what terms, or alternatively, whether the obligation under rule 20.11 is a mandate that the parties must enter into an agreement to a reasonable rate of mutual compensation. In either case, we find that resolution of the rule 20.11 claim depends first on the establishment of a reasonable rate. We note, however, that due to the language of rule 20.11, claims regarding the non-payment of an established interconnection rate would not run afoul of our "collection action" prohibition.[6]

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[4] *North County Communications Corp. v. MetroPCS California, LLC,* Memorandum Opinion and Order, 24 FCC Rcd 3807 (Enf. Bur. rel. Mar. 30, 2009) ("*Bureau Merits Order*") at ¶6.

[5] Second Amended Complaint, File No. EB-06-MD-007 (filed August 24, 2006) ("Complaint").

[6] *Bureau Merits Order*, ¶15, note 55.

North County filed an Application for Review of the *Bureau Merits Order* before the full FCC, which resulted in *North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, 24 FCC Rcd 14036 (2009) ("*MetroPCS Review Order*"), which was issued by the FCC on November 19, 2009. This order left unchanged the referral of North County to this Commission for a determination of a "reasonable rate" for call termination. The FCC also placed the complaint of North County in abeyance "pending the California PUC's determination of a reasonable rate for North County's termination of MetroPCS's intrastate traffic."[7]

Although the *MetroPCS Review Order* did not address the issue of whether MetroPCS was liable to North County for any payment, it stated that:

> We note that the purpose of converting North County's claim back into a formal complaint would not be to review the propriety of the termination rate prescribed by the California PUC. Such a review, if any, of the California PUC's rate prescription would proceed according to whatever mechanism is provided by applicable California law. The purpose of any conversion of North County's claim back into a formal complaint would, instead, be limited to determining whether, despite the application of the termination rate prescribed by California law, MetroPCS has still failed to pay North County "reasonable compensation" under rule 20.11. Such a dispute could arise from a myriad of factors, including but not limited to a continuing disagreement between the parties about whether and to what extent (i) North County's recovery should be limited by the statute of limitations, or (ii) North County is entitled to an award of prejudgment interest.[8]

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[7] *Id.* at ¶30.

[8] *Id.* at ¶24.

The *MetroPCS Review Order* also makes clear that the FCC continues to maintain that it has jurisdiction in this policy area:

> Contrary to the parties' contention, the Enforcement Bureau did not hold that only a state commission has jurisdiction to determine what constitutes "reasonable compensation" under section 20.11 of the Commission's rules. *See, e.g.,* North County AFR at 1, 6, MetroPCS AFR at 3, 5. Thus, by affirming the *Bureau Merits Order*, we do not hold that the Commission lacks such jurisdiction. Rather, we merely affirm the Bureau's finding that the state commission, in this instance, is the more appropriate forum.[9]

Read in its entirety, the *MetroPCS Review Order* indicates that the FCC will not review any "reasonable rate" determination reached by this Commission, but leaves unchanged the *Bureau Merits Order's* reservation to the FCC of the right to determine whether MetroPCS has any liability at all towards North County for call termination, or whether the FCC will use the rate set by this Commission in any way.

On January 7, 2010, MetroPCS applied for judicial review of the *MetroPCS Review Order* before the D.C. Circuit.[10] Final Briefs are due July 1, 2010.[11]

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[9] *Id.* at ¶12 note 46, footnotes omitted.

[10] MetroPCS Cal., LLC v. Federal Commc'ns Comm'n and United States of America, Case No. 10-1003, D.C. Cir., filed January 7, 2010 ("MetroPCS v. FCC"); North County Communications Corp. v. MetroPCS California, LLC, Order on Review, File No. EB-06-MD-008, 09-100 (2009) ("Order on Review").

[11] See Motion of MetroPCS California, LLC's (U3079C) Motion for Official Notice of Facts, March 24, 2010, Attachment 1.

2.2. Procedural Background before the California Commission

On January 6, 2010, the day before the filing of the appeal of the *MetroPCS Review Order* by MetroPCS in the D.C. Circuit, North County filed the instant application before this Commission.

In response, on February 8, 2010 MetroPCS filed a motion to dismiss North County's Application or, in the alternative, to hold the proceeding in abeyance.[12] In addition, MetroPCS also filed a protest of North County's Application.[13]

On February 8, 2010, AT&T,[14] Cricket Communications, Inc. (U3076C), CTIA - The Wireless Association®, Sprint Spectrum L.P. (as agent for Wireless Co, L.P. (U3062C) and Sprint Telephony PCS, L.P. (U3064C), and for Nextel of California, Inc. (U3066C)), T-Mobile West Corporation d/b/a T-Mobile, and Verizon Wireless[15] (collectively, the "Wireless Coalition") filed a motion to

[12] Motion to Dismiss North County's Application or in the Alternative Motion to Hold the Proceeding in Abeyance ("MetroPCS Motion").

