

**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 Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2))	WC Docket No. 02-78
)	
)	

NOTICE OF PROPOSED RULEMAKING

Adopted: October 21, 2004

Released: November 15, 2004

By the Commission: Commissioners Copps and Adelstein issuing separate statements; Commissioner Martin concurring and issuing a statement.

Comment Date: 30 days after Federal Register publication of this Notice

Comment Reply Date: 45 days after Federal Register publication of this Notice

I. INTRODUCTION

1. Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers), a competitive local exchange carrier (LEC) in the Terry, Montana exchange, filed a petition with the Commission requesting that it be classified as an incumbent LEC in that exchange pursuant to section 251(h)(2) of the Communications Act of 1934, as amended (the Act or Communications Act).¹ Section 251(h)(2) allows the Commission to treat a competitive LEC as an incumbent LEC if the Commission determines “by rule” that the competitive LEC satisfies certain statutory criteria.² Resolution of the Mid-Rivers’ petition raises novel and difficult questions implicating several of the Commission’s major policies including local competition, universal service, and access charges. We thus initiate this Notice of Proposed Rulemaking (Notice) and invite comment on how this section of the Act should be applied to this specific factual situation as well as to future petitions of this type.³ Despite the complicated legal and policy issues posed by this petition, we intend to complete this proceeding as expeditiously as possible.

¹ Mid-Rivers serves approximately 11,000 access lines throughout a substantial portion of eastern Montana, generally between the Missouri and Yellowstone Rivers, and was formed in 1952 as a cooperative in order to bring telephone service to then unserved or poorly served rural areas. *See* 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 at 1 (filed Feb. 5, 2002) (Mid-Rivers Petition).

² 47 U.S.C. § 251(h)(2).

³ The only Commission precedent for the application of section 251(h)(2) involved the Guam Telephone Authority (GTA), which satisfied all of the requirements of section 251(h)(1) except that it was not a member of the National Exchange Carrier Association (NECA). *See Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h)(2) of the Communications Act*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925 (1997) (*Guam Declaratory Ruling and NPRM*); *Treatment of the Guam* (continued....)

II. BACKGROUND

A. Relevant Statutory Provisions

2. Section 251, added to the Communications Act by the 1996 Act, is a major element of Congress' plan to promote competition in the market for local exchange telephone service.⁴ To carry out this plan, Congress distinguished incumbent LECs from other LECs in section 251(h). Section 251(h)(1) defines an incumbent LEC as a carrier that, on the date of enactment of the 1996 Act, provided local exchange service and was either a member of NECA,⁵ or became a successor or assign of a member of NECA.⁶ The Commission previously has described the problems associated with reading literally the "successor or assign" provision of section 251(h)(1) and opted to interpret the statute more holistically to conform with the traditional notion of "successor or assign."⁷ All other LECs are presumptively not incumbents, and therefore are competitors.⁸

3. A LEC may also be treated as an incumbent if the Commission determines "by rule" that it meets the requirements of section 251(h)(2).⁹ This section of the Act sets forth a three-prong test for the

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Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, Report and Order, 13 FCC Rcd 13765, 13768-69, para. 6 (1998) (*Guam Report and Order*) (adopting in full the conclusions set forth in the *Guam Declaratory Ruling and NPRM*).

⁴ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15506, para. 4 (1996) (*Local Competition First Report and Order*).

⁵ NECA is an association, established by Commission rule, for all "telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line tariff participants, or receive payments from the transitional support fund administered by the association." 47 C.F.R. § 69.601(b). The association was established "in order to prepare and file access tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another company for all access elements." 47 C.F.R. § 69.601(a).

⁶ 47 U.S.C. § 251(h)(1). Incumbent LECs are subject not only to the requirements of sections 251(a) and (b), which are applicable to all LECs, but also are subject to the more detailed obligations in section 251(c). These obligations include the duties to: negotiate interconnection agreements in good faith; provide other carriers with unbundled access to its network elements; allow other carriers to resell its exchange service at wholesale rates; and provide physical collocation of other carriers' equipment. 47 U.S.C. § 251(c).

⁷ *Application of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14894-95, paras. 447-48 (1999) (declining to follow the literal approach set forth in *MCI Telecommunications Corp. v. The Southern New England Telephone Co.*, 27 F.Supp.2d 326, 336-37 (D.Conn. 1998)), *rev'd on other grounds*, *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

⁸ See generally, *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd 6925; *Guam Report and Order*, 13 FCC Rcd 13765 (determining by rulemaking the incumbent LEC status of GTA).

⁹ 47 U.S.C. § 251(h)(2). See also section 51.223 of the Commission's rules, 47 C.F.R. § 51.223, which implements section 251(h)(2).

Commission to use to determine whether treating the LEC as an incumbent is appropriate. The Commission may conclude, upon a clear and convincing showing, that a LEC should be treated as an incumbent if the LEC: (1) occupies a market position comparable to an incumbent; (2) has “substantially replaced” an incumbent LEC, and; (3) the reclassification serves the public interest, convenience, and necessity.¹⁰

B. Position of the Parties

4. Qwest is the incumbent LEC in the Terry, Montana exchange.¹¹ Mid-Rivers, an incumbent LEC in nearby exchanges, entered the Terry, Montana exchange as a competitive LEC in 1997 and quickly acquired a majority of the local subscribers.¹² Mid-Rivers claims to serve approximately 93 percent of the access lines in the exchange.¹³ Mid-Rivers serves its customers in the Terry exchange primarily over its own facilities.¹⁴ Therefore, Mid-Rivers, through its petition, asserts that the Commission should classify it as an incumbent LEC in Terry because it meets the three-part statutory test set forth in section 251(h)(2) of the Act.¹⁵

5. Several parties commented on the Mid-Rivers Petition. The Montana Public Service Commission, the Rural Independent Competitive Alliance (RICA), the National Telecommunications Cooperative Association (NTCA), and John Starulakis, Inc. all expressed support for the Mid-Rivers Petition.¹⁶ However, Western Wireless filed comments in opposition to the Mid-Rivers Petition asserting that the petition fails to satisfy the public interest standard in section 251(h)(2)(C) due primarily to the changes in universal service support availability that would result from a grant of the petition.¹⁷ Qwest filed a letter regarding the Mid-Rivers Petition that did not oppose the petition

¹⁰ 47 U.S.C. § 251(h)(2). *See Local Competition First Report and Order*, 11 FCC Rcd 15499, 16110, para. 1248.

