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December 2, 2022

Via Email Only

Gary Widerburg
Commission Administrator
Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111
psc@utah.gov

Re: Petition for Exemption from the Carrier of Last Resort Obligation Docket No: 22-049-62

Dear Mr. Widerburg:

Attached for filing please find Qwest/CenturyLink's Petition for Exemption from the Carrier of Last Resort Obligation. We have a confidential exhibit that we will file in accordance with the proper filing procedures.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Max Backlund
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Max.backlund@lumen.com

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>In the Matter of</p> <p>QWEST CORPORATION d/b/a CENTURYLINK QC</p> <p>Petition for Statewide Exemption from the R746-350-1(b) Carrier of Last Resort Obligation</p>	<p>Docket No. 22-049-62</p> <p>Petition for Exemption from the Carrier of Last Resort Obligation</p>
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PETITION

Qwest Corporation d/b/a CenturyLink QC (“CenturyLink” or “the Company”) requests that the Commission exempt it in whole, or in the alternative in part, from the carrier of last resort obligation (“COLR”) described in R746-350-1(b). This exemption will result in reduced and more flexible regulation, which will allow the CenturyLink to invest based on market principles rather than regulatory principles that were last updated in the nineties, well before competition fully developed.

I. BACKGROUND

CenturyLink is a non-rate of return regulated carrier of last resort provider of telecommunications in the state of Utah.¹ CenturyLink has provided local telephone service to customers in Utah for decades. It began as a traditional telephone utility and later received varying degrees regulatory relief under to Utah statutes and Commission rules. The Company moved from rate-of-return regulation to a price index mechanism in the late 1990s. Beginning in 1995, the legislature reduced and then eliminated rate of

¹ *Report and Order, Case No. 5413, Mountain States Telephone and Telegraph Company*, Public Service Commission of Utah (June 1, 1964).

return regulation for CenturyLink, reflecting the fact that competition in the marketplace was more than sufficient to govern the prices. Later, the Company was relieved from certain service quality requirements, which the Commission then eliminated from its rules, showing that the competitive marketplace would ensure reasonable prices for service and high-quality service. Although CenturyLink has some limited relief in its tariff from building out new service where an investment would not be prudent, it is subject to the COLR. Relief from the COLR is the next step in the evolution of modernizing telecommunications regulation.

A. The COLR is an Out-Dated and Harmful Regulatory Paradigm

The goal of the COLR regulation is to ensure that customers within an incumbent local exchange carrier (“ILEC”) service territory have access to reliable and affordable telephone service. The requirement was one of the three pillars of the “regulatory compact.”² These founding pillars of the regulatory compact include: (1) An assurance from the state that the utility would have a monopoly in its market; (2) a guarantee to the utility of a reasonable return on its investment; and (3) the COLR, a commitment from the utility to provide access to service to all customers in its designated service territory.³

The demise of the regulatory compact began decades ago when Congress passed the Telecommunications Act of 1996 (“the Act”), opening the market for local telecommunications service to competitors. Although Congress established mechanisms

² *Deregulatory Takings and Breach of the Regulatory Compact*, 71 N.Y.U.L Rev. 851 (1996).

