

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
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In the Matter of the Petition of CenturyLink, Inc. for a Variance to Minnesota Rules, part 7810.5800

ISSUE DATE: August 11, 2014

DOCKET NO. P-421/AM-14-255

In the Matter of the CenturyLink, Inc. Petition for Rulemaking to Revise Service Quality Rules

DOCKET NO. P-421/AM-14-256

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

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

ORDER DENYING VARIANCE REQUEST

PROCEDURAL HISTORY

On March 26, 2014, CenturyLink, Inc. (CenturyLink) filed a petition requesting that the Commission both initiate a rulemaking proceeding to examine its service quality rules and, pending the outcome of that proceeding, grant CenturyLink a variance to Minn. R. 7810.5800, which governs out-of-service conditions. CenturyLink requested that the variance include changes to associated requirements in its current alternative regulation plan (also called an AFOR).

On May 22, 2014, the Commission initiated a rulemaking proceeding to consider possible amendments to Minn. R. 7810.4100 through 7810.6100.¹

On April 2, 2014, the Commission issued a notice requesting comments on the variance request.

On April 28, 2014, the Commission received joint comments on the petition from AARP and the Legal Services Advocacy Project.

On April 30, 2014, the Commission received comments from the Department of Commerce (the Department), CenturyLink, and jointly from the following competitive local exchange carriers (CLECs): Eschelon Telecom of Minnesota, Inc.; Integra Telecom of Minnesota, Inc.; tw telecom of minnesota llc; US Link Inc.; and Velocity Telephone, Inc. (collectively, the Joint CLECs).

¹ See Docket No. P-421/AM-14-256 and Docket No. P-999/R-14-413.

On May 21, 2014, CenturyLink filed reply comments requesting that the Commission grant either a full variance to the rule, which requires that utilities seek to clear 95 percent of all out-of-service troubles within 24 hours of the time such troubles are reported, or that it vary the rule to reduce the standard from 95 to 85 percent.

On May 23, 2014, the Commission issued a supplemental notice requesting comments on CenturyLink's request to reduce the service quality objective to 85 percent.

On June 12, 2014, the Commission received comments from the Joint CLECs, the Minnesota Cable Communications Association (MCCA), the Department, and CenturyLink.

On July 10, 2014, the petition came before the Commission.

FINDINGS AND CONCLUSIONS

I. Background

Direct oversight of service quality is a key policy objective of the Commission's regulatory responsibilities under Minn. Stat. § 237.011, which directs the Commission to consider, in carrying out its duties, maintaining or improving service quality. This oversight extends to the provision of retail service by all telecommunications service providers.

Federal law also governs service quality, setting forth protections for wholesale service by requiring that an interconnection with a competitive carrier be at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.²

The Commission's rules governing service quality are set forth in Minn. R. Ch. 7810. The rule governing out-of-service conditions requires that a telephone utility reestablish service with the shortest possible delay and with a minimum objective to clear 95 percent of all out-of-service troubles within 24 hours of the time such troubles are reported.³ A telephone utility is not subject, under the Commission's rules, to specific penalties or remedies for failure to meet this objective or others.

Since the Commission's rules were promulgated, the Legislature enacted laws setting forth alternatives to rate-of-return regulation. The purpose of an alternative regulation plan – also called an alternative form of regulation plan (AFOR) – is to provide a telephone company's customers with service of a quality consistent with commission rules at affordable rates, to facilitate the development of telecommunication alternatives for customers and to provide, where appropriate, a regulatory environment with greater flexibility than is available under traditional rate-of-return regulation.⁴ The advantage of these plans to the companies is that they offer price flexibility in lieu of traditional rate-of-return regulation.⁵

² 47 U.S.C. § 251(c)(2).

³ Minn. R. 7810.5800.

⁴ Minn. Stat. § 237.76.

⁵ Minn. Stat. § 237.761.

This legislative step not only lessened rate regulation by establishing new price flexibility, it simultaneously strengthened the state's emphasis on service quality by reinforcing service quality requirements and by authorizing penalties.⁶

The Commission's approval of an AFOR, for example, is contingent upon the plan containing a service quality plan or settlement for retail customers.⁷ If no service quality plan or settlement is approved, there must be evidence that the company's current service quality substantially complies with Commission rules, justifying lessened rate regulation.⁸ Penalties paid for failure to meet service quality standards must be returned to customers using a method identified in the plan.⁹

An AFOR approved by the Commission must remain in force for no less than three years.¹⁰ A company is authorized to extend its plan once, in lieu of proposing a new plan, for between one and three years if the company is in substantial compliance with the plan's service quality provisions.¹¹ Termination of the extension is permitted with notice but subjects the company to traditional rate-of-return regulation.¹²

II. Variance Request

A. The Legal Standard

Under Minn. R. 7829.3200, the Commission must vary its rules upon making the following findings:

- (1) enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;
- (2) granting the variance would not adversely affect the public interest; and
- (3) granting the variance would not conflict with standards imposed by law.

