

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent	)	WC Docket No. 02-78
Local Exchange Carrier in Terry, Montana	)	
Pursuant to Section 251(h)(2)	)	

**Comments of TCA, Inc. – Telcom Consulting Associates**

**I. INTRODUCTION AND SUMMARY**

TCA, Inc. - Telcom Consulting Associates (“TCA”) hereby submits these comments in response to the Notice of Proposed Rulemaking<sup>1</sup> and Public Notice<sup>2</sup> issued in the above-captioned proceeding.

TCA is a consulting firm that performs financial, regulatory, management, and marketing services for over eighty small, rural local exchange carriers (LEC) throughout the United States. Many of TCA’s clients operate competitive LECs, in a similar fashion to Mid-Rivers Telephone Cooperative, Inc. (“Mid-Rivers”). Therefore, the issues raised in the NPRM are of importance to TCA’s clients – both rural ILECs and rural CLECs.

There can be no doubt that the issues being addressed in this proceeding are those of first impression. While situations similar to Mid-Rivers’ have undoubtedly arisen since 1996, to TCA’s knowledge no filings have been previously made asking the Commission to implement 47 U.S.C. § 251(h)(2). While the Commission is correct in proceeding with some level of caution before designating a competitive carrier as the (or an) incumbent, the time has come to make a decision in this case – Without a decision, the consumers residing in Terry, Montana who stand to benefit from Mid-Rivers’ incumbency, will be harmed.

TCA urges the Commission to grant Mid-Rivers’ petition as quickly as possible. TCA notes that Mid-Rivers filed its petition on February 5, 2002, and it is reasonable for any regulated

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<sup>1</sup> *In the Matter of Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, Notice of Proposed Rulemaking, released November 15, 2004 (NPRM)

<sup>2</sup> *Public Notice* (DA 04-3789), issued November 30, 2004, WC Docket No. 02-78

entity to expected a decision before thirty-three months. The issues revolving around this petition are well-documented, and provide the Commission with ample reason to quickly grant Mid-Rivers' request to be designated the ILEC in Terry, Montana.

## II. MID-RIVERS MEETS SECTION 251(h)(2)(A) CRITERIA

Section 251(h)(2)(A)<sup>3</sup> requires that, in order to be designated an incumbent in Terry, Montana, Mid-Rivers must occupy "a position in the market for telephone services within an area that is comparable to the position occupied" by Qwest, the current incumbent.<sup>4</sup> In the NPRM, the Commission delineates this requirement into two issues: 1) the definition of the "area" Mid-Rivers must serve, and 2) whether Mid-Rivers occupies a position in the market comparable to Qwest.

### A. The Relevant "Area," for Purposes of this Proceeding, is the Terry, Montana Exchange

In the NPRM, the Commission seeks comment on how to define the "relevant" area for purposes of Section 251(h)(2)(A).<sup>5</sup> Options provided by the Commission are: 1) any area of the ILEC, including an area as small as an exchange, or 2) all or a significant part of the legacy ILECs' service area.<sup>6</sup>

Qwest raised this issue by asking "whether the statute allows Mid-Rivers to be designated as an ILEC in 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."<sup>7</sup> The Commission seemingly raises Qwest's concern to another level by mentioning that Qwest operates as an ILEC in thirteen other states,<sup>8</sup> implying that, perhaps, Mid-Rivers should be held to some unattainable standard, based on Qwest's enormous service area, before being designated the ILEC in Terry, Montana.

TCA agrees with Mid-Rivers that the raising of this issue is "frivolous."<sup>9</sup> First, in no way should a competitive LEC seeking designation as an ILEC under Section 251(h)(2) in an area

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<sup>3</sup> 47 U.S.C. § 251(h)(2)(A)

<sup>4</sup> Qwest, formerly known as US West, received its incumbent LEC status by virtue of meeting the definition contained in Section 251(h)(1).

