Before the
Federal Communications Commission
Washington, D.C. 20554

North County Communications Corp.,	)	
	)	
Complainant,	)	
	)	
v.	)	**File No. EB-06-MD-007**
	)	
MetroPCS California, LLC,	)	
	)	
Defendant.	)	

ORDER ON REVIEW

Adopted: November 19, 2009 **Released: November 19, 2009**

By the Commission:

I. INTRODUCTION

1. In this Order on Review, we grant in part and otherwise deny the Application for Review[1] filed pursuant to rule 1.115[2] by North County Communications Corp. ("North County") challenging one holding of the *Bureau Merits Order*[3] in this proceeding. We also deny the similar Application for Review filed by MetroPCS California, LLC ("MetroPCS").[4] In short, according to the parties, the *Bureau Merits Order* erred by holding that, before North County may seek to enforce whatever right to compensation it may have here at the Commission under rule 20.11,[5] North County must first obtain from the California Public Utilities Commission ("California PUC") a determination of a reasonable rate for North County's termination of intrastate, intraMTA[6] traffic originated by MetroPCS. For the reasons explained below, we affirm the finding in the *Bureau Merits Order* that under the current rules as interpreted by Commission precedent, the California PUC is the more appropriate forum for determining a reasonable rate for North County's termination of intrastate, intraMTA traffic originated by MetroPCS, and that

[1] Application for Review, File No. EB-06-MD-007 (filed Apr. 29, 2009) ("North County AFR"). *See* North County Communications Corp.'s Response to MetroPCS California, LLC's Application for Review, File No. EB-06-MD-007 (filed May 14, 2009) ("North County Response"); North County Communications Corp.'s Reply to Response of MetroPCS of California, LLC, File No. EB-06-MD-007 (filed May 26, 2009) ("North County Reply").

[2] 47 C.F.R. § 1.115.

[3] *North County Communications Corp. v. MetroPCS California, LLC*, Memorandum Opinion and Order, 24 FCC Rcd 3807 (Enf. Bur. rel. Mar. 30, 2009) ("*Bureau Merits Order*").

[4] Application for Review of MetroPCS California, LLC, File No. EB-06-MD-007 (filed Apr. 29, 2009) ("MetroPCS AFR"). *See* Response of MetroPCS California, LLC to the Application for Review of North County Communications Corp., File No. EB-06-MD-007 (filed May 14, 2009) ("MetroPCS Response"); Reply of MetroPCS California, LLC to the North County Communications Corp. Response to MetroPCS California, LLC's Application for Review, File No. EB-06-MD-007 (filed May 26, 2009) ("MetroPCS Reply").

[5] 47 C.F.R. § 20.11.

[6] *See, e.g.*, 47 C.F.R. § 24.202(a) (defining "MTA").

North County should seek to obtain such a determination from the California PUC before seeking to enforce whatever right to compensation it may have here at the Commission under rule 20.11. Rather than dismiss North County's claim without prejudice (as the *Bureau Merits Order* did), however, we will hold the claim in abeyance (in the form of an informal complaint) pending the California PUC's determination of a reasonable termination rate to avoid any prejudice to North County's alleged claim for compensation.

II. BACKGROUND

2. The parties do not challenge the factual findings of the *Bureau Merits Order* (with one exception discussed below).[7] Therefore, we incorporate those findings by reference.[8] We provide a summary of those findings below before addressing the parties' legal arguments on review.

3. North County is a licensed competitive local exchange carrier ("CLEC") that provides switched and non-switched local exchange, exchange access, and other telecommunications services in California.[9] Most, if not all, of North County's end user customers are either chat-line providers or telemarketers.[10]

4. MetroPCS is a Commercial Mobile Radio Service ("CMRS") carrier that provides wireless communications services in California.[11] MetroPCS is indirectly interconnected with North County in California through the switching facilities of other local exchange carriers ("LECs").[12] MetroPCS does not have a written interconnection agreement with North County.[13]

5. The traffic exchanged between North County and MetroPCS is jurisdictionally intraMTA and intrastate (hereinafter "intrastate" traffic).[14] Moreover, all of the traffic exchanged between the parties is in-bound to North County from MetroPCS.[15] That is because North County's chat line provider customers generate no outbound calls, and, according to North County, legal restrictions preclude its telemarketer customers from calling wireless phones.[16]

6. Despite the absence of a written interconnection agreement with MetroPCS, North County began billing MetroPCS for the termination of intrastate traffic sometime in 2003.[17] MetroPCS

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[7] *See* ¶¶ 19-20, *infra* (discussing the parties' cursory, belated, and scantily supported assertion that some unspecified portion of the traffic at issue is jurisdictionally interstate).

[8] *See Bureau Merits Order*, 24 FCC Rcd at 3808-3810, ¶¶ 3-7.

