

BRIEF FOR RESPONDENTS

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

\_\_\_\_\_  
No. 02-1255  
\_\_\_\_\_

MOUNTAIN COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

Respondents.

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ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION  
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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

### A. Parties:

All parties, intervenors, and amici appearing below and in this Court are listed in the Brief of Petitioner.

### B. Rulings Under Review:

Mountain Communications, Inc. v. Qwest Communications International, Inc., 17 FCC Rcd 2091 (Enf. Bur. 2002) (“Staff Order”) (J.A. ), 17 FCC Rcd 15135 (“Order”) (J.A. ).

### C. Related Cases:

This case has not previously been before this court or any other court. Counsel are not aware of any related cases currently pending before this or any other Court.

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## **GLOSSARY**

APA	Administrative Procedure Act
CLEC(s)	competitive local exchange carrier(s)
CMRS	Commercial Mobile Radio Service
CPNP	Calling Party Network Pays
DID	direct inward dialing
IXC(s)	interexchange carrier(s)
LATA	local access and transport area
LEC(s)	local exchange carrier(s)
Mountain	Mountain Communications, Inc.
MTA(s)	major trading area(s)
POC	point of connection
Qwest	Qwest Communications International

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ON PETITION FOR REVIEW OF AN ORDER  
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BRIEF FOR RESPONDENTS

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**STATEMENT OF ISSUES PRESENTED**

The Federal Communications Commission in the complaint proceeding on review upheld certain charges that Qwest Communications International (“Qwest”), an incumbent local exchange carrier (“LEC”), had assessed upon Mountain Communications, Inc. (“Mountain”), a paging company. Mountain Communications, Inc. v. Qwest Communications International, Inc., 17 FCC Rcd 2091 (Enf. Bur. 2002) (“Staff Order”) (J.A. ), 17 FCC Rcd 15135 (“Order”) (J.A. ). The issues on review are as follows:

1. Whether the Commission reasonably determined that Qwest lawfully had charged Mountain for certain dedicated toll facilities used to deliver traffic to Mountain because those facilities were part of a wide area calling arrangement?

2. Whether the Commission reasonably determined that Qwest lawfully had charged Mountain for transporting to Mountain traffic that originates on the networks of third carriers?

### **STATUTES AND REGULATIONS**

The pertinent statutes and regulations are reproduced in an appendix to this brief.

### **COUNTERSTATEMENT OF THE CASE**

#### **I. Background**

“Historically, paging has been a one-way wireless radio-transmission using coded radio signals to activate a device that provides an audio, visual, or tactile indicator.”<sup>1</sup> One-way paging services – the kind of services offered by Mountain Communications, Inc. – involve the conveyance of a message to a small portable wireless receiver, or pager, that the paging service provider furnishes to its subscriber. The subscriber carries the pocket-sized pager that is designed to alert him that someone is trying to contact him. See Pocket Phone Broadcast Service v. FCC, 538 F.2d 447, 449 (D.C. Cir. 1976).

One-way paging services can involve either local or interexchange communications. Local paging calls generally originate on the facilities of a local exchange carrier (“LEC”) and are conveyed to the paging carrier for termination on the pager belonging to the paging carrier’s customer. An interexchange paging call also generally originates on the facilities of a LEC, which sends the message to the facilities of an interexchange carrier (“IXC”) for transmission to

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<sup>1</sup> Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 14 FCC Rcd 10145, 10180 (1999).

the LEC in the local serving area of the called party; that LEC in turn hands the call off to the paging carrier for termination.

At least three different “area” concepts apply to the providers of the services involved in this case. First, the Local Access and Transport Area (“LATA”) is the area within which a LEC is authorized to provide local exchange telephone service or exchange access services. A LATA may be an entire state, or it may be a more limited area within a state that includes one or more local exchanges. A LEC providing service within a LATA may offer interexchange toll service within the LATA as well as flat-rated local exchange service.<sup>2</sup>

Second, the local service area of a LEC is the area within which the LEC provides local service without toll charges.<sup>3</sup> This area often is defined by a state regulatory body, and the state’s definition of the local service area generally determines indirectly which calls are subject to toll charges. A LEC also may extend toll-free service to include service within several local service areas in an arrangement known as wide area service.

Third, a Major Trading Area (“MTA”) is the local service area of a wireless telephone carrier, known generally as a Commercial Mobile Radio Service (“CMRS”) carrier.<sup>4</sup> MTAs often are larger than the local service areas that apply to wireline LECs. See Staff Order, 17

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<sup>2</sup> See Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1046 (D.C. Cir. 1997). See also 47 U.S.C. § 153(25).

<sup>3</sup> See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 360, 370 (1999) (“AT&T Corp.”).

<sup>4</sup> CMRS are mobile telecommunications services that are provided for profit and make interconnected service available to the public (or to such classes of eligible users as to be effectively available to a substantial portion of the public). 47 C.F.R. § 20.3(a). See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 10 FCC Rcd 8844, 8844-45 (¶ 1) (1995). Paging carriers are CMRS providers.

FCC Rcd at 2092-93 n.11 (J.A. ). CMRS carriers are not regulated by state commissions and are free to set their own rates without regard to MTA boundaries.

Mountain offers one-way paging services to customers in a MTA that encompasses the Colorado communities of Colorado Springs, Pueblo, and Walsenburg. Qwest, the incumbent LEC that offers local telephone service in the relevant Colorado communities, is the interconnecting LEC for Mountain's paging services and transports calls from its telephone network to Mountain's network.<sup>5</sup> Mountain in turn transports the calls to its subscribers' pagers.

Although Colorado Springs, Pueblo, and Walsenburg are located in the same LATA and the same MTA, they are in different LEC local service areas. Thus, any telephone call between these communities (e.g., a Colorado Springs-to-Pueblo call or a Walsenburg-to-Colorado Springs call) is a toll call under Qwest's intrastate telephone tariff.

Mountain has a single point of connection ("POC") with Qwest in the relevant MTA, which is located in Pueblo. For purposes of serving its own customers, however, Mountain assigns them direct inward dialing ("DID") numbers that are associated with Qwest switches in each of Qwest's Pueblo, Walsenburg and Colorado Springs central offices.<sup>6</sup> Mountain then obtains from Qwest dedicated toll facilities connecting all of these DID numbers to Mountain's single POC in Pueblo.<sup>7</sup> This arrangement enables Mountain to offer its subscribers in each of the communities paging numbers that can be called by LEC subscribers in that local service area

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<sup>5</sup> Staff Order, 17 FCC Rcd at 2091 (¶ 2) (J.A. ).

<sup>6</sup> Mountain's subscribers in Pueblo thus have numbers that are associated with Qwest's Pueblo local service area, Mountain's Walsenburg customers have Walsenburg numbers, and its Colorado Springs customers have Colorado Springs numbers. For a definition of DID, see Staff Order, 17 FCC Rcd at 2098 n.14 (J.A. ).

<sup>7</sup> Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 4 (¶ 8) (Jan. 19, 2001) (J.A. ).

without toll charges. For example, under the arrangement it obtains from Qwest, Mountain can provide a subscriber in Walsenburg with a paging number from the Walsenburg central office, even though Mountain does not have a POC in Walsenburg. As a result, calls from a LEC subscriber in Walsenburg to the Mountain subscriber (who may or may not be in Walsenburg at the time of a particular call) appear to be local calls, and the party calling the pager incurs no toll charges, even though Qwest delivers the call to Mountain outside the Walsenburg service area. In the absence of the dedicated toll facilities connecting the three communities to make up a wide-area service arrangement, persons in Walsenburg calling the Mountain pager ordinarily would be charged for a toll call because Mountain has no POC in Walsenburg and the call would have to be transported from one LEC service area (Walsenburg) to another (Pueblo).<sup>8</sup> Qwest bills the paging carrier a flat monthly rate for the dedicated facilities across its toll network.<sup>9</sup>

#### **A. Statutory and Regulatory Background**

The Communications Act of 1934 (“1934 Act”) gives the Commission responsibility to adjudicate private disputes concerning the lawfulness of a common carrier's actions. 47 U.S.C. §§ 206-209. Section 208(a) allows any person “complaining of anything done or omitted to be done by any common carrier subject to this [1934 Act], in contravention of the provisions thereof,” to file a complaint with the Commission. 47 U.S.C. § 208(a). The Commission has a duty to rule upon the issues raised by the complainant, American Telephone & Telegraph Co. v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992), cert. denied, 509 U.S. 913 (1993), but it has discretion to investigate the complaint “in such manner and by such means as it shall deem proper,” 47

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<sup>8</sup> See Answer, Exh. 1 (Declaration of Vicki Boone) at 4 (J.A. ).

<sup>9</sup> Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 4 (¶ 7) (J.A. ).

U.S.C. § 208(a). The complainant bears the burden of proving that the carrier violated the Act or regulations implementing the Act.<sup>10</sup> The Commission has authority to award monetary damages to the complainant. 47 U.S.C. § 209.

Section 332 – a provision of the Act specifically pertaining to mobile services – directs the Commission, upon receipt of a reasonable request from a CMRS provider, to order a common carrier to establish physical connection with that CMRS provider pursuant to section 201(a). 47 U.S.C. § 332(c)(1)(B). Section 201(a) authorizes the Commission to require a common carrier “to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.” 47 U.S.C. § 201(a). The Commission’s authority with respect to mobile services under section 332 applies to both interstate and intrastate interconnections.<sup>11</sup>

Section 251(b)(5), added to the Communications Act as part of the Telecommunications Act of 1996,<sup>12</sup> requires LECs to “establish reciprocal compensation arrangements for the

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<sup>10</sup> E.g., High-Tech Furnace Systems v. FCC, 224 F.3d 781, 787 (2000); American Message Centers v. FCC, 50 F.3d 35, 41 (D.C. Cir. 1995).

