Decision 11-03-034 March 24, 2011

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 (a competitive local exchange carrier, or CLEC) for the termination of certain telecommunications traffic originated by the CMRS providers' customers. Pac-West generally alleges 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 further 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.

In its *MetroPCS Review Order*, the FCC referred a similar CMRS-CLEC dispute -- between North County Communications Corp. (North County or NCC) and MetroPCS California, LLC (MetroPCS) -- to this Commission for determination of a "reasonable rate." North County then filed an Application (A.10-01-003) with this Commission, asking that we set such a reasonable rate for the termination of intrastate CMRS traffic. We are now dismissing the instant

[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 without prejudice for many of the same reasons that we dismissed without prejudice North County's Application for ratesetting pursuant to the *MetroPCS Review Order*.[2]

In that Decision (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 District of Columbia Circuit (D.C. Circuit).[3] 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*,[4] (3) the FCC has a duty under § 208 of the Communications Act to decide complaint cases

[2] Decision 10-06-006, in Application (10-01-003) of North County Communications Corporation of California (U5631C) for Approval of Default Rate for Termination of Intrastate, IntraMTA Traffic Originated by CMRS Carriers.

[3] 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.

[4] 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) (T-Mobile).

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.

Depending on how these issues are decided by the D.C. Circuit, there may 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 CMRS traffic at issue, there is a significant risk the Commission would end up wasting the resources devoted to this effort. Conversely, if the D.C. Circuit affirms the FCC's referral and clarifies the scope of this Commission's task, or if the decision is affirmed and the FCC provides guidance about the parameters of reasonableness in this controversial area, it will presumably make sense for this Commission to proceed. In any event, if the D.C. Circuit and/or the FCC fail to act within a reasonable time, the parties herein may once again seek resolution of these matters.

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 complaints as written intertwine federal and state law. Moreover, none of the authority Pac-West cites compels us to consider these claims immediately. In particular, we find unpersuasive Pac-West's argument that, under D.97-11-024, it has an

independent and immediate right under California law to be compensated for CMRS traffic.

Finally, we agree with the defendants that Pac-West will suffer no irreparable harm if the complaints here are dismissed without prejudice pending the resolution of these federal issues. 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.[5] 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

[5] 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 Pub. Util. Code § 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.

> 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*, 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 pleads multiple (usually five[6]) "causes of action":

- A first cause of action, which pleads the tariff, and then requests that Commission determine a "reasonable rate" based on 47 C.F.R. § 20.11 and the MetroPCS Review Order – although this cause of action specifies that the reasonable rate should be PacWest's intrastate tariff;

[6] See previous footnote.

- A second cause of action, which asks for reasonable compensation pursuant to Pub. Util. Code §§ 558 and 761, with reference to the tariff;
- A third cause of action, requesting "reasonable compensation" pursuant to 47 CFR § 20.11(b)(2), with no reference to tariff;
- A fourth cause of action, which asks for "reasonable compensation" pursuant to Pub. Util. Code § 558 and the common law of unjust enrichment, with no reference to the tariff; and
- A fifth cause of action, which advances a novel theory of undue discrimination pursuant to Pub. Util. Code § 453; *viz.*, that the defendant CMRS carriers are discriminating against Pac-West by paying large ILECs such as AT&T for termination services, but not paying smaller CLECs like PacWest for such termination services.

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.[7] 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 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

[7] 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 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 defendants[8] 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.)

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

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 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 PCS[9] 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.)

[9] 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.

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 joint reply to the opposition, which they did on September 17, 2010. We consider the arguments raised in these pleadings in the discussion below.

3. Discussion

The CMRS carriers have moved to dismiss Pac-West's complaints on four grounds: (1) the prudential considerations set forth in D.10-06-006 and described above; (2) the asserted attempt by Pac-West to impose its tariffed rates, even though this is expressly prohibited by the *T-Mobile Ruling*; (3) Pac-West's alleged failure to state a claim because there is no federal obligation to pay compensation under the facts here; and (4) the claimed lack of jurisdiction of this Commission to set a CMRS-CLEC rate.

