In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re	)	
	)	
Mid-Rivers Telephone	)	**No. 04–1163**
Cooperative,	)	
	)	
Petitioner	)	
	)	

OPPOSITION OF THE
FEDERAL COMMUNICATIONS COMMISSION
TO PETITION FOR A WRIT OF MANDAMUS

Mid-Rivers Telephone Cooperative is a competitive local exchange carrier in the Terry, Montana, exchange, for which Qwest (formerly U.S. West) is the incumbent local exchange carrier, or ILEC. In February 2002, Mid-Rivers petitioned the Federal Communications Commission for an order designating Mid-Rivers as the ILEC in Terry. Mid-Rivers now seeks a writ of mandamus compelling the Commission to act on its petition within 30 days.

Mid-Rivers has failed to show that it is entitled to the extraordinary relief of mandamus. The legal and policy issues raised in its pending petition for reclassification as an ILEC are novel and complex, and potentially far reaching in their effect. Moreover, 47 U.S.C. § 251(h)(2) requires that the Commission issue a rule if it seeks to designate Mid-Rivers as an ILEC in Terry. The FCC staff therefore has prepared, and the Commissioners currently are voting on, a draft Notice of Proposed Rulemaking that would address both concerns. Mid-Rivers' petition for a writ of mandamus should be denied.

1. Statutory background.

a. Until 1996, local telephone service typically was offered by local exchange carriers (LECs) that held exclusive state franchises to serve their

designated service areas. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). In the Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, Congress eliminated monopoly franchises in favor of competitive entry. To further the objective of local competition, Congress added to the Communications Act new section 251(c), which requires "incumbent local exchange carriers" to interconnect with competitive LECs and to provide them with access to various parts of the local phone network. 47 U.S.C. § 251(c). Congress exempted incumbent "rural telephone companies" (essentially, very small LECs, *see* 47 U.S.C. § 153(37)) from network access obligations under section 251(c), although it provided that state commissions could terminate the exemption under specified conditions. 47 U.S.C. § 251(f)(1).

The term "incumbent local exchange carrier" is defined in section 251(h), 47 U.S.C. § 251(h). Section 251(h)(1) defines a LEC as an ILEC in a service area if: (1) the LEC offered local telephone service in that area when the Telecommunications Act was enacted, and (2) the LEC was on that date a member of an FCC-established association of local telephone companies (known as the National Exchange Carriers Association, or NECA) or subsequently became a "successor or assign" of a NECA member. 47 U.S.C. § 251(h)(1)(A), (B). For clarity, we refer to an ILEC defined under section 251(h)(1) as a section 251(h)(1) incumbent.

Section 251(h)(2) sets forth an alternative means for imposing network access obligations under section 251(c) on a LEC that does not meet the historically oriented definition in section 251(h)(1). Under section 251(h)(2), the Commission may "by rule" provide for the treatment of a LEC as an ILEC "for purposes of" section 251 if: (1) the LEC "occupies a position in the market for telephone exchange service within an area that is comparable to

the position occupied by" a section 251(h)(1) incumbent; (2) the LEC has "substantially replaced" the section 251(h)(1) incumbent; and (3) imposing incumbent LEC treatment is "consistent with the public interest, convenience, and necessity and the purposes of [section 251]." 47 U.S.C. § 251(h)(2)(A)–(C).

b. The Telecommunications Act also codified the Commission's existing universal service policies, which encourage ubiquitous availability of certain telephone services at affordable prices. 47 U.S.C. § 254. As part of the statutory program, universal service support payments are made from a federal fund to "eligible telecommunications carriers" (ETCs) designated by the FCC or by a state commission. *See* 47 U.S.C. §§ 214(e), 254(e). To be designated as an ETC, a carrier must offer services supported by the federal universal service program "throughout the service area for which the designation is received" and "advertise the availability of such services and the charges therefor." 47 U.S.C. § 214(e)(1)(A), (B). In addition, "[b]efore designating an additional [ETC] in an area served by a rural telephone company," the FCC or a state commission must find "that the designation is in the public interest." 47 U.S.C. § 214(e)(2). The right to receive universal service support depends upon designation as an ETC, and not upon status as an ILEC.

2. Mid-Rivers' petition for reclassification as an ILEC.

On February 5, 2002, Mid-Rivers—which is a section 251(h)(1) ILEC in some of the service areas adjacent to Terry—filed a petition under section 251(h)(2) seeking to change its status in Terry from that of a competitive LEC to that of an ILEC. Petition of Mid-Rivers Telephone Cooperative (Mid-Rivers' FCC Pet.) at 1–2 (Mandamus Pet., App. 1). Mid-Rivers asserted that it had captured from Qwest approximately 97% of the 317 residential and 118

business lines in town of Terry and approximately 93% of the lines in the Terry exchange. *Id.* at 2. Mid-Rivers also stated that it used its own facilities to serve customers in Terry, although it relied on Qwest's network to serve customers located outside town limits. *Id.* at 2 & n.1. Mid-Rivers noted that it already had been designated as an ETC by the state of Montana and was thus already entitled to receive universal service support for its operations in Terry. *Id.* at 2.

Mid-Rivers contended that it satisfied the three-part test for ILEC designation under section 251(h)(2). Mid-Rivers asserted under section 251(h)(2)(A) and (B) that its market share in Terry, and its obligation as a state-designated ETC to provide telephone service throughout the service area, demonstrated that it occupied a "position in the community comparable to that held by Qwest" and that it had "more than substantially replaced the ILEC" in the Terry market. *Id.* at 3. Mid-Rivers also argued that the public interest would be served by "*de jure* recognition of the *de facto* situation in Terry." *Id.* Although Mid-Rivers asserted that it was "ready, willing and able to undertake the obligations of an incumbent," *id.* at 3, it did not address whether it would seek to take advantage of the rural carrier exemption to the network-access requirements of section 251(c).

The Commission issued a Public Notice on April 19, 2002, seeking comment on Mid-Rivers' petition for reclassification as an ILEC.[1] Four commenters supported Mid-Rivers' petition. Western Wireless Corporation

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[1] *Pleading Cycle Established for Comments on Mid-Rivers Telephone Cooperative Inc. Petition for Declaratory Ruling to Declare Mid-River an Incumbent LEC Pursuant to Section 251(h)(2) of the Act*, WC Docket No. 02–78, Public Notice, DA 02-914 (rel. Apr. 19, 2002) (Mandamus Pet., App. 2).

filed comments opposing the petition.[2] Qwest requested that the Commission issue a notice of inquiry before acting on Mid-Rivers' petition.[3] Both Western Wireless and Qwest asserted that Mid-Rivers' request to be designated as a section 251(h)(2) incumbent implicates the Commission's universal service policies and raises significant legal questions.

Qwest, in particular, argued that designating Mid-Rivers as the incumbent LEC in Terry could affect the universal service program. Qwest Letter 3. Under the Commission's rules, the amount of universal service support a carrier may receive varies to some degree according to the rural or non-rural status of the carrier and its ILEC or competitive LEC status. *See*, *e.g.*, 47 C.F.R. §§ 54.307, 54.309. Because Mid-Rivers qualifies as a rural telephone company, Qwest argued, the Commission should not designate Mid-Rivers as a section 251(h)(2) incumbent until it has considered fully the implications of that designation for universal service payment purposes. Qwest Letter 3–4.

Western Wireless and Qwest also asserted that other competitive LECs might have greater difficulty obtaining universal service support if Mid-Rivers were designated the incumbent LEC in Terry. Western Wireless Opp. 1–2; Qwest Letter 2 (citing 47 U.S.C. § 214(e)(2) (requiring that carriers seeking universal service support for an area served by a rural carrier show that ETC designation is in the public interest)). Western Wireless and Qwest also contended that, if Mid-Rivers were permitted to combine its surrounding

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[2] Opposition of Western Wireless Corporation (May 6, 2002) (Western Wireless Opp.) (attached, *infra*, App. A).

[3] Letter from Craig J. Brown, Senior Attorney, Qwest, to Marlene H. Dortch, Secretary, FCC (June 28, 2002), at 1 (Qwest Letter) (attached, *infra*, App. B).

