

Minnesota Public Utilities Commission
Staff Briefing Paper

Meeting Date: October 2, 2014..... ** Agenda Item # 2

Company: CenturyLink, Inc.

Docket No. P-421/AM-14-255
In the Matter of the Petition of CenturyLink, Inc. for Waiver of Minnesota Rules
Part 7810.5800

- Issues:
1. Should the Commission reconsider or reopen its August 11th *Order*?
 2. If so, should the August 11th *Order* be modified?

Please Note: Minn. Rules 7829.3000, subp. 6, states that “[t]he commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition.

Staff: Kevin O’Grady.....651-201-2218

Relevant Documents

Commission *Order*..... August 11, 2014
CenturyLink Petition for Reconsideration August 21, 2014
Comments: AARP/LSAP August 29, 2014
Comments: DOC..... September 2, 2014

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Background

On March 26, 2014, CenturyLink, on behalf of its affiliated companies, asked the Commission to:

- (i) open a rulemaking proceeding to revise its quality-of-service rules, and
- (ii) grant an immediate variance of Minn. Rules Part 7810.5800 governing service interruptions.

The Commission separated the two requests, assigning the request for rulemaking to Docket 14-256 and the variance request to Docket 14-255. Subsequently, the Commission opened a rulemaking proceeding (Docket 14-413). This Briefing Paper addresses the request for a variance of Part 7810.5800.

On August 11, 2014, the Commission issued its *Order Denying Variance*.

On August 21, 2014, CenturyLink filed a petition for reconsideration.

On August 29, 2014, AARP and the Legal Services Advocacy Project (LSAP), jointly, filed comments opposing CenturyLink's petition.

On September 2, 2014, the Minnesota Department of Commerce (DOC) filed comments opposing CenturyLink's petition.

Rules Guiding Reconsideration

Commission rules make provision for reconsideration of an order:

The commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition. [Minn. Rules 7829.3000, subp. 6]

And Commission policy guides the motion to reconsider:

Any action of the Commission may be reconsidered. However, only a Commissioner voting on the prevailing side may move to reconsider. If the motion to reconsider passes, then the matter is before the Commission. The Commission may then alter, amend, rescind, or uphold its previous decision. The same question cannot be reconsidered a second time. (Mason, sec. 457.2.) However, the Commission may at any time, on its own motion or upon the motion of an interested party, upon notice, reopen any case after issuing an order. (Minn. Stat. sec. 216B.25.) [Minnesota Public Utilities Commission, *Operating Procedures and Policy, Meeting Procedures*, issued February 1, 1995]

All five current Commissioners supported the motion codified in the *Order* and, as such, any one of them may offer a motion to reconsider.

Petition for Reconsideration

Minn. Rules, Part 7810.5800

Part 7810.5800 addresses interruptions of service. It states, in full:

Each telephone utility shall make all reasonable efforts to prevent interruptions of service. When interruptions occur, the utility shall reestablish service with the shortest possible delay. The minimum objective should be to clear 95 percent of all out-of-service troubles within 24 hours of the time such troubles are reported. In the event that service must be interrupted for purposes of working on the lines or equipment, the work shall be done at a time which will cause minimal inconvenience to customers. Each utility shall attempt to notify each affected customer in advance of the interruption. Emergency service shall be available, as required, for the duration of the interruption.

Every telephone utility shall inform the commission, as soon as possible, of any major catastrophe such as that caused by fire, flood, violent wind storms, or other acts of God which apparently will result in prolonged and serious interruption of service to a large number of customers.

CenturyLink Petition

CenturyLink argues that Minn. Rules, Part 7810.5800, imposes an excessive burden on CenturyLink. Granting a variance to that rule advances the public interest and is consistent with applicable law. The Commission's *Order* improperly applies Minn. Stat. § 237.011 and improperly ignores substantial uncontroverted evidence that the standards for granting a variance apply. The Commission should reconsider its *Order* and grant CenturyLink's request that Part 7810.5800, either be waived while the current rulemaking (14-413) takes place, or be altered to an 85% standard during that time period.

The *Order* identifies "[d]irect oversight of service quality" as "a key policy objective of the Commission's regulatory responsibilities under Minn. Stat. § 237.011." This finding is inconsistent with both the language of the statute and the Commission's regulatory approach to service quality. The statute does not mention "direct oversight." Furthermore, the Commission does not directly oversee the service quality of any Minnesota telecommunications provider other than for those companies that must agree to an AFOR Plan in order to receive the same pricing flexibility its competitors receive. Instead, it only addresses such issues in the unlikely event of a complaint. If direct oversight of service quality were a key policy objective required by statute, the Commission should justify why it only implements such oversight for a small percentage of Minnesota customers. It does not do so for facilities-based competitive local exchange carriers. It does not do so for small incumbent providers. It does not do so for larger incumbent providers unless the provider agrees to an AFOR Plan.

