

CT05-003
RECEIVED

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

APR 14 2005

Date Docketed APR 14 2005 500 East Capitol Building, Pierre SD 57501

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

COMPLAINT

Complainant(s) (Person(s) filing the complaint)		Respondent(s) (Person(s) or Company complained against) At a minimum, the name of the company	
Name	Eldon Lindquist Pierre Radio Paging & Telephone	Utility Company	QWest
Address	PO Box 99	Contact Person	Colleen Sevold
City, State, Zip	Pierre, SD 57501-0099	Address	125 South Dakota Ave. 8th floor
Work Phone	605-224-2848	City, State, Zip	Sioux Falls, SD 57194
Home Phone	605-224-2211	Phone	605-335-4596
Cellular Phone	605-280-7717	Fax	

If the Complainant is represented by an attorney, please list the attorney's name, address, telephone number and fax number below: (If Complainant is not represented by an attorney, please leave blank:

Thomas M. Maher 201 N. Euclid Ave., Pierre, SD 57501 605-224-0491 605-224-0493 Fax

These are the facts giving rise to my complaint:

See exhibit 1 and attachments

Please complete the reverse side of this document

NOTE: Please attach additional pages, if necessary, to explain your situation. Also enclose copies of any bills or other documents which may pertain to your complaint.

RESOLUTION REQUEST

I ask that the Public Utilities Commission grant the following remedy. (What do you think the Commission should do to solve your complaint? Be specific in your request for a resolution.)

See exhibit 1 and attachments.

NOTE: Please attach any additional pages, if necessary

AFFIRMATION STATEMENT

I hereby affirm that these statements are true and accurate to the best of my knowledge.

Ellen Seeger
Complainant's Signature(s)

4-14-05
Date

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon

Callan Sewall, PUE

605-339-5390

Sara Greff

4/14/05

1:55 P.M.

Exhibit 1

We received a letter from Qwest on July 25th 2000 in their response to the Federal Communications Commission (FCC) Memorandum Opinion & Order (MO&O) resolving complaints regarding charges for local interconnection facilities provided to one-way paging providers. Their position was that the MO&O was unlawful and would be overturned on appeal, but would comply with the FCC's decision in the mean time. Our response of August 2, 2000 was since that the Local Competition Order was made effective in November of 1996 that any adjustment to the billing affected by the MO&O should be refunded (including interest on unlawfully collected funds) back to November 1996.

On January 19, 2001 we received settlement proposal from Qwest as follows: Two year offer of 38% refund with no recourse if the order is reversed on appeal. Four year offer of 75% refund with recourse if order is reversed.

On February 12-2001 we responded that the full amount overpaid was \$23,296.47 and expect a full refund of this amount plus interest.

On June 21, 2001 we received letter from Qwest stating that they still object to the MO&O and waiting for pending appeal.

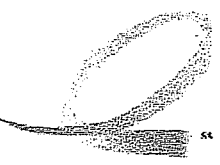
Any attempts by myself or attorneys have gone unanswered.

On January 16, 2004 the U.S. Court of Appeals ruled in favor of Mountain Communications in Mountain Communications v. FCC. I believe this ruling reinforces my position and I am seeking reimbursement in the amount of the original overpaid amount of \$23,296.47 plus interest.

I ask for help from the Public Utilities Commission to bring this matter to conclusion:

1. Determine if Qwest attempted to resolve this matter in a manner that complies with PUC policies and directives.
2. Review billing overcharges and determine a fair settlement.

USWEST is now

Qwest 

Qwest Corporation
Vickie Boone
Billing Manager/Wireless
250 Bell Plaza, Rm. 1001
Salt Lake City, Utah 84111
(801)239-4096

Rec
7-25-00

Dear Paging Provider:

The Federal Communications Commission ("FCC") recently issued a decision resolving several complaints regarding charges for local interconnection facilities provided to one-way paging providers ("*Memorandum Opinion and Order*"). You may want to familiarize yourself with this order.

Qwest Corporation (formerly U S WEST Communications, Inc.) has reviewed the *Memorandum Opinion and Order* and is implementing changes to its billing for the affected facilities to reflect the FCC's conclusions regarding charges for paging interconnection facilities. Specifically, the FCC held that incumbent local exchange carriers ("ILECs") such as Qwest may not assess charges for local interconnection facilities used to deliver traffic that originates on their network and is delivered to a paging provider. At the same time, the FCC clarified that ILECs are entitled to be compensated for so-called "transiting traffic" (*i.e.*, traffic that originates from a carrier other than the interconnecting LEC and is delivered to the paging provider) on local interconnection facilities, and facilities that are not essential for interconnection, as discussed further below.

While Qwest firmly believes the *Memorandum Opinion and Order* is unlawful and is confident it will be overturned on appeal, we are committed to complying with the FCC's decision in the meantime. Therefore, we will be eliminating charges for the portion of local interconnection facilities used to deliver traffic that originates on Qwest's network and terminates on your network. We will be implementing the billing changes to the network access channel charges on the August bill and the interoffice transport charges on the September bill. You will continue to be billed for transiting traffic at the applicable tariff or contract rates. A list of the transiting factors to be applied in each state is attached hereto. These transiting factors are the result of interconnection negotiations with paging providers and are not based on traffic studies. If you believe you may be entitled to a refund, then you should contact your account representative to discuss the issue.

Please be advised, however, that paging providers are obligated by the *Memorandum Opinion and Order* to continue paying for all facilities and services that are not essential for interconnection, pursuant to the terms and conditions of applicable

tariffs or contracts. These facilities include, but are not limited to, private lines, foreign exchange ("FX") facilities, Wide Area Calling services, 800 Pageline Services, diversity products, nonrecurring charges for Direct Inward Dialing ("DID") numbers, after-hours labor, and any retail lines. Qwest will continue to bill for these facilities and services at applicable tariff or contract rates, and will expect full and timely payment.

