

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Petition for Order Declaring South Slope)
Cooperative Telephone Company, Inc. an) WC Docket No. 04-347
Incumbent Local Exchange Carrier in the)
Iowa Exchanges of Oxford, Tifton and Solon)

**COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.**

Qwest Communications International Inc. (“Qwest”) respectfully submits these Comments in response to the Petition of South Slope Cooperative Telephone Company, Inc. (“South Slope”) to be declared an incumbent local exchange carrier (“ILEC”) in certain telephone exchanges in Iowa.¹ South Slope’s Petition implicates the same issues raised in a similar petition filed by Mid-Rivers Telephone Cooperative, Inc. (“Mid-Rivers”).² Qwest therefore supports South Slope’s request to include consideration of its Petition in the *Notice of Proposed Rulemaking* (“NPRM”) that the Federal Communications Commission (“Commission”) is considering with regard to Mid-Rivers’ petition or another *NPRM*.

In response to Mid-Rivers’ petition, Qwest filed an *ex parte* letter urging the Commission to address that petition in the context of a rulemaking, given the host of issues of first impression raised by the petition.³ Qwest noted that, within its territory alone, numerous rural telephone companies were overbuilding, or had announced plans to overbuild, exchanges served by Qwest,

¹ See *Public Notice*, DA 04-2871, rel. Sept. 3, 2004.

² See *In the Matter of Petition for Order Declaring Mid-Rivers Telephone Cooperative, Inc. An Incumbent Local Exchange Carrier in Terry, MT*, WC Docket No. 02-78, filed Feb. 5, 2002. *Petition for a Writ of Mandamus*, filed May 20, 2004, Case No. 04-1163 (D.C. Cir.).

³ *Ex Parte* letter from Craig J. Brown, Qwest, to Marlene H. Dortch, FCC, WC Docket No. 02-78, filed June 28, 2002. For the convenience of the Commission, Qwest has attached this *ex parte* submission to these Comments.

and that any decision with regard to Mid-Rivers would have at least presumptive effect in the event another rural company sought ILEC status in an overbuilt exchange.⁴ Of particular importance to Qwest, Mid-Rivers indicated that it intended to seek a study area waiver to add the affected Montana exchange to its existing study area. If such a waiver were granted, Mid-Rivers would receive significantly more high-cost support per-line than it and other eligible telecommunications carriers (including Qwest) receive in that exchange today.⁵ Such a result would be contrary to the Commission's current rule that all carriers competing for a given customer are entitled to the same universal service support.⁶ Mid-Rivers' petition also raised novel issues regarding the unbundling obligations that would apply to Mid-Rivers and Qwest if the petition were granted. In its opposition to a petition for writ of mandamus filed by Mid-Rivers, the Commission agreed that the issues implicated in Mid-Rivers' petition for reclassification are "novel and complex, and potentially far reaching in their effect."⁷

South Slope's Petition confirms the need for a rulemaking to address the issues raised by the Mid-Rivers and South Slope petitions, as well as similar petitions that are likely to follow. South Slope seeks ILEC status in three Iowa exchanges (in addition to its existing study area) and implies that it is considering overbuilding additional exchanges served by Iowa Telecom and

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *In the Matter of Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20480 ¶ 90 (1999), *rev'd sub. nom. on other grounds, Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). "To ensure competitive neutrality, we believe that a competitor that wins a high-cost customer from an incumbent LEC should be entitled to the same amount of support that the incumbent would have received for the line, including any interim hold-harmless amount." *Id.*

⁷ *Opposition of the Federal Communications Commission to Petition for a Writ of Mandamus*, filed Aug. 11, 2004, Case No. 04-1163, at 1 (D.C. Cir.). *See id.* at 10 (noting that the Commission's decision on Mid-Rivers' petition could have "national significance.") The

Qwest. South Slope acknowledges that the inclusion of the three exchanges to its existing study area would result in an increase in its high-cost universal service support, though it claims that its universal service funding would not change “materially.”⁸

Recognizing the Commission’s apparent intention to issue an *NPRM* on Mid-Rivers’ petition, South Slope requests that the Commission include its Petition in that *NPRM*, or issue a separate *NPRM* on South Slope’s Petition. Qwest supports this approach. In the context of a rulemaking, the Commission can consider the universal service and other significant issues raised by the petitions. In particular, the Commission should consider something akin to the sale of exchanges rule,⁹ whereby a carrier that is reclassified an ILEC in an area served by another ILEC would receive the same universal service support as the preexisting ILEC would have received in that area.

