

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Mountain Communications, Inc.,
Complainant,
v.
Qwest Communications International, Inc.,
Defendant.
File No. EB-00-MD-017

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2002

Released: February 4, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the above-captioned formal complaint that Mountain Communications, Inc. ("Mountain") filed against Qwest Communications International, Inc. ("Qwest", formerly U S West Communications, Inc.) pursuant to section 208 of the Communications Act of 1934, as amended (the "Act").

1 47 U.S.C. § 208. Qwest is the successor to U S WEST Communications, Inc., following the companies' June 30, 2000 merger. See Qwest Communications International, Inc. and U S WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, 15 FCC Red 11909 (2000).

2 See 47 C.F.R. §§ 51.703(b) and 51.709(b).

3 Mountain also alleged in its complaint that Qwest violated section 51.305 of the Commission's rules, 47 C.F.R. § 51.305, and sections 201, 251, and 252 of the Act, 47 U.S.C. §§ 201, 251, 252, by failing to negotiate an interconnection agreement with Mountain in good faith. See Formal Complaint of Mountain Communications, Inc, File No. EB-00-MD-017, at 12-18 (filed Sep. 11, 2000) ("Mountain Complaint").

Based on the principles established in the *TSR Wireless Order*⁴ and the *Texcom Order*,⁵ we deny Mountain's claims. In short, we find that Qwest may lawfully charge Mountain for costs associated with "transiting traffic" and for facilities used to provide "wide area calling."

II. BACKGROUND

2. Mountain offers one-way paging services to its customers in the state of Colorado.⁶ Qwest is the incumbent local exchange carrier ("LEC") offering local telephone service to the public in Colorado.⁷ Qwest serves as the interconnecting LEC for Mountain's paging facilities and transports calls from the public switched network to Mountain's network.⁸ Qwest has been providing such interconnection services to Mountain since at least November 1996.⁹

3. The services that Mountain obtains from Qwest include a "wide area calling" service.¹⁰ With respect to service provided to paging carriers, wide area calling refers generally to an arrangement that allows a paging carrier to subsidize the cost of calls from a LEC's customers to the paging carrier's customers, when completing such calls requires the LEC to transport them from one of its local calling areas to another of its local calling areas.¹¹ One example of a wide area calling arrangement is known as "reverse billing" or "reverse toll," in which a LEC agrees

Market Disputes Resolution Division, File No. EB-00-MD-017 (Sep. 19, 2001) ("*Letter Ruling*").

⁴ *TSR Wireless, LLC v. U S West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166 (2000) ("*TSR Wireless Order*"), *aff'd sub. nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

⁵ *Texcom, Inc., d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications*, Memorandum Opinion and Order, FCC 01-347 (rel. Nov. 28, 2001) ("*Texcom Order*" or "*Texcom*"), Petition for Reconsideration pending.

⁶ See Joint Statement of Mountain Communications, Inc. and Qwest Communications International, Inc., File No. EB-00-MD-017, at 5 (filed Oct. 16, 2000) ("*Joint Statement*"); *Mountain Complaint* at 3; Answer of Qwest Communications International, Inc., File No. EB-00-MD-017, at 12 (filed Oct. 2, 2000) ("*Qwest Answer*").

⁷ See *Joint Statement* at 5; *Mountain Complaint* at 3; *Qwest Answer* at 12.

⁸ *Mountain Complaint* at 3; *Qwest Answer* at i, 13; *Joint Statement* at 8.

⁹ See *Mountain Complaint*, Exhibit III at 2; *Qwest Answer* at 1, 13.

¹⁰ See Qwest Corporation's Brief on the Disputed Material Issues, File No. EB-00-MD-017, at 10-13 (filed Jan. 19, 2001) ("*Qwest Brief*").

