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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JOSEPH B. MCNEAL, d/b/a PAGEDATA, Complainant, vs. QWEST CORPORATION, Respondent.	CASE NO. QWE-T-03-25

PAGEDATA'S REQUEST FOR SUMMARY JUDGMENT

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Introduction

PageData has provided enough information with this and previous submittals to the Idaho Public Utilities Commission ("PUC") to request a summary judgment of Case No. QWE-T-03-25, whether or not Qwest replies to PageData's Complaint. It is PageData's understanding that under Idaho PUC Rule 57[1] the Commission can make a decision on a complaint, whether or not Qwest chooses to respond. Qwest's silence on the matter could be an indication to the PUC that a summary judgment may be in the best interest of Qwest and it could be a quick way for the Commission to resolve the complaint without much fanfare. In Qwest's Limited Reply to the Complaint Qwest said they reserved the right to defend themselves. We submit that is a misapplication of the Commission rules because Qwest has no rights to reserve. PageData served Qwest's legal representatives under Rule 54[2] and Qwest failed to reply within the designated 21 days.

We have attached as Exhibit A the recent ruling by the U.S. Court of Appeals in the Mountain Communications, Inc., v. Federal Communications Commission case[3] ("Mountain Decision"), which is directly relevant to PageData's Complaints No. QWE-T-03-25 and USW-T-99-24 with the Idaho PUC.

Qwest has started to show some movement in correcting PageData's accounts. However, a new scheme appears to be on the horizon wherein Qwest is trying to treat each division in Qwest as its own separate company. Qwest implies that one division has the right to disconnect services of PageData for lack of payment while another division of Qwest is withholding reciprocal compensation payments from PageData, which more

[1] IPUC Rules of Procedure, Rule 57
[2] IPUC Rules of Procedure, Rule 54

than cover the amounts billed to PageData. Another Qwest division is hiding the fact that the old disputed bills that PageData received from Qwest were predominantly filled with charges for delivery of Qwest originated traffic, which Qwest is prohibited from charging.

Qwest is correcting the invoices per the interconnection agreement that was effective after signing on December 22, 2002 and approved by the Idaho PUC on February 25, 2003, but still not agreeing to remit payment for reciprocal compensation due PageData. Qwest is expecting PageData to remit a monthly payment for facilities and transit factor while Qwest is unjustly holding reciprocal compensation from PageData. The reciprocal compensation due PageData for terminating Qwest originated traffic has always offset, at a minimum, any monthly obligation that PageData has had with Qwest. According to the FCC, reciprocal compensation is calculated using the formula of the LEC's costs as a starting point. Qwest's reciprocal compensation obligation started when PageData received its first facility from Qwest.

PageData requests that this reciprocal compensation issue be addressed head on and that the code of silence at Qwest and the Idaho PUC about reciprocal compensation owed PageData be addressed openly and forthrightly. Not doing so would needlessly perpetuate both companies continuance of billing and legal disputes.

Bellowing

Qwest, by its attorneys, has been bellowing to the Idaho PUC and the FCC, using its prestige as a multi-national, multi-billion dollar company, that PageData does not want

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[3] United States Court of Appeals for the District of Columbia Circuit Decision dated January 16, 2004, in the case of *Mountain Communications, Inc. v. Federal Communications Commission,* No. 02-1255,

to pay Qwest one cent and has not paid Qwest since at least October 1998.[4] At first glance by the uninitiated, this is a damning statement. But once Qwest's claims are scrutinized with the eyes of the 1996 Telecommunications Act and subsequent FCC and federal court decisions, the uninitiated will discover that the emperor has no clothes. Here is the rest of the story. The uninitiated will discover that PageData has paid Qwest over $250,000 in cash[5] for Qwest delivering Qwest originated traffic (47 CFR § 51.703(b) unequivocally prohibits Qwest from charging for delivery of Qwest originated traffic, with no exception[6]), but Qwest has not remitted one cent to PageData for reciprocal compensation or refunded the overcharges. Qwest has manipulated the regulatory process to keep unjust gains of hundreds of small, family-owned businesses throughout Qwest's fourteen state territory and has cannibalized a once great company so that a few individuals at the top can receive million dollar bonuses (as attested to by former Qwest employees at http://www.tsewq.com).

Qwest's Scheme

It is PageData's belief that all the invoices that PageData has received from Qwest are an orchestrated systemization of errors that includes a scheme to force PageData and other carriers to pay Qwest for delivery of Qwest-originated traffic in the LATA in direct contradiction of the 1996 Telecommunications Act. This scheme has been well articulated in the recent Mountain Decision.

