IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-38225

QWEST CORPORATION, d/b/a CENTURYLINK QC,

Appellant

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

BERNALILILLO COUNTY, CITY OF ALBUQUERQUE, and COMMUNICATION WORKERS OF AMERICA DISTRICT 7,

Interveners-Appellees.

CWA'S ANSWER BRIEF

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INTRODUCTION

Communication Worker of America District 7 ("CWA"), by and through undersigned counsel, hereby makes its Answer Brief in opposition to Appellant Qwest Corporation d.b.a. CenturyLink QC's ("CenturyLink) arguments in its Brief in Chief.

As the parties generally agree, this case focuses on legal questions of statutory construction. Section 63-9A-8 of the Telecommunications Act specifies the standards that the Public Regulation Commission ("PRC" or "Commission") applies in determining whether a regulated telecommunication service is subject to "effective competition," and that upon such a finding, the PRC is to reduce regulations so that there is "parity" with unregulated competitive providers. In 2013, in a case brought under the prior version of that law, the PRC found effective competition for basic residential voice telephone services sold in packages with unregulated services (e.g., cable television or internet access), while finding that standalone basic local exchange services, the subject of the present case, were not subject to effective completion and should continue to be regulated. *See* 6 RP 1239-40.

In 2017, the Legislature passed SB 53, which made material changes to the standards used to test whether effective competition exists. Laws 2017, ch. 71, § 3. Whereas the prior standards were generic to any regulated telecommunications

service, and specified arguably subjective analyses of the relevant markets and competitive offerings, SB 53 enacted a new Section 63-9A-8(C) that gives a simple, objective test through which an "incumbent local exchange carrier" may obtain a presumptive finding of effective competition for regulated telecommunications services in a wire center through a showing that the carrier provides "basic local exchange service" to less than 50% of certain customer locations in that wire center.[1] The Legislature specified that the customer locations to be used in the denominator of the Section 8(C) test are the "locations where such service is available." The meaning of this phrase is the central dispute in this case.

CWA and CenturyLink agree that Section 8(C) can be described as a "line loss" test. *See* 9 RP 2381. The Commission properly construed Section 8(C) as a line loss test that measures the number of basic local exchange customers in a wire center currently served by the Company versus the number of residential locations where such service is available by virtue of the Company having facilities deployed capable of delivering local exchange services (i.e., its current active lines plus its "lost" lines).

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[1] Section 8(C) provides that the 50% test is made and applied separately for residential and business local exchange services. As only residential services are at issue in this case, this brief will generally omit mention of this distinction for readability.

CenturyLink stood on a different interpretation of Section 8(C), staking its case entirely on evidence in which it calculated percentages for each of its wire centers, with the numerator being the number of its current local exchange lines and the denominators being variants on the total number of housing units in each wire center. As explained in its Brief in Chief, CenturyLink justifies this by what it claims is its legal obligation to provide local exchange services to any requesting customer at any housing unit in a wire center. In other words, CenturyLink argues that the PRC should count all housing units in an area because in theory, CenturyLink might have to provide service at those locations.

But, the word "available" means more than a mere theoretical possibility that something can be used. *State ex rel. N.M. Gaming Control Bd. v. Ten Gaming Devices*, 2005-NMCA-117, ¶ 10, 120 P.3d 848, 852. Moreover, CenturyLink's construction of "available" in the clause "customer locations where such service is available" as meaning all housing units in a wire center – i.e., all "customer locations" in a wire center – impermissible renders the words that follow, "where such service is available" superfluous and meaningless. Following the plain meaning approach to statutory construction, and/o following the canon that statutes must be construed so that no part is rendered superfluous, CenturyLink's interpretation of Section 8(C) as specifying a count based on all housing units must be rejected.

In its briefing, CenturyLink offers an alternative approach to construing the "customer locations where such service is available" as referring to all locations where either CenturyLink is provisioning local exchange voice services, or the functional equivalent is being provided by a competitor using wireless or VoIP facilities. This is a futile argument, when CenturyLink did not present evidence in its case below for the number of customer locations according to this alternative definition. More importantly, CenturyLink's argument conflicts with express language in the Telecommunications Act at Section 63-9A-3 excluding wireless voice services from the "local exchange service," and other definitions in that section indicating "local exchange service" is intended to mean Commission-regulated voice services.

For the reasons argued herein, the Court, through its own *de novo* statutory analysis, should affirm the PRC's construction of Section 8(C) and the Commission's order. In the event that the Court finds some ambiguity in the statute, it can accord some deference the Commission's specialized expertise in this highly technical and complex area.

