

Oral Argument Scheduled for \_\_\_\_\_, 2003

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

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Case No. 02-1255

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**MOUNTAIN COMMUNICATIONS, INC.**  
*Petitioner,*

v.

**FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,**  
*Respondents.*

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

**PETITIONER'S BRIEF**

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April 18, 2003

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with Circuit Rule 28(a)(1), hereby certifies:

### **Parties and Amici**

Mountain Communications, Inc. (“Mountain”) is the Petitioner, and the Federal Communications Commission (“FCC”) and the United States of America are the Respondents. The following parties have been granted leave to intervene on behalf of the Petitioner: Allied National Paging Association; Arch Wireless Operating Company; AT&T Wireless Services, Inc.; Sprint Corporation; T-Mobile USA, Inc.; and Western Wireless Corporation. The following party has been granted leave to intervene on behalf of the Respondents: Qwest Communications International Inc. Because this proceeding is a review of an agency order, a list of all parties, intervenors, and *amici* who appeared before the agency is not applicable. *See Circuit Rule 28(a)(1)*.

### **Rulings under Review**

Petitioner seeks review of the July 25, 2002 ruling by the FCC styled: *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, EB-00-MD-017, 17 F.C.C.R. 15135 (July 25, 2002).

### **Related Cases**

The case on review has not previously been before the Court. Counsel is not aware of any other related cases in this or any other court. No entities have filed petitions for reconsideration of the order on review with the FCC.

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Benjamin J. Aron, Counsel for Petitioner

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Circuit Rule 26.1 of the United States Court of Appeals for the District of Columbia Circuit, Mountain Communications, by its attorneys, respectfully submits this corporate disclosure statement.

Mountain Communications (“Mountain”) is a privately held corporation that is incorporated under the laws of the State of Colorado. Mountain has no debt in the hands of the public. Mountain provides wireless telecommunications services to the public, including paging services, in parts of Colorado.

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## GLOSSARY

<b>1996 Act</b>	Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996)
<b>The Act</b>	Communications Act of 1934, 47 U.S.C. § 151 <i>et seq.</i> , as amended
<b>BOC</b>	Bell Operating Company – one of the four remaining local exchange carriers that were spun off from AT&T as part of the AT&T divestiture
<b>CMRS</b>	Commercial Mobile Radio Service – a category of wireless carrier that provides telephony and/or paging services
<b>CPNP</b>	Calling Party’s Network Pays – a compensation method in which the network of the calling party pays other networks utilized in transporting and terminating the telecommunications to the person being called.
<b>FCC</b>	Federal Communications Commission (or “the Commission”)
<b>LEC</b>	Local exchange carrier – a telephone company using wired, or landline, technology
<b>LATA</b>	Local Access and Transport Area – a contiguous area established as part of the AT&T divestiture within which BOCs may provide their services
<b>MTA</b>	Major Trading Area – an area within which CMRS carriers provide their mobile services and the area where the FCC has ruled its reciprocal compensation rules apply and as defined by 47 C.F.R. § 24.202(a)
<b>NPA</b>	Numbering Plan Area, or area code – the first three digits of a 10-digit telephone number
<b>NXX</b>	Central Office Code – the fourth, fifth and sixth digits of a 10-digit telephone number
<b>POI</b>	Point of Interconnection – the demarcation point separating one network from another interconnecting network
<b>Transit Traffic</b>	Traffic that is transported and switched by an intermediate third party carrier between two carriers that do not directly connect with each other.
<b>Type 1</b>	A form of Interconnection as defined in Bellcore Technical Reference GR-145-CORE that provides a trunk connection between a LEC end office switch and a CMRS network. <i>See also, TSR Wireless v. U S WEST</i> , 15 F.C.C.R. 11166 (June 21, 2000), <i>aff’d sub nom., Qwest v. FCC</i> , 252 F.3d 462 (D.C. Cir. 2001) at ¶ 24.

**Type 2** A form of Interconnection as defined in Bellcore Technical Reference GR-145-CORE that provides a trunk connection between a LEC tandem switch and a CMRS network.

**WAC** Wide Area Calling – a reverse billing arrangement as defined in *TSR Wireless v. U S WEST*, 15 F.C.C.R. 11166 (June 21, 2000), *aff'd sub nom., Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) at footnote 6 whereby the toll calls that a LEC would ordinarily bill to its calling customer are instead paid for by the terminating carrier

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**JURISDICTIONAL STATEMENT**

This Court has jurisdiction under 47 U.S.C. § 402(a), 28 U.S.C. § 2342(a), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15. The Federal Communications Commission (“FCC”) released its final order under review on July 25, 2002, and the petition for review was timely filed on August 12, 2002.

**STATUTES AND REGULATIONS**

Relevant statutes and regulations are reproduced in the addendum to this brief.

**ISSUES PRESENTED FOR REVIEW**

1. In the Telecommunications Act of 1996, Congress imposed on local exchange carriers (“LECs”) the duty to compensate other carriers for the costs they incur in terminating LEC-

originated calls over their networks. 47 U.S.C. § 251(b)(5). The FCC adopted a corollary rule that LECs may not charge the terminating carrier for calls originated by the LEC and must bear its own costs for delivering such calls to the terminating carrier. 47 C.F.R. § 51.703(b). This rule has been affirmed on appeal in a complaint proceeding which held that Qwest had improperly charged a paging carrier for the interconnection facilities Qwest used in delivering its traffic to the paging carrier. *See Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001), *aff'g TSR Wireless v. U S WEST*, 15 F.C.C.R. 11166 (2000) (“*TSR Order*”). In the order under review, which also arose in the context of an adjudicatory (complaint) proceeding against the same incumbent LEC, the FCC decided that Qwest may charge the terminating carrier for the costs of the facilities it uses in delivering its traffic to the terminating carrier – a decision that is at complete odds with the *TSR Order* involving the same incumbent LEC and the same type of interconnection facilities. In light of the discrepancy between these two decisions, the first issue presented for review is whether the FCC’s failure to follow its own rules and precedent in a complaint proceeding is arbitrary and capricious.

2. Telecommunications carriers currently operate under a “calling-party’s-network-pays” (“CPNP”) regime, where the originating carrier, or the calling-party’s network, compensates other carriers involved in call termination. Carriers may interconnect with each other either *See Virginia Arbitration Order*, CC Docket No. 00-218, DA 02-1731 (July 17, 2002) directly or indirectly. If an originating carrier elects to interconnect indirectly, it chooses an intermediary carrier – known as a “transit carrier” – to transport the call to the terminating carrier. Consistent with CPNP and fundamental “cost-causer” principles, and as prescribed in the FCC’s rules, the industry has developed a practice whereby the originating carrier pays the transit carrier its transit costs—i.e., the entity demanding service compensates the carrier which provides service.

The FCC changed this convention in the order under review, ruling that transit carriers may bill the terminating carrier rather than the originating carrier for the final interconnection facility – even though it is the originating carrier which selects and demands services from the transit carrier (rather than interconnecting directly with the terminating carrier). As the Commission’s order under review has changed the way in which its rules and orders had previously been interpreted, the second issue presented for review is whether the orders under review are arbitrary and capricious and inconsistent with the FCC’s prior orders and rules establishing a “calling-party’s-network-pays” (“CPNP”) regime for intercarrier compensation.

### **STATEMENT OF THE CASE**

The FCC, in a complaint proceeding filed by a small paging carrier (Mountain) against a large incumbent LEC (Qwest) has upset major principles of intercarrier compensation law, including FCC rules affirmed by this Court. In doing so, the FCC contravened the 1996 Act, as interpreted since its enactment by the FCC itself. The FCC also significantly modified its rules without commencing a new rulemaking proceeding, contrary to the Administrative Procedures Act.

The FCC’s orders and rules prohibit LECs from charging the carrier serving the called party (the “terminating carrier”) for the interconnection facilities a LEC uses in delivering traffic originated on its network to the terminating carrier’s network. Qwest ignored these rules and orders, by charging certain providers of commercial mobile radio services (“CMRS”) for the cost of its interconnection facilities. In June 2000, the FCC granted a complaint filed by a paging carrier and confirmed that Qwest and other incumbent LECs may not charge CMRS carriers for the facilities they use in transporting LEC traffic to the CMRS carrier’s network. *See TSR*

*Wireless v. U S WEST*, 15 F.C.C.R. 11166 (June 21, 2000), *aff'd sub nom., Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) (“*TSR Order*”).

The interconnection facility at issue in the *TSR Order* connected switches in Flagstaff and Yuma, Arizona, a distance of over 240 miles. *See* 15 F.C.C.R. 11170 ¶ 9. Although the FCC ruled that Qwest could not charge at all for this facility because Flagstaff and Yuma are located in the same LATA, Qwest decided it would not comply with the FCC’s order. Instead, Qwest decided that it would not charge for the first 20 miles of the interconnection facility, but that it would continue to charge for that portion of the facility beyond 20 miles.

In September 2000, Petitioner Mountain Communications, Inc. (“Mountain”) filed an FCC complaint alleging that Qwest was still imposing the charges that the FCC already ruled were unlawful. *See Mountain Communications, Inc. v. Qwest Communications*, File No. EB-00-MD-017, Formal Complaint, at ¶¶ 36-40 (Sept. 11, 2000) (J.A. \_\_\_\_). Mountain also alleged that Qwest was charging it, the terminating carrier, for transit traffic originating on other networks, and it sought a refund for the Qwest facilities charges it had paid and for an order directing Qwest to cease imposing such charges in the future. *See id.* at ¶¶ 41-4 and 84-87 (J.A. \_\_\_\_). Although Qwest admitted it was still imposing facility charges after the *TSR Order*, Qwest Answer at ¶¶ 24, 71-87, 124 (Oct. 2, 2000) (J.A. \_\_\_\_), and although Mountain’s complaint was a mirror image of the *TSR* complaint the FCC’s Enforcement Bureau denied Mountain’s complaint. *See Mountain Communications v. Qwest Communications*, 17 F.C.C.R. 2091 (Feb. 4, 2002)(“*Mountain Bureau Order*”). The Enforcement Bureau ruled that, notwithstanding the FCC’s *TSR Order*, Qwest could charge Mountain for Qwest’s facilities and certain of its transit costs.

On March 5, 2002, Mountain asked the FCC to reconsider the Enforcement Bureau's order, pointing out the errors in the Bureau's decision. *See* Petition for Reconsideration (March 5, 2002) (J.A. \_\_\_\_). The FCC denied this petition in an Order on Review released on July 25, 2002. *See Mountain Communications v. Qwest Communications*, 17 F.C.C.R. 15135 (July 25, 2002) ("*Mountain Order*"). This appeal followed.

The orders under review arose in the context of a complaint (or adjudicatory) proceeding, wherein the FCC's duty is to apply existing rules and orders to the facts presented. In this case, however, the FCC ignored its rules and precedent and radically changed the law regarding intercarrier compensation and the traffic delivery obligations of carriers that originate traffic. For all practical purposes, the FCC adopted different, entirely new rules outside of the rulemaking process. The FCC's decision, although purportedly limited to one paging carrier and one incumbent LEC, has the practical consequence of affecting all telecommunications carriers and their dealings with each other.

