STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
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In the Matter of a Rulemaking to Consider Possible Amendments to Minnesota Rules, parts 7810.4100 through 7810.6100

DOCKET NO. P-999/R-14-413

REPLY COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL - RESIDENTIAL UTILITIES AND ANTITRUST DIVISION

The Office of the Minnesota Attorney General – Residential Utilities and Antitrust Division ("OAG") respectfully submits its Reply Comments in the matter of a Rulemaking to Consider Possible Amendments to Minnesota Rules parts 7810.400 through 7810.6100. This Reply will primarily respond to the claims put forward in the Comments of CenturyLink, Inc. ("CenturyLink"), Citizens Telecommunications Company of Minnesota, LLC, and Frontier Communications of Minnesota, Inc. (collectively "the Telecom Parties"). The evidence produced by these parties does not satisfy the Commission's evidentiary requirements, and the parties' arguments in favor of repealing substantive service quality rules are unpersuasive. The Commission should not repeal or reduce the effectiveness of Minnesota Rules parts 7810.4100 through 7810.6100 (the "Service Quality Rules") because they provide important benefits for consumers.

INTRODUCTION[1]

The Telecom Parties' request to degrade or repeal the Service Quality Rules is based on the erroneous claim that wireline telephone companies face effective competition from several other sources of voice communication services, including wireless, CLECs, cable telephone, and VoIP. A proper analysis of the relevant law and the evidence produced by the Telecom Parties, however, clearly indicates that there is no effective competition faced by wireline telephone service. In the absence of such market pressure, the Service Quality Rules are necessary to ensure that Minnesota consumers receive adequate telephone service.

The OAG's Reply Comments will address several issues: First, the OAG will briefly restate the foundational principles of antitrust law; second, the OAG will describe why the *Horizontal Merger Guidelines*[2] provide valuable guidance about the proper manner to analyze CenturyLink's claims that it faces effective competition[3] in Minnesota from other providers of voice service; third, the OAG will explain why the *Phoenix Forbearance Order*[4] is relevant to the analysis in this matter; fourth, the OAG will explain why the evidentiary submissions of CenturyLink are flawed as a general matter; fifth, the OAG will discuss why the evidence

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[1] The following terminology will be used throughout these comments: (1) "Voice service" means the provision of telephone service to end-user customers, such as individuals and businesses, at retail regardless of the technology used; (2) "Wireline" or "landline" service means voice service provided through the network of an Incumbent Local Exchange Carriers ("ILEC"), such as CenturyLink; (3) "CLEC" means Competitive Local Exchange Carrier; (4) "Wireless service" means voice service provided by wireless telephone providers, such as T-Mobile; (5) "Cable telephone" means voice service offered by facilities-based Voice Over Internet Protocol ("VoIP") providers, such as Comcast; (6) "VoIP service" means voice service offered by companies like Vonage who do not operate their own telecommunications networks and instead require customers to obtain access to a network owned by others (e.g., CenturyLink or Comcast); the term is not intended to encompass cable telephone providers despite the fact that there service is also based on VoIP technology.

[2] United States Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* at 7 (Aug. 19, 2010) ("*Merger Guidelines*").

[3] When the OAG uses the term "effective competition" herein this is intended to be shorthand for goods and services that are part of the same "relevant market" for antitrust purposes. *See infra* note 5.

[4] Federal Communications Commission, *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135 (June 22, 2010) ("*Phoenix Forbearance Order*").

submitted by the Telecom Parties is insufficient to demonstrate effective competition in regard to each particular voice service at issue; sixth, the OAG will discuss why Minnesota Statutes section 237.411 has no bearing on the current matter; and, finally, the OAG will address the Telecom Parties' argument that portions of the Service Quality Rules are obsolete due to changes in telecommunications technology.

Ultimately, the OAG submits to the Commission that the Service Quality Rules are necessary to ensure adequate service because the Telecom Parties do not face effective competition from rivals. Any substantive weakening of the Commission's Service Quality Rules would thus leave consumers at the mercy of monopolists with no economic or regulatory incentive to maintain satisfactory service quality. For that reason, any changes to the Service Quality Rules should be limited to only those changes necessary to provide the same substantive consumer protections in a technology-neutral manner.

I. ANTITRUST REFRESHER—ONLY SERVICES IN SAME "PRODUCT MARKET" AND "GEOGRAPHIC MARKET" COMPETITIVELY CONSTRAIN ONE ANOTHER.

As discussed in detail in the OAG's initial comments, goods and services only compete with one another in an antitrust sense if they occupy the same "relevant market," which consists of a "product market" and "geographic market."[5] "[The] basic relevant product market test is 'reasonable interchangeability.' Interchangeability may be measured by, and is substantially synonymous with, cross-elasticity. A market is *elastic* if demand goes down as price goes up. A market is *cross-elastic* if rising prices for product *A* cause consumers to switch to product *B*."[6]

[5] 12/4/14 OAG Comments Section III.A.-B.; *see also, e.g., United States v. Empire Gas Corp.*, 537 F.2d 296, 303 (8th Cir. 1976) ("There are two components in the concept of relevant market: relevant product market and relevant geographic market."); *Am. Online, Inc. v. GreatDeals.Net*, 49 F.Supp.2d 851, 857 (E.D.Va. 1999) (same).

[6] *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1131 (10th Cir. 2002) (italics original).

A corollary to the focus on consumer substitution is that the functional interchangeability of two goods or services, by itself, is not enough to conclude that they are in the same product market.[7] The proponent of the product market at issue must further provide evidence of cross-elasticity of demand between the two goods or services to establish that they actually compete with one another.[8] Finally, a properly-defined geographic market is the area in which the seller operates and a consumer can practicably turn to alternative suppliers of the product.[9]

II. THE MERGER GUIDELINES ESTABLISH GENERALLY APPLICABLE ANTITRUST PRINCIPLES RELEVANT TO PROPERLY EVALUATING MANY COMPETITION ISSUES.

Despite the claims of the Telecom Parties to the contrary, the antitrust principles discussed in the *Merger Guidelines* address far more than just the effects of mergers. The *Merger Guidelines* provide an economically sound basis for the Commission to evaluate the competition—or lack thereof—present in the market for voice service in Minnesota. For example, the guidelines address generally applicable antitrust principles such as how to properly define product and geographic markets,[10] who is considered a market participant (i.e., competitor) in the relevant market,[11] and the likelihood that new competitors will enter the market,[12] all of which assist in recognizing and preventing the creation, enhancement, or entrenchment of market power.[13]

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[7] *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1241 (8th Cir. 2011) (stating that "functionally similar products may be in separate product markets, depending on the facts of the case").

[8] *See, e.g., Empire Gas Corp.*, 537 F.2d at 303 ("It is true that . . . other fuels will serve the same function as [liquefied petroleum]. However, the inquiry does not end there. Whether a particular product's sales constitute a relevant market . . . depends on the cross-elasticity of demand for that product; in other words, the readiness and ability of consumers to turn to reasonable alternatives to the product in question.").

[9] *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

[10] *Merger Guidelines* § 4.

[11] *Merger Guidelines* § 5.1.

[12] *Merger Guidelines* § 9.

[13] *See Merger Guidelines* § 1 (stating that "[t]he unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.").

