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IN THE MATTER OF QWEST CORPORATION'S APPLICATION FOR ARBITRATION PROCEDURE AND APPROVAL OF INTERCONNECTION AGREEMENT WITH HANDY PAGE, PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS

DOCKET NOS. T-01051B-06-0175
T-02556A-06-0175
T-03693A-06-0175

QWEST CORPORATION'S OPENING BRIEF REGARDING INCLUSION OF "WIDE AREA CALLING" IN THE SECTION 252(b) ARBITRATION OF PAGING INTERCONNECTION AGREEMENT

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Qwest Corporation ("Qwest") hereby files its Opening Brief in response to the Procedural Order issued July 13, 2006, asking Qwest and Interstate Wireless, Inc. d/b/a Handy Page ("Handy Page") to brief the legal issue of whether "Wide Area Calling" should be subject to an Interconnection Agreement arbitrated under the Telecommunications Act of 1996.¹ Qwest requests that the Hearing Division issue a proposed ruling consistent with the ruling of the Federal Communications Commission ("FCC"), finding that "Wide Area Calling," which allows a paging carrier to pay the long distance toll charges incurred by Qwest subscribers who dial the paging carrier's customers, is a billing service, and is not a telecommunications service, an interconnection facility or a network element; that Qwest may continue to charge paging carriers

¹ Specifically, 47 U.S.C. §252(b).

1 for that billing service under the existing tariff, and that such charges do not violate any statutes
2 or regulations regarding how carriers compensate each other for the transport and termination of
3 calls; and that “Wide Area Calling” is not necessary for Handy Page to interconnect to Qwest or
4 for Handy Page to provide paging services to its customers. Accordingly, the issues Handy Page
5 seeks to arbitrate are not required to be part of an interconnection agreement under the Act, and
6 therefore have no place in an interconnection arbitration under Section 252(b) of the Act.

7 8 I. INTRODUCTION AND BACKGROUND

9 10 A. Wide Area Calling

11 As described by the FCC, “Wide Area Calling” (“WAC”) is a service in which a LEC
12 agrees not to assess toll charges on calls from the LEC’s end users to the interconnecting
13 carrier’s end users, in exchange for which the other carrier pays the LEC a per-minute fee to
14 recover the LEC’s toll carriage costs. WAC is also known as “reverse billing” or “reverse toll.”²

15 In his affidavit which is attached hereto as Exhibit B, Robert Weinstein on behalf of
16 Qwest describes WAC in greater detail (the “Weinstein Declaration”). WAC provides an
17 optional billing service that allows Qwest landline customers to direct dial a pager anywhere in
18 the LATA without incurring toll charges. WAC operates to suppress any toll charge that would
19 apply to such calls. Qwest’s WAC toll suppression only operates on calls from Qwest landline
20 customers.³ A carrier subscribing to WAC pays a bulk-billed charge per minute of use,
21 according to one of the two pricing options from which the carrier selects. Such charges provide
22 Qwest with the means of recovering the costs associated with providing WAC.⁴ The telephone

23
24 ² Memorandum Opinion and Order, *In the Matter of TSR Wireless, LLC, et al., Complainants, v. U S WEST Communications, Inc., et al., Defendants*, 15 FCC Rcd 11166, at fn. 6 (Rel. June 21, 2000) (“*TSR Wireless Order*”). A copy of the *TSR Wireless Order* is attached hereto as Exhibit A.

25 ³ Weinstein Declaration at ¶¶ 2-3.

26 ⁴ *Id.* at ¶¶ 3-5.

1 service underlying the telephone call which is placed by the Qwest subscriber is a service
2 provided by Qwest to the Qwest landline customer, not to the paging carrier. Qwest is entitled to
3 charge its landline customer toll charges for those calls if the call is not originated and terminated
4 in the same local calling area. The service remains a service provided by Qwest to its customer,
5 regardless of whether the toll charge is suppressed by reason of the paging carrier assumption of
6 the charges, whether by WAC or otherwise.⁵

7 A paging carrier requiring interconnection must separately obtain switching and transport
8 service by contracting for Type 2 interconnection service, whether or not the paging carrier
9 subscribes to WAC. A landline call to a paging carrier with a Type 2 interconnection travels
10 over the Public Switched Telephone Network in the same manner whether or not the carrier
11 subscribes to WAC.⁶

12 Qwest offers the "WIDE AREA CALLING" ("WAC") billing arrangement that is the
13 subject of this proceeding to paging carriers pursuant to a tariff which has been in effect for
14 approximately ten years years. The WAC tariff is attached hereto as Exhibit C.

15

16 **B. Statutory Background and FCC Rules**

17 **1. Reciprocal Compensation**

18 A helpful summary of the statutory scheme for reciprocal compensation between
19 interconnecting carriers, and the FCC's implementation of that scheme, particularly as it relates
20 to traffic between LECs and wireless carriers, may be found in the U.S. Tenth Circuit Court of
21 Appeals' opinion in *Atlas Telephone Company et al. v. Oklahoma Corporation Commission et*
22 *al.*⁷ ("*Atlas Telephone*"), which is attached hereto as Exhibit D. (See, Sections II and III, at
23 pages 5-6 of the LEXIS print attached as Exhibit D). As recapped in that decision, under Section

24

25 ⁵ Id., ¶ 7.

26 ⁶ Id., ¶¶ 6, 7.

⁷ *Atlas Telephone Company et al. v. Oklahoma Corporation Commission et al.*, 400 F. 3d 1256,
(3rd Cir. 2005).

1 251(b) LECs are obligated to “establish reciprocal compensation arrangements for the transport
2 and termination of telecommunications.”⁸ The FCC determined that reciprocal compensation
3 should only apply to telecommunications traffic originating and terminating in the same local
4 area. First Report and Order, FCC 96-325, CC Docket Nos. 96-98, 95-185, P 1034 (Aug. 8,
5 1996) “*First Report and Order*.”). State commissions are responsible for determining what areas
6 are local for purposes of applying the reciprocal compensation obligations found in §251(b)(5),
7 except in the case of traffic to or from a wireless carrier. *Id.* P 1035. The FCC determined that
8 traffic to or from a [wireless] network that originates and terminates within the same [Major
9 trading Area] (“MTA”) is subject to transport and termination rates under section 251(b)(5)
10 rather than interstate and intrastate access charges. *Id.* P 1036. An MTA is the largest FCC-
11 authorized wireless license territory, and might encompass numerous state-defined local calling
12 areas. *Id.*

13 In its description of reciprocal compensation, the Court in *Atlas Telephone* states:

14 “*Having been compensated by its customer, the originating network in turn*
15 *compensates the terminating carrier for completing the call.*”⁹

16 It is important to keep in mind that the LEC’s entitlement to charge its customer is separate,
17 distinct, and independent from the LEC’s obligation to pay compensation to the terminating
18 carrier. That distinction is critical to understanding the true nature of WAC, as is discussed
19 below.

20 2. *TSR Wireless*

21 In the *First Report and Order*, the FCC promulgated certain rules regarding reciprocal
22 compensation. Specifically relevant to this matter, the FCC promulgated 47 CFR §51.703(b),
23 which states:

24 A LEC may not assess charges on any other telecommunications carrier for local
25 telecommunications traffic that originates on the LEC’s network.

26 ⁸ 47 U.S.C. §251(b)(5).

⁹ *Atlas Telephone*, 1260 (Citing *First Report and Order*) at P 1034).

1 Subsequently, the FCC's Common Carrier Bureau ruled that § 51.703(b)'s bar on LEC charges
2 for completion of LEC-originated calls also covered charges for certain facilities used by paging
3 providers for the delivery of traffic from the LEC network to the paging provider.¹⁰ Ultimately,
4 a complaint at the FCC was filed by one-way paging providers, claiming that LECs had charged
5 for facilities used to deliver LEC-originated traffic in violation of the rule. That complaint led to
6 the *TSR Wireless Order*, Exhibit A hereto.

7 The FCC ruled in the *TSR Wireless Order* that the LECs may not charge paging carriers
8 for delivery of LEC-originated, intraMTA traffic to the paging carriers point of interconnection,
9 and that consequently, "[LECs] may not impose upon [paging carriers] charges for facilities used
10 to deliver LEC-originated traffic to [paging carriers]."¹¹

11 Notably, however, the FCC also ruled in the *TSR Wireless Order*:

12 We further conclude that section 51.703(b) of *the Commission's rules does not*
13 *prohibit LECs from charging, in certain instances, for "wide area calling" or*
14 *similar services where a terminating carrier agrees to compensate the LEC for toll*
*charges that would otherwise have paid by the originating carrier's customer.*¹²

15 The *TSR Wireless Order* specifically addresses the very same WAC billing reversal service that
16 is at issue in this arbitration proceeding today in Arizona. As the FCC determined, WAC does
17 not violate §51.703(b). Further, as discussed in greater detail below, the FCC found that WAC is
18 not necessary for interconnection, and is a service which the LECs are not even required to offer
19 under federal law. Nothing in any subsequent actions by the FCC or court interpretations,
20 including the FCC's more recent *T-Mobile Order*¹³ and rule,¹⁴ serve to transform the optional

21 ¹⁰ *Letter of Chief of the FCC Common Carrier Bureau A. Richard Metzger, Jr.*, December 30,
22 1997, 13 FCC Rcd 184 (1997).

23 ¹¹ *TSR Wireless Order* at ¶1.

24 ¹² *Id.* (Emphasis added).

25 ¹³ Declaratory Ruling and Report and Order, *T-Mobile et al. Petition for Declaratory Ruling*
26 *Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-02, (FCC, rel. Feb.
24, 2005).

¹⁴ 47 CFR §20.11 Interconnection to facilities of local exchange carriers, was amended by adding
subsections (e) and (f):

(e) Local exchange carriers may not impose compensation obligations for traffic not
subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

1 billing and collection service into a compensation obligation for the transport and termination of
2 traffic under §251(b)(5). Based on the FCC's holding in the *TSR Wireless Order*, Handy Page's
3 claims fail.

5 II. DISCUSSION

7 A. WAC Is Not Necessary For Interconnection, and Is Not Required To Be Provided 8 Under the FCC's Rules.

9 In the *TSR Wireless Order*, Qwest (formerly U S WEST) pointed out to the FCC that
10 WAC is an optional billing and collection service that enables TSR to promote calls to its paging
11 subscribers as toll-free, because TSR is billed at a bulk discount for the toll traffic. The FCC
12 agreed completely:

13 TSR asserts that rule 51.307(b) prohibits U S WEST from charging for "wide area
14 calling" service. We disagree. We find persuasive U S WEST's argument that "*wide*
15 *area calling*" services are not necessary for interconnection or for the provision of TSR's
16 service to its customers. We conclude, therefore that Section 51.703(b) does not compel
17 a LEC to offer wide area calling or similar services without charge, *Indeed, LECs are*
not obligated under our rules to provide such services at all; accordingly, it would seem
incongruous for LEC's who choose to offer these services not to be able to charge for
them. *TSR Wireless Order* at ¶ 30. (Emphasis added; footnotes omitted).

18 The FCC's ruling is clear. Qwest is not obligated to offer WAC to Handy Page as part of
19 interconnection under the Act. Indeed, so far as the FCC is concerned, Qwest is not obligated to
20 offer WAC to Handy Page at all. Handy Page's Statement of Un-Resolved Interconnection
21 Agreement Items ("Handy Page's Statement) regarding WAC only contains various
22 reformulations of the same issue that the FCC put to rest in *TSR Wireless Order*.

24 (f) An incumbent local exchange carrier may request interconnection from a
25 commercial mobile radio service provider and invoke the negotiation and arbitration procedures
26 contained in section 252 of the Act. A commercial mobile radio service provider receiving a
request for interconnection must negotiate in good faith and must, if requested, submit to
arbitration by the state omission. Once a request for interconnection is made, the interim
transport and termination pricing describe in §451.715 shall apply.

1 **1. The WAC Tariff Is Not InterCarrier Compensation for the Transport and**
2 **Termination of Traffic Exchanged Under Section 251(b).**

3 At page 2 of Handy Page's Statement, lines 5-9, Handy Page asserts, "Although the costs
4 for Interconnection facilities would be billed under a Type 2a Interconnection Agreement, the
5 'WAC service tariff' is responsible for determining the 'compensation obligation' of what a
6 CMRS Paging Carrier will pay or receive for Wide Area Calling 'minutes of use' (MOU and
7 other service charges." In framing its issue thusly, Handy Page attempts to equate charges
8 Qwest bills under WAC, with a "compensation obligation" under FCC Rule §20.11(e).

9 However, as the FCC ruled in the *TSR Wireless Order*, the charges flowing from WAC
10 are simply a reversal of the toll charges that are otherwise due from Qwest's customer, and a re-
11 billing of those charges to the paging carrier. The FCC was careful to distinguish between the
12 LEC's duty to deliver calls within the MTA at no charge to the paging carrier, versus the ability
13 of the LEC to charge its own end user for placing the call. The former is carrier compensation
14 under the FCC's reciprocal compensation rules; the latter is not. The FCC explained the
15 distinction as follows:

16 Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for
17 facilities used to deliver LEC-originated traffic that originates and terminates
18 within the same MTA, as this constitutes local traffic under our rules. Such traffic
19 falls under our reciprocal compensation rules if carried by the incumbent LEC,
20 and under our access charge rules if carried by an interexchange carrier. This may
21 result in the same call being viewed as a local call by the carriers and a toll call by
22 the end-user. For example, to the extent the Yuma-Flagstaff T-1 is situated
23 entirely within an MTA, does not cross a LATA boundary, and is used solely to
24 carry U S West-originated traffic, U S West must deliver the traffic to TSR's
25 network without charge. However, *nothing prevents U S West from charging its*
26 *end users for toll calls completed over the Yuma-Flagstaff T-1. Similarly, section*
51.703(b) does not preclude TSR and U S West from entering into wide area
calling or reverse billing arrangements whereby TSR 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. Should paging providers and LECs decide to enter into
wide area calling or reverse billing arrangements, nothing in the Commission's
rules prohibits a LEC from charging the paging carrier for those services. TSR
Order at ¶31. (Emphasis added; footnotes omitted).

25 The distinction is merely a reflection of the fact that there are two transactions involved when a
26 call is exchanged with an interconnecting carrier. These were recognized by the FCC in the First

1 Report and Order. One transaction is between the originating network and the terminating
2 network. In this case, that is the delivery of the call from the Qwest network to Handy Page.
3 The other transaction is between the originating network provider and its customer. In this case,
4 that is the toll service that a Qwest customer uses to call the pager number. The latter transaction
5 is all that is associated with WAC.

6 Handy Page presses the same theme at lines 16-26 on page 2, and at the top of page 3 of
7 its Statement, asserting that under the FCC's *T-Mobile Order*, WAC arrangements are
8 compensation arrangements that must be made via negotiated agreements, and not pursuant to
9 tariff. As shown above, these arguments erroneously characterize WAC as interconnection
10 under §251. Indeed, as the FCC held, Qwest is not even required to offer WAC—a finding that
11 conclusively demonstrates that WAC is not interconnection, and therefore not a “compensation
12 arrangement” under the rule. Therefore, WAC is not subject to compulsory negotiation and
13 arbitration under the Act and the implementing rules.

14
15 **2. The WAC Tariff and the Interconnection Agreement Are Not Intertwined.**

16 At page 2 of Handy Page's Statement of Un-Resolved Interconnection Agreement Items
17 (“Handy Page's Statement”), lines 13-14, Handy Page makes the bald statement that “Both the
18 WAC and the Interconnection Agreement items are inextricably intertwined with each other.
19 However, Handy Page does not provide any support for that assertion, and indeed, it cannot,
20 because the two matters operate independently. It is not necessary to purchase WAC in order to
21 interconnect with Qwest. (Weinstein Declaration, at ¶6). In fact, as an optional billing service,
22 WAC is never needed for interconnection. There are no cross-conditions or interdependencies
23 between the two, other than the obvious fact that WAC is only offered to Type 2 wireless paging
24 interconnectors.

25 Handy Page states at page 2, lines 9-11, that “The WAC MOU ‘traffic usage’ also
26 determines who pays what percentage of the Interconnection Agreement ‘facilities’ charges, per

1 the 1996 Telecommunications Act, between Qwest and Handy Page". This is a totally erroneous
2 statement by Handy Page. The Type 1 and Type 2 Paging Interconnection Agreement that
3 Qwest has proposed provides for a bill and keep arrangement for Type 1 Paging. That is, Qwest
4 does not charge for any of the Type 1 facilities within the LATA and the paging provider does
5 not bill Qwest reciprocal compensation for terminating Qwest originated traffic. On Type 2
6 facilities Qwest charges the paging provider only that portion of the facility used to deliver
7 transit traffic.¹⁵

8

9 **3. The Justness and Reasonableness of the WAC Tariff Rates May Not Be**
10 **Adjudicated In An Arbitration Under §252(e) Because WAC Is Not An**
11 **Interconnection Facility or Network Element**

12 This arbitration proceeds under very specialized statutory provisions and rules. Section
13 252(d) of the Telecommunications Act of 1996 provides for state commission review of the
14 justness and reasonableness only of rates for the interconnection of facilities and equipment for
15 purpose of subsection (c)(2) of section 251, and for network elements for purposes of subsection
16 (c)(3) of such section. As demonstrated above, WAC is a billing service. It does not concern
17 interconnection of facilities or network elements. Therefore, no basis exists in this arbitration
18 proceeding to review the rates associated with WAC.

