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Docket No. 5
T-01051B-06-0175
T-02556A-06-0175
T-03693A-06-0175

Interstate Wireless, Inc.
841 West Fairmont Drive
Suite 5
Tempe, Az. 85282-3331
Voice 480-350-9400
Fax 480-350-9494
waynem@handypage.net

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6 November 2006

RE: Interstate Wireless D/b/a Handy Page's Request for Rehearing, DOCKET Nos. T-01051B-06-0175, et al.

Dear Commissioners,

Enclosed is a timely filed CORRECTION of the Request for Rehearing filing we made yesterday on 06 November, 2006.

The Request for Rehearing filing made by Handy Page yesterday contains typographical errors, omissions and printing errors. Please accept the attached and corrected replacement Request for Rehearing in DOCKET NO. T-01051B-06-0175, et al.

Please discard the filing made yesterday and replace it with this document.

We apologize for any inconvenience. Thank you for your help.

Sincerely,

Wayne Markis

Arizona Corporation Commission
DOCKETED

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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
WILLIAM A. MUNDEL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner
BARRY WONG
Commissioner

IN THE MATTER OF QWEST
CORPORATION'S
APPLICATION FOR ARBITRATION
PROCEDURE AND APPROVAL OF AN
INTERCONNECTION AGREEMENT
WITH HANDY PAGE, AND PURSUANT
TO SECTION 252(B) OF THE
COMMUNICATIONS ACT OF 1932, AS
AMENDED BY THE
TELECOMMUNICATIONS ACT OF
1996, AND THE APPLICABLE STATE
LAWS.

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

) INTERSTATE WIRELESS, INC D/b/a
) HANDY PAGE'S REQUEST FOR
) REHEARING\

) (CORRECTED FILING)
)

Request for Rehearing of the October 17, 2006 Order of the Arizona Corporation
Commission, Decision No. 68993, in Docket No. T-01051B-06-0175 et. al.

(This filing is a correction to a previous filing)

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**This Request for Rehearing is filed in conformance with Arizona Revised Statutes, Title 40,
Chapter 2, Article 3, Section 40-253.**

1 **Summary.**

2 The ACC Order's statement that, "Wide Area Calling is not a telecommunications
3 service subject to arbitration under Section 251(b) of the Act," failed to resolve Handy Page's
4 Complaints regarding Qwest charges for Wide Area Calling ("WAC") billed to Handy Page,
5 failed to address unresolved issues in Qwest's proposed Interconnection Agreement and raised
6 but failed to dispose of the issue of unlawful carriage of "toll" traffic by Qwest.
7

8
9
10 **Unlawful Qwest Charges for Intra-MTA Traffic.**

11 A determination by the ACC that WAC is not a telecommunications service subject to
12 arbitration under Section 251(b) of the Act¹, does not in any way diminish or resolve Handy
13 Page's original complaint and dispute regarding charges Qwest has made to Handy Page for so-
14 called WAC services. The Qwest intra-MTA charges at issue in this proceeding are being billed
15 under a tariff but without an "arrangement" (agreement) as required by FCC rules. The October
16 6, 2006 release of the FCC's *Mountain Communications, Inc. v. Qwest Communications*
17 *International, Inc.*, Memorandum Opinion and Order on Remand (FCC 06-147) ("Mountain
18 Order") reiterated that Qwest cannot assess WAC charges on a CMRS carrier such as Handy
19 Page without a specific "arrangement" (agreement) for an intra-MTA WAC arrangement.² The
20 Mountain Order states, "... we conclude, consistent with the D.C. Circuit's reasoning, that
21
22
23

24 ¹ Telecommunications Act of 1996, Pub. L.A. No. 104-104, 110 Stat. 56 (1996).

25 ² *"The record demonstrates that Qwest charged Mountain a fee for delivering one-way paging traffic that*
26 *originated and terminated in the same MTA.² And, as the D.C. Circuit noted, Mountain did not enter into a wide*
27 *area calling arrangement with Qwest that might have permitted Qwest to charge for the traffic at issue.² Absent*
28 *such an arrangement, we conclude, consistent with the D.C. Circuit's reasoning, that Qwest's charges for*
transporting one-way paging telecommunications traffic to Mountain from Qwest's own customers are unlawful."
Mountain v Qwest, FCC 06-147, released 10/06/06, Paragraph 9.