In the *Order*, the Commission rejected CenturyLink's arguments that the 95% standard imposes an excessive burden because CenturyLink did not submit a specific cost associated with compliance. As was explained at the hearing, identifying any specific cost associated with the standard would be artificial. CenturyLink could meet the standard at no cost if it (i) stopped installing new service and (ii) stopped repairing broadband services or telecommunications service that does not involve an out-of-service condition. Taking such an approach would clearly contradict Commission goals and CenturyLink's business interests. Any other cost estimate would require assumptions regarding the repair resources allocated to these competing demands. Instead of providing an artificial cost estimate, CenturyLink provided the Commission with a number of critical factors that cause this standard to impose an excessive burden. This evidence does represent a cost to the Company that is far more powerful than simply quantifying a dollar amount. CenturyLink has met its obligation to demonstrate that the rule imposes an excessive burden and that a variance is appropriate.

The *Order* reasons that force majeure provisions in the AFOR ameliorate the impact of the 95% standard. While force majeure language can be helpful in addressing the standard, such events

do not account for the wide discrepancy in repair events reported pursuant to the metric. The number of customers experiencing out-of-service conditions varies widely from day to day and such variability may or may not be caused by weather or other outside circumstances.

In rejecting CenturyLink's petition, the *Order* simply dismisses CenturyLink's evidence despite having no factual basis to do so. However, the only sworn evidence in the case establishes not only that the standard causes a misallocation of resources, but also that the standard disadvantages consumers by delaying the availability of new services and by delaying repair of non-outage conditions. Thus while the Legislature has recognized the importance of service quality, the *Order* fails to account for uncontroverted evidence establishing that this service quality standard has the effect of hurting, rather than assisting with achievement of that goal.

Finally, the *Order* did not resolve the question of whether or not CenturyLink's petition is consistent with applicable law. CenturyLink relies on its submissions to date on this issue.

AARP/LSAP Position

AARP and LSAP believe the service quality rules should not be waived during the pendency of the requested rulemaking proceeding. Moreover, any waiver or elimination of critical consumer protections should be based upon substantive evidence, not generalized statements contending that compliance with those protections is burdensome to industry interests. In our opinion, CenturyLink has failed to provide this substantive evidence in the oral hearing, and we agree with the Commission's order that CenturyLink's "lack of any quantification of associated costs undermines the company's claim that the standard imposes extraordinary costs and reduces the company's competitiveness."

Furthermore, AARP and LSAP believe that service quality is a key objective of the Commission's regulatory responsibilities under Minn. Stat. § 237.011. Telephone communication is a basic necessity, allowing older people to maintain social contact, preserve health and safety, and call for assistance in an emergency. People age 65 and older are more likely than any other age group to have landline telephone service in their home and have a justifiable expectation that their phone service will be repaired in a reasonable timeframe should they experience a loss of service.

We believe there is no need to sacrifice important consumer protections simply because technology evolves as the evolution of networks does not necessarily result in effective competition and indeed could reduce competitive options. In fact, the level of competition that exists varies by product market and by geographic market. Unless and until the requested

rulemaking proceeding demonstrates that effective competition exists in Minnesota, regulatory oversight and service quality measures remain essential to address market imperfections, including those that harm consumers, like prolonged service outages.

DOC Position

DOC opposes CenturyLink's petition. The Commission's decision was well informed, reasoned, and appropriate. CenturyLink has presented no new arguments, new evidence, or information to justify reconsideration of the *Order* or to compel a different conclusion than that presented in the *Order*.

DOC argues that the Commission did not err in its application of Minn. Stat. § 237.011. The statute identifies "maintaining or improving quality of service" and "ensuring consumer protections are maintained in the transition to a competitive market for local telecommunications service" among the "goals that should be considered as the commission executes its regulatory duties with respect to telecommunication services." Clearly these are key policy objectives that the Commission should consider, particularly for a request to eliminate or vary a Commission rule designed to maintain quality of service and ensure consumer protections. The statute does not mandate that the Commission consider every goal in every case, nor does the statute confine the scope of the Commission's authority to consider telecommunications issues that fall outside the confines of these enumerated goals. DOC believes that CenturyLink, rather than the Commission, erred in its application of § 237.011 to the current case.