[13] Protest of North County Communications Corporation Application ("MetroPCS Protest").

[14] Here, AT&T collectively means New Cingular Wireless PCS, LLC (U3060C), Cagal Cellular Communications Corporation (U3021C), Santa Barbara Cellular Systems, Ltd. (U3015C), and Visalia Cellular Telephone Company (U3014C).

[15] The following entities are doing business as Verizon Wireless in California: Cellco Partnership (U3001C), California RSA No. 4 Limited Partnership (U3038C), Fresno MSA Limited Partnership (U3005C), GTE Mobilnet of California Limited Partnership (U3002C), GTE Mobilnet of Santa Barbara Limited Partnership (U3011C), Los Angeles SMSA Limited Partnership (U3003C), Modoc RSA Limited Partnership (U3032C), Sacramento Valley Limited Partnership (U3004C), and Verizon Wireless (VAW) LLC (U3029C).

dismiss the Application.[16] The Wireless Coalition also simultaneously filed a motion to hold the proceeding in abeyance[17]and a protest to the Application.[18]

On February 18, 2010, North County filed a reply to the protests.[19]

On February 23, North County filed a single response to all the motions.[20]

On March 5, 2010, MetroPCS[21] and the Wireless Coalition[22] each replied to the North County Response.

On March 24, 2010, MetroPCS filed a Motion for Official Notice of Facts requesting that the Commission take official notice of an Order of the United States Court of Appeals for the District of Columbia Circuit[23] setting forth a

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[16] Motion to Dismiss North County Communications Corp.'s Application ("Wireless Coalition's Motion to Dismiss").

[17] Motion to Hold North County Communication Corp.'s Application in Abeyance Pending Final Resolution of the Complaint Proceeding at the Federal Communications Commission ("Wireless Coalition's Motion to Hold in Abeyance").

[18] Protest to North County Communications Corp.'s Application ("Wireless Coalition's Protest").

[19] Reply to Protests.

[20] Response to Protestants' Motions to Dismiss and Hold Proceedings in Abeyance ("North County Response").

[21] Reply to the Response of North County Communications Corporation to Protestants' Motions to Dismiss and Hold Proceedings in Abeyance ("MetroPCS Reply to North County Response").

[22] The Wireless Coalition filed two replies to the North County Response. One reply was titled Reply to North County Communications Corp.'s Response to Motion to Hold Application in Abeyance Pending Final Resolution of the Complaint Proceeding at the Federal Communications Commission ("Wireless Reply to North County's Argument Against Abeyance"). The second reply was titled Reply to Response of North County Communications Corp. to Protestants' Motion to Dismiss ("Wireless Reply to North County Argument Against Dismissal").

[23] *MetroPCS California, LLC v FCC, et al.*, Order, No 10-1003, filed March 15, 2010 (D.C. Circuit).

briefing schedule for MetroPCS' Petition for Review in *MetroPCS California v. FCC*.[24]

3. Should the California Commission Proceed with the Application?

At this time, the Commission will only address the question of whether to proceed with consideration of the application of North County.

3.1. Positions of Parties on the Issue of Whether to Proceed with Consideration of the Application of North County at this Time

The motions of MetroPCS and the Wireless Coalition argue against proceeding with a consideration of the North County application at this time.

MetroPCS argues that if this Commission does not dismiss North County's Application, then:

> … it should hold the proceeding in abeyance pending (a) the resolution of MetroPCS' Petition for Review of the FCC decisions that currently is before the United States Court of Appeals for the District of Columbia (the "MetroPCS Petition for Review") and (b) FCC action in the traffic pumping proceeding.[25]

MetroPCS argues that "In other similar circumstances, the Commission has found it appropriate to delay the resolution of proceedings pending the outcome of parallel federal cases where such 'uncertainty' exists."[26] In particular,

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[24] *MetroPCS v. FCC*, MetroPCS Petition for Review, filed January 7, 2010.

[25] MetroPCS Motion at 25. The traffic pumping proceeding to which MetroPCS refers is *Establishing Just and Reasonable Rates for Local Exchange Carriers, Notice of Proposed Rulemaking*, FCC 07-176, ¶1 WC Docket No. 07-135, rel. October 2, 2007 ("*Traffic Pumping NPRM*").

