

Oral Argument Not Yet Scheduled

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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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**ERRATA**

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

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

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

### **Parties and Amici**

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioner Mountain Communications, Inc.

### **Rulings under Review**

References to the rulings at issue also appear in the Petitioner's Brief.

### **Related Cases**

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

Dated April 5, 2003

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Circuit Rule 26.1, the six Wireless Carrier Intervenors, by their attorneys, respectfully submit this corporate disclosure statement.

**Allied National Paging Association** is a non-profit trade association whose members provide wireless services throughout the United States. Members include both private and publicly traded companies.

**Arch Wireless, Inc.** provides one-way and two-way wireless short messaging services throughout the United States. Arch is a publicly held Delaware corporation traded under the symbol AWIN.

**AT&T Wireless Services, Inc.** (“AWS”) provides wireless telecommunications services throughout the United States. AWS is a publicly held corporation that is incorporated under the laws of the State of Delaware, and its stock is publicly traded under the symbol AWE. AWS has no parent company. NTT DoCoMo USA, Inc. owns approximately 17 percent of AWS’s voting securities and is the only company that owns more than 10 percent of the stock of AWS.

**Sprint Spectrum L.P., d/b/a Sprint PCS**, is a Delaware limited partnership that is wholly owned by Sprint Corporation. Sprint Corporation is a holding company whose subsidiaries engage in the provision of telecommunications services and related businesses. Sprint PCS, together with other subsidiaries that

are wholly owned by Sprint Corporation, comprise the wireless division of Sprint Corporation and provide wireless telecommunications services to the public. Sprint Corporation stock is publicly traded under the symbols FON (Sprint FON Group) and PCS (Sprint PCS Group).

**T-Mobile USA, Inc.** is a wholly owned subsidiary of Deutsche Telekom AG that together with other subsidiaries that are wholly owned by Deutsche Telekom comprise the wireless division of Deutsche Telekom. Deutsche Telekom is a holding company whose subsidiaries engage in telecommunications and related businesses. Deutsche Telekom stock is publicly traded under the symbol DT.

**Western Wireless Corporation** provides wireless telecommunications services principally in rural areas. Western Wireless is a publicly held corporation that is incorporated under the laws of the State of Washington, and its stock is publicly traded under the symbol WWCA.

Dated April 5, 2003

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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.*
- 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.
- CPNP** Calling Party’s Network Pays – a compensation method in which the provider of the calling party’s network pays the providers of the other networks utilized in terminating the telecommunications to the person being called.
- 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).

- POI** Point of Interconnection – the demarcation point separating one network from another interconnecting network.
- Transit** Transit – the function performed by an intermediary carrier that connects the network of the originating carrier to the network of the terminating carriers.
- WAC** Wide Area Calling – a reverse billing arrangement whereby the toll calls that a LEC would ordinarily bill to its own calling customers are instead billed to and paid by the terminating carrier.

Oral Argument Not Yet Scheduled

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

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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, the “Wireless Carrier Intervenors” – submit this Joint Brief in support of the Petitioner, Mountain Communications, Inc. (“Mountain”).

## **STATUTES AND REGULATIONS**

Pertinent statutes and regulations not set forth in the Addendum to the Petitioner's Brief are reproduced in the addendum to this brief.

## **STATEMENT OF ISSUES**

1. Did the FCC act in an arbitrary and capricious manner or otherwise contrary to law when it departed from its own rules and required an interconnecting wireless carrier to pay the incumbent telephone company for facilities that the incumbent uses to deliver calls from its own subscribers to the interconnecting carrier when those facilities cross the incumbent's local calling area boundaries?

2. Did the FCC act in an arbitrary and capricious manner or otherwise contrary to law when it departed from its own rules and required an interconnecting wireless carrier to pay the incumbent telephone company for a portion of the facilities that the incumbent uses to deliver calls from a third carrier to the interconnecting carrier?

## **STATEMENT OF THE CASE**

This is an appeal of an FCC denial of a complaint lodged by Petitioner Mountain, a telecommunications carrier providing one-way paging services, a type of wireless service or commercial mobile radio service ("CMRS"), against Qwest Corporation ("Qwest"), an incumbent local exchange carrier ("LEC") that provides

local telephone services. The complaint involves compensation for the facilities, or circuits, that telecommunications carriers use to connect their respective networks so their customers can place calls to, and receive calls from, each other.