Decided January 16, 2004

[4] Qwest Corporation's Limited Response to Joseph B. McNeal d/b/a PageData's Complaint, (Case No. QWE-T-03-25) p. 4

[5] Verified by Qwest during the hearing process of Case No. USW-T-99-24 at the Idaho PUC

[6] United States Court of Appeals for the Fourth Circuit Decision dated December 18, 2003, in the case of *MCImetro Access Transmission Services, Inc, v. BellSouth Telecommunications Inc. and the North Carolina Utilities Commission*, No. 03-1238

Reciprocal Compensation

Qwest has been obligated to pay reciprocal compensation since 1996, but Qwest has erected barriers and roadblocks to prevent the payment of reciprocal compensation to CMRS carriers that Qwest considered paging only. To date, PageData has not received any reciprocal compensation from Qwest or any acknowledgement from Qwest that Qwest owes PageData reciprocal compensation. In light of the Mountain Decision, Qwest no longer has any excuse for withholding reciprocal compensation from PageData. Qwest's objections to paying PageData reciprocal compensation have no merit. The reciprocal compensation due and owing from Qwest to PageData has never been taken into account in any of the Idaho PUC's decisions and this must be corrected. Not addressing reciprocal compensation skews the numbers and gives Qwest an unfair advantage.

Single Point of Presence

It has long been PageData's contention that since 1996 Qwest has been obligated to provide a single point of presence in the LATA. This has been born out by subsequent FCC and court decisions. The Idaho PUC has not taken this statutory benefit, granted to PageData by the 1996 Telecommunications Act, into any of its decisions, and this must be corrected. Since August 29, 1998, and on more than fifty occasions such as by letter, telephone, formal hearings, Idaho PUC complaints, informal complaints at the FCC, interconnection agreement negotiations, and formal hearings, PageData has requested a single point of presence with 10 T-1s from Qwest.

It was Qwest's company policy not to provide a single point of presence to Type 1 or Type 2 CMRS carriers, that Qwest considered paging only, until the introduction of the single point of presence amendment to the AirTouch/Arch interconnection agreement approximately one year ago. This single point of presence amendment was not timely filed and had a short expiration date. Qwest filed the amendment with the various state PUCs in response to an informal complaint filed by PageData with the FCC.

PageData should have been able to peaceably enjoy the statutory right of a single point of presence afforded by the 1996 Telecommunications Act. However, Qwest put PageData on unofficial provisioning hold to lock PageData into pre-1996 facilities with exorbitant and unlawful rates. PageData has been rescued from this scheme by the Metzger letter and the TSR Order, which totally exempted CMRS carriers from tariff. The TSR Order further stated that carriers did not need to have an interconnection agreement in order to receive the best rates. Qwest is just now in the process of installing the facilities for a traditional single point of presence for PageData.

<u>Unfiled Interconnection Agreements</u>

It has long been PageData's contention that PageData has been discriminated against by Qwest's failure to file interconnection agreements with favorable terms and conditions, which made the terms and conditions unavailable for PageData to adopt. For example, PageData has not had access to Vice-Presidents and the President of Qwest for dispute resolution in a timely manner, as other carriers have received in their previously secret, unfiled interconnection agreements.

Both Minnesota and Arizona aggressively pursued Qwest for illegally intervening in the regulatory process with fines, but have not required Qwest to file the interconnection agreements with the Commissions so those terms and conditions would be available to other carriers, which would cost Qwest more than the fines. Qwest was fined $8,000,000 and $24,000,000 by Arizona and Minnesota, respectively, for breaking laws that are similar to Idaho statutes. The Idaho PUC should similarly fine Qwest for its illegal behavior in the state of Idaho. The citizens of Idaho deserve the same representation.

Transit Charges

The U.S. Court of Appeals decision on the Mountain case has also addressed Qwest's contention that it can collect charges for a transit factor while denying PageData the third party calling information. Qwest's withholding of third party information denies PageData the right to be compensated for terminating third party traffic.

FCC Pre-emption of Tariff

Qwest's legal counsel very clearly articulated that tariff rates, rules and regulations do not apply to billing of CMRS carriers such as PageData[7]:

> The long-standing confusion over the extent of FCC preemption led to considerable difficulty in interconnection negotiations and ultimately litigation in interconnection arbitrations, in the courts, and at the FCC. The extent of the preemption was very uncertain until approximately one year ago.[13]

[7] Qwest Corporation's Limited Response to Joseph B. McNeal d/b/a PageData's Complaint dated November 26, 2003, Case No. QWE-T-03-25 before the Idaho Public Utilities Commission.

