

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

In the matter of
METROCALL, INC.,
Complainant,
v.
SOUTHWESTERN BELL TELEPHONE
COMPANY and PACIFIC BELL TELEPHONE
COMPANY,
Defendants.
File Nos. E-98-16, E-98-17

MEMORANDUM OPINION AND ORDER
ON SUPPLEMENTAL COMPLAINT FOR DAMAGES

Adopted: September 26, 2001

Released: October 2, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order on Supplemental Complaint for Damages, we determine the damages owed by defendants Pacific Bell Telephone Company ("Pac Bell") and Southwestern Bell Telephone Company ("SWBT") (collectively, "the SBC defendants") to complainant Metrocall, Inc. ("Metrocall") pursuant to our previous decision in this proceeding. We find that Metrocall is not entitled to any refund of its payment from the SBC defendants because, even under Metrocall's assumptions, Metrocall's payments did not exceed the lawful charges on the relevant accounts for the services at issue. We also reject Metrocall's demands for consequential and punitive damages. Finally, we deny Metrocall's request that we reconsider certain aspects of our decision in the Liability Order.

II. BACKGROUND

2. The facts and circumstances leading to our decision in the Liability Order are fully recited therein and we need not reiterate them at length. In that decision, we found that the SBC defendants and other Local Exchange Carriers ("LECs") had violated Commission rules and the Communications Act of 1934, as amended, by charging Metrocall and another paging carrier, TSR Wireless, Inc. ("TSR"), for the delivery of LEC-originated, intraMTA traffic to the paging companies' point of interconnection, and by imposing non-cost-based charges solely for the paging companies' use of Direct Inward Dialing (DID) numbers. We rejected claims by Metrocall and TSR that the SBC defendants had improperly charged for other services, such as reverse billing and the delivery of transiting

1 TSR Wireless, LLC v. U S West Communications, Inc., 15 FCC Rcd 11166 (2000) ("Liability Order"), petition for review denied sub nom. Qwest Corporation v. FCC, 252 F.3d 462 (D.C. Cir. 2001).

2 Liability Order, 15 FCC Rcd at 11176, para. 18, 11185-86, para. 33.

traffic.³ The *Liability Order* deferred the question of damages, permitting Metrocall and TSR to file supplemental complaints for damages within 60 days after release of our decision.

3. In its amended supplemental complaint and an addendum thereto, Metrocall seeks the return of \$297,361.53 it allegedly paid in illegal charges to Pac Bell and the return of \$243,411.03 it allegedly paid to SWBT, plus interest on each of these sums.⁴ Metrocall also wants removal of any illegal charges from the outstanding balances on its accounts with the SBC defendants, although Metrocall does not state precisely how much of these balances constitute illegal charges.⁵ Metrocall demands \$132,463 in consequential damages for the legal fees incurred during this proceeding,⁶ and \$7 million in punitive damages, to be divided among the SBC defendants and their co-defendant, U S West Communications, Inc. (now Qwest Corporation (“Qwest”).⁷ Metrocall also seeks call termination compensation, although it does not state precisely how much the SBC defendants allegedly owe.⁸ Finally, Metrocall requests that the Commission hold that, contrary to the *Liability Order*, Metrocall does not have to pay LECs for the delivery of transiting traffic.⁹ The SBC defendants have responded to each of these damage claims.

III. DISCUSSION

A. Metrocall Is Not Entitled To The Refund Of Its Payments As Compensatory Damages Because, Even Under Metrocall’s Assumptions, It Paid Less Than The Amount Of Lawful Charges On Its Accounts With The SBC Defendants.

4. As compensatory damages from the SBC defendants, Metrocall seeks a refund of its payments to the SBC defendants for charges deemed unlawful in the *Liability Order*. Metrocall determines this amount by subtracting the charges for services deemed lawful in the *Liability Order* from its total payments to the SBC defendants for the relevant accounts. According to Metrocall, after subtracting the lawful charges from its payments to the SBC defendants since November 1996, it is entitled to the return of about \$540,000 plus interest. Metrocall also seeks “full credit for any outstanding balances for local interconnection charges and/or DID-related charges.”¹⁰ We find that Metrocall is not entitled to any refund from the SBC defendants because, even assuming the company’s figures are correct, it still underpaid for the lawful charges on its interconnection-related accounts with the SBC defendants.