Mountain raised two claims in its complaint. It first contended that Qwest was charging Mountain for a portion of the facilities that Qwest uses to bring calls from its own customers to Mountain for delivery to Mountain's customers and that such "facilities charges" are unlawful. Second, Mountain claimed that Qwest was charging Mountain for the portion of the facilities that Qwest uses to bring calls originating on third party networks to Mountain for delivery to Mountain customers and that such "transit charges" were unlawful. Qwest admitted it was imposing these charges but asserted its charges were lawful. The FCC agreed with Qwest and denied Mountain's complaint – even though FCC rules and orders directly on point expressly prohibit originating carriers like Qwest from imposing such charges on CMRS carriers like Mountain.

The FCC's decision has potential impacts far beyond the two parties to this complaint case. The FCC has consistently declared that its interconnection rules apply to all telecommunications carriers, including carriers like Petitioner and the Wireless Carrier Intervenors. Nothing in these rules or prior decisions suggested the new exception the FCC created in the order under review, which allows an incumbent LEC to shift costs to the terminating CMRS carrier when the facilities

in question are more than 20 miles long and cross a local calling area. *See Mountain Communications v. Qwest Communications*, Order on Review, 17 F.C.C.R. 15135 (2002) (“*Mountain Order*”); *see also Mountain Communications v. Qwest Communications*, Memorandum Opinion and Order, 17 F.C.C.R. 2091 (2002) (“*Mountain Bureau Order*”). On the contrary, the FCC had repeatedly stated that wireless providers may select a single interconnection point in each market (LATA), a rule which virtually guarantees that many, if not most, intercarrier links will cross local calling area boundaries and will therefore fall under the new exception established by the *Mountain Order*.

In short, the exception the FCC created in the complaint (or adjudicatory) proceeding under review is patently inconsistent with the published rules that have served as the foundation for thousands of interconnection contracts and is thus arbitrary and capricious. For all practical purposes, the FCC retroactively sought to change its interconnection rules without conducting a rulemaking proceeding and without affording affected parties like the Wireless Carrier Intervenors an opportunity to comment before the preexisting rules were changed. Although the facts underlying the FCC's decision were limited to a specific form of interconnection, ILECs like Qwest already have sought to apply the *Mountain Order* to other forms of interconnection and all types of CMRS providers. The Wireless Carrier Intervenors therefore urge the Court to vacate the *Mountain Order*

under review and to direct the FCC to apply its existing law to the claims that Mountain has made.

## STATEMENT OF FACTS

Intervenors will not repeat Petitioner's statement of the facts underlying this dispute except to note that Mountain's interconnection arrangement with Qwest is similar to arrangements between many wireless carriers and incumbent LECs. To the extent the FCC has excepted the Mountain architecture from the cost apportionment regime created by prior law, and the ILECs succeed in their attempts to broadly construe the *Mountain Order*, all wireless carriers could face disruption to their networks and increases in their costs of doing business.

From the inception of wireless technology, incumbent LECs like Qwest have refused to interconnect with CMRS providers on a technically efficient basis, overcharged them for interconnection facilities, and refused to compensate CMRS carriers for termination of calls originated by LEC customers.

Initially, the FCC acknowledged these problems, but was hamstrung by jurisdictional limitations.<sup>1</sup> Allegations of continuing abuse, and the growth of the CMRS industry, led to passage of the Omnibus Budget Reconciliation Act of 1993

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<sup>1</sup> See generally, *In re Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 59 RR 2d 1275 (1986); *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Third Report and Order, 9 F.C.C.R. 7988 (1994); *In re Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Service*, Memorandum Opinion and Order on Reconsideration, 4 F.C.C.R. 2369 (1989).

(“1993 Act”). The 1993 Act represented a sea of change for the FCC and the CMRS industry it regulates. Not only did Congress establish a nationwide policy for CMRS oversight, it also expressly addressed and confirmed the authority of the FCC over interconnection issues involving CMRS, including interconnection of intrastate traffic. *See* 47 U.S.C. §§ 332(c)(1)(B), 152(b), as amended.

The FCC exercised its new authority in a number of proceedings,<sup>2</sup> and among other things adopted a rule requiring telephone companies to compensate wireless carriers for the costs wireless carriers incur in terminating LEC traffic over their mobile networks. 47 C.F.R. § 20.11. Following passage of the Telecommunications Act of 1996 (“1996 Act”), the FCC issued implementing rules in its *Local Competition Order*,<sup>3</sup> which addressed interconnection issues between CMRS providers and incumbent LECs within a broader, competitive context. Using its authority under the 1996 Act, the FCC treated CMRS providers in the same way as competitive LECs for some purposes, while recognizing the unique role of CMRS providers in other respects. The *Local Competition Order* established the following basic principles:

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<sup>2</sup> *See, e.g., In re Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 F.C.C.R. 1411, 1497-98 ¶¶ 230-32 (1994).

