

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

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 SBC COMMUNICATIONS INC.¹

I. INTRODUCTION AND SUMMARY

A. The Commission Should Eliminate Dominant Carrier Regulation for Qwest in Terry, Montana.

In its initial comments, SBC demonstrated that, in communities such as Terry, Montana, in which a facilities-based new entrant succeeds in winning a substantial number of customers from the incumbent, which remains in the market, there is no justification for perpetuating legacy, dominant carrier regulation of any carrier. As SBC pointed out, in this context, neither carrier possesses market power, and neither can block competitive entry. Consequently, the Commission should not classify the new entrant as an incumbent LEC, nor should it perpetuate dominant carrier regulation of the incumbent, including by continuing to impose the obligations of section 251(c) on the incumbent. Most of the other parties that addressed this issue agreed with SBC.²

The Montana Public Service Commission (“MPSC”), however, contends that, even if Mid-Rivers is classified as an ILEC under 47 U.S.C. § 251(h), Qwest still should “retain its

¹ SBC Communications Inc. files these reply comments on behalf of itself and its wholly-owned subsidiaries, including: Southwestern Bell Telephone LP, Pacific Bell, Nevada Bell, Ameritech Illinois, Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, Ameritech Wisconsin, the Southern New England Telephone Company, ASI, AADS Illinois, AADS Michigan, AADS Indiana, AADS Ohio, AADS Wisconsin, SBC LD, and SBC Telecom (collectively “SBC”).

² See, e.g., *Qwest Comments* at 2-3, 9-15; *ACS Comments* at 2-5; *Iowa Telecom Comments* at 11-15.

status as an incumbent carrier, and remain subject to the unbundling obligations of Section 251 [and] the carrier of last resort obligations of Section 214.”³ In particular, the MPSC contends that section 251(h) states that the Commission “may declare a local exchange carrier an incumbent ‘for purposes of this section,’” and argues that section 251(h) thus “contemplates [that] . . . there might be two co-existing ILECs” with different regulatory treatment for each, depending on each carrier’s status as either a “legacy incumbent LEC under 251(h)(1)” or as a “new ILEC designated under 251(h)(2).”⁴ The MPSC further contends that, in this context, subjecting the two ILECs to different regulatory treatment is “consistent with the separate qualification mechanisms of section 251(h).”⁵ The MPSC maintains that, because Qwest purportedly retains its “region wide market dominance,” Qwest should continue to be subject to the full panoply of obligations imposed by section 251(c) and carrier of last resort obligations, while Mid-Rivers should be treated as a rural ILEC,⁶ which, under the Commission’s rules, is exempt from the requirements of section 251(c).

The MPSC’s contention that the Act contemplates “two co-existing ILECs” with different regulatory treatment for each is flatly inconsistent with the Act. As an initial matter, the Act establishes no such classifications as “legacy ILEC” and “new ILEC,” despite the MPSC’s attempt to manufacture such classifications out of whole cloth. Nor is there any suggestion that there can, or should, be more than one ILEC in any given service area. Indeed, the statutory criteria for extending ILEC treatment to a LEC that does not meet the definition in section 251(h)(1) suggests that, at most, only one ILEC should be subject to dominant carrier regulation

³ *MPSC Comments* at 8.

⁴ *MPSC Comments* at 8.

⁵ *MPSC Comments* at 8-9.

⁶ *MPSC Comments* at 9.

at any given time. In particular, before the Commission may treat a LEC as an ILEC under section 251(h)(2), it must find (*inter alia*) that the carrier “occupies a position in the market” that is comparable to the position occupied by the original ILEC and has “substantially replaced” the ILEC.⁷ Thus, a CLEC can be classified as an ILEC only where it has replaced the original ILEC and occupies a dominant position in the market. Accordingly, while there may be circumstances in which no carrier should be subject to dominant carrier regulation (including the requirements of section 251(c)), such as where – as here – no carrier has market power in the relevant market, the Act does not contemplate imposing ILEC status (with all its attendant obligations) on more than one carrier in any given area.

Moreover, even if there could be more than one ILEC in a particular market, nothing in the Act suggests that the Commission could regulate two ILECs in the same market differently depending on whether they are a so-called “legacy ILEC” versus a “new ILEC.” Apart from the fact that those terms simply have no basis in and thus no meaning with respect to the actual provisions of the Act, the Commission could impose ILEC status on a “new ILEC” only if it occupied a comparable position in the relevant market to that of the so-called “legacy ILEC.” In these circumstances, there can be no justification under the Act or in sound public policy for tipping the regulatory scales in favor of one or the other carrier.

Accordingly, the Commission should reject the MPSC’s claim that Qwest should retain its status as an ILEC in Terry, Montana. Rather, for the reasons discussed in SBC’s opening comments and herein, the Commission should eliminate dominant carrier regulation in Terry.

⁷ 47 U.S.C. § 251(h)(2).

B. The Commission Should Cap Mid-River's Access Charges at Qwest's Rates.

SBC agrees with Sprint that the Commission cannot find that classifying Mid-Rivers as an ILEC is consistent with the public interest, as required by section 251(h)(2), if Mid-Rivers is permitted to increase its switched access charges above those currently charged by Qwest.⁸ As Sprint observes, under the Commission's rules, CLECs generally cannot charge more for access than the ILEC.⁹ As a consequence, Mid-Rivers has been able to successfully enter the market with its own facilities and win virtually all of Qwest's customers, while charging no more for access than Qwest. Unless Mid-Rivers is illegally cross-subsidizing its operations in Terry, it must be recovering its costs under its existing rates. In this context, there can be no justification for allowing Mid-Rivers to jack up its access charges to a higher rate if it is classified as the ILEC in Terry. Accordingly, the Commission should make clear that, if it reclassifies Mid-Rivers as an ILEC in Terry, Mid-Rivers may not charge more for access than Qwest did.

Respectfully Submitted,

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⁸ Sprint Comments at 5.

⁹ *Id.*, citing *Access Charge Reform*, 16 FCC Rcd 9923, 9938 (2001).