18

19 **4. Qwest Does Not Bill Handy Page for Local Calls In Violation of the *TSR***
20 ***Wireless Order*.**

21 At page 5 of its Statement, lines 4-8, Handy Page alleges that Qwest violates the *TSR*
22 *Wireless Order* by billing Handy Page for local calls. Qwest believes that Handy Page may have
23 in mind the two WAC billing options which Handy Page describes at page 4, lines 12-14.

24

25 ¹⁵ Transit traffic is traffic that originates on another carrier's network and transits Qwest's
26 network. The transit factor is a state-wide factor that was developed through negotiations and it
applies to all paging providers doing business with Qwest in Arizona. The transit factor has
nothing to do with WAC MOU traffic usage which is all Qwest originated traffic by the way.
Weinstein Declaration ¶11.

1 However, Handy Page's argument fails, because under WAC Handy Page has the option of
2 selecting between the two billing options. Handy Page is free to select the option that allocates
3 toll charges to Handy Page based upon the number of such calls, rather than spreading such
4 charges over a larger number. In fact, that is the selection Handy Page has made for its business.
5 In any event, neither option represents a charge by Qwest to Handy Page for the delivery of
6 Qwest originated, intra-MTA traffic to Handy Page's point of interconnection pursuant to
7 Section 251. There is no charge for that under the new Type 2 Interconnection Agreement.
8 The WAC charge is recovery of charges that would otherwise be assessed to Qwest's customers.
9 The second option merely spreads the toll charges for which Handy Page is picking up the tab, in
10 a different manner, which may be better for any given paging provider. For example, a paging
11 provider whose customers are paged more often by toll calls (WAC) would benefit greatly by
12 selecting the lower rate.

13
14 **5. Qwest Is Agreeable to Paying Handy Page Termination Compensation For**
15 **Qwest Originated Intra-MTA Calls, Including WAC Calls, For Type 2.**

16 At page 6, lines 4-10, Handy Page addresses the issue of payment of terminating
17 compensation for Qwest originated, Intra-MTA calls, including WAC calls. The only thing
18 standing in the way of Handy Page's objective is Handy Page's refusal, to date, to sign a new
19 Type 1 and 2 Paging Interconnection Agreement. Originally, Handy Page negotiated and signed
20 a Type 2 paging agreement with Qwest's predecessor U S West which was approved by the
21 Arizona Commission on April 30, 1998. It was one of the first paging agreements signed
22 between U S West and a paging company. That agreement did not have any provisions for either
23 party to collect reciprocal compensation.¹⁶ It was later, in subsequent versions of Qwest's
24 paging agreements (around the year of 2000), that reciprocal compensation became part of the
25 language of the baseline Qwest paging agreement. For whatever reason, Handy Page did not

26 ¹⁶ Weinstein Declaration ¶8.

1 sign a new agreement, but continued under the older agreement which had no provisions for the
2 payment of reciprocal compensation to either party.

3 Qwest agrees that a Type 2 paging interconnection agreement reached by negotiation or
4 arbitration in accordance with the *T-Mobile* rule, should provide for terminating compensation
5 for Qwest originated, intra-MTA calls, including WAC calls if that is what the paging carrier
6 wishes.

7
8 **III. CONCLUSION**
9

10 For the foregoing reasons, Qwest respectfully requests that the Hearing Division issue a
11 proposed ruling consistent with the ruling of the Federal Communications Commission (“FCC”),
12 finding that “Wide Area Calling,” which allows a paging carrier to pay the long distance toll
13 charges incurred by Qwest subscribers who dial the paging carrier’s customers, is a billing
14 service, and is not a telecommunications service, or an interconnection facility or a network
15 element under Section 251(b) of the Act; that ILECs who choose to offer “Wide Area Calling”
16 may charge paging carriers for that billing service, and such charges do not violate any statutes
17 or regulations regarding how interconnecting carriers compensate each other for the transport
18 and termination of calls; and that “Wide Area Calling” is not necessary for Handy Page to
19 interconnect to Qwest or for Handy Page to provide paging services to its customers.
20 Accordingly, the issues Handy Page seeks to arbitrate are not required to be part of an
21 interconnection agreement under the Act, and therefore have no place in an interconnection

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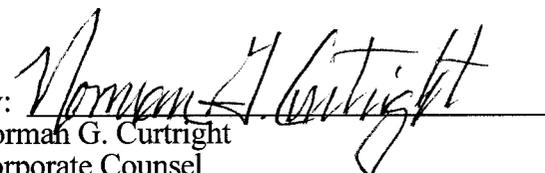
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1 arbitration under Section 252(b) of the Act. Qwest's offering of "Wide Area Calling" by way of
2 its tariff is appropriate.

3 RESPECTFULLY SUBMITTED, this 25th day of August, 2006.

4 QWEST CORPORATION

5
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EXHIBIT A

3 of 3 DOCUMENTS

In the Matters of TSR WIRELESS, LLC, et al., Complainants, v. U S WEST
COMMUNICATIONS, INC., et al., Defendants

File Nos. E-98-13, E-98-15; E-98-16, E-98-17, E-98-18

FEDERAL COMMUNICATIONS COMMISSION

15 FCC Rcd 11166; 2000 FCC LEXIS 3219; 21 Comm. Reg. (P & F) 49

RELEASE-NUMBER: FCC 00-194

June 21, 2000 Released; Adopted May 31, 2000

ACTION: **[**1]** MEMORANDUM OPINION AND ORDER

JUDGES:

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement; Commissioner Powell concurring and issuing a statement

OPINION:

[*11166] 1. In this Order, we address five separate formal complaints filed by paging carriers TSR Wireless, LLC (TSR) and Metrocall, Inc. (Metrocall) (hereinafter "Complainants" or "paging carriers") against local exchange carriers (LECs) Pacific Bell Telephone Company (Pacific Bell), U S West Communications, Inc. (U S West), GTE Telephone Operations (GTE), and Southwestern Bell Telephone Company (SWBT) (collectively "Defendants"). The paging carriers allege that the LECs improperly imposed charges for facilities used to deliver LEC-originated traffic and for Direct Inward Dialing (DID) numbers in violation of sections 201(b) and 251(b)(5) of the Communications Act of 1934, as amended, n1 and the Commission's rules promulgated thereunder. We find that, pursuant to the Commission's rules and orders, LECs may not charge paging carriers for delivery of LEC-originated traffic. Consequently, Defendants may not impose upon Complainants charges for facilities used to deliver LEC-originated traffic to Complainants. In addition, **[**2]** we conclude that Defendants may not impose non-cost-based charges upon Complainants solely for the use of numbers. We further conclude that section 51.703(b) of the Commission's rules does not prohibit LECs from charging, in certain instances, for "wide area calling" or similar services where a terminating carrier agrees to compensate the LEC for toll charges that would otherwise have been paid by the originating carrier's customer. **[*11167]** Accordingly, for the reasons set forth below, we grant in part and deny in part Complainants' claims. We note that the Complainants in this proceeding did not seek compensation for the transport and termination of LEC-originated traffic. Consequently, this order does not address the question of whether or under what circumstances paging carriers are entitled to such compensation.

n1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); 47 U.S.C. § § 201(b), 251 (1991 & West Supp. 1999).

I. BACKGROUND

2. Complainants are Commercial Mobile Radio Service (CMRS) carriers that provide telecommunications services, including one-way paging services. They assert that section 51.703(b) of **[**3]** the Commission's rules, n2 the Commission's *Local Competition Order*, n3 and Common Carrier Bureau letters n4 interpreting these provisions, prohibit incumbent LECs from charging paging carriers for telecommunications traffic that originates on a LEC's network. n5 Complainants seek an order prohibiting Defendants from charging for dedicated and shared transmission

facilities used to deliver LEC-originated traffic, DID numbers, and "wide area calling service." n6 Defendants assert that the Commission lacks authority under the Act to adjudicate Complainants' claims. n7 They further argue that because the Complainants are one-way [*11168] way paging carriers, they are not entitled to the benefit of the Commission's reciprocal compensation regime set forth in the Commission's rules, and therefore must pay for facilities used to deliver LEC-originated traffic.

n2 47 C.F.R. § 51.703(b).

n3 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom.*, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*. [**4]

n4 Letter from Regina M. Keeney, Chief, Common Carrier Bureau to Cathleen A. Massey, AT&T Wireless Services, Inc. (March 3, 1997) (Keeney Letter); Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau to Keith Davis, Southwestern Bell Telephone, DA 97-2726 (Dec. 30, 1997) (Metzger Letter).

n5 Metrocall, Inc.'s Brief on the Merits, at 5-6; Initial Brief of TSR Wireless LLC at 8-10, 14-15.

n6 "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. *See, e.g.*, Letter from Gary A. Evenson, Assistant Administrator, Telecommunications Division, Wisconsin Public Service Commission, to James D. Schlichting, Chief, Competitive Pricing Division, Common Carrier Bureau, FCC, February 16, 1998.

n7 Initial Brief of Defendants BellSouth, GTE, Pacific Bell, Southwestern Bell Telephone Company, and U S West, Sept. 11, 1998 (Metrocall Defendants' Brief) at 4-5. The Metrocall Defendants filed joint briefs and pleadings (Metrocall Defendants' Brief and Metrocall Defendants' Reply) to respond to Metrocall's allegations. Metrocall had also filed a complaint on January 20, 1998 against BellSouth Corporation and BellSouth Telecommunications, Inc. alleging the same causes of action as the instant matters (E-98-14). The BellSouth entities had participated in these proceedings until the Commission dismissed Metrocall's case against them on December 13, 1999. [**5]

3. In the *Local Competition Order*, the Commission promulgated section 51.703(b), which provides that: "A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." n8 In adopting this rule, the Commission stated that "as of the effective date of [the *Local Competition Order*], a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge." n9 The Order further provided that carriers operating under arrangements that do not comport with the Commission's mutual compensation principles "shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of [the *Local Competition Order*]." n10 When the *Local Competition Order* was appealed to the Eighth Circuit, the court specifically held that sections 2(b) and 332(c) of the Act granted the Commission authority to issue rules of special concern to CMRS providers. Consequently, the court permitted section 51.703 to remain in full force and [**6] effect as it applied to CMRS providers. n11 Defendants in this proceeding also participated in the appeal of the Eighth Circuit's holding to the Supreme Court, but did not seek review of the Commission's rules relating to CMRS carriers.

n8 47 C.F.R. § 51.703(b).

n9 *Local Competition Order*, 11 FCC Rcd at 16016.

n10 *Local Competition Order*, 11 FCC Rcd at 16028. The Order took effect on November 1, 1996. The Commission's conclusions regarding reciprocal compensation were codified as Sections 51.701-17 of the Commission's rules. 47 C.F.R. §§ 51.701-17.

n11 *Iowa Utils. Bd. v. FCC*, 120 F.3d at 800 n.21, 820 n.39.

4. Section 251(b)(5) of the 1996 Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." n12 The Commission in promulgating regulations to implement that

section determined that CMRS providers such as paging carriers offer "telecommunications" as defined in the Act, n13 and that LECs therefore "are obligated, pursuant to section 251(b)(5) ... to enter into reciprocal compensation arrangements with [**7] all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks." n14 The Commission went on to [*11169] state that because section 251(b)(5) "does not address charges payable to a carrier that originates traffic," section 251(b)(5) "prohibits charges such as those some incumbent LECs currently impose on CMRS carriers for LEC-originated traffic." n15

n12 47 U.S.C. § 251(b)(5).

n13 See 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

n14 *Local Competition Order*, 11 FCC Rcd at 15997.

n15 *Local Competition Order*, 11 FCC Rcd at 16016.

5. On January 30, 1997, concerned that LECs would disconnect their interconnection service for failure to pay for LEC-originated traffic notwithstanding the FCC's regulations, several paging carriers requested that the Bureau "affirm" that section 51.703(b) of [**8] the Commission's rules prohibited LECs from charging CMRS providers, including paging providers, for local telecommunications traffic that originated on the LECs' networks. n16 On March 3, 1997, then-Chief of the Common Carrier Bureau Regina Keeney issued a letter responding to these carriers' concerns. n17 The Keeney Letter restated the Commission's conclusions from the *Local Competition Order*, and concluded that because the Act defines the term "telecommunications carrier" to include CMRS providers, "a LEC is prohibited by section 51.703(b) from assessing charges on CMRS providers for local telecommunications traffic that originates on the LEC's network." n18

n16 Letter from Cathleen A. Massey, AT&T Wireless Services, Inc. to Regina M. Keeney, Chief, Common Carrier Bureau, January 30, 1997.

n17 Keeney Letter, *supra* note 4.

n18 *Id.* at 2.

6. On December 30, 1997, A. Richard Metzger, Jr., then-Chief of the Common Carrier Bureau issued another letter in response to a request by several carriers for clarification of section 51.703(b) and the *Local Competition Order*. n19 The Metzger Letter stated that the Commission's rules do not allow a LEC to charge a provider [**9] of paging services for the cost of "LEC transmission facilities that are used on a dedicated basis to deliver to paging service providers local telecommunications traffic that originates on the LEC's network." n20 In January of 1998, Defendants SWBT, Pacific Bell, and U S West filed Applications for Review of the Metzger Letter. n21 Shortly before and soon after the release of the Metzger Letter, TSR and Metrocall filed the instant complaints seeking the cessation of unlawful conduction and recovery [*11170] of the allegedly unlawful charges imposed by Defendants in violation of sections 201(b) and 251 of the Act and section 51.703(b) of the Commission's rules.

n19 Metzger Letter, *supra* note 4, at 2.

n20 *Id.* at 3.

n21 U S West bases its Application for Review on Section 1.115(b)(2)(i) of the Commission's rules, which requires applicants to demonstrate that the action taken pursuant to delegated authority "is in conflict with statute, regulation, case precedent, or established Commission policy." 47 C.F.R. § 1.115(b)(2)(i). U S West Application for Review, at 2, n.2. This Application for Review is pending at the time of this order. On January 30, 1998, SBC also filed a petition for stay of the Metzger Letter pending review of the letter by the Commission. [**10]

II. FACTS

A. TSR v. U S West

7. Complainant TSR provides CMRS one-way paging service to its subscribers in Arizona. n22 Defendant U S West is a LEC that provides facilities and services necessary for TSR to connect its CMRS one-way paging systems in Arizona to the public switched telecommunications network. n23 The parties agree that, because TSR currently provides exclusively one-way paging service in Arizona, no calls are conveyed from TSR's paging terminals to U S

West's network. n24 A TSR subscriber therefore cannot originate a call to the U S West landline network over TSR's system.

n22 TSR and U S West Joint Stipulation of Facts, June 2, 1998, at P1.

n23 *Id.* at P2.

n24 *Id.* at P5.

8. U S West had billed and continues to bill TSR for the following types of charges under U S West's Arizona tariff, which TSR contests: 1) monthly recurring charges for DID numbers; 2) monthly recurring charges associated with dedicated Type 1 DID trunks; 3) charges for dedicated T-1 circuits necessary to connect U S West offices to the TSR network for delivery of LEC-originated traffic to TSR's network; 4) installation charges for DID numbers, DID trunks and T-1 circuits; [**11] and 5) usage charges described as "transport land to mobile and end office switching" associated with wide area calling service provided by U S West. n25

n25 *Id.* at P6.

9. Beginning in November, 1996, TSR refused to pay the contested charges imposed by U S West based on TSR's position that Commission regulations and decisions prohibit U S West's imposition of these charges against CMRS one-way paging carriers. n26 U S West also informed TSR on more than one occasion that it would "waive" charges for DID numbers retroactive to October 7, 1996, although to date, it has not done so. n27 On June 26, 1997, TSR submitted to U S West a letter requesting a T-1 circuit to handle TSR's Yuma, Arizona, to Flagstaff, Arizona, paging traffic (the Yuma-Flagstaff T-1). n28 The next day, U S West responded [**1171] that it would not provide the Yuma-Flagstaff T-1 and that U S West had imposed a "Stop Provisioning Order" against TSR based on TSR's refusal to pay the contested charges, which amounted to \$ 231,927.08 in TSR's May 1997 invoice. n29

n26 *Id.* at P8.

n27 *Id.* at P10.

n28 *Id.* at P11.

n29 *Id.* at P12.

10. TSR filed its complaint with the Commission against [**12] U S West on December 24, 1997. TSR also filed a supplemental motion alleging that U S West violated the Commission's *ex parte* rules when representatives of U S West and Commission staff met without inviting TSR on May 26, 1999. n30

n30 TSR Motion to Impose Sanctions at 4-9.