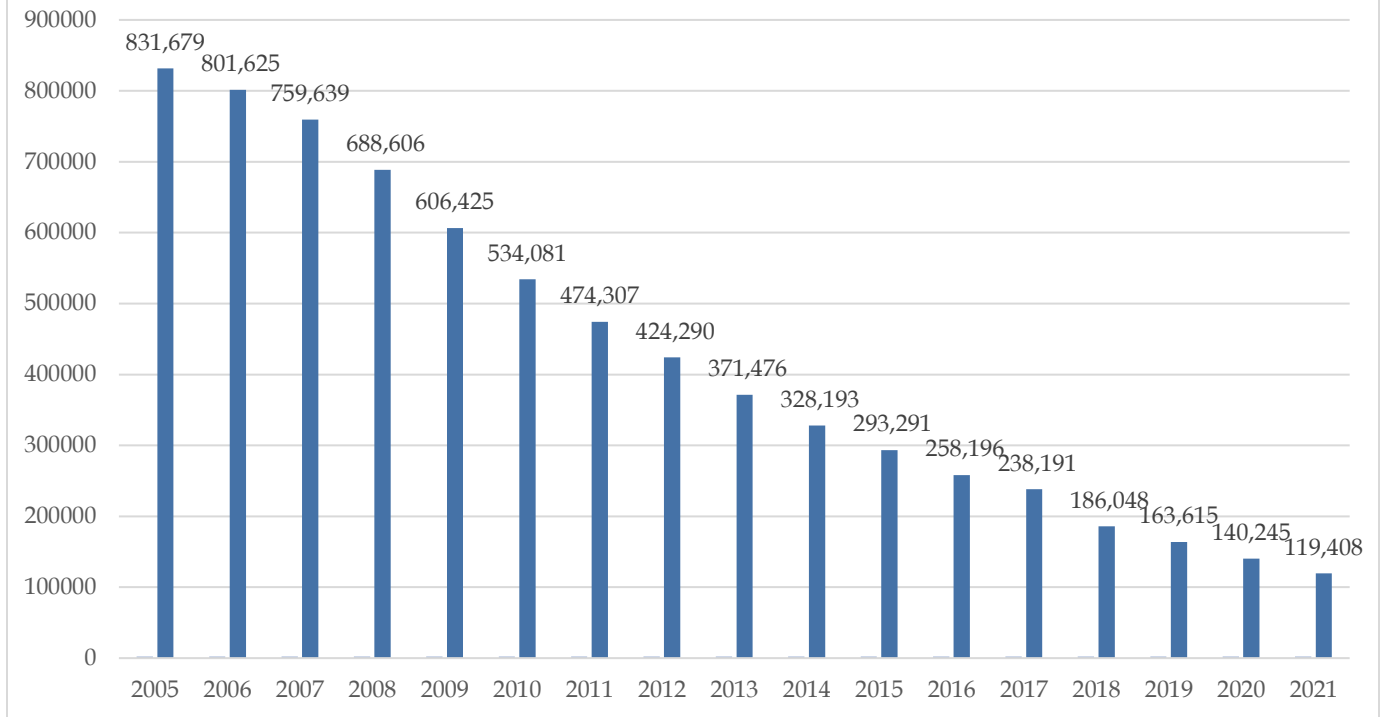
³ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

like a universal service fund to lessen the harm to ILECs that resulted from opening the market to competition, these mechanisms are no longer sufficient to support legacy regulatory obligations within a competitive marketplace. Requiring only CenturyLink to bear significant uneconomic and unrecoverable financial burdens is not sensible, distorts the marketplace, and is discriminatory.

When the regulatory compact was functional, CenturyLink was ensured a monopoly in the market for basic local telephone service. The monopoly allowed the Company to recover the costs of providing service in disproportionately high-cost areas where population density was low, despite the high cost of providing service in those areas – this ensured that it would earn a reasonable return on its investment across the entire market. Because of competition, CenturyLink’s market share has dramatically shrunk in both low- and high-cost areas, but especially in low-cost areas, revenues from which traditionally allowed the Company to recover the costs of serving areas where local rates did not cover the cost of providing service:⁴

⁴ See Exhibit 3 – Share of Utah Voice Connections. See also, Exhibit 2 – Utah CenturyLink Access Line Chart 2005 through 2021.

Utah Access Lines 2005 - 2021



Because implicit rate subsidies and explicit universal service funding have been eliminated for CenturyLink, the COLR obligation is unreasonable, uneconomic, and unsustainable.

B. The Telecommunications Act of 1996 Ultimately Failed to Ease the Impact of Competition on ILECs, Even Though it Required Competitors to Pay ILECs Wholesale Prices for Access to ILEC Networks and Created the Federal Universal Service Fund.

The collapse of the regulatory compact for telecommunications utilities did not occur as an immediate consequence of the passage of the Act. At that time very little facilities-based competition existed and it took some time for it to fully develop. Instead of mandating facilities-based competition, the Act mandated competition by

requiring ILECs to open their networks for lease to competitive local exchange carriers (“CLECs”) on a wholesale basis.⁵ Congress attempted to blunt the effect of the anticipated ILEC market share loss by helping them recover at least the costs of the wholesale services they were forced to provide to competitors. Its efforts, though well-intended, have not been enough to reduce the impacts of competition.

1. *Despite the FCC’s efforts competition has continued to erode implicit support for high-cost areas.*

Although the FCC established an explicit FUSF to address the loss of implicit support for high-cost areas, that funding has been insufficient to expand and modernize networks in high-cost areas. Section 254 of the Act established the federal universal service fund (“FUSF”) to help ILECs recover the disproportionately high cost of serving rural areas.⁶ Unlike the implicit subsidies that resulted from traditional ratemaking, the FUSF was an explicit subsidy – ILECs received funding for serving high-cost areas as a direct payment. ILECs had to certify that they were using the funding “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”⁷ Much of that funding was utilized to maintain existing rural networks that often needed the most maintenance, and that were more costly to maintain.

More recently, the FCC established the Connect America Fund (“CAF”) and later the CAF II, to replace the traditional FUSF for price cap companies like CenturyLink. The CAF subsidy programs provided federal funding to incumbents that certified they

⁵ 47 U.S.C. §§ 251 and 252.

⁶ 47 U.S.C. § 254.

⁷ 47 U.S.C. § 254(e).

were using the subsidies appropriately. The funding supported qualifying voice and broadband service in specific areas, defined by census blocks. For higher cost areas, the FCC followed CAFII with a reverse auction, i.e., the lowest qualifying bidder wins the subsidy. Winning bidders assumed an obligation to offer broadband and voice service in areas that were unserved or underserved – the CAF was the first attempt by the FCC to recognize that consumers demand broadband internet above traditional telephone service provided on a copper wire. And this is a rational approach, because any customer that has a broadband connection can use it to establish voice telephony using a VoIP connection, an option offered by numerous companies both nationally and in Utah.⁸ In fact, Utah VoIP provides account for approximately 15% of voice connections in the state.⁹

More recently, the CAF II was replaced by the Rural Digital Opportunity Fund (“RDOF”). The RDOF also relied on an auction process and, like the CAF programs, the RDOF was intended to support voice *and* broadband in high-cost locations, but this time at higher speeds, well above the 25Mbps service that the CAF supported.¹⁰ Unlike the CAF, where ILECs had the right of first refusal in the funding grants, the RDOF was made available to all providers. In addition, the FCC has established a process for ILECs to petition for elimination of the equivalent federal COLR obligation in areas

⁸ According to the FCC, there are over 13,000 over-the-top interconnected VoIP providers in the United States that customers can choose from. See <https://www.fcc.gov/voice-telephone-services-report>. See also, Exhibit 1 - Utah Households by Technology Preference (2019) and Exhibit 4 - Utah Broadband and Mobile Voice Providers by Wire Center.

⁹ See Exhibit 3.

¹⁰ See <https://www.fcc.gov/auction/904> for more information regarding the RDOF.

where a competitor provides service using RDOF funding.¹¹ Although the funding awarded to Starlink in CenturyLink service areas was recently withdrawn by the FCC, that funding will be re-offered providing opportunities for CenturyLink and other providers to deploy broadband and voice alternatives to customers.¹²

CenturyLink's federal universal funding ended in 2021 when it received \$1.89M in Utah. With the advent of RDOF in 2022, Lumen now receives zero federal universal service support to maintain service in high-cost areas in Utah. In addition, once the FCC reallocates the RDOF that it initially granted to Starlink, those subsidized competitors will build new networks in CenturyLink territories, further eroding CenturyLink's market share by replacing CenturyLink as the federal eligible telecommunications provider.

2. *Through access charge reform, ILECs lost another form of implicit subsidy that supported the provision of basic telephone service in high-cost areas.*

ILECs historically relied on charges assessed to interexchange carriers for access to ILEC networks to initiate and complete long-distance calls from/to ILEC customers. That revenue traditionally helped support ILECs in providing affordable service in high-cost areas. The 1996 Act changed that regime. It directed the FCC to create an explicit USF, which ultimately would supplant the implicit subsidies that ILECs had relied on to support service in high-cost areas.

Congress wrote in the Act that "support should be explicit and sufficient to

¹¹ *In the Matter of Rural Digital Opportunity Fund, Connect America Fund*, WC Docket No. 19-126; WC Docket No. 10-90, 35 FCC Rcd 686, 743-746, ¶¶ 133-139 (January 30, 2020).

¹² <https://www.fcc.gov/document/fcc-rejects-ltd-broadband-starlink-bids-broadband-subsidies>

achieve the purposes of this section.”¹³ However, Congress did not anticipate how significantly and rapidly implicit subsidies, including access charges, would begin to evaporate. As of 2000, access charges had been reduced by \$6.4 billion.¹⁴ The FCC did at that time acknowledge the problem, stating that the “new competitive environment envisioned by the 1996 Act, however, threatens to undermine this implicit support structure over the long run.”¹⁵ But it did not focus its efforts on relieving ILECs of the COLR, and the FUSF was not increased to make up the delta – in fact it diminished over time as described above. And although the FCC has made it easier for ILECs to seek relief from the federal COLR is helpful, that is separate from and in addition to the state COLR requirements.

II. THE COMMISSION IS AUTHORIZED TO GRANT CENTURYLINK’S PETITION FOR EXEMPTION BECAUSE THE MARKETS IT SERVES IN UTAH ARE SUBJECT TO EFFECTIVE COMPETITION AND THE EXEMPTION IS IN THE PUBLIC INTEREST

The Commission is authorized to exempt CenturyLink from any requirement in the statutes that govern its authority. Section 54-8b-3(1)(a) states:

The commission, on its own initiative or in response to an application by a telecommunications corporation, a public agency, or a user of a public telecommunications service, may, after public notice and a hearing, issue an order exempting any telecommunications corporation or public telecommunications service from any requirement of this title...

The Commission’s authority to exempt a telecommunications corporation or service includes the carrier of last resort obligation found in 54-8b-15(1)(b):

¹³ 47 U.S.C. § 254(e).

¹⁴ https://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrcc0029.html

¹⁵ *In re Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low Volume Long Distance Users, and Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket No. 96-26 and 94-1, Report and Order in CC Docket No. 99-249, and Eleventh Report and Order in CC Docket 96-45, FCC 00-193, 15 FCC Rcd 12962, at ¶ 24 (2000).

“Carrier of last resort” means:

- (i) an incumbent telephone corporation; or
- (ii) a telecommunications corporation that, under Section 54-8b-2.1: (A) has a certificate of public convenience and necessity to provide local exchange service; and (B) has an obligation to provide public telecommunications service to any customer class of customers that requests service within the local exchange.

Utah Code § 54-8b-3 further sets out two criteria for the Commission to grant an exemption. The Commission must first find that “the telecommunications corporation or service is subject to effective competition” and that “the exemption is in the public interest.”¹⁶ CenturyLink is subject to effective competition throughout its service territory. In only one wire center does CenturyLink serve more than 12% of customers. It serves between 10 and 12 percent of customers in four wire centers and, shockingly, serves only between 1.84 and 8.68 percent of customers in the remaining 30 wire centers.¹⁷ Customers are choosing other more modern alternatives, including VoIP (usually over coaxial cable), cellular wireless, satellite, and fixed wireless – there are an abundance of choices covering virtually every inch of the state of Utah. There are no “captive customers” in CenturyLink wire centers. Moreover, the FCC’s data shows that every single census block in the state has numerous alternative voice service providers available to customers.¹⁸ Therefore, no harm will come to customers as a result of

¹⁶ Utah Code § 54-8b-3(4)(a) and (b).

¹⁷ See Highly Confidential Exhibit 5, Utah Household Percentage by Wire Center. The information contained in Exhibit 5 is proprietary, competitively sensitive data that could be used by competitors to harm CenturyLink.

¹⁸ See Exhibit 6, Utah Competitive Service by Providers. Exhibit 6 includes data showing that there are numerous alternative providers covering every census block in each of CenturyLink’s exchanges. CenturyLink sourced the data from the FCC’s publicly available database.

granting the exemption.

Second, the Commission must find that the Petition is in the public interest. Granting the Petition provides an equal and balanced marketplace by relieving obligations to which competitors are not subject. Without the exemption, CenturyLink is at a substantial competitive disadvantage. Moreover, it is hampered in its ability to continue to deploy broadband and other advanced services throughout its markets. It is not possible to both maintain a statewide network for traditional voice service and make the significant investments necessary to deploy new, enhanced networks capable of providing high speed access to the internet. Granting the petition is therefore in the public interest.

A. ILEC Market Share, Data on Cell Phone Substitution, Competitor Coverage Maps, and RDOF Coverage Demonstrate that CenturyLink is Subject to Effective Competition throughout its Utah Service Territory

For the Commission to grant this Petition, it must find that CenturyLink is subject to “effective competition.”¹⁹ The law sets out a list of criteria for the Commission to consider in making its determination:

In determining if the telecommunications corporation or service is subject to effective competition, the commission shall consider all relevant factors, which may include:

- (a) the extent to which competing telecommunications services are available from alternative telecommunications providers;
- (b) the ability of alternative telecommunications providers to offer competing telecommunications services that are functionally equivalent or substitutable and reasonably available at comparable prices, terms, quality, and conditions;
- (c) the market share of the telecommunications corporation for which an exemption is proposed;

¹⁹ See *id.*

(d) the extent of economic or regulatory barriers to entry;
(e) the impact of potential competition; and (f) the type and degree of exemptions to this title that are proposed.²⁰

First and foremost, CenturyLink's market share has shrunk in all of its Utah wire centers. That diminished market share shows that competition is thriving, and alternatives are readily available to virtually every location in the Company's service territory.²¹ While the evidence of CenturyLink's market share loss is, by itself, sufficient to demonstrate effective competition, there are a number of other sources of data that further support granting the Petition.

B. Granting the exemption is in the public interest because none of CenturyLink's Customers in its Utah Service Territory are "Captive" and the COLR Diminishes the Company's Ability Invest in the Services that Customers Demand

The Commission must also find that granting the exemption is in the public interest. The legislature has provided specific criteria for the Commission to consider in determining whether an exemption is in the public interest: "In determining if the proposed exemption is in the public interest, the commission shall consider, in addition to other relevant factors, the impact the proposed exemption would have on captive customers of the telecommunications corporation."²² As explained above, the FCC data shows that there are no customers in CenturyLink's Utah service territory who do not have an alternative provider for voice service. There are numerous wireline, wireless, fixed wireless, and satellite providers that provide service throughout Utah.

²⁰ 54-8b-3(5).

²¹ See Exhibit 6 – UT Competitive Service by Providers.

²² § 54-8b-3(6).

CenturyLink no longer has a captive customer base.

There are other factors that support a finding that the exemption is in the public interest, including the massive federal subsidies already and soon to be received by providers and the State of Utah. The CAF and CAF II programs have already funded build-out of broadband and voice services to many of the areas in CenturyLink's service territory, resulting in new ETCs being designated for those areas across the state. In Utah, after the rejection of the Starlink bid, that funding must (and will) be distributed. In addition, Utah will receive massive amounts of funding, some of which can be used for broadband infrastructure, including \$13.6 billion from the CARES Act, \$9.2 billion from the ARPA Act, and \$136 million in federal coronavirus relief funding for capital projects.²³ This funding will spur investment and facilitate even more competition in CenturyLink service areas.

III. THE LEGISLATURE HAS DECLARED THAT IT IS THE POLICY OF THE STATE OF UTAH TO ALLOW FLEXIBLE AND REDUCED REGULATION AND TO FACILITATE THE DEPLOYMENT OF ADVANCED SERVICES

Granting this Petition advances the policies that the legislature established to ensure regulation reflects modern markets, including to:

- (3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;
- (4) allow flexible and reduced regulation for telecommunications corporations and public telecommunications services as competition develops;
- (5) facilitate and promote the efficient development and deployment of an advanced telecommunications infrastructure, including networks with

²³ Utah State Legislature, "How We Used Flexible Federal ARPA Dollars" (May 13, 2022). https://budget.utah.gov/utah_arpa_update/

nondiscriminatory prices, terms, and conditions of interconnection.²⁴

This exemption will result in reduced and more flexible regulation, which will allow the Company to invest based on market principles rather than regulatory principles that were developed decades ago and updated last in the nineties, well before competition fully developed.

