ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 10-1003

METROPCS CALIFORNIA, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a), the following is a statement of parties, *amici*, rulings under review, and related cases.

(A) Parties. The parties before the Federal Communications Commission in the proceeding on review were:

North County Communications Corp.
MetroPCS California, LLC

The parties appearing in this Court are:

MetroPCS California, LLC
Federal Communications Commission
United States of America

(B) Ruling Under Review. The Commission order under review is *North County Commc'ns Corp. v. MetroPCS California, LLC*, 24 FCC Rcd 14036 (2009) (J.A.).

(C) Related Cases. The order on review has not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

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GLOSSARY

Br.	brief
Bureau Order	*North County Commc'ns Corp. v. MetroPCS California, LLC*, 24 FCC Rcd 3807 (Enf. Bur. 2009)
California PUC	California Public Utilities Commission
CLEC	competitive LEC
CMRS	commercial mobile radio service
FCC or Commission	Federal Communications Commission
ILEC	incumbent LEC
J.A.	Joint Appendix
LEC	local exchange carrier
MetroPCS	MetroPCS California, LLC
MTA	Major Trading Area, as defined in 47 U.S.C. § 24.202(a)
North County	North County Communications Corp.
Order	*North County Commc'ns Corp. v. MetroPCS California, LLC*, 24 FCC Rcd 14036 (2009)

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BRIEF FOR RESPONDENTS

JURISDICTION

The Order on review was released on November 19, 2009.[1] The Commission had authority to issue the Order pursuant to 47 U.S.C. § 208, which directs the Commission to investigate and act upon administrative complaints filed against telecommunications common carriers. Petitioner MetroPCS timely filed its petition for review on January 8, 2010, pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

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[1] *North County Commc'ns Corp. v. MetroPCS California, LLC*, 24 FCC Rcd 14036 (2009) ("*Order*") (J.A.), *affirming in relevant part* 24 FCC Rcd 3807 (Enf. Bur. 2009) ("*Bureau Order*") (J.A.).

STATEMENT OF THE ISSUE

Section 20.11(b)(2) of the Commission's rules, 47 C.F.R. § 20.11(b)(2), requires a commercial mobile radio service ("CMRS") provider to pay "reasonable compensation" to a local exchange carrier ("LEC") to terminate calls that originate on the CMRS provider's network. In the 1994 order adopting that rule, the Commission explained that the regulation did not reach the setting of rates for intrastate traffic terminated by LECs from CMRS providers – a function that state commissions retain the authority to perform in accordance with their own ratemaking standards. Many other FCC decisions before and since also repeatedly declined to preempt the traditional power of state public utility commissions to set LEC/CMRS compensation rates for termination of intrastate traffic.

This case presents the question whether the Commission reasonably interpreted Rule 20.11(b) and its longstanding precedent in concluding that the California Public Utilities Commission ("California PUC") is the more appropriate forum to set a rate for a LEC's termination of purely intrastate calls originated by a CMRS provider.

STATUTES AND REGULATIONS

Pertinent statutes and regulations, in addition to those appended to the petitioner's opening brief, are included in an addendum to this brief.

STATEMENT OF THE CASE

Section 20.11(b)(2) of the Federal Communications Commission's rules, 47 C.F.R. § 20.11(b)(2), provides that "[a] commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider." Thus, for example, when a salesman uses his wireless phone to call to the landline phone at his office across town, the rule requires the salesman's CMRS provider (the originating carrier) to pay the office's LEC (the terminating carrier) reasonable compensation for completing that call.

This case involves the Commission's application of Rule 20.11(b)(2) to intrastate telephone calls – calls in which the calling and called parties are within the same state. Under the dual scheme of regulation established by the Communications Act of 1934, as amended, absent preemption by the FCC, individual state public utility commissions traditionally have exercised regulatory authority over intrastate telephone traffic. That generally includes the ability to set rates that a terminating carrier may charge an originating carrier for completing intrastate telephone calls.

The calls at issue in this case originated in California on the facilities of MetroPCS California, LLC ("MetroPCS"), a CMRS provider, and terminated in California on the facilities of North County Communications Corp. ("North County"), a LEC whose customers, as relevant to this case, are providers of so-

called "chat-line" services.[2] When MetroPCS failed to pay North County's invoices for terminating these intrastate calls to North County's chat-line customers (at rates unilaterally set by North County), North County complained to the FCC, alleging among other things that MetroPCS had violated Rule 20.11(b)(2).

Grounding its decision on the rulemaking order that adopted Rule 20.11(b)(2) and on over two decades of FCC precedent holding that the FCC has not preempted the states' traditional power to set compensation rates between a CMRS provider and a LEC for intrastate traffic, the FCC in the Order on review upheld a prior staff-level decision holding that the California PUC, not the FCC, was the more appropriate forum to set the rate for terminating the purely intrastate calls at issue here. *Order*, paras. 1, 9-16 (J.A.). The *Order* accordingly placed the case in abeyance pending a rate-setting determination by the California PUC. *Id.*, paras. 22-24 (J.A.).

[2] A "chat-line" service allows multiple incoming callers to call a chat-line telephone number and be connected with each other simultaneously to discuss topics of mutual interest. *See*, *e.g.*, *Total Telecomm. Servs., Inc. v. AT&T Corp.*, 16 FCC Rcd 5726, 5728, para. 5 (2001), *subsequent history omitted.*

STATEMENT OF THE FACTS

I. Regulatory Background

1. The Communications Act of 1934, as amended,[3] gives the Commission authority over many aspects of interconnection between local exchange carriers and commercial mobile radio service carriers. Section 201(a) of the Act, 47 U.S.C. § 201(a), provides generally that "in cases where the Commission * * * finds such action necessary or desirable in the public interest," common carriers (which include both LECs and CMRS carriers) must "establish physical connections with other carriers." Moreover, section 332(c)(1)(B) of the Act, added to the statute in 1993,[4] specifically requires the Commission to "order a common carrier to establish physical connections * * * pursuant to the provisions of section 201" upon "reasonable request of any person providing commercial mobile service." 47 U.S.C. § 332(c)(1)(B).

Historically, the Communications Act also strictly divided regulatory jurisdiction over telephone service into separate interstate and intrastate spheres – with the FCC administering federal law regarding interstate traffic and state public utility commissions administering state law regarding intrastate traffic. Section 2(a) of the Act grants the FCC jurisdiction over "all interstate and foreign communications by wire or radio," 47 U.S.C. § 152(a), while section 2(b) generally preserves the states' power to regulate, among other things, "charges * *

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[3] 47 U.S.C. §§ 151 *et seq.*

[4] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) (the "1993 Budget Act").