B. CenturyLink's Petition

CenturyLink's petition requests that the Commission vary, pending the outcome of the Commission's rulemaking proceeding, the rule requiring that companies seek to restore out-of-service conditions within 24 hours 95 percent of the time. CenturyLink also requested that the Commission modify the company's associated AFOR requirements.

The company stated that in lieu of a complete waiver of the standard, however, varying the standard from 95 to 85 percent, on a temporary basis, would effectively alleviate the concerns

⁶ Minn. Stat. § 237.765 (a) and (b).

⁷ Minn. Stat. § 237.765 (a).

⁸ Minn. Stat. § 237.765 (a) (1).

⁹ Minn. Stat. § 237.765 (b).

¹⁰ Minn. Stat. § 237.766, subd. 1.

¹¹ Minn. Stat. § 237.766, subd. 3.

¹² Minn. Stat. § 237.766, subd. 1 and subd. 3.

raised. CenturyLink argued that granting the variance would be a small but significant step in ensuring a fair marketplace that would benefit all Minnesota customers.

1. Excessive burden

CenturyLink's variance request claims that the 95 percent standard set forth in the rule imposes extraordinary costs on the company, delays installation of new services and scheduled repairs, and puts the company at a competitive disadvantage.

CenturyLink stated that its success in reducing the average number of outages per month from 0.85 percent of customer lines in 2007 to 0.27 percent in 2014 has made it more difficult to meet the standard, particularly on high-outage days. The company stated that it has little margin to recover from adverse events, such as damaging weather. In such situations, the company must not only exceed the standard each day but must do so for a long enough period of time to catch up. In turn, this requires the company to reallocate resources to meet the standard, which results in underperformance in other areas such as installations and scheduled repairs.

The company also stated that the standard imposes an excessive burden because its competitors are not effectively held to the same standard because they are not subject to reporting requirements. They argued that imposing an expensive service quality metric is therefore unnecessary. The company also stated that the standard does not distinguish between customers who have, and do not have, an alternate form of telecommunications service.

CenturyLink stated that the resources needed to meet the rule's standard would be better used for the deployment of advanced services that Minnesota consumers desire, such as broadband, and to ensure timely installations and scheduled repairs.

2. Public interest

CenturyLink stated that a variance would not adversely affect the public interest. The company argued that reducing or eliminating the standard would not result in a deterioration of service quality and that it would instead result in better service by enabling the company to allocate resources to increase the availability of broadband and to ensure timely installations and scheduled repairs.

CenturyLink also stated that of the approximately 27,000 customers who will experience outages in 2014, nearly all have an alternate means of communication available, making it less critical to restore service within 24 hours.

CenturyLink stated that a rule variance would increase service quality for customers, including those who rely solely on landline phones, particularly in the context of a competitive environment. The company also stated that eliminating or reducing the standard would not have a significant impact on the number of customers who experience out-of-service conditions and would enable the company to plan more reasonably to address customer concerns.

3. Standards imposed by law

CenturyLink also requested that the Commission alter the terms of its current AFOR. To do that, CenturyLink recommended that the Commission modify, as agreed to by the company, its prior Order approving the plan.

III. Comments

A. The Joint CLECs

The Joint CLECs did not oppose a temporary variance, pending the outcome of the Commission's rulemaking proceeding, to reduce the standard from 95 to 85 percent, stating that the impact on wholesale service quality would not be significant.

The Joint CLECs also argued, however, that if competitors are not competing based on service quality, incentives to maintain existing standards are diminished. The Joint CLECs stated that they were particularly concerned with how varying the rule entirely would affect wholesale service quality and requested that, in that case, conditions be placed on CenturyLink to ensure protection of wholesale service quality standards. The CLECs asserted that this would prevent changes to CenturyLink's wholesale obligations, which are governed by interconnection agreements and by CenturyLink's Performance Assurance Plan (CPAP). Some of the wholesale measures within the CPAP are measured against CenturyLink's retail performance.