3.1. 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. 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 docket[10] -- 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

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

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.)

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* [11] 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 . . ."[12] 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

[11] 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).

[12] *Bureau Merits Order* at ¶ 15, footnote 55.

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. Both the issue stated and the conclusion reached by D.97-11-024 are summarized in its first Ordering Paragraph (OP): "All telecommunications 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 or rating and routing instructions for completion of calls are proper." This OP 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 elsewhere in 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*.

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*.

3.2. 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.)[13]

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

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[13] 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.)

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. [14]

[14] 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 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 3.1 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.

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. Pac-West filed Comments on January 3, 2011; the CMRS carriers filed joint reply comments on January 10, 2011.

4.1. Elimination of Alleged Dicta

Pac-West's comments on the PD ask us to hold these cases "in abeyance" until the D.C. Circuit rules on the *MetroPCS Review Order*, or – in the alternative -- eliminate unnecessary "dicta" in the proposed decision.[15] Originally, the CMRS carriers themselves asked that these cases be held in abeyance, but now find the same request in Pac-West's comments to be "a 180 degree about-face by Pac-West," and argue that the proposed decision should be adopted as written.[16]

Upon consideration, and in view of the continually evolving situation in the D.C. Circuit and at the FCC (which we describe below), we agree that it is not necessary at this time to address in full the merits of each of Pac-West's causes of action.[17] We will, instead, rely on our earlier ruling in D. 06-04-010, where – as noted above -- we concluded that dismissal without prejudice is the proper procedure where related matters are pending at the federal level.

Although we have decided to omit a significant portion of the case

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[15] Pac-West Comments, at 2, 11, 14, *passim*.

[16] Defendants' Reply Comments on PD, at 1, fn. 1.

[17] *Compare* D.10-06-006, at 1-2 ("Since the Commission has decided to dismiss the application without prejudice at this time, the Commission will not address the merits of the application").

discussion that appeared in the PD, it should be noted that none of the cases cited by Pac-West in support of claims it contends are based solely on state law is inconsistent with the approach we take today, because none of those cases dealt with the propriety of dismissing state law claims without prejudice when related federal proceedings might be determinative of the issues presented by the state claims.[18]

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[18] As noted in the PD, one of Pac-West's more serious allegations is that the defendants have unreasonably discriminated against Pac-West by refusing to pay it charges for terminating CMRS traffic, even though the defendants pay such charges to ILECs with which they have ICAs. Pac-West contends that this differing treatment violates Pub. Util. Code § 453. We demonstrate elsewhere in this decision why -- at least for the time being -- this practice appears to be permissible under federal law. The principal decision that Pac-West has cited in support of its § 453 claim is *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458 (1979). That decision merely held, however, that a group of gay law students who had sued Pacific Telephone & Telegraph (Pacific) over its refusal to hire or promote openly homosexual persons stated a cause of action against Pacific under Pub. Util. Code § 453, as well as other provisions of state law. The case did not involve any claim of primary jurisdiction by a state or federal agency, nor – unlike the situation here – did it involve the pendency of any appeals in federal court that might have been determinative of the claims made by the law students.

The same is true of the principal decisions Pac-West cites to support its second cause of action, which alleges that the defendants' refusal to pay Pac-West termination charges constitutes a violation of Pub. Util. Code § 761. One of those is D.99-08-025 (2 CPUC3d 97), the decision on rehearing in *Irvine Apartment Communities v. Pacific Bell*. Pac-West argues that this decision stands for the proposition that § 761 "has frequently 'been applied in complaint cases' and that, in conjunction with § 762, allows 'aggrieved parties to complain about utility conduct which may comply with all existing laws and regulations but nonetheless may be unreasonable.'" As the PD demonstrated, however, the basic holding of D.99-08-025 was to reaffirm the Commission's earlier decision in D.98-12-023 (83 CPUC2d 286) that Pacific Bell had violated § 453 when it refused a request by an apartment owner to reconfigure the demarcation point between the apartment owner's telecommunications facilities and those owned by Pacific Bell so that Cox Communications could compete with Pacific Bell to provide residential telephone service at the apartment owner's properties. As the PD also explained, D.98-12-023 differed from the situation here

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4.2. The Complaints Implicate Federal Law.

