STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: COMPLAINT OF REHABILITATION CENTER OF ALLISON	DOCKET NO. FCU-2012-0019

ORDER GRANTING MOTION TO COMPEL

(Issued September 29, 2015)

On August 25, 2015, the Office of Consumer Advocate, a division of the Iowa Department of Justice (Consumer Advocate), filed a motion to compel discovery seeking an order requiring CenturyLink Communications, LLC (CenturyLink), to produce the document requested in OCA data request no. 67. Data request no. 67 relates to CenturyLink's certification to the Federal Communications Commission (FCC) regarding CenturyLink's eligibility for the FCC's rural call completion Safe Harbor provisions. The certification includes information about the necessity for CenturyLink's use of Verizon as its underlying carrier on some routes even though Verizon could not commit to delivery of calls with only the single "hop" CenturyLink wanted.

The Consumer Advocate states CenturyLink provided it with a redacted version of the certification filed with the FCC, and the redacted material in the certification appears in Exhibits 3 and 4. The Consumer Advocate states both exhibits contain call completion data on calls in which CenturyLink used Verizon as

an intermediate carrier. Exhibit 3 does not include specific telephone numbers, while Exhibit 4 does include such numbers. The Consumer Advocate states CenturyLink provided the Consumer Advocate with a partially unredacted version of Exhibit 3, which displays the data for operating company numbers (OCNs) in Iowa. The Consumer Advocate states CenturyLink has refused to produce the national totals shown in Exhibit 3 and has continued to refuse to produce an unredacted version of Exhibit 4. The Consumer Advocate argues discovery rules are to be liberally construed; the information sought is relevant to CenturyLink's claims that it qualifies for Safe Harbor treatment and its claim that invocation of the federal Safe Harbor will address the problems revealed in the evidence; and the information is not privileged. The Consumer Advocate further argues the information has been disclosed to the FCC and confidentiality concerns have been addressed by the procedures adopted by the Consumer Advocate, communicated to CenturyLink, and used throughout these proceedings. The Consumer Advocate states CenturyLink has offered to provide a version of Exhibit 4 redacting the last four digits of the telephone numbers in the exhibit, but argues there is no good reason why the information provided to the FCC should be redacted here. The Consumer Advocate argues if the last four digits of the telephone numbers are relevant to the certification to the FCC, they are relevant here, and the Consumer Advocate cannot evaluate their relevance without seeing them. The Consumer Advocate also noted CenturyLink asserted for the first time in these proceedings that it could not produce the redacted material except in

accordance with the procedures set forth in subsection (c) of 18 U.S.C. § 2703. The Consumer Advocate argues this statute has no application in the context of these civil administrative proceedings. Therefore, the Consumer Advocate requests an order compelling production of the unredacted document requested in data request no. 67, excluding information pertaining to OCNs outside Iowa.

CenturyLink responded to the motion to compel on September 4, 2015, stating that the Consumer Advocate seeks unredacted versions of two exhibits that CenturyLink provided to the FCC in the certification process for the Safe Harbor. CenturyLink states Exhibit 3 contains aggregate call completion data for the entire country in which CenturyLink used Verizon as its underlying carrier. CenturyLink states it provided the Consumer Advocate with unredacted data from Exhibit 3 relating to the OCNs in Iowa. CenturyLink argues the Consumer Advocate has made no real argument that the redacted information concerning other jurisdictions outside of Iowa, or the national totals that include these other jurisdictions, has any particular relevance to these Iowa proceedings. CenturyLink argues this data is essentially about limited exceptions to the Safe Harbor provisions and has been filed confidentially with the FCC in the context of complying with the application of federal regulations. It argues no such state regulatory regime exists in Iowa.