<sup>11</sup> Although section 2(b) of the 1934 Act generally denied the Commission jurisdiction over intrastate communications, see Louisiana PSC v. FCC, 426 U.S. 355 (1986), Congress made an exception to that jurisdictional limitation for matters regulated under section 332. See 47 U.S.C. § 152(b). See also AT&T Corp. v. Iowa Utilities Bd., 525 U.S. at n.8 (1996 amendments to 1934 Act extended FCC authority over local competition and thus lessened the practical effect of section 2(b) as a limitation on FCC jurisdiction).

<sup>12</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

transport and termination of telecommunications.”<sup>13</sup> 47 U.S.C. § 251(b)(5).<sup>14</sup> In the rulemaking proceeding that implemented this statute, the Commission determined that section 251(b)(5) applied to interconnections between LECs and CMRS providers, “including one-way paging providers, for the transport and termination of traffic on each other’s networks.”<sup>15</sup> The Commission held further that section 251(b)(5) applies only to local telecommunications traffic, i.e., traffic that originates and terminates within the MTA, and not to long-distance or toll interstate traffic.<sup>16</sup> The Commission in that proceeding also adopted section 51.703(b), a regulation that states that a “LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC’s network.” 47 C.F.R. § 51.703(b). This regulation addressed a common practice under which LECs had charged paging carriers for the privilege of terminating calls that originated with LEC subscribers.

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<sup>13</sup> The term “telecommunications” as defined in the 1996 Act is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43).

<sup>14</sup> Under reciprocal compensation arrangements, “when a customer of LEC A calls a customer of LEC B, LEC A must pay LEC B for completing the call.” Bell Atlantic Telephone Companies, 206 F.3d 1, 4 (D.C. Cir. 2000). See also Global Naps, Inc. v. FCC, 247 F.3d 252, 254 (D.C. Cir. 2001).

<sup>15</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15997 (¶ 1008) (1996) (“Local Competition Order”), vacated in part, affirmed in part, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev’d in part, affirmed in part, AT&T Corp., 525 U.S. 360.

<sup>16</sup> Local Competition Order, 11 FCC Rcd at 16013 (¶ 1034). See also Global Naps, Inc. v. FCC, 247 F.3d at 254; Bell Atlantic Telephone Companies v. FCC, 206 F.3d at 2. The Commission determined that “traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties’ locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5).” Local Competition Order, 11 FCC Rcd at 16016 (¶ 1043). The Commission changed its definition of what is covered by section 251(b)(5) in its ISP Remand Order, 16 Rcd 9151 (2001), but made clear in that order the change had no impact on CMRS traffic, id., 16 FCC Rcd at 9173 (¶ 47). This Court set aside the ISP Remand Order on review. Worldcom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002).

**B. TSR Wireless Order**

In TSR Wireless, LLC v. U S West Communications, Inc., 15 FCC Rcd 11166 (2000) (“TSR Wireless”), aff’d, Qwest Corp. v. FCC, 252 F.3d 462 (D.C. Cir. 2001) (“Qwest Corp.”), the Commission granted in part and denied in part the complaints of five paging carriers alleging inter alia that certain LECs had charged them for facilities that were used in the delivery of LEC-originated traffic to paging carriers, in violation of section 51.703(b). The Commission in that order reaffirmed the applicability of the reciprocal compensation requirements of section 251(b)(5) to local calls that are delivered to one-way paging carriers. 15 FCC Rcd at 11176-78 (¶¶ 18-21). Because reciprocal compensation governed the payment obligation for such calls, LECs could not charge paging carriers for the local traffic the LECs handed off to them. The Commission also held that LECs could not circumvent the requirement in section 51.703(b) by “redesignating . . . ‘traffic’ charges as ‘facilities’ charges.” 15 FCC Rcd at 11181 (¶ 25).

The Commission made clear in that order, however, that section 51.703(b) does not bar LECs in all circumstances from imposing charges on a paging carrier in connection with traffic that terminates on a paging carrier’s network. See Qwest Corp. v. FCC, 252 F.3d at 468 (paging carrier must pay for facilities in some circumstances). First, the Commission stated that LECs lawfully could charge paging carriers for transiting traffic, i.e., “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.” TSR Wireless, 15 FCC Rcd at 11177 n.70.<sup>17</sup> See Qwest Corp., 252 F.3d at 468.

Second, the Commission determined that section 51.703(b) does not prohibit LECs from charging paging carriers for facilities used to permit wide area calling “or similar services.” 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). The Commission pointed out that such services “are not necessary for interconnection or for the provision of [a paging carrier's] service to its customers.” 15 FCC Rcd at 11184 (¶ 30). Wide area calling services instead permit a paging carrier to “‘buy down’ the cost of . . . toll calls to make it appear to end users that they have made a local call rather than a toll call.” 15 FCC Rcd at 11184 (¶ 30). This is advantageous to the paging carrier because it allows more calls to paging subscribers to be considered local (non-toll) and thus to make the paging service more useful to those subscribers. Because LECs are under no obligation “to provide such services at all,” the Commission found that “it would seem incongruous for LECs who choose to offer these services not to be able to charge for them.” 15 FCC Rcd at 11184 (¶ 30).

### C. Qwest-Mountain Arrangements

On July 24, 2000, Qwest informed Mountain and other paging companies by letter that it was revising its billing policies in order to comply with TSR Wireless.<sup>18</sup> Qwest specified that it

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<sup>17</sup> In the damages phase of that proceeding, the Commission reiterated that TSR Wireless “unambiguously permitted LECs to charge paging carriers for ‘transiting traffic.’” Metrocall v. Southwestern Bell Telephone Co., 16 FCC Rcd 18123, 181226 (¶ 8) (2001) (“Metrocall Order”), recon. denied, 17 FCC Rcd 4781 (2002) (“Metrocall Reconsideration”). On the basis of that holding, the Commission determined that the complainant in TSR Wireless was not entitled to damages because the amount the complainant owed the LEC for transiting charges exceeded the unlawful facilities charges that the complainants had paid.

was “eliminating charges for the portion of local interconnection facilities used to deliver traffic that originates on Qwest’s network and terminates on [the paging company’s] network.”<sup>19</sup> As a result, Qwest “would no longer bill paging companies for any interconnection facilities charges except transit charges.”<sup>20</sup> On the basis of its calculation that 26.2 percent of the traffic on its paging interconnection facilities in Colorado was transiting traffic, Qwest stated that it would reduce Mountain’s facilities charges beginning in August 2000 by 73.8 percent.<sup>21</sup>

Qwest stated that it would continue to assess tariffed charges for facilities and services that are not essential for interconnection, including wide area calling services and non-recurring charges for DID numbers.<sup>22</sup> Qwest pointed out that the Commission in TSR Wireless had recognized that a LEC is entitled to charge its own end users for toll calls that are delivered at no charge to paging companies. Qwest stated that it would charge paging companies who elect to “‘buy down’ the cost of such toll calls to make it appear to the ILEC’s end users that they have made a local call rather than a toll call,” as permitted by TSR Wireless.<sup>23</sup>

Qwest offered the paging companies several configuration and billing options. At the request of a paging carrier, Qwest offered to reconfigure a paging carrier’s foreign exchange,

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<sup>18</sup> Letter by Vickie Boone, Qwest Corp. (July 24, 2000), *attached to* Mountain Communications Complaint, Exh. XXIII (“Qwest July 2000 Letter”) (J.A. ); Joint Statement of Mountain Communications And Qwest Corporation (Oct. 18, 2000) at 8 (¶ 22) (“Stipulated Facts”) (J.A. ); “Answer and Affirmative Defenses of Qwest Corp.” (Oct. 2, 2000) at 17 (“Answer”) (J.A. ).

<sup>19</sup> Qwest July 2000 Letter at 1 (J.A. ); Stipulated Facts at 8 (¶ 22) (J.A. ).

<sup>20</sup> Qwest July 2000 Letter at 1 (J.A. ); Stipulated Facts at 8 (¶ 22) (J.A. ).

<sup>21</sup> Stipulated Facts at 8 (¶ 22) (J.A. ).

<sup>22</sup> Qwest July 2000 Letter at 1-2 (J.A. ); Stipulated Facts at 8 (¶ 22) (J.A. ).

<sup>23</sup> Qwest July 2000 Letter at 2, quoting TSR Wireless, 15 FCC Rcd at 11184 (¶ 30) (J.A. ).

wide area calling, reverse billing or 800 number arrangements in a way that allows Qwest to collect toll charges from its own end user customers. Under that option, Qwest would deliver “its traffic to [the paging carrier’s] network at no charge”<sup>24</sup> and would charge paging carriers for transiting traffic only.

For Mountain, such a reconfiguration would result in Qwest’s free delivery of all calls originated by Qwest’s end users within the MTA directly to Mountain’s point of connection in Pueblo. Mountain would obtain Pueblo DID numbers from Qwest for all its subscribers (including those who were not located in Pueblo), and Qwest would assess toll charges for any interexchange intraLATA calls made by Qwest’s subscribers to Mountain’s subscribers. Under this approach, a Qwest subscriber outside the Pueblo service area who called a Mountain subscriber would have to pay toll charges to Qwest, even though the Mountain subscriber might be physically located in the same service area as the calling party. For example, Qwest would assess toll charges on its subscriber in the Colorado Springs local service area who called a Mountain subscriber also physically located in Colorado Springs, because the Mountain subscriber had a Pueblo DID paging number.<sup>25</sup>

Alternatively, if the paging carrier chose to retain arrangements that permitted Qwest’s end user customers to avoid such toll charges when calling the pager’s subscriber, Qwest said that the paging carrier would have to pay Qwest at the “appropriate tariff or contract rates for

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<sup>24</sup> Qwest July 2000 Letter at 3 (J.A. ).

