

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

Case No. 02-1255

MOUNTAIN COMMUNICATIONS, INC.
Petitioner,

v.

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

On Petition for Review of an Order of the
Federal Communications Commission

REPLY BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

1. Facilities Charges: ILEC Traffic. Prior to the order under review, interconnecting carriers could obtain a single point of interconnection (“POI”) in each LATA, obtain local telephone numbers in each incumbent LEC (“ILEC”) local calling area (“LCA”) where they provide service, *and* the ILEC was prohibited from charging the competitive carrier for the costs it incurred in delivering its customers’ traffic to the competitive carrier’s centralized POI – even if the calls are carried from one LCA to another. See Qwest v. FCC, 252 F.3d 462, 468 (D.C. Cir. 2001)(FCC order “simply requires LECs to look to their own customers to recoup the

needed costs of their facilities.”). The FCC changed these rules in the order under review. Specifically, it held that an interconnecting carrier must now make a choice:

1. It may avoid ILEC facility charges and maintain a single POI per LATA if it forfeits its right to assign its customers local telephone numbers; *or*
2. It may avoid ILEC facility charges and obtain local telephone numbers if it forfeits its right to establish a single POI per LATA.

There are three problems with this FCC ruling. First, an agency decision will be affirmed on appeal only where it “articulate[s] with reasonable clarity its reasons for decision, and identif[ies] the significance of the crucial facts” Greater Boston v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). The FCC below provided no explanation for the new Hobson’s choice it imposed on competitive carriers (*i.e.*, they must forfeit some interconnection rights to retain others). Second, an agency “must conform to its prior decisions or explain the reason for its departure from such precedent.” Channel 51 v. FCC, 79 F.3d 1187, 1191 (D.C. Cir. 1996). Here, the FCC does not reconcile the order under review with either (a) TSR Wireless v. U S WEST, 15 F.C.C.R. 11166 (2002), *aff’d* Qwest v. FCC, 252 F.3d 462 (D.C. Cir. 2001)(“TSR”), or (b) Virginia Arbitration Order, 17 F.C.C.R. 27039 (2002) (“Virginia”), a contemporaneous decision by the Chief of the Wireline Competition Bureau. Third, the FCC cannot radically change its rules in an adjudicatory proceeding, where the issue is the application of current law during the time covered by the complaint. See C.F. Communications v. FCC, 128 F.3d 735, 739 (D.C. Cir. 1997)(To amend rules, FCC “must use the notice and comment procedure of the Administrative Procedure Act. It may not bypass this procedure by rewriting its rules under the rubric of ‘interpretation.’”). Given the FCC’s flagrant disregard of the requirements of the Administrative Procedure Act, the Court would be justified in vacating and remanding the order under review without the conduct of oral argument.

2. Facilities Charges: Transit Traffic. Carriers interconnect with each other either directly or indirectly. With direct interconnection, the originating carrier is responsible for delivering its traffic to the terminating carrier's switch serving the called party, and it is prohibited from charging the terminating carrier for the delivery of this traffic. See 47 C.F.R. §§ 51.701(c), 51.703(b); 51.709(b); TSR. The same rules apply for indirect interconnection, when the originating carrier chooses to use the transit services of a third party. Qwest thus "recovers the bulk of [its transit] costs . . . from the originating carrier." Qwest/Verizon Br. at 2. However, improperly, "the cost of the dedicated connection between an end office and a paging carrier is not charged to the originating carrier. Instead, this cost is charged . . . to the terminating Type 1 carrier." Id. at 9.

The FCC nevertheless held in the order under review that Qwest can bill Mountain, the terminating carrier, for some of its transit costs, even though it is the originating carrier that demands use of Qwest's transit services to terminate calls upon Mountain's system. Although the FCC acknowledges it is "required to articulate a rational basis for its decision," FCC Br. at 43, it has never provided any explanation for its ruling permitting transit carriers to recover a portion of their transit costs from the terminating carrier rather than the originating carrier. Rather than attempt to defend the FCC decision on the merits, FCC counsel instead advances a variety of procedural arguments why this Court should avoid addressing the merits. Mountain demonstrates below that these procedural arguments lack merit.