B. Metrocall v. GTE, Pacific Bell, SWBT, and U S West

11. Shortly after the Commission's *Local Competition Order* took effect on November 1, 1996, Metrocall sent letters to Defendants GTE and Pacific Bell (along with SWBT and U S West hereinafter collectively "Metrocall Defendants") requesting that these carriers cease charging Metrocall for local transport, DID numbers, and facilities used for local transport based on its view that section 51.703(b) of the Commission's rules prohibited such charges. n31 Typical of these letters is Metrocall's November 19, 1996 letter to Jamie Miller of GTE Corporation. In that letter, Metrocall requests that GTE "immediately revise its paging interconnection terms and rates ... in light of Section 252(a) of the Telecommunications Act of 1996 ... and the [Commission's] rules and Orders." n32 The letter stated that "the FCC concluded that a 'LEC may not charge a CMRS [**13] provider or other carrier for terminating LEC-originated traffic,' and, as of the 'effective date' of that FCC Order (August 30, 1996), the LEC 'must provide that [LEC-originated] traffic to the CMRS provider or other carrier without charge.'" n33 The letter also referenced the Commission's conclusion in the *Local Competition Order* that "local" traffic includes CMRS-LEC traffic that originates and terminates within the same Major Trading Area ("MTA") pursuant to rule 51.701(b)(2), and language from the *Second Local Competition Order* n34 concerning nondiscriminatory access to numbers. n35 The letter concluded with a statement that, if GTE wished to continue assessing the charges, Metrocall "expected a [**1172] written explanation, within 30 days of the date of this letter, as to how those charges would not be in violation of the Telecom Act and the FCC's rules." n36

n31 See Letter from Frederick M. Joyce, Counsel to Metrocall, Inc. to GTE Corporation, Attention of Jamie Miller (Nov. 19, 1996), Metrocall Complaint Exh. 9 (Miller Letter); and Letter from Frederick M. Joyce, Counsel to Metrocall, Inc. to Pacific Bell Corporation, Attention of Robert Butland (Nov. 19, 1996), Metrocall Complaint Exh. 11. [**14]

n32 Miller Letter at 1.

n33 *Id.* at 1-2.

n34 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Report and Order, 11 FCC Rcd 19392, 19538 (1996) (Second Local Competition Order).*

n35 Miller Letter at 2.

n36 *Id.*

12. The Metrocall Defendants rejected Complainant's requests, averring that the Commission lacked jurisdiction to enforce section 51.703(b), and that, in any event, section 51.703(b) could only be applied by a state commission during the section 252 arbitration process. n37 Metrocall filed its complaints with the Commission on January 20, 1998.

n37 Metrocall Defendants Brief at 6-10, 22-23.

III. DISCUSSION

A. Jurisdiction

13. As an initial matter, we reject Defendants' arguments that the Commission lacks jurisdiction to resolve the issues raised in these formal complaints. n38 Section 208 permits "any person ... complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof" to file a complaint with the Commission. n39 Defendants are common carriers. Complainants allege that Defendants [**15] have imposed certain charges upon them in violation of sections 201, and 251-252 of the Act and of the Commission's rules implementing those sections. n40 The Commission stated in the *Local Competition Order* that "an aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder" n41 Therefore, our authority to decide the complaints arises from sections 201, 208, 251 and 252 of the Act. n42

n38 Metrocall Defendants' Brief at 4-5; U S West Brief at 6-9.

n39 47 U.S.C. § 208.

n40 47 U.S.C. § § 201, 251-252; TSR Complaint at 18 P30 (§ § 201, 251-252 of the Act); Metrocall Brief at 2, 5 (§ § 201(b) & 251(b) of the Act).

n41 *Local Competition Order* at 15564, P127. Defendants relied on the Eighth Circuit's opinion in *Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997)*, to argue that the Commission lacks jurisdiction to adjudicate this complaint. See, e.g., Metrocall Defendants' Brief at 11-12. Because the Supreme Court vacated the Eighth Circuit's decision on that point on ripeness grounds in *AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999)*, the Commission's jurisdictional decision in the *Local Competition Order* controls. [**16]

n42 We note that section 1, 47 U.S.C. § 151, also provides us with authority "to execute and enforce the provisions" of the Act. An additional basis for authority for the action we take here exists under section 332 of the Act, 47 U.S.C. § 332. See *supra* note 11.

[**1173] B. Res Judicata and Collateral Estoppel

14. Metrocall contends that the doctrines of res judicata and collateral estoppel prohibit Defendants from challenging Sections 51.701-17 of the Commission's rules in this proceeding. n43 Defendants counter that they may mount a challenge to the rules as applied to them in an enforcement proceeding pursuant to *Functional Music, Inc. v. FCC*, n44 and *Geller v. FCC*, n45 and that the Eighth Circuit Court of Appeals did not address the precise issues raised in this complaint proceeding. n46 In *Iowa Utils. Bd.*, the Eighth Circuit struck down the majority of the Commission's local competition rules on jurisdictional grounds, but upheld the rules at issue here as a valid exercise of the Commission's authority under section 332(c) of the Act. n47 Defendants herein filed comments in the [**17] *Local Competition* proceeding, and participated in the appeals of that order to the Eighth Circuit Court of Appeals and Supreme Court. TSR and Metrocall did not directly file comments in the *Local Competition* proceeding before the

Commission, although Personal Communications Industry Association (PCIA), which represents the paging industry, did file comments. n48 The Court of Appeals considered the merits of section 51.703(b) and its application to paging carriers, and the Commission's other reciprocal compensation rules adopted by the *Local Competition Order*. n49 Defendants vigorously litigated the issue of the Commission's jurisdiction, but chose not to appeal the Court of Appeals' conclusions concerning reciprocal compensation for paging carriers.

n43 Metrocall Brief at 4 n.4. Although it does not label its argument as res judicata or collateral estoppel, TSR makes a related argument that, because the Court of Appeals upheld the Commission's LEC-CMRS interconnection rules, the rules are binding upon Defendants and must be followed. TSR Brief at 17-18.

n44 274 F.2d 543 (D.C. Cir. 1958).

n45 610 F.2d 973 (D.C. Cir. 1979). [**18]

n46 See, e.g., Metrocall Defendants' Brief at 7 n.8.

n47 See *Iowa Utils. Bd.*, 120 F.3d at 800 n.21, 820 n.39; see also *supra* note 11.

n48 *Local Competition Order*, 11 FCC Rcd at 16185, 16189.

n49 See Brief for Intervenors CMRS Providers in Support of Respondents, filed December 23, 1996, in No. 96-3321, *Iowa Utils. Bd. v. FCC*, at 4-6 (arguing in favor of validity of §§ 51.701(b), 51.703, 51.709(b), 51.711(a), 51.715(d), and 51.717 of the Commission's rules); see also Reply Brief of the Mid-sized Local Exchange Carriers, filed January 6, 1997, in No. 96-3321, *Iowa Utils. Bd. v. FCC*, at 34 (arguing against LEC-CMRS interconnection regime adopted in the *Local Competition Order*).

15. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. n50 Under [**11174] the doctrine of collateral estoppel, a judgment in a prior suit precludes relitigation by the same parties of issues actually litigated and necessary to the outcome of the first action. n51 The record does not [**19] indicate whether TSR and Metrocall are PCIA members, and Complainants do not assert that they are "privies" of PCIA for purposes of res judicata. Although Complainants were neither parties nor privies to the *Local Competition Order* and its appeals, they may still estop the Defendants from challenging the validity of the Commission's rules by invoking the doctrine of collateral estoppel, as recognized by the Supreme Court in *Parklane Hosiery Co. v. Shore*. n52 *Parklane Hosiery Co.* provides courts with discretion to allow a non-party to a particular proceeding to prevent a party to that proceeding from re-litigating issues adversely decided against that party based primarily on fairness concerns. n53 Thus, once an issue is raised and determined, the doctrine of collateral estoppel precludes the entire issue, not just the particular arguments raised in support of it in the first case. n54 Accordingly, a litigant may not raise a new argument in a second proceeding regardless of whether it was made in the first proceeding; so long as the argument could have been made, it is precluded. n55 And, even when an opinion is silent on a particular issue, issue preclusion is applicable [**20] if resolution of that issue was necessary to the judgment. n56

n50 1B J. Moore, Federal Practice P0.405[1], pp. 622-24 (2d ed. 1974)(quoted in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979)).

n51 *Id.*

n52 439 U.S. 322 (1979).

n53 *Parklane Hosiery Co. v. Shore*, 439 U.S. at 331.

n54 *Yamaha Corp. v. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992).

n55 See *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990).

n56 *American Iron & Steel Ass'n v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989).

16. We find that it is fair for Complainants to invoke collateral estoppel against Defendants here, given that the Defendants were parties to the appeal of the *Local Competition Order* and possessed strong incentives to litigate these issues in that appeal. n57 In the *Local Competition Order* the Commission considered issues identical to those Defendants raise here: namely, whether CMRS carriers, and specifically, paging carriers should be included within the [**21] Commission's reciprocal compensation framework. n58 The Court of Appeals upheld the LEC-CMRS interconnection rules in a proceeding in which Defendants herein participated. Defendants possessed ample opportunity

to argue to the Supreme Court that the Commission [*11175] acted arbitrarily and capriciously in adopting these rules, but chose not to do so. n59 Accordingly, we find Defendants to be estopped from relitigating these issues that the Commission considered in the *Local Competition Order* and that were subsequently affirmed by the Eighth Circuit. This estoppel precludes Defendants from asserting that the Commission acted arbitrarily and capriciously in extending application of its reciprocal compensation rules to CMRS carriers, including paging carriers, and from challenging the decision to apply section 51.703(b) even in the absence of an interconnection agreement. n60 Moreover, under relevant precedent, the Eighth Circuit's judgement upholding the rules retains its preclusive effect even though the decision contains no detailed discussion of the merits of the rules. n61 The parties litigated the merits of the rules before this Commission n62 and, as the briefs submitted [**22] in that proceeding indicate, before the Eighth Circuit as well. n63 Defendants attempt to raise new arguments as to why the rules may be invalid, and the doctrine of collateral estoppel does not permit such tactics. n64 We conclude, however, that this estoppel does not bar Defendants from litigating issues that the *Local Competition Order* did not address, such as whether section 51.703(b) prohibits LECs from charging Complainants for wide area calling service, or for DID numbers.

n57 See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21, 820 n.39 (8th Cir. 1997), rev'd in part sub. nom. *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); see also *supra* note 11.

n58 See *Local Competition Order*, 11 FCC Rcd at 15993-16058.

n59 At the same time, Defendants retain the opportunity in the various petitions for reconsideration of the *Local Competition Order* and applications for review of the Metzger Letter to argue their position. The reconsideration petitions and applications for review of the Metzger Letter provide a forum for defendants to argue, for instance, that paging carriers should be excluded from the Commission's reciprocal compensation framework, or that they should not be considered to be telecommunications carriers. We expect to rule in these pending proceedings in the near future and our action here is without prejudice to action in such proceedings. [**23]

n60 The *Local Competition Order* made the Commission's reciprocal compensation policy requiring carriers to deliver LEC-originated traffic at no charge effective "as of the date of this [*Local Competition*] order." See *Local Competition Order*, 11 FCC Rcd at 16027-16028. The Order further provided that carriers operating under arrangements that do not comport with the Commission's mutual compensation principles "shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of this [*Local Competition Order*]." *Id.* at 16028. We therefore find that Defendants were on notice that the Commission intended that the rules should apply immediately, and that the rules could be invoked even before a carrier made a formal request for interconnection negotiations pursuant to § § 251 and 252 of the Act.

n61 *Yamaha Corp.*, 961 F.2d at 254; *Securities Indus. Ass'n*, 900 F.2d at 364; *American Iron & Steel Ass'n*, 886 F.2d at 397.

n62 See *Local Competition Order*, 11 FCC Rcd at 16008-16058. [**24]

n63 See Brief for Intervenors CMRS Providers in Support of Respondents, filed December 23, 1996 at 22 (arguing that the Commission properly applied section 251(b)(5)'s reciprocity requirement to paging companies); see also Reply Brief of the Mid-Sized Incumbent Local Exchange Carriers, filed January 6, 1997 at 34 (arguing against symmetrical pricing for LEC-CMRS interconnection).

n64 *Securities Indus. Ass'n*, 900 F.2d at 364.

17. We further find Defendants' reliance on *Functional Music* and *Geller* to be misplaced. *Functional Music* and *Geller* enable a party in an enforcement proceeding to file a [*11176] challenge to an administrative rule after the limitations period for challenging the rule otherwise would have expired. n65 For instance, the rule of these decisions would permit a party that did not participate in the litigation concerning the validity of the rules before the Court of Appeals to challenge those rules in an enforcement proceeding, notwithstanding that the limitations period for challenging the *Local Competition Order* otherwise would have run. *Functional Music* and *Geller* do not, however, award [**25] a "second bite of the apple" to parties, such as Defendants that participated in the litigation but failed to raise these arguments in that appeal. n66 Consequently, we find that the Defendants' opportunity to challenge the validity of the Commission's rules at issue here has expired.

C. May Defendants charge one-way paging carriers for delivery of LEC-originated traffic to the paging carrier's point of interconnection?

n65 See *Functional Music*, 274 F.2d at 546; see also *Geller*, 610 F.2d at 978.

n66 See *Public Citizen v. Nuclear Regulatory Commission*, 901 F.2d 147, 153 n.3 (D.C. Cir. 1990); *Western Coal Traffic League v. Interstate Commerce Commission*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

18. The gravamen of many of the Defendants' arguments is that the reciprocal compensation regime established by section 51.703(b) and the Commission's other reciprocal compensation rules do not apply to the Complainants. n67 For the reasons stated below, we reject those arguments and find that the Commission's reciprocal compensation rules, including section [**26] 51.703(b), are applicable and that the Defendants cannot charge Complainants for the delivery of LEC-originated, intraMTA traffic to the paging carrier's point of interconnection.

1. Applicability of the Commission's Reciprocal Compensation Rules to One-Way Paging Carriers

n67 See, e.g., Metrocall Defendants Brief at 18-23; U S West Brief at 13-16.

19. The *Local Competition Order* provides that LECs must establish reciprocal compensation arrangements with paging carriers:

Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of "telecommunications." Under section 3(43), "the term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." All CMRS providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251(b)(5) ... to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and [*11177] termination of traffic on each other's networks, [**27] pursuant to the [Commission's rules governing reciprocal compensation.] n68

There is no ambiguity in the Commission's language concerning the applicability of section 251(b)(5) and the rules promulgated thereunder to paging carriers. As stated in the *Local Competition Order*, and re-stated in both the Keeney and Metzger letters, paging carriers, as carriers of "telecommunications," are entitled to the benefit of the Commission's reciprocal compensation rules, n69 including section 51.703(b) of the rules. n70

n68 *Local Competition Order*, 11 FCC Rcd at 15997 (emphasis supplied).

n69 47 C.F.R. § 51.701, *et seq.*

n70 Section 51.703(b) of the rules affords carriers the right not to pay for delivery of local traffic originated by the other carrier. However, Complainants are required to pay for "transiting traffic," that is, traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier's network. See *Local Competition Order*, 11 FCC Rcd at 16016-17. In addition, the paging carrier would be responsible for paying charges for facilities ordered from the LEC to connect points on the paging carrier's side of the point of interconnection, such as facilities ordered to connect the paging terminal with its antennas. [**28]

20. Defendants make no effort to distinguish the *Local Competition Order's* multiple, clear statements that the Commission intended to permit paging carriers to benefit from its reciprocal compensation framework. Instead, they argue that a conflict exists between the *Local Competition Order* and the rules that it adopted. n71 According to Defendants, section 51.701(e) of the Commission's rules, which contains the definition of reciprocal compensation, presupposes that both carriers receive compensation, and therefore, "by definition" a one-way carrier is not entitled to reciprocal compensation. n72 They further argue that the reciprocal compensation rules should not apply to one-way paging carriers because only one of the carriers, in this case, the paging carrier, receives termination compensation, and that section 51.701(e) must govern over any contrary language contained in the *Local Competition Order*. n73

n71 See Metrocall Defendants' Brief at 22.

n72 *Id.* at 19. Rule 51.701(e) provides that "a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." [**29]

n73 Metrocall Defendants' Brief at 19, 21-22.

21. We disagree that any conflict exists here between the Order and the rules. Section 51.701(e) must be read in conjunction with the rest of the Order and section 51.703(a). Section 51.703(a) states that "each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting [*11178] telecommunications carrier." n74 Like the text of the Order, which states that "paging carriers" shall be entitled to request reciprocal compensation arrangements, section 51.703(e) draws no distinction between one-way and two-way carriers. Indeed, section 51.703(a) specifically states that "any ... telecommunications carrier" may request a reciprocal compensation arrangement with a LEC. n75 As stated previously, paging carriers, including those that provide only one-way service, are "telecommunications carriers" under the Act. Absent a specific *exclusion* in the rules, there is no basis upon which to presume that such carriers should not be included within the scope of these provisions. Section 51.701(e) does not, as Defendants argue, require that compensation actually [**30] flow in both directions between carriers. It requires only that, to the extent that local telecommunications traffic originates on the network facilities of one carrier and terminates on the facilities of another, compensation shall be paid to the terminating carrier. n76 In fact, the Commission's regulation defining reciprocal compensation and its interpretation of those regulations was recently upheld in *Pacific Bell v. Cook Telecom, Inc.* n77 The Ninth Circuit concluded that the Commission's "interpretation of 'reciprocal' [was] a plausible and permissible interpretation of an ambiguous statutory term" and that our interpretation was entitled to deference. n78 Accordingly, we reject Defendants' arguments that section 51.703(b) of the Commission's rules does not apply to one-way carriers.