Respectfully submitted,

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October 4, 2004

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Commission also stated in its opposition that the Commissioners are currently voting on a draft *NPRM* that would address Mid-Rivers’ petition for reclassification. *Id.* at 1, 13.

⁸ South Slope Petition at 7.

⁹ *See* 47 C.F.R. § 54.305.



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FILED VIA ECFS

EX PARTE

June 28, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Letter – *In the Matter of Petition for Order Declaring Mid-Rivers Telephone Cooperative, Inc. an Incumbent Local Exchange Carrier in Terry, MT*, WC Docket No. 02-78

Dear Ms. Dortch:

On February 5, 2002, Mid-Rivers Telephone Cooperative, Inc. (“Mid-Rivers”) filed a petition seeking treatment as the incumbent local exchange carrier (“ILEC”) in the Terry, Montana telephone exchange. As explained below, Mid-Rivers’ petition raises significant issues regarding the Federal Communications Commission’s (“Commission”) local competition policies and the proper interpretation of section 251(h) of the Act.¹ Moreover, the ultimate relief that Mid-Rivers is pursuing—the incorporation of the Terry exchange into its ILEC study area and the NECA tariff—threatens to undermine the Commission’s principle that all carriers competing for a given customer are entitled to the same universal service support. Given these issues, it is questionable whether treating Mid-Rivers as the ILEC in the Terry exchange is consistent with the public interest, convenience, and necessity, as the Commission must find in order to designate Mid-Rivers an ILEC in the Terry exchange. Accordingly, before ruling on Mid-Rivers’ petition, the Commission should issue a notice of inquiry to gather a more complete record on the issues raised by Mid-Rivers.

I. The Commission Should Issue a Notice of Inquiry to Consider the Broad Implications of the Relief Sought by Mid-Rivers

Under section 251(h), the Commission may not treat a carrier as an ILEC in an area unless “such treatment is consistent with the public interest, convenience, and necessity and the purposes of [section 251].”² Before the Commission can determine whether this statutory

¹ 47 U.S.C. § 251(h).

² 47 U.S.C. § 251(h)(2)(C). The statute also requires that “(A) such carrier occupies a position in the market for telephone exchange service . . . that is comparable to the position

requirement is satisfied, the Commission must consider the multitude of issues raised by Mid-Rivers' petition, as well as the request for a study area waiver that Mid-Rivers intends to file.

Mid-Rivers' petition raises questions of first impression regarding the Commission's local competition policies and the application of section 251(h). As Western Wireless notes, inclusion of the Terry exchange in Mid-Rivers' study area could adversely affect other carriers' ability to provide service in that exchange as eligible telecommunications carriers ("ETCs"), unless they serve Mid-Rivers' entire study area.³ Furthermore, it is unclear whether the statute would require the state commission to apply a more stringent standard for allowing additional ETCs to be designated in the Terry exchange, given Mid-Rivers' status as a rural telephone company.⁴ There is a strong argument that this provision should not apply in this case, even if Mid-Rivers is treated as an ILEC. Mid-Rivers' petition also implicates the issue whether the same unbundling requirements should apply to Mid-Rivers in the Terry exchange as apply to Qwest in that area, or, as Mid-Rivers will likely contend, it is subject to the exemption in section 251(f)(1) of the Act.⁵ Whatever policy the Commission adopts with regard to Mid-Rivers would presumptively apply to similar petitions filed in the future. Resolution of these policy questions will have wide-ranging consequences, and the Commission should not decide them without a more complete record.

Resolution of Mid-Rivers' petition also requires the Commission to resolve two issues of statutory interpretation regarding section 251(h). *First*, the Commission must determine whether the statute allows Mid-Rivers to be designated as an ILEC for the Terry exchange alone, as Mid-Rivers seeks, or, more reasonably, for the entire service area for which it has been designated an ETC in Qwest's study area. *Second*, if Mid-Rivers is designated an ILEC in the Terry exchange, the Commission will need to consider whether Qwest should cease to be an ILEC in that area. According to the petition, Mid-Rivers serves 97 percent of the access lines in Terry.⁶ Moreover, Mid-Rivers implies that it is seeking to become the sole ILEC in the Terry exchange, by requesting that it be "treated as *the* incumbent local exchange carrier . . . in the Terry, Montana telephone exchange."⁷ In any case, this is an issue that the Commission has not had to face in ruling on past petitions, such as that filed by Guam Telephone Authority, where there was no preexisting ILEC. As with the local competition issues noted above, this statutory interpretation is likely to apply to other carriers and therefore should be addressed on the broader record that would result from a notice of inquiry.

occupied by [an ILEC]; [and] (B) such carrier has substantially replaced an [ILEC]." *Id.* § 251(h)(2).

