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TO PARTIES OF RECORD IN CASE 09-12-014 ET AL.

This is the proposed decision of Administrative Law Judge (ALJ) McKenzie. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ McKenzie at mck@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTONKaren V. Clopton, Chief
Administrative Law Judge

KVC:tcg

Attachment

Decision **PROPOSED DECISION OF ALJ MCKENZIE** (Mailed 12/14/2010)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pac-West Telecomm, Inc. (U5266C),

Complainant,

vs.

Sprint Spectrum, L.P., WirelessCo. L.P., Sprint
Telephony PCS, L.P., Nextel of California, Inc.
and jointly d/b/a Sprint PCS (U3062C, U3064C,
and U3066C),

Defendants.

Case 09-12-014
(Filed December 9, 2009)

And Related Matters.

Case 10-01-019
Case 10-01-020
Case 10-01-021

DECISION DISMISSING COMPLAINTS WITHOUT PREJUDICE

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DECISION DISMISSING COMPLAINTS WITHOUT PREJUDICE

1. Summary

In this decision, we dismiss without prejudice four virtually identical complaints that Pac-West Telecomm, Inc. (Pac-West) has filed against four groups of carriers that provide Commercial Mobile Radio Service (CMRS) and transmit CMRS traffic for termination to Pac-West. In each of the complaints, Pac-West alleges that the CMRS providers have wrongfully refused to pay Pac-West for its termination services, and that each of the defendants should be required to pay a rate equal to the termination rate appearing in Pac-West's intrastate tariff, which applies to carriers like the defendants with which Pac-West does not have an interconnection agreement (ICA). Pac-West also alleges that this Commission has jurisdiction to set an appropriate termination rate for CMRS traffic pursuant to the so-called *MetroPCS Review Order*,¹ which was issued by the Federal Communications Commission (FCC) on November 19, 2009.

We are dismissing these complaints without prejudice for many of the same reasons that recently led us in Decision (D.) 10-06-006 to dismiss without prejudice Application (A.) 10-01-003, the application of North County Communications Corporation of California (NCC or North County) to set a rate for the termination of intrastate CMRS traffic.

In D.10-06-006, we noted that the *MetroPCS Review Order* is currently the subject of a petition for review in the United States Court of Appeals for the

¹ The formal title of the *MetroPCS Review Order* is *North County Communications Corp. v. MetroPCS California, LLC, Order on Review* (FCC 09-100), 24 FCC Rcd 14036, issued November 19, 2009.

District of Columbia Circuit (D.C. Circuit).² In its petition for review, MetroPCS argues that the FCC acted arbitrarily and capriciously, and failed to engage in reasoned decision making, when it concluded that this Commission is a “more appropriate” forum than the FCC to determine a termination rate for the CMRS traffic at issue. The bases for this argument are that (1) §§ 201 and 332 of the Communications Act give the FCC plenary authority to regulate interconnection between CMRS providers and other common carriers and require the FCC to ensure that rates for such interconnection are just and reasonable, (2) the referral of the rate issue to this Commission is inconsistent with the FCC’s 2005 *T-Mobile Ruling*,³ (3) the FCC has a duty under § 208 of the Communications Act to decide complaint cases alleging violations of its regulations, and (4) even assuming the referral to this Commission was permissible, the FCC acted arbitrarily and capriciously by failing to give guidance about the parameters of a proper CMRS rate.

If these arguments before the D.C. Circuit are successful, there will be little, if any, role for this Commission to play in determining the proper rate for termination of intrastate CMRS traffic. Thus, if this Commission were to accede to Pac-West’s request that it immediately establish a rate for termination of the

² In the D.C. Circuit, the petition for review is pending under the name of *MetroPCS California, LLC v. Federal Communications Commission*, Case No. 10-1003. According to Pac-West, the matter was scheduled for oral argument before the D.C. Circuit on October 14, 2010.

³ The formal citation for the *T-Mobile Ruling* is *Developing a Unified Intercarrier Compensation Regime; T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, FCC 05-42, 20 RCC Rcd 4855 (released February 24, 2005).

CMRS traffic at issue, there is a significant risk the Commission would end up wasting the resources devoted to this effort.

Although Pac-West has argued at length that it is seeking different relief under California law than the relief sought by NCC in A.10-01-003, we find Pac-West's arguments unpersuasive. First, even though it strenuously denies doing so, Pac-West is effectively asking us to apply its intrastate tariff to the CMRS traffic at issue here, even though the FCC in its *T-Mobile Ruling* has forbidden the setting of termination rates for intrastate CMRS traffic through tariffs. Second, although Pac-West claims that all of its causes of action except one are based on California law, it is clear to us that the basis for these claims is really federal law, and that none of the authority Pac-West cites compels us to consider these claims immediately. In particular, we find no merit in Pac-West's argument that under D.97-11-024, Pac-West has an independent right under California law to be compensated for CMRS traffic. Interpreting D.97-11-024 in the manner Pac-West suggests would not only ignore the decision's context, but would also be inconsistent with the FCC's broad powers to regulate CMRS traffic under §§ 201 and 332 of the Communications Act, authority that this Commission has been careful not to tread upon.

Finally, we agree with the defendants that Pac-West will suffer no harm if the complaints here are dismissed without prejudice. As we held in D.06-04-010, where we dismissed a complaint in which many of the issues presented were also pending before the FCC, Pac-West may petition this Commission to reopen these cases to the extent the D.C. Circuit's decision concerning the *MetroPCS Review Order* (and any subsequent FCC rulings resulting directly from that decision) leave issues for this Commission to decide with respect to intrastate

CMRS traffic termination. Moreover, under D.06-04-010, any of Pac-West's claims that were timely when these four complaints were originally filed will remain timely if the cases are reopened.

2. Procedural Background

As indicated by the discussion below, our decision today follows extensive briefing by the parties on the joint motion to dismiss that the defendants filed on August 19, 2010. The motion to dismiss resulted, in turn, from discussion at the prehearing conference (PHC) held in these matters on July 22, 2010. Prior to that PHC, both Pac-West and the defendants had submitted extensive PHC statements in response to a ruling issued by the assigned Administrative Law Judge (ALJ) on June 30, 2010.

Because of this extensive procedural history, we begin the discussion below with a description of the allegations in the four complaints. We then describe D.10-06-006, the decision that dismissed without prejudice A.10-01-003, the proceeding in which NCC sought relief similar in many respects to what is being sought in these complaints. Following the description of D.10-06-006, we summarize the ALJ ruling of June 30, 2010, as well as the discussion that occurred at the PHC. The final section of this decision considers the issues raised by both the complainants and the defendants in their respective pleadings.

2.1. The Allegations in the Complaints

The four complaints at issue here are nearly identical.⁴ All of them allege that Pac-West has carried out its duty under § 558 of the Pub. Util. Code to terminate CMRS traffic for the defendants, but that defendants have wrongfully refused to pay Pac-West any compensation for these termination services. The complaints also allege that since Pac-West does not have an ICA with any of the defendants, it is necessary for the Commission to set an appropriate termination rate. Finally, Pac-West alleges that the appropriate amount is the rate for termination appearing in Pac-West's intrastate tariff, which this Commission has approved and which is normally applicable to carriers with which Pac-West does not have an ICA.

With respect to how the rate for CMRS termination should be set, paragraph 27 of each complaint alleges:

In D.06-06-055, the Commission found that “. . . it is appropriate to apply the CLEC's intrastate tariff for termination services afforded to another CLEC where no interconnection agreement is in effect between the two CLECs.” In this instance, the Commission should reaffirm that the terms, conditions and charges set forth in Pac-West's tariff are reasonable and should be made applicable to the traffic that [defendant] sends to Pac-West for termination. Specifically, the Commission should not enforce Pac-West's Intrastate Tariff against [defendant] *per se*,

⁴ At the July 22 PHC, counsel for Pac-West acknowledged that the only real difference among the complaints (apart from the number of minutes terminated and the amount sought) is that the complaint against Sprint PCS (C.09-12-014) does not include a specific cause of action for undue discrimination under § 453. (July 22 PHC Transcript, p. 27.) We note, however, that the claim pleaded under § 761 in the complaint against Sprint PCS is essentially an undue discrimination claim.

but should instead find that the rates set forth in the tariffs constitute reasonable compensation to Pac-West for the termination services it provides to [defendant].

Each complaint also alleges that under the *MetroPCS Review Order*, this Commission has jurisdiction to set a rate for intrastate CMRS termination.

Paragraphs 29 and 30 in each complaint allege:

29. Pursuant to the [*MetroPCS Review Order*] and other federal authority, this Commission has the responsibility and authority to determine reasonable compensation owed to Pac-West for terminating intrastate calls that originated on [defendant's] network.

30. The Commission's jurisdiction to determine reasonable compensation owed to Pac-West for terminating intrastate calls includes intraMTA and interMTA traffic originated by [defendant]. Upon information and belief, substantially all of the traffic originated by [defendant] and terminated by Pac-West is intraMTA and intrastate.

After setting forth the general allegations described above, each complaint alleges that the defendants' conduct also violates various provisions of California law. In particular, the second count of each complaint alleges that the defendant has violated Pub. Util. Code § 761 (which requires California utilities to maintain just, reasonable and adequate practices), and the fifth count of each complaint (except the one filed against Sprint) alleges a violation of Pub. Util. Code § 453, which prohibits undue discrimination by utilities. The fourth count of each complaint alleges that by failing to pay termination charges, each defendant has unjustly enriched itself.

2.2. The NCC Application and D.10-06-006

As noted above, the four complaints here all rely on the FCC's November 2009 ruling in the *MetroPCS Review Order*, which held that this Commission was a "more appropriate forum" than the FCC for determining the rate applicable to intrastate CMRS traffic that NCC terminates for MetroPCS. The *MetroPCS Review Order* was also the basis for A.10-01-003, in which NCC requested this Commission to set a rate for the intrastate traffic that NCC terminates for MetroPCS.

On June 3, 2010, we dismissed NCC's application without prejudice in D.10-06-006. That decision began by noting that the *MetroPCS Review Order*

. . . left unchanged the referral of [NCC] to this Commission for a determination of a "reasonable rate" for call termination. The FCC also placed the complaint of [NCC] in abeyance "pending the California PUC's determination of a reasonable rate for [NCC's] termination of MetroPCS's intrastate traffic."
(D.10-06-006 at 6.)

D.10-06-006 pointed out that despite the referral of the termination rate issue to this Commission, the *MetroPCS Review Order* did not disclaim the FCC's own jurisdiction to decide what a proper rate for termination of intrastate CMRS traffic should be. In support of this interpretation, the decision quoted the following passage from the *MetroPCS Review Order*:

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 [47 C.F.R. § 20.11] . . . 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. (*Id.* at 7, quoting

MetroPCS Review Order at ¶ 12, note 46.)

D.10-06-006 also pointed out that in the *MetroPCS Review Order*, the FCC had declined to rule on whether NCC was entitled to any compensation at all under FCC Rule 20.11 until after the FCC had the benefit of this Commission's deliberations. D.10-06-006 quoted the *MetroPCS Review Order* as follows:

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. (*Id.* at 6, quoting *MetroPCS Review Order* at ¶ 24.)

In light of the character of the FCC's rulings in the *MetroPCS Review Order*, D.10-06-006 concluded that the most appropriate course of action was to dismiss A.10-01-003 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 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. (*Id.* at 15-16.)

An application for rehearing of D.10-06-006 is pending.

2.3. The ALJ Ruling Convening the PHC in These Cases

On June 30, 2010, the assigned ALJ for these four proceedings issued a ruling tentatively consolidating them and scheduling a PHC for July 22, 2010.⁵ After noting the key points in D.10-06-006 summarized above, the June 30 PHC Ruling stated that the principal issue to be discussed at the PHC would be "why, if at all, the factors relied upon in D.10-06-006 do not apply with equal force to these cases, and why, therefore, these case should not also be dismissed."

The ruling acknowledged that there were differences between A.10-01-003 and these proceedings, the most obvious being that the former was cast as an application seeking to have the Commission set a rate, whereas these cases take

⁵ *Administrative Law Judge's Ruling Tentatively Consolidating Cases and Scheduling Prehearing Conference*, issued June 30, 2010. Hereinafter, this ruling will be referred to as the "June 30 PHC Ruling."

the form of complaints alleging wrongful withholding of compensation for CMRS call termination. However, the ruling continued, “these differences appear to be matters of form rather than substance.” (June 30 PHC Ruling at 5.)

In particular, the ruling singled out paragraph 27 of each complaint, which is quoted above and which asks the Commission not to enforce Pac-West’s intrastate tariff *per se*, but instead to “find that the rates set forth in the tariffs constitute reasonable compensation to Pac-West for the termination services it provides.” Concerning this paragraph, the Ruling stated:

Although this request may seem reasonable at first glance, it is apparent on reflection that it is an attempt to plead around the limitations in the *MetroPCS Review Order* and to avoid the issues that led to dismissal of NCC’s application. By asking the Commission not to “enforce Pac-West’s intrastate tariff against [the defendants] *per se*,” Pac-West is obviously seeking to avoid the FCC’s prohibition [in the *T-Mobile Ruling*] against using intrastate tariffs to set CMRS termination rates where no interconnection agreement is in effect between the parties. However, as D.10-06-006 recognized, the only plausible way this Commission could do that is by undertaking the kind of time-consuming and resource-intensive costing exercise that proved wasteful with respect to TSLRIC in the OANAD proceeding.

In short, Pac-West has glossed over the substantial burdens and potential for wasted Commission effort that its request for relief in the complaints here would involve, especially if the D.C. Circuit agrees with petitioners in the *MetroPCS* case that the FCC acted unlawfully by failing to set an intrastate CMRS termination rate on its own. (*Id.* at 6.)

The June 30 PHC Ruling closed by directing Pac-West to submit a PHC statement dealing with specified issues no later than July 12, 2010, and the defendants to submit a response no later than July 19. The ruling also provided

that Pac-West would be given an opportunity at the PHC to respond to the defendants' arguments.

2.4. The Discussion at the July 22 PHC

The PHC in these four cases took place as scheduled on July 22, 2010. The PHC began with a lengthy oral reply by Pac-West's counsel to the points raised in the defendants' joint response of July 19, which had supported the proposed dismissal of these cases.

First, although Pac-West's counsel conceded that in the *MetroPCS Review Order*, the FCC had not disclaimed its own jurisdiction to decide the intrastate termination rate issue, he argued it was nonetheless appropriate for this Commission to adjudicate the four complaint cases. This Commission has never held that the pendency of an appeal of a federal decision is a sufficient ground for the Commission not to discharge its duties under the Public Utilities Code and other California law, he maintained, especially in view of the possibility that litigation over the issues raised in the in the *MetroPCS Review Order* could go on for years. (PHC Transcript, pp. 13-15).

Second, he argued that the amount of work necessary for the Commission to develop a rate for intrastate CMRS traffic termination was less than the June 30 PHC Ruling, D.10-06-006, and the defendants all seemed to assume. Pac-West argued in its July 12 PHC statement that this Commission has consistently used the costs of incumbent local exchange carriers (ILECs) based on the Total Element Long Run Incremental Cost Methodology (TELRIC) as proxies when evaluating the reasonableness of rates proposed by competitive local exchange carriers (CLECs) such as Pac-West, and that the Commission has never required CLECs to submit cost studies. Since the defendants here do not appear to

dispute these facts, it is not reasonable to assume that the setting of an intrastate CMRS termination rate would necessarily involve a complex and time-consuming proceeding. (*Id.* at 15-17.)

Third, counsel argued that the FCC “traffic pumping” proceeding cited by the defendants⁶ is no reason not to move forward with these cases. The FCC itself has recognized that alleged traffic pumping by CLECs may raise issues different from those for other carriers, and in any event, the FCC has not yet promulgated any rules in this area. Allegations that CLECs such as Pac-West have business models based on impermissible traffic pumping are necessarily fact-intensive and would require a hearing. (*Id.* at 23-26.)

Fourth, Pac-West’s counsel reviewed the causes of action set forth in the complaints, and while acknowledging that the first and third causes of action are based on federal law, argued that valid claims are stated under the Pub. Util. Code and other California law for unreasonable utility practices, unjust enrichment, and undue discrimination. (*Id.* at 28-30.)

In her response to these arguments, counsel for defendant Cricket Communications, Inc. (Cricket) asserted that in all of its pleadings, Pac-West had failed to address one of the key concerns in D.10-06-006 and the June 30 PHC Ruling; *viz.*, the potential for wasted effort by this Commission if the D.C. Circuit were to agree with the petitioner in the *MetroPCS Review Order* case that (1) the FCC has a duty under Rule 20.11 to determine the rate for intrastate CMRS traffic termination itself, or (2) that the FCC had acted arbitrarily and capriciously in

⁶ *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking (FCC 07-176), 22 FCC Rcd 17989 (2007).

failing to give this Commission guidance about what would constitute a proper termination rate. (*Id.* at 34-35.) She also disagreed that Pac-West's various causes of action stated valid claims under California law.

In his remarks, counsel for defendant Sprint PCS⁷ argued that the use of TELRIC-based ILEC termination charges would not necessarily be appropriate to determine rates for CMRS traffic termination, since it is not clear that ILEC-like services are the nature of the termination services that Pac-West is providing. Thus, the Commission should not accept Pac-West's assurances that if these cases were to move forward, there would be no need for a protracted cost proceeding. (*Id.* at 43-46.)

After a discussion with the ALJ, it was agreed that the defendants would file a motion to dismiss setting forth their various contentions on August 19, 2010, and that Pac-West would file a response on September 2, 2010. The ALJ also said that he would entertain a request from the defendants to file a reply, if they deemed that necessary.

The defendants filed a 34-page motion to dismiss the complaints on August 19, and Pac-West filed a 59-page opposition on September 2, 2010. The defendants were granted leave by the ALJ to file a reply to the opposition, which they did on September 17, 2010. We consider the arguments raised in these pleadings in the discussion below.

⁷ As noted in the caption for C.09-12-014, "Sprint PCS" is the trade name under which Sprint Spectrum, L.P., WirelessCo. L.P., Sprint Telephony PCS, L.P., and Nextel of California, Inc. do business.

3. Discussion

3.1. This Commission's Approval Without Further Review of the Termination Rate in Pac-West's Intrastate Tariff Might Conflict with the *MetroPCS Review Order*.

As noted above, one of the key concerns expressed in the June 30 PHC Ruling, as well as in D.10-06-006, was that going forward with the complaints here would effectively require the Commission to engage in an extensive costing proceeding to arrive at a reasonable rate for intrastate CMRS traffic termination, since all parties acknowledge that the *T-Mobile Ruling* prohibits ILECs and CLECs from setting rates for CMRS traffic termination through tariffs.⁸ Our decision on the NCC application cited the workload this costing work would create (and the potential for the work to be wasted) as one of the grounds for dismissing A.10-01-003 without prejudice. (D.10-06-006 at 16.) In the June 30 PHC Ruling, the assigned ALJ concluded that "approval of the termination rate in Pac-West's current intrastate tariff is clearly what is being sought here," and continued that in view of the *T-Mobile Ruling*, "the only plausible way this Commission could do that is by undertaking the kind of time-consuming and resource-intensive costing exercise that proved wasteful with respect to TSLRIC in the OANAD proceeding." (June 30 PHC Ruling at 5-6.)

⁸ Paragraph 14 of the *T-Mobile Ruling* provides in full:

Although we deny the CMRS providers' requested ruling under the current rules, we now take action in this proceeding to amend our rules going forward in order to make clear our preference for contractual arrangements for non-access CMRS traffic. As discussed above, precedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more

Footnote continued on next page

In its July 12, 2010 PHC Statement, Pac-West argues that both D.10-06-006 and the June 30 PHC Ruling exaggerate the amount of work that would be necessary, because (1) this Commission has never required CLECs to submit cost studies, and (2) the Commission has regularly relied on TELRIC-based ILEC costs as proxies (or ceilings) when considering the reasonableness of proposed CLEC rates. In its PHC Statement, Pac-West argues:

Raising the specter of OANAD-type ILEC cost proceedings to determine [the] reasonableness of any CLEC rate, including call termination rates for intrastate CMRS-originated . . . calls, flies in the face of over fifteen years of consistent Commission policy and precedent establishing the fundamentally different regulatory framework for determining the reasonableness of rates for all CLEC services under California law. *Never* since the adoption of the 1996 Telecom Act has the Commission required a cost study of any kind to establish the reasonableness of any CLEC rate. To the contrary, the Commission has approved scores of CLEC retail tariffs with no cost showings at all, numerous CLEC access charge tariffs subject only to caps based on comparisons to ILEC access charges, and hundreds of [ICAs] between CLECs and ILECs where the rates to be charged by the CLEC are based on the TELRIC-determined (and Commission-approved) cost-based

consistent with the pro-competitive policies reflected in the 1996 Act. Accordingly, we amend Rule 20.11 of the Commission's rules to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariff. Therefore, such existing wireless termination tariffs shall no longer apply upon the effective date of these amendments to our rules. We take this action pursuant to our plenary authority under sections 201 and 332 of the Act, the latter of which states that "upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service . . ." (20 FCC Rcd at 4863-64; footnotes omitted.)

rates of the ILEC. As demonstrated below, this long-standing Commission policy and precedent is all that must be followed to grant the relief sought in the Pac-West complaints. This is because the Pac-West rates involved in these Complaints are in fact based on AT&T CA's Commission-approved TELRIC rates contained in Pac-West's currently-effective [ICA] with AT&T CA. As shown below, the Commission has found CLEC use of these rates reasonable for functionally identical purposes on numerous occasions. (Pac-West PHC Statement at 7-8; footnote omitted, emphasis in original.)

While Pac-West is correct that this Commission has regularly used the TELRIC-based costs of ILECs as a benchmark in determining the reasonableness of CLEC rates, we have never ruled out the possibility that, in appropriate circumstances, CLECs might be required to submit cost studies for specified purposes. In this case, there is a strong argument for requiring such cost studies, because we think the approach that Pac-West suggests in its PHC statement – approving the termination rate set forth in its intrastate tariff without further review, because that rate is based on the costs of AT&T California – is unlikely to pass muster as the type of “non-tariff procedural mechanism” that ¶ 14 of the *MetroPCS Review Order* said should be used to determine a CMRS termination rate. We think the FCC would be likely to view the course of action Pac-West proposes here as a mere rubber-stamping of its intrastate tariff, and thus inconsistent with the *T-Mobile Ruling*.

In support of its argument that the Commission should not require any cost studies to establish an intrastate CMRS termination rate, Pac-West relies on D.97-09-115 and other decisions issued immediately after passage of the 1996 Telecommunications Act. As CLECs have become more established players since the passage of the 1996 Act, we have had less occasion to speak to the issue

of when cost studies might be appropriate. One instance where we recently did so, however, was in D.07-12-020, in which we reduced the intrastate access charges of mid-size ILECs to \$0.025 per minute in 2008, and then limited these charges to the higher of AT&T's or Verizon's intrastate access charges, plus 10%, beginning on January 1, 2009.

Pac-West relies on the statement in Finding of Fact No. 5 in D.07-12-020 that "doing intrastate access cost-of-service studies for each competitive and mid-sized local exchange carrier is inefficient and unnecessary." However, D.07-12-020 does not hold, as Pac-West seems to imply, that CLEC cost studies are never appropriate. Ordering Paragraph 6 of D.07-12-020 states that the Commission might "authorize higher intrastate access charges upon a demonstration, *including a thorough cost-of-service study*, of higher actual costs" than the adopted caps.⁹ (Emphasis added.)

The argument for requiring cost studies to set a CMRS termination rate in these cases is increased by the limited discussion of what would constitute an appropriate "non-tariff procedural mechanism" that appears in the *MetroPCS Review Order* and the decision it reviewed, the so-called *Bureau Merits Order*.¹⁰ The only significant discussion on this point appears in the *Bureau Merits Order*, in which the FCC's Enforcement Bureau, in holding that this Commission was the "more appropriate venue" to decide the termination rate issue, stated that this Commission could decide the question "via whatever procedural

⁹ See also Conclusion of Law No. 9.

¹⁰ The formal citation for the *Bureau Merits Order* is *North County Communications Corp. v. MetroPCS California, LLC*, Memorandum Opinion and Order (DA 09-719), 24 FCC Rcd 3807 (2009).

mechanism it deems appropriate under state law (e.g., complaint proceeding, declaratory ruling proceeding, generic cost or rulemaking proceeding)."¹¹

Whatever this language may mean, it certainly seems to contemplate something more than the *pro forma* blessing of a rate set forth in an intrastate tariff that is based upon the comparable rates of ILECs such as AT&T California.¹²

An additional reason that we find Pac-West's discussion of the costing issue to be unconvincing is that in the *MetroPCS Review Order*, the FCC did not rule out the possibility that in setting an appropriate termination rate, this Commission might want to consider the nature of the traffic that NCC terminates for the defendants, a point also made by counsel for SprintPCS at the July 22 PHC. (PHC Transcript at 43-46.) The discussion of this issue appears in ¶ 21 of the *MetroPCS Review Order*, which states:

Recognizing that we might affirm the *Bureau Merits Order*, MetroPCS asks, in the alternative, that we provide guidance to the California PUC about how to establish a reasonable termination rate under the particular facts of this case. MetroPCS focuses especially on the facts that the traffic at issue is unidirectional toward North County and routed entirely to

¹¹ *Bureau Merits Order* at ¶ 9. In ¶ 12 of the *MetroPCS Review Order*, the FCC affirmed and incorporated this language by reference.

¹² In this connection, it is important to recall that in footnote 46 of the *MetroPCS Review Order* (at ¶ 12), the FCC stated that it was not disclaiming jurisdiction to determine what constitutes an appropriate intrastate CMRS termination rate. All the *Bureau Merits Order* held, the FCC said, was that "the state commission, in this instance, is the more appropriate forum" to decide the question.

In view of the FCC's apparent reservation of the right to decide the compensation issue for itself, we think that if we are ultimately called upon to set a termination rate, our work will command more respect if it is supported by a more rigorous costing exercise than the use of ILEC termination costs as proxies, which is what Pac-West proposes here.

chat-lines. We decline MetroPCS's request. We believe that the California PUC is fully equipped to determine a reasonable termination rate under the specific circumstances presented. (Footnotes omitted.)

At this stage of this litigation, we cannot disagree with the assertions of SprintPCS that (1) discovery may be necessary concerning the actual nature of the traffic that Pac-West terminates for the defendants, and (2) a lower rate may be appropriate for terminating this traffic than the rate for traditional voice traffic. We also agree with the defendants that if we are ultimately called upon to set an intrastate termination rate for CMRS traffic, we would be likely to benefit from guidance by the FCC as to what issues that agency considers relevant.

In short, given all of the considerations set forth above, we are unwilling to accept the assurances of Pac-West that in order to set an intrastate CMRS termination rate, complex costing proceedings would not be necessary. Rather, we agree with the following statement in the defendants' joint motion to dismiss:

Permitting Pac-West to enforce its tariffed rate through a complaint proceeding would in effect create a *de facto* wireless termination tariff sanctioned by this Commission and contradict the FCC's *T-Mobile Ruling* and its rules. It would also run afoul of the *MetroPCS Review Order* in which the FCC went out of its way to reaffirm that any state commission proceeding to consider a compensation rate should be a "non-tariff" proceeding. A "non-tariff" proceeding must be something more than simply declaring that rates contained in a tariff constitute reasonable compensation for the termination of CMRS-originated traffic. (Defendants' Motion to Dismiss at 16; footnote omitted.)

3.2. D.97-11-024 Does Not Confer a Right Upon Pac-West Under State Law to an Immediate Determination of What Constitutes Reasonable Compensation for Terminating CMRS Traffic, Especially in View of the Pendency of Related Proceedings.

Although Pac-West argues in its papers here that it has stated four valid causes of action under state law, D.97-11-024 (76 CPUC2d 458) is the underlying basis for its claim that under California law, it is entitled to compensation for terminating the defendants' CMRS traffic. Pac-West argues that in D.97-11-024, the Commission held that under Pub. Util. Code § 558, "all carriers are obligated to complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangements are proper." However, Pac-West argues, D.97-11-024 stated as a corollary of this obligation that "carriers are entitled to just and reasonable compensation for the completion of calls over their facilities," and that to allow the pursuit of such claims, "the Commission has provided procedural remedies through the complaint process and other formal and informal dispute-resolution measures in which restitution can be achieved." Pac-West concludes that in filing these complaint cases, it is merely pursuing the right to compensation recognized in D.97-11-024, and that the Commission should therefore adjudicate its rights promptly. (Opposition to Motion to Dismiss at 11-13.)

The joint defendants argue that Pac-West reads D.97-11-024 too broadly. They point out that the holding of the decision is that "all carriers are obligated to complete calls where it is technically feasible to do so," regardless of the carriers' views about the relevant intercarrier compensation arrangements. However, defendants continue, in D.97-11-024 the Commission "was not

addressing, much less resolving, appropriate compensation arrangements,” an issue that the decision -- which was issued in the Commission’s Local Competition docket¹³ -- left to another proceeding. Moreover, defendants continue, “the key issue in the Pac-West complaints – as it was in the NCC Application -- is whether an obligation to [pay] just and reasonable compensation between a CLEC and a CMRS provider attaches in the absence of a tariff or agreement. D.97-11-024 does not address much less resolve that issue.” (Joint Reply to Opposition to Motion to Dismiss at 4, 5.)

Although Pac-West is correct that D.97-11-024 recognizes in the abstract a carrier’s right to be compensated for calls it terminates, the joint defendants offer a more persuasive reading of the case. As they note in their September 17, 2010 joint reply, the language on which Pac-West relies for its right to seek compensation appears in a single paragraph that follows several others emphasizing the duty of all carriers to complete calls under both § 558 of the Pub. Util. Code and § 251(a)(1) of the Telecommunications Act. The language on which Pac-West relies is as follows:

While carriers are entitled to just and reasonable compensation for the completion of calls over their facilities, the resolution of any disputes over compensation must necessarily be addressed after, and independent of, the physical routing of the calls has been completed. The Commission has provided procedural remedies through the complaint process and other formal and informal dispute-resolution measures in which restitution can be achieved. (76 CPUC2d at 460.)

¹³ The Local Competition proceeding was a combined rulemaking (R.) and investigation (I.) assigned docket numbers R.95-04-043/I.95-04-044.

When read in context, this paragraph merely makes the point that carriers have a remedy if they believe the compensation they are receiving for call completion is inadequate. However, D.97-11-024 says nothing about when this remedy may be available, or how it may be affected by other proceedings. Indeed, apart from announcing the general duty of all carriers to complete calls, one of the few specific things D.97-11-024 does decide is that resolution of the issues in the complaint case that gave rise to D.97-11-024 should take place elsewhere:

We do not address here the merits of the factual dispute in the Pac-West complaint which gave rise to this issue. Nonetheless, in whatever manner we ultimately resolve that complaint, we conclude that all carriers are entitled to have their calls routed and completed by other carriers in the manner they have requested . . . The question of call rating and routing restrictions and compensation arrangements for the routing of calls to distant locations will be resolved as a separate matter in the complaint case or in an alternative procedural forum to be determined by the Commission. (*Id.* at 460-61.)

Contrary to Pac-West's arguments, nothing in D.97-11-024 suggests that this Commission cannot invoke its regular procedural tools -- such as dismissing complaints without prejudice -- when the use of such procedures is appropriate because related and potentially determinative issues are pending in other forums.

As D.10-06-006 makes clear, there are a large number of issues related to these cases that are pending in other forums. First, as defendants point out, the *MetroPCS Review Order* did not disturb the holding of the *Bureau Merits Order* that the FCC was making "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 . . .”¹⁴ If we were to hold prior to the D.C. Circuit’s decision on the *MetroPCS Review Order* that D.97-11-024 creates an obligation under state law to pay compensation in the absence of an interconnection agreement (or that CMRS providers are obligated to enter into such agreements with CLECs despite the *T-Mobile Ruling*), we might be creating a significant potential for conflict with federal law governing CMRS traffic, an area in which §§ 332 and 201 of the Telecommunications Act give the FCC very broad authority. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800 n. 21 (8th Cir. 1997), *aff’d in part and rev’d in part on other grounds sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999); *T-Mobile Ruling* at ¶ 14, n. 58.

Second, as noted above, D.97-11-024 was an announcement of general policy issued in this Commission’s Local Competition docket. It sheds no light on the nature of the compensation that CLECs like Pac-West can appropriately receive for the termination services they provide to CMRS providers like the defendants. As discussed in Section 3.1. of this decision, the compensation issues in these cases raise difficult questions that may require protracted cost proceedings. If this Commission is ultimately called upon to decide these questions, we believe we would benefit from guidance by the FCC. We note that the FCC’s failure to offer such guidance is one of the grounds for reversal cited in the petition for review of the *MetroPCS Review Order*.

¹⁴ *Bureau Merits Order* at ¶ 15, footnote 55.

We conclude that nothing in D.97-11-024 limits our powers to manage the Commission's docket by dismissing these cases without prejudice until related (and potentially determinative) issues have been addressed by the D.C. Circuit in the challenge to the *MetroPCS Review Order*.

3.3. Under the Current State of Federal Law, Pac-West is Not Entitled to go Forward on its First, Second, Fourth, and Fifth Causes of Action.

In addition to arguing that D.97-11-024 recognizes the right of carriers like itself to be compensated for traffic that it terminates on behalf of other carriers, Pac-West argues that it has stated valid causes of action for CMRS compensation under California law and is entitled to go forward on these state law claims. In particular, Pac-West argues that it has stated valid claims for relief under Pub. Util. Code § 453 (which prohibits undue discrimination), § 761 (which empowers the Commission to prohibit unjust and unreasonable utility practices), and the law of unjust enrichment.

We consider each of these claims below. We conclude that while Pac-West has cited some authority to support its claims under California law, none of this authority deals with the situation we are confronted with here: *viz.*, a case in which issues pending in related federal proceedings could be determinative of the state law claims. Further, none of the cases cited by Pac-West suggests that this Commission lacks traditional powers to manage its docket – including the power to dismiss cases without prejudice – where, as here, there is a significant potential for wasting Commission resources if the federal courts eventually conclude that the federal agency in a related proceeding has acted erroneously.

3.3.1. Pac-West's First Cause of Action is Based on Federal Law, Not State Law

As noted above, except for C.09-12-014, all of the complaints in these cases purport to set forth five causes of action.¹⁵ Although Pac-West now argues that all of these claims except the third cause of action arise under California law,¹⁶ it is clear to us that the first cause of action in each complaint is really based on federal law. As shown below, Pac-West's counsel conceded as much at the July 22, 2010 PHC.

Despite its counsel's concession, Pac-West argues in its September 2, 2010 opposition to the joint dismissal motion that the first cause of action arises under California law. But an examination of the actual allegations in the first cause of action demonstrates, as the assigned ALJ pointed out at the PHC, that this is really a federal claim. Accordingly, it makes sense to dismiss this claim without prejudice until the D.C. Circuit brings some additional clarity to the muddled area of CMRS compensation law by ruling on the petition for review of the *MetroPCS Review Order*.

¹⁵ As noted in Section 2.1. of this decision, C.09-12-014 contains only four causes of action. Although the second cause of action in that complaint is based upon Pub. Util. Code § 761, it includes a claim of undue discrimination that in the other three complaints is pleaded as the fifth cause of action.

¹⁶ At page 40 of its September 2 Opposition to the Motion to Dismiss, Pac-West concedes that its third cause of action is a claim for relief under federal law. Pac-West's counsel made a similar admission at the PHC. (See July 22 PHC Tr. at 28.)

Like all of the other claims in the complaints, the first cause of action begins with an incorporation by reference of paragraphs 1-34, which set forth the background facts leading up to the *MetroPCS Review Order*. The key paragraphs in the first cause of action then follow:

37. Pac-West terminates [defendant]-originated traffic using the same facilities it uses to terminate traffic from other types of carriers.

38. Pac-West's Intrastate Tariff contains charges that Pac-West imposes on carriers other than CMRS carriers that terminate traffic to Pac-West customers but do not have an interconnection agreement with Pac-West.

39. The provisions of the Intrastate Tariff were approved by the Commission, establishing Pac-West's lawful and reasonable rates for terminating the traffic described therein, including applicable late charges.

40. [Defendant] has refused to pay the Commission-approved reasonable charges contained in the invoices presented by Pac-West for the traffic that [defendant] originates and delivers to Pac-West.

41. [Defendant] pays other local exchange carriers similar rates for their termination of [defendant]-originated traffic.

42. Pursuant to 47 C.F.R. Section 20.11, the [*MetroPCS Review Order*], and other federal authority, the Commission should determine a reasonable rate of compensation for Pac-West's termination of [defendant]-originated traffic.

43. The Commission should exercise its jurisdiction to determine that the rates Pac-West charges for termination pursuant to its Intrastate Tariff also constitute reasonable compensation for terminating intrastate, intraMTA CMRS calls . . . (Footnotes omitted.)

Although it seems clear from ¶ 42 that the authority relied on for this claim is federal law, Pac-West argues that the first cause of action is really based on California law. After quoting the portion of ¶ 43 set forth above, Pac-West asserts:

While ¶ 42 mentions 47 C.F.R. § 20.11 and the [*MetroPCS Review Order*], Pac-West's First Cause of Action asks the Commission to exercise "its jurisdiction" under state law to determine "reasonable compensation for terminating intrastate, intraMTA calls." (Opposition to Motion to Dismiss at 26-27; emphasis in original.)

Pac-West goes on to argue that the charges set forth in its intrastate tariff constitute reasonable compensation for CMRS call termination because (1) these charges are taken from the TELRIC-based costs of California ILECs that provide the same functions, (2) the Commission has long held that "Commission-approved rates for ILECs should be used as the basis to set reasonable rates for the equivalent functions provided by CLECs," and (3) detailed cost studies from CLECs like Pac-West are therefore not necessary. (*Id.* at 27.)

As noted in Section 3.1. above, we find these arguments unpersuasive. First, the Commission has not held that ILEC costs for particular network functions will automatically and in all cases be used to set CLEC rates for allegedly equivalent functions. Second, as the quoted paragraphs from the first cause of action show, the "jurisdiction" that ¶ 43 asks the Commission to exercise is not authority derived from state law, but from the federal decisions and regulations cited in ¶ 42. Third, as noted above, Pac-West's counsel acknowledged at the July 22 PHC that the first cause of action is a request for relief under federal law:

MR. TOBIN: With respect to the first [cause of action], it's hard to

say that that is not a request under federal law. Now, I will say these complaints, which of course we have the right to amend, . . . were drafted before the North County dismissal order [*i.e.*, D.10-06-006] and were drafted only in light of the FCC order that had been issued and made effective. But I will not have too much argument about the first cause of action being –

ALJ MCKENZIE: Kind of a request for relief.

MR. TOBIN: Sort of, yes. (July 22 PHC Tr. at 27-28.)

In light of this admission, it is clear that the First Cause of Action arises under federal law, and that Pac-West must therefore look to other causes of action to support its argument that the Commission has an independent obligation under California law to set a CMRS termination rate promptly.

3.3.2. Pac-West’s Fifth Cause of Action – Which Alleges That Pub.Util. Code § 453 is Violated by the Defendants’ Refusal to Pay Pac-West Compensation Comparable to What the Defendants Pay LECs With Which They Have ICAs – Fails to State a Claim Because the Conduct at Issue is Authorized by Current Federal Law

Although Pac-West makes similar claims with respect to other sections of the Pub. Util. Code, one of its key contentions in the complaints here is that the defendants’ refusal to pay Pac-West compensation for terminating the defendants’ CMRS traffic, while paying such compensation to LECs with which the defendants have ICAs, constitutes a violation of § 453(a) of the Code.

In its fifth cause of action, Pac-West alleges:

66. Section 453 provides that “No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.”

67. [Defendant's] payment to other LECs – including ILECs such as AT&T – of termination charges comparable to those set forth in Pac-West's Intrastate Tariff (and in any event more than zero) constitutes prejudice, disadvantage, and discrimination against Pac-West.

The joint defendants have moved to dismiss this claim on the ground that “the conduct challenged in the Complaint is that of the utilities . . . who are receiving service. PU Code Section 453's prohibition is, however, on the utility that is *providing* a service and charging rates; it does not impose any obligation on the entity that receives service from another utility and pays that utility's rates.” (Joint Motion to Dismiss at 23-24; emphasis in original.) Defendants point out that in the *Bureau Merits Order*, the FCC's Enforcement Bureau relied on this distinction in dismissing NCC's discrimination claim under § 202 of the Communications Act, and argue that this Commission should do the same:

In its FCC complaint, NCC alleged that MetroPCS's “refusal to enter into an interconnection agreement that provides a comparable rate for like termination services constitutes unjust and unreasonable discrimination” in violation of Section 202(a) of the Act. The Enforcement Bureau held that NCC failed to state a claim, finding that “[s]ection 202(a) is inapplicable where as here, the challenged conduct – refusing to pay ‘a comparable rate for [allegedly] like termination services’ – is that of the carrier receiving the communication service rather than the carrier providing the service.” The Enforcement Bureau concluded that MetroPCS's “willingness or obligation to pay other carriers a different rate for terminating intrastate traffic than what it is willing to pay North County for terminating services does not fall within section 202(a) of the Act.” The Commission should similarly find that PU Code Section 453 is inapplicable to the facts at issue here and dismiss Pac-West's claims. (Joint Motion to Dismiss at 24-25; footnotes omitted.)

Although we are not obliged to follow the FCC's reading of § 202 of the Telecommunications Act when construing § 453 – and we think that the defendants' reading of § 453 is too cramped in view of applicable California precedent – we agree with the defendants' overall point that the conduct of which Pac-West complains is not now actionable under § 453 because it is currently permitted under federal law.

As the defendants point out, the FCC held in the 2005 *T-Mobile Ruling* that LECs could no longer use state tariffs to collect compensation for terminating the non-access traffic of CMRS providers. At the same time, however, the FCC ruled that it would amend Rule 20.11 to allow ILECs to request interconnection agreements from CMRS providers, and would allow the ILECs to invoke the negotiation and arbitration provisions in § 252 of the Telecommunications Act in the event negotiations for such an agreement were unsuccessful. (*T-Mobile Ruling* at ¶ 16.) The FCC also stated, however, that “in the absence of a request for an interconnection agreement, no compensation is owed for termination.” (*Id.* at ¶ 14, footnote 57.) Since, under the *T-Mobile Ruling* and Rule 20.11(e), only ILECs and not CLECs like Pac-West are entitled to invoke the negotiation and arbitration provisions of § 252 to obtain an ICA,¹⁷ the joint defendants' position is

¹⁷ Rule 20.11(e) (47 C.F.R. § 20.11(e)) provides in full:

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. A commercial mobile radio service 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 § 51.715 of this chapter shall apply.

that they have engaged in no undue discrimination by (i) failing to reach agreement with Pac-West on the terms of interconnection, or (ii) failing to pay Pac-West termination charges in the absence of such an agreement.

To get around this reasoning, Pac-West alleges in ¶ 28 of each complaint that “under 47 C.F.R. § 20.11, [defendant] is obligated to pay reasonable compensation to Pac-West for termination of traffic [the defendant] originated.” However, this allegation assumes the answer to a question that, in the *Bureau Merits Order*, was expressly reserved for future FCC consideration:

We make no determination 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. (*Bureau Merits Order* at ¶ 15, footnote 55.)

In view of the FCC’s broad authority over CMRS traffic, we would be stretching the provisions discussed above beyond their reasonable limits if we were to hold, contrary to the FCC’s preference in the *T-Mobile Ruling* for resolving compensation issues through interconnection agreements, that CLECs – even though they are not entitled to request ICAs under *T-Mobile* -- nonetheless enjoy the same rights as ILECs to receive compensation for terminating CMRS traffic.

However, as to the defendants’ argument that we should construe § 453 in the same way the FCC construed § 202 of the Telecommunications Act -- *viz.*, that the prohibitions in § 453 apply only to utilities providing services, not to those receiving services – we agree with Pac-West that such a construction would be at odds with the California Supreme Court’s broad interpretation of § 453 in *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458 (1979). In

that case, Pacific Telephone (PT&T) argued that § 453(a) “should be interpreted to proscribe discrimination only in the area of rates, services or other consumer-related functions,” and not the employment discrimination of which the plaintiffs were complaining. The Supreme Court rejected this argument:

First, and perhaps most obviously, PT&T’s proposed narrow construction of [§ 453(a)] is difficult to reconcile with the explicit broad language of the provision. As we have seen, the statute provides that “[n]o public utility shall, as to rates, charges, service, facilities or in any other respect . . . subject any . . . person to any prejudice or disadvantage.” (Italics added.) The narrow interpretation of the section suggested by PT&T would fail to give full effect to the broad, emphasized language of the provision . . . The chosen language indicates that the Legislature intended to prohibit public utilities from engaging in arbitrary discrimination “in any respect,” including employment discrimination. (24 Cal.3d at 478; citations omitted, emphasis in original.)

Under the Supreme Court’s reasoning in *Gay Law Students Assn.*, if it were purely a matter of state law, we think the language of § 453(a) is broad enough to allow for a claim against a certificated CMRS provider that receives a service from two different types of local exchange carriers, and pays one type of carrier for this service while not paying the other.

In this case, however, the applicable rules are *not* purely a matter of state law. FCC Rule 20.11(e) allows ILECs but not CLECs to request interconnection from a CMRS provider, and to invoke the negotiation and arbitration provisions of § 252. The *T-Mobile Ruling*, which the FCC reaffirmed in the *MetroPCS Review Order*, holds that “in the absence of [such] a request for an interconnection agreement, no compensation is owed for termination.” (*T-Mobile Ruling* at ¶ 14,

footnote 57.) Thus, the discrimination in compensation practices that Pac-West complains about appear to be sanctioned by current FCC rules.¹⁸

Until the D.C. Circuit hopefully brings some clarity to the muddled area of CMRS compensation law, we think the most appropriate course of action is to dismiss Pac-West's § 453(a) claims here without prejudice.

¹⁸ Even allowing for the breadth of § 453's language, nothing in *Gay Law Students Assn.* suggests that § 453 prohibits discrimination in the payment for a utility service where such discrimination is sanctioned by federal law, as is the case with the differing treatment of ILECs and CLECs here. Indeed, by upholding the lower court's decision that a claim for employment discrimination was not stated under the California Fair Employment Practices Act (FEPA), *Gay Law Students Assn.* supports the conclusion that the differing treatment of ILECs and CLECs authorized by Rule 20.11(e) is not actionable here.

In *Gay Law Students Assn.*, the plaintiffs argued that, like the Unruh Act construed in *In re Cox*, 3 Cal.3d 205 (1970), the categories of prohibited discrimination set forth in the FEPA should be considered merely illustrative, and that the statute should be interpreted as banning all forms of employment discrimination, including discrimination against homosexuals. The Supreme Court rejected this argument:

The defect in plaintiffs' argument . . . lies in the fact that whereas the Unruh Act represented a codification of the common law principle barring all discrimination by public accommodations in the provision of services, the prohibitions on employment discrimination contained in the FEPA are in no sense declaratory of preexisting common law doctrine but rather include areas and subject matters of legislative innovation, creating new limitations on an employer's right to hire, promote or discharge its employees. Under these circumstances, the rationale of *Cox* is inapplicable to the FEPA, and the specifically enumerated categories as to which discrimination is prohibited cannot be viewed as simply "illustrative." Indeed, the fact that the Legislature has repeatedly amended the FEPA in recent years, protecting successively the categories of sex . . . , age . . . , physical handicap . . . , medical condition . . . and marital status . . . , affords a rather strong indication that the Legislature itself does not regard the original 1959 act as a bar to all forms of arbitrary discrimination. (24 Cal.3d at 490; citations omitted.)

3.3.3. Pac-West's Second Cause of Action – Which Alleges That Defendants Have Engaged in Unjust and Unreasonable Practices by Refusing to Pay Pac-West Compensation Comparable to What the Defendants Pay LECs With Which They Have ICAs – Fails to State a Claim Because the Conduct at Issue is Authorized by Current Federal Law

As noted above, Pac-West has relied on the same set of operative facts to allege other violations of the Pub. Util. Code. In its second cause of action, Pac-West alleges that the defendants' actions constitute a violation of § 761.

The second cause of action begins by noting that under § 558, Pac-West is obliged to “receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation with whose line a physical connection has been made.” After alleging that it has carried out its duties under this provision by terminating traffic for the defendants, but that the defendants have refused to pay any compensation for these services, Pac-West continues:

49. Section 761 requires carriers to have just, reasonable, proper and adequate practices.

50. [Defendant's] payment to other LECs of termination charges comparable to those set forth in Pac-West's Intrastate Tariff (and in any event more than zero) constitutes an unjust and unreasonable practice in violation of P.U. Code Section 761.

The joint defendants have moved to dismiss the § 761 claim on the ground that the different treatment they afford Pac-West versus those LECs with which they have ICAs is authorized by federal law:

It makes no sense that the Joint Defendants' payment of compensation to carriers with which they have agreements and

not to Pac-West, with which they have no agreements, can possibly constitute an unreasonable practice under PU Code Section 761. This is especially true because the FCC has affirmed the finding in the [*Bureau Merits Order*] that Metro PCS's failure to negotiate a[n] interconnection agreement with NCC did not constitute an unreasonable practice under section 201(b) of the Act. Therefore, Pac-West's claim that the Joint Defendants' practice of paying compensation to other LECs when they refuse to pay comparable compensation to Pac-West is an unjust and unreasonable practice in violation of PU Code section 761 is without merit and should be dismissed as a matter of law. (Joint Motion to Dismiss at 25-26; footnotes omitted.)

In support of its § 761 claim, Pac-West cites D.99-08-025 (2 CPUC3d 197), the decision on rehearing in *Irvine Apartment Communities v. Pacific Bell*. Pac-West characterizes the decision as follows:

In *Irvine Apartment Communities, Inc. v. Pacific Bell* ("Irvine"), the Commission made crystal clear that § 761 has frequently "been applied in complaint cases" and that, in conjunction with § 762, it allows "'aggrieved parties to complain about utility conduct which may comply with all existing laws and regulations but nonetheless may be unreasonable.'" (Quoting *H.B. Ranches, Inc. v. Southern California Edison Co.* (1983) 11 Cal.P.U.C.2d 400, 406.) The Commission went on to note that while § 761 was often used in conjunction with § 762 for environmental issues, neither section is limited to environmental issues. (Opposition to Motion to Dismiss at 17; footnote omitted.)

Just as we have found Pac-West's discrimination claim under § 453 to be deficient under current law, we also conclude that Pac-West has failed to state a claim under § 761, because the differing treatment of which Pac-West complains is authorized by current federal law. Moreover, for the reasons set forth below, we think that the decision on which Pac-West relies to support its § 761 claim,

D.99-08-025, is inapposite here.

As noted above, the FCC held in the *T-Mobile Ruling* that while ILECs would no longer be permitted to use intrastate tariffs to collect compensation for terminating CMRS traffic, they would be permitted to request ICAs with CMRS providers under the newly-amended Rule 20.11, including the right to invoke the negotiation and arbitration provisions of § 252 of the Telecommunications Act. The *T-Mobile Ruling* also provided, however, that “in the absence of a request for an interconnection agreement, no compensation is owed for termination.” (*T-Mobile Ruling* at ¶ 14, footnote 57.) Since only ILECs are entitled to request ICAs with CMRS providers under the *T-Mobile Ruling*, and the FCC’s rulings to date have concluded that conduct like the defendants’ here does not violate federal law, a CLEC like Pac-West has no apparent basis for complaining that its failure to receive compensation is an unjust and unreasonable practice.¹⁹

The decision on which Pac-West relies, D.99-08-025, does not support a contrary conclusion. While it is true that the brief quotations above concerning § 761 appear in the decision, the basic holding of D.99-08-025 was to reaffirm the Commission’s decision in D.98-12-023 (83 CPUC2d 286) that certain conduct of Pacific Bell (Pacific) had violated Pub. Util. Code § 453. The basic issue in D.98-12-023 was whether § 453 had been violated by Pacific’s refusal to honor a request by Irvine Apartment Communities (IAC) to reconfigure the Minimum

¹⁹ This is especially true in view of two key rulings in the *Bureau Merits Order*: (1) that the FCC would reserve judgment on whether any compensation is owed by CMRS providers under Rule 20.11 in the absence of an ICA, and (2) that MetroPCS did not engage in an unreasonable practice under § 201 of the Telecommunications Act by failing to reach agreement with NCC on the terms of an ICA.

Point of Entry (MPOE) -- *i.e.*, the demarcation point between IAC's facilities and those of Pacific -- at eight properties owned by IAC so that Cox Communications could compete with Pacific to provide residential telephone service at those properties. The Commission held that § 453 had been violated and summarized its decision as follows:

We find here that Pacific has violated the terms of the 1992 Settlement by failing to file a tariff setting forth the conditions under which a continuous property owner may add MPOEs. Because Pacific has failed to establish in its tariffs any conditions for adding MPOEs, Pacific has relied solely on its discretion in determining which customer requests for reconfiguring or adding MPOEs to honor and which to deny. By honoring some requests and denying others for similarly-situated customers, with no standards set forth governing these determinations, Pacific has engaged in preferential or discriminatory conduct in violation of § 453 of the PU Code. In the newly-developing competitive telecommunications marketplace, we must discourage discriminatory activity, especially when it prevents competitors from offering their services directly to customers, thus limiting customer choice.

Therefore, we direct Pacific to honor the request by IAC to reconfigure its MPOEs so as to add a new MPOE closer to the property line of each of the affected IAC existing continuous properties. (83 CPUC2d at 297).²⁰

Not only was the decision in *Irvine Apartment Communities* based principally on § 453, but in that case there was -- unlike the situation here -- no potential for conflict with federal law. As the Commission explained, the 1992 settlement referred to in the quotation above grew out of a 1990 FCC report that

²⁰ The quoted language was not modified by D.99-08-025.

had established a new definition for demarcation points. The Commission continued that “D.90-10-064 and D.92-01-023 added clarification to the [FCC’s] demarcation point ruling, including approval of” the 1992 settlement. (*Id.* at 290.) In this case, by contrast, a ruling that Pac-West is entitled under § 761 to compensation for terminating the defendants’ CMRS traffic – despite the lack of ICAs between Pac-West and any of the defendants – would prejudge an issue that the *Bureau Merits Order* has reserved to the FCC.

Because of the potential for conflict with current federal law in an area in which the FCC has very broad jurisdiction, we conclude that Pac-West has not stated a valid claim under § 761 of the Pub. Util. Code. However, because the petition for review of the *MetroPCS Review Order* raises the possibility that federal law in this area may change, our dismissal of the § 761 claim – like the dismissal of Pac-West’s other state law claims -- will be without prejudice.

3.3.4. Pac-West’s Fourth Cause of Action – Which Alleges That Defendants Have Unjustly Enriched Themselves by Refusing to Pay Pac-West Compensation Comparable to What the Defendants Pay LECs With Which They Have ICAs – Fails to State a Claim Because the Conduct at Issue is Authorized by Current Federal Law

In its fourth cause of action, Pac-West alleges that the defendants’ refusal to pay Pac-West compensation for terminating the defendants’ CMRS traffic constitutes unjust enrichment. After alleging that Pac-West has complied with its obligations under Pub. Util. Code § 558 despite its differences with the defendants over compensation, the fourth cause of action continues:

61. [Defendant] has and continues to originate traffic that Pac-West is legally obligated to terminate, and that Pac-West does

terminate.

62. [Defendant] has and continues to refuse to pay Pac-West reasonable compensation for terminating [defendant]-originated intrastate traffic.

63. By collecting its own charges from its customers for CMRS calls, but refusing to pay legally mandated reasonable termination charges to Pac-West, while continuing to send traffic that Pac-West is legally obligated to terminate, [defendant] is unjustly enriched.

To support these allegations, Pac-West relies on California common law and a handful of recent Commission decisions. Pac-West argues that unjust enrichment is:

. . . a cause of action for which the Commission is empowered to grant the equitable remedy of restitution in furtherance of its statutory authority. In this case, as already addressed, equitable relief is in furtherance of the Commission's statutory authority: the Commission's express statutory authority to prohibit unjust and unreasonable practices (P.U. Code § 761) and specific authority to prescribe, in the absence of agreement, reasonable compensation for use by a telecommunications carrier of the network of another (D.97-11-024, P.U. Code §§ 558 and 767). The procedural remedy pursuant to the complaint process established in D.97-11-024 specifically contemplates restitution. (Opposition to Motion to Dismiss at 19.)

Pac-West places particular reliance on two Commission decisions for its argument that the Commission has equitable powers to award compensation for the CMRS call termination here. In the first, D.97-02-040, *West San Martin Water Works, Inc. v. San Martin County Water District* (71 CPUC2d 75), the Commission ordered the San Martin County Water District (District) to return to the West San Martin Water Works (Water Works) possession and control of certain facilities

that the District had seized in 1996. The Commission found that the seizure was wrongful because the facilities had been specifically ceded by a predecessor of the District to the Water Works 15 years before as a contribution in aid of construction.

In concluding that it had the power to order return of the facilities to the Water Works, the Commission cited the discussion of its equitable powers in *Consumers Lobby Against Monopolies v. Public Utilities Com.*, 25 Cal.3d 891 (1979) (*CLAM*), and noted that under Pub. Util. Code § 701, it has the power “to do all things, whether specifically designated in the Public Utilities Act, or in addition thereto, which are necessary or convenient in the supervision and regulation of public utilities, subject only to the requirement that such exercise be cognate and germane to [the Commission’s] regulation.” (71 CPUC2d at 85.)

While it is true that this Commission has broad equitable powers, the *CLAM* decision makes clear that those powers are not unlimited. In *CLAM*, the California Supreme Court concluded that while the Commission possessed sufficient equitable powers in 1979 to enable it to award attorneys fees in a reparation proceeding under the common fund doctrine, the Commission did not enjoy the power to award such fees in quasi-legislative ratemaking proceedings. After noting that (1) ratemaking involves the exercise of legislative functions, (2) when setting rates, the Commission does not “adjudicate vested interests or render quasi-judicial decisions,” and (3) the Commission’s “primary task” in ratemaking is to “assimilate [conflicting] views into a composite ‘public interest,’” the Supreme Court concluded:

These differences illustrate why certain concepts developed by the courts for use in an adversary system are not easily transplanted outside the adjudicatory context . . . Because of

these marked contrasts between the two proceedings we hold that the commission's equitable jurisdiction to award attorney fees in quasi-judicial reparation actions does not extend to its quasi-legislative ratemaking duties. (25 Cal.3d at 909.)

The *CLAM* Court also ruled that this conclusion was not changed by the broad language of Pub. Util. Code § 701 (or of § 728), and that “the decision to include . . . ‘public participation costs’ in ratemaking proceedings is more appropriately within the province of the Legislature.”²¹

In view of the limitations on the Commission’s equitable powers identified in *CLAM*, Pac-West cannot rely on *West San Martin Water Works* to insulate its unjust enrichment claim from a motion to dismiss.

The second Commission decision on which Pac-West relies to support its unjust enrichment theory is D.96-01-014, *Re Southern California Gas Company*, 64 CPUC2d 496, one of the so-called Wheeler Ridge cases. In that decision, according to Pac-West, “the Commission granted relief based on unjust enrichment by requiring interstate gas pipeline shippers to pay for interconnection access service provided by a gas utility.” (Opposition to Motion to Dismiss at 20.)

Pac-West has fairly characterized the discussion in D.96-01-014. After noting that the shippers seeking rehearing there had acknowledged that the facilities to which the access charge applied enabled the shippers to meet their

²¹ It should be noted that in *Southern Cal. Gas Co. v. Public Utilities Com.*, 38 Cal.3d 64 (1985), the Supreme Court dismissed challenges to the intervenor compensation rules adopted by this Commission in 1983. The Court dismissed the challenges because, in 1984, the Legislature had enacted Senate Bill 4, which affirmed the Commission’s power to adopt such rules by adding §§ 1801-1808 to the Pub. Util. Code.

intrastate contractual obligations, the Commission said:

In addition to liability under express contract [*i.e.*, the tariff] for the charge for G-INT service, the shippers also have a quasi-contractual obligation to reimburse SoCalGas for the reasonable value of the service provided. The doctrine of unjust enrichment recognizes an obligation imposed by law regardless of the intent of the parties upon the person benefitted to make

reimbursement. Under the circumstances, the reasonable worth of the access service is the interconnection access fee set out in the G-INT tariff. (64 CPUC2d at 500-501.)

Despite this language, Pac-West's reliance on D.96-01-014 is misplaced, because the validity of its analysis was called into serious question by subsequent developments in the Wheeler Ridge litigation. After this Commission denied the shippers' application for rehearing in D.96-01-014, the same shippers sought relief from the Federal Energy Regulatory Commission (FERC). That agency held that this Commission lacked jurisdiction to impose the charge set forth in the G-INT tariff, because it amounted to an impermissible access charge on interstate shippers seeking to introduce gas into an intrastate system. In *Public Utilities Com'n of State of Cal. v. F.E.R.C.*, 143 F.3d 610 (D.C. Cir. 1998), the D.C. Circuit upheld FERC's conclusion on the matter and said:

FERC found that the tariff which CPUC authorized SoCal to charge to interstate shippers was not a permissible charge for intrastate services rendered, but, rather, an access charge for the privilege of introducing gas into SoCal's intrastate system. FERC therefore concluded that the charge illegally infringed on FERC's jurisdiction over interstate shipment of gas, because the access charge was essentially a charge for carrying gas interstate to the Wheeler Ridge interchange. SoCal and CPUC argue that this determination by FERC was arbitrary and capricious or otherwise not in accordance with law. See 5 U.S.C.

§ 706(2)(A) (1994). Reviewing in accordance with this standard, we hold that FERC's determination that the tariff was an access charge was reasonable, not arbitrary, and that FERC's conclusion that the tariff was illegal was a proper interpretation of 15 U.S.C. § 717(c). (143 F.3d at 614.)

In this case, if we were to move forward on Pac-West's unjust enrichment theory, the same potential for conflict with federal law would exist as in the Wheeler Ridge cases. As noted above, the FCC has held in the *T-Mobile Ruling* that ILECs can no longer use state tariffs to collect compensation for terminating non-access CMRS traffic. At the same time, the FCC ruled that it would amend Rule 20.11 to allow ILECs (but not CLECs like Pac-West) to request interconnection agreements from CMRS providers, and would allow the ILECs to invoke the negotiation and arbitration provisions of § 252 of the Telecommunications Act to obtain such agreements. (*T-Mobile Ruling* at ¶ 16.) The FCC also stated, however, that "in the absence of a request for an interconnection agreement, no compensation is owed for termination." (*Id.* at ¶ 14, footnote 57.)

As noted above, the joint defendants have argued that under these rulings, they have engaged in no wrongdoing by (i) failing to reach agreement with Pac-West on the terms of interconnection, or (ii) failing to pay Pac-West termination charges in the absence of an ICA. Unless federal law changes as a result of the D.C. Circuit's decision on the petition for review of the *MetroPCS Review Order*, we conclude that Pac-West has failed to state a claim for unjust enrichment, and that it is appropriate to dismiss this claim without prejudice.

**3.3.5. The Commission Should Not Move Forward
on Pac-West's Third Cause of Action –
Which is Admittedly Based on Federal Law –
Because of the Unsettled State of the Law**

Due to Appeal of the *MetroPCS Review Order*.

As noted above, Pac-West acknowledges in its opposition to the motion to dismiss that its third cause of action is based on federal rather than California law. (Opposition to Motion to Dismiss at 40.) Nonetheless, Pac-West argues that this Commission should move forward on the third cause of action now, because (1) the *MetroPCS Review Order* is a binding FCC order that has not been stayed, and (2) the *MetroPCS Review Order* establishes that under Rule 20.11, CLECs like Pac-West are entitled to compensation for terminating CMRS traffic, even in the absence of an ICA.

While it is true that the *MetroPCS Review Order* has not been stayed, it is the subject of a petition for review that attacks its central conclusion that this Commission, rather than the FCC itself, is the appropriate forum to determine what a reasonable intrastate CMRS compensation rate is. Moreover, it is *not* the case that in the *MetroPCS Review Order*, the FCC has determined that CLECs like Pac-West are entitled to compensation under Rule 20.11 for terminating CMRS traffic, even in the absence of an ICA. While the FCC's General Counsel has apparently taken that position in his brief before the D.C. Circuit opposing the petition for review, an examination of the actual language of the *MetroPCS Review Order* reveals that the FCC declined the opportunity to overrule the statement in footnote 55 of the *Bureau Merits Order* that under Rule 20.11, the obligation of CMRS providers to pay compensation to CLECs in the absence of an interconnection agreement is still an open question. Under these circumstances, and in view of the other challenges to the *MetroPCS Review Order* raised in the petition for review, it is appropriate to dismiss the third cause of action without prejudice – along with Pac-West's four claims based on state law

- until the D.C. Circuit issues its ruling and hopefully brings some clarity to the uncertain state of CMRS compensation law.

The basis for Pac-West's argument that in the *MetroPCS Review Order*, the FCC has determined that CLECs are entitled to compensation for terminating CMRS traffic, even if no ICA is in effect, is as follows:

In the [*MetroPCS Review Order*], the FCC granted in part North County's Application for Review to "hold [North County's Rule 20.11 reasonable-compensation] claim in abeyance ... pending the California PUC's determination of a reasonable termination rate to avoid any prejudice" to North County. This decision to hold North County's claims in abeyance would be entirely nonsensical if, as the Defendants claim, MetroPCS had no retrospective liability to North County unless and until the parties finally executed a contract that established the rate of "reasonable compensation" required by Rule 20.11. If the Defendants' theory was correct, the FCC simply would have sustained the Enforcement Bureau's (incorrect) dismissal of North County's Rule 20.11 claim for want of that allegedly critical contract. But since the FCC overturned the Enforcement Bureau's decision in this regard to hold North County's case open and in abeyance pending this Commission's establishment of the rate, then it necessarily follows that retroactive liability is available under the Rule . . . (*Id.* at 41; footnote omitted.)

A thorough review of the FCC's order demonstrates that in making this argument, Pac-West has read paragraphs 22-24 of the *MetroPCS Review Order* too broadly, and has ignored other, more relevant, language in the order that is at odds with its position. Specifically, in the very first paragraph of the *MetroPCS Review Order*, the FCC was careful not to prejudge the issue of whether an ICA is a precondition to liability under Rule 20.11. The FCC said:

In this Order on Review, we grant in part and otherwise deny

the Application for Review filed pursuant to rule 1.115 by North County Communications Corp. (“North County”) challenging one holding of the *Bureau Merits Order* in this proceeding. We also deny the similar Application for Review filed by MetroPCS California, LLC (“MetroPCS”). In short, according to the parties, the *MetroPCS Review Order* erred by holding that, before North County may seek to enforce *whatever right to compensation it may have here at the Commission under rule 20.11*, North County must first obtain from the California Public Utilities Commission . . . a determination of a reasonable rate for North County’s termination of intrastate, intraMTA traffic originated by MetroPCS. For the reasons explained below, we affirm the finding in the *MetroPCS Review Order* that under the current rules as interpreted by Commission precedent, 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*. Rather than dismiss North County’s claim without prejudice (as the *Bureau Merits Order* did), however, we will hold the claim in abeyance (in the form of an informal complaint) pending the [CPUC’s] determination of a reasonable termination rate to avoid any prejudice to North County’s *alleged* claim for compensation. (Footnotes omitted, emphasis supplied.)

In the same vein, ¶ 22 of the *MetroPCS Review Order* makes clear that the FCC decided to hold NCC’s claim in abeyance, rather than dismiss it without prejudice, not because it was clear that NCC had a right to compensation under Rule 20.11, but to avoid complications later in the litigation from the referral of the compensation issue to this Commission. Citing cases based on the primary jurisdiction doctrine, ¶ 22 of the *MetroPCS Review Order* states in part:

The *Bureau Merits Order* dismissed without prejudice Count I of the Complaint, stating that the [CPUC] is the more appropriate

venue for determining a reasonable rate for terminating MetroPCS's traffic, and that if North County believes that MetroPCS has failed to pay what is owed pursuant to that rate, it may seek enforcement of any payment obligation under rule 20.11. Instead, to prevent the possibility that North County may be prejudiced in any way during the pendency of its proceeding to seek a rate determination from the [CPUC], we believe the

better course is to hold Count I in abeyance rather than dismiss it without prejudice. (Footnotes omitted.)²²

²² In its opposition to the motion to dismiss, Pac-West makes much of the fact that in ¶ 24 of the *MetroPCS Review Order*, the FCC stated that one reason it would hold Count I of NCC's complaint in abeyance was to preserve NCC's rights against possible defenses based on the statute of limitations or the availability of prejudgment interest. Pac-West states:

Indeed, the FCC explicitly provided North County with the ability to convert its informal complaint into a formal complaint based on a myriad of facts, including any dispute over whether "North County's recovery should be limited by the statute of limitations" or whether "North County is entitled to an award of prejudgment interest." Neither of these possibilities would make any sense if the Defendants' interpretation of Rule 20.11 were shared by the FCC. The statute of limitations would have no relevance if retroactive liability were impossible. Likewise, a party cannot logically recover prejudgment interest if there were no prejudgment (*i.e.*, retroactive) damages available under Rule 20.11 on top of which interest would be owed. (Opposition to Motion to Dismiss at 41; footnotes omitted, emphasis in original.)

While this argument may be a linguistically possible interpretation of what the FCC meant in ¶ 24, a more plausible interpretation – and one that is more consistent with the carefully-qualified language of ¶ 1 quoted in the text -- is that the FCC was referring to the time period prior to April 29, 2005, the effective date of the *T-Mobile Ruling*. As noted in ¶ 11 of the *MetroPCS Review Order*, NCC had asked the FCC, as alternative relief in its application for review of the *Bureau Merits Order*, to reverse the Enforcement Bureau's dismissal of Count I with respect to the period prior to April 29, 2005 and hold that as to that period, NCC was entitled to compensation at the rates set forth in its intrastate tariff.

By reversing the dismissal of Count I and holding that count in abeyance until after this Commission ruled on the intrastate compensation issue, the FCC was acting to preserve NCC's claims with respect to the period prior to April 29, 2005. The most plausible reading of ¶ 24 of the *MetroPCS Review Order* is that it was these claims the FCC was seeking not to prejudice with respect to arguments based on the statute of limitations or the availability of prejudgment interest, not some generalized right to obtain compensation in the absence of an ICA.

As the defendants have pointed out, in arguing that this Commission should rule on Pac-West's third cause of action because CLECs have a right under federal law to compensation for terminating CMRS traffic, even in the absence of an ICA, Pac-West ignores the problems its position would create with respect to Rule 20.11(e). In their motion to dismiss, the joint defendants argue:

[A]ny conclusion that FCC Rule 20.11 itself creates an enforceable compensation obligation in the absence of a contractual arrangement would make no sense because it would afford CLECs greater rights to impose rates unilaterally on CMRS providers than the rights given ILECs, who must establish termination rates under agreements pursuant to section 252(b) of the Act. Because the FCC prohibited all LECs from filing tariffs to obtain compensation from CMRS providers, the FCC ruled that if ILECs wished to obtain such compensation on a prospective basis they would need to enter into agreements with CMRS providers. The FCC did not give such rights to CLECs. Accordingly, any interpretation of FCC Rule 20.11(b) that automatically gives all LECs who terminate traffic for CMRS providers a right to compensation would nullify FCC Rule 20.11(e) because then no LEC, including an ILEC, would need to request an agreement from a CMRS provider. Thus, the only logical interpretation of applicable FCC precedent on this issue is that there must be an agreement in order to trigger the compensation requirements in FCC Rule 20.11. (Motion to Dismiss at 20; footnotes omitted.)

In the petition now pending in the D.C. Circuit for review of the *MetroPCS Review Order*, the FCC is arguing that in "adopting Rule 20.11(b), the Commission has already determined that reasonable compensation is owed" to CLECs, even in the absence of an ICA.²³ In addition to arguing that this position

²³ Brief for Respondents (filed May 27, 2010), *MetroPCS California, LLC v. FCC*, D.C. Cir.

Footnote continued on next page

contradicts the FCC's own prior rulings,²⁴ the petitioner has raised many other challenges to the *MetroPCS Review Order*. Its basic position is that the FCC acted arbitrarily and capriciously, and failed to engage in reasoned decision making, when it concluded that this Commission was a "more appropriate" forum to determine a rate for intrastate CMRS traffic than the FCC. The bases for this argument are that (1) §§ 201 and 332 of the Communications Act give the FCC plenary authority to regulate interconnection between CMRS providers and other common carriers, and require the FCC to ensure that the rates for such interconnection are just and reasonable,²⁵ (2) the referral of the rate issue to this Commission is inconsistent with the *T-Mobile Ruling*,²⁶ (3) the FCC has a duty under § 208 of the Communications Act to decide complaint cases alleging violations of its regulations,²⁷ and (4) even assuming the referral to this Commission was permissible, the FCC acted arbitrarily and capriciously by failing to give guidance about the parameters of a proper intrastate CMRS termination rate.²⁸

Case No. 10-1003, p. 34.

²⁴ See Final Reply Brief of Petitioner (filed July 8, 2010), *MetroPCS California, LLC v. FCC*, D.C. Cir. Case No. 10-1003, pp. 19-20, 22-24.

²⁵ Initial Brief of Petitioner (filed April 27, 2010), *MetroPCS California, LLC v. FCC*, D.C. Cir. Case No. 10-1003, pp. 21-25.

²⁶ *Id.*, pp. 38-42.

²⁷ *Id.*, pp. 30-33.

²⁸ *Id.*, pp. 48-50; Final Reply Brief of Petitioner, p. 31.

It is apparent that if any of these arguments are successful, the time and effort this Commission would have to invest to determine an appropriate intrastate CMRS termination rate applicable to these cases would likely be wasted. Accordingly, in accordance with the cases described in the next section of this decision, the most appropriate course of action is to dismiss these four complaint cases without prejudice. If, after the decision from the D.C. Circuit, there remains anything for this Commission to decide, there will be a greater degree of assurance that the time we spend on those tasks will not be wasted.

3.4. Commission Precedent Authorizes the Dismissal of These Cases Without Prejudice

In their joint motion to dismiss, the defendants request that these cases should either be dismissed, or “held in abeyance pending at least the resolution” of the petition for review of the *MetroPCS Review Order*. (Joint Motion to Dismiss at 34.)

We have concluded that where, as here, related and potentially determinative issues are pending in a federal forum, our decisions authorize the dismissal without prejudice of complaint cases such as these. In D.06-04-010, *Pacific Bell Telephone Company v. MAP Mobile Communications, Inc.*, we held that it was appropriate to dismiss a complaint case alleging refusal to pay for interconnection services because the FCC was “considering many, if not all” of the same issues in a complaint case that the defendant had filed at the FCC a few months before.

Pacific opposed the dismissal on grounds that echo the arguments made by Pac-West here. First, Pacific argued that dismissal was inappropriate because the issues pending before the FCC and this Commission were not identical. In response to this, the Commission stated:

We need not resolve whether the issues before the FCC and this Commission are identical, because there are, at the least, many overlapping issues and defenses (e.g., the validity of the interconnection agreement) to resolve. The similarity of the two actions merits [a dismissal without prejudice.] Moreover, Pacific will not be prejudiced if the FCC fails to resolve all of the issues raised in this complaint. Should the FCC's final disposition of the similar case before it fail to resolve the issues between Pacific and MAP presented in this case, Pacific may petition to reopen its complaint in this case to resolve those issues. (D.06-04-010 at 5.)²⁹

Pacific also urged this Commission to stay its complaint rather than dismiss it without prejudice because of concerns about the statute of limitations.

²⁹ In granting the dismissal without prejudice, D.06-04-010 relied on *Pacific Bell v. AT&T Communications of California, Inc.*, D.97-09-105, 75 CPUC2d 678. At pages 4-5 of D.06-04-010, the Commission described that earlier decision as follows:

In *Pacific Bell v. AT&T*, the Commission dismissed without prejudice Pacific's complaint that AT&T and MCI were marketing their local and interexchange services as one package, thus violating federal law and an FCC decision, as well as state law. The Commission reasoned that whether violations of federal law occurred were best left to the FCC. The Commission also justified its result with reasoning equally applicable to the instant case:

"... consistent application of federal law will be enhanced by having one regulatory body address these issues. Finally, efficient deployment of this Commission's resources requires that we decline to exercise our jurisdiction where a fully competent agency is also addressing the same issues." ([75 CPUC2d] at 679.)

In response to this, the Commission stated:

According to Pacific, a stay would not affect the statu[t]e of limitations [on] Pacific's claims, whereas a dismissal may result in some of Pacific's claims being time-barred in a subsequent action before the Commission. However, the decision states that if any of the issues between Pacific and MAP presented in this case are not resolved in the FCC action, that Pacific may petition this Commission to reopen its complaint case to resolve those issues. It is our intention that if the Commission grants Pacific's motion to reopen the complaint case, that case would be processed according to the initial filing date. (*Id.* at 6; emphasis in original.)

The same relief granted in D.06-04-010 is appropriate here. We will dismiss these four complaint cases without prejudice. If Pac-West wishes to reopen them after the D.C. Circuit has ruled on the petition for review of the *MetroPCS Review Order* (and the FCC has completed any proceedings resulting directly from that ruling), Pac-West may petition this Commission to do so. If the petition to reopen the proceedings is granted, any claim by Pac-West that was timely on the original filing date of the complaints will be deemed timely upon the reopening of the cases.³⁰

³⁰ In addition to the other arguments described in the text, Pac-West argues that a dismissal of its complaints here -- even a dismissal without prejudice -- would violate the requirements of both due process and the Equal Protection Clause. (Opposition to Motion to Dismiss at 48-53.)

Pac-West's arguments have not persuaded us that dismissal of these cases without prejudice would violate constitutional requirements. As the defendants point out in their September 17, 2010 joint reply, the argument that dismissal of these complaints would deny Pac-West equal protection is really an attack on the FCC's decision in the *T-Mobile Ruling* to give only ILECs, and not CLECs like Pac-West, the right to demand negotiation and arbitration with CMRS providers under § 252 of the

Footnote continued on next page

4. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with § 311 of the Pub. Util. Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

5. Assignment of Proceeding

In C.09-12-014, John A. Bohn is the assigned Commissioner and A. Kirk McKenzie is the assigned ALJ. In Cases 10-01-019, 10-01-020, and 10-01-021, Nancy E. Ryan is the assigned Commissioner and A. Kirk McKenzie is the assigned ALJ.

Telecommunications Act. Pac-West may be dissatisfied with the FCC's rule, but if that is the case, the correct response – as the defendants observe – is to petition the FCC to change the rule, not to ask this Commission to conduct an end-run around it. (Joint Reply to Opposition to Motion to Dismiss at 5-9.)

With respect to Pac-West's due process argument, it seems to be based mainly on the assertion that a dismissal without prejudice would amount to rescinding, altering or amending D.97-11-024 without a hearing, in violation of Pub. Util. Code § 1708. (Opposition to Motion to Dismiss at 49.) Although Pac-West argues that D.97-11-024 "specifically authorizes" the complaints here, the discussion in Section 3.2. of this decision demonstrates that the holding of D.97-11-024 is that all carriers have a duty to complete calls under § 558 of the Pub. Util. Code, whether or not they are satisfied with the relevant compensation arrangements. Nothing in D.97-11-024 suggests that this Commission cannot invoke regular procedural tools such as dismissing complaints without prejudice, especially when potentially determinative issues are pending in related federal proceedings.

Findings of Fact

1. The complaint in C. 09-12-014 was filed on December 9, 2009, and the complaints in Cases 10-01-019, 10-01-020, and 10-01-021 were all filed on January 25, 2010.

2. Apart from the number of minutes at issue and the amount of compensation sought, the allegations in the complaints in Cases 10-01-019, 10-01-020, and 10-01-021 are identical.

3. The complaint in C.09-12-014 is essentially identical (except for minutes of use and amount sought) to those in Cases 10-01-019, 10-01-020, and 10-01-021, except that the undue discrimination theory pleaded as the fifth cause of action in the other three complaints is incorporated as part of the second cause of action in C.09-12-014.

4. None of the defendants has entered into an ICA with Pac-West.

5. Each complaint alleges that the defendants named therein have wrongfully refused to pay Pac-West compensation for terminating intrastate CMRS traffic originated on the defendants' networks.

6. Each of the complaints alleges that under the *MetroPCS Review Order* and other federal authority, this Commission has the authority and responsibility to determine an appropriate rate to compensate Pac-West for terminating intrastate CMRS traffic that originates on the defendants' respective networks.

7. Each of the complaints asks this Commission to rule that the appropriate termination rate for such traffic is the termination rate set forth in Pac-West's intrastate tariff, which applies to carriers with which Pac-West does not have an ICA.

8. In A.10-01-003, NCC asked this Commission to set an appropriate rate for terminating intrastate CMRS traffic that originates on the networks of CMRS providers with which NCC does not have an ICA.

9. In D.10-06-006, this Commission dismissed A.10-01-003 without prejudice.

10. One of the grounds for dismissal cited in D.10-06-006 was that in the *MetroPCS Review Order*, the FCC declined to determine whether, under FCC rules, MetroPCS had any liability to NCC for terminating intrastate CMRS traffic originating on MetroPCS's network in the absence of an ICA between the parties.

11. Another ground for dismissal cited in D.10-06-006 was that in the *MetroPCS Review Order*, the FCC did not disclaim its own jurisdiction to decide an appropriate termination rate for the CMRS traffic at issue, but concluded that this Commission was the more appropriate venue to consider the issue in the first instance.

12. A third ground for dismissal cited in D.10-06-006 was the pendency of a petition for review of the *MetroPCS Review Order* in the D.C. Circuit. In that proceeding the petitioner alleges, among other things, that the FCC failed to carry out its duties under the Telecommunications Act by refusing to set a termination rate for intrastate CMRS traffic and referring the issue to this Commission instead. In D.10-06-006, the Commission concluded that it would benefit from any guidance offered by the D.C. Circuit on the jurisdictional issues raised in the petition for review.

13. A fourth ground for dismissal cited in D.10-06-006 was that the setting of an appropriate termination rate for CMRS traffic was likely to require a significant investment of Commission resources in complex cost proceedings. In D.10-06-006, the Commission expressed concern that these resources might end

up being wasted depending on the rulings of the D.C. Circuit and the FCC in response to the petition for review of the *MetroPCS Review Order*.

14. On June 30, 2010, the assigned ALJ for these cases issued a ruling tentatively consolidating them and scheduling a PHC for July 22, 2010.

15. In the June 30 Ruling, the ALJ directed the parties to submit PHC statements addressing, among other issues, whether the relief sought in these complaint cases was essentially identical to the relief sought in A.10-01-003, and whether, therefore, these cases should not also be dismissed without prejudice in light of D.10-06-006.

16. On July 12, 2010, Pac-West submitted a 25-page PHC statement, and on July 19, 2010, the defendants submitted a 17-page joint response thereto.

17. A PHC was held on July 22, 2010, during which counsel for Pac-West orally responded to the arguments raised in the defendants' joint response, a thorough discussion of the jurisdictional issues took place, and the parties agreed upon a briefing schedule for a motion to dismiss proposed by the defendants.

18. Pursuant to the schedule agreed upon at the PHC, the defendants filed a 34-page joint motion to dismiss these cases on August 19, 2010, Pac-West filed a 59-page opposition thereto on September 2, and the defendants filed a 14-page joint reply to Pac-West's opposition on September 17, 2010.

19. Paragraphs 1-34 in each of the complaints (a) recite the history of the dispute between the parties, (b) allege that under FCC Rule 20.11, the defendants are obligated to pay Pac-West reasonable compensation for terminating intrastate CMRS traffic originated on the defendants' networks, and (c) allege that under the *MetroPCS Review Order* and other federal authority, this Commission has the responsibility and authority to determine an appropriate

rate for the termination services at issue.

20. The first cause of action in each complaint alleges that (a) Pac-West's intrastate tariff sets forth termination charges applicable to carriers with which Pac-West does not have an ICA, (b) this Commission has approved the rates set forth in this intrastate tariff, and (c) this Commission should find that the termination rates set forth in Pac-West's intrastate tariff also constitute reasonable compensation for the intrastate CMRS traffic that Pac-West terminates for defendants.

21. At the July 22 PHC, Pac-West's counsel acknowledged that the first cause of action is a request for relief under federal law.

22. In its 2005 *T-Mobile Ruling*, the FCC held that while ILECs would no longer be permitted to use intrastate tariffs to collect compensation for terminating CMRS traffic, ILECs would be allowed to request ICAs with CMRS providers, and would also be allowed to invoke the negotiation and arbitration provisions of § 252 of the Telecommunications Act to obtain such ICAs. Under the *T-Mobile Ruling*, these rights were not extended to CLECs such as Pac-West.

23. The termination charges set forth in Pac-West's intrastate tariff are based upon the rates and costs of AT&T California, which in turn are based upon the TELRIC methodology.

24. In the *MetroPCS Review Order*, the FCC stated that in determining an appropriate CMRS termination rate, this Commission was free to use any non-tariff procedural mechanism it considered suitable.

25. In the *MetroPCS Review Order*, the FCC did not rule out the possibility that in determining an appropriate CMRS termination rate, this Commission might want to consider the nature of the traffic at issue, which MetroPCS alleged was

unidirectional toward NCC and routed entirely to chat-lines.

26. Although this Commission has regularly used the TELRIC-based costs of ILECs as proxies (or ceilings) for proposed CLEC rates, the Commission has never ruled that it would exempt CLECs from submitting cost studies, no matter what the circumstances.

27. In view of all of the foregoing circumstances, if this Commission is ultimately called upon to determine an appropriate termination rate for intrastate CMRS traffic, cost studies are likely to be necessary.

28. The second cause of action in each complaint here, after incorporating paragraphs 1-34 by reference, alleges that the defendants' practice of paying compensation for CMRS traffic termination to carriers with which the defendants have ICAs, while refusing to pay such compensation to carriers with which the defendants do not have ICAs (such as Pac-West), constitutes an unjust and unreasonable utility practice under Pub. Util. Code § 761.

29. In the *Bureau Merits Order*, the FCC's Enforcement Bureau declined to decide whether FCC Rule 20.11 creates an obligation to pay compensation for the termination of intrastate CMRS traffic in the absence of an ICA, and the *MetroPCS Review Order* did not overturn this determination.

30. The third cause of action in each complaint here, after incorporating paragraphs 1-34 by reference, alleges that under FCC Rule 20.11, a CMRS provider is required to pay reasonable compensation to LECs that terminate traffic originating on the CMRS provider's network.

31. The fourth cause of action in each complaint here, after incorporating paragraphs 1-34 by reference, alleges that by collecting charges from their own customers for CMRS calls, while refusing to pay reasonable compensation to

Pac-West for terminating such calls, the defendants have unjustly enriched themselves.

32. The fifth cause of action in the complaints in Cases 10-01-019, 10-01-020, and 10-01-021 (and, by implication, the second cause of action in C.09-12-014), after incorporating paragraphs 1-34 by reference, alleges that the defendants' payment of compensation for CMRS traffic termination to LECs with which the defendants have ICAs, while refusing to pay such compensation to Pac-West, constitutes undue discrimination toward Pac-West, in violation of Pub. Util. Code § 453(a).

Conclusions of Law

1. This Commission has authority to dismiss a complaint case without prejudice where the issues raised in the complaint case are also pending before federal agencies or courts, and the decision on those issues by the applicable federal agency or court may be determinative in whole or in part of the issues raised in the Commission complaint case.

2. Although they are cast as complaints for wrongful withholding of compensation, the four complaints at issue here seek essentially the same kind of relief that was sought by NCC in A.10-01-003.

3. The first cause of action in each of the complaints here is based upon federal law rather than California law.

4. In view of the pendency before the D.C. Circuit of the petition for review of the *MetroPCS Review Order*, which may result in a decision determinative of many of the issues presented by these cases, the first cause of action in Pac-West's complaints here should be dismissed without prejudice.

5. D.97-11-024 held that carriers have an obligation under Pub. Util. Code § 558 to complete traffic routed to them, even if they are dissatisfied with the compensation arrangements applicable to such traffic. D.97-11-024 does not hold that carriers have an unqualified right to receive compensation for terminating traffic, no matter what the circumstances.

6. Under §§ 201 and 332 of the Telecommunications Act, the FCC has very broad authority over CMRS traffic.

7. In view of the facts that (a) Pac-West has not entered into an ICA with any of the defendants, and (b) the *Bureau Merits Order* has reserved for a future FCC decision the issue of whether FCC Rule 20.11 creates an obligation to pay compensation for CMRS traffic termination in the absence of an ICA, the conduct about which Pac-West complains in the second cause of action appears lawful under current federal authority, and so does not constitute an unjust and unreasonable utility practice under Pub. Util. Code § 761.

8. None of the authority cited by Pac-West in support of its § 761 claim undercuts the foregoing conclusion.

9. In view of the conclusions set forth in the two preceding Conclusions of Law (COLs), the second cause of action in Pac-West's complaints here should be dismissed without prejudice.

10. In view of the admissions of Pac-West's counsel that the third cause of action in the complaints here is based on federal law, and the reservation to a future FCC decision of the issue whether FCC Rule 20.11 creates an obligation to pay compensation for CMRS traffic termination in the absence of an ICA, the third cause of action in Pac-West's complaints here should be dismissed without prejudice.

11. In view of the facts that (a) Pac-West has not entered into an ICA with any of the defendants, and (b) the *Bureau Merits Order* has reserved for a future FCC decision the issue of whether FCC Rule 20.11 creates an obligation to pay compensation for CMRS traffic termination in the absence of an ICA, the conduct about which Pac-West complains in the fourth cause of action appears lawful under current federal authority, and so does not state a claim for unjust enrichment under California law.

12. None of the authority cited by Pac-West in support of its unjust enrichment claim undercuts the foregoing conclusion.

13. In view of the conclusions set forth in the two preceding COLs, the fourth cause of action in Pac-West's complaints here should be dismissed without prejudice.

14. In view of the facts that (a) under the *T-Mobile Ruling*, CLECs like Pac-West are not entitled to invoke the negotiation and arbitration provisions of § 252 of the Telecommunications Act to obtain ICAs with CMRS providers, (b) Pac-West has not entered into an ICA with any of the defendants, and (c) the *Bureau Merits Order* has reserved for a future FCC decision the issue of whether FCC Rule 20.11 creates an obligation to pay compensation for CMRS traffic termination in the absence of an ICA, the conduct about which Pac-West complains in the fifth cause of action appears lawful under current federal authority, and so does not constitute undue discrimination against Pac-West in violation of Pub. Util. Code § 453(a).

15. None of the authority cited by Pac-West in support of its undue discrimination claim, including the California Supreme Court's decision in *Gay Law Students Assn.*, undercuts the foregoing conclusion.

16. In view of the conclusions set forth in the two preceding COLs, the fifth cause of action in the complaints here should be dismissed without prejudice.

17. In the event Pac-West wishes to revive these cases after the D.C. Circuit's decision on the petition for review of the *MetroPCS Review Order* and any FCC proceedings resulting directly from that decision, Pac-West should file with this Commission a petition to reopen the cases.

18. In the event the petition to reopen described in the preceding COL is granted, any claim set forth in these four cases that was timely when the cases were filed will continue to be deemed timely upon the reopening of the cases.

19. Cases 09-12-014, 10-01-019, 10-01-020, and 10-01-021 should be closed.

20. This decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Cases 09-12-014, 10-01-019, 10-01-020, and 10-01-021 are dismissed without prejudice.

2. Cases 09-12-014, 10-01-019, 10-01-020, and 10-01-021 are closed.

This order is effective today.

Dated _____, at San Francisco, California.

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated December 14, 2010, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TDD# (415) 703-2032 five working days in advance of the event.