¹¹ See *TSR Wireless Order*, 15 FCC Rcd at 11169, ¶ 6 n.6. During the relevant period, section 51.701(b)(1) of the Commission's rules defined a LEC's "local" calling area as the service area, defined by state commissions, within which calls are not subject to toll charges. 47 C.F.R. § 51.701(b)(1) (2000). (The Commission has since amended section 51.701(b)(1), but not in a manner relevant here. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9167, ¶ 34, and 9173, ¶ 46 (2001) ("*Reciprocal Compensation Remand Order*"). Local service areas for CMRS carriers, by contrast, are generally referred to as Major Trading Areas ("MTAs"). 47 C.F.R. § 51.701(b)(2). MTAs are based on the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd edition, at pages 38-39, with several exceptions and additions set forth in 47 C.F.R. §24.202(a). 47 C.F.R. §24.202(a). MTAs are typically larger than "local" calling areas applicable to LECs. *TSR Wireless Order*, 15 FCC Rcd at 11177, ¶ 31.

with a paging carrier not to assess toll charges on calls from the LEC's end users to the paging carrier's end users, in exchange for the paging carrier paying the LEC a per-minute fee to recover the LEC's toll carriage costs.¹² The wide area calling arrangement at issue here involves Qwest's provision of dedicated toll facilities to Mountain that connect the Direct Inward Dialing ("DID")¹³ numbers that Mountain has obtained in each of Qwest's local calling areas to Mountain's interconnection point in another Qwest local calling area. This enables the calling customer in each of Qwest's local calling areas to dial a local number to reach a Mountain subscriber and avoid incurring toll charges.¹⁴

4. As part of the interconnection services it provided to Mountain beginning in 1996, Qwest transported calls made by its customers to Mountain's customers.¹⁵ Qwest also transported "transiting traffic" to Mountain, *i.e.*, calls to Mountain's customers originating from customers of carriers other than Qwest.¹⁶

5. Beginning in 1998, Mountain requested that Qwest cease assessing Mountain any charges associated with the delivery of traffic to Mountain's network and issue refunds for all such charges paid by Mountain since August 1996.¹⁷ Over the course of the next two years, the parties attempted to resolve their dispute regarding the charges at issue, but were unsuccessful.¹⁸ Mountain then filed the instant complaint.

6. Mountain's complaint alleges two claims that we must address in this order: 1) that Qwest violated sections 51.703(b) and 51.709(b) of the Commission's rules by charging Mountain for the transport of transiting traffic to Mountain's network;¹⁹ and 2) that Qwest

¹² See *TSR Wireless Order*, 15 FCC Rcd at 11169, ¶ 6 n.6.

¹³ "Direct Inward Dialing" or "DID" is a service that reduces the facilities needed (and thus the cost) to carry traffic between a local exchange carrier and a customer with multiple telephone numbers by transporting that traffic over significantly fewer lines. Unlike normal telephone service, which requires dedicated facilities for each number, a DID service transports traffic over shared facilities to the customer's premises. For example, a 100-telephone number customer purchasing DID service might need only 10 lines to carry traffic between its premises and the network, as opposed to the 100 individual lines needed for traditional service. DID service also supports additional features that can result in further cost savings. See generally Annabel Z. Dodd, *The Essential Guide to Telecommunications*, 48-49 (2d ed. 1999); Harry Newton, *Newton's Telecom Dictionary*, 264-65 (16th ed. 2000).

¹⁴ See *Qwest Brief* at 10-12, Second Supplemental Declaration of Sheryl R. Fraser, at ¶¶ 7-8. Mountain contends that the service described above is not a "wide area calling" service within the meaning of the *TSR Wireless Order*. Mountain Communications, Inc. Reply to Qwest Corporation's Brief on the Disputed Material Issues, File No. EB-00-MD-017, at 8-10 (filed Jan. 26, 2001) ("*Mountain Reply*"). As discussed, *infra*, we disagree with Mountain.

¹⁵ *Mountain Complaint* at 3; *Qwest Answer* at 13.

¹⁶ See *TSR Wireless Order*, 15 FCC Rcd at 11177, ¶ 19 n.70; *Mountain Complaint* at 11; Exhibit 23, at 2; *Qwest Answer* at 10; 23; *Joint Statement* at 8.

¹⁷ See *Mountain Complaint* at 3, 22, Exhibits III and IV.