Footnote 13 The principal issues concerning preemption were: (i) the extent to which FCC rules, as interpreted by the FCC, preempted state tariffs and state commission decisions; (ii) whether paging carriers may obtain LEC facilities from the LECs without paying and if so, within what geographic area; (iii) whether paging carriers are entitled to compensation or free facilities even if they purchased the facilities under state tariffs and have not entered into section 251/252 interconnection agreements; (iv) transit traffic.

These questions raised by Qwest's legal counsel were addressed and answered by the 1996 Telecommunications Act, but it was Qwest's policy to delay and hinder the implementation of the Act. Qwest's continued insistence on using the obsolete tariff billing regime constitutes false billing. The U.S. Court of Appeals Mountain Decision chastised both the FCC and Qwest by stating, "We therefore rather easily conclude that the Commission's decision on this issue is arbitrary and capricious."[8] The U.S. Appeals Court upheld that 47 C.F.R. § 51.703(b) "unequivocal[ly] prohibit[s] LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions" (*See MCImetro Access Transmission Servs. V. BellSouth Telecomms, Inc.*, No. 03-1238, 2003 U.S. App. LEXIS 25782, at *24 (4th Cir. Dec. 18, 2003)

Dispute Process

Qwest has been penalizing PageData even though Qwest has not implemented any formal dispute process such as filing a formal complaint or seeking arbitration, and has been trying to apply tariff rules and regulations to a co-carrier, which is prohibited by law.

[8] Page 9, US Court of Appeals, Mountain Decision

Qwest knows these accounts have been in dispute for over five years. However, this has not been reflected on any of the invoices. Qwest cannot penalize a co-carrier in any way (including withholding of reciprocal compensation or facilities) for actively disputing illegal charges for over five years.

Call to Action

PageData is calling on the PUC to put an end to this charade. It was easy for the Idaho PUC to originally side with a multi-billion dollar, multi-national company. Several small paging carriers – three of which were Idaho companies —yelled that the emperor, Qwest, has no clothes. The U.S. Court of Appeals vindicated our yell and shined the spotlight on the naked monarch who has orchestrated a false and systematic way of bilking carriers by charging for Qwest originated and transit traffic. For paging carriers in Idaho, Qwest has designated the traffic split as 76% Qwest originated and 24% transit. Qwest is prohibited from passing on or cost shifting its costs for delivery of Qwest originated traffic to CMRS carriers. Since the originating carrier is responsible for paying all transport costs, the 24% transit traffic costs is prohibited from being shifted to the CMRS carrier. Under current rules, it is impossible for a carrier such as PageData to have a monthly billing on one-way facilities. This is a fact of law that even to this day Qwest refuses to accept. PageData is calling on the Idaho PUC to enforce this law.

LECs, such as Qwest, have erected elaborate schemes by coercing carriers into signing unlawful interconnection agreements or not signing interconnection agreements at all. The FCC and federal courts have systematically struck down each barrier that the LECs erected. They recognize the monopolistic position that a company such as Qwest has in the marketplace. The LEC must be in compliance with the 1996 Telecommunications Act whether or not the carrier has an interconnection agreement. The TSR Order covers not having an interconnection agreement and the MCImetro decision covers interconnection agreements with terms that violate the 1996 Telecommunications Act.[9]

Formula for Charges

The U.S. Appeals Courts' Mountain and MCImetro Decisions set out the formula that is to be used to determine what the billing rate should be. The formula is a basic tenth grade story problem. The outline of the story and the formula is listed below.

Through testimony given at the Idaho PUC for Case No. USW-T-99-24[10], PageData established its point of interconnection (POI) was Boise. Qwest is unequivocally prohibited from levying charges for traffic originating on its network, with or without an interconnection agreement. Questionably Qwest has determined that 24% of the traffic delivered to PageData's network is transit traffic, i.e., third party traffic. It is undisputed that Qwest need not absorb these costs. Nor should Qwest look to PageData to absorb these costs. It is the originating carrier who is obligated to bear all transport costs.