CenturyLink's[14] and Dr. Staihr's[15] argument that the *Merger Guidelines* are not pertinent because they concern only mergers is incorrect. Unless the conduct at issue is a *per se* violation of antitrust laws (e.g., price fixing), many principles discussed in the *Merger Guidelines* are used by courts to evaluate competition in a wide variety of contexts besides mergers.[16] Indeed, Dr. Staihr contradicts his dismissal of the relevance of the guidelines in his own affidavit, as he discusses therein how the reasonable-interchangeability standard used to determine whether consumers view goods or services as substitutable is "the standard that is explicitly mentioned in the . . . Horizontal Merger Guidelines (page 9) as well as in economics textbooks."[17] Many aspects of the *Merger Guidelines* are thus highly relevant to analyzing the presence or absence of competition among rival providers of voice service in Minnesota.

Dr. Staihr also claims, again incorrectly, that the *Merger Guidelines* "are of no use at all" due to their emphasis on the role of price competition in defining a product market, pointing out that goods and services often compete on non-price characteristics as well.[18] But this assertion is nothing more than a truism that highlights the unremarkable proposition that not all products are homogenous; some are differentiated and also compete on their non-price attributes.[19] Quite

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[14] Comments of CenturyLink of December 4, 2014 ("12/4/14 CenturyLink Comments") at 15.

[15] Affidavit of Dr. Brian K. Staihr of December 4, 2014 ("12/4/14 Staihr Affidavit") at 12.

[16] Absent a *per se* violation, identifying and analyzing (among other things) product and geographic markets, market power, and other market participants is typically required because one cannot determine the effect on competition, if any, of the conduct at issue without first determining the contours of the relevant market within which to analyze competition. *See, e.g., Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 596 (8th Cir. 2009) (discussing, in the context alleged collusion and monopolization, how "[w]ithout a well-defined relevant market, a court cannot determine the effect that [the challenged conduct] has on competition").

[17] 12/4/14 Staihr Affidavit at 3 n.3.

[18] 12/4/14 Staihr Affidavit at 12.

[19] "Products are homogenous when virtually all buyers regard them as identical. Products are differentiated when many buyers regard them as different though the products still perform the same essential function." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 563a at 407-08 (4th ed. 2014) (hereafter "Areeda & Hovenkamp"). An example of homogenous products would be wheat or coal. *Id.* An example of differentiated products would be "machines performing the same function - such as copiers, computers, or automobiles - [that] differ not only in

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contrary to Dr. Staihr's argument, when dealing with differentiated products that also compete on non-price characteristics the "key to distinguishing product differentiation from [a] separate product markets lies in price information."[20] Legions of antitrust courts and scholars have thus repeatedly—and correctly—focused on the presence or absence of cross-price elasticity in analyzing whether differentiated products occupy the same product market.[21] Even the Supreme Court has stated that price should be the central focus when evaluating competition under antitrust laws, calling it "the central nervous system of the economy."[22] An appropriate antitrust analysis of whether wireless and wireline services compete should focuses on whether the pricing of one constrains the pricing of the other, regardless of whether the services are differentiated.

Dr. Staihr attempts to buttress his erroneous dismissal of the role of price in defining appropriate product markets by discussing the response of branded drug manufacturers to the competition that they face from generic drugs.[23] But it is well documented that branded drug manufacturers, instead of slashing their prices to compete with generics, often reduce marketing expenditures and raise prices on the branded drug to maximize revenue from customers who

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brand name but also in performance, physical appearance, size capacity, cost, price, reliability, ease of use, service, customer support, and other features." *Id*.

[20] *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1056 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

[21] *See* Areeda & Hovenkamp ¶ 563a at 407-10 (discussing how differentiated products "generally compete with one another sufficiently that the price of one brand is greatly constrained by the price of others," and then going to state that the SSNIP test is still utilized to define product markets with differentiated goods and services); *see also, e.g., DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1340 (Fed. Cir. 2014) (utilizing the *Merger Guidelines*'s SSNIP test to evaluate an antitrust claim involving differentiated products); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 43 (D.D.C. 2009) ("If part of the same product market, [product A] and the Defendants' [product B] are undoubtedly differentiated products. . . . However, there is no evidence to suggest that the price of [product B] is sensitive in any way to changes in pricing by [product A] vendors, or vice-versa.").

[22] *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978) (quotation omitted).

[23] 12/4/14 Staihr Affidavit at 13.

prefer the branded drug regardless of it higher price (i.e., customers who are price insensitive).[24] Dr. Staihr's curious decision to highlight this unique—but well documented—phenomenon specific to the pharmaceutical industry again demonstrates nothing more than his lack of understanding of the generally applicable antitrust principles the *Merger Guidelines* embody. The *Merger Guidelines* provide a useful and important framework for reviewing competition in many contexts, including this one.

III. THE *PHOENIX FORBEARANCE ORDER* ESTABLISHES A RELEVANT AND APPROPRIATE FRAMEWORK FOR THE COMMISSION TO ANALYZE CENTURYLINK'S CLAIM THAT IT FACES EFFECTIVE COMPETITION FROM RIVAL PROVIDERS OF VOICE SERVICE.

The Telecom Parties also dispute whether the *Phoenix Forbearance Order* and the FCC's antitrust analysis therein is on-point precedent for this proceeding. But, once again, it is CenturyLink and Dr. Staihr—not the Commission—that fail to understand the order's significance to the current matter. The *Phoenix Forbearance Order*, like the *Merger Guidelines*, provide valuable context for reviewing the Telecom Parties' claims of competition.

A. The *Phoenix Forbearance Order* Carefully Analyzed the Exact Same Issue Presently Before the Commission—Whether There is Effective Competition Between CenturyLink and Rival Providers of Voice Service.

In the Phoenix forbearance proceeding, CenturyLink[25] petitioned the FCC to forbear the requirement that it, as an Incumbent Local Exchange Carrier ("ILEC"), provide competing sellers of voice service access to Unbundled Network Elements ("UNEs").[26] UNEs are certain

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[24] *See* M. Howard Morse, *Product Market Definition in the Pharmaceutical Industry*, 71 Antitrust L.J. 633, 642 (2003) (citing various economic and other literature in explaining that "[i]t is also now well documented that [branded] manufacturers often curtail [marketing efforts] and raise the price of the [branded] drug in response to generic entry").

[25] Qwest became part of CenturyLink following a merger of the two companies in 2011. Unless otherwise appropriate for clarity, Qwest will be referred to as CenturyLink even in regard to its pre-merger existence.

[26] *See* 47 U.S.C. § 251(c)(3) (imposing a "duty to provide . . . nondiscriminatory access to network elements on an unbundled basis"). Qwest also sought forbearance from certain other regulatory requirements in the proceeding, but these were not the focus of CenturyLink's discussion of the matter in its initial comments so neither will they be the OAG's focus in these reply comments. *See* Federal Communications Commission, *Petition of Qwest Corporation*

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components of the physical infrastructure that ILECs use to provide wireline service to customers. "Congress enacted and the [FCC] implemented the UNE framework in an attempt to lower barriers to entry [into the retail telephone market for carriers competing with ILECs] and to create a viable platform for entry into the local market."[27]

CenturyLink argued in the Phoenix proceeding that there was no need to maintain the competition-enhancing UNE mandate because the market for voice service was already competitive.[28] One of the questions the FCC was thus required to address is the same question currently facing the Commission: is CenturyLink's claim that it faces effective competition from rival voice service providers correct? This fact renders the framework that the FCC used in the *Phoenix Forbearance Order* to analyze competition—an analysis that was affirmed on appeal[29]—highly relevant to the current matter.

B. CenturyLink's and Dr. Staihr's Baseless Attempts to Distinguish the *Phoenix Forbearance Order* Only Demonstrates Their Misunderstanding of the Order.