¹⁸ As of February 16, 1998, Mountain ceased to pay any charges Qwest billed it for its continuing receipt of interconnection services. See *Qwest Answer* at 4.

¹⁹ See *Mountain Complaint* at 9-11; *Joint Statement* at 10; Mountain Communications, Inc. Brief, File No. EB-

violated sections 51.703(b) and 51.709(b) of the Commission's rules by charging Mountain for the facilities used to transport certain Qwest-originated traffic to Mountain's network.²⁰ For the reasons discussed below, we deny both claims.

III. DISCUSSION

A. The Commission Has Jurisdiction to Adjudicate Mountain's Complaint

7. Qwest asserts that we lack jurisdiction to adjudicate disputes concerning sections 51.703(b) and 51.709(b) of the Commission's rules where, as here, the disputing parties lack an interconnection agreement under sections 251 and 252 of the Act.²¹ The Commission has already rejected this argument.²² Consequently, we do so here, as well, and rule that we have jurisdiction to adjudicate Mountain's claims.

B. Qwest May Lawfully Charge Mountain for Transiting Traffic.

8. Section 51.703(b) of the Commission's rules provides that "[a] LEC may not assess charges on any other telecommunications carrier [including a paging carrier] for local telecommunications traffic that originates on the LEC's network."²³ Moreover, section 51.709(b) of the Commission's rules requires a LEC to charge a connecting carrier for dedicated transmission facilities used to carry traffic between the two carriers based solely on the amount of traffic that the connecting carrier sends back to the LEC.²⁴ In the *TSR Wireless Order* and the *Texcom Order*, the Commission construed these rules to mean that an interconnecting LEC may charge a paging carrier for the transport of transiting traffic.²⁵

9. Mountain contends that Qwest violates sections 51.703(b) and 51.709(b) of the

00-MD-017, at 1-6 (filed Jan. 8, 2001) ("*Mountain Brief*"); *Mountain Reply* at 4-7; Mountain Communication, Inc.'s Opposition to Qwest's Motion to Dismiss, File No. EB-00-MD-017, at 3-10 (filed Jan. 10, 2001) ("*Mountain Opposition*").

²⁰ See *Mountain Complaint* at 10-12; *Joint Statement* at 10; *Mountain Brief* at 7-9; *Mountain Reply* at 7-9. Mountain improperly uses the term "termination" to characterize the *transport* function that Qwest provides Mountain. Qwest does not "terminate" the traffic it carries to Mountain's network within the meaning of the Commission's rules. See, e.g., 47 C.F.R. § 51.701(d) (termination is the switching of telecommunications traffic from the terminating carrier's end office switch and delivery of such traffic to the called party's premises). Thus, we view Mountain's claim as addressing the lawfulness of Qwest's charges for the transport of certain traffic to Mountain, not the termination of such traffic.

²¹ See *Qwest Answer* at 32. See 47 U.S.C. §§ 251 and 252.

²² See *TSR Wireless Order*, 15 FCC Rcd at 11172, ¶ 13; *Qwest Corp. v. FCC*, 252 F.3d at 463.

²³ 47 C.F.R. § 51.703(b).

²⁴ 47 C.F.R. § 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").

²⁵ *TSR Wireless Order*, 15 FCC Rcd at 11177, ¶ 19 n.70.

Commission's rules by charging Mountain for the transport of transiting traffic.²⁶ In particular, Mountain argues that: 1) the *TSR Wireless Order* misconstrued section 51.703(b), because the Commission's rules do not allow LECs to charge for transiting traffic;²⁷ 2) we should consider *all* traffic that terminates on Mountain's network to have originated on Qwest's network;²⁸ and 3) permitting Qwest to charge for transiting traffic would allow it to recover its costs twice, because Qwest already receives adequate compensation for carrying this traffic from other sources, such as long distance carriers and other interconnecting LECs.²⁹

10. Mountain's arguments mirror those that the Commission recently rejected in the *Texcom* case.³⁰ Because Mountain raises no issues of law or fact that were not fully considered in *Texcom*, we apply *Texcom's* reasoning here and reject Mountain's arguments regarding Qwest's treatment of transiting traffic. Accordingly, we conclude that Qwest does not violate sections 51.703(b) and 51.709(b) of the Commission's rules by assessing Mountain charges associated with transiting traffic.³¹

