

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of the

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

ORDER 05

GRANTING MOTION FOR
AMENDED PROTECTIVE ORDER

BACKGROUND

- 1 On January 8, 2024, the CenturyLink Companies – Qwest Corporation, CenturyTel of Washington, CenturyTel of Inter Island, CenturyTel of Cowiche, and United Telephone Company of the Northwest (collectively referred to as CenturyLink or Company) filed with the Washington Utilities and Transportation Commission (Commission) a Petition for Competitive Classification (Petition) pursuant to the Revised Code of Washington (RCW) 80.36.320 and the Washington Administrative Code (WAC) 480-121-061 (Petition).¹ The Commission suspended the effective date of the Petition by Order on January 25, 2024, and initiated this adjudicative proceeding.²
- 2 On February 5, 2024, at the request of Commission staff (Staff) and with the agreement of the parties, the Commission entered Order 03, Protective Order with Provisions Governing Highly Confidential Information (Order 03).³ Order 03 governs the disclosure of information designated by the parties as confidential or highly confidential as necessary to protect the provider of such information while promoting the free exchange of information and development of the evidentiary record.
- 3 On March 21, 2024, Staff filed a Motion for Amended Protective Order (Motion) requesting that the Commission amend the protective order to allow for Staff to use

¹ *In re Petition of Qwest Corp.*, Docket UT-240029, CenturyLink Petition for Competitive Classification (Jan. 8, 2024).

² *In re Petition of Qwest Corp.*, Docket UT-240029, Order 01 (Jan. 25, 2024).

³ *In re Petition of Qwest Corp.*, Docket UT-240029, Order 03, 2-4 ¶¶ 7-12 (Feb. 5, 2024) (Order 03).

certain information provided to it by the Federal Communications Commission (FCC) in its analysis of the Petition, without being required to provide such unprocessed information to the other parties.⁴ Staff states that the FCC's provision of the data at issue is limited by an agreement to restrict the use of the data to Commission employees.⁵

4 Staff adds that it will aggregate the data into documents "as appropriate and relevant to the proceeding" and will provide such documents to parties that request it.⁶

5 On March 27, 2024, CenturyLink filed a response to the Motion objecting to the requested amendment.⁷ In its response, CenturyLink argues that it would be unfair to allow Staff to use data or information that other parties cannot independently evaluate. CenturyLink further argues that the data itself is not relevant and may be misleading.⁸

DISCUSSION

6 We grant Staff's Motion. WAC 480-07-420(2)(a) allows the Commission to restrict party access to highly confidential information on a showing of convincing justification for the requested restriction. To determine whether the reasons for limiting disclosure are sufficient to support amending a protective order, we must weigh the requesting party's interest in the requested protective measures against the general interest in transparency and equal access to information. Staff claims that the information, which can be used only in compliance with the FCC's disclosure limitation, will allow Staff to calculate a Herfindahl-Hirschman Index (HHI), which Staff states is a commonly acceptable measure of market concentration. CenturyLink argues that the data is not relevant, and that the requested limitations on disclosure are unfair. We address each argument in turn.

A. The FCC Data at Issue is Sufficiently Relevant for Staff to Use in its Calculations.

7 Staff asserts that the fixed voice data it seeks to collect from the FCC is necessary for it to evaluate the state of competition in the telecommunications marketplace. Specifically,

⁴ *In re Petition of Qwest Corp.*, Docket UT-240029, Motion for Amended Protective Order (Motion) (March 21, 2024).

⁵ Motion at 3 ¶ 6.

⁶ Motion at 3-4 ¶ 8.

⁷ *In re Petition of Qwest Corp.*, Docket UT-240029, Century Links' Response to Motion for Amended Protective Order (Response) (March 21, 2024).

⁸ Response at 1 ¶ 1.

Staff seeks permission to use the information contained in the FCC's Form 477 (now Broadband Data Collection) voice subscribership data (the fixed voice data).⁹

8 CenturyLink asserts that the nature of the data Staff requests to employ is unclear and that the index Staff intends to calculate, the HHI, is a tool used to evaluate mergers, not to assess the level of available, effective competition.¹⁰ CenturyLink further alleges that because the HHI evaluates which providers are actually serving consumers at any given moment, as opposed to *available* providers, it is not relevant to determine whether CenturyLink is actually subject to competition.¹¹

9 First, as to clarity, Staff's request is for line count data, elsewhere referred to as "fixed voice" or "voice subscribership" data. This is data that Staff has had access to under an existing confidentiality agreement, and Staff's representation of the data it seeks to use is sufficiently clear for a determination of relevance.

10 As to whether the HHI is probative of the existence of competition, CenturyLink's argument suggests that the Commission will be unable to assess the value of analysis of the data in question without full disclosure of the data itself. In presenting any resulting analysis, we expect that Staff will fully disclose the nature and applicability of the raw data, and trust that we will be able to accurately determine the relevancy and weight of Staff's presentation when we take it under consideration as proposed evidence. CenturyLink may directly object to any evidence offered that results from such data and make its arguments as to relevancy at that time.

11 CenturyLink has acknowledged that Staff is "awash in data" and has at its disposal all the data available to it through discovery requests and provided by CenturyLink in the Petition.¹² We imagine that the record in this matter will be similarly awash with data and analysis from which the Commission can glean the information that will ultimately determine whether CenturyLink is subject to competition. While we make no finding here as to the *relative* probative value of an HHI, we can hypothesize that there may be otherwise undiscernible conclusions that could be drawn from a thorough view of actual subscribership that reflects on the availability of alternate providers.

⁹ Motion at 1 ¶ 2.

¹⁰ Response at 4 ¶¶ 10-12.

¹¹ Response at 4 ¶ 9.

¹² Response at 4 ¶ 9.

12 We thus find that the fixed voice data in the FCC's Form 477 that Staff requests protection for is sufficiently relevant to be available to Staff under the FCC's required restrictions.

B. Staff's Interest in the FCC Data, Restricted by the FCC-Imposed Limitations on Disclosure, Outweighs CenturyLink's Right to Disclosure of Raw Data.

13 Staff states that the FCC will grant the Commission permission to use the line count data only on the condition that the data will be held strictly confidential and access to the data will be limited to Staff, the Commissioners, and the presiding ALJ.¹³ CenturyLink argues that such limitation is contrary to the Commission's commitment to transparency and the opportunity for adverse parties to verify source data.¹⁴

14 We are committed to such transparency when it is remotely possible. In this rare instance, the alternative to restricting access is to render the data unavailable in its entirety. The restrictions imposed on distribution of the data here are part of the ongoing agreement between Staff and the FCC, not arbitrarily imposed by the Commission. The FCC demands the restriction for the valid purpose of protecting company-specific, market-sensitive data regarding CenturyLink's competitors. Although we agree that all parties ideally should have access to raw data in order to verify analysis, in this case the value of obtaining this potentially useful data *at all* outweighs the need for such data to be broadly available.

15 We thus find that Staff's interest in having the data available to it outweighs CenturyLink's disadvantage at being denied equal access.

C. The Commission Should Amend Order 03 as Requested by Staff

16 Staff's request is not without precedent. The Commission has provided protections similar to those requested in previous adjudications where similar company-specific market-sensitive data was at issue.¹⁵ Although in those cases, the data was provided directly by competitors, the justification for protection of the data is the same regardless of the source. We find Staff's rationale to be in keeping with the reasoning in our previous decisions and, as detailed above, we are convinced that Staff has provided sufficient justification to modify Order 03 as requested in the Motion. Therefore,

¹³ Motion at 2 ¶¶ 2,3 and 7.

¹⁴ Response at 2-3 ¶¶ 4,7, and 8.

¹⁵ See, e.g. *In re Petition of Qwest Corp.*, Docket UT-030614, Order 07 (June 30, 2003); *In re Petition of US West Communications, Inc.*, Docket UT-000883, Fifth Supplemental Order (Sept. 22, 2000); .

pursuant to Staff's access agreement with the FCC, we hereby amend Order 03 to include the following new paragraph:

In this proceeding, the Commission has determined that it will treat as "Highly Confidential" data about the number of lines served by provider, by county, from the Federal Communications Commission (FCC). The company-specific market-sensitive data is of the type that might impose a serious business risk if disseminated without heightened protections and should be designated "Highly Confidential." Access to this data will be limited to Commission Staff who have executed the confidentiality agreement attached to this Protective Order, the Commissioners, and the presiding administrative law judge. Staff will aggregate this data into such documents as appropriate and relevant to the proceeding, and provide such documents to all parties who have agreed to be subject to the protective order in this docket.

ORDER

17 THE COMMISSION ORDERS THAT:

- 18 (1) Commission Staff's Motion for an Amended Protective Order is GRANTED.
- 19 (2) Order 03, Protective Order with Highly Confidential Provisions is hereby modified as described in paragraph 16.

Dated at Lacey, Washington, and effective April 2, 2024.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ Paige Doyle
PAIGE DOYLE
Administrative Law Judge