CenturyLink claims that the Phoenix proceeding has no bearing on the present matter because "the Phoenix UNE Forbearance Petition focused on the regulation of wholesale UNEs provided to CLECs, not retail services provided to end users."[30] Dr. Staihr similarly claims that the Commission's reference to the matter "appears to confuse" the "market for retail service . . .

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for Forbearance Pursuant to 47 U.S.C. § 160(c) at 7-11, WC Docket No. 09-135 (March 24, 2009) ("*Qwest Phoenix Petition*").

[27] *Phoenix Forbearance Order* ¶ 84. *See also, e.g., BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 966 (11th Cir. 2005) (stating the mandate that ILECs sell UNEs to rivals was intended "to enhance competition in the local telephone service market to promote better quality and lower prices").

[28] *Phoenix Forbearance Order* ¶ 23.

[29] *Qwest Corporation v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

[30] 12/4/14 CenturyLink Comments at 10.

and the market for the [wholesale UNE] inputs . . . used to provide retail voice service."[31] It is CenturyLink and Dr. Staihr, however, that are confused about the relevance of the *Phoenix Forbearance Order* in arguing that there is none.

Dr. Staihr acknowledges the purpose of requiring the sale of UNEs to rival providers of voice service at wholesale is to promote additional competition in the *retail* market.[32] But if the retail market for voice service is already competitive, the need to promote competition through the forced sharing of UNEs is unnecessary. The FCC thus explained that granting CenturyLink's forbearance request for the Phoenix area would be proper if *either* the wholesale UNE market[33] or retail voice service market[34] is competitive. In arguing that the order is irrelevant because it focuses only on the wholesale sale of UNEs, CenturyLink and Dr. Staihr—intentionally or not—ignore the fact that the FCC analyzed competition in *both* the retail and wholesale markets.[35]

Dr. Staihr further misconstrues the FCC's analysis in the *Phoenix Forbearance Order* when he claims that the FCC incorrectly segregated wireline service from wireless service on the basis of a "technological distinction" because "economists do not define markets based on

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[31] 12/4/14 Staihr Affidavit at 13-14.

[32] 12/4/14 Staihr Affidavit at 14 ("The obligation to provide UNE has historically been viewed as one way of lowering barriers to entry into the retail market for voice service.").

[33] *See Phoenix Forbearance Order* ¶ 43 (stating that CenturyLink could satisfy the forbearance criteria by proving "the relevant wholesale markets [for the sale of UNEs] are effectively competitive"). The rationale behind this principle is that effective competition among wholesale sellers of UNEs would prevent any single UNE seller from acting anticompetitively because purchasers of UNEs would have a meaningful choice among rival UNE sellers. By contrast, if a wholesale seller of UNEs is a monopolist it can utilize its power over the UNE wholesale market—a necessary input if another carrier is to provide retail voice service—to impede retail competition.

[34] *See Phoenix Forbearance Order* ¶ 43 (stating that CenturyLink could satisfy the forbearance criteria by demonstrating "that there are a sufficient number of significant, full facilities-based competitors providing the relevant retail services so as to make those markets effectively competitive"). The rationale behind this principle is that if a properly-defined market for voice service is already competitive *without the need to rely on access to CenturyLink's UNEs* then any regulatory requirements designed to promote additional competition in the retail market are superfluous. Importantly, however, the FCC noted that "the mere fact that a relevant retail market was effectively competitive would not, by itself, be sufficient to justify [forbearance], particularly if that retail competition may depend on the rules and regulations from which forbearance relief is being sought." *Id.* ¶ 94 n.282.

[35] The bulk of the FCC's analysis of the retail market for voice service is found in paragraphs 46, 51-68, 80-91, and 97-100 of the *Phoenix Forbearance Order*. The bulk of the analysis of the wholesale UNE market is found in paragraphs 46-50, 64-65, 66-79, and 96 of the order.

technology."[36] Dr. Staihr's claim is nothing more than a straw man, as the FCC did no such thing. The FCC properly framed the question of whether wireline and wireless service occupy the same product market under antitrust laws,[37] and then found that "neither [CenturyLink] nor any other commentator has submitted evidence that would support the conclusion that mobile wireless service constrains the price of wireline service."[38] Accordingly, the *Phoenix Forbearance Order* is highly instructive regarding the appropriate manner to analyze whether CenturyLink faces effective competition from other providers of voice service in Minnesota. CenturyLink and Dr. Staihr's claims to the contrary are, in a word, wrong.[39]

IV. CENTURYLINK'S EVIDENTIARY SUBMISSIONS ARE INSUFFICIENTLY GRANULAR TO DRAW CONCLUSIONS ABOUT THE COMPETITION, IF ANY, IT MAY FACE FROM RIVALS, RIFE WITH METHODOLOGICAL PROBLEMS, AND FALL FAR SHORT OF PROVIDING A SUFFICIENT EVIDENTIARY BASIS TO ROLLBACK THE SERVICE QUALITY RULES.

CenturyLink has attempted to produce evidence supporting its claims, but neither the evidentiary affidavit of Mr. Brigham or the economic affidavit of Dr. Staihr are sufficient to demonstrate effective competition. This is not the first time CenturyLink has failed to meet such an evidentiary burden. CenturyLink was also required to provide evidence of competition in the Phoenix proceeding. It submitted an evidentiary affidavit from Robert Brigham,[40] the same

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[36] 12/4/14 Staihr Affidavit at 14.

[37] *Phoenix Forbearance Order* ¶ 56 ("The fundamental question in a traditional product market definition exercise is whether mobile wireless access service constrains the price of wireline access service. . . . "[W]e consider whether there are a sufficient number of wireline service customers who, in response to a price increase in wireline local access service, would stop subscribing to their wireline service and instead rely exclusively on mobile wireless service, so as to render [a small but significant non-transitory increase in price] unprofitable.").

[38] *Phoenix Forbearance Order* ¶ 58.

[39] CenturyLink is also incorrect in asserting that the Arizona Corporation Commission proceeding that it references in its comments provides better guidance for the Commission than the *Phoenix Forbearance Order*. *See* 12/4/14 CenturyLink Comments at 12-13. The Arizona Corporation Commission proceeding resulted in a settlement between CenturyLink and various other parties, as CenturyLink expressly acknowledges. Accordingly, no scrutiny of evidence was performed, no facts were found, and no conclusions were drawn about *anything* in that proceeding, much less whether wireline service competes with other voice service under antitrust law principles.

[40] *See* Declaration of Robert H. Brigham Regarding the Status of Telecommunications Competition in the Phoenix, Arizona Metropolitan Statistical Area (March 24, 2009) ("Brigham Phoenix Affidavit").

employee who submitted an evidentiary affidavit in the present matter.[41] The FCC found that Mr. Brigham's affidavit failed to provide sufficient evidence of competition and denied CenturyLink's petition. The same is true here. Further, Dr. Staihr's economic affidavit—which is equal parts misunderstanding and misapplication of antitrust law—only compounds these evidentiary shortcomings, as described further below.

A. Mr. Brigham's sweeping pronouncement that effective competition exists for voice service throughout Minnesota is not supported by the particularized, market-specific evidence that antitrust laws require.

Defining a relevant market for antitrust purposes, and establishing the competitive dynamics of a properly defined relevant market, is fact-specific inquiry that must be based on evidence particular to the market at issue.[42] But Mr. Brigham only generalizes about Minnesota as a whole. He appears to simply assume that all types of communication services should be included in the same product market, and that the entire state is a single geographic market. His basis for doing so is never explained, and the veracity of his sweeping assumptions—which underlie the entirety of his affidavit—strains belief because the competitive dynamics present in different geographic areas of Minnesota likely vary greatly.