²⁶ See *Mountain Complaint* at 9-11; *Mountain Brief* at 1-6; *Mountain Reply* at 4-7; *Mountain Opposition* at 3-10. Mountain contends for the first time in its briefs that Qwest's 26.2 percent "transiting factor" -- which estimates how much of the total traffic that Qwest transports to Mountain is transiting traffic -- is unreasonably high. See Mountain Communications, Inc.'s Opposition to Qwest's Motion to Dismiss, File No. EB-00-MD-017, at 10-11 (filed Jan. 10, 2001) ("*Mountain Opposition*"); *Mountain Reply* at 7; *Mountain Complaint*, Exhibit XXIII. Mountain failed to raise this issue in its complaint. Therefore, the record provides an inadequate basis on which to assess the merits of this potentially complex argument. Accordingly, we decline to address this assertion in this order. See, e.g., *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130, 16133 n.18 (2001) (declining to address an issue raised for the first time in the brief).

²⁷ See *Mountain Complaint* at 9-10; *Mountain Brief* at 3-5; *Mountain Opposition* at 4-5.

²⁸ See *Mountain Complaint* at 2-4, 6-7; *Mountain Opposition* at 5-6; *Mountain Brief* at 4.

²⁹ See *Mountain Complaint* at 5; *Mountain Opposition* at 7-8.

³⁰ See *Texcom Order*, ¶¶ 5-13. As the Commission indicated in *Texcom*, the CMRS carrier pays the interconnecting LEC for the costs of the portion of facilities used to transport transiting traffic from the interconnecting LEC's network to the CMRS carrier's network. The CMRS carrier may then seek reimbursement of the costs associated with transport and termination of that traffic from the carriers that originated the transiting traffic in question. See 47 U.S.C. § 251(b)(5); 47 C.F.R. §§ 51.701, *et seq.*

³¹ Our ruling effectively moots Qwest's Motion to Dismiss, in which Qwest sought dismissal of Mountain's claims that Qwest could not charge for transiting traffic. See Qwest Corporation's Motion to Dismiss Mountain Communication, Inc.'s Transit Claims, File No. EB-00-MD-017, at 14 (filed Jan. 2, 2001) ("*Motion to Dismiss*"). Accordingly, we dismiss the *Motion to Dismiss*.

C. Qwest May Lawfully Charge Mountain for Wide Area Calling.

11. As discussed earlier, section 51.703(b) of the Commission's rules bars a LEC from charging for the delivery of traffic that originates on the LEC's own network.³² In the *TSR Wireless Order*, the Commission found that, pursuant to section 51.703(b), a LEC may not charge CMRS providers for the delivery of LEC-originated traffic that originates and terminates within the same Major Trading Area ("MTA"), as this constituted local traffic under the Commission's rules.³³ The Commission noted, however, that nothing prevents a LEC from charging its end users for intraLATA toll calls that originate on its network and terminate over facilities that are situated entirely within a single MTA.³⁴ Thus, if a LEC end user makes a call from one local calling area to a paging customer whose number is assigned to a central office in another local calling area of the LEC, the LEC may assess the caller the appropriate toll set forth in its local tariff, even if both LEC calling areas are within the same MTA. Importantly, however, the Commission acknowledged in the *TSR Wireless Order* the possibility that a paging carrier might want to avoid having callers to its customers pay such toll charges. Thus, the Commission concluded that section 51.703(b) does not preclude a CMRS carrier and a LEC from entering into wide area calling or reverse billing arrangements where the CMRS carrier can "buy down" the cost of such calls to make it appear to the LECs' end users that they have made a local call rather than a toll call.³⁵ Moreover, the Commission concluded that its rules do not prohibit a LEC from charging the paging carriers for those services.³⁶ The Commission's conclusion that section 51.703(b) allows a LEC to charge for wide area calling or similar services was based on the fact that wide area calling services are not necessary for interconnection or for the provision of service by a paging provider to its customers, as well as the recognition that the Commission's rules do not require LECs to offer such services at all.³⁷

12. As noted above, the wide area calling arrangement at issue here involves Qwest's provision of dedicated toll facilities that connect Mountain's DID numbers in each of Qwest's local calling areas to Mountain's interconnection point in another Qwest local calling area. Thus, the calling customer in each of the local calling areas calls a local number to reach a Mountain subscriber and avoids incurring toll charges.³⁸ Mountain contends that Qwest violates the

³² 47 C.F.R. § 51.703(b).

