

Oral Argument Scheduled November 18, 2003

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Petition for Review of an Order of the Federal Communications Commission

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

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Case No. 02-1255

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

v.

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

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**JOINT REPLY BRIEF OF WIRELESS CARRIER INTERVENORS  
IN SUPPORT OF THE PETITIONER**

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## GLOSSARY

- Act** Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended.
- 1993 Act** Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).
- 1996 Act** Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996).
- APA** Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq.*
- CLEC** Competitive Local Exchange Carrier – a landline telephone company that competes with the incumbent local exchange carriers.
- CMRS** Commercial Mobile Radio Service – a category of wireless carrier that provides mobile telephony and/or paging services. *See* 47 U.S.C. § 332(d)(1); 47 C.F.R. § 20.9.
- DID** Direct Inward Dialing – a service that transports traffic over shared facilities to the customer’s premises, thereby reducing the facilities needed (and thus the cost) to carry traffic between a local exchange carrier and a customer with multiple telephone numbers.
- FCC** Federal Communications Commission.
- ILEC** Incumbent Local Exchange Carrier – a LEC that as of the date of the 1996 Act provided telephone exchange services in a specific area. *See* 47 U.S.C. § 251(h).
- LEC** Local Exchange Carrier – a telephone company using wired, or landline, technology that provides telephone exchange services and exchange access. *See* 47 U.S.C. § 153(26).
- LATA** Local Access and Transport Area – an area within which Bell Operating Companies are permitted to provide their services. *See* 47 U.S.C. § 153(25).
- Mountain** Mountain Communications, Inc.
- MTA** Major Trading Area – an area within which CMRS carriers provide their mobile services and the area where the FCC has ruled its

reciprocal compensation rules apply. *See* 47 C.F.R. §§ 24.202 and 51.701(b).

**NPA-NXX** Numbering Plan Area – Central Office Code – the first six digits of a 10-digit telephone number which identify a particular geographic area and a particular switch within that area.

**POI** Point of Interconnection – the demarcation point separating one network from another interconnecting network. Sometimes also referred to as the “Point of Connection” or “POC.”

**Transit** Transit – the function performed by an intermediary carrier that connects the network of the originating carrier to the network of the terminating carriers.

Type 1 – an arrangement where a LEC sends its calls to a CMRS carrier directly from one of its end office switches.

Type 2 – an arrangement where a LEC generally sends its calls to a CMRS carrier from a LATA tandem switch.

**Wide Area Calling** Wide Area Calling – also known as “reverse billing” or “reverse toll,” is a service in which a LEC agrees with an interconnecting carrier not to assess charges on calls from the LEC’s end users to the interconnecting carrier’s end users, in exchange for which the carrier pays the LEC a per-minute fee to recover the LECs’ toll carriage costs. The FCC held that its rules do not prohibit a LEC from charging a carrier for these services.

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Intervenors Allied National Paging Association, Arch Wireless, Inc., AT&T Wireless Services, Inc., Sprint Spectrum L.P., T-Mobile USA, Inc. and Western Wireless Corporation (collectively, “Wireless Intervenors”) submit this Joint Reply Brief in response to the briefs of Respondents<sup>1</sup> and of Intervenors Qwest

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<sup>1</sup> Respondents’ brief repeatedly refers to Wireless Intervenors as “Paging Carriers.” Only two Wireless Intervenors provide one-way paging services; the remaining Wireless Intervenors provide two-way CMRS. Although the discussion in Respondents’ brief references only paging services, the ruling at issue is not so limited and may be applied more broadly.

Communications International Inc. and Qwest Corporation (“Qwest”) and Amici Curiae the Verizon telephone companies (together, “ILEC Intervenors”).

### **SUMMARY OF ARGUMENT**

The order under review cannot be reconciled with either the FCC’s existing rules or its prior holdings, including *TSR Wireless*, which was affirmed by this Court. The material facts underlying both orders are identical: the paging carrier maintained one, centralized interconnect point in the MTA and LATA, but obtained local telephone numbers in different local calling areas in the MTA and LATA. Yet in *TSR Wireless*, the FCC ruled that it was unlawful for Qwest to charge the paging carrier for facilities connecting one local calling area with an interconnection point in a different local calling area (240 miles away). Here, the FCC held that it was lawful for Qwest to charge a different paging carrier for the same interconnect facilities (only 40 miles away).