For example, Mr. Brigham discusses the different voice providers present in Minnesota as if each one offers service throughout the entirety of the state. But persons and businesses in the Twin Cities metropolitan area likely have more options for choosing a provider of voice service than those in Roseau or Worthington. Mr. Brigham does not acknowledge, much less

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[41] *See* Affidavit of Robert Brigham of December 4, 2014 ("12/4/14 Brigham Minnesota Affidavit").

[42] *See Berlyn, Inc. v. Gazette Newspapers, Inc.*, 223 F. Supp. 2d 718, 728-29 (D. Md. 2002) (discussing how a proponent of a relevant market, typically the plaintiff in an antitrust case, must offer "sufficient evidence on the highly technical and fact-specific question of relevant market. Plaintiffs' arguments based on decisions from courts in other cases are unpersuasive, as those cases did not deal with the specific product or geographic markets involved in this case. Plaintiffs' reliance on studies conducted by the defendants is also misplaced, absent a showing that these studies dealt specifically with the markets alleged here or that they were aimed at defining relevant market for antitrust purposes."); *see also, e.g., Eichorn v. AT & T Corp.*, 248 F.3d 131, 139-40 (3d Cir. 2001), *as amended* (June 12, 2001) (noting a "fact specific inquiry [is] required to assess antitrust liability under the Sherman Act").

account for, how such differences affect the competitive conditions present in different areas of the state.

As all voice providers do not serve all areas of Minnesota it is critical to know the geographic areas that they do serve. Only by knowing the particulars of each providers' service territory can one assess whether their offerings are available as an alternative to CenturyLink's wireline service. Mr. Brigham, however, provides *no* usable data on the geographic areas in which rivals to CenturyLink offer service.[43] Having such information is necessary to analyzing whether effective competition exists at all, and if it does, whether any area in which effective competition exists is limited to only certain portions of the state.

Mr. Brigham further fails to discuss the differing nature of the types of voice service rival providers offer, and how exactly their service is marketed to customers. CenturyLink acknowledges in its initial comments that CLECs focus on business, not residential, customers.[44] This raises the question of whether a CLEC serving a particular area of the state even offers voice service to all customers in the area, or only to certain business customers viewed as more lucrative by the CLEC. CenturyLink never discusses this point. By way of another example, it also fails to address whether cable telephone companies offer voice service separate from a bundle of services that include internet and TV. Knowing such information is critical to evaluating whether cable telephone acts as a competitive constraint on wireline service.

As the above discussion suggests, there are likely many different geographic markets in Minnesota served by a changing mix of voice providers whose services vary in nature and may or may not be included in the same product market. Indeed, the Commission recognized the

[43] Mr. Brigham's inclusion of alleged wireless coverage maps in the appendix of his affidavit is woefully insufficient as to this point, as discussed further below, and, of course, says nothing about the territory served by non-wireless providers of voice service.

[44] 12/4/14 Brigham Minnesota Affidavit ¶ 18, 23.

likelihood of such circumstances because its Request for Comments specifically requires anyone seeking to change the Service Quality Rules to provide evidence about competition in "different geographic areas where customers face the same choice of competitive services (in some cases this may require defining the market at a level less than that covered by a wire center – for example where cable is offered in an urban area but not in the rural portion of the wire center)."[45] Mr. Brigham wholly disregards the Commission's directive, instead indiscriminately treating all of Minnesota and all providers of voice service as if it were one, big "relevant market" for antitrust purposes. This error renders his affidavit of little, if any, evidentiary worth.

Moreover, yet other portions of Mr. Brigham's affidavit appear to be similar or identical to—and were presumably lifted from—the evidentiary affidavit he submitted in the Phoenix proceeding.[46] Such a "cut-and-paste" approach to providing evidence to the Commission is not indicative of the necessary, market-specific analysis needed for CenturyLink to satisfy its burden. Indeed, despite failing to establish effective competition in one city there, Phoenix, Mr. Brigham now asks the Commission to find that equivalent testimony suffices to establish effective competition throughout an entire state, Minnesota.

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[45] Request for Comments at 1 (Aug. 4, 2014).

[46] *Compare, e.g.,* Brigham Phoenix Affidavit ¶ 13 (arguing that the "decline in Qwest landlines, coupled with the dramatic increase in wireless connections, demonstrates that Phoenix MSA customers increasingly view wireless phones as substitute for wireline service") *with* 12/4/14 Brigham Minnesota Affidavit ¶ 29 (arguing that the "decline in CenturyLink landlines, coupled with the dramatic increase in wireless connections, demonstrates that ever-increasing number of Minnesota customers view wireless phones as a functional equivalent substitute for wireline service"), *and* Brigham Phoenix Affidavit ¶ 20 ("In various regulatory forums, some parties have argued that wireless service should not be considered to be a substitute for wireline service because *all* customers may not view it as a substitute. There is no doubt that some customers may not yet view wireless service to be a substitute for wireline service, and some of these customers may not want to give up their wireline phone under any circumstances. However, as long as there are enough customers willing to 'cut the cord' (often called customers 'at the margin'), the risk of losing such customers and the desire to attract current 'wireless-only' customers constrains CenturyLink's prices and service quality.") *with* 12/4/14 Brigham Minnesota Affidavit ¶ 34 ("In various regulatory forums, some parties have argued that wireless service should not be considered to be a substitute for wireline service because *all* customers may not view it as a substitute. There is no doubt that some customers do not view wireless service to be a substitute for wireline service, and some of these customers may not want to give up their wireline phone under any circumstances. However, as long as there are enough customers willing to 'cut the cord' (often called customers 'at the margin'), this constrains Qwest's prices.").

CenturyLink has previously tried this same, scattershot method to arguing that competition exists as part of its UNE forbearance petition to the FCC regarding the Twin Cities area.[47] There, the Commission correctly recognized that such a haphazard approach did not provide a sound evidentiary basis to conclude that effective competition exists among different providers of voice service, telling the FCC in comments it filed as part of that matter:

> [CenturyLink's] focus on the number of telecommunications service providers operating in the [Twin Cities area] as a measure of competition is misplaced. All services are not good substitutes for each other, and a service available in one location is not a substitute for that service in another location. [CenturyLink's] Petition is not sufficiently granular to indicate whether effective alternatives are sufficiently widespread to allow the MNPUC to conclude that the markets, as characterized by [CenturyLink], are competitive.[48]

The Commission could not have been more right. CenturyLink must provide sufficiently granular and particularized market data regarding each geographic market at issue here. Suffice to say, Mr. Brigham's decidedly un-granular "evidence" fails to establish that effective competition exists anywhere in Minnesota, much less throughout the state.

B. Mr. Brigham wholly fails to provide relevant pricing data allowing the Commission to conclude that wireline and other types of voice service share the same product market.

As discussed in more detail below, another omission running throughout Mr. Brigham's affidavit is the lack of relevant pricing data that would allow the Commission to determine whether wireline service should be included in the same product market as other types of voice service. Such data could be used to establish that cross-elasticity demand exists between wireline service and other voice service, and that they therefore share the same product market.

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[47] *See generally* Federal Communications Commission, *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97 (2007), *motion for voluntary remand granted, Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) ("*4 MSA Forbearance Proceeding*").