<sup>25</sup> See Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1-2 (¶ 3) (J.A. ). If Mountain establishes a POC in Walsenburg and Colorado Springs, Qwest stated that “[e]ach of these POCs and the delivery of all local calls to these POCs by Qwest would be free to the paging carrier.” *Id.* at 2 (¶ 4) (J.A. ).

these optional arrangements.”<sup>26</sup> Qwest stated that it considered the first 20 miles of Type 1 facilities to be local interconnection facilities and thus would charge paging carriers only for the transiting traffic associated with those facilities whether or not it obtained optional toll suppression arrangements.<sup>27</sup>

Mountain elected to retain a Type 1<sup>28</sup> facilities arrangement whereby it obtains DID numbers separately in Walsenburg, Pueblo, and Colorado Springs, with dedicated toll facilities, obtained from Qwest, connecting these numbers to Mountain’s single POC in Pueblo. As noted above, this arrangement permits a Qwest end user located in the same local service area with a Mountain subscriber to dial a local number to reach that subscriber without incurring toll charges. Mountain did not choose the option of obtaining free interconnection facilities for all calls placed by Qwest customers within a MTA – an option under which Qwest would have assessed toll charges on its end-users located outside of Pueblo for calls placed to Mountain subscribers. Under the arrangement favored by Mountain, then, Qwest lost some toll revenues it otherwise would have collected and Mountain received the advantage of having calls to its customers unburdened by toll charges that might have discouraged usage and thus might have made its paging service less attractive.

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<sup>26</sup> Qwest July 2000 Letter at 3 (J.A. ).

<sup>27</sup> Qwest July 2000 Letter at 2 (J.A. ); Stipulated Facts at 8 (¶ 22) (J.A. ).

<sup>28</sup> Type 1 and Type 2 interconnections are forms of interconnection that LECs offer to CMRS carriers. Under Type 1 interconnection, the LEC owns the switch serving the wireless network, whereas under Type 2 interconnection the wireless carrier owns the switch. See Petitions of Sprint PCS and AT&T Corp., 17 FCC Rcd 13192, 13197 n.36 (2002), petition for review filed, AT&T Corp. v. FCC, D.C. Circuit No. 02-1221 (filed July 9, 2002).

## II. Administrative Proceedings

### A. Mountain's Complaint and Responsive Pleadings

On September 12, 2000, Mountain filed a formal complaint against Qwest. Complaint (J.A. ). Mountain claimed inter alia that Qwest had violated sections 51.703(b) and 51.709(b) of the Commission's rules by levying charges for the delivery of calls to Mountain's system. Complaint at 9-10 (¶¶ 36-40) (J.A. ).<sup>29</sup> Mountain argued that Qwest was responsible not only for the costs associated with terminating traffic that originated on Qwest's own facilities, but also for the costs associated with transiting traffic that originated on the networks of other carriers. Complaint at 11 (¶ 44) (J.A. ).

In an Answer filed on October 2, 2000, Qwest denied that it charges "paging carriers for the portion of local interconnection facilities used to deliver traffic that originates on Qwest's network." Answer (October 2, 2000) at ii (J.A. ). Qwest asserted that it "bills Mountain only for that portion of the Type 1 paging facilities used to deliver so-called 'transiting traffic,' that is, traffic not originated on Qwest's local network."<sup>30</sup> Qwest asserted that the Commission in TSR Wireless had ruled that LECs may assess charges for transiting traffic, and it argued that Mountain could not collaterally attack TSR Wireless in this complaint proceeding. Answer at 10-11, 21, 24 (J.A. ).

Qwest denied Mountain's claim that it recovers the costs of delivering transit traffic from other sources. Qwest stated that the costs of the dedicated facilities at issue in this case "are not

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<sup>29</sup> Even though Mountain filed its complaint against Qwest, it charged unlawful conduct by U S West Communications, a company that subsequently merged with Qwest and "currently operates as Qwest." Complaint at 1 (J.A. ). The references to Qwest in this brief include U S West, where appropriate.

<sup>30</sup> Answer, Exh. 1 (Decl. of Vickie Boone) at 3 (J.A. ).

recovered in any switched charge” or in any other form.<sup>31</sup> Although Qwest acknowledged that it “assesses charges on the originating carrier for transporting and switching traffic that originates on that carrier’s network,” it claimed that “those charges do not encompass the dedicated facilities connecting Qwest’s network and a paging provider’s network.”<sup>32</sup>

Qwest rejected Mountain’s claim that Qwest is the originating party for all traffic that is terminated on Mountain’s network. Qwest asserted that the Commission in TSR Wireless had made clear that the originating LEC is the LEC whose customer places the call, not the LEC that delivers the traffic to the paging company. Answer at 21-22 (J.A. ). Qwest reiterated that TSR Wireless expressly permits a LEC to charge a paging company for the delivery of traffic that originates on another LEC’s facilities. Answer at 21-22 (J.A. ).

Qwest also asserted that TSR Wireless permits a LEC to charge a paging carrier for wide-area and similar calling arrangements that allow the paging carrier to offer customers a paging number in a local calling area in which the paging carrier has no point of contact. According to Qwest, such calling arrangements, which enable Qwest customers in an extended calling area to call paging customers without incurring toll charges that Qwest otherwise would collect, “are not necessary for interconnection’ and thus need not be provided at all, much less for free.” Answer at 11, quoting TSR Wireless, 15 FCC Rcd at 11184 (¶ 30) (J.A. ). Qwest emphasized that Mountain has the option of receiving traffic throughout its MTA at no charge, provided that

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<sup>31</sup> Answer at 10-11 (J.A. ). See id. Declaration of Vickie Boone at 3 (“Qwest only recovers the costs of [facilities used for transiting traffic] from Mountain and does not receive any compensation for them from originating carriers”).

<sup>32</sup> Answer Exh. 3 (Declaration of Sheryl R. Fraser) at 2 (J.A. ).

the arrangement allows Qwest to collect applicable toll charges from its own end users. Answer at 11-12 (J.A. ).

As an affirmative defense, Qwest claimed inter alia that Mountain had not shown that it had been injured by Qwest's alleged violations. Answer at 35-36 (J.A. ). Qwest pointed out that Mountain had not paid Qwest "anything for any paging facilities that it has purchased since February 1998, including the transiting charges upheld in TSR Wireless." Answer at iii, 36 (J.A. ). According to Qwest, Mountain owed an outstanding balance of more than \$21,000 (including late payment charges) attributable to charges permitted by TSR Wireless.<sup>33</sup>

### **B. Staff Order**

On February 4, 2002, the Commission's staff, on delegated authority, denied Mountain's complaint. Staff Order, 17 FCC Rcd 2091 (J.A. ). The staff found first that sections 51.703(b) and 51.709(b) of the Commission's rules do not bar the LECs from charging paging carriers for transiting traffic. 17 FCC Rcd at 2094-95 (¶¶ 7-10) (J.A. ). The staff pointed out that the Commission in TSR Wireless<sup>34</sup> and the subsequent Texcom Order<sup>35</sup> had construed those rules to allow a LEC to charge paging carriers for the transport of transiting traffic. Staff Order, 17 FCC Rcd at 2094-95 (¶¶ 8-10) (J.A. ).

The staff also upheld the lawfulness of Qwest's charges for the dedicated toll facilities that connect Mountain's DID numbers in Colorado Springs and Walsenburg to Mountain's sole POC in Pueblo. 17 FCC Rcd at 2096-97 (¶¶ 11-13) (J.A. ). The staff determined that Qwest's

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<sup>33</sup> Answer, Exh. 1 (Declaration of Vicki Boone) at 4 (J.A. ).

<sup>34</sup> TSR Wireless, 15 FCC Rcd at 11177 n.70.

<sup>35</sup> Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Cor., d/b/a/ Verizon Communications, 16 FCC Rcd 21493, 21494 (¶ 4) (2001) ("Texcom Order"), recon. denied, 17 FCC Rcd 6275 (2002) ("Texcom Reconsideration").

provision of dedicated toll facilities that enable Mountain to offer its subscribers a local number in several local calling areas is “an optional service that is not necessary for interconnection.” 17 FCC Rcd at 2097 (¶ 13) (J.A. ). The staff reasoned that Qwest would have assessed toll charges on its end users located outside the Pueblo local calling area for calls to Mountain’s subscribers if Mountain had not obtained this arrangement. The staff thus concluded that Mountain, in effect, had entered into a wide area calling arrangement with Qwest, and relying on TSR Wireless, the staff held that Qwest is entitled to charge Mountain for that arrangement. 17 FCC Rcd at 2097 (¶ 13) (J.A. ).

### C. Commission Order.

Mountain petitioned the Commission to review the Staff Order.<sup>36</sup> The Commission on July 25, 2002, denied Mountain’s petition. Order, 17 FCC Rcd 15135 (J.A. ).

The Commission affirmed that Qwest may charge Mountain for the cost of facilities used to transport transiting traffic, finding that the staff properly had determined that TSR Wireless permits LECs to assess charges on paging carriers for transiting traffic. Order, 17 FCC Rcd at 15136-37 (¶¶ 2-3) & n.8 (J.A. ). The Commission also found that Mountain had not provided support for its claim that Qwest recovers the costs of these facilities from another source. 17 FCC Rcd at 15136-37 (¶¶ 2-3) (J.A. ). The Commission noted that Qwest is not a terminating carrier for the transiting traffic it sends to Mountain and thus is unable to recover reciprocal compensation payments for such traffic. 17 FCC Rcd at 15137 (¶ 3) (J.A. ).