In its comments on the PD, PacWest continues to argue that some of its causes of action plead purely state claims, and that this Commission has jurisdiction to determine a reasonable CMRS termination rate under state law.[19]

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because it did not present any potential for conflict with a decision in a pending federal appeal.

Nor do the cases cited by Pac-West in support of its unjust enrichment claim preclude a dismissal without prejudice here. In support of its unjust enrichment claim, Pac-West relies on common law principles and two Commission decisions. In the first of these, *Re Southern California Gas Company*, D.96-01-014 (64 CPUC2d 496), the Commission ordered interstate gas pipeline shippers to pay for interconnection access service provided by a California gas utility. The Commission's decision was based both on the terms of the gas utility's tariff and common law principles of unjust enrichment. (64 CPUC2d at 500-501.) However, when the interstate shippers sought relief on account of these charges from the Federal Energy Regulatory Commission (FERC), that agency held that this Commission lacked jurisdiction to impose the charges, because they amounted to an impermissible access charge on interstate shippers seeking to introduce gas into an intrastate system. The FERC's decision was upheld against a claim that it was arbitrary and capricious in *Public Utilities Com'n of Cal. V. FERC*, 143 F.3d 610, 614 (D.C. Cir. 1998).

The other decision cited by Pac-West in support of its unjust enrichment claim, *West San Martin Water Works, Inc. v. San Martin County Water District*, D.97-02-040 (71 CPUC2d 75), involved a situation in which this Commission ordered the defendant water district to return to the complainant possession and control of certain facilities the district had seized, because the facilities had been specifically ceded by a predecessor of the water district to the complainant 15 years before as a contribution in aid of construction. D.97-02-040 did not involve a situation in which related issues were being litigated in a federal appeal, and its brief discussion of this Commission's equitable powers must be read in light of the California Supreme Court's more extensive discussion of those powers (and their limitations) in *Consumers Lobby Against Monopolies v. Public Utilities Com.*, 25 Cal.3d 891, 909-912 (1979).

[19] *See, e.g.,* Pac-West Comments, at pp. 4-7; *see also* Opposition to Joint Motion to Dismiss, filed September 2, 2010, at 9 *ff* ("Pac-West 's Complaints assert claims arising fully under state law").

The problem with this theory is that paragraphs 28-29 of each of the complaints plead 47 C.F.R. § 20.11, the *MetroPCS Review Order,* "and other federal authority." Paragraphs 28 and 29, in turn, are incorporated into each of Pac-West's causes of action, creating an uncertainty about whether any of those causes of action are indeed based solely on state law.

Pac-West also claims that it "does not seek to invoke its Intrastate Tariff against Defendants," as such a result would be preempted by the FCC's *T-Mobile* decision.[20] Here again, Pac-West's introductory paragraphs give the lie to its claims: paragraphs 23, 27 (quoted above), and 32 all reference Pac-West's Intrastate Tariff, and all are incorporated into each of Pac-West's causes of action, including those which do not otherwise mention the tariff.

Thus, the Pac-West Complaints at issue here inevitably ask us to wade into issues that are under review at the federal level, and/or have been left unclear by past FCC decisions.[21] As described below, it remains to be seen whether and to what extent the FCC may on its own initiative provide guidance on the extent of a CMRS provider's obligation to compensate CLECs for terminating asymmetric traffic originated by the CMRS provider's customers, or may be forced by the D.C. Circuit to decide this issue itself.

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[20] Opposition, at 51.