¹¹ Qwest is the incumbent LEC in Terry, Montana because its predecessor, U S WEST, was a member of NECA and was the exclusive local exchange carrier in Terry on the date of enactment of the 1996 Act. *See* 47 U.S.C. § 251(h)(1). For purposes of clarity this *Notice*, we describe Qwest and similarly situated carriers as legacy incumbent LECs.

¹² Mid-Rivers Petition at 1-2. The Terry, Montana exchange includes customers located both within and outside of the town of Terry.

¹³ Mid-Rivers Petition at 2; Mid-Rivers serves approximately 97 percent of the 317 residential access lines and 97 percent of the 118 business access lines in the town of Terry. *Id.*

¹⁴ Mid-Rivers Petition at 2; *see* Letter from David Cosson, Counsel for Mid-Rivers, to Michael K. Powell, Chairman, FCC, WC Docket No. 02-78 at 1 (filed Apr. 24, 2003) (Mid-Rivers Apr. 2003 *Ex Parte* Letter). Mid-Rivers asserts that it neither resells Qwest service nor utilizes unbundled network elements of Qwest for its customers within the town limits of Terry. *Id.* Mid-Rivers purchases some resold services from Qwest to serve customers outside of the town of Terry.

¹⁵ Mid-Rivers Petition at 1.

¹⁶ Letter from Gary Feland, Chairman, Montana Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-78 (filed June 5, 2003) (June 5, 2003 Montana Commission *Ex Parte* Letter); RICA Comments; NTCA Comments; John Staurulakis, Inc. Comments.

¹⁷ *See* Opposition of Western Wireless at 1-2. Western Wireless proposes several conditions that, if imposed, would ameliorate its concerns. *Id.* at 3 (suggesting that the Terry service area should be a separate study area for (continued....))

explicitly. Qwest did raise questions about how granting this petition could adversely affect universal service support and local competition policies and concerns about the proper application of section 251(h)(2).¹⁸ Thus, Qwest proposes that the Commission issue a Notice of Inquiry to address its concerns.¹⁹

III. DISCUSSION

A. Classifying Mid-Rivers as an Incumbent LEC

1. Section 251(h)(2)(A)

6. In order to treat Mid-Rivers as an incumbent LEC, the Commission must find that Mid-Rivers “occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in [section 251(h)(1)].”²⁰ In the *Guam Declaratory Ruling and NPRM*, the Commission stated that “incumbent LECs typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c).”²¹

7. We seek comment on how to define the relevant “area” for the purposes of section 251(h)(2)(A). Can “area” be construed such that any part of a legacy incumbent LEC’s service area in which the competitive LEC contends that it meets the above statutory criteria would qualify? Specifically, should “area” be construed to be as small as an exchange? Under this interpretation, for example, the Terry exchange would be the relevant “area” for purposes of analyzing the Mid-Rivers petition. Alternatively, should a competitive LEC be required to demonstrate that it meets the statutory criteria for all or a significant part of the legacy incumbent LEC’s service area? Under this interpretation, the size of the legacy incumbent LEC’s service area is a more decisive variable – in this case Qwest operates as an incumbent LEC in disparate areas throughout the state of Montana and throughout 13 other states. We further invite commenters to address the extent to which universal service concerns should inform our interpretation of the relevant “area.” As discussed below, reclassification could result in newly-classified incumbent LECs being eligible for higher levels of universal service support than legacy incumbent LECs for serving the same area.²² Moreover, to the

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competitive ETC designation from Mid-Rivers’ current study area; that Mid-Rivers should be required to provide section 251(c)(2) interconnection in the Terry exchange, despite the 251(f) rural exemption, and; that competitive ETC applications should be evaluated according to the standards applicable to an area served by a non-rural company).

¹⁸ See Letter from Craig Brown, Senior Attorney, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-78 (filed June 28, 2002) (Qwest June 28, 2002 *Ex Parte* Letter).

¹⁹ *Id.* at 1.

²⁰ 47 U.S.C. § 251(h)(2)(A). Mid-Rivers asserts that it satisfies this requirement. Mid-Rivers Petition at 3.

²¹ *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd at 6941, para. 26, citing *Local Competition First Report and Order*, 11 FCC Rcd at 15505-12, paras. 1-20; *Guam Report and Order*, 13 FCC Rcd at 13768-69, para. 6 (adopting in full the conclusions set forth in the *Guam Declaratory Ruling and NPRM*).

²² See *infra*, para. 10.

extent that the legacy incumbent LEC is reclassified as a competitive LEC and obtains competitive Eligible Telecommunications Carrier (ETC) status²³ for that area, it would be eligible for the same per-line amount of high-cost universal service support that is available to the newly-classified incumbent LEC.²⁴

8. Assuming that the Terry exchange is the relevant “area” for purposes of analyzing the Mid-Rivers petition, we tentatively conclude that Mid-Rivers “occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [an incumbent LEC].”²⁵ We reach this tentative conclusion based on Mid-Rivers’ provision of facilities-based service to 93 percent of the lines in the Terry exchange. We ask parties to comment on this tentative conclusion.

2. Section 251(h)(2)(B)

9. In order for the Commission to treat LECs such as Mid-Rivers as incumbents, section 251(h)(2)(B) requires a showing that “such carrier has substantially replaced an incumbent local exchange carrier described in [section 251(h)(1)].”²⁶ In the *Guam Declaratory Ruling and NPRM*, the Commission concluded that this section is satisfied where the LEC at issue provides local exchange service “to all or virtually all” of the subscribers in a service area.²⁷ Assuming that the Terry exchange is the relevant “area” for purposes of analyzing the Mid-Rivers petition, we tentatively conclude that Mid-Rivers has “substantially replaced” Qwest for purposes of satisfying section 251(h)(2)(B) because it serves 93 percent of the subscribers in the Terry exchange. We seek comment on this tentative conclusion.

3. Section 251(h)(2)(C)

10. We further seek comment on whether the requested classification change is “consistent with the public interest, convenience, and necessity.”²⁸ Congress has declared unequivocally that promoting competition in local exchange and exchange access markets serves the public interest.²⁹ We invite comment as to whether the local competition provisions of the Act can be better served by classifying competitive carriers like Mid-Rivers as incumbent LECs in their exchanges.³⁰ Congress has also

²³ Section 254(e) of the Act provides that “only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support.” 47 U.S.C. § 254(e); *see also* 47 U.S.C. § 214(e); 47 C.F.R. § 54.201.

²⁴ *See* 47 C.F.R. 54.307; *see infra* discussion at paras. 10-14.

²⁵ 47 U.S.C. § 251(h)(2)(A).

²⁶ 47 U.S.C. § 251(h)(2)(B). Mid-Rivers asserts that it satisfies this requirement. Mid-Rivers Petition at 3.

²⁷ *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd at 6947, para. 38; *see Guam Report and Order*, 13 FCC Rcd at 13768-69, para. 6 (adopting in full the conclusions set forth in the *Guam Declaratory Ruling and NPRM*).

²⁸ 47 U.S.C. § 251(h)(2)(C). Mid-Rivers asserts that it satisfies this requirement. Mid-Rivers Petition at 3.

²⁹ *See* 47 U.S.C. § 160(b).

³⁰ Like the GTA, Mid-Rivers qualifies as a rural telephone company and, therefore, is exempt from regulation under section 251(c) of the Act. *Guam Declaratory Ruling and NPRM*, 12 FCC Rcd at 6946-48, paras. 35, 40; *see Guam Report and Order*, 13 FCC Rcd at 13768-69, para. 6 (adopting in full the conclusions set forth in the *Guam* (continued....))

encouraged the deployment of advanced telecommunications capability to all Americans.³¹ We believe there may be benefits both to consumers and potential competitors in the technical capabilities of Mid-Rivers' network, especially in comparison to the existing incumbent LEC. For example, Mid-Rivers claims that its network is superior to Qwest's facilities in the exchange and, apparently, is capable of carrying multiple advanced services.³² We seek comment on this. We also seek comment on the extent to which we should consider under the public interest standard broader market conditions. This would include comment regarding the regulatory treatment of other carriers, such as the legacy incumbent LEC which, in this instance, serves less than five percent of the market.³³ Furthermore, we encourage the Montana Public Service Commission to provide any additional comment on whether it is appropriate to grant the petitions in light of any particular state considerations that may exist.³⁴

11. We invite comment on the significance of universal service concerns to the public interest analysis under section 251(h)(2)(C). If we were to grant Mid-Rivers' petition, we note that the amount of high-cost universal service support available to the area could well increase because it would then be served by a newly classified incumbent LEC that qualifies for support under a different set of high-cost support mechanisms than the legacy incumbent LEC.³⁵ Therefore, classification may lead to fund increases by changing the amount of support available for service to particular areas. Unlike Qwest, for example, Mid-Rivers would be eligible for high-cost loop support, local switching support, and interstate

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Declaratory Ruling and NPRM). The Commission reasoned in the *Guam* case that the public interest is served because the section 251(f) exception is not absolute in that it includes a procedure for terminating the exception. Therefore, a carrier declared to be an incumbent has the potential to be subject to the obligations of section 251(c) while a carrier not declared to be an incumbent will never be subject to such obligations. *Id. But see* Opposition of Western Wireless at 1-2 (raising concerns about the potential effect of reduced interconnection obligations); Qwest June 28, 2002 *Ex Parte* Letter at 2 (raising the issue of section 251(c) obligations).

³¹ 47 U.S.C. § 157 nt.

³² Mid-Rivers Petition at 3. Therefore, Mid-Rivers states that reclassifying Mid-Rivers as an incumbent LEC in the Terry exchange would serve the public interest by allowing competitors to interconnect to a more capable and advanced network, including the local loops, increasing the potential for competitive service offerings to consumers. *But see* Opposition of Western Wireless at 2-3; Qwest June 28, 2002 *Ex Parte* Letter at 3. *See also* 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 (filed June 21, 2004).

³³ We discuss in detail the treatment of legacy incumbent LECs *infra* Part III.B.

³⁴ *See* June 5, 2003 Montana Commission *Ex Parte* Letter (briefly stating the state commission's support for the Mid-Rivers petition); *see also Local Competition First Report and Order*, 11 FCC Rcd at 16110, para. 1248 (stating, "[w]e expect to give particular consideration to filings from state commissions"). We note that the Montana Public Service Commission has designated Mid-Rivers as an ETC in the Terry exchange. *Mid-Rivers Petition* at 2 & n.4.

