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<b>BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH</b>	
Qwest Corporation d/b/a CenturyLink QC's Petition for Statewide Exemption from Carrier of Last Resort Obligations	Docket No. 23-049-01  Division of Public Utilities' Limited Pre- Hearing Brief

Pursuant to Utah Code section 54-4a-1, Utah Administrative Code R746-1, and the Public Service Commission of Utah's ("Commission") Order Granting Motion to Amend Scheduling Order to Allow for Limited Prehearing Briefs, the Division of Public Utilities ("Division") submits this Limited Pre-Hearing Brief providing its legal analysis of the two statutory construction issues contested in this docket.

#### I. INTRODUCTION

On June 24, 2024, Qwest Corporation d/b/a CenturyLink QC ("CenturyLink") filed with the Commission its Petition for Statewide Exemption from Carrier of Last Resort ("COLR") Obligations ("Petition") requesting exemption under Utah Code section 54-8b-3(1)(a) from its COLR obligations. On January 4, 2024, the Office of Consumer Services ("Office") filed a Joint Motion to Amend the Scheduling Order to Allow for Limited Prehearing Briefs and for Expedited Treatment on behalf of the Office, the Division, the Utah Rural Telecom Association,

and CenturyLink (collectively “the Parties”). The Parties agreed to limited briefing (no more than five pages) on the following issues:

1. Does the term “captive customers” in Utah Code § 54-8b-3(6) refer to present customers only, or does it include present and potential customers in CenturyLink’s certificated exchange areas, including new/potential customers who move into locations presently served by CenturyLink?
2. Whether a public telecommunication service’s eligibility for UUSF support pursuant to Utah Code § 54-8b-15 makes that service a “functionally equivalent” service to landline service, as the term “functionally equivalent” is used in Utah Code § 54-8b-3(5)(b)?<sup>1</sup>

## II. DISCUSSION

Under Utah law, CenturyLink, as a telecommunications corporation, may apply to the Commission for an exemption from any requirement of Title 54 of the Utah Code.<sup>2</sup> The Commission may grant an exemption “only if it finds that: (a) the telecommunications corporation or service is subject to effective competition; and (b) the exemption is in the public interest.”<sup>3</sup> Section 54-8b-3 states that “the [C]ommission “shall consider . . . the impact the proposed exemption would have on *captive customers* of the telecommunications corporation” in its determination of whether the proposed exemption is in the public interest.<sup>4</sup>

Furthermore, Utah Code subsection 54-8b-3(5) provides that, “in determining whether the telecommunications corporation or service is subject to effective competition, the [C]ommission shall consider all relevant factors,” one of which may include “the ability of

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<sup>1</sup> Joint Mot. at 2.

<sup>2</sup> Utah Code Ann. § 54-8b-3(1)(a).

<sup>3</sup> Utah Code Ann. § 54-8b-3(4).

<sup>4</sup> Utah Code Ann. § 54-8b-3(6) (emphasis added).

alternative telecommunications providers to offer competing telecommunications services that are *functionally equivalent* or substitutable and reasonably available at comparable prices, terms, quality, and conditions.”<sup>5</sup> In addition, the Universal Public Telecommunications Service Support Fund (“Utah Universal Service Fund” or “UUSF”) provides funding for a COLR’s “deployment and management of networks capable of providing: (i) access lines; (ii) connections; or (iii) broadband internet access service.”<sup>6</sup>

“It is a well-settled principle of statutory construction that [the Commission] looks ‘first to the plain language of the statute’ when interpreting meaning.”<sup>7</sup> Although neither “captive customers” nor “functionally equivalent” are defined in Title 54, their meanings can be derived from regulatory publications and other states’ statutorily defined terms.

**A. The term “captive customers” in Utah Code section 54-8b-3(6) refers to present and potential customers in CenturyLink’s service territory**

While the Utah Code does not provide a definition of “captive customers,” the term should be interpreted to include CenturyLink’s present and potential customers in its service territory. The term “captive customers” has been used in the realm of public utility regulation to refer to those customers who “do[] not have access to alternative sources of service,” even if they have the legal ability to buy from a competitor.<sup>8</sup>

As a COLR, CenturyLink is required to provide service to “any customer or class of

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<sup>5</sup> Utah Code Ann. § 54-8b-3(5) (emphasis added).

<sup>6</sup> Utah Code Ann. § 54-8b-15.

<sup>7</sup> *Savage v. Utah Youth Village*, 2004 UT 102, ¶ 18, 104 P.3d 1242, 1248.