1 Qwest's charges for transporting one-way paging telecommunications traffic to Mountain from
2 Qwest's own customers are unlawful." During the time in which the issues for Handy Page's
3 case were being briefed and decided upon, neither the ACC nor its staff had the benefit of this
4 highly relevant and probative case-on-point. Once the ACC is able to reconsider the facts of this
5 case against this recent case law from the FCC, Handy Page is confident it will prevail on the
6 merits.
7

8 According to the holding in the Mountain Order, without an arrangement (agreement) for
9 WAC services, all Qwest originated intra-MTA traffic is subject to the FCC's reciprocal
10 compensation rules. The record in this proceeding has not produced any claim, evidence or
11 statement whatsoever that Qwest has an "arrangement" (agreement) of any kind with Handy
12 Page regarding the so-called WAC traffic for which it is billing Handy Page. Qwest's billing for
13 the intra-MTA traffic to Handy Page has been made entirely and solely under an Arizona Qwest
14 tariff, and is therefore unlawful by FCC rules and not germane to the ACC's Order. Qwest may
15 claim³ that Handy Page "ordered" the WAC tariff service, but an "order" for a tariff service does
16 not constitute an "arrangement", as noted in the Court of Appeals remand⁴ of the FCC's
17 Mountain Order on Review⁵. In essence, the Court of Appeals remanded the Mountain Order on
18 Review back to the FCC because the FCC had erroneously concluded that Qwest could charge
19 Mountain for Wide Area Calling without an "arrangement" (agreement) based solely on the fact
20 that Mountain had "ordered" facilities and services out of the Qwest tariff and Qwest was
21

22
23 ³ Handy Page has been unable to ascertain if such a "claim" has been made to date by Qwest.

24 ⁴ See *On Petition for Review of an Order of the Federal Communications Commission*
25 United States Court of Appeals for the District of Columbia Circuit, No. 02-1255, *MOUNTAIN*
26 *COMMUNICATIONS, INC., PETITIONER v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED*
27 *STATES OF AMERICA, RESPONDENTS, T-MOBILE USA, INC., ET AL., INTERVENORS*; Decided January 16,
28 2004

⁵ See, **Paragraph 5, FCC 02-220, Mountain Communications, Inc., Complainant, v. Qwest Communications International, Inc., Defendant.** File No. EB-00-MD-017, **ORDER ON REVIEW, Released:** July 25, 2002.

1 billing Mountain on that basis.⁶ But the Court of Appeals pointed out that both the Act and the
 2 FCC's own rules did not allow billing for Wide Area Calling without an "arrangement"
 3 (agreement) for such services separate and apart from a tariff. In essence, the Court found that
 4 the FCC's rule 51.703(b) prohibits charges for Qwest originated intra-MTA call traffic without
 5 exception.⁷

6 Perhaps more fundamental, by abandoning the concept of a buy-down agreement
 7 between the parties and simply designating the service Mountain obtained as a wide area
 8 calling service, the Commission seemingly comes into direct conflict with its own
 9 regulation. See *MCImetro Access Transmission Servs. v. BellSouth Telecomms, Inc.*, No.
 10 03-1238, 2003 U.S. App. LEXIS 25782, at *24 (4th Cir. Dec. 18, 2003) (holding that 47
 11 C.F.R. § 51.703(b) "unequivocal[ly] prohibit[s] LECs from levying charges for traffic
 12 originating on their own networks, and, by its own terms, admits of no exceptions"). In
 13 *TSR*, the Commission had interpreted its regulation 51.703(b), which prohibits LECs
 14 from assessing *charges* on other carriers for delivering traffic originating on the LEC's
 15 network, as not applying to a voluntary *agreement* that a paging carrier enters into with
 16 the LEC to compensate the LEC for foregoing its option to charge its customers.
 17 In other words, the Commission implicitly construed such an agreement as not a
 18 "charge" for telecommunications traffic but rather compensation for a separate
 19 benefit. The Commission described "wide area calling" as "a service in which a
 20 LEC *agrees* with an interconnector not to assess toll charges on calls from the
 21 LEC's end users to the interconnector's end users, *in exchange for which* the
 22 interconnector pays the LEC a per-minute fee to recover the LEC's toll carriage
 23 costs." *TSR*, 15 FCCR at 11167 n.6 (emphasis added). But in this case the
 24 Commission abandoned that construction, instead allowing Qwest to *charge*
 25 Mountain for the wide area calling service it was deemed to enjoy, though there
 26 was no agreement. By shifting its characterization of the exception to §
 27 51.703(b)'s prohibition on charges from an agreement to compensate LECs for a
 28

21 ⁶ See, **Paragraph 5, FCC 02-220**, Mountain Communications, Inc., Complainant, v. Qwest Communications
 22 International, Inc., Defendant. File No. EB-00-MD-017, **ORDER ON REVIEW, Released: July 25, 2002**
 23 "Accordingly, Mountain has obtained a wide area calling service for which it must compensate Qwest. Mountain's
 24 position that the lack of a written agreement between the parties indicates that no wide area calling arrangement with
 25 Qwest exists is meritless.²⁶ Mountain's ordering and acceptance of the T-1 facilities from a tariff that create a wide
 26 area calling arrangement constitutes an agreement between the parties regarding the provisioning of this service.²⁷"
 27 ²⁶ See Mountain Petition at 18-20, ¶¶ 29-33.
 28 ²⁷ Mountain Order, 17 FCC Rcd at 2097, ¶ 13.