³⁵ *See Federal-State Joint Board on Universal Service*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, CC Docket No. 96-45, FCC 03-249 (rel. Oct. 27, 2003) at para. 103 ("The amount of federal high-cost support available to an incumbent carrier differs according to the size, population density, and topography of the incumbent carrier's study area, whether the costs of service are allocated to the state or federal jurisdiction, and whether the incumbent carrier's interstate access service is subject to price cap or rate-of-return regulation.").

common line support for serving the Terry exchange because of its comparatively small size.³⁶ Many competitive carriers such as Mid-Rivers are rural telephone companies that expand their service into neighboring rural areas served by large incumbent LECs, and consumers in such areas may benefit significantly from such competition.³⁷ At the same time, the Commission has recognized the vital importance of avoiding excessive growth in universal service fund size.³⁸ For example, we note that, under the Commission's rules, if Mid-Rivers were to purchase or otherwise acquire the Terry exchange from Qwest, Mid-Rivers' universal service support for the exchange generally would be frozen at the level of support prior to the transfer.³⁹ We seek comment on whether similar measures would be appropriate in the section 251(h)(2) context. We invite commenters to address these issues, and whether and how they should inform our analysis under section 251(h)(2)(C).⁴⁰

12. We also invite parties to comment on whether access charge considerations are relevant to the public interest analysis under section 251(h)(2)(C). Under the Commission's rules, competitive LECs may not tariff interstate access rates that are higher than the competing incumbent LEC rate,⁴¹ except that a rural competitive LEC that competes with a price cap LEC may charge rates contained in the NECA tariff.⁴² In some cases, a grant of incumbent LEC status under section 251(h) might result in increased access rates.⁴³ We ask parties to comment on whether potential increases in access charges should be a factor that the Commission considers in its public interest analysis under section 251(h)(2).

³⁶ See *supra* note 1; 47 C.F.R. sections 36.601, *et seq.*, 54.301, and 54.901. Moreover, because high-cost support generally is calculated based on costs averaged over an entire study area, a carrier serving a single, high-cost exchange will have higher costs than one serving multiple exchanges with varying costs.

³⁷ See Rural Independent Competitive Alliance Comments in CC Docket No. 96-45, FCC 03J-1 (May 5, 2003), at 1. The Rural Independent Competitive Alliance is a national association of approximately 80 competitive LECs operating in rural areas and affiliated with incumbent rural telephone companies. *Id.*

³⁸ See, e.g., *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, 16 FCC Rcd 11244, 11327, para. 211 (2001) (*Rural Task Force Order*).

³⁹ 47 C.F.R. § 54.305.

⁴⁰ See, e.g., *supra* note 17 (describing proposals by Western Wireless).

⁴¹ 47 C.F.R. § 61.26(b)(1).

⁴² 47 C.F.R. § 61.26(e). A "rural CLEC" is defined as a competitive LEC "that does not serve (*i.e.*, terminate traffic to or originate traffic from) any end users located within either: (i) Any incorporated place of 50,000 inhabitants or more . . . or (ii) [a]n urbanized area, as defined by the Census Bureau." 47 C.F.R. § 61.26(a)(6).

⁴³ For example, if a carrier charges the CALLS rate when it is classified a competitive LEC (because it is competing with a price cap LEC in a non-rural area), but it would be subject to rate-of-return regulation if it were classified as an incumbent LEC, interexchange carriers will pay higher rates as a result of a decision to classify the carrier as an incumbent LEC. See also *Opposition of Western Wireless at 2-3*.

B. Subsequent Regulatory Treatment of Qwest

13. In its application, Mid-Rivers does not discuss the subsequent regulatory treatment of Qwest if the Commission grants its petition.⁴⁴ The Commission has not previously been faced with the issue of reclassifying a legacy incumbent LEC, and section 251(h) is silent on this issue as well. Resolution of this issue raises a number of legal and policy concerns on which we seek comment. We seek comment on what regulatory treatment is appropriate for incumbent LECs which have been “substantially replaced” and which may no longer “occup[y] a position in the market” comparable to an incumbent LEC.⁴⁵ If the Commission finds that a competitive LEC has satisfied the requirements of section 251(h)(2), must the Commission also find that the legacy incumbent LEC should no longer be subject to dominant carrier regulations? Can the Commission simply reclassify an incumbent LEC as a competitive LEC on the basis of applying the three-part test in section 251(h)(2)? Implicit in support for such a theory is a finding that when all three conditions of section 251(h)(2) are satisfied to classify a competitive LEC as an incumbent in that service area, the legacy incumbent LEC will not retain the market characteristics that define an incumbent LEC and that require special treatment. In this respect, the record indicates that Qwest serves fewer than five percent of the lines in this exchange.⁴⁶ Thus, we seek comment on whether the logic implicit in the section 251(h)(2)(A) and (B) tests can be applied to reclassify automatically a legacy incumbent LEC as a competitive LEC.

14. Alternatively, we seek comment on whether there is any reason to permit more than one incumbent LEC in an exchange.⁴⁷ We note that Qwest continues to fit the literal definition in section 251(h)(1) of an incumbent LEC in Terry regardless of any potential classification of Mid-Rivers as an incumbent LEC in that service area.⁴⁸ We seek comment on what implications this has on our current interpretation of the Act. In particular, we seek comment on how such a situation would affect the Commission’s rules regarding administration of universal service, as those rules are predicated on a single incumbent LEC per study area.⁴⁹ For example, if two incumbent LECs were to be designated for

⁴⁴ Mid-Rivers, however, alludes to the possibility that Qwest might choose to leave the exchange if Mid-Rivers’ petition is granted, stating that it “would not object to a Qwest relinquishment of ETC status in Terry pursuant to section 214(e)(4) and would consider purchase of Qwest’s facilities in the Terry exchange.” Mid-Rivers Petition at 3 n.8.

⁴⁵ We also seek comment on how to address any additional statutory obligations particular to a legacy incumbent LEC that is a Bell Operating Company (BOC) – such as Qwest – that has additional obligations under sections 271 and 272 of the Act.

⁴⁶ See *supra* note 13.

⁴⁷ See Qwest June 28, 2002 *Ex Parte* Letter at 2 (questioning how the Commission would address this novel question).

⁴⁸ *Supra* paras. 3, 5 & n.14.

⁴⁹ Competitive ETCs normally receive the same per-line amount of high-cost universal service support that the incumbent LEC would receive for serving that customer, based on the incumbent LEC’s costs. 47 C.F.R. § 54.307. We note that the Commission asked the Federal-State Joint Board on Universal Service (Joint Board) to reexamine certain of the Commission’s rules relating to high-cost support, including the methodology for calculating support in areas served by multiple ETCs, and to provide recommendations as to whether these rules should be modified. See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 17 FCC Red 22642, para. 1 (2002). The Joint Board plans to address possible modifications to the basis of support for all ETCs as part of a comprehensive review of high-cost support mechanisms in the Rural/Non-Rural proceeding. See *Federal-State* (continued....)

a given area, which incumbent LEC's costs would serve as the basis of support in that area?⁵⁰ Similarly, we seek comment on whether a legacy incumbent LEC in such an exchange should be considered a competitive LEC or an incumbent LEC for purposes of the Commission's access charge rules.