³ *Id.*, 15 FCC Rcd at 11177, para. 19, 11184, para. 30.

⁴ *See generally* Addendum to Supplemental Complaint for Damages, File Nos. E-98-16 *et al.* (Oct. 27, 2000) (“Addendum”). The Addendum corrected material discrepancies in Metrocall’s Amended Complaint regarding Metrocall’s compensatory damages claim. *See* Amended Supplemental Complaint for Damages, File Nos. E-98-16 *et al.* (Sept. 13, 2000). Although the Addendum substantially revised Metrocall’s compensatory damages claim, it did not revise the Amended Complaint’s demand for punitive and consequential damages, and did not provide recalculated figures regarding Metrocall’s outstanding balance.

⁵ *See* Addendum at 9, para. 16, 10, para. 19 (seeking “full credit for any outstanding balance of interconnection and DID-related charges”).

⁶ Amended Complaint at 10, para. 26.

⁷ *Id.* at 14, para. 33. Metrocall and Qwest settled Metrocall’s complaint against Qwest in its entirety and the Enforcement Bureau released an order granting the parties’ joint motion to dismiss on January 8, 2001. *See Metrocall, Inc. v. U S West Communications, Inc.*, Order, File No. E-98-18 (Enf. Bur. rel. Jan. 8, 2001).

⁸ Amended Complaint at 15-16, paras. 34-35.

⁹ *Id.* at 17, para. 38.

¹⁰ *See, e.g.*, Addendum at 10, para. 19.

5. In the *Liability Order*, we found that LECs may not charge one-way paging carriers for the delivery of intra-MTA LEC-originated traffic to the paging carrier's point of interconnection.¹¹ We also found that LECs may not impose recurring charges solely for the use of numbers.¹² But we did not find that all charges imposed by the LECs on paging carriers were illegal. Rather, we held that LECs may charge for a number of services, including (1) "wide area calling" services,¹³ (2) a reasonable initial connection charge to compensate the LECs for the cost of software and other charges associated with new numbers, (3) the delivery of "transiting" traffic, that is, traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC's network to that of the paging carrier,¹⁴ and (4) the delivery of traffic that originates or terminates outside the MTA.¹⁵

6. The parties agree that we should assess Metrocall's damages claim based on comparing the lawful charges on Metrocall's accounts with the SBC defendants against Metrocall's payments to the SBC defendants on those accounts. The parties also agree that, between November 1996 and October 2000, Metrocall paid the SBC defendants for both illegal and legal charges under the *Liability Order*, but generally stopped paying for most interconnection-related services about December 1998. The parties disagree, however, about how much Metrocall paid SWBT and Pac Bell, whether certain charges were lawful under the *Liability Order* or were properly charged to Metrocall even if legal, and the balance on Metrocall's accounts with each company. The SBC defendants assert that Metrocall's figures are incorrect, and have provided figures based on their records of the Metrocall accounts. For purposes of this decision, however, we will assume Metrocall's allegations are true because, even based on Metrocall's calculations, the company did not make payments greater than the lawful charges on its relevant accounts with Pac Bell and SWBT.

7. Pac Bell Charges. According to Metrocall, it incurred \$3,478,583.64 in charges on its accounts with Pac Bell between November 1996 and May 2000.¹⁶ During that period, Metrocall alleges that it paid Pac Bell \$1,116,569.97.¹⁷ Metrocall does not dispute that it incurred lawful charges in several categories, such as Monthly Service charges, Monthly Usage charges, Remote Call Forwarding, and long-distance calls, among others.¹⁸ According to Metrocall, these charges constitute \$819,208.44. Metrocall subtracts the undisputed lawful charges from its total payments and argues that it is entitled to a refund of

¹¹ *Liability Order*, 15 FCC Rcd at 11176, para. 18.