* for or in connection with intrastate communication service," *id.* § 152(b). *See generally Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986); *Public Service Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1514-15 (D.C. Cir. 1990); *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1329 (D.C. Cir. 1989). Under this statutory regime, the FCC could assert jurisdiction over intrastate matters only if the interstate and intrastate aspects of the regulation were inseverable and state regulation would thwart or impede valid federal policies. *Louisiana Public Service Comm'n*, 476 U.S. at 375 & n.4; *Public Service Comm'n of Maryland*, 909 F.2d at 1515.

The 1993 Budget Act altered the traditional jurisdictional boundaries with respect to CMRS carriers. Specifically, section 332 expressly preempted state regulation of intrastate retail rates charged by CMRS carriers to their end user customers. With certain exceptions and subject to a process by which states could petition to continue to regulate intrastate retail CMRS rates, the new statute provided that "no State or local government shall have any authority to regulate entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). At the same time, "the new provisions of Section 332 d[id] not augment or otherwise affect" CMRS interconnection rights under section 201,

other than to require the Commission to respond to CMRS interconnection requests.[5]

2. In 1994, the Commission adopted Rules 20.11(a) & (b), 47 C.F.R. §§ 20.11(a) & (b), to implement its authority under sections 201 and 332(c) with respect to LEC/CMRS interconnection.[6] Rule 20.11(a) requires that LECs provide the type of "interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable." 47 C.F.R. § 20.11(a).[7] Rule 20.11(b) imposes three requirements: it mandates that LECs and CMRS carriers "comply with principles of mutual compensation," 47 C.F.R. § 20.11(b); it provides that a "[LEC] shall pay reasonable compensation to a [CMRS] provider in connection with terminating traffic that originates on facilities of the [LEC]," *id.* §

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[5] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, para. 227 (1994) ("*CMRS Second R&O*"); *see* 47 U.S.C. § 332(c)(1)(B) ("Except to the extent that the Commission is required to respond to such a request" by a CMRS provider, this provision "shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to the Act."). *Cf. Iowa Utils. 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*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (upholding the Commission's authority to adopt other rules, governing CMRS interconnection with incumbent LECs, "[b]ecause Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by [CMRS] providers, * * * and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS providers").

[6] *CMRS Second R&O*, 9 FCC Rcd at 1520-21 (Appendix A).

[7] That provision also identifies procedures for "[c]omplaints against carriers under * * * 47 U.S.C. § 208, alleging a violation of this section." 47 C.F.R. § 20.11(a).

20.11(b)(1); and it requires that a "[CMRS] provider shall pay reasonable compensation to a [LEC] in connection with terminating traffic that originates on the facilities of the [CMRS] provider," *id.* § 20.11(b)(2).

In adopting these new regulations, the Commission recognized, with respect to interconnection, that "[c]ommon carriers are generally subject to state regulation of intrastate services" under section 2(b) of the Act, unless the interstate and intrastate aspects of the regulation are inseverable and state regulation would undermine valid federal objectives. *CMRS Second R&O*, para. 3 & n.11 (citing, *e.g.*, *Louisiana Public Service Comm'n v. FCC*, 476 U.S. at 375 & n.4). Applying that jurisdictional principle to the interconnection rights provided in Rule 20.11(a), the Commission found that "separate interconnection arrangements for interstate and intrastate commercial mobile radio services are not feasible (i.e., intrastate and interstate interconnection in this context is inseverable)." *Id.*, para. 230. The Commission further concluded that "state regulation of the right and type of interconnection would negate the important federal purpose of ensuring CMRS interconnection to the interstate network." *Ibid.* Accordingly, the Commission preempted "state and local regulations of the kind of interconnection to which CMRS providers are entitled." *Ibid.*

Similarly, the "mutual compensation" requirement of the first sentence of Rule 20.11(b) – which requires LECs and CMRS carriers to compensate each other for terminating traffic that originates on the facilities of the other carrier, *CMRS Second R&O*, para. 232. – applies inseverably both to interstate and intrastate

traffic. *AirTouch Cellular v. Pacific Bell*, 16 FCC Rcd 13502, paras. 12, 14. (2001) ("*AirTouch Order*").

By contrast, in addressing the requirements of Rule 20.11(b)(1) & (2) that LECs and CMRS carriers pay each other "reasonable compensation" for terminating traffic originating on their respective networks, the Commission determined that "LEC costs associated with the provision of interconnection for interstate and intrastate cellular services are segregable." *CMRS Second R&O*, para. 231 (citing *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling*, 2 FCC Rcd 2910, paras. 10-18 (1987)). The Commission therefore required "that LECs shall establish reasonable charges for interstate interconnection provided to commercial mobile radio service licensees," but, importantly, did "not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time." *CMRS Second R&O*, paras. 231, 233 (emphasis added). Instead, relevant state commissions retained their authority, consistent with prior FCC precedent, to implement intrastate ratesetting according to their own ratemaking standards,[8]

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[8] *See*, *e.g.*, *The Need to Promote Competition and Efficient Use of Sprectrum for Radio Common Carrier Services*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, para. 25 (1987) (noting that that compensation arrangements with respect to intrastate traffic between landline telephone companies and cellular carriers are subject to state regulatory jurisdiction); *accord The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, paras. 18, 44-45 (1987); *Indianapolis Telephone Co. v. Indiana Bell Telephone Co.*, Memorandum Opinion and Order, 1 FCC Rcd 228, para. 10 (1986).

subject to the federal requirement of Rule 20.11(b) that originating carriers pay the rate that the state prescribes.

3. In the Telecommunications Act of 1996 ("the 1996 Act"),[9] Congress added, among other things, sections 251 and 252 to the Communications Act. 47 U.S.C. §§ 251, 252. Those provisions, designed to open local telecommunications markets to competition,[10] impose a number of duties on incumbent LECs ("ILECs") (as well as other carriers),[11] *see* sections 251(a), 251(b) & 251(c), and establish a carefully defined arbitration process for new entrants and other requesting carriers to invoke when seeking to enforce those duties against incumbents, *see generally* section 252.

Among the obligations imposed by section 251 and enforceable against ILECs under section 252 is the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Analogous to the requirements under the existing Rule 20.11(b) regime, the section 251(b)(5) reciprocal compensation obligation, where it applies,

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[9] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of Title 47 of the United States Code).

[10] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1998).

[11] Generally speaking, incumbent LECs are the carriers that already were providing local exchange service and exchange access in their areas of service on the date the 1996 Act was enacted. 47 U.S.C. § 251(h). These carriers are in contrast with competitive LECs (or "CLECs"), which thereafter entered the local exchange marketplace.

entitles the originating carrier to have its traffic terminated by a LEC at regulated rates established by state commissions. 47 C.F.R. § 51.705.