CenturyLink states that Exhibit 4 contains call detail records showing called and calling numbers of customers whose calls were completed by Verizon. CenturyLink states it will provide Exhibit 4 if three conditions are satisfied: (1)

CenturyLink receives a subpoena for the records as required by a provision of the Electronics Communications Privacy Act of 1986 (ECPA); (2) the records will be maintained confidentially; and (3) non-Iowa intrastate data is redacted. CenturyLink argues this will provide the Consumer Advocate with Iowa data relevant to these proceedings while protecting the customers' privacy as ECPA requires. CenturyLink further argues that 18 U.S.C. § 2703(c) clearly states what any government agency, state or federal, is required to do to receive customer or subscriber records related to electronic communications services, contrary to the Consumer Advocate's argument that these provisions are only applicable to wiretap or criminal law enforcement. CenturyLink argues while it is true that some of the provisions of 18 U.S.C. § 2703 are limited to criminal investigative procedures, subsection (c)(2) does not contain such limitations and only allows access to customer or subscriber records pursuant to an administrative subpoena. CenturyLink argues ECPA applies to the data maintained in Exhibit 4 and asks the Board to deny the motion to compel.[1]

On September 8, 2015, the undersigned issued an order requiring the Consumer Advocate and CenturyLink to provide further information regarding their discovery dispute.

On September 14, 2015, the Consumer Advocate filed a reply on its motion to compel. The Consumer Advocate states it does not seek redacted information pertaining solely to states other than Iowa, but does seek redacted information

[1] CenturyLink also raised a question related to provision of the documents to another party to this proceeding, but that issue has apparently been resolved and will not be discussed further in this order.

pertaining to interstate as well as intrastate calls terminating to Iowa OCNs for the same reason the FCC included intrastate as well as interstate calls in the federal reporting requirements: the same network is used for both interstate and intrastate calls and allowing carriers to report only one or the other would provide an incomplete picture of the rural call completion problem and would leave the FCC or the Board poorly equipped to ensure that calls are being properly completed.

The Consumer Advocate reiterated its argument that the ECPA, including the specific provision on which CenturyLink relies, 18 U.S.C. § 2703(c), the Federal wiretap law, protects against the unauthorized interception of electronic communications and relates only to criminal law enforcement and criminal cases. In contrast, argues the Consumer Advocate, these civil administrative proceedings involve no effort by government to intercept communications and involve no criminal law enforcement. These are regulatory proceedings that seek to remedy widespread call completion failures and therefore to restore the reliability of the telephone network in rural Iowa. The Consumer Advocate argues the document in question was previously provided to the FCC, evidently without any attempt to comply with the above statute, and CenturyLink offers nothing that would distinguish between providing the document to the FCC and providing it to the Board or Consumer Advocate. The Consumer Advocate notes that CenturyLink and every other provider of telecommunications service in Iowa in these proceedings and in hundreds or thousands of others, including every complaint file, have always and routinely

provided information of the type listed in 18 U.S.C. § 2703(c) without interposing an objection under this statute. The Consumer Advocate notes CenturyLink has previously provided an abundance of evidence regarding telephone connection records, session times and durations and telephone numbers in this very proceeding without interposing an objection under 18 U.S.C. § 2703(c). The Consumer Advocate argues it would be a pointless and wasteful administrative burden if the Board (or the FCC) were required to issue a subpoena every time the Board or Consumer Advocate needed information of the type referenced in the statute. The Consumer Advocate argues the statute at issue has been on the books since 1986 and to its knowledge, there is no authority anywhere that supports its application to civil administrative proceedings such as these. The Consumer Advocate argues CenturyLink appears to have interposed its objection to make the discovery process as slow, cumbersome and resource-intensive as possible for the Board and the Consumer Advocate.

The Consumer Advocate, in answer to a question posed in the September 8 order, states that issuance of an administrative subpoena would resolve the issue in part, but not completely. The Consumer Advocate states it appears CenturyLink would still not provide national total numbers, which are relevant to CenturyLink's claim it qualifies for the Safe Harbor, which is relevant in turn to the reporting requirements for Iowa.

Also in answer to a question posed in the September 8 order, the Consumer Advocate argues the FCC's procedures, by which the Board or the Consumer Advocate could request the information from the FCC, do not apply to the Board and the Consumer Advocate in these call completion cases unless the Board chooses to invoke them. The Consumer Advocate recommends the Board not invoke them because it has independent jurisdiction and full authority to obtain relevant documents directly from the companies. The Consumer Advocate argues its request to CenturyLink is governed by the discovery rules, which require production of all relevant, not privileged, information. The Consumer Advocate argues the requested information is highly relevant to CenturyLink's claim 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 Consumer Advocate argues obtaining the information from CenturyLink is more efficient and effective than requesting it from the FCC.

For all these reasons, the Consumer Advocate argues the motion to compel should be granted.

On September 21, 2015, CenturyLink filed a reply to the Consumer Advocate's response. CenturyLink argues ECPA properly applies to the Consumer Advocate and Iowa Utilities Board in a civil setting. CenturyLink acknowledges the statute is in the criminal code, but argues Sections 2701 and 2702 criminalize the release of stored content and customer records without proper legal procedures, which is why it

is in the criminal code. CenturyLink argues the statute outlines what is specifically required for any governmental entity, such as the Consumer Advocate, to obtain records or other information pertaining to subscribers or customers of an electronic communication service. CenturyLink notes the statute permits disclosure of subscriber records pursuant to a subpoena, warrant, or court order, among other criteria. CenturyLink argues the statutory provisions apply equally in civil administrative settings, are not limited to law enforcement or criminal investigations, and thus apply to the Consumer Advocate and the Board.

CenturyLink states it is true that in the past, it has not consistently required subpoenas for customer information. However, it argues, CenturyLink has determined that the ECPA provisions do pertain to its release of customer information to governmental entities and that it will require one except in very limited cases. CenturyLink argues its past conduct with respect to state activity does not constitute a waiver of its statutory obligations. CenturyLink argues it followed the ECPA in providing the disputed information to the FCC because such disclosure was within one of the statutory exceptions where a subpoena was not required. CenturyLink argues the FCC is the regulatory entity that determines whether a provider has met the Safe Harbor requirements and CenturyLink could not protect its rights or its ability to provide service unless and until it proved to the FCC that it had met its Safe Harbor rule requirements. As part of that proof, CenturyLink states, it provided the customer information at issue here to the FCC.

CenturyLink argues no such similar regulatory structure exists with respect to the Board. CenturyLink argues the Board and the Consumer Advocate do not have the responsibility to determine whether CenturyLink has complied with the FCC's Safe Harbor requirements, and there are no relevant reporting requirements imposed by the Board yet. CenturyLink argues the Consumer Advocate's proposed solutions filed in this case do not yet have the full force and effect of law. CenturyLink notes this is a discovery dispute. It argues this is not a required filing to determine compliance with the law and would not fall within the exception listed in the statute.

CenturyLink argues when a customer files a complaint with the Board or the FCC, CenturyLink does not impose a subpoena requirement on regulatory agencies. Rather, CenturyLink states, it considers the complaining customer to have consented to the release of relevant customer record information. CenturyLink argues such release is also associated with CenturyLink's protection of its rights. CenturyLink argues no similar analysis can be applied here. It argues the information CenturyLink provided to the FCC in Exhibit 4 that the Consumer Advocate wants access to has nothing directly to do with the complaint at issue before the Board. CenturyLink argues Exhibit 4 lists random calls made by random CenturyLink customers in Iowa who have no relationship to the complainants, or are random calls terminating to Iowa customers, none of whom filed a complaint with the Board.

CenturyLink states that the issuance of a subpoena for Iowa terminating call detail information will resolve the vast majority of the dispute. CenturyLink states it

would comply with a subpoena for intrastate terminating call detail information contained in Exhibit 4. CenturyLink states it continues to object to release of information unrelated to Iowa call data. It states Exhibit 3 and Exhibit 4 both have national data unrelated to Iowa that is not relevant or necessary for the Consumer Advocate's purposes. CenturyLink states the Consumer Advocate purports to need the national data to determine CenturyLink's compliance with the Safe Harbor and the reporting requirements for Iowa. CenturyLink argues the Consumer Advocate has no responsibility to determine CenturyLink's compliance with the Safe Harbor and there are no reporting requirements for Iowa "at the time that this information is relevant to."