2. Whether one-way paging carriers "switch" traffic within the meaning of the Commission's rules

n74 47 C.F.R. § 51.703(a).

n75 *See* 47 C.F.R. § 51.703(a) (emphasis added).

n76 Indeed, Defendants' argument, if adopted, would lead to the peculiar result that a carrier that delivered a single call to the incumbents' network would pay essentially nothing for the interconnection facilities (*i.e.*, where 99.9 percent of the traffic originates on the incumbent's network) while a carrier that does not deliver any calls to the incumbent's network would pay for the entire interconnection facilities. [**31]

n77 197 F.3d 1236 (9th Cir. 1999).

n78 *Id.* at 1245.

22. The *Local Competition Order* states that paging providers "transport," "switch," and "terminate" traffic. n79 Moreover, our rules do not require that a carrier possess a particular switching technology as a prerequisite for obtaining reciprocal compensation. Section 51.701(d) defines termination as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premise." n80 By using the phrase "switch or equivalent facility," the rules contemplate that a [*11179] carrier may employ a switching mechanism other than a traditional LEC switch to terminate calls. A paging terminal performs a termination function because it receives calls that originate on the LEC's network and transmits the calls from its terminal to the pager of the called party. This is the equivalent of what an end office switch does when it transmits a call to the telephone of the called party. To perform this function, the terminal first directs the page to an appropriate transmitter [**32] in the paging network, and then that transmitter delivers the page to the recipient's paging unit. The terminal and the network thus perform routing or switching and termination. Because a paging terminal performs switching functions akin to an end office switch, we find unpersuasive Defendants' argument that a paging terminal does not qualify as a "switch or equivalent facility" as defined by the Commission's rules. Consequently, we reject Defendants' argument that Complainants fall outside of our reciprocal compensation framework because paging terminals allegedly do not perform a switching function, and, therefore, do not constitute a "switch or equivalent facility" as defined in the Commission's rules.

n79 *See, e.g., Local Competition Order, 11 FCC Rcd at 16043* ("Using LEC costs for termination of voice calls thus may not be a reasonable proxy for paging costs as the types of switching and transport that paging carriers perform are different from those of LECs and other voice carriers.").

n80 47 C.F.R. § 51.701(d) (emphasis supplied).

23. We similarly reject Defendants' argument that paging carriers do not truly provide a call termination [**33] function because the paging terminal does not establish a direct communication path between the originating caller and the paging customer. n81 As authority for this proposition Defendants cite Newton's Telecom Dictionary, which defines switching as "connecting the calling party to the called party." n82 We find Defendants' reliance on Newton's Telecom

Dictionary's definition of switching to be misplaced. There is no requirement in the statute or the Commission's rules that a two-way communications path must be established in order for switching to occur. In fact, a number of packet switching protocols, including internet protocols, make use of "connectionless" switching. n83 With these protocols, a sender sends the network one or more packets with a destination address, and the network delivers one packet at a time to the destination. We conclude that there are two reasons why the Commission chose to include "equivalent facilities" in addition to switches in section 51.701(d)'s definition of termination. First, by including equivalent facilities as well as switches, the rule ensures that CMRS carriers that employ Mobile Transport and Switching Offices or paging terminals to perform [**34] functions equivalent to end office switching will fall within the definition. The second is to ensure that the definition of termination will remain relevant as technology changes. To [*11180] adopt Defendants' view would improperly exclude these networks from the Commission's reciprocal compensation framework based on the technology they employ to channel their traffic to their end users, in contravention of the Act's goals of promoting the development of new technologies and compensating network owners for traffic termination that does not originate on their network.

n81 Metrocall Defendants' Brief at 20-21.

n82 Metrocall Defendants' Brief at 20 (citing *Newton's Telecom Dictionary*, 578 (11th ed. 1996)). Complainant TSR obtains both Type 1 and Type 2 interconnection from U S West. TSR Joint Stipulation of Facts at 4.

n83 *Newton's Telecom Dictionary* defines "connectionless network" as:

A type of communications network in which no logical connection (*i.e.*, no leased line or dialed-up channel) is required between sending and receiving stations. Each data unit ... is sent and addressed independently, and, thereby, is independently survivable Connectionless networks are becoming more common in broadband city networks now increasingly offered by phone companies.

Newton's Telecom Dictionary, 178 (14th ed. 1998). [**35]

24. Finally, we reject Defendants' argument that carriers such as Complainants that employ Type 1 interconnection do not perform call termination functions and should therefore be excluded from our reciprocal compensation framework. n84 Citing the *Third Radio Common Carrier Order*, a pre-1996 Act case, Defendants argue that for Type 1 interconnection, the LEC switch actually "terminates" the call. n85 As Defendants point out, prior to enactment of the 1996 Act, the Commission described Type 1 as an interconnection option whereby the LEC switch performs, in the case of two-way communications, both call origination and termination functions. The same order describes Type 2 as the interconnection option where the CMRS provider owns the switch and provides call origination and termination functions. We find, however, that section 51.701(d)'s definition of termination is broad enough to encompass Type 1 interconnection. Simply put, for the LEC's customers' calls to reach the paging carrier's customers, more is required than mere delivery by the LEC of traffic to the paging terminal. For Type 1 interconnection, the paging terminal must still route these calls and distribute them over [**36] the paging carrier's network so that they reach the called party. n86 Because paging carriers [*11181] receiving Type 1 interconnection carry calls from their "switch, or equivalent facility," and deliver them to the called party's premises, these carriers terminate calls within the meaning of section 51.701(d). This same rationale applies to paging carriers that utilize the more sophisticated Type 2 interconnect^r interconnect with LEC networks, as such carriers also must route and distribute the LEC customer's calls to ena^r to reach the called party.

3. Does section 51.703(b) contemplate a distinction between "traffic" and "facilities"?

n84 The Commission has previously described Type 1 and Type 2 interconnection as follows:

Type 1 service involves interconnection to a telephone company end office similar to that provided by a telephone exchange (PBX). Under Type 1 interconnection, the telephone company owns the switch and, therefore, performs the origination and termination of both incoming and outgoing calls. Under Type 2 interconnection, the [CMRS provider] owns the switch, enabling it to originate outgoing calls and to terminate incoming calls.

Third Radio Common Carrier Order, 4 FCC Rcd at 2372, n. 16. TSR currently obtains Type 1 and Type 2 interconnection from U S West. TSR and U S West Joint Statement of Uncontested Facts at P4.

n85 *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Third Radio Common Carrier Order), Memorandum Opinion and Order on Reconsideration, FCC 89-60, 4 FCC Rcd. 2369 (1989). See Metrocall Defendants' Brief at 21.*

n86 A PBX trunk is a connection between an end user premise and the LEC switch. A Type 1 connection, in contrast, links the LEC to the Mobile Telephone Switching Office, or its equivalent facility, in this case the paging terminal, which is not an end user premise. *Bell Atlantic Telephone Companies, 6 FCC Rcd 4794, 4795 (1991)*. Although Type 1 interconnection is somewhat analogous to that provided to a PBX, the paging carrier performs a significant switching function by broadcasting the call over its network to enable its customer to receive messages. In addition, as a carrier of "telecommunications," the paging carrier is responsible for obtaining necessary regulatory authorizations and building a network sufficient to serve its customers. In contrast, the PBX owner is an end user customer of the LEC who has purchased a PBX and, accordingly, would not be entitled to co-carrier status. *See id.* (noting that treating Type 1 connections like a PBX would not conform to the Commission's LEC-CMRS interconnection policies). [**38]

25. Defendants argue that section 51.703(b) governs only the charges for "traffic" between carriers and does not prevent LECs from charging for the "facilities" used to transport that traffic. n87 We find that argument unpersuasive given the clear mandate of the *Local Competition Order*. The Metzger Letter correctly stated that the Commission's rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself. Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic and would be inconsistent with the rules. Moreover, the Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates. n88 Indeed, the distinction urged by Defendants is nonsensical, because LECs could continue to charge carriers for the delivery of originating traffic by merely re-designating the "traffic" charges as "facilities" charges. n89 Such a result would be inconsistent with the language and intent of the Order and the Commission's rules.

n87 Metrocall Defendants Brief at 17. [**39]

n88 *Local Competition Order, 11 FCC Rcd at 16027-28.*

n89 GTE argues that the Metzger Letter does not apply to it, asserting that the literal terms of that letter only prohibit charges for dedicated facilities. GTE states that it only uses shared facilities to deliver its traffic to Complainants. Metrocall Defendants Brief at 18. We reject this argument because section 51.703(b) prohibits charges for LEC-originated traffic, regardless of whether the facilities used to deliver such traffic are dedicated or shared.

26. Nor are we persuaded by the LEC arguments that the reference to "transmission facilities" in section 51.709(b) compels the conclusion that 51.703(b) is limited to "traffic charges." n90 Section 51.709(b) applies the general principle of section 51.703(b) - that a LEC [**11182] may not impose on a paging carrier any costs the LEC incurs to deliver LEC-originated, intraMTA traffic, regardless of how the LEC chooses to characterize those costs - to the specific case of dedicated facilities. Thus, the promulgation of the more specific rule in section 51.709(b) supports, rather than undercuts, our conclusion regarding the effect of [**40] section 51.703(b).

4. Are Complainants entitled to the benefits of section 51.703(b) absent a section 252 interconnection agreement?

n90 *See, e.g., Metrocall Defendants' Brief at 17. Section 51.709(b) provides that:*

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

47 C.F.R. § 51.709(b).

27. Defendants assert that, even if section 51.703(b) requires LECs to deliver LEC-originated traffic to complainants without charge, CMRS providers may only obtain that benefit by engaging in the section 252 agreement process. According to Defendants, Complainants possess two options when seeking to terminate LEC-originated traffic: they may either purchase service from Defendants' state tariffs and thereby forgo their rights under section 51.703(b) of the rules, or they may formally request interconnection under sections 251 and 252 and obtain those rights either [**41] through negotiation or arbitration. Defendants assert that, because Complainants did not make a formal request for

interconnection negotiations under section 252, they are not entitled to the benefits available under section 251(b)(5) of the Act and section 51.703(b) of the Commission's rules. n91 The Defendants argue that the Act "does not authorize the Commission to impose the reciprocal compensation duties of section 251(b)(5) - one of the statutory bases for section 51.703(b) - outside the context of negotiations undertaken pursuant to the procedures established in section 252 of the Act." n92 They offer as support for this proposition the Eighth Circuit's decision, which they describe as holding that the "sole avenue for enforcement and review of the provisions of sections 251 and 252 is the negotiation and arbitration procedures established in section 252." n93 The Supreme Court, however, vacated the Eighth Circuit's decision limiting the Commission's section 208 authority by concluding that the issue was not ripe for adjudication. It also explicitly held that the Commission has "jurisdiction to make rules governing matters to which the 1996 Act applies." n94 Given Defendant's [**42] argument relies on a vacated holding, the Commission will afford it no weight. Rather, the Defendants' obligations in this matter are governed by the Commission's *Local Competition Order*.

n91 Metrocall Defendants' Brief at 4.

n92 Metrocall Defendants' Brief at 11.

n93 *Id.* at 12.

n94 *AT&T v. Iowa Utilities*, 119 S. Ct. at 730.

28. The *Local Competition Order* states that, "as of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge." n95 The [*11183] Keeney and Metzger letters re-iterated this position. n96 Consequently, Defendants' argument that the benefits of section 51.703(b) of the Commission's rules are available only through a section 252 interconnection agreement process is incorrect. n97

n95 See *Local Competition Order*, 11 FCC Rcd at 16016 (emphasis supplied). The reference to "terminating LEC-originated traffic" refers to the fact that, among other things, LECs also had imposed charges on CMRS carriers for facilities used solely to deliver the LEC-originated traffic to the CMRS carrier's point of interconnection. [**43]

n96 See Keeney Letter at 1-2 (citing *Local Competition Order*, P1042); Metzger Letter at 2 (same).

n97 While not required to be addressed by this order, to the extent that other Commission rules promulgated under the *Local Competition Order* were not made "effective immediately," we would expect that requesting carriers would utilize the interconnection agreement process of sections 251 and 252 to obtain services under section 251. Moreover, it is clear that requesting carriers may negotiate and agree to terms other than those established by sections 251(b) and (c) and the Commission's implementing rules. See 47 U.S.C. § 252(a). In particular, requesting carriers, including CMRS carriers, may agree to forgo rights established by section 251 and the Commission's rules, for instance, in return for other consideration from the ILEC. Thus, we anticipate that the sections 251 and 252 interconnection agreement process will utilize the sections 251(b) and (c) obligations and the Commission's implementing rules as a starting point for negotiations and that requesting carriers may negotiate different terms through that process.

29. [**44] The Commission's *Local Competition Order* clearly calls for LECs immediately to cease charging CMRS providers for terminating LEC-originated traffic; the order does not require a section 252 agreement before imposing such an obligation on the LEC. n98 Defendants claim further that ceasing to charge for LEC-originated traffic would violate their pricing obligations under state tariffs by compelling them to provide certain state tariffed interconnection services free of charge. The *Local Competition Order* made clear, however, that as of the order's effective date, LECs had to provide LEC-originated traffic to CMRS carriers without charge. n99 Accordingly, any LEC efforts to continue charging CMRS or other carriers for delivery of such traffic would be unjust and unreasonable and violate the Commission's rules, regardless of whether the charges were contained in a federal or a state tariff. On its effective date, given the clear language of the *Local Competition Order*, Defendants should not have doubted their obligation to cease charging Complainants for the facilities at issue here, regardless of whether Complainants subsequently requested interconnection negotiations pursuant [**45] to sections 251 and 252 of the Act.

D. Does section 51.703(b)'s prohibition against charges for LEC-originated traffic prohibit LECs from charging paging carriers for wide area calling services?

n98 See *Local Competition Order*, 11 FCC Rcd at 16016.

n99 *Id.*

30. TSR asserts that rule 51.703(b) prohibits U S West from charging for "wide area calling" service. n100 We disagree. We find persuasive U S West's argument that "wide area [*11184] calling" services are not necessary for interconnection or for the provision of TSR's service to its customers. n101 We conclude, therefore, that Section 51.703(b) does not compel a LEC to offer wide area calling or similar services without charge. Indeed, 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 to be able to charge for them.

n100 TSR Brief at 10-11.

n101 U S West Brief at 16.

31. Section 51.703(b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users. [**46] Section 51.703(b), when read in conjunction with Section 51.701(b)(2), n102 requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated, with the exception of RBOCs, which are generally prohibited from delivering traffic across LATA boundaries. n103 MTAs typically are large areas that may encompass multiple LATAs, and often cross state boundaries. 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, as this constitutes local traffic under our rules. n104 Such traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier. n105 This may result in the same call being viewed as a local call by the carriers and a toll call by the end-user. For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA, n106 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. However, nothing prevents U S West [**47] from charging its end users for toll calls completed over the Yuma-Flagstaff T-1. n107 Similarly, section 51.703(b) does not preclude TSR and U S West from entering into wide area calling or reverse billing arrangements whereby TSR 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. Should paging providers and LECs decide to enter into wide area calling or reverse billing arrangements, nothing in the [*11185] Commission's rules prohibits a LEC from charging the paging carrier for those services. n108

E. DID Number and Code Opening Charges

n102 Section 51.701(b)(2) defines "local telecommunications traffic" as "telecommunications traffic between a LEC and a CMRS 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." MTA service areas are based on the Rand McNally 1992 *Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with several exceptions and additions set forth in Section § 24.202(a). 47 C.F.R. § 24.202(a).

n103 See 47 C.F.R. § 51.703(b); see also 47 C.F.R. § 51.701(b)(2). [**48]

n104 See 47 C.F.R. § 51.701(b)(2); see also *Local Competition Order*, 11 FCC Rcd at 16016-17.

n105 *Local Competition Order*, 11 FCC Rcd at 16016-17.

n106 See TSR Brief at 5.

n107 We 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.

n108 U S West asserts that TSR's allegations extend to the provision of FX services. U S West Brief at 16. However, TSR's complaint does not refer to FX service and there is no indication in its pleadings that such service is encompassed by its complaint. Therefore, we need not address in this proceeding whether TSR or U S West must pay for such service.