ARGUMENT

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

A. THE ORDER UNDER REVIEW IS INCONSISTENT WITH THE TSR ORDER AFFIRMED ON APPEAL

Mountain demonstrated in its opening brief that the underlying material facts in its case are identical to those the FCC faced in TSR – namely, in both cases the paging carrier obtained local telephone numbers in a Qwest Type 1 switch that is in a local calling area (“LCA”) different from the LCA of its centralized point of interconnection; the Type 1 switch and the single POI are located in the same MTA and LATA; and the paging carrier challenged the lawfulness of Qwest charges for interconnection facilities between Qwest’s Type 1 switch in one LCA and the centralized POI located in another LCA. See Mountain Br. at 34. Yet, the FCC reached completely opposite decisions – holding in TSR that it was unlawful for Qwest to charge for facilities over 240 miles in length, but holding in Mountain Communications, Inc. v. Qwest Communications International, Inc., 17 F.C.C.R. 15135 (2002)(J.A.____)(“Mountain”) that Qwest may charge for facilities approximately 40 miles in length.¹

In response, the FCC acknowledges that the network configuration in TSR and Mountain “is similar,” FCC Br. at 29, but it makes no attempt to rebut Mountain’s demonstration that the material facts are identical.

	<u>TSR</u>	<u>Mountain</u>
Does the paging carrier connect with Qwest using Type 1 interconnection?	Yes	Yes
Does the paging carrier has a single POI in the LATA?	Yes	Yes
Are the paging carrier’s Type 1 (or “DID”) numbers rated in a LCA different from LCA where POI is located?	Yes	Yes

¹ Qwest imposes its charges only for facilities longer than 20 miles from the originating LCA. *See* Qwest/Verizon Br. at 6; Mountain Br. at 21-22. The FCC says Qwest adopted this “charge after 20 mile” practice in response to TSR. FCC Br. at 12. But the FCC ruled in TSR that *all* intraMTA facilities charges, including for facilities 240 miles in length, were unlawful.

	<u>TSR</u>	<u>Mountain</u>
Are the Type 1 numbers stored in the Qwest switch located in the LCA different from a LCA where the POI is located?	Yes	Yes
How does Qwest rate call made by its customers in the LCA where its Type 1 switch is located to paging customer whose number is rated in same LCA?	Local, because the NPA-NXX in the numbers of both parties are rated in same LCA	Local, because the NPA-NXX in the numbers of both parties are rated in same LCA
How does Qwest rate call made by its customers in the LCA where its Type 1 switch is located to a paging customer whose number is rated in different LCA?	Toll, because the NPA-NXX in the numbers of the parties are rated in different LCAs	Toll, because the NPA-NXX in the numbers of the parties are rated in different LCAs
In delivering its customers' traffic from the Type 1 switch to the paging carrier's single POI, must Qwest transport customers' calls from one LCA to another?	Yes	Yes
Does Qwest consider these transport circuits "dedicated toll facilities" because they begin and end in different LCAs?	Yes	Yes
Is Qwest local traffic (calls that originate and terminate in the same LCA) carried over these "dedicated toll facilities"?	Yes	Yes
Length of so-called "dedicated toll facilities"?	Over 240 miles	Approximately 40 miles
Do Qwest's facilities charges contravene FCC Rule 51.703(b)	Yes	No
May Qwest charge for these facilities when they are used to deliver Qwest customer traffic to paging carrier's POI?	No	Yes

While the FCC does not dispute that the material facts in TSR and Mountain are identical, it does assert there is one "decisionally significant" difference between the two cases:

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."

