

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

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

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc., through counsel and on behalf of itself and its affiliates, including Qwest Corporation (“QC,” its local exchange carrier affiliate) (collectively, “Qwest”), hereby submits the following reply comments in connection with the Federal Communications Commission’s (the “Commission’s”) *Notice of Proposed Rulemaking* (the “*NPRM*”)¹ requesting comment with respect to the Petition of Mid-Rivers Cooperative, Inc. (the “Mid-Rivers Petition”) seeking an order declaring it to be an incumbent local exchange carrier (“ILEC”) in Terry, Montana pursuant to Section 251(h)(2) of the 1996 Telecommunications Act (the “Act”).

I. THE MAJORITY OF COMMENTING PARTIES AGREE THAT MID-RIVERS SHOULD NOT BE ALLOWED TO INCREASE ITS UNIVERSAL SERVICE SUPPORT AND THAT THE COMMISSION SHOULD ADDRESS ACCESS RATES IN ANOTHER DOCKET

In its initial comments, Qwest demonstrated that, regardless of which solution is adopted, the Commission should not permit Mid-Rivers to obtain a competitive advantage subsidy by

¹ *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*, FCC 04-252, rel. Nov. 15, 2004. *And see Public Notice*, DA 04-3789, rel. Nov. 30, 2004. *See also*, Mid-Rivers Telephone Cooperative, Inc., 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.

increasing its universal service support and that any access rate issues should be addressed in the intercarrier compensation docket, rather than this docket. The majority of commenting parties that address these issues concur with Qwest on these points.

Qwest echoes the concerns articulated by General Communication, Inc. (“GCI”), Sprint Corporation (“Sprint”), SBC Communications Inc. (“SBC”), AT&T Corp. (“AT&T”), ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc. (collectively, “ACS”) and Iowa Telecommunications Services, Inc. (“Iowa Telecom”) regarding Mid-Rivers’ apparent intent to convert universal service support into a competitive advantage subsidy.² Sprint notes that, “[j]ust as carriers should not purchase exchanges in order to increase its [sic] universal service support dollars, neither should a carrier seek to be designated as an ILEC in order to maximize universal service support dollars.”³ Similarly, SBC observes that “where a carrier like Mid-Rivers has been able to extend its facilities into an area and profitably serve the vast majority of customers with little or no universal service support, there is no basis for allowing that carrier to manipulate the universal service regime to obtain additional funding and thus increase its profits.”⁴ GCI states that, as applied to the universal service system, the Mid-Rivers

² While taking a less direct attack on Mid-Rivers’ attempt to obtain increased universal service support than the above parties mentioned here, ACS (at 6 – “If the Commission finds that Mid-Rivers is an ILEC for universal service purposes, however, the Commission should apply this classification not only to receipt of universal service funds, but also to universal service *obligations* typically applicable to ILECs”) and Iowa Telecom (at 7 – “[T]he propriety of two carriers operating in the same study area receiving different levels of ILEC universal support ... should be considered on a case-by-case basis and, therefore, not resolved in a manner financially beneficial to the CLEC [competitive local exchange carrier] without adequate consideration of the merits.”) implicitly support Qwest’s contention that the universal service issue presented by the Mid-Rivers Petition should not be resolved in such a way that Mid-Rivers obtains a competitive advantage subsidy.

³ Sprint at 2.

⁴ SBC at 8.

Petition is nothing more than an egregious attempt at “arbitrage.”⁵ AT&T comments that “carriers should *not* be permitted to abuse Section 251(h)(2) in order to obtain USF payments as an ILEC...”⁶

In short, the majority of commenting parties concur in Qwest’s position that, if the Commission were to allow Mid-Rivers to increase its universal service support via the instant Petition, it would undermine the Commission’s long-standing position that all carriers competing for a given customer are entitled to the same universal service support. Again, the Commission should prevent this “gaming of the system” by, at the very least, freezing universal service levels at existing levels. Any additional universal service issues presented by the Mid-Rivers Petition or others like it should then be addressed in the universal service docket.

In contrast, the comments of the Montana Public Service Commission (“MPSC”) and certain other commenting parties stand the rationale of universal service on its head in arguing that universal service should be available as a competitive advantage subsidy in precisely the manner sought by Mid-Rivers. MPSC states that “Mid-Rivers’ investment warrants the increased support that it might get [should the Mid-Rivers Petition be granted] and it successfully petition[s] for a waiver of the study area rules.”⁷ Similarly, both the Rural Independent Competitive Alliance (“RICA”) and Hancock Communications, Inc. (“Hancock”) state that Mid-Rivers should be rewarded for its investment in Terry by receiving increased universal service support.⁸ These comments conflict with the Commission’s extensive record demonstrating the fundamental principle that universal service support must be provided in a competitively-neutral

⁵ GCI at 5.

⁶ AT&T at 4.

⁷ MPSC at 5.