[26] *Id.*

MetroPCS states that "[i]n its D.C. Circuit appeal, MetroPCS will assert that the FCC committed reversible error by abdicating its responsibility to set an appropriate rate for North County and will ask the Court to remand the proceeding to the FCC with instructions to set a rate."[27] MetroPCS also cites the FCC's *Traffic Pumping NPRM,* which addresses asymmetric traffic flows. MetroPCS notes that if its proposal in that proceeding is granted, "this Commission will have performed a useless act by devoting its time, attention and resources to setting a compensation rate for North County."[28]

The Wireless Coalition argues in its Motion to Hold in Abeyance that:

> Although the FCC's recent decision in that matter deferred the issue of what constitutes reasonable compensation to this Commission, it retained for itself any decisions regarding the key threshold liability issues which, from a prudential standpoint, should be resolved before any resources are expended to set a hypothetical rate.[29]

The Wireless Coalition, like MetroPCS, also cites the MetroPCS Petition for Review as a source of uncertainty.[30] The Wireless Coalition argues that:

> … in order to conserve the valuable resources of this Commission and all interested parties, while also preserving the rights of all parties, and to otherwise avoid potentially inconsistent rulings and jurisdictional conflicts, the Application should be held in abeyance until the federal case

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[27] *Id*.

[28] *Id*. at 26.

[29] Wireless Coalition's Motion to Hold in Abeyance at 1-2.

[30] Wireless Coalition's Motion to Hold in Abeyance at 3.

> is finally resolved, at which time the issues will either be ripe for consideration or rendered moot.[31]

The Wireless Coalition argues further that holding the proceeding in abeyance will not prejudice either party.

In its response to the motions, North County argues that "the Commission, as the FCC has indicated, is the proper forum to decide the issue of what is the just and reasonable rate for North County's services, during the entire time period in question."[32]

North County, although conceding that the FCC "may take action to preempt state judicial enforcement of North County's implied contract claims, or may attempt to over-ride the Commission's rate determination, or may take some other action that moots this proceeding," argues that "no intent on the part of the FCC to do so can be inferred…"[33]

North County also argues against holding the proceeding in abeyance. North County contends that awaiting "pending federal appeals would seriously undermine [the Commission's] ability to carry out its responsibilities." North County further contends that waiting until the FCC decides the liability issue is not necessary because "North County may bring, and in fact has pending, implied contract causes of action in state court…"[34]

In reply, MetroPCS argues:

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[31] *Id.*

[32] North County Response to Motions at 7.

[33] *Id.* at 8.

[34] *Id.* at 14.

> North County fails to acknowledge that setting a rate prior to the resolution of MetroPCS v. FCC, and any determination by the FCC or any court of any liability by the wireless carriers to North County for intercarrier compensation, would be a complete waste of the Commission's time. It simply makes no sense for this Commission to devote precious resources to setting a rate prior to any determination that there is an implied contract or other legal obligation to which a rate must be applied.[35]

In particular, MetroPCS argues that a decision adopting a rate at this time would be "merely advisory."[36] More specifically, MetroPCS contends that:

> The requisite case or controversy is lacking in this instance. North County has alleged no wrongdoing in its Petition, and has pointed to no interim or final decision in any of the many forums it has visited that would create liability to pay the rate that North County asks this Commission to set.[37]

MetroPCS also contends that the controversy is not ripe for resolution at this time. MetroPCS argues:

> North County also fails to mention a fundamental threshold that it must get over to set a rate – there must be ripeness. Ripeness, in this context, means that the rate must <u>apply</u> to something. Here, however, the rate will apply to nothing, since absent a voluntary agreement no charges for terminating traffic may be applied.[38]

Regarding the prosecution of this application, MetroPCS summarizes its position as follows:

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[35] MetroPCS Reply to North County Response at 2-3.

[36] *Id.* at 4.

[37] *Id.* at 5.

[38] *Id.* at 15-16, footnotes omitted, emphasis in original.

> Further, this petition is the classic situation where holding the proceeding in abeyance would serve the public interest. There is uncertainty as to the lawfulness of the FCC's abdication of authority and a reversal by the Court of Appeals will completely abrogate this proceeding. Accordingly, the Commission should act in the interests of judicial economy and act to hold the proceedings in abeyance, should it not choose to simply dismiss North County's Application outright.[39]

In its reply, the Wireless Coalition raises arguments similar to those of MetroPCS. The Wireless Coalition states:

> The pending petition for review of the FCC NCC Order before the D.C. Circuit, and the parties' future proceedings before the FCC, will not just potentially affect the matters at issue before the Commission in this matter; they will directly and unequivocally determine the viability of the Application itself.[40]

The Wireless Coalition also contends that "the Commission (and all parties) could easily spend countless resources trying to establish 'reasonable compensation' in these circumstances only to have the Application rendered moot."[41] The Wireless Coalition then continues:

> The Commission will certainly recall the heavy price such proceedings can impose on all parties involved, including the Commission, when a new FCC decision obliges the Commission to change course in the middle of costing proceedings and start over again.[42]

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[39] *Id.* at 22.