26 ⁷ See On Petition for Review of an Order of the Federal Communications Commission
 27 United States Court of Appeals for the District of Columbia Circuit, No. 02-1255, MOUNTAIN
 28 COMMUNICATIONS, INC., PETITIONER v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED
 STATES OF AMERICA, RESPONDENTS, T-MOBILE USA, INC., ET AL., INTERVENORS; Decided January
 16, 2004.

1 foregone opportunity to a *charge* for the telecommunications traffic, the FCC
 2 decision appears to run afoul of § 51.703(b)'s prohibition on charges....
 3 We therefore rather easily conclude that the Commission's decision on this issue
 4 is arbitrary and capricious. *See generally, e.g., Ramaprakash v. FAA*, 346 F.3d
 1121, 1124–25 (D.C. Cir. 2003).

5 Handy Page has noted this requirement in its Opening Brief⁸ as well as subsequent pleadings,
 6 but the ACC failed to take into account either the Court of Appeals ruling cited above or the
 7 FCC's October 6, 2006 Memorandum Opinion and Order on Remand in its Decision No. 68993.
 8 In paragraphs 22, 28 and 29 of its Order, the ACC has made exactly the same error that the FCC
 9 made in its erroneous Mountain Order on Review by allowing Qwest to bill Handy Page under a
 10 state tariff rather than requiring an agreement for Wide Area Calling as required by law. The
 11 facts of *Mountain* are indistinguishable from Handy Page's current situation, and any holding to
 12 the contrary would be arbitrary and capricious and an unlawful departure from established
 13 precedent.
 14 president.

15
 16 In the TSR Wireless Order⁹ at paragraph 31, the FCC noted that paging providers such as
 17 Handy Page and LEC's such as Qwest could, "...*decide to enter into wide area calling or*
 18 *reverse billing arrangements...*"¹⁰ However, in the Mountain Order of October 6, 2006, the FCC
 19 concluded, based on a remand from the U.S. Court of Appeals for the District of Columbia,¹¹ that
 20

21
 22 ⁸ See the Background section and Footnote 6, Page 4 of the Opening Brief of Handy Page.

23 ⁹ See FCC 00-194, *TSR Wireless vs Qwest, et al.* Released June 21, 2000.

24 ¹⁰ "*Should paging providers and LECs decide to enter into wide area calling or reverse billing arrangements,*
 25 *nothing in the Commission's rules prohibits a LEC from charging the paging carrier for those services.*" (TSR
 Wireless Order at paragraph 31.)

26 ¹¹ See On Petition for Review of an Order of the Federal Communications Commission
 27 United States Court of Appeals for the District of Columbia Circuit, No. 02-1255, MOUNTAIN
 STATES OF AMERICA, RESPONDENTS, T-MOBILE USA, INC., ET AL., INTERVENORS; Decided January
 28 16, 2004.

1 the paging carrier must enter into a wide area calling “arrangement” with the LEC, otherwise, as
 2 the FCC noted in paragraph 1 of the Mountain Order, “we find that Qwest violated sections
 3 51.703(b) and 51.709(b) of our rules¹² by improperly charging Mountain for delivering one-way
 4 paging traffic that originated and terminated in the same Major Trading Area (“MTA”) and for
 5 which no wide area calling arrangement had been established.”
 6

7 Specifically, the ACC’s statement at paragraph 29 of the Order that “Qwest’s offering by
 8 way of its tariff is appropriate” is not applicable to the so-called WAC traffic sent to Handy Page
 9 by Qwest. Additionally, Qwest’s statement in the record¹³ concerning the application of its
 10 Arizona WAC tariff to the Handy Page calls is invalid according to the Mountain Order. Taken
 11 together with Handy Page’s prior arguments in the ACC proceeding, the FCC’s Mountain Order
 12 served to confirm that the Qwest tariff charges for WAC are invalid in this particular instance
 13 and, absent an “arrangement” (agreement) between the carriers, the so-called WAC intra-MTA
 14 traffic is subject to reciprocal compensation.
 15
 16
 17

18 **The Staffs Assertion Regarding WAC Traffic is Not Valid in the Absence of an**
 19 **“Arrangement” for such Services.**

20
 21 The Staff asserted, and the ACC relied upon in the Order at paragraph 22, “*that this* [that
 22 FCC rule 51.703(b) did not prohibit Qwest from charging for WAC] *essentially means that WAC*
 23

24 ¹² 47 C.F.R. §§ 51.703(b) (prohibiting a LEC from assessing charges on another carrier for telecommunications
 25 traffic that originates on the LEC’s own network), 51.709(b) (“The rate of a carrier providing transmission facilities
 26 dedicated to the transmission of traffic between two carriers’ networks shall recover only the costs of the proportion
 27 of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier’s
 28 network.”).