In the *Local Competition Order*,[12] the Commission ruled that section 251(b)(5) requires LECs to establish reciprocal compensation arrangements for the exchange of local traffic with CMRS carriers.[13] At the same time, the Commission determined that, because CMRS carriers are not local exchange carriers, they are "not [themselves] subject to the obligations of section 251(b)(5)." *Local Competition Order*, para. 1005. Accordingly, under the regime adopted in the *Local Competition Order*, the section 252 arbitration process could not be invoked to require CMRS carriers to terminate LEC-originated traffic under section 251(b)(5). *See T-Mobile Ruling*, para. 15 (noting that that regime "does not explicitly impose reciprocal compensation obligations on CMRS providers"). Nor could the section 252 arbitration process be invoked against CLECs, since section

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[12] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *aff'd in part and rev'd in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part and aff'd in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366.

[13] *Local Competition Order*, paras. 1036, 1041. *Accord Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, para. 3 (2005) ("*T-Mobile Ruling*") (subsequent history omitted). The Commission defined the relevant "local" traffic with respect to such exchanges as traffic to or from a CMRS network that originates and terminates within the same Major Trading Area ("MTA"). MTAs, defined at 47 C.F.R. § 24.202(a), are the largest FCC-authorized license territories for CMRS carriers. *Local Competition Order*, para. 1036.

252, by its terms, contemplates proceedings against incumbents. *See, e.g.*, 47 U.S.C. § 252(a)(1), (b)(1) (contemplating that the "incumbent local exchange carrier" receives a request for interconnection that triggers the arbitration procedures), § 252(d)(2)(A) (establishing pricing principles "for purposes of compliance by an incumbent local exchange carrier with section 251(b)(5)").[14]

Where the section 251/252 process does not apply – including interconnection disputes between CLECs and CMRS carriers (*see* n.14) – Rule 20.11(b) provides "default rights" to intercarrier compensation. *T-Mobile Ruling*, para. 12. Since adoption of that rule, the Commission has continued to refrain

[14] In the 2005 *T-Mobile Ruling* (at para. 16), the Commission later opened the section 252 arbitration process to permit ILECs "to compel negotiations and arbitrations" with CMRS carriers. The Commission found this rule change necessary to create regulatory balance in the negotiation process, since CMRS carriers already could invoke section 252 arbitration procedures against ILECs, but ILECs had no similar recourse against CMRS carriers. *Ibid.* The rule revisions adopted in the *T-Mobile Order* did not provide *CLECs* with corresponding section 252 rights against CMRS carriers. The section 252 procedures adopted in the *Local Competition Order* had not provided CMRS carriers with section 252 rights against CLECs, so there was no regulatory imbalance to correct between the two categories of carriers.

from preempting state authority to establish LEC termination rates for intrastate CMRS traffic.[15]

II. The North County v. MetroPCS Complaint.

The administrative proceedings leading to the *Order* on review commenced in August 2006, when North County filed a complaint, pursuant to 47 U.S.C. § 208, against MetroPCS.[16] North County, a CLEC, provides telephone exchange, exchange access and other telecommunications services in California.[17] All or almost all of its end user customers are either chat-line providers, which exclusively generate inbound calls, or telemarketers, which, by law, may not make outgoing calls to wireless phones.[18] As a result, North County generates no outgoing calls to wireless carriers, such as MetroPCS.

MetroPCS, which provides commercial mobile radio service in California, is indirectly interconnected with North County through the switching facilities of

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[15] *See*, *e.g.*, *T-Mobile Ruling*, para. 10 n.41 (noting that the Commission has "specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers"); *AirTouch Order*, paras. 12, 14 (Rule 20.11(b) mandates mutual compensation for termination of traffic but does not preempt state regulation of the actual rate paid by CMRS carriers for intrastate interconnection); *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, para. 109 (1996) (stating that the Commission's LEC-CMRS mutual compensation rules do not preempt the states from setting intrastate interconnection rates).

[16] Second Amended Complaint, File EB-06-MD-007 (filed Aug. 24, 2006) ("Complaint") (J.A.).

[17] *Order*, para. 3 (J.A.); *Bureau Order*, para. 3 (J.A.).

[18] *Order*, paras. 3, 5 (J.A.); *Bureau Order*, paras. 3, 5 (J.A.).

other LECs and has no interconnection agreement with North County. *Order*, para. 4 (J.A.); *Bureau Order*, para. 4 (J.A.). Despite the absence of such an interconnection agreement, North County in 2003 began billing MetroPCS for terminating the intrastate, intraMTA traffic that MetroPCS originated, at rates that North County set unilaterally. North County filed its complaint in 2006, after efforts by the parties to negotiate an interconnection agreement reached an impasse. *Order*, paras. 6-7 (J.A.); *Bureau Order*, paras. 6-7 (J.A.). MetroPCS has not paid North County any amount for the traffic North County has terminated. *Order*, para. 6 (J.A.); *Bureau Order*, para. 6 (J.A.).

North County's complaint presented five different counts alleging various statutory and rule violations by MetroPCS. Only Count I is relevant here, because that is the only count that the parties pursued to a potentially reviewable Commission-level ruling.[19] In Count I, North County alleged that MetroPCS was violating the "reasonable compensation" requirement of Rule 20.11(b)(2) by failing to pay North County any amounts for terminating the intrastate, intraMTA

[19] In Count II, North County alleged that MetroPCS was violating section 251(b)(5) of the Act and implementing rule 51.301 by failing to negotiate and execute a written interconnection agreement in good faith. Counts III and V of the complaint alleged that MetroPCS was violating sections 201(b) and 202(a) of the Act, respectively, by declining to enter into a written interconnection agreement. And Count IV alleged that MetroPCS had violated Rule 51.715 by refusing to enter into an interim interconnection agreement with North County. *Order*, para. 7 (J.A.); *Bureau Order*, para. 7 (J.A.). The Commission's Enforcement Bureau denied each of these counts on the merits. *See Bureau Order*, paras. 16-18 (denying Counts II and IV), paras. 19-20 (denying Count III), paras. 21-23 (denying Count V) (J.A.). Neither party sought Commission review of any of these Enforcement Bureau rulings. *Order*, para. 8 (J.A.).

traffic that originated on MetroPCS's network. *Order*, paras. 7, 9 (J.A.) (citing Complaint at 15-16, paras. 64-68 (J.A.)); *accord Bureau Order*, paras. 7, 8 (J.A.).