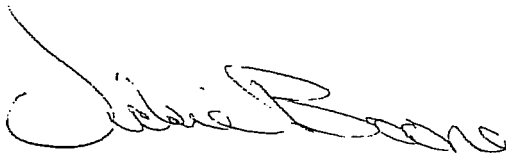
Moreover, the *Memorandum Opinion and Order* clarified that an ILEC is entitled to charge its own end users for toll calls that are delivered at no charge to paging providers. If a paging provider elects to "buy down" the cost of such toll calls to make it appear to the ILEC's end users that they have made a local call rather than a toll call, the ILEC is entitled to charge the paging provider for the arrangement (assuming an ILEC chooses to offer such an arrangement at all). Accordingly, you must immediately notify Qwest if you wish to reconfigure FX, wide area calling, reverse billing or 800 number arrangements in a manner that allows Qwest to collect toll charges from its own end users where appropriate and deliver its traffic to your network at no charge. Otherwise, you are obligated to continue paying the appropriate tariff or contract rates for these optional arrangements. We will consider the first 20 miles of Type 1 facilities to be local interconnection facilities and will bill that portion of the facilities based on the transiting factor.

You are further advised that Qwest will be filing state tariffs that specify the terms and conditions under which facilities and services will be provided to paging providers in light of the FCC's decision. If you have a more immediate need for local interconnection facilities, Qwest will provision such facilities pursuant to an interim provisioning agreement or state-approved interconnection agreement. To expedite the provisioning process, Qwest will work with you to gather the necessary information and prepare your service request at the same time as the parties negotiate the agreement. The interim provisioning agreement is being offered solely as a stopgap measure until the tariffs become effective. Once approved, you are free to purchase services out of the state tariffs and are not obligated to negotiate an interconnection agreement.

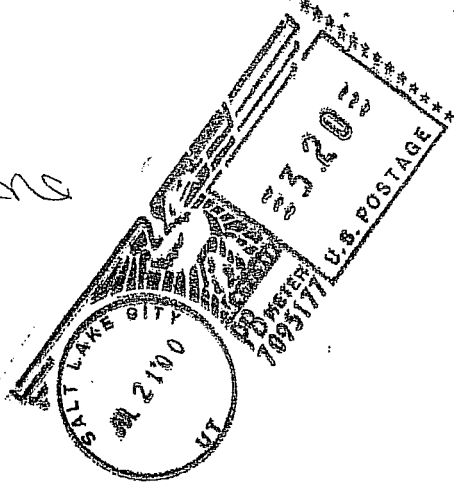
Finally, as noted above, Qwest believes that the *Memorandum Opinion and Order* violates both the Telecommunications Act of 1996 and other administrative and legal principles. Qwest also notes that the FCC's decision directly conflicts with various state commission orders and other state laws and regulations. Accordingly, you are hereby notified that the procedures outlined above relating to the provisioning of local interconnection facilities are being implemented by Qwest under protest. Further, you are hereby notified that no action being undertaken by Qwest or any statement made by Qwest to comply with the *Memorandum Opinion and Order* is to be construed as either (i) a waiver of Qwest's rights or (ii) Qwest's concurrence with the FCC's decision.

Thank you for your patience in working through the complexity of the *Memorandum Opinion and Order*. Should you have any questions, please do not hesitate to contact your account representative at (800)955-6714.

Respectfully,



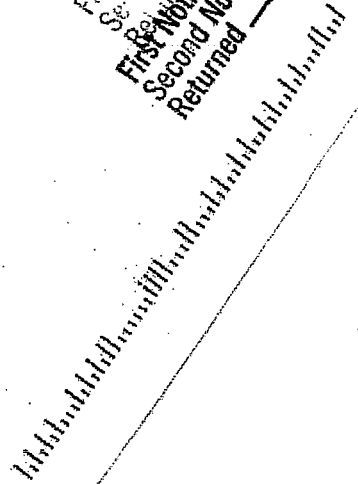
Vickie Boone



7000 0600 0028 8170 0836

Pierre Radio Paging & Tel
PO Box 99
Pierre, SD 57501

725
First Notice 7/5/00
Second Notice 7/10/00
Returned



USWEST
US WEST is now Qwest
Attn: Vickie Boone
250 Bell Plaza, Rm. 601
Salt Lake City, UT 84111

57501x0028

PIERRE RADIO PAGING & TELEPHONE INC.

1520 NORTH GARFIELD
P.O. BOX 99
PIERRE, SD 57501
(605) 224-2848

~
August 2, 2000

Vickie Boone
Billing Manager/Wireless
Qwest Corporation
250 Bell Plaza room 1001
Salt Lake City, Utah 84111
Telephone 801 239 4096

Re: Pierre Radio Paging & Telephone Inc., Pierre, South Dakota

Dear Vickie Boone,

Recently, you sent an undated letter, that was received on August 1, 2000, explaining Quest Corporation's response to the June 21, 2000 Federal Communications Commission's ("FCC") *Memorandum Opinion and Order* ("MO&O") regarding interconnection with one-way paging providers.

We appreciate your notification that Qwest will be implementing some of the mandates of the FCC's order. However, your letter did not clarify several issues.

First, The FCC's MO&O, in Paragraph 29 stated that: "The Local Competition Order made clear, however, that as of the order's effective date, LEC's had to provide LEC-originated traffic to CMRS carriers without charge." (Local Competition Order, 11 FCC Rcd at 16016). Since the Local Competition Order was made effective in November of 1996, any adjustment to the billing record for interconnection facilities affected by the MO&O should be refunded (including interest on unlawfully collected funds) or credited, back to November 1996. We herein request written confirmation that Qwest intends to credit or refund all of the charges made since November 1996 for interconnection facilities used by Qwest to deliver sent paid call traffic that was terminated on Pierre Radio's network.

Second, we disagree with Qwest's interpretation of the MO&O's conclusions concerning so-called "transiting traffic", (i.e., traffic that originates from a carrier other than the interconnecting LEC and is delivered to the paging provider). Sent paid call traffic, including any transit charges, is the responsibility of the originating carrier, or the toll carrier, as appropriate. In fact, it can be shown that Qwest is already being compensated for sent-paid transit traffic by the originating, or toll, carrier. Qwest cannot demonstrate that there is any forward-looking economic cost associated with delivering sent paid transit traffic to a paging carrier that is not recovered by existing compensatory arrangements. Therefore, any compensation paid to Qwest by a terminating paging carrier, for sent-paid "transiting traffic," would be an unlawful double recovery of costs by Qwest.

