Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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) Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange	)	WC Docket No. 02-78

QWEST PETITION FOR FORBEARANCE

I. INTRODUCTION

Qwest Corporation ("Qwest") hereby requests that the Federal Communications Commission ("Commission"), pursuant to Section 10(c) of the Telecommunications Act of 1996,[1] forbear from applying the requirements of 47 U.S.C. Sections 251(c) and 271(c) on Qwest, and from otherwise regulating Qwest as an incumbent local exchange carrier ("LEC") in the Terry, Montana local exchange.[2] Such relief is long over due. The Commission has not set a threshold at which a carrier should be relieved of incumbent LEC obligations. Qwest submits that any threshold for such relief should be far above Qwest's miniscule market share in the Terry local exchange.

In 1997, Mid Rivers Telephone Cooperative, Inc. ("Mid-Rivers") entered the Terry,

[1] 47 U.S.C. § 160(c).

[2] 47 U.S.C. §§ 251(c), 271(c).

Montana exchange as a competitive LEC and overbuilt Qwest's facilities.[3] Mid-Rivers estimates that it serves approximately 93 percent of the access lines in the entire Terry exchange and 97 percent of the residential and business access lines within the Terry town limits.[4] Mid-Rivers now has a ubiquitous network, serving the entire exchange with its own facilities.[5] In light of Mid-Rivers' gains in the Terry exchange, the Commission recently declared that Mid-Rivers is an incumbent LEC in the Terry exchange, under Section 251(h)(2), deciding that Mid-Rivers occupies a position comparable to that of a legacy incumbent LEC.[6] The Commission also found that Mid-Rivers had substantially replaced Qwest in the Terry exchange,[7] and that it was important that a hypothetical new competitive LEC seeking to serve the Terry exchange not be permanently foreclosed from obtaining interconnection, unbundled network elements ("UNEs") or other offerings mandated by Section 251(c) from Mid-Rivers[8].

II. ARGUMENT

Conditions in the Terry exchange present the Commission with its second opportunity to forbear from the market-opening requirements of Sections 251(c) and 271(c). The first opportunity was in Omaha, where the Commission granted forbearance from the requirement that Qwest provide unbundled loops and transport in nine wire centers.[9] Given the market

---

[3] *See 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)*, Report and Order, 21 FCC Rcd 11506 (2006) ("*Report and Order*").

[4] *Id.* at 11506-07 ¶ 2.

[5] *Id.* at n.3.

[6] *Id.* at 11509-10 ¶¶ 8, 9.

[7] *Id.* at 11509 ¶ 8, 11513-14 ¶ 15.

[8] *Id.* at 11515 ¶ 19.

[9] *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19448 ¶ 66, 19449-51 ¶¶ 68-69 (2005) ("*Omaha Order*"), *appeal*

conditions in the Terry exchange, the Commission should forbear from imposing any of the requirements of Sections 251(c) and 271(c), and any other incumbent LEC regulation,[10] on Qwest. The Commission should not regulate Qwest as an incumbent in the Terry exchange because Qwest no longer has the only last-mile facilities in the exchange,[11] the Commission has said that Mid-Rivers' facilities appear to be technically superior to Qwest's,[12] and Mid-Rivers now serves substantially all of the customers in the Terry exchange with its ubiquitous facilities.[13] Continuing to impose the regulatory burdens of incumbency on Qwest, a carrier with less than 10 percent of the market, would be absurd.[14] As the Commission noted in the Mid-Rivers *Report and Order*, it is unlikely that a third competitor will try to enter this rural market where there are already two facilities-based competitors.[15] Nonetheless, if such a competitor does emerge it is important that Qwest not bear the burdens of incumbency in the Terry exchange.

A. The Commission Should Forbear From Regulating Qwest As An Incumbent LEC

Heavy regulation of an incumbent LEC stems from the assumption that the incumbent has the only ubiquitous network, and has a dominant market share. These assumptions no longer hold in the Terry exchange. Therefore, Qwest seeks forbearance from regulation as an

---

pending sub nom. Qwest Corporation v. FCC, No. 05-1450 (D.C. Cir. *oral argument scheduled for* Feb. 6, 2007).

[10] *Report and Order*, 21 FCC Rcd at 11515-21 ¶¶ 20-34.

[11] *Id.* at 11511-12 ¶ 12.

[12] *Id.*

[13] *Id.* at 11511-12 ¶¶ 12-13.

[14] There is no need to separate out mass market and enterprise segments in the Terry exchange. *Id.* at 11511 ¶ 12 & n.31.

