

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

In the Matter of)	
)	
Petition of Mid-Rivers Telephone)	WC Docket No. 02-78
Cooperative, Inc. for Order Declaring it to)	
Be an incumbent Local Exchange)	
Carrier in Terry, Montana pursuant to)	
47 U.S.C. §251(h)(2))	

**REPLY COMMENTS OF THE
MONTANA PUBLIC SERVICE COMMISSION**

I. Overview

The Montana Public Service Commission (MPSC) reiterates its request that the Federal Communications Commission (Commission or FCC) issue an order declaring Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers) be treated as an incumbent local exchange carrier in the Terry, Montana exchange pursuant to 47 U.S.C. §251(h)(2).¹

Mid-Rivers is a facilities based competitor of the legacy ILEC Qwest Communications (Qwest) in the Terry exchange. In building a network in this area, Mid-Rivers has done exactly what the Act² contemplated. Policy issues implicated by Mid-Rivers’ build out and investment should be addressed appropriately and separately from the issue of whether Mid-Rivers satisfies the criteria of 47 U.S.C. §251(h)(2). While Mid-Rivers’ petition and the issues associated with rural overbuild carriers elicits internal inconsistencies in the Act, the reality remains that Mid-Rivers has satisfied 47 U.S.C. §251(h)(2).

¹ 47 CFR 51.223(b).

² 47 U.S.C. §151 *et seq.*

The MPSC urges the Commission to grant Mid-Rivers' petition based on the facts and the law pertaining to the petition.

II. Response to Comments

Comments filed regarding Mid-Rivers' petition primarily address policy issues implicated when a rural carrier overbuilds the legacy ILEC. The MPSC urges the Commission to make its decision based on the facts specific to Mid-Rivers in the Terry, Montana exchange, and the controlling law, 47 U.S.C. §251(h)(2). Policy issues pertaining to the universal service fund, access charge rates, and §251(c) obligations should be addressed only as they pertain to Mid-Rivers specifically in its provision of services in Terry Montana as an ILEC. Subsequent regulatory treatment of the current ILEC, Qwest, and general policy issues regarding universal service and access charge rates should be addressed separately.

A. Qwest

Qwest's status in the Terry exchange should not impact the Commission's decision with respect to whether Mid-Rivers has qualified for ILEC status in the exchange. The elements of §251(h)(2) are limited to consideration of the carrier applying for ILEC status, and the Commission's evaluation of Mid-Rivers' petition should not be further delayed as a result of questions regarding Qwest's regulatory status.

If the Commission does consider how to treat Qwest in this proceeding, Qwest's status should be viewed in light of its status as a legacy Bell Company operating in a region-wide market. Any decision regarding Qwest's treatment as a CLEC or ILEC should account for the geographic scope of Qwest's market; whether or not Qwest's §251(c) obligations would be affected only in the Terry exchange or elsewhere; and how

Qwest's support should be calculated. If Qwest is designated a CLEC in Terry it ultimately stands to gain in terms of how much universal service support it will receive, as its per line support will increase as measured by what Mid-Rivers will be eligible to receive.³ Qwest currently appears to benefit from retaining the Terry exchange as part of its study area while showing a line loss in that area.⁴

In Qwest's view, a legacy ILEC should be allowed to do nothing in a rural exchange, get overbuilt, lose nearly all of its customers and lines, and then be essentially deregulated while the overbuild carrier is denied increased support through the universal service fund and access charge rates. It is not in the public interest to reward Qwest for losing lines in rural exchanges by allowing Qwest to retain those exchanges in its study area when the exchange has been overbuilt by a rural carrier with a superior network. Qwest's position that rural carriers like Mid-Rivers should not be rewarded for overbuilding legacy incumbent carriers conflicts with the Commission's policy of encouraging facilities based competition. Mid-Rivers has done exactly what the Act contemplated: it built a network on which it competes with Qwest in rural America. Taking a punitive approach to Mid-Rivers by denying it increased support from universal service funds and access charge rates, for which it has qualified, directly contradicts the Act's purpose of developing facilities based competition. Treating Mid-Rivers as an ILEC and potentially allowing it to increase its support mechanisms does not create a competitive subsidy but gives legal recognition to what now exists as a matter of fact.