[9] *Bureau Merits Order*, 24 FCC Rcd at 3808, ¶ 3.

[10] *Id.* For purposes of this Order, a "chat-line provider" offers a service that "combine[s] multiple incoming calls that happen to arrive in a common time frame, but are otherwise unscheduled by the parties and may result in connecting callers who are unknown to one another." *Bureau Merits Order*, 24 FCC Rcd at 3808, n.7.

[11] *Bureau Merits Order*, 24 FCC Rcd at 3808, ¶ 4. *See* 47 C.F.R. § 20.3 (defining "commercial mobile radio service").

[12] *Bureau Merits Order*, 24 FCC Rcd at 3808, ¶ 4.

[13] *Id.*

[14] *Bureau Merits Order*, 24 FCC Rcd at 3808-3809, ¶ 5 and nn.11-12. *See* ¶¶ 19-20, *infra*.

[15] *Bureau Merits Order*, 24 FCC Rcd at 3808-3809, ¶ 5 and n.13.

[16] *Bureau Merits Order*, 24 FCC Rcd at 3808-3809, ¶ 5 and n.14. *See* 47 U.S.C. § 227(b)(1)(A)(iii); *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) (subsequent history omitted); 47 C.F.R. § 64.1200(a)(1)(iii).

[17] *Bureau Merits Order*, 24 FCC Rcd at 3809, ¶ 6 and n.15.

has not paid North County any amount of money for the traffic terminated by North County.[18] In MetroPCS' view, a default "bill-and-keep" arrangement exists, whereby neither party pays the other for traffic termination.[19] Between August 2005 and approximately June 2006, North County and MetroPCS attempted to negotiate a written interconnection agreement, without success.[20]

7. Upon reaching an impasse in its negotiations with MetroPCS regarding a written interconnection agreement, North County filed a formal complaint[21] against MetroPCS pursuant to section 208 of the Communications Act of 1934, as amended (the "Act").[22] Count I of the Complaint alleged that MetroPCS is violating rule 20.11(b)[23] by failing to pay North County for terminating traffic originated on MetroPCS' network.[24] Count II of the Complaint alleged that MetroPCS is violating section 251(b)(5) of the Act[25] and rule 51.301[26] by failing to negotiate and execute a written interconnection agreement with North County in good faith.[27] Counts III and V of the Complaint alleged that MetroPCS is violating sections 201(b) and 202(a) of the Act,[28] respectively, by refusing to enter into a written interconnection agreement with North County.[29] Count IV of the Complaint alleged that MetroPCS is violating rule 51.715[30] by refusing to enter into an interim interconnection agreement with North County.[31]

8. Based upon thorough and well-reasoned analyses, the *Bureau Merits Order* denied Counts II, III, IV, and V of the Complaint.[32] Neither the North County AFR nor the MetroPCS AFR challenges those denials. Therefore, those denials are final,[33] and we do not address them here. The only challenged portion of the *Bureau Merits Order* concerns the dismissal without prejudice of Count I, which we discuss below.

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[18] *Bureau Merits Order*, 24 FCC Rcd at 3809, ¶ 6 and n.16.

[19] *Bureau Merits Order*, 24 FCC Rcd at 3809, ¶ 6 and n.17.

[20] *Bureau Merits Order*, 24 FCC Rcd at 3809, ¶ 6.

[21] *See, e.g.*, Second Amended Complaint, File No. EB-06-MD-007 (filed Aug. 24, 2006) ("Complaint").

[22] 47 U.S.C. § 208. *See Bureau Merits Order*, 24 FCC Rcd at 3809-3810, ¶ 7.

[23] *See, e.g.*, 47 C.F.R. § 20.11(b) (providing that "[l]ocal exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation"); 47 C.F.R. § 20.11(b)(2) (providing 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").

[24] *See, e.g.,* Complaint at 15-16, ¶¶ 64-68.

[25] 47 U.S.C. § 251(b)(5) (providing that "[e]ach local exchange carrier has … [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications").

[26] 47 C.F.R. § 51.301 (providing, in pertinent part, that "[a]n incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act").

[27] *See, e.g.,* Complaint at 16-19, ¶¶ 69-76.

[28] 47 U.S.C. §§ 201(b) (barring any "unjust and unreasonable" practice in connection with communication service), 202(a) (barring "unjust and unreasonable discrimination" by any carrier "in connection with like communication service").

[29] *See, e.g.,* Complaint at 19-20, ¶¶ 77-86; 22-23, ¶¶ 95-103.

[30] 47 C.F.R. § 51.715(b) (providing, in pertinent part, that "an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of telecommunications traffic at symmetrical rates").

[31] *See, e.g.,* Complaint at 20-22, ¶¶ 87-94.

[32] *See, e.g.*, *Bureau Merits Order*, 24 FCC Rcd at 3814-3817, ¶¶ 16-23.