In addition, the "Transit Factors" attachment to your letter appears to be an attempt to somehow "justify" the unlawful double recovery of compensation for trunk facilities used to carry transit call traffic. You stated that the "transiting factors" listed, are "not based on traffic studies", but are the result of "negotiations with paging providers." It is not logical or reasonable to conclude that either the actual, or estimated, amount of "transit traffic," lawful or unlawful, can be calculated, "as the result of negotiations with paging providers".

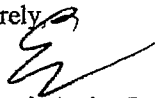
Third, your letter arbitrarily declares that, "We (Qwest) will consider the first 20 miles of Type 1 facilities to be local interconnection facilities..." Nowhere in the *Local Competition Order* or the MO&O is it specified that "Type 1 facilities" should be "limited" to 20 miles. The MO&O specifically states in

paragraph 31 that: "Section 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LEC's to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated, with the exception of RBOC's which are generally prohibited from delivering traffic across LATA boundaries." Paragraph 31 also states: "Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules." Thus we expect Qwest to deliver call traffic, without an arbitrary distance or interconnection type limitation, anywhere within a given LATA.

In summary, we herein request confirmation that Qwest intends to refund or credit unlawfully billed trunk facility charges back to November 1996. We also note Qwest's proposed "transit factors" related to trunk facilities and Type 1 trunk facility 20 mile distance limitations are unlawful.

Thank you for your cooperation and assistance.

Sincerely,



Eldon Lindquist, President
Pierre Radio Paging & Telephone, Inc.

Cc:

Mr. Daniel J. Culhane, Senior Attorney
Qwest Corporation (US West, Inc.)
Law Department
1801 California Street
Suite 5100
Denver CO 80202

Vic Jackson
Vic Jackson Interconnection Services
2377 Seminole Dr.
Okemos, MI 48864
e-mail <vicjackson@home.com>

USWEST[®] is now

Qwest[®]



Qwest Corporation
Vickie Boone
Billing Manager/Wireless
250 Bell Plaza, Rm. 601
Salt Lake City, Utah 84111
(801) 239-4096

January 19, 2001

Pierre Radio Paging & Telephone

VIA FACSIMILE:

Re: Pierre Radio Paging & Telephone/ Qwest Corporation

Recalculation of Billing Amounts Under *TSR Wireless* Decision and Settlement Proposal

Dear Eldon Lindquist

Revised Billing Reports

I am writing to provide the results of our recalculations and analysis of billing data for Pierre Radio Paging & Telephone in light of the Federal Communication Commission's (FCC's) *Memorandum Opinion and Order* issued in *TSR Wireless, L.L.C. v. U S WEST Communications* on June 21, 2000 (the "TSR Wireless Order").

Qwest Corporation (formerly U S WEST Communications, Inc.) has appealed the TSR Wireless Order to the Court of Appeals, District of Columbia Circuit. Qwest believes that the FCC will be overturned on appeal.

Nevertheless, Qwest is committed to complying with the FCC's decision in the meantime. Therefore, Qwest has prepared the enclosed reports to recalculate billing amounts for Pierre Radio Paging & Telephone under protest to comply with the FCC's directive. The billing reports reflect elimination of charges for the portion of local interconnection facilities used to deliver traffic that originated on Qwest's network and terminated on [Paging Provider's] network.

Preparation of the revised billing reports has proven complex and time-consuming. As you know, the TSR Wireless Order made clear that paging carriers must pay for facilities used to carry transiting traffic, as well as those facilities and services not necessary for interconnection. The revised billing reports reflect charges for facilities and services in accordance with the TSR Wireless Order.

Settlement Proposal

In addition to providing Pierre Radio Paging & Telephone with the billing reports, I am writing to convey Qwest's proposed settlement of these matters. Qwest's settlement proposal consists of two alternative offers, either of which may be elected by Pierre Radio Paging & Telephone. These alternative offers are the "Two Year Offer" and the "Four Year Offer." The terms of the offers are:

1. Settlement of Billing Disputes. Since passage of the Telecommunications Act of 1996, Qwest and Pierre Radio Paging & Telephone have disagreed regarding for which facilities and services the parties may charge each other, and the amounts of those charges. These disagreements are referred to in this settlement proposal as the "Billing Disputes."
2. Time Periods. You will note that the enclosed billing recalculations show two different summaries: the sheet entitled "Itemizations of Charges 8-98 thru 7-00" sets out a recalculation for a period going back two years, and the sheet entitled "11-96 thru 7-00" provides a recalculation of billing amounts all the way back to November 1, 1996, the effective date of the FCC's interconnection rules. These calculations relate to Qwest's alternative settlement offers.
 - a. Two-Year Offer: Qwest will agree to settle the Billing Disputes by [crediting Paging Provider] [refunding to Pierre Radio Paging & Telephone] the amount of \$8,913.00, as reflected in the two-year summary sheet enclosed. Qwest further agrees that even if the TSR Wireless Order is reversed on appeal, the settlement will not be affected and Qwest will not reinstate any charges covered by the settlement; or
 - b. Four-Year Offer: Qwest will agree to settle the Billing Disputes by [crediting Paging Provider] [refunding to Pierre Radio Paging & Telephone] the amount of \$17,673.00, as reflected in the four-year summary sheet enclosed. However, if the TSR Wireless Order is reversed on appeal, this settlement of the Billing Disputes will be cancelled and Qwest will reinstate charges that are part of the Billing Disputes.
3. Settlement Agreement. Under either option, the parties would enter into a confidential billing settlement agreement, providing for a complete release of all claims related to the Billing Disputes, except for the effect of an appellate reversal of the TSR Wireless Order as provided above. A draft of the confidential billing settlement agreement is enclosed.

Please note that in Qwest's view, Pierre Radio Paging & Telephone purchased the interconnection facilities in question pursuant to valid state tariffs. Qwest has prepared the enclosed recalculated billing reports, and has set out its offers stated above, under protest. Qwest does not waive its right to payment for facilities used by Pierre Radio Paging & Telephone, in

January 19, 2001

Page 3

accordance with the terms and conditions set out in lawful state tariffs, except as provided under the Two-Year Offer.

Pierre Radio Paging & Telephone may select a settlement option by initialing the chosen option on the enclosed agreement. The agreement should then be signed and sent back to me, and I will obtain Qwest's authorized signature.