B. Minnesota Cable Communications Association

The MCCA did not oppose a temporary variance, pending the outcome of the Commission's rulemaking proceeding, to reduce the standard from 95 to 85 percent.

The MCCA also stated, however, that CenturyLink's comments did not provide sufficiently comprehensive substantive record information to support its variance request to eliminate the standard. The MCCA stated that if a variance to the rule were granted, CenturyLink should be required to agree to limit the impact of the variance to retail service quality and to agree that there would be no impact on interconnection agreements or wholesale service quality standards.

Further, MCCA stated that CenturyLink's claims should be addressed in the Commission's rulemaking proceeding, which will allow all interested stakeholders to provide comments and substantive evidence.

C. The Department

The Department recommended that the Commission deny CenturyLink's variance request.

The Department stated that a variance would be inconsistent with the Commission's goal of maintaining or improving service quality and would remove, rather than maintain, a protection particularly important for the most vulnerable consumers who depend on reliable service. Further, the Department raised concerns about the potential impacts on competition by granting a variance to a single company.

The Department rejected the claim that the burden is excessive in light of CenturyLink's statements that out-of-service conditions would remain its priority if the standard were not in effect and that resources used to meet the standard would be allocated elsewhere. The Department cited a 2013 article by the National Health Interview Survey, which shows that the availability of reliable competitive alternatives to basic telephone service varies significantly by customer age and location.

The Department also stated that without quantification of costs and details about the number of technicians available, it is impossible to analyze the relationship between the reduction in outages and the company's ability to meet the 95 percent standard. Finally, the Department stated that CenturyLink did not provide any evidence showing that an 85 percent standard is optimal.

The Department recommended that the Commission consider these issues in its rulemaking proceeding.

D. OAG

The Office of the Attorney General, Antitrust and Utilities Division (OAG) concurred with the Department's comments and recommendation to deny the variance request. The OAG stated that CenturyLink had failed to meet the requirements for a variance to eliminate or modify the 95 percent standard. The OAG recommended that the issues raised by the petition be developed during the course of the Commission's rulemaking proceeding, in which the OAG intends to participate.

E. Community Action Partnership

Community Action Partnership (CAP) is the state's association of 26 community action agencies, which provide services in all 87 counties to persons who are vulnerable, in need, or at risk. CAP recommended that CenturyLink's variance request be denied.

In equating reliable phone service with landline service, CAP stated that access to affordable and reliable telephone service is not simply a matter of convenience but a matter of health and safety. Significant numbers of people, CAP stated, continue to rely on landline service as their primary or only source of phone service, including those who, as they age, continue living in their homes for longer periods of time.

CAP also described the lack of reliable cell phone coverage as a point of concern of all individual CAP agencies. CAP stated that there are locations, within homes and communities, where cell phone service is intermittent.

CAP cited the 2014 propane heating crisis, for which Governor Dayton issued an emergency declaration, as an example of the importance of landline service. CAP stated that there were over 100 phone calls to and from CAP agencies daily during the crisis and that 50-60 percent of households within the West Central CAP territory were in communication by landline.

Further, CAP stated that while these protections might someday no longer be required, eliminating them prematurely could result in unintended consequences. CAP stated that there is no justification for removing existing protections at this time.

F. AARP and Legal Services Advocacy Project

AARP and Legal Services Advocacy Project (Legal Services) opposed CenturyLink's variance request and opposed any reduction in the 95 percent standard. They recommended that the Commission deny the request.

AARP and Legal Services argued that landline telephone service is a basic necessity for older people to maintain social contact, preserve health and safety, and call for assistance in an emergency. They stated that people age 65 and older are more likely than any other group to have landline telephone service in their homes and that seniors rely on medical monitoring and alert systems that are not yet compatible with wireless phones. Rural populations are also more heavily reliant on landline service, and therefore any weakening of existing consumer protections could adversely affect these populations.

They also argued that CenturyLink's outage numbers are misleading, stating that while the percentage of outages has decreased from a monthly average of 0.85 percent in 2007 to 0.27 percent in 2014, the number of people affected remains significant. With over 27,000 customers experiencing outages each year, there is the potential for serious harm to the health and safety of consumers and members of their households.

They stated that CenturyLink has failed to quantify its claimed costs imposed by the standard and that the claims are vague and unsubstantiated. Further, they challenged claims that the 95 percent objective standard hinders CenturyLink's ability to compete, stating that the company's stock price is higher than last year at this time, is higher than five years ago, and has earned a rate of return of 8.5 percent over the last ten years.