The Commission also rejected Mountain’s challenge to Qwest’s charges for the dedicated toll facilities that connect the DID numbers in Colorado Springs and Walsenburg to Mountain’s

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<sup>36</sup> Petition for Reconsideration filed by Mountain (March 5, 2002) ( J.A. ).

interconnection point in Pueblo. 17 FCC Rcd at 15137-39 (¶¶ 4-7) (J.A. ). The Commission agreed with its staff that Qwest lawfully can charge Mountain for this type of arrangement because it is a form of wide area calling within the meaning of TSR Wireless. By procuring DID numbers in Walsenburg, Pueblo, and Colorado Springs, and obtaining dedicated lines from Qwest to connect these DID numbers to its POC in Pueblo, “Mountain ensures that calls to the DID numbers in each of the relevant Qwest central offices appear local and involve no toll charges to [Qwest’s end-user customers] in those areas.” 17 FCC Rcd at 15135 (¶ 5) (J.A. ). Mountain’s facilities configuration in effect “prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain’s network” 17 FCC Rcd at 15138 (¶ 5) (J.A. ).<sup>37</sup>

Although the Commission acknowledged the similarity of the network configuration at issue in TSR Wireless to Mountain’s arrangement with Qwest, the Commission rejected Mountain’s claim that TSR Wireless barred Qwest from charging Mountain for the dedicated toll facilities at issue in this case. 17 FCC Rcd at 15138-39 (¶ 6) (J.A. ). The Commission pointed out that TSR Wireless permitted a LEC to charge a CMRS carrier for wide area calling service arrangements that are not necessary to effectuate interconnection. 17 FCC Rcd at 15139 (¶ 6) (J.A. ). The Commission explained that Mountain was free to reorder its DID numbers and cancel the dedicated toll facilities connecting those numbers to its single POC, and instead permit Qwest to bill its own end users for toll calls. Mountain’s choice not to pursue that

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<sup>37</sup> The Commission rejected Mountain’s claim that the lack of a written agreement shows that Mountain and Qwest did not enter into a wide area calling arrangement: “Mountain’s ordering and acceptance of the T-1 facilities from a tariff that create[s] a wide area calling arrangement constitutes an agreement between the parties regarding the provisioning of this service.” 17 FCC Rcd at 15135 (¶ 5) (J.A. ).

alternative and to maintain an arrangement that “prevents Qwest from charging its customers for what would ordinarily be toll calls” meant that the challenged charges were lawful. 17 FCC Rcd at 15139 (¶ 6) (J.A. ).<sup>38</sup>

### **SUMMARY OF ARGUMENT**

1. The Commission reasonably applied its own regulations in determining that the facilities charges at issue in this case were lawful charges for facilities used in providing wide area calling or equivalent services. TSR Wireless describes wide area calling or equivalent services as optional services with a toll suppression function. The Commission reasonably held that Mountain’s facilities arrangement with Qwest was a form of wide area calling service. The facilities arrangement was optional because Mountain had the choice of obtaining free delivery of all its paging traffic to its POC by permitting Qwest to modify its facilities configuration. And the facilities arrangement had a toll suppression function because it eliminates some intraLATA toll charges that Qwest otherwise would have assessed upon its own customers.

The Commission reasonably rejected Mountain’s argument that these charges are identical to the facilities charges invalidated in TSR Wireless. The Commission in TSR Wireless construed section 51.703(b) to bar LECs from charging for the delivery of LEC-originated intraMTA, intraLATA traffic to the paging carrier’s POC. Unlike TSR Wireless, this case does not involve Qwest’s refusal to provide the delivery of intraMTA, intraLATA traffic that Qwest originates to Mountain’s POC. Rather, the charges in question are for an optional service that is

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<sup>38</sup> As with transiting traffic, the Commission found unpersuasive Mountain’s claim that permitting Qwest to charge for the dedicated toll facilities would result in “double recovery.” 17 FCC Rcd at 15139 (¶ 7) (J.A. ). The Commission found that Qwest is unable to recover the costs of those facilities through reciprocal compensation charges and that Mountain provided no evidence that Qwest recovers its transport costs for those facilities from another source. 17 FCC Rcd at 15139 (¶ 7) (J.A. ).

designed to reduce significantly the toll charges that Qwest otherwise would collect from its own end-users for calling Mountain's subscribers. Because these optional facilities qualify as a wide area calling arrangement under TSR Wireless, section 51.703(b) does not bar Qwest from charging Mountain for them.

2. The Commission reasonably upheld Qwest's charges for transiting traffic. The Commission in TSR Wireless and in subsequent decisions repeatedly has upheld the lawfulness of LECs' charges for the delivery of transiting traffic. The Commission reasonably followed precedent in adjudicating Mountain's complaint without considering alternative approaches. Indeed, the Commission's responsibility as an adjudicator is to decide a complaint under the law in effect at the time of the complaint. Qwest relied upon the policy established in TSR Wireless and its progeny in charging Mountain for the delivery of transiting traffic. It was reasonable for the Commission not to consider applying a new policy retroactively in this adjudication.

The Commission's policy on transiting charges is reasonable and consistent with cost-causation principles. Mountain offers – and charges its subscribers for – the ability to receive messages between a calling party's premises and Mountain's subscriber's pager. The transiting traffic is a necessary part of the service Mountain provides to its end-users. In contrast, transiting traffic is not part of any service that Qwest offers to its subscribers. The Commission's determination that Qwest lawfully charged Mountain for transiting traffic does not violate principles of cost causation.

The Court should not consider the intervenors' claim that Qwest's charges for transiting traffic violate section 51.709(b). Mountain did not raise a section 51.709(b) issue on review, and the intervenors may not present issues not raised by the petitioner. If the Court reaches the section 51.709(b) issue, it should reject the intervenors' claim. By its express language section

51.709(b) is limited to traffic between “two carriers’ networks,” and transiting traffic, by definition, is the transport of traffic among at least three carriers’ networks. Moreover, the construction of section 51.709(b) advanced by the paging carriers is inconsistent with agency precedent.

3. The Court lacks jurisdiction to consider Mountain’s claim that the Commission erred in not providing an explanation for its statement in footnote 13 of the Order that a terminating carrier may seek reimbursement for transiting costs from originating carriers through reciprocal compensation. Because Mountain did not raise any argument about footnote 13 in a petition for reconsideration before the agency, section 405 bars the Court from considering it. Mountain also has not shown how it is injured by footnote 13 and thus has no standing to challenge it. Furthermore, the Court’s subject-matter jurisdiction to review agency orders does not extend to the review of non-decisional statements such as the one in footnote 13. If the Court considers the issue, it should reject Mountain’s argument. While the Commission has a duty to justify its orders, it is under no obligation to provide an explanation for every statement set forth in its written decisions.

#### **STANDARD OF REVIEW**

To prevail on review, Mountain must show that the Order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the court presumes the validity of agency action. E.g., Davis v. Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000). The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. E.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971).

The Court’s review of an agency’s interpretation of its own regulations is “particularly deferential.” Davis, 202 F.3d at 365.<sup>39</sup> The Court must “give ‘controlling weight’ to the Commission’s interpretation of its own regulation ‘unless it is plainly erroneous or inconsistent with the regulation.’”<sup>40</sup> Deference to the expert agency’s interpretation “is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.” Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (internal quotations omitted.).

## ARGUMENT

### **I. THE COMMISSION REASONABLY HELD THAT QWEST HAD LAWFULLY CHARGED MOUNTAIN FOR FACILITIES USED IN A FORM OF WIDE AREA CALLING.**

#### **A. The Charges Challenged In This Case Are For Dedicated Toll Facilities That Are Part Of A Wide Area Calling Arrangement.**

TSR Wireless established that section 51.703(b) does not prohibit LECs from charging paging carriers for facilities used in wide area calling “or similar services.” 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). Wide area calling or equivalent services as described in TSR Wireless have two characteristics. First, they are optional services that are “not necessary for interconnection or for the provision of [a paging carrier’s] service to its customers.” 15 FCC Rcd at 11184 (¶ 30). Second, these services have a toll suppression function that, at the expense

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<sup>39</sup> See also Omnipoint Corp. v. FCC, 78 F.3d 620, 631 (D.C. Cir. 1996), quoting National Medical Enterprises v. Shalala, 43 F.3d 691, 697 (D.C. Cir. 1995).

<sup>40</sup> Biltmore Forest Broadcasting FM, Inc. v. FCC, 321 F.3d 155, 160 (D.C. Cir. 2001), quoting High Plains Wireless L.P. v. FCC, 276 F.3d 599, 607 (2002).

of the originating LEC, provides benefits to the paging carrier by enabling the paging carrier to “‘buy down’ the cost of . . . toll calls to make it appear to end users that they have made a local call rather than a toll call.” 15 FCC Rcd at 11184 (¶ 30). By eliminating the toll charges, Mountain makes its paging service more attractive to its own subscribers, who may expect to receive more calls because they are free to the callers. As shown below, the arrangement by which Mountain acquires DID numbers from Qwest in Pueblo, Walsenburg and Colorado Springs and obtains dedicated toll facilities from Qwest connecting these DID numbers to its sole point of connection POC in Pueblo has both characteristics of a wide area calling or equivalent service. See Order, 17 FCC Rcd at 15137-39 (¶¶ 4-6) (J.A. ).

It is conceded that this arrangement is not necessary for interconnection or for Mountain’s provision of paging service.<sup>41</sup> The record shows that Qwest offers Mountain a variety of interconnection configurations for the termination of traffic to Mountain’s customers.<sup>42</sup> Some of these options provide for the free delivery of intraLATA calls placed by Qwest’s subscribers through any POC (or multiple POCs) that Mountain selects within the MTA.<sup>43</sup> For example, Qwest offers to deliver without charge all calls placed by its subscribers within the LATA through Mountain’s Pueblo POC, so long as Mountain obtains and uses DID numbers for its subscribers from the closest central office to that POC.<sup>44</sup> Thus, if Mountain obtained Pueblo

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<sup>41</sup> See Staff Order, 17 FCC Rcd at 2079 (¶ 13) (J.A. ).

<sup>42</sup> See, e.g., Qwest July 2000 Letter at 3 (J.A. ); Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) (J.A. ).

<sup>43</sup> Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A. ).

<sup>44</sup> Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A. ).

DID numbers and assigned them to all of its subscribers, calls to those subscribers would not generate charges to Mountain. As another option, if Mountain were to establish a separate POC in Walsenburg “for its paging subscribers that prefer a Walsenburg telephone number, and a third POC in Colorado Springs for its paging subscribers that prefer a Colorado Springs telephone number,” “[e]ach of these POCs and the delivery of all local calls to these POCs by Qwest would be free.”<sup>45</sup>

Mountain’s arrangement with Qwest also satisfies the second criterion of a wide area calling service because it eliminates some intraLATA toll charges that Qwest otherwise could collect from its own customers who call Mountain’s paging subscribers. This arrangement permits Mountain – with a single POC in Pueblo – to “obtain telephone numbers rated in each exchange [Colorado Springs, Pueblo and Walsenburg] so Qwest customers in one local calling area can avoid toll charges when calling a Mountain customer located in the same calling area.” Petitioner’s Brief at 10. This is so even though the calls in many cases would pass from one calling area to another (Pueblo) in order to reach the called paging customer through Mountain’s single POC in Pueblo. Under many state regulatory policies, LECs ordinarily impose toll charges on calls that originate in one service area and terminate in another. Mountain’s arrangement enables the paging carrier to “ensure[] that calls to the DID numbers in each of the relevant Qwest central offices appear local and involve no toll charges to callers in those areas.” Order, 17 FCC Rcd at 2097 (¶ 13) (J.A. ).<sup>46</sup>

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<sup>45</sup> Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 2 (¶ 4) (J.A. ).