⁸ RICA at 5; Hancock at 3.

manner.⁹ RICA,¹⁰ National Telecommunications Cooperative Association (“NTCA”)¹¹ and TCA, Inc. - Telecom Consulting Associates (“TCA”)¹² also argue that the Commission should ignore these universal service concerns because the expected increases in universal service support are not “significant” enough to warrant concern. Qwest believes that the amounts directly at issue in the Mid-Rivers Petition are significant. Regardless, however, these parties ignore the significant, aggregate impact on universal service that will result in light of the anticipated onslaught of petitions of this type in the future.

Finally, MPSC, in arguing that Mid-Rivers should be entitled to increased universal service support, places great weight on the fact that Mid-Rivers has built a network capable of deploying advanced services.¹³ This argument also misses the mark. Universal service funding has never been available to support the build-out of advanced services such as DSL, cable, dial-up internet, voicemail, caller ID, etc. Universal service support is directed only at the provision of basic telecommunications services. Again, Mid-Rivers asserts that it has already constructed outside plant facilities in Terry to provide both basic telephone service and advanced services and presumably believed it could profitably do so based on the universal service support available from the non-rural fund. Preventing Mid-Rivers from obtaining unjustified increases in its universal service support does not penalize Mid-Rivers, but rather ensures that a level playing field is preserved.

⁹ For this reason, Qwest also opposes the suggestion of certain parties that universal service and access charge issues presented by the Mid-Rivers Petition can simply be ignored.

¹⁰ RICA at 6.

¹¹ NTCA at 5.

¹² TCA at 6.

¹³ MPSC at 6.

There is also strong support, by the majority of parties addressing the issue, with Qwest's position that issues presented by the Mid-Rivers Petition relating to access charges should be addressed in the intercarrier compensation docket as part of any appropriate overall reform.¹⁴

II. QWEST OPPOSES THE COMMENTS OF CERTAIN COMMENTING PARTIES THAT QC SHOULD CONTINUE TO HAVE UNBUNDLING OBLIGATIONS IN TERRY OR THAT MID-RIVERS SHOULD HAVE THE BENEFIT OF THE RURAL ILEC EXEMPTION

The Commission should also be careful to avoid the creation of another, related type of improper competitive advantage in ruling on the Mid-Rivers Petition. As discussed in Qwest's initial comments, whatever the Commission does with the Mid-Rivers Petition, it must avoid a result where QC retains unbundling obligations or where Mid-Rivers obtains the benefits of ILEC status without the attendant burdens (*i.e.* unbundling obligations). This issue parallels the universal service issue addressed above. As discussed below and in Qwest's initial comments, the solution for addressing the competitive circumstances presented by the Mid-Rivers Petition is not to make Mid-Rivers the ILEC in Terry. However, Qwest opposes the comments of certain parties that the Commission should, if it grants the Mid-Rivers Petition, leave two ILECs in Terry¹⁵ or that Mid-Rivers should, in the event it is granted ILEC status, have the benefit of the rural ILEC exemption set forth in Section 251(f).¹⁶ Regardless of whether the Commission chooses to make Mid-Rivers an ILEC, QC should not remain an ILEC in Terry. As Iowa Telecom notes:

Logic dictates that for such a set of facts to arise, the historic ILEC must no longer possess sufficient market share, and resulting bargaining power, to negotiate reasonable rates, terms, and conditions on which the CLEC in question provides wholesale exchange service. In such a circumstance, the Commission

¹⁴ AT&T at 2; Iowa Telecom at 7-8; MPSC at 7; NTCA at 3.

¹⁵ MPSC at 8; RICA at 7; John Staurulakis, Inc. at 2.

¹⁶ MPSC at 11.

should conclude that the same Section 251(c) obligations should no longer be imposed on the historic ILEC.¹⁷

Similarly, Qwest supports GCI's comments stating that, should the Commission decide to grant the Mid-Rivers Petition, it should also make clear that Mid-Rivers, in becoming an ILEC, waives any right to the Section 251(f) rural exemption.¹⁸ Such a ruling will, in combination with the requested rulings described above on universal service and access charges, discourage future petitions designed merely to game the system by obtaining ILEC benefits without ILEC burdens.