³³ *TSR Wireless Order*, 15 FCC Rcd at 11177, ¶ 31. Mountain notes that section 51.701(b)(2) defined "local telecommunications traffic" as "telecommunications traffic between a LEC and a CMRS provider that, at the beginning of a call, originates and terminates within the same MTA. *Id.* The Commission's recent removal of the word "local" from section 51.703 does not alter the definition contained in section 51.701(b)(2). See *Reciprocal Compensation Remand Order*, 16 FCC Rcd at 9167, ¶ 34, and 9173, ¶ 46.

³⁴ *TSR Wireless Order*, 15 FCC Rcd at 11177, ¶ 31.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 11177, ¶ 30.

³⁸ See *Qwest Brief* at 10-12, Second Supplemental Declaration of Sheryl R. Fraser, at ¶¶ 7-8.

Commission's rules by charging Mountain for the dedicated toll facilities that Qwest uses to transport calls made to Mountain's interconnection point from outside of the Qwest local calling area where Mountain's interconnection point resides.³⁹ Mountain argues that, because a CMRS carrier's local calling area is an MTA, Qwest is not permitted to charge Mountain for facilities used by Qwest to deliver calls from anywhere within the MTA to Mountain's interconnection point.⁴⁰ Mountain similarly maintains that Qwest cannot charge it for facilities Qwest uses to deliver to Mountain's interconnection point calls made to DID numbers that are outside the Qwest-defined local calling area but within the same MTA, and the same LATA, because those facilities are used to deliver Qwest-originated traffic to Mountain.⁴¹

13. Based on the Commission's analysis of wide area calling arrangements in *TSR Wireless*, we agree with Qwest that the provision of dedicated toll facilities by Qwest to enable Mountain to offer its customers a local number in several local calling areas is an optional service that is not necessary for interconnection.⁴² We note that Mountain does not dispute that this service is not necessary for interconnection.⁴³ Moreover, although Qwest concedes that it must allow Mountain to interconnect without charge at any point within an MTA that is within the LATA,⁴⁴ Qwest disagrees that it must transport, free of charge, all calls made to Mountain within the MTA to Mountain's interconnection point. Qwest points out that, for those calls made by its end users in local calling areas outside the local calling area where Mountain's interconnection point resides, Qwest would ordinarily assess toll charges to those end users, pursuant to Qwest's General Exchange tariff in Colorado.⁴⁵ We agree with Qwest that, pursuant to the *TSR Wireless Order*, if Mountain wants to avoid having callers to its customers pay such charges to access Mountain's network, it may enter into a wide area calling arrangement with Qwest. Mountain has effectively entered into such an arrangement with Qwest by requesting dedicated toll facilities to transport calls made to DID numbers provided to Mountain's customers, free of charge to Qwest's customers. We, therefore, conclude that Qwest is not prohibited from assessing Mountain charges for such services.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, 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), 208, and sections 51.703(b) and 51.709(b) of the Commission's rules, 47 C.F.R. §§ 51.703(b) and 51.709(b), that Mountain's Complaint IS DENIED and that this proceeding IS TERMINATED as of the Release

³⁹ *Mountain Brief* at 7-9.

⁴⁰ *Id.* at 8.

⁴¹ *Mountain Brief* at 8.

⁴² *See Qwest Brief* at 10-12.

⁴³ *See Mountain Brief* at 7-9.

⁴⁴ *Qwest Brief* at 11.

⁴⁵ *Id.*

Date of this Order.

15. IT IS FURTHER ORDERED, 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), 208, that Qwest's *Motion to Dismiss* IS DENIED as moot.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau