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)	)	

REPLY COMMENTS OF GENERAL COMMUNICATION, INC.

General Communication, Inc. (GCI) files in reply to the comments filed in this proceeding on December 30, 2004. The relief proposed by Mid-Rivers and some of its supporters would contort the Act's pro-competitive purposes and undermine the public interest in insuring that universal service monies are used where needed to support high cost services to customers. To ensure that Section 251(h)(2) is faithfully implemented, GCI highlights the following issues. First, in evaluating petitions under Section 251(h)(2), the Commission should not adopt bright-line tests, for example, based on retail market share, but should instead decide on a case-by-case basis all requests for designation of a LEC as "comparable" to an incumbent. Second, there is no statutory or policy basis for forbearing from regulation of an existing incumbent as part of the incumbent designation process without satisfying the requirements of Section 10. Section 251(h) expressly contemplates that there may be more than one carrier subject to ILEC obligations under Section 251: the Section 251(h)(1) ILEC and the Section 251(h)(2) LEC that is treated as comparable to an ILEC. Under Section 10, the Commission may forbear from Section 251(c), but only when the forbearance standard required under Section 10 has been fully met, including Section 10(d)'s requirement for full implementation of Section 251(c). Finally, the Commission should clarify that CLECs cannot increase their universal service support or access charges by seeking designations of ILEC comparability, and thus remove the incentive for designation requests that are unrelated to preserving, when necessary, the market-opening requirements of Section 251(c).

I. SECTION 251(h)(2) DESIGNATION DOES NOT ENTITLE A CLEC TO TREATMENT AS AN ILEC UNDER THE COMMISSION'S UNIVERSAL SERVICE AND ACCESS CHARGE RULES.

As the Montana Public Service Commission points out, Mid-Rivers has accomplished an incredible competitive feat. Not only has Mid-Rivers overbuilt Qwest's service area within the town of Terry, Montana, but it has done so by installing a network that now offers advanced services, "providing DSL, cable and dial up internet as well as Voicemail, Caller ID, and a full line of Customer Calling and CLASS features and ITV facilities to the Terry school."[1] Mid-Rivers serves 85 percent of the telephone customers in the Terry exchange, leaving Qwest with only 75 customers.[2] Mid-Rivers also provides 100 customers with dial up internet, 50 customers with high speed DSL, at access speeds of 768 kbps downstream and 254 kbps upstream, and 250 customers with cable service.[3] Mid-Rivers devised a business plan that offered customers multiple products and services. This plan allowed Mid-Rivers to enter the market and offer superior service to most of the residents of the Terry exchange (although apparently not to those in the least dense areas outside of the town of Terry). Mid-Rivers did all of this without:

(1) the protection of the Section 251(f)(1) rural exemption (which, if left in place, would have allowed Qwest to refuse to interconnect at cost-based and non-discriminatory rates);

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[1] Comments of the Montana Public Service Commission at 3.

[2] *Id*. at 2. From Mid-Rivers' petition, it does appear that Mid-Rivers has focused its facilities-based entry only on those parts of the Terry exchange that are the most densely populated and least costly to serve, leaving Qwest to serve the outlying areas.

[3] *Id*.

(2) embedded cost-based universal service support; instead Mid-Rivers received the same support per line as Qwest;

(3) the ability to pool access costs through the NECA common line and traffic sensitive pools;

(4) the ability to charge access rates other than those permitted under the CLEC access charge rules; and

(5) the security of rate-of-return regulation.[4]

In light of Mid-Rivers' demonstrated ability to enter and provide the market with superior service at existing universal service and access charge levels, the Montana Commission, RICA and other commenters are wrong to suggest that Mid-Rivers now needs these five tools to continue to offer high quality services in Terry, or that doing so would promote the growth of competition in rural areas.[5] RICA's suggestion that limiting Mid-Rivers' future USF support to Qwest's support would "ensure that rural communities . . remain communications backwaters" flies in the face of Mid-Rivers' actual competitive accomplishments.[6] As SBC notes, "Given the fact that it was able to successfully enter the market, deploy an overlay network, and win virtually all of Qwest's customers as a CLEC, there can be no justification for providing increased universal service support or allowing Mid-Rivers to provide service on a rate-of-return basis."[7] Mid-Rivers never had an implicit or explicit regulatory compact.