[21] The FCC's *T-Mobile* decision disapproved of tariffs as a basis for rating CMRS traffic terminated to local landline telephones, suggesting instead that CMRS providers and ILECs could enter into interconnection agreements. It did not address the situation of CLECs, which have no ability to demand interconnection agreements. 20 FCC Rcd at 4864-65, ¶16 (February 17, 2005).

4.3. As a Prudential Matter, this Commission Will Follow Its Earlier Decision to Defer Adjudicating these Cases in Order to Give the FCC and the D.C. Circuit the Opportunity to Clarify the Scope of the Commission's Authority Regarding CMRS-CLEC Traffic.

Pac-West's January 3, 2011 comments on the PD suggest that a decision by the D.C. Circuit on the petition for review of the *MetroPCS Review Order* can be expected momentarily, and that this Commission should simply wait until that decision is rendered and proceed from there.[22] We believe the situation is more complex than that.

Before the FCC, Metro PCS had requested that the FCC provide some guidance to this Commission as to what factors the Commission might consider in setting a "reasonable rate" for asymmetrical CMRS-CLEC traffic terminated by North County. The FCC refused to do so in the *MetroPCS Review Order*,[23] although it has softened this position somewhat before the D.C. Circuit.[24] As

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[22] Comments, at 2-3.

23 Metro PCS Review Order, at ¶ 21:

> 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 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.)

[24] *See* FCC's May 27, 2010 Brief for Respondents, in *MetroPCS California, LLC v. FCC,* D.C. Circuit Case No. 10-1003, at 36, fn 32 ("…if a state were to set the charge for the intrastate component of interconnection 'so high as to effectively preclude

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noted previously, Metro PCS has argued in its petition for review that the FCC acted arbitrarily and capriciously by failing to give guidance about the parameters of a proper intrastate CMRS termination rate.[25]

The situation is further complicated by the FCC's most recent attempt to develop a "unified intercarrier compensation regime," in the form of a Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (NPRM/FNPRM) issued on February 8-9, 2011.[26] This massive document, comprising several hundred pages and over 700 paragraphs of text, directly addresses the issue of the sort of asymmetrical traffic at issue here, and suggests that the solution to this problem that the FCC adopted with respect to ISP-bound traffic in the so-called *ISP Remand Order* (*i.e.*, rate caps, and/or bill & keep)[27] might be extended to all asymmetrical or unidirectional "access stimulation" traffic. *See, e.g.*, NPRM/FNPRM at ¶ 672 ("CTIA alleges that traffic stimulation involving reciprocal compensation rates between CMRS providers and

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interconnection,' the state would be inviting federal preemption"), referencing the FCC's Second Report and Order re *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services* (*9 FCC Rcd 1411 (1994) at ¶¶ 228, 231.

[25] Initial Brief of Petitioner (filed April 27, 2010), *MetroPCS California, LLC v. FCC*, D.C. Cir. Case No. 10-1003, pp. 45-46.

[26] FCC 11-13, *In re Connect America Fund,* WC Docket No. 10-90 and related proceedings (including *Developing an Unified Intercarrier Compensation Regime,* CC Docket No. 01-92), Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (NPRM/FNPRM).

[27] Order on Remand and Report and Order, *Implementation of Local Competition Provisions in Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 ¶¶1, 3-4, 78, 80-81 (2001) (*ISP Remand Order*).

competitive LECs is increasing");[28] and ¶ 675 ("[s]ome states, such as Iowa, have taken action to curb access stimulation associated with intrastate access rates"). Indeed, paragraph 673 of the NPRM/FNPRM directly asks about the "impact, if any, of the Commission's recent *North County [MetroPCS Review Order]* decision," and whether "the decision has had any impact on traffic stimulation."

While we assume that the NPRM/FNPRM will have prospective effect only, it calls into question whether it would be worthwhile for this Commission to invest the significant resources that might be required to hold a costing proceeding to establish a reasonable CMRS termination rate. As noted above, one of the key concerns expressed in the June 30 PHC Ruling in these cases, as well as in D.10-06-006, was that going forward with the complaints here could effectively require this 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.[29] Our decision on the

[28] The FCC asks for comment on whether a bill-and-keep regime should be imposed on LECs terminating traffic that exceeds a 3:1 terminating to originating ratio, a proposal adopted with regard to ISP-bound traffic in the FCC's *ISP Remand Order*.