¹² *Id.*, 15 FCC Rcd at 11185-86, para. 33.

¹³ "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. *Id.*, 15 FCC Rcd at 11167, para. 2 n.6. In essence, paging carriers use wide area calling to place toll charges on pager users, rather than the people calling them.

¹⁴ *Id.*, 15 FCC Rcd at 11177, para. 19 n.70.

¹⁵ *Id.*, 15 FCC Rcd at 11184, para. 31.

¹⁶ Addendum, Exhibit 2 at 6.

¹⁷ *Id.* at 8, para. 15, Exhibit 2 at 6.

¹⁸ *Id.* at 7-8, paras. 14, 16. Metrocall concedes its responsibility for non-recurring charges for DID numbers, but asserts that Pac Bell's one-time charges are unreasonably high. Metrocall does not quantify these charges or offer any justification for its assertion. Because we are operating under Metrocall's assumptions here solely for purposes of this decision, however, we do not reach this issue.

\$297,361.53,¹⁹ plus interest, for payments on “Type 1 and Type 2 interconnection charges and DID-related charges” deemed unlawful under the *Liability Order*.²⁰

8. Metrocall ignores the language of the *Liability Order*. In that decision, we unambiguously permitted LECs to charge paging carriers for transiting traffic. Although it reflects other charges deemed lawful in the *Liability Order*, however, Metrocall’s damages calculation omits these lawful charges from its calculations. Though the SBC defendants raised this issue in their Answer,²¹ Metrocall never offered a means of determining its transiting traffic charges. Instead, Metrocall avers in its Reply that it owes nothing for charges relating to transiting traffic, then suggests that, even if the SBC defendants properly charged Metrocall for such traffic, “they have no legal right to argue that claim in this proceeding; they failed to raise any counter-claims during the liability phase of this proceeding, and are legally barred from doing so now.”²² Metrocall also points to a petition for reconsideration of the Commission’s decision on transiting traffic, suggesting that the question of its liability for transiting traffic is still open.²³

9. The *Liability Order* explicitly states that “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.”²⁴ Some percentage of the interconnection-related charges imposed by the SBC defendants on Metrocall constitutes such traffic, and they are entitled to charge for it. We reject Metrocall’s claim that the SBC defendants had to raise the issue of Metrocall’s liability for transiting traffic charges as a counterclaim for those charges to be considered here.²⁵ In considering the transiting charges applicable to Metrocall’s accounts, we are not determining whether to award damages to the SBC defendants. Rather, we are following the measure of damages set forth by Metrocall -- weighing the amount Metrocall allegedly paid on its accounts with the SBC defendants against the charges lawfully applicable to those accounts, in order to determine the amount, if any, of any refund to Metrocall. It is therefore appropriate that we consider the amount of the transiting traffic charges.

10. Further, we reject Metrocall’s claim that the transiting traffic issue is somehow uncertain because of a pending petition for reconsideration of that aspect of the *Liability Order*. The existence of a

¹⁹ Metrocall’s calculation assumes that its damages are its total payments to Pac Bell minus any lawful charges (\$1,116,569.97 - \$819,208.44 = \$297,361.53).

²⁰ As noted above, solely for purposes of this decision, we assume that Metrocall’s account calculations are correct. We note that the SBC defendants allege several problems with Metrocall’s calculations, which they claim do not include other charges permitted under the *Liability Order*, such as non-recurring charges for administration of DID numbers, transiting traffic charges, late fees, taxes, and other fees.

²¹ Answer of Defendants Southwestern Bell Telephone Company and Pacific Bell Telephone Company, File Nos. E-98-16 *et al.* at 20, para. 52 (Oct. 3, 2000) (“Answer”).

²² Metrocall, Inc. Reply to Affirmative Defenses of Southwestern Bell Telephone Company and Pacific Bell Telephone Company, File Nos. E-98-16 *et al.* at 8, para. 13 (Oct. 11, 2000) (“Reply”).