[48] *4 MSA Forbearance Proceeding*, Comments of the Minnesota Public Utilities Commission at 2 (Sept. 21, 2009).

But Mr. Brigham does not provide *any* data on prices. His only reference to pricing is a snapshot of other voice providers' current, publically-stated list prices in the appendix to the affidavit.[49] Such data says nothing about the actual price of these services after any discounts or rebates, the change in the price of these services over time, and most importantly, cross-elasticity of demand.

C. A decrease in the number of wireline customers says nothing, by itself, about whether wireline service competes with other voice services.

Mr. Brigham spills much ink discussing how CenturyLink has seen a significant decrease in the size of its wireline customer base over the last decade, while at the same time asserting that the number of consumers relying on other types of voice service has increased.[50] But this fact, by itself, provides no insight into whether wireline and other types of voice service are in the same product market because it illuminates nothing about the *cause* of the decline. Mr. Brigham begs this question in his affidavit by assuming that the cause must be effective competition from other voice providers.

But there are many reasons why demand for a particular product or service may decline. Disruptive innovation that upends an established product or service is one of the more prominent examples. The invention of the car largely replaced the horse, computers replaced typewriters, CDs replaced cassettes, Netflix/Redbox replaced Blockbuster stores, and so on. In each of these instances, it is likely that the innovative, new product did not result in an increase in cross-elasticity of demand with the established product, as opposed to an outright decline in demand for the established product instead. Mr. Brigham needed to establish CenturyLink's wireline customer base is shrinking *and* the reason for this decrease was because of effective competition

[49] 12/4/14 Brigham Minnesota Affidavit Ex. RHB-4.

[50] 12/4/14 Brigham Minnesota Affidavit ¶¶ 6-17. The veracity of the data from Centris, a consulting firm, that Mr. Brigham touts throughout his affidavit also appears to be questionable. Centris refuses to stand behind the data, stating that "[it] makes no representations or warranties to third parties regarding the accuracy of this data." 12/4/14 Brigham Minnesota Affidavit Ex. RHB-2 n.2. Presumably, Centris considers the Commission a third party.

from other voice service providers. He only provided evidence of the former, hoping the Commission would overlook his failure to address the latter. It should not do so.

D. Mr. Brigham's claim that functionally equivalent communication services compete with voice service only demonstrates his erroneous view of competition.

Mr. Brigham also repeatedly references how different types of communication services, including non-voice services, are "functionally" interchangeable with wireline service.[51] But cross-price elasticity is the test of whether goods or services share the same product market and compete, not functional equivalence.[52] Bicycles serve the same function as cars, shovels serve the same function as snow blowers, and paint brushes serve the same function as paint sprayers. Yet it is folly to suggest that a small but significant non-transitory increase in price (*i.e.*, 5-10%) for a bike, shovel, or paint brush would result in consumers purchasing more cars, snow blowers, or paint sprayers. This, however, is effectively what Mr. Brigham is claiming.

E. It strains belief for Mr. Brigham to claim that voice service should be included in the same product market as non-voice communication services such as email and social networking messages.

Courts have explained that the "mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes."[53] Mr. Brigham disregards this notion by conflating numerous, distinct types of communications services that he claims compete with wireline service. In addition to claiming wireline service competes with cable, CLEC, wireless, and VoIP service—discussed in detail further below—he also claims that CenturyLink "face[s] competition from

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[51] *See, e.g.,* 12/4/14 Brigham Minnesota Affidavit ¶¶ 17, 19, 29, 34, 37, 42.
[52] *See supra* Section I.
[53] *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 50-51 (D.D.C. 2011) (alteration and quotation omitted).

non-voice services such as email, texting, internet communication and social networking sites."[54] He again provides no pricing (or other) evidence for this claim besides his own conclusory assertion. Regardless, it is exceedingly difficult to imagine the existence of evidence supporting the notion that Google' Gmail service constrains CenturyLink's pricing of its wireline service.

F. Dr. Staihr's attempt to draw conclusions from Mr. Brigham's notably deficient affidavit renders his testimony of little value, and he also utilizes the wrong standard to denote competition.

Given its the numerous shortcomings, attempting to draw sound economic conclusions about competition among different voice service providers from Mr. Brigham's evidentiary affidavit is largely impossible. The fact that Dr. Staihr nevertheless purports to do so—and with gusto—speaks volume about whether the Commission should give this testimony any weight at all. Even apart from his reliance on the "evidence" supplied by Mr. Brigham, however, Dr. Staihr's affidavit contains other notable shortcomings.

Dr. Staihr repeatedly opines that products are competitive substitutes if they have the ability "to take significant amounts of business away from each other."[55] He argues that many consumers utilize other types of voice service—cable telephony, VoIP, CLEC voice and wireless—and thus "it is clear that, in customer's minds, these others services . . . are viable competitive substitutes."[56] But this proffered benchmark is an inappropriate watering down of the correct product market test, and is not used by the Department of Justice, Federal Trade Commission, or the courts.[57]

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[54] 12/4/14 Brigham Minnesota Affidavit ¶ 4.

[55] Affidavit of Dr. Brian K. Staihr of December 4, 2014 ("12/4/14 Staihr Affidavit") at 5, 6, 7, 15, 18, and 19.

[56] 12/4/14 Staihr Affidavit at 6.

[57] The solitary court opinion Dr. Staihr cites for this proposition does not state otherwise. To the contrary, *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978), applies the reasonable-interchangeability product market test, and only then states that "[i]n sum, defining a relevant product market is a process of describing those groups of producers which, *because of the similarity of their products*, have the ability actual or potential to take

(Footnote Continued on Next Page)

The correct focus is instead on whether there is satisfactory evidence of cross-price elasticity among the goods or services at issue, here wireline and other voice service. The Commission should not give CenturyLink special treatment by allowing it to meet a lesser standard than that which every other party—including the government—must satisfy to establish that two goods or services actually compete. CenturyLink must produce sufficient evidence of reasonable interchangeability establishing that other types of voice service constrain its pricing of wireline service before these services can be found to share the same product market. As already discussed above, Mr. Brigham's affidavit simply does not provide an evidentiary basis on which Dr. Staihr could soundly draw such a conclusion.

V. CENTURYLINK HAS FAILED TO PROVIDE SUFFICIENT EVIDENCE ESTABLISHING THAT WIRELESS SERVICE IS IN THE SAME PRODUCT MARKET AS WIRELINE SERVICE, AND THE TWO THEREFORE ACT AS A COMPETITIVE CHECK ON ONE ANOTHER.

As discussed in detail in the OAG's initial comments,[58] antitrust authorities have to date found that wireless and wireline service occupy different product markets and therefore do not compete with one another. The Telecom Parties have provided the Commission with no valid basis to question this conclusion. Indeed, if the Commission were to conclude herein that wireless and wireline service occupy the same product market for antitrust purposes, it would be—to the best of the OAG's knowledge—the very first regulator in the country to do so. For all of the reasons discussed herein, the Telecom Parties has fallen far short of providing a sufficient evidentiary basis for the Commission to make such a ground-breaking conclusion.

(Footnote Continued from Previous Page)
significant amounts of business away from each other." *Id*. at 1063 (emphasis added). In short, the court was simply using different terminology to describe the appropriate product market test.

[58] *See* 12/4/14 OAG Comments Section III.C.

A. Mr. Brigham provides no relevant pricing or other econometric data that would enable the Commission to determine whether there is cross-elasticity of demand between wireline and wireless service.