<sup>5</sup> NPRM, at ¶ 7

<sup>6</sup> *Id.*

<sup>7</sup> Qwest *Ex Parte* Letter, dated June 28, 2002, at page 2

<sup>8</sup> NPRM, at ¶ 7

<sup>9</sup> Mid-Rivers *Ex Parte* Letter, dated April 23, 2003, from David Cosson, attachment at page 2

served by a non-rural carrier be required to serve an area as large as the non-rural ILEC's state study area, let alone an area based on the non-rural ILEC's nationwide service area. A requirement of this sort is completely contrary to the competition and universal service provisions contained in the 1996 Act, and would conflict with the Commission's rules regarding designation of competitive eligible telecommunications carriers (CETCs). As the Commission is well aware, CETCs are only required to serve an area designated by the state commission. In Montana, Mid-Rivers has been designated a CETC in six Qwest *exchange* areas, meaning the Montana Public Service Commission (Montana PSC) has decided that, for purposes of CETC designation, the applicable service area is equal the individual exchanges served by Qwest. Further, even Qwest's misplaced concern over the definition of "area" appears to only reach to the six exchange areas in which Mid-Rivers has been designated a CETC, not its entire thirteen-state service area.

Therefore, given the fact that Mid-Rivers is designated a CETC in six individual Qwest exchanges, and that Qwest's federal universal service support is calculated at the exchange level,<sup>10</sup> the Commission can only find the Terry, Montana exchange area as the area in which Mid-Rivers must occupy a position similar to Qwest's.

**B. Mid-Rivers Clearly Occupies a Position "Comparable" to Qwest in the Terry, Montana Exchange Area.**

TCA agrees with the Commission's tentative conclusion that Mid-Rivers occupies a position in the Terry, Montana telephone service market that is comparable to the position held by Qwest.<sup>11</sup> While the term "comparable" is not defined in the context of Section 251(h)(2)(A), the fact that Mid-Rivers serves over ninety percent of the customers in Terry, and has been designated an ETC in Terry, strongly argues that Mid-Rivers occupies a position similar to that of Qwest's. In essence, Mid-Rivers and Qwest are both available as ubiquitous providers of telephone services in Terry, Montana.<sup>12</sup>

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<sup>10</sup> Since Qwest's support is calculated at the exchange level, there can be no concerns of Mid-Rivers attempting to "cream-skim"

<sup>11</sup> *NPRM*, at ¶ 8

### III. MID-RIVERS MEETS SECTION 251(h)(2)(B) CRITERIA

Section 251(h)(2)(B)<sup>13</sup> requires that, in order to be designated an incumbent carrier in Terry, Montana, Mid-Rivers must substantially replace Qwest, the current ILEC. TCA concurs with the Commission's tentative conclusion that Mid-Rivers has met this requirement by virtue of serving ninety-three percent of the subscribers in the Terry, Montana exchange.<sup>14</sup> It is difficult to contemplate an easier finding for the Commission to make.

### IV. MID-RIVERS SATISFIES THE REQUIREMENTS OF SECTION 251(h)(2)(C)

#### A. Mid-Rivers' Petition is Consistent with the Public Interest, Convenience, and Necessity.

Section 251(h)(2)(C)<sup>15</sup> requires that, in order to be designated an incumbent carrier in Terry, Montana, Mid-Rivers' request must be consistent with the public interest, convenience, and necessity. The Commission invites comment on a number of possible public interest considerations, including 1) if reclassifying CLECs as ILECs, in situations similar to the one being addressed in this proceeding, will better serve the local competition provisions of the 1996 Act; 2) whether there are benefits to both consumers and potential competitors of the advanced telecommunications capabilities likely to be deployed by Mid-Rivers; and 3) if universal service considerations should affect the public interest in the instant proceeding.

While the above issues appear to be relevant to the public interest test contained in Section 251(h)(2)(C) in a global sense, it appears that, in the instant case, the public interest test is one that is effortlessly passed. In Terry, Montana, ninety-three percent of the telephone service-consuming public has spoken – Mid-Rivers is the preferred carrier. Therefore, it certainly appears that classifying Mid-Rivers as the incumbent is wholly consistent with the public interest, convenience, and necessity.

Another consideration under the public interest test should be whether the consumers in Terry, Montana will be better off once Mid-Rivers is designated the ILEC. The Commission, in

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<sup>12</sup> See Mid-Rivers' Petition, at page 3: "...Mid-Rivers is ready, willing and able to undertake the obligations of an incumbent."