As Iowa Telecom notes, neither the Commission's universal service rules in Part 54 nor its access charge rules in Part 69 define "incumbent LEC" to include a LEC designated as

[4] GCI Comments at 3.
[5] Montana PSC Comments at 4-8; RICA Comments at 5-7.
[6] RICA Comments at 6.
[7] SBC Comments at 5.

comparable to an incumbent LEC under Section 251(h)(2).[8] Instead, Sections 54.5 and 69.1(hh) of the Commission's rules define an ILEC, for the purposes of the universal service and access charge rules, respectively, as including only those entities defined as ILECs in Section 251(h)(1), specifically excluding LECs designated as "comparable" to ILECs under Section 251(h)(2). Accordingly, a CLEC does not automatically gain ILEC treatment under the universal service and access charge rules simply because it has been designated as "comparable" to an ILEC under Section 251(h)(2).

As AT&T, SBC, Qwest and Sprint all point out, this is the right result.[9] There is no reason to provide additional universal service support and access charges to Mid-Rivers when it clearly has been able to be overwhelmingly successful without such support and access charges. Indeed, paying additional universal service support to Mid-Rivers in this context can only be viewed as excessive, as it is demonstrably not necessary to ensure that *consumers* receive affordable telephone service.[10] Paying such excessive support will "create inefficient incentives for entry, as well as negative impacts on the rural support mechanism."[11] Mid-Rivers made its investment decisions without a reasonable expectation of recovering the costs of its new facilities from the universal service fund. There is no public policy support for reimbursing that investment with monies collected from other ratepayers now. As Qwest documents, to establish universal service support as an incentive for competitive entry would set a continuous upward curve for rural high cost support.[12]

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[8] Iowa Telecom Comments at 6.
[9] AT&T Comments at 5-6, SBC Comments at 4-6,8, Qwest Comments at 4-9, and Sprint Comments at 2-5.
[10] *See Alenco v. FCC*, 201 F.#d 6-8, 620 (5th Cir. 2000).
[11] Qwest Comments at 7. *See also* SBC Comments at 6 ("Such a decision not only would significantly increase universal service support payment to those carriers (unnecessarily inflating the fund), but also encourage inefficient market entry by rural carriers seeking to expand into adjacent exchanges simply to inflate their universal service support payments rather than to implement a rational business plan."); Sprint Comments at 3.
[12] Qwest Comments at 8.

In the NPRM, the Commission proposes to added language to Section 51.5 of the Commission's rules to include a CLEC designated as comparable to an ILEC within the definition of an ILEC. While this would be appropriate with respect to Section 251(c), the Commission should ensure that the definition of ILEC in Section 54.5 is not also automatically amended. Furthermore, as discussed further below, the Commission should also clarify that such a definitional change does not permit a CLEC designated as comparable to an ILEC under Section 251(h)(2) to assert a Section 251(f) exemption or suspension of its Section 251(c) requirements.

II. NO COMMENTER JUSTIFIES ALLOWING MID-RIVERS TO ASSERT THE SECTION 251(f) EXEMPTIONS AND SUSPENSIONS.

As GCI argued in its initial comments, it would not be in the public interest for Mid-Rivers to be able to take advantage of the market-opening provisions of Section 251(c) to gain overwhelming market share, and then to seek treatment as an ILEC in order to invoke the exemption and suspension provisions of Section 251(f).[13] No commenter, not even those supporting Mid-Rivers petition, attempts to justify allowing Mid-Rivers to take advantage of Section 251(f), notwithstanding Western Wireless' express discussion of this issue in its opposition to Mid-Rivers' petition. As GCI proposed, the Commission should condition any designation of ILEC comparability pursuant to Section 251(h)(2) on the LEC foregoing the protections of Section 251(f).

[13] GCI Comments at 10-12.

III. THE EXISTING ILEC'S SECTION 251(c) DUTIES MAY ONLY BE REMOVED PURSUANT TO SECTION 10, WHICH CANNOT BE SATISFIED BY A SIMPLISTIC RETAIL MARKET SHARE TEST.

All of the commenters that urge the Commission to declassify Qwest as an incumbent LEC on the basis of the Mid-Rivers' Section 251(h)(2) petition, rather than a Section 10 forbearance petition, ignore the express terms of the statute. Section 251(h)(2) itself grants the FCC no authority to remove ILECs from the scope of Section 251(h)(1). The only authority granted to the FCC in Section 251(h)(2) is to designate additional entities to be treated a comparable to an incumbent LEC. Accordingly, Section 251(h) itself contemplates that two carriers can operate in a market with incumbent LEC obligations; both the Section 251(f)(1) ILEC and the CLEC designated as comparable to the ILEC under Section 251(f)(2).

The Act, however, does not consign all Section 251(h)(1) ILECs to permanent ILEC status. Section 10 expressly permits (and, in fact, requires) the Commission to forbear from the enforcement of Section 251(c) when any ILEC meets Section 10's requirements. Section 10 sets forth specific requirements for such forbearance, and expressly requires that the Commission find that Section 251(c) requirements have been "fully implemented" before it may forbear from Section 251(c).