Please provide a response within thirty days of the date of this letter. If you have any questions in the meantime, please call me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Vicki Boone", written in a cursive style.

Vicki Boone
Billing Manager

PIERRE RADIO

Itemization of Charges 8-98 thru 7-00

	Billing 8/98 thru 7-00	Total Revenue	Taxes 9/98 thru 7-00	Total Taxes	LPC	Payments	Misc Adjustments	Net	PLT Not Included Below:	
"Local" Facilities/Type 1	\$11,126	\$11,126	\$316	\$316	\$0			\$11,442	Billed	\$11,442
"Local" Facilities/Type 2	\$0	\$0	\$0	\$0	\$0			\$0	Rerate Credit	(\$8,650)
NonLocal Facilities/Type 1	\$0	\$0	\$0	\$0	\$0			\$0	Tax @ 3.0%	(\$259.51)
NonLocal Facilities/Type 2	\$0	\$0	\$0	\$0	\$0			\$0	LPC Adj	\$0
Total Intronnctn Facilities	\$11,126	\$11,126	\$316	\$316	\$0	\$0	\$0	\$11,442	Total Credit	(\$8,910)
800 PageLine/Type I	\$0	\$0	\$0	\$0	\$0			\$0	New Amt	\$2,632
Wide Area Calling	\$0	\$0	\$0	\$0	\$0			\$0	Payments	(\$11,445)
WAC Usage/Type II	\$0	\$0	\$0	\$0	\$0			\$0	Net	(\$8,913)
Total WAC/800 Pageline	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0		
Self-Healing Protection	\$0	\$0	\$0	\$0	\$0			\$0		
DID Number Activation	\$0	\$0	\$0	\$0	\$0			\$0		
Less DID Credits	(\$2,205)	(\$2,205)	(\$63)	(\$63)				(\$2,268)		
DID Number Reservation	\$0	\$0	\$0	\$0	\$0			\$0		
Misc	\$0	\$0	\$0	\$0	\$0			\$0		
Total Miscellaneous	(\$2,205)	(\$2,205)	(\$63)	(\$63)	\$0	\$0	\$0	(\$2,268)		
Total NonInterconnection	(\$2,205)	(\$2,205)	(\$63)	(\$63)	\$0	\$0	\$0	(\$2,268)		
Total	\$8,921	\$8,921	\$254	\$254	\$0	(\$11,445)	\$2,267	(\$3)		ADJUSTMENTS
Private Line	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	MISC ADJ	2,267.41
									TAX ADJ	0.00
									LPC ADJ	0.00
Grand Total	\$8,921	\$8,921	\$254	\$254	\$0	(\$11,445)	\$2,267	(\$3)	DID CREDIT	(2,205.00)
									PLTS ADJ	0.00
									TOTAL	62.41
NOTES:										
Facility formula:										
0-25 miles - local facilities										
26-50 miles - 1/2 local and 1/2 non local										
50+ miles - Non local facilities										
NAC - Local										
LPC Formula										

PIERRE RADIO

Itemization of Charges 11-96 thru 7-00

	Billing 11-96 thru 7-00	Total Revenue	Taxes 11-96 thru 7-00	Total Taxes	LPC	Payments	Misc Adjustments	Net	PLT Not Included Below:	
"Local" Facilities/Type 1	\$21,816	\$21,816	\$639	\$639	\$0			\$22,455	Billed	\$23,778
"Local" Facilities/Type 2	\$0	\$0	\$0	\$0	\$0			\$0	Rerate Credit	(\$17,158)
NonLocal Facilities/Type 1	\$0	\$0	\$0	\$0	\$0			\$0	Tax @ 3.0%	(\$514.75)
NonLocal Facilities/Type 2	\$0	\$0	\$0	\$0	\$0			\$0	LPC Adj	\$0
Total Intrcnctn Facilities	\$21,816	\$21,816	\$639	\$639	\$0	\$0		\$0	Total Credit	(\$17,673)
800 PageLine/Type I	\$0	\$0	\$0	\$0	\$0			\$0	New Amt	\$6,105
Wide Area Calling	\$0	\$0	\$0	\$0	\$0			\$0	Payments	(\$23,296)
WAC Usage/Type II	\$0	\$0	\$0	\$0	\$0			\$0	Net	(\$17,192)
Total WAC/800 PageLine	\$0	\$0	\$0	\$0	\$0	\$0		\$0		
Self-healing Protection	\$0	\$0	\$0	\$0	\$0			\$0		
DID Number Activation	\$2,100	\$2,100	\$62	\$62	\$0			\$2,162		
Less DID Credits	(\$3,015)	(\$3,015)	(\$88)	(\$88)				(\$3,103)		
DID Number Reservation	\$0	\$0	\$0	\$0	\$0			\$0		
Misc	\$0	\$0	\$0	\$0	\$0			\$0		
Total Miscellaneous	(\$915)	(\$915)	(\$27)	(\$27)	\$0	\$0		\$0	(\$942)	
Total NonInterconnection	(\$915)	(\$915)	(\$27)	(\$27)	\$0	\$0		\$0	(\$942)	
Total	\$20,901	\$20,901	\$613	\$613	\$0	(\$23,296)		\$2,265	\$481	ADJUSTMENTS
Private Line	\$0	\$0	\$0	\$0	\$0	\$0		\$0	\$0	MISC ADJ 2,264.50
										TAX ADJ 0.00
Grand Total	\$20,901	\$20,901	\$613	\$613	\$0	(\$23,296)		\$2,265	\$481	LPC ADJ (6.59)
										DID CREDIT (3,015.00)
										PLTS ADJ 0.00
										TOTAL (757.09)
NOTES:										
Actual payments for T1 received 12/96-7/2000 for Pierre Radio were \$23,296.47. Balance due in 11/96 was \$0.00, therefore only \$23,296.47 in payments apply to settlement period										LPC Formula 24,528
Facility formula:										
0-25 miles - local facilities										
26-50 miles - 1/2 local and 1/2 non local										
50+ miles - Non local facilities										
NAC - Local										

FAX COVER SHEET

DATE February 8, 2001

TO

Eldon Lindquist
Pierre Radio Paging & Telephone
FAX 605/224-1687
TEL 605/224-2848

FROM

Michael L. Higgs, Jr.
Schwaninger & Associates
FAX 202/659-0071
TEL 202/223-8837

SUBJECT

Draft Reply to Qwest

PAGES

4 page including this cover sheet. **Any problems with this transmission should be directed to our receptionist.**

COMMENTS

Eldon:

Please review the proposed response to Qwest's recent "settlement" offer. Once you have had the opportunity to look it over, let me know if you would like for us to fire it off, or if you would like to change the tone before sending.