29 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 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,

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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.)

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,[30] 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 non-frivolous argument for requiring such cost studies, because we think the approach that Pac-West has suggested in its papers here – simply 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 –may not 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.

The argument for waiting is also underscored by a recent FCC amicus brief filed in the Ninth Circuit in the *AT&T v. Pac-West* appeal.[31] There, the FCC opined that this Commission had overstepped its bounds by applying Pac-

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> 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.)

[30] Pac-West PHC Statement at 7-8; footnote omitted.

[31] February 2, 2011 Amicus Brief for the Federal Communications Commission in Partial Support of Plaintiff-Appellant Urging Reversal, in Ninth Circuit No. 08-17030, *AT&T v. Pac-West Telecom et al.*

West's intrastate tariff, rather than the *ISP Remand Order's* rules, to ISP-bound traffic, which is similar to the traffic at issue here because it is largely (if not completely) unidirectional.[32] While asymmetric or unidirectional ISP-bound traffic has characteristics that have allowed the FCC to assert jurisdiction over it as interstate, the same policy concerns about regulatory arbitrage apply to the intrastate traffic at issue here, because such chat-room and other traffic is also asymmetric.[33]

Thus, while we agree with the FCC's position before the D.C. Circuit in the petition for review of the *MetroPCS Review Order* that CLECs are entitled (at least at this point in time) to *some* compensation for terminating CMRS traffic,(even if that traffic is asymmetric) [34], the rules that the FCC would have the states apply, and the specific terms of the FCC's referral of the dispute between MetroPCS and North County to this agency, are still undefined.

If Metro PCS succeeds in its petition for review before the D.C. Circuit, and/or if the FCC clarifies or changes the rules applicable to asymmetric CMRS

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[32] *Id.* at 6, 9, 20-21.

[33] The matter is further complicated because, in D.06-06-055, the decision that gave rise to the *AT&T v Pac-West* appeal, the Commission believed it was defensible to apply a CLEC's tariff to the traffic at issue because there appeared to be no rule prohibiting it, and because the policies embodied in the Telecommunications Act of 1996 would not be frustrated. In these cases, by contrast, there clearly is a rule that prohibits the relief Pac-West is seeking, *i.e.,* the *T-Mobile Ruling's* prohibition on using state tariffs to rate CMRS-LEC traffic. *T-Mobile, supra,* 20 RCC Rcd at 4863-64, and ¶¶ 1, 3, 14, 19, *passim.*

[34] FCC Respondents Brief, *supra,* at 19 ("general requirement that carriers compensate each other for terminating traffic that originates on the other carrier's network"), 34 ("by adopting Rule 20.11(b), the Commission has already determined that reasonable compensation is owed"), 35 ("right, under Rule 20.11(b), to be mutually compensated").

to CLEC traffic, the time and effort this Commission would have to invest if it were to determine now an appropriate intrastate CMRS termination rate applicable to these cases could be either wasted or substantially diminished in its effect. Accordingly, in accordance with the cases described in Section 3.2 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.

On the other hand, this Commission should not have to wait indefinitely for the FCC to act. We are dismissing these cases without prejudice at this time in order to give the FCC (and/or the D.C. Circuit) an opportunity to clarify the applicable rules. If such clarity has not come about within the next 12 to 18 months, we invite Pac-West to refile these complaints. As noted above, if such a refiling occurs, Pac-West's claims will be preserved against any statute of limitation defense that arose after the filing of the original complaints, and will relate back to Pac-West's initial filings herein.

