

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

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

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2009

Released: March 30, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we dismiss in part and otherwise deny the claims alleged in the formal complaint that North County Communications Corp. ("North County") filed against MetroPCS California, LLC ("MetroPCS") under section 208 of the Communications Act of 1934, as amended ("Act").

2. As explained below, we dismiss Count I of the Complaint without prejudice because North County should first obtain from the California Public Utilities Commission ("PUC") a determination of a reasonable compensation rate. We deny Counts II and IV of the Complaint because the Commission rules upon which those Counts are predicated apply only to incumbent local exchange carriers ("incumbent LECs"), and neither North County nor MetroPCS is an incumbent LEC. Finally, we deny Counts III and V of the Complaint because the record does not demonstrate a violation of either section 201(b) or section 202(a) of the Act.

1 Second Amended Complaint, File No. EB-06-MD-007 (filed Aug. 24, 2006) ("Complaint").

2 47 U.S.C. § 208.

3 47 U.S.C. §§ 201(b), 202(a), and 251(b)(5).

4 47 C.F.R. §§ 20.11, 51.301, and 51.715.

5 See, e.g., Complaint at 15-16, ¶¶ 64-68 (Count I); 16-19, ¶¶ 69-76 (Count II); 19-20, ¶¶ 77-86 (Count III); 20-22, ¶¶ 87-94 (Count IV); and 22-23, ¶¶ 95-103 (Count V).

II. BACKGROUND

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.⁶ Most, if not all, of North County’s end user customers are either chat-line providers or telemarketers.⁷

4. MetroPCS is a Commercial Mobile Radio Service (“CMRS”) carrier that provides wireless communications services in California.⁸ MetroPCS is indirectly interconnected with North County in California through the switching facilities of other local exchange carriers (“LECs”).⁹ MetroPCS does not have a written interconnection agreement with North County.¹⁰

5. All of the traffic exchanged between North County and MetroPCS at issue here is jurisdictionally intraMTA¹¹ and intrastate (hereinafter “intrastate” traffic).¹² Moreover, all of the traffic

⁶ See, e.g., Third Further Supplemental Joint Statement, File No. EB-06-MD-007 (filed Jan. 8, 2007) (“Joint Statement”) at 12, ¶ 64.

⁷ See, e.g., Joint Statement at 12, ¶ 61; Response to Commission’s February 2, 2007 Letter, File No. EB-06-MD-007 (filed Feb. 9, 2007) (“Feb. 9 Stipulation”) at 1; Initial Brief of North County Communications Corp., File No. EB-06-MD-007 (filed Sept. 28, 2007) (“North County Initial Brief”) at 29-30. 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.” Feb. 9 Stipulation at 1.

⁸ See, e.g., Joint Statement at 1, ¶ 2; MetroPCS California, LLC’s Amended Answer to North County’s Second Amended Complaint, File No. EB-06-MD-007 (filed Oct. 19, 2006) (“Amended Answer”) at 4, ¶ 6. See 47 C.F.R. § 20.3 (defining “commercial mobile radio service”).

⁹ See, e.g., Joint Statement at 3, ¶ 15.

¹⁰ See, e.g., Joint Statement at 3, ¶ 18.

¹¹ See, e.g., Complaint at 2-3, ¶¶ 8-10; Legal Brief of MetroPCS California, LLC, File No. EB-06-MD-007 (filed Sept. 28, 2007) (“MetroPCS Initial Brief”) at 3-7 (describing the dispute as pertaining to reciprocal compensation involving “local termination”); 47 C.F.R. § 24.202(a) (defining “MTA”). MetroPCS initially asserted that some of the traffic may not be intraMTA, because the jurisdictional nature of MetroPCS’ calls to North County’s chat lines may depend not only on the location of the MetroPCS caller and of the North County chat line, but also on the location of all the other callers with whom the MetroPCS caller is chatting. See, e.g., Amended Answer at 5-7, ¶¶ 8-10; Legal Analysis in Support of MetroPCS California, LLC’s Amended Answer (“MetroPCS Legal Analysis”) at 6-11. Later, however, MetroPCS essentially withdrew that assertion and limited its argument to a contention that a chat line call with multiple participants does not constitute “telecommunications” under section 3(43) of the Act, 47 U.S.C. § 153(43). Reply of MetroPCS California, LLC to North County Communications Corp.’s Brief in Opposition to the Legal Brief of MetroPCS California, LLC, File No. EB-06-MD-007 (filed Oct. 26, 2007) at 12. We address that argument at ¶ 13, *infra*.

¹² Although the Complaint refers to the traffic only as intraMTA, the record is replete with grounds for concluding that the traffic is also intrastate, *i.e.*, to and from end users within California. See, e.g., Complaint at 1-2 (naming MetroPCS California as the defendant, and referring exclusively to MetroPCS’ service territory in California); Complaint at 3 (relying heavily on North County’s California tariff); Complaint at 4 (relying heavily on a traffic termination rate adopted by the California PUC); Complaint at 12, Joint Statement at 12, ¶ 63 (both relying heavily on local termination rates paid by MetroPCS to two other California LECs); Complaint Exhibit G, ¶ 5 (declaring that North County terminated calls from “MetroPCS’ end users within the intraMTA that includes San Francisco and Sacramento”); Complaint Exhibit 1 (copies of North County invoices to MetroPCS for “IntraLATA Call Termination”); Complaint Exhibit 16 (describing the traffic at issue as “all intraLATA traffic” within California); Complaint Exhibits 11 and 18 (draft North County/MetroPCS interconnection agreement which describes the traffic covered by the agreement as “local traffic”). Perhaps most telling, none of the parties’ pleadings describes the traffic as interstate, including even the six briefs they filed after Commission staff (i) directed the parties to address the question of “[w]hich is the proper and preferable forum (in terms of jurisdiction, comity, *forum non conveniens*, or otherwise) for resolution of this dispute, the FCC or the California PUC?”, and (ii) listed for the parties several

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exchanged between the parties is in-bound to North County from MetroPCS.¹³ 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.¹⁴