Talk to you soon...Mike

mjh

*2-12-01
Mike
90
Answered*



Schwanger & Associates, P.C. Attorneys at Law

1331 H Street, N.W., Suite 500, Washington, DC 20005

Internet Address - <http://www.sa-lawyers.net>

telephone - (202) 347-8580

facsimile - (202) 347-8607

Robert H. Schwanger, Jr.
Michael L. Higgs, Jr.†
Delaney M. DiStefano
Benjamin J. Aron
Richard P. Hanno †
†Admitted in Maryland

Vic Jackson
Interconnection Consultant

February 8, 2001

via Registered Mail

Vickie Boone
Billing Manager/Wireless
Qwest Corporation
250 Bell Plaza room 1001
Salt Lake City, Utah 84111
Telephone 801 239 4096

DRAFT

Re: Qwest Settlement Proposal
Pierre Radio Paging & Telephone Inc., Pierre, South Dakota

Dear Ms. Boone:

We are in receipt of your letter dated January 19, 2001 that detailed results of Qwest's "recalculations" of billing amounts and analysis of billing data for Pierre Radio Paging & Telephone Inc. In this letter you refer to the Federal Communications Commission's ("Commission") *Memorandum Opinion and Order* issued in *TSR Wireless, L.L.C. v. US WEST Communications* on June 21, 2000 ("*TSR Wireless Order*").

The *TSR Wireless Order* was a clarification of previous Commission Orders with respect to charges for facilities used to deliver call traffic to CMRS carriers; it is not new law. The effective date of the Commission's Order regarding facility charges is therefore November 1996. Considering the significant time frames involved and the deliberate and calculated actions by Qwest in this matter, we believe Qwest has been, and continues to be, in violation of Commission rules. As noted in the *TSR Wireless Order*, the Commission's rules are very clear and unambiguous with respect to facilities charges:

DRAFT

The *Local Competition Order* made clear, however, that as of the order's effective date, LECs had to provide LEC-originated traffic to CMRS carriers without charge.¹ Accordingly, any LEC efforts to continue charging CMRS or other carriers for delivery of such traffic would be unjust and unreasonable and violate the Commission's rules, regardless of whether the charges were contained in a federal or a state tariff. On its effective date, given the clear language of the *Local Competition Order*, Defendants should not have doubted their obligation to cease charging Complainants for the facilities at issue here, regardless of whether Complainants subsequently requested interconnection negotiations pursuant to sections 251 and 252 of the Act.

In light of Qwest's serious and anticompetitive violations of Commission rules, we herein request that Qwest immediately credit all unlawful billings made to Pierre Radio Paging & Telephone Inc. and refund all monies paid as a result of those unlawful billing practices. Qwest's assertions that the amounts unlawfully billed by Qwest are a "billing dispute" is patently untrue. Clearly, any dispute over the Commission's authority in this matter is between Qwest and the FCC and not between Qwest and Pierre Radio Paging & Telephone Inc. Qwest's proposed "Confidential Billing Settlement Agreement" of these unlawful billings is both unwarranted and an affront to established business practice.

In addition, the Itemization of Charges 11-96 thru 7-00 statement does not provide any explanation for the acronyms LPC and PLT, nor is there any indication of how the \$17,192 amount, as mentioned in your Settlement Proposal, was calculated. We note that Qwest acknowledges receiving actual payments of \$23,296.47 from Pierre Radio Paging & Telephone Inc. for the time period from 12/96-7/2000 for the Qwest facilities used to deliver Qwest originated call traffic. We therefore expect a full refund/credit of this amount, plus interest, to be immediately made to Pierre Radio Paging & Telephone Inc. or we will have no choice but to file a complaint over this matter with the Commission.

Thank you for your attention to this matter. If you have any questions or concerns regarding this matter, please do not hesitate to contact undersigned counsel.

Very truly yours,

DRAFT

Michael L. Higgs, Jr.

MLH:sdl

¹ *Id. See Local Competition Order*, 11 FCC Rcd at 16016.

CC:

Mr. Daniel J. Culhane, Senior Attorney
Qwest Corporation (US West, Inc.)
Law Department
1801 California Street
Suite 5100
Denver CO 80202

Vic Jackson
Vic Jackson Interconnection Services
2377 Seminole Dr.
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DRAFT

June 22, 2001



CERTIFIED MAIL

PIERRE RADIO PAGING & TEL

Attn: Eldon Lindquist
P O Box 99
Pierre, SD 57501

Dear Eldon,

In July of last year we sent you a letter regarding the Federal Communications Commission's ("FCC") issuance of its June 21, 2000 Memorandum Opinion and Order resolving several complaints by paging providers concerning the charges of incumbent local exchange carriers ("ILECs") for local interconnection facilities (*Memorandum Opinion and Order*). In its July 2000 letter, Qwest stated that it would comply with the *Memorandum Opinion and Order* under protest, and would there make changes to its billings to paging providers to implement the FCC's decision. Qwest has made these billing changes, which were effective August 2000. Qwest has since appealed the *Memorandum Opinion and Order*, and the appeal is now pending in the federal appellate courts.

In the *Memorandum Opinion and Order*, the FCC held that "ILECs" such as Qwest may not assess charges for local interconnection facilities used to deliver traffic that originates on the ILEC's network and is delivered to a paging provider. At the same time, the FCC clarified that ILECs are entitled to be compensated for transiting traffic (i.e., traffic that originates from a carrier other than the interconnecting ILEC, transits the ILEC's network, and is delivered by the ILEC to the paging provider). Additionally, the *Memorandum Opinion and Order* clarified that an ILEC is entitled to assess toll charges to its customers that originate calls to paging providers, where such calls are carried over the toll network, but that the paging provider may establish a more ubiquitous local presence by "buying down" toll charges through services such as Wide Area Calling. Such services are available to paging providers as an alternative to establishing connections in each local calling area, or purchasing foreign exchange ("FX") facilities.