<sup>3</sup> *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; In re Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 F.C.C.R. 15499 (1996) (“*Local Competition Order*”).

- CMRS providers are treated as “requesting carriers” for the purposes of negotiating arrangements for interconnection, unbundled elements and cost-based compensation under Sections 251 and 252 of the Act. *Id.* at 15517, 16005 ¶¶ 33, 1023.
- Incumbent LECs are prohibited from discriminating among carriers because of the technology they use or their regulatory status. *Id.* at 15612 ¶ 218.
- Incumbent LECs are required to pay (in most cases at symmetrical rates) CMRS providers to terminate ILEC-originated traffic on CMRS networks. *Id.* at 15997, 16018 ¶¶ 1008, 1045.
- Incumbent LECs must provide direct or indirect interconnection to requesting CMRS providers at any one or more technically feasible points within the incumbent LEC’s network. There is no obligation for a CMRS provider to establish multiple points of interconnection within an incumbent LEC’s network. 47 C.F.R. § 51.305(a); *Local Competition Order*, 11 F.C.C.R. at 15588, 16000 ¶¶ 173, 1015.
- All providers of local exchange service have a duty to establish reciprocal compensation arrangements, pursuant to which they “will receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such

compensation for certain traffic that they transmit and terminate to other carriers.” *Id.* at 16018 ¶ 1045.

- The FCC defined CMRS providers’ local calling areas and made those areas coextensive with Major Trading Areas (“MTAs”), which are significantly larger than the local calling areas the state commissions have established for incumbent LECs. “Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under Section 251(b)(5) [of the Act], rather than interstate and intrastate access charges.” *Id.* at 16014 ¶ 1036.
- Interconnect facilities which link incumbent systems to the point(s) of interconnection designated by the CMRS provider may be billed to the CMRS provider only to the extent they are utilized to carry traffic originated by the CMRS provider. 47 C.F.R. §§ 51.703(b) and 51.709(b); *Local Competition Order*, 11 F.C.C.R. at 16016 ¶ 1042.

Consistent with the above, Mountain and Qwest interconnect at a single, technically feasible point near Mountain’s paging switch in Pueblo, Colorado. Mountain receives calls at this interconnection point from Qwest end offices in Pueblo, and in the neighboring exchanges of Colorado Springs and Walsenberg. These three exchanges are located within the same LATA and MTA. By technical

necessity, Qwest calls from the Walsenberg and Colorado Springs exchanges must be transported to Mountain's interconnect point in Pueblo, before being delivered to the called party.

Despite the FCC's clear rules authorizing such an architecture, Qwest insisted on charging Mountain for the interconnection facilities linking its Colorado Springs and Walsenberg exchanges to Mountain's Pueblo interconnect point. Because Mountain sends no traffic to Qwest, those facilities are used exclusively to carry calls originated by Qwest and other incumbent LECs.

### **SUMMARY OF ARGUMENT**

FCC regulations implementing the 1996 Act allow competing telecommunications carriers like Mountain to interconnect at any technically feasible point on the network of incumbent LECs like Qwest. They also require originating carriers to bear the costs of facilities used to transport calls by their own customers to this interconnection point. In the face of challenges by incumbent LECs, these rules have been reaffirmed repeatedly by the FCC, including (most significantly) in *Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001), *aff'g TSR Wireless v. U S WEST*, Memorandum Opinion and Order, 5 F.C.C.R. 11166 (2000) ("*TSR Order*"), and, most recently, in the *Virginia Arbitration*. See *In re 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 Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 F.C.C.R. 27039, 27064 ¶ 52 (2002) (“*Virginia Arbitration*”). None of the FCC’s rules or orders contained any exception, whether as to distance or otherwise, to the general principle which imposes transport costs on the calling party’s network. Nearly all of the thousands of interconnection agreements negotiated since the 1996 Act have relied on this body of law.

The *Mountain Order* was decided in the context of a complaint rather than a rulemaking under the Administrative Procedure Act, where the procedure is the application of existing law rather than the adoption of new or amended rules that would apply on a prospective basis. 5 U.S.C. § 554. There was no opportunity for the Wireless Carrier Intervenors to participate. Yet the FCC chose the *Mountain Order* as a vehicle to create an exception which effectively swallows the general rules described above. The holding in the *Mountain Order* – that an ILEC may shift to a terminating paging carrier costs of transport beyond 20 miles – is irreconcilable with the plain language of the regulations and with prior FCC interpretations, including especially the *TSR Order*, which imposed on this same respondent ILEC the costs of transport facilities more than 240 miles long. The *Mountain Order* is also irreconcilable with the *Virginia Arbitration*, which was decided six days prior to the *Mountain Order*, and which upheld the established

cost-apportionment rule, stating, correctly, that any change in that rule should be accomplished by way of a formal rulemaking, consistent with the Administrative Procedure Act.