³ Opposition of Western Wireless at 2.

⁴ 47 U.S.C. § 214(e)(2).

⁵ 47 U.S.C. § 251(f)(1). *See* Opposition of Western Wireless at 2.

⁶ Petition at 2.

⁷ *Id.* at 1 (emphasis added).

The Commission also must consider the ultimate relief sought by Mid-Rivers, and at a minimum make clear that its decision on the instant petition does not extend to or indicate any predisposition about relief it may later seek. Specifically, in its petition, Mid-Rivers indicates that the relief sought in this petition—to be declared the ILEC in the Terry exchange—is just a stepping stone to incorporate the Terry exchange into its ILEC study area and the NECA tariff, each of which would have significant regulatory impacts.⁸ Allowing Mid-Rivers to incorporate the Terry exchange into its study area presumably would entitle Mid-Rivers to universal service support in that exchange computed by the rural universal service support mechanism, resulting in much higher universal service support than it currently receives in the Terry exchange under the non-rural support mechanism.⁹ Moreover, permitting Mid-Rivers to include the Terry exchange in the NECA tariff will enable it to provide services in that exchange subject to rate-of-return regulation, even though Qwest is subject to price cap regulation.

Allowing Mid-Rivers to obtain such relief in the Terry exchange would likely trigger a slew of similar requests from Mid-Rivers and other similar ILECs. Qwest is aware of at least 20 areas within its in-region service territory where a rural ILEC has overbuilt Qwest's local telephone network and gained a substantial market share. In Montana alone, Mid-Rivers and other rural ILECs have overbuilt and obtained substantial market share in at least three communities served by Qwest, and additional build-out is underway. For example, Three Rivers Telephone Cooperative intends to begin offering service this fall in Shelby, MT, which has more than 2,000 access lines.¹⁰ Qwest expects that rural ILECs are likewise overbuilding in non-rural service territories in other parts of the country as well. If Mid-Rivers is treated as an ILEC in the Terry exchange and that treatment ultimately results in a dramatic increase in its universal service support, the Commission can expect rural carriers to file similar petitions for other areas they have overbuilt. Such a decision may also create incentives for rural ILECs to expand into adjacent areas simply to increase their universal service support, thus undermining the

⁸ Mid-Rivers states that, upon grant of the petition, it will promptly file a petition for waiver of the frozen study area rules and whatever other documents are necessary to incorporate the Terry exchange into its existing rural ILEC study area and the NECA tariff. Petition at 3.

⁹ In the third quarter of 2002, ETCs are projected to receive monthly universal service support of approximately \$26 per line when serving customers in the Terry exchange. See USAC Website: <http://www.universalservice.org/overview/filings/2002q3/HC11%20Projected%20HCM%20Support%20by%20Wire%20Center%203Q02.xls> (Appendix HC 11). In contrast, Qwest estimates that Mid-Rivers is projected to receive approximately \$45 per line of support in its existing study area in the third quarter. See USAC Website: <http://www.universalservice.org/overview/filings/2002q3/HC04%20Projected%20Monthly%20Loop%20Support%20by%20State%203Q02.xls> (Appendix HC 4).

¹⁰ See *\$5 Million Plant Coming to Shelby; 3 Rivers Building Phone Facility*, Great Falls Tribune (May 9, 2002) (construction to begin in June with telephone, Internet and other services available as early as October).

Commission's past efforts to avoid such outcomes.¹¹ Cumulatively, these increases could put significant pressure on the rural universal service fund.

Given the broad legal and policy issues raised by Mid-Rivers' petition, the Commission should initiate a notice of inquiry to create a fuller record to address these issues. Before ruling on the relief sought by Mid-Rivers, the Commission should determine the number of similarly-situated carriers that are likely to request relief similar to Mid-Rivers. This is particularly important given the potential impact on the universal service fund. In addition to the opportunity to gather factual information, a notice of inquiry will allow the Commission to compile a more fully developed record on the legal questions noted above, including the unbundling requirements that should apply to a carrier that is treated as an ILEC in the study area of a non-rural ILEC and whether the "new" ILEC becomes the sole ILEC in that area.