¹³ “*The WAC tariff that TSR challenged in 2000, and which Handy Page challenges on the same grounds, is the
 same tariff, and is the same offering.*” Qwest Reply Brief at page 3.

1 *is not a cost related to LEC originating traffic.”* (emphasis added) However in light of the
2 Mountain Order, this Staff assertion is not valid in the absence of an affirmative “arrangement”
3 (agreement) for WAC services between Qwest and Handy Page. As noted previously, an
4 “arrangement” or (agreement) is required in order for WAC traffic to be considered “not
5 necessary for interconnection” for two reasons. First, The FCC’s Mountain Order requires an
6 “arrangement” (agreement) for so-called Wide Area Calling traffic to not fall under the FCC’s
7 51.703(b) reciprocal compensation rules. Additionally, the FCC’s T-Mobile Order¹⁴ prohibits
8 tariff charges for any traffic subject to reciprocal compensation; “We amend our rules to make
9 clear our preference for contractual arrangements by prohibiting LECs from imposing
10 compensation obligations for non-access CMRS traffic pursuant to tariff.”¹⁵

11
12
13
14 **Remaining Non-WAC Disputes to be Arbitrated.**

15
16 The ACC’s Order’s statements at paragraphs 28 and 30 that there are no more “remaining
17 issues” in this arbitration is untrue and not based on the record in this proceeding. As noted in
18 the Order at paragraph 23, the ACC statement, “However, because Handy Page and Qwest
19 appear to have agreed on all issues...” is contrary to the record in this proceeding.¹⁶ Handy
20 Page, in fact, does have several unresolved issues, unrelated to WAC, with Qwest’s proposed
21 interconnection agreement, including the “transit traffic” charges for facilities and the amount of
22 reciprocal compensation offered in the agreement. Because the record in this proceeding has
23

24
25 ¹⁴ See, *T- Mobile, etc. Petition for Declaratory Ruling FCC 05-42*, released February 24, 2005 (“T-Mobile
Order”).

26 ¹⁵ See, T-Mobile Order at ¶9

27 ¹⁶ See, *INTERSTATE WIRELESS, INC d/b/a HANDY PAGE’S Exceptions to the Recommendation of the*
28 *Administrative Law Judge* at page 12.

1 indisputably shown that there is no “transit” traffic being sent from Qwest to Handy Page under
2 the current interconnection,¹⁷ the fixed transit traffic percentage (21.1%) in the Qwest proposed
3 agreement is neither logical nor reasonable, and should be set at zero percent unless and until it is
4 established that there is transit traffic being sent over the facilities here at issue and a
5 determination made as to the amount of such transit traffic traversing the facilities.
6

7 With respect to the issue of compensation for the termination of traffic, it has been
8 established in the record, and Qwest has agreed, that Qwest is responsible for paying
9 compensation to Handy Page for termination of all Qwest originated call traffic. However,
10 Qwest has proposed in its Interconnection Template Agreement a level of compensation that
11 fails to come close to adequately compensating Handy Page for the facilities it uses to terminate
12 Qwest originated call traffic, as called for under Section 252 of the Act. The offered
13 compensation is based in neither fact nor logic, and is ripe for arbitration.
14

15 As noted herein and in the record, the ACC’s Order failed to address all of the disputed
16 issues that Handy Page brought to this arbitration proceeding.
17
18

19 **Toll Carriage Issue Created by the ACC’s Order.**

20 The ACC Order itself has raised an important issue, an impossible contradiction that must
21 now be resolved. As pointed out in these proceedings by Handy Page, Qwest is unlawfully
22 carrying WAC “toll” calls.¹⁸ The ACC found in paragraph 28, “We find that Handy Page’s
23 arguments that no “toll” calls exist between Qwest and Handy Page’s interconnection is erroneous.” This
24

25
26 ¹⁷ See *INTERSTATE WIRELESS, INC d/b/a HANDY PAGE’S Exceptions to the Recommendation of the
Administrative Law Judge* at page 12

27 ¹⁸ See *INTERSTATE WIRELESS, INC d/b/a HANDY PAGE’S Reply to the Qwest Corporation Opening Brief
28 and the Staff’s Statement* at page 8 and footnotes 19 and 20.