There was no legal or factual basis for the FCC's action herein, which is therefore arbitrary and capricious, and should be vacated and remanded to the FCC.

## ARGUMENT

### I. **THE FCC DECISION WAS ARBITRARY AND CAPRICIOUS IN REQUIRING A TERMINATING CARRIER TO PAY FOR INTERCONNECTION FACILITIES USED TO TRANSPORT INCUMBENT LEC-ORIGINATED TRAFFIC.**

#### A. **Existing FCC Rules Do Not Permit Incumbent LECs to Charge for Interconnection Facilities Used to Deliver Incumbent LEC-Originated Calls.**

The FCC acted improperly in the *Mountain Order* by ignoring its own regulations, as well as prior FCC and judicial precedent, on the issue of whether an ILEC may charge a terminating carrier for interconnection facilities that the ILEC uses to send its own traffic to another carrier for completion.

Three established FCC regulations are critical to this case:

First, an incumbent LEC must provide requesting carriers with interconnection at any technically feasible point within the incumbent LEC's network and within the LATA. The location of the point or points is at the option of the requesting CMRS provider. 47 U.S.C. § 252(c)(3); 47 C.F.R. § 20.11(a).

Thus, CMRS provider may not be forced to establish multiple interconnect points on the incumbent LEC's network.<sup>4</sup>

Second, a competing carrier may obtain telephone numbers in each local calling area in its service area. The reason is obvious: callers on the incumbent's network must be able to dial the competitor's subscribers on the same terms as they are able to dial subscribers to the incumbent system.<sup>5</sup>

Third, a terminating wireless carrier may not be required to pay the costs of facilities needed to transport other carriers' calls to the terminating carrier's interconnect point. *See, e.g.*, 47 C.F.R. § 51.703(b) ("A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.")<sup>6</sup>.

Although the incumbent LECs, Qwest foremost among them, brought challenges against these rules in various forums, the courts and the FCC

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<sup>4</sup> *See, e.g., Virginia Arbitration*, 17 F.C.C.R. at 27064 ¶ 52 ("Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA."); *In re Developing a Unified Inter-carrier Compensation Regime*, Notice of Proposed Rulemaking, 16 F.C.C.R. 9610, 9650-51 ¶ 112 (2001) ("*Inter-carrier Compensation Regime*") ("[A]n ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA.") .

<sup>5</sup> *See, e.g.*, 47 C.F.R. § 52.15(g); *In re Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, 15 F.C.C.R. 7574, 7577 n.2 (2000) ("A carrier must obtain a central office code for each rate center in which it provides service...."); *Numbering Resource Optimization*, Notice of Proposed Rulemaking, 14 F.C.C.R. 10322, 10371 n.174 (1999) ("[T]o enable the rating of incoming wireline calls as local, wireless carriers typically associate NXXs with wireline rate centers that cover either the business or residence of [wireless] end users.").

<sup>6</sup> Section 51.709(b) further provides: "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

consistently rejected these challenges. The first attack was at the Eighth Circuit, where the FCC's rules, including specifically Section 51.703(b), were upheld as applied to wireless carriers. *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n.21 (8<sup>th</sup> Cir. 1997), *vacated on other grounds, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). Southwestern Bell then took the issue to the FCC's Common Carrier Bureau, which specifically held that a LEC may not charge a CMRS provider for facilities used to transport LEC-originated traffic.<sup>7</sup> When Qwest still refused to comply with the rules, multiple complaints were filed, and the FCC entered judgment against Qwest, with this Court affirming the FCC. *See Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001), *aff'g TSR Wireless v. U S WEST*, 15 F.C.C.R. 11166 (2000). The *TSR Order* reaffirmed that Qwest was in violation of 47 C.F.R. § 51.703(b) by charging a paging carrier for the interconnection facilities between Flagstaff and Yuma, Arizona, a distance over 240 miles. *See Qwest v. FCC*, 252 F.3d at 467-68.

As recognized by the FCC itself in the *Mountain Order*, “the network configuration discussed in the *TSR Order* is similar to Mountain's arrangement

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that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.”

<sup>7</sup> Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau, to Keith Davis, Southwestern Bell, 13 F.C.C.R. 184, 185 (1997) (There is “no basis for the argument . . . that LECs are permitted to assess charges on CMRS carriers to recover the costs of facilities that are used by LECs to deliver traffic to CMRS carriers.”). *See also In re Local Competition Order*, 11 F.C.C.R. at 16028 ¶ 1062 (1996) (“The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks . . . which the providing carrier owns and uses to send its own traffic to the interconnecting carrier.”).

with Qwest”. *See Mountain Order*, 17 F.C.C.R. at 15138 ¶ 6. In each case, the interconnection was between a paging carrier and various Qwest end offices to which paging numbers had been rated. In each case, the interconnect point and the end offices were within the same LATA and MTA. The only distinction is that the longest distance described in the *TSR Order* is 240 miles, as compared to forty-five miles here. Yet, in the *TSR Order*, the FCC held Qwest responsible for facilities costs, while in the *Mountain Order*, the terminating carrier has been held responsible for such costs.

Most recently, the FCC’s Wireline Competition (formerly, Common Carrier) Bureau resolved numerous interconnection disputes between several competing LECs and an incumbent LEC (Verizon), including a dispute over the costs of interconnection facilities. *See Virginia Arbitration*. Unlike Qwest, which unilaterally began charging competitive carriers for that portion of the facilities longer than 20 miles from the originating local calling area, Verizon proposed charging competitive carriers for facilities longer than 25 miles from the originating local calling area. *See id.* at 27057 ¶ 37. Just as Qwest contended below, Verizon argued that the interconnecting carriers should pay for interconnection facilities needed to transport Verizon-originated traffic outside of the local calling area in which those calls originated. Indeed, Verizon made the same argument that Qwest made in this case, that a literal interpretation of the

FCC's rules would require Verizon to pay for facilities used to carry what it considers to be toll traffic but for which Verizon could not impose toll charges on its customers. *See id.* at 27062 ¶ 48. The Bureau rejected Verizon's position as being inconsistent with FCC rules and reaffirmed that FCC rules mean what they say: an incumbent LEC is "prohibit[ed] . . . from charging any other carrier for traffic originating on that LEC's network:"

Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA. The Commission's rules implementing the reciprocal compensation provisions in Section 252(d)(2)(A) prevent any LEC from assessing charges on another telecommunications carrier for telecommunications traffic subject to reciprocal compensation that originates on the LEC's network. Furthermore, under these rules, to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic.

*Id.* at 27064-65 ¶¶ 52-53 (emphasis added; supporting citations omitted). The Bureau added that Verizon should make its interconnection proposal in a pending FCC rulemaking proceeding that is reexamining the rules governing intercarrier compensation. *See id.* at 27065 ¶ 54.

The FCC's decision in the *Mountain Order* cannot be reconciled with its own regulations, as interpreted in the *TSR Order* and the *Virginia Arbitration*. Although the FCC attempted to create an exception by arguing that Mountain had created a so-called "wide area calling" arrangement which required Qwest to

transport calls outside of its originating local calling area, there was no basis or support for this determination. “Wide area calling” is a term of art which had already been defined by the *TSR Order* and other precedents:

"Wide area calling," also known as "reverse billing" or "reverse toll," is a service in which a LEC agrees with an interconnector not to assess toll charges on calls from the LEC's end users to the interconnector's end users, in exchange for which the interconnector pays the LEC a per-minute fee to recover the LEC's toll carriage costs.

*TSR Order*, 15 F.C.C.R. at 11167 n.6.

In the *Mountain Order*, the FCC announced for the first time and without any explanation that a “reverse billing arrangement is *only one of several types* of wide area calling services.” *Mountain Order*, 17 F.C.C.R. at 15138 ¶ 5 (emphasis in original). Specifically, the FCC redefined wide area calling service to include any situation where a LEC delivers the call to a wireless carrier outside the originating local calling area (though in the same LATA), even though "wide area calling" previously had been limited to arrangements where the terminating carrier paid the originating caller's landline toll charge.<sup>8</sup> For the FCC in the *Mountain Order*, it made no difference that Qwest continued to be able to bill its own customers in any of the three exchanges for toll charges when they dialed

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<sup>8</sup> The *Mountain Order* is not entirely clear and must be read in conjunction with the *Mountain Bureau Order*, 17 F.C.C.R. at 2096 ¶ 12: “the wide area calling arrangement at issue here involves Qwest’s provision of dedicated toll facilities that connect Mountain’s DID numbers in each of Qwest’s local calling areas to Mountain’s interconnect point in another Qwest local calling area.”