Granting the Petition will promote more efficient development and deployment of advanced services. The requirement that CenturyLink maintain a connection to every customer location even when the Company does not serve them significantly reduces margins and leaves a smaller capital spending budget spread out over greater geographic areas.

IV. CENTURYLINK REQUESTS THAT THE COMMISSION ISSUE AN ORDER GRANTING THIS PETITION IN AN INFORMAL ADJUDICATION PURSUANT TO UTAH CODE § 54-8b-3(1)(b)

Utah Code § 54-8b(1)(b) permits the Commission to consider this Petition in an informal adjudication, without a hearing, and CenturyLink requests that it do so. The statute provides:

The Commission may issue an order described in Subsection (1)(a), after an informal adjudication, without a hearing if: (i) the matter is not a proceeding described in Subsection 54-1-3(2)(a); (ii) a party to an application submitted under Subsection (1)(a) requests an informal adjudication; and (iii) no person oppose the request for informal adjudication before 10 business days after the day on which the party files the request.

With respect to subsection 8b(1)(b)(i), Utah Code § 54-1-3(2)(a) states:

The following proceedings shall be heard by at least a majority of the commissioners:

- (i) general rate proceedings to establish rates for public utilities which

²⁴ Utah Code § 54-8b-1.1

- have annual revenues generated from Utah utility service in excess of \$200,000,000; or
- (ii) any proceeding which the commission determines involves an issue of significant public interest.

This Petition is not a request for a rate increase, which leaves only the question of whether the Petition involves an issue of *significant* public interest. The facts set forth in this Petition demonstrate that CenturyLink is no longer the dominant provider of voice service in Utah. As a result, the relief CenturyLink seeks will have a non-material impact to customers in CenturyLink's service territory.²⁵ Therefore, it is appropriate for the Commission to grant the request for an informal adjudication, assuming that no party opposes the request under subsection 8b(1)(b)(iii).

V. CONCLUSION

Competition today is *fully* developed in CenturyLink's Utah service territory. As Senator Orrin Hatch advised, "Vigilant and effective antitrust enforcement today is preferable to the heavy hand of government regulation of the Internet tomorrow."²⁶ Today's market for telecommunications in CenturyLink's Utah service territory has arrived at Senator Hatch's tomorrow – the regulation is now due for an update to reflect this fact.

The law authorizes the Commission to exempt CenturyLink for the COLR, and

²⁵ CenturyLink is not seeking, nor does it intend, to discontinue service to customers. CenturyLink values its customers throughout Utah. Rather, the relief CenturyLink seeks in this petition will give it the flexibility to make investments where it is most prudent to do so to meet competition. That includes choosing not to invest in areas where competitors are offering equivalent and often more advanced services.

²⁶ Jeffrey A. Eisenbach and Thomas M. Lenard, The Progress and Freedom Foundation, *Competition, Innovation, and the Microsoft: Antitrust in the Digital Marketplace*, at p. 26 (2001).

the Petition satisfies the criteria set out in the law that guides the Commission in granting the exemption. The Petition satisfies all of the specific criteria for an exemption from COLR: (a) Competing telecommunications services widely are available from alternative telecommunications providers; (b) alternative telecommunications providers, using a variety of technologies, are offering competing telecommunications services that are functionally equivalent or substitutable and reasonably available at comparable prices, terms, quality, and conditions; (c) CenturyLink has lost massive numbers of customers to competitors in every corner of the state, leaving the Company with minority share in the market for which an exemption is proposed; (d) there are no economic or regulatory barriers to entry; (e) the impact of potential competition is substantial and has resulted in advanced services being deployed throughout CenturyLink's service territory; and (f) full exemption is warranted given the state of competition and wide availability of alternatives to customers.

VI. REQUEST FOR RELIEF

CenturyLink respectfully requests that the Commission exempt it in whole, or in the alternative in part, from the carrier of last resort obligation, set forth in R746-350-1(b), for all the wire centers in its Utah service territory. CenturyLink further requests that the Commission treat the matter as an informal adjudication.

Respectfully submitted this 2nd day of December 2022.

CENTURYLINK

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