III. QWEST SUPPORTS SBC'S COMMENTS THAT THE SOLUTION TO THE COMPETITIVE CIRCUMSTANCES PRESENTED BY THE MID-RIVERS PETITION IS TO ELIMINATE OBSOLETE ILEC REGULATION AND OPPOSES THE COMMENTS OF CERTAIN OTHER PARTIES SUGGESTING THAT THE STATUS OF THE ILEC SHOULD BE IGNORED

Other commenting parties, such as Iowa Telecom discussed above, join Qwest in recognizing the competitive circumstances presented by the Mid-Rivers Petition. Iowa Telecom contends that, when such circumstances are demonstrated, the legacy ILEC, at the very least, can no longer be deemed an ILEC or a dominant carrier and that "there [can] be [no] doubt that the historic ILEC has implemented the requirements of Section 251(c) as required by Section 10(d)."¹⁹ Iowa Telecom further suggests that, when considering 251(h)(2) petitions in the future, the Commission should simultaneously seek comment both on the petitioner's ILEC designation request and on whether the Commission should forbear from applying Section 251(c) to the historic ILEC.²⁰ Iowa Telecom further suggests that, in considering the merits of such forbearance, "the Commission should establish a rebuttable presumption that, to the extent that

¹⁷ Iowa Telecom at 11; *see also*, TCA at 7 (stating that, if Mid-Rivers is declared to be an ILEC in Terry, Qwest must be considered a non-dominant, competitive carrier rather than establishing two ILECs in Terry).

¹⁸ GCI at 5.

¹⁹ Iowa Telecom at 14.

²⁰ *Id.*

the CLEC has, indeed, substantially replaced the historic ILEC, each of the requirements for forbearance under Section 10 is met.”²¹ Iowa Telecom’s proposal fails to go far enough.

As Qwest demonstrates in its initial comments, the immediate significance under the Act presented by the circumstances underlying the Mid-Rivers Petition is that Qwest’s unbundling obligations should automatically go away. Additionally, the Mid-Rivers Petition presents competitive circumstances in which the Commission should forbear from regulating Qwest at all as an ILEC or as a dominant carrier. SBC, in its initial comments, states the case succinctly:

Where, as in the case of Mid-Rivers in Terry, an efficient competitor has successfully entered the market, deployed an overlay network that replicates (and, in some respects, may even be superior to) the incumbent’s network, and succeeded in winning virtually all of the customers in that market away from the incumbent, which nevertheless remains in the market as a competitor, there is no justification for perpetuating dominant carrier regulation of any carrier in the market. In this context, neither carrier possesses market power, nor can either block competitive entry. As a consequence, the Commission should neither classify the CLEC as an incumbent LEC, nor should it continue to impose dominant carrier regulation on the ILEC.²²

For these same reasons, Qwest opposes the comments of GCI, MPSC and ACS suggesting that the treatment of Mid-Rivers and the subsequent regulatory treatment of Qwest are unrelated and that the Commission should not deal with the latter in this docket.²³ Similarly, Qwest opposes the comments of RICA suggesting that the Commission should not address Qwest’s status, under a forbearance analysis or otherwise, in this docket.²⁴ These parties miss the point. The Commission correctly recognizes that it can not simply ignore the status of the legacy ILEC when evaluating the Mid-Rivers Petition. The Mid-Rivers Petition presents circumstances where a second facilities-based local exchange carrier has been able to compete so effectively

²¹ *Id.*

²² SBC at 3.

²³ GCI at 14; MPSC at 9; ACS at 2.

²⁴ RICA at 7.

that it contends it has “substantially replaced” QC as the ILEC. This level of competition demonstrates unequivocally that QC is no longer the dominant carrier in Terry and that Terry is highly competitive. It is equally clear that the ILEC interconnection rules as specified in Section 251(c) of the Act can have no applicability to a non-dominant carrier.²⁵ In the alternative, it is clear that the Commission can and should forbear, in such circumstances, from regulating QC as the ILEC in Terry pursuant to Section 251(h)(1) and forbear as well from dominant carrier regulation and the specific unbundling and resale requirements of Sections 251 and 271 in Terry -- rather than re-classify Mid-Rivers as the ILEC in Terry pursuant to Section 251(h)(2).

Finally, as discussed in Qwest’s initial comments, the Commission can manage the processing of the Mid-Rivers Petition and future petitions like it even more efficiently than the process proposed by Iowa Telecom. The Commission can simply issue an “umbrella” order holding that, whenever a petition is submitted demonstrating that a non-ILEC has overbuilt the legacy ILEC utilizing its own facilities, the Commission shall enter an order forbearing from regulating the legacy ILEC as the ILEC in that area pursuant to Section 251(h)(1) and forbearing as well from dominant carrier regulation and the specific unbundling and resale requirements of Sections 251 and 271 in that area.

²⁵ Qwest disagrees with the suggestion by ACS that a 50% market share should be the exclusive threshold for determining when an ILEC has lost its dominant position. ACS at 3. As discussed in Qwest’s initial comments, an incumbent’s obligation to provide unbundled network elements should be removed automatically upon a straight-forward showing of competition. Adequate competition can be demonstrated in different ways and certainly can be demonstrated where market share levels are lower than 50%. The Commission can and should define measurable thresholds at which an incumbent’s obligation to provide unbundled network elements is removed automatically. However, for purposes of the Mid-Rivers Petition and future petitions like it, it is clear that they make a showing far in excess of any reasonable standard.

IV. CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission take the actions described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY 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 Janice M. Myles of the Competition Policy Division of the FCC 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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