In the *Phoenix Forbearance Order*, the FCC faulted CenturyLink for failing to provide the pricing evidence necessary to determine whether wireless service was in the same product market as wireline service and would thus act as a competitive check on wireline service, stating:

> Although [CenturyLink] argues that wireless provides competitive discipline on wireline prices and that competition at the margin disciplines a firm's pricing behavior, it has provided no empirical or documentary evidence that its pricing has been constrained by wireless service offerings. [CenturyLink]'s observation that the number of wireless access lines exceeds the number of wireline access lines is not probative of the issue of the substitutability between wireline and wireless services for residential households.[59]

The FCC continued:

> [CenturyLink] has [also] produced no econometric analyses that estimate the cross-elasticity of demand between mobile wireless and wireline access services. Nor has it produced any evidence that it has reduced prices for its wireline services or otherwise adjusted its marketing for wireline service in response to changes in the price of mobile wireless service. Nor has it produced any marketing studies that show the extent to which consumers view wireless and wireline access services as close substitutes.[60]

This was the heart of the FCC's rejection of CenturyLink's claim that wireless service competes with wireline service, yet it has again failed to provide any pricing or other econometric evidence to the Commission here. If anyone has the ability and incentive to compile such data it is CenturyLink. Its failure to do so, especially after the FCC prominently highlighted this shortcoming in the Phoenix proceeding, speaks volumes. Regardless, CenturyLink's failure to provide relevant pricing data makes it impossible to determine whether any cross-elasticity of demand exists between wireless and wireline service.

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[59] *Phoenix Forbearance Order* n.173.

[60] *Phoenix Forbearance Order* ¶ 58 (footnotes omitted).

B. Highlighting the existence of wireless only households does not make up for CenturyLink's failure to provide pricing data establishing a cross-elasticity of demand between wireless and wireline service.

In an effort to gloss over its utter failure to provide relevant pricing or other econometric data establishing that wireless and wireline service occupy the same product market, CenturyLink instead discusses how an increasing number of households are "cord cutters" that rely solely on wireless service.[61] Such circumstances, however, do not meet its evidentiary burden to show that it faces effective competition from wireless providers.

Indeed, the FCC properly rejected this exact same argument in the Phoenix proceeding when CenturyLink provided similar data on the prevalence of wireless-only households, stating:

> [CenturyLink] submitted studies that estimate the percentage of households that exclusively rely upon mobile wireless services in the Phoenix area, which cannot alone establish whether mobile wireless services should be included in the same relevant product market as residential wireline voice service. Knowing the percentage of households that rely exclusively upon mobile wireless is insufficient to determine whether mobile wireless services have a price-constraining effect on wireline access services. Moreover, while we acknowledge that the number of customers that rely solely on mobile wireless service has been growing steadily, we find that other reasons may explain the growth in the number of wireless-only customers, besides an increasing cross-elasticity of demand between mobile wireless and wireline services. For example, nationwide statistics published by the CDC suggest that the choice to rely exclusively upon mobile wireless services could be driven more by differences in consumers' age, household structure, and underlying preferences than by relative price differentials. Furthermore, just as some customers may rely solely on mobile wireless service regardless of the price of wireline service, several classes of customers appear unlikely to drop wireline service in response to a significant price increase, including those who: (a) value the reliability and safety of wireline service; (b) value a single point of contact for multiple household members; (c) live in a household with poor wireless coverage; (d) operate a business out of their home and believe that wireline service offers better reliability and sound quality; or (e) desire a service that is more economically purchased when bundled with a local service (e.g., wireline broadband Internet service, or a video service).[62]

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[61] 12/4/14 Brigham Minnesota Affidavit ¶¶ 29-34.

[62] *Phoenix Forbearance Order* ¶ 59 (footnotes omitted).

These same conclusions still hold, and the Commission should disregard the existence of cord cutters in evaluating whether CenturyLink has met its evidentiary burden to establish wireless and wireline service occupy the same product market.

C. Caves's generalized discussion of possible wireless and wireline substitution does not make up for CenturyLink's blanket failure to provide probative data on whether these two voice services actually compete in Minnesota.

Failing to provide evidence of cross-price elasticity between wireline and wireless service in Minnesota, CenturyLink instead relies on a paper by Kevin Caves[63] that purports to find some minimal consumer substitution between these services.[64] But Caves's purportedly "new" review of wireless customer data falls far short of establishing effective competition between these services for a number of reasons.

First, as with much of CenturyLink's supposed evidence of effective competition, Caves's paper is not Minnesota specific. Given that Caves's acknowledges that there is "evidence that wireless substitution varies substantially across geographic regions"[65] this is a critical variable that CenturyLink does not account for regarding Minnesota.

Second, the wireless customer data underlying Caves's paper is from the years 2001 to 2007.[66] Accordingly, both the FCC[67] and DOJ[68] had this data available to them prior to concluding that wireless and wireline service do not have a price constraining effect on one

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[63] Kevin W. Caves, *Quantifying Price-Driven Wireless Substitution in Telephony* (2011) ("Caves Paper").

[64] *See* 12/4/14 CenturyLink Comments at 13-14; 12/4/14 Staihr Affidavit at 17-18.

[65] Caves Paper at 7.

[66] Caves Paper at 9 ("we estimate the demand function . . . using a panel data set . . . for the years 2001-2007").

[67] *Phoenix Forbearance Order* ¶ 60 (finding in its 2010 order that CenturyLink "has proffered insufficient evidence to justify including mobile wireless service in the same relevant product market as wireline service").

[68] *United States of America v. AT&T, Inc. et al.*, No. 11-cv-01560, Complaint ¶ 12 (D.D.C. Aug. 31, 2011) (alleging in 2011 that wireless and wireline service occupy separate product markets); U.S. Department of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* at 65-66 (Nov. 2008) (discussing in 2008 how "there is little evidence that landline telephone companies consider the threat of wireless substitution sufficient to change their access prices").

another. If the data on which Caves relies was not good enough for the FCC and DOJ to find that these two different types of voice service occupied the same product market for antitrust purposes, the Commission should be very wary of relying on it now.

Finally, even assuming *arguendo* that Caves's (questionable) conclusion is correct, this does not affect the competitive dynamics in areas of Minnesota that lack reliable wireless coverage. As any drive outside of the Twin Cities metropolitan area will evidence, there are many such areas in Minnesota. Indeed, even when wireless carriers' coverage maps purport to serve a particular area the alleged coverage reflected on the map is often so spotty that it is impossible to make a call. This makes wireless coverage an unviable alterative to many, many rural Minnesotans who rely on wireline service. CenturyLink's attempt to address this concern by submitting what appear to be print-offs of coverage maps from wireless carriers' websites[69] fails to take the issue seriously. Neither should the Commission take seriously CenturyLink's claim that reliable wireless coverage exists throughout Minnesota.

VI. CLECs Do Not Competitively Incentivize CenturyLink to Maintain Adequate Service Quality Because They Rely on the Same Network as CenturyLink to Deliver Voice Service.

The Telecom Parties claim, without evidence, that CLECs provide competition to wireline services. "CLECs are new entrants into a local retail telephone market who either purchase or lease needed telecommunication services and facilities from the market's incumbent carrier."[70] Federal law requires ILECs to offer CLECs "pieces of their networks as unbundled building blocks, which the CLECs can lease, repackage, and use to compete against the ILECs in telecommunications markets across the country."[71] In theory then, CLECs could potentially act

[69] *See* 12/4/14 Brigham Minnesota Affidavit Ex. RHB-5.
[70] *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 248 (Minn. 2005).
[71] *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 531 (D.C. Cir. 2006).

as a competitive restraint on an ILEC. In reality, there is substantial reason to question whether this is the case in many areas of Minnesota for several reasons.