²³ Letter from Frederick M. Joyce, Alston & Bird, Counsel for Metrocall, to William H. Davenport, Enforcement Bureau, Federal Communications Commission at 1-2 (October 18, 2000) (citing Small Business in Telecommunications Petition for Reconsideration or Clarification, File Nos. E-98-13 *et al.* (filed July 21, 2000)).

²⁴ *Liability Order*, 15 FCC Rcd at 11177, para. 19 n.70.

²⁵ When Metrocall filed its original complaint (January 1998), the formal complaint rules in effect at the time permitted defendants to file counterclaims with their answers. 47 C.F.R. § 1.725 (1997). Our current rules expressly prohibit counterclaims. 47 C.F.R. § 1.725.

reconsideration petition (which Metrocall neither filed nor supported) does not alter the effect of our holding. In any event, we have now denied that petition.²⁶

11. In light of Metrocall's failure to suggest any alternative, we will use, for purposes of this proceeding only, the 26 percent transiting factor supplied by Pac Bell, which is based on a 1999 interconnection agreement between the LEC and Metrocall. Based on Metrocall's allegations, Pac Bell assessed Metrocall \$2,659,375.20 in interconnection-related charges.²⁷ If we apply the 26 percent transiting factor to the interconnection-related charges identified by Metrocall, we find that Metrocall incurred \$691,437.55 in transiting traffic charges.²⁸

12. As noted above, Metrocall admits that it is responsible for \$819,208.44 in "lawful" charges. The sum of these charges and the \$691,437.55 in transiting traffic charges leads to a balance of \$1,510,645.99 in lawfully imposed charges. But Metrocall, by its own calculations, has paid Pac Bell only \$1,116,569.97. Therefore, even assuming Metrocall's account figures, Metrocall is not entitled to any refund of its payments to Pac Bell as compensatory damages because the lawful charges imposed by Pac Bell minus Metrocall's total payments to Pac Bell results in an outstanding balance of \$394,076.02 in charges permitted under the *Liability Order*, which are due and owed to Pac Bell.²⁹

13. SWBT Charges. We reach a similar conclusion with respect to Metrocall's claim against SWBT. Metrocall's spreadsheets state that it incurred \$4,502,364.44 in charges on its accounts with SWBT between November 1996 and July 2000. During that period, Metrocall alleges that it paid \$800,382.49 on those same accounts.³⁰ Metrocall does not dispute that it is responsible for \$348,152.33 in Monthly Usage charges by SWBT, as well as the balances on accounts unrelated to interconnection, amounting to \$208,819.13. According to Metrocall, these charges constitute \$556,971.46. Metrocall alleges that it is entitled to its total payments minus what it considers to be lawful charges, resulting in a refund of \$243,411.03 for payments on charges deemed unlawful under the *Liability Order*.³¹

14. Once again, however, Metrocall ignores the *Liability Order's* finding that LECs may lawfully charge for transiting traffic. SWBT provides an average transiting factor of 23 percent, derived by averaging the transiting factors applied in the five SWBT states (Arkansas, Kansas, Oklahoma, Missouri, and Texas). As we did with the Pac Bell charges, in light of Metrocall's failure to offer any alternative, we will apply SWBT's transiting factor to Metrocall's outstanding balance.³² Even if we

²⁶ See *TSR Wireless, Inc. et al. v. U S West Communications, Inc. et al.*, Order On Petition for Reconsideration, FCC 01-169 (Enf. Bur. rel. May 22, 2001).

²⁷ Metrocall's interconnection-related charges equal the total Pac Bell charges minus the charges considered "unlawful" by Metrocall ($\$3,478,583.64 - \$819,208.44 = \$2,659,375.20$).

²⁸ Total interconnection-related payments multiplied by a transiting factor equals Metrocall's transiting traffic charges ($\$2,659,375.20 * 0.26 = \$691,437.55$).

²⁹ Total "lawful" charges minus Metrocall's total payments equals Metrocall's outstanding balance for "lawful" charges ($\$1,510,645.99 - \$1,116,569.97 = \$394,076.02$).

³⁰ Addendum at 8, para. 15.