76% Qwest originated traffic
24% Transit traffic

100% Total

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[9] Page 14, US Court of Appeals, MCI Decision

[10] *In The Matter of the Joint Petition of Robert Ryder, d/b/a Radio Paging Service, Joseph B. McNeal, d/b/a PageData and InterPage of Idaho, for Declaratory Order and Recovery of Overcharges from U.S. West Communications. Inc.*

Seventy-six percent (76%) Qwest originated traffic

Qwest is unequivocally prohibited from charging the terminating carrier (PageData).

Twenty-four (24%) Transit traffic

Qwest has not identified to PageData the originating carrier, who must bear all costs for transport. Qwest is prohibited from transferring the originating carrier's obligation to pay transport to the terminating carrier.

Reciprocal Compensation

One hundred percent of Qwest originated traffic is subject to reciprocal compensation, with or without an interconnection agreement.

Because all the accounts listed below are subject to this formula, the scheme is revealed and it is actually Qwest that owes PageData money.

Disputed Spurious Billing Accounts

As requested by Qwest's billing department, PageData has identified and listed the long disputed accounts as follows:

208 R55-2312 312
208 R51-0454 454
208 R51-0485 085
208-642-8000-188B
208-D08-6826-826
6058670 (old Act # 178793)
L-208-111-1770-117M
L-208-111-1771-7718
L-208-111-1769-7698
208-373-9000-260B
208-375-9003-192B
208-375-9844-00-00

208-375-8896-00-00

As of June 2003, the fictitious billing balance totaled $278,597.42 (including $70,290.54 + in interest charges and $38,425.92 + in overcharges according to Qwest's billing methods). These fictitious billings continue to date and are disputed in full as such. The U.S. Court of Appeals Mountain ruling validates PageData's claim that these bills are fictitious and have no basis in law for a CMRS carrier.

208-375-8896-012B

The reciprocal compensation that Qwest is holding should be applied to accounts 208 R51-0454 454 and 208-375-8896-012B, so Qwest cannot claim that PageData owes Qwest money on any account.

Wide Area Calling

In the Mountain Decision, the U.S. Court of Appeals ruled that Qwest could not charge for delivery of traffic to the carrier's POI. The Court of Appeals called Wide Area Calling dubious, by the fact that there are no additional services provided by wide area calling and the only difference between wide area calling and traditional telephony is the entity billed for the tolls. The U.S. Court of Appeals said the LEC could not force a carrier into a wide area calling arrangement.[11] The Court of Appeals declared that there could not be wide area calling between co-carriers in the LATA since the originating carrier is responsible for all transport costs and Qwest is unequivocally prohibited for charging for traffic originating on its network.

[11] Page 8, U.S. Court of Appeals, Mountain Decision

76% Qwest originated traffic
24% Transit traffic – Originating Carrier Responsible for Cost
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100% = zero charge to PageData

76% = Qwest originated traffic – reciprocal compensation due PageData

Qwest should not be allowed to gain a competitive edge through the use of unlawful behavior. On August 29, 1998, PageData submitted a written request for a single point of presence to Qwest, which would have eliminated the "wide area calling" debate because Qwest was obligated to connect at any technically feasible point in the LATA.

Conclusion

For every issue that PageData presented to the Idaho PUC – some the Idaho PUC took and some they did not – Qwest has lost through either FCC Decisions and Orders or federal court. PageData is demanding that the PUC's Decisions and Orders start reflecting the U.S. Court of Appeals tone to the FCC and Qwest, "We therefore rather easily conclude that the Commission's decision on this issue is arbitrary and capricious."[12]

Despite the invoices that Qwest continues to send PageData, with the implementation of the 1996 Telecommunications Act, PageData does not owe Qwest any money. Rather, Qwest owes PageData money. We have provided these accounts in this letter so the correct Qwest personnel can properly note on the accounts that each of these invoices and accounts are disputed and PageData does not owe Qwest any money.

Qwest is prohibited from charging for recurring costs associated with transport and is obligated to correct that part of PageData's invoices. Qwest is prohibited from charging for traffic originated on its network and must correct that part of the billing. Qwest is prohibited from charging the terminating carrier transit charges and must correct that part of the billing. Qwest must correct the interest charges on the disputed amounts. Qwest is responsible for paying PageData reciprocal compensation and must correct that part of the billing. Qwest must recognize it is PageData that determines the POI and not Qwest and that POI for PageData is Boise. When all components of the billing are corrected, the formula in the story problem outlined by the Fourth Circuit Court of Appeals MCImetro decision and the District of Columbia Circuit Court of Appeals Mountain decision shows that PageData has been unlawfully billed for terminating Qwest originated traffic and has been denied reciprocal compensation for terminating such traffic.