CenturyLink argues the FCC has provided a means for state boards and commissions to obtain state-relevant data filed by companies pursuant to the Rural Call Completion Order.[2] Whether the Board gets the information from the FCC pursuant to this process or from CenturyLink, it will be asked to maintain the confidentiality of the information as it is proprietary network information and CenturyLink would ask for confidentiality under Iowa Code § 22.7 and Board rule 199 IAC 1.9.

CenturyLink notes the Consumer Advocate contends it is more efficient for the Board to require CenturyLink to provide the requested information, but continues to assert that it should not have to wait for the FCC to identify a problem, and that

[2] *In the Matter of Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154, ¶¶ 85-100 (2013) (Rural Call Completion Order).

providing the information to the Consumer Advocate would relieve the FCC of the sole responsibility to review and analyze the data. CenturyLink argues the Consumer Advocate cannot enforce these federal rules and statutes and there is no allegation that the FCC cannot timely and adequately review the data and determine whether CenturyLink has complied with the Safe Harbor requirements. CenturyLink argues the FCC's procedures are adequate to protect the state's interests.

Therefore, CenturyLink asks the Board to deny the motion to compel.

On September 23, 2015, the Consumer Advocate filed a reply to CenturyLink's new argument on its motion to compel. The Consumer Advocate argues the court cases newly cited by CenturyLink do not meet its argument that the context for application of 18 U.S.C. § 2703(c) is criminal law enforcement and criminal procedure. The Consumer Advocate further argues CenturyLink tacitly concedes it took no affirmative action under 18 U.S.C. § 2703(c) when it provided the information to the FCC. The Consumer Advocate argues CenturyLink offers a convoluted argument that disclosure to the FCC, but not the Board, is authorized without such action under 18 U.S.C. § 2702(c)(3). The Consumer Advocate notes CenturyLink stated the filing with the FCC was required. The Consumer Advocate argues the filing was voluntary because no company is required to invoke the Safe Harbor. The Consumer Advocate argues disclosures to the FCC and the Board stand on the same footing. The Consumer Advocate also notes that the company is required to respond to discovery requests.

The Consumer Advocate states CenturyLink is arguing that the state has no interest in the legitimacy or illegitimacy of CenturyLink's claimed Safe Harbor compliance. The Consumer Advocate notes CenturyLink's argument that the FCC's actions are adequate to protect the state's interests. However, argues the Consumer Advocate, CenturyLink is using the claimed Safe Harbor compliance as a basis for arguing it deserves a waiver of state oversight. The Consumer Advocate argues the Board, in partnership with the FCC, has an independent and focused interest in seeing that calls are completed to Iowa destinations. It further argues the information is well within the broad relevance standards of the discovery rules. Therefore, argues the Consumer Advocate, the motion to compel should be granted.

Analysis

Discovery procedures applicable to civil actions are available to the parties in contested cases before the Board. Iowa Code § 17A.13 (2015); 199 IAC 7.15(1). "The rules providing for discovery and inspection should be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding and to provide the parties with access to all relevant facts. Iowa R. Civ. P. 1.501(2). Discovery must be conducted in good faith, and responses to discovery requests, however made, must fairly address and meet the substance of the request." Iowa R. Civ. P. 1.501(3). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or

defense of the party seeking discovery or to the claim or defense of any other party[.]… It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Iowa R. Civ. P. 1.503(1). "As this rule makes clear, a party is entitled to discover any information that is not privileged and that is relevant to the subject matter of the lawsuit. [citation omitted.] Relevancy to the subject matter of the lawsuit is broader than relevancy to the precise issues in the pleadings because the rule allows discovery of inadmissible information as long as it leads to the discovery of admissible evidence." *Mediacom Iowa, LLC, v. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004).