<sup>8</sup> Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 YALE J. ON REG. 257, 265 (1995). See also *Captive Market*, COLLINS DICTIONARY (14th ed. 2023) (defining “captive market” as “a group of consumers who are obliged through lack of choice to buy a particular product, thus giving the supplier a monopoly”) and *Captive Customer*, THE LAW DICTIONARY (Jan. 23, 2024), <https://thelawdictionary.org/captive-customer/> (defining “captive customer” as “[a] customer who does not have realistic alternatives to buying power from the local utility, even if that customer had the legal right to buy from competitors.”).

customers that requests service within the local exchange.”<sup>9</sup> Despite CenturyLink’s assertions in its Petition that “[t]he concept of captive customer is only applicable when a provider seeks to discontinue service to a specific location,” the definition of captive customers does not hinge on the type of relief that a service provider seeks in its petition for exemption.<sup>10</sup> For example, a ratepayer of a franchised and regulated public utility is a captive customer the same as a rural telecommunications customer who lacks a viable alternative service provider. Public utility regulation of a monopoly as well as lack of competition in a telecommunication company’s service territory both lead to captive customers. Therefore, as used in this docket, a captive customer is any current or potential customer who is obligated to buy service from CenturyLink and is without viable alternatives for reliable, comparable service.

**B. A public telecommunication service’s eligibility for UUSF support pursuant to Utah Code section 54-8b-15 alone does not make that service a “functionally equivalent” service to landline service, as the term “functionally equivalent” is used in Utah Code section 54-8b-3(5)(b)**

A telecommunication service’s eligibility for UUSF alone does not equate to a determination that the service is “functionally equivalent” to landline service. The UUSF provides a mechanism for the Commission to use funds for, among other things, funding continuing or one-time distributions to a COLR for the deployment and management of networks capable of providing voice service or broadband internet access service.<sup>11</sup> Although it is possible that some of the UUSF-eligible services may be functionally equivalent in many areas, section 54-8b-15 provides no evaluation of functional equivalency, and merely qualifying for UUSF funding does not mean that a service is necessarily deemed functionally equivalent.

Although “functionally equivalent” is not defined in Title 54 of the Utah Code, other

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<sup>9</sup> See Utah Code Ann. § 54-8b-15(1)(b).

<sup>10</sup> Pet. at 3. CenturyLink also asserts that “[s]ince CenturyLink is not seeking relief from discontinuance obligations, the idea of captive customer does not apply to COLR relief.” *Id.* at 13.

<sup>11</sup> Utah Code Ann. § 54-8b-15(3).

states' definitions and regulatory research aid in interpretation. Under Colorado law, “‘functionally equivalent’ refers to services or products which perform the same or similar tasks or functions to obtain substantially the same result at reasonably comparable prices.”<sup>12</sup> In addition, a National Regulatory Research Institute report provides that “[f]unctional equivalency means that two products perform the same functions, even if they do so in a different way.”<sup>13</sup>

The availability of telecommunications services that are functionally equivalent to landline service can differ based on location.<sup>14</sup> Although customer adoption of new products may provide a criterion for determining functional equivalency,<sup>15</sup> due to “differing requirements for customers in different geographic locations,” state regulators play a role in “determining whether products are ‘functionally equivalent’ on a location specific basis before accepting them as a suitable substitute for customers under their jurisdiction.”<sup>16</sup> While some services arguably provide the same functions as landline service in the densely populated portions of Utah, local conditions may cause those same services to not function at all or function very poorly compared to landline service in remote geographic locations.

In conclusion, the Division urges the Commission to adopt the Division’s legal interpretation of the two statutory construction issues addressed above.

Respectfully submitted this 25th day of January, 2024.

*/s/ Patrick Grecu* \_\_\_\_\_  
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<sup>12</sup> Colo. Rev. Stat. § 40-15-102(9).

<sup>13</sup> SHERRY LICHTENBERG, NAT’L REGUL. RSCH. INST., PRODUCT SUBSTITUTION, FUNCTIONAL EQUIVALENCY, AND THE TECHNOLOGY TRANSITION 9 (2016).

<sup>14</sup> *See id.* at 25, 30, 32, 34.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 26.

CERTIFICATE OF SERVICE

I certify that on January 25, 2024, I caused a true and correct copy of the foregoing to be filed with the Public Service Commission and served by the Utah Division of Public Utilities to the following in Utah Docket No. 23-049-01 as indicated below:

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