<sup>46</sup> See Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A. ).

Mountain claims that its arrangement with Qwest is not a form of wide area calling as defined by TSR Wireless. Mountain first contends that the arrangement here cannot be a wide area calling service because “there is no record evidence to support” the Commission’s finding that this arrangement prevents Qwest from charging its customers “for what would ordinarily be toll calls to access Mountain’s network.” Petitioner’s Brief at 38, quoting Order, 17 FCC Rcd at 15139 (¶ 5) (J.A. ). Mountain’s claim that the Commission’s finding lacks evidentiary support is simply wrong. Substantial record evidence shows that Mountain’s arrangement enables Qwest end-users outside of the Pueblo service area to avoid toll charges they otherwise would pay when they call Mountain subscribers physically located in the same local calling area.<sup>47</sup> By acquiring DID numbers in Colorado Springs and Walsenburg and dedicated toll facilities connecting those numbers to its POC in Pueblo, Mountain enables that Qwest customers in Colorado Springs and Walsenburg to avoid toll charges when calling Mountain subscribers located within the same exchange.

Contrary to Mountain’s assertion, the fact that “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)” does not undercut the Commission’s finding that its arrangement is a form of wide area calling. Petitioner’s Brief at 38. Nothing in TSR Wireless states that a wide area calling or equivalent service must eliminate all toll charges. The Commission reasonably construed TSR Wireless to classify as a form of wide area calling an optional arrangement that “allows a paging carrier to subsidize the cost of calls from a LEC’s

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<sup>47</sup> See, e.g., Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) (J.A. ); “Qwest Corporation’s Opposition to Mountain’s Petition for Reconsideration of Memorandum Opinion and Order” (Mar. 18, 2002) at 6 (J.A. ).

customers to the paging carrier's customers," even if the arrangement does not eliminate all toll fees. Order, 17 FCC Rcd at 15137 (¶ 5) (J.A. ). See TSR Wireless, 15 FCC Rcd at 11184 (¶ 30).

Mountain asserts that calls to DID numbers associated with the Walsenburg or Colorado Springs central office are charged as local calls whenever they are placed by persons calling from Walsenburg or Colorado Springs. Although its argument is not clear, Mountain apparently contends that the Commission erred in finding that its arrangement is a wide area calling service that suppresses toll calling because calls that originate and terminate in the same local calling area should not be subject to toll charges. As noted above, however, Mountain's arrangement provides Mountain with DID numbers associated with the Walsenburg or Colorado Springs central office and the dedicated facilities used to transport messages to those numbers from Mountain's POC in Pueblo and this, in turn, enables Qwest end-users located in Walsenburg and Colorado Springs to avoid toll charges when calling Mountain subscribers. Although Mountain's arrangement with Qwest provides a different form of toll suppression from one that directly affects the rates of individual calls, that fact does not undercut the reasonableness of the Commission's determination that Mountain's arrangement is a form of wide area calling.

Equally unavailing is Mountain's claim that its arrangement cannot be a form of wide area calling because Mountain did not order the specific reverse billing arrangement denominated as "wide area calling" in Qwest's intrastate tariff.<sup>48</sup> The Commission in TSR Wireless stated explicitly that LECs, consistent with section 51.703(b), were entitled to charge

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<sup>48</sup> "A 'reverse billing arrangement' is one in which the LEC assesses a per minute usage charge to the CMRS carrier, in place of a toll charge to the originator of the call." Order, 17 FCC Rcd at 15137 n.18 (J.A. ).

paging carriers for “‘wide area calling’ or similar services.” 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). The language of TSR Wireless itself establishes that the category of “‘wide area calling’ or similar services” for which LECs can charge paging carriers is broader than the specific reverse billing arrangement in Qwest’s Colorado tariff. As the Commission explained, a “reverse billing arrangement is only one of several types of wide area calling services.” Order, 17 FCC Rcd at 15138 (¶ 5) (J.A. ).<sup>49</sup>

Finally, Mountain argues that the Order is arbitrary because it “remove[s] the ability of a CMRS carrier to maintain a single point of interconnection within a LATA.” Petitioner’s Brief at 39. According to Mountain, “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.” Id. In fact, the evidence of record shows that the Order has no effect on Mountain’s ability, if it chooses, both to maintain its single POC in Pueblo and to obtain “free interconnection facilities for all calls placed by Qwest customers within the LATA.”<sup>50</sup> In that case, an end user outside the Pueblo local services area would incur toll charges on calls delivered by Qwest to Mountain’s POC in Pueblo, which is why the arrangement with Mountain includes a toll suppression feature.

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<sup>49</sup> Mountain also claims that its arrangement cannot reasonably be classified as a form of wide area calling service because Mountain uses a Type 1 rather than a Type 2 interconnection. E.g., Petitioner’s Brief at 39. The Commission in TSR Wireless described wide area calling or similar services as optional services with a toll suppression function, not as services that conformed to specific technical characteristics. Nothing in TSR Wireless or any other Commission decision suggests that the category of “‘wide area calling’ or similar services” (15 FCC Rcd at 11166, 11184 (¶¶ 1, 30)) is limited to services that use a Type 2 interconnection or have other specific technical characteristics.

<sup>50</sup> Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A. ).

As noted above, Mountain made a business decision to acquire a specific type of network configuration in which it obtains DID numbers in Colorado Springs, Walsenburg and Pueblo and obtains dedicated toll facilities connecting these DID numbers to its single POC in Pueblo. Although that particular configuration includes a form of wide area calling, Mountain retains the option of reconfiguring its network to eliminate the wide area calling feature and its associated charges. For example, “Mountain is free to cancel both the DID numbers [associated with the Colorado Springs and Walsenburg central offices] and the dedicated toll facilities connecting those DID numbers to Mountain’s single point of connection.” Order, 17 FCC Rcd at 15139 (¶ 6) (J.A. ). Qwest then would supply Mountain with DID numbers from its central office in Pueblo and would deliver all calls originated by its end users in the LATA to Mountain’s single POC at no charge.<sup>51</sup>

Mountain thus is wrong in suggesting that the charges in question are a result of its election to establish a single POC. Rather, the charges are attributable to Mountain’s business decision to maintain a network arrangement – including the single POC, but also including DID numbers from three central offices and dedicated toll facilities connecting those offices with the single POC – that incorporates wide area calling.

**B. The Commission Reasonably Found That Qwest’s Charges to Mountain Were Not Traffic Or Facilities Charges Proscribed By Section 51.703(b) And TSR Wireless.**

The Commission in TSR Wireless interpreted section 51.703(b) to prohibit a LEC from assessing charges for delivering intraLATA traffic originated on its network to the POC (or

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<sup>51</sup> Qwest Corporation’s Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A. ).

POCs) selected by the paging carrier. TSR Wireless, 15 FCC Rcd at 11176 (¶ 18). The Commission also construed section 51.703(b) to forbid a LEC from requiring paging carriers to pay for such delivery “by merely re-designating the ‘traffic’ charges as ‘facilities’ charges.” 15 FCC Rcd at 11181 (¶ 25). Neither section 51.703(b) nor any other rule prohibits a LEC from assessing charges for optional wide area calling or similar services. 15 FCC Rcd at 1183-84 (¶¶ 30-31).

The Commission in this case reasonably concluded that the challenged charges were not delivery or facilities charges proscribed by section 51.703(b) and TSR Wireless. It is undisputed that Qwest offered Mountain – and continues to offer Mountain – the delivery of all intraMTA, intraLATA calls from Qwest end-users to Mountain’s POC free of charge.<sup>52</sup> Where Mountain does not procure an optional wide area calling arrangement that reduces the toll charges Qwest assesses on its own customers, Qwest is required by the rule to transport for free every intraMTA, intraLATA call made by a Qwest end-user directly to Mountain’s POC.

In contrast to TSR Wireless, this case does not involve Qwest’s refusal to provide free delivery of intraLATA traffic that it originates to the paging carrier’s POC in violation of section 51.703(b). Rather, this case involves Qwest’s charges for dedicated toll facilities as part of an optional wide area calling arrangement that has the effect of suppressing certain toll charges that Qwest otherwise would collect from its own end-users. The Commission in TSR Wireless established that section 51.703(b) does not forbid LECs to charge for that type of arrangement. The Commission’s interpretation of section 51.703(b) in this case is consistent with the relevant

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<sup>52</sup> See Qwest July 2000 Letter at 3 (J.A. ); Qwest Corporation’s Brief on the Disputed Material Issues at 11 & Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1 (¶ 3) (J.A. ). Under this option, Mountain would obtain from Qwest DID numbers associated with the central office closest to Mountain’s POC.

administrative precedent, including TSR Wireless. Indeed, Qwest revised its billing and interconnection practices explicitly to comply with TSR Wireless.<sup>53</sup>

The paging companies argue that the technical features of Mountain's arrangement in this case are "identical in all material respects" to the arrangement in TSR Wireless, except for the length of the dedicated lines. Petitioner's Brief at 32. See Paging Carriers Intervenors' Brief at 13-14. Because the Commission held that some of Qwest's charges in TSR Wireless were unlawful facilities fees, the paging carriers argue that the Commission departed from administrative precedent in not concluding that Qwest's charges in this case also were proscribed facilities charges.

The Commission recognized that "the network configuration discussed in the TSR Wireless Order is similar to Mountain's arrangement with Qwest," but it explained in detail why the technical similarities were not decisionally significant. Order, 17 FCC Rcd at 15138 (¶ 6) (J.A. ). TSR Wireless establishes that LECs cannot charge for facilities that are necessary for the delivery of Qwest-originated intraLATA traffic. The charges in this case, however, are for an optional arrangement that is "not necessary to effectuate interconnection." Order, 17 FCC Rcd at 15139 (¶ 6) (J.A. ). Qwest gave Mountain the option of receiving free delivery of all intraLATA calls originated by its end-users, and required Mountain to pay only for an optional configuration that effectively reduced Qwest's own toll revenues and enhanced the value of Mountain's services to its subscribers. The Commission reasonably explained why it classified the charges in this case as permissible wide area calling fees rather than as unlawful facilities charges.

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<sup>53</sup> See Qwest July 2000 Letter (J.A. ).

The paging carriers in large part fail to mention – let alone attempt to refute – the Commission’s reasons for distinguishing Qwest’s charges in this case from the facilities charges found unlawful in TSR Wireless. Although “an agency may not ‘treat like cases differently,’”<sup>54</sup> it is not arbitrary for the Commission, as it did here, to consider the differences between the case before it and a prior ruling, and to explain the reasons for reaching different conclusions. See, e.g., Melcher v. FCC, 134 F.3d 1143, 1150 (D.C. Cir. 1998).

**C. The Paging Carriers’ Contention That The Commission Erred By Ignoring The Virginia Arbitration Order Is Not Properly Before the Court, And Is Without Merit In Any Event.**

The paging carriers claim that the Order is inconsistent with the Virginia Arbitration Order, an almost contemporaneous interlocutory staff ruling that addresses the terms and conditions of interconnection agreements between Verizon Virginia and three competitive LECs.<sup>55</sup> Several parties filed applications for review of the Virginia Arbitration Order with the Commission, and one hotly contested issue in that pending administrative proceeding is whether the staff decision is consistent with the Order in this case.<sup>56</sup> The Commission has not yet ruled on the merits of this issue (or indeed more generally on whether the Virginia Arbitration Order reflects agency policy). Appellate counsel thus take no position on whether that staff decision

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<sup>54</sup> Freeman Engineering Associates v. FCC, 103 F.3d 169, 178 (D.C. Cir 1997), quoting Airmark Corp. v. FAA, 758 F.2d 685, 691 (D.C. Cir. 1985).

<sup>55</sup> Petition of WorldCom, 17 FCC Rcd 27039 (WCB, 2002), petitions for reconsideration and applications for review pending (“Virginia Arbitration Order”).

<sup>56</sup> See, e.g., “Verizon’s Application for Review of the Wireline Competition Bureau’s October 8, 2002 Order Approving the Interconnection Agreements,” CC Docket No. 00-249, Petition of Cox Virginia Telcom (filed August 16, 2002) at 15-19; “Opposition of Cox Virginia Telecom, Inc.,” CC Docket No. 00-249, Petition of Cox Virginia Telcom (filed Sept. 10, 2002) at i-ii, 10-12.

was correct. The Court can and should resolve this case without addressing the merits of the paging carriers' claim that the Order is inconsistent with the Virginia Arbitration Order. The Court lacks jurisdiction to consider that argument, and, in any event, the Commission is not required to conform its decisions with a decision of its staff.

Section 405 of the Communications Act bars judicial review of issues of law or fact on which the Commission "has been afforded no opportunity to pass." 47 U.S.C. § 405.<sup>57</sup> By requiring a litigant to raise an argument before the Commission as a condition precedent to judicial review, section 405 provides the agency with "an opportunity to cure any defect" in its order.<sup>58</sup> Because Mountain did not argue in this case, in a petition for reconsideration or in any other pleading,<sup>59</sup> that the Commission had an obligation to issue a ruling that was consistent with the Virginia Arbitration Order, section 405 denies the Court jurisdiction to consider that argument on review.

Even if the issue were properly before the Court, the paging companies are wrong in claiming that the Commission had a legal obligation to adhere to the Virginia Arbitration Order or to justify a departure from its staff's ruling. "It is well established that 'the positions of an agency's staff do not preclude the agency from subsequently reaching its own conclusion.'" MacLeod v. ICC, 54 F.3d 888, 891 (D.C. Cir. 1995), quoting San Luis Obispo Mothers for Peace

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<sup>57</sup> See, e.g., United States Cellular Corp. v. FCC, 254 F.3d 78, 83 (D.C. Cir. 2001).

<sup>58</sup> Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 181 (D.C. Cir. 1997). See FTC Communications, Inc. v. FCC, 750 F.2d 226, 231 (D.C. Cir. 1984); Rogers Radio Communications Services v. FCC, 593 F.2d 1225, 1229 (D.C. Cir. 1978).

<sup>59</sup> While the Virginia Arbitration Order was decided after the pleadings had been filed in the administrative pleading below, Mountain could have brought the issue to the Commission's attention in a petition for reconsideration of the Order.

v. NRC, 789 F.2d 26, 34 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986).<sup>60</sup> Staff rulings such as the Virginia Arbitration Order thus are “irrelevant to [the Court’s] analysis of the Commission’s fidelity to its own precedents.” Id. See Community Care Foundation v. Thompson, 318 F.3d at 227. This Court has emphasized that the FCC does not depart from precedent merely because it does not adhere to the decisions of “a subordinate body of the Commission.” Amor Family Broadcasting Group v. FCC, 918 F.2d 960, 962 (D.C. Cir. 1991). Just as this Court is not bound by the decisions of the federal district courts, the Commission is not bound by the decisions of its staff.<sup>61</sup>

Application of this principle is even more compelling where, as here, the staff order itself remains subject to further agency review. The Commission not only has not endorsed the Virginia Arbitration Order, but it is currently considering whether to vacate, modify or affirm it. It would be anomalous for the Court to require the Commission to adhere to a staff ruling while the agency is considering whether to affirm or overturn it on direct review. Such a ruling would

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<sup>60</sup> See generally Community Care Foundation v. Thompson, 318 F.3d 219, 227 (D.C. Cir. 2003) (“[T]here is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level”).

<sup>61</sup> See Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1320 (D.C. Cir. 1998), quoting San Luis Obispo Mothers For Peace v. NRC, 789 F.2d at 33 (“position of an agency’s staff, taken before the agency itself decided the point, does not invalidate the agency’s subsequent application and interpretation of its own regulation”). Cf. Wood v. Thompson, 246 F.3d 1026, 1034 (7<sup>th</sup> Cir. 2001) (agency not bound by decision of administrative law judge).

interject the Court prematurely into an ongoing administrative proceeding and have a disruptive effect on the ongoing administrative process.<sup>62</sup>

**D. The Paging Carriers' Claim That The Commission Failed To Follow Required Procedures Is Not Properly Before The Court, And In Any Event It Lacks Merit.**

Mountain and its supporting intervenors argue that the Order is procedurally defective because the Commission effectively repealed section 51.703(b) without employing the notice and comment procedures set forth in section 4 of the Administrative Procedure Act, 5 U.S.C. § 553. Because that procedural argument was never raised before the Commission, section 405 bars the Court from considering it on review. See Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1169-71 (D.C.Cir.1994) (section 405 bars petitioner from arguing for the first time on review that the FCC violated APA notice and comment requirements); City of Brookings Municipal Telephone Co. v. FCC, 822 F.2d 1153, 1163 (D.C.Cir.1987) (same).

In any event, the paging carriers are wrong in claiming that the Order effectuated a de facto repeal of section 51.703(b). The Commission in its Order adjudicated Mountain's complaint that Qwest had violated section 51.703(b). In the course of that adjudication, the Commission interpreted section 51.703(b) not to prohibit the challenged charges because they were assessed for an optional wide area calling service, rather than for the delivery of LEC-

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<sup>62</sup> The argument that the Commission should have considered the Virginia Arbitration Order "precedent" also is undercut by the sequence of the decisions. The Staff Order in this case was released on February 4, 2002, more than five months before the Virginia Arbitration Order was released on July 17, 2002. The Commission's Order in this case was released on July 25, 2002 – just five days after the staff released the Virginia Arbitration Order. There is no reason to assume that the Commission itself was even aware of the staff's Virginia Arbitration Order when it adopted and released its Order in this case. In these circumstances, the requirement of section 405 that the agency have the opportunity in the first instance to address an issue is particularly compelling.

originated intraLATA traffic. The Commission’s ruling thus construed and applied section 51.703(b); it did not repeal that regulation. Section 51.703(b) remains fully in effect and continues to prohibit LECs from imposing charges on paging carriers for facilities necessary for the delivery of LEC-originated intraMTA, intraLATA traffic. Although the paging carriers may not agree with the way the Commission construed and applied section 51.703(b), their disagreement does not transform this section 208 adjudication into a procedurally defective rulemaking. See Everett v. United States, 158 U.S. F.3d 1364 (D.C. Cir. 1998).

## **II. THE COMMISSION REASONABLY UPHELD QWEST’S CHARGES FOR TRANSITING TRAFFIC.**

### **A. The Commission’s Decision Is Consistent With Administrative Precedent.**

The Commission has made clear that “paging carriers themselves must pay . . . for ‘transiting traffic.’” See Qwest Corp., 252 F.3d at 468. Before Mountain filed its complaint, the Commission in TSR Wireless explicitly had declared that its rules permit the LECs to charge paging carriers for the transport of transiting traffic. 15 FCC Rcd at 11177 n.70. In subsequent complaint orders, the Commission has reaffirmed that it is lawful for LECs to assess such charges on paging carriers. Metrocall Order, 16 FCC Rcd 18123; Metrocall Reconsideration, 17 FCC Rcd 4781; Texcom Order, 16 FCC Rcd at 21494 (¶ 4); Texcom Reconsideration, 17 FCC Rcd 6275. The Commission consistently has denied every complaint filed by a paging carrier challenging the lawfulness of LECs’ charges for delivering transiting traffic.