First, as with its claims regarding competition from wireless service, CenturyLink provides no pricing data establishing that there is a cross-elasticity of demand between the voice service offered by CLECs and ILECs. Given that CLECs offer the same wireline service using the same network as the ILEC, it seems possible for there to be some demand substitution by customers who have a choice between these services. CenturyLink's failure to provide relevant pricing data in regards to CLECs is therefore presumably more a factor of ineptitude rather than, as with wireless service, impossibility. Either way, the Commission still has no evidentiary basis on which to find that CenturyLink faces effective competition from Minnesota CLECs.

Second, as CenturyLink acknowledges in its initial comments,[72] many CLECs focus their efforts on serving more lucrative business customers, and it is unclear how, if at all, they market or offer voice service to residential customers. Accordingly, residential customers may not be able to turn to a CLEC as an alternative provider of voice service—even if CenturyLink increased its prices dramatically—because CLECs may not make its service available to them. This is a second glaring omission in the "evidence" supposedly establishing CenturyLink faces effective competition from CLECs in Minnesota.

Finally, CLECs rely on the basic infrastructure owned by the Telecom Parties to provide their rival voice service. If the Telecom Parties fail to maintain their infrastructure, resulting in reduced service quality, this will cause a similar loss of customer goodwill between CLECs and their customers. Minnesota CLECs thus do not place competitive pressure on ILECs to

[72] 12/4/14 Brigham Minnesota Affidavit ¶ 18, 23.

maintain satisfactory service quality because they will be harmed equally by any deterioration in service quality due to their reliance on ILECs' networks.

Accordingly, even assuming for the sake of argument that CLECs compete with CenturyLink, given the unique nature of any such competition they do not place pressure on it to maintain adequate service quality. For this reason as well, the Commission should disregard any supposed competition from CLECs in evaluating whether rival providers of voice service exert sufficient competitive pressure on CenturyLink to maintain adequate service quality, absent the Service Quality Rules.

VII. THE FCC HAS FOUND THAT VOIP SERVICE IS NOT IN THE SAME PRODUCT MARKET, AND THEREFORE DOES NOT COMPETE, WITH WIRELINE SERVICE.

VoIP service, such as Vonage or MagicJack, requires a user to obtain access to a high speed internet connection and then transmits calls over the public internet. Mr. Brigham claims that VoIP "represents a competitive alternative to traditional landline-based telephone service in Minnesota,"[73] but then goes on to admit that "it is very difficult to obtain accurate subscribership information regarding VoIP in Minnesota."[74] How Mr. Brigham draws the former conclusion from the latter void is unknown, and regardless, belies the veracity of his claim.

Indeed, despite Mr. Brigham's suggestion otherwise,[75] the FCC has specifically refused to find that VoIP service occupies the same product market as wireline service in multiple, different proceedings in which the issue has arisen. In the Phoenix forbearance proceeding, for example, it reaffirmed its earlier conclusion that CenturyLink's evidence was "insufficient to determine which over-the-top VoIP services should be included in the relevant product market,"

[73] 12/4/14 Brigham Minnesota Affidavit ¶ 38.
[74] 12/4/14 Brigham Minnesota Affidavit ¶ 39.
[75] *See* 12/4/14 Brigham Minnesota Affidavit ¶ 38.

and therefore refused to consider VoIP providers in determining whether it had met is burden to prove effective competition existed in the Phoenix area.[76]

VIII. WHILE CABLE TELEPHONE SERVICE MAY THEORETICALLY CONSTRAIN THE PRICING OF WIRELINE SERVICE, THE TELECOM PARTIES HAVE PROVIDED NO EVIDENCE THAT IT ACTUALLY DOES SO IN MINNESOTA.

If there is a VoIP-based service that could plausibly share the same product market with wireline service, it is cable telephone. But once again, CenturyLink has provided *no* relevant pricing data on which the Commission could make a determination one way or the other as to whether wireline and cable telephone actually compete. Mr. Brigham instead discusses how cable telephone is available to customers residing in many of CenturyLink's wire centers in Minnesota.[77] But even if this is true, it is only evidence of a duopoly, which are frequently as bad as monopolies in terms of higher prices and reduced consumer welfare.[78]

It is also unclear whether cable companies will continue to offer stand-alone voice service to Minnesota customers, versus offering the service only as part of a bundle also including broadband and television. Mr. Brigham discusses at length the supposed competition that Charter adds to the voice market in Minnesota, including how Charter may acquire large amounts of new customers if the Comcast-Time Warner Cable transaction is permitted to close.[79] But just last year Charter petitioned the FCC to stop offering cable telephone as a stand-alone service.[80] Charter only withdrew the petition in regard to Minnesota after the Minnesota

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[76] *Phoenix Forbearance Order* ¶ 54; *see also 4 MSA Forbearance Proceeding* ¶ 16 ("We do not include providers of 'over-the-top' or nomadic [VoIP] services in our competitive analysis because there are no data in the record that justify finding that these providers offer close substitute services.").

[77] 12/4/14 Brigham Minnesota Affidavit ¶ 18.

[78] *See* 12/4/14 OAG Comments Section III.E.

[79] 12/4/14 Brigham Minnesota Affidavit ¶ 21.

[80] *See* Federal Communications Commission, *In the Matter of Section 63.71 Application of CC Fiberlink, LLC et al. to Discontinue Interconnected VoIP Services*, Docket No. WC-14-68 (March 18, 2014.).

Department of Commerce intervened to oppose the request.[81] If cable telephone is increasingly available as only part of a more expensive bundle of services, it is difficult to foresee it being a competitive constraint on CenturyLink's offering of stand-alone wireline service.

IX. MINNESOTA STATUTES SECTION 237.411 HAS NO BEARING ON WHETHER CENTURYLINK ACTUALLY FACES EFFECTIVE COMPETITION FROM RIVAL PROVIDERS OF VOICE SERVICE IN MINNESOTA.

CenturyLink also argues that Minnesota Statutes section 237.411, which obviates certain regulatory requirements for certain types of customers, is indicative that the market for voice service in Minnesota is competitive.[82] But the Minnesota legislature's regulatory prerogative has absolutely no bearing on whether wireline service competes with other types of voice service under antitrust laws. Indeed, states, including Minnesota, can and often do pass laws that have a detrimental effect on competition,[83] which are not subject to antitrust challenge under what is known as the "state action immunity doctrine."[84] The legislature's enactment of section 237.411 is irrelevant to whether CenturyLink has satisfied its evidentiary burden to establish effective competition among rival providers of voice service in Minnesota.

X. ANY CHANGES TO THE SERVICE QUALITY RULES SHOULD BE LIMITED TO CHANGES THAT ARE NECESSARY TO ENSURE THAT THE RULES PROVIDE EXISTING, TECHNOLOGY-NEUTRAL PROTECTIONS FOR CONSUMERS.

While the Telecom Parties primarily rely on competition to justify eliminating the Service Quality Rules, in identifying the specific changes they seek the Telecom Parties also claimed that many of the rules are outdated because they refer to processes and technology that

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[81] *Id*., Minnesota Department of Commerce, *Comments on Section 63.71 Application* (May 9, 2014).

[82] 12/4/14 CenturyLink Comments at 7-8.