This construction of the Act is consistent with its express terms. To relieve Qwest, or any other ILEC, of its Section 251 duties might impede the development of a competitive market because the ILEC will still have substantial economies of connectivity and scale that allow it control access to some customers.[14] The Commission should not forbear from enforcing any ILEC's Section 251(c) duties until that ILEC has made a record that the Section 10 tests have

[14] See discussion at paragraphs 27 and 31-32, Declaratory Ruling in Guam Telephone Authority, CCB Pol. 96-18, CC Docket 97-134, released May 19, 1997.

been met. ILECs must show that they have fully implemented Section 251(c),[15] that enforcement of section 251(c) "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly and unreasonably discriminatory," that enforcement of Section 251(c) "is not necessary for the protection of consumers," and that forbearance from Section 251(c) "is in the public interest,"[16] including "promot[ing] competitive market conditions" and "enhanc[ing] competition among providers of telecommunications services."[17]

In any event, the Commission should reject ACS' proposed retail market share test, which is the same, unworkable test it has espoused in other proceedings. As AT&T recognized[18], a retail market share test that ignores the means by which services (*i.e.*, the status of wholesale competition) are provided is meaningless. Capturing a substantial retail market share using competitive facilities is a very different market than one in which competition has flourished over self-provisioned facilities. ACS' assertions about the implications of GCI's retail market share are inaccurate. Rather than demonstrating GCI's market power as ACS suggests, GCI's ability to sell services to more customers at lower rates than the incumbent demonstrates ACS continuing market power. Market power is demonstrated when a carrier can increase prices without losing substantial market share, rather than when a carrier is forced to lower prices to attract customers. ACS still retains control of many of GCI's costs because GCI serves its

[15] 47 U.S.C. § 160(d)
[16] 47 U.S.C. § 160(a)(1)-(3).
[17] 47 U.S.C. § 160(b).
[18] ATT comments, page 2.

customers over facilities leased from ACS, and ACS has the ability to raise its interconnection prices in arbitration proceedings.[19]

In this regard, ACS analogy to the Commission's treatment of AT&T in the interexchange market is flawed.[20] When AT&T was declared non-dominant, there were several facilities-based wholesale providers of interexchange services, each of whom offered services to resellers in an open, competitive market. Accordingly, a new entrant interexchange carrier could turn not just to AT&T, but to several other facilities-based interexchange carriers to procure necessary wholesale services. That competitive wholesale market facilitated the development of a competitive retail market. AT&T was declared non-dominant in the interstate interexchange retail and wholesale market only after the Commission found that retail and wholesale customers could chose from amongst several providers who could provide service independently of each other.[21] No analogous record exists in this case. A finding that another carrier has earned incumbent status under Section 251(h)(2) is not sufficient to determine that the existing incumbent is no longer dominant, nor does retail market share establish that competition exists in the wholesale market.

IV. CONCLUSION

In conclusion, the Commission should not ignore the substantial public interest issues presented by the Mid-Rivers petition. The prospective increases to universal service support and access charges are significant. The Commission should specify that Mid-Rivers is an incumbent only for Section 251 purposes to prevent it from reaping a universal service and access charge

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[19] ACS' recent efforts to raise its UNE prices through arbitration were successful. The RCA raised the Anchorage loop rates set in 1996 at $14. 92 to $18.64 in U-96-89(51), entered December 7, 2004.

[20] ACS comments pages 3-4.

[21] Indeed, even when AT&T was declared non-dominant, the Commission retained dominant status for AT&T Alascom's wholesale services, because AT&T Alascom retained a facilities monopoly. In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271 (1995), *affirmed* Order on Reconsideration, 12 FCC Rcd 20787 (1997).

windfall. Mid-Rivers' efforts to provide better services in a rural community are to be commended, but a sound business case rather than the prospect of increased universal service and access payments and the opportunity to exclude subsequent competitors should be the incentive for the development of competitive markets in rural areas. The Commission should follow the procedural path described in the Act and not forbear from treating Qwest as an incumbent based on a retail market share test or Mid-Rivers' designation as an incumbent. Until there is a record that the test Congress described in Section 10 for incumbent carriers whose markets have become fully competitive, the Commission should continue to treat Qwest as an incumbent.

Respectfully submitted,

GENERAL COMMUNICATION, INC.

/s/

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CERTIFICATE OF SERVICE

I, Colleen Nunez, do hereby certify that a copy of the foregoing Comments of General Communication, Inc. was sent via electronic mail to the addresses indicated below this 14th day of January, 2005, to the following:

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