The paging carriers do not deny that TSR Wireless and its progeny upheld LEC charges to paging carriers for transiting traffic. Mountain acknowledges that the Commission declared that “[c]omplainants [paging carriers] are required to pay for ‘transiting traffic.’” Mountain Brief at 41, quoting TSR Wireless, 15 FCC Rcd at 11177 n.70. The paging carriers argue instead

that TSR Wireless and the Texcom orders – the paging carriers ignore the Metrocall orders – were wrongly decided. Mountain Brief at 41-42; Paging Carriers Intervenor Brief at 22. That argument is not properly before the Court and in any event lacks merit.

The Court lacks jurisdiction to entertain the paging carriers’ collateral challenge to the Texcom orders and TSR Wireless. Mountain’s petition for review invokes the Court’s jurisdiction to review the Order, not prior Commission decisions that have been affirmed (TSR Wireless) or were not challenged in Court within the 60 day period prescribed by the Hobbs Act (Texcom). See 28 U.S.C. §§ 2342(a), 2344; 47 U.S.C. § 402(a). The paging carriers’ claims that the Texcom orders and TSR Wireless are “unexplained,” “without legal support,” or “incompatible with cost causation principles” thus are not properly before the Court. See Mountain Brief at 42; Paging Carriers Intervenors’ Brief at 22.

In any event, the paging carriers’ challenge to the Commission’s adherence to administrative precedent in adjudicating Mountain’s complaint can only be characterized as frivolous. The Commission, in section 208 adjudications, “has an obligation to decide the complaint under the law currently applicable.” AT&T Corp. v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992), cert. denied, 509 U.S. 913 (1992). See also American Message Centers v. FCC, 50 F.3d 35, 41 (D.C. Cir 1995). As Mountain acknowledges elsewhere, the Commission’s duty as an adjudicator is “to apply existing rules and orders to the facts presented.” Mountain Brief at 5. As shown above, the existing law – established by TSR Wireless and its progeny – permits LECs to charge paging carriers for the transport of transiting traffic.

Mountain and its supporting intervenors argue that it would be better for the Commission to bar LECs from charging paging carriers for transiting traffic and to permit the LECs to recover the costs of delivering that traffic from the originating carriers. Appellate counsel take no

position on whether the Commission should adopt that policy prospectively. The Commission is conducting a rulemaking to consider changes in its existing intercarrier compensation rules and policies, and the agency has not yet decided what changes, if any, it will implement.<sup>63</sup>

The merits of the policy proposal advanced by the paging carriers, however, are irrelevant to the Court's disposition of this case. As noted above, the Commission adhered to existing law in adjudicating the section 208 complaints. Even if the Commission in the Order had been persuaded that the paging carriers' approach was preferable, it would have been inappropriate for the Commission to apply that new policy retroactively in this adjudication. The Court distinguishes between cases in which the agency adopts "a new policy for a new situation,"<sup>64</sup> and those that entail the "substitution of new law for old law that was reasonably clear."<sup>65</sup> In the latter situation, an agency may "protect the settled expectations of those who had relied" on the previous policy by giving the new policy "prospectively-only effect."<sup>66</sup> Indeed, as this Court has stated, "an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy."<sup>67</sup> Qwest in charging Mountain for the transport of transiting traffic relied upon the policy established in TSR Wireless and its progeny, and the Commission reasonably adhered to that policy in this adjudication.

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<sup>63</sup> Developing a Unified Intercarrier Compensation Regime, 16 FCC Rcd 9610 (2001) ("Intercarrier Compensation NPRM").

<sup>64</sup> Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993), quoting New England Telephone, 826 F.2d 1101, 1110 (D.C. Cir. 1987).

<sup>65</sup> Verizon Telephone Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001), quoting Williams Natural Gas, 3 F.3d at 1554.

<sup>66</sup> Public Service Company of Colorado v. FERC, 91 F.3d 1478, 1488 (D.C. Cir. 1996), quoting Williams Natural Gas, 3 F.3d at 1554.

<sup>67</sup> New England Telephone Co. v. FCC, 826 F.2d 1101, 1110 (D.C. Cir. 1987).

**B. The Commission's Policy Is Reasonable  
And Consistent With Agency Regulations.**

Mountain argues that permitting LECs to charge paging carriers for transiting traffic defies “simple economic logic” and “contravenes cost-causation principles.” Mountain Brief at 41, 42. According to Mountain, the costs associated with that traffic result from the “unilateral demands of the originating carrier,” and should be recovered from that carrier. Mountain Brief, at 43.

Both Mountain and the originating LEC provide a communications service between the premises of the calling party and the pager of Mountain's subscriber. The originating LEC charges its subscribers for the ability to send messages to the pagers of Mountain's customers, and Mountain charges its subscribers for the ability to receive those messages.<sup>68</sup> The transiting traffic thus is an essential component of the end-to-end service that Mountain provides to its customers.

In contrast, transiting traffic is not part of any service that Qwest offers to its end-users. “[T]he only relationship between the [transiting] LEC's customers and the call is the fact that the call traverses the LEC's network on its way to the terminating carrier.” Texcom Order, 16 FCC Rcd at 21495 (¶ 6). As between Qwest and Mountain, Mountain is the cost-causer, *i.e.*, the carrier responsible for the transiting traffic. The Commission's determination that Qwest lawfully charged Mountain for the transport of transiting traffic thus is consistent with “cost-causation principles” and economic logic. The Commission recognizes that other legitimate

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<sup>68</sup> Petitions of Sprint and AT&T Corp., 17 FCC Rcd at 13199 (¶ 14). See CMRS Calling Party Pays Service Offering, 14 FCC Rcd 10861 (¶ 2) (1999) (“[T]he presubscribed customer of a CMRS provider – the ‘called party’ – generally pays all charges associated with incoming calls.”). The Commission has stated that CMRS carriers do not strictly follow a calling party pays regime because those carriers “typically still charge their subscribers for incoming calls.” Id. at 9624 n.54.

compensation schemes could be devised. The existence of other reasonable approaches, however, does not make the Commission's policy choice arbitrary and capricious.

Finally, Mountain argues cryptically that the Order "appears inconsistent" with unspecified "FCC intercarrier rules." Mountain Brief at 40. Mountain apparently contends the Commission's rules require a Calling Party Network Pays ("CPNP") approach for all types of carrier interconnection.<sup>69</sup> That contention is incorrect. Although CPNP is one approach to intercarrier compensation, it is not the only approach sanctioned by the Commission's regulations.<sup>70</sup> As the Commission has made clear, the intercarrier compensation rules "allow a LEC to charge a paging carrier for traffic that transits the LEC's network and terminates on the paging carrier's network as long as the traffic does not originate on the LEC's network." Texcom Order, 16 FCC Rcd at 21495 (¶ 5).

**C. The Intervenors' Argument That Qwest's Charges For Transiting Traffic Violate Section 51.709 Is Not Properly Before The Court And In Any Event Is Without Merit.**

The paging carrier intervenors make a separate argument not raised by Mountain on review: that the Commission erred in not interpreting section 51.709(b) to bar Qwest from charging Mountain for the transport of transiting traffic. See 47 C.F.R. § 51.709(b). Paging Carriers Intervenors' Brief at 22-24. The Court should not permit the intervenors to raise an

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<sup>69</sup> Under a CPNP regime, the calling party's carrier compensates the called party's carrier for terminating the call. Inter-carrier Compensation NPRM, 16 FCC Rcd at 9614 (¶ 9).

<sup>70</sup> See Inter-carrier Compensation NPRM, 16 FCC Rcd at 9613 (¶ 5). Recognizing that its "complex system of intercarrier compensation regulations . . . treat[s] different types of carriers and different types of services disparately," the Commission instituted a proceeding to revise its rules to establish a "unified approach to intercarrier compensation." 16 FCC Rcd at 9612, 9613 (¶¶ 2, 5)

issue that the petitioner did not raise. If the Court entertains the argument, however, it should find no inconsistency between the Order and section 51.709(b).

The Supreme Court has observed that “one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues.” Vinson v. Washington Gas Co., 321 U.S. 489, 498 (1944). In the absence of an “extraordinary case[]”<sup>71</sup> of the sort not presented here, the Court will refuse to permit intervenors to argue issues not presented by the principal parties.<sup>72</sup> Although Mountain argued before the Commission that Qwest’s charges for transiting traffic violated section 51.709(b), Mountain has chosen not to pursue that issue on review.<sup>73</sup> Mountain’s opening brief does not even mention section 51.709(b), let alone argue that the Commission

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<sup>71</sup> National Association of Regulatory Utility Commissioners v. ICC, 41 F.3d 721, 730 (D.C. Cir. 1994).

<sup>72</sup> E.g., Louisiana Public Service Commission v. FERC, 174 F.3d 218, 224 n.5 (D.C. Cir. 1999); SBC Communications v. FCC, 56 F.3d 1484, 1489-90 (D.C. Cir. 1995). Illinois Bell Telephone Co. v. FCC, 911 F.2d 776, 786 (D.C. Cir. 1990).

<sup>73</sup> Mountain may not resurrect the section 51.709(b) issue by presenting it in its reply brief. The Court will not consider an argument raised by a party on review for the first time in a reply brief. See, e.g., Kimberlin v. Department of Justice, 318 F.3d 228, 232 n.2 (D.C. Cir. 2003); Benkelman Telephone Co. v. FCC, 220 F.3d 601, 607 n.10 (D.C. Cir. 2000).

misconstrued that rule. The Court should not permit the intervenors to expand the scope of this review proceeding.<sup>74</sup>

In any event, the Commission reasonably interpreted section 51.709(b) not to prohibit Qwest from charging Mountain for the transport of transiting traffic. Both the language of the rule and administrative precedent support that construction.

Section 51.709(b) provides that “the rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers’ networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier’s network.”<sup>75</sup> Transiting traffic, however, always involves the transport of traffic among at least three carriers’ networks: the originating carrier, the transiting carrier(s) and the terminating carrier. The text of section 51.709(b) thus does not address transiting traffic.