In anticipation of a very extended time for decision from the appellate courts, our July 2000 letter indicated Qwest would be filing state tariffs to specify the terms and conditions under which Qwest would provide facilities and services to paging providers in light of the FCC's decision. Because Qwest now expects relevant decisions to be made by the appellate courts within the next six months, we have decided to delay the tariff filings until the pending appeal of the FCC's decision is ruled on by the appellate courts. If the FCC's decision is upheld, Qwest will file the state tariff amendments. Meanwhile, Qwest will continue to comply under protest with the FCC's ruling.

Qwest understands the FCC's position to be that the FCC has preempted certain terms and conditions relating in ILEC state tariffs governing paging interconnection. As we stated in the July 2000 letter, if you have an immediate need for local interconnection facilities, Qwest will provision such facilities pursuant to an interim provisioning agreement or state-approved interconnection agreement. Unless you have an interim provisioning agreement or a interconnection agreement in place, charges and other terms for Qwest's facilities and services continue to be governed by applicable tariffs, except to the extent the FCC's decision has modified certain tariff terms and conditions.

Finally, as stated in its July 2000 letter, Qwest believes the *Memorandum Opinion and Order* violates Qwest's fundamental rights and other federal and state laws. Accordingly, you are hereby notified that Qwest continues to object to the *Memorandum Opinion and Order* and has implemented the FCC's decision under protest. No action being undertaken by Qwest or any statement made by Qwest to comply with the *Memorandum Opinion and Order* is to be construed as either (I) a waiver of Qwest's rights or (II) Qwest's concurrence with the FCC's decision.

Should you have any questions, please do not hesitate to contact your billing representative at (800) 955-6714.

Respectfully,



Bobbie R. Halverson

Product Manager – Paging Interconnection Services

cc: Vickie Boone, Wireless Billing Manager



1-28-04
Rsb

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Vic Jackson

Interconnection Consultant

January 28, 2004

Via Fax (605) 224-1677

Eldon:

The last time we talked about your interconnection matter I explained that we were hesitant to move the matter forward until we obtained a decision in the pending case, Mountain Communications v. FCC, since the outcome of that matter would have a direct relevance on your ability to obtain full relief from the LEC. Had we completed negotiation of your matter before the decision, we would have risked your leverage in the negotiations and likely would have had our chains jerked by the LEC.

Following herewith is a copy of the Mountain case that was just decided by the U.S. Court of Appeals. In sum, we won. Now we can stand up to the LECs without having our position undercut by the FCC's earlier, foolish decision. This case is a pure victory for many who were being abused by the LECs in negotiations.

Enjoy the read and we will move your matter forward based on the existing law created in Mountain, to get you a fair deal.

Robert

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 18, 2003 Decided January 16, 2004

No. 02-1255

MOUNTAIN COMMUNICATIONS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

T-MOBILE USA, INC. ET AL.,
INTERVENORS

On Petition for Review of an Order of the
Federal Communications Commission

Benjamin J. Aron argued the cause for petitioner. With him on the briefs was *Robert H. Schwabinger, Jr.*

Charles W. McKee argued the cause for Wireless Carrier intervenors T-Mobile USA, Inc., et al., in support of petition-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

er. With him on the briefs were *Luis A. Lencetti, Doanne F. Kiechel, Thomas J. Sugrue, David M. Wilson, Laura R. Hundman, Jonathon E. Canis, and Douglas I. Brandon.*

Stewart A. Block, Counsel, Federal Communications Commission, argued the cause for respondents. On the briefs were R. Hewitt Pata, Assistant Attorney General, U.S. Department of Justice, Catherine G. O'Sullivan and Nancy C. Garrison, Attorneys, John A. Rogovin, General Counsel, Federal Communications Commission, John E. Ingle, Deputy Associate General Counsel, and Laurel R. Bergold, Counsel.

Robert B. McKenna, Jr. argued the cause for intervenors Qwest Communications International Inc., et al, and amici curiae Verizon Telephone Companies. With him on the brief were Michael E. Glover, John M. Goodman, and Edward H. Shakin.

Before: SENTELLE and GARLAND, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge SILBERMAN*.

SILBERMAN, Senior Circuit Judge: Mountain Communications, Inc. is a paging carrier that petitions for review of an FCC order dismissing its complaint against Qwest—the local exchange carrier (LEC) serving the areas where Mountain operates—for charging petitioner two types of fees. The dispute between the carriers as to one of the fees evaporated at oral argument, but we hold that the FCC's decision as to the other was arbitrary and capricious.

I.

Mountain serves customers in three Colorado local calling areas: Colorado Springs, Walsenburg, and Pueblo. All three local calling areas are within the same Local Access and Transport Area (LATA), and Qwest is the provider of local service within each of those local calling areas. Calls from a Qwest customer to another Qwest customer in the same local calling area are local calls, but if a Qwest customer were to

call from one of these local calling areas to another, he or she would incur a toll.

Though Mountain services all three local calling areas, it uses a single point of interconnection (POI) with Qwest, as it is entitled by statute. See 47 U.S.C. § 251(c)(2)(B) (providing that LECs must provide interconnection facilities with other carriers "at any technically feasible point within the [incumbent local exchange] carrier's network"); see also 47 C.F.R. § 51.321(a); *In re: Developing a Unified Inter-carrier Compensation Regime*, 16 FCCR 9610, 9650-51 ¶ 112 (2001). The POI is located in Pueblo. Customers in each of the three calling areas have pager numbers associated with their individual local calling areas. It is therefore the paging customer's residence that correlates with the paging number, and a call from a telephone in a local calling area to a pager associated with the same local calling area will seem to the calling party to be a local call. But Mountain's maintenance of a single POI in Pueblo, however, means that every call to a Mountain customer, regardless of the place where the call originated, must pass through Pueblo before Qwest hands it off to Mountain and Mountain delivers it to the pager. Thus, a Colorado Springs resident attempting to page a Colorado Springs Mountain customer dials a Colorado Springs exchange, but the call is first routed to Pueblo before being re-routed to Colorado Springs.