15. The Commission has authority to forbear from certain regulatory requirements that might apply to a legacy incumbent LEC. We note that section 10 of the Act establishes a rigorous standard for forbearance⁵¹ and prohibits the Commission from forbearing from the section 251(c) interconnection obligations of incumbent LECs until those requirements have been "fully implemented."⁵² We seek comment on whether section 10 forbearance is the required mechanism to address the status of a legacy incumbent LEC. We also seek comment on whether and how findings that a carrier "has substantially replaced" the legacy incumbent LEC and satisfies the other requirements to be an incumbent LEC under section 251(h)(2) are relevant to the various requirements under section 10 for forbearance from regulation of the legacy incumbent LEC. Furthermore, we seek comment on the potential impact that Commission forbearance under section 10 would have on any relevant state regulation of legacy incumbent LECs, such as carrier of last resort obligations.

C. Other Considerations

16. The Commission has developed rules defining an incumbent LEC, but those rules do not explicitly provide for carriers that have been deemed to be incumbent LECs pursuant to section 251(h)(2) of the Act.⁵³ Because this definition is crucial to the implementation of the Commission's local competition and other rules, we propose adding a category under the definition of incumbent LEC in the Commission's rules to account for any carriers that have been found by the Commission to be incumbent LECs pursuant to section 251(h)(2) of the Act.⁵⁴ We seek comment on such a rule change.

17. We also seek comment on whether this petition depicts market situations that are representative of other local exchanges in which competitive LECs might choose to file petitions under

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Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, FCC 04J-1, para. 88 (rel. Feb. 27, 2004); *Rural Task Force Order*, 16 FCC Rcd at 11310, para. 169; *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, 19 FCC Rcd 10800 (2004).

⁵⁰ See, e.g., Western Wireless Corp. Comments; Qwest June 28, 2002 *Ex Parte* Letter. We also note that, if the petition is granted, affected carriers like Mid-Rivers and Qwest would need to amend their filing status with the Commission. See *Mid-Rivers Application* at 3, stating, "Upon grant of this petition, Mid-Rivers will promptly file a petition for waiver of the frozen study area rules and execute such other documents as are necessary to incorporate the Terry exchange into its ILEC study area and the NECA tariff."

⁵¹ 47 U.S.C. § 160(a), (b).

⁵² 47 U.S.C. § 160(d).

⁵³ 47 C.F.R. § 51.5 ("Incumbent Local Exchange Carrier," as defined in our local competition rules, describes incumbent LECs only by the criteria set forth in section 251(h)(1) of the Act).

⁵⁴ We propose adding the following clause to the Commission's definition of Incumbent Local Exchange Carrier in section 51.5 of the Commission's rules: ". . . (3) Is deemed by the Commission to be an incumbent local exchange carrier, pursuant to 47 U.S.C. § 251(h)(2)."

section 251(h)(2) and whether this petition signals a larger trend in local exchange markets.⁵⁵ If so, we seek comment on what the underlying market and regulatory motivations driving such a trend are and how the Commission should address any such conditions.

18. We further seek comment on the process by which the Commission should address any future applications of this type. We seek comment on whether the Commission should craft generally applicable rules and standards to address the application of section 251(h)(2) rather than continuing to proceed on a case-specific basis. We also seek comment on how such generally applicable rules would operate. Additionally, we seek comment on whether future applications for reclassification under section 251(h)(2) can, as a legal matter, be decided by the Commission through adjudication rather than through the rulemaking process.⁵⁶ Specifically, does section 251(h)(2) permit the Commission to adopt a set of rules, applicable on a case-by-case basis, that would allow the Commission to resolve petitions through an adjudication? To the extent there are a number of similarly situated carriers interested in filing applications of this kind, we seek comment on how the process for addressing these applications could be made more efficient. Finally, we seek comment on whether there are additional regulatory constraints, beyond those mentioned already, that might affect the process by which applications of this type are addressed.

IV. PROCEDURAL MATTERS

A. Ex Parte Presentations

19. These matters shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s ex parte rules.⁵⁷ Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.⁵⁸ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.⁵⁹

⁵⁵ See Rural Independent Competitive Alliance Comments at 2 (stating that “[t]he experience of Mid-Rivers in Terry, Montana, is consistent with the experience of other RICA members across rural America.”). See also *supra* note 37 and accompanying text; Qwest June 28, 2002 *Ex Parte* Letter at 3-4.

⁵⁶ We note that the Act states, “[t]he Commission may, *by rule*, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier.” 47 U.S.C. § 251(h)(2) (emphasis added). However, we also note that the Commission’s rules provide that “[a] state commission, or any other interested party, may request that the Commission issue an *order* declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs.” 47 C.F.R. § 51.223(b) (emphasis added). The only Commission precedent under section 251(h)(2) was adopted by rulemaking. *Guam Declaratory Order and NPRM*, 12 FCC Rcd 6925.

⁵⁷ 47 C.F.R. §§ 1.1200-1.1216.

⁵⁸ See 47 C.F.R. § 1.1206(b)(2).

⁵⁹ 47 C.F.R. § 1.1206(b).

B. Comment Filing Procedures

20. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on Mid-Rivers' petition within 30 days after publication in the Federal Register and may file reply comments within 45 days after publication in the Federal Register. All filings shall refer to WC Docket No. 02-78. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. One (1) courtesy copies must be delivered to Janice M. Myles at Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, 445 12th Street, SW, Suite 5-C140, Washington, DC 20554, or via e-mail, janice.myles@fcc.gov, and one (1) copy must be sent to Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or via e-mail www.bcpiweb.com.

21. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

22. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

23. Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160, or via e-mail www.bcpiweb.com.

24. For further information regarding this proceeding, contact Ian Dillner, Competition Policy Division, Wireline Competition Bureau, (202) 418-1580, or via e-mail Ian.Dillner@fcc.gov.

25. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act (PRA) comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Judith-B.Herman@fcc.gov, and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, N.W., Washington, DC 20503 via the Internet to Kristy_L_LaLonde@omb.eop.gov or by fax to 202-395-5167.

C. Initial Regulatory Flexibility Analysis

26. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁶⁰ the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided above in Section IV.B. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁶¹ In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.⁶²

1. Need for, and Objectives of, the Proposed Rules

27. The Commission initiates this rulemaking proceeding because the Mid-Rivers' petition raises novel and difficult questions implicating several of the Commission's major policies affecting LECs of all sizes, including local competition, universal service, and access charges.⁶³ In this proceeding, we seek comment on whether Mid-Rivers satisfies the requirements of section 251(h)(2) to be classified as an incumbent LEC in Terry, Montana. To this end, the Commission makes tentative conclusions that Mid-Rivers satisfies the first two statutory prongs of section 251(h)(2). However, the Commission will weigh these tentative conclusions against the alternative possibility that Mid-Rivers does not satisfy the standards set forth in the Act.⁶⁴ The Commission also plans to consider whether the petition satisfies the third prong of section 251(h)(2) – the public interest standard – and will weigh the benefits of granting the application against other considerations, such as the impact on other major Commission policies.⁶⁵ Furthermore, the Commission plans to review: (1) the subsequent regulatory treatment of Qwest, including whether two incumbent LECs can serve the same exchange, and whether

⁶⁰ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

⁶¹ See 5 U.S.C. § 603(a).

⁶² See *id.*

⁶³ See, e.g., *supra* para. 1.

⁶⁴ See *supra* paras. 6-9.

⁶⁵ See *supra* paras. 10-12.

the Commission is authorized to reclassify Qwest as a competitive LEC;⁶⁶ (2) whether the Act permits expected future applications of this type to be decided by final order rather than by rulemaking;⁶⁷ and (3) the appropriate regulatory requirements for classification changes such as these. Thus, we ask interested parties to address how the Commission can best balance its objective to advance local competition and other policy goals within the existing statutory and regulatory framework. The Commission also plans to consider the various alternative approaches, as described in the Notice of Proposed Rulemaking.

2. Legal Basis

28. The legal basis for any action that may be taken pursuant to this Notice is contained in sections 4, 10, 201-202, 214, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 160, 201-204, 214, 303, and 403, section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157nt, and sections 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216, of the Commission's rules, 47 C.F.R. §§ 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200-1.1216.

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Would Apply

29. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.⁶⁸ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁶⁹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁷⁰ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁷¹

30. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted in this Order. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its

⁶⁶ See *supra* paras. 13-15.

⁶⁷ See *supra* paras. 16-18.

⁶⁸ 5 U.S.C. § 604(a)(3).

⁶⁹ 5 U.S.C. § 601(6).

⁷⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

⁷¹ 15 U.S.C. § 632.

Trends in Telephone Service report.⁷² The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,⁷³ Paging,⁷⁴ and Cellular and Other Wireless Telecommunications.⁷⁵ Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

31. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”⁷⁶ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.⁷⁷ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

32. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.⁷⁸ According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.⁷⁹ Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.⁸⁰ Thus, under this size standard, the great majority of firms can be considered small.

33. *Incumbent Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has

⁷² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* at Table 5.3, Page 5-5 (May 2004) (*Trends in Telephone Service*). This source uses data that are current as of October 22, 2003.

⁷³ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

⁷⁴ 13 C.F.R. § 121.201, NAICS code 517211.

⁷⁵ 13 C.F.R. § 121.201, NAICS code 517212.

⁷⁶ 15 U.S.C. § 632.

⁷⁷ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

⁷⁸ 13 C.F.R. § 121.201, NAICS code 517110.

⁷⁹ 1997 Economic Census, Establishment and Firm Size, Table 5, NAICS code 513310 (issued Oct. 2000).

⁸⁰ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁸¹ According to Commission data,⁸² 1,310 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

34. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁸³ According to Commission data,⁸⁴ 563 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 563 carriers, an estimated 472 have 1,500 or fewer employees and 91 have more than 1,500 employees. In addition, 14 carriers have reported that they are "Shared-Tenant Service Providers," and all 14 are estimated to have 1,500 or fewer employees. In addition, 37 carriers have reported that they are "Other Local Service Providers." Of the 37, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

35. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁸⁵ According to Commission data,⁸⁶ 281 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 254 have 1,500 or fewer employees and 27 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

36. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁸⁷ According to Commission data,⁸⁸ 23 carriers have

⁸¹ 13 C.F.R. § 121.201, NAICS code 517110.

⁸² *Trends in Telephone Service* at Table 5.3.

⁸³ 13 C.F.R. § 121.201, NAICS code 517110.

⁸⁴ *Trends in Telephone Service* at Table 5.3.

⁸⁵ 13 C.F.R. § 121.201, NAICS code 517110.

⁸⁶ *Trends in Telephone Service* at Table 5.3.

⁸⁷ 13 C.F.R. § 121.201, NAICS code 517110.

reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action. *Prepaid Calling Card Providers*. The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.⁸⁹ According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards.⁹⁰ Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.⁹¹ Consequently, the Commission estimates that the great majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

37. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to “Other Toll Carriers.” This category includes toll carriers that do not fall within the categories of interexchange carriers, OSPs, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁹² According to Commission’s data, 65 companies reported that their primary telecommunications service activity was the provision of other toll services.⁹³ Of these 65 companies, an estimated 62 have 1,500 or fewer employees and three have more than 1,500 employees.⁹⁴ Consequently, the Commission estimates that most “Other Toll Carriers” are small entities that may be affected by the rules and policies adopted herein.

38. *Wireless Service Providers*. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”⁹⁵ and “Cellular and Other Wireless Telecommunications.”⁹⁶ Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.⁹⁷ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees

(Continued from previous page) _____

⁸⁸ *Trends in Telephone Service* at Table 5.3.

⁸⁹ 13 C.F.R. § 121.201, NAICS code 517310.

⁹⁰ *Trends in Telephone Service* at Table 5.3.

⁹¹ *Id.*

⁹² 13 C.F.R. § 121.201, NAICS code 517110.

⁹³ *Trends in Telephone Service* at Table 5.3.

⁹⁴ *Id.*

⁹⁵ 13 C.F.R. § 121.201, NAICS code 517211.

⁹⁶ 13 C.F.R. § 121.201, NAICS code 517212.

⁹⁷ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

or more.⁹⁸ Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.⁹⁹ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.¹⁰⁰ Thus, under this second category and size standard, the great majority of firms can, again, be considered small. *Broadband PCS*. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹⁰¹ For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁰² These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.¹⁰³ No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.¹⁰⁴ On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 305, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close

⁹⁸ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

⁹⁹ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

¹⁰⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

¹⁰¹ *See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b).

¹⁰² *See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996).

¹⁰³ *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332 (1994).

¹⁰⁴ *Broadband PCS, D, E and F Block Auction Closes*, (rel. Jan. 14, 1997); *see also Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436 (1997).

of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

39. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.¹⁰⁵ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.¹⁰⁶ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹⁰⁷ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.¹⁰⁸ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.¹⁰⁹ The SBA has approved these small business size standards.¹¹⁰ A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.¹¹¹ Three of these claimed status as a small or very small entity and won 311 licenses.

40. *Specialized Mobile Radio.* The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to

¹⁰⁵ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

¹⁰⁶ See “Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” Public Notice, PNWL 94-004 (released Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” Public Notice, PNWL 94-27 (released Nov. 9, 1994).

¹⁰⁷ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

¹⁰⁸ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

¹⁰⁹ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

¹¹⁰ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

¹¹¹ See “Narrowband PCS Auction Closes,” Public Notice, 16 FCC Rcd 18663 (WTB 2001).

firms that had revenues of no more than \$15 million in each of the three previous calendar years.¹¹² The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.¹¹³ The SBA has approved these small business size standards for the 900 MHz Service.¹¹⁴ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.¹¹⁵ A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.¹¹⁶

41. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹¹⁷ An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹¹⁸ The SBA has approved these small business size standards.¹¹⁹ The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies proposed herein.

42. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave

¹¹² 47 C.F.R. § 90.814(b)(1).

¹¹³ 47 C.F.R. § 90.814(b)(1).

¹¹⁴ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

¹¹⁵ See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” Public Notice, 18 FCC Rcd 18367 (WTB 1996).

¹¹⁶ See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

¹¹⁷ See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order, 12 FCC Rcd 18600 (1997), 63 Fed.Reg. 6079 (Feb. 6, 1998).

¹¹⁸ *Id.*

¹¹⁹ See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998) (VoIP); Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002 (WTB).

frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).¹²⁰ In connection with the 1996 MDS auction, the Commission defined “small business” as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.¹²¹ The SBA has approved of this standard.¹²² The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).¹²³ Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.¹²⁴

43. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,¹²⁵ which includes all such companies generating \$12.5 million or less in annual receipts.¹²⁶ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.¹²⁷ Of this total, 1,180 firms had annual receipts of under \$10 million, and an additional 52 firms had receipts of \$10 million or more but less than \$25 million.¹²⁸ Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies.

44. Finally, while SBA approval for a Commission-defined small business size standard

¹²⁰ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) (*MDS Auction R&O*).

¹²¹ 47 C.F.R. § 21.961(b)(1).

¹²² See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of \$40 million size standard for MDS auction).

¹²³ Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. See *MDS Auction R&O*, 10 FCC Rcd at 9608, para. 34.

¹²⁴ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard for “other telecommunications” (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

¹²⁵ 13 C.F.R. § 121.201, NAICS code 517510.

¹²⁶ *Id.*

¹²⁷ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4 (issued October 2000).

¹²⁸ *Id.*

applicable to ITFS is pending, educational institutions are included in this analysis as small entities.¹²⁹ There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

45. *Incumbent 24 GHz Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of “Cellular and Other Wireless Telecommunications” companies. This category provides that such a company is small if it employs no more than 1,500 persons.¹³⁰ According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.¹³¹ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.¹³² Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent¹³³ and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

46. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined “small business” as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding \$15 million.¹³⁴ “Very small business” in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.¹³⁵ The SBA has approved these definitions.¹³⁶ The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

¹²⁹ In addition, the term “small entity” under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

¹³⁰ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

¹³¹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Employment Size of Firms Subject to Federal Income Tax: 1997,” Table 5, NAICS code 513322 (issued October 2000).

¹³² *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1,000 employees or more.”

¹³³ Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

¹³⁴ *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967, para. 77 (2000) (24 GHz Report and Order); see also 47 C.F.R. § 101.538(a)(2).

¹³⁵ *24 GHz Report and Order*, 15 FCC Rcd at 16967, para. 77; see also 47 C.F.R. § 101.538(a)(1).

¹³⁶ See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary M. Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

47. The Commission in this Notice of Proposed Rulemaking makes tentative conclusions as to some, but not all of the necessary requirements of section 251(h)(2) for a competitive LEC, Mid-Rivers, to be declared an incumbent LEC. Should the Commission decide to find, after reviewing the record, that Mid-Rivers satisfies the requirements of section 251(h)(2) to be declared an incumbent LEC, and should the Commission make a finding as to the appropriate regulatory classification of the legacy incumbent LEC Qwest, the filing and compliance requirements of both Mid-Rivers and Qwest could potentially change. This is because incumbent LEC status often entails additional regulatory obligation and our decision on how to treat the legacy incumbent LEC could reduce Qwest's regulatory obligation. The Commission seeks comment in this Notice of Proposed Rulemaking regarding what, if any, broadly applicable rules would be necessary to properly implement this provision of the Act. Without more certainty about what rules, if any, the Commission will choose to adopt, we cannot accurately estimate the cost of compliance by small carriers. We therefore seek comment on the types of burdens carriers could face if the proposed recommendations are adopted. Entities, especially small businesses, are encouraged to quantify, if possible, the costs and benefits of potential reporting, recordkeeping, and other compliance requirements.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

48. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹³⁷

49. While the Commission's primary concern is to implement the provisions of the Act, the Commission also plans to evaluate any adverse effect that its review of issues in this proceeding will have on small business entities. Our tentative conclusions that Mid-Rivers satisfies two of the three prongs of the statutory standard apply irrespective of the petitioner's size. However, some of the regulations and obligations that pertain to the incumbent LEC status that Mid-Rivers seeks are, by statute, limited in many circumstances because the Act exempts certain small incumbent local exchange telephone companies from the significant obligations of section 251(c).¹³⁸ Thus, because Mid-Rivers qualifies for the exemption because of its small size, if our tentative conclusions are adopted as a part of an order granting the relief requested by Mid-Rivers, it is most likely that Mid-Rivers will not be subject to many of the costly regulations that generally pertain to incumbent LECs. Finally, we also consider procedural mechanisms that, if warranted, could potentially reduce the burdens on small entities that wish to seek similar treatment from the Commission.¹³⁹ While it remains unclear what effect the

¹³⁷ 5 U.S.C. § 603(c)(1)-(c)(4).

¹³⁸ See discussion *supra* para. 10 n.30.

¹³⁹ See *supra* para. 18.

alternative choices we face in this proceeding will have on small business entities, establishing this rulemaking will create a full record upon which we can more capably weigh these matters.

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

50. None.

D. Paperwork Reduction Act

51. This Notice of Proposed Rulemaking does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

V. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 2, 4(i)-4(j), 201, 251, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i)-4(j), 201, 303(r), this Notice IS ADOPTED.

53. IT IS FURTHER ORDERED that the Commission’s Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *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), Notice of Proposed Rulemaking (WC Docket No. 02-78)*

In the Telecommunications Act, Congress set out a path for designating a new carrier as the incumbent local exchange carrier in a particular market. Today's Notice of Proposed Rulemaking takes an appropriate step down this road. It asks about standardizing the process for determining when a carrier has "substantially replaced" an incumbent. It also poses vital questions about the impact of reclassification on universal service. I support this approach because Congress was clear in Section 251(h)(2) that any effort to reclassify carriers as incumbents must take place "by rule[.]" But I also believe we have a special duty to resolve this issue expeditiously. The petition that is at the heart of this proceeding has been pending for more than two years. With time, the issues it poses will only grow more prominent. Carriers like Mid-Rivers that are providing service in a shifting marketplace deserve clarity about their regulatory status. I look forward to working with my colleagues to provide this certainty as soon as possible.

**CONCURRING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

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

Today's decision initiates a Notice of Proposed Rulemaking that seeks comment on how section 251(h)(2) of the Communications Act should be applied to the request by Mid-Rivers Telephone Cooperative, Inc ("Mid-Rivers"), a competitive local exchange carrier in the Terry, Montana exchange, to be classified as an incumbent local exchange carrier ("ILEC") in that exchange.

Mid-Rivers filed its request in February 2002 and the Commission sought comment on that request in April 2002.¹⁴⁰ In its petition, Mid-Rivers declared that it serves approximately 97% of the residential and business access lines in the Terry exchange primarily over its own facilities. Given its 97% share of the local exchange market in Terry, Montana, Mid-Rivers asserts that it meets the requirements of the three part statutory test to be classified as an ILEC. Mid-Rivers asserts that its overwhelming market-share demonstrates that it: "...occupies a position in the market for telephone exchange service that is comparable to the position occupied by [the ILEC];"¹⁴¹ "has substantially replaced the ILEC..."¹⁴²; and that the "...public interest, convenience, and necessity..."¹⁴³ is served by recognition of its *de facto* status of serving virtually all the customers in the Terry exchange over its modern network facilities. The Mid-Rivers' petition was supported by the Montana Public Service Commission and the incumbent LEC in Terry, Montana did not file in opposition.

While I agree that this petition--which has been pending for nearly three years-- raises questions regarding some of the Commission's fundamental policies, such as universal service and local competition, I believe that the Commission could have moved forward to grant the petition while simultaneously seeking further comment on these policy issues.

Accordingly, I concur in the result of the Order.

¹⁴⁰ See Mid-Rivers Telephone Cooperative, Inc., *Petition for Order Declaring Mid-Rivers Telephone Cooperative, Inc. an Incumbent Local Exchange Carrier in Terry, MT*, WC Docket 02-78 (filed Feb. 5, 2002).

¹⁴¹ See 47 USC 251(h)(2)(A)

¹⁴² See 47 USC 251(h)(2)(B)

¹⁴³ See 47 USC 251(h)(2)(C)

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Petition of Mid-Rivers Telephone Cooperative to be Declared an ILEC Pursuant to Section 251(h)(2) of the Communications Act, WC Docket 02-78.

I support today's decision to open a Notice of Proposed Rulemaking seeking comment on the process for designating a competitive carrier as an incumbent LEC when it has substantially replaced the existing incumbent provider. Congress specifically provided for this circumstance by adopting Section 251(h)(2) of the Act, which sets out a statutory test for designation of a comparable carrier as an incumbent LEC. This Notice asks important questions about the process for such designations and about the implications for our universal service and local competition rules. Designation as an incumbent may mean that additional universal service support is available to rural carriers who expand into the markets of their non-rural carrier neighbors, so the issues raised in this proceeding are meaningful for the development of choice and high quality services for those in Rural America. Timely resolution of this proceeding, which has been pending for over two years, is essential because we must ensure that our rules create incentives for carriers to invest in the latest and most powerful technologies to serve Rural America.