The FCC chooses not to answer Petitioner’s and Wireless Intervenors’ argument relating to transited traffic on its merits, and relies exclusively on procedural grounds. On inspection these grounds prove specious.

This Court should remand this case so the FCC can attempt to explain why, given current rules and precedents, a terminating carrier should pay the costs for interconnection facilities used exclusively to carry calls originated by other carriers.

## ARGUMENT

### I. THE FCC DECISION REQUIRING AN INTERCONNECTING CMRS CARRIER TO PAY FOR INTERCONNECTION FACILITIES USED TO TRANSPORT INCUMBENT LEC-ORIGINATED TRAFFIC IS ARBITRARY AND CAPRICIOUS.

The FCC has ruled that an ILEC may charge a wireless carrier for facilities that the ILEC uses to bring calls from its customers to the carrier for delivery to the called party. *See Mountain Communications v. Qwest*, Order on Review, 17 F.C.C.R. 15135 (2002) (“*Mountain Order*”). This ruling contravenes applicable statutes, judicial precedent and the FCC’s own well-established rules which prohibit an ILEC from imposing facilities charges on terminating carriers for land-to-mobile calls that originate and terminate within the same MTA (intra-MTA calls).<sup>2</sup>

Here, the FCC changed its interconnection rules in an adjudicatory proceeding rather than in a rulemaking proceeding. Moreover, in a complaint case involving a one-way paging carrier and a particular form of interconnection (Type 1), the FCC used sweeping language suggesting that its new rules apply to all wireless carriers and to other forms of interconnection (*e.g.*, Type 2). Indeed, ILECs like Qwest and Verizon have already demanded that the Wireless

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<sup>2</sup> Historically, Bell Operating Companies have been limited to providing services within LATAs, which are generally smaller than MTAs.

Intervenors renegotiate their interconnection contracts to reflect the *Mountain Order*.

With nothing to support the FCC's deviation from existing law in the *Mountain Order*, that Order is arbitrary and capricious and should be vacated and remanded to the FCC.

**A. The FCC's Order Contravenes Existing Law.**

As explained in the Wireless Intervenors' Brief, current interconnection architecture is based upon on three principles which, until the *Mountain Order*, remained firmly fixed in FCC regulations and decisions:

- ILECs must provide direct or indirect interconnection to requesting CMRS providers at any *one or more* technically feasible points. There is no obligation for a CMRS provider to establish multiple points of interconnection within an MTA (or LATA). The FCC consistently has reaffirmed this "single POI" rule. *See* 47 C.F.R. § 51.305(a)(2); *Unified Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 9650-51 ¶ 112 (2001) (ILEC must allow interconnection at any technically feasible point, including "the option to interconnect at a single POI per LATA").
- The originating carrier must bear the costs of transporting its own intra-MTA calls to the interconnect point. 47 U.S.C. §§ 251(b)(5) and

252(d)(2)(A)(i). Where such transport requires a LEC to provide facilities, the LEC may not charge the terminating carrier. 47 C.F.R. §§ 51.703(b) and 51.709(b).

- Every carrier has the right to obtain telephone numbers in each ILEC local calling area within its service area. There is no requirement to maintain a switch or interconnection facilities in each rate center in order to obtain numbers rated to that center. *See* 47 C.F.R. § 52.15(g)(2); *see also* Wireless Intervenors' Brief at 12 n.5 (citing authorities). An originating LEC may charge long distance rates to one of its customers who places a call to the number of a competing carrier's customer rated to a *different* rate center. However, a LEC customer may place such a call on a local (or toll-free) basis when the number is rated to the *same* rate center. *See Petition of WorldCom, Inc. pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n regarding Interconnection Disputes with Verizon Virginia and for Expedited Arbitration*, 17 F.C.C.R. 27039, 27176-77 ¶¶ 286-288 (2002) (“*Virginia Arbitration Order*”).

Consistent with these well-established provisions, the FCC ruled in *TSR Wireless*, and this Court affirmed, that Qwest could not impose charges for the

provision of dedicated facilities necessary to carry LEC-originated, intra-MTA, intra-LATA traffic to the carrier's interconnection point. *TSR Wireless v. U S WEST*, 15 F.C.C.R. 11166, 11181-82 ¶¶ 25-26 (2000) ("*TSR Wireless*"), *aff'd*, *Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

The interconnection between Mountain and Qwest is indistinguishable from that at issue in *TSR Wireless* and the *Virginia Arbitration Order*: Mountain has one interconnection point in the LATA and MTA and has local telephone numbers assigned to different Qwest local calling areas in the same MTA/LATA.

Nonetheless, the *Mountain Order* holds that Qwest may charge Mountain for facilities linking each local calling area to Mountain's Pueblo interconnect point.

The FCC argues that these are permissible charges for providing a Wide Area Calling service. Respondents' Brief at 21. The result is *Alice in Wonderland*: simply because the FCC has said so, what in prior decisions was intra-MTA traffic covered by 47 C.F.R. § 51.703(b) has become Wide Area Calling exempt from 47 C.F.R. § 51.703(b). As Petitioner has demonstrated, under the Mountain arrangement (with numbers rated to three local calling areas within a larger tandem serving area), calls between numbers rated to different local calling areas continue to be rated as toll calls.<sup>3</sup> See Petitioner's Brief at 15-17. The FCC ignores this point entirely.

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<sup>3</sup> ILEC Intervenors suggest that Qwest is unable to track toll usage on the facilities at

Under existing, industry-wide billing conventions, carriers rate calls by comparing the originating and terminating NPA-NXX codes without regard to the routing of the calls. *See Virginia Arbitration Order*, 17 F.C.C.R. at 27176-77 ¶ 286. A call from a Qwest customer in Colorado Springs to a Mountain customer with a Colorado Springs-rated number constitutes a local call – regardless of the fact that Qwest must carry the call to Mountain’s interconnection point in Pueblo.<sup>4</sup> The “toll free” nature of the call results from Mountain’s right to local numbering resources, not from any negotiated concession on the part of Qwest. Conversely, a call from a Qwest customer in Pueblo to a Mountain customer with a Colorado Springs-rated number is a toll call – regardless of the fact that Qwest hands off the call to Mountain in Pueblo.

Inexplicably, the FCC accepts Qwest’s argument that it rates calls as local or toll, not by comparing the NPA-NXX of the originating and terminating telephone numbers, but by comparing the originating telephone number and the local calling area where the POI is located. But a call is not “terminated” at the POI. A call is terminated only when it is received by the called party and, as the FCC has acknowledged, “NPA-NXX rating is the established compensation mechanism not

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issue. *See* ILEC Intervenors’ Brief at 4 n.4. If that is the case, it is a technical problem within Qwest’s network and not the result of the configuration of Mountain’s interconnection.

<sup>4</sup> It is critical that although such a call is routed through Pueblo, it is terminated on the Mountain customer’s pager, most likely located in Colorado Springs. *See* 47 C.F.R. § 51.701(d).

only for [Verizon], but industry wide.” *Virginia Arbitration Order*, 17 F.C.C.R. at 27181-82 ¶ 301.

Contrary to the FCC’s *ipse dixit*, Mountain has created no “extended local calling area,” and Qwest has not been deprived of toll revenues it “otherwise would collect.” Respondents’ Brief at 28. Mountain has simply exercised its right to obtain numbers in each rate center where it provides service. Qwest for its part has complied with its obligation to furnish the facilities necessary to transport its own calls. Neither of these factors affects Qwest’s ability to bill as toll calls between numbers in different rate centers.

For the FCC, the “decisionally significant” difference between the two cases is that Mountain’s interconnection, unlike in *TSR Wireless*, involves “an optional arrangement that is ‘not necessary to effectuate interconnection.’” Respondents’ Brief at 29. Mountain’s arrangement is “optional,” because “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 office to that POC.” *Id.* at 22 (emphasis added). In other words, wireless carriers must make a choice:

1. They may obtain “free” delivery of ILEC calls if they rate all of their customers’ telephone numbers in the local calling area where the POI is located. This prevents wireless customers from enjoying an inbound local calling area similar to what the ILEC offers to its own customers; *or*

2. They may obtain local telephone numbers in each ILEC local calling area, if they forfeit their right to a single POI per LATA and pay for interconnect facilities to each local calling area.

In short, wireless carriers must either forfeit their right to use a single centralized interconnect point in an MTA (or LATA), or must forfeit their customers' right to local telephone numbers.