Lastly, the Court should be cognizant of the context for this case. SB 53, in addition to promulgating new standards for determining whether basic local exchange services are subject to effective competition, removed much of the Commission's rate review authority. See 8 RP 2029-30; NMSA 1978 §§ 63-9A-

5(C) & 8.1. Thus, this case is not about whether CenturyLink should have the ability to retain its New Mexico business through competitive pricing flexibility. Rather, the most significant result of CenturyLink gaining a finding of effective competition for residential local exchange service at this juncture is that it would then be poised to request it be regulated in "parity" with its unregulated competitors and be relieved from complying with the Commission's quality of service regulations. NMSA 1978 § 63-9A-8(A) (upon a finding of effective competition "there shall be parity of retail regulatory standards" for all providers of "comparable" services). As CWA's witness Susan Baldwin testified, other states have found that competitive pressures are insufficient to compel incumbents like CenturyLink to maintain adequate service quality throughout their service territories. 4 RP 870-73. Moreover, even wire centers that display a high degree of competition in aggregate include many individual customers who have no reasonable alternative to CenturyLink's services in the event that they are dissatisfied with the Company's quality of service. 4 RP 890-9. Should the Court grant CenturyLink's appeal in whole or in part, it should not do anything foreclosing CWA or other parties from arguing to the Commission that the Section 8(C) presumption of effective competition is rebutted for these vulnerable consumers.

ARGUMENT

Standard of Review

"The party challenging the PRC's decision bears the burden to demonstrate that the decision is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *Alb. Bernalillo Co. Water Util. Auth. v. NMPRC,* 2010-NMSC-013, ¶ 17, 31, 229 P.3d 494, 504 (internal quotation marks and citation omitted). The Court begins its review by looking at "whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise." *Id.* (citations omitted). The Court has explained that "Statutory construction is not a matter within the purview of the PRC's expertise and, therefore, we afford little, if any, deference to the PRC on this matter." *Id.* at ¶ 50 (internal quotation marks, brackets and citations omitted). However, while the Court generally gives "little deference to the Commission's construction of statutes," it "accord[s] some deference to the Commission's interpretation of its own governing statutes and 'will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.'" *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation*

Comm'n, 2019-NMSC-012, ¶ 15, 444 P.3d 460, 468 quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 904 P.2d 28.

The Court must view the evidence in the light most favorable to the PRC's decision, but should only uphold the decision if it is supported by substantial evidence. ABCWUA, 2010-NMSC-013 at ¶ 18. "Substantial evidence on the record as a whole is evidence demonstrating the reasonableness of an agency's decision, and we neither reweigh the evidence nor replace the fact finder's conclusions with our own." *Id.* at ¶ 24 (internal quotation marks and citation omitted).

1. The PRC Properly Gave Effect to the Statute's Plain Meaning, Not Speculation About the Legislature's Intent

Appellant CenturyLink's first argument is that the Commission misconstrued Section 8(C) because it failed to give effect to the Legislature's deregulatory intent in enacting the 2017 statutory amendments. This exception must be rejected, because under well-established law, legislative intent is determined by looking to the "plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 20, 168 P.3d 105, 112. In other words, the plain meaning of the statute controls, and not speculation about legislators' intent. CenturyLink's "deregulatory intent" argument appears to be plea for liberal construction of the

statutes in its favor, but, Appellant can provide no justification for that. The Legislature knows how to direct the courts in that fashion, but chose not to include that direction in the Telecommunications Act. *Cf.* Public Utility Act at NMSA 1978 § 62-3-2.1.

Section 8(C) Implements a Line-Loss Test

Ironically, analysis of the language and history of the statute demonstrates that, in amending the Telecommunications Act by adding Section 8(C), the Legislature was reacting to CenturyLink's undisputed history of line losses in New Mexico. *See* BiC at 10 citing 9 RP 1753.[2] Section 8(C) is not a generic statute for determining the presence of competitive telecommunications markets; that would describe Section 8(B). Rather, Section 8(C) is a statute specifically addressed to the situation of an "incumbent local exchange carrier" (ILEC) providing "basic local exchange service." As demonstrated below, Section 8(C) provides a numeric standard which tests whether the incumbent is no longer serving 50% or more of the locations it was previously serving, in contrast to the more complex and subjective analyses provided by Section 8(B). Under Section 8(C), if CenturyLink proves up its line-loss claims, separately for residential and business customers in a wire-center, it gains a presumption of effective competition in that wire-center. To

[2] The Brief in Chief's citation to 9 RP 1753 appears to be a typo.

that end, the denominator required by Section 8(C) is the number of locations where the ILEC has equipment in place to provide residential basic local exchange services, by virtue of having provisioned services at that location now or in the past.

CenturyLink never provided that data in its case below, and instead sought that the Commission base its Section 8(C) determination on alternative numbers (variations on the total number of housing units) that did not comport with the statute's requirements. The Commission properly rejected CenturyLink's Petition for failure to meet its burden of proof. 9 RP 2496.

Sections 8(B) and 8(C) State Different Approaches

Section 8(C) was added to the New Mexico Telecommunications Act with the enactment of SB 53 by the 2017 Legislature. Under prior law, the Commission was empowered to find public telecommunications services were subject to effective competition in a "relevant market area," and on that basis, modify, reduce or eliminate regulations concerning such services. NMSA 1978 § 63-9A-8(A) (1987). In making such determinations of effective competition, the Commission was to consider "(1) the extent to which services are reasonably available from alternate providers in the relevant market area; (2) the ability of alternate providers to make functionally equivalent or substitute services readily available at

competitive rates, terms and conditions; and (3) existing economic or regulatory barriers." NMSA 1978 § 63-9A-8(B) (1987).

SB 53 amended Section 8(B) to replace "relevant market area" with the more specific instructions that the existence of effective competition is to be determined on a "wire center serving area basis," for each "service" for which a determination is requested, and in any event, separately for residential and business services. *See* NMSA 1978 § 63-9A-8(B) (2017). In addition, SB 53 added four analyses to the three pre-existing analyses in Section 8(B), which are, (4) the number of competitors "offering the same or reasonably comparable services"; (5) whether there are at least two "facilities-based competitors," including wireless and VoIP providers, offering "the same or reasonably comparable service"; (6) the ability of the petitioning company to affect prices or deter competition; and (7) "such other factors as the commission deems appropriate."

Both prior to and after the 2019 amendments, the criteria in Section 8(B) were available upon the petition of "*any* interested party," and could be used to test whether effective competition existed for "*any* public telecommunications service. *See* NMSA 1978 § 63-9A-8(A) (emphasis added). But SB 53 also inserted a new Section 8(C) into the statutory schema for determining effective competition, which focused exclusively on *ILEC basic local exchange services*:

> If, in the wire center serving area for which a determination of effective competition is requested, the incumbent local exchange

> carrier provides basic local exchange service either separately or bundled to less than one-half of the customer locations where such service is available at the time the petition is filed, the public interest requires that effective competition be presumed for all regulated telecommunications services provided by the incumbent provider in that wire center serving area; provided, however, that findings and presumptions applied pursuant to this section shall be made separately for residential and business services and customer locations.

NMSA 1978 § 63-9A-8(C) (2017). Section 8(C) created an apparently simple and objective arithmetic standard for a finding of effective competition, that can be paraphrased as "does CenturyLink today provide service to less than 50% of the customer locations in a wire center where it can provide services," and which stands as an alternative to a company having to satisfy the more complex standards and analyses in Section 8(B). *See* 9 RP 2379 (CenturyLink arguing legislative intent was to make it "easier" to demonstrate effective competition).

But, as the case below and this appeal illustrate, the Section 8(C) standard is not as simple as it seems on its face, since it requires construction of "customer locations where such service is available," a clause which CenturyLink interpreted in its direct case below as meaning all residential units in a wire center, and not, as the rules of statutory construction provide, the locations in which it has installed facilities that can deliver basic local exchange service.

2. The Commission's Interpretation of "Locations Where Such Service is Available" is Correct

Within the language in Section 8(C) are all the words necessary to show that the Legislature meant "customer locations where such service is available" to only reference ILEC basic local exchange services, and that the denominator for the numerical test is the housing units where ILEC basic local exchange services was available at the time the Petition was filed. To begin with, applying the plain meaning rule, "such *service*," when it follows by just few words "the incumbent local exchange carrier provides basic local exchange *service*," is to indicate a reference to the word "service" in that prior clause of the same sentence. When these are the only two uses of the word "service" in Section 8(C), there can be no other meaning for "service" in the "such service" clause than the basic local exchange services provided by the ILEC.

Thus, "customer locations where such service is available" means customer locations where ILEC basic local exchange services are available, which as a practical matter, the PRC correctly found meant residential locations where facilities to provide ILEC basic local exchange service are present and available.

CenturyLink's argues for a statutory construction that would encompass every housing unit in a wire center, under the rationale that its obligation to serve makes its services theoretically available to all housing units. But if the Legislature wanted the 8(C) test to be that CenturyLink served less than 50% of the

housing units (or occupied housing units) in each wire center, it could have easily – and more simply – written the statute that way. Instead, the Legislature wrote Section 8(C) with express references to locations where basic local exchange service was "available."

In *State ex rel. N.M. Gaming Control Bd. v. Ten Gaming Devices*, the Court of Appeals considered the various dictionary definitions for "available" in construing the meaning of that word in the context of whether a machine was "available to play or operate a 'game'" (a "game" being a game of chance that can result in a payment). 2005-NMCA-117, ¶ 12, 120 P.3d 848, 852. In *Ten Gaming Devices*, slot machines acquired from a commercial Nevada distributor had been seized from a private home. *Id.* at ¶ 2. The gaming statutes generally exempted activities in private residencies, but the issue before the Court was whether *the theoretical possibility* that the slot machines could be being used in illegal gaming brought them within the definition of being "available" for gaming. *Id.* at ¶¶ 10-12. The Court of Appeals placed weight on the fact that "the words and phrases, 'accessible, at one's disposal, convenient, reachable and within reach' are common synonyms for the word "available." *Id.* citing Burton's Legal Thesaurus 48 (3d ed. 1998). It held that all the definitions it considered "and the common understanding of the word 'available' lead us to conclude that the legislature meant that a machine must be *accessible* to play or operate a 'game' to be a 'gaming machine'"

Id. I.e., it rejected the Gaming Board's argument that "available" encompassed "the mere possibility" of use. *Id.* at ¶ 10.

Ten Gaming Machines, and the dictionary definitions on which it relies, are persuasive and should be followed by this Court in holding that availability, as used in the Section 8(C) standard means more than a theoretical possibility. The Commission understood "available," in the context of basic local exchange services, to mean that CenturyLink had facilities to provide basic local exchange service deployed at that location. 9 RP 2494. The Commission arrived at this determination based upon *Ten Gaming Devices* and other case-law, but also in considering how the FCC defines availability and the related portions of the Telecommunications Act. 9 RP 2489-94. The Commission also considered evidence regarding how local exchange services are deployed, and how the obligation to serve is limited in practice. 9 RP 2494. To the extent the Court has any question as to whether the Commission properly construed any ambiguity in the statute, it should defer to the Commission's interpretation on this question, which falls squarely within its specialized expertise and legislative charge. *Pub. Serv. Co. of New Mexico*, 2019-NMSC-012 at ¶ 15.

CenturyLink's Argument for an Alternative Standard are Unavailing

In its direct case below, CenturyLink stood on a construction of "the customer locations where such service is available" as meaning all housing units in

a wire center, possibly allowing for some vacancies, based on its obligation to serve theory. *See, e.g.*, 9 RP 2337. The evidence it introduced used the number of housing units in a wire center as the starting point for several variations on the counting of the "locations" denominator. 4 RP 577; 5 RP 1052-64 (calculating the Section 8(C) test adjusting the number of housing units for vacant units, and "greenfield" lots, and to respond to criticisms of its census block methodology). CenturyLink's obligation to serve rationale, the focus of its direct case, must be rejected based on the meaning of "available," as discussed above.

CenturyLink offered an alternative argument in its post-hearing briefing, which it reprises in this appeal. CenturyLink now seemingly acknowledges that "such services" in Section 8(C) means basic local exchange services, and "locations where such services are available" means locations where local exchange service is physically available, but in opposition to CWA's (and the Commission's) construction of the statute, reads "such services" to mean any basic local exchange service equivalent, not just ILEC-provided local exchange services.

CenturyLink's new standard is a pure market-share test, as opposed to a line loss test. It is not a correct reading of the statute, which must be read as including "the incumbent local exchange carrier" on both sides of the equation, when "such services" refers to "the incumbent local exchange carrier provides basic local exchange services," and when wireless and VoIP, while functionally substitutes for

ILEC basic local exchange services are most obviously not the same identical thing – or they would be regulated by the PRC.

Definitions in the Act Expressly Preclude Counting Wireless and VoIP as Local Exchange Services.

Section 63-9A-3, providing definitions for terms used in the Telecommunications Act, makes clear that, as used in the Act, "local exchange service" does not include wireless and VoIP. To begin with, subsection (k) defines "local exchange service" as "switched voice communications furnished by a *telecommunications company* within a *local exchange area*" (emphasis added). In subsection (P) we see that a "telecommunications company" "provides public telecommunications service" and in subsection (O), the Legislature tells us that "public telecommunications service" "does not include . . . radio common carrier services, including mobile telephone service." In sum, CenturyLink's arguments must fail because the definition of "local exchange service" in the Act expressly excludes wireless voice service, its primary competitor. *See* 5 RP 1057 (Ziegler: wireless services dominant in the marketplace).