### **STATEMENT OF FACTS**

The issues in this appeal are limited in scope to land-to-mobile traffic and, in particular, to the costs of interconnection facilities used by an incumbent LEC (here, Qwest) to deliver traffic to the networks of wireless carriers (here, Mountain). To best understand the implications and unprecedented nature of the order under review, it is necessary to review:

1. How calls are rated (for purposes of charging the caller) under existing law;
2. How calls are routed (for purposes of physically connecting the call) under existing law;
3. The definition of "wide area calling" prior to the Mountain decision; and
4. The procedural history of the Mountain case.

Mountain provides one-way paging services in parts of Colorado, including in the communities of Colorado Springs, Pueblo, and Walsenburg, all along the I-25 corridor.<sup>1</sup> A paging carrier is deemed a provider of CMRS under the Communications Act. *See* 47 U.S.C. § 332(d)(1); 47 C.F.R. § 20.9(a)(6). Qwest is the incumbent LEC in and around Colorado Springs, Pueblo and Walsenburg. Calls from Qwest customers to Mountain customers are routed by Qwest over dedicated circuits from end offices in each of the three communities to Mountain's switching facility in Pueblo.

**1. How Calls Are Rated Under Existing Law.**

Qwest has established state approved telephone exchange boundaries (also known as “local calling areas” or “rate centers”) to rate (or bill) calls as local or toll.<sup>2</sup> A landline-to-landline call is deemed local, and thereby included within the LEC's local exchange service charge, if the caller and the called party are located in the same exchange (*e.g.*, the call originates and terminates in the Colorado Springs exchange). If the caller and person being called are located in different exchanges (*e.g.*, Colorado Springs and Pueblo), the incumbent LEC bills toll charges to its customer originating the call.<sup>3</sup>

The same rating arrangement applies when an incumbent LEC customer calls a customer of a CMRS carrier like Mountain. For example, if a Qwest customer in Colorado Springs calls a Mountain customer's number in Colorado Springs, the Qwest customer expects that the call will be rated as local. Similarly, if a Qwest customer in Pueblo calls a Mountain customer with a

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<sup>1</sup> *See* Mountain and Qwest Joint Statement at 5 ¶ 1 (Oct. 17, 2000) (J.A. \_\_\_\_); Qwest Second Supplemental Fraser Declaration at 4 ¶ 8 (Jan. 15, 2001) (J.A. \_\_\_\_).

<sup>2</sup> *See Second Numbering Resource Optimization Order*, 16 F.C.C.R. 306, 366 ¶ 144 (2000) (“The rate center system was established in the 1940s primarily to facilitate the routing and billing of telephone calls.”).

<sup>3</sup> *See generally* 47 U.S.C. § 153(47) (“The term ‘telephone exchange service’ means (a) service within a telephone exchange . . . and which is covered by the exchange service charge . . . .”); at § 153(48) (“The term ‘telephone toll service’ means telephone service between stations in different exchange areas . . . .”).

Colorado Springs number, the Qwest customer expects she will pay the same toll charges as if she had instead called a Qwest customer in Colorado Springs

When a call involves customers of different carriers, the originating carrier may not know the physical location of the person being called (and this is especially the case when the called party is a mobile customer). Accordingly, incumbent LECs like Qwest rate calls as local or toll “by comparing the originating and terminating NPA-NXX codes,” the first six digits of a 10-digit telephone number. *Virginia Arbitration Order*, CC Docket No. 00-218, DA 02-1731, at ¶ 301 (2002)(noting this practice is used “industry-wide”). If the NXX portion of the called party’s telephone number is “rated” in the same local calling area as the NXX portion of the caller’s telephone number (*e.g.*, both NXXs are “rated” in the Colorado Springs exchange), the originating carrier rates the call as a local call. If, however, the NXX portion of the called party’s telephone number is instead rated in a different local calling area than the NXX portion of the caller’s telephone number (*e.g.*, the caller’s number is rated in Pueblo, while the called party’s number is rated in Colorado Springs), then the originating carrier bills its customer toll charges. Absent a wide area calling arrangement, calls between Qwest and Mountain customers in the three named Colorado exchanges would be rated as follows:

<i>ORIGINATING LCAs</i>	Terminating LCAs		
	<b>COLORADO SPRINGS NPA/NXX</b>	<b>PUEBLO NPA/NXX</b>	<b>WALSENBURG NPA/NXX</b>
<b>COLORADO SPRINGS NPA/NXX</b>	Local	Toll	Toll
<b>PUEBLO NPA/NXX</b>	Toll	Local	Toll
<b>WALSENBURG NPA/NXX</b>	Toll	Toll	Local

Wireless and other competitive carriers need to obtain telephone numbers rated in different incumbent LEC exchanges, or rate centers, so they can offer an inbound local calling area comparable to that provided by incumbent LECs. As the FCC has noted, a competitive carrier must obtain telephone numbers for “each [incumbent LEC] rate center in which it provides service in a given area.” *First Numbering Resource Optimization Order*, 15 F.C.C.R. 7574, 7577 n.2 (2000).

[T]o enable the rating of incoming wireline calls as local, wireless carriers typically associate NXXs with wireline rate centers that cover either the business or residences of [wireless] end users.

*Numbering Resource Optimization Notice of Proposed Rulemaking*, 14 F.C.C.R. 10322, 10371 n.174 (1999)

The rating of calls as local or toll does not necessarily follow the physical routing of calls. There is a self-evident reason for this: a call must first be routed to the terminating carrier’s switch before it can be completed to the person being called.

## **2. How Calls Are Routed Under Existing Law.**

As noted above, Mountain provides its paging services in three Colorado communities: Colorado Springs, Pueblo, and Walsenburg. All three communities are located in the same area code (719), the same Local Access and Transport Area (the Colorado Springs LATA), and the same Major Trading Area (the Denver MTA), but Qwest has designated these three communities as separate exchanges, or separate “local calling areas” (“LCAs”).<sup>4</sup> Exchanges are designated for purposes of *rating* landline-to-landline calls, but not necessarily for the purpose of routing landline to CMRS calls. The FCC has specifically defined the local calling area for LEC-to-

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<sup>4</sup> Mountain Reply to Qwest’s Brief on the Disputed Material Issues, at 9 (Jan. 26, 2002) (J.A. \_\_\_\_). MTAs are the geographic areas where the FCC’s reciprocal compensation rules apply. *See* 47 C.F.R. § 51.701(b)(2).

CMRS traffic as the MTA.<sup>5</sup> Based on the FCC's rules, the Iowa Utilities Board ruled that LECs cannot impose originating Access charges for Inter-Exchange (as defined by the State Commission), Intra-LATA calls from LECs to CMRS carriers and that the calls must be rated as local, for purposes of reciprocal compensation, by the originating LEC.<sup>6</sup> These rulings assume that the dialed NPA-NXX (or NXX when only 7 digits are dialed) is *rated* as local in the local exchange routing guide,<sup>7</sup> even though the call *routing* may be to a distant point in the LATA.

For routing purposes, the FCC has determined that an interconnecting carrier like Mountain need establish only one point of interconnection ("POI") per LATA.<sup>8</sup> Colorado Springs, Pueblo, and Walsenburg are each located in the Colorado Springs LATA, and Mountain has chosen Pueblo, which is centrally located between Colorado Springs and Walsenburg, as its centralized interconnection point.<sup>9</sup>

FCC rules specify that a "local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier." 47 C.F.R. § 20.11. Wireless carriers generally interconnect with an incumbent LEC using either Type 1 interconnection or Type 2 interconnection. One difference between these two forms of interconnection is the

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<sup>5</sup> See, 47 C.F.R. § 51.701(b)(2), Scope of Transport and Termination pricing rules.

<sup>6</sup> See, Iowa Utilities Board, DOCKET NO. SPU-00-7 TF-00-275 (DRU-00-2), Order denying Application for Rehearing (May 3, 2002).

<sup>7</sup> The local exchange routing guide is a database maintained by Telcordia Technologies that carriers use to identify NPA-NXX routing, among other purposes.

<sup>8</sup> See, e.g., *Unified Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 9650 ¶ 112 (2001)("[A]n ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA."). See also Qwest Brief on the Disputed Material Issues, at 11 (Jan. 19, 2001)("Qwest is not disputing its basic obligation to interconnect at any point within the MTA (within the LATA). Indeed, Mountain may interconnect with Qwest at a *single POC* [Point of Connection] within the LATA if it chooses, and will not be charged for any intraLATA facilities (other than transit charges.")(emphasis in original) (J.A. \_\_\_\_).

<sup>9</sup> See Mountain Reply to Qwest's Brief on the Disputed Material Issues, at 9 (Jan. 26, 2002) (J.A. \_\_\_\_).

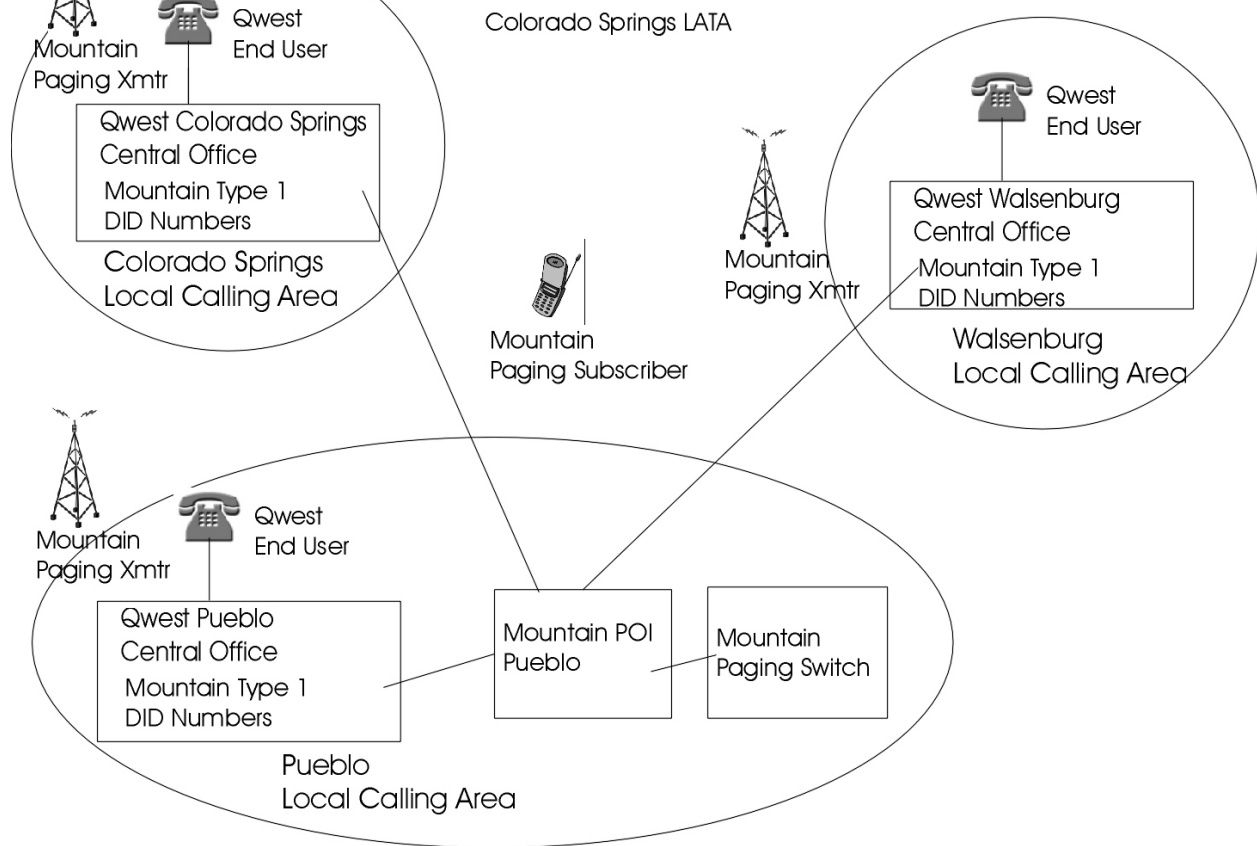
location where telephone numbers assigned to a wireless carrier are stored, or “homed,” for routing purposes.