32. Metrocall contends that section 51.703(b) prohibits Defendants from charging it for DID numbers. n109 TSR asserts that the *Second Local Competition Order* n110 and the *1986 Interconnection Order* n111 prohibit imposition of recurring charges for numbers or for central office (CO) "code opening." n112 In its reply brief in the TSR case, U S West asserts no controversy exists, as U S West has stated it would [**49] provide a credit to TSR for such charges, effective retroactively to October 7, 1996. n113

n109 Metrocall Brief at 4.

n110 *Second Local Competition Order*, 11 FCC Rcd at 19538.

n111 *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order*, 59 RR2d 1275, 1284 (1986) (1986 Interconnection Order).

n112 Code opening charges are charges imposed by a LEC for activating numbers associated with a particular a particular central office.

n113 U S West Reply at 7-8.

33. The 1986 *Interconnection Order* permits telephone companies to impose "a reasonable initial connection charge to compensate the costs of software and other changes associated with new numbers." n114 The order also provides, however, that telephone companies "may not impose recurring charges solely for the use of numbers." n115 The *Second Local Competition Order* "explicitly forbids incumbent LECs from assessing unjust, discriminatory, or unreasonable charges for activating [central office] codes" and re-iterates that telephone companies may not impose recurring charges [**50] solely for the use of numbers. n116 Metrocall has submitted evidence purporting to show that Pacific Bell and GTE have imposed recurring charges solely for the use of numbers. n117 The Commission's previous orders make clear that such [*11186] recurring charges may not be assessed by incumbent LECs, and accordingly, Complainants are entitled to refunds of any recurring charges assessed solely for the use of numbers. U S West has agreed to refund its recurring DID number charges retroactive to October 7, 1996. If the parties are unable to agree upon the amount to which Complainants are entitled, we will consider this during the damages phase of this bifurcated proceeding.

F. Takings

n114 *Id.*

n115 *Id.*

n116 *Second Local Competition Order*, 11 FCC Rcd at 19538.

n117 See Metrocall Complaint Exhibit 10, p. 2, GTE invoice for service from December 16, 1997 to January 16, 1998 ("direct-in-dial 20 numbers 125 at 10.00 ... \$ 1250.00"). See Metrocall Complaint Exhibit 15, p. 1, Pacific Bell invoice ("Paging Service Connection Arrangement 1st 100 numbers' for \$.41, 'add'l block of 100 #'s' for \$ 7.79").

34. According [**51] to Defendants, the *Local Competition Order's* regulatory regime, which requires carriers to pay for facilities used to deliver their originating traffic to their co-carriers, represents a physical occupation of Defendants property without just compensation, in violation of the Takings Clause of the Constitution. n118 We disagree. The *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents [**52] "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.

n118 Metrocall Defendants Brief at 24 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). In *Loretto* the Supreme Court struck down a New York law requiring landlords to permit cable television providers to install cable television wires on the landlords' property upon the payment of a modest fee. The court found the New York law constituted a taking because it caused a permanent, physical occupation of landlords' property without just compensation.

35. The instant dispute arose because Defendants believe that Complainants, as one-way paging carriers, should not be entitled to the benefits of the Commission's reciprocal compensation regime. In sum, Complainants argue that Defendants seek to deny them status as telecommunications carriers, and instead to treat them as customers who must pay for the facilities that the LECs use to deliver LEC-originated traffic. Defendants basically argue that they should be permitted to charge [**53] Complainants for facilities that, since they are used solely to deliver Defendants' originating

traffic, are part of Defendants' own network. Defendants possess other options for recovering these costs, such as recovering these costs from the end users that originates the calls. We disagree that prohibiting Defendants from charging Complainants for Defendants' portion of the network resembles in any way the physical occupation of property that the Supreme Court found violative of the Constitution in *Loretto*.

G. Sanctions

[*11187] 36. TSR seeks the imposition of fines and forfeitures upon U S West for its "willful and repeated violations of the Act and the Commission's Rules." n119 Metrocall requests the Commission determine the appropriate amount of "damages and sanctions" for the Metrocall Defendants' unreasonable, unjust and discriminatory practices in violation of the Communications Act and Commission rules and orders. n120 Section 208 of the Act provides for private remedies for individuals aggrieved by carriers, while section 503 gives the Commission the discretion to assess forfeitures. If the Commission determines that Defendants' violations warrant the issuance [**54] of a Notice of Apparent Liability for Forfeiture under section 503, the Commission will do so in a separate proceeding. n121 To the extent requested, we will address Complainant's request for punitive damages in the damages phase of this bifurcated proceeding.

n119 TSR Complaint P32.

n120 Metrocall Complaint pp. 13-14.

n121 See *Halprin v. MCI Telecommunications Corp.*, 13 FCC Rcd. 22568, P31 (rel. Nov. 10, 1998); see also 47 U.S.C. § 208, 503(b); see also 47 C.F.R. § 1.80(e).

H. TSR's *Ex Parte* Allegation

37. Under the Commission's *ex parte* rules, formal complaint proceedings are "restricted" proceedings, in which *ex parte* presentations to Commission decision-making personnel are prohibited. n122 However, because TSR's and Metrocall's formal complaints raised the issue of the applicability of reciprocal compensation to paging carriers, a matter that is also the subject of pending petitions for reconsideration filed in the *Local Competition* proceeding, the Common Carrier Bureau issued a public notice modifying the *ex parte* rules for this proceeding. The Bureau's *Public Notice* [**55] provided that presentations on policy questions concerning reciprocal compensation to paging carriers would be subject to the permit-but-disclose procedures under section 1.1206. n123

n122 See 47 C.F.R. § 1.1208; see also 47 C.F.R. § 1.1202(a) (defining in relevant part a "presentation" as "[a] communication directed to the merits or outcome of a proceeding ..."); 47 C.F.R. § 1.1202(b) (a written *ex parte* presentation is one that "is not served on the parties to the proceeding"; an oral *ex parte* presentation is one that is "made without advance notice to the parties and without opportunity for them to be present").

n123 Public Notice, *Ex Parte* Procedures Established for Formal Complaints Filed by TSR Paging against U S West (File No. E-98-13) and by Metrocall, Inc. against Various LECs (File Nos. E-98-14-18), and for Petitions for Reconsideration of the Implementation of the Local Competition Provisions in the *Telecommunications Act of 1996*, 13 FCC Rcd 2866 (1998) (*Public Notice*). Under the permit-but-disclose procedures, *ex parte* presentations to Commission decision-making personnel are permissible provided they are properly disclosed under section 1.1206. [**56]

38. TSR alleges that U S West violated the *ex parte* rules with respect to TSR's formal complaint proceeding in connection with a May 26, 1999 meeting and a September 27, 1999 meeting (to which it was not invited) between representatives of U S West and Commission [*11188] staff. n124 Specifically, TSR claims that U S West made oral and written presentations to Commission staff that discussed "all aspects of LEC-paging interconnection - not just the issue of the 'applicability of reciprocal compensation to paging carriers[.]'" in violation of section 1.1208. n125 TSR also contends that U S West's June 1, 1999 letter notifying the Commission of the *ex parte* presentations concerning the May 26 meeting was filed late and failed to reference TSR's formal complaint proceeding. n126 U S West maintains that its *ex parte* presentations were permissible under the *ex parte* rules. n127

n124 TSR Motion to Impose Sanctions (filed July 7, 1999) at 4-9; TSR Second Motion to Impose Sanctions (filed Oct. 28, 1999) at 3-7. At the May 26 meeting were Jeffrey A. Brueggeman and Kenneth T. Cartmell from U S West, and the following members of the Commission's staff: Jim Schlichting (Deputy Chief of the Wireless Telecommunications Bureau (WTB)), Nancy Boocker (Deputy Chief of the WTB's Policy Division), Jeanine Poltronieri (the WTB's Senior Counsel), and Peter Wolfe (Senior Attorney of the WTB's Policy Division). At the September 27 meeting were Mr.

Brueggeman, Sheryl Fraser, and Melissa Newman from U S West, and the following members of the Commission's staff: Sarah Whitesell (Legal Advisor to Commissioner Gloria Tristani), Adam Krinsky (Acting Legal Advisor to Commissioner Tristani), and Rebecca Beynon (Legal Advisor to Commissioner Harold Furchtgott-Roth). [**57]

n125 TSR Motion to Impose Sanctions at 4 and TSR Second Motion to Impose Sanctions at 5. At the May 26 meeting, U S West provided the Commission with a written outline of its oral presentation and a "white paper" entitled "LEC/Paging Interconnection: The FCC's Role and Rules" and "Paging/LEC Interconnection: The FCC's Role and Rules", respectively. At the September 27 meeting, U S West provided the Commission with a written outline of its oral presentation and a white paper, both of which are entitled "LEC/Paging Interconnection: The FCC's Role and Rules". The white papers submitted in connection with the May 26 and September 27 meetings are substantively identical.

n126 Letter from Kenneth T. Cartmell, Esq., U S West, Inc., to Magalie Roman Salas, Secretary, FCC (dated and date-stamped June 1, 1999) (June 1, 1999 letter).

n127 Opposition of U S West Communications, Inc. to Motion to Impose Sanctions (filed July 14, 1999); Opposition of U S West Communications, Inc. to Second Motion to Impose Sanctions (filed Nov. 4, 1999).

39. We conclude that U S West's presentations concerning general paging interconnection issues raised in the *Local Competition* proceeding, as [**58] well as the specific issue of the applicability of reciprocal compensation to paging carriers were permissible. n128 As U S West observes, although the *Public Notice* expands the ability of the parties in the complaint proceedings to address the reciprocal compensation issue by making them subject to permit-but-disclose procedures, the *Public Notice* made no change in the rights of the parties to make presentations on all other issues within the scope of the rulemaking proceeding on a permit-but-disclose basis. We find, however, that U S West failed to disclose its May 26 presentation in accordance with the requirements of section 1.1206 for purposes of the *Local Competition* proceeding and the formal complaint proceedings. n129 U S West states that it was not obvious to it [*11189] that it had to make disclosure of its May 26 presentation in the complaint proceedings, but that it has done so out of an abundance of caution. The *Public Notice*, however, clearly states that any presentation concerning the issue of reciprocal compensation to paging carriers should be disclosed in *both* the rulemaking proceeding and the complaint proceedings. n130 Moreover, U S West's [**59] *ex parte* submissions filed in connection with the May 26 presentation were not filed on a timely basis. Although U S West now asserts that it will provide timely *ex parte* notices in the complaint proceedings if it has further meetings with Commission staff regarding the rulemaking proceeding, U S West is admonished to exercise particular care to insure that all appropriate steps are indeed timely taken to comply with the provisions of our *ex parte* rules in the future. We note that U S West disclosed its September 27 presentation on a timely basis and in accordance with the requirements of section 1.1206 for purposes of the *Local Competition* proceeding and the formal complaint proceedings. n131 In light of this fact and our determination on this issue, it appears that no further action is warranted at this time with respect to TSR's *ex parte* contentions.

n128 See U S West's written outline and "white paper" filed in connection with the May 26 and September 27 presentations.

n129 See June 1, 1999 letter (referencing the *Local Competition* proceeding) and June 23, 1999 letter from Kenneth T. Cartmell, Esq., U S West, Inc., to Magalie Roman Salas, Secretary, FCC (referencing TSR's and Metrocall's formal complaint proceedings). Under the permit-but-disclose rules, a person who makes an *ex parte* presentation should file a summary of the presentation one business day after the presentation. 47 C.F.R. § 1.1206(b). [**60]

n130 *Public Notice* ("if such a presentation is made in the *Local Competition Order* proceeding, the required disclosure of such presentation under section 1.1206 should be made in that rulemaking proceeding and both formal complaint proceedings").

n131 See September 28, 1999 letter from Melissa Newman to Magalie Roman Salas, Secretary, FCC.

IV. CONCLUSION

40. Based on our analysis above, we conclude that: 1) Defendants may not impose upon Complainants charges for the facilities used to deliver LEC-originated traffic to Complainants; 2) Defendants may not impose non-cost-based charges upon Complainants solely for the use of numbers; 3) section 51.703(b) of the Commission's rules does not prohibit LECs from charging, in certain instances, for "wide area calling" or similar services where a terminating carrier agrees to compensate the LEC for toll charges that would otherwise have been paid by the originating carrier's customer; and 4) to the extent TSR's Yuma-Flagstaff T-1 is situated entirely within an MTA, defendant U S West must provide this facility at its own expense.

V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, pursuant to §§ 1, 4(i), 201, 251, [**61] 252, and 332 of the Act, 47 U.S.C. § 1, 4(i), 201, 251, 252, 332, that the formal complaints filed by complainant Metrocall, Inc. against defendants Pacific Bell, U S West, GTE, and SWBT ARE GRANTED IN PART and DENIED IN PART, as provided in this Order;

[*11190] 42. IT IS FURTHER ORDERED, pursuant to §§ 1, 4(i), 201, 251, 252, and 332 of the Act, 47 U.S.C. § 1, 4(i), 201, 251, 252, 332, that the formal complaint filed by complainant TSR defendant U S West IS GRANTED IN PART and DENIED IN PART, as provided in this Order;

44. IT IS FURTHER ORDERED, pursuant to § 1.722 of the Commission's rules, 47 C.F.R. § 1.722, that Complainants MAY FILE within 60 days any supplemental complaint for damages.

Magalie Roman Salas

Secretary

CONCURBY: POWELL

CONCUR:

[*11194] STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING

In the Matters of TSR Wireless, LLC, et al. v. U.S. WEST Communications, Inc., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order

Although I support this enforcement action, I do so reluctantly. Section 51.703(b) of the Commission's rules is a current, enforceable rule, duly [**62] promulgated by the Commission and upheld in court. We have jurisdiction to enforce it and we should enforce it. However, I write separately to raise a concern that the Commission has set up, through this rule and ones like it, a scheme that tends to undermine the interconnection regime established by Congress in the Telecommunications Act of 1996. Our rules should be reexamined so that, in the future, all telecommunications carriers clearly understand their respective duties and obligations under the key interconnection provisions of the 1996 Act.

Specifically, under section 251(a) of the Communications Act, 47 U.S.C. § 251(a), interconnection is a duty of all telecommunications carriers, including paging carriers like the complainants in this case. Under section 251(b)(5), all local exchange carriers (LECs) have the duty to establish reciprocal compensation "arrangements" for transport and termination. These provisions are not by their terms simply discretionary or suggested conditions. Moreover, when dealing with incumbent local exchange carriers, like the defendants in this case, Congress imposed additional obligations, including the duty to [**63] negotiate in good faith interconnection terms and conditions in accordance with section 252 of the Communications Act. See 47 U.S.C. § 251(c)(1). Interestingly, the statute also places a duty on the requesting telecommunications carrier to negotiate in good faith the terms and conditions of interconnection agreements. Section 252 sets forth in some detail the negotiation process and the points in the process where negotiating carriers may request government intervention.

The rule we enforce by this Order allows certain telecommunications carriers to bypass this process. Section 51.703(b) was adopted "pursuant to section 251(b)(5)." n1 Undoubtedly, after *Iowa Utilities*, the Commission can establish rules to carry out the provisions of the Communications Act, including sections 251 and 252, at least for purposes of "guiding the state-commission judgments." n2 In this case, LECs, by rule, were required to cease charging CMRS providers or other carriers for terminating LEC-originated traffic and must provide that traffic to CMRS providers or other carriers without charge. No negotiation or even a request to the LEC is necessary under the rule. [**64]

n1 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16016 (1996).*

n2 *AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721, 733 (1999).*

However, in their proper context, a better reading of section 251 and the negotiation provisions is that Congress wanted there to be a fair opportunity for parties, through negotiation, to work out the terms and conditions of their

interconnection relationship in the market, rather than by regulatory mandate -- the section is entitled "Development of Competitive Markets." I [*11195] see the specific duties in 251(b) and (c) as general backstops should negotiations fail. Indeed, the preference for the "market" is revealed by the fact that the contract can supercede any and all these obligations. n3

n3 See 47 U.S.C. 252(a)(1).

Therefore, the quandary in my mind is that, if the Commission, over time, develops its own rules and regulations about interconnection, why should a party have to slog through the statutory process to get what it [*65] is entitled to under the rule? If the rule is favorable to a requesting party, why would it ever concede that term to an ILEC in negotiation and, thus, isn't the process a waste? I think the answer is that ILECs have a right under the statute to try to bargain away those duties by offering something of greater value to the requesting carrier. Moreover, it is entirely conceivable that a requestor would forgo some "regulatory rights" in exchange for other things. Thus, it is at least plausible that the terms of the rule would not ultimately prevail in negotiation. In light of this, while section 51.703 of our rules should be enforced, we should expeditiously reexamine its effects on the market-based negotiation process and, based on the interconnection negotiations that *have* taken place and other circumstances, determine whether or not it should be modified to fit better within the statutory scheme. n4

n4 I note that there are several long-pending reconsideration petitions and applications for review that address this and other reciprocal compensation rules. It would behoove us to act on these quickly.

