

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE PETITION OF)
CENTURYLINK QC REGARDING EFFECTIVE) Docket No. 18-00295-ET
COMPETITION FOR RETAIL RESIDENTIAL)
SERVICES)

FINAL ORDER ADOPTING RECOMMENDED DECISION

THIS MATTER comes before the New Mexico Public Regulation Commission (“Commission”) upon the recommended decision, exceptions, and responses to exceptions described below.

Whereupon, being duly informed,

THE COMMISSION FINDS AS FOLLOWS:

1. Hearing Examiner Carolyn R. Glick issued her Recommended Decision in this case on November 21, 2019 (the “RD”). The RD recommends that the Commission deny the Petition Requesting a Determination of Effective Competition for Retail Residential Telecommunications Services Pursuant to NMSA 1978, § 63-9A-8(C) (the “Petition”), filed by Qwest Corporation dba CenturyLink QC (“CenturyLink”).

2. On December 4, 2019, CenturyLink filed its Exceptions and Request for Oral Argument (the “Exceptions”).

3. On December 12, 2019, Staff of the Telecommunications Bureau of the Commission (“Staff”) filed its response to the Exceptions (the “Staff Response”), the City of Albuquerque (the “City”) filed its response to the Exceptions (the “City Response”), Bernalillo County (the “County”) filed its response to the Exceptions (the “County Response”), and the Communication Workers of America District 7 (“CWA”) filed its response to the Exceptions (the “CWA Response”).

4. The Commission has jurisdiction over the parties and the subject matter of this case.

The Exceptions

5. CenturyLink argues that the RD, especially when coupled with the Commission's adoption of quality of service and consumer protection rules applicable to CenturyLink in Docket No. 17-00186-UT, is "at odds with the deregulatory intent of SB 53 and the obvious and apparent competition for telecommunications in New Mexico." CenturyLink further argues that it "serves less than a fifth of the New Mexico telecommunications marketplace, and may not be able to sustain continued investment in New Mexico if the Commission continues to single out CenturyLink for regulation." CenturyLink asks the commission to reject the RD, to "find that effective competition exists in every one of CenturyLink QC's New Mexico wire centers, and [to] move to Phase II, directing the parties to work towards a reasonable but limited set of regulations that transition regulation downwards consistent with the level of competition CenturyLink QC faces."

6. CenturyLink goes on to state that "[t]he RD correctly recognizes that the key dispute in this proceeding is legal, not factual." CenturyLink further contends that "no party disputes that nearly every New Mexico home has phone service of some kind available to it, whether from CenturyLink, a wireless provider, or a cable provider." CenturyLink argues that "[t]he only real dispute in this case is a dispute over how to define a phrase in NMSA § 63-9A-8(C)" That phrase is from one of the statutory tests for effective competition that CenturyLink seeks to prove that it meets in this matter: whether CenturyLink "provides basic local exchange service either separately or bundled to less than one half of the customer locations where such service is available at the time the petition is filed" CenturyLink states

that the key terms in dispute are “basic local exchange service,” “such service,” and “available,” none of which are defined in the statute.

7. CenturyLink argues that the RD interprets each of these terms “in the most narrow way possible . . .” CenturyLink states that the RD interprets “basic local exchange service” and “such service” to include “only CenturyLink QC’s basic local exchange service . . .” CenturyLink further states that the RD interprets “available” to include “only residential locations where CenturyLink QC’s network facilities are physically present.”

8. CenturyLink notes that, though “basic local exchange service” is not defined in the statute, the term “local exchange service” is defined as “the transmission of two-way interactive switched voice communications furnished by a telecommunications company within a local exchange area,” while specifying no particular technology used to “switch” or route those communications. CenturyLink then takes issue with the RD’s references to the FCC’s instructions for FCC Form 477 and to Newton’s Telecom Dictionary, for interpretation of the term, instead of the statute and Commission rules. CenturyLink also argues that the RD’s narrow interpretation of the term ignores the testimony of “every witness,” as all witnesses “agreed that wireless and VoIP service had the characteristics of local exchange service.” CenturyLink further argues that the RD’s unduly narrow interpretation is at odds with the statute’s definition of effective competition as “the competition that results from the customers of the service having reasonably available and comparable alternatives to the service, consistent with the standards set forth in Section 63-9A-8 NMSA 1978.”

9. Moving on to the RD’s interpretation of “such service,” CenturyLink argues that a definition applied by the New Mexico Supreme Court as well as dictionary definitions of “such” require consideration of *similar* services, not just identical “basic local exchange service.” The

ratio test prescribed in Section 63-9A-8(C) compares the number of “basic local exchange” customers CenturyLink actually serves in a particular wire center to the number of residential “locations where such service is available” in that wire center. CenturyLink argues that, if the Legislature had wanted to limit the definition to locations where CenturyLink’s service was available, it would have used the term “its service” instead of “such service.” CenturyLink goes on to cite the definition of “such” from Merriam-webster.com as “of a kind or character to be indicated or suggested . . . : having a quality to a degree to be indicated . . . ; of the character, quality, or extent previously indicated or implied . . . ; [or] of the same class, type, or sort . . .” CenturyLink notes that the RD points to Black’s Law Dictionary, which “has a similar primary definition . . . ‘of this or that kind’.”

10. CenturyLink goes on to cite a New Mexico Supreme Court decision, *State v. Nick R.*, 2009-NMSC-050, which is also cited by the RD. CenturyLink argues that the decision actually supports CenturyLink’s view that “‘such’ does not operate to limit its reference to the specific things mentioned before, but instead refers to things of the kind of those mentioned.” In that case, the Court found that the addition of language in a statute, “and all such weapons with which dangerous cuts can be given,” at the end of a list of specific types of cutting weapons, did not include a pocketknife because it is not of the same kind as the listed items. CenturyLink argues that the Court’s determination “turned not on the fact that ‘pocketknife’ was not among the listed ‘deadly weapons’ but on the fact that a pocketknife is not of the same kind of item as the listed weapons.” Thus, according to CenturyLink, “such service” should include services of the same kind of CenturyLink’s voice service, such as wireless and VoIP.

11. Finally, CenturyLink disputes the RD’s interpretation of “available” as, similarly, too narrow. CenturyLink argues that the RD further limits the scope of the denominator of the

abovedescribed ratio test to only those “residential locations where CenturyLink facilities currently exist, thus excluding residential developments and apartment complexes its competitors have won.” CenturyLink contends that “[t]his interpretation stands in tension with the Commission’s rules and CenturyLink’s own tariffs that require CenturyLink to provide service throughout its service territory.” CenturyLink warns that this interpretation of the term “available” could “have precedential effects that the Commission may want to consider more carefully” as it may call into question CenturyLink’s obligation to serve customers within its territory where another provider has installed network infrastructure. Moreover, CenturyLink states that the RD has concluded that “CenturyLink could avoid its obligations to provide service if it faced unreasonable costs.” CenturyLink argues that this language in the RD could “in effect grant CenturyLink significant provider of last resort relief . . .” CenturyLink contends that it would be more reasonable for the Commission to conclude that “CenturyLink service is ‘available’ anywhere its tariffs or Commission rules require it to be provided upon customers’ requests.” CenturyLink observes that the Commission’s Broadband Program rule applies an availability concept similar to CenturyLink’s broader interpretation of the term. CenturyLink notes that, under the Broadband Program rule, “a household has access to broadband service if the household can readily subscribe to that service upon request.”

12. CenturyLink concludes that “the RD’s failure to find even a single wire center to have effective competition demonstrates the unreasonableness of its interpretive approach.” CenturyLink also requests oral argument, contending that “[g]iven the importance of these issues and the complex relationship between evaluating competition and determining appropriate levels of regulation, CenturyLink believes that a constructive discussion would be helpful to the Commission . . .”

The Responses

13. In the Staff Response, Staff “objects strongly to [CenturyLink’s] request for oral argument.” Staff argues that there is nothing to be added through oral argument and that “there is a great danger that CenturyLink would interject additional items” outside of the closed record of this case. Staff joins in the conclusion of the CWA Response – “to reject CenturyLink’s Exceptions and adopt the well-reasoned Recommended Decision without alteration.”

14. In the CWA Response, CWA urges the Commission to reject CenturyLink’s arguments concerning the “deregulatory intent of the legislature,” noting that “the plain meaning of the statute controls, not speculation about the Legislature’s policy views.”

15. With regard to CenturyLink’s arguments concerning the alleged narrowness of interpretation for the Section 63-9A-8(C) test, CWA argues that the test is “specifically addressed to the situation of an ‘incumbent local exchange carrier’ (ILEC) providing ‘basic local exchange service’.” Thus, it tests for precisely the issue that CenturyLink repeatedly raises and argues should tilt the balance in CenturyLink’s favor – access line losses. In other words, it “tests whether the incumbent is no longer serving 50% or more of the residential locations it was serving.” Accordingly, the narrower interpretations of the terms discussed above, as per the RD, are the appropriate interpretations. CWA also takes issue with CenturyLink’s interpretation of the Court’s decision in *Nick R.*, arguing that the statute cited in that case is not analogous to the statute being construed in the RD. This is because, in the statute cited in *Nick R.*, “such” referred to a list of multiple types of weapons, whereas, in the statute being construed in the RD, “such service” refers back to a single type of service.

16. With regard to the definition of “available,” CWA disagrees with CenturyLink’s contention that the RD, if adopted, “would modify a carrier’s obligation to serve.” CWA argues

that Section 8(C) of the statute “has no direct relevance to a carrier’s service obligations, rather, [it] . . . is merely a one-dimensional numeric test that an ILEC may use to obtain a rebuttable presumption of effective competition . . .” CWA agrees with the RD’s adoption of a “plain meaning” of “available.” CWA recommends that the Commission reject the Exceptions and adopt the RD.

17. Similarly, the County urges rejection of the Exceptions and adoption of the RD by the Commission. The County argues that the RD “is based substantially on the facts in the case and a reasonable interpretation of the plain language of the statutes.” The County further contends that oral argument is not required as “[t]he case provided ample opportunity for all parties,” and “[it] allowed CenturyLink to file testimony, amended testimony, second amended testimony, rebuttal testimony and supplemental rebuttal testimony and to participate in a two-day hearing on September 25 and 26, 2019.”

18. Finally, the City requests that the Commission fully adopt the RD and deny CenturyLink’s request for oral argument because the City believes that “CenturyLink will simply present its misplaced, conclusory speculative arguments – devoid of any legitimate analysis.” The City also makes arguments concerning the definitional issues raised by CenturyLink, which arguments are similar to those by CWA, summarized above.

The Commission’s Findings

19. The Commission finds that the RD is based upon a reasonable interpretation of the applicable law and the record of this case. The Commission does not find CenturyLink’s arguments compelling. The Commission finds the responses to the Exceptions, as summarized above, compelling.

20. The Commission finds that oral argument would not be helpful in this matter as the arguments on all sides are clear and fully developed in the RD, Exceptions, and responses to the Exceptions.

21. The Commission accepts and adopts all findings of fact and conclusions of law throughout the RD.

IT IS THEREFORE ORDERED:

A. The Decretal Paragraphs contained in the RD are incorporated by reference as if fully set forth herein and are ADOPTED, APPROVED, and ACCEPTED as orders of the Commission.

B. The RD is ADOPTED, APPROVED, and ACCEPTED in its entirety.

C. This Order is effective immediately.

D. A copy of this Order shall be served upon all parties listed on the attached certificate of service via email, if the email addresses are known, and if not known, by regular mail.

E. This docket is now closed.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 26th day of
February, 2020.

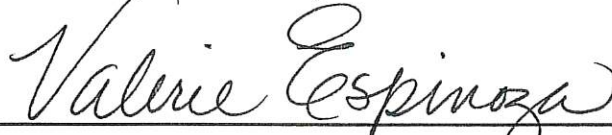
NEW MEXICO PUBLIC REGULATION COMMISSION



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JEFFERSON L. BYRD, COMMISSIONER DISTRICT 2



VALERIE ESPINOZA, COMMISSIONER DISTRICT 3



THERESA BECENTI-AGUILAR, COMMISSIONER DISTRICT 4



STEPHEN FISCHMANN, COMMISSIONER DISTRICT 5



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Final Order Adopting Recommended Decision** issued by the New Mexico Public Regulation Commission on February 26th, 2020, was sent via email to the parties indicated below:

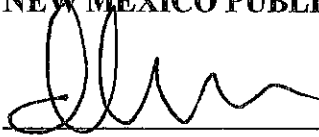
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DATED this 26th day of February, 2020.

NEW MEXICO PUBLIC REGULATION COMMISSION



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