FCC Br. at 29, citing Mountain, 17 F.C.C.R. at 15168 (¶6)(J.A.____). But the FCC never explains why TSR’s interconnection arrangement with Qwest was “necessary,” while Mountain’s identical interconnection arrangement is “optional” and “not necessary.”² If TSR’s arrangement was deemed “necessary,” then Mountain’s arrangement necessarily must be deemed “necessary” because the underlying material facts in the two cases are identical.³

Prior to the order under review, the FCC consistently held that competitive carriers had at least three rights: (1) they could establish a single POI in a LATA; (2) they could obtain local telephone numbers in each local calling area where they provide service; and (3) the ILEC cannot charge the competitive carrier for the facilities it uses in delivering its calls to the centralized POI – including when ILEC calls are transported from one LCA to a POI in a different LCA. In the order under review, the FCC announced – without any discussion – that competitive carriers must forfeit some rights in order to secure other rights. Specifically, the FCC held that interconnecting carriers have a choice, but the choice is now among two rights only, not three:

- Option 1: Carriers can maintain a single POI per LATA and avoid ILEC facility charges, but they must forfeit their right to obtain local telephone numbers – meaning that a call from a spouse to a paging customer at a neighbor’s house becomes a toll call (unless the two persons happen to be located in the LCA where the POI is located); *or*
- Option 2: Carriers can obtain local telephone numbers but they must forfeit their right to maintain only a single POI per LATA – because they must now obtain and pay for interconnection facilities to (in order to establish a POI in) each ILEC local calling area.

² The FCC’s assertion – “[i]t is conceded that this arrangement is not necessary for interconnection” (FCC Brief at 22) – is inaccurate. Mountain never “conceded” that its network configuration is “not necessary.” Indeed, it needs local telephone numbers in all Qwest LCAs where it provides mobile services so Mountain can offer an inbound calling area comparable to that which Qwest offers to its own customers.

³ Importantly, “a LEC is obligated to provide a CMRS provider with the interconnection of its choice upon its request.” Bowles v. United Telephone, 12 F.C.C.R. 9840, 9849 ¶15 (1997). See also 47 C.F.R. § 20.11(a).

However, TSR was *not* required to have a POI within each Qwest LCA as a condition to avoiding Qwest facilities charges. TSR’s Type 1 numbers – what the FCC calls “DID numbers” – were located in one LCA (Yuma) while its POI was located in another LCA (Flagstaff), over 240 miles away. The FCC held unequivocally in TSR that Qwest’s charges for the circuits connecting these two LCAs were unlawful:

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

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

Qwest/Verizon, realizing that the FCC has not distinguished TSR, asserts that “Mountain has never sought to negotiate an interconnection agreement with Qwest” and has “chosen to bypass the negotiation process set up by the Act and instead complain directly to the FCC.” Qwest/Verizon Br. at 4 and 12. This assertion is factually inaccurate, because Qwest concedes that the parties conducted “some negotiations ... on an interconnection agreement,” although these negotiations admittedly ended when Mountain was compelled to file a complaint because Qwest refused to follow the FCC’s decision in TSR. In addition, Qwest unsuccessfully made the identical argument in TSR. See TSR, 15 F.C.C.R. at 11183, ¶29 (“The Commission’s Local Competition Order⁴ clearly calls for LECs immediately to cease charging CMRS providers for

⁴ In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order (“Local Competition Order”), 11 F.C.C.R. 15449 (1996).

terminating LEC-originated traffic; the order does not require a section 252 agreement before imposing such an obligation on the LEC.”).⁵

Qwest/Verizon further asserts that in TSR, “the FCC held [that] calls from Yuma to the TSR POC in [Flagstaff] could be billed as toll calls.” Qwest/Verizon Br. at 15. This assertion is also factually inaccurate. What the FCC actually said was that “[w]e assume for the sake of this argument that a call from Yuma, Arizona to Flagstaff, Arizona would be billed as a toll call to the caller placing the call.” TSR, 15 F.C.C.R. at 11185 n.107. Qwest would assess toll charges if one of its Yuma customers called a TSR customer in Flagstaff with a local Flagstaff telephone number. But the calls at issue in TSR involved local calls – that is, calls from a Qwest customer in Yuma to a TSR customer in Yuma with a local Yuma telephone number (that happens to be routed through a centralized POI in Flagstaff). The FCC’s assumed scenario is not contested in this matter, i.e., a Qwest customer in Walsenberg can be charged toll for a call to a Mountain customer with a Pueblo telephone number. Thus, Mountain’s assertions in this matter are consistent with the FCC’s assumption in TSR.