6. Despite the absence of a written interconnection agreement with MetroPCS, North County began billing MetroPCS for the termination of intrastate traffic sometime in 2003.¹⁵ MetroPCS has not paid North County any amount of money for the traffic terminated by North County.¹⁶ In MetroPCS' view, a default "bill-and-keep" arrangement exists, whereby neither party pays the other for traffic termination.¹⁷ Between August 2005 and approximately June 2006, North County and MetroPCS attempted to negotiate a written interconnection agreement, without success.¹⁸

7. Upon reaching an impasse in its negotiations with MetroPCS regarding a written interconnection agreement, North County filed its Complaint. Count I of the Complaint alleges that MetroPCS is violating rule 20.11(b)¹⁹ by failing to pay North County for terminating traffic originated on MetroPCS' network.²⁰ Count II of the Complaint alleges that MetroPCS is violating section 251(b)(5) of the Act²¹ and rule 51.301²² by failing to negotiate and execute a written interconnection agreement with North County in good faith.²³ Counts III and V of the Complaint allege that MetroPCS is violating

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Commission orders declining to preempt state jurisdiction to set rates charged by LECs to terminate traffic from CMRS providers. Letter from Alex Starr, Chief, EB, MDRD, FCC, to Michael B. Hazzard, Counsel for North County, and Carl W. Northrop, Counsel for MetroPCS (dated Aug. 10, 2007) ("Briefing Order"). In fact, MetroPCS concedes that the Commission orders cited by Commission staff in the Briefing Order permit the Commission to allow states to establish rates for the type of traffic at issue here. MetroPCS Initial Brief at 21.

¹³ See, e.g., Joint Statement at 12, ¶ 61; North County Initial Brief at 30; Amended Answer, Exhibit E, Declaration of Dena Bishop in Support of MetroPCS California, LLC's Answer at 7, ¶ 35; Amended Answer, Exhibit 27 at 3; MetroPCS Legal Analysis at 6-7.

¹⁴ See, e.g., North County Initial Brief at 29-30; MetroPCS Initial Brief at 2. See also 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).

¹⁵ See, e.g., Joint Statement at 3, ¶ 16. For a period of time prior to May 2006, North County billed MetroPCS \$0.004 per minute of use and \$0.007 per call set-up for intrastate traffic termination. See, e.g., Joint Statement at 2, ¶ 6. In May 2006, North County changed its intrastate termination rate and began billing MetroPCS \$0.011 per minute of use. See, e.g., Joint Statement at 2, ¶ 7.

¹⁶ See, e.g., Joint Statement at 3, ¶ 19; 13, ¶ 65.

¹⁷ See, e.g., Amended Answer at 9, ¶ 16, 12, ¶ 21; MetroPCS Legal Analysis at 28; MetroPCS Initial Brief at 5-6. See also Joint Statement at 2, ¶ 9.

¹⁸ See, e.g., Joint Statement at 2, ¶ 8; 3, ¶¶ 13, 18; 4-6, ¶¶ 23-25, 27, 29-35; 7-11, ¶¶ 36-59.

¹⁹ 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").

²⁰ See, e.g., Complaint at 15-16, ¶¶ 64-68.

²¹ 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").

²² 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").

²³ See, e.g., Complaint at 16-19, ¶¶ 69-76.

sections 201(b) and 202(a) of the Act,²⁴ respectively, by refusing to enter into a written interconnection agreement with North County.²⁵ Count IV of the Complaint alleges that MetroPCS is violating rule 51.715²⁶ by refusing to enter into an interim interconnection agreement with North County.²⁷ The Complaint asks the Commission to issue an order (i) prescribing a rate 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.²⁸

III. DISCUSSION

A. Count I of the Complaint is Dismissed Without Prejudice So That the California PUC May First Determine a Reasonable Compensation Rate.

8. 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.”²⁹ Count I of the Complaint alleges that MetroPCS is violating that rule by failing to pay for North County's termination of intrastate traffic originated by MetroPCS.³⁰

9. We decline to determine, in the first instance, what constitutes “reasonable compensation” in this case.³¹ The Commission has repeatedly held that (i) states have authority under section 2(b) of the Act³² to establish rates charged by LECs for termination of intrastate traffic from

²⁴ 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”).

²⁵ See, e.g., Complaint at 19-20, ¶¶ 77-86, 22-23, ¶¶ 95-103.

²⁶ 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”).

²⁷ See, e.g., Complaint at 20-22, ¶¶ 87-94.

²⁸ See, e.g., Complaint at 23-26, ¶¶ 104-119. MetroPCS filed several unopposed motions seeking judicial notice of a number of federal court and public utility commission submissions. See MetroPCS California, LLC's Motion for Judicial Notice, File No. EB-06-MD-007 (filed Apr. 6, 2007); MetroPCS California, LLC's Second Motion for Judicial Notice, File No. EB-06-MD-007 (filed May 16, 2007); MetroPCS California, LLC's Third Motion for Judicial Notice, File No. EB-06-MD-007 (filed Feb. 12, 2008) (collectively “Motions for Judicial Notice”). We hereby grant MetroPCS' Motions for Judicial Notice. The parties also filed other motions regarding the briefing in this case. See North County Communications Corp. Motion to Strike Portions of MetroPCS Brief in Opposition, File No. EB-06-MD-007 (filed Oct. 16, 2007); MetroPCS California, LLC Motion Requesting Supplemental Briefing, File No. EB-06-MD-007 (filed Nov. 17, 2008). We hereby deny those motions.

²⁹ 47 C.F.R. § 20.11(b)(2) (emphasis added).

³⁰ 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.*, 127 S.Ct. 1513 (2007); *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001). See generally North County Initial Brief at 12-14; MetroPCS Initial Brief at 8-12.

³¹ North County acknowledges that the Commission cannot adjudicate Count I of the Complaint without knowing what constitutes “reasonable compensation” for North County's termination of intrastate traffic originated by MetroPCS. See, e.g., Complaint at 23-26 (asking the Commission to prescribe a reasonable rate for North County's termination of intrastate traffic originated by MetroPCS).

³² 47 U.S.C. § 152(b).