1 finding creates a significant dilemma for the ACC because, as noted in the record of this proceeding,
2 if the so-called WAC traffic is “toll” traffic, as determined by the ACC, then Qwest is unlawfully
3 transporting at least some of that “toll” traffic in violation of FCC rules regarding Qwest
4 subscriber Preferred Inter-exchange Carrier (PIC) choices.¹⁹ Additionally, Qwest’s claims that
5 the WAC charges are to “buy down” the cost of such “toll” calls to make it appear to end users
6 that they have made a local call rather than a toll call are patently untrue. Any Qwest subscribers
7 that have an intra-LATA PIC that is a carrier other than Qwest, would not be paying Qwest for
8 the WAC “toll” call, and thus Qwest’s charges to Handy Page as a “buy down” for such calls
9 constitute an unlawful recovery of a non-existent cost. In the least, Qwest is depriving inter-
10 exchange carriers (“IXC”) of their rightful business and revenues.
11
12

13 Qwest is not authorized by FCC rules to charge for services or traffic it is unlawfully
14 providing or transporting, whether the result of the ACC’s erroneous determination or not. More
15 to the point, the determination by the ACC that the so-called WAC calls are “toll” calls is not in
16 accordance with the facts as presented in the record in this case.²⁰ Handy Page has shown in
17 several instances in this proceeding that the so-called WAC calls are dialed as 7 digit “local”
18 calls and therefore cannot be “toll” calls.²¹ Although Wide Area Calling has been ruled by this
19 Commission to not be a telecommunications service subject to arbitration under Section 251(b)
20 of the Act, the ACC determination in this Order does not alter the fact that the calls are dialed as
21
22

23 ¹⁹ See INTERSTATE WIRELESS, INC d/b/a HANDY PAGE’S *Reply to the Qwest Corporation Opening Brief*
24 *and the Staff’s Statement* at page 3

25 ²⁰ See, INTERSTATE WIRELESS, INC d/b/a HANDY PAGE’S *Exceptions to the Recommendation of the*
26 *Administrative Law Judge*, page 9 and INTERSTATE WIRELESS, INC d/b/a HANDY PAGE’S *Reply to the Qwest*
Corporation Opening Brief and the Staff’s Statement at page 5.

27 ²¹ See September 1, 2006 INTERSTATE WIRELESS, INC d/b/a HANDY PAGE’S *Reply to the Qwest*
28 *Corporation Opening Brief and the Staff’s Statement*, Pages 3 and 4 and INTERSTATE WIRELESS, INC d/b/a
HANDY PAGE’S Exceptions to the Recommendation of the Administrative Law Judge at page 8.

1 7 digit calls and are therefore “local” calls and not “toll” calls with respect to FCC rules. The
2 *established fact* that the WAC calls are dialed as 7 digit, “local” calls has not been disputed by
3 any party to this proceeding, including Qwest.
4

5 Based on the facts as listed above, the ACC should reconsider it’s determination that
6 “Wide Area Calling is not a telecommunications service subject to arbitration under Section
7 251(b) of the Act.”
8

9
10 **The ACC Order Failed to Distinguish Between *Intra*-MTA and *Inter*-MTA Calling and its**
11 **Designation of Inter-MTA Calling as Subject to a “Tariffed Billing Service” is Unlawful.**

12 It has not been disputed that inter-MTA (non-local/access) calls to CMRS carriers such as
13 Handy Page are not subject to reciprocal compensation and such calls *do* fall under the FCC’s
14 Access Charge rules. However, intra-MTA (local/non-access) call traffic, originated by a LEC
15 such as Qwest, and delivered to a CMRS carrier such as Handy Page, *is* subject to the FCC’s
16 reciprocal compensation rules absent any “arrangement” (agreement) for Wide Area Calling.
17 The ACC’s Order did not distinguish between WAC traffic that is inter-MTA versus WAC
18 traffic that is intra-MTA. In essence, the ACC has declared that all WAC traffic, including inter-
19 MTA WAC traffic constitutes “... a tariffed billing service unnecessary for interconnection, and
20 is therefore not a telecommunications service subject to arbitration under Section 251(b) of the
21 Act.” Since inter-MTA traffic falls under the FCC’s Access rules, the designation of such traffic
22 as being subject to a “tariffed billing service” is unlawful. The undeniable conundrums created
23 by the ACC’s inconsistent ruling must be addressed right away for they threaten to unravel the
24 entire interconnection regime in the State of Arizona with respect to the obvious and inevitable
25
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28

1 chaos that will ensue as carriers are forced to decide which of several conflicting laws each will
2 follow.

3
4
5 **Request for Rehearing.**

6 The ACC Order's conclusions regarding the classification of Wide Area Calling, and its
7 conclusions with respect to other disputed issues in this arbitration are not in conformance with
8 FCC rules and Orders and are contrary to the facts as given in the briefs and arguments on the
9 record in this proceeding. Additionally, and more importantly, the issue of the validity of
10 Qwest's tariff charges for so-called WAC traffic sent to Handy Page was not settled in
11 accordance with Section 251(b) of the Act or the FCC's rules. The ACC's conclusion, "Under
12 the applicable law and rules, WAC is a tariffed billing service unnecessary for interconnection,
13 and is therefore not a telecommunications service subject to arbitration under Section 251(b) of
14 the Act", is not germane to the disputed issues in this docket, is inconsistent with applicable FCC
15 rules and violates the Act.
16
17

