

Decision 10-12-013 December 2, 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

ORDER EXTENDING STATUTORY DEADLINE

Pub. Util. Code § 1701.2(d) provides that adjudicatory matters such as these consolidated complaint cases shall be resolved within 12 months after they are initiated, unless the Commission makes findings why the 12-month deadline cannot be met and issues an order extending the 12-month deadline. In Case (C.) 09-12-014, the first-filed of the four complaints, the 12-month deadline expires on December 9, 2010.

As explained below, these cases raise complex issues concerning the interaction of state and federal telecommunications law. In addition, the defendants have moved to dismiss the complaints on multiple grounds, and the complainant has responded to these arguments at length. In view of the complexity of these arguments, it is clear that the deadline for all four of these proceedings needs to be extended. Accordingly, we will extend the deadline for resolving these cases for 12 months; i.e., until December 9, 2011.

Procedural Background

The four complaints here are essentially identical. In each of them, Pac-West Telecomm, Inc. (Pac-West) alleges that the defendants, four groups of carriers that provide Commercial Mobile Radio Service (CMRS) and transmit CMRS traffic to Pac-West for termination, have wrongfully refused to pay Pac-West for its termination services. Each complaint also alleges that for these services, 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. Pac-West also alleges that this Commission has jurisdiction to set an appropriate termination rate for intrastate CMRS calls pursuant to the so-called *MetroPCS Review Order*,¹ which was issued by the Federal Communications Commission (FCC) on November 19, 2009.

On August 19, 2010, after extensive discussion of the issues at a prehearing conference (PHC), the defendants in these four cases jointly moved to dismiss 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.

complaints. Their first argument is that although these proceedings are cast as complaints, they seek relief similar to what was recently sought in Application (A.) 10-01-003. In that proceeding, North County Communications Corporation of California (NCC) had requested this Commission to set a rate for the termination of intrastate CMRS traffic. We dismissed A.10-01-003 without prejudice in Decision (D.) 10-06-006, and the joint defendants argue that the same relief is appropriate here.

Our principal reason for dismissing NCC's application was the pendency of a petition for review challenging the *MetroPCS Review Order* that is currently before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).² In that petition, 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 set a termination rate for intrastate CMRS traffic. In D.10-06-006, we pointed out that if this challenge to the *MetroPCS Review Order* is upheld, there will be little (if any) role for this Commission to play in setting a proper rate for CMRS traffic termination. We also noted that if the challenge in the D.C. Circuit is successful, there is a substantial likelihood that any resources this Commission invests in determining a CMRS traffic termination rate are likely to be wasted. Accordingly, we dismissed NCC's application without prejudice.

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.

In their motion to dismiss here, the joint defendants argue that there is an additional reason for dismissing these cases without prejudice (or holding them in abeyance) beyond the factors that were present in A.10-01-003. The additional reason is that Pac-West is asking this Commission to approve as a CMRS termination rate the same rate for termination that appears in Pac-West's intrastate tariff. Such relief is impermissible, the joint defendants argue, because it would run afoul of the FCC's *T-Mobile Ruling*,³ which prohibited the use of intrastate tariffs to impose CMRS termination charges. The joint defendants note that in the *MetroPCS Review Order*, the FCC expressly reaffirmed the *T-Mobile Ruling*.

In addition to their arguments based on D.10-06-006 and the *T-Mobile Ruling*, the joint defendants argue that in the complaints here, Pac-West has failed to state valid causes of action under California law, including §§ 453 and 761 of the Pub. Util. Code and the law of unjust enrichment.

In its opposition papers, Pac-West argues that all of its claims for relief are valid, and that the Commission should find that the defendants have wrongfully refused to pay Pac-West the termination rate it is seeking. First, Pac-West argues that the *MetroPCS Review Order* is the currently-applicable federal law, and that the pendency of an appeal of that decision is no reason not to proceed here. Second, Pac-West argues that the rate it is seeking to have applied here is based on the costs of incumbent local exchange carriers (ILECs) such as AT&T

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).

California, and that for many years the Commission has routinely approved rates proposed by competitive local exchange carriers like Pac-West that are based on ILEC costs. Finally, Pac-West argues that all of the claims it has stated under state law are valid, and that it would constitute a denial of both due process and equal protection of the laws not to afford Pac-West the relief it is seeking.

The pleadings setting forth the parties' arguments are extensive. Prior to the PHC held on July 22, 2010, both sides filed extensive PHC statements.⁴ The PHC statement that Pac-West filed on July 12, 2010 was 25 pages long, and the response submitted by the joint defendants on July 19 comprised 17 pages. After the defendants were granted leave at the PHC to put their arguments into a formal motion to dismiss, the motion they filed on August 19, 2010 comprised 34 pages, and the opposition to the dismissal motion that Pac-West filed on September 2 comprised 59 pages. In addition, the joint defendants asked for and were granted leave to file a reply to Pac-West's opposition. They did so on September 17, 2010, and it comprised 14 pages.