With Type 2 interconnection, the wireless carrier’s telephone numbers reside within its mobile switch or at the incumbent LEC’s tandem office. With Type 1 interconnection, in contrast, the wireless carrier’s telephone numbers instead reside in the incumbent LEC’s end office switch – generally referred to as a Type 1 serving office and routed through that switch. Because Qwest has designated the three communities where Mountain provides its paging services (Colorado Springs, Pueblo and Walsenburg) as separate local calling areas, Mountain must obtain telephone numbers rated in each exchange so Qwest customers in one local calling area can avoid toll charges when calling a Mountain customer located in the same calling area. Mountain therefore has Type 1 interconnection with Qwest in each of these communities (*i.e.*, there is a Qwest Type 1 office in Colorado Springs, in Pueblo, and in Walsenburg),<sup>10</sup> and Mountain provides paging services in all three Qwest exchanges through a single paging switch located in Pueblo. The interconnection arrangement between Qwest and Mountain is thus as follows:

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<sup>10</sup> See Qwest Second Supplemental Fraser Declaration at 4 ¶ 8 (Jan. 15, 2001) (J.A. \_\_\_\_).

## Mountain Communications - Qwest Interconnection Network Diagram 1



Qwest routes its calls destined to Mountain customers to the Qwest Type 1 office based on the telephone number assigned to the Mountain customer and dialed by the Qwest customer originating the call. For example, a Colorado Springs-based Mountain customer would be assigned a local Colorado Springs telephone number stored in Qwest's Type 1 office in Colorado Springs. Conversely, a Pueblo-based Mountain customer would be assigned a local Pueblo telephone number stored in Qwest's Type 1 office in Pueblo.

If a Qwest customer in Colorado Springs calls a Mountain customer in Colorado Springs (assigned a local Colorado Springs telephone number), Qwest must route the call from its Type 1 office in Colorado Springs to Mountain's interconnection point in Pueblo. Mountain then assumes the responsibility for transmitting the call to its radio transmitter serving Colorado

Springs for delivery of the call to its customer. Although Qwest delivers the call to Mountain in an exchange other than the exchange of the calling Qwest customer, namely, Mountain's POI in Pueblo, Qwest rates the call as local to the calling party because the calling and called parties are both located in the Colorado Springs local calling area (as confirmed by the fact that the two sets of telephone numbers are both "rated" in the same Colorado Springs exchange). The delivery of Qwest's call to Mountain at Mountain's POI in Pueblo is inconsequential to the rating of the call as local because Mountain is entitled to establish a single POI per LATA.<sup>11</sup> It is especially important to note that the call is not terminated at the Mountain switch in Pueblo; instead, it is terminated on the end user's mobile unit, which in this example is located in Colorado Springs. *See* 47 C.F.R. § 51.701(d)("[T]ermination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.").

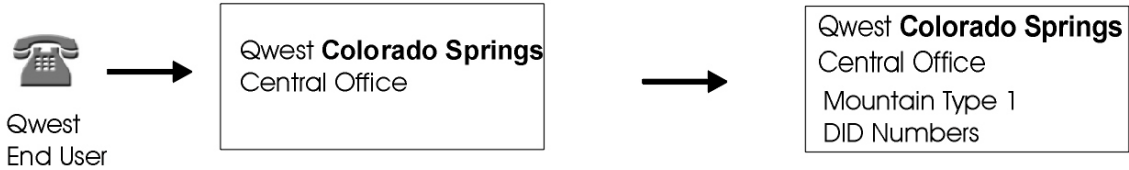
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<sup>11</sup> *See, e.g., Unified Inter-carrier Compensation Regime*, 16 F.C.C.R. 9610, 9650 ¶ 112 (2001)("[A]n ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA."). *See also* Qwest Brief on the Disputed Material Issues, at 11 (Jan. 19, 2001)("Qwest is not disputing its basic obligation to interconnect at any point within the MTA (within the LATA). Indeed, Mountain may interconnect with Qwest at a *single POC* [Point of Connection] within the LATA if it chooses, and will not be charged for any intraLATA facilities (other than transit charges.")(emphasis in original) (J.A. \_\_\_\_).

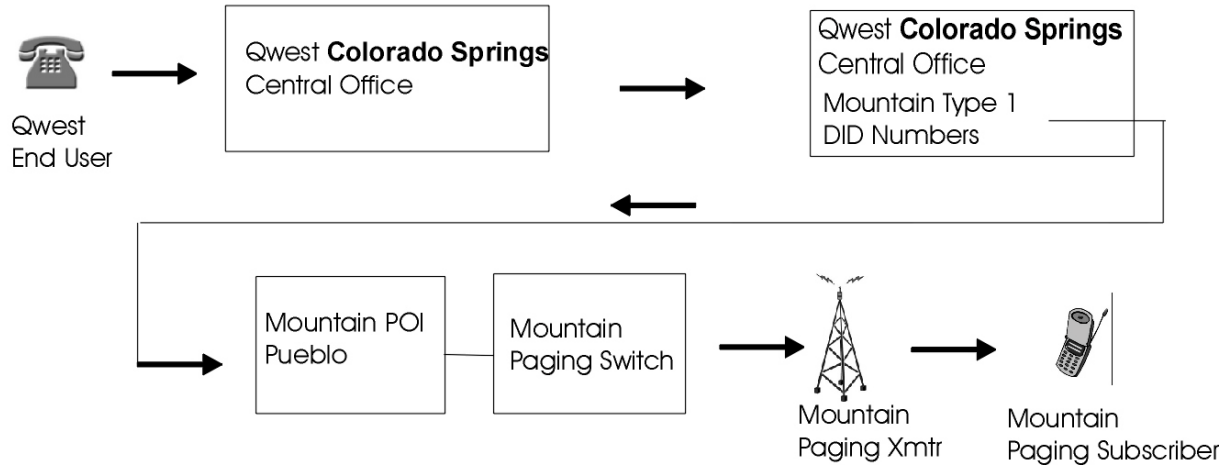
# Mountain Communications Colorado Springs Call Rating and Routing Diagram 2

Qwest Colorado Springs Local Number to Mountain Colorado Springs Local Number

## Call Rating: Local Call



## Call Routing



If, however, a Qwest customer in Pueblo calls a Mountain customer's telephone number in Colorado Springs, Qwest would route the call to its Type 1 office in Colorado Springs where the Mountain telephone number is rated, Qwest would then deliver the call to Mountain at its POI in Pueblo (where Mountain assumes the responsibility of delivering the call to its customer in Colorado Springs). In this example, Qwest bills its customer a toll charge because the Mountain customer's telephone number is rated in a different exchange (*i.e.*, Colorado Springs) than the caller's telephone number (which is rated in Pueblo).

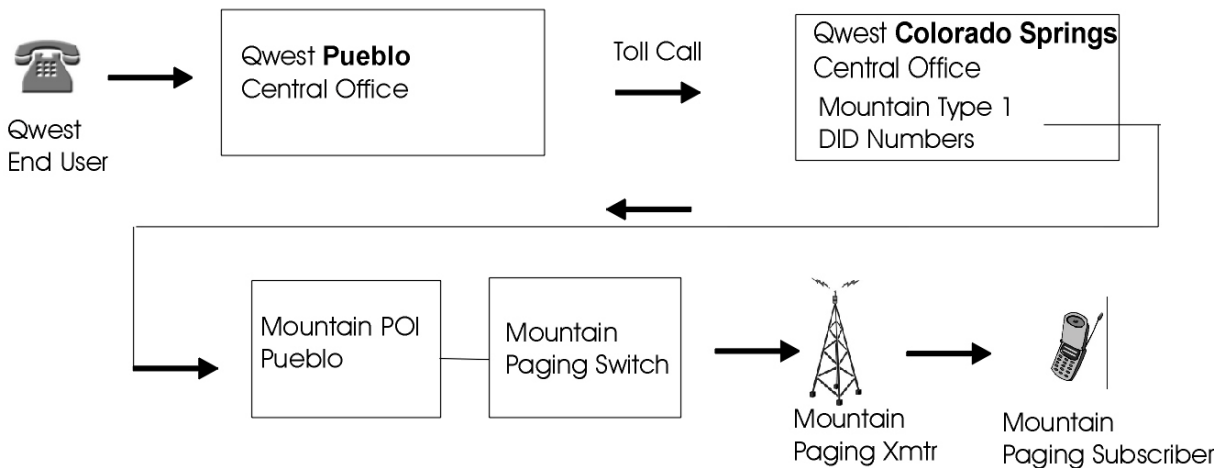
Mountain Communications  
Pueblo to Colorado Springs Call Rating and Routing Diagram 3

Qwest Pueblo Local Number to Mountain Colorado Springs Local Number

**Call Rating: Toll Call**



**Call Routing**



**3. The definition of wide area calling prior to the Mountain decision:** The FCC’s interconnection rules govern the relationship between interconnecting carriers; they do not govern what the originating carrier charges its own customers for originating their calls. As noted, an originating carrier like Qwest rates its calls as local or toll by comparing the NPA-NXX codes in the calling and called numbers to determine if the numbers are rated in the same rate center. Thus, Qwest would rate a call from a Qwest customer in Colorado Springs to a Mountain customer’s number in Pueblo as a toll call.