[33] *See, e.g.*, 47 C.F.R. §§ 0.203(b), 1.102(b), 1.115.

III. DISCUSSION

9. Rule 20.11(b) provides, in pertinent part, 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."[34] As stated above, Count I of the Complaint alleged that MetroPCS is violating rule 20.11(b) by failing to pay reasonable compensation for North County's termination of intrastate traffic originated by MetroPCS.[35] The Complaint asked the Commission to issue an order (i) prescribing a rate (under section 205 of the Act[36]) for terminating intrastate traffic between the parties at or above the rate billed by North County to MetroPCS, and (ii) awarding North County past due amounts consistent with the Commission's prescribed intrastate termination rate, plus reasonable interest.[37]

10. The *Bureau Merits Order* declined to determine what constitutes "reasonable compensation" in this case and thus declined to prescribe a rate or award damages.[38] In doing so, the *Bureau Merits Order* relied on the Commission's repeated holdings that (i) states have authority to establish rates charged by LECs for termination of intrastate traffic from CMRS providers, and (ii) the Commission has not preempted such state authority.[39] Thus, according to the *Bureau Merits Order*, the

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[34] 47 C.F.R. § 20.11(b)(2) (emphasis added).

[35] *See, e.g.*, Complaint at 15-16, ¶¶ 64-68. For purposes of this Order only, we assume, without deciding, that a violation of rule 20.11 would be a violation of the Act cognizable under section 208 of the Act. *See Center for Communications Management Information v. AT&T Corporation*, Memorandum Opinion and Order, 23 FCC Rcd 12249, 12253 at ¶ 11, n.29 (2008); *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007); *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001).

[36] 47 U.S.C. § 205.

[37] *See, e.g.*, Complaint at 23-26, ¶¶ 104-119; *Bureau Merits Order*, 24 FCC Rcd at 3809-3810, ¶ 7.

[38] *Bureau Merits Order*, 24 FCC Rcd at 3810-3811, ¶ 9.

[39] *Bureau Merits Order*, 24 FCC Rcd at 3810-3811, ¶ 9, *citing In the Matter of 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, 4861 at ¶ 10 n.41 (2005) ("*T-Mobile Declaratory Ruling*") (subsequent history omitted) (stating that "the Commission preempted state and local regulations governing the kind of interconnection to which CMRS providers are entitled, but it specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers"); *Airtouch Cellular v. Pacific Bell*, Memorandum Opinion and Order, 16 FCC Rcd 13502, 13507 at ¶ 14 (2001) (stating that the determination of the actual rates charged for intrastate LEC-CMRS interconnection is left to the states); *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5072 at ¶ 109 (1996) (subsequent history omitted) (stating that the Commission's LEC-CMRS mutual compensation rules do not preclude the states from setting the actual interconnection rates that LECs and CMRS providers charge); *Equal Access and Interconnection Obligations Pertaining to CMRS*, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5451 at ¶ 104 (1994) (noting that the Commission has declined to preempt state regulation of LEC rates for intrastate interconnection with cellular carriers); *In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1498 at ¶¶ 231-232 (1994) (subsequent history omitted) (adopting rule 20.11, but declining to preempt state regulation of LEC intrastate interconnection rates); *The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, 2372 at ¶ 25 (1989) (noting that compensation arrangements regarding intrastate traffic between landline telephone companies and cellular carriers are subject to state regulatory jurisdiction); *The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2912 at ¶ 18, 2915 at ¶¶ 44-45 (1987) (noting that intrastate charges for cellular interconnection with landline carriers is subject to intrastate regulation); *Indianapolis Telephone Company v. Indiana Bell Telephone Company Inc.*, Memorandum Opinion and Order, 1 FCC Rcd 228, 229-30 at ¶ 10 (1986) (stating that financial arrangements between cellular and landline carriers regarding intrastate traffic fall with the purview of state regulatory authorities). *See Rural Iowa Independent Telephone Association v. Iowa Utilities Board*, 385 F. Supp.2d 797, 825 (S.D. Iowa 2005), *aff'd*, 476 F.3d 572 (8th

(continued …)

more appropriate venue for determining what rate will result in "reasonable compensation" for North County's termination of intrastate traffic originated by MetroPCS is not this Commission, but rather the California PUC, via whatever procedural mechanism it deems appropriate under state law (*e.g.*, complaint proceeding, declaratory ruling proceeding, generic cost or rulemaking proceeding).[40] In turn, unless and until what constitutes reasonable compensation for North County's termination of intrastate traffic originated by MetroPCS is determined, the Commission cannot determine whether or to what extent MetroPCS has violated its duty under rule 20.11(b)(2) to pay such compensation.[41] Accordingly, the *Bureau Merits Order* dismissed without prejudice Count I of the Complaint, and stated that, if after the California PUC prescribes a reasonable termination rate North County believes MetroPCS has failed to pay what is owed pursuant to that rate under rule 20.11(b)(2), North County may then seek resolution of such dispute.[42]