³¹ Metrocall alleges that its damages equal its total payments minus any lawful charges ($\$800,382.49 - \$556,971.46 = \$243,411.03$).

³² Our use here of the transiting factors proposed by SWBT and Pac Bell should not be read as a finding that these factors are necessarily correct. We have used the SBC defendants' transiting factors in light of Metrocall's failure either to contest their validity or to provide transiting factors of its own. Nor does our decision here determine how much Metrocall owes the defendants for the charges deemed lawful in the *Liability Order*. Rather, we are determining, based on the record before us, whether Metrocall could have paid more than the SBC defendants' lawful charges.

exclude the charges Metrocall deems unrelated to interconnection, as well as \$84,500.78 in Minimum Monthly Usage charges that Metrocall deems unlawful,³³ Metrocall nevertheless incurred \$3,860,848.20 in interconnection-related charges, based on the figures provided by Metrocall.³⁴ Applying the 23 percent transiting factor to this balance results in \$887,995.09 in transiting traffic charges.³⁵ Adding the \$556,971.46 for which Metrocall admits responsibility and the \$887,995.09 in transiting traffic charges, results in a balance of \$1,444,966.55 in lawfully imposed charges. But Metrocall, by its own calculations, has paid SWBT only \$800,382.49. Therefore, even assuming Metrocall's account figures, Metrocall is not entitled to the refund of any overpayment as compensatory damages because it appears to have underpaid SWBT by at least \$644,584.06, after subtracting the total lawful charges from Metrocall's total payments.³⁶

15. As part of its compensatory damages claim, Metrocall also seeks "full credit for any outstanding balances for local interconnection charges and/or DID-related charges."³⁷ Metrocall has failed to state a claim regarding this aspect of its supplemental complaint. At no point in this case has Metrocall offered a clear estimate of these charges,³⁸ forcing us to parse through confusing spreadsheets attached to Metrocall's pleadings in search of hard numbers for use in calculating Metrocall's compensatory damages. We have used Metrocall's figures and methodology in our determination of its compensatory damages claim, but caution that our decision does not endorse Metrocall's figures and methodology. Moreover, we do not necessarily accept Metrocall's categorization of specific charges as "lawful" or "illegal." Rather, our analysis is intended to show that, even using Metrocall's assumptions, the company should receive no refund of any overpayment as compensatory damages because it actually underpaid its relevant accounts with Pac Bell and SWBT by at least \$394,076.02 and \$644,584.06, respectively. In light of Metrocall's failure to support its request that the Commission modify its outstanding balance, we reject Metrocall's claim.

B. Metrocall Is Not Entitled To Consequential Or Punitive Damages.

16. Metrocall also seeks consequential and punitive damages against the SBC defendants. We find that Metrocall's request for "consequential" damages is, effectively, a request for attorneys' fees, which we have no authority to award under the Act. Moreover, even assuming we have authority to award punitive damages, we find that such damages are unwarranted here.

³³ Metrocall claims that it has no responsibility for Minimum Monthly Usage charges on its accounts, amounting to \$84,544.78. For purposes of this decision, we will not consider these charges in our calculations, since they do not affect our conclusion.

³⁴ Total charges minus total "lawful" charges equals the amount of interconnection-related charges (\$4,502,364.44 - \$556,971.46 - \$84,544.78 = \$3,860,848.20).

³⁵ Total interconnection-related charges multiplied by the transiting factor equals the amount of transiting traffic charges (\$3,860,848.20 * 0.23 = \$887,995.09).

³⁶ Total "lawful" charges plus transiting traffic charges minus the amount paid equals Metrocall's outstanding balance (\$1,444,966.55 - \$800,382.49 = \$644,584.06).

³⁷ Addendum at 10, para. 19.

