

STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE COMPLAINT OF: REHABILITATION CENTER OF ALLISON	Docket No. FCU-2012-0019
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Motion to Compel Discovery

The Office of Consumer Advocate (OCA) seeks an order compelling CenturyLink Communications, LLC (CenturyLink) to produce the document requested in OCA data request no. 67 by a date certain in the near future. In support of the motion, OCA states:

1. On March 9, 2015, OCA directed the following data request no. 67 to CenturyLink:

Please provide an update, as of the date of your response to this data request, regarding CenturyLink's progress toward implementation of the provisions of the safe harbor requirements in the FCC's rules regarding recording, retention and reporting of rural call completion data. Has CenturyLink provided to the FCC the certification required by 47 C.F.R. § 64.2107(a)(1)? If so, please indicate the date on which the certification was provided and produce a copy of it. If not, when does CenturyLink anticipate providing the certification?

2. A response to the data request, provided May 15, 2015, stated: "As required by the FCC, we will file our Safe Harbor certification when we file our first report with the FCC on August 1, 2015. That means, however, that we had to be operating in Safe Harbor as of March 1, 2015, which we were." No additional information was provided at that time. See OCA Ex. CL-67, filed May 26, 2015.

3. On August 13, 2015, in response to renewed requests from OCA for an update, CenturyLink provided a *redacted* certification filed by CenturyLink with the FCC on July 31, 2015. See OCA Ex. CL-67S, filed August 18, 2013, also posted to the FCC's website at <http://apps.fcc.gov/ecfs/document/view?id=60001120323>. No objection to the data request was stated. See *Schaap v. Chicago & N.W.R. Co.*, 261 Iowa 646, 649, 155 N.W.2d 531, 533 (1968) ("Failure to object is usually considered to be a waiver of the objection").

4. According to the redacted certification, "some limited exceptions to the Safe Harbor call routing are inevitable." In particular, "[d]ue to a very limited number of providers for such services, CenturyLink has no choice but to use Verizon as a carrier on disaster recovery routes and as a routing option of last resort," and "Verizon does not offer a Safe Harbor product." According to the certification, the exceptions have been "previously reviewed with the [FCC's] Wireline Competition Bureau."

5. In telephone discussions with OCA on August 21, 2015, CenturyLink advised that, at the eleventh hour, in March 2015, CenturyLink learned that Verizon could not commit to delivery of calls with only the single "hop" that CenturyLink was hoping for. The matter was discussed with the FCC at the time. No *ex parte* filing was made at the FCC.¹ When asked whether the FCC has advised CenturyLink whether CenturyLink is in compliance with the safe harbor requirements, CenturyLink responded "no." CenturyLink further advised it anticipates removing Verizon from Iowa routing by the end of September 2015.

¹According to CenturyLink, FCC personnel advised that no *ex parte* filing was necessary.

6. On August 13, 2015, upon receipt of the redacted certification, OCA advised CenturyLink: “We need the confidential version.” See attachment 1.

7. On August 13, 2015, CenturyLink produced another updated response but again did not provide the redacted materials. This response stated:

The redacted data is highly confidential. Its disclosure is governed by 47 CFR § 64.2109 which gives providers the right to request confidential treatment of such data. §64.2109(b) provides “(b) The Chief of the Wireline Competition Bureau will release information to states upon request, if the states are able to maintain the confidentiality of this information.” The State can work with the FCC to determine if they can meet the confidentiality for this information.

See attachment 2.

8. On August 13, 2015, OCA wrote CenturyLink:

The purpose of this message is to attempt to resolve a discovery dispute without the need for the involvement of the presiding officer. Again, time is of the essence.

We have now received another updated response to data request no. 67, this one containing a previously absent objection to producing the document.

The fact that the document is “highly confidential” is not a proper basis for objection. Under the discovery rules, all documents relevant and not privileged must be disclosed. Confidentiality procedures are already in place. CenturyLink has invoked them many times throughout these proceedings. See my letter outlining OCA discovery procedures dated March 29, 2012.

The FCC rule cited by CenturyLink does not grant a privilege to CenturyLink that allows it to refuse to disclose the document. The FCC rule simply indicates the circumstances under which the FCC will release the information to the state, namely, if the state requests it, and if confidentiality can be maintained. The document remains subject to the requirements of the discovery rules. Again, the confidentiality concerns have previously been addressed.

Is there a time tomorrow when you and I can discuss the matter?
Thank you.

See attachment 3.

9. At 2:00 p.m. on August 14, 2015, OCA and CenturyLink discussed by telephone CenturyLink's refusal to produce the redacted material. At this point, for the first time in these entire proceedings, CenturyLink took the position that redacted material could not be produced except in accordance with the procedures specified in subsection (c) of 18 U.S.C. § 2703.