[15] *Id.* at 11515 ¶ 19 & n.56.

incumbent. Specifically, Qwest seeks forbearance from regulation as an incumbent under Sections 224, 251, 252, 259, 271 and 275, and any regulations enacted pursuant to those provisions. Qwest outlines the most salient of these provisions in the following paragraphs.

1. The Commission Should Forbear from the Requirement that Qwest Provide UNEs in the Terry Exchange

As in Omaha the state of local exchange competition justifies forbearance from UNE obligations.[16] In Omaha the Commission granted forbearance in nine wire centers even though Cox, the competitor, had less than 100% coverage.[17] Here, Mid-Rivers serves the entire exchange with its own facilities. Thus, the Commission should forbear from the unbundling requirements of Sections 251(c)(3) and 271(c)(2)(b)(ii), (iv), (v), and (vi) throughout the exchange. Moreover, the Commission should also forbear from the additional requirement that Qwest provide wholesale access to loops, transport and switching at just and reasonable rates under Section 271(c).

2. The Commission Should Forbear from the Requirement that Qwest Provide Interconnection at Any Technically Feasible Point and Reasonable Notice of Network Changes

Because Mid-Rivers has ubiquitous coverage in the Terry exchange, and because there are no other facilities-based carriers in the exchange Qwest's network is not needed for interconnection under Section 251 (c)(2) and 271(c)(2)(B)(i).[18] Furthermore, because Mid-Rivers is an incumbent LEC, there is another carrier that could provide interconnection at any technically feasible point.[19] Since Qwest's network is no longer necessary for interconnection,

---

[16] *Omaha Order*, 20 FCC Rcd at 19446-47 ¶ 63.

[17] *Id.* at 19450-51 ¶ 69.

[18] *Id.* at 19457-58 ¶ 86.

[19] *Report and Order*, 21 FCC Rcd at 11509 ¶ 8, 11514-15 ¶ 18.

the Commission should also forbear from the related requirement that Qwest give notice of network changes under Section 251(c)(5).

3. The Commission Should Forbear from the Requirement that Qwest Provide Collocation

Section 251(c)(6) requires incumbent LECs to provide collocation for interconnection as well as for access to UNEs. In the *Omaha Order*, the Commission granted Qwest forbearance from collocation only for access to the UNEs from which it granted forbearance.[20] The Commission did not grant forbearance from collocation for interconnection because it mandated that Qwest must still provide interconnection.[21] By contrast, in the Terry exchange it is no longer necessary that Qwest provide interconnection at any technically feasible point. Accordingly, the Commission should forbear from collocation for both interconnection and access to UNEs.

4. The Commission Should Forbear from the Requirement that Qwest Provide Resale at a Wholesale Discount

The Commission should forbear from requiring Qwest to provide resale at a wholesale discount under Sections 251(c)(4) and 271(c)(2)(B)(xiv). Given its market position, Qwest should only be required to provide resale at just and reasonable rates under Section 251(b), as would any other carrier with a similar market position.

5. The Commission Should Forbear from the Requirement that Qwest Negotiate in Good Faith when Fulfilling Requests Under Section 251(c)

Because it should no longer be required to respond to requests from requesting carriers under Section 251(c) Qwest should no longer be required to negotiate with requesting carriers in good faith under Section 251(c)(1). Qwest will retain the requirement to negotiate in good faith in order to fulfill its duties under sSection 251(b).

---

[20] *Omaha Order*, 20 FCC Rcd at 19458 ¶ 86.

[21] *Id.* and at 19456 ¶ 84.

6. The Commission Should Forbear from Considering Qwest an Incumbent LEC or a Bell Operating Company in the Provision or Request of Poles, Ducts, Conduits or Rights-of-Way

Given Qwest's market position it is no longer reasonable to consider Qwest an incumbent LEC in the provision or request of poles, ducts, conduits and rights-of-way in the Terry exchange under Sections 224 and 271(c)(2)(B)(iii).

B. THE FORBEARANCE CRITERIA ARE MET

Section 10(a) of the Act requires that the Commission "forbear from applying any regulation or any provision of this [Act] to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" if the following factors are satisfied:

> (1) enforcement of such regulation or provision 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 or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

In making the Section 10(a)(3) public interest determination, Section 10(b) requires that the Commission consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. Section 10(d) bars the Commission from forbearing from the requirements of Section 251(c) or Section 271 until those requirements have been fully implemented.