CMRS providers, and (ii) the Commission has not preempted such state authority.³³ Thus, the more appropriate venue for determining what constitutes “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). 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. Accordingly, we dismiss without prejudice Count I of the Complaint. If after the California PUC prescribes a reasonable rate North County believes that MetroPCS has failed to pay what is owed pursuant to that rate under rule 20.11(b)(2), then North County may seek resolution of that dispute at that time.

10. In North County’s view, because rule 20.11(a) permits parties to file complaints under section 208 of the Act alleging violations of rule 20.11(b)(2), rule 20.11(a) implicitly requires the Commission to determine what a reasonable compensation rate under rule 20.11(b)(2) is in this complaint proceeding.³⁴ According to North County, “[a]n ability to adjudicate a refusal to pay compensation without an ability to adjudicate the rate is nonsensical.”³⁵ We disagree. Construing the Commission’s adjudicatory role under rule 20.11 as permitting states to determine in the first instance whether the

³³ *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) (“*Airtouch v. Pacific Bell*”) (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) (“*LEC-CMRS Interconnection NPRM*”) (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) (“*CMRS Equal Access and Interconnection Obligations NPRM/NOP*”) (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) (“*CMRS Second Report and Order*”) (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 within 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) (“*RIITA v. IUB*”), *aff’d*, 476 F.3d 572 (8th 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) (“*INS v. Qwest*”) (holding that state commissions may arbitrate indirect interconnection agreements between LECs and CMRS carriers).

³⁴ See, e.g., North County Initial Brief at 18-19 (citing 47 C.F.R. § 20.11(a), which provides, in pertinent part, that parties may file “[c]omplaints against carriers under section 208 of the Communications Act ... alleging a violation of this section....”).

³⁵ North County Initial Brief at 18.

charged rate is reasonable is perfectly consistent with the plain language of rule 20.11 and with the Commission's multiple orders – including the order adopting rules 20.11(a)-(b) – expressly declining to preempt state authority to establish intrastate rates charged by LECs to terminate traffic from CMRS providers.³⁶ Indeed, in an order inaptly relied upon by North County, the Commission squarely held that, “although LECs were required to pay mutual compensation to CMRS carriers [and vice-versa] for intrastate traffic pursuant to [rule 20.11] . . . , the determination of the actual rates charged for intrastate interconnection would be left to the states.”³⁷ Thus, North County's interpretation of rule 20.11(a) is wrong.

11. MetroPCS argues that allowing the California PUC to establish a reasonable compensation rate for North County's termination of intrastate traffic would violate section 332(c)(3)(A) of the Act, which provides, in pertinent part, that “no State or local government shall have any authority to regulate the . . . rates charged by any commercial mobile service. . . .”³⁸ That position is not supported by Commission precedent. The rates charged by North County to MetroPCS for transport and termination are not “rates charged by any commercial mobile service” within the meaning of section 332(c)(3)(A) of the Act. The Commission has interpreted section 332(c)(3)(A) to prohibit States from “prescribing, setting or fixing” rates, and determined that the proscription extends to regulation of rate levels and structures for CMRS, including how much may be charged for CMRS.³⁹ Thus, the Commission has stated that this provision applies to retail charges to end users of CMRS, rather than to termination charges to other carriers associated with CMRS.⁴⁰ In other words, by explicitly declining to preempt state regulation of intrastate rates that LECs charge CMRS providers for termination after the passage of section 332(c)(3)(A) of the Act, the Commission has not applied section 332(c)(3)(A) to such intercarrier rates.⁴¹ Therefore, allowing the California PUC to establish a reasonable compensation rate for North County's termination of intrastate traffic does not conflict with section 332(c)(3)(A) of the Act.

12. North County and MetroPCS also contend that allowing the California PUC to establish a reasonable compensation rate for North County's termination of intrastate traffic would conflict with the Commission's decision in its *T-Mobile Declaratory Ruling*, which permits incumbent LECs, but not CLECs, to invoke the state arbitration procedures of section 252 of the Act to reach interconnection agreements with CMRS carriers.⁴² We disagree. The *T-Mobile Declaratory Ruling* expressly acknowledges the Commission's prior orders declining to preempt state regulation of intrastate rates that LECs charge CMRS providers for termination, and then does not alter or overrule those orders.⁴³ Moreover, the *T-Mobile Declaratory Ruling* addresses a carrier's power to invoke the state arbitration processes specifically authorized by section 252 of the Act, but does not purport to address a state's

³⁶ See n.33, *supra*. See also *T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4867, ¶ 15 n.61 (stating that, “although CMRS providers may indeed have an existing legal obligation to compensate LECs for the termination of wireless traffic under section 20.11(b)(2) . . . , the rules fail to specify the mechanism by which LECs may obtain this compensation”).

³⁷ *Airtouch v. Pacific Bell*, 16 FCC Rcd at 13507, ¶ 14 (emphasis added).

³⁸ 47 U.S.C. § 332(c)(3)(A). See MetroPCS Initial Brief at 13-16.

³⁹ See, e.g., *In the Matter of Truth-In-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6462-3 at ¶ 30 (2005).

⁴⁰ *Id.*

⁴¹ See, e.g., *T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4860-61, ¶ 10 n.41; *Airtouch v. Pacific Bell*, 16 FCC Rcd at 13507, ¶ 14 (2001); *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd at 5072, ¶ 109; *CMRS Equal Access and Interconnection Obligations NPRM/NOI*, 9 FCC Rcd at 5451, ¶ 104; *CMRS Second Report and Order*, 9 FCC Rcd at 1498, ¶¶ 231-232. See also *RIITA v. IUB*, 385 F.Supp.2d at 825; *INS v. Qwest*, 385 F.Supp.2d at 893.

⁴² See, e.g., North County Initial Brief at 14-17; MetroPCS Initial Brief at 17-18.