Therefore, according to the formulas laid out by the Appeals Courts, in a timely manner PageData's accounts should be zeroed out; PageData should receive a refund of all cash paid to Qwest for interconnection activities; and Qwest should remit reciprocal compensation through January 2003 directly to PageData. The reciprocal compensation that Qwest is holding for the time period from January 2003 forward should be applied to the same corresponding invoices under account 208 R51-0454 454 and 208-375-8896-012B on a going forward basis, with any additional credits remitted to PageData by check. If Qwest does not voluntarily implement the formula laid out by the court and continues its fraudulent billing practices being delivered by U.S. Postal Service or common carrier in violation of federal and state law, then the Idaho PUC should follow the actions of Minnesota and Arizona and fine Qwest no less than $2,000,000.

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[12] U.S. Court of Appeals, Mountain Decision, p. 9

All the Qwest managers/personnel that are involved need to be brought up to date so this can get resolved quickly and concisely. The billing problem will be perpetuated if the reciprocal compensation issue is not settled along with the invoices being corrected. Qwest is perpetuating the problem by not recognizing its obligations to correct the billing in a timely manner and to remit reciprocal compensation to PageData in a timely manner. PageData has made it quite clear that PageData's reciprocal compensation credits are designated to offset PageData's invoices from Qwest. Qwest is creating this crisis by giving an illusion that PageData is in arrears and PageData owes Qwest money when the opposite is true.

RESPECTFULLY SUBMITTED this 29th day of January, 2004.

JOSEPH B. MCNEAL, d/b/a
PAGEDATA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of January, 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jean Jewell
Idaho Public Utilities Secretary
472 W. Washington Street
PO Box 83720
Boise, ID 83720-0074
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JOSEPH B. MCNEAL

EXHIBIT

A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 18, 2003 Decided January 16, 2004

No. 02-1255

MOUNTAIN COMMUNICATIONS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

T–MOBILE USA, INC., ET AL.,
INTERVENORS

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

Benjamin J. Aron argued the cause for petitioner. With him on the briefs was *Robert H. Schwaninger, Jr.*

Charles W. McKee argued the cause for Wireless Carrier intervenors T–Mobile USA, Inc., et al., in support of petition-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

er. With him on the briefs were *Luisa A. Lancetti, Doanne F. Kiechel, Thomas J. Sugrue, David M. Wilson, Laura R. Handman, Jonathan E. Canis,* and *Douglas I. Brandon.*

Stewart A. Block, Counsel, Federal Communications Commission, argued the cause for respondents. On the briefs were *R. Hewitt Pate*, Assistant Attorney General, U.S. Department of Justice, *Catherine G. O'Sullivan* and *Nancy C. Garrison*, Attorneys, *John A. Rogovin*, General Counsel, Federal Communications Commission, *John E. Ingle*, Deputy Associate General Counsel, and *Laurel R. Bergold*, Counsel.

Robert B. McKenna, Jr. argued the cause for intervenors Qwest Communications International Inc., et al., and *amici curiae* Verizon Telephone Companies. With him on the brief were *Michael E. Glover, John M. Goodman*, and *Edward H. Shakin.*

Before: SENTELLE and GARLAND, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

SILBERMAN, *Senior Circuit Judge*: Mountain Communications, Inc. is a paging carrier that petitions for review of an FCC order dismissing its complaint against Qwest–the local exchange carrier (LEC) serving the areas where Mountain operates–for charging petitioner two types of fees. The dispute between the carriers as to one of the fees evaporated at oral argument, but we hold that the FCC's decision as to the other was arbitrary and capricious.

I.

Mountain serves customers in three Colorado local calling areas: Colorado Springs, Walsenburg, and Pueblo. All three local calling areas are within the same Local Access and Transport Area (LATA), and Qwest is the provider of local service within each of those local calling areas. Calls from a Qwest customer to another Qwest customer in the same local calling area are local calls, but if a Qwest customer were to call from one of these local calling areas to another, he or she would incur a toll.