³⁸ In the parties' Joint Statement, Metrocall claims -- and the SBC defendants dispute -- that the SBC defendants "should credit [its] outstanding balances for local interconnection charges and DID-related charges in the following amounts: Pac Bell, \$2,544,000; SWBT, \$2,707,935.72." Joint Statement, File Nos. E-98-16 *et al.*, at 7 para. 15 (Oct. 17, 2000) ("Joint Statement"). As mentioned above, however, Metrocall subsequently filed an Addendum to its Amended Supplemental Complaint which substantially revised the accounts relevant here, the categories of charges, and the amount on those charges. The Addendum did not include outstanding balance figures. Rather, Metrocall simply demanded "full credit for any outstanding balances for local interconnection charges and/or DID-related charges," but gave no explanation about the amount of this "full credit," in light of its revised calculations. Addendum at 10, para. 19.

17. Metrocall alleges that it suffered consequential damages from the SBC defendants' insistence that it pay for charges deemed illegal under the *Liability Order*, because it had to pursue legal actions, including this proceeding, to "force" defendants to comply with the law. According to Metrocall, it is "well-established that, pursuant to Sections 206 and 207 of the [Communications] Act, any common carrier ... is liable for consequential damages when, due to its violation of the Act, and/or the Commission's rules and orders, it harms another party."³⁹ Metrocall therefore seeks \$132,463 in consequential damages for "the full amount of the legal fees it incurred in prosecuting the [complaints in this proceeding]."⁴⁰

18. Thus, Metrocall explicitly seeks its attorneys' fees in this proceeding as "consequential damages." But we repeatedly have held that the Commission lacks authority under the Act to award attorneys' fees as damages.⁴¹ Indeed, in the same case and the same paragraph Metrocall cites for the proposition that the Commission may award consequential damages, the Commission explicitly stated "[w]e have no power to award attorneys fees and that request will be denied."⁴² Metrocall argues that we may nevertheless award attorneys fees arising as a result of the SBC defendants' actions, citing to a Commission decision in which we held that consequential damages may lie for "interference with the conduct of [complainant's] business, for which Defendants were responsible directly resulting in the need for additional professional services, loans and expenditure of time."⁴³ But the "professional services" to which that decision refers were not legal services, but rather engineering services unrelated to the prosecution of the formal complaint.⁴⁴

19. We also reject Metrocall's demand for punitive damages against the SBC defendants. Even assuming that we have such authority (an issue we need not address here), the facts here do not justify an award of punitive damages. Metrocall argues that the SBC defendants have engaged in "wanton and willful misconduct" by continuing to charge paging carriers for the delivery of LEC-originated traffic despite the *Local Competition Order's* language to the contrary, as well as letters from the Common Carrier Bureau in 1997 "re-affirming" that holding.⁴⁵

20. While we are troubled by the SBC defendants' persistent refusal to acknowledge the effect of the *Local Competition Order*, we find that the mere act of billing Metrocall does not demonstrate that the SBC defendants acted "maliciously, wantonly, or with a recklessness that betokens improper motive or vindictiveness."⁴⁶ Indeed, as discussed above, a significant portion of the bills that the SBC

³⁹ Amended Complaint at 9, para. 23 (citing *Comark Cable Fund III*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 100 FCC 2d 1244, 1257, para. 31 (1985)).

⁴⁰ Amended Complaint at 10, para. 26.

⁴¹ See, e.g., *Ascom Communications, Inc. v. Sprint Communications Co., L.P.*, 15 FCC Rcd 3223, 3236, para. 31 (2000) ("[W]e have no authority to award attorneys' fees and costs ..."); *Multimedia Cablevision, Inc. v. Southwestern Bell Tel. Co.*, 11 FCC Rcd 11202, 11208, para. 16 (1996) ("We agree ... that we do not have authority to grant costs and attorneys fees.").

⁴² *Comark*, 100 FCC 2d at 1257, para. 31 n.51.

⁴³ Reply at 11, para. 21 (citing *Edwards Indus. v. Bell Tel. Co. of Nevada*, 74 FCC 2d 322, 328, para. 17 (1992)).

⁴⁴ *Id.*, 74 FCC 2d at 327, para. 16.

⁴⁵ Amended Complaint at 11-12, paras. 28-30; Reply at 12-13, paras. 25.

⁴⁶ *Strouth v. Western Union Tel. Co.*, Initial Decision, 70 FCC 2d 525, 570, para. 129 (ALJ 1977) (setting forth standard for punitive damages, even assuming Commission has authority to award such damages), *aff'd in relevant part*, 70 FCC 2d 506 (Rev. Bd. 1978). See also *Krauss v. MCI Telecom. Corp.*, 14 FCC Rcd 2770, 2776, para. 12 (Com. Car. Bur. 1999) (declining to award punitive damages even assuming, without deciding, that

(continued...)

defendants sent Metrocall covered services that we have recognized are properly charged CMRS carriers, including charges for the delivery of transiting traffic. We also note that, despite Metrocall's admitted balance of more than \$6 million with the SBC defendants, and the fact that Metrocall largely refused to pay for any services, the SBC defendants continued to provide service to the paging carrier.⁴⁷ Even assuming we had the authority to grant punitive damages, such behavior hardly constitutes the "wanton, oppressive or malicious intent or ... incompetence or recklessness" that might justify such an award.⁴⁸

C. Metrocall Waived Its Right To Dispute Our Holdings In the *Liability Order* By Not Filing A Petition For Reconsideration Or Petition For Review.

21. Finally, Metrocall challenges two aspects of our decision in the *Liability Order*. Specifically, although it acknowledges the *Liability Order's* holding that LECs may charge paging carriers for transiting traffic, Metrocall states that it "disagrees with this analysis and asks that the Commission hold that Metrocall does not have to pay the LECs for transiting traffic."⁴⁹ We do not reach Metrocall's arguments on this subject because its request is procedurally improper. If Metrocall disagreed with some aspect of the *Liability Order*, it should have filed a petition for reconsideration with the Commission or filed a petition for review with the federal appellate courts. This proceeding is not the proper forum in which to challenge the conclusions of the *Liability Order*.

22. Similarly, Metrocall challenges the *Liability Order's* finding that the paging company "did not seek compensation for the transport and termination of LEC-originated traffic" in this proceeding.⁵⁰ Metrocall argues that this holding was mistaken and that the company has properly sought recovery for termination of LEC-originated traffic.⁵¹ As with the transiting traffic issue, however, Metrocall should have raised this argument in a petition for reconsideration or a petition for review, not in a supplemental complaint for damages. Metrocall contends that it may seek compensation for the transport and termination of LEC originated traffic in its supplemental complaint because it asked the Commission to bifurcate the liability and damages aspects of this proceeding and now is simply "request[ing] damages for defendants' violation of the call termination rules."⁵² But the *Liability Order* did not reach the question of whether the defendants violated those rules, because it found that Metrocall had never raised such a claim in the first place.⁵³ Without a finding that the SBC defendants actually violated any rule, we cannot make any damages calculation here.

IV. CONCLUSION

23. Based on our analysis above, we deny Metrocall's claims for compensatory, consequential, and punitive damages. We also deny Metrocall's demands that we revisit our conclusions in the *Liability Order*.

(...continued from previous page)

Commission has authority to do so; "Krauss has failed to show that MCI acted 'maliciously, wantonly or with a recklessness that betokens improper motive or vindictiveness.'")

⁴⁷ See Joint Statement at 4, para. 5 (Metrocall and the SBC defendants stipulate as an undisputed fact that "[t]he Defendants have never disconnected any existing service nor have they ever refused to provide additional services ordered by Metrocall.").

⁴⁸ *Strouth*, 70 FCC 2d at 570, para. 130.

⁴⁹ Amended Complaint at 17, para. 36.

⁵⁰ *Liability Order*, 15 FCC Rcd at 11167, para. 1.

⁵¹ Amended Complaint at 15, para. 34.

⁵² *Id.* at 15, para. 34 n.52.

⁵³ *Liability Order*, 15 FCC Rcd at 11167, para. 1.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 206-209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 206-209, and section 1.722 of the Commission's rules, 47 C.F.R. § 1.722, that Metrocall, Inc.'s amended supplemental complaint for damages against Pacific Bell Telephone Company and Southwestern Bell Telephone Company is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary