

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of

THE CENTURLINK COMPANIES – QWEST CORPORATION; CENTURYTEL OF WASHINGTON; CENTURYTEL OF INTERISLAND; CENTURYTEL OF COWICHE; AND UNITED TELEPHONE COMPANY OF THE NORTHWEST

To be Competitively Classified Pursuant to RCW 80.36.320

**DOCKET UT-240029**

**CENTURLINK’S RESPONSE TO STAFF’S MOTION FOR AMENDED PROTECTIVE ORDER WITH PROVISIONS GOVERNING HIGHLY CONFIDENTIAL INFORMATION**

- 1* Pursuant to WAC 480-07-375(4), the CenturyLink ILECs (“CenturyLink”) submit this brief response to Staff’s March 21, 2024 motion for an amended protective order. Staff’s motion (“Motion”) asks the Commission to amend the protective order (Order 03 herein) to create a category of confidentiality that will permit Staff, but not the CenturyLink ILECs or Public Counsel, to review and utilize protected information in order to evaluate and possibly oppose CenturyLink’s petition for competitive classification. CenturyLink requests that the Commission deny the Motion. Staff’s request is both unfair and unnecessary.
- 2* The information in question is, according to Staff, “data about the number of lines served by provider, by county, from the Federal Communications Commission (FCC). Specifically, Staff sought permission to use the information contained in the FCC’s Form 477 (now Broadband Data Collection) voice subscribership data (**the fixed voice data**).” Motion, ¶ 2 (bold added). Staff explains that the FCC, the source of the data that Staff can access, will not allow the information to be shared outside of the Commission.

- 3 While CenturyLink understands that Staff feels hamstrung by FCC limitations, the Commission should not permit the use of, or rely upon, data or information that all parties cannot evaluate, test and adequately respond to. Staff has ample information at its disposal to evaluate CenturyLink’s petition and testimony, and has not argued or established that it will be prejudiced if it cannot use the FCC’s Form 477 data.
- 4 Fairness and Due Process. Transparency and fairness are fundamental tenets of Commission proceedings. CenturyLink would be significantly prejudiced if the Commission considers and relies upon – when evaluating whether CenturyLink’s petition for competitive classification should be granted with or without additional conditions – information that CenturyLink, the petitioner, is barred from accessing, analyzing and testing.
- 5 Staff claims that its “approach balances the procedural rights of the parties while protecting the confidential business information of CenturyLink’s competitors in a manner that is consistent with both the protective orders issued in previous competitive classification cases.” But it does not. It permits Staff to review some ambiguous *subset of information* (see paragraph 12 below) and perform calculations that the other parties can’t assess or refute. If CenturyLink asked the Commission to consider secret calculations that Staff and Public Counsel had no way of verifying, Staff would strenuously object.
- 6 The Commission has repeatedly stressed that it wants parties’ evidence to be transparent and readily capable of verification.<sup>1</sup> In response to a data request from Qwest in Docket UT-023003, CLECs refused to provide Qwest with granular third-party information, including preprocessed customer location and algorithm inputs. The Commission

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<sup>1</sup> See *In the Matter of the Review of: Unbundled Loop and Switching Rates; the Deaveraged Zone Rate Structure; and Unbundled Network Elements, Transport, and Termination (Recurring Costs)*, Docket UT-023003, 13<sup>th</sup> Supp. Order Granting, in Part, Motions to Compel at ¶ 17 (Sept.8, 2003).

ordered their production, weighing the need for the information sought with the overall needs of the adjudication. When the CLECs put the model at issue in the proceeding, Qwest was entitled to see the raw (“preprocessed”) data used in the model.

Even though the CLECs have provided Qwest and Verizon with much information about customer location inputs and results from the HAI model, **this is not sufficient to permit the incumbents an opportunity to explore how the preprocessed inputs operate to create customer location data upon which network costs are based.**<sup>2</sup>

7 This demand for transparency is a longstanding requirement from the Commission, as seen in a similar order from 1998:

In the Seventh Supplemental Order in [Docket UT-980311(a)], the Commission indicated that when a party puts in issue a cost model such as the HAI model, other parties must be entitled to obtain information necessary to validate the accuracy of the model, no matter whether that information is pre-processed by a third party.

8 The information Staff seeks to use (without access by CenturyLink) is the same type of information compelled in the above-referenced cases. While the Commission was sensitive to the concerns of the provider in those cases, the need for transparency prevailed: “However, **AT&T’s position leaves the parties and the Commission in a totally unacceptable ‘black hole with respect to evaluating this information.’**”<sup>3</sup>

9 No Need for the FCC Data. Through CenturyLink’s highly granular petition, testimony and exhibits, Staff’s and Public Counsel’s exhaustive discovery, as well as its own license to utilize the FCC’s Broadband Data Collection fabric,<sup>4</sup> Staff is awash with data

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<sup>2</sup> *Id.* at ¶ 16 (bold added). Also, “The Commission has repeatedly stressed that it wants the parties’ cost models to be transparent and readily capable of verification.” *Id.* at ¶ 17.

<sup>3</sup> *In the Matter of Determining Costs for Universal Service*, Docket UT-980311(a), Seventh Supp. Order Granting and Denying, in part, GTE’s Motion to Compel, and Denying U S West’s Motion to Remove Testimony (Aug. 26, 1998) (bold added).

<sup>4</sup> See <https://www.costquest.com/broadband-serviceable-location-fabric/>. See also [What is the Location Fabric? – BDC Help Center \(fcc.gov\)](#). CenturyLink understands that Staff procured a license to the Costquest fabric in 2023.

that will allow it to evaluate whether the CenturyLink ILECs are subject to effective competition in Washington. The Motion does not contend that Staff is lacking sufficient information to make this evaluation or to assess any other factor related to the Commission's analysis of RCW 80.36.320.

- 10** Instead, Staff explains, “Staff has asked the FCC for permission to use the **fixed voice data** for purposes of compiling a Herfindahl Hi[r]schman Index (HHI) in this docket.” Motion, ¶ 7 (bold added). Mr. Bennett explains that Staff “will use this protected information to help evaluate the state of competition in the telecommunications marketplace by calculating a Herfindahl-Hirschman Index (HHI), which is a commonly accepted measure of market concentration. Once the analysis is complete, Staff will publish the score publicly for each county.” Bennett Declaration, ¶ 4.
- 11** HHI is used by the federal Department of Justice to evaluate mergers. See <https://www.investopedia.com/terms/h/hhi.asp#citation-2>. While HHI could tangentially offer color to the Commission's analysis of this case, which is *not a merger approval proceeding*, that analysis is not essential or even particularly probative to the Commission's consideration of RCW 80.36.320 (see paragraph 16 below). Notably, Staff does not claim it to be critical, essential or even important. Instead, it appears that Staff would simply prefer to add a limited HHI analysis to its presentation.
- 12** It is also unclear if Staff intends to evaluate all of CenturyLink's competitors in a county when “calculating HHI.” Staff does not explain what it means by “fixed voice data” (the universe it intends to analyze) in paragraph 2 of the Motion and whether such data includes competitors using mobile technologies (mobile wireless, i.e., CMRS) and fixed technologies (copper, fiber, cable, fixed wireless, satellite). The FCC's use of “fixed provider” in its 477 resources appears to limit the term to landline and fixed wireless, and to exclude all other forms of intermodal competition, including most importantly CMRS

(mobile wireless) services that dominate the competitive landscape.<sup>5</sup> See CenturyLink’s Petition, Graphic 1, which illustrates that mobile wireless companies provide 78.7% of the voice connections in Washington. It appears that Staff is seeking to use secret, non-rebuttable data (in the sense that the other parties cannot analyze and potentially refute Staff’s findings) that only looks at a relatively small subset of CenturyLink’s competitors. This would be directly contrary to the Department of Justice’s definition of HHI itself. “The HHI is calculated by squaring the market share of **each firm competing in the market** and then summing the resulting numbers.”

<https://www.justice.gov/atr/herfindahl-hirschman-index> (bold added)

- 13** Given the fundamental unfairness of CenturyLink only having access to Staff’s calculated output (“the score...for each county”) without the ability to test and analyze the data or Staff’s application of HHI, Staff’s mere preference to calculate some derivation of HHI does not justify the use of secret evidence.
- 14** RCW 80.36.320 focuses on whether CenturyLink is subject to effective competition and whether CenturyLink has a substantial captive customer base. Staff has access to current, highly granular, publicly available FCC data that shows every carrier, irrespective of technology, that can presently offer broadband service (and thus voice service as well) at every serviceable customer location in Washington. That data is updated every six months, and is subject to a challenge process<sup>6</sup> that refreshes the data and makes it more accurate. Staff and Public Counsel have also asked exhaustive discovery (well over 100 data requests, hundreds with subparts) to test CenturyLink’s petition and testimony.
- 15** Given the mountain of data Staff possesses, there is no compelling need to calculate HHI, especially if Staff is limiting that calculation to a mere subset of the carriers that compete

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<sup>5</sup> See [WhoMustFileForm477.pdf | Powered by Box](#)

<sup>6</sup> See <https://www.fcc.gov/sites/default/files/bdc-challenge-overview.pdf>.

with CenturyLink in Washington. CenturyLink has not calculated HHI, and cannot speculate as to what it might reveal, but the index could not and would not refute the vast number and types of competitors operating across CenturyLink's ILEC footprint.

**16** Furthermore, HHI is irrelevant to this proceeding. That is, HHI focuses on which providers *actually serve customers at a given moment*, as opposed to which providers *are available substitutes* to CenturyLink service. If the Cheney, Washington customer illustrated in Graphic 2 of the petition utilizes CenturyLink landline service instead of the many options available to her (Davis, Hughes, Northwest, Dish, AT&T, Verizon, T-Mobile and others), it cannot be argued that CenturyLink is the customer's only choice (or that she is a captive customer), or that these seven FCC-identified alternatives aren't competitors. HHI looks only at who presently serves the customer, and thus misses the point underlying RCW 80.36.320.

**17** Based on the unfairness that would result from Staff's request, as well as the lack of any allegation of necessity by Staff, the Commission should deny the Motion.

Submitted this 27<sup>th</sup> day of March 2024.

CENTURYLINK



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