Mountain numbers rated to either of the other exchanges.<sup>9</sup> The FCC also failed to acknowledge that Mountain had specifically *not* entered into the only form of wide area calling plan made available by Qwest tariffs in Colorado. Finally, the FCC failed to acknowledge that the Mountain/Qwest arrangement is no different from that which exists wherever a CMRS carrier establishes a single interconnection point serving multiple local calling areas. Because such an arrangement has been chosen by nearly all such carriers, the result of the FCC's "exception" could be an evisceration of 47 C.F.R. §§ 51.703(b) and 51.709(b).

The FCC's ruling in the *Mountain Order* that an incumbent LEC may charge for interconnection facilities beyond the originating local calling area contrasts sharply with its own Bureau's ruling only six days earlier, when the Bureau specifically rejected similar arguments by Verizon that ILECs should be compensated for the transport of traffic outside of local calling areas. *See Virginia Arbitration*, 17 F.C.C.R. at 27062 ¶ 48. In "reject[ing]" Verizon's argument, the Wireline Competition Bureau concluded that the competitive LECs' position

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<sup>9</sup> The *Mountain Bureau Order*, 17 F.C.C.R. at 2097 ¶ 13 recites Qwest's concession "that it must allow Mountain to interconnect without charge at any point within an MTA that is within the LATA". Yet the same paragraph states that Qwest is under no obligation to transport calls to Mountain numbers "free of charge to Qwest's customers," and it seems to be the Commission's core assumption that calls by Qwest subscribers to Mountain subscribers are "free of charge." However, there is nothing in the record below to support a finding that Qwest's customers in any rate center have somehow been immunized from paying ordinary toll charges when they call Mountain numbers in a different rate center. *See* Petitioner's Brief at 16, *Mountain Communications v. FCC* (Apr. 18, 2003) (No. 02-1255) ("*Pet. Br.*").

“more closely conforms to the Commission’s current rules governing points of interconnection and reciprocal compensation than do Verizon’s proposals.”

[The competitive LECs’ positions] are more consistent with the Commission’s rules for section 252(b)(5) traffic which prohibit any LEC from charging any other carrier for traffic originating on that LEC’s network; they are also more consistent with the right of competitive LECs to interconnect at any technically feasible point.

*Id.* at 27058, 27064-65 ¶¶ 39 and 52-53.

The result in the *Mountain Order* should have been the same: FCC Rules 51.703(b) and 51.709(b) should have been upheld as they were previously applied. If Qwest wishes another bite at the apple, it should have made its arguments in the rulemaking proceeding the FCC established precisely to consider possible revisions to its intercarrier compensation rules.<sup>10</sup>

The Wireless Carrier Intervenors, as well as other wireless service providers and competitive LECs, thus face the likelihood that despite the FCC rules, they will now be required to pay for interconnection facilities that are used to deliver incumbent LEC-originated local traffic when those facilities cross local calling area boundaries.

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<sup>10</sup> See *Intercarrier Compensation Regime*, 16 F.C.C.R. at 9634, 9650-51 ¶¶ 72, 112 (footnote omitted).

**B. The FCC Unlawfully Authorized Incumbent LECs to Charge For Interconnection Facilities Used to Deliver Incumbent LEC-Originated Traffic When Those Facilities Cross Local Calling Area Boundaries.**

The FCC improperly sought to change its rules in an adjudicatory proceeding. The *Mountain Order* results from a complaint lodged against Qwest under 47 U.S.C. § 208, an adjudication under the Administrative Procedure Act. *See* 5 U.S.C. § 554. As Justice Scalia has recognized, unlike a rulemaking, which deals with “what the law will be,” an “[a]djudication deals with what the law was.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (J. Scalia, concurring). An agency, this Court has declared, “has an obligation to decide the complaint under the law currently applicable.” *AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992).

Congress established requirements for the rates, terms, and conditions of interconnection between incumbent LECs and competing networks in 47 U.S.C. § 251(c)(2) (1996). Congress further required in § 251 that “[w]ithin six months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.” *Id.* § 251(d)(1) (emphasis added). The FCC complied with this Congressional directive by promulgating the rules in

47 C.F.R. § 51, including § 51.703(b) and § 51.709(b). Under these rules, as consistently applied by it, the FCC should have entered judgment for Mountain.<sup>11</sup>

Nonetheless, fully six years after publishing rules that preclude such very action, the FCC has now ruled that Qwest may charge a terminating carrier for interconnection facilities when they are longer than 20 miles.<sup>12</sup> The FCC has thus created a situation whereby Qwest (under the *TSR Order*) may not charge one paging carrier for Type 1 interconnection facilities 240 miles in length but may charge another paging carrier (Mountain) for Type 1 interconnection facilities 45 miles in length.<sup>13</sup>

This Court long ago held that “an agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored: ‘[If] an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.’” *See Greater Boston Television v. FCC*, 444 F.2d 841, 852

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<sup>11</sup> *See Nat’l Conservative Political Action Committee v. Federal Election Comm’n*, 626 F.2d 953, 959 (D.C. Cir. 1980) (“Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.”).