Qwest has sought to collect fees from Mountain for these types of calls—calls that originate and terminate in Colorado Springs or Walsenburg but go through Mountain's POI in Pueblo. Qwest considers these calls to be toll calls, but does not charge its own customer—the caller—for placing such calls, perhaps because it lacks the technological ability to do so. See *Starpower Communications, LLC v. Verizon South, Inc.*, 2003 FCC LEXIS 6245, at *23 ¶ 17 (Nov. 7, 2003) (attributing such a technological incapacity to Verizon). Instead, Qwest determines whether a customer's call is a toll call by comparing the number of the caller with the number of the person receiving the call. If both are Colorado Springs numbers, Qwest does not charge the customer a toll even if the call is routed to Pueblo and then back to Colorado Springs.

Qwest claimed in response to Mountain's complaint before the FCC that it was entitled to charge Mountain for the tolls it was unable to charge its own customers. According to Qwest, Mountain could avoid the toll charges by establishing a POI in each of the three local calling areas—doubtless at an increased cost. Then, if a paging call were placed from a local number to another local number, no toll would be charged to anyone. If, on the other hand, a paging call were made from one local calling area to another, Qwest would transport the call to Mountain's POI—without crossing a local calling area boundary—at which time Mountain would assume responsibility for delivering the call across the local calling areas, presumably at Mountain's expense.

Mountain claimed before the FCC that the Commission's regulations, specifically 47 C.F.R. § 51.703(b), which states that LECs such as Qwest "may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network," prohibit Qwest from charging for transmitting calls from Qwest customers to Mountain's POI. Mountain also relied on a recent FCC decision, *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCCR 11166, 11184 ¶ 31 (2000), which interpreted that regulation and rejected a similar effort on the part of an LEC to charge a paging carrier for transmitting calls to the paging carriers' POI, where the POI and the caller are in the same LATA but different local calling areas.

The Commission rejected Mountain's contention. The FCC said that in its *TSR* decision it had cautioned,

nothing prevents [the LEC] from charging its end users for toll calls completed [between local calling areas]. Similarly, section 51.703(b) does not preclude [the paging carrier and the LEC] from entering into wide area calling or reverse billing arrangements whereby [the paging carrier] can "buy down" the cost of such toll calls to make it appear to end users that they have made a local call rather than a toll call.

15 FCCR at 1184 ¶31 (emphasis added). This buy-down arrangement is the same concept behind conventional 800 numbers, where the called party is billed for the toll ordinarily incurred by the calling party.

The Commission concluded that here, by establishing a POI in Pueblo and then asking Qwest for lines to connect local customer numbers in Walsenburg, Colorado Springs, and Pueblo to the POI, Mountain made it appear to Qwest customers that they were making local calls from Colorado Springs numbers to Colorado Springs paging numbers—even though they passed through a Pueblo POI. “By configuring its interconnection arrangement in this manner, Mountain prevents Qwest from charging its customers for what would ordinarily be toll calls to access Mountain’s network.” *Mountain Communications, Inc. v. Qwest Communications Int’l, Inc.*, 17 FCCR 15135, 15138 ¶5 (2002). The Commission determined that Mountain had obtained a wide area calling service, which is similar to a wide area calling arrangement, and therefore Qwest was entitled to charge Mountain for that service.

II.

Although petitioner does not quarrel with the Commission’s caveat in *TSR*—that the regulation does not prohibit a wide area calling arrangement—it insists that this case is no different than *TSR*; the Commission has simply turned 180 degrees without explanation, and adopted a position at odds with its own regulation and the statutory provision allowing Mountain to make use of one POI within a LATA. We are befuddled at the Commission’s efforts to explain away its *TSR* decision; the facts seem—and are conceded to be—identical, but the results are opposite. In *TSR*, the FCC prohibited US West, the LEC, from charging *TSR*, the paging carrier, for the costs of transporting calls from US West customers to *TSR*’s POI.¹ In that case, just as in the present situation, the paging carrier served separate local calling

¹ US West was the predecessor company to Qwest, the LEC involved in the present dispute.

areas (Yuma and Flagstaff, Arizona), both of which were within the same LATA and served by the same LEC. TSR used a single POI, and a US West customer wishing to page a TSR customer within the same local calling area would have to place a call that would be routed across local calling area boundaries. US West attempted, as Qwest attempts here, to charge the paging carrier a fee for transporting those calls to the paging carrier's POI. The FCC ruled that such a charge would violate 47 C.F.R. § 51.703(b), because the calls originated on US West's network, and an LEC may not charge another carrier for traffic originating on the LEC's network. See *TSR*, 15 FOCR at 11176 ¶18, 11181 ¶25, 11184 ¶31.² The FCC concedes that the facts of *TSR* are identical to those presented here, but argues that the present network configuration nevertheless may be considered wide area calling, even if the same configuration in *TSR* was not so considered.

The Commission's attempt to stretch the concept of a wide area calling arrangement (essentially an agreement) to a wide area calling "service" is logically inconsistent with its *TSR* decision.³ The premise, according to the Commission's *TSR*

² In the words of the Commission, "[s]ection 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to [wireless] providers anywhere within the MTA [Major Trading Area] in which the call originated. . . ." *TSR*, 15 FOCR at 11184 ¶31. An MTA is the area within which wireless providers offer service, and within which the FCC's reciprocal compensation rules apply. All three local calling areas at issue here are within the same MTA. Section 51.701(b)(2), to which the Commission referred, defines "telecommunications traffic" as that traffic "exchanged between a LEC and a [wireless] provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter."

³ Mountain argues that under Qwest's tariffs, wide area calling services exist only where the wireless carrier uses an interconnection known as Type 2. Mountain uses a Type 1 interconnection, which differs from Type 2 in that Mountain's customers have telephone numbers associated with their individual local calling

reasoning, of a wide area calling arrangement is that the LEC can charge a toll call to its customers. In that event the paging carrier has an incentive to "buy down" that charge so that Qwest's customer is not deterred by the toll from making a paging call. Here, for reasons not entirely clear to us, Qwest does not charge its customers for what it regards as a toll call if the originating number and the paging number are in the same local calling area. See generally *Starpower Communications*, 2003 FCC LEXIS 6245 at *23 ¶ 17 (Nov. 7, 2003) (noting that "industry practice among local exchange carriers . . . appears to have been that calls are designated as either local or toll by comparing the [phone numbers] of the calling and called parties").⁴ Accordingly, Mountain has no incentive to enter into a wide area calling arrangement with Qwest. Mountain's system of interconnection provides it no advantages other than those to which, presumably, it is entitled for free.⁵ The Commission nevertheless chooses to

areas instead of having numbers associated with the location of the POI, here, Pueblo. Before us, the FCC denies that there is any distinction between Type 1 and Type 2 interconnections for the purpose of establishing whether there is a wide area calling arrangement. We need not decide whether there can be a wide area calling arrangement in a Type 1 system, and our analysis does not turn on a conception of wide area calling being limited to Type 2 systems.