The intervenors contend that section 51.709(b) “on its face” precludes Qwest from charging for traffic it delivers “to Mountain from a third carrier.” Paging Carrier Intervenors’ Brief at 23. Under well-established law, however, a statute or regulation “must, if possible, be

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<sup>74</sup> The intervenors in seeking leave to file a separate brief told the Court that “it appears that the particular interconnect architecture utilized by Mountain and Qwest is substantially different from that used by most” intervenors. “Joint Submission By Petitioner and Petitioner-Intervenors Regarding Proposed Briefing Format,” (Dec. 19, 2002) at 3. The intervenors stated that a separate brief would enable them to argue that “the principles announced in the Mountain Orders should not be applied to their own interconnection situations.” Id. at 4. In their separate brief, however, the intervenors assert that “Mountain’s interconnection arrangement with Qwest is similar to arrangements between many wireless carriers and incumbent LECs.” Paging Carriers Intervenors’ Brief at 5. See also id. at 17 (“[T]he Mountain/Qwest arrangement is no different from that which exists whenever a CMRS carrier establishes a single interconnection point serving multiple local calling areas.”). The intervenors have not justified their attempt to enlarge the issues on review.

<sup>75</sup> 47 C.F.R. § 51.709(b) (emphasis added).

construed in such fashion that every word has some operative effect.”<sup>76</sup> The intervenor’s construction ignores the limiting phrase “between two carriers’ networks” in section 51.709(b), in violation of that principle of statutory and regulatory construction.

Moreover, the Commission’s construction comports with administrative precedent. The Commission in Texcom held that section 51.709(b) “governs the division of the cost of dedicated transition facilities between two carriers,” and thus “does not apply in the transiting traffic context, where the traffic . . . originates instead with a third carrier.” Texcom, 16 FCC Rcd at 21496 (¶ 8). The Commission in this case followed Texcom in rejecting the interpretation of section 51.709(b) advanced by the intervenors in this case. See also Qwest Corp. v. FCC, 252 F.3d at 468.

**III. MOUNTAIN’S CLAIM THAT THE COMMISSION ERRED BY FAILING TO EXPLAIN HOW A TERMINATING CARRIER MAY BE REIMBURSED FOR TRANSITING COSTS IS NOT PROPERLY BEFORE THE COURT AND IN ANY EVENT HAS NO MERIT.**

The Commission in footnote 13 of the Order observed that “a terminating carrier may seek reimbursement of [transiting] costs from originating carriers through reciprocal compensation.” Order, 17 FCC Rcd at 15137 n.13 (J.A. ). Mountain argues that the Commission committed reversible error because it did not explain in this adjudication how such reimbursement would occur. Mountain also contends that footnote 13 is unworkable. For three independent reasons, the Court lacks jurisdiction to consider these arguments.

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<sup>76</sup> Dole Food Co. v. Patrickso, 123 S.Ct 1655, 1661 (2003), quoting United States v. Nordic Village, Inc, 503 U.S. 30, 36 (1992).

First, Mountain did not bring to the Commission's attention any of the arguments about footnote 13 that it presents in its brief. Section 405 thus bars the Court from considering these arguments on review. See United States Cellular Corp. v. FCC, 254 F.3d at 83.

Second, Mountain lacks standing to challenge footnote 13. To establish standing, a litigant must establish that it suffers an actual or imminent injury that is fairly traceable to the challenged agency action and is likely to be redressed by a favorable decision. See, e.g., Vermont Agency of Natural Resources v. United States, 529 U.S. 765, 771 (2000). The Commission's general observation that terminating carriers may seek reimbursement of transiting traffic costs from originating carriers through reciprocal compensation does not even arguably subject Mountain to any actual or imminent harm.

Third, the Commission's non-decisional observation that terminating carriers "may seek" reimbursement of transiting costs from originating carriers is not within the Court's jurisdiction to review the agency's action. As the Supreme Court repeatedly has recognized, courts review "judgments, not statements in opinions."<sup>77</sup> The task of a federal appellate court thus is not to review an agency's observations in isolation, but rather to determine whether an alleged legal error "resulted in an erroneous judgment." Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842, reh. denied, 468 U.S. 1227 (1984). In FCC v. Pacifica Foundation, 438 U.S. 726, reh. denied, 439 U.S. 883 (1978), for example, the Supreme Court held that "general statements" in Commission adjudications that "do not change the character of its order" are unreviewable. 438 U.S. at 734.

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<sup>77</sup> E.g., Johnson v. DeGrandy, 512 U.S. 997, 1003 n.5 (1994); California v. Rooney, 483 U.S. 307, 311, reh. denied, 483 U.S. 1056 (1987).

Congress codified this well-established restraint on the judicial reviewing power by authorizing the courts of appeals to review only Commission “orders.” 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a). As this Court has held, the statutory term “order” operates as a limitation on the Court’s subject-matter jurisdiction by denying review of non-decisional statements in Commission opinions. See American Telephone & Telegraph Co. v. FCC, 602 F.2d 401, 407 (D.C. Cir. 1979).

The Commission’s statement in footnote 13 that terminating carriers “may seek” reimbursement of transiting traffic charges from originating carriers is not a part of the judgment reviewable by this Court. The Order adjudicated a complaint filed by Mountain against a single carrier, Qwest, alleging that Qwest unlawfully had assessed charges for the delivery of transiting traffic. The Order did not adjudicate Mountain’s entitlement vel non to the reimbursement of transiting traffic charges from originating carriers. Indeed, Mountain in its complaint did not ask for such reimbursement. The Order did not adjudicate issues not raised in the complaint or determine the liability of parties not before it.

If the Court nonetheless reaches the issue, it should reject Mountain’s claim that the Commission had a duty to explain how its reciprocal compensation rules would operate to permit a terminating carrier to seek reimbursement of transiting charges.<sup>78</sup> Although the Commission is required to articulate a rational basis for its decision, there is no requirement that it provide an explanation for non-decisional observations or statements contained in an order.

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<sup>78</sup> Although Mountain complains that footnote 13 is unexplained and unworkable, it does not claim that the Commission was wrong in stating that “a terminating carrier may seek reimbursement of [transiting] costs from originating carriers.” Order, 17 FCC Rcd at 15137 n.13 (J.A. ). Indeed, Mountain told the Court that there is “no issue over the originating carrier’s ultimate responsibility to pay for all transit charges.” Mountain Brief at 39 (emphasis omitted).

Equally unpersuasive is Mountain's assertion that the alleged "reimbursement scheme" mentioned in footnote 13 is "unworkable" because Qwest does not "send Mountain the information it needs to identify and bill the originating carrier." Mountain Brief at 45. The Commission in footnote 13 observed generally that terminating carriers "may seek" reimbursement from originating carriers; it did not decide that Mountain necessarily is entitled to such reimbursement. That is hardly surprising, since the record evidence shows that Mountain had not paid Qwest's transiting traffic bills.<sup>79</sup> Mountain does not explain how it could obtain reimbursement for transiting traffic charges without paying those charges in the first instance. And, although Mountain complains that Qwest did not "send" it information on the identity of the originating carriers, Mountain does not claim that it asked Qwest for that information.<sup>80</sup>

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<sup>79</sup> Answer at iii, 36 (J.A. ).

<sup>80</sup> There is no merit to Mountain's claim that the Commission's observation in footnote 13 conflicts with the staff's Virginia Arbitration Order, 17 FCC Rcd 27039. As shown in Section I.C., the Commission has no legal obligation to conform its judgments with staff decisions. A fortiori the Commission does not err merely because dicta in a footnote allegedly "is inconsistent with the views of its . . . staff." Mountain Brief at 44.

**CONCLUSION**

The Court should deny the petition for review.

Respectfully submitted,

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June 19, 2003

In the United States Court of Appeals for the  
District of Columbia Circuit

MOUNTAIN COMMUNICATIONS, INC., )  
 )  
 PETITIONER, )  
 )  
 V. )  
 )  
 FEDERAL COMMUNICATIONS COMMISSION AND UNITED ) No. 02-1255  
 STATES OF AMERICA, )  
 )  
 RESPONDENTS. )  
 )  
 )  
 )

**CERTIFICATE OF COMPLIANCE**

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Respondents” in the captioned case contains 13509 words.

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June 19, 2003

## **STATUTORY APPENDIX**

47 USC § 208

47 USC § 405

47 C.F.R. § 51.703

47 C.F.R. § 51.709

**UNITED STATES CODE ANNOTATED**  
**TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS**  
**CHAPTER 5--WIRE OR RADIO COMMUNICATION**  
**SUBCHAPTER II--COMMON CARRIERS**  
**PART I--COMMON CARRIER REGULATION**

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Current through P.L. 108-30, approved 05-29-03

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to

November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

**(3)** Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

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

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Current through P.L. 108-30, approved 05-29-03

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

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

petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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

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

**CODE OF FEDERAL REGULATIONS**  
**TITLE 47--TELECOMMUNICATION**  
**CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION**  
**SUBCHAPTER B--COMMON CARRIER SERVICES**  
**PART 51--INTERCONNECTION**  
**SUBPART H--RECIPROCAL COMPENSATION FOR TRANSPORT AND**  
**TERMINATION OF**  
**TELECOMMUNICATIONS TRAFFIC**

Current through June 2, 2003; 68 FR 32799

[§ 51.703 Reciprocal compensation obligation of LECs.](#)

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

**CODE OF FEDERAL REGULATIONS**  
**TITLE 47--TELECOMMUNICATION**  
**CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION**  
**SUBCHAPTER B--COMMON CARRIER SERVICES**  
**PART 51--INTERCONNECTION**  
**SUBPART H--RECIPROCAL COMPENSATION FOR TRANSPORT AND**  
**TERMINATION OF**  
**TELECOMMUNICATIONS TRAFFIC**

Current through June 2, 2003; 68 FR 32799

[§ 51.709 Rate structure for transport and termination.](#)

(a) In state proceedings, a state commission shall establish rates for the transport and termination of telecommunications traffic that are structured consistently with the manner that carriers incur those costs, and consistently with the principles in § 51.507 and 51.509.

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.