That is the Hobson's choice offered by Qwest and sanctioned by the FCC. Qwest offers Mountain "free" transport of Qwest calls to its single POI in Pueblo (as required under Rules 51.703(b) and 51.709(b)) "*so long as* Mountain obtains and uses DID numbers for its subscribers from the closest central office ... and assign[s] them to *all* of its subscribers...." Respondents' Brief at 22-23 (emphasis added). Under this arrangement, all calls from Qwest customers to Mountain customers would result in the imposition of toll charges on the Qwest end user except for calls from Qwest customers in Pueblo.<sup>5</sup> Alternatively, Qwest would "allow" Mountain to use local numbers from other areas provided that Mountain establishes (at its own expense) *multiple* interconnection points, *i.e.*, one in each Qwest local calling area in which Mountain offers service. Respondents' Brief at 23.

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<sup>5</sup> A call from a judge in chambers to a law clerk in the court's library would be a local call, whether the clerk used a landline or wireless telephone. Under the Order here, this intra-building call would remain local only if the law clerk used a landline telephone. But if the clerk instead used a wireless telephone, the call would become a toll call – unless the wireless carrier happened to maintain its centralized interconnect point in this local calling area.

*TSR Wireless* is not conditioned upon such a *quid pro quo*. *TSR Wireless* maintained a centralized interconnect point in one local calling area (Flagstaff) but obtained telephone numbers in another local calling area (Yuma) so Qwest customers in Yuma would not pay toll charges when calling *TSR Wireless* customers in Yuma. The FCC ruled (and this Court affirmed) that Qwest could not charge *TSR Wireless* for interconnect facilities over 240 miles in length. The FCC's ruling in the order under review is irreconcilable with *TSR Wireless*.

The FCC's radical deviation from existing law makes the *Mountain Order* arbitrary and capricious. Wireless Intervenors urge this Court to vacate and remand the order to the FCC.<sup>6</sup>

**B. The FCC's Order Would Reverse the Existing Regulatory Regime.**

Hundreds of wireless providers and an estimated 40 million mobile customers rely upon interconnection arrangements virtually identical to those at issue here. CMRS switches (usually no more than one in each MTA) are connected to incumbent LECs' networks at technically feasible points which often

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<sup>6</sup> The FCC's wholesale reversal of its rules in an adjudicatory proceeding violates the Administrative Procedure Act. Wireless Intervenors' Brief at 19-21. The FCC asserts that Petitioner did not raise this point before the FCC and that Wireless Intervenors are barred from raising it now. 47 U.S.C. § 405. *See* Respondents' Brief at 33-34. However, these procedural issues were implicit in the Petitioner's arguments that the FCC had ignored its existing rules in the *Mountain Order*. Moreover, courts may elect not to apply the discretionary exhaustion doctrine in Section 405 when the issues concern, as here, "administrative due process." *See, e.g., Action for Children's Television v. FCC*, 564 F.2d 458, 469 (D.C. Cir. 1977).

do not correspond to the locations to which CMRS numbers are rated.<sup>7</sup> The costs of the intercarrier links are borne by the carriers in the proportions that their originating traffic bears to total traffic on the facility. *See* 47 C.F.R. § 51.709(b).

CLECs also often utilize similar interconnection configurations. The FCC's Wireline Competition Bureau reaffirmed the right of competitive carriers to request a single point of interconnection as well as the LECs' financial responsibility for transporting their traffic to that single point. *Virginia Arbitration Order*, 17 F.C.C.R. at 27064 ¶ 52. The Bureau reaffirmed that call rating shall be based upon comparison of NPA-NXX codes of the calling and called numbers – and not based on the centralized interconnect point. *Id.* at 27177 ¶ 288.

Evading the inconsistency between the *Mountain Order* and all other FCC precedent, the FCC focuses attention on the status of the *Virginia Arbitration Order* as binding precedent. *See* Respondents' Brief at 30-33. But the status of the order (which remains effective pending appeal) is irrelevant. The *Virginia Arbitration Order* “appl[ied] current Commission rules and precedents”<sup>8</sup> in circumstances identical to those in the *Mountain Order*. Wireless Intervenors cite

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<sup>7</sup> *See, e.g., Numbering Resource Optimization*, 14 F.C.C.R. 10322, 10370-71 n.174 ¶ 112 (1999) (“to enable the rating of incoming wireline calls as local, wireless carriers typically associate NXXs with wireline rate centers that cover either the business or residence of end-users”).

<sup>8</sup> 17 F.C.C.R. at 27043 ¶ 3.

the *Virginia Arbitration Order* to illustrate the uniform understanding of both the FCC's staff and the telecommunications industry prior to the *Mountain Order*.

