



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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Application of North County Communications Corporation of California (U5631C) for Approval of a Default rate for Termination of Intrastate, IntraMTA Traffic Originated by CMRS Carriers.

A.10-01-003  
(Filed January 6, 2010)

**WIRELESS COALITION'S REPLY COMMENTS ON PROPOSED DECISION**

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Pursuant to Rule 14.3(d) of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission” or “CPUC”), the Wireless Coalition respectfully submits this Reply to North County Communications Corporation of California’s (“NCC”) Comments on the Proposed Decision Dismissing Application Without Prejudice Due to Pendency of Federal Proceedings (“Proposed Decision”). For the reasons set forth below, the Commission should reject NCC’s arguments and adopt the Proposed Decision.

## I. INTRODUCTION

NCC’s comments fail to set forth any factual, legal or technical errors in the Proposed Decision. Instead, NCC misconstrues the *MetroPCS Orders*,<sup>1</sup> mischaracterizes statements made in the *First Local Competition Order*<sup>2</sup> and asserts (incorrectly) that the Federal Communications Commission (“FCC”) has already decided that commercial mobile radio services (“CMRS”) providers are liable for intraMTA traffic allegedly terminated by CLECs like NCC. Then NCC makes the completely baseless argument that the Commission would be in violation of an FCC order and subject to an enforcement action under Section 401(b) of the Communications Act<sup>3</sup> if it failed to set the rate requested in NCC’s Application. Notably absent from NCC’s comments is any discussion or even recognition of the complex and costly proceeding the Commission would have to undertake to set the rate requested by NCC without a clear commitment from the FCC to use the results of the Commission’s efforts.

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<sup>1</sup> *North County Communications Corp. v. MetroPCS California, LLC*, Memorandum Opinion and Order, 24 FCC Rcd 3807 (Enf. Bur. 2009) (“*MetroPCS Bureau Order*”); *North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, 24 FCC Rcd 14036 (2009) (“*MetroPCS Review Order*”), (together, “*MetroPCS Orders*”).

<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (“*First Local Competition Order*”).

<sup>3</sup> 47 U.S.C. § 401(b) provides: “If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order.”

The Proposed Decision is sound from both a legal and public policy perspective, and NCC provides no valid basis for modifying it. Accordingly, the Proposed Decision should be adopted.

## **II. NCC MISCONSTRUES THE *METROPCS ORDERS* AND THE *FIRST LOCAL COMPETITION ORDER***

NCC first attempts to argue that the *MetroPCS Orders* did not need to decide the liability issue because the FCC in its *First Local Competition Order* has already “conclusively determined liability for intra-MTA CMRS compensation . . . .”<sup>4</sup> NCC’s arguments, however, ignore the plain language of the *MetroPCS Orders* and mischaracterize the FCC’s statement in the *First Local Competition Order*. The fact that the *MetroPCS Orders* did not decide the liability issue could not be clearer. As the Proposed Decision correctly notes, the *MetroPCS Bureau Order* clearly stated:

*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.*<sup>5</sup>

NCC’s reading of the FCC’s *First Local Competition Order* is similarly flawed. NCC offers the following quote in support of its theory that the *First Local Competition Order* established liability: “traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under 251(b)(5).” When read in context, however, it is clear that the purpose of the FCC’s statement was not to establish a compensation obligation but rather to “define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section

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<sup>4</sup> NCC Comments at 2 (citing *First Local Competition Order*, 11 FCC Rcd at 16014 ¶ 1036).

<sup>5</sup> Proposed Decision at 5 (quoting *MetroPCS Bureau Order*, 24 FCC Rcd at 3814 ¶ 15 n.55) (emphasis added). See also *MetroPCS Review Order*, 24 FCC Rcd at 14040 ¶ 12, 14044-45 ¶ 22 (affirming the *MetroPCS Bureau Order* in all respects except for the dismissal without prejudice).

251(b)(5).”<sup>6</sup> Moreover, the quoted sentence on its face applies only to traffic subject to Section 251(b)(5). Both the FCC and the Ninth Circuit have held **in cases involving NCC** that Section 251(b)(5) imposes no obligations on CMRS providers.<sup>7</sup> In fact, the FCC has stated that Section 251(b)(5) does not “explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or the applicable compensation regime, if any, when carriers exchange traffic without making prior arrangements with each other.”<sup>8</sup>

The Proposed Decision’s findings and conclusions regarding liability to NCC are correct and should be adopted by the Commission.

### **III. THE FCC HAS NOT ORDERED THE COMMISSION TO SET A RATE**

Based on its faulty analysis and mischaracterizations of the *MetroPCS Orders* and the *First Local Competition Order*, NCC then makes the bold assertion that the *MetroPCS Review Order* is an “order of the [FCC]” within the meaning of Section 401(b) of the Communications Act that **requires** this Commission to set the rate requested by NCC in its Application. This is yet another blatant mischaracterization of the FCC’s holdings.