⁵ Qwest/Verizon admit that no interconnection agreement existed between Mountain and Qwest, however, the FCC found that, “Mountain’s . . . wide area calling arrangement constitutes an agreement between the parties regarding the provisioning of this service.” Accordingly, the FCC found that a contract existed between Mountain and Qwest, which contract contained implied terms of which Mountain was unaware and repeatedly denies. See, Mountain’s Reply to Qwest Corp.’s Brief on Disputed Material Issues, 8-9 (J.A. ____) and Mountain’s Petition For Reconsideration of Memorandum, Opinion and Order, pg. 18-20 (J.A.____). The FCC nonetheless interpreted conflicting parol evidence to find that Mountain unwittingly contracted for toll suppression and facilities to terminate Qwest-originated traffic, at Mountain’s cost. The FCC’s insertion of these contract terms is inconsistent with industry practice and the agency’s rules which demonstrate that the standard rating of calls by ILEC’s is contrary to the implied terms assumed in the agency’s finding. The result is that the agency is attempting to first create unconscionable contract terms and then enforce same as though each were fully memorialized.

The FCC acknowledges that it “may not treat like cases differently,” FCC Br. at 30, but it inexplicably does not reconcile its Mountain decision with TSR. This alone is grounds to vacate the order under review.

B. MOUNTAIN IS INCONSISTENT WITH THE FCC STAFF’S CONTEMPORANEOUS INTERPRETATION OF FCC INTERCONNECTION RULES

Eight days before Mountain was released, the Wireline Competition Bureau resolved an interconnection dispute between an ILEC (Verizon) and several competitive LECs. See Virginia Arbitration Order, 17 F.C.C.R. 27039 (2002). Like Qwest, Verizon proposed to charge competitive carriers for transporting its calls when the centralized POI is located in a local calling area different than the LCA where the call originated – except that Verizon proposed to use a “charge after 25 mile” rule rather than the “charge after 20 mile” practice which Qwest unilaterally adopted. See id. at ¶37. The Bureau, applying “current Commission rules and precedents,” held that Verizon’s proposed facility charges were unlawful:

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

Id. at ¶3 and ¶52. The Bureau held, like the FCC in TSR, that ILECs could not impose facility charges when it must deliver a call to a POI located in a local calling area different than the originating LCA.

The FCC does not dispute that its staff’s ruling in Virginia is incompatible with its decision in Mountain. FCC counsel instead states they take “no position on whether that staff decision was correct.” FCC Br. at 30-31. Qwest/Verizon likewise make no attempt to

distinguish the Virginia order; they assert only that the decision “is wrong.” Qwest/Verizon Br. at 18.

Unable (or unwilling) to distinguish Virginia, the FCC instead asserts that the Court should not consider the merits of the order for two reasons. First, the FCC contends that the Court “lacks jurisdiction” to consider Virginia because Mountain did not cite the case in its briefs below. See FCC Br. at 31. Of course, Mountain did not cite Virginia below; that case was released only eight days before the order under review, long after the time for filing briefs had closed.

Moreover, Section 405 of the Act bars judicial review of “questions of fact or law upon which the Commission ... has been afforded no opportunity to pass.” 47 U.S.C. § 405(a). In this appeal, Mountain raises no question of fact or law that it did not raise below. Mountain argued that Qwest’s facilities charges are unlawful under FCC rules, and Virginia merely provides additional precedent demonstrating that order under review is arbitrary, capricious and inconsistent with “current Commission rules and precedents,” at least as viewed by the Chief of the Wireline Competition Bureau responsible for applying the FCC’s interconnection law. Virginia at ¶ 3.

The FCC additionally contends that it had no obligation to “adhere to ... or to justify a departure from its staff’s ruling.”⁶ FCC Br. at 31-32. However, Mountain cited Virginia only to show that FCC’s staff interpreted “current Commission rules and precedent” in the same way as Mountain – and in the same way the FCC applied its rules in TSR.