Though Mountain services all three local calling areas, it uses a single point of interconnection (POI) with Qwest, as it is entitled by statute. *See* 47 U.S.C. § 251(c)(2)(B) (providing that LECs must provide interconnection facilities with other carriers "at any technically feasible point within the [incumbent local exchange] carrier's network"); *see also* 47 C.F.R. § 51.321(a); *In re: Developing a Unified Intercarrier Compensation Regime*, 16 FCCR 9610, 9650–51 ¶ 112 (2001). The POI is located in Pueblo. Customers in each of the three calling areas have pager numbers associated with their individual local calling areas. It is therefore the paging customer's residence that correlates with the paging number, and a call from a telephone in a local calling area to a pager associated with the same local calling area will seem to the calling party to be a local call. But Mountain's maintenance of a single POI in Pueblo, however, means that every call to a Mountain customer, regardless of the place where the call originated, must pass through Pueblo before Qwest hands it off to Mountain and Mountain delivers it to the pager. Thus, a Colorado Springs resident attempting to page a Colorado Springs Mountain customer dials a Colorado Springs exchange, but the call is first routed to Pueblo before being rerouted to Colorado Springs.

Qwest has sought to collect fees from Mountain for these types of calls–calls that originate and terminate in Colorado Springs or Walsenburg but go through Mountain's POI in Pueblo. Qwest considers these calls to be toll calls, but does not charge its own customer–the caller–for placing such calls, perhaps because it lacks the technological ability to do so. *See Starpower Communications, LLC v. Verizon South, Inc.*, 2003 FCC LEXIS 6245, at *23 ¶ 17(Nov. 7, 2003) (attributing such a technological incapacity to Verizon). Instead, Qwest determines whether a customer's call is a toll call by comparing the number of the caller with the number of the person receiving the call. If both are Colorado Springs numbers, Qwest does not charge the customer a toll even if the call is routed to Pueblo and then back to Colorado Springs.

Qwest claimed in response to Mountain's complaint before the FCC that it was entitled to charge Mountain for the tolls it was unable to charge its own customers. According to Qwest, Mountain could avoid the toll charges by establishing a POI in *each* of the three local calling areas–doubtless at an increased cost. Then, if a paging call were placed from a local number to another local number, no toll would be charged to anyone. If, on the other hand, a paging call were made from one local calling area to another, Qwest would transport the call to Mountain's POI–without crossing a local calling area boundary–at which time Mountain would assume responsibility for delivering the call across the local calling areas, presumably at Mountain's expense.

Mountain claimed before the FCC that the Commission's regulations, specifically 47 C.F.R. § 51.703(b), which states that LECs such as Qwest "may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network," prohibit Qwest from charging for transmitting calls from Qwest customers to Mountain's POI. Mountain also relied on a recent FCC decision, *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCCR 11166, 11184 ¶ 31 (2000), which interpreted that regulation and rejected a similar effort on the part of an LEC to charge a paging carrier for transmitting calls to the paging carriers' POI, where the POI and the caller are in the same LATA but different local calling areas.

The Commission rejected Mountain's contention. The FCC said that in its *TSR* decision it had cautioned,

> nothing prevents [the LEC] from charging its end users for toll calls completed [between local calling areas]. Similarly, section 51.703(b) does not preclude [the paging carrier and the LEC] from entering into wide area calling or reverse billing *arrangements* whereby [the paging carrier] can 'buy down' the cost of such toll calls to make it appear to end users that they have made a local call rather than a toll call.

15 FCCR at 11184 ¶ 31 (emphasis added). This buy-down arrangement is the same concept behind conventional 800 numbers, where the called party is billed for the toll ordinarily incurred by the calling party.

The Commission concluded that here, by establishing a POI in Pueblo and then asking Qwest for lines to connect local customer numbers in Walsenburg, Colorado Springs, and Pueblo to the POI, Mountain made it appear to Qwest customers that they were making local calls from Colorado Springs numbers to Colorado Springs paging numbers–even though they passed through a Pueblo POI. "By configuring its interconnection arrangement in this manner, Mountain prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain's network." *Mountain Communications, Inc. v. Qwest Communications Int'l, Inc.*, 17 FCCR 15135, 15138 ¶ 5 (2002). The Commission determined that Mountain had obtained a wide area calling *service*, which is similar to a wide area calling arrangement, and therefore Qwest was entitled to charge Mountain for that service.

II.