As a related matter, the complainants in this case have invoked Section 208 [*66] to complain to this Commission that ILECs have, *inter alia*, violated sections 251 and 252, and the rules promulgated thereunder. While this item properly applies the enforcement policy embodied in the *Local Competition Order*, I am concerned this approach all but swallows the carefully crafted mechanisms for dispute resolution set forth in the 1996 Act. I would suggest that the issue of our authority under section 208 to enforce the general provisions of sections 251 and 252 are now ripe for judicial review. n5

n5 See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 803 (8th Cir. 1997), *rev'd AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct 721, 733 (1999).

DISSENTBY: FURCHTGOTT-ROTH

DISSENT:

In the Matters of TSR Wireless, LLC, et al., Complainants, v. U S West Communications, Inc., et al., Defendants

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

I dissent from this Memorandum Opinion and Order. I do so on the ground that the application and enforcement of regulations promulgated under section 251, absent the existence of any interconnection agreement, guts the reticulated procedures for the creation [*67] and review of such agreements in section 252. Accordingly, I would read section 51.703 of our rules to govern the conduct of local exchange carriers (LECs) only in the context of a negotiated and arbitrated interconnection agreement. I would not understand that regulation to impose a free-standing federal duty upon all LECs, as the majority does.

* * *

This case presents the question whether the statutory duties of section 251 apply generally to all LECs, even where the complaining party has not sought to secure the performance of those duties in an interconnection agreement as provided in section 252. n1 In light of the entire statutory scheme concerning interconnection established by the Telecommunications Act of 1996, I think the answer is no. Accordingly, the soundest construction of the instant regulation is that it does not apply outside the context of an approved interconnection agreement.

n1 Here, there is no dispute that TRS takes service from US West exclusively out of Arizona tariffs, and that it has rejected the suggestions of US West to pursue interconnection agreements.

As I explained in a recent proceeding involving an application to provide long distance service, [*68] the statutory plan for interconnection agreements makes clear that

not all section 252 contracts need comply with [section 251] in order to be valid under the Act. In particular, section 252 contracts may be voluntarily entered into "*without regard* to the standards set forth in subsections (b) and (c) of section 251," [47 U.S.C.] 252(a)(1), which impose the major substantive duties under the Act, such as resale, interconnection, unbundling, and collocation, on [LECs].

Concurring [*11191] Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295 (rel. Dec. 22, 1999) (emphasis added).

[*11192] Similarly, if voluntary agreements approved pursuant to section 252 are exempt from the requirements of section 251, then so too must be entirely private arrangements such as traditional tariffed provisioning. For section 252 shows, as I have said, that "Congress clearly meant to allow noncompulsory agreements on interconnection, recognizing the advantages of allowing parties [**69] to contract around [federal] rules and tailor their contracts to individualized needs." *Id.*

Clearly, then, the duties of LECs under section 251 are not universal ones. They apply not to all such carriers, but only to those who are party to arbitrated and approved interconnection agreements. Conversely, section 251 does not automatically vest in all telecommunications carriers the full panoply of rights described therein, but guarantees carriers the ability to include those rights in interconnection agreements with LECs. Indeed, the language of section 251 specifically ties interconnection duties to the existence of statutory interconnection agreements: it refers to an incumbent LEC's "negotiation. . . in accordance with section 252 [of] the particular terms and conditions of agreements to fulfill the duties described [in section 251(b) and (c)]." 47 U.S.C. section 251(c)(1).

But if interconnection can occur outside the requirements of section 251, as the foregoing statutory language indicates, then section 251(b)(5) and its implementing regulations *cannot* be self-effectuating. For if the regulations created free-standing federal duties on [**70] the part of all LECs, then those carriers would violate federal law every time they provided interconnection pursuant to contracts or any other commercial arrangements that fall short of section 251. That result, however, would contradict the provisions of the Act clearly establishing the ability of parties to contract for less than what section 251 might provide. n2

n2 Even the Commission Order adopting the regulations under section 251 implied that they have no such general effect. The Order declined to announce the unlawfulness of existing CMRS-LEC contracts that did not go to the outer limits of section 251; instead, the Order pointed out the availability of negotiation and arbitration procedures for future contracts as a means for securing section 251 guarantees. *See Local Interconnection Order, 11 FCC Rcd 15499* at paras. 170, 1024 (1996).

Moreover, if section 251 regulations created LEC duties independent of the existence of any interconnection agreements, there would be little reason for telecommunications carriers ever to enter into an agreement with a LEC. Nor would there be any point in having State Commissions and federal courts review [**71] the agreements for compliance with section 251. *See* section 252(e). The telecommunications carriers would *already* - solely by operation of our regulations promulgated under section 251 - be entitled to everything that section 251 provides. No proper contract would be necessary to establish or enforce the rights made available by section 251. Thus, instead of going through negotiation, arbitration, and review under section 252, parties could sidestep that process by coming, as has TRS, directly to the Commission. Section 252 and its carefully delineated procedures for creation and approval of interconnection agreements would be drastically undermined, if not obliterated. Whether or not section 252's implementation plan is convenient, it is the plan that Congress adopted, and we [*11193] should not disable that plan by creating a different one that bypasses it entirely. n3

n3 None of this is to say that the Commission lacked jurisdiction to adopt section 51.703(b) in the first place; clearly, the statute directed the Commission to make rules pursuant to section 251 to flesh out the meaning of the statutory duties. Rather, my argument is that the purpose of the regulation was to set out the rights available to telecom carriers in the arbitration process, not to create generally applicable duties for LECs regardless of the existence of an interconnection agreement. [**72]

Given the undisputed lack of an interconnection agreement between the parties, the ultimate effect of this Order is to preempt the Arizona tariffs pursuant to which TRS took its service from US West. I do not believe that Congress intended to require all state tariffs, which set the prices for customers generally, to comply with the minimum requirements of section 251. Rather, as described above, that section seems to have been enacted for the much more

limited purpose of giving individual carriers the option of securing certain terms in contracts pursued according to section 252. As interpreted by the Commission, however, our section 251 regulations seem to set a federal floor to which all state tariffs must now arise.

* * *

In sum, the Commission's understanding of the scope of section 51.703(b) is inconsistent with the statutory scheme for the creation and enforcement of interconnection rights. Specifically, by creating a federal regulatory process that is wholly outside of, and apart from, the carefully defined plan of section 252, this Order makes that provision a redundant afterthought. In order to avoid undermining section 252 in this manner, we should read 51.703(b) to create **[**73]** rights in telecommunications carriers, as against LECs, that are enforceable in the context of a negotiated and arbitrated interconnection agreements. We should not understand it to create independent federal duties on the part of LECs absent any such agreement. Because I would not interpret the rule to operate outside the context an interconnection agreement, I see no duty to enforce it under section 208 in this case, where there is no such agreement. Accordingly, I would dismiss the instant complaint.

EXHIBIT B

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BEFORE THE ARIZONA CORPORATION COMMISSION

- JEFF HATCH-MILLER**
Chairman
- WILLIAM MUNDELL**
Commissioner
- MIKE GLEASON**
Commissioner
- KRISTIN MAYES**
Commissioner
- BARRY WONG**
Commissioner

IN THE MATTER OF QWEST CORPORATION'S APPLICATION FOR ARBITRATION PROCEDURE AND APPROVAL OF INTERCONNECTION AGREEMENT WITH HANDY PAGE, PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS

DOCKET NO. T-01051B-06-0175
T-02556A-06-0175
T-03693A-06-0175

DECLARATION OF ROBERT H WEINSTEIN

1. My name is Robert H. Weinstein. I am employed by the Wholesale Carrier Division of Qwest Communications, Inc. ("Qwest") as a Staff Witness Representative. My business address is 1801 California Street, Floor 2400, Denver, CO 80202.

2. Qwest offers "Wide Area Calling" ("WAC") to paging carriers in Arizona pursuant to Section 16.3 of the Qwest Access Service Price Cap Tariff filed with and approved by the Arizona Corporation Commission.

3. WAC is an optional billing service. WAC provides a way for Qwest landline customers to make toll-free, direct-dialed, non-local calls to pagers in a manner that is similar to the way 800 Service works, i.e., charges are assessed to the paging carrier instead of to the originating landline customer. By subscribing to WAC, a paging carrier can substantially enlarge the geographic area from which Qwest landline callers can send toll-free messages to a pager. WAC is also known as "reverse billing" or "reverse toll." It is important to note that WAC only suppresses the toll charges on a call from a Qwest Corporation local exchange service customer.

1 Calls to a WAC number made by a wireless service or by some telephone services provider such
2 as Cox, for example, are not affected, and toll charges may apply according to the terms of the
3 service arrangement that such other provider has with its end user.

4 4. WAC operates to suppress any toll charge that would apply to any land-to-mobile toll call
5 between exchanges, when that call is originated by a Qwest landline customer to a WAC
6 telephone number. Qwest agrees not to assess toll charges on calls from Qwest's wireline end
7 users to the interconnecting carrier's end users, in exchange for which the interconnecting carrier
8 pays the LEC a per-minute fee to recover the LEC's toll carriage costs. WAC enables a paging
9 carrier to promote calls to its paging subscribers as toll-free from Qwest wireline customers,
10 because the paging carrier is billed at a bulk discount for the toll traffic, rather than the
11 originating caller paying long distance rates.

12 5. A radio carrier subscribing to WAC pays a bulk billed charge per minute of use,
13 according to one of the two pricing options from which the carrier selects. Option 1 represents a
14 charge per minute of use for each toll call from a Qwest land line customer on which toll is to be
15 suppressed. Option 2 represents a charge per minute of use for each call from a Qwest landline
16 customer to a WAC telephone number, regardless of whether a local call or one on which toll is
17 to be suppressed. Such charges provide Qwest with the means of recovering the costs associated
18 with providing WAC.

19 6. Any paging carrier electing to subscribe to WAC must separately obtain switching and
20 transport services by subscribing to or contracting for Type 2 interconnection service. However,
21 it is not necessary to purchase WAC in order to interconnect with Qwest. In fact, as an optional
22 billing service, WAC is never needed for interconnection and WAC itself is not an
23 interconnection service, and is in no way integral to interconnection. As evidence of this, more
24 carriers interconnect with Qwest who don't use WAC than those who do.

25 7. A Qwest landline call to a paging carrier with Type 2 interconnection travels over the
26 Public Switched Telephone Network in the same manner whether or not the paging carrier

1 subscribes to Wide Area Calling service. The telephone service underlying the telephone call
2 which is placed by the Qwest subscriber is a service provided by Qwest to the Qwest landline
3 customer, not to the paging carrier. The service remains a service provided by Qwest to its
4 customer, regardless of whether the toll charge is suppressed by reason of the paging carrier
5 assumption of the charges, whether by WAC or otherwise.

6 8. Handy Page originally negotiated and signed a Type 2 paging agreement with Qwest's
7 predecessor U S West which was approved by the Arizona Commission on April 30, 1998. The
8 agreement did not have any provisions for either party to collect reciprocal compensation. In
9 subsequent versions of Qwest's baseline paging agreements reciprocal compensation became
10 part of the language of the base Qwest paging agreement. Handy Page did not sign a new
11 agreement and continued under the original agreement that had no provisions for the payment of
12 reciprocal compensation to either party.

13 9. Due to Qwest's inability to record WAC usage from PAL (Public Access Lines), Paging
14 carriers subscribing to WAC are also assessed a flat rated charge to recover the costs of any and
15 all calls made to WAC numbers from payphones. This charge is in addition to the usage charge
16 billed to the Paging company for traditional (non-PAL) WAC calls.

17 10. It is not appropriate for WAC to be included in an Interconnection Agreement. Qwest is
18 not obligated to offer WAC to Handy Page as part of interconnection under the Act. Qwest's
19 offering of "Wide Area Calling" by way of its tariff is appropriate.

20 11. On Type 2 facilities, Qwest charges the paging provider only that portion of the facility
21 used to deliver transit traffic. Transit traffic is traffic that originates on another carrier's network
22 and transits Qwest's network. The transit factor is a state wide factor that was developed through
23 negotiations and it applies to all paging providers doing business with Qwest in Arizona. The
24 transit factor has nothing to do with WAC MOU traffic usage, which is all Qwest originated
25 traffic.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 4th day of August, 2006.



Robert H Weinstein

Subscribed and sworn to me

this 10th day of August, 2006.


Notary Public

My commission expires 4/13/10.

EXHIBIT C

Issued: 10-7-03

Effective: 11-6-03

16. FACILITIES FOR RADIO CARRIERS

(N)

16.3 WIDE AREA CALLING SERVICE**A. Description**

Wide Area Calling Service is a billing service offered to Paging Service Carriers, in conjunction with their Type 2 Interconnection. Wide Area Calling Service provides direct dialed LATA-wide toll free calling for Qwest Corporation land to mobile (paging) calls. The Type 2 Interconnection provides for the completion of the land to mobile (paging) calls and for the billing of the calls to the Carrier rather than the calling party.

B. Terms and Conditions

1. The Carrier must subscribe to Type 2 Interconnection and must follow all of the configuration requirements of the Type 2 Interconnection.
2. A dedicated NXX(s) is required for Wide Area Calling. The Carrier may have multiple Wide Area Calling NXXs in a LATA, but each NXX may only be used in one LATA. It is the Carrier's responsibility to obtain the dedicated NXX(s) from the North American Numbering Plan Administration (NANPA).
3. The Company performs recording and rating of all Wide Area Calling Service calls.
4. Wide Area Calling Service has two pricing options. Option 1 covers minute of use billing of only those calls which would otherwise be considered toll, originating outside of the local calling area for the Wide Area Calling Service prefix, but within the same LATA. Option 2 covers minute of use billing for both local and toll equivalent calls to a Wide Area Calling Service prefix. Only one option may be selected per customer, per LATA.
5. Wide Area Calling Service rates do not apply to calls originating from ILECs or outbound WATS lines or any non-direct dialed IntraLATA toll call.
6. Calls originating from PALs within the same LATA of the Wide Area Calling Service and within the Company's serving area are applicable to Wide Area Calling Service. The calling party would be charged the current PAL pay telephone charge to access the network, but would not pay any long distance charges. The Carrier will be charged WAC usage rates for PAL originated calls. In the event actual usage cannot be billed, the WAC NXX flat monthly usage rate will be applicable.

Issued: 10-7-03

Effective: 11-6-03

16. FACILITIES FOR RADIO CARRIERS

(N)

16.3 WIDE AREA CALLING SERVICE

B. Terms and Conditions (Cont'd)

7. The service establishment interval is per industry standards (105 days), in the case of a new prefix or an existing prefix which is being relocated in addition to being converted to Wide Area Calling. The service establishment interval is 90 days in the case of an existing prefix that is not being relocated in the process of being converted to Wide Area Calling.
8. The service removal interval is 60 days, in the case of a Wide Area Calling prefix being converted to a regular wireless prefix, without being relocated during the process. The service removal interval is per industry standards (105 days), in the case of a Wide Area Calling prefix being entirely eliminated or being relocated in the process of removing the Wide Area Calling service.
9. Calls will be billed in actual seconds, however, the minimum billed will be 20 seconds.

Issued: 10-7-03

Effective: 11-6-03

16. FACILITIES FOR RADIO CARRIERS

(N)

16.3 WIDE AREA CALLING SERVICE (Cont'd)

C. Rates and Charges

Rates and charges for the underlying Type 2 Interconnection arrangement are in addition to the rates and charges listed below.

	USOC	NONRECURRING CHARGE
• Service Establishment - per LATA		
- 1st Dedicated NXX	VOVWA	\$8,700.00
- Subsequent NXX, each	VOVWA	5,000.00
		RATE PER MINUTE
• Pricing Option 1 - toll equivalent calls[1]		
- Local switching		\$0.0536
- Local transport		0.0364
• Pricing Option 2 - local and toll equivalent calls[1]		
- Local switching		0.0214
- Local transport		0.0086
	USOC	MONTHLY FLAT USAGE RATE
• Per Wide Area Calling NXX, applicable only when PAL originated usage cannot be billed	MA5CX	\$23.32

[1] Local and toll equivalent calls are determined by the V&H of the originating end office and the V&H of the serving wire center of the Carrier's Point of Connection.