11. North County asks us to either (i) reverse the *Bureau Merits Order* in its entirety, prescribe a reasonable compensation rate under section 205 of the Act, and award damages based on that rate; or (ii) reverse the *Bureau Merits Order* as applied to the period prior to April 29, 2005,[43] award damages for that period based on the rates then contained in North County's California tariff, and hold Count I in abeyance, rather than dismiss it, pending a determination by the California PUC of a reasonable compensation rate for the post-April 29, 2005 period; or (iii) hold Count I in abeyance, rather than dismiss it, pending a determination by the California PUC of a reasonable compensation rate for the whole period at issue.[44] MetroPCS asks us to either (i) reverse the *Bureau Merits Order* and remand Count I to the Enforcement Bureau with instructions to prescribe a reasonable compensation rate and award damages (if any) based on that rate, or (ii) provide guidance to the California PUC about how to determine a reasonable compensation rate.[45]

12. We have carefully examined the record before the Enforcement Bureau, the *Bureau Merits Order*, and the record on review. In our view, for the reasons set forth in the *Bureau Merits Order* itself, the *Bureau Merits Order* was correct to conclude 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. In addition, the parties' arguments on review regarding the forum issue largely mirror those they already made before the Bureau.[46] Therefore, we deny the parties' Applications for Review regarding the forum issue primarily by affirming and incorporating by reference the reasoning and holdings of the *Bureau Merits Order*.[47] Only a few of the parties' positions on the

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Cir. 2007) (holding that state commissions may arbitrate indirect interconnection agreements between LECs and CMRS carriers); *Iowa Network Services, Inc. v. Qwest Corporation*, 385 F. Supp.2d 850, 893 (S.D. Iowa 2005) (holding that state commissions may arbitrate indirect interconnection agreements between LECs and CMRS carriers).

[40] *Bureau Merits Order*, 24 FCC Rcd at 3810-3811, ¶ 9.

[41] *Id.*

[42] *Id.*

[43] April 29, 2005 is the effective date of the *T-Mobile Declaratory Ruling*, according to North County. *See, e.g.*, North County AFR at 15, n.55. We accept North County's assertion for purposes of this Order.

[44] *See* North County AFR; North County Response; North County Reply.

[45] *See* MetroPCS AFR; MetroPCS Response; MetroPCS Reply.

[46] 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. *See, e.g.*, North County AFR at 1, 6, MetroPCS AFR at 3, 5. 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.

[47] *Bureau Merits Order*, 24 FCC Rcd at 3810-3814, ¶¶ 8-15.

forum issue warrant further discussion, which we provide below.

13. Most of the parties' arguments on review (that warrant express discussion here) rest on one fundamental proposition: the *Bureau Merits Order* allegedly misinterpreted the Commission's holdings and purposes in the *T-Mobile Declaratory Ruling*. In the *T-Mobile Declaratory Ruling*, the Commission established, *inter alia*, that after the effective date of that order, (i) LECs could not impose compensation obligations for non-access CMRS traffic pursuant to tariff, and (ii) an incumbent LEC could request interconnection from a CMRS carrier and invoke the negotiation and arbitration procedures set forth in section 252 of the Act.[48] According to North County and MetroPCS, those two holdings, read together, mean that the Commission intended to reserve for itself, and exclude the states from, the task of establishing rates for a CLEC's termination of CMRS traffic.[49] Thus, in the parties' view, the *Bureau Merits Order* conflicts with the Commission's *T-Mobile Declaratory Ruling* by allowing a state (the California PUC) to establish rates for North County's (a CLEC's) termination of MetroPCS traffic (CMRS traffic).[50]

14. We disagree with the parties. As the *Bureau Merits Order* aptly observes, the *T-Mobile Declaratory Ruling* expressly acknowledges the Commission's many prior orders declining to preempt state regulation of intrastate rates that LECs charge CMRS providers for termination, and then does not alter or amend those orders.[51] Moreover, the *T-Mobile Declaratory Ruling* does not purport to limit the states' general authority to regulate rates for intrastate traffic as preserved by section 2(b) of the Act, except that LECs cannot impose compensation obligations for non-access CMRS traffic pursuant to state tariff.[52] Therefore, the better application of the *T-Mobile Declaratory Ruling* to the situation here is the one reached by the *Bureau Merits Order*: consistent with the Commission's repeated refusals to preempt state authority in this regard, the California PUC is the more appropriate venue for determining what constitutes a "reasonable compensation" rate under rule 20.11 for North County's termination of intrastate traffic originated by MetroPCS;[53] and the California PUC may employ whatever non-tariff procedural mechanism it deems appropriate under state law, as long as such mechanism affords interested parties an opportunity to be heard prior to the determination of the rate.[54]

15. The parties lament that the *Bureau Merits Order* creates the risk of piecemeal litigation,

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[48] *See, e.g., T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4860, ¶ 9.

[49] *See, e.g.,* North County AFR at 12 and n.46.

[50] *See, e.g.*, North County AFR at 8-13; MetroPCS AFR at 13-15.

[51] *Bureau Merits Order*, 24 FCC Rcd at 3812-3813, ¶ 12. *See, e.g., T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4860-61, ¶ 10.

[52] *Bureau Merits Order*, 24 FCC Rcd at 3812-3813, ¶ 12; 47 U.S.C. § 152(b).

[53] Despite the parties' protestations to the contrary, *see, e.g.*, North County AFR at 2, 6-7, 12-13; MetroPCS AFR at 3-5, 8-15; MetroPCS Response at 5-6, there is nothing anomalous about a state commission establishing an intrastate rate to effectuate a compensation right arising from federal law. *See, e.g.*, 47 U.S.C. §§ 251-252.

[54] *See, e.g.*, *Bureau Merits Order*, 24 FCC Rcd at 3810-3811, ¶ 9 (listing as procedural examples a complaint proceeding, a declaratory ruling proceeding, and a generic cost or rulemaking proceeding, all of which historically have afforded interested parties an opportunity to be heard before a ruling is rendered). *See also T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4858-4859, ¶ 7 n.32 (noting that many state commissions had allowed LECs' wireless termination tariffs to go into effect without prior investigations). The parties point out that, since the *T-Mobile Declaratory Ruling*, a few state commissions have declined to arbitrate interconnection agreements between CLECs and CMRS providers. *See, e.g.*, North County AFR at 5, 9. As the *Bureau Merits Order* correctly observes, however, those state commission decisions have only concerned processes authorized by section 252 of the Act; thus, those state commission decisions do not indicate that state commissions will decline to exercise their general authority under state law to regulate rates for intrastate traffic as preserved by section 2(b) of the Act. *Bureau Merits Order*, 24 FCC Rcd at 3813, ¶ 12, n.45.

which could be cumbersome, time-consuming, and expensive.[55] The parties point out that they (and any future parties who are similarly situated) may have to litigate once to establish a rate, and then perhaps again to establish other interconnection terms and a damages amount.[56] However, as the *T-Mobile Declaratory Ruling* observes, most small LECs, such as CLECs like North County, are only *indirectly* interconnected with CMRS carriers like MetroPCS.[57] Consequently, if and when CLECs and CMRS carriers have interconnection disputes, it is likely that those disputes will largely, if not entirely, concern only compensation. Indeed, North County states here that the parties have agreed to all interconnection terms except North County's termination rate.[58] Thus, we expect that, in most instances, litigation following a state commission's rate determination will either be unnecessary or relatively limited in scope. Accordingly, we do not find persuasive the parties' contention that allowing state commissions to establish rates governing CLECs' termination of intrastate CMRS traffic will be procedurally onerous.

16. The parties proffer several other policy arguments why, despite past Commission orders to the contrary, we should in this complaint proceeding effectively preempt the California PUC's authority to regulate North County's intrastate termination rates as applied to MetroPCS's traffic.[59] The *Bureau Merits Order* correctly responded to those arguments as follows:

> Without commenting one way or another on the merits of MetroPCS's policy arguments, we decline MetroPCS's suggestion to preempt such state authority in the context of this complaint proceeding. Whether to depart so substantially from such long-standing and significant Commission precedent is a complex question better suited to a more general rulemaking proceeding.[60]

MetroPCS expresses special concern that allowing state commissions to set CLEC rates for termination of intrastate CMRS traffic will undermine the policy of promoting national uniformity of CMRS regulation.[61] We disagree with MetroPCS's premise. Moreover, by ruling that incumbent LECs may invoke state processes under section 252 of the Act to reach interconnection agreements with CMRS carriers, the Commission in the *T-Mobile Declaratory Ruling* has already demonstrated that, under current law, other interests can sometimes take priority over complete, national uniformity of CMRS

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[55] *See, e.g.,* MetroPCS AFR at 9-12; North County AFR at 12.

[56] *See, e.g.*, North County AFR at 6-7, 12-13; MetroPCS AFR at 4, 13, 19-20; MetroPCS Response at 5-6.

[57] *Bureau Merits Order*, 24 FCC Rcd at 3808, ¶ 4; *T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4857-4858, ¶ 5.

[58] *See, e.g.*, North County AFR at 4.

[59] *See, e.g.*, North County AFR at 12-13; MetroPCS AFR at 3-5; 8-15; MetroPCS Response at 5-6.

[60] *Bureau Merits Order*, 24 FCC Rcd at 3814, ¶ 14, *citing In the Matter of Developing a Unified Intercarrier Compensation Regime*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 2008 WL 4821547 (2008); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Comment Sought on Missoula Intercarrier Compensation Reform Plan, 20 FCC Rcd 4855 (2005); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001). The parties point out that no Commission order or court decision precludes the Commission from changing course and deciding to preempt state authority over the termination rates that LECs charge CMRS providers for intrastate traffic. *See, e.g.*, North County AFR at 5, 8-10, 12-13; MetroPCS AFR at 3-5, 8-15. Again, that may be true, but we decline to take such action in this complaint proceeding. *See, e.g.*, *Bell Atlantic-Delaware, Inc. v. Frontier Communications Services, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 8112, 8120 (2001) ("We are mindful that the Commission has been asked to clarify or revise existing regulations governing the per-call compensation scheme on a going-forward basis. 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.").

[61] *See, e.g.*, MetroPCS AFR at 3-4, 7-15.

regulation.

17. North County argues in the alternative that we should distinguish between the period before April 29, 2005 and the period after April 29, 2005.[62] Specifically, according to North County, we should reverse the *Bureau Merits Order* as applied to the period before April 29, 2005, enforce the termination rates contained in North County's California state tariff before April 29, 2005, and award damages accordingly -- even if we affirm the *Bureau Merits Order* as applied to the period after April 29, 2005.[63]

18. We disagree with North County. The *Bureau Merits Order* relied on a long line of Commission orders dating back to 1986 in which the Commission declined to preempt the states' authority to set rates for a LEC's termination of intrastate CMRS traffic, and we find that the effective date of the *T-Mobile Declaratory Ruling* has no bearing on that determination. Consistent with those orders, we find that the California PUC is the more appropriate forum for determining a reasonable rate for North County's termination of MetroPCS's intrastate traffic. Therefore, we reject North County's assertion that we, rather than the California PUC, should determine a pre-April 29, 2005 termination rate by simply enforcing the termination rates contained in North County's California state tariff at that time.[64]

19. Finally, the parties assert that we should reverse the *Bureau Merits Order* because some portion of the traffic at issue is allegedly interstate, intraMTA traffic and thus subject only to *our* exclusive rate-making jurisdiction.[65] Neither party made this assertion in any of its numerous and voluminous filings prior to the *Bureau Merits Order*. Consequently, section 1.115 of the Commission's rules plainly precludes the parties from now arguing – for the first time on review – that any of the traffic at issue is interstate.[66] Accordingly, we summarily reject this argument and dismiss it as untimely and thus not properly raised.[67]

20. In any event, even if this contention were properly before us, we would reject it. Based on the record before the Bureau and now before us on review, any assertion that the amount of interstate, intraMTA traffic at issue, if any, is anything but trivial is simply not credible. Neither party has provided specific evidence on the record to demonstrate that any of the traffic at issue is, in fact, interstate.[68] As the *Bureau Merits Order* correctly notes, the record is replete with explicit and implicit

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[62] North County AFR at 13-15. As previously mentioned, North County contends that April 29, 2005 is the effective date of the *T-Mobile Declaratory Ruling*. North County AFR at 15, n.55.

[63] *See, e.g.*, North County AFR at 13-15; North County Reply at 6-9.

[64] Because we reject North County's assertion on that ground, we need not and do not address MetroPCS's contentions that (i) North County's assertion is barred by rule 1.115(c); (ii) North County's California state tariff was unlawful as applied to MetroPCS traffic even before April 29, 2005; (iii) North County's California state tariff, by its own terms, did not apply to termination of MetroPCS's traffic; (iv) North County's claim for damages arising prior to April 29, 2005 is wholly or partially barred by the two-year statute of limitations in 47 U.S.C. § 415; and (v) awarding damages based on traffic terminated prior to April 29, 2005 would undermine Commission policies favoring negotiated interconnection agreements and limiting interim compensation to incumbent LECs. S*ee, e.g.*, MetroPCS Response at 7-15.

[65] *See* North County AFR at 8 n.30; MetroPCS Response at 4-5.

[66] Rule 1.115(c) provides: "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." 47 C.F.R. § 1.115(c).

[67] We expressly dismiss this claim on procedural grounds. *Cf. BDFCS, Inc. v. FCC*, 351 F.3d 1177, 1183-84 (D.C. Cir. 2003) (upholding the Commission's dismissal on procedural grounds of arguments not first presented to the bureau).

[68] For example, North County belatedly asserts in a single, unsupported footnote in its Application for Review that the parties have never stipulated that the traffic at issue is all intrastate, and that "this is simply not the case." North

(continued …)

references to the traffic at issue as traveling between end users *within* the State of California. Despite multiple opportunities to present evidence to the Bureau and on review, the parties have failed to provide any factual basis for the conclusory statements they now make. Moreover, the parties never before described any of the traffic at issue as interstate intraMTA, despite being directed by Commission staff to address whether the California PUC is a proper forum for this dispute.[69] Even now, on review, the parties make their interstate assertion cursorily,[70] belatedly,[71] and with no specific evidentiary support, as required by our rules.[72] Tellingly, neither party provides any indication – not even a rough estimate – as to the amount of traffic at issue that is allegedly interstate, intraMTA. Thus, the record permits no other conclusion than that the amount of interstate, intraMTA traffic at issue – if any – is *de minimus*. Therefore, even if the parties' interstate claim were properly presented, we would affirm the conclusion of the *Bureau Merits Order* that the traffic at issue is intrastate, intraMTA and thus subject to the general rate-making jurisdiction of the California PUC.[73]

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.[74] MetroPCS focuses especially on the facts that the traffic at issue is unidirectional towards North County and routed entirely to chat-lines.[75] 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.[76]

22. Notwithstanding all of the foregoing, we do believe that one aspect of the *Bureau Merits Order* warrants modification. The *Bureau Merits Order* dismissed without prejudice Count I of

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County AFR at 8, n.30. Similarly, MetroPCS now contends, in response to North County's belated assertion, that some unspecified portion of the traffic is interstate. MetroPCS Response at 4-5.

[69] *Bureau Merits Order*, 24 FCC Rcd at 3808, ¶ 5, n.12.

[70] North County makes the assertion in a single, unsupported footnote. *See* North County AFR at 8 n.30.

[71] MetroPCS did not make the assertion until its Response. *See* Metro Response at 4-5. Indeed, MetroPCS's Application refers to the traffic at issue as intrastate several times. *See* MetroPCS AFR at ii, 1, 17.

[72] Rule 1.720(c) provides: "Facts must be supported by relevant documentation or affidavit." 47 C.F.R.§ 1.720(c). *See* 47 C.F.R. §§ 1.721(a)(5), 1.724(g), 1.726(e), 1.732(b) (all requiring that factual assertions in formal complaint proceedings be supported by declarations and/or documents).

[73] Given the parties' failure to preserve or support their claim that there is any interstate traffic at issue here, we have no occasion in this adjudicatory proceeding to address whether it would be appropriate for the state commission to determine a rate for any such traffic.

[74] MetroPCS AFR at 16-17.

[75] *See, e.g.,* MetroPCS AFR at 17-24.

[76] After the pleading cycle closed in this review process, CTIA – The Wireless Association ("CTIA") sought leave to file an "*amicus curiae* letter" supporting the parties' Applications for Review and asking that this proceeding be converted from "restricted" to "permit-but-disclose" for purposes of the Commission's *ex parte* rules. Letter dated July 10, 2009 from Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA, to Marlene Dortch, Secretary, FCC ("CTIA Letter"). *See* 47 C.F.R. §§ 1.1200-1.1216 (setting forth the Commission's *ex parte* rules). We hereby grant CTIA's request to file the CTIA Letter, and we have carefully considered the Letter's contents. *See, e.g.*, *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Order on Reconsideration, 20 FCC Rcd 8578, 8580, at ¶ 6 n.16 (2005) (subsequent history omitted). We deny CTIA's request to convert this proceeding from "restricted" to "permit-but-disclose," because CTIA has not shown that the public interest supports changing the *ex parte* status of this adjudicatory proceeding from "restricted" to "permit-but-disclose." For example, CTIA has not shown that such a conversion is necessary to provide us with a comprehensive record on which to base our decisions. Indeed, all of the arguments asserted in the CTIA Letter were already made by the parties themselves and are expressly addressed either in the *Bureau Merits Order* or in this Order on Review or in both.

the Complaint, stating that the California PUC is the more appropriate venue for determining a reasonable rate for terminating MetroPCS's traffic, and that if North County believes that MetroPCS has failed to pay what is owed pursuant to that rate, it may seek enforcement of any payment obligation under rule 20.11.[77] Instead, to prevent the possibility that North County may be prejudiced in any way during the pendency of its proceeding to seek a rate determination from the California PUC, we believe the better course is to hold Count I in abeyance rather than dismiss it without prejudice.[78]

23. To effectuate the abeyance, Count I of the Complaint will be converted to an informal complaint, with the File Number of EB-09-MDIC-0041. This conversion is for internal administrative purposes only, and has no effect on the rights of the parties. Once the California PUC determines a reasonable termination rate and its decision is final and no longer subject to judicial review, North County may convert the informal complaint back to a formal complaint by notifying the Commission of its intent to do so within 90 days of the California PUC decision's finality (subject to waiver and extension of such deadline for good cause).

24. 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. Such a dispute could arise from a myriad of factors, including but not limited to a continuing disagreement between the parties about whether and to what extent (i) North County's recovery should be limited by the statute of limitations, or (ii) North County is entitled to an award of prejudgment interest.