⁴³ See, e.g., *T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4860-61, ¶ 10.

general authority to regulate rates for intrastate traffic as preserved by section 2(b) of the Act.⁴⁴ Therefore, allowing the California PUC to establish a reasonable compensation rate for North County's termination of intrastate traffic pursuant to its general authority to regulate intrastate traffic does not conflict with the *T-Mobile Declaratory Ruling*.⁴⁵

13. MetroPCS further asserts that rule 20.11 does not apply at all to the traffic at issue here, because such traffic is not "telecommunications" under section 3(43) of the Act.⁴⁶ To support that assertion, MetroPCS observes that "telecommunications" only includes the transmission of information "between or among points *specified by the user*,"⁴⁷ and callers to chat lines do not specify the particular person(s) with whom he/she is going to communicate.⁴⁸ Even assuming that the obligation to pay reasonable compensation for termination of traffic under rule 20.11 only applies to traffic that meets the definition of "telecommunications" at section 3(43) of the Act, MetroPCS' assertion lacks merit.⁴⁹ The completion of calls from MetroPCS' customers to North County's customers is "transmission."⁵⁰ In addition, the chat line itself is sufficient to constitute the "point[] specified by the user" as used in the definition of "telecommunications."⁵¹ Thus, the calls to chat lines at issue here satisfy the statutory definition of "telecommunications."⁵²

⁴⁴ 47 U.S.C. § 152(b).

⁴⁵ According to North County, we should not assume that the California PUC will initiate a proceeding to establish a rate for termination of LEC/CMRS intrastate traffic because, since the release of the *T-Mobile Declaratory Ruling*, certain states have declined to arbitrate interconnection agreements between CLECs and CMRS carriers. North County Initial Brief at 14-16. Those decisions, however, only concern state arbitration of interconnection agreements under section 252 of the Act, not a state's general authority to regulate rates for intrastate traffic as preserved by section 2(b) of the Act.

⁴⁶ 47 U.S.C. § 153(43). *See, e.g.*, Amended Answer at 4-7, ¶¶ 5, 8-10; MetroPCS Legal Analysis at 6-11; MetroPCS Initial Brief at 40-43; Reply of MetroPCS California, LLC to North County Communications Corp.'s Brief in Opposition to the Legal Brief of MetroPCS California, LLC, File No. EB-06-MD-007 at 11-13 (filed Oct. 26, 2007).

⁴⁷ 47 U.S.C. § 153(43) (emphasis added).

⁴⁸ *See, e.g.*, MetroPCS Legal Analysis at 7, ¶ 10, 9-10, ¶¶ 12-13; MetroPCS Initial Brief at 41-42.

⁴⁹ We note that rule 20.11 does not use the term "telecommunications," and instead requires compensation for termination of "traffic"; moreover, the relevant provisions of rule 20.11 actually predate the adoption of the "telecommunications" definition at section 3(43) of the Act.

⁵⁰ *See, e.g.*, *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7539 at ¶ 41 (2006).

⁵¹ Moreover, MetroPCS appears to conflate multiple concepts, and does not demonstrate that the physical location of the parties calling into the chat line is relevant to the "telecommunications service" or "information service" classification of either the chat line service or the termination service. Nor does MetroPCS cite any precedent suggesting that the Commission has preempted the states' jurisdiction regarding intrastate traffic to chat lines. Indeed, recent precedent suggests the contrary. *Cf. Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17994-95 at ¶12 & n.40 (2007) (noting that "increased switched access traffic appears to be caused by the deployment of chat lines, conference bridges, or other similar high call volume operations in the service areas of certain rate-of-return or competitive LECs," and seeking comment regarding *interstate* calls to such numbers, while observing that "[i]ntrastate calls may also be made to these numbers, but those calls are beyond the jurisdiction of this Commission and thus are not the subject of this order").

⁵² Although MetroPCS also asserts that, in *AT&T v. Jefferson*, the Commission referred to a LEC with end users who offered chat-line service as an "information provider," that assertion is both incorrect and irrelevant. *See, e.g.*, MetroPCS Initial Brief at 40 (citing *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130, 16131 at ¶ 2 (2001)). *AT&T v. Jefferson* refers to the LEC's *customer* – not to the LEC itself – as an "information provider;" and in any event, *AT&T v. Jefferson* does not discuss at all the statutory definitions of "telecommunications" and "information service." 47 U.S.C. §§ 153(43), 153(20). Moreover, by definition,

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14. Finally, MetroPCS proffers several policy arguments why, despite past Commission rulings to the contrary, we should effectively preempt the California PUC's authority to regulate North County's intrastate termination rates as applied to CMRS carriers.⁵³ 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.⁵⁴

15. For the foregoing reasons, we conclude that the California PUC is the more appropriate venue for determining a reasonable termination rate. Accordingly, we dismiss without prejudice the claim in Count I of the Complaint that MetroPCS is violating rule 20.11 by failing to pay for North County's termination of intrastate traffic originated by MetroPCS.⁵⁵

B. We Deny Counts II and IV of the Complaint, Because Section 251(b)(5) of the Act and Sections 51.301 and 51.715 of the Commission Rules Do Not Apply to MetroPCS.

16. Count II of the Complaint alleges that MetroPCS is violating section 251(b)(5) of the Act by failing to negotiate and enter into a written reciprocal compensation arrangement with North County.⁵⁶ Section 251(b)(5) imposes a duty to establish reciprocal compensation only upon LECs.⁵⁷ Moreover, the Commission has stated unequivocally that "CMRS providers will not be classified as LECs and are not subject to the obligations of section 251(b)."⁵⁸ Therefore, as a CMRS provider, MetroPCS is not subject

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information services are provided "via telecommunications." 47 U.S.C. § 153(20). Thus, *AT&T v. Jefferson* is inapposite here.

⁵³ See, e.g., MetroPCS Initial Brief at 18-21.

⁵⁴ See, e.g., *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). MetroPCS points 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. MetroPCS Initial Brief at 21-23. That may be true, but we decline to take such action in this complaint proceeding.

⁵⁵ We make no determinations at this time as to whether rule 20.11 imposes obligations to pay compensation in the absence of an agreement, and if so, on what terms, or alternatively, whether the obligation under rule 20.11 is a mandate that the parties must enter into an agreement to a reasonable rate of mutual compensation. In either case, we find that resolution of the rule 20.11 claim depends first on the establishment of a reasonable rate. We note, however, that due to the language of rule 20.11, claims regarding the non-payment of an established interconnection rate would not run afoul of our "collection action" prohibition. See, e.g., *Contel of the South, Inc. v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548, 551 at ¶ 7 (2008) (explaining that actions to enforce compensation obligations explicitly imposed by our rules may be brought to the Commission).

