ROBERT J. MOORE (5764)
Assistant Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0158
rmoore@agutah.gov
*Attorney for Utah Office of Consumer Services*

| **BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH** | |
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| Qwest Corporation d/b/a CenturyLink QC's Petition for Statewide Exemption from Carrier of Last Resort Obligations | Docket No. 23-049-01<br>Office of Consumer Services' Response to CenturyLink's Petition for Review, Rehearing or Reconsideration of the Commission's March 15, 2024, Order |

Pursuant to Utah Code §§ 54-10a-303, 54-7-15, 63G-4-301, and UTAH ADMIN. CODE r. 746-1-801(3), the Office of Consumer Services (OCS) submits this Response to Qwest Corporation d/b/a/ CenturyLink QC's (CenturyLink) Petition for Review, Rehearing or Reconsideration of the Public Service Commission of Utah's (PSC) March 15, 2024, Order denying CenturyLink's Petition. The OCS argues that Reconsideration be denied because CenturyLink's Petition for Review fails to marshal the evidence supporting challenged findings, ignores relevant and contrary evidence, misapplies governing statutes, and misreads the PSC's March 15th Order.

## BACKGROUND

On June 21, 2023, CenturyLink filed its Petition for exemption from its Carrier of Last Resort (COLR) obligations, in whole or in part, pursuant to Utah Code § 54-8b-3. CenturyLink's Petition asserts that it is not seeking to discontinue existing services but only

seeks relief from the obligation to provide voice services to new customer locations regardless of the cost of service. Petition at 2. However, CenturyLink is also a federal Eligible Telecommunication Carrier (ETC) which imposes the obligation to offer universal service within its territory. Order at 7 & n.21. CenturyLink testified that the purpose of its Petition is to eliminate duplicate obligations in state and federal law. February 8, 2024, Hearing Testimony (Hr'g Test.) 26:24-27;6.

On February 8, 2024, the PSC held an evidentiary hearing on CenturyLink's Petition which resulted in the March 15, 2024, Order denying the Petition on the grounds that the evidence presented at the hearing did not establish that "effective competition at comparable terms and conditions is adequately available to Utah customers." Order at 21. In addition, the PSC found that granting the Petition is not in the public interest. *Id.*

**LEGAL STANDARD**

CenturyLink seeks relief from its ongoing COLR obligations pursuant to Utah Code § 54-8b-3. Section 54-8b-3 allows the filing of a petition to exempt "any telecommunications corporation . . . from any requirement of" of title 54. Specifically, section 54-8b-3 provides: "The commission may issue an order for 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." In determining whether effective competition exists, the PSC "shall consider all relevant factors, which may include . . . the ability of alternative telecommunication providers to offer competing telecommunication services that are the functionally equivalent or substitutable and reasonably available at comparable prices, terms, quality, and conditions. . . ."[1] Section 54-8b-3(6) provides that in determining whether the

[1] In addition, section 54-8b-3(4) list other factors which may be relevant to the issue of the existence of effective competition: the extent to which competing telecommunications services are

exemption is in the public interest, the PSC "shall consider, in addition to other relevant factors, the impact the proposed exemption would have on captive customers of the telecommunications corporation." CenturyLink has the burden of proof to demonstrate the existence of effective competition and that the exemption is in the public interest. Order at 16.

## ARGUMENT

CenturyLink makes four arguments supporting its Petition for Reconsideration. One, the PSC erred in ruling that CenturyLink's supporting evidence was not sufficiently granular. Two, the PSC erred when it failed to consider the parties' pre-hearing briefs. Three, the PSC erred in interpreting COLR technology to mean stand-alone voice services. Four, the PSC erred in improperly weighing the benefits to the public interest. Petition for Reconsideration at 3. 5, 6, 8. None of these arguments justify the reconsideration of the PSC's March 15, 2024, Order.

### A. Evidence not Sufficiently Granular

CenturyLink's argument concerning the granularity of its evidence is somewhat confused. The title of the section and its concluding sentence focus on the specific issue of granularity of the evidence but the remainder of its arguments focuses on the contention that the PSC found the "geographic scope of competing telecommunication service offered by alternate telecommunication providers was incomplete to support the conclusion of effective competition." Petition for Reconsideration at 3.

To the extent that CenturyLink is challenging the PSC's finding that the "available competing telecommunications services offered in Utah by alternative telecommunication providers is not supported by the evidence" this argument must be rejected because CenturyLink failed to meet the PSC's requirement that to adequately challenge a finding of fact, a Petitioner

available from alternative telecommunication providers; the market share of the telecommunications for which an exemption is proposed; the extent of economic or regulatory barriers to entry; the impact on potential competition; the type and degree of exemptions to this title that are proposed.

must marshal the evidence in support of the challenged findings. Moreover, here CenturyLink does not even address the subordinate findings supporting the PSC's ultimate conclusion that are articulated in the Order itself. Order at 17. Given these facts, CenturyLink has not adequately supported its argument that the evidence is insufficient to demonstrate the existence of adequate competition.

Utah Administrative Code R745-1-801(2) provides: "A person that challenges a finding of fact in [a petition for reconsideration] shall marshal the record evidence that supports the challenged finding, as set forth in State v. Nielson, 2014 UT 10, Section 33-44, 326 P.3d 645." In *Nielson*, the Supreme Court held that though the failure to marshal evidence does not set an absolute bar in considering a parties' claim, "a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal.") *Nielson*, 2014 UT 10, ¶ 42.

In this case, not only does CenturyLink fail to identify and deal with evidence in the record that supports the PSC's determination, but CenturyLink fails to challenge the factual findings in the Order that support the PSC's ultimate conclusion that "there is not substantial evidence showing that effective competition at comparable terms and conditions is adequately available to Utah consumers." Order at 21. Specifically, CenturyLink ignores the PSC's determination that credible evidence supports the facts that none of CenturyLink's local exchanges have 100% coverage from wire, fixed wireless and mobile services and coverage in Juab, Morgan, and Kane County is only 65.27%. Order at 17; Meredith Direct 8:176-190 (referencing Ziegler Direct Exhibit 5). In addition, CenturyLink does not challenge the OCS's testimony concerning pockets of customers within a competitive exchange that do not have available competitive options. Order at 18; Anderson Direct 3:60-64. Nor does CenturyLink

address the fact that all of its evidence is broadband data as opposed to stand-alone voice. Finally, despite the fact that stand-alone voice data is provided by CenturyLink to the FCC, CenturyLink did not present such data in this docket. Order at 18; Hr'g Test. at 132:15-133:20.

All these findings are present in the PSC order and not challenged or in any way dealt with in asserting that the PSC erred in finding that "there is not substantial evidence showing that effective competition at comparable terms and conditions is adequately available to Utah consumers." Order at 21. Accordingly, not only does CenturyLink fail to marshal the evidence in the record, but CenturyLink fails to properly marshal the evidence cited in the Order itself. Thus, pursuant to Rule 746-1-801(2) and *State v. Neilson*, CenturyLink has failed to carry its burden of proof to establish that the PSC erred in finding that the evidence presented does not support the contention that adequate competition exists within CenturyLink's territory.[2]

To the extent that CenturyLink is arguing only that the PSC erred in finding that its evidence is not sufficiently granular, this argument also fails. While the PSC did find that testimony arguing that CenturyLink's evidence was insufficiently granular was credible, the PSC did not base its decision of insufficient evidence solely on this determination. As demonstrated above, there are several evidentiary factors that the PSC relied on to support its conclusion that

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[2] In a throwaway line, CenturyLink asserts: "Effective competition does not mean that 100% of the locations in an area have an alternative. Rather, it means that a provider does not have any market power." Petition for Reconsideration at 4 (citations omitted). However, CenturyLink does not cite to any authority in support of this bald assertion nor does CenturyLink develop this argument beyond just stating the proposition. In fact, the only cite to the record is a cite to hearing testimony that does not support this proposition. *See* Petion for Reconsideration at 4 (citing Hearing Testimony at 144;4-146;6). Simply, asserting a proposition is insufficient for CenturyLink to carry its burden of proof. *Accord, CORA USA LLC. v. Quick Change Artiest LLC,* 2017 UT App. 66, ¶ 2, 397 P.3d 759 m ("It is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief. To be adequately briefed, an argument shall contain the contentions and reasons of the appellant with respect to the issues presented with citations to the authorities, statutes, and parts of the record relied on.") (cleaned up); *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998)(an issue is inadequately brief "when the overall analysis of the issue is so lacking as to shift the burden on research and argument to the reviewing court.")(citations omitted).