ILEC service area with the Terry exchange—as Mid-Rivers proposed, *see* Mid-Rivers' FCC Pet. 3—other competitive carriers might be required under 47 U.S.C. § 214(e) to serve Mid-Rivers' entire incumbent service area (rather than just the Terry exchange) in order to be designated as an ETC and receive universal service support. Western Wireless Opp. 2; Qwest Letter 2.

Qwest also questioned Mid-Rivers' exclusive focus on the Terry exchange. In order to designate Mid-Rivers as an ILEC under section 251(h)(2), the Commission must find that Mid-Rivers occupies a comparable position to Qwest "within an area" and that Mid-Rivers has "substantially replaced" Qwest. 47 U.S.C. § 251(h)(2)(A), (B). Section 251(h) does not specify the geographic area to be considered. Qwest suggested that, rather than just the Terry exchange, the relevant area under section 251(h)(2) should be the entirety of Qwest's service area in Montana in which Mid-Rivers has been designated as an ETC. Qwest Letter 2.

Finally, Western Wireless and Qwest argued that, if Mid-Rivers is exempt as a rural telephone company from the network access obligations that section 251(c) places on ILECs—and if Qwest ceased to be subject to those obligations when Mid-Rivers became the ILEC in Terry—then the FCC's grant of Mid-Rivers' petition might diminish the ability of competitive LECs to obtain access to the local telephone network in Terry. Western Wireless Opp. 2; Qwest Letter 2, 6.

3. Subsequent developments.

The Commission's Wireline Competition Bureau (the component of the agency responsible for telecommunications matters) has prepared a draft Notice of Proposed Rulemaking (NPRM) addressing Mid-Rivers' petition for designation as an ILEC in Terry, soliciting comment on the legal and policy issues arising out of Mid-Rivers' petition, and reaching certain tentative

conclusions. FCC Chairman Powell has circulated the NPRM to the other Commissioners for their consideration. Commission voting on the circulated item is currently in progress.

ARGUMENT

The Commission is "entitled to considerable deference in establishing a timetable for completing its proceedings." *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987). This Court will intervene only where "the agency's delay is so egregious as to warrant mandamus." *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (*TRAC*). In *TRAC*, the Court set forth a list of considerations for evaluating whether that high bar has been cleared:

> (1) the time agencies take to make decisions must be governed by a rule of reason;
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d at 80 (citations and internal quotation marks omitted). The Court also considers whether the agency is taking steps to bring its proceeding to completion. *See Cutler*, 818 F.2d at 897 (courts "should evaluate any prospect of early completion"); *In re Monroe Communications Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988) (denying mandamus where the agency was taking steps to complete its proceeding).

1. Mid-Rivers argues before this Court that the extraordinary relief of mandamus is warranted because section 251(h)(2) is a "straight forward provision" without the "ambiguities" or "inherent complexity" that "often require unavoidable extended periods to resolve." Mandamus Pet. 5, 6. Mid-Rivers acknowledged before the Commission, however, that its petition for reclassification raises issues "of first impression and so requires careful consideration."[4] For instance, section 251(h)(2) provides for designation of a carrier as an ILEC where consistent with "the purposes of" section 251, and the Commission rule addressing section 251(h)(2) (47 C.F.R. § 51.223) reflects an expectation that the reclassification provision would be invoked by either state commissions or competitors seeking to vindicate the network-opening mandates of section 251(c).[5] In the sole Commission precedent under section 251(h)(2), the Commission was asked by the territorial commission in Guam to resolve the ILEC status of the Guam Telephone Authority (GTA) in connection with requests by competitive LECs seeking access to GTA's

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[4] Letter from David Cosson, Kraskin, Lesse & Cosson, LLC, to Michael K. Powell, Chairman, FCC (Apr. 24, 2003) (Mid-Rivers' Letter), at 1 (Mandamus Pet., App. 3).

[5] *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16110 ¶ 1248 (1996) ("when the conditions set forth in section 251(h)(2) are met, the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbents"), *aff'd in part and rev'd in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part and aff'd in part*, *Iowa Utils. Bd.*, 525 U.S. 366.

network under section 251(c).[6] Here, by contrast, Mid-Rivers seeks to have itself designated as an ILEC. Its reasons for seeking reclassification under section 251(h)(2) are not reflected in the agency record, but they apparently are unrelated to the statutory obligations of section 251, because nothing *precludes* Mid-Rivers from voluntarily providing competitive LECs access to its network under the terms and conditions specified in section 251(c), even if it is not an ILEC.