Although petitioner does not quarrel with the Commission's caveat in *TSR*–that the regulation does not prohibit a wide area calling arrangement–it insists that this case is no different than *TSR*; the Commission has simply turned 180 degrees without explanation, and adopted a position at odds with its own regulation and the statutory provision allowing Mountain to make use of one POI within a LATA. We are befuddled at the Commission's efforts to explain away its *TSR* decision; the facts seem–and are conceded to be–identical, but the results are opposite. In *TSR*, the FCC prohibited US West, the LEC, from charging TSR, the paging carrier, for the costs of transporting calls from US West customers to TSR's POI.[1] In that case, just as in the present situation, the paging carrier served separate local calling

[1] US West was the predecessor company to Qwest, the LEC involved in the present dispute.

areas (Yuma and Flagstaff, Arizona), both of which were within the same LATA and served by the same LEC. TSR used a single POI, and a US West customer wishing to page a TSR customer within the same local calling area would have to place a call that would be routed across local calling area boundaries. US West attempted, as Qwest attempts here, to charge the paging carrier a fee for transporting those calls to the paging carrier's POI. The FCC ruled that such a charge would violate 47 C.F.R. § 51.703(b), because the calls *originated* on US West's network, and an LEC may not charge another carrier for traffic originating on the LEC's network. *See TSR*, 15 FCCR at 11176 ¶ 18, 11181 ¶ 25, 11184 ¶ 31.[2] The FCC concedes that the facts of *TSR* are identical to those presented here, but argues that the present network configuration nevertheless may be considered wide area calling, even if the same configuration in *TSR* was not so considered.

The Commission's attempt to stretch the concept of a wide area calling arrangement (essentially an agreement) to a wide area calling "service" is logically inconsistent with its *TSR* decision.[3] The premise, according to the Commission's *TSR*

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[2] In the words of the Commission, "[s]ection 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to [wireless] providers anywhere within the MTA [Major Trading Area] in which the call originated. . . ." *TSR*, 15 FCCR at 11184 ¶ 31. An MTA is the area within which wireless providers offer service, and within which the FCC's reciprocal compensation rules apply. All three local calling areas at issue here are within the same MTA. Section 51.701(b)(2), to which the Commission referred, defines "telecommunications traffic" as that traffic "exchanged between a LEC and a [wireless] provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter."

[3] Mountain argues that under Qwest's tariffs, wide area calling services exist only where the wireless carrier uses an interconnection known as Type 2. Mountain uses a Type 1 interconnection, which differs from Type 2 in that Mountain's customers have telephone numbers associated with their individual local calling

reasoning, of a wide area calling arrangement is that the LEC can charge a toll call to its customers. In that event the paging carrier has an incentive to "buy down" that charge so that Qwest's customer is not deterred by the toll from making a paging call. Here, for reasons not entirely clear to us, Qwest does not charge its customers for what it regards as a toll call if the originating number and the paging number are in the same local calling area. *See generally Starpower Communications*, 2003 FCC LEXIS 6245 at *23 ¶ 17 (Nov. 7, 2003) (noting that "industry practice among local exchange carriers ... appears to have been that calls are designated as either local or toll by comparing the [phone numbers] of the calling and called parties").[4] Accordingly, Mountain has no incentive to enter into a wide area calling arrangement with Qwest. Mountain's system of interconnection provides it no advantages other than those to which, presumably, it is entitled for free.[5] The Commission nevertheless chooses to

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areas instead of having numbers associated with the location of the POI, here, Pueblo. Before us, the FCC denies that there is any distinction between Type 1 and Type 2 interconnections for the purpose of establishing whether there is a wide area calling arrangement. We need not decide whether there can be a wide area calling arrangement in a Type 1 system, and our analysis does not turn on a conception of wide area calling being limited to Type 2 systems.

[4] Mountain further argues that Qwest would not legally be permitted to charge for calls by Qwest customers to paging customers with numbers in the same local calling area as the caller. *See* 47 U.S.C. § 153(48) (allowing a "separate charge" beyond that required for local service for "telephone service *between* stations in different exchange areas") (emphasis added); 47 C.F.R. § 51.701(d) (defining a call's termination as the point at which the call is delivered to the called party). We need not decide whether the FCC could reasonably interpret the statute and regulation to allow a toll where a call begins and ends within a single local calling area but passes through a different one.

[5] Neither in *TSR* nor in this case has the Commission suggested, or has Qwest claimed, that Qwest had any right to refuse to allow

term what Mountain has ordered from Qwest as wide area calling "*service*," which presto becomes a reasonable facsimile of a wide area calling *agreement*. The FCC's characterization of Mountain's arrangement as a wide area calling "service,"–sort of a constructive agreement–is rendered even more dubious by the fact that there are no additional services provided by wide area calling. The only difference between wide area calling and traditional telephony is the entity billed for the tolls.

Unfortunately for the Commission, the exact same analysis could have been applied in *TSR*–but was implicitly rejected. Therefore the Commission has, just as Mountain has claimed, changed direction without explanation, indeed without even acknowledging the change.