Qwest's obligations under §251(c) are independent of Mid-Rivers' status as an ILEC. Mid-Rivers, as a rural ILEC, would be subject to the obligations of §251(c) under

³ See MPSC comments at page 4.

⁴ Id. at p. 5 fn. 6.

certain circumstances. As a rural ILEC Mid-Rivers would be entitled to the protections of §251(f) unless and until those protections are removed by the state commission.

Contrary to Qwest's position, the presence of two facilities based carriers in Terry does not make the exchange "a competitive market." Qwest's comments provide no analytical basis to support such a far reaching policy conclusion. The evidence presented in Mid-Rivers' petition is that within the town of Terry Mid Rivers captured about 97% of the customers (93% in the exchange). This fact alone is not a credible basis upon which to conclude that a market is competitive and, in turn, upon which to base regulatory policy.

The Commission should not make a decision in this docket as to whether Qwest satisfies the criteria of 47 U.S.C. §160. If forbearance from applying any statutory criteria to Qwest is appropriate, decisions regarding the scope of that forbearance both geographically and as a matter of law require additional information that the Commission does not currently have in this docket.⁵

Qwest's regulatory status should be addressed separately from the determination of whether Mid-Rivers has qualified for ILEC status under §251(h)(2).

B. NTCA

The comments of NTCA are consistent with those of the MPSC, and the position advocated by the NTCA is in accord with that advocated by the MPSC.

⁵ Qwest's market power in the Terry exchange and its market power in Montana generally are issues that would merit additional information prior to a Commission decision on forbearance. The Commission has not requested such information nor has it been provided. In the first instance, it appears that Qwest could not satisfy the criteria of 47 U.S.C. §160(a). *See generally*, MPSC Docket No. D99.8.200, esp. the comments of the Montana Consumer Counsel (MCC) filed on 12-30-04 citing Schedule 35 of Qwest's annual report as reporting Qwest's rate of return on equity at 46.334 percent; *see also generally* MPSC Docket No. D2003.2.22, esp. "Second Notice of Investigation and Request for Information" dated 4-24-03. Questions of fact regarding Qwest's regulatory status are relevant and necessary to a Commission decision under 47 U.S.C. §160, but they do not bear on the Commission's action on Mid-Rivers' petition.

C. IOWA TELECOMMUNICATIONS SERVICES, INC

Iowa Telecom's analysis of a carrier's obligations under 47 U.S.C. §251 once it is granted ILEC status is generally in line with the analysis of the MPSC.

When a carrier qualifies for ILEC status under §251(h)(2) the legacy ILEC should neither be automatically relieved from its §251(c) obligations, nor should the forbearance criteria of §160 be deemed automatically satisfied. Whether the legacy ILEC should be bound by §251(c) and whether it qualifies for forbearance under §160 are separate questions from whether a carrier qualifies for ILEC status under §251(h)(2).

D. RURAL INDEPENDENT COMPETITIVE ALLIANCE

The comments of the Rural Independent Competitive Alliance (RICA) are generally in accord with the comments filed by the MPSC.

E. TELECOM CONSULTING ASSOCIATES (TCA)

TCA's comments regarding the definition of "area" for purposes of Mid-Rivers' petition; Mid-Rivers' satisfaction of the criteria of §251(h)(2); and universal service support issues are consistent with the MPSC's comments.

With respect to the number of ILEC's in a given exchange, §251(h) contemplates the existence of more than one ILEC for purposes of §251. How those co-existing ILECs should be treated for purposes of §254 is a different question that would not be appropriately answered by the Commission in this docket. The hypothetical questions raised by TCA regarding the implications of having two ILECs in one exchange don't warrant rejecting Mid-Rivers' petition. The treatment of co-existing ILECs for purposes of §254 is not before the Commission in this docket, and cannot be considered by the Commission pursuant to §251(h)(2)(C).