10. Subsection (c) of 18 U.S.C. § 2703 provides:

(c) Records concerning electronic communication service or remote computing service.--(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and\

(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

8. This statute, enacted as a part of the Electronics Communications Privacy Act of 1986, amended title III of the Omnibus Crime Control and Safe Streets Act of 1968 – the Federal wiretap law – to protect against the unauthorized interception of electronic communications. Sen. Rep. No. 99-541, 99th Cong., 2d Sess. (1986), p. 1. The statute has no application in the context of these civil administrative proceedings. As evidenced by subsection (d) of 18 U.S.C. § 2703, cross-referenced in subparagraph 1(B) of subsection (c), the statutory context is one in which there are reasonable grounds to believe that the information sought is “relevant and material to an ongoing criminal investigation.” That is not the case here.

10. It appears the belated objection under 18 U.S.C. § 2703 has been interposed for the purpose of delay. If 18 U.S.C. § 2703(c) did apply to disclosures in these proceedings, it would also apply to disclosures to the FCC. Yet there is no indication that CenturyLink invoked any of the procedures specified in 18 U.S.C. § 2703(c) prior to disclosing the information to the FCC. CenturyLink has offered to provide the information in question if served with an administrative subpoena pursuant to

paragraph (2) of subsection (c). That is an option available to the presiding officer, but there is no need for issuance of a subpoena pursuant to a statute that does not apply.

11. The redacted material in CenturyLink's federal safe harbor certification appears in two exhibits – 3 and 4. Both exhibits contain call completion data on calls in which CenturyLink used Verizon as an intermediate carrier. Exhibit 3 includes no specific telephone numbers. Exhibit 4 evidently does include specific telephone numbers. In correspondence subsequent to August 13, 2015, CenturyLink has provided OCA with a partially un-redacted version of Exhibit 3, which displays the data for operating company numbers (OCNs) in Iowa. CenturyLink has continued to refuse to produce an un-redacted version of Exhibit 4. CenturyLink has also refused to produce the national totals shown in Exhibit 3.

12. The discovery rules are liberally construed to effectuate the disclosure of relevant information. *Sioux Pharm, Inc. v. Eagle Laboratories, Inc.*, 865 N.W.2d 528, 536 (2015). The information sought is highly relevant to CenturyLink's claim that it qualifies for safe harbor treatment and to its claim that invocation of the federal safe harbor will address the problems revealed in the evidence. The information is not the subject of any privilege. It has been disclosed to the FCC. Confidentiality concerns have been addressed in the procedures adopted by OCA, communicated to CenturyLink and utilized throughout these proceedings. See Attachment 4.

13. CenturyLink has offered to provide a version of Exhibit 4 redacting the last four digits of the telephone numbers appearing in the exhibit. There is no good reason why information provided to the FCC should be redacted here. If the last four

digits of the telephone numbers are relevant to the certification to the FCC, they are relevant here. Nor is OCA in a position to evaluate their relevance without seeing them.

14. As evidenced by the foregoing, OCA has made a good faith effort to resolve the issue without the involvement of the presiding officer.

WHEREFORE, OCA requests the entry of an order compelling production of the un-redacted document requested in data request no. 67 by a date certain in the near future, excluding information pertaining to OCNs outside Iowa.

Respectfully submitted,

Mark R. Schuling
Consumer Advocate

/s/ Craig F. Graziano

Craig F. Graziano
Attorney

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Des Moines, IA 50319-0063
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E-Mail: Craig.Graziano@oca.iowa.gov

OFFICE OF CONSUMER ADVOCATE

Graziano, Craig [OCA]

From: Graziano, Craig [OCA]
Sent: Thursday, August 13, 2015 11:30 AM
To: Becky Kilpatrick (becky.kilpatrick@centurylink.com)
Subject: FW: Iowa Utilities Board Docket Nos. FCU-2012-0019, FCU-2013-0004, FCU-2013-0005, FCU-2013-0006 and FCU-2013-0009

Becky,

I received an updated response to DR 67 this morning, but the version provided was redacted. We need the confidential version. I asked for that by the end of the week because we need time to review it in advance of the prehearing conference scheduled for August 26. Again, please provide by the end the week. Thank you.

Craig

**OFFICE OF CONSUMER ADVOCATE
DATA REQUEST #67 Update**

DATE : August 13, 2015
DOCKET NO. : FCU-2012-0019
COMPANY : CenturyLink

67. Please provide an update, as of the date of your response to this data request, regarding CenturyLink's progress toward implementation of the provisions of the safe harbor requirements in the FCC's rules regarding recording, retention and reporting of rural call completion data. Has CenturyLink provided to the FCC the certification required by 47 C.F.R. § 64.2107(a)(1)? If so, please indicate the date on which the certification was provided and produce a copy of it. If not, when does CenturyLink anticipate providing the certification?