CenturyLink states that "the Commission should justify why it only implements [direct oversight of service quality] for a small percentage of Minnesota customers," arguing that the Commission does not do so for facilities based competitive local exchange carriers, small incumbent providers, or large incumbent providers unless the provider agrees to an alternative form of regulation (AFOR) plan. First, the Commission is not required to "justify" the rule in the current docket. Second, CenturyLink's "unfairness" argument, alleging that the Commission's oversight of service quality is selectively applied to large incumbent providers who have chosen to be regulated under an AFOR plan, is not a new one. CenturyLink appears to object to the terms of the service quality plan in its AFOR plan, rather than to application of Part 7810.5800 itself. CenturyLink takes issue with the fact that it is required to track and annually report certain service quality results pursuant to its AFOR. This service quality reporting and tracking requirement stems from the provisions CenturyLink agreed to in its AFOR. No other CenturyLink company for whom the waiver is sought is subject to reporting because no other CenturyLink company has elected to be regulated pursuant to an AFOR plan.

DOC also argues that CenturyLink has not established that Part 7810.5800 imposes an excessive burden. In support of its request, CenturyLink states that (i) it has presented evidence more powerful than an artificial quantification of cost in support of its petition, and (ii) force majeure provisions in the AFOR do not fully address the problems caused by the standard. The first argument has already been considered by the Commission and dismissed. With respect to the second argument CenturyLink has provided no new facts or evidence.

Further, CenturyLink has not established that a variance is in the public interest. The Commission clearly considered CenturyLink's claims and CenturyLink has provided no new facts to justify reconsideration.

Staff Comment

CenturyLink, in its petition, did not address the issue of whether the Commission has the authority to modify CenturyLink's AFOR in midterm other than to state: "The Order did not resolve the question of whether or not CenturyLink's petition is consistent with applicable law. CenturyLink relies on its submissions to date on this issue." As such, and although not stated explicitly, Staff believes that CenturyLink's petition encompasses a request to modify its AFOR in accordance with the rule variance it seeks.

Staff believes several points of Century Link's argument warrant comment:

CenturyLink voluntarily approached the Commission to extend its AFOR plan. The Commission approved that extension on November 20, 2013 (docket 13-498).

CenturyLink is not the only company in Minnesota to face service reporting requirements in an AFOR. Two other relatively large carriers (Citizens and Frontier) have also voluntarily adopted AFOR Plans that include service outage reporting requirements.

CenturyLink argues that it could meet the 95% standard at no cost if it (i) stopped installing new service and (ii) stopped repairing broadband services or telecommunications service that does not involve an out-of-service condition. This argument sets up a false dichotomy by neglecting the fact that a corporation as large and complex as CenturyLink is likely to have myriad managerial and financial options available to it as alternatives to reducing service quality. For example, many services included within the AFOR Plan allow CenturyLink considerable pricing flexibility. And Minn. Stat. 237.411 relieves all providers from most rate-regulation for customers subscribing to four or more business lines. CenturyLink's financial health received no substantive discussion.

CenturyLink has provided empirical evidence of line counts that have decreased over a number of years. That evidence does not necessarily provide an indication of increased financial burden. Lost lines may reduce costs. Revenues from retained lines may increase from the sale of new products.

CenturyLink has characterized any direct empirical evidence of burden as “artificial,” effectively asking the Commission to rely solely on oft-repeated general assertions.

Staff recommends that the Commission deny CenturyLink’s petition for reasons stated by the Commission in its initial *Order*:

The Commission does not dispute that meeting the standard requires careful management and allocation of resources, but a lack of any quantification of associated costs undermines the company’s claim that the standard imposes extraordinary costs and reduces the company’s competitiveness. [*Order*, p. 8]

And,

The rulemaking proceeding was initiated to develop, in further detail, these issues and to consider whether permanent rule changes are needed and reasonable. That proceeding remains the most appropriate vehicle for examining these issues. [*Order*, p. 8]

And,

Concluding that the public interest would not be adversely affected by granting the variance requires finding that the company is correct in its assertions that it cannot both meet the standard and effectively allocate resources in a manner that best serves consumers and best protects service quality. Based on the record in this case, however, there is not sufficient information or other data to draw that conclusion. [*Order*, p. 8]

Commission Options

Issue 1: Should the Commission Reconsider or Reopen its August 11th Order?

- 1.a Grant CenturyLink's petition for reconsideration.
- 1.b Deny CenturyLink's petition for reconsideration.

Note: if the Commission denies CenturyLink's petition it need not address Issue 2.

Issue 2: Should the August 11th Order be Modified?

- 2.a Vary Part 7810.5800 to eliminate the service restoral requirement for CenturyLink and its affiliated companies while the current rulemaking (14-413) takes place. Modify CenturyLink's AFOR accordingly.
- 2.b Vary Part 7810.5800 to reduce the 95% standard to an 85% standard for CenturyLink and its affiliated companies while the current rulemaking (14-413) takes place. Modify CenturyLink's AFOR accordingly.
- 2.c Seek further comment addressing the Commission's authority to modify a standing AFOR Plan.
- 2.d Make no modification to the August 11th Order.
- 2.e Take other action.