EXHIBIT D

1 of 58 DOCUMENTS

ATLAS TELEPHONE COMPANY; BEGGS TELEPHONE COMPANY; BIXBY TELEPHONE COMPANY; CANADIAN VALLEY TELEPHONE COMPANY; CARNEGIE TELEPHONE COMPANY; CENTRAL OKLAHOMA TELEPHONE COMPANY; CHEROKEE TELEPHONE COMPANY; CHICKASAW TELEPHONE COMPANY; CHOUTEAU TELEPHONE COMPANY; CIMARRON TELEPHONE COMPANY; CROSS TELEPHONE COMPANY; DOBSON TELEPHONE COMPANY; GRAND TELEPHONE COMPANY; HINTON TELEPHONE COMPANY; KANOKLA TELEPHONE ASSOCIATION; MCLLOUD TELEPHONE COMPANY; MEDICINE PARK TELEPHONE COMPANY; OKLAHOMA TELEPHONE & TELEGRAPH; OKLAHOMA WESTERN TELEPHONE COMPANY; PANHANDLE TELEPHONE COOPERATIVE INC.; PINE TELEPHONE COMPANY; LAVACA TELEPHONE COMPANY, doing business as Pinnacle Communications; PIONEER TELEPHONE COOPERATIVE INC.; POTTAWATOMIE TELEPHONE COMPANY; SALINA-SPAVINAW TELEPHONE COMPANY; SANTA ROSA TELEPHONE COOPERATIVE INC.; SHIDLER TELEPHONE COMPANY; SOUTH CENTRAL TELEPHONE ASSOCIATION, INC.; SOUTHWEST OKLAHOMA TELEPHONE COMPANY; TERRAL TELEPHONE COMPANY; TOTAH TELEPHONE COMPANY INC.; VALLIANT TELEPHONE COMPANY, Plaintiffs-Appellants, v. OKLAHOMA CORPORATION COMMISSION; DENISE A. BODE; BOB ANTHONY; JEFF CLOUD, Corporation Commissioners in their official capacities, Defendants, and AT&T WIRELESS SERVICE, Inc., Defendant-Appellee. ATLAS TELEPHONE COMPANY; BEGGS TELEPHONE COMPANY; BIXBY TELEPHONE COMPANY; CANADIAN VALLEY TELEPHONE COMPANY; CARNEGIE TELEPHONE COMPANY; CENTRAL OKLAHOMA TELEPHONE COMPANY; CHEROKEE TELEPHONE COMPANY; CHICKASAW TELEPHONE COMPANY; CHOUTEAU TELEPHONE COMPANY; CIMARRON TELEPHONE COMPANY; CROSS TELEPHONE COMPANY; DOBSON TELEPHONE COMPANY; GRAND TELEPHONE COMPANY; HINTON TELEPHONE COMPANY; KANOKLA TELEPHONE ASSOCIATION; MCLLOUD TELEPHONE COMPANY; MEDICINE PARK TELEPHONE COMPANY; OKLAHOMA TELEPHONE & TELEGRAPH; OKLAHOMA WESTERN TELEPHONE COMPANY; PANHANDLE TELEPHONE COOPERATIVE INC.; PINE TELEPHONE COMPANY; LAVACA TELEPHONE COMPANY, doing business as Pinnacle Communications; PIONEER TELEPHONE COOPERATIVE INC.; POTTAWATOMIE TELEPHONE COMPANY; SALINA-SPAVINAW TELEPHONE COMPANY; SANTA ROSA TELEPHONE COOPERATIVE INC.; SHIDLER TELEPHONE COMPANY; SOUTH CENTRAL TELEPHONE ASSOCIATION, INC.; SOUTHWEST OKLAHOMA TELEPHONE COMPANY; TERRAL TELEPHONE COMPANY; TOTAH TELEPHONE COMPANY INC.; VALLIANT TELEPHONE COMPANY, Plaintiffs-Appellants, v. OKLAHOMA CORPORATION COMMISSION; DENISE A. BODE; BOB ANTHONY; JEFF CLOUD, Corporation Commissioners, in their official capacities; SOUTHWESTERN BELL WIRELESS INC., doing business as Cingular Wireless LLC, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, Oklahoma City SMSA Limited Partnership, Defendants-Appellees. ATLAS TELEPHONE COMPANY; BEGGS TELEPHONE COMPANY; BIXBY TELEPHONE COMPANY; CANADIAN VALLEY TELEPHONE COMPANY; CARNEGIE TELEPHONE COMPANY; CENTRAL OKLAHOMA TELEPHONE COMPANY; CHEROKEE TELEPHONE COMPANY; CHICKASAW TELEPHONE COMPANY; CHOUTEAU TELEPHONE COMPANY;

CIMARRON TELEPHONE COMPANY; CROSS TELEPHONE COMPANY;
 DOBSON TELEPHONE COMPANY; GRAND TELEPHONE COMPANY;
 HINTON TELEPHONE COMPANY; KANOKLA TELEPHONE ASSOCIATION;
 MCLLOUD TELEPHONE COMPANY; MEDICINE PARK TELEPHONE
 COMPANY; OKLAHOMA TELEPHONE & TELEGRAPH; OKLAHOMA
 WESTERN TELEPHONE COMPANY; PANHANDLE TELEPHONE
 COOPERATIVE INC.; PINE TELEPHONE COMPANY; LAVACA TELEPHONE
 COMPANY, doing business as Pinnacle Communications; PIONEER TELEPHONE
 COOPERATIVE INC.; POTTAWATOMIE TELEPHONE COMPANY; SALINA-
 SPAVINAW TELEPHONE COMPANY; SANTA ROSA TELEPHONE
 COOPERATIVE INC.; SHIDLER TELEPHONE COMPANY; SOUTH CENTRAL
 TELEPHONE ASSOCIATION, INC.; SOUTHWEST OKLAHOMA TELEPHONE
 COMPANY; TERRAL TELEPHONE COMPANY; TOTAH TELEPHONE
 COMPANY INC.; VALLIANT TELEPHONE COMPANY, Plaintiffs-Appellants, v.
 OKLAHOMA CORPORATION COMMISSION; DENISE A. BODE, BOB
 ANTHONY, JEFF CLOUD, Corporation Commissioners in their official capacities;
 WWC LICENSE LLC, Defendants-Appellees. ATLAS TELEPHONE COMPANY;
 BEGGS TELEPHONE COMPANY; BIXBY TELEPHONE COMPANY;
 CANADIAN VALLEY TELEPHONE COMPANY; CARNEGIE TELEPHONE
 COMPANY; CENTRAL OKLAHOMA TELEPHONE COMPANY; CHEROKEE
 TELEPHONE COMPANY; CHICKASAW TELEPHONE COMPANY;
 CHOUTEAU TELEPHONE COMPANY; CIMARRON TELEPHONE
 COMPANY; CROSS TELEPHONE COMPANY; DOBSON TELEPHONE
 COMPANY; GRAND TELEPHONE COMPANY; HINTON TELEPHONE
 COMPANY; KANOKLA TELEPHONE ASSOCIATION; MCLLOUD
 TELEPHONE COMPANY; MEDICINE PARK TELEPHONE COMPANY;
 OKLAHOMA TELEPHONE & TELEGRAPH; OKLAHOMA WESTERN
 TELEPHONE COMPANY; PANHANDLE TELEPHONE COOPERATIVE INC.;
 PINE TELEPHONE COMPANY; LAVACA TELEPHONE COMPANY, doing
 business as Pinnacle Communications; PIONEER TELEPHONE COOPERATIVE
 INC.; POTTAWATOMIE TELEPHONE COMPANY; SALINA-SPAVINAW
 TELEPHONE COMPANY; SANTA ROSA TELEPHONE COOPERATIVE INC.;
 SHIDLER TELEPHONE COMPANY; SOUTH CENTRAL TELEPHONE
 ASSOCIATION, INC.; SOUTHWEST OKLAHOMA TELEPHONE COMPANY;
 TERRAL TELEPHONE COMPANY; TOTAH TELEPHONE COMPANY INC.;
 VALLIANT TELEPHONE COMPANY, Plaintiffs-Appellants, v. OKLAHOMA
 CORPORATION COMMISSION; DENISE A. BODE; BOB ANTHONY; JEFF
 CLOUD, Corporation Commissioners in their official capacities; SPRINT
 SPECTRUM LIMITED PARTNERSHIP, d/b/a Sprint PCS, Defendants-Appellees.

No. 04-6096, No. 04-6098, No. 04-6100, No. 04-6101

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

400 F.3d 1256; 2005 U.S. App. LEXIS 4020

March 10, 2005, Filed

PRIOR HISTORY: [**1] APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. (D.C. No. 03-CV-347-F). *Atlas Tel. Co. v. Corp. Comm'n*, 309 F. Supp. 2d 1313, 2004 U.S. Dist. LEXIS 9445 (W.D. Okla., 2004)

Atlas Tel. Co. v. Corp. Comm'n, 309 F. Supp. 2d 1299, 2004 U.S. Dist. LEXIS 9442 (W.D. Okla., 2004)

DISPOSITION: Affirmed.

COUNSEL: Kendall W. Parrish (Ron Comingdeer, Mary Kathryn Kunc, David W. Lee, and Ambre C. Gooch, Comingdeer, Lee & Gooch, Oklahoma City, Oklahoma, and Kimberly K. Brown, Kimberly K. Brown, P.C., Oklahoma City, Oklahoma, with him on the briefs), Comingdeer, Lee & Gooch, Oklahoma City, Oklahoma for Plaintiffs-Appellants.

Phillip R. Schenkenberg (Michael G. Harris and William H. Hickman, Moricoli Harris & Cottingham, Oklahoma City, Oklahoma, with him on the brief), Briggs and Morgan, P.A., Saint Paul, Minnesota, for Defendant-Appellee WWC License L.L.C.

Marc Edwards and Jennifer Kirkpatrick, Phillips McFall McCaffrey McVay & Murrah, P.C., Oklahoma City, Oklahoma, and Lawrence S. Smith, Smith, Majcher & Mudge, L.L.P., Austin, Texas, on the brief for Defendant-Appellee AT&T Wireless Services, Inc.

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JUDGES: Before KELLY, ANDERSON [**2] and O'BRIEN, Circuit Judges.

OPINIONBY: [*1259] KELLY

OPINION:

KELLY, Circuit Judge.

In these consolidated appeals, Plaintiffs-Appellants rural telephone companies ("RTCs") collectively appeal the district court's orders affirming final orders of the Oklahoma Corporation Commission ("OCC"). The OCC orders established interconnection obligations under the federal Telecommunications Act of 1996 between the RTCs and Defendant-Appellees commercial mobile radio service ("CMRS") providers. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

Background

The RTCs are traditional landline telecommunications carriers doing business in Oklahoma. CMRS providers are wireless telecommunications carriers. This dispute arose from negotiations for interconnection agreements between the RTCs and CMRS providers.

The Telecommunications Act of 1996 ("Telecommunications Act" or "Act"), 47 U.S.C. §§ 151-614, opened the previously [*1260] monopolized telecom-

munications industry to competition. Under the Act, local exchange carriers ("LECs"), n1 like the RTCs, have a duty to interconnect with competitors and negotiate agreements in good faith. 47 U.S.C. §§ 251(a)(1) [**3], (c)(1). In the instant cases, the RTCs and CMRS providers resolved many outstanding issues during voluntary negotiations entered into pursuant to § 252(a)(1) of the Act. However, negotiations broke down over compensation for the transport and termination of telecommunications traffic. The CMRS providers subsequently filed petitions with the OCC seeking arbitration of the contested issues pursuant to § 252(b)(1) of the Act.

n1 An LEC is defined in the Act as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26) (excluding CMRS providers from the definition).

The parties raised numerous issues before the OCC-appointed arbitrator. Relevant here, the RTCs and CMRS providers disputed the compensation regime that would apply to the transport and termination of telecommunications between the parties' networks. Under the terms of the interconnection agreements, the CMRS providers were not required to establish physical connections [**4] with the RTC networks, although the agreements do not preclude such connections. Rather, telecommunications traffic could be routed through an interexchange carrier ("IXC"), Southwestern Bell Telephone Company ("SWBT"). When an RTC customer places a call to a CMRS customer, the call must first pass from the RTC network through a point of interconnection with the SWBT network. SWBT then routes the call to a second point of interconnection between its network and the CMRS network. The call is then delivered to the CMRS customer. n2 In contrast, were the RTC and CMRS networks directly connected, the call would pass only through a single point of interconnection.

n2 The converse is true for calls originated by a CMRS customer and delivered to an RTC customer.

The CMRS providers maintained that, regardless of the presence of the IXC, the telecommunications exchange referenced above is subject to the reciprocal compensation obligations found in § 251(b)(5) of the Act. The Federal Communications Commission ("FCC"), [**5] charged with effectuating the provisions of the Act, has determined that reciprocal compensation should only apply to telecommunications traffic originating and

terminating in the same local area. First Report and Order, FCC 96-325, CC Docket Nos. 96-98, 95-185, P 1034 (Aug. 8, 1996) ("First Report and Order"). Under a typical reciprocal compensation agreement between two carriers, the carrier on whose network the call originates bears the cost of transporting the telecommunications traffic to the point of interconnection with the carrier on whose network the call terminates. *Id.* Having been compensated by its customer, the originating network in turn compensates the terminating carrier for completing the call. *Id.* In contrast, the RTCs maintained that traffic passing through an IXC is subject to the access charge, or long-distance calling, regime. Under the access charge regime, the originating caller pays the IXC, which in turn compensates the originating and terminating networks. *Id.* Thus, the RTCs contend that they have no obligation to compensate CMRS providers for transporting and terminating such traffic.

In the context of the instant cases, the difference between [**6] the compensation schemes is more than semantic. Under these reciprocal compensation agreements, [*1261] the originating network bears the cost of transporting telecommunications traffic across SWBT's network to the point of interconnection with the terminating network. The originating network is then required to compensate the terminating network for terminating the call. Under the Act, reciprocal compensation is based solely on the costs of transport and termination incurred by the terminating provider. 47 U.S.C. § 252(d)(2)(A). In contrast, under the access charge regime, both the originating and terminating carriers would be compensated by the IXC. Under this scenario, neither carrier bears the cost of transporting traffic on the IXC network.

Excepting traffic to or from a CMRS provider, state commissions are responsible for determining what areas are local for purposes of applying the reciprocal compensation obligation found in § 251(b)(5). First Report and Order P 1035. However, the FCC has determined that "traffic to or from a CMRS network that originates and terminates within the same [Major Trading Area] is subject to transport and termination rates under [**7] section 251(b)(5), rather than interstate and intrastate access charges." *Id.* P 1036. A major trading area ("MTA") is the largest FCC-authorized wireless license territory, and might encompass all or part of numerous state-defined local calling areas. *Id.* Relying on this FCC determination, the OCC-appointed arbitrator determined that reciprocal compensation would apply to agreements between the RTCs and CMRS providers in the instant cases. The OCC subsequently approved provisions in the arbitrated agreements reflecting this determination.

In addition, and solely with respect to Defendant-Appellee WWC License L.L.C. ("Western Wireless"), the arbitrator determined that Western Wireless should

have the option under the agreements to establish local numbers without establishing direct connections with the RTCs. This determination resulted in a provision under the OCC- approved interconnection agreement requiring an RTC to deliver calls to Western Wireless at a SWBT switch.

On completion of the arbitration, the conformed agreements were submitted to and approved by the OCC. The RTCs initially appealed the OCC orders approving the interconnection agreements to the Oklahoma Supreme [**8] Court, but their suit was dismissed for lack of jurisdiction. The RTCs then brought suit in federal district court. In its first order and judgment, the district court affirmed various aspects of the OCC orders, including the determination that compensation for the transport and termination of telecommunications would be reciprocal. *Atlas Tel. Co. v. Corp. Comm'n of Okla.*, 309 F. Supp. 2d 1299, 1309-10 (W.D. Okla. 2004) ("Atlas I"). In its second order and judgment, the district court affirmed that part of the OCC's final order approving the provision in the interconnection agreement that requires an RTC to deliver calls to Western Wireless at a SWBT switch. *Atlas Tel. Co. v. Corp. Comm'n of Okla.*, 309 F. Supp. 2d 1313, 1316-17 (W.D. Okla. 2004) ("Atlas II").

Issues on Appeal

In Nos. 04-6096, 04-6098, and 04-6101, the RTCs challenge that portion of Atlas I affirming the OCC's determination "that reciprocal compensation obligations apply to all calls originated by an RTC and terminated by a wireless provider within the same major trading area, without regard to whether those calls are delivered via an intermediate carrier." 309 F. Supp. 2d at 1310. [**9] The RTCs contend that the holding is contrary to both the Telecommunications Act and FCC regulations. In No. 04-6100, the RTCs reiterate the foregoing and further challenge the district court's determination that the Act [*1262] does not require competing carriers to interconnect physically with the LEC's network as contrary to the express language of the statute and FCC regulations. *Atlas II*, 309 F. Supp. 2d at 1317.

Discussion

I. Standard of Review

The issues raised by the RTCs in the instant cases are purely legal. As such, we will conduct a de novo review to determine whether the interconnection agreements, as approved by the OCC, comply with the requirements of the Act and federal regulations implementing its statutory provisions. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 498 (10th Cir. 2000). However, we note that the RTCs have not challenged the validity of the various FCC regulations at issue in this case. Thus, we have not

been asked to undertake, nor will we engage in, a reasonableness inquiry concerning those determinations. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). [**10]

II. The Statutory Scheme

Section 251 of the Act establishes a three-tier system of obligations imposed on separate, statutorily defined telecommunications entities. *Pac. Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1237-38 (9th Cir. 1999); *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1071 (8th Cir. 1997). *Section 251(a)* obligates each "telecommunications carrier" n3 "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). Under *Section 251(b)*, the more limited class of "local exchange carriers" n4 is obligated to, among other things, "establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* § 251(b)(5). Finally, § 251(c) imposes additional obligations on "incumbent local exchange carriers" ("ILECs"). n5 For instance, ILECs have the duty to negotiate in good faith interconnection agreements that comply with the obligations in §§ 251(b)-(c). *Id.* § 251(c)(1). ILECs also bear the statutory duty to "provide, for the facilities and equipment of any requesting telecommunications [**11] carrier, interconnection with the [ILEC's] network." *Id.* § 251(c)(2). Such interconnection must be provided "at any technically feasible point within the [ILEC's] network," *id.* § 251(c)(2)(B), and "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *Id.* § 251(c)(2)(D).

n3 "Telecommunications carrier" is defined as "any provider of telecommunications services." 47 U.S.C. § 153(44). "Telecommunications service" is in turn defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46). The FCC has determined that CMRS providers qualify as "telecommunications carriers," and thus are subject to the provisions of § 251(a). First Report and Order P 1012.

n4 See *supra* note 1.

n5 "Incumbent local exchange carriers" are defined in the Act as certain dominant carriers that provided telephone exchange service on February 8, 1996. See 47 U.S.C. § 251(h)(1).