25. Finally, we note that, in a cursory e-mail submitted long after the formal pleading cycle concluded, North County apparently suggests that the D.C. Circuit's decision in *AT&T Corp. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) ("*AT&T v. FCC*") establishes a statutory duty on the Commission's part to determine *in this section 208 complaint proceeding* what a reasonable termination rate would be for traffic that MetroPCS delivers to North County.[79] Because neither party presented this argument predicated upon *AT&T v. FCC* to the Bureau in advance of the *Bureau Merits Order*, this argument is not properly before the Commission in this review proceeding.[80]

26. *AT&T v. FCC* would not be controlling here, in any event. That case involved a section 208 complaint for injunctive relief and damages that AT&T filed against MCI alleging that MCI had violated the Communications Act by charging rates that were not filed in federal tariffs. The FCC had dismissed that complaint without determining whether AT&T's conduct violated the Act (and, thus, without determining whether damages were warranted), concluding instead that the lawfulness of MCI's conduct should be resolved in a broader rulemaking proceeding. The Court of Appeals set the Commission's order aside, holding that because the agency's contemplated rulemaking proceeding, by definition, could develop rules that would "operate[] only *prospectively*," it was "a logical *non sequitur*"

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[77] *See, e.g.*, *Bureau Merits Order*, 24 FCC Rcd at 3810-3811, ¶ 9.

[78] *Cf., e.g.*, *Reiter v. Cooper*, 507 U.S. 258, 267-68 (1993); *American Association of Cruise Passengers v. Cunard Line, Ltd.,* 31 F.3d 1184, 1187-88 (D.C. Cir. 1994) (both holding that a federal court should stay rather than dismiss a complaint if doing so is necessary to prevent prejudice to the plaintiff during the pendency of a primary jurisdiction referral).

[79] *See* Letter from Michael Hazzard, Counsel for North County, to Marlene H. Dortch, Secretary, FCC, File No. EB-06-MD-007 (filed Nov. 16, 2009), Exhibit A.

[80] *See* 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 to opportunity to pass").

to address in such a proceeding a complaint challenging the lawfulness of (and seeking damages for) conduct "under present law."[81] Here, by contrast, we are not dismissing North County's complaint at all, but rather holding it in abeyance while the parties seek a determination by the California PUC of what is a reasonable rate under Rule 20.11. Unlike in *AT&T v. FCC*, that determination will be made under existing law, and North County may later seek redress (and possible retrospective relief) – again under existing law – if MetroPCS has not been paying the rate that the California PUC determines to be reasonable.[82]

IV. ORDERING CLAUSES

27. IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 208, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 208, and 332, and sections 1.115, 1.721-1.736, and 20.11, of the Commission's rules, 47 C.F.R. §§ 1.115, 1.721-1.736, and 20.11, that North County's Application for Review is GRANTED in part and otherwise DENIED, as described herein.

28. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 208, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 208, and 332, and sections 1.115, 1.721-1.736, and 20.11, of the Commission's rules, 47 C.F.R. §§ 1.115, 1.721-1.736, and 20.11, that MetroPCS's Application for Review is DENIED.

29. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 208, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 208, and 332, and sections 1.115, 1.721-1.736, and 20.11, of the Commission's rules, 47 C.F.R. §§ 1.115, 1.721-1.736, and 20.11, that the *Bureau Merits Order* in MODIFIED in part and otherwise AFFIRMED, as described herein.

30. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 208, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 208, and 332, and sections 1.115, 1.711-1.736, and 20.11, of the Commission's rules, 47 C.F.R. §§ 1.115, 1.711-1.736, and 20.11, that (i) Count I of the Complaint shall be held in abeyance pending the California PUC's determination of a reasonable rate for North County's termination of MetroPCS's intrastate traffic; (ii) such abeyance is hereby effectuated by converting Count I of the Complaint into an informal complaint with the File Number of EB-09-MDIC-0041; and (iii) once North County has exhausted its administrative remedies with the California PUC and the California PUC's order is no longer subject to judicial review, North County may convert the informal complaint back to a formal complaint by notifying the Commission of its intent to do so within 90 days of the California PUC's final action.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[81] *AT&T v. FCC*, 978 F.2d at 732 (emphasis added to "prospectively") (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

[82] *See* ¶¶ 23-24**,** *supra.* Other decisions make clear that the *AT&T v. FCC* decision also was predicated in large measure on the court's view that, by deferring to a separate rulemaking the question of whether MCI's practice of charging non-tariffed rates violated the Communications Act, the Commission was consciously attempting to insulate previously adopted policies from judicial review. *See AT&T Corp. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000); *American Message Centers v. FCC*, 50 F.3d 35, 41 (D.C. Cir. 1995). No such concern is presented here.