<sup>12</sup> It should be noted that while the *Mountain Order* imposed charges on Mountain for interconnect facilities which transport calls originated in one Qwest local calling area “to Mountain’s interconnection point in another local calling area,” the actual criterion applied by Qwest shifted charges to Mountain wherever the facility exceeds 20 miles in length. *See Joint Statement of Mountain and Qwest* at 8 ¶ 22 (Oct. 17, 2000) (J.A.\_\_\_\_).

<sup>13</sup> *See County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (citations omitted) (“A long line of precedent has established that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.”); *Crosthwait v. FCC*, 584 F.2d 550, 556 (D.C. Cir. 1978) (citations omitted) (“agency action cannot stand when it is ‘so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.’”)

(D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (quoting *New Castle County Airport Comm'n v. C. A. B.*, 371 F.2d 733, 735 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 930 (1967)); *See also Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) (FCC “cannot silently depart from previous policies or ignore precedent.”).

In this case, the FCC did not have the option to “swerve from prior precedent” because the case involved a complaint proceeding, and an “[a]djudication deals with what the law was.” *Bowen, supra*, 488 U.S. at 221. *See also Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (quoting *Pub. Serv. Comm'n of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)) (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544 (D.C. Cir. 1993)) (“[T]he governing principle is that when there is a ‘substitution of new law for old law that was reasonably clear,’ the new rule may justifiably be given prospectively-only effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’”).

**II. THE FCC DECISION REQUIRING AN INTERCONNECTING CARRIER TO PAY A PORTION OF THE COSTS TO TERMINATE TRANSIT TRAFFIC IS ARBITRARY AND CAPRICIOUS.**

Mountain complained that Qwest’s charges for that portion of the interconnection facilities that Qwest uses to deliver transit traffic – calls made by customers of a third carrier and routed to Mountain through Qwest – were

unlawful. The FCC rejected this claim without analysis, relying simply on its prior decisions in *Texcom v. Bell Atlantic*, 16 F.C.C.R. 21493 (2001), *petition for reconsideration denied*, 17 F.C.C.R. 6275 (2002) (“*Texcom Order*”) and its 2000 *TSR Order* and stating “Mountain provides no basis for us to overturn the Bureau’s decision.” *Mountain Order*, 17 F.C.C.R. at 15136 ¶ 2 and n.8. *See also Mountain Bureau Order*, 17 F.C.C.R. at 2095 ¶ 10 (“Because Mountain raises no issues of law or fact that were not fully considered in *Texcom*, we apply *Texcom*’s reasoning here and reject Mountain’s arguments regarding Qwest’s treatment of transiting traffic.”). However, in summarily rejecting Mountain’s position, the FCC never explained or reconciled its *Texcom* and *TSR Orders* as they apply to transit with its existing rules and principles of cost causation.

Mountain itself has demonstrated that the *Texcom* and *TSR Orders* upon which the FCC relied are not explained and are incompatible with cost causation principles.<sup>14</sup> *See Pet. Br.* at 41-45. Additionally, the *Texcom* and *TSR Orders* contravene FCC Rule 51.709(b). Mountain had raised Rule 51.709(b) in its complaint, and the Bureau addressed this rule in its order, but ultimately the FCC

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<sup>14</sup> Although this Court affirmed the *TSR Order*, the transit issue was not presented in that appeal. As the FCC has recognized, the *TSR* “appeal raises different issues from those presented in SBT’s Petition for Reconsideration or Clarification.” *TSR Wireless v. U S West*, Order on Reconsideration, 16 F.C.C.R. 11462 ¶ 1 n.1 (2001) (“*TSR Reconsideration Order*”). In this case, a group of paging carriers asked the FCC to reconsider its statement in footnote 70 in the *TSR Order* that terminating carriers are responsible for certain transit costs. The FCC, while dismissing this reconsideration petition, never reached the merits of the petition because it dismissed the petition on procedural grounds – namely, the petitioners did not “explain why they could not participate in the proceeding at an earlier stage.” *Id.* at 11462 ¶ 2. Thus, the merits of the FCC’s position on transit traffic have never been raised before this or another court.

ignored the indisputable relevance of this rule in its order under review. *See Mountain Bureau Order*, 17 F.C.C.R. at 2094-95 ¶¶ 8-10.