1. "Just and Reasonable" Prices

To grant forbearance, the Commission must first determine that "enforcement of [the challenged] regulation or provision 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 or unreasonably discriminatory." Having lost more than 90 percent of the market, Qwest obviously no longer enjoys market power in Terry, as reflected in the Commission's decision to declare Qwest non-dominant in Terry.[22] In fact, Mid-Rivers enjoys market share "significantly higher than the shares held by many legacy incumbent LECs in recent years."[23] Moreover, the Commission has already found that other facilities (those of Mid-Rivers) appear to be technically superior to Qwest's.[24] For these reasons, the Commission has already concluded that Mid-Rivers has substantially replaced Qwest in the Terry local exchange.[25]

Clearly, Qwest does not maintain a level of power in the Terry market that would justify a continuation of resale, unbundling and other incumbent LEC obligations such as interconnection at any technically feasible point, providing public notice of changes in the network that would affect interoperability, and satisfying collocation obligations. If Qwest attempted to charge unjust or unreasonably discriminatory rates, its customers would simply turn to Mid-Rivers. Qwest is now a bit player in the Terry exchange and no longer has the monopoly on facilities that is assumed in Sections 251(c), 271, and other incumbent LEC regulation. Unlike the situation in Omaha, where the Commission denied forbearance from Section

---

[22] *Report and Order*, 21 FCC Rcd at 11506 ¶ 1, 11513-14 ¶ 15.

[23] *Id.* at 11511-12 ¶ 12.

[24] *Id.*

[25] *See id.* at 11513-14 ¶¶ 14-15.

251(c)(3) except as to unbundling in nine wire centers, there are no competitors in the Terry exchange that rely on Qwest's wholesale services at all.[26] Accordingly, forbearance would not lead to a reduction in retail competition.[27]

2. Consumer Protection, the Public Interest, and Full Implementation

For largely the same reasons, Sections 10(a)(2) and (3), and 10(d) are satisfied as well: *i.e.*, imposing unbundling, resale, and other incumbent LEC regulation on Qwest in the Terry exchange is unnecessary to protect consumers,[28] forbearance is in the public interest,[29] and Sections 251(c) and 271 have been "fully implemented."[30] Mid-Rivers does not use Qwest's facilities in order to compete, yet it serves the vast majority of customers in the Terry exchange. This demonstrates that if Qwest attempted to use freedom from incumbent LEC regulation, to harm consumers, those consumers would simply leave Qwest. As such, the Commission should find that the second condition is satisfied.

The third statutory condition for forbearance is also met. The public interest will be advanced by reducing the present regulatory asymmetry between competing carriers and eliminating the economic distortions caused by the imposition of intensive regulations on Qwest, which is only a small provider in the Terry exchange.[31]

Finally, Sections 251 and 271 have been fully implemented. Section 251(c) is fully implemented nationwide because the Commission has issued rules implementing Section 251(c)

---

[26] *Omaha Order*, 20 FCC Rcd at19444-45 ¶ 60.

[27] *Id.*

[28] 47 U.S.C. § 160(a)(2).

[29] 47 U.S.C. § 160(a)(3).

[30] 47 U.S.C. § 160(d).

[31] *Omaha Order*, 20 FCC Rcd at 19454-55 ¶ 78. Finding that the public interest is furthered by increasing regulatory parity.

and those rules have gone into effect.[32] Section 271(c) is fully implemented in Montana, including Terry, because there is nothing further the Commission or Qwest needs to do to implement the checklist.[33]

III. CONCLUSION

For the foregoing reasons Qwest requests that the Commission forbear from enforcing the requirements of Sections 251(c) and 271(c) on Qwest and from otherwise regulating Qwest as an incumbent LEC in the Terry, Montana local exchange. Qwest's market share is far below any threshold necessary to trigger forbearance from treating a carrier as an incumbent LEC. The Commission should promptly release Qwest from incumbent LEC obligations in the Terry exchange.

Respectfully submitted,

QWEST CORPORATION

By: /s/Daphne E. Butler
Craig J. Brown
Robert B. McKenna
Daphne E. Butler
Suite 950
607 14th Street, N.W.
Washington, DC 20005
303-383-6653

Its Attorneys

January 22, 2007

---

[32] *Id.* at 19440 ¶ 53.

[33] *See In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, Memorandum Opinion and Order, 17 FCC Rcd 26303 (2002); *see also In the Matters of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21503 ¶ 16 (2004), *aff'd sub nom., Earthlink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir.), *reh'g denied*, 2006 U.S. App. LEXIS (D.C. Cir. Nov. 9, 2006) (No. 05-1087).

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **QWEST PETITION FOR FORBEARANCE** to be 1) filed with the Secretary of the FCC via the FCC's Electronic Comment Filing System in WC Docket No. 02-78 and 2) served (electronic copy) via e-mail on the FCC's contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

January 22, 2007