⁶ Although the staff order has been challenged, the order is nonetheless final and effective – unless the FCC later overturns the decision. See Virginia Contract Approval Order, 17 F.C.C.R. 19654, 19655-56 ¶2 (2002)(“Under the Commission rules, the pendency of these [application for review] petitions do not affect the finality of the *Arbitration Order*, and does not prevent this Order from being effective and binding upon release.”). See generally Committee to Save WEAM v. FCC, 808 F.2d 113, 114 (D.C. Cir. 1986)(“[T]he Bureau’s decision was effective upon issuance.”).

Virginia is consistent with the FCC's TSR order. The order under review is incompatible with both decisions and renders the order under review arbitrary and capricious.

C. THE MOUNTAIN INTERCONNECTION ARRANGEMENT DOES NOT PREVENT QWEST FROM ASSESSING TOLL CHARGES

In TSR, the FCC confirmed that, “pursuant to section 51.703(b) of the Commission’s rules, a LEC may not charge a CMRS carrier for the delivery of LEC-originated traffic that originates and terminates within the same [MTA].” Mountain, 17 F.C.C.R. at ¶6, citing TSR. The FCC further confirmed that its interconnection rules address “how carriers must compensate each other for the transport and termination of calls” and do “not address the charges that carriers may impose upon their end users.” TSR, 15 F.C.C.R. at 11184 ¶ 31. In this regard, the FCC held that its interconnection rules do “not compel a LEC to offer wide-area calling *or similar services* without charge:”

LECs are not obligated under our rules to provide such services at all; accordingly, it would seem incongruous for LECs who choose to offer these services not be to be able to charge for them.

TSR at 11184, ¶30 (emphasis added).

The FCC now concedes that Mountain’s arrangement with Qwest is not a traditional “wide-area calling” service, where the terminating carrier rather than the Qwest calling customer pays the ILEC’s per-minute toll charges. See FCC Br. at 25-26. Instead, the FCC attempts to characterize Mountain’s arrangement with Qwest as a “similar” or “equivalent” service. See id. at 21. The simple response to this argument is that Mountain’s interconnection arrangement is identical to TSR Wireless’ interconnection arrangement, yet the FCC reached entirely different results. Wireless carriers are, thus, left confounded by the interconnection rules that currently are in effect: the rule confirmed in TSR (it is unlawful for a LEC to charge for intraMTA

interconnection facilities), or the rule announced in Mountain (it is lawful for a LEC to charge for intraMTA interconnection facilities).

The FCC takes the position that Mountain's interconnection arrangement with Qwest is "similar" to wide area calling because it supposedly provides "a different form of toll suppression from one that directly affects the rates of individual calls." FCC Br. at 25. According to the FCC, Mountain "prevents Qwest from charging its customers for what would ordinarily be toll calls." Mountain, 17 F.C.C.R. at 15138, ¶5. This FCC conclusion is completely unexplained. It is also factually erroneous.⁷

ILECs rate their customers' calls as local or toll by comparing the telephone numbers of the calling and called parties.⁸ Specifically, ILECs rate calls as local or toll based on NPA-NXX codes (the first six digits of a 10-digit telephone number) assigned to telephone customer equipment. If the NPA-NXX codes of both the calling and called numbers are rated in the same local calling area (or rate center), the ILEC will rate the call as local. Conversely, if the NPA-NXX codes of the calling and called numbers are rated in different rate centers, the ILEC will consider the call to be a toll call and apply per-minute charges (or hand off the call to an interexchange carrier). As the FCC has explained:

Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes....
Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry wide.

Virginia at ¶301.

⁷ Indeed, it is not possible for a terminating carrier to determine how the originating carrier bills its own customers for making their calls – unless the two carriers happen to have a contract addressing how the originating carrier will bill its own customers. Qwest and Mountain have never executed such a contract.

⁸ ILECs use this procedure because they generally do not know the physical location of the person being called when the called party is served by a different carrier. See Virginia at ¶302 ("Verizon concedes that currently there is no way to determine the physical end points of a communications.")