4.4. Arriving at a Reasonable Rate for Asymmetric CMRS-CLEC Traffic is More Difficult than Pac-West Suggests.

In its comments on the PD, Pac-West argues that the PD errs in ruling, "contrary to decades of state and federal precedent," that "the Commission may require a complex incremental or [TELRIC] cost study to establish a reciprocal compensation rate applicable to CLEC termination of local traffic." (Pac-West PD Comments at 9.) Rather than undertaking such an unjustified exercise, Pac-West argues, this Commission should follow the example of the New York Public Service Commission (NYPSC) in its February 4, 2010 Order Granting Motion to Dismiss in Part and Denying in Part and Granting Complaint in Part

and Denying in Part (Initial Order) in Case 07-C-1541, *Complaint of XChange Telecom, Inc. Against Sprint Nextel Corporation for Refusal to Pay Terminating Compensation*.

In that order, according to Pac-West, the NYPSC exercised its authority under New York law and set a rate for the termination of wireless traffic over XChange's network based upon the reciprocal compensation rate of Verizon New York, "the largest ILEC in New York." (Pac-West PD Comments at 9.) Pac-West argues that this Commission should take the same approach here and reject the "premature and unnecessary advisory opinion" expressed in the PD that in order to set a termination rate for CMRS traffic, "cost studies are likely to be necessary." (*Id.* at 11.)

When read in its entirety, the NYPSC Initial Order is not nearly as simple in its analysis as Pac-West suggests. Rather, it grapples with the complexity of setting a rate where the traffic is asymmetric, and where the CLEC involved cannot compel arbitration.[35] In a subsequent Notice Requesting Comments

[35] In the Initial Order, the NYPSC began its analysis by noting that in the *T-Mobile Ruling*, the FCC "expanded the scope of the negotiation/arbitration procedures set forth under § 252 to allow ILECs to request mandatory negotiation/arbitration from a CMRS provider and submit to the state's jurisdiction." (NYPSC Initial Order at 3.) However, the NYPSC continued:

> The FCC opted not to expand the scope of the § 252 mandatory negotiation/arbitration to LEC-CMRS requests. Therefore . . . we find that XChange's request to enter into an ICA under the mandatory arbitration process pursuant to federal law is denied and Sprint's motion to dismiss in that regard is granted. The Commission does not have the authority to arbitrate an ICA between a CLEC and a CMRS provider under § 252 of the Act. (*Id.* at 3; footnotes omitted.)

The NYPSC then concluded that it had jurisdiction to set a termination rate under New

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issued in the same proceeding (which Pac-West does not cite and which is

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York law, because – apart from forbidding the use of tariffs for doing so – "the FCC did not [in the *T-Mobile Riling*] preempt state regulation of intrastate rates that LECs can charge CMRS providers for termination of their traffic." (*Id.*) The New York Commission noted that the FCC had recently reaffirmed this conclusion in the *MetroPCS Review Order.*

The New York Commission then turned to the question of what the termination rate should be. The NYPSC rejected XChange's argument that it was entitled to a rate comprised of Verizon's tandem reciprocal compensation rate, its tandem transit rate, and its record processing charge, because it was clear that XChange's network did not perform all of these functions:

> The Commission previously determined in its Competition II Proceeding that CLECS should be entitled to, at a minimum, charge the per-minute Verizon tandem termination rate if their networks were functionally equivalent to Verizon's. However, we are advised by Department Staff that in this particular situation the functionality of XChange's network is not operationally equivalent to a tandem arrangement since the calls coming into the XChange switch are terminated to customers on that switch and not routed to other XChange local switches for termination. Since XChange's network does not replicate the functionality of a tandem, but only an end-office switch, it is appropriate that the rate reflect the cost associated only with end office call termination. (*Id.* at 12-13; footnote omitted.)

While the NYPSC rejected Sprint's argument that a "convergent traffic" rate should apply because "there is no evidence that XChange is involved in a traffic-pumping scheme whereby XChange has a relationship with certain end-users in an effort to generate large one-way call volumes, thereby exploiting intercarrier compensation," the New York Commission also emphasized that "Sprint is free to petition the Commission to consider the appropriateness of a convergent rate . . . on a showing that the traffic imbalance between the XChange and Sprint networks warrants such treatment." (*Id.* at 14; footnoted omitted.)