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CenturyLink did not present sufficient evidence to establish adequate competition. In fact, CenturyLink bases its granularity argument on one late filed exhibit.[3] Petition for Reconsideration at 3-4. However, this exhibit suffers from the same deficiency as all of CenturyLink's evidence; it deals with broadband data not stand-alone voice service data. Hr'g Test. at 134;7-23. Moreover, this exhibit shows that 2,688 customers do not have alternative providers, of any technology that provides voice services outside of satellite services. Lubeck Surrebuttal at 6:9-11. Accordingly, the arguments that the PSC erred in determining that CenturyLink's evidence does not establish effective competition and is not sufficiently granular, do not justify reconsideration of the PSC's Order. CenturyLink fails to marshal the evidence in support of the PSC's Order and ignores both conflicting evidence and findings in the Order itself that support the PSC's ultimate factual determinations.

**B. Failure to Consider Pre-Hearing Briefs/Weighing Public Interest**

CenturyLink argues that the PSC erred in failing to consider their pre-hearing brief and failing to properly weigh the appropriate factors in determining whether granting the Petition is in the public interest. Petition for Reconsideration at 5, 8. Both these arguments concern section 54-8b-3(6)'s direction that in determining whether an exemption is in the public interest the PSC "shall consider, in addition to other relevant factors, the impact the proposed exemption would have on captive customers of the telecommunications corporation." Specifically, CenturyLink argues that the term "captive customers" in section 54-8b-3(6) only refers to current customers

[3] CenturyLink asserts that the OCS did not review this data. Petition for Reconsideration at 3-4. However, this contention is not accurate. During the hearing Ms. Anderson of the OCS was asked "Have you reviewed [the late filed data]" and she replied "I have, . . ." Hr'g Test. 110:19-20. In addition, CenturyLink asserts that Ms. Anderson's testimony "established that the effective competition statute does not require 100% marketplace saturation to show effective competition." While Ms. Anderson did state this in testimony, CenturyLink's analysis of Ms. Anderson's testimony is incomplete and therefore somewhat misleading because Ms. Anderson also testified that the effective competition statute does not specify any required threshold of market saturation to prove effective competition. *Id* at 112:24-113:6.

and therefore because it does not seek to discontinue service to existing customers in this proceeding there is no impact to "captive customers." Petition for Reconsideration at 5.

However, the PSC did not fail to consider this argument. Rather, the PSC did not reach this argument because it based its public interest analysis on factors other than the impact on "captive customers." Order at 20-21. Specifically, the PSC focused on the fact that "even if the Petition is granted, CenturyLink will still have its federal ETC obligations to provide service and thus CenturyLink's claim of financial burden associated with its COLR obligations would not be relieved." Order at 20. The PSC also rejected CenturyLink's claim that relief from its COLR obligations would enable them to modernize its "antiquated modes of service that the majority of Utah citizens no longer want or use." Order at 20. The PSC found CenturyLink did not provide sufficient evidence to support this claim. *Id.* Nor could CenturyLink produce such evidence since relief from its COLR could not help CenturyLink's finances due to its ongoing ETC obligations. Importantly, the PSC also noted that "public testimony established that members of the public believe they will be negatively impacted regardless of whether the customer is classified as captive." Order at 21. This is due, in part, to the inability to access 911 service in a power outage. *Id.* Thus, the PSC did not err in failing to specifically rule on CenturyLink's pre-hearing brief concerning captive customers because it resolved the public interest determination on factors other than the effect of the proposed relief from COLR obligations on captive customers.

CenturyLink also challenges the factors the PSC relied on in reaching its conclusion that granting CenturyLink's petition is not in the public interest. Oddly, CenturyLink claims "the Order improperly weighs the benefit to CenturyLink when it should be determining benefit to the public interest." Petition for Reconsideration at 8. However, the impact of a PSC's order on a

utility is always a factor in a public interest determination. Indeed, throughout these proceedings CenturyLink has argued that it should be relieved from its COLR obligations because the obligation places it at a competitive disadvantage. Petition at 8 ("Because implicit rate subsidies and explicit universal service funding have been eliminated for CenturyLink, the COLR obligation is unreasonable, uneconomic, and unsustainable for the company.") Accordingly, the PSC did not err in considering the lack of a financial impact on CenturyLink resulting from any relief from its COLR obligations in considering whether granting the Petition is in the public interest.