<sup>13</sup> 47 U.S.C. § 251(h)(2)(B)

<sup>14</sup> NPRM, at ¶ 9

<sup>15</sup> 47 U.S.C. § 251(h)(2)(C)

essence, has already answered this question when it stated: “We believe there may be benefits both to consumers and potential competitors in the technical capabilities of Mid-Rivers’ network, especially in comparison to the existing incumbent LEC.”<sup>16</sup> The evidence on record in this proceeding demonstrates that the public in Terry, Montana will be better off with Mid-Rivers as the incumbent provider.<sup>17</sup> Mid-Rivers will be better able to serve its Terry customers once it can combine its CLEC and ILEC operations, and include Terry in its currently-existing study area. Moreover, the Montana PSC, in comments supporting Mid-Rivers’ petition, states unequivocally that Mid-Rivers’ petition is in the public interest because, among other reasons, “Mid-Rivers’ network in Terry is superior to Qwest’s network.”<sup>18</sup>

### **B. No Harm to Current or Potential Competitors Will Occur**

The Commission appears to be concerned about potential harm that could occur to existing competition in Terry if Mid-Rivers’ petition is finally granted.<sup>19</sup> As noted by this Commission and the Montana commission, Mid-Rivers’ superior network in Terry will allow competitors to connect to a more capable network.<sup>20</sup> Additionally, concern over whether Mid-Rivers, if granted the incumbency in Terry, will invoke the rural exemption afforded RLECs under Section 251(f)(1) of the Act, is misplaced and overblown. The exemption afforded RLECs under Section 251(f)(1) is not permanent, and can be revoked by the Montana PSC, if it sees fit. Finally, any concern expressed by Western Wireless, also a CETC in the Terry, Montana exchange, over the ability of such “competitors” to enter the Terry market<sup>21</sup> should be promptly ignored. Western Wireless’ self-serving arguments are nothing more than an attempt to ensure its gravy train of universal service support continues on the track, unimpeded. Western Wireless is not a competitor in the sense being discussed in this proceeding – offering consumers improvement in their telecommunications service lot – but instead only “competes” for USF support.

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<sup>16</sup> NPRM, at ¶ 10

<sup>17</sup> See Mid-Rivers petition at page 1. TCA is unable to find any rebuttal to facts presented in Mid-Rivers’ petition regarding the service being provided by Qwest.

<sup>18</sup> *Comments of the Montana Public Service Commission*, WC Docket No. 02-78 (dated December 21, 2004), at page 3

<sup>19</sup> NPRM, at ¶ 10

<sup>20</sup> *Id.*

<sup>21</sup> *Opposition of Western Wireless Corporation*, WC Docket 02-78 (filed May 6, 2002) at page 1

### C. Universal Service Fund Support Issues

TCA rejects the consideration of universal service fund support issues in this specific proceeding. The amounts at stake are insignificant, and no evidence has been presented that the net impact on the federal USF mechanisms will be adverse.<sup>22</sup> However, the Commission raises some interesting issues that deserve thoughtful response.

The Commission asks whether, in cases where the CLEC is designated the ILEC under Section 251(h)(2), USF support should be limited in a similar fashion to when the legacy ILEC's facilities are purchased.<sup>23</sup> TCA opposes this proposal in the instant proceeding, for reasons noted in prior comments filed with the Commission.<sup>24</sup> If Mid-Rivers is reclassified as the ILEC in Terry, Montana, includes Terry in its currently-existing study area, and its costs are such that USF support will increase to provide quality telecommunications service of the like customers in Terry have never seen, then its support should be based on its cost of providing universal service. The Commission's support limitation rules, in the event of transfers of exchanges, already provide a disincentive for certain types of transactions and resulting investment. These same rules should not be mistakenly applied to CLEC to ILEC conversions under Section 251(h)(2), certainly not when the price is decreased service quality to consumers.

### V. MID-RIVERS SHOULD BE DESIGNATED THE ILEC IN TERRY, MONTANA

The Commission recognizes the unique circumstances of this proceeding when it asks how Qwest, as the deposed ILEC in Terry, Montana, should be treated from a regulatory standpoint. There are two basic alternatives for the Commission to consider: 1) declare Qwest a non-dominant, competitive carrier in Terry, or 2) declare Mid-Rivers an additional ILEC.