[40] Wireless Reply to North County's Argument Against Abeyance at 2.

[41] *Id.* at 7.

[42] *Id.* at 8.

To illustrate this point, the Wireless Coalition then provides a series of citations to the Commission's experience in the unbundled network element proceeding:

> See e.g., D.99-11-050 (which finally set unbundled network element ("UNE") prices for then Pacific Bell Telephone Company after the Commission's multi-year efforts that resulted in the establishment of a TSLRIC pricing standard for UNEs (D.96-08-021) were modified to comply with the FCC's later edict on TELRIC pricing for UNEs (D.98-02-106)).[43]

3.2. Discussion: Consideration of the Application of North County is not Appropriate at this Time

The question before the Commission is whether to consider at this time the application of North County. On this question, we conclude that it is not prudent to commit Commission resources to a consideration of this application at this time. Furthermore, since statutory deadlines limit the time that the Commission can take to process a proceeding, it is not a preferred Commission policy to hold a proceeding "in abeyance" while awaiting the actions of courts or other regulatory agencies. Instead, we will dismiss the application of North County without prejudice.

On the question before us – whether to proceed at this time – the arguments of MetroPCS and the Wireless Coalition are convincing. First, it makes no sense to proceed with this matter while it is before the D.C. Circuit. Initially, both parties sought resolution of this entire matter by the FCC, and MetroPCS is appealing the FCC's decision to the D.C. Circuit. The decision of that court may lead to a resolution of this matter, and will likely shed light on the many jurisdictional issues that the parties have raised in the FCC proceeding and

[43] *Id*. at 8, footnote 26.

in this proceeding, as well. Thus, awaiting the court decision may either resolve this matter or provide guidance that facilitates action by this Commission.

Second, we take to heart the Wireless Coalition's reminder to this Commission of the years of effort that the Commission and telecommunications companies spent in the unbundling proceedings of the 1990's that were rendered irrelevant by subsequent judicial and FCC actions, as well as by technological and market developments. It is incontrovertible that this Commission's efforts to cost and price call services were both complex and costly for all involved. In light of this experience and the current limitations on resources arising from California's budgetary constraints, it would certainly be unwise to proceed with a consideration of this application without a clear commitment from the FCC to use the results of California's regulatory efforts and a determination that MetroPCS is liable for payment to North County.

For these reasons, it is not prudent to proceed with consideration of this application until the resolution of the appeal to the D.C. Circuit and a determination of liability by the FCC. Since holding this proceeding in abeyance is not the preferred administrative practice at this Commission, it is reasonable to dismiss this application without prejudice. Following action by the D.C. Circuit Courts and the FCC, North County may refile its application. At that time, parties may renew their motions concerning jurisdictional issues, which we have not considered here. Since we dismiss this application, A.10-01-003 is closed.

4. Categorization and Need for Hearing

In Resolution ALJ 176-3247 dated January 21, 2010, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were necessary. Ultimately, no hearings were held in this matter.

5. Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on May 18, 2010 by North County, and reply comments were filed on June 1 by MetroPCS and the Wireless Coalition.

North County argues that this order "misapplies the MetroPCS decision" and "ignores the FCC's prior ruling in the First Order and Report on CMRS Traffic [11 FCC Rcd. 15499] where the FCC specifically found that reciprocal compensation obligations do apply to CMRS providers within the intra-MTA areas."[44] North County further argues that this Commission must follow the FCC's order or risk an enforcement action.

In reply, MetroPCS argues that the FCC has not ordered this Commission to do anything. MetroPCS notes that the FCC's *Order on Review* states that the Commission "*may* employ whatever non-tariff procedural mechanism it deems appropriate under state law."[45] Concerning the issue of reciprocal compensation, MetroPCS argues that "the FCC *expressly rejected* Section 251(b)(5) as a basis for finding compensation to North County here. The [*Bureau Merits Order*] found that 'as a CMRS provider, MetroPCS is not subject to the obligations arising directly from Section 251(b)(5) itself … [a]ccordingly, we deny North County's claim … that MetroPCS is violating Section 251(b)(5) of the Act.'"[46] MetroPCS

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[44] North County Comments at 1.