⁵⁶ See, e.g., Complaint at 16-18, ¶¶ 69-76; North County Legal Analysis at 9-12; North County Communications Corp.'s Legal Analysis Replying to MetroPCS California, LLC's Answer, File No. EB-06-MD-007 at 10-13 (filed Oct. 25, 2006) ("North County Reply Legal Analysis").

⁵⁷ 47 U.S.C. § 251(b)(5).

⁵⁸ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15996, at ¶ 1005 (1996) (subsequent history omitted). *Accord T-Mobile Declaratory Ruling*, 20 FCC Rcd at 4864, ¶ 16 (stating that "section 251(b)(5) requires LECs to enter into reciprocal compensation agreements with all CMRS providers but [] does not explicitly impose reciprocal compensation obligations on CMRS providers").

to the obligations arising directly from section 251(b) itself. Accordingly, we deny North County's claim in Count II of the Complaint that MetroPCS is violating section 251(b)(5) of the Act.

17. Counts II and IV of the Complaint also allege that MetroPCS is violating sections 51.301 and 51.715 of the Commission's rules⁵⁹ by refusing to negotiate or execute in good faith either an interim or a final rate for the transport and termination of intrastate telecommunications traffic.⁶⁰ To support these allegations, North County argues that rules 51.301 and 51.715 apply to CMRS providers such as MetroPCS by virtue of rule 20.11(c), which provides, in pertinent part, that "[l]ocal exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51" of the Commission's rules.⁶¹

18. We reject North County's assertion that rule 20.11(c) expands the scope of rules 51.301 and 51.715 to reach CMRS providers such as MetroPCS. Under rule 20.11(c), CMRS providers must comply only with "*applicable*" provisions of part 51.⁶² Rules 51.301 and 51.715 apply to negotiations between an incumbent LEC and a requesting telecommunications carrier.⁶³ Because neither MetroPCS nor North County is an incumbent LEC, rules 51.301 and 51.715 are not "*applicable*" provisions of part 51 within the meaning of rule 20.11(c). Thus, North County has failed to state a claim under rules 51.301 and 51.715.⁶⁴ Accordingly, we deny North County's claim in Count II of the Complaint that MetroPCS is violating rule 51.301, and we deny North County's claim in Count IV of the Complaint that MetroPCS is violating rule 51.715.⁶⁵

C. We Deny Count III of the Complaint, Because MetroPCS' Failure to Negotiate an Interconnection Agreement With North County Does Not Violate Section 201(b) of the Act.

19. Count III of the Complaint alleges that MetroPCS' refusal to enter into an interconnection agreement with North County to pay for terminating intrastate traffic constitutes an unjust and unreasonable practice under section 201(b) of the Act.⁶⁶ Specifically, North County alleges that

⁵⁹ 47 C.F.R. §§ 51.301, 51.715.

⁶⁰ Complaint at 16-18, ¶¶ 69-76; 20-21, ¶¶ 87-93; North County Legal Analysis at 9-14; North County Reply Legal Analysis at 15-16; North County Initial Brief at 42-47; North County Communications Corp.'s Brief in Opposition to the Legal Brief of MetroPCS California, LLC, File No. EB-06-MD-007 at 29-30 (filed Oct. 15, 2007) ("North County Opposition Brief"); Reply Brief of North County Communications Corp. to the Opposition of MetroPCS California, LLC, File No. EB-06-MD-007 at 14-15 (filed Oct. 26, 2007) ("North County Reply Brief").

⁶¹ 47 C.F.R. § 20.11(c).

⁶² 47 C.F.R. § 20.11(c) (emphasis added).

⁶³ 47 C.F.R. § 51.301(a) (providing that "[a]n incumbent LEC shall negotiate in good faith ... the duties established by sections 251(b) and (c) of the Act"); 51.715(b) (providing that "an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of telecommunications traffic at symmetrical rates"). Moreover, rule 51.301 appears in Subpart D of Part 51, which is entitled "Additional Obligations of Incumbent Local Exchange Carriers."

⁶⁴ In any event, a careful review of the record reveals no failure by MetroPCS to negotiate in good faith. The parties' inability to reach either an interim or a final interconnection agreement stemmed not from any misconduct, but rather from an honest disagreement about what constitutes a reasonable termination rate under the specific facts and applicable law here. *See, e.g.*, Joint Statement at 2-20. *See also* Part III(C), *infra*.

⁶⁵ For purposes of this Order only, we assume, without deciding, that a violation of either rule 51.301 or rule 51.715 would be a violation of the Act cognizable under section 208 of the Act. *See* n.30, *supra*.

⁶⁶ *See, e.g.*, Complaint at 19-20, ¶¶ 77-86; North County Legal Analysis at 12-13; North County Reply Legal Analysis at 13-15. *See also* 47 U.S.C. § 201(b) (barring any "unjust or unreasonable" practice in connection with communication service).

MetroPCS is “unreasonably delay[ing] negotiation of an interconnection agreement in order to avoid paying termination services as long as possible.”⁶⁷ In particular, North County alleges that MetroPCS is “making unsupported allegations that it is entitled to free termination until such time as the parties enter an interconnection agreement.”⁶⁸ In addition, North County alleges that, during the parties’ negotiations, MetroPCS refused to substantiate alleged discrepancies in North County’s billed minutes of use and MetroPCS’ measured minutes of use.⁶⁹ North County also maintains that MetroPCS has continued to send traffic to North County each month even though North County has requested that MetroPCS stop doing so.⁷⁰ North County argues that these facts, viewed in their totality, demonstrate that MetroPCS has violated section 201(b) of the Act by unreasonably delaying negotiation of an interconnection agreement to avoid paying for intrastate termination services as long as possible.⁷¹

20. Based on our careful review of the entire record, we conclude that North County has failed to prove by a preponderance of the evidence that the parties’ inability to reach an agreement regarding termination of intrastate traffic stems from unreasonable conduct by MetroPCS.⁷² Rather, the record clearly demonstrates that the parties’ inability to reach an agreement regarding termination of intrastate traffic stems from irreconcilable but *honestly* held beliefs regarding the compensation rate, which, in turn, stem from *good faith* disagreements.⁷³ These *bona fide* disputes – and not any illegitimate posturing by MetroPCS (or North County) – are what ultimately precluded the parties from reaching an agreement.⁷⁴ Therefore, we deny the claim in Count III of the Complaint that MetroPCS is violating section 201(b) of the Act by failing to enter into an agreement to pay for North County’s termination of

⁶⁷ Complaint at 20, ¶ 84. *See, e.g.*, North County Legal Analysis at 11-12; North County Initial Brief at 42-47; North County Opposition Brief at 29-30.