Finally, the NYPSC denied XChange's request for interim rate relief, "because the rate we establish today will apply prospectively. Any retroactive relief is not appropriate given that, up until now, the Commission has not acted in establishing a rate for the exchange of this type of traffic and no agreement exists governing the [parties'] interconnection." (*Id.*)

described below), the NYPSC appears to have developed enough concerns about the termination rate set in the Initial Order to justify asking the affected parties for comments on the reasonableness of this rate.[36] All of these factors support the conclusion in the PD that doing what Pac-West seeks here – a *pro forma* rubber-stamping of the termination rate contained in its intrastate tariff -- would not be appropriate, and might well fail to pass muster under the limited guidance on rate-setting the FCC has provided in the *MetroPCS Review Order*.

In the Notice Requesting Comments issued in the *XChange v. Sprint Nextel* docket in June of last year, the NYPSC noted that while Sprint Nextel and several other CMRS carriers had filed petitions for rehearing of the Initial Order, "very few comments were filed on the appropriateness of the actual rate established [in the Initial Order] pursuant to the FCC's pricing standards."[37] Accordingly, the NYPSC asked the parties for comments that addressed "whether the rate established in our February 4, 2010 Order is reasonable and otherwise address the issues presented on rehearing."[38] In response to this Notice, comments were filed during the summer and fall of 2010, and the entire case remains pending before the NYPSC.

Although Pac-West's January 3, 2011 comments strenuously argue that the PD engaged in a "premature and unnecessary advisory opinion" in suggesting that cost studies might be necessary in these cases, we believe that the Initial

[36] June 21, 2010 Notice Requesting Comments, at 3 (available at http://www.dps.state.ny.us/New_Search.html, by searching for Case No. 07-C-1541)

[37] *Id.*

[38] *Id.*

Order and the Notice Requesting Comments of the NYPSC in the *XChange v. Sprint Nextel* case demonstrate that the PD was right to conclude that Pac-West had failed to engage in a serious and focused analysis of the problems involved in setting a rate for the traffic at issue here.

Pac-West also argues that the PD erred in reaching a "premature and unfounded conclusion that [the] issue [of traffic pumping] is somehow relevant to CLEC wireless termination rates." (Pac-West PD Comments at 9, 11.) In view of the careful analysis in the NYPSC's Initial Order, and the New York Commission's subsequent request for comments on the reasonableness of the CMRS termination rate that it did set, the concerns expressed in the PD that cost studies might be necessary here, and that "discovery may be necessary concerning the actual nature of the traffic that Pac-West terminates for the defendants," were well-founded.

5. Assignment of Proceeding

In C.09-12-014, John A. Bohn was the originally assigned Commissioner and A. Kirk McKenzie was the assigned ALJ. In Cases 10-01-019, 10-01-020, and 10-01-021, Nancy E. Ryan was the originally assigned Commissioner and A. Kirk McKenzie the assigned ALJ. These cases are currently assigned to Commissioner Peevey and ALJ Jacqueline Reed.

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. On February 8-9, 2011, the FCC issued the NPRM/FNPRM in CC Docket No. 01-92 and other dockets for the stated purpose of developing a unified intercarrier compensation regime. The NPRM/FNPRM asks affected parties for comments on, among other topics, the impact of the *MetroPCS Review Order*, and whether the *MetroPCS Review Order* has had any impact on traffic stimulation.

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. 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 specify any specific analysis or methodology for arriving at a reasonable rate where appropriate.

4. For the same reasons set forth in D.10-06-006, the complaints here should be dismissed without prejudice.

5. None of the authority cited by Pac-West in support of the various causes of action pleaded in the four complaints at issue here is inconsistent with the decision herein to dismiss these cases without prejudice.

6. 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.

7. In the event the petition to reopen described in the preceding Conclusion of Law 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.

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

9. 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 March 24, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK FERRON
Commissioners