The undersigned notes that CenturyLink has provided customer call information in these call completion cases to the Consumer Advocate in discovery without asserting the applicability of ECPA. The undersigned also notes that CenturyLink filed its proposed solutions in this and the other Iowa rural call completion cases on April 27, 2015. In the proposed solutions, CenturyLink stated it would be willing to provide the Board with the Iowa-specific data included in the quarterly reports it will file with the FCC beginning in August 2015, on the condition the Board would predesignate the filings as confidential due to the fact they will contain Customer Proprietary Network Information as well as CenturyLink's own proprietary data. In the order setting the in-person prehearing conference in this case and the other call completion cases, the undersigned stated that pre-

designation of confidential information to be filed with the Board is done by rule, as in 199 IAC 1.9(5)(c). The order stated it is not clear the Board has the authority to predesignate such reports as confidential without going through a rulemaking process, and therefore, stated the undersigned's interest in discussing the issue with CenturyLink at the prehearing conference.

The prehearing conference was held on August 26, 2015, at which this issue was discussed. CenturyLink did not know of any authority that would allow the Board to predesignate the reports and agreed it would need to request confidentiality when (and if) it filed each report pursuant to 199 IAC 1.9. The undersigned stated at the prehearing conference that the Board itself considers requests for confidentiality, and this type of information is the kind of information the Board routinely grants confidentiality protection pursuant to the rule and Iowa Code chapter 22. At the prehearing conference, CenturyLink never asserted that 18 U.S.C. §§ 2702 and 2703 applied to the provision of this information to the Board.

The redacted Safe Harbor certification material that the Consumer Advocate seeks in its discovery request is similar to and related to the material in the quarterly reports CenturyLink has already stated it would be willing to provide. CenturyLink apparently took the position that the redacted material could not be produced except in accordance with the provisions in 18 U.S.C. § 2703 for the first time on August 14, 2015, in a telephone call with the Consumer Advocate.

CenturyLink's arguments regarding the applicability of this statute to the Consumer Advocate's data request are not persuasive. CenturyLink provides no explanation for its change in position; it merely says that it "has determined" that the ECPA provisions apply to CenturyLink's release of customer information to governmental entities. The cases cited by CenturyLink are also not persuasive.

For the reasons set forth in the filings by the Consumer Advocate, the undersigned finds the Consumer Advocate's arguments that this statute does not apply to its discovery request in the context of this call completion case are persuasive.

The Consumer Advocate is correct that the Board has an interest in seeing that calls are completed to Iowa customers. In granting the requests for these formal proceedings, the Board has already determined it would conduct its own proceedings. CenturyLink is correct that the FCC will determine whether it has complied with the FCC's Safe Harbor provisions, but this does not set the bounds of what is relevant for discovery purposes in these Iowa call completion cases. In CenturyLink's proposed long-term solutions for its call completion problems in Iowa that it filed in this and the other call completion cases, CenturyLink has asserted the work it is doing to meet the FCC's Safe Harbor requirements are relevant as part of its Iowa solutions. The information CenturyLink has filed with the FCC regarding its Safe Harbor activities is clearly relevant to this Iowa case and the other call completion cases in which CenturyLink is involved.

Considering all of these factors, the undersigned finds the arguments of the Consumer Advocate to be persuasive as to why the information requested is relevant and discoverable and why the statutory provisions in 18 U.S.C. §§ 2702 and 2703 do not apply to this case.

The Board has treated these call completion cases differently than other customer complaint proceedings, although these cases began with customer complaints to the Board about their call completion problems. The Board and the parties have focused on finding solutions to the call completion problems faced by Iowa customers. The parties should continue this focus.

IT IS THEREFORE ORDERED:

1. The "Motion to Compel Discovery," filed by the Consumer Advocate on August 25, 2015, is hereby granted.

2. CenturyLink Communications, LLC, must provide the information requested to the Consumer Advocate on or before October 9, 2015.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

Dated at Des Moines, Iowa, this 29th day of September 2015.