⁶⁸ Complaint at 20, ¶ 82. *See, e.g.*, North County Reply Legal Analysis at 13-16.

⁶⁹ *See, e.g.*, Complaint at 20, ¶ 83; North County Reply Legal Analysis at 13; North County Initial Brief at 10, 43-44; North County Reply Brief at 14-15.

⁷⁰ *See, e.g.*, Joint Statement at 5, ¶ 29, 7, ¶ 38, 9, ¶ 46.

⁷¹ *See, e.g.*, Complaint at 19-20, ¶¶ 77-86; North County Legal Analysis at 12-13; North County Reply Legal Analysis at 13-15.

⁷² For purposes of this Order only, we assume, without deciding, that a CMRS carrier’s failure to enter in good faith into an agreement with a CLEC regarding the termination of intrastate traffic, and a failure to pay a CLEC for such termination, could constitute a violation of section 201(b) of the Act. *See* n.30, *supra*. We further assume, *arguendo*, that section 201(b), which on its face is limited in application to “charges, practices, classifications, and regulations for and in connection with [interstate or foreign communication],” nevertheless applies to the intrastate traffic at issue.

⁷³ These disagreements involved, *inter alia*, (i) whether the parties have, or should be deemed to have, a default bill-and-keep arrangement; (ii) whether the one-way nature of the intrastate traffic involved renders an analogy to “ISP-bound traffic” dispositive; (iii) whether and to what extent the rates the parties charge and pay other carriers for terminating intrastate traffic are dispositive; (iv) whether North County’s failure to provide cost information is dispositive; (v) whether and to what extent the applicable statute of limitations bars North County’s claims; (vi) whether any rate prescription could be prospective only; (vii) whether the California PUC has adopted a relevant traffic termination rate; and (viii) whether sections 202(a) and 252(b)(5) of the Act and sections 51.301 and 51.715 of the Commission’s rules apply to MetroPCS in this context. *See, e.g.*, Complaint at 4-14, ¶¶ 21-58, 16-20, ¶¶ 69-86; North County Legal Analysis at 9-13; Amended Answer at 12-32, ¶¶ 21-58, 38-49, ¶¶ 69-86, 67, ¶ 6, 69, ¶ 10; MetroPCS Legal Analysis at 17-30; Reply of North County Communications Corp. to MetroPCS California, LLC’s Amended Answer, File No. EB-06-MD-007 at 19-26, ¶¶ 69-86 (filed Oct.25, 2007); North County Reply Legal Analysis at 8-15; North County Initial Brief at 42-47; North County Opposition Brief at 29; Opposition of MetroPCS California, LLC to Legal Brief of North County Communications Corporation, File No. EB-06-MD-007 at 22-28 (filed Oct. 15, 2007); North County Reply Brief at 14-15.

⁷⁴ We note that both parties contributed to lengthening the duration of this dispute by disregarding the Commission’s clear and repeated statements that state commissions, and not this Commission, are the appropriate fora for establishing a LEC’s intrastate termination rates. *See* Part III (A), *supra*.

intrastate traffic.⁷⁵

D. We Deny Count V of the Complaint, Because MetroPCS Has Not Violated Section 202(a) of the Act.

21. Count V of the Complaint alleges that MetroPCS' "refusal to enter into an interconnection agreement that provides a comparable rate for like termination services constitutes unjust and unreasonable discrimination" under section 202(a) of the Act.⁷⁶ Specifically, North County contends that MetroPCS has negotiated and paid reasonable termination rates for intrastate traffic with other carriers, but refuses to do so with respect to North County.⁷⁷ North County asserts that this conduct violates the non-discrimination requirement of section 202(a) of the Act.⁷⁸

22. We disagree. Section 202(a) is inapplicable where, as here, the challenged conduct – refusing to pay “a comparable rate for [allegedly] like termination services” – is that of the carrier receiving the communication service rather than the carrier providing the service. Notably, North County does not base its section 202(a) claim on services provided by MetroPCS at all, but on alleged similarities between North County's own termination services and the termination services of other carriers. As the Commission has explained, however, “[s]ection 202(a) is not concerned with whether the services of two *separate* carriers are ‘like’; it is concerned with whether two services offered by the *same* carrier are like.”⁷⁹ There is no dispute that North County, not MetroPCS, is the carrier providing the communication service in question here. Thus, MetroPCS' willingness or obligation to pay other carriers a different rate for terminating intrastate traffic than what it is willing to pay North County for terminating services does not fall within the scope of section 202(a) of the Act.⁸⁰

23. In sum, North County has failed to state a claim under section 202(a) of the Act. Accordingly, we deny North County's claim in Count V of the Complaint that MetroPCS is violating section 202(a) of the Act.

E. We Deny MetroPCS' Motion for Sanctions.

24. MetroPCS requests that the Commission impose sanctions against North County for an

⁷⁵ To the extent that Count III is based on MetroPCS' failure to pay North County for terminating intrastate traffic, separate and distinct from MetroPCS' failure to execute an agreement for such payment, Count III is dismissed for the reasons explained in Part III (A), *supra*.

⁷⁶ Complaint at 23, ¶ 101. *See, e.g.*, Complaint at 22-23, ¶¶ 95-103; North County Legal Analysis at 15-18; North County Reply Legal Analysis at 17-19. *See also* 47 U.S.C. § 202(a) (providing that “[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service ...”).

⁷⁷ *See, e.g.*, Complaint at 22-23, ¶¶ 95-103; North County Legal Analysis at 14-15; North County Reply Legal Analysis at 18.

⁷⁸ *See, e.g.*, Complaint at 23, ¶ 102; North County Legal Analysis at 15; North County Reply Legal Analysis at 19.

⁷⁹ *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7568, 7582, at ¶ 34 (2003) (emphasis in original) (footnote omitted), *vacated on other grounds*, *SBC Communications, Inc. v. FCC*, 407 F.3d 1223 (D.C. Cir. 2005). *See, e.g.*, *Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993) (“Section 202(a) is designed to prevent a carrier from granting a discount to one (usually large) user that it would not grant were the same or a ‘like’ service purchased by another (usually small) customer.”); *Reservation Telephone Cooperative v. AT&T*, 59 Rad. Reg. 2d 484 at ¶ 33 (1985) (stating that section 202 “was derived from Interstate Commerce Act provisions that were designed primarily for the protection of customers of common carrier services”).

⁸⁰ Because section 202(a) clearly does not apply in the manner alleged by North County, we need not, and do not, decide whether section 202(a) could apply to a CMRS carrier's provision of service in connection with intrastate traffic. *See* n.30 and n.72, *supra*.

alleged violation of the Commission's *ex parte* rules.⁸¹ Specifically, MetroPCS seeks sanctions because North County allegedly violated the Commission's *ex parte* rules by soliciting a prohibited *ex parte* presentation by Congressman Bob Filner. North County has opposed the request.⁸²

25. Congressman Filner's November 17, 2008 letter to Commissioner McDowell supported North County's attempts to meet with Commission staff to expedite resolution of this proceeding and, in doing so, also characterized the matters at issue in this proceeding in a manner that can be construed as favorable to North County.⁸³ The letter contained no indication that it was served on MetroPCS. It was, however, put into the record and served on MetroPCS by North County on November 21, 2008 as an attachment to a pleading.⁸⁴ Because this proceeding is classified as restricted under the *ex parte* rules,⁸⁵ we find that Congressman Filner's letter is a prohibited *ex parte* presentation.⁸⁶ We reject North County's contention that the letter should be deemed a status inquiry that would be permissible under the *ex parte* rules, rather than a prohibited presentation.⁸⁷

26. The Commission's *ex parte* rules prohibit the solicitation of improper presentations.⁸⁸ We find, however, that even if North County solicited Congressman Filner's letter, there is no justification for imposing any sanction against North County, other than an admonition to comply with the *ex parte* rules in the future. The circumstances do not suggest either that North County sought to conceal Congressman Filner's communication with the Commission or that MetroPCS was prejudiced by the *ex parte* nature of Congressman Filner's letter. North County has shown a general awareness of and willingness to comply with the *ex parte* rules by copying MetroPCS on its e-mail traffic regarding its

⁸¹ See MetroPCS California LLC's Motion Requesting Sanctions Against North County Communications Corporation, File No. EB-06-MD-007 (filed Dec. 11, 2008) ("Motion for Sanctions").

⁸² North County Communications Corporation's Opposition to MetroPCS California, LLC's Motion Requesting Sanctions, File No. EB-06-MD-007 (filed Dec. 18, 2008).

⁸³ See North County Communications Corporation's Opposition to MetroPCS California, LLC's Motion Requesting Supplemental Briefing, File No. EB-06-MD-007 (filed Nov. 21, 2008), Exhibit A, Declaration of Todd Lesser at Attachment 1 (Letter from Bob Filner, Member of Congress to the Honorable Robert M. McDowell dated November 17, 2008). The letter stated, for example: "[North County] has been pursuing an FCC enforcement action against a regional wireless carrier, MetroPCS, for refusing to pay North County Communications for use of its network *as the FCC's rules require*." *Id.* at 1 (emphasis added).

⁸⁴ *Id.*

⁸⁵ Formal complaints are made restricted by 47 C.F.R. §§ 1.1202(d)(2) (stating that parties to a formal complaint are parties to a proceeding for purposes of the *ex parte* rules) and 1.1208 (stating that proceedings not otherwise designated are restricted). *Ex parte* presentations to and from Commission decision-makers are prohibited in restricted proceedings. See 47 C.F.R. § 1.1208.

⁸⁶ The resolution of this issue was made in consultation with the Commission's Office of General Counsel, in accordance with 47 C.F.R. § 0.251(g). See Letter from David Senzel, Attorney-Advisor, Office of General Counsel, FCC, to Marlene H. Dortch, Secretary, FCC, File No. EB-06-MD-007 (filed Mar. 6, 2009) ("Senzel Letter"), attaching Letter from Joel Kaufman, Associate General Counsel to the Honorable Bob Filner (Feb. 5, 2009) (concluding the Congressman Filner's letter is a prohibited *ex parte* presentation). A presentation is a communication directed to the merits or outcome of a proceeding, but does not include inquiries relating solely to the status of a proceeding. See 47 C.F.R. § 1.1202(a). A written presentation not served on the parties to the proceeding is an *ex parte* presentation. See 47 C.F.R. § 1.1202(b).

⁸⁷ A status inquiry made on an *ex parte* basis, unlike an *ex parte* presentation, is permissible. However, a status inquiry is a prohibited presentation if it states or implies a view as to the merits or outcome of the proceeding or a preference for a particular party, states why timing is important to a particular party or indicates a view as to the date by which a proceeding should be resolved. See 47 C.F.R. § 1.1202(a). Congressman Filner's letter both states why timing is important to North County and appears to express a view as to the merits.

⁸⁸ 47 C.F.R. § 1.1210 (providing that "[n]o person shall solicit or encourage others to make any improper presentation ...").

desire to meet with Commission staff.⁸⁹ Moreover, only four days after Congressman Filner's letter, and before MetroPCS complained of an *ex parte* violation, North County served a copy of the letter on MetroPCS as an attachment to a pleading.⁹⁰ These facts readily distinguish this case from prior cases in which the Commission imposed sanctions for more egregious violations.⁹¹

27. As a related matter, we see no basis to find that Congressman Filner's letter represents improper intrusion into the Commission's adjudicative process. The Commission has recognized that certain intrusions by Congress into administrative decision-making may deprive parties of due process.⁹² An evaluation of whether such improper intrusion has occurred turns on two factors: (1) whether there is an appearance of bias, and (2) whether congressional pressure actually affected the outcome.⁹³ In this regard, the analysis focuses on whether congressional influence shaped the agency's decision on the merits.⁹⁴ Simply stating a Member of Congress' views on the merits without a showing that the communication biased the agency's decision does not constitute improper influence.⁹⁵

28. We do not believe that our decision on the merits above can be seen as affected by the contents of Congressman Filner's letter. First, Congressman Filner's letter presented a viewpoint on the merits almost as an aside to his views on timing. More importantly, the record supports, and this Order

⁸⁹ For example, a North County e-mail states: "As with all of our correspondence, I have copied Carl Northrop, who represents MetroPCS in this proceeding." The subject line of the e-mail reads: "North County v. MetroPCS, EB-06-MD-007 (RESTRICTED PROCEEDING)." Senzel Letter, attaching E-mail from Michael Hazzard to Matthew Berry and Joseph Palmore (Nov. 19, 2008).

⁹⁰ See *Elliott J. Greenwald, Esq.*, Letter, 13 FCC Rcd 7132, 7134-35 (OGC 1998) (finding no significant *ex parte* violation where party's failure to ensure timely service of congressional presentations did not reflect an intent to deprive opposing party of fair notice of the presentations); *Power Authority of the State of New York v. FERC*, 743 F.2d 93, 110 (2d Cir. 1984) (stating that, in evaluating an *ex parte* violation, one must look particularly to whether the communications contain factual matter or other information outside the record, which the parties did not have an opportunity to rebut). North County filed the Filner letter on November 21, 2008. See n.83, *supra*. MetroPCS first raised the *ex parte* issue on November 25, 2008. See Letter from Carl W. Northrop, Counsel for MetroPCS, to Matthew Berry, Office of General Counsel, File No. EB-06-MD-007 (filed Nov. 25, 2008).

⁹¹ See, e.g., *Desert Empire Television Corp.*, Memorandum Opinion and Order, 88 FCC 2d 1413 (1982) (imposing a \$6,000 forfeiture against a party that repeatedly violated the *ex parte* rules despite being admonished to comply with the rules and promising compliance); *Elkhart Telephone Co.*, Notice of Apparent Liability and Forfeiture, 11 FCC Rcd 1165 (1995) (imposing a \$5,000 forfeiture on party sending a letter plainly attempting to solicit a communication that would violate the *ex parte* rules, and subsequently mischaracterized its efforts to the Commission).

⁹² See *Elliott J. Greenwald, Esq.*, 13 FCC Rcd at 7135, citing *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-65 (5th Cir. 1966).

⁹³ See *ATX, Inc. v. U.S. Dep't of Transportation*, 41 F.3d 1522, 1527 (D.C. Cir. 1994).

⁹⁴ See *id.* at 1528 (finding unobjectionable congressional pressure that may have prompted agency to hold hearing resulting in the denial of an application, where there was no reason to doubt that hearing was fair and impartial). See also *Elliott J. Greenwald, Esq.*, 13 FCC Rcd at 7135 (finding unobjectionable congressional interest that may have prompted FCC to accelerate its deliberations, where congressional letters focused on timing, not the merits). Thus, even if Congressman Filner's letter might have been a factor in the decision of Commission staff to meet with North County or to accelerate deliberations in this proceeding, that would not be the type of influence that the courts have found to be a violation of due process.

⁹⁵ See *ATX*, 41 F.3d at 1528. In *ATX*, a case in which members of Congress explicitly urged denial of an application, the court nevertheless found the agency's decision denying the application was free of bias. The court noted that the final decision-maker, who was aware of congressional letters, had insulated his decision-making from congressional interference in that he issued a lengthy opinion based on the record and that the basis of the decision was clear, open to scrutiny, and fully supported by the record. The court also noted that the final decision-maker did not reverse the decision reached by the ALJ after the hearing, and that the case was not a close one. If the decision-maker had suddenly reversed course or the case was a close one, the court stated that it might have found influence.

reaches, an outcome different from the one apparently advocated by Congressman Filner.⁹⁶ Thus, we deny MetroPCS' Motion for Sanctions.

IV. ORDERING CLAUSES

29. 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 1.721-1.736, 20.11, and 51.711 of the Commission's rules, 47 C.F.R. §§ 1.721-1.736, 20.11, and 51.711, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Count I of the Complaint is DISMISSED WITHOUT PREJUDICE.

30. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 202, 208, 251(b)(5), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 208, 251(b)(5), and 332, and sections 1.721-1.736, 51.301 and 51.715 of the Commission's rules, 47 C.F.R. §§ 1.721-1.736, 51.301, and 51.715, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Counts II, III, IV and V of the Complaint are DENIED.

31. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.721-1.736 of the Commission's rules, 47 C.F.R. §§ 1.721-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that MetroPCS California, LLC's Motions for Judicial Notice are GRANTED.

32. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.721-1.736 of the Commission's rules, 47 C.F.R. §§ 1.721-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that North County Communications Corp.'s Motion to Strike Portions of MetroPCS' Brief in Opposition, MetroPCS California, LLC's Motion Requesting Supplemental Briefing, and MetroPCS California, LLC's Motion Requesting Sanctions Against North County are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

⁹⁶ The record also reflects that Congressman Filner contacted two House subcommittee chairmen and sought hearings on Commission enforcement processes. Motion for Sanctions, Exhibits 2 & 3 (letters from Congressman Filner dated November 17, 2008 to Congressman Edward J. Markey, Chairman, Committee on Commerce and Energy, Subcommittee on Telecommunications/Internet and Congressman Bart Stupak, Chairman, Committee on Commerce and Energy, Subcommittee on Oversight and Investigations). However, there is no indication that this resulted in any further contact with the Commission. Accordingly, Congressman Filner's communications with his House colleagues did not violate the *ex parte* rules and does not represent improper congressional intrusion into the Commission's adjudicative process.