CONFIDENTIAL INFORMATION HIGHLIGHTED WITHIN {}:

RESPONSE:

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}

Update 5/15/15: As required by the FCC, we will file our Safe Harbor certification when we file our first report with the FCC on August 1, 2015. That means however, that we had to be operating in Safe Harbor as of March 1, 2015, which we were.

Update 8/13/15: See Attachment A, CenturyLink's Safe Harbor certification electronically filed with the FCC on July 31, 2015.

Update: 8/13/15: The redacted data is highly confidential. Its disclosure is governed by 47 CFR § 64.2109 which gives providers the right to request confidential treatment of such data. §64.2109(b) provides "(b) The Chief of the Wireline Competition Bureau will release information to states upon request, if the states are able to maintain the confidentiality of this information." The State can work with the FCC to determine if they can meet the confidentiality for this information.

We would also be willing to give you a high level verbal overview of the data if you are interested in that approach. The data we would discuss would need to be protected as confidential.

Graziano, Craig [OCA]

From: Graziano, Craig [OCA]
Sent: Thursday, August 13, 2015 5:22 PM
To: Becky Kilpatrick (becky.kilpatrick@centurylink.com)
Subject: RE: Iowa Utilities Board Docket Nos. FCU-2012-0019, FCU-2013-0004, FCU-2013-0005, FCU-2013-0006 and FCU-2013-0009

Becky,

The purpose of this message is to attempt to resolve a discovery dispute without the need for the involvement of the presiding officer. Again, time is of the essence.

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The FCC rule cited by CenturyLink does not grant a privilege to CenturyLink that allows it to refuse to disclose the document. The FCC rule simply indicates the circumstances under which the FCC will release the information to the state, namely, if the state requests it, and if confidentiality can be maintained. The document remains subject to the requirements of the discovery rules. Again, the confidentiality concerns have previously been addressed.

We would appreciate a high level verbal overview (subject, of course, to the confidentiality procedures in place). We first need to see the document.

Is there a time tomorrow when you and I can discuss the matter? Thank you.

Craig F. Graziano, Attorney
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March 29, 2012

Becky Owenson Kilpatrick, Senior Corporate Counsel
CenturyLink
319 Madison Street
Jefferson City, M 651 01

In Re: Rehabilitation Center of Allison, Iowa, Docket No. FCU-2012-0129

Dear Ms. Kilpatrick:

This letter is intended to confirm the procedure used by this office to preserve and protect the confidentiality of documents or other information provided to the OCA under a claim of confidentiality.

As you know, the Office of Consumer Advocate (OCA) is a statutory division of the Iowa Department of Justice and as such is subject to Iowa Code Chapter 22, Iowa's Open Records law. Any documents or other information, including but not limited to responses to data requests or other discovery, provided to the OCA under a claim of confidentiality will not be released to any person outside the OCA (other than consultants, if any, retained by OCA in connection with this proceeding who will observe the same procedures) until the party claiming confidentiality has an opportunity to take appropriate action to prevent disclosure under Iowa Code Chapter 22.

If the OCA receives a request for the release of documents or other information for which you claim confidentiality, the OCA will promptly notify you and delay the release of the documents or other information for 14 calendar days from the date of the request pursuant to Iowa Code § 22.8(4) to permit you to take appropriate action to prevent disclosure.

If the OCA files with the Iowa Utilities Board a document containing information for which you have claimed confidentiality, pages containing such information will be conspicuously marked confidential and will be filed separately on a confidential basis, and the information claimed to be confidential will be redacted from the public version of any filing. If the Iowa Utilities Board has not yet determined whether the information constitutes "confidential records" pursuant to Iowa Code § 22.7, you would have the opportunity to file with the Utilities Board a request for confidential treatment pursuant to 199 Iowa Admin. Code 1.9.

Becky Kilpatrick
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This procedure will apply to all material submitted under a claim of confidentiality and will continue in force until such time as Iowa Code Chapter 22 is amended to prohibit such a procedure. This procedure, however, should not be construed as a determination by OCA that such confidentially designated material may be exempt from disclosure under Chapter 22. Instead, this procedure is intended to allow efficient discovery to take place by preserving the rights of the parties involved until such time, if any, as a final determination of confidentiality is needed.

If you have any questions, please let me know. Thank you.

Sincerely,

/s/ Craig F. Graziano

Craig F. Graziano
Attorney

ak

e-mail: Becky,Kilpatrick@centurylink.com