The MPSC urges the Commission to grant Mid-Rivers' petition to be treated as an ILEC in Terry for purposes of §251, and to separately address the issues of how each carrier is addressed for purposes of §254.

E. JOHN STAURULAKIS, INC. (JSI)

The comments of JSI are generally consistent with those of the MPSC. The Commission should decide the Mid-Rivers' petition based on the facts in the petition and the controlling law, and leave fundamental policy concerns, such as the methodologies used to calculate support for dual ILECs, to a separate inquiry and analysis.

G. SBC COMMUNICATIONS (SBC)

Mid-Rivers overbuild of Qwest's facilities in Terry, Montana was not a "cynical attempt to manipulate the universal service regime"⁶ but rather implementation of the Act's direction that competitors become facilities based. In order for Mid-Rivers to qualify for increased universal service funds and increased access charge rates it will necessarily have to undertake a second proceeding, in which issues of increases to support mechanisms should be addressed.

In this proceeding, it would be inconsistent with the fundamental principles of the Act to deny Mid-Rivers the opportunity to pursue increased support based on allegations that Mid-Rivers is gaming the system

In seeking ILEC status Mid-Rivers is not manipulating the system but simply asking that it be compensated for its compliance with the requirements of the Act. The MPSC urges the Commission to declare Mid-Rivers an ILEC in the Terry exchange and thereby provide it the opportunity to seek such compensation.

⁶ SBC Comments page 2, footnote 4.

Currently, Mid-Rivers is in a position to block competitive entry in the Terry exchange. As a CLEC providing service to nearly all of the customers in Terry, Mid-Rivers is not bound by §251(c), and is in a position to block market entry, contrary to SBC's contention.⁷ If Mid-Rivers were treated as an ILEC, it would be subject to §251(c) obligations under certain circumstances.

SBC's comments generally raise concerns about policy matters that the MPSC urges the Commission to address, but appropriately and with proper notice in a separate proceeding. Arguments about how universal service funds should be allocated properly belong in a separate proceeding. The question before the Commission in this proceeding is whether Mid-Rivers has satisfied the criteria of §251(h)(2) in the Terry exchange. The unequivocal answer to that question is yes.

H. AT&T

AT&T's analysis of whether Mid-Rivers has satisfied §251(h)(2) generally accords with the MPSC's analysis.

With regard to consideration of increased access charges, Mid-Rivers' status as an ILEC may allow it the ability to change its access charge rates, but that consideration should be undertaken separately from the consideration of whether Mid-Rivers has satisfied the elements of §251(h)(2). If the Commission does address the issue of potentially increased access charge rates, it should consider that Mid-Rivers has gained de facto ILEC status as the dominant carrier in Terry, and that Mid-Rivers should be compensated based on its status as a matter of fact, rather than upon the artificially suppressed mechanism now in place.

⁷ SBC comments page 7.

If Mid-Rivers were eventually allowed the opportunity to increase its access charge rates such an increase would not be a windfall to Mid-Rivers but would rather justly compensate Mid-Rivers for its investment. Similarly situated rural carriers should be entitled to similar compensation mechanisms. Currently in the Terry exchange Mid-Rivers is not being compensated in a manner like similarly situated rural ILECs. Remedying this disparity would not be a windfall to Mid-Rivers but rather would make Mid-Rivers whole.

I. GENERAL COMMUNICATIONS, INC. (GCI)

GCI mischaracterizes the issue before the Commission. Safeguarding against unreasonable increases in the universal service fund size does not require punishing carriers like Mid-Rivers by denying them compensation for complying with the Act.

Rural ILECs should be treated similarly under the Act, regardless of whether they are deemed an ILEC under §251(h)(1) or (2). Rural ILECs are subject to §251(c) obligations when circumstances warrant.⁸ GCI's position regarding §251(c) obligations with respect to rural ILECs misapprehends the Act's requirement that rural ILECs are subject to §251(c) obligations in certain circumstances. GCI advocates limiting Mid-Rivers' ability to set access charge rates and to obtain universal service funds. Limiting Mid-Rivers support mechanisms would be a punitive approach to a carrier for building out a network in a rural area, and is not in the public interest. As a facilities based competitor, Mid-Rivers should not be limited by the presence of a legacy ILEC that has made no investment in the Terry exchange.