TCA can see no convincing reason, or rational method, for having two incumbent LECs designated in one service area. The very term incumbent implies one carrier that is responsible for serving all requesting customers. Just as there can only be one carrier of last resort, there can only be one incumbent LEC in Terry, Montana. Declaring two ILECs in one exchange area could also have longer term impacts, such as when both carriers are member of the NECA access

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<sup>22</sup> TCA notes that Mid-Rivers is already a CETC in the exchange at issue, and therefore, the impact on the federal fund would be negligible. This Commission and many state commissions routinely award CETC status to wireless carriers while noting a far greater impact on the fund.

<sup>23</sup> See 47 CFR § 54.305, "Sale or Transfer of Exchanges"

<sup>24</sup> See Comments of TCA, filed October 15, 2004 in CC Docket No. 96-45, at pages 8-9 (TCA believes section 54.305 of the FCC's rules should be repealed in its entirety)

charge pools, or if both carriers were rural telephone companies and were receiving support based on embedded costs.<sup>25</sup>

Since only one carrier can be considered the incumbent in any given service area, Qwest must be considered a competitive carrier. While this result may come with additional issues, such as interconnection, ETC status, and universal service concerns, the alternative is unsound policy.

## VI. FUTURE APPLICATIONS

TCA urges the Commission to grant Mid-Rivers' petition as quickly as possible. The FCC should not delay approval of Mid-Rivers' petition while it considers how it should process any future petitions made under Section 251(h)(2). While no evidence has been presented as to how many petitions such as Mid-Rivers' are likely to be filed in the future, there are likely other CLECs, in Mid-Rivers' or a similar position, waiting to see how the Commission implements this section of the 1996 Act. Thus far, these other carriers must be fairly concerned, as the instant proceeding has been open for almost three years, including an expensive appeal to the courts.<sup>26</sup>

Although petitions filed under Section 251(h)(2) will likely bring with them different circumstances, arguments, and considerations, making a set of generic processing guidelines difficult, the Commission should endeavor to provide CLECs some form of regulatory certainty as to how their specific petition would be processed. Both this Commission and the state commissions have been able to establish a process under which applicants seeking CETC status, with differing circumstances, arguments and considerations, are able to find regulatory certainty. CLECs, also an entity regulated by this Commission, deserve no less. For example, the Commission can and should find, on a global basis that the "area" contemplated under Section 251(h)(2)(A) should be as requested by the petitioner, and should not, under any circumstances, be defined so as to effectively prevent a small rural CLEC from becoming the ILEC in certain areas. In addition, the Commission can and should find, on a global basis that potential competitive concerns based on assumptions of how a carrier would behave are not a consideration, and issues raised by parties with blatantly self-serving motivations should be ignored. In reality, all that should be required is an investigation into whether the CLEC has

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<sup>25</sup> In both cases, the two ILECs would report costs for serving the same customers in the same area – a result not contemplated by today's rules.

substantially replaced the incumbent in its position in the telephone services market. Finally, the Commission can only process such petitions if the incumbent is a non-rural, price cap regulated carrier – the issues revolving around when the invaded ILEC is a rural rate of return regulated carrier deserve and necessitate more, and differing, analysis.

## VII. CONCLUSION

TCA urges the Commission to grant Mid-Rivers' petition, filed nearly three years ago, on an expeditious basis. Mid-Rivers has easily met the requirements of Section 251(h)(2) to be designated the ILEC in Terry, Montana. Any future petitions, to the extent reflecting circumstances substantially similar to Mid-Rivers' petition, including whether the CLEC is competing with a non-rural, price cap-regulated carrier, can and should be acted upon on an expedited basis.

Respectfully submitted,

[electronically filed]

TCA, Inc.-Telcom Consulting Associates  
1465 Kelly Johnson Blvd., Suite 200  
Colorado Springs, CO 80920  
(719) 266-4334

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<sup>26</sup> See Mid-Rivers *Ex Parte* letter, dated September 27, 2004, attachment (US Court of Appeals pleading)