Mountain's interconnection arrangement does *not* "prevent Qwest from charging its customers for what would ordinarily be toll calls." Mountain, 17 F.C.C.R. at 15138, ¶5. In fact, the Mountain arrangement results in absolutely no change in Qwest's ordinary toll scheme. For example, when a Qwest customer in Walsenburg, Colorado calls her spouse's pager with a Walsenburg number, there is no toll charge – just as Qwest does not charge its Walsenburg's customer toll charges when she calls her spouse at a landline telephone in the Walsenburg exchange. Conversely, if the Qwest customer in Walsenburg calls a pager with a number rated in Pueblo or Colorado Springs, Qwest will impose toll charges because the calling and called telephone numbers are rated in different exchanges. See, Mountain Br. at 6-8. Again, this same Qwest customer would incur the identical toll charges if she instead calls a Qwest customer located in Pueblo or Colorado Springs.

In this case, Qwest was able to confuse the FCC by characterizing the interconnection facilities as "dedicated toll facilities."⁹ Qwest was able to do so because a local call between a Qwest customer in Walsenburg to a Mountain customer in Walsenburg is routed through Mountain's point of interconnection ("POI") in Pueblo. What the FCC neglected to consider in the order under review is that once the Qwest call reaches the POI in Pueblo, Mountain assumes the obligation of transporting the call to its paging customer being called (and a Walsenburg paging customer is generally located in Walsenburg).¹⁰ A land-to-mobile call is not completed until the call reaches the mobile terminal.

⁹ Qwest calls the interconnection facilities, "dedicated toll facilities," because they originate in one of its local calling areas (*e.g.*, Walsenburg) and terminate in another (at the Pueblo POI). While these interconnection facilities do carry some toll traffic (*e.g.*, a call from a Qwest Walsenburg customer to a Mountain Pueblo customer), they largely carry local traffic (*i.e.*, calls from Qwest Walsenburg customers to Mountain Walsenburg customers).

¹⁰ FCC rules make clear that while an ILEC's network responsibility for land-to-mobile calls may end at the POI, its financial responsibility extends until the call is delivered to the person being called. *See* 47 C.F.R. § 51.701.

Qwest/Verizon would give the Court the impression they rate calls as local or toll by comparing the local calling area where the call is originated and the LCA where the terminating carrier's POI is located. See, Qwest/Verizon Br. at 5-7. They do not. As the FCC has recognized, the practice used "industry-wide" is for ILECs to "rate calls by comparing the originating and terminating NPA-NXX codes." Virginia at ¶301.¹¹

Qwest/Verizon are thus wrong in suggesting that Mountain's interconnection arrangement causes Qwest to lose toll revenues. See, Qwest/Verizon Br. at 15. A Qwest-Walsenburg call to a Mountain-Walsenburg customer is a local call, just as a Qwest-Walsenburg call to a Qwest-Walsenburg customer is a local call. Similarly, a Qwest Walsenburg call to a Mountain-Pueblo customer is a toll call, just as Qwest-Walsenburg call to a Qwest-Pueblo customer is a toll call.

This case does not involve "toll suppression," as the FCC suggests. It rather involves "toll expansion." According to the FCC, the only way Mountain can avoid Qwest facility charges is to assign all of its customers (located in Colorado Springs, Pueblo and Walsenburg) telephone numbers rated in Pueblo, where its centralized POI is located.¹² Under this approach, Mountain would be precluded from assigning local Walsenburg telephone numbers to its Walsenburg customers, and all calls from Qwest Walsenburg customers to Mountain

¹¹ It is not within Mountain's capacity to prevent Qwest from rating calls in a manner pursuant to Qwest's local tariff, which tariff also reflects the dictates of the Commission's Rules. Therefore, the FCC's statement that, "Mountain prevents Qwest from charging its customers for what would ordinarily be toll calls..." Mountain, 17 F.C.C.R. at 15138, ¶5 is belied by the factual and legal circumstances underlying the rights and duties of Mountain and Qwest. Thus, Qwest's legal or technological incapacity to rate calls in a manner most favorable to Qwest cannot be deemed having arisen from Mountain's prevention of any lawful act by Qwest. See, Qwest/Verizon Br. at n.4. Since the FCC's decision relies on its finding of "toll suppression" by Mountain, the decision must be vacated as being wholly without factual basis.