Some LECs like Qwest developed a LATA-wide “wide area calling” service for CMRS carriers, where the LEC agreed not to bill its customers toll charges for calls to numbers in

different local calling areas if the terminating carrier instead agreed to pay such charges, an arrangement similar to the 800 services offered by long distance carriers. According to the FCC, Wide Area Calling, “also known as ‘reverse billing’ or ‘reverse toll,’ is a service in which a LEC agrees with an interconnector not to assess toll charges on calls from the LEC's end users to the interconnector's end users, in exchange for which the interconnector pays the LEC a per-minute fee to recover the LEC's toll carriage costs.” *TSR Wireless v. Qwest*, 15 F.C.C.R. at 11168 n.6. Qwest tariffs in effect at the time Mountain filed its complaint reflected the general understanding of “wide area calling” throughout the industry:

Wide Area Calling Service is a billing service offered to Commercial Mobile Radio Carriers and Private Mobile Radio Carriers, in conjunction with their Type 2 Interconnection. Wide Area Calling Service provides direct dialed LATA-wide toll free calling for [Qwest] land to mobile calls. The Type 2 Interconnection provides the exchange of the land to mobile calls and for the billing of the calls to the Carrier rather than the calling party.<sup>12</sup>

Qwest argued below, and the FCC agreed, that Qwest’s arrangements with Mountain constitute another form of wide area calling. At first blush, the argument is strained. For one thing, Mountain interconnects with Qwest via Type 1 facilities, while Qwest’s tariffs specify that this service is available only to carriers that interconnect using Type 2 facilities.<sup>13</sup> More relevant is that under the Qwest/Mountain arrangement, calls between numbers in different local calling areas continue to be rated as toll, while a wide area calling arrangement (as described in Qwest’s tariff and by the FCC in the *TSR Order*) would exempt the Qwest caller anywhere in the LATA from paying toll rates for a call to *any* of the numbers maintained by Mountain in the three

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<sup>12</sup> Qwest (formerly, U S WEST) Exchange and Network Services Tariff, Colo. P.U.C. No. 15, § 20.3.A, First Revised Sheet 20.1. See Mountain Reply to Qwest Corporation’s Opposition at §7, pgs 5-6.

<sup>13</sup> According to Qwest’s tariff, one of the “conditions” to subscribing to Wide Area Calling service is that the carrier “must subscribe to Type 2 Interconnection and must follow all of the configuration requirements of the Type 2 interconnection.” *Id.* at § 20.3.B.1.

exchanges.<sup>14</sup> Wide Area Calling Service is a billing service involving the *rating* of calls, whereas Mountain’s complaint is about facilities charges and is a *routing* issue. As described above, the rating of the calls is not in question. All parties agree the calls are locally rated calls, based on the NPA-NXX of the originating and terminating rate centers, and thus, the FCC’s reciprocal compensation rules apply, including Qwest’s traffic delivery obligations, and the application of Wide Area Calling Service is inapplicable. The difference between traditional “wide area calling” and the Mountain arrangement is easily illustrated:

**The Qwest/Mountain Arrangement**

<i>ORIGINATING LCAs</i>	Terminating LCAs		
	<b>COLORADO SPRINGS NPA/NXX</b>	<b>PUEBLO NPA/NXX</b>	<b>WALSENBURG NPA/NXX</b>
<b>COLORADO SPRINGS NPA/NXX</b>	Local	Toll	Toll
<b>PUEBLO NPA/NXX</b>	Toll	Local	Toll
<b>WALSENBURG NPA/NXX</b>	Toll	Toll	Local
<b>ALL OTHER EXCHANGES IN THE LATA</b>	Toll	Toll	Toll

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<sup>14</sup> See, QWEST CORPORATION’S BRIEF ON THE DISPUTED MATERIAL ISSUES, Exhibit 1, Second Supplemental Declaration of Sheryl R. Fraser, Paragraph 6.

**Wide Area Calling Arrangement, As Tarrified by Qwest and Understood by the Industry**

<i>ORIGINATING LCAs</i>	Terminating LCAs		
	<b>COLORADO SPRINGS NPA/NXX</b>	<b>PUEBLO NPA/NXX</b>	<b>WALSENBURG NPA/NXX</b>
<b>COLORADO SPRINGS NPA/NXX</b>	Local	Local	Local
<b>PUEBLO NPA/NXX</b>	Local	Local	Local
<b>WALSENBURG NPA/NXX</b>	Local	Local	Local
<b>ALL OTHER EXCHANGES IN THE LATA</b>	Local	Local	Local

5. **Procedural History of The FCC's Intercarrier Compensation Rules and the TSR/Qwest Litigation.**

Section 251(b) of the Communications Act, added in 1996, specifies that LECs like Qwest have “[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). In adopting its implementing rules, the FCC made clear that LECs were required not only to compensate terminating carriers for the costs they incurred in terminating a LEC’s call over the terminating carrier network, but were also prohibited from charging the terminating carrier to receive the LEC’s traffic. 47 C.F.R. § 51.703(b)(“A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.”). The FCC further made clear in its accompanying order that under this rule, LECs may not charge terminating carriers for the facilities LECs use in delivering their traffic to the terminating carrier’s network.

The interconnecting carriers, however, should not be required to pay the providing carrier for one-way trunks . . . which the providing carrier owns and uses to send its own traffic to the interconnecting carrier.

*Local Competition Order*, 11 F.C.C.R. 15499, 16028 ¶ 1062 (1996).

Incumbent LECs thereafter began asserting that these rules and orders did not apply to their interconnection facilities with paging carriers.<sup>15</sup> In March 1997, the Chief of the FCC's Common Carrier Bureau confirmed that FCC rules prohibited LECs from assessing charges on wireless carriers for LEC-originated traffic. *See* Letter from Chief, Common Carrier Bureau, to AT&T Wireless Services (March 3, 1997) (J.A. \_\_\_\_). Again in December 1997, the then new Chief of the FCC's Common Carrier Bureau also found "no basis" to this LEC argument:

[W]e conclude that the Commission's current rules do not allow a LEC to charge a provider of paging services for the cost of LEC transmission facilities that are used on a dedicated basis to deliver to paging service providers local telecommunications traffic that originates on the LEC's network.

Letter from Chief, Common Carrier Bureau, to Southwestern Bell, *et al.*, 13 F.C.C.R. 184, 186 (Dec. 30, 1997).

Qwest ignored the FCC rules, orders and staff clarifications. In 1998, the paging carrier, TSR Wireless, filed a complaint alleging that, in violation of FCC Rule 51.703(b), Qwest was charging it for the facilities connecting the Qwest Type 1 end offices and TSR Wireless' central point of interconnection.<sup>16</sup> The FCC granted this complaint in June 2000, holding that Qwest "cannot charge Complainants for the delivery of LEC-originated, intraMTA traffic to the paging carrier's point of interconnection." *TSR Wireless v. U S WEST*, 15 F.C.C.R. 11166, 11176 ¶ 18 (June 21, 2000) ("*TSR Order*"). The FCC specifically ruled that Qwest's charges for the Qwest-owned facilities connecting its Type 1 end office to the paging carrier's central interconnection

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<sup>15</sup> Incumbent LECs historically charged paging carriers for these interconnection facilities, but in 1996 the FCC ruled that these LEC charges are "in violation of section 20.11 of our rules." *Local Competition Order*, 11 F.C.C.R. 15499, 16044 ¶ 1094 (1996). Because incumbent LECs at one time charged for these facilities (unlawfully), they like to characterize the debate as a request for "free facilities."

<sup>16</sup> Qwest International acquired U S WEST after the TSR Wireless complaint had been filed but before the FCC entered its complaint order. *See Qwest Communications International Inc. and U S WEST, Inc, Applications for Transfer of Control*, 15 F.C.C.R. 5376 (March 10, 2000). For the sake of simplicity, this Brief refers to Qwest to include the period of time before Qwest acquired U S WEST.

point was “inconsistent with the language and intent of the [Local Competition] Order and the Commission's rules”:

Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic and would be inconsistent with the rules. Moreover, the Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates.

*Id.* at 11181 ¶ 25. Qwest challenged the FCC’s decision in this Court. Finding the FCC’s reasoning for its decision “compelling,” this Court rejected Qwest’s arguments and affirmed the FCC’s order because it “simply requires the LECs to look to their own customers to recoup the needed costs of their facilities.” *Qwest Corp. v. FCC*, 252 F.3d 462, 467-68 (D.C. Cir. 2001).

***Qwest’s Response to the TSR Order.*** In response to the *TSR Order*, Qwest decided that it would not charge wireless carriers for the first 20 miles of its facilities connecting its Type 1 end offices to the wireless carrier point of interconnection (other than transit charges discussed below), but that it would continue to charge for that portion of the interconnection facility that was beyond 20 miles.<sup>17</sup> Qwest adopted this “charge after 20-mile” policy even though the FCC was unequivocal in the *TSR Order* that Qwest could not charge the terminating carrier at all for its interconnecting circuit:

Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA . . . For example, to the extent the Yuma-Flagstaff T-1 [interconnection facility] is situated entirely within an MTA, does not cross a LATA boundary, and is used solely to carry U S WEST-originated traffic, *U S West must deliver the traffic to TSR’s network without charge.*

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<sup>17</sup> Joint Statement of Mountain and Qwest, at 8 ¶ 22 (Oct. 17, 2000) (J.A. \_\_\_\_).

*TSR Order*, 15 F.C.C.R. at 11184 ¶ 31 (emphasis added). The interconnection facility at issue in the *TSR Order* connected Qwest's Type 1 serving office in Flagstaff, Arizona with TSR's paging switch in Yuma, Arizona, a distance of over 240 miles. *Id.* at 11170 ¶ 9.

***Qwest's Transit Facility Charges.*** Carriers interconnect with each other in one of two ways: either directly or indirectly. *See* 47 U.S.C. § 251(a). "Interconnection is direct when a carrier's facilities or equipment is attached to another carrier's facilities or equipment. Interconnection is indirect when the attachment occurs through the facilities or equipment of an additional carrier or carriers." *Advanced Telecommunications Capability Order*, 15 F.C.C.R. 17806, 17845 n.198 (2000). The interconnection between Mountain and Qwest is an example of a direct interconnection.

When a call destined to a Mountain customer is originated on a network other than Qwest, the interconnection is deemed indirect, because the originating carrier via a demand for services from Qwest hands off the call to Qwest which, in turn, then transports the call to the terminating carrier (here, Mountain) over the same interconnection facilities Qwest uses to send its own traffic to Mountain—thus, satisfying the originating carrier's demand for routing services. Indirect interconnection ordinarily involves three carriers: (1) the originating carrier serving the calling party; (2) an intermediary carrier; and (3) the terminating carrier serving the called party.<sup>18</sup> The function this intermediate carrier performs on behalf of the originating carrier is known as "transit,"<sup>19</sup> and the dominant incumbent LEC which operates LATA tandem

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<sup>18</sup> Three-carrier calls involving a transit carrier thus differ from three-carrier calls involving an interexchange carrier ("IXC") because with the latter, it is the IXC and not the originating carrier that has a customer relationship with the calling party and thus bills for the call.

<sup>19</sup> *See Qwest v. FCC*, 252 F.3d 462, 468 (D.C. Cir. 2001), *quoting TSR Wireless v. U S WEST*, 15 F.C.C.R. at 11177 n.70 (FCC defines "transiting traffic" as "traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier's network.").

switches (generally a Bell Operating Company) is the predominant provider of transit services today. Interconnection between many carriers involves indirect interconnection because those carriers do not have sufficient traffic volumes with those other carriers to cost-justify use of a direct, dedicated interconnection facility between the two networks.<sup>20</sup>

Intercarrier compensation for call completion is currently governed by the “calling-party’s-network-pays” (“CPNP”) principle. With CPNP, “the calling party’s carrier, whether a LEC, IXC or CMRS, . . . compensate[s] the called party’s carrier for terminating the call.” *Unified Intercarrier Compensation*, 16 F.C.C.R. at 9614 ¶ 9. Under FCC rules embodying the CPNP principle, the calling party’s carrier is responsible for delivering its customers’ calls “to the terminating carrier’s end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.” 47 C.F.R. § 51.701(d). CPNP principles also dictate that the originating carrier compensate the terminating carrier for the additional costs the terminating carrier incurs in terminating the call to the called party. *See* 47 U.S.C. §§ 251(b)(5) and 252(d)(2); 47 C.F.R. §§ 20.11(b) and 51.703(a).