Finally, as mentioned above, the PSC clearly rejected CenturyLink's contention that relief from its COLR obligations would ease any financial burden on the company, which in turn would allow it to modernize. However, the only argument CenturyLink provides in this reconsideration request in favor of its contention that the granting of the Petition is in the public interest is the assertion that "it would advance the policies of the state to encourage competition, allow flexible and reduced regulations, and *most importantly, facilitate the deployment of advanced services."* Petition for Reconsideration at 8-9 (emphasis added). In its request for reconsideration, CenturyLink takes a position expressly rejected by the PSC, yet the company does not address the PSC's rationale for its position, i.e., the continuing federal ETC obligations. By not addressing the PSC's rationale for its conclusion, CenturyLink has not adequately challenged the PSC's decision. *Accord, CORA USA LLC.,* 2017 UT App. 66, ¶ 2; *Thomas*, 961 P.2d at 305; *see supra* n. 2. Thus, CenturyLink's only argument in favor of its claim that the public interest supports its petition fails.

### C. Statutory analysis of "captive customers"

CenturyLink also offers its statutory analysis concerning whether the term "captive customers" in section 54-8b-3(6) refers to only present customers or refers to present and future customers, despite the fact that the PSC did not reach the arguments in the pre-hearing briefs because it based its decision on other public interest factors. Adding to the confusion, CenturyLink's arguments focus not on its own analysis but on the analysis presented in the pre-hearing briefs of the parties arguing that the term "captive customers" includes potential customers. Petition for Reconsideration at 5-6. Nevertheless, to the extent it is relevant, the OCS addresses its statutory analysis.

Under the applicable rules of statutory construction, the term "captive customers," as it appears in section 54-8b-3(6), must be harmonized with the definition of a COLR contained in Utah Code § 54-8b-15(1)(b) leading to the conclusion that "captive customers" means both present and potential customers, including future customers who move into locations presently served by CenturyLink. Section 54-8b-3(6) does not indicate whether the term captive customer refers to potential as well as present customers. Therefore, to determine its meaning, the term must be harmonized with other related terms in Chapter 8b, Public Telecommunication Law. *Taylor v. Taylor,* 2022 UT 35, ¶ 28, 517 P.3d 380; *State v. Bess*, 2019 UT 70, ¶ 25, 473 P.3d 157. In the context of Chapter 8b, the plain meaning of "captive customers" refers to customers who have no option other than one telecom service. *Taylor,* 2022 UT 35, ¶ 28 (terms interpreted according to plan meaning); *McKitrick v. Gibson*, 2021 UT 48, ¶ 19, 496 P.3d 147 (same). This means that "captive customers," who have only one choice in telecom

services, must be customers of a COLR because COLRs have the obligation of serving all customers who request services.

Therefore, a logical nexus exists between the concept of "captive customers" in section 54-8b-3(6) and the concept of a COLR defined in section 54-8b-15(1)(b). Section 54-8b-15(1)(b) provides, in pertinent part: '"Carrier of Last Resort" means . . . a telecommunications corporation that . . . has the obligation to provide public telecommunication service to any customer or class of customer that request services within a local exchange."[4] As this provision expressly provides that a COLR has the obligation to provide services to all customers *requesting* services, the definition clearly applies to both existing and potential customers. Thus, harmonizing these provisions leads to only one reasonable interpretation of the term "captive customers" in section 54-8b-3(6), i.e., captive customers refer to existing *and* potential customers, including future customers who move into locations presently served by CenturyLink.

CenturyLink counters this argument by asserting that it is circular. Petition for Reconsideration at 5. However, CenturyLink simply states the proposition and offers no explanation or analysis explaining the claim. There is nothing circular or illogical about the OCS's statutory construction analysis. CenturyLink's failure to attempt to explain its conclusory statement dooms its contention. *Accord, CORA USA LLC.,* 2017 UT App. 66, ¶ 2; *Thomas*, 961 P.2d at 305; *see supra* n. 2. More is needed to justify reconsideration of a PSC order.

Finally, CenturyLink argues that "it contravenes the tenets of rational legal discourse for the Commission to attempt to determine the 'impact a proposed exemption [could] have on

[4] More fully, section 54-8b-15(1)(b) defines COLR as (1) and incumbent telecom, or (2) a telecom that under Utah Code § 54-8b-2.1, has the "obligation to provide . . . services to any customer . . . that request services . . ." Section 54-8b-2.1(4) provides that incumbent telecoms and telecom providing services pursuant to 54-8b-2.1 have identical customer service obligations.