The Enforcement Bureau dismissed North County's Rule 20.11 claim, concluding that the California PUC, "via whatever procedural mechanism it deems appropriate under state law," was "the more appropriate venue for determining what constitutes 'reasonable compensation' for North County's termination of intrastate traffic originated by MetroPCS." *Bureau Order*, para. 9 (J.A.). Explaining its decision, the Bureau noted that the Commission had "repeatedly held" that states retain authority to set intrastate rates for LEC termination of CMRS traffic. *Id.*, para. 9 & n.33 (J.A.) (cataloguing precedent). The Bureau stated that, until the California PUC has exercised that authority to determine the rate North County may charge, the FCC "cannot determine whether or to what extent" MetroPCS has violated any duty under Rule 20.11. *Id.*, para. 9 (J.A.). The Bureau added that its dismissal of Count I was without prejudice – noting that if, after the California PUC sets a rate, North County believes that MetroPCS has failed to pay what is owed, "North County may seek resolution of that dispute [from the FCC] at that time." *Ibid.*

Both North County and MetroPCS sought review of this ruling by the full Commission. *Order*, para. 11 (J.A.). North County asked the Commission to reverse the Bureau, to prescribe a reasonable compensation rate and award damages, or to hold Count I in abeyance (rather than dismiss it) pending a determination by the California PUC of a reasonable compensation rate. *Ibid.* For

its part, MetroPCS asked the Commission either to remand Count I to the Bureau with instructions to prescribe a reasonable compensation rate and award damages (if any) on the basis of that rate, or, at least, to provide ratemaking guidance to the California PUC. *Ibid.*

After considering the record before the Bureau and the arguments on review, the Commission upheld the Bureau's conclusion that "the California PUC is the more appropriate forum for determining the reasonable compensation rate for North County's termination of intrastate, intraMTA traffic originated by MetroPCS." *Order*, para. 12 (J.A.); *see generally id.*, paras. 13-21 (J.A.) (addressing the parties' arguments). In doing, the Commission relied on a consistent line of administrative precedent – including the rulemaking order that adopted Rule 20.11(b), as well as multiple decisions both before and after it – in which the agency had determined that it would not preempt state ratemaking authority, but instead would continue to allow state commissions to exercise their authority to establish intrastate termination rate levels.[20]

The Commission did, however, modify "one aspect" of the Bureau Order. Instead of dismissing Count I without prejudice, as the Bureau had done, the Commission held that claim in abeyance pending final action by the California PUC to determine what rate North County could charge MetroPCS for terminating MetroPCS's intrastate traffic. *Order*, para. 22 (J.A.). Making a rough analogy to

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[20] *Order*, para. 10 n.39 (J.A.) (compiling precedent, including the *CMRS Second R&O*, paras 231-232, and the *AirTouch Order*, para. 14, among many other decisions).

similar practices by federal courts in the context of primary jurisdiction referrals, the Commission concluded that holding the proceeding in abeyance, rather than dismissing the complaint, would prevent any possibility that North County might be prejudiced – *e.g.*, by statute of limitations concerns – during the pendency of state commission proceedings. *Id.*, para. 22 (J.A.) (citing, *cf., Reiter v. Cooper*, 507 U.S. 258, 267-68 (1993)).

III. Subsequent Events.

Although it failed to secure a favorable ruling from the Commission on any aspect of its complaint, North County has not sought review of the Order and, indeed, has not intervened in this case. Despite prevailing on virtually every claim North County made against it in the complaint proceeding, MetroPCS now seeks review of the Commission's holding that North County must first initiate and conclude rate proceedings in a different forum – the California PUC – if it wishes to pursue any claim against MetroPCS under Rule 20.11. North County has initiated proceedings before the California PUC to establish a termination rate. MetroPCS is resisting North County's request in those state commission proceedings.

SUMMARY OF ARGUMENT

1. The Commission reasonably interpreted and applied its own rules and precedents in holding North County's Rule 20.11(b) claim against MetroPCS in abeyance to allow North County to seek a determination by the California PUC of the appropriate rate to charge MetroPCS for terminating its intrastate traffic. That rule allows states to continue intrastate ratesetting according to their own

ratemaking standards, subject only to the federal requirement that originating carriers pay the rate determined by the state. Courts accord an agency substantial deference when, as in this case, the agency interprets and applies its own rules and precedents; the FCC's action here easily passes muster under the applicable standard of review.

MetroPCS's contrary claims are not persuasive. Because Rule 20.11(b), by its terms, allows states to continue to exercise their authority to set intrastate termination rates and the California PUC had never established such a rate for the termination service North County provides to MetroPCS, there is no merit to MetroPCS's claim that the Commission violated a putative duty under 47 U.S.C. § 208 to resolve the question of whether MetroPCS had paid North County the compensation Rule 20.11(b) requires. In any event, MetroPCS's contention that section 208 compelled, rather than merely authorized, the FCC to resolve that question is not properly before the Court because no party below provided the Commission with an "opportunity to pass" upon it, as required by 47 U.S.C. § 405.

Nor is there merit to MetroPCS's assertion that the Commission had a duty to determine the appropriate intrastate termination rate pursuant to 47 U.S.C. §§ 201 & 332. The only claim that the parties presented for Commission (rather than staff) review was the claim that MetroPCS had violated Rule 20.11(b). Thus, any challenge predicated on sections 201 or 332 of the Communications Act is not before the Court. *See* 47 U.S.C. § 155(c)(7) (requiring an application for full Commission review as a prerequisite to any challenge to staff action). In any event, because Rule 20.11(b) does not preempt state commission authority over the

relevant intrastate ratesetting, it would have been contrary to established administrative law principles for the Commission to take action inconsistent with that rule in this adjudicatory proceeding. Normally, regulations (like Rule 20.11(b)) that are adopted in notice and comment rulemaking proceedings may only be modified in such notice and comment proceedings.

2. The Court should reject MetroPCS's alternative claim that the Commission breached a duty to provide the California PUC with guidance regarding the ratemaking principles it should apply in determining the appropriate intrastate termination rate North County may charge. Apart from the general requirement that carriers compensate each other for terminating traffic that originates on the other carrier's network, Rule 20.11(b) does not purport to establish a federal standard that constrains state commissions in setting rates that a LEC may charge a CMRS carrier for intrastate traffic termination. Accordingly, there would be no basis for providing guidance regarding the application of that rule.

Moreover, although the Commission had authority to provide guidance regarding the types of state ratemaking actions that might warrant future preemption under section 332 of the Act, the agency has broad discretion under 47 U.S.C. § 154(j) to determine the scope of its proceedings. MetroPCS has presented no reason to compel the agency, in the exercise of that discretion, to provide such guidance in this proceeding.