The FCC suggests that it may reverse the *Virginia Arbitration Order*, although claiming that it takes “no position on whether that staff decision was correct.” Respondents’ Brief at 30-31. For their part, the ILEC Intervenors simply assert that the *Virginia Arbitration Order* “is wrong.” ILEC Intervenors’ Brief at 18. The implicit admission is that the *Mountain Order* and the *Virginia Arbitration Order* cannot be reconciled.

The *Mountain Order* also is inconsistent with at least one federal case (other than *TSR Wireless*). In *Southwestern Bell Telephone Co. v. Texas Public Utility Comm’n*, No. MO-01-CA-045, 2002 U.S. Dist. LEXIS 26002 (W.D. Tex., Dec. 26, 2002), the court overruled state regulators who permitted an ILEC to charge for interconnect facilities that crossed local calling area boundaries:

[T]he Court is of the opinion that AT&T has the statutory right under the Act to select the location of a technically feasible point of interconnection, and that the regulations of the [FCC], including in particular 47 C.F.R. § 51.703(b), prohibit SWBT from imposing charges for delivering its “local” traffic originating on its network to the point of interconnection selected by AT&T *even when that point is outside of the local calling area of SWBT*, and that because the PUCT decision below allows such charges the PUCT has erred, as the PUCT has now confessed to this Court in light of the latest FCC pronouncement on this issue.

*Id.* at \* 2-3 (emphasis added). Another federal court “found itself challenged to reconcile” the various FCC rulings in this area. *See MCIMetro Access*

*Transmission Services v. BellSouth Telecommunications*, No. 5:01-CV-921-H(4), 2003 U.S. Dist. LEXIS 2473, at \*15 (E.D.N.C., Jan. 21, 2003).

This state of affairs only further highlights the need to remand this matter to the FCC so that it may establish a coherent policy going forward.

## **II. THE FCC DECISION THAT TERMINATING CARRIERS MUST PAY FOR FACILITIES ASSOCIATED WITH TRANSIT TRAFFIC IS ARBITRARY AND CAPRICIOUS.**

The FCC argues that the argument based on FCC Rule 51.709(b) is “not properly before the Court.” Respondents’ Brief at 38-41. Intervenors beg to differ. Both Petitioners and Wireless Intervenors rely on *TSR Wireless*, which in turn relied on both 47 C.F.R. 51.703(b) and 51.709(b). *See TSR Wireless*, 15 F.C.C.R. at 11181-82 ¶ 26. *See also* Mountain’s Complaint herein (filed Sept. 11, 2000) ¶¶ 103, 108 and its Petition for Reconsideration (JA \_\_\_\_). The FCC itself stated in the second sentence of the order under review that “the Bureau denied Mountain’s complaint alleging that [Qwest], an incumbent local exchange carrier (“LEC”), violated sections 51.703 and 51.709 of the Commission’s rules . . .” *Mountain Order*, 17 F.C.C.R. 15135 ¶ 1.

This Court has noted that “nothing in our local rule . . . forbids an intervenor from raising, or a reviewing court from considering, an issue not mentioned by the petitioner [in opening brief] . . . but fully litigated in the agency proceedings and potentially *determinative of the outcome of judicial review.*” *Synovus Financial*

*Corp. v. Board of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991) (emphasis added).

Because of space limitations, the Wireless Carrier Intervenors incorporate Mountain's Reply Brief for a response to the FCC's additional arguments regarding facilities charges for transit traffic.

### CONCLUSION

Because the FCC has failed to reconcile the order under review with its own rules and prior precedent, the Wireless Intervenors respectfully request that this Court vacate the order and remand the matter to the FCC for further proceedings not inconsistent with the Court's opinion.

Respectfully submitted,

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July 21, 2003

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## **CERTIFICATE OF COMPLIANCE**

Under Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief is proportionally spaced, has a typeface of 14 points or more and contains 3,095 words. This certificate was prepared in reliance on the word count of the word-processing system (Word/WP) used to prepare this brief.

Dated July 21, 2003

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## **CERTIFICATE OF SERVICE**

I, Doane F. Kiechel, hereby certify that on this 21<sup>st</sup> day of July, 2003, two copies of the foregoing Joint Reply Brief of Wireless Carrier Intervenors were served by first-class United States mail, postage prepaid, upon the persons listed on the attached service list.

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Doane F. Kiechel