II. At a Minimum, the Commission Should Affirm that Mid-Rivers, Qwest, and Any Other ETC Will Continue to Receive the Same Per-Line Universal Service Support in the Terry Exchange

As noted above, the most prudent course in this proceeding would be for the Commission to issue a notice of inquiry to gather more information and compile a better record for addressing the significant legal and policy issues raised by Mid-Rivers' current petition and the study area waiver it intends to file once the present petition is granted. Nevertheless, even if the Commission decides to rule on Mid-Rivers' petition without issuing a notice of inquiry, the Commission must ensure that universal service support continues to be distributed in a competitively-neutral manner in the Terry telephone exchange. Thus, all carriers—Mid-Rivers, Qwest, or any other ETC—must receive the same universal service funding when serving a customer in the Terry exchange.

Since the passage of the 1996 Act, the Commission has consistently held that the Act requires that the same level of universal service support be available to all ETCs serving customers in a particular geographic area. In the *First Report and Order*, the Commission established "competitive neutrality" as a fundamental principle underlying its implementation of section 254, dictating that the Commission's universal service support mechanisms and rules must neither unfairly advantage or disadvantage one provider over another.¹² Accordingly, the

¹¹ See, e.g., *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8942-43 ¶ 308 (1997) ("*Universal Service First Report and Order*"), *aff'd in part, rev'd in part, remanded in part sub nom.* Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999), *cert. denied in part*, 530 U.S. 1210 (2000), and *cert. granted in part*, 531 U.S. 1124 (2000), *cert. dismissed* 531 U.S. 975 (adopting rule whereby purchaser of exchange receives same universal service support as seller of exchange, in order to discourage carrier from placing unreasonable reliance upon potential universal service support in deciding whether to purchase exchanges from other carriers).

¹² *Universal Service First Report and Order*, 12 FCC Rcd at 8801-02 ¶¶ 46-48.

Commission made high cost universal service support “portable” to all ETCs serving customers in an ILEC’s study area.¹³ In the *Ninth Report and Order*, the Commission reiterated this principle and specified that the same amount of universal service support should be available to competing ETCs: “To ensure competitive neutrality, we believe that a competitor that wins a high-cost customer from an incumbent LEC should be entitled to the same amount of support that the incumbent would have received for the line, including any interim hold-harmless amount.”¹⁴ The Commission reasoned that unequal federal funding could discourage competitive entry in high-cost areas and stifle a competitor’s ability to provide service at rates competitive to those of the incumbent.¹⁵ Finally, in the *Rural Universal Service Order*, the Commission confirmed that the same portability rules apply to study areas served by rural ILECs.¹⁶

There is no basis for departing from the principle of competitive neutrality here. Allowing Mid-Rivers to receive more per-line support than Qwest in the Terry exchange would unfairly undermine Qwest’s ability to compete for customers in Terry.¹⁷ Moreover, Mid-Rivers asserts that it has already constructed outside plant facilities in Terry to provide basic telephone service and offers “significant additional services such as DSL, Internet, ITV to the school, and CLASS.”¹⁸ Thus, in deciding to offer service in Terry, Mid-Rivers apparently believed it could profitably do so based on the universal service support available from the non-rural fund. As noted above, allowing Mid-Rivers to obtain unjustified increases in its universal service support purely because it is a rural ILEC will create inefficient incentives for entry, as well as negative impacts on the rural support mechanism.

III. Conclusion

Mid-Rivers’ petition raises significant legal and policy issues that should be addressed in the context of a broader proceeding that assesses the overall impact of the requested relief on the Commission’s local competition policies. Moreover, the ultimate relief sought by Mid-Rivers threatens the Commission’s fundamental policy of competitive neutrality regarding the

¹³ *Id.* at 8932-34 ¶¶ 286-90.

¹⁴ *In the Matter of Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20480 ¶ 90 (1999), *rev’d sub. nom.* Qwest Corp. v. FCC, 258 F.3d 1191 (10th Cir. 2001).

¹⁵ *Id.*

¹⁶ *In the Matter of Federal-State Joint Board on Universal Service; Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11291 ¶ 114 (2001).

¹⁷ In fact, Mid-Rivers already enjoys significant advantages over Qwest as a telephone cooperative, including tax exemptions and higher exchange access revenues.

¹⁸ Petition at 2.

Ms. Marlene H. Dortch
Federal Communications Commission
June 28, 2002
Page 6 of 6

availability of universal service support. Before taking any action on Mid-Rivers' petition, the Commission therefore should issue a notice of inquiry to consider these issues in the broader context they deserve.

Sincerely,

/s/ Craig J. Brown

cc: Michelle Carey
Katherine Schroder
Ian Dillner

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served, via e-mail on Ms. Janice M. Myles of the Wireline Competition Bureau, Competition Policy Division, at janice.myles@fcc.gov, 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com, and 4) served, via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

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October 4, 2004

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