

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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

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

**WIRELESS COALITION'S REPLY TO RESPONSE OF NORTH COUNTY COMMUNICATIONS CORP. TO PROTESTANTS' MOTION TO DISMISS**

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Pursuant to Rule 11.1(f) of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, and with the express permission of Administrative Law Judge Timothy J. Sullivan granted via email dated February 26, 2010,<sup>1</sup> the Wireless Coalition<sup>2</sup> respectfully submits this Reply to the Response of North County Communications Corporation of California (“NCC”) to Protestants’ Motion to Dismiss. In support of this Reply, the Wireless Coalition states as follows:

**I. INTRODUCTION**

NCC still fails to cite to any clear authority or precedent under state law for the Commission to set a non-tariffed rate for the alleged termination of CMRS-originated traffic by a CLEC.<sup>3</sup> The cases NCC does cite are clearly distinguishable and lend no support to its assertions

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<sup>1</sup> Email from ALJ Sullivan to Suzanne Toller (Feb. 26, 2010) (granting permission to file a reply to NCC’s Response).

<sup>2</sup> The Wireless Coalition consists of New Cingular Wireless PCS, LLC (U3060C), Cagal Cellular Communications Corporation (U3021C), Santa Barbara Cellular Systems, Ltd. (U3015C), and Visalia Cellular Telephone Company (U3014C) (collectively, “AT&T”), Cricket Communications, Inc. (U3076C), CTIA - The Wireless Association<sup>®</sup>, Sprint Spectrum L.P. as agent for WirelessCo, L.P. (U3062C), Sprint Telephony PCS, L.P. (U3064C), and Nextel of California, Inc. (U3066C), T-Mobile West Corporation d/b/a T-Mobile (U3065C), and the following entities doing business as Verizon Wireless in California: Cellco Partnership (U3001C), California RSA No. 4 Limited Partnership (U3038C), Fresno MSA Limited Partnership (U3005C), GTE Mobilnet of California Limited Partnership (U3002C), GTE Mobilnet of Santa Barbara Limited Partnership (U3011C), Los Angeles SMSA Limited Partnership (U3003C), Modoc RSA Limited Partnership (U3032C), Sacramento Valley Limited Partnership (U3004C), and Verizon Wireless (VAW) LLC (U3029C).

<sup>3</sup> *North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, 24 FCC Rcd 14036, 14041 ¶ 14 (2009) (“*MetroPCS Review Order*”) (“California PUC may employ whatever *non-tariff* procedural mechanism it deems appropriate under state law.”) (emphasis added). See also 47 C.F.R. § 20.11(d) (“[LECs] may not impose compensation obligations for traffic not subject to access charges upon [CMRS] providers pursuant to tariffs.”).

that the Commission has authority to set a non-tariffed rate in these circumstances. Furthermore, the California Public Utilities Code (“PU Code”) sections NCC cites are all predicated on the existence of a rate that is (or at least could be) tariffed.

Perhaps even more significantly, NCC’s Response does not and cannot dispute the fact that the Commission’s setting of a rate in this instance may be a completely academic exercise and a waste of administrative resources because, as NCC acknowledges, the issue of liability has yet to be established and will be decided by another body—the Federal Communications Commission (“FCC”) or the courts. There is certainly a question whether either of these bodies will in fact establish that CMRS providers do have liability in the absence of an express contract. Moreover, the FCC decision that prompted NCC’s Application is currently the subject of a petition for review before the United States Court of Appeals for the District of Columbia Circuit and that court may decide that the Commission is **not** the correct body to decide the rate issue or that, at a minimum, the FCC should provide guidance to the Commission before any rate is set.

Because the Commission does not have the authority to set a non-tariffed rate, the Wireless Coalition requests that the Commission dismiss NCC’s Application. Alternatively, the Commission should exercise its discretion to dismiss NCC’s Application on the grounds that the relief sought is declaratory in nature and the underlying case is not ripe for adjudication. Dismissal is particularly appropriate because NCC’s request to set a rate is not a trivial one. Although NCC attempts to oversimplify what it is asking the Commission to do, in reality, the Commission will have to bring significant resources to bear in order to set the reasonable compensation rate requested by NCC in its Application.

## **II. NCC FAILS TO CITE ANY CLEAR STATE LAW AUTHORITY THAT CONFERS JURISDICTION ON THE CPUC TO SET A NON-TARIFFED RATE**

The FCC was clear in its instruction that this Commission use “whatever non-tariff procedural mechanism it deems appropriate under **state law** . . .” to set a reasonable

compensation rate for NCC’s alleged termination of traffic originated by MetroPCS.<sup>4</sup> As the Wireless Coalition explained in its Motion to Dismiss, there is no general “non-tariff procedural mechanism” available to NCC under California law to set the rate NCC requests. While acknowledging that “an explicit procedure for setting [NCC]’s call termination rate is not set forth in the Public Utilities Code,” NCC contends that the Commission has unlimited authority to set any rate using any procedures it deems suitable to use.<sup>5</sup>

In support of its arguments, NCC asserts that article XII, section 6 of the California constitution gives the Commission the authority to “fix rates . . . for all public utilities subject to its jurisdiction,”<sup>6</sup> and that that authority is not limited to the statutory enactments of the Legislature.<sup>7</sup> This is simply not true. While the constitutional section cited by NCC gives the Commission general ratemaking authority, the California Supreme Court has repeatedly held that article XII, section 5 gives legislative enactments supremacy over the general powers provided in California’s constitution.<sup>8</sup> Thus, the Commission’s constitutional authority is subject to limitation by statute.

Unable to find any direct authority, NCC resorts to straw man arguments to establish the Commission’s authority to establish non-tariff rates. NCC cites two statutes—PU Code Sections 532 and 489—that allegedly give the Commission such authority. While acknowledging that the

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<sup>4</sup> *MetroPCS Review Order*, 24 FCC Rcd at 14041 ¶ 14.

<sup>5</sup> Response at 2-3.

<sup>6</sup> CAL. CONST. art. XII, § 6.

<sup>7</sup> Response at 2.

<sup>8</sup> In *Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640 (1913), the Supreme Court described the Legislature’s power under former article XII, sections 22 and 23 (now section 5) as “perhaps the first instance where a constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions . . . .” *Id.* at 658. Again in *County of Sonoma v. State Energy Resources Conservation & Development Commission*, 40 Cal.3d 361 (1985), the Supreme Court observed that section 5 of article XII, adopted in 1974, “in effect restates provisions in former sections 22 and 23 of article XII,” originally adopted in 1911, which gave the Legislature “comprehensive powers over PUC matters.” *Id.* at 367. *See also* CAL. CONST. art. XII, § 9 (“The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change.”). *But see Independent Energy Producers Association v. McPherson*, 38 Cal.4th 1020 (2006) (holding that the art. XII, section 5 does not preclude citizens of California, through exercise of the constitutional initiative power, from conferring additional regulatory authority on the Commission).

statutes do not apply, NCC contends the statutes nevertheless give the Commission authority because they do not expressly preclude the Commission from setting a non-tariff rate. These statutes, however, provide no support for NCC's argument. The Commission has provided an instructive discussion of the interplay between PU Code Sections 532 and 489:

PU Code Section 489 requires that all utility charges and rates must be tariffed or otherwise publicly posted . . . We, therefore, interpret PU Code Section 532 to complement PU Code Section 489 by providing that the utilities shall not deviate from tariffs required by PU Code Section 489. PU Code Section 532 applies to any tariff rate or other provision.<sup>9</sup>

Thus, it is clear that these sections require, in the first instance, that a public utility have a filed tariff before the Commission could allow a deviation from the tariff.

NCC next attempts to show that there is "longstanding precedent" or "analogous circumstances" that allows the Commission to set a non-tariff rate. The decisions cited by NCC as precedent are in fact distinguishable and lend no support to NCC's contention that the Commission can act outside of its authority provided in the Public Utilities Act and establish a non-tariffed rate. The first case cited by NCC relates to interconnection matters between ILECs and what were once referred to as radiotelephone utilities and cellular carriers (collectively "RTUs").<sup>10</sup> In that case, however, the Commission affirmed its mandate that ILECs **tariff** the interconnection arrangements with RTUs.<sup>11</sup> Unlike the cases where the Commission exercised jurisdiction over RTU interconnection matters, here there is no ILEC involved, both NCC and

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<sup>9</sup> *Pac-West Telecomm, Inc. v. AT&T Communications of California, Inc.*, Decision 06-06-055, 2006 Cal. PUC LEXIS 248, \*54 (2006) (quoting *Toward Utility Rate Normalization, Inc. v. Pacific Bell*, Decision 93-05-062, 1993 Cal. PUC LEXIS 394, \*16-17 (1993)) ("*Pac-West v. AT&T*").

<sup>10</sup> Response at 2 (citing *Investigation on the Commission's own motion into the regulation of cellular radiotelephone utilities; And Related Matter*, Decision 94-09-076, 1994 Cal. PUC LEXIS 659 (1994)).

<sup>11</sup> See also *Rulemaking instituted on the Commission's own motion into the regulation of radiotelephone utilities*, Decision 92-01-016, 1992 Cal. PUC LEXIS 17, \*5-6, \*44-45 (1992) (requiring ILECs to tariff RTU interconnection services because interconnection is a monopoly service and warranted stringent regulation in order to assure equal bargaining power between RTUs and ILECs and to assure equal availability of interconnection with ILECs at reasonable, non-discriminatory terms); *Investigation on the Commission's own motion into the regulation of cellular radiotelephone utilities; And Related Matter*, Decision 94-04-085, 1994 Cal. PUC LEXIS 344 at \*8-9 (extending mandatory tariffing of RTU interconnection services to cellular carriers).

the members of the Wireless Coalition are non-dominant carriers, and the tariffing of wireless termination rates is prohibited.<sup>12</sup> Thus, the radiotelephone and cellular decisions are inapposite to the facts of this situation.

NCC also cites *Pac-West v. AT&T*, a decision that is similarly distinguishable. The only similarity between *Pac-West v. AT&T* and the NCC Complaint at the FCC that prompted NCC's Application before this Commission is that in both cases one competitive carrier was seeking reciprocal compensation from another competitive carrier without an interconnection agreement in place. Significantly, however, in *Pac-West v. AT&T* the Commission did not have to set a rate at all, much less a non-tariffed rate—the Commission simply enforced Pac-West's tariff. As the Wireless Coalition explained in their Motion to Dismiss, CLECs are prohibited by the FCC from unilaterally imposing termination rates for CMRS-to-CLEC traffic via tariff.<sup>13</sup>

### **III. THE ISSUE OF LIABILITY HAS YET TO BE DECIDED AND IS FAR FROM CLEAR; THEREFORE, THE COMMISSION'S SETTING OF A RATE MAY BE A COMPLETELY ACADEMIC EXERCISE AND WASTE OF RESOURCES**

The Wireless Coalition explained in significant detail how the establishment of rate in this context was in the nature of a declaratory ruling or advisory opinion, which is disfavored by the Commission.<sup>14</sup> NCC disagrees, arguing that any decision will be the law and that courts will be obliged to follow it.<sup>15</sup> NCC misses the point. While the FCC (or a court) may apply a rate established by the Commission if it is determined that the wireless carriers have liability, such a determination is far from certain. NCC concedes that the FCC has yet to decide the issue of liability under Rule 20.11.<sup>16</sup> Furthermore, given Congress's and the FCC's preference for negotiated agreements, there is at least a reasonable chance that the FCC will find, as it did in its

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<sup>12</sup> 47 C.F.R. § 20.11(d).

<sup>13</sup> *Id.*

<sup>14</sup> Motion to Dismiss at 14-17.

<sup>15</sup> Response at 7-8.

<sup>16</sup> Response at 8.

*T-Mobile Declaratory Ruling*, that reciprocal compensation payment obligations for CMRS providers and LECs under Rule 20.11 do not arise in the absence of a contractual arrangement.<sup>17</sup>

Acknowledging this possibility, NCC asserts that the FCC's decision regarding Rule 20.11 does not matter as the FCC has acknowledged the right of carriers to recover intercarrier compensation under state implied contract law.<sup>18</sup> In support of its assertion, NCC cites a FCC decision and a federal court decision.<sup>19</sup> As an initial matter, the decisions cited by NCC do more to support the Wireless Coalition's position because in both cases the holding is that compensation is or would be due under the terms of a contractual arrangement.<sup>20</sup> Moreover, in the *CMRS Access Charges Ruling*, the FCC affirmatively established a preference for written agreements. To the extent the decisions reference implied contracts, they offer them only as a possible remedy if the existence of an implied contract can be established under state law. In this regard, the FCC decision expressly recognizes that "the existence of a contract is a matter to be decided under state law" by the courts, not the FCC.<sup>21</sup> Thus, in order for the Commission's rate to be used, NCC must still establish a *prima facie* implied contract under California law.

Whether NCC can do so under California law is questionable at best because a plaintiff must

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<sup>17</sup> *T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd at 4855, 4863 n.57 (2005) ("*T-Mobile Declaratory Ruling*").

<sup>18</sup> Response at 6.

<sup>19</sup> Response at 6-7. See *Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192, 13198 ¶ 12 (2002) ("*CMRS Access Charges Ruling*"); *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651 (2003).

<sup>20</sup> At issue in the FCC's *CMRS Access Charge Ruling* was whether AT&T was obligated to compensate Sprint PCS for the costs of terminating interexchange traffic bound for Sprint PCS's CMRS customers. Sprint PCS based its court action on three separate claims under state law: breach of implied contract, *quantum meruit*, and action on account. In response to the U.S. District Court for the Western District of Missouri's primary jurisdiction referral, the FCC held that Sprint PCS was not prohibited from charging AT&T access charges, but that AT&T was not required to pay such charges absent a contractual obligation to do so. The FCC also held that until the court decides whether there was a contract (that is, AT&T was liable), it was premature to address the court's question regarding the reasonableness of the rate charged by Sprint PCS. The FCC noted that while a written contract is preferable, state laws may recognize that an agreement may exist even absent an express contract. In *Graphnet*, there was a written contract between Worldcom and Graphnet. At issue was whether the contract was required to be filed with the FCC in order to be effective. The court held that the contract was not required to be filed and even if Worldcom was required to file the contract, its failure to do so would not by itself prevent Worldcom from recovering under those contracts. *Id.* at 656-57.

<sup>21</sup> *CMRS Access Charges Ruling*, 17 FCC Rcd at 13198 ¶¶ 12-13 (emphasis added) (footnote omitted).

prove that all the formalities of an express contract exists (offer, acceptance, meeting of the minds, etc.) in order to prevail on a breach of implied contract claim in California.<sup>22</sup> Although NCC may be able to establish some elements of a contract, in the absence of any established rate, it will be very difficult for NCC to establish that there was a “meeting of the minds” regarding compensation, a key element to a contract. Accordingly, an implied-in-fact contract could not be said to exist between NCC and Wireless Coalition members.

In addition, it is also clear that NCC will not be able to establish a right to compensation in a federal court. On February 10, 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s dismissal of NCC’s complaint seeking compensation from a number CMRS providers, including the members of the Wireless Coalition, holding that NCC had no private right of action to enforce FCC Rule 20.11 in federal court.<sup>23</sup> By way of background, NCC alleged that the CMRS defendants unlawfully refused to compensate NCC for terminating intraMTA calls in violation of Section 251(b)(5) of the Communications Act and FCC Rule 20.11. NCC further alleged that the CMRS defendants’ refusal to pay compensation was an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act and therefore, it was entitled to seek recovery of unpaid termination fees under sections 206 and 207 of the Communications Act. NCC asserted that the violations of these statutes and FCC regulations established a private cause of action and asked the court to issue a declaratory ruling that it was entitled to compensation. The court found that none of these statutes or regulations cited provided NCC with a basis for a federal cause of action. The court held:

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<sup>22</sup> *Yari v. Producers Guild of America, Inc.*, 161 Cal.App.4th 172, 182 (2008) (“A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor’s conduct.”) (citations and internal quotations omitted).

<sup>23</sup> See *North County Communications Corp. v. California Catalog & Technology*, Case No. 08-55048, 2010 WL 446505 (9th Cir. Feb. 10, 2010) (“*NCC Ninth Circuit Order*”), *petition for review en banc filed*, Feb. 24, 2010. 47 C.F.R. § 20.11.

“Specifically, the [FCC]’s determinations that 47 U.S.C. § 251(b) is inapplicable to CMRS providers, and that the [FCC] is the appropriate forum for pursuing compensation under 47 C.F.R. § 20.11(b) are fatal to North County’s contention. We also conclude that North County’s declaratory judgment claims premised on 47 U.S.C. § 201(b) are fatally flawed because the [FCC] has not determined that the CMRS providers’ lack of compensation to CLECs violates § 201(b). Finally, we hold, that, because North County cannot establish an independent right to compensation, 47 U.S.C. § 206 and § 207 are not viable vehicles for it to seek relief.”<sup>24</sup>

**IV. SETTING A RATE IS NOT AN INSIGNIFICANT UNDERTAKING AND SHOULD ONLY BE DONE WHEN THE LAW UNDER WHICH THE RATE IS BEING SET IS CLEAR**

NCC attempts to diminish the significance of what it is asking the Commission to do by stating that the Application “simply asks the Commission to do what it has done for nearly 100 years . . . .”<sup>25</sup> As the Commission well knows, and as the Wireless Coalition explained in its Protest, the exercise of setting a rate is quite a substantial one.<sup>26</sup> Moreover, in setting a rate, the Commission has relied on specific statutory authority often supplemented by years of established procedures and precedent. In this case, however, even if the Commission had the authority to determine what constitutes “reasonable compensation” in this context, it will have to plow new and complicated ground before setting a rate for reasonable compensation.

For example, the Commission will have to consider what effect NCC’s one-way traffic pumping business model has on rates. To the extent the Commission determines a cost-based rate is appropriate,<sup>27</sup> it must decide what cost methodology is appropriate and then engage in a

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<sup>24</sup> *NCC Ninth Circuit Order*, at \*5.

<sup>25</sup> Response at 1.

<sup>26</sup> *See* Wireless Coalition Protest.

<sup>27</sup> As noted in the Motion to Dismiss at 20-21, “the FCC had to establish a specific, national intercarrier compensation *rate* for traffic to CLECs with inbound-only business models, the FCC must also establish the rate for traffic of the type at issue here to avoid ‘regulatory arbitrage and distorted economic incentives.’”

cost study proceeding that is consistent with the provisions of the Communications Act.<sup>28</sup>

Considering the fact that the Commission has never set cost-based rates for a CLEC, many issues of first impression will likely have to be addressed including what cost standard would apply (for example, whether to apply total service long run incremental cost (“TSLRIC”) or total element long run incremental cost (“TELRIC”) costing methodologies), and then, having resolved that thorny issue, decide how the cost studies should be done (an unprecedented undertaking for any CLEC). This would be a significant amount of work under any circumstance, but it is particularly questionable as a wise expenditure of the Commission’s resources given that NCC is asking the Commission to undertake this work under the shadow of the possibility that the FCC or courts may end up deciding that no compensation is owed, or otherwise deciding to provide guidance on how compensation should be determined.

The Commission has been down this road before. In the proceedings setting rates for unbundled network elements, the Commission decided to move forward and adopt a pricing methodology for unbundled network elements only to have to start all over when the FCC decided that a different pricing methodology was to be used.<sup>29</sup>

Of course NCC feels that this is a simple matter because it wants the Commission to back-door its prohibited tariffed rate into a legally binding rate without any more than a comparison to other irrelevant (and expired) agreements that CMRS providers entered into after intense arms-length negotiations. As discussed above, to the extent the Commission determined

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<sup>28</sup> See 47 U.S.C. § 251(c) (state actions must be consistent with the provisions of the Act and the accompanying regulations).

<sup>29</sup> See, e.g., *Rulemaking on the Commission’s Own Motion To Govern Open Access to Bottleneck Services and Establish A Framework for Network Architecture Development of Dominant Carrier Networks.*; *Investigation of the Commission’s Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks*, Decision 98-02-106, 1998 Cal. PUC LEXIS 294, \*3-13 (1998) (discussing the Commission’s multi-year efforts that resulted in the establishment of a TSLRIC pricing standard for UNEs (Decision 96-08-021) only for the Commission to have to engage in further proceedings in order to comply with the FCC’s later edict on TELRIC pricing for UNEs (Decision 98-02-106)).

it had the authority and the desire to move forward at this time, this is anything but a “simple matter.”

## V. CONCLUSION

In sum, the Commission should dismiss NCC’s Application because it has no clear authority to determine a non-tariffed reasonable compensation rate for CMRS-originated traffic received by CLECs. Even if the Commission has the required authority, it should dismiss the Application on the basis that it seeks relief that is advisory in nature because neither the FCC nor the courts have held that any compensation is owed.

Respectfully submitted,

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Dated: March 5, 2010

**CERTIFICATE OF SERVICE**

I, Judy Pau, certify:

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

On, March 5, 2010, I caused the following to be served:

**WIRELESS COALITION'S REPLY TO RESPONSE OF NORTH COUNTY COMMUNICATIONS CORP. TO PROTESTANTS' MOTION TO DISMISS**

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

/s/ \_\_\_\_\_

Judy Pau

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

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