Although “[t]he phrase ‘order of the Commission’ is not defined in the Communications Act,”<sup>9</sup> *Hawaiian Telephone* and other federal decisions hold that there is no “order” within the meaning of Section 401(b) if the defendant named in the Section 401(b) action is not required to do anything.<sup>10</sup> The *MetroPCS Orders* do not order, much less require, the Commission to do

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<sup>6</sup> *First Local Competition Order*, ¶ 1036. See also *T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) (discussing Section 251(b)(5) and the *First Local Competition Order*) (“*T-Mobile Declaratory Ruling*”).

<sup>7</sup> *MetroPCS Bureau Order*, 24 FCC Rcd at 3814-15 ¶ 16; *North County Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149, 1156 (9th Cir. 2010). Moreover, the Ninth Circuit also found that the FCC has not yet decided whether CMRS providers owe compensation to CLECs like NCC. *Id.* at 1158.

<sup>8</sup> *T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4857 ¶ 4.

<sup>9</sup> *Hawaiian Tel. Co. v. Pub. Utils. Comm’n of Hawaii*, 827 F.2d 1264, 1270 n.16 (1987).

<sup>10</sup> The Ninth Circuit in *Hawaiian Telephone* found that the FCC’s decision requiring the application of the Ozark separations procedures to Hawaii was an “order” of the FCC within the meaning of Section 401(b) because it required a particular action by the Public Utilities Commission of Hawaii. *Id.* at 1272. The Third Circuit held that a FCC regulation was not an “order” because the regulation did not require any particular action by the defendant.

anything. In fact, the *MetroPCS Orders* do not order any entity, including NCC, to do anything.

The *MetroPCS Orders* merely hold that:

[T]he more appropriate venue for determining what constitutes ‘reasonable compensation’ for North County’s termination of intrastate traffic originated by MetroPCS is not [the FCC], but rather the [CPUC], via whatever procedural mechanism it deems appropriate under state law . . . .<sup>11</sup>

Because the *MetroPCS Orders* do not obligate the Commission to set the rate requested by NCC, or to take any other action, Section 401(b) is simply inapplicable.

Following state law and the Commission’s “procedural mechanisms it deem[ed] appropriate under state law,” the ALJ issued the Proposed Decision and wisely declined to expend the Commission’s resources on setting a rate in an environment where there is no clear direction from the FCC that CMRS providers are obligated to compensate a CLEC in the absence of an interconnection agreement. Thus, there is no error on the part of the ALJ and the Commission should adopt the Proposed Decision.

#### **IV. NCC’S RIGHTS ARE NOT AFFECTED BY THE DISMISSAL WITHOUT PREJUDICE**

The procedural mechanism chosen by NCC to set a default rate for the termination of CMRS-originated traffic was an application, not a complaint. While NCC has chosen to file complaints in other venues, including the FCC and state and federal courts, it did not do so here. As a result, the dismissal without prejudice of NCC’s Application has no effect on NCC’s rights, if any, whether here, at the FCC, or in any other action filed by NCC. If warranted, NCC will be

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*Mallenbaum v. Adelpia Commc’ns Corp.*, 74 F.3d 465, 469 (1996). A federal district court held that an authorization granted by the FCC was not an “order within the meaning of Section 401(b) because it was binding only on the plaintiff and it did not direct the plaintiff or anyone else to do anything. *Kroeger v. Stahl*, 148 F.Supp. 403, 405-06 (1957).

<sup>11</sup> *MetroPCS Bureau Order*, 24 FCC Rcd at 3810-11 ¶ 9; *MetroPCS Review Order*, 24 FCC Rcd at 14036-37 ¶ 1 (“[The CPUC] is the more appropriate forum for determining a reasonable rate for North County’s termination of intrastate, intraMTA traffic originated by MetroPCS, and that North County should seek to obtain such a determination from [the CPUC] before seeking to enforce whatever right to compensation it may have here at the Commission under rule 20.11.”).

free to file a new application once the appeals of the *MetroPCS Orders* have been exhausted or the FCC has committed to use the rate set by the Commission.

## V. CONCLUSION

For the reasons set forth above, the Commission should adopt the ALJ's Proposed Decision.

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

I, Judy Pau, certify:

I am employed in the City and County of San Francisco, California, am over eighteen years of age and am not a party to the within entitled cause. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-3834.

On, June 1, 2010, I caused the following to be served:

**WIRELESS COALITION'S REPLY COMMENTS ON PROPOSED DECISION**

via electronic mail to all parties on the service list A.10-01-003 who have provided the Commission with an electronic mail address and by First class mail on the parties listed as "Parties" and "State Service" on the attached service lists who have not provided an electronic mail address.

/s/ \_\_\_\_\_  
Judy Pau

**VIA U.S. MAIL AND EMAIL**

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