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Recognizing that implementation of the pro-competitive provisions of the Act would not be instantaneous, Congress included language to ensure that certain exchange access and interconnection requirements would continue to be enforced after passage of the statute.

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall [**1263] provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 . . . until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.

Id. § 251(g). As the United States Court of Appeals for the District of Columbia Circuit has explained, § 251(g) is a transitional provision designed to keep in place certain restrictions and obligations, including the existing access charge regime, until such provisions are superseded by FCC regulations: [**13] *WorldCom, Inc. v. FCC*, 351 U.S. App. D.C. 176, 288 F.3d 429, 432-33 (D.C. Cir. 2002).

Finally, in defining the parameters for reciprocal compensation under § 251(b)(5), Congress mandated that the terms and conditions for such compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(A)(i). However, Congress clearly indicated that it did not seek to preclude "arrangements that waive mutual recovery (such as bill-and-keep arrangements)." *Id.* § 252(d)(2)(B)(i).

III. FCC Implementation

In its First Report and Order, the FCC made several determinations that bear directly on these consolidated cases. While declining to treat CMRS providers as LECs, and thus subject to the obligations imposed under § 251(b)-(c), the FCC expressly determined that LECs are obligated under § 251(b)(5) to enter into reciprocal compensation arrangements with CMRS providers. First Report and Order P 1006, 1008. Furthermore, the Commission determined [**14] that "incumbent LECs are

required to provide interconnection to CMRS providers who request it for the transmission and routing of telephone exchange service or exchange access, under the plain language of *section 251(c)(2)*." Id. P 1015.

In determining the scope of the § 251(b)(5) obligation, the FCC concluded that "reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area." Id. P 1034. With respect to LEC-LEC communication, the FCC determined that state commissions retained the authority to define "local area" for the purpose of applying the § 251(b)(5) obligation. Id. P 1035. However, the Commission defined the local area for LEC-CMRS communication as coterminous with the MTA, the largest Commission-authorized wireless territory. Id. P 1036. The FCC explained that "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)*, rather than interstate and intrastate access charges." Id. (emphasis added).

These FCC determinations have since been codified as regulations binding on the industry and state commissions. [**15] Relevant here, 47 C.F.R. § 51.305 details an ILEC's obligation under § 251(c)(2) of the Act to provide for interconnection with requesting carriers and identifies technically feasible points of interconnection on the ILEC's network. With respect to reciprocal compensation requirements, the regulations further provide that "each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier." 47 C.F.R. § 51.703(a). For purposes of applying [*1264] the requirement in *section 51.703*, "telecommunications traffic" is defined in relevant part as that "exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area." Id. § 51.701(b)(2). Finally, "transport" in the context of reciprocal compensation obligations is defined as "the transmission and any necessary tandem switching of telecommunications traffic subject to *section 251(b)(5)* of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves [**16] the called party, or equivalent facility provided by a carrier other than an [ILEC]." Id. § 51.701(c).

IV. Appellants' Common Issue - Inconsistency Between the Agreements and the Act and Federal Regulations

We construe the RTCs' briefs in these consolidated cases as raising a single common issue alleging inconsistency between the interconnection agreements and the plain language of the Act, the First Report and Order, and the relevant regulations. n6 This issue roughly corre-

sponds to that treated by the district court in part II.B of its order and judgment in *Atlas I*. 309 F. Supp. 2d at 1309-10. We treat the issue unique to No. 04-6100, the "Western Wireless Issue," separately below.

n6 In so doing, we necessarily reject the CMRS providers' contention that the RTCs failed to preserve an issue, that the Act and FCC regulations require carriers to exchange local traffic through a point of interconnection within the ILEC's network, by asserting it before the district court. See *Mauldin v. Worldcom, Inc.*, 263 F.3d 1205, 1210 n.1 (10th Cir. 2001). There is a difference, albeit subtle, between arguing that CMRS providers are required to interconnect directly with the ILECs and arguing that the exchange must occur within the ILEC's network. The latter argument was raised in the district court, Aple. Supp. App. at 81-82, and accordingly we consider it.

[**17]

We begin, as we must, with the plain language of 47 U.S.C. § 251(b)(5) n7 and its regulatory counterpart 47 C.F.R. § 51.703(a). n8 In no uncertain terms, both provisions impose a duty on LECs to establish reciprocal compensation arrangements with requesting carriers. We next turn to 47 C.F.R. § 51.701(b)(2), a regulatory provision that both gives effect to and narrows the LECs' obligation. *Regulation 51.701(b)(2)* defines "telecommunications traffic" subject to reciprocal compensation as, in relevant part, that "exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same [MTA]." 47 C.F.R. § 51.701(b)(2).

n7 LECs have "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5).

n8 "Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier." 47 C.F.R. § 51.703(a).

[**18]

We hold that the mandate expressed in these provisions is clear, unambiguous, and on its face admits of no exceptions. The RTCs in the instant case have a mandatory duty to establish reciprocal compensation agreements with the CMRS providers, see *Qwest Corp. v.*

FCC, 258 F.3d 1191, 1200 (10th Cir. 2001) (noting that the term "shall" connotes a mandatory, as opposed to permissive, requirement), for calls originating and terminating within the same MTA. Where the regulations at issue are unambiguous, our review is controlled by their plain meaning. *In re Sealed Case*, 345 U.S. App. D.C. 19, 237 F.3d 657, 667 (D.C. Cir. 2001). Nothing in the text of these provisions provides support for the RTC's contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network.

[*1265] Our reading of the plain language of the relevant statutory and regulatory provisions is further supported by the FCC's definition of "telecommunications traffic" in the context of landline-to-landline exchange in the same regulations. See 47 C.F.R. § 51.703(b)(1). Regulation 51.701(b)(1) specifically excludes from reciprocal [*19] compensation requirements landline traffic exchanged between a LEC and a non-CMRS carrier "that is *interstate or intrastate exchange access*" in nature. *Id.* § 51.701(b)(1) (emphasis added). Significantly, the Commission did not carry forward that same exception into regulation 51.701(b)(2), the operative definition in this case. We agree with the district court's conclusion that the FCC was undoubtedly aware of issues arising when access calls are exchanged, yet chose not to extend a similar exception to LEC-CMRS traffic. *Atlas I*, 309 F. Supp. 2d at 1310. When in exercising its quasi-legislative authority an agency includes a specific term or exception in one provision of a regulation, but excludes it in another, we will not presume that such term or exception applies to provisions from which it is omitted. Cf. *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (noting that when Congress so acts, courts will presume that the exclusion was intentional).

We are not persuaded by the RTCs' arguments that our interpretation creates tension or is inconsistent with other FCC regulations and provisions of the Act. The RTCs first contend [*20] that 47 U.S.C. § 251(c)(2) mandates that the exchange of local traffic occur at specific, technically feasible points within an RTC's network, n9 and that this duty is separate and distinct, though no less binding on interconnecting carriers, from the reciprocal compensation arrangements mandated by § 251(b)(5). We simply find no support for this argument in the text of the statute or the FCC's treatment of the statutory provisions. Section 251(c)(2) imposes a duty on the ILECs to provide physical interconnection with *requesting* carriers at technically feasible points within the RTCs' networks. By its terms, this duty *only* extends to ILECs and is *only* triggered on request. n10 The fallacy of the RTCs' argument is demonstrated in a number of ways. The RTCs contend that the general requirement imposed on all carriers to interconnect "di-

rectly or *indirectly*," 47 U.S.C. § 251(a) (emphasis added), is superceded by the more specific obligations under § 251(c)(2). Yet, as noted above, the obligation under § 251(c)(2) applies only to the far more limited class of ILECs, as opposed to the obligation imposed on all telecommunications [*21] carriers under § 251(a). The RTCs' interpretation would impose concomitant duties on both the ILEC and a *requesting* carrier. This contravenes the express terms of the statute, identifying only ILECs as entities bearing additional burdens under § 251(c). We cannot conclude that such a provision, embracing only a limited class of obligees, can provide the governing framework for the exchange of local traffic.

n9 In this instance, the RTCs do not argue that the CMRS providers must directly connect to their networks. Rather, the essence of their argument is that RTCs cannot be forced to bear the additional expense of transporting traffic bound for a CMRS provider across the SWBT network. Under their interpretation, RTCs are only responsible for transport to a point of interconnection on their own network.

n10 According to testimony of OCC Public Utility Division analyst Lillie R. Simon before the OCC-appointed arbitrator, such a request is typically made when the volume of traffic passing between two carriers makes physical interconnection economically feasible. I App. at 216.

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[*1266] We also find that the RTCs' interpretation of § 251(c)(2) would operate to thwart the pro-competitive principles underlying the Act. Although § 251(c)(2) interconnection is only triggered by request, the RTCs would make such interconnection obligatory to all carriers seeking to exchange local traffic. At the same time, however, the Act exempts RTCs from the application of § 251(c) until a request is made and the appropriate "State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent [with other provisions of the Act]." *Id.* § 251(f)(1)(A). If Congress had intended § 251(c)(2) to provide the sole governing means for the exchange of local traffic, it seems inconceivable that the drafters would have simultaneously incorporated a rural exemption functioning as a significant barrier to the advent of competition. In sum, accepting the RTCs' interpretation of § 251(c) would compel us to assume too much and ignore altogether the express language of the statute. n11

n11 Because we hold that 47 U.S.C. § 251(c)(2) does not govern interconnection for the purposes of local exchange traffic, the RTCs' argument that CMRS providers must bear the expense of transporting RTC-originated traffic on the SWBT network must fail. The pricing standards established under 47 U.S.C. § 252(d)(1) by their terms only apply in the context of interconnection under § 251(c)(2).

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The RTCs' next argument, in various permutations, is that the local traffic at issue here qualifies as exchange access traffic because it transits the IXC network. In that historical exchange access requirements continue in force even after passage of the Telecommunications Act, 47 U.S.C. § 251(g), the RTCs argue that such requirements yet apply when calls are transported across the IXC network. In support, the RTCs point to various statements by the FCC in its First Report and Order limiting the scope of reciprocal compensation requirements under the Act.

In the First Report and Order, the FCC limited application of reciprocal compensation requirements to traffic originating and terminating within a local area. First Report and Order P 1034. In so doing, the Commission determined that reciprocal compensation obligations "do not apply to the transport or termination of interstate or intrastate interexchange traffic." *Id.* While this statement might be read to preclude reciprocal compensation in the instant case, we conclude that the FCC did not intend such a bar to apply in the context of LEC-CMRS traffic. First, in describing the interexchange traffic at [**24] issue, it is clear that the FCC had in mind the traditional setting of landline-to-landline calls. The Commission illustrated the traffic at issue by pointing to an LEC-IXC-LEC exchange, this after previously declining to treat CMRS providers as LECs. While this distinction is not dispositive, we note it as relevant. Second, and most significant, the FCC subsequently determined that "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), rather than interstate and intrastate access charges." *Id.* § 1036. Although in a preceding paragraph, *Id.* P 1035, the FCC noted the continuing application of interstate and intrastate access charges in the context of landline communications, it omitted such language when referring to the CMRS communications. We will not ignore the clear distinction drawn by the agency.

We also agree with the CMRS providers that the RTCs' argument finds no support in paragraph 1043 of the First Report and Order. The sweep of this paragraph is limited to a narrow range of interstate interexchange

traffic and is silent on the [**1267] issue of reciprocal compensation [**25] owed CMRS providers. As such, we find it neither persuasive nor controlling.

Having carefully reviewed the FCC's decision in *TSR Wireless, LLC v. U.S. West Communications, Inc.*, we find nothing in that decision sounding as contrary to our holding. 15 F.C.C.R. 11166 (2000), *aff'd sum nom Qwest Corp. v. FCC*, 346 U.S. App. D.C. 271, 252 F.3d 462 (D.C. Cir. 2001). *TSR Wireless, LLC* is factually dissimilar to the instant dispute. The relevant issue, the analysis and answer to which the RTCs cite, was whether "section 51.703(b)'s prohibition against charges for LEC-originated traffic prohibits LECs from charging paging carriers for wide area calling services?" *TSR Wireless, LLC*, 15 F.C.C.R. at 11183 (emphasis added). Section 51.703(b) prohibits LECs from charging other carriers for traffic originating on the LECs' networks. 47 C.F.R. § 51.703(b). In resolving this issue, the FCC reiterated that LECs may not charge CMRS providers for facilities used to deliver local traffic. *TSR Wireless, LLC*, 15 F.C.C.R. at 11,184. The Commission then noted that "such traffic falls under our reciprocal [**26] compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an [IXC]." *Id.* The FCC then stated that "this may result in the same call being viewed as a local call by the carriers and a toll call by the end-user." *Id.* It is clear to us that the FCC made this seemingly incongruous comment in the context of discussing the effect on LEC customers. After making this comment, the Commission unequivocally stated that the LEC was required to deliver relevant calls free of charge to the CMRS provider, but was not precluded from charging its own customers for toll calls. *Id.* This simply does not address the LEC's duty to compensate the CMRS provider for call termination. Rather, it reflects the logical end result of the application of the FCC's regulations. It certainly does not relieve the originating carrier of its obligation to compensate the terminating carrier under the reciprocal compensation regime. n12

n12 We likewise find that the RTCs' reliance on *Texcom, Inc., D/B/A Answer Indiana v. Bell Atlantic Corp., D/B/A Verizon Communications*, 16 F.C.C.R. 21,493 (2001) ("*Texcom*"), is unwarranted. *Texcom* involved "transiting traffic," i.e., traffic originating with a third party that "transits" the network of an LEC for delivery to a CMRS provider. *Id.* at 21495. The FCC concluded that an LEC may charge the CMRS provider for the transport of such traffic. *Id.* This is, of course, in stark juxtaposition to an LEC's obligations where, as here, traffic originates with its own customers. The FCC explained that in the reciprocal compensation setting, "the cost of delivering LEC-

originated traffic is borne by the persons responsible for those calls, the LEC's customers." *Id.* at 21495. The Commission refused to extend this burden in the "transit" setting where LEC customers did not generate the traffic at issue. *Id.*

[**27]

Finally, we find no merit in the RTCs' argument that the provisions in the instant agreements contravene the statutory scheme. The RTCs' assertion that the FCC expected reciprocal compensation arrangements to be contained in agreements under *section 251(c)* is unsupported by the footnote to which they cite in *TSR Wireless, LLC, 15 F.C.C.R. at 11183 n.97*, and undermined by language in the decision indicating that certain duties imposed under reciprocal compensation were operative regardless of the existence of an agreement. *Id.* at 11,182-83. The RTCs further argue that the indirect connection at issue in the instant agreements would render their rural exemption nugatory because carriers like the CMRS providers would not be required to request interconnection under 47 U.S.C. § 251(c). As we explained above, no such requirement applies to the CMRS providers, and the rural [*1268] exemption remains available when the RTCs are confronted with requests for direct connection under § 251(c).

Accordingly, we hold that the OCC-approved agreements are not inconsistent with or in violation of the federal regulatory and statutory schemes.

V. [**28] The "Western Wireless" Issue n13

n13 The district court designated this issue "the Western Wireless issue." *Atlas II, 309 F. Supp. 2d at 1313*. We adopt this terminology for purposes of our discussion.

The final issue before us is unique to No. 04-6100. The RTCs assert that the Telecommunications Act requires competing carriers to establish a *physical connection* within an ILEC's network for the exchange of local traffic. While distinct from the assertion that traffic must be exchanged at a point of interconnection within the RTC's network, an analysis of this issue nonetheless touches on many aspects of our foregoing discussion.

The RTCs interpret 47 U.S.C. § 251(c) as imposing a requirement of direct connection on a competing carrier. We disagree. As detailed above, the affirmative duty established in § 251(c) runs solely to the ILEC, and is only triggered on request for direct connection. The physical interconnection contemplated by § 251(c) in no way undermines [**29] telecommunications carriers' obligation under § 251(a) to interconnect "directly or indirectly." In full accord with our previous analysis, we hold that the RTCs' obligation to establish reciprocal compensation arrangements with the CMRS provider in the instant case is not impacted by the presence or absence of a direct connection.

For the foregoing reasons, we AFFIRM the orders of the district court.