Moreover, the term "local exchange area," which is also used in the definition of "local exchange service," is defined in subsection (J) with reference to "maps, tariffs or rate schedules filed with the commission, where local exchange rates apply," making it is clear that local exchange service is the legal name for the

voice communication service that is provided by the carriers regulated by the Commission.

CenturyLink's Evidence Does Not Match its Argument

Even if CenturyLink's argument for alternative standard based using the number of locations where functional substitutes for local exchange services are being provided was accepted (in contravention of the express definitions of the relevant terms in Section 63-9A-3), the carrier's arguments would be futile: CenturyLink did not put into the record the number of residential locations in each wire center where either ILEC local exchange, wireless, or VoIP is being provisioned. CenturyLink had data of that type, which it provided in discovery, but chose to not put it into the record and subject it to examination. *See* 4 RP 887, 891 (describing confidential discovery response CWA 1-8).

Summary

The Legislature provided CenturyLink with an avenue to make a showing that its local exchange services were subject to effective competition from alternate providers offering services that are "functionally equivalent" or "substitutes" for ILEC services – that is Section 8(B). *See* NMSA 1978 § 63-9A-8(B)(2). CenturyLink apparently found it difficult to convince the PRC to accept its case under the more complex and potentially subjective standards of Section (B), and requested a simper test from the Legislature based on the pure numbers of its line

losses, which became Section 8(C). CenturyLink did not make the showing required under Section 8(C), and the Commission properly denied its Petition.

3. CenturyLink's Further Arguments on the Meaning of "Available" Should be Rejected

CenturyLink's third point on appeal is a rehash of its earlier arguments that "available" must mean all locations in a wire center, because the regulations and tariffs it operates under place an obligation on the Company to furnish service to all customers who desire service. *See, e.g.,* BiC at 24. This point must be rejected for the reasons stated previously in our brief and in the Commission's order, which is that the Company's theoretical obligation to serve does not equate to "available" as used in Section 8(C).

But in addition to the authorities construing available to mean more than theoretical availability, CenturyLink's arguments also result in an impermissible construction of Section 8(C). If, as CenturyLink argues, the PRC should count *every location* in a wire center, on account of the Company's theoretical obligation to serve, then the test stated in Section 8(C) effectively reads: "the incumbent local exchange carrier provides basic local exchange service either separately or bundled to less than one-half of the customer locations." There is no need for, or meaning ascribed to, the words that follow, which are: "where such service is available." Because '[s]tatutes must be construed so that no part of the statute is rendered

surplusage or superfluous," CenturyLink's construction must fail. *Matter of Rehab. of W. Inv'rs Life Ins. Co.*, 1983-NMSC-082, ¶ 12, 671 P.2d 31, 34.

CONCLUSION

For the reasons given herein, the Court should affirm the Commission's order which CenturyLink now appeals.

The Court Should Not Foreclose Litigation of Matters Not Presented in this Appeal

However, in the alternative that Court grants CenturyLink's appeal in whole or in part, and remands the matter for further consideration by the Commission, the Court must remain cognizant that the result of successful showing under the Section 8(C) test is only a *rebuttal presumption* of effective competition. NMSA 1978 § 63-9A-8(C) (specifying "that effective competition be presumed" when the test is satisfied).[3]

CWA argued below that, if the test specified in Section 8(C) is satisfied for residential services in a particular wire center, the presumption of effective competition can be rebutted by evidence that pertains to the Section 8(B) standards. *E.g.*, 9 RP 2364-65. CWA adduced competent evidence into the record

[3] Use of the word "presumed" in a statute creates a presumption that may be rebutted by other evidence. See *Apodaca v. Chavez*, 1990-NMSC-028, ¶ 18 n.5, 788 P.2d 366, 371. A statutory presumption "is rebuttable and is best characterized as a prima facie inference in that it shifts the burden of going forward." *In re Kinscherff*, 1976-NMCA-097, 556 P.2d 355, 359 (construing tax statute stating that agency valuations "are presumed to be correct.")

to rebut any presumption that might have been gained from CenturyLink's direct case below, which was not rebutted by CenturyLink. *See* 9 RP 2365-69.

Although these arguments and evidence are not put at issue by CenturyLink's appeal, any ruling by this Court granting CenturyLink relief, in whole or in part, should not foreclose CWA's (or other parties') ability to present their evidence and argument rebutting any presumption which results from the evidence CenturyLink put into the record in the case below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Answer Brief was served on the following parties this 5 day of October 2020, by filing same in the Court's Odyssey system and requesting electronic service to parties of record.

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