Walsenburg customers would be billed as toll calls – because an intermediary link in the routing of the call happens to be located in Pueblo. According to the FCC’s new approach, Mountain can obtain local telephone numbers, but to obtain these numbers it must forfeit its right to maintain only one POI per LATA (because under this new approach, to obtain local numbers in a given local calling area, it must obtain interconnection facilities and establish a POI in that local calling area).

The problem with the order under review is threefold. The FCC provided no reasons for its dramatic change in its rules; the new rules are inconsistent with all FCC precedent (including decisions which this Court has affirmed); and given that this is a complaint case, the FCC does not possess the flexibility to change its rules and apply them retroactively; it must commence a new notice and comment rulemaking proceeding.

II. THE FCC’S DECISION REGARDING TRANSIT TRAFFIC IS ARBITRARY AND CAPRICIOUS

FCC rules specify that the originating carrier is responsible for delivering (either directly or indirectly *via* a transit carrier) its calls “to the terminating carrier’s end office switch that directly serves the called party.” 47 C.F.R. § 51.701(c).¹³ Qwest is a transit carrier in that it delivers to Mountain calls that originate on the networks of carriers other than Qwest (over the same interconnection facilities it uses to deliver its own traffic). Qwest acknowledges it recovers “the bulk of [its transit] costs ... from the originating carrier.” Qwest/Verizon Br. at 2. However, Qwest does charge Mountain for the interconnection facility insofar as the circuit is

¹² See, FCC Br. at 22 (“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.”)(emphasis added).

used to carry transit traffic. See, id. Mountain challenged this Qwest practice, arguing that Qwest should recover all its transit costs from the cost causer – namely, the originating carrier electing to use Qwest’s transit services. The FCC rejected this challenge, holding that Qwest could impose these “transit facility charges” and that Mountain’s remedy was to “seek reimbursement of these costs from originating carriers.”¹⁴ The FCC made this decision even though the record evidence was undisputed that Mountain cannot seek reimbursement from the originating carrier because Qwest does not send to Mountain the information it needs to bill the originating carrier. See Mountain Br. at 46-47.

FCC counsel makes numerous, mostly procedural arguments in an attempt to defend the FCC’s decision. A point of clarification is necessary at the outset. The FCC cites “Qwest Corp., 252 F.3d at 468” for the proposition that “paging carriers themselves must pay ... for transiting traffic” (See, FCC Br. at 34), even though the FCC has acknowledged that transit was not in issue in that appeal.¹⁵ Equally misleading is the FCC’s suggestion that its transit decisions “have been affirmed” on appeal. See, FCC Br. at 35.

The FCC argues that it had no choice but to apply its “transit facility charge” rule because in Section 208 adjudications, it “has an obligation to decide the complaint under the law currently applicable.” FCC Br. at 35, quoting AT&T v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992). The FCC is correct as a general matter, although it notably did not follow this principle

¹³ Once the LEC call reaches the terminating carrier’s switch, the LEC is also responsible for compensating the terminating carrier for carrying the call from the switch to the called party’s telephone. See, 47 C.F.R. § 51.701(d).

¹⁴ Mountain, 17 F.C.C.R. at 15137 n.13. Although the FCC stated that it “and the Bureau have made clear that a terminating carrier may seek reimbursement of these costs from originating carriers,” id., FCC counsel now suggests that this statement is a “non-decisional observation” and Mountain may not be entitled to such reimbursement. See FCC Br. at 42 and 44.

¹⁵ See TSR Wireless Reconsideration Order, 16 F.C.C.R. 11462 n.1 (2001)(“The [TSR] appeal raises different issues than presented in SBT’s [transit] Petition for Reconsideration or Clarification.”).

regarding the facilities charge addressed in Part I above. But like most general rules of law, exceptions exist, such as in the very AT&T case that the FCC relies upon. There, Judge Silberman, speaking on behalf of a unanimous court, rejected this very FCC argument, stating that this Court has “not held ... that an agency is obliged to apply a rule in an adjudicatory context if intervening events indicate that the rule is unlawful.” Id. at 733. The FCC has not challenged Mountain’s demonstration that its “transit facility charge” rule is based on unexplained *dicta* that is inconsistent with FCC rules and principles of cost-causation. See Mountain Br. at 41-46. Accordingly, the FCC’s claim of powerlessness to consider the lawfulness of the transit “rule” is baseless.