Specific issues pertaining to how Mid-Rivers will get support should be resolved in a separate proceeding that is designed for that purpose. In this docket, the Commission

⁸ 47 U.S.C. §251(f).

should address the specific issue before it, which is whether or not Mid-Rivers has satisfied the criteria of 251(h). The MPSC respectfully submits that it has, and should be declared an ILEC in the Terry exchange.

J. ACS ANCHORAGE, INC., ACS OF ALASKA, INC., AND ACS OF FAIRBANKS, INC.

The general concerns raised by ACS are beyond the scope of this proceeding. The MPSC urges the Commission to address the specific issues relevant to the Terry exchange in its analysis of whether Mid-Rivers should be declared an ILEC in Terry, Montana. The public interest criteria should be analyzed in the context of the Terry exchange and the facts presented by Mid-Rivers in its petition. Based on the benefits to the rural customers in Terry, Montana, through Mid-Rivers' superior network, and Mid-Rivers' compliance with and implementation of the fundamental policy of the Act to promote facilities based competition, it is in the public interest to declare Mid-Rivers an ILEC in the Terry exchange.

K. SPRINT CORPORATION

Sprint's concerns center on universal service fund issues and access charge rates that might result if Mid-Rivers is granted ILEC status. These issues are not germane to the determination of whether Mid-Rivers has satisfied section §251(h) of the Act. Public policy concerns regarding the universal service fund and access charge rates should be addressed by the Commission in an appropriate, separate forum.

L. HANCOCK COMMUNICATIONS

Hancock Communications advocates the same result advocated by the MPSC and are generally consistent with the position taken by the MPSC.

III. Public Interest Concerns

The public interest element of §251(h)(2)(C) is limited to §251.⁹ Consequently, in assessing whether Mid-Rivers' petition is in the public interest, concerns about the universal service fund and access charge rates may not be considered. If the Commission expands the public interest analysis beyond the scope of §251(h)(2)(C) then it should consider that Mid-Rivers has invested in one of the most rural areas in America, building out a network where the legacy ILEC was not investing. Mid-Rivers provides direct, facilities based competition along with high quality local service and presence to achieve an 85% share of the market. The consumers of Terry, Montana have benefited enormously from Mid-Rivers' presence.

Public interest issues involving the universal service fund and access charge rates are critical and should be addressed. This docket however is not the appropriate forum for that inquiry. Mid-Rivers' petition to be declared an ILEC should be evaluated on the facts presented in the petition and the statutory criteria set forth in §251(h)(2). Mid-Rivers' application must be evaluated upon the factual circumstances and public interest issues pertaining to the Terry, Montana exchange and should not be evaluated based upon global public interest issues raised in many of the comments.

The Montana PSC respectfully urges that the Commission approve Mid-Rivers' petition and issue an Order declaring Mid-Rivers an ILEC in the Terry exchange.

IV. Conclusion

Mid-Rivers has implemented the Act and provides superior telecommunications services to the most rural consumers in America. Based on the specific facts presented

⁹ A carrier may be treated as an ILEC if "such treatment is consistent with the public interest, convenience, and necessity and *the purposes of this section.*" 47 U.S.C. §251(h)(2)(C), emphasis added.

by Mid-Rivers' petition, and the controlling statutory provisions, Mid-Rivers' petition should be granted.

The MPSC urges the FCC to declare Mid-Rivers an ILEC in the Terry, Montana exchange without further delay.

Respectfully submitted this 14th day of January, 2005.

THE MONTANA PUBLIC SERVICE COMMISSION

GREG JERGESON, Chairman
BRAD MOLNAR, Vice-Chairman
DOUG MOOD, Commissioner
ROBERT H. RANEY, Commissioner
THOMAS J. SCHNEIDER, Commissioner