Application of CPNP principles is straightforward when two carriers interconnect directly with each other (*e.g.*, a two-carrier call). The originating carrier delivers its call to the switch serving the person being called (assuming the costs of this delivery), and it compensates the terminating carrier for the costs the latter incurs in completing the call over its network (from the switch to the person being called).<sup>21</sup> If the originating carrier instead delivers its call to the

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<sup>20</sup> *See, e.g., Unified Intercarrier Compensation*, 16 F.C.C.R. 9610, 9643 ¶ 91 (2001)(“Where CMRS-LEC traffic volumes are small, . . . the CMRS carrier connects to LEC end offices connected to the tandem together with other carriers (including IXCs) interconnected through the tandem.”); at 9644 ¶ 95 (“Because intercarrier, local CMRS traffic is often insufficient to justify a dedicated trunk, the majority of CMRS-to CMRS call exchange occurs through a RBOC tandem switch.”).

<sup>21</sup> *See Bell Atlantic v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000)(“Thus, when a customer of LEC A calls a customer of LEC B, LEC A may pay LEC B for completing the call, a cost usually paid on a per-minute ba-

terminating carrier at some point before the switch serving the called party (*e.g.*, a tandem switch rather than the terminating switch serving the called party), the originating carrier also pays the terminating carrier for the additional transport costs that it incurs (*e.g.*, tandem switching, transport between the tandem switch and the terminating end office). *See* 47 C.F.R. § 51.701(c).

With indirect interconnection, in contrast, the originating carrier delivers its call to the transit carrier's tandem switch, and the transit carrier then forwards the call over its facility connected to the terminating carrier's switch serving the called party. As the FCC has explained in the context of mobile-to-land calls (as opposed to the land-to-mobile calls at issue in this appeal), "wireless carriers can elect to deliver CMRS-originated calls to a large ILEC (typically a Regional Bell Operating Company [RBOC]) for routing to the rural LEC carrier":

Once the CMRS-originated traffic is switched by the ILEC tandem, the CMRS-originated traffic, travels on the same trunk as wireline calls to the ILEC. The CMRS carrier pays the ILEC for switching and transport, and the rural LEC can seek recovery of its termination costs (if it can segregate the traffic) by asking the ILEC to charge the CMRS carrier.

*Unified Inter-carrier Compensation*, 16 F.C.C.R. at 9643 n.143. The order under review, if allowed to stand, would create an anomalous exception to the "originating party responsibility" rule described above. While a CMRS provider *as an originating carrier* would assumedly continue to pay the intermediate ILEC for transporting calls to a third party carrier for termination, the converse would not be true. Instead, the CMRS provider *as a terminating carrier* would also be responsible for paying transport to the ILEC, with the originating third party carrier being relieved of its obligation

According to Qwest, with Type 1 interconnection, it performs five different steps in providing its transit services once the call leaves the originating carrier's network:

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sis."). These reciprocal compensation arrangements "ensure compensation both for the originating LEC,

1. “[T]he call is routed over [Qwest] facilities [connected to the originating carrier network] to Qwest’s Tandem;
2. “[T]he call is switched at Qwest’s Tandem;
3. “[T]he call is routed over Qwest’s network facilities used to transport traffic from the Tandem to the End Office (represented in the diagram as “Serving Wire Center”) that houses the terminating carrier’s [Type 1] numbers;
4. “[T]he call undergoes local switching at the End Office and is routed to the appropriate dedicated facilities; [and]
5. “[T]he call is routed over these decided facilities to the terminating carrier’s POC [Point of Connection].<sup>22</sup>

At the point of interconnection, the paging carrier assumes responsibility for delivering the call to its customer being called.

According to Qwest, its practice is to bill the originating carrier for the first four transit steps and to bill the terminating carrier for the fifth and final step:

Qwest bills the originating carrier or IXC for the transport and switching of the call all the way to the End Office (including any tandem switched transport and local switching at the End Office [Steps 1-4 above]. Qwest bills the Type 1 CMRS carrier, such as Mountain, for the use of the dedicated facilities to deliver the call from the End Office to the carrier’s [centralized interconnection point] [Step 5 above].<sup>23</sup>

As noted above, under its post-*TSR Order* policy, Qwest began billing the terminating carrier for 100 percent of the cost of the interconnection facilities that extend beyond 20 miles from the Type 1 office. Qwest has also determined to bill Mountain for 26.2 percent of the costs of the facilities for the first 20 miles on the ground that a portion of the facility is devoted to transit traffic (*i.e.*, originates on a network other than Qwest).<sup>24</sup>

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which receives payment from the end-user, and for the recipient’s LEC.” *Id.* at 2.

<sup>22</sup> Qwest Supplemental Declaration of Sheryl R. Fraser at 2 ¶ 4 (J.A. \_\_\_\_)

<sup>23</sup> *Id.* at 3 ¶ 6.

<sup>24</sup> *See* Joint Statement of Mountain and Qwest, at 8 ¶ 22 (Oct. 17, 2000) (J.A. \_\_\_\_).

It is the fifth and final step - Qwest's practice of charging the terminating carrier rather than the originating carrier for the interconnection facility, including that portion used for transit traffic - that was at issue below and is the second issue in this appeal.

***The Order Under Review.*** Mountain challenged Qwest's new post-*TSR Order* facilities charges in a complaint it filed with the FCC on September 11. Although Mountain's interconnection arrangement with Qwest was identical in all material respects to that involved in the *TSR Order*, this time the FCC ruled that Qwest could charge the paging carrier for the interconnecting facilities.<sup>25</sup>

Mountain's complaint was initially handled by the FCC's Enforcement Bureau. The Bureau reaffirmed that "a LEC may not charge CMRS providers for the delivery of LEC-originated traffic that originates and terminates within the same Major Trading Area." *Mountain Bureau Order*, 17 F.C.C.R. 2091, 2096 ¶ 11 (Feb. 4, 2002). The Bureau noted, again correctly, that while Qwest may not charge Mountain for the interconnection facilities, Qwest may charge its own customers toll charges if the Mountain customer does not have a telephone number "rated" in the originating Qwest exchange:

[I]f a LEC end user makes a call from one local calling area to a paging customer whose number is assigned to a central office in another local calling area of the LEC, the LEC may assess the caller the appropriate toll set forth in its local tariff, even if both LEC calling areas are within the same MTA.

*Ibid.* The Bureau then concluded that Mountain had "effectively entered" a "wide area calling" arrangement and that as a result, "Qwest is not prohibited from assessing Mountain charges for its services." *Id.* at 2097 ¶ 13.

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<sup>25</sup> Qwest should have been collaterally estopped from re-litigating the unlawfulness of its Type 1 interconnection facilities charges, but Mountain did not raise this collateral estoppel issue before the FCC.

The Enforcement Bureau's conclusion failed to acknowledge that an Intra-MTA call from a LEC to CMRS falls under the FCC's reciprocal compensation rules and is defined by those rules as a local call. Additionally, the Bureau did not address the FCC's single point of interconnection requirement and the resulting traffic delivery obligation of Qwest. The Bureau also claimed: "[m]oreover, although Qwest concedes that it must allow Mountain to interconnect without charge at any point within an MTA that is within the LATA,<sup>26</sup> Qwest disagrees that it must transport, free of charge, all calls made to Mountain within the MTA to Mountain's interconnection point. Qwest points out that, for those calls made by its end users in local calling areas outside the local calling area where Mountain's interconnection point resides, Qwest would ordinarily assess toll charges to those end users, pursuant to Qwest's General Exchange tariff in Colorado."<sup>27</sup>

The Bureau's statement is inaccurate. As noted earlier in this brief, the rating of calls is determined by the NPA/NXX of the calling and called numbers not by the geographic location of an interconnection point used for routing to another carrier.<sup>28</sup> Mountain's establishment (or use) of locally rated number blocks (Type 1) to provide local calling for its subscribers is exactly the same as other CMRS carrier's establishment of Type 2 number blocks in Colorado for similar purposes.<sup>29</sup> The classification of these LEC-to-CMRS Intra-MTA calls as local by the FCC's rules, for purposes of reciprocal compensation, and Qwest's obligation to transport that traffic to a single point of interconnection in a LATA, is the same regardless of whether the

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<sup>26</sup> *Qwest Brief* at 11.

<sup>27</sup> *Id.*

<sup>28</sup> *Virginia Arbitration Order*, CC Docket No. 00-218, DA 02-1731 ¶ 301 (July 17, 2002).

<sup>29</sup> *See, Mountain Communications, Inc. v. Qwest Communications*, File No. EB-00-MD-017, Formal Complaint, at Exhibit 22, Type 1 and Type 2 Paging Connection Service Agreement, Sections 2.1.1 and 4. (Sept. 11, 2000) Formal Complaint

interconnection is Type 1 or Type 2.<sup>30</sup> Moreover, the application of Wide Area Calling Service is irrelevant and unwarranted because the rating of the calls is not in question. Mountain's complaint is based on a routing issue, namely Qwest's obligation for traffic delivery of local (as clearly defined by the FCC's rules) landline-to-CMRS calls.

Mountain asked the FCC to reconsider the Enforcement Bureau's order, noting the numerous errors that the Bureau had made. The FCC recognized that "the network configuration in the *TSR Wireless Order* is similar to Mountain's arrangement with Qwest," but concluded that "Mountain's understanding of wide area calling is incorrect." *Mountain Order on Review*, 17 F.C.C.R. 15135 ¶¶ 5-6 (July 25, 2002). According to the FCC, a "reserve billing arrangement is *only one of several types* of wide area calling services" and, therefore, Qwest may charge Mountain for the interconnection facilities. *Id.* (emphasis in original). In short, by expanding its definition of wide area calling services, the FCC was able to conclude that Qwest could charge for the very type of Type 1 interconnection facilities that two years earlier it had ruled was unlawful. The FCC further rejected Mountain's claim that Qwest's transit charges were unlawful, relying on its prior orders without discussion or analysis. *See id.* at ¶ 8.

The FCC thus ruled in favor of Qwest in the *Mountain Order* and against Qwest in the *TSR Order* – even though the underlying material facts in the two cases were identical.

### **SUMMARY OF ARGUMENT**

As the argument below will show, the FCC's decision concerning Qwest's charges for facilities to rout its own traffic is arbitrary and capricious. The FCC's decisions below are inconsistent with FCC's rules applying the Communications Act and those FCC cases

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<sup>30</sup> *Virginia Arbitration Order*, CC Docket No. 00-218, DA 02-1731, at , rel. 7/17/2002, 52 (July 17, 2002).

interpreting both the Communications Act and the FCC's rules implementing the Communications Act. Further, the FCC was without authority to repeal or amend its rules in an adjudicatory proceeding. For the FCC to repeal or amend its rules, it would have had to engage in notice and comment rulemaking, a step it did not and could not have taken in an adjudicatory proceeding.