STANDARD OF REVIEW

To the extent that petitioner MetroPCS contests the FCC's interpretation of the Communications Act, its challenge is governed by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 980 (2005). This deference applies not only to the Commission's implementation of ambiguous statutory terms regarding matters that clearly are within its delegated authority, but also to the agency's threshold "interpretation of the scope of its [regulatory] jurisdiction" under the governing statute. *Maine Public Utils. Comm'n v. FERC*, 520 F.3d 464, 479 (D.C. Cir. 2008); *accord Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007). *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-45 (1986).

To the extent that MetroPCS challenges the reasonableness of the FCC's Order, the Court must reject such challenge unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action;" the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1202-08 (D.C. Cir. 1996). Moreover, particular deference under this standard is accorded where the agency is interpreting its own regulations. *MCI WorldCom Network Servs., Inc. v. FCC*, 274 F.3d 542, 547 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006). Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

ARGUMENT

In addressing the only count of North County's administrative complaint against MetroPCS that is before the Court in this case, the Commission implemented a straightforward application of its own Rule 20.11(b), which North County had argued MetroPCS was violating. MetroPCS's various contentions that the Commission acted unlawfully in its disposition of the Rule 20.11 claim are based on a misreading of the Commission's regulation and are otherwise without merit.

I. The Commission Reasonably Interpreted and Applied Rule 20.11(b) in Concluding that the California PUC Was the Proper Forum to Determine the Rate North County May Charge For Terminating MetroPCS's Intrastate Traffic.

Some portions of Rule 20.11 apply inseverably both to interstate and intrastate traffic. Thus, at the time the Commission first adopted that rule in the *CMRS Second R&O*, it made clear that paragraph (a), requiring LECs to provide CMRS carriers "the type of interconnection reasonably requested" unless "not technically feasible or * * *economically reasonable," applied to requests for interconnection for both intrastate and interstate communications. *CMRS Second R&O*, paras. 230, 234. Similarly, although the *CMRS Second R&O* did not directly address whether the "mutual compensation" requirement in Rule 20.11(b)[21] applies to both interstate and intrastate communications, the Commission later made clear that that obligation applied inseverably. *AirTouch Order*, paras. 12, 14. Thus, for instance, a state commission would be preempted from imposing a regime in which the originating carrier could charge the terminating carrier for delivering intrastate traffic.

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[21] Rule 20.11(b), 47 C.F.R. § 20.11(b), provides in full:

> Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.
>
> (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.
>
> (2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

By contrast, the Commission, from the outset, made clear that while an originating carrier has an obligation under federal law to compensate the terminating carrier with respect to both interstate and intrastate traffic, Rule 20.11(b) does not reach the actual ratesetting function with respect to intrastate traffic. The Commission stated in the *CMRS Second R&O* that, "[w]ith regard to the issue of LEC intrastate interconnection rates, we continue to believe that LEC costs associated with the provision of interconnection for interstate and intrastate cellular services are segregable, and, therefore, we will not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time." *CMRS Second R&O*, para. 231 (citation omitted) (emphasis added). Rather, as a matter of federal law, the Commission required only "that LECs shall establish reasonable charges for interstate interconnection provided to commercial mobile radio service licensees." *Id.*, para. 233 (emphasis added). Thus, although LECs and CMRS providers have a duty under rule 20.11(b) to compensate each other for terminating interstate and intrastate non-access traffic originating on the facilities of the other carrier, Rule 20.11(b)(1) and (b)(2) do not preempt the authority of state commissions to establish the level of intrastate termination charges. *See AirTouch Order*, para. 14 (Although Rule 20.11(b) requires LECs "to pay mutual compensation to CMRS carriers for intrastate traffic * * *, the determination of the actual rates charged for intrastate interconnection [is] left to

the states."). The rule thus leaves undisturbed the states' traditional power to set rates for intrastate service.[22]

Given this history, the Commission implemented a straightforward application of Rule 20.11(b) when it determined that the California PUC is the proper forum to establish what North County reasonably could charge MetroPCS for terminating its intrastate, intraMTA traffic, and held in abeyance the question of whether MetroPCS was complying with any obligation to compensate North County until the state PUC had determined the reasonable rate. *Order*, paras. 9-12, 22-24 (J.A.).

The Commission's construction and implementation of its own regulation is entitled to deference. *See MCI WorldCom*, 274 F.3d at 547 ("[W]e review an agency's interpretation of its own regulations under a highly deferential standard * * * * We give an agency's interpretation of its own regulation controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (internal

[22] Indeed, as the Commission noted, a long and consistent line of FCC precedent makes clear that the agency has not displaced state ratemaking authority with respect to intrastate termination charges. *Order*, para. 10 n.39 (J.A.). *See* nn.8 & 15, above.

quotations omitted); *accord AT&T Corp. v. FCC*, 448 F.3d at 431.[23] The FCC's longstanding and consistent interpretation of Rule 20.11(b), which fully comports with the Communications Act's traditional division of regulatory authority over interstate and intrastate services, easily satisfies that forgiving standard of review.

In its brief, MetroPCS largely ignores the language and history of Rule 20.11(b) and does not come to grips with the long and consistent series of FCC orders – especially the *CMRS Second R&O* and the *AirTouch Order* – that make clear that the FCC has never displaced the states' traditional power to set rates for a LEC's termination of intrastate CMRS traffic. Nor does MetroPCS grapple with the fact that the FCC's interpretation of Rule 20.11(b) is fully consistent with the historic division of authority in the Communications Act, whereby states retain authority to set rates for intrastate communications, absent FCC preemption. These significant omissions fatally undermine MetroPCS's contention that Rule

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[23] Language in the *Order* referring to the California PUC as the "*more* appropriate forum" for determining the allowable intrastate termination charge, *see*, *e.g.*, *Order*, paras. 1, 10, 12, 14 (J.A.) (emphasis added), should not be read to suggest that the Rule 20.11(b)(2) in fact reaches the ratesetting function with respect to intrastate traffic, but that the Commission has nevertheless allowed the state commission to implement it. Given the FCC's plain statement in the *CMRS Second R&O* (at para. 231) that Rule 20.11(b)(2) does *not* reach intrastate termination ratesetting, the "more appropriate forum" language in the *Order* is best read simply to avoid any suggestion that the agency would be without *statutory* authority under section 332 to reach intrastate termination rates charged by CLECs to CMRS carriers if necessary to avoid harm to federal policies. *Cf. CMRS Second R&O*, para. 228 (warning that if "the charge for the intrastate component of interconnection" were set "so high as to effectively preclude interconnection," it would "potentially warrant[] our preemption of some aspects of particular intrastate charge[]").