⁴ Mountain further argues that Qwest would not legally be permitted to charge for calls by Qwest customers to paging customers with numbers in the same local calling area as the caller. See 47 U.S.C. § 153(48) (allowing a "separate charge" beyond that required for local service for "telephone service between stations in different exchange areas") (emphasis added); 47 C.F.R. § 51.701(d) (defining a call's termination as the point at which the call is delivered to the called party). We need not decide whether the FCC could reasonably interpret the statute and regulation to allow a toll where a call begins and ends within a single local calling area but passes through a different one.

⁵ Neither in *TSR* nor in this case has the Commission suggested, or has Qwest claimed, that Qwest had any right to refuse to allow

term what Mountain has ordered from Qwest as wide area calling "service," which presto becomes a reasonable facsimile of a wide area calling agreement. The FCC's characterization of Mountain's arrangement as a wide area calling "service,"—sort of a constructive agreement—is rendered even more dubious by the fact that there are no additional services provided by wide area calling. The only difference between wide area calling and traditional telephony is the entity billed for the tolls.

Unfortunately for the Commission, the exact same analysis could have been applied in *TSR*—but was implicitly rejected. Therefore the Commission has, just as Mountain has claimed, changed direction without explanation, indeed without even acknowledging the change.

Perhaps more fundamental, by abandoning the concept of a buy-down agreement between the parties and simply designating the service Mountain obtained as a wide area calling service, the Commission seemingly comes into direct conflict with its own regulation. See *MCI Metro Access Transmission Servs. v. BellSouth Telecomms, Inc.*, No. 03-1238, 2003 U.S. App. LEXIS 25782, at *24 (4th Cir. Dec. 18, 2003) (holding that 47 C.F.R. § 51.703(b) "unequivocal[ly] prohibit[s] LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions"). In *TSR*, the Commission had interpreted its regulation 51.703(b), which prohibits LECs from assessing charges on other carriers for delivering traffic originating on the LEC's network, as not applying to a voluntary agreement that a paging carrier enters into with the LEC to compensate the LEC for foregoing its option to charge its customers. In other words, the Commission implicitly construed such an agreement as not a "charge" for telecommunications traffic but rather compensation for a separate benefit. The Commission described "wide area calling" as "a service in which a

Mountain to obtain paging numbers associated with each local calling area. See *In re: Numbering Resource Optimization*, 15 FCCR 7574, 7577 n.2 (2000) ("A carrier must obtain a central office code [the first three digits of a seven-digit phone number] for each rate center in which it provides service in a given area code.").

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." *TSR*, 15 FCCR at 11167 n.6 (emphasis added). But in this case the Commission abandoned that construction, instead allowing Qwest to charge Mountain for the wide area calling service it was deemed to enjoy, though there was no agreement. By shifting its characterization of the exception to § 51.703(b)'s prohibition on charges from an agreement to compensate LECs for a foregone opportunity, to a charge for the telecommunications traffic, the FCC decision appears to run afoul of § 51.703(b)'s prohibition on charges.

The Commission, moreover, has not even tried to explain how its position can be reconciled with the statutory provision, 47 U.S.C. § 251(c)(2)(B), which, it will be recalled, obliges an LEC to provide interconnection facilities with any other carrier at a single "technically feasible" POI. Mountain maintains that that statutory provision implicitly precludes an LEC from charging for such an interconnection, and the Commission has not responded to that argument. We do not, therefore, decide whether the Commission could reasonably interpret the statute to allow for such charges.

We therefore rather easily conclude that the Commission's decision on this issue is arbitrary and capricious. *See generally, e.g., Romapratish v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003).

III.

In addition to the charges Qwest has assessed for delivering Qwest-originated calls to Mountain's POI, Qwest has also assessed "transit" charges for the delivery of calls originated by a customer of an entirely different network. If a non-Qwest customer wishes to page a Mountain customer, the call is routed to Qwest. Qwest then carries the call on its network-in like manner as if a Qwest customer had placed the call to Mountain's POI. Mountain then assumes respon-

sibility for delivering the call to the Mountain customer. Qwest incurs costs for switching and routing these calls over the Qwest network, and Qwest charged Mountain for the last of five parts of those expenses—the cost of delivering the call from the Qwest end office switch to Mountain's POI. The FCC allowed Qwest to charge for this service, but indicated that Mountain could seek reimbursement from the originating carrier for whatever charges it paid to Qwest. *See Mountain Communications*, 17 FCCR at 15137 n.13. Mountain's petition challenged this FCC decision as well, claiming that the charge is arbitrary and capricious because it does not follow the standard practice of charging the cost of calls to the network of the party initiating the call. Mountain insisted that the prospect of reimbursement from the originating carrier was illusory, because Mountain never receives information from Qwest about which carrier initiates any individual call, and it is therefore impossible for Mountain to seek reimbursement from a third carrier.

It is undisputed that Qwest need not absorb these costs; the only question is whether Qwest can charge Mountain for one of the five portions of this cost or must instead look to the originating carrier for all of the costs. It might well be reasonable for the Commission to authorize Qwest to apportion those costs, but we do not understand why the Commission did so. It did not explain why it rejected Mountain's contention that the originating carrier should be charged for all the costs. In any event, by indicating that Mountain could charge the originating carrier, it suggested that Mountain was essentially correct in claiming that the originating carrier should bear *all* the transport costs. At oral argument, Qwest's counsel obviated any need for us to decide this issue by indicating that Qwest would provide Mountain with the information necessary so that Mountain could charge the originating carrier for reimbursement. Under those circumstances, Mountain dropped that part of its petition.

* * * * *

Accordingly, the Commission's order is vacated in part and the case is remanded.