Discussion

As is evident from the summary of the parties' positions set forth above, the issues raised by these cases are numerous and complex. Although we understand that the assigned ALJ has been working diligently on a proposed decision (PD) concerning the issues presented, it will not be possible to complete

⁴ The July 22 PHC was held pursuant to a ruling issued by the assigned Administrative Law Judge (ALJ). See *Administrative Law Judge's Ruling Tentatively Consolidating Cases and Scheduling Prehearing Conference*, issued June 30, 2010. In his ruling, the ALJ asked the parties to address various questions in written PHC statements, including "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 cases should not also be dismissed." (June 30 Ruling at 3.)

the PD, issue it for comment, and then consider it at a Commission meeting prior to the December 9 deadline that applies to C.09-12-014.

Recognizing the complexity of the issues that have been raised in these cases, the assigned ALJ informed the parties at the July 22 PHC that whatever the outcome, an extension order was likely to be necessary. (July 22 PHC Transcript, at 61.) Based on the arguments both sides have presented and the volume of the pleadings, we agree. Accordingly, in order to allow enough time for a PD to be completed (and for any ensuing application for rehearing or appeal to be disposed of), we have decided – pursuant to our powers under Pub. Util. Code § 1701.2(d) – to extend the time for resolving these consolidated proceedings until December 9, 2011.

Waiver of Comment Period

Under Rule 14.6(c)(4) of the Commission’s Rules of Practice and Procedure, the Commission may reduce or waive the period for public review and comment of PDs extending the deadline for resolving adjudicatory proceedings. Accordingly, pursuant to this rule, the otherwise applicable period for public review and comment is waived.

Assignment of Proceeding

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

Findings of Fact

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

2. Apart from the minutes of use at issue and the amount of termination charges allegedly owed on account thereof, the complaints in C.10-01-019, C.10-01-020, and C.10-01-021 are identical.

3. Apart from the minutes of use at issue and the amount of termination charges allegedly owed on account thereof, the complaint in C.09-12-014 is substantially identical to the three complaints referred to in Finding of Fact No. 3. Although a fifth cause of action is not pleaded in the complaint in C.09-12-014, the allegations in the second cause of action therein are substantially the same as the fifth cause of action in the other complaints.

4. All four of the complaints at issue here allege, among other things, that this Commission has jurisdiction pursuant to the *MetroPCS Review Order* to determine the proper rate for termination of intrastate CMRS traffic.

5. In D.10-06-006, the Commission dismissed A.10-01-003 without prejudice on the ground, among others, that if the petition for review of the *MetroPCS Review Order* now pending in the D.C. Circuit is successful, there will be little (if any) role for this Commission to play in setting a proper rate for CMRS traffic termination.

6. In D.10-06-006, the Commission cited as an additional ground for dismissal without prejudice that if the challenge to the *MetroPCS Review Order* is successful, there is a substantial likelihood that any resources this Commission invested in determining an appropriate CMRS traffic termination rate would be wasted.

7. On June 30, 2010, the assigned ALJ issued a ruling tentatively consolidating these four cases, scheduling a PHC for July 22, 2010, and asking the parties to address in PHC statements whether, in light of D.10-06-006, these cases should also be dismissed.

8. At the PHC held on July 22, the defendants argued that, in view of D.10-06-006 and for other reasons, these four cases should be dismissed, while the complainant argued that the cases should go forward.

9. Pursuant to leave granted at the July 22 PHC, the defendants in these four cases filed a joint motion to dismiss the complaints on August 19, 2010.

10. Pursuant to leave granted at the July 22 PHC, the complainant herein filed a lengthy opposition to the motion to dismiss on September 2, 2010, to which the defendants jointly replied on September 17, 2010.

11. An extension of time until December 9, 2011 should give the assigned ALJ adequate time to draft a PD dealing with the many issues raised by the parties' motions, and for any application for rehearing or appeal to be disposed of.

Conclusions of Law

1. Because of the many issues raised by the parties in their pleadings on the motion to dismiss and at the July 22 PHC, it will not be possible to resolve these four consolidated cases by the deadline applicable to the first-filed of the cases, which is December 9, 2010.

2. The deadline applicable to these four cases should be extended for 12 months to allow for resolution of the proceedings.

IT IS ORDERED that the deadline applicable to Case (C.) 09-12-014, C.10-01-019, C.10-01-020, and C.10-01-021 for resolving those proceedings, which is December 9, 2010, is extended to and including December 9, 2011.

This order is effective today.

Dated December 2, 2010, at San Francisco, California.

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