[45] MetroPCS Reply at 2. citing *Order on Review* ¶1.

[46] *Id.* at 2.

brings attention to the analysis offered in the decision that cites to the *FCC's Bureau Order* and its conclusion that the FCC makes "no determination …[concerning] obligations to pay compensation in the absence of an agreement."[47] Furthermore, MetroPCS argues that this Commission will not be subject to FCC enforcement action because the FCC "did not *orde*r this Commission to do anything" and because this case is "completely distinguishable" from the case cited by North County.[48]

In reply, the Wireless Coalition argues that "the FCC and the Ninth Circuit have held in cases involving [North County] that Section 251(b)(5) does not 'explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation … when carriers exchange traffic without making prior arrangements with each other.'"[49]

The Wireless Coalition also argues that the FCC has not ordered the Commission to set a rate, and that North County's rights are not affected by the dismissal without prejudice.

We note that North County has failed to address the substance of our analysis. As MetroPCS has pointed out in June 1 reply, the FCC has provided no indication as to whether it will use a Commission-determined cost in resolving this matter. Thus, we have not misread the FCC's order.

Second, the question of whether the exchange of this traffic creates obligations for reciprocal compensation is, as MetroPCS and the Wireless Coalition point out, still undecided. Reciprocal obligations are generally

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[47] *Id.* at 3.

[48] *Id.* at 4.

[49] Wireless Coalition Reply at 3.

resolved pursuant to the terms of an interconnection agreement, which is lacking in this situation.

Finally, North County errs in asserting that this Commission's failure to act invites an enforcement action by the FCC. As MetroPCS and the Wireless Coalition point out, the FCC has not ordered this Commission to do anything. In addition, the facts of this case are readily distinguishable from the facts in the case cited by North County, which set forth explicit order that the Hawaii PUC subsequently ignored. There is no order given to this Commission. Moreover, under § 252 of the Telecommunications Act, which guides state action pertaining to interconnection issues, any failure of a state to carry out its obligations results in FCC preemption, not an enforcement proceeding against the state. We note, however, that this Commission stands ready to act on any interconnection agreement filed with us pursuant to § 252 of the Telecommunications Act.

6. Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner and Timothy J. Sullivan is the assigned ALJ in this proceeding.

Findings of Fact

1. *North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, 24 FCC Rcd 14036 (2009) (the *MetroPCS Review Order*) directed North County Communications to seek a determination from this Commission of a "reasonable rate" for the termination services it provides to MetroPCS California.

2. In the *MetroPCS Review Order*, the Federal Communications Commission reserved the right to determine whether MetroPCS has any liability at all towards North County for call termination, and whether the FCC will use the associated compensation rate set by this Commission in any way.

3. On January 7, 2010, MetroPCS of California applied for judicial review of the *MetroPCS Review Order* before the D.C. Circuit. Final briefs are due July 1, 2010.

4. Determining the cost of terminating telephone calls can be both complex and resource intensive.

Conclusions of Law

1. The Federal Communications Commission has made no determination as to whether MetroPCS California is liable to North County Communications Corp. for services that North County provides in terminating certain calls from MetroPCS customers.

2. Because of the uncertainty arising from the appeal of the *MetroPCS Review Order* to the D.C. Circuit Court, and because the Federal Communications Commission has made no determination concerning whether MetroPCS California is liable to North County Communications Corp. for the cost of terminating certain calls, it would be imprudent for the Commission to consider this application at this time.

3. It is reasonable to dismiss this application without prejudice.

4. Application 10-01-003 should be closed.

5. This decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Application 10-01-003 is dismissed without prejudice.
2. Application 10-01-003 is closed.

This order is effective today.

Dated June 3, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners

CERTIFICATE OF SERVICE

I, Christopher M. Arfaa, hereby certify that I have this day electronically filed the foregoing Preliminary Objections of T-Mobile with the Pennsylvania Public Utility Commission, in accordance with the requirements of 52 Pa. Code §§ 1.32 and 5.101. I further certify that I have caused a copy of the filed document to be served upon the persons listed below by the means indicated in accordance with the requirements of 52 Pa. Code § 1.54:

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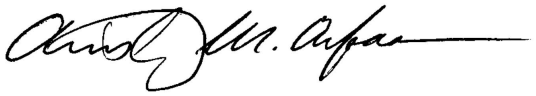

DATE OF SERVICE: December 6, 2010

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