The unusual posture of Mid-Rivers' petition is significant because Mid-Rivers has asked the Commission to determine that its reclassification is "consistent with the public interest, convenience, and necessity," 47 U.S.C. § 251(h)(2)(C), and (as explained above) commenters have argued that Mid-Rivers' petition has important implications for competitive carriers' ability to obtain network access under section 251(c), as well as for universal service. *See*, *supra*, pp. 5–6. The reclassification petition also presents a novel question whether the relevant geographic area of inquiry under section 251(h)(2) should be the Terry exchange, the entirety of Qwest's service area in Montana in which Mid-Rivers is an ETC, or some other area.

Given the complexity of the issues raised by Mid-Rivers' petition and

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[6] *See Guam Public Utils. Comm'n*, 12 FCC 6925, 6932–33 ¶¶ 10 (1997) (*GTA NPRM*). Because of a jurisdictional dispute, GTA, the telephone company in Guam, was not a member of NECA when the Telecommunications Act was passed, and, therefore, did not qualify as a section 251(h)(1) incumbent. *Id.* at 6930–32 ¶¶ 6–9, 6938 ¶ 20. Concluding that this situation undermined the purposes of section 251, the Commission proposed to issue a rule designating GTA as an ILEC under section 251(h)(2), *id.* at 6939–48 ¶¶ 22–43, and subsequently adopted such a rule, *Treatment of the Guam Tel. Auth. and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, 13 FCC Rcd 13765, 13765 ¶ 1 (1998).

their significance to other interested parties, "it is to be expected that consideration of such matters will take longer than might rulings on more routine items." *Monroe Communications*, 840 F.2d at 946; *see also Cutler*, 818 F.2d at 898 ("complexity of the task confronting the agency" is relevant to ascertaining reasonableness of delay). Moreover, although Mid-Rivers emphasizes that Terry, Montana, has only a tiny percentage of the nation's telephone lines, Mandamus Pet. 6, the comments in the agency record indicate that the Commission's decision on Mid-Rivers' petition could have national significance. For instance, the Rural Independent Competitive Alliance—an association of approximately 80 competitive LECs that, like Mid-Rivers, are owned by rural ILECs—has informed the Commission that "[s]everal rural CLECs have substantially replaced the incumbents in their service area, and are prepared to assume the obligations of incumbents."[7] The existing record before the Commission thus suggests that its decision on Mid-Rivers' petition may establish a precedent that will inform business and regulatory decisions by and concerning LECs throughout the nation.

Mid-Rivers asserts that the Commission can defer the resolution of any "difficult questions raised by the petition" to "subsequent proceedings." Mandamus Pet. 6. In order to grant Mid-Rivers' petition, however, the Commission must determine under section 251(h)(2)(C) that reclassification as an ILEC is consistent with the public interest and the purposes of section 251. The Commission may not grant the petition and defer those issues to a

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[7] Letter from Clifford C. Rohde, Kraskin, Lesse & Cosson, LLC, to Marlene H. Dortch, Secretary, FCC (Oct. 28, 2003), Att., at 2 (attached, *infra*, App. C); *see also* Comments of the Rural Independent Competitive Alliance, CC Dkt. No. 96–45 (May 5, 2003), at ii, 1 (excerpted, *infra*, App. D).

later proceeding. In any event, as Mid-Rivers recognizes, Mandamus Pet. 6, the Commission has discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j).

Relatedly, Mid-Rivers has not explained in its mandamus petition or the attached FCC filings how the Commission's ongoing consideration of the reclassification request is causing Mid-Rivers actual harm. Mid-Rivers states vaguely that "[b]y delaying . . . regulatory recognition of what Mid-Rivers has accomplished" in acquiring customers in Terry, "the FCC has imposed a financial burden on the subscriber/owners of Mid-Rivers." Mandamus Pet. 7. Elsewhere, however, Mid-Rivers asserts that reclassification as an ILEC would cause "little change in the amount of Universal Service support received by Mid-Rivers." *Id*. at 6. (And as noted, section 251 imposes network access *obligations* on ILECs.) Absent a showing of actual harm to Mid-Rivers, there is no basis for granting Mid-Rivers a writ of mandamus. *See*, *e.g.*, *TRAC*, 750 F.2d at 80 (the court must consider "the nature and extent of the interests prejudiced by delay"); *Cutler*, 818 F.2d at 898 ("perhaps most critically, the court must examine the consequences of the agency's delay").

2. Mid-Rivers' request for a writ of mandamus also is deficient because Mid-Rivers has not shown that the period of time for which its petition has been pending is unreasonable, much less that the agency's conduct of the proceeding has been so egregious as to warrant extraordinary relief. *TRAC*, 750 F.2d at 79; *see also In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir.) ("a finding that delay is unreasonable does not, alone, justify judicial intervention"), *cert. denied*, 502 U.S. 906 (1991).

In proceeding on Mid-Rivers' request for reclassification, the Commission

has employed its "broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Cutler*, 818 F.2d at 896. In the 31 months since Mid-Rivers filed its petition, the Commission and the Wireline Competition Bureau have processed and acted upon other matters including 18 applications by Bell operating companies seeking authority under 47 U.S.C. § 271 to provide long distance services in 40 states.[8] The Commission had a statutory duty to act on those (usually hotly contested) applications within 90 days. 47 U.S.C. § 271(d)(3). The agency also has a statutory duty to review every two years (*i.e.*, in 2002 and again this year) *all* of its telecommunications regulations to determine whether they should be retained, modified, or repealed. *See* 47 U.S.C. § 161. In 2003, the Commission and the Bureau were deeply engaged in conducting the "Triennial Review" of the Commission's rules specifying the network elements that ILECs must "unbundle" under section 251(c)(3).[9] This activity (in conjunction with other pressing telecommunications and non-telecommunications matters that have demanded the agency's attention[10]) shows that the period for which Mid-Rivers' petition has been pending is not

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[8] *See*, *e.g.*, RBOC Applications to Provide In-region, InterLATA Services under § 271, http://www.fcc.gov/Bureaus/Common_ Carrier/in-region_applications/.

[9] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003), *aff'd in part and vacated in part*, *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *pets. for cert. pending*, Nos. 04–12, 04–15 & 04–18 (filed June 30, 2004).

[10] *See*, *e.g.*, *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) (comprehensive review of the Commission's media ownership rules), *aff'd in part and remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *pet. for panel reh'g pending* (filed Aug. 9, 2004).

the result of unreasonable agency delay, but of the agency's need "to prioritize in the face of limited resources." *Cutler*, 818 F.2d at 898; *see also* Mid-Rivers' Letter 1 (acknowledging that "the Commission has been focused on several substantial common carrier issues").

The Commission, moreover, is poised to take action addressing Mid-Rivers' petition. The Wireline Competition Bureau has drafted, the FCC Chairman has circulated, and the five FCC Commissioners are voting on a draft Notice of Proposed Rulemaking concerning Mid-Rivers' request for reclassification. Section 251(h)(2) requires the Commission to act "by rule," and the Commission proceeded in this manner in the only previous application for such designation. *See GTA NPRM*, 12 FCC Rcd at 6940 ¶ 25. Adoption of the NPRM would enable the Commission to inform the public of the specific issues that were raised in comments on Mid-Rivers' petition, and to solicit comment on the issues of general significance from a broader array of interested parties, including parties that might not have direct involvement in the provision of service in Terry, Montana.

Mid-Rivers' request for a judicial order requiring the FCC to grant or deny Mid-Rivers' reclassification petition "within 30 days," *see* Mandamus Pet. 7, thus is wholly unjustified. The full Commission's pending consideration of an NPRM is an appropriate response to the significant legal and policy issues presented in Mid-Rivers' petition. Under these circumstances, there is no basis for "interfer[ing] with the normal progression of agency proceedings." *See In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004).

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted,

John A. Rogovin
General Counsel

Austin C. Schlick
Deputy General Counsel

John E. Ingle
Deputy Associate General Counsel

Nandan M. Joshi
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418–1740

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