

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

<p><b>In the Matter of</b></p> <p><b>Mountain Communications, Inc.,</b></p> <p style="padding-left: 100px;"><b>Complainant,</b></p> <p style="padding-left: 100px;">v.</p> <p><b>Qwest Communications</b></p> <p><b>International, Inc.,</b></p> <p style="padding-left: 100px;"><b>Defendant.</b></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><b>File No. EB-00-MD-017</b></p>
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**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 complaint<sup>1</sup> 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”).<sup>2</sup> 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,<sup>3</sup> we find that Qwest violated sections 51.703(b) and 51.709(b) of our rules<sup>4</sup> 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.

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<sup>1</sup> Formal Complaint, File No. EB-00-MD-017 (filed Sept. 12, 2000) (“Complaint”).

<sup>2</sup> 47 U.S.C. § 208.

<sup>3</sup> See *Mountain Communications, Inc. v. FCC*, 355 F.3d 644 (D.C. Cir. 2004) (“*Mountain v. FCC*”).

<sup>4</sup> 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.<sup>5</sup> Qwest is the incumbent local exchange carrier (“LEC”) serving those Colorado cities.<sup>6</sup>

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.<sup>7</sup> The Enforcement Bureau denied Mountain’s Complaint.<sup>8</sup> Citing the Commission’s earlier order in *TSR Wireless*,<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> The Bureau then found that Mountain and Qwest effectively had entered into a wide area calling arrangement.<sup>13</sup> Thus, the Bureau concluded that Qwest was entitled to collect from Mountain the transport fees at issue.<sup>14</sup> The Commission affirmed the Bureau,<sup>15</sup> whereupon Mountain filed a petition for review in the D.C. Circuit.<sup>16</sup>

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<sup>5</sup> *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*.

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

<sup>7</sup> 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).

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

<sup>9</sup> *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*”).

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

<sup>11</sup> *Bureau Order*, 17 FCC Rcd at 20946, ¶ 11.

<sup>12</sup> *Bureau Order*, 17 FCC Rcd at 2096, ¶ 11.

<sup>13</sup> *Bureau Order*, 17 FCC Rcd at 2096-97, ¶¶ 12-13.

<sup>14</sup> *Bureau Order*, 17 FCC Rcd at 2097-98, ¶¶ 13-14.

<sup>15</sup> *Commission Order*, *supra*.

<sup>16</sup> *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.<sup>17</sup> 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."<sup>18</sup> 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).<sup>19</sup> Accordingly, the court vacated and remanded the Commission's denial of Mountain's Complaint.<sup>20</sup>

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.<sup>21</sup> Qwest asserted that issues remain properly before the Commission in this post-remand phase of this proceeding and submitted a statement supporting its position.<sup>22</sup> 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,<sup>23</sup> and (ii) the applicable statute of limitations bars any potential damages award.<sup>24</sup>

### 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

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<sup>17</sup> *Mountain v. FCC*, 355 F.3d at 647-48.

<sup>18</sup> *Mountain v. FCC*, 355 F.3d at 647-48.

<sup>19</sup> *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)).

<sup>20</sup> *Mountain v. FCC*, 355 F.3d at 647-49.

<sup>21</sup> 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.

<sup>22</sup> 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").

<sup>23</sup> Qwest Statement of Issues at 1-2.

<sup>24</sup> 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.<sup>25</sup> The Enforcement Bureau, however, already dismissed Mountain's claims relating to the negotiation of interconnection agreements.<sup>26</sup> 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.<sup>27</sup> Indeed, the *Bureau Order* so held,<sup>28</sup> 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 rules<sup>29</sup> to reserve damages issues for a subsequent proceeding.<sup>30</sup> Moreover, even if Qwest's statute of limitations defense were valid, it would bar neither the non-damages claim for relief resolved in this Order<sup>31</sup> nor Mountain's claim for damages arising from "economic harm"<sup>32</sup> 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.<sup>33</sup> We agree. The record demonstrates that Qwest charged Mountain a fee for delivering one-way paging traffic that originated and terminated in

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<sup>25</sup> 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.").

<sup>26</sup> 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).

<sup>27</sup> 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)).

<sup>28</sup> *Bureau Order*, 17 FCC Rcd at 2094, ¶ 7.

<sup>29</sup> 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").

<sup>30</sup> Complaint at 19, ¶ 83.

<sup>31</sup> 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).

<sup>32</sup> Complaint at 19, ¶ 82.

<sup>33</sup> Qwest Statement of Issues at 3.

the same MTA.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

#### 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

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<sup>34</sup> 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.

<sup>35</sup> *Mountain v. Qwest*, 355 F.3d at 647-48.

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