The argument below will also establish that the billing arrangements between Mountain and Qwest did not constitute a "wide area calling" service. The record below clearly establishes that the arrangement between Mountain and Qwest lacked any of the elements traditionally found in a "wide area calling" service, as that service has been previously defined by the FCC. Lacking any evidence upon which to base its conclusion, the FCC's decision effectively, and without explanation, changes the definition of a "wide area calling" service. The FCC's new definition of "wide area calling" service is both without basis in the record and contrary to common interpretation of that term. As the FCC's new description of "wide area calling" service is without foundation, it is inaccurate and an improper basis for the FCC's decision below.

Mountain's argument which follows clearly demonstrates that the FCC's decision regarding Qwest's charges to the terminating carrier, Mountain, is arbitrary and capricious. Prior to its adoption of the decision under review, transit charges were applied based on a cost-causation principle, which principle worked well to assign charges rightfully to the entity which caused a carrier to incur costs. Stated simply, the carrier which demanded services in the form of requesting the routing of traffic by another carrier paid the charges for all such routing services. However, the FCC's decision below reverses this logical arrangement and allows a carrier of transit traffic to charge the terminating carrier for a portion of such routing services demanded by the originating carrier. As further evidence of the arbitrary nature of the FCC's decision, the agency

did not explain how the terminating carrier might obtain reimbursement for termination charges from the originating carrier, despite the FCC's claim that such charges are proper and lawful.

### STANDARD OF REVIEW

Under the Administrative Procedure Act, an FCC decision must be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “without observance of procedure required by law,” or “unsupported by substantial evidence.” 5 U.S.C. § 706(2)(A), (D)-(E). This Court will uphold an agency decision only if the FCC made factual findings supported by substantial evidence, considered the relevant factors, and “articulated a rational connection between the facts found and the choice made.” *See Motor Vehicle Manufacturers Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983); *Association of Data Processing Serv. Orgs. v. Board of Governors*, 745 F.2d 677, 683-86 (D.C. Cir. 1984); *Greater Boston Television v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

### ARGUMENT

#### **I. THE FCC DECISION CONCERNING QWEST'S FACILITIES CHARGES FOR ITS OWN TRAFFIC IS ARBITRARY AND CAPRICIOUS**

The law governing intercarrier interconnection was clear prior to the *Mountain Order*. In fact, this law was confirmed only eight days before the *Mountain Order* was released: terminating carriers had a right to establish a single point of interconnection in a LATA, and originating carriers were responsible for the costs of transporting their traffic to terminating carriers and were prohibited by rule from charging the terminating carriers for their interconnection facilities. Indeed, in the *TSR Order*, the FCC required Qwest to transport –

without charge – calls from its Flagstaff Type 1 office to the terminating carrier’s switch in Yuma, a distance of more than 240 miles.

The *Mountain Orders* changed all of this by the FCC’s finding an exception to its rules and its *TSR Order* by dramatically expanding the definition of “wide area calling arrangements” to encompass any situation where an originating LEC must transport its own calls beyond the originating local calling area – in short, the very situation covered by its rules and the *TSR Order*. This time, the FCC held that Qwest could charge for interconnection facilities that were more than 20 miles from the originating local calling area.<sup>31</sup> Under the FCC’s decision, Qwest may not charge one wireless carrier (TSR Wireless) for Type 1 interconnection facilities, but may charge another wireless carrier (Mountain) for such facilities.

The FCC is, of course, free to change its rules prospectively by commencing a rulemaking proceeding and providing an opportunity for public comment. Here, however, the FCC changed its rules retroactively in a complaint proceeding where third parties were prohibited from participating. The Administrative Procedures Act does not give the FCC the flexibility to act in such an arbitrary fashion.

**A. THE FCC’S DECISION BELOW IS INCONSISTENT WITH FCC RULES APPLYING THE COMMUNICATIONS ACT AND FCC CASES DIRECTLY ON POINT**

The order below is not simply inconsistent with the Communications Act and the FCC’s own rules, but inconsistent with FCC decisions directly on point – involving the identical subject matter and the identical local exchange carrier. The order under review constitutes the classic case of arbitrary and capricious agency decision-making. “A long line of precedent has

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<sup>31</sup> There is no clear justification for Qwest’s decision to limit its liability under 47 C.F.R. § 51.703(b) to interconnection circuits of twenty miles or less. See, Joint Statement of Mountain Communications and Qwest, etc. at ¶22. There is no distance limiter in the regulations, or in Section 252(d)(2) of the Act, or in

established that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.” *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999)(supporting citations omitted).

This is not the first time we have had to remind the [FCC] of the principle that agency action cannot stand when it is “so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.”

*Crosthwait v. FCC*, 584 F.2d 550, 556 (D.C. Cir. 1978), quoting *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975).

The FCC has ruled repeatedly – and consistently – that a LEC like Qwest may not charge a terminating carrier like Mountain for the interconnection facilities a LEC uses to deliver its traffic to the terminating carrier. See, e.g., 47 C.F.R. § 51.703(b); *Local Competition Order*, 11 F.C.C.R. 15499, 16028 ¶ 1062 (1996)(“The interconnecting carriers, however, should not be required to pay the providing carrier for one-way trunks . . . which the providing carrier owns and uses to send its own traffic to the interconnecting carrier.”); Letter from Chief, Common Carrier Bureau, to Southwestern Bell, 13 F.C.C.R. 184, 185 (Dec. 30, 1997)(There is “no basis for the argument . . . that LECs are permitted to assess charges on CMRS carriers to recover the costs of facilities that are used by LECs to deliver traffic to CMRS carriers.”).

Qwest nonetheless chose to ignore these FCC rules, orders, and staff confirmations by continuing to charge wireless carriers for the facilities connecting its Type 1 end offices and a wireless carrier’s single point of interconnection. In 1998, a paging carrier filed a complaint alleging that Qwest’s facility charges contravened FCC Rule 51.703(b). The FCC granted this complaint, holding that Qwest “cannot charge Complainants for the delivery of LEC-originated,

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the *TSR Order*, which in fact required Qwest to interconnect – at no charge to the terminating carrier – over a distance of 240 miles.

intraMTA traffic to the paging carrier's point of interconnection." *TSR Order*, 15 F.C.C.R. at 11176 ¶ 18. The FCC specifically ruled that Qwest's charges for the Qwest-owned facilities connecting its Type 1 end offices to the paging carrier's central interconnection point was "inconsistent with the language and intent of the [Local Competition] Order and the Commission's rules:"

Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic and would be inconsistent with the rules. Moreover, the [Local Competition] Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates.

*Id.* at 11181 ¶ 25.

Qwest challenged the FCC's decision in this Court. Finding the FCC's reasoning for its decision "compelling," this Court rejected Qwest's arguments and affirmed the FCC's decision: "the Commission's order simply requires the LECs to look to their own customers to recoup the needed costs of their facilities." *Qwest Corp. v. FCC*, 252 F.3d 462, 467-68 (D.C. Cir. 2001). Accordingly, FCC rules and administrative and judicial precedent all confirm that LECs may not charge terminating carriers for the facilities LECs use in delivering their traffic to the terminating carrier's network.

Qwest did not, however, eliminate its facility charges in response to the *TSR Order*. Rather, it decided to cancel such charges only for the first 20 miles of its facilities connecting its Type 1 end offices to a wireless carrier's point of interconnection (and to continue to charge the terminating carrier for any facility beyond 20 miles from the LEC's type 1 office).<sup>32</sup> Qwest adopted this "charge after 20-mile" policy even though the FCC was unequivocal in the *TSR*

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<sup>32</sup> See Joint Statement of Mountain and Qwest, at 8-9 ¶ 22 (Oct 17, 2000) (J.A. \_\_\_\_).

*Order* that Qwest could not charge a terminating carrier at all for its interconnecting circuit – even though the Flagstaff-Yuma circuit at issue was over 240 miles in length:

Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA . . . . For example, to the extent the Yuma-Flagstaff T-1 [interconnection facility] is situated entirely within an MTA, does not cross a LATA boundary, and is used solely to carry U S WEST-originated traffic, *U S West must deliver the traffic to TSR’s network without charge.*

*TSR Order*, 15 F.C.C.R. at 11184 ¶ 31 (emphasis added).

Mountain’s interconnection arrangement with Qwest is identical in all material respects to that involved in the *TSR Order*, except that the distance of Qwest’s interconnection facilities (Colorado Springs to Pueblo, and Walsenburg to Pueblo) is much, much shorter (about 45 miles). This time, however, the FCC ruled that Qwest could charge the paging carrier for the interconnection facilities. The FCC thus ruled in favor of Qwest in the *Mountain Order* and against Qwest in the *TSR Order* even though the underlying material facts are identical:

- In both cases, the paging carrier obtained local telephone numbers in a Qwest Type 1 end office that is in a local calling area different from its centralized interconnection point;
- In both cases, the Type 1 end office and the centralized interconnection point were located in the same Major Trading Area (“MTA”) and the same Local Access Transport Area (“LATA”); and
- In both cases, the paging carrier challenged the lawfulness of Qwest charges for the interconnection facilities between Qwest’s Type 1 serving office in one local landline calling area and the centralized paging interconnection point located in another landline local calling area.

While acknowledging that “Mountain is correct that the network configuration discussed in the *TSR Wireless Order* is similar to Mountain’s arrangement with Qwest,” *Mountain Order*, 17 F.C.C.R. 15135 ¶ 6, the FCC nonetheless ruled that Qwest could not charge one paging carrier (*TSR Wireless*) for an interconnection facility over 240 miles long (Flagstaff to Yuma, Arizona),

but could charge another paging carrier (Mountain) for interconnection facilities approximately 45 miles in length (Colorado Springs to Pueblo, and Walsenburg to Pueblo, Colorado).

The position the FCC adopted in the *Mountain Order* is also inconsistent with an order of the Chief of the Wireline Competition Bureau (formerly, the Common Carrier Bureau) released only eight days earlier. *See Virginia Arbitration Order*, CC Docket No. 00-218, DA 02-1731 (July 17, 2002).<sup>33</sup> This proceeding involved an interconnection arbitration between the incumbent LEC, Verizon, and several competitive LECs, and the Bureau therefore “appl[ie]d current Commission rules and precedents.” *Id.* at ¶ 3. Like Qwest, Verizon proposed to charge terminating carriers for a portion of the interconnection facilities, except that Verizon proposed to use a 25-mile rule rather than the 20-mile rule that Qwest had adopted. *See id.* at ¶ 37. The competitive LECs argued that Verizon’s proposal “violate[s] the Commission’s holding in the *TSR Wireless Order*, because Verizon’s proposals would make Cox, rather than Verizon, responsible for the costs of delivering Verizon-originated traffic to Cox.” *Id.* at ¶ 44. The Bureau agreed with the competitive LECs and rejected Verizon’s facility charge proposal:

Under the Commission’s rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA . . . . Furthermore, under these rules, to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic.

*Id.* at ¶ 52.

"It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent." *Channel 51 v. FCC*, 79 F.3d 1187, 1191 (D.C. Cir. 1996), *quoting Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995). The FCC in this case

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<sup>33</sup> The Wireline Competition Bureau’s July 17, 2002 *Verizon Arbitration Order* is also incompatible with the Enforcement Bureau’s February 4, 2002 *Mountain Bureau Order*.

did not explain the departure from its previous decisions that Qwest could charge some paging carriers (Mountain) for Type 1 interconnection facilities but not other paging carrier (TSR Wireless) for the same kind of Type 1 interconnection facilities. Here, the FCC's disparate rulings in the *TSR Order* and *Mountain Order* are arbitrary and capricious, and the *Mountain Order* must be vacated as a result.

**B. THE FCC DID NOT HAVE THE AUTHORITY TO REPEAL OR AMEND ITS RULES IN AN ADJUDICATORY PROCEEDING**

As a general rule, an agency can change course and modify its rules prospectively – so long as it provides “adequate explanation” for its change in course. *See, e.g., Petroleum Communications v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994). In this case, however, the FCC's ability to change course was severely limited, because it changed course in the context of a complaint (adjudicatory) proceeding rather than in a rulemaking proceeding.

It is a bedrock principle of administrative law that substantive rules must be repealed or modified through notice and comment rulemaking. As this Court has recognized, “an agency seeking to repeal or modify a legislative rule . . . is obligated to undertake [notice and comment rulemaking] procedures to accomplish such modification or repeal”:

Thus, unless and until it amends or repeals a valid legislative rule or regulation, an agency is bound by such a rule or regulation. . . . These fundamental principles would be vitiated if an agency could validly justify an adjudication [in order to change a] longstanding interpretation. . . . [Otherwise] administrative agencies would effectively repeal legislative rules and abandon longstanding interpretations of statutes indirectly, by adjudication, without providing affected parties any opportunity to comment on the proposed changes, and without providing any significant explanation for their departure from their established views.

*American Federation of Government Employees v. FLRA*, 77 F.2d 751, 759 (D.C. Cir. 1985).

*See also C.F. Communications v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997)(“But to [change its rules], [the FCC] must use the notice and comment procedure of the Administrative Procedure

Act. It may not bypass this procedure by rewriting its rules under the rubric of ‘interpretation.’”).<sup>34</sup>

As noted above, FCC rules and orders explicitly prohibit a local exchange carrier like Qwest from charging terminating carriers for the LEC’s interconnection facilities. This was a point that Qwest told the FCC it did not contest:

Qwest is not disputing its basic obligation to interconnect at any point within the MTA (within the LATA). Indeed, Mountain may interconnect with Qwest at a *single POC* [Point of Connection] within the LATA if it so chooses, and will *not be charged for any intraLATA facilities (other than transit charges)*.<sup>35</sup>

The FCC applied its Rule 51.703(b) in the *TSR Order* (and the *Virginia Arbitration Order*), but did not apply the same Rule in the *Mountain Order* under review – even though the underlying facts were identical in all material respects. For all practical purposes, the FCC repealed its Rule 51.703(b) in the order under review – something it may not do in an adjudicatory proceeding outside the context of a rulemaking.<sup>36</sup>

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<sup>34</sup> The FCC has itself acknowledged that it is “inappropriate” to consider challenges to rules “in a restricted adjudicatory proceeding, ‘where third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record.’” *Great Empire Broadcasting*, 14 F.C.C.R. 11145, 11148 ¶ 8 (1999). *See also id.* (“[T]he Administrative Procedure Act (“APA”) contemplates that a substantive rule would be amended or repealed by a rulemaking under the APA. 5 U.S.C. § 553(e).”).

<sup>35</sup> Qwest Brief on the Disputed Material Facts, at 11 (Jan. 19, 2001)(emphasis added) (J.A. \_\_\_\_).

<sup>36</sup> The *Virginia Arbitration Order* noted that issues regarding points of interconnection and “virtual” numbers were currently being reviewed in CC Dkt. No 01-92, which is the Commission’s Notice of Proposed Rulemaking into the current intercarrier compensation regime. Essentially the *Virginia Arbitration Order* (at paragraph 54) concurred with the position taken by appellants and intervenors here, i.e., that any change in current rules must await the outcome of a formal rulemaking, rather than being the result of ad hoc complaint procedures.

**C. THE FCC’S CONCLUSION THAT THE MOUNTAIN/QWEST ARRANGEMENT CONSTITUTED A “WIDE AREA CALLING” SERVICE IS INCONSISTENT WITH THE RECORD EVIDENCE**

The FCC recognized in its *Mountain Order* that, under its rules and the holding in its *TSR Order*, “a LEC may not charge a CMRS carrier for the delivery of LEC-originated traffic that originates and terminates within the same Major Trading Area (“MTA”).” *Mountain Order* at ¶ 6. Yet, the FCC ruled that Qwest could charge Mountain for its interconnection circuits even though Qwest’s Type 1 serving offices and Mountain’s point of interconnection are located in the same MTA – the very charges prohibited by FCC rules and the *TSR Order*. The FCC achieved this result by redefining, and substantially expanding, the definition of a “wide area calling” service. As demonstrated below, the FCC’s new definition is so sweeping in scope that it effectively repeals Rule 51.703(b) and vacates the holding in the *TSR Order* (as well as the *Virginia Arbitration Order*).

The FCC made clear in its *TSR Order* that its interconnection rules address only “how carriers must compensate each other for the transport of calls” and do “not address the charges that carriers may impose upon their end users.” *TSR Order*, 15 F.C.C.R. at 11184 ¶ 31. The FCC confirmed that its rule prohibition on facility charges does not prevent the originating LEC from charging its own calling customers toll charges in the appropriate circumstances (*i.e.*, the telephone numbers of the calling and called parties are rated in different exchanges), and that this arrangement “may result in the same call being viewed as a local call by the carriers and a toll call by the end-user”:

For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA, does not cross a LATA boundary, and is used solely to carry [Qwest]-originated traffic, [Qwest] must deliver the traffic to TSR's network without charge. However, nothing prevents [Qwest] from charging its end users for toll calls completed over the Yuma-Flagstaff T-1.

*TSR Order*, 15 F.C.C.R. at 11184 ¶ 31. The FCC further recognized that Qwest offered wireless carriers a “wide area calling” service and that its rule prohibition on facility charges does not preclude Qwest from charging wireless carriers for this service:

Similarly, section 51.703(b) does not preclude TSR and [Qwest] from entering into wide area calling or reverse billing arrangements whereby TSR can “buy down” the cost of such toll calls to make it appear to end users that they have made a local call rather than a toll call. Should paging providers and LECs decide to enter into wide area calling or reverse billing arrangements, nothing in the Commission's rules prohibits a LEC from charging the paging carrier for those services.

*Ibid.*

The FCC concluded in the order under review that Mountain had ordered Qwest’s “wide area calling” service as defined in the *TSR Order*:

As the Commission pointed out in the *TSR Wireless Order*, wide area calling allows a paging carrier to subsidize the cost of calls from a LEC's customers to the paging carrier's customers, *when the LEC must complete those calls by transporting the calls from one local calling area to another.*

*Mountain Order* at ¶ 5, *citing TSR Order*, 15 F.C.C.R. at 11177 ¶¶ 30-31 (emphasis added).

Contrary to the *Mountain Order*, the *TSR Order* did *not* hold that a “wide area calling” service exists “when the LEC must complete those calls by transporting the calls from one local calling area to another.” On the contrary, the *TSR Order* explicitly held that transport between local calling areas must be provided and provided “without charge” (so long as the interconnection facility is in the same LATA). Instead, “wide area calling” under *TSR* exists where the originating carrier has agreed not to impose toll charges on its own customers where they would otherwise apply.<sup>37</sup> There is nothing in the record here to reflect any agreement or arrangement by which Qwest has foregone any possible toll charges for calls between Qwest and Mountain

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<sup>37</sup> See *TSR Order*, 15 F.C.C.R. at 11168 n.6 (“Wide area calling, also known as ‘reverse billing’ or ‘reverse toll,’ is a service in which a LEC agrees with an interconnector not to assess toll charges on calls

customers in different rate centers. On the contrary (*see* diagrams above), calls by Qwest users to Mountain numbers will continue to be billed as toll or local depending on the rate centers of the calling and called numbers. This is the very same regime that applies to calls between Qwest's own customers, and which would apply to calls between Qwest and other competitive carriers with numbers in the same rate centers.<sup>38</sup> Put simply, the FCC in *Mountain* misinterpreted its own *TSR Order* and confused the rules that govern the interconnection between carriers and the manner in which an originating carrier bills its own customers for retail services provided.<sup>39</sup>

The FCC further held that “Mountain prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain’s network.” *Mountain Order on Review*, at ¶ 5. This is not accurate, and there is no record evidence to support it. As demonstrated at pages 6-8 *supra*, Qwest is free to impose toll charges if a customer in one of its local calling areas (*e.g.*, Colorado Springs) calls a Mountain customer in a different local calling area (*e.g.*, Pueblo). Further, the FCC’s rules establish that Mountain is entitled to maintain a single point of interconnection within a LATA, and this is a fact Qwest did not dispute.<sup>40</sup> Nevertheless, if the

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from the LEC's end users to the interconnector's end users, in exchange for which the interconnector pays the LEC a per-minute fee to recover the LEC's toll carriage costs.”).

<sup>38</sup> See *Virginia Arbitration Order*, CC Docket No. 00-218, DA 02-1731, at ¶ 301 (2002)(noting this practice is used “industry-wide”)

<sup>39</sup> The rules that govern interconnection allow CMRS and other competing providers to designate a single point of interconnection in each LATA, and require the originating ILEC to deliver its calls (at its own expense) to that point. See above at pages 8-14. The rules that govern call rating allow the originating carrier to impose toll charges on its own customers when they call a number with a different rate center. Qwest’s right to charge tolls for calls among the Colorado Springs, Pueblo and Walsenburg rate centers is utterly unaffected by the fact that it must transport those calls to Mountain’s Pueblo location so that Mountain may then terminate the calls in the intended local calling area.

<sup>40</sup> See, *e.g.*, *Unified Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 9650 ¶ 112 (2001)(“[A]n ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA.”). See also Qwest Brief on the Disputed Material Issues, at 11 (Jan. 19, 2001)(“Qwest is not disputing its basic obligation to interconnect at

FCC's decision is allowed to stand, it will remove the ability of a CMRS carrier to maintain only a single point of interconnection within a LATA. Following the FCC's decision, a CMRS carrier will need a point of interconnection in each local calling area to avoid incurring facilities charges imposed upon it by a LEC. This result is contrary to the Commission's rules and decisions, illogical, and cannot be allowed to stand.

Similarly inconsistent with the facts was the FCC's assertion that Mountain ordered a "wide area calling" service from Qwest's tariffs. *See Mountain Order on Review* at ¶ at 5. Mountain could not have possibly ordered "wide area calling" service under Qwest tariffs. As noted above, those tariffs provide that "wide area calling" service is available only if the wireless carrier uses Type 2 interconnection, but Mountain uses Type 1 interconnection. *See* pages 14-16 *supra*.

In the end, through the simple expedient of changing (actually, expanding) its definition of wide area calling, the FCC was able to rule that the very Qwest facility changes that were deemed unlawful only two years earlier were now suddenly lawful. This constitutes arbitrary and capricious decisionmaking.

## **II. THE FCC DECISION CONCERNING QWEST'S TRANSIT CHARGES IS ARBITRARY AND CAPRICIOUS**

No one questions the right of a transit carrier like Qwest to receive compensation for its transit services, where it forwards traffic from an originating network to the terminating network. There is also no issue over the originating carrier's ultimate responsibility to pay for all transit costs. As the FCC has stated in the order under review:

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any point within the MTA (within the LATA). Indeed, Mountain may interconnect with Qwest at a *single POC* [Point of Connection] within the LATA if it chooses, and will not be charged for any intraLATA facilities (other than transit charges.")(emphasis in original) (J.A. \_\_\_\_).

[T]he Commission and the Bureau have made clear that a terminating carrier may seek reimbursement of these costs from originating carriers through reciprocal compensation.

*Mountain Order on Review* at n.13 (internal citations omitted). Nevertheless, in the order under review, the FCC held that a transit carrier may bill the terminating carrier some of its transit costs – specifically, “a portion of the facilities used for the transport of transiting traffic.” *Id.* at ¶ 2.

There are three separate flaws with this FCC order. First, the one reason that the FCC recited in support of its decision is meritless. Second, the FCC’s assertion that a terminating carrier can recover transit costs from the originating carrier under FCC intercarrier compensation rules is never explained, and appears inconsistent with those rules. Third, the record evidence before the FCC was uncontroverted that the reimbursement right it extended to terminating carriers is illusory, because transit carriers do not furnish to terminating carriers the information they need to seek reimbursement from the originating carrier.

**A. THE FCC’S DECISION BELOW IS UNEXPLAINED AND INCONSISTENT WITH CORE COST-CAUSATION PRINCIPLES**

The FCC has declared that its interconnection compensation rules “follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic, and ultimately their customers.” *Texcom v. Bell Atlantic*, 16 F.C.C.R. 21493, 21495 ¶ 6 (2001). The FCC’s current rules allocate *all* of the cost of a call to the originating caller and/or the caller’s carrier.<sup>41</sup> The order under review contravenes this fundamental cost-causer principle, because it is the originating carrier that chooses to interconnect indirectly (rather than directly) with the terminating carrier and thus decides to use an intermediary carrier’s transit services. The Bureau’s contention that the terminating carrier is somehow responsible for the transport of the traffic

prior to its point of interconnection with the network sending it the traffic is contrary to the FCC's current rules.

As noted above, Qwest has stated it performs five different functions in providing its transit services, and it bills the originating carrier for four of these functions and the terminating carrier (here, Mountain) for the fifth function (use of the interconnection facility). *See* pages 22-23 *supra*. On its face, Qwest's practice of billing the terminating carrier for transit calls traversing the interconnection facility contravenes cost-causation principles, because it is the originating carrier that chooses to interconnect with the terminating carrier indirectly (rather than directly).

The FCC nonetheless rejected Mountain's challenge to Qwest's transit charges, reciting its *Texcom Order*, which in turn, recited its *TSR Order*. *See Mountain Order* at ¶ 2 and n.8. The FCC's discussion of transit traffic in the *TSR Order*, however, was limited to the following sentence buried in footnote 70:

Complainants are required to pay for "transiting traffic," that is, traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier's network. *See Local Competition Order*, 11 FCC Rcd at 16016-17.

*TSR Order*, 15 F.C.C.R. at 11177 n.70.

The problem with this statement is that the citation, "*Local Competition Order*, 11 FCC Rcd at 16016-17," does not support the proposition for which it is cited. Specifically, the two cited pages from the *Local Competition Order* do not discuss transit arrangements. Thus, the

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<sup>41</sup> See, FCC, NOTICE OF PROPOSED RULEMAKING; In the Matter of Developing a Unified Intercarrier Compensation Regime CC Docket No. 01-92 , Rel. April 27, 2001, Paragraphs 8 and 19, Footnotes 8, and 36.

FCC's one sentence statement in its *TSR Order* – terminating carriers “are required to pay for ‘transiting traffic,’” – is both unexplained and without legal support.<sup>42</sup>

The FCC's decision that a transit carrier may bill the terminating carrier for the interconnection facility, rather than the cost causer (*i.e.*, the originating carrier choosing to use the transit services), is irrational in addition to being unexplained. It makes no sense administratively for the transit carrier to issue two bills for each transit call: one bill to the originating carrier (for four steps), and a second bill to the terminating carrier (for the fifth step). Such an arrangement is inefficient for the transit carrier (because it must render two bills rather than one), and is equally inefficient for the terminating carrier, because it is then forced to prepare a third bill in an attempt to obtain reimbursement from the originating carrier. The billing arrangement that the FCC sanctioned below results in three transit bills for one telephone call – needlessly increasing costs to all carriers without any corresponding benefit.

Further, applying simple economic logic, the charges for transiting traffic must logically be levied on the entity demanding such service, the originating carrier. The FCC's decision allows for the transit carrier, Qwest, to bill the terminating carrier, Mountain, for services which the terminating carrier did not demand and at a level which is fully outside the control of the terminating carrier. The billable transaction occurs solely between the originating carrier and the transit carrier, to which the terminating carrier is not privy. To create in the terminating carrier the status of a third party guarantor of a portion of those charges, which are created by the

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<sup>42</sup> The paging carriers involved in the *TSR Order* did not to appeal the FCC's decision on this transit issue. Thus, this Court has not had an opportunity to consider this transit issue. See *Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001). However, another party raised the transit issue in a reconsideration petition filed in response to the *TSR Order*. The FCC dismissed this petition because the petitioner was not a party to the TSR complaint proceeding and because the petitioner did not explain why it “could not participate in the proceeding at an earlier stage.” *TSR Reconsideration Order*, 16 F.C.C.R. 11462 (May 22, 2001). The FCC apparently takes the view that the reconsideration petitioners should have divined that

unilateral demands of the originating carrier upon the facilities of the transit carrier, is inequitable and legally unsupportable.

In the end, the FCC has supplied no reason for its holding that a transit service provider may bill a terminating carrier as opposed to the originating carrier for a portion of the interconnection facilities used for the transport of transiting traffic, when as the FCC readily acknowledges, it is the originating carrier that is ultimately responsible for all transit costs. The FCC's decision below that Qwest may charge Mountain for certain transit costs is unexplained and arbitrary and capricious as a result.

**B. THE FCC NEVER EXPLAINS HOW ITS INTERCONNECTION COMPENSATION RULES PERMIT A TERMINATING CARRIER TO RECOVER TRANSIT COSTS PAID FROM THE ORIGINATING CARRIER**

According to the FCC, “a terminating carrier may seek reimbursement of these [transit] costs from originating carriers through reciprocal compensation.” *Mountain Order* at n.13. The FCC, however, never explained how its reciprocal compensation rules permit such a reimbursement.

The Communications Act imposes on LECs the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). FCC rules define “transport” as the transmission of telecommunications traffic “*from the interconnection point between two carriers to the terminating carrier’s end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.*” 47 C.F.R. § 51.701(c)(emphasis added). At issue in this appeal is an interconnection facility that is located *before* the terminating carrier’s interconnection point (*e.g.*,

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the FCC planned to change how transit carriers recover their costs *before* the FCC even entered its *TSR Order*.

the facility connecting Qwest's Type 1 office in Colorado Springs with Mountain's interconnection point in Pueblo). Because Rule 51.701(c) appears to apply only to those facilities on the terminating carrier's side of the interconnection point, it would appear that the Qwest interconnection facility at issue here is not included within the FCC rule definition of "transport."

More fundamentally, only eight days before FCC released its *Mountain Order*, the FCC's Wireline Competition Bureau ruled that transit services were not within the scope of Section 251(b)(5) of the Act and the FCC's implementing interconnection rules:

[T]he Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates.

*Virginia Arbitration Order* at ¶ 117. The FCC's unexplained conclusion in the *Mountain Order* that transit services are subject to its reciprocal compensation rules is thus inconsistent with the views of its own staff.

The important point for purposes of this appeal is that the Commission has never explained how a terminating carrier can recover under its reciprocal compensation rules billed transit costs from the originating carrier. This omission further renders the orders under review arbitrary and capricious.

**C. THE FCC FAILED TO ACKNOWLEDGE THE UNDISPUTED EVIDENCE THAT ITS REIMBURSEMENT SCHEME IS NOT WORKABLE AND THAT THE SUPPOSED RIGHT OF REIMBURSEMENT IS ILLUSORY**

As noted, the FCC recognizes that the originating carrier is ultimately responsible for paying all transit costs, including those incurred in delivering the originating carrier's traffic to the terminating carrier's interconnection point. The FCC nonetheless decided that, unlike all

other transit costs (where the transit carrier bills the originating carrier), the transit carrier can bill the terminating carrier for a “portion” of the interconnection facility, after which the terminating carrier would then seek reimbursement from the originating carrier. *See Mountain Order* at n.13.

This reimbursement scheme works only if the transit carrier provides to the terminating carrier information about the identity of the originating carrier, so the terminating carrier can seek reimbursement from the originating carrier. However, the uncontroverted record evidence before the FCC was that Qwest does *not* send to Mountain the information Mountain needs to identify and bill the originating carrier. Specifically, Qwest never disputed Mountain’s point:

Qwest claims that “[Mountain] may seek compensation for such charges directly from the originating carrier or IXC,” is technically impossible. Qwest does not send any call information to Mountain on Type 1 calls, and thus it is not possible for Mountain to bill a carrier when it is not furnished any originating call information.<sup>43</sup>

If, as the FCC has held, the originating carrier is responsible for all transit costs, it is arbitrary and capricious for the FCC to permit the transit carrier to bill the terminating carrier when the transit carrier does not provide the information the terminating carrier needs to seek reimbursement from the originating carrier.

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<sup>43</sup> Mountain’s Opposition to Qwest’s Motion to Dismiss at 9 (Jan. 9, 2001) (J.A. \_\_\_\_). *Compare AT&T v. FCC*, 292 F.3d 808, 810 (D.C. Cir. 2002)(Court notes that the terminating carrier was “unable to identify and block the traffic on a CLEC-specific basis” because “the CLECs first routed their traffic to a tandem switch operated by the ILEC in their area” and by “the time the call reached AT&T’s network, it was intermingled with the [transit] traffic of other carriers.”).

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court vacate the order under review and remand the matter to the FCC for further proceedings not inconsistent with the Court's opinion.

Respectfully submitted,

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April 18, 2003

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## **CERTIFICATE OF COMPLIANCE**

Under Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit rule 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations.

Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 13,604 words and, therefore, complies with the Court's Order issued on February 26, 2003. This certificate was prepared in reliance on the word count of the word-processing system (Word/WP) used to prepare this brief.

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Benjamin J. Aron

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing "Petitioner's Brief" were served *via* hand delivery and/or First Class U.S. Mail upon the below listed parties on this 18<sup>th</sup> day of April, 2003.

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