18
19 Handy Page respectfully requests a rehearing and reconsideration of the ACC's Order,
20 Decision No. 68993, and a revision of the conclusions provided therein for all of the reasons
21 listed above.
22
23
24
25
26
27
28

1 DATED this 6th day of November 2006.
2

3 Interstate Wireless, Inc.
4 d/b/a Handy Page
5

6
7
8 By:  _____
9

10 Wayne Markis, President
11 Interstate Wireless, Inc.
12 841 West Fairmont Drive
13 Suite 5
14 Tempe, Arizona 85282-3331
15 Telephone: (480) 350-9400
16
17
18
19

20 ORIGINAL and 13 copies hand-delivered for filing
21 this 6th day of November, 2006 to:
22

23 Docket Control
24 ARIZONA CORPORATION COMMISSION
25 1200 West Washington Street
26 Phoenix, Az. 85007
27

1 Copies of the foregoing mailed/delivered
2 this 6th day of November, 2006 to:

3
4 Lyn Farmer, Chief Administrative Law Judge
5 Hearing Division
6 Arizona Corporation Commission
7 1200 West Washington Street
8 Phoenix, Az. 85007

Maureen A. Scott, Esq.
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Az. 85007

9 Christopher Kempsey, Chief Counsel
10 Legal Division
11 Arizona Corporation Commission
12 1200 West Washington Street
13 Phoenix, Az. 85007

Norman Curtwright
Qwest Corporation
20 East Thomas Road, 16th Floor
Phoenix, Az. 85012

14
15 Ernest G. Johnson, Director
16 Utilities Division
17 Arizona Corporation Commission
18 1200 West Washington Street
19 Phoenix, Az. 85007

Michael L. Higgs, Jr.
Higgs Law Group, LLC.
1028 Brice Road
Rockville, Md. 20852-1201

20 Arizona Reporting Service, Inc.
21 2627 North Third Street
22 Suite Three
23 Phoenix, Az. 85014-1104

Wayne Markis
Melody Markis
Interstate Wireless, Inc.
841 West Fairmont Drive
Suite 5
Tempe, Az. 85282-3331

24
25 By: 

26
27 Wayne Markis

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Mountain Communications, Inc.,)	
)	
Complainant,)	
)	
v.)	File No. EB-00-MD-017
)	
Qwest Communications)	
International, Inc.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: October 5, 2006

Released: October 6, 2006

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order on Remand, we grant a formal complaint¹ brought by Mountain Communications, Inc. ("Mountain") against Qwest Communications International, Inc. ("Qwest") pursuant to section 208 of the Communications Act of 1934, as amended ("Act").² In accordance with a decision by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") vacating and remanding our earlier order,³ we find that Qwest violated sections 51.703(b) and 51.709(b) of our rules⁴ by improperly charging Mountain for delivering one-way paging traffic that originated and terminated in the same Major Trading Area ("MTA") and for which no wide area calling arrangement had been established. In so holding, we reject Qwest's assertion that granting the complaint is inappropriate in light of the jurisdictional and limitations defenses it raises.

¹ Formal Complaint, File No. EB-00-MD-017 (filed Sept. 12, 2000) ("Complaint").

² 47 U.S.C. § 208.

³ See *Mountain Communications, Inc. v. FCC*, 355 F.3d 644 (D.C. Cir. 2004) ("*Mountain v. FCC*").

⁴ 47 C.F.R. §§ 51.703(b) (prohibiting a LEC from assessing charges on another carrier for telecommunications traffic that originates on the LEC's own network), 51.709(b) ("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.").

II. BACKGROUND

2. Mountain is a Commercial Mobile Radio Service (“CMRS”) provider that offers one-way paging services to customers in three Colorado cities located in one MTA.⁵ Qwest is the incumbent local exchange carrier (“LEC”) serving those Colorado cities.⁶

3. Mountain filed a formal complaint with the Commission on September 11, 2000. In its Complaint, Mountain asserted, *inter alia*, that Qwest violated sections 51.703(b) and 51.709(b) of the Commission’s rules by charging Mountain a fee for delivering to Mountain certain local traffic that originated on Qwest’s network, *i.e.*, local calls from Qwest’s customers to Mountain’s paging customers in the three Colorado cities at issue.⁷ The Enforcement Bureau denied Mountain’s Complaint.⁸ Citing the Commission’s earlier order in *TSR Wireless*,⁹ the Bureau recognized that a LEC generally could not charge CMRS providers for the delivery of LEC-originated traffic that originated and terminated within the same MTA, because such traffic constituted local traffic under the Commission’s rules.¹⁰ The Bureau further explained, however, that nothing prevented a LEC from charging its end users for intraLATA toll calls that originated on its network and terminated over facilities situated entirely within a single MTA.¹¹ The Bureau noted that, if a paging carrier wanted to avoid having callers to its customers pay such toll charges, *TSR Wireless* left open the possibility of wide area calling or reverse billing arrangements where the CMRS carrier could “buy down” the cost of such calls to make it appear to the LEC’s end users that they have made a local call rather than a toll call.¹² The Bureau then found that Mountain and Qwest effectively had entered into a wide area calling arrangement.¹³ Thus, the Bureau concluded that Qwest was entitled to collect from Mountain the transport fees at issue.¹⁴ The Commission affirmed the Bureau,¹⁵ whereupon Mountain filed a petition for review in the D.C. Circuit.¹⁶

⁵ *Mountain v. FCC*, 355 F.3d at 647 n.2; *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 2091, 2096, ¶ 11 (Enf. Bur. 2002) (“*Bureau Order*”), *aff’d*, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, Order on Review, 17 FCC Rcd 15135 (2002) (“*Commission Order*”), *vacated and remanded*, *Mountain v. FCC*, *supra*.

⁶ *Mountain v. FCC*, 355 F.3d at 645-46; *Bureau Order*, 17 FCC Rcd at 2091, ¶ 2.

⁷ Complaint at 9-10, ¶¶ 36-40; *Mountain v. FCC*, 355 F.3d at 646; 47 C.F.R. § 51.703(b); 47 C.F.R. § 51.709(b).

⁸ *Bureau Order*, 17 FCC Rcd at 2097-98, ¶¶ 13-14.

⁹ *TSR Wireless, LLC v. U S West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166 (2000) (rejecting similar effort by LEC to charge paging carrier for delivering local calls that originated on LEC’s network) (“*TSR Wireless*”), *aff’d sub nom. Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) (“*Qwest v. FCC*”).

¹⁰ *Bureau Order*, 17 FCC Rcd at 2094-96 ¶¶ 8, 11.

¹¹ *Bureau Order*, 17 FCC Rcd at 20946, ¶ 11.

¹² *Bureau Order*, 17 FCC Rcd at 2096, ¶ 11.

¹³ *Bureau Order*, 17 FCC Rcd at 2096-97, ¶¶ 12-13.

¹⁴ *Bureau Order*, 17 FCC Rcd at 2097-98, ¶¶ 13-14.

¹⁵ *Commission Order*, *supra*.

¹⁶ *Mountain v. FCC*, 355 F.3d at 645.

4. The D.C. Circuit disagreed with the Commission's finding that Mountain had entered into a constructive wide area calling arrangement with Qwest.¹⁷ According to the court, the Commission wrongly "stretch[ed] the concept of a wide area calling arrangement" to encompass the situation between Mountain and Qwest, noting that Mountain had "no incentive to enter into a wide area calling arrangement with Qwest."¹⁸ In so finding, the Court concluded that the Commission departed, without explanation, from *TSR Wireless* (in which, the Court said, the "facts seem – and are conceded to be – identical, but the results are the opposite"), and came into "direct conflict" with rule 51.703(b) (which prohibits a LEC from assessing charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network).¹⁹ Accordingly, the court vacated and remanded the Commission's denial of Mountain's Complaint.²⁰

5. After release of the court's opinion, and at the request of Commission staff, the parties and Commission staff engaged in a written and oral dialogue regarding whether, in light of the Court's opinion, the Commission should simply grant Mountain's complaint on the ground that the applicable rules and precedent bar Qwest from imposing the transport charges at issue.²¹ Qwest asserted that issues remain properly before the Commission in this post-remand phase of this proceeding and submitted a statement supporting its position.²² Specifically, Qwest sought to brief its position that the Commission should not simply grant Mountain's Complaint, because (i) the Commission lacks subject matter jurisdiction to adjudicate disputes regarding interconnection negotiations,²³ and (ii) the applicable statute of limitations bars any potential damages award.²⁴

III. DISCUSSION

6. As explained below, we grant Mountain's complaint and find that Qwest's imposition of charges for transporting to Mountain the Qwest-originated one-way paging traffic at issue violated section 51.703(b) and 51.709(b) of the Commission's rules. Accordingly, we reject Qwest's contentions that the

¹⁷ *Mountain v. FCC*, 355 F.3d at 647-48.

¹⁸ *Mountain v. FCC*, 355 F.3d at 647-48.

¹⁹ *Mountain v. FCC*, 355 F.3d at 647-48 (citing *TSR Wireless*, 15 FCC Rcd at 11184, ¶ 31; 47 C.F.R. § 51.703(b)).

²⁰ *Mountain v. FCC*, 355 F.3d at 647-49.

²¹ See Joint Statement of Mountain Communications, Inc. and Qwest Corporation Regarding Proceeding on Remand, File No. EB-00-MD-017 (filed Feb. 20, 2004); Supplement to Joint Statement of Mountain Communications, Inc. and Qwest Corporation Regarding Proceeding on Remand, File No. EB-00-MD-017 (filed Mar. 9, 2004). Conference calls involving Commission staff and the parties occurred on April 8, 2004, April 30, 2004, and May 7, 2004.