IV. Commission Action

The Commission concludes, for the following reasons, that at this time and on this record, the company has not met the requirements for a variance under Minn. R. 7829.3200.

A. Excessive burden

On June 12, 2013, CenturyLink filed a request to extend its existing AFOR for three years through 2016. In its filing, the company did not address existing service quality requirements other than to acknowledge that, under the AFOR statute, approval of the extension was dependent on whether the company was in substantial compliance with the AFOR's service quality provisions. The company stated that it had made annual filings showing that it was in substantial compliance with the service quality requirements.

The Department reviewed the extension request, concurred with the company that it had demonstrated substantial compliance with the service quality provisions, and therefore recommended that the Commission approve the request to extend the AFOR for three years. On November 20, 2013, the Commission approved the extension through December 31, 2016.¹³ CenturyLink's recent request to extend its AFOR for three years rather than propose a new AFOR with an amended service quality plan to address the Company's concern regarding the 95 percent standard calls into question the severity of the burden.

In its petition requesting a rule variance, including modification of associated AFOR terms, CenturyLink claimed that the standard imposes extraordinary costs on the company. Instead of quantifying those costs, however, the company relied on the argument that the burden is excessive

¹³ See *In the Matter of Extending CenturyLink's Second Revised Alternative Form of Regulation Plan*, Docket No. P-421/AR-13-498, Order Approving Extension of Second Revised Alternative Form of Regulation Plan (November 20, 2013).

because it presents the company with the difficult task of prioritizing three categories of service: installations, scheduled repairs, and out-of-service conditions. According to the company, reducing the standard from 95 to 85 percent would, pending the outcome of the Commission's rulemaking proceeding, provide sufficient relief.

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. Further, the company did not explain or quantify how reducing the standard to 85 percent would reduce its costs and increase its competitiveness.

The company argued that its success in reducing the percentage of outages makes it increasingly difficult to meet the standard, particularly on high-outage days caused by adverse events, such as damaging weather. The company's AFOR directly addresses this concern, stating that no customer remedy will be required for missed restoration of service due to force majeure events beyond the company's control.¹⁴ Further, the AFOR limits complaints against the company by the Department or OAG for non-compliance if failure to meet a standard is the result of circumstances beyond the company's control.¹⁵

And although CenturyLink has requested a variance temporarily, pending the outcome of the Commission's rulemaking proceeding, the company clearly seeks a permanent reduction in the standard. 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.

B. Public Interest

CenturyLink did not argue that the standard itself harms consumers, but rather, that the cost to comply with the standard adversely affects the public interest by delaying other services, such as installations and scheduled repairs, and by limiting its ability to allocate resources to deliver more desirable services, such as broadband.

Further, the company claimed that longer outages do not raise serious concerns because most customers do not experience outages and most have access to other forms of telecommunications service, such as cell phones. The company does not, however, track whether a customer has access to other forms of telecommunications service.

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.

¹⁴ See *In the Matter of the Petition of Qwest Corporation for Approval of its Second Revised Alternative Form of Retail Regulation Plan*, Docket No. P-421/AR-09-790, Second Revised AFOR, Retail Service Quality Plan, Appendix B, p. 5.

¹⁵ See *In the Matter of the Petition of Qwest Corporation for Approval of its Second Revised Alternative Form of Retail Regulation Plan*, Docket No. P-421/AR-09-790, Second Revised AFOR, Retail Service Quality Plan, Appendix B, p. 2.

Further, the Legislature has recognized the continuing importance of service quality by requiring each AFOR to prioritize service quality and by directing the Commission to consider, in its oversight of telecommunications services, maintaining or improving service quality.

For all these reasons, the Commission concludes that CenturyLink has not met the requirements for a variance under Minn. R. 7829.3200.

C. Standards Imposed by Law

For the foregoing reasons, the Commission does not reach the issue of whether changing the terms of CenturyLink's AFOR would conflict with applicable statutes governing the plan's continuing effect.

ORDER

1. The Commission hereby denies CenturyLink's request for a variance to Minn. R. 7810.5800.
2. The Commission hereby denies CenturyLink's petition to modify the associated terms of CenturyLink's AFOR, eliminating entirely or reducing the service outage metric.
3. This order shall become effective immediately.

BY ORDER OF THE COMMISSION



Burl W. Haar
Executive Secretary



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