The FCC further contends that this Court “lacks jurisdiction” to entertain this portion of Mountain’s appeal because the time for appealing earlier FCC complaint decisions has lapsed. See, FCC Br. at 35. But in the very case that the FCC relies upon, Judge Silberman held it is “well established that a rule may be reviewed when it is applied in an adjudication – an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review.” AT&T, 978 F.2d at 734 (internal citations omitted). The FCC never explains how Mountain, a non-party to the complaint cases where the FCC initially applied its “transit facility charge” rule could have obtained standing to challenge that rule (or lodge an appeal).

The FCC also asserts that the Court cannot consider the lawfulness of the “transit facility charge” rule under FCC Rule 51.709 because Mountain supposedly did not raise this rule. See FCC Br. at 38-41. In fact, in the second sentence of the order under review, the FCC stated that “the Bureau denied Mountain’s complaint alleging that Qwest ... violated sections 51.703 and 51.709(b) of the Commission’s rules.” Mountain, 17 F.C.C.R. at 15135, ¶ 1.

The FCC additionally argues that “[a]s between Qwest and Mountain, Mountain is the cost-causer, i.e., the carrier responsible for the transiting traffic.” FCC Br. at 37. However, Mountain is not suggesting that Qwest should provide its transit services for free to the originator of the transit traffic. The issue rather is whether Qwest should bill the terminating carrier or, as Mountain has consistently argued, the originating carrier that elects to use its transit services. The FCC never addresses this question in the order under review. Mountain avers that simple economic theory should have guided the FCC to ask the question, “who is demanding the transit service.” The subject traffic is the result of demand by the originating carrier on Qwest’s network, and that “cost-causer” is the economically logical entity to bear all costs of transit. Contrary conclusions arise out of Qwest’s desire to avoid the effect of its own call rating method, which the FCC has inexplicably attempted to ratify by turning established cost causation methodologies on their head.

The FCC next argues that its “transit facility charge” rule is reasonable because transit traffic is “an essential component of the end-to-end service that Mountain provides to its customers.” Id. at 37. Of course, Mountain’s customers benefit when they receive pages not only from Qwest customers but also from customers served by carriers other than Qwest. But this has nothing to do with the question of whether Qwest should bill the terminating carrier or the originating carrier that elects to use its transit services.

FCC counsel further states they take “no position on whether the Commission should adopt that policy prospectively.” FCC Br. at 35-36. But this statement avoids the agency’s responsibility as articulated by this Court, “the agency has an obligation to decide the complaint under the law currently applicable”:

[Agencies] cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively. The choice

an agency has between different methods of “making law” is simply irrelevant when the agency is called upon as an adjudicator to apply existing law to a complaint.

AT&T, 978 F.2d at 732 (internal citations omitted).

The FCC acknowledges that it is “required to articulate a rational basis for its decision.” FCC Br. at 43. Nevertheless, the FCC has *never* provided a rational basis for its decision that a transit carrier can bill the terminating carrier rather than the originating carrier for some of its transit costs – namely, the interconnection facility needed so the originating carrier can complete its customers’ calls and comply with FCC rules that specify that it must deliver its traffic “to the terminating carrier’s end office switch that directly serves the called party.” 47 C.F.R. § 51.701(c).

CONCLUSION

Mountain respectfully requests that this Court vacate the order under review and remand the matter to the FCC for further proceedings consistent 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 contains 6,135 words and, therefore, complies with the Court's Order issued on February 26, 2003. This certificate was prepared in reliance on the word count of the word-processing system (Word/WP) used to prepare this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing "Reply Brief of Petitioner" were served *via* hand delivery and/or First Class U.S. Mail upon the below listed parties on this 21st day of July, 2003.

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