[potential] captive customers,' when those customers do not exist and may never exist." Petition for Reconsideration at 5. This is a hollow argument considering CenturyLink's Petition is limited to seeking an exemption from its COLR obligations only for future customers, customers that CenturyLink now claims should not be considered because they "do not exist and may never exist." *Id.* CenturyLink's self-contradicting argument is insufficient to require reconsideration of the PSC order. There is nothing unduly speculative in the notion that if CenturyLink is relieved from its COLR obligations some of their customers will move or otherwise leave a CenturyLink served location making room for new customers.

Accordingly, CenturyLink's arguments related to the public interest and proper interpretation of the term "captive customers" do not justify reconsideration of the PSC's March 15th Order.

**D. Stand-Alone Voice Services**

CenturyLink's final argument is that the PSC erred in ruling that broadband and satellite service were not the equivalent of stand-alone voice services because voice services are only included in broadband and satellite services as an add on at additional cost. Petition for Reconsideration at 6; Order at 19. In challenging this ruling CenturyLink relies on a statutory analysis based on its conclusory assertion that: "Services that already qualify for COLR funding must be considered 'functionally equivalent' services for purpose of granting COLR relief" under section 54-8b-3(5)(b). Petition for Reconsideration at 7; Order at 19. However, under the applicable rules of statutory construction, the fact that services are eligible for UUSF support is not sufficient to demonstrate that they are "functionally equivalent" services under section 54-8b-3(5)(b).

CenturyLink argues that services that are supported by the UUSF under section 54-8b-15(3)(d) (one time distribution for non-rate-of-return COLRs)—which include wire and radio services, fixed wireless services, and fixed satellite services—constitute "functionally equivalent" services to landline voice services under section 54-8b-3(5)(b). Rebuttal Testimony Lubeck, 2:15 to 4:4. However, no clear logical nexus exists between sections 54-8b-15(3)(5)(b)'s listing of UUSF supportive services and 54-8b-15(3)(d)'s term "functional equivalent" and therefore CenturyLink's conflation of section 54-8b-3(5)(b) and section 54-8b-15(3)(5)(b) is unwarranted. When read as a whole section 54-8b-3(5)(b) precludes the possibility that services supported by the UUSF by definition constitute functionally equivalent services to landline voice services. *Taylor,* 2022 UT 35, ¶ 28 (statutes must be read as a whole); *Bess*, 2019 UT 70, ¶ 25 (same). Section 54-8b-3(5)(b) provides a factor to consider in determining the existence of effective competition is the "ability of alternative telecommunications providers to offer competing telecommunications services that are the functionally equivalent or substitutable and reasonably available at *comparable prices, terms, quality, and conditions.*" (emphasis added). The evidence produced in this docket establishes that satellite services—services that are supported by the UUSF—are in no way comparable to landline voices services in terms of price and conditions. Direct Meredith, 13:312-322; Rebuttal Testimony Lubeck, 2:15 to 4 4; 13:14-15; Hr'g Test, 138:25 to 139:9. Therefore, the argument that the services supported by the UUSF for non-rate-of-return COLRs constitute functionally equivalent service to landline voice services fails, as these services are not offered under reasonably comparable prices and conditions.

This conclusion is also evidenced by the fact that services supported by the UUSF for rate-of-return COLRs, under section 54-8b-15(3)(c), are also not functionally

equivalent services to landline voice services under section 54-8b-3(5)(b). Specifically, under section 54-8b-15(3)(c)(iii), rate-of-return COLRs can receive UUSF funding for "wholesale broadband Internet access services." It cannot be seriously argued that wholesale broadband internet access services are functionally equivalent to retail landline voice services. Again, there is no inherent connection between UUSF supported services and services that are functionally equivalent to landline services under section 54-8b-3(5)(b). Accordingly, contrary to CenturyLink's argument, services that are funded by the UUSF under section 54-8b-15(3)(d) are not by definition the functional equivalent to landline voice services under 54-8b-3(5)(b).

Thus, CenturyLink's statutory arguments fail and do not support a reconsideration of the PSC's March 15th Order.

## CONCLUSION

For the reasons outlined above, the PSC must deny CenturyLink's Petition for Reconsideration.

Respectfully submitted, April 26, 2024.

/s/ *Robert J. Moore*
Robert J. Moore
ASSISTANT ATTORNEY GENERAL
A*ttorney for the Office of Consumer Services*