[83] *See, e.g.,* Minn. Stat. § 115A.94, subd. 7(a) ("A political subdivision that organizes [trash] collection under this section is authorized to engage in anticompetitive conduct to the extent necessary to plan and implement its chosen organized collection system and is immune from liability under state laws relating to antitrust, restraint of trade, unfair trade practices, and other regulation of trade or commerce.").

[84] *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1007 (2013) ("Under this Court's state-action immunity doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws.").

are no longer used in the wireline system. This argument is unconvincing for two reasons: first, the Telecom Parties have not produced any concrete explanation of why, specifically, any particular rule is no longer relevant to current technologies; and second, even assuming *arguendo* that some of the Service Quality Rules are outdated, the Telecom Parties have not explained why it would be preferable to repeal rules rather than modify them to provide the same service quality requirements in a technology-neutral manner.

For example, CenturyLink claims that Minnesota Rule 7810.4100 "refers to obsolete testing procedures and technology," but CenturyLink does not provide any evidentiary support for its claim.[85] Rule 7810.4100 provides that "Each telephone utility shall provide or have access to test facilities which will enable it to determine the operating and transmission capabilities of circuit and switching equipment, either for routine maintenance or for fault locations." It does not appear that any of the language in Rule 7810.4100 refers to specific technologies; rather, the rule generally requires that CenturyLink have the ability to test its system for routine maintenance and fault locations. While the transition towards IP soft switches may mean that CenturyLink's method for conducting tests must change, it does not mean that CenturyLink should not still be required to have a method for testing the adequacy of its system. Moreover, regardless of any technological change to switching, the CenturyLink's system will always rely on many miles of cable, whether they be copper suspended from utility poles or underground fiber-optic. It will always be necessary for CenturyLink, and every other telephone utility, to be able to test for, locate, and repair faults so that any outages can be repaired.

[85] 12/4/14 CenturyLink Comments at 19.

Minnesota Rule 7810.4900 serves a similarly essential purpose. CenturyLink argues that Rule 7810.4900 is "out of date and not appropriate for an internet protocol environment,"[86] but the basic requirements of Rule 7810.4900 are the foundational requirements of any regulated service: telecommunication utilities have to provide service that is adequate. To accomplish this, the rule requires utilities to conduct basic traffic studies to determine what facilities are necessary to provide adequate service, to assign their facilities in a manner sufficient to accomplish that goal, and to keep basic records so that the adequacy of service can be reviewed. Regardless of what type of technology is used to connect the telephone system, ensuring the adequacy of the connection will always be a fundamental requirement. Rule 7810.4900 is necessary to ensure adequate service due to the absence of effective competition.

Minnesota Rule 8710.5300 is also necessary, at a fundamental level, for a regulated utility. Rule 7810.5300 requires the utility to ensure that callers get a dial tone within three seconds when they pick up the phone, and that their calls are connected when they dial a number. CenturyLink asserts that the "rule does not reflect current methods of operation" and provides no value,[87] but does not provide any explanation of why the rule does not apply to its current operations. The rule is short, specific, and to the point. It contains little technical language, and appears to be generally applicable to all telephone service. Moreover, it represents the most basic assumptions about how telephone service should work: when you pick up the phone, you get a dial tone, and when you dial a number, your call is connected. Regardless of what technology is used to complete a telephone call, a utility should always meet those expectations.

[86] 12/4/14 CenturyLink Comments at 20.
[87] 12/4/14 CenturyLink Comments at 23.

Each of these rules, and the remaining rules that CenturyLink seeks to roll back, provide important protections for consumers. To the extent that any of the rules *do* refer to specific technology or systems that have changed, the most reasonable thing to do is modify the rules so that they are technology-neutral and provide equivalent consumer protections regardless of what technology is used to make phone calls. This is especially true during the current transition, where traditional lines and switches may be in use at the same time as fiber lines and software switches. The fact that the technology behind the phone system may be changing does not mean that customers should not receive the same quality of service that they have received in the past, and that is required for a public necessity.

CONCLUSION

The Service Quality Rules protect consumers from telecommunications companies who provide *essential* utility service without any effective market competition. Without enforceable rules to govern the minimum level of service that is required, CenturyLink, Frontier, and other telecommunications providers will be free to reduce the quality of service, or increase price, for many Minnesotans who have no other option for their wireline phone provider. Moreover, CenturyLink has made *clear* that, if the Service Quality Rules are changed as it prefers, it will no longer provide the same level of service required for an essential utility service—if CenturyLink were planning to maintain the same quality of service, then CenturyLink would have no motive to seek a repeal of the Service Quality Rules in the first place.

Repealing the Service Quality Rules will result reduce the quality of service that Minnesotans receive from their telecommunications providers. For example, Minnesota Rule 7810.5800, which is incorporated in the Retail Service Quality Plan in CenturyLink's AFOR, requires CenturyLink to repair outages as quickly as possible, and resolve 95 percent of outage reports within 24 hours. The OAG has reason to believe that, even with this rule, CenturyLink

refuses to open a repair ticket for wireline phone customers until they agree to pay if CenturyLink determines that the problem with the line was not CenturyLink's fault. Even *with* the Service Quality Rules, CenturyLink attaches financial conditions to a simple request to repair a line outage. If the Service Quality Rules are repealed, CenturyLink will do *less* to ensure that outages are repaired quickly.

Rolling back the substantive protections provided by the Service Quality Rules will ensure that CenturyLink and other providers have little incentive to provide acceptable service in the absence of effective competition. Instead, as CenturyLink acknowledges, the telecommunications providers will re-focus their investments to serve more profitable cable television and broadband customers.[88] Because wireline telephone service is a public utility, and there is no effective competition in the market, the Service Quality Rules are necessary. The Commission should ensure that the Service Quality Rules continue to provide adequate protection to consumers, and that any changes are limited to those necessary to update the Rules in a technology-neutral manner.

[88] Petition, *In the Matter of the Petition of CenturyLink, Inc. on behalf of its Affiliated Companies for Waiver of Minnesota Rule Part 7810.5800*, Docket No. P-421/AM-14-255, at 4 (Mar. 26, 2014).

Dated: March 13, 2015

Respectfully submitted,

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March 13, 2015

Mr. Daniel Wolf, Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

Re: ***In the Matter of a Rulemaking to Consider Possible Amendments to Minnesota Rules, parts 7810.4100 through 7810.6100***
MPUC Docket No. P-999/R-14-413

Dear Mr. Wolf:

Enclosed and e-filed in the above-referenced matter please find *Reply Comments of the Office of the Attorney General – Residential Utilities and Antitrust Division*

By copy of this letter, all parties have been served. An Affidavit of Service is also enclosed.

Sincerely,

s/ Ryan Barlow

RYAN P. BARLOW
Assistant Attorney General

(651) 757-1473 (Voice)
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Enclosures

AFFIDAVIT OF SERVICE

Re: ***In the Matter of a Rulemaking to Consider Possible Amendments to Minnesota Rules, parts 7810.4100 through 7810.6100***
MPUC Docket No. P-999/R-14-413

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

JUDY SIGAL hereby state that on March 13, 2015, I filed with eDockets *Reply Comments of the Office of the Attorney General – Residential Utilities and Antitrust Division* and served the same upon all parties listed on the attached service list by e-mail, and/or United States mail with postage prepaid, and deposited the same in a U.S. Post Office mail receptacle in the City of St. Paul, Minnesota.

s/ Judy Sigal
Judy Sigal

Subscribed and sworn to before me
this 13th day of March, 2015.

s/ Patricia Jotblad
Notary Public

My Commission expires: January 31, 2020.

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