FCC Rule 51.709(b) incorporates the “originating carrier pays” principle and provides under the facts of this case that Qwest may recover from Mountain *only* the costs of interconnection facilities that Mountain uses to *send* traffic to Qwest.

47 C.F.R. § 51.709(b) provides:

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.

The record evidence is undisputed that Mountain, as a one-way paging carrier, sends no traffic to Qwest. Thus, Rule 51.709(b) on its face precludes Qwest from charging Mountain for *any* portion of the interconnection facilities – including the portion Qwest uses to deliver traffic to Mountain from a third carrier.

The FCC, recognizing that a plain reading of Rule 51.709(b) would preclude a transit carrier from charging the terminating carrier, simply announced that this Rule does “not apply in the transiting traffic context”:

Section 51.709(b) governs the division of cost of *dedicated* transmission facilities between *two carriers*. As we stated in the *TSR Wireless Order*, “Section 51.709(b) simply applies the general principle of section 51.703(b) – that a LEC may not impose on a paging carrier any costs the LEC incurs to deliver *LEC-originated*, intraMTA traffic, regardless of how the LEC characterizes those costs – to the specific case of dedicated facilities.”

*Texcom Order*, 16 F.C.C.R. at 21496 ¶ 8 (footnote omitted and emphasis in original).

Qwest's facilities connecting to Mountain's network (or the network of any other competitive carrier for that matter) are "dedicated to the transmission of traffic between two carriers' networks." 47 C.F.R. § 51.709(b). But Qwest sends to Mountain two types of traffic over these dedicated facilities: (1) traffic originated by its own customers, and (2) traffic originated by customers of third party networks.

The FCC, in deciding that Rule 51.709(b) did not apply to transit traffic, examined only two alternatives in determining how these transit facility costs should be recovered: assessing the transit provider (here, Qwest), or on the terminating carrier (here, Mountain). Noting that its interconnection rules "follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic," the FCC determined that it would be inappropriate to charge the transit carrier for costs associated with traffic that did not originate on its own network:

Where the LEC's customers do not generate the traffic at issue, those customers should not bear the cost of delivering that traffic from a CLEC's network to that of a CMRS carrier. . . . Construing section 51.709(b) to bar transiting traffic charges, therefore, would compel the LEC and its customers to bear the cost of carrying traffic to which they have no relation . . . .

*Texcom Order*, 16 F.C.C.R. at 21495-96 ¶¶ 6 and 10 (emphasis in original). The Wireless Carrier Intervenors do not challenge this particular FCC decision, and they agree a transit carrier should be paid for transit services provided to the originating carrier.

The FCC, however, never considered a third, *and the most obvious*, alternative – namely, the transit carrier should bill the third party carrier whose customers are originating the transit traffic, just as it already bills its other transit costs to the originating carrier. It is undisputed that the originating third party carrier is the cost causer of transit traffic, since this carrier (and not the terminating carrier) is using Qwest’s transit services. In this regard, the FCC readily concedes that the originating third party carrier is the cost causer when it confirmed that the terminating carrier can “seek reimbursement of the [transit] costs . . . that originated the traffic in question.” *Mountain Order*, 17 F.C.C.R. at 15139 ¶ 6 n.30. While the plain language of Rule 51.709(b) precludes Qwest from recovering transit costs from Mountain, neither this Rule nor any other rule precludes Qwest from recovering its transit costs directly from the third party carrier that is imposing the transit costs.

This Court has held that an agency’s failure to consider significant alternatives renders the decision arbitrary and capricious and requires a remand so the agency can consider the alternatives. *See, e.g., Nat’l Black Media Coalition v.*

*FCC*, 775 F.2d 342, 357 (D.C. Cir. 1985); *Public Citizen v. Steed*, 733 F.2d 93, 104-05 (D.C. Cir. 1984); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 975, 815-18 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). Given that the FCC itself concedes that assessing terminating carriers for transit costs is incompatible with cost causation principles, this Court should remand the transit issue so the FCC can consider the most logical alternative: the transit carrier should directly bill the third party carrier originating the transit traffic.

### CONCLUSION

The Wireless Carrier Intervenors respectfully request that this Court vacate the order under review and remand the matter to the FCC for further proceedings not inconsistent with the Court's opinion.

Respectfully submitted,

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## **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 6,242 words. This certificate was prepared in reliance on the word count of the word-processing system (Word/WP) used to prepare this brief.

Dated April 5, 2003

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## **CERTIFICATE OF SERVICE**

I, Doane F. Kiechel, hereby certify that on this 5th day of May, 2003, two copies of the foregoing Joint Brief of Wireless Carrier Intervenors in Support of the Petitioner 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