²² Statement of Issues to be Addressed on Remand by Qwest Communications International, Inc., File No. EB-00-MD-017 (filed May 17, 2004) ("Qwest Statement of Issues"). See Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, to Robert B. McKenna, Jr., Qwest Corporation, and Benjamin J. Aron, Schwaninger & Associates, P.C., counsel for Mountain, File No. EB-00-MD-017 (May 13, 2004); Mountain Communications, Inc.'s Reply to Statement of Issues to be Addressed on Remand by Qwest Communications International, Inc., File No. EB-00-MD-017 (filed May 17, 2004) ("Mountain's Reply").

²³ Qwest Statement of Issues at 1-2.

²⁴ Qwest Statement of Issues at 2.

Commission cannot grant this complaint because we lack subject matter jurisdiction in this matter or because the statute of limitations bars any potential damages award.

7. First, Qwest's position on jurisdiction seems directed exclusively at disputes concerning the negotiation of an interconnection agreement.²⁵ The Enforcement Bureau, however, already dismissed Mountain's claims relating to the negotiation of interconnection agreements.²⁶ We, therefore, find that the jurisdictional issue Qwest raises is moot. Moreover, to the extent that Qwest challenges Mountain's use of the Commission's section 208 complaint procedure to resolve disputes over the charges at issue, that jurisdictional question has long since been resolved in favor of Commission jurisdiction.²⁷ Indeed, the *Bureau Order* so held,²⁸ and Qwest did not challenge that holding in court.

8. Second, as a factual matter, Qwest's defense that the statute of limitations has expired on any damages award is not justified at present, because Mountain exercised its right under section 1.722 of the Commission's rules²⁹ to reserve damages issues for a subsequent proceeding.³⁰ Moreover, even if Qwest's statute of limitations defense were valid, it would bar neither the non-damages claim for relief resolved in this Order³¹ nor Mountain's claim for damages arising from "economic harm"³² and other injuries allegedly incurred since September 11, 1998. Thus, it is appropriate to defer briefing on Qwest's statute of limitations defense until the subsequent damages proceeding, if any, commences. Accordingly, Qwest may raise the statute of limitations defense in its answer to any supplemental complaint for damages filed by Mountain.

9. Qwest concedes that, aside from the two issues discussed above, there is nothing further for us to adjudicate in the liability phase of the instant proceeding.³³ We agree. The record demonstrates that Qwest charged Mountain a fee for delivering one-way paging traffic that originated and terminated in

²⁵ Qwest Statement of Issues at 1-2 ("Because the Act specifies that disputes over an interconnection negotiation belong before state regulatory authorities, Mountain's claims must be addressed in a state arbitration proceeding rather than in a complaint proceeding before this Commission.").

²⁶ Letter Ruling from Frank G. Lamancusa, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, to Michael L. Higgs, counsel for Mountain, and Blair A. Rosenthal, Qwest Corporation, File No. EB-00-MD-017 at 2 (Sept. 19, 2001).

²⁷ See, e.g., *Qwest v. FCC*, 252 F.3d at 463-64 (upholding Commission's use of complaint procedure under sections 208 and 332 of the Act to resolve paging carrier's claims alleging violation of rule 51.703(b)).

²⁸ *Bureau Order*, 17 FCC Rcd at 2094, ¶ 7.

²⁹ 47 C.F.R. § 1.722(d) (identifying the steps a complainant must take if it "wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made").

³⁰ Complaint at 19, ¶ 83.

³¹ See *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 23898, 23915, ¶ 45 (2004) (declining to consider statute of limitations defense during liability phase of bifurcated proceeding in which complainant sought both prospective relief and damages).

³² Complaint at 19, ¶ 82.

³³ Qwest Statement of Issues at 3.

the same MTA.³⁴ And, as the D.C. Circuit noted, Mountain did not enter into a wide area calling arrangement with Qwest that might have permitted Qwest to charge for the traffic at issue.³⁵ Absent such an arrangement, we conclude, consistent with the D.C. Circuit's reasoning, that Qwest's charges for transporting one-way paging telecommunications traffic to Mountain from Qwest's own customers are unlawful.³⁶

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.720-1.736, 51.703(b), and 51.709(b) of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 51.703(b), and 51.709(b), Mountain's claim that Qwest's charges for transporting traffic to Mountain from Qwest's own customers are unlawful IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ Joint Statement of Mountain Communications and Qwest Corporation, File No. EB-00-MD-017 at 8, ¶ 22 (filed Oct. 16, 2000). See *Mountain v. Qwest*, 355 F.3d at 645.

³⁵ *Mountain v. Qwest*, 355 F.3d at 647-48.

³⁶ This Order concerns application of our existing rules only, and expresses no opinion with regard to formulation of new or revised intercarrier compensation rules.