Perhaps more fundamental, by abandoning the concept of a buy-down agreement between the parties and simply designating the service Mountain obtained as a wide area calling service, the Commission seemingly comes into direct conflict with its own regulation. *See MCImetro Access Transmission Servs. v. BellSouth Telecomms, Inc.*, No. 03–1238, 2003 U.S. App. LEXIS 25782, at *24 (4th Cir. Dec. 18, 2003) (holding that 47 C.F.R. § 51.703(b) "unequivocal[ly] prohibit[s] LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions"). In *TSR*, the Commission had interpreted its regulation 51.703(b), which prohibits LECs from assessing *charges* on other carriers for delivering traffic originating on the LEC's network, as not applying to a voluntary *agreement* that a paging carrier enters into with the LEC to compensate the LEC for foregoing its option to charge its customers. In other words, the Commission implicitly construed such an agreement as not a "charge" for telecommunications traffic but rather compensation for a separate benefit. The Commission described "wide area calling" as "a service in which a

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Mountain to obtain paging numbers associated with each local calling area. *See In re: Numbering Resource Optimization*, 15 FCCR 7574, 7577 n.2 (2000) ("A carrier must obtain a central office code [the first three digits of a seven-digit phone number] for each rate center in which it provides service in a given area code.").

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*, 15 FCCR at 11167 n.6 (emphasis added). But in this case the Commission abandoned that construction, instead allowing Qwest to *charge* Mountain for the wide area calling service it was deemed to enjoy, though there was no agreement. By shifting its characterization of the exception to § 51.703(b)'s prohibition on charges from an agreement to compensate LECs for a foregone opportunity, to a *charge* for the telecommunications traffic, the FCC decision appears to run afoul of § 51.703(b)'s prohibition on charges.

The Commission, moreover, has not even tried to explain how its position can be reconciled with the statutory provision, 47 U.S.C. § 251(c)(2)(B), which, it will be recalled, obliges an LEC to provide interconnection facilities with any other carrier at a single "technically feasible" POI. Mountain maintains that that statutory provision implicitly precludes an LEC from charging for such an interconnection, and the Commission has not responded to that argument. We do not, therefore, decide whether the Commission could reasonably interpret the statute to allow for such charges.

We therefore rather easily conclude that the Commission's decision on this issue is arbitrary and capricious. *See generally, e.g., Ramaprakash v. FAA*, 346 F.3d 1121, 1124–25 (D.C. Cir. 2003).

III.

In addition to the charges Qwest has assessed for delivering Qwest-originated calls to Mountain's POI, Qwest has also assessed "transit" charges for the delivery of calls originated by a customer of an entirely different network. If a non-Qwest customer wishes to page a Mountain customer, the call is routed to Qwest. Qwest then carries the call on its network–in like manner as if a Qwest customer had placed the call–to Mountain's POI. Mountain then assumes responsibility for delivering the call to the Mountain customer. Qwest incurs costs for switching and routing these calls over the Qwest network, and Qwest charged Mountain for the last of five parts of those expenses–the cost of delivering the call from the Qwest end office switch to Mountain's POI. The FCC allowed Qwest to charge for this service, but indicated that Mountain could seek reimbursement from the originating carrier for whatever charges it paid to Qwest. *See Mountain Communications*, 17 FCCR at 15137 n.13. Mountain's petition challenged this FCC decision as well, claiming that the charge is arbitrary and capricious because it does not follow the standard practice of charging the cost of calls to the network of the party initiating the call. Mountain insisted that the prospect of reimbursement from the originating carrier was illusory, because Mountain never receives information from Qwest about which carrier initiates any individual call, and it is therefore impossible for Mountain to seek reimbursement from a third carrier.

It is undisputed that Qwest need not absorb these costs; the only question is whether Qwest can charge Mountain for one of the five portions of this cost or must instead look to the originating carrier for all of the costs. It might well be reasonable for the Commission to authorize Qwest to apportion those costs, but we do not understand why the Commission did so. It did not explain why it rejected Mountain's contention that the originating carrier should be charged for all the costs. In any event, by indicating that Mountain could charge the originating carrier, it suggested that Mountain was essentially correct in claiming that the originating carrier should bear *all* the transport costs. At oral argument, Qwest's counsel obviated any need for us to decide this issue by indicating that Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement. Under those circumstances, Mountain dropped that part of its petition.

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Accordingly, the Commission's order is vacated in part and the case is remanded.