20.11(b) establishes a federal forum to establish a rate for the purely intrastate traffic at issue here. As explained above, it does not; instead, Rule 20.11(b) requires an originating carrier to pay the terminating carrier compensation for intrastate traffic at a rate established by the state commission. MetroPCS's misreading of the meaning and reach of Rule 20.11(b) infects virtually all its arguments before the Court.

MetroPCS attacks the Commission's treatment of North County's Rule 20.11(b) claim by arguing that section 332 of the Communications Act (along with section 201) "empowers the Commission to regulate the interconnection of CMRS providers and other carriers," including the power to regulate the CLEC termination rates at issue here. MetroPCS Br. 21-23. That may well be true; indeed, the Commission has never renounced the ability to preempt state ratemaking authority over intrastate LEC/CMRS termination charges. *See, e.g., CMRS Second R&O*, para. 231 (declining to preempt state regulation of LEC intrastate interconnection charges to CMRS carriers "at this time"); *Order*, para. 12 & n.46 (J.A.) ("[B]y affirming the [*Bureau Order*], we do not hold that the Commission lacks * * * jurisdiction" to set CLEC intrastate termination rates charged to CMRS carriers). The argument is beside the point, however, with respect to the Rule 20.11 claim that is before the Court. Whatever powers section 332 might authorize the Commission to assert in the abstract, as discussed above, Rule 20.11(b) itself does not create a federal right or obligation that displaces the California PUC's power – under section 2(b) of the Communications Act and *Louisiana Public Service Commission* – to prescribe the charges North County

may assess against MetroPCS for terminating its intrastate intraMTA traffic. And the only part of North County's complaint that is before the Court is the Count I claim under Rule 20.11.[24]

MetroPCS also argues that, by leaving it to the California PUC to determine the rate North County may charge it for terminating MetroPCS's intrastate traffic, the Commission has "abdicated its regulatory and regulatory duty" under section 208 to resolve the compensation dispute under three allegedly applicable provisions of federal law – Rule 20.11, section 201 and section 332. MetroPCS Br. 30; *see generally id.* at 31-33. This claim fails on multiple grounds.

As an initial matter, the claim is not before the Court, because it was not properly presented in the administrative proceedings below. In particular, although North County below attempted to raise the claim that section 208 compelled (rather than merely authorized) the Commission to resolve the compensation dispute, the Commission properly dismissed the claim because it had not first been presented to the Commission's Enforcement Bureau, as required by the agency's procedural rules. *See Order*, para. 25 (J.A.) (citing 47 C.F.R. § 1.115(c) (providing that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no

[24] 47 U.S.C. § 155(c)(7) requires parties seeking judicial review of action taken in a staff order first to seek and obtain review by the full Commission. *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1304 (D.C. Cir. 1997); *International Telecard Ass'n v. FCC*, 166 F.3d 387, 387-88 (D.C. Cir. 1999). Because no party sought Commission review of any matter other than the Enforcement Bureau's disposition of North County's Count I claim regarding Rule 20.11(b), only that claim is before the Court.

opportunity to pass")). Section 405 of the Communications Act, 47 U.S.C. § 405, bars claims that rely on "questions of law or fact upon which the Commission * * * has been afforded no opportunity to pass." And the required "opportunity to pass" is not provided where, as here, the issue was not presented in "compliance with the agency's procedural rules." *Northwest Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470-71 (D.C. Cir. 1989).

MetroPCS's section 208 claim fails on the merits in any event. Assuming that a violation of Rule 20.11(b) would be cognizable under section 208,[25] MetroPCS makes no plausible argument that the Commission has breached any duty under the complaint statute. First, as discussed above, Rule 20.11(b) does not reach the ratesetting function with respect to intrastate termination charges and thus imposes no federal right or obligation that displaces the California PUC's power to set such charges in this case. Accordingly, even if section 208 were viewed as imposing an immutable duty on the Commission to decide all federal claims properly before it, it was hardly a violation of section 208 for the FCC to refrain from preempting, on the basis of Rule 20.11(b), the authority of the California PUC to establish the proper rate for North County's termination of MetroPCS's intrastate traffic.

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[25] Section 208 permits the filing of administrative complaints against communications common carriers alleging acts or omissions "in contravention of the provisions of [the Communications Act]." 47 U.S.C. § 208(a). In the *Order*, the Commission assumed, *arguendo*, that a violation of Rule 20.11 would constitute a violation of the Act. *See Order*, para. 9 n.35 (J.A.).

Second, even assuming, for the sake of argument, that sections 201 and 332 independently impose a duty on the Commission to establish reasonable rates for LEC termination of intrastate traffic from CMRS carriers – and they do not[26] – those provisions do not change the meaning of Rule 20.11(b). And since no separate counts involving either section 201 or section 332 were ever brought before the full Commission for review,[27] MetroPCS's current contention that the Commission violated section 208 by failing to determine reasonable rates under sections 201 and 332 is beyond the scope of this proceeding. *See* n.24, above.

Moreover, even if it were permissible to treat Count I of the complaint as though it raised a plea for relief from the Commission under sections 201 and 332, the Commission properly declined to establish a rate for North County's termination of the intrastate traffic at issue. As noted, the decision not to preempt state jurisdiction over intrastate termination rates in Rule 20.11(b) was made in the *CMRS Second R&O* – a notice and comment rulemaking proceeding. As this

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[26] As previously noted, section 332 preempts state authority over CMRS in two respects: It preempts state regulation of the rates CMRS carriers charge for providing commercial mobile radio service; and it preempts state entry regulation. 47 U.S.C. § 332(c)(3). State ratemaking authority over the rates a *LEC* charges a CMRS carrier for terminating its intrastate traffic falls outside this express preemption. The Commission has suggested that it might intervene if a state were to set LEC intrastate termination charges so high as to be an effective barrier to CMRS entry, *see CMRS Second R&O*, para. 228, but MetroPCS does not even allege such a risk here.

[27] Indeed, the Enforcement Bureau specifically denied claims that MetroPCS's failure to pay North County the charges it was assessing for terminating traffic violated section 201 of the Act. *Bureau Order*, paras. 19-20 (J.A.). No party sought full Commission review of that ruling.

Court has explained, "an agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal." *American Federation of Government Employees, AFL-CIO, Local 3090 v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("American Federation of Government Employees") (*citing Action on Smoking and Health v. CAB*, 713 F.2d 795, 798-801 (D.C. Cir. 1983)).[28] Although this principle of administrative law is not so rigid as to require an agency "to apply a rule in an adjudicatory context if intervening events indicate that the rule is unlawful," *AT&T v. FCC*, 978 F.2d 727, 733 (D.C. Cir. 1992), MetroPCS makes no showing that Rule 20.11(b), as the Commission consistently has interpreted it, has been rendered unlawful by some intervening event. Rather, as the Commission noted, the parties' primary challenges to the Commission's application of the rule were merely about "policy" – particularly, putative concerns about the alleged risk of "cumbersome, time-consuming, and

[28] The Commission referred to this principle below. *See Order*, para. 16 n.60 (J.A.) (quoting *Bell Atlantic-Delaware, Inc. v. Frontier Communications Services, Inc.*, 16 FCC Rcd 8112, 8120 (2001) ("'We are mindful that the Commission has been asked to clarify or revise existing regulations * * * * But because this issue has come before us as part of a section 208 complaint proceeding regarding past behavior, we are constrained to interpret our current regulations and orders.")).

expensive" "piecemeal litigation." *Order*, paras. 15-16 (J.A.).[29] In these circumstances, the Commission reasonably "'decline[d] MetroPCS's suggestion to preempt such state authority [to regulate North County's intrastate termination rate] in the context of this complaint proceeding.'" *Order*, para. 16 (J.A.) (quoting *Bureau Order*, para. 14 (J.A.)). The agency concluded, instead, that the question "'[w]hether to depart so substantially from such long-standing and significant Commission precedent is a complex question better suited to a more general rulemaking proceeding.'" *Ibid.*[30] That decision was certainly reasonable

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[29] The FCC found that these "policy" concerns were overstated in any event. It observed that most CMRS carriers and CLECs interconnect only indirectly with each other through the switching facilities of an incumbent LEC. As a consequence, most interconnection disputes "will largely, if not entirely, concern only compensation," making the need for additional adjudicatory proceedings before the FCC either "unnecessary or relatively limited in scope." *Order*, paras. 15-16 (J.A.).

[30] The other "policy considerations" to which MetroPCS alludes in its brief (at 44-45) are no stronger. Neither the length of time that the complaint had been pending, nor the fact that both North County and MetroPCS asked the Commission to prescribe a reasonable rate has any bearing on the continuing lawfulness of Rule 20.11(b). Moreover, although section 332 in some respects establishes a "'national regulatory policy for CMRS, not a policy that is balkanized state-by-state,'" MetroPCS Br. 23 (quoting *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 FCC Rcd 7842, para. 14 (1995)), it does not purport to preclude state regulation of *CLEC* rates for termination of intrastate CMRS traffic. Indeed, even the prohibition against state regulation of *CMRS* rates in section 332(c)(3)(A) applies only to their *retail* rates to end users, not their interconnection charges to other carriers. *Bureau Order*, para. 11 & nn. 39-40 (J.A.). This case, of course, involves no CMRS charges of *any* kind, since MetroPCS terminates no traffic from North County. *Order*, para. 5 (J.A.).

under the general rule articulated in American Federation of Government Employees.

MetroPCS also asserts that the Commission acknowledged that Rule 20.11(b) reaches ratesetting for terminating intrastate CLEC/CMRS traffic, but nevertheless improperly deferred that question to the California PUC by analogy to primary jurisdiction referrals. MetroPCS Br. 34-38 (citing *Order*, para. 22 n.78 (J.A.)). According to MetroPCS, the primary jurisdiction doctrine may not "be invoked in favor of a state administrative agency, at least where (as here) 'the claim is brought under federal law * * * *'" Br. 35 (*quoting County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1310 (2d Cir. 1990)). This claim, which MetroPCS presses at some length, mischaracterizes the Commission's citation to primary jurisdiction cases.

Contrary to MetroPCS's assertion, the Commission has not referred a question covered by Rule 20.11(b) to the California PUC. As explained, that rule simply does not reach the ratesetting question with respect to intrastate traffic. Instead, it allows states to continue to address that question (as they traditionally have) and requires only that the originating carrier pay the rate that the state determines. The Commission's citation to primary jurisdiction cases was intended for an entirely different purpose: to explain by analogy the agency's decision to hold in abeyance the federal claim that MetroPCS was not complying with an obligation to compensate North County, while the California PUC addressed the distinct, non-federal question of the specific rate levels North County could charge for intrastate termination. *See Order*, para. 22 n.78 (J.A.) (citing primary

jurisdiction cases, "*cf.*", for the proposition that "a federal court should stay rather than dismiss a complaint if doing so is necessary to prevent prejudice to the plaintiff").

MetroPCS also argues that, independent of the Commission's power to refrain from preempting state authority over rates for LEC termination of intrastate CMRS traffic, the Commission erred in failing to address the allegedly "antecedent" federal question of whether MetroPCS owed North County anything at all. Br. 38, 40-42. MetroPCS asserts in this connection that, following the Commission's decision in the *T-Mobile Ruling* (at para. 9) to prohibit the use of tariffs to establish either interstate or intrastate termination rates, there has been an open federal question under Rule 20.11 regarding what triggers an obligation to pay termination charges at all in the absence of an interconnection agreement. Br. 41.[31] MetroPCS further alleges that the Enforcement Bureau expressly and arbitrarily declined to decide this alleged antecedent question in finding that the California PUC should determine the appropriate rate. Br. 42 n.11 (citing *Bureau Order*, para. 15 n.55 (J.A.)).

This claim is not properly before the Court, because no party raised below the "sequencing" issue of the FCC's alleged duty to decide an alleged separate

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[31] Although its argument on this point is difficult to follow, MetroPCS also appears to argue that the Commission's failure to preempt state ratemaking in this case is inconsistent, in some broader sense, with the *T-Mobile Ruling*. Br. 38-40. There is no merit to this suggestion. This case involves the Commission's interpretation and application of Rule 20.11(b). That rule was adopted in the *CMRS Second R&O* and was not amended in the *T-Mobile Ruling*. *Order*, paras. 13-14 (J.A.).

liability question before the California PUC exercises its ratesetting authority over intrastate traffic. Although – as MetroPCS acknowledges (Br. 42 n.11) – the Enforcement Bureau expressly declined to decide whether MetroPCS owes North County anything, no party presented this inaction as a separate legal shortcoming at the application for review stage. The claim is thus waived under 47 U.S.C. § 405. *See Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) ("Under the plain language of [47 U.S.C. § 405], an issue cannot be preserved for judicial review simply by raising it before a Bureau of the FCC. It is 'the Commission' itself that must be afforded the opportunity to pass on the issue."); *accord Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005, 1009 (D.C. Cir. 2001).

The claim is baseless, in any event, because it is predicated on the false premise that there is an unanswered "antecedent" question of liability. In fact, by adopting Rule 20.11(b), the Commission has already determined that reasonable compensation is owed. The rate to be used to calculate the level of that compensation is an open question, however, and it is the state's traditional role – undisturbed by Rule 20.11(b) – to answer it with respect to intrastate traffic. Once the state commission has performed this function, the FCC can then determine whether MetroPCS has failed to pay what is owed in violation of the rule. If, for example, the California PUC were to establish a bill-and-keep rate-setting regime under which each carrier recovers its termination costs from its own end users (rather than the originating carrier), MetroPCS would not owe North County any additional compensation for the traffic North County terminated. *See WorldCom,*

Inc. v. FCC, 288 F.3d 429, 431, 434 (D.C. Cir. 2002) (describing bill-and-keep ratemaking). By contrast, if the California PUC were to specify a termination rate outside of a bill-and-keep regime, MetroPCS might well owe North County additional compensation for past traffic under its "mutual compensation" obligation. In either case, the answer to the liability question must await the California PUC's action in setting the appropriate intrastate LEC termination rate.

MetroPCS asserts that the Commission's alleged error in refraining from preempting the California PUC's authority to determine the actual rate North County may charge is further exposed by the fact that the FCC would lack the power to enforce any resulting state rate order. Br. 43. MetroPCS cites no authority for this claim, but it is beside the point in any event. Under Rule 20.11(b), the Commission would not be enforcing the California PUC's rate order per se. Rather, it would be enforcing North County's federal right, under Rule 20.11(b), to be mutually compensated for terminating MetroPCS's intrastate traffic at the rate determined by the California PUC. The Commission is entitled to deference in determining the scope of its own jurisdiction. *Maine Public Utils. Comm'n v. FERC*, 520 F.3d at 479; *Transmission Agency of Northern California v. FERC*, 495 F.3d at 673.

II. The Commission Reasonably Declined to Provide Guidance to the California PUC for Determining What North County May Charge MetroPCS.

MetroPCS argues, finally, that, even if the Commission was not obligated to set a rate for terminating intrastate traffic, the agency nevertheless acted arbitrarily in declining to provide guidance to the California PUC on the meaning of

"reasonable compensation" under Rule 20.11(b)(2). Br. 45-46. This claim fails from the start because, like most of MetroPCS's other arguments, it is predicated on the mistaken view that Rule 20.11(b) establishes a federal standard that displaces state ratemaking authority with respect to the charges a CLEC may impose on a CMRS carrier for the termination of intrastate traffic. *See* Br. 45 (asserting that the FCC should have provided "guidance to the states on the meaning of federal law"). As discussed above, it does not.

More importantly, although the Commission would have had the authority, pursuant to sections 332 and 201(b) of the Act, to provide guidance to states regarding intrastate CLEC/CMRS interconnection matters that touch on rates – and, indeed, has previously exercised that authority[32] – the agency was under no legal obligation to do so here. In the absence of a controlling mandate to the contrary, section 4(j) of the Communications Act, 47 U.S.C. § 154(j), authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." By enacting that provision, Congress was "'explicitly and by implication' delegating to the Commission power to resolve 'subordinate questions of procedures * * * [such as]

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[32] Although the Commission, in the *CMRS Second R&O* (at para. 231), declined to preempt the authority of state commissions to determine the rates LECs may charge CMRS carriers for terminating *intra*state traffic, the agency also provided guidance in that order and elsewhere that, if a state were to set the charge for the intrastate component of interconnection "so high as to effectively preclude interconnection," the state would be inviting federal preemption. *Id.*, para. 228; *accord Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, 9 FCC Rcd 5408, para. 104 (1994).

the scope of the inquiry.'" *FCC v. Schrieber*, 381 U.S. 279, 289 (1965) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)). *Accord Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975).

MetroPCS has made no showing here of any pressing need for further guidance that would constrain the Commission's well established discretion to control the scope of its proceedings. MetroPCS claims, for example, that the Commission's course of action should have been dictated by its decision to cap termination rates for allegedly similar one-way traffic delivered to Internet Service Providers ("ISPs"). Br. 48-50 (*citing Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 142 (D.C. Cir. 2010)). In the case of the ISP-bound traffic at issue in Core Communications, however, the Commission had an extensive industry-wide record, developed over a period of years, that state commission ratemaking decisions regarding ISP-bound traffic had "distort[ed] the development of competitive markets" and had led to "classic regulatory arbitrage" of nearly $2 billion annually – in some cases enabling competitors to provide free service to ISPs and to pay ISPs to be their customers, as well as inducing outright fraud. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, 16 FCC Rcd 9151, paras. 2, 4, 5, 21, 29, 70 n.134, 76 (2001) (subsequent history omitted). In addition, as this Court recognized, the ISP-bound traffic that the Commission capped was jurisdictionally interstate and therefore within the Commission's traditional zone of authority. *Core Commc'ns*, 592 F.3d at 143-44.

By contrast, no similarly detailed record of industry-wide competitive distortion has been developed with respect to the MetroPCS/North County traffic at issue in this two-party dispute; and that traffic here is intrastate, rather than interstate, in nature, and therefore within the states' traditional area of authority. MetroPCS is free, of course, to convince the California PUC to apply to its North County-bound traffic the same ratemaking principles that the FCC employed with respect to ISP-bound traffic. But it was not error for the Commission to determine that the California PUC "is fully equipped to determine a reasonable termination rate" for purely intrastate traffic "under the specific circumstances presented." *Order*, para. 21 (J.A.).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for judicial review.

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May 27, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

METROPCS CALIFORNIA, LLC, PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS.	)	CASE NO. 10-1003

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 9704 words.

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STATUTORY APPENDIX

47 U.S.C. § 155
47 U.S.C. § 405

47 C.F.R. § 1.115

47 U.S.C.A. § 155(c)(7)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 155. Commission

. . . . .

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

. . . . .

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

. . . . .

47 U.S.C.A. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 U.S.C.A. § 405 (cont'd)

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 1.115(c)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE
RECONSIDERATION AND REVIEW OF ACTIONS
TAKEN BY THE COMMISSION AND
PURSUANT TO DELEGATED AUTHORITY; EFFECTIVE
DATES AND FINALITY DATES OF
ACTIONS

§ 1.115. Application for review of action taken pursuant to delegated authority.

. . . . .

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

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10-1003

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MetroPCS California, LLC, Petitioner,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Laurence N. Bourne hereby certify that on May 27, 2010, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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