

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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**In re Rehabilitation Center of  
Allison, Iowa**

**Docket No. FCU-2012-0019**

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**QWEST COMMUNICATIONS COMPANY, LLC D/B/A CENTURYLINK QCC'S  
REPLY TO OCA'S RESPONSE**

Qwest Communications Company, LLC d/b/a CenturyLink QCC (“CenturyLink”)<sup>1</sup> files this Reply to the Office of Consumer Advocate’s (“OCA”) Response as directed by the September 8, 2015 Order issued by the Iowa Utilities Board (the “Board”). These matters concern the OCA’s Motion to Compel CenturyLink to produce un-redacted documents in response the Data Request No. 67.

**I. Application of ECPA**

**A. ECPA Properly Applies to the OCA and the Iowa Utilities Board in a Civil Setting.**

Title 18, Chapter 121 of the United States Code, is titled “Stored Wire and Electronic Communications *and Transactional Records Access*” and is part of the Electronic Communications Privacy Act of 1986 (“ECPA”) known as the Stored Communications Act (“SCA”). Sections 2701 and 2702 of the Act criminalize the release of stored content and customer records without proper legal procedures, hence the

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<sup>1</sup> During the pendency of this proceeding, Qwest Communications Company, LLC d/b/a CenturyLink QCC underwent an internal reorganization approved by the Iowa Utilities Board in SPU-2014-0002 and subsequently received approval of a name change to CenturyLink Communications, LLC in SPU-2014-0008.

location of the SCA in Title 18, which constitutes the criminal code. However, Congress created specific exceptions to the criminal prohibition contained in Sections 2702 and 2703. Specifically:

Section 2702(a)(3) of this chapter states that:

“a provider of remote computing service or electronic communication service to the public *shall not knowingly divulge a record or other information pertaining to a subscriber or customer of such service...to any governmental entity.*” (emphasis added).

Subsection (c) of this section provides exceptions allowing disclosure of customer records in certain circumstances:

- (c) Exceptions for Disclosure of Customer Records.—A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—
- (1) *as otherwise authorized in section 2703;*
  - (2) with the lawful consent of the customer or subscriber;
  - (3) *as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;*
  - (4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency;
  - (5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A; or
  - (6) *to any person other than a governmental entity.* (emphasis added).

Provisions of Chapter 121, particularly 18 U.S.C. § 2703(c)(2), outline what is specifically required for any governmental entity, such as the OCA, to obtain records or other information pertaining to subscribers or customers of an electronic communication service:

§2703. Required disclosure of customer communications or records

(c) Records Concerning Electronic Communication Service or Remote Computing Service

(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).<sup>2</sup> (emphasis added).

The OCA continues to insist that these provisions are only applicable in cases involving criminal law enforcement. However, it is well settled that these provisions are equally applicable in civil administrative settings. For instance, in *State ex rel. Koster v. Charter Communications, Inc.* 461 S.W.3d 851 (Mo. Ct. App. W.D. 2015), the Missouri Attorney General issued a Civil Investigative Demand (“CID”) to Charter for a civil investigation into the state’s telemarketing law. *Id.* at 853. Charter argued that a CID was not the equivalent to an “administrative subpoena” under 18 U.S.C. § 2703(c)(2). *Id.* at 854. The Court disagreed stating:

“Most often § 2703 is used when law enforcement is attempting to investigate criminal offenses, and it was clearly written with criminal investigations in mind.” *See Federal Trade Comm’n v. Netscape Commc’ns Corp.*, 196 F.R.D. 559, 560 (N.D. Cal. 2000). However, courts have found that it also encompasses a governmental entity’s ability to obtain information regarding electronic communications in **civil** cases, *id.*, and the plain language of § 2703(c) is broad enough to support its application in both criminal and **civil** matters. *See also Telecomms. Regulatory Bd. of Puerto Rico v. CTIA – The Wireless Ass’n.* 752 F.3d 60, 65-67 (1<sup>st</sup> Cir. 2014).” (emphasis added)

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<sup>2</sup> Paragraph (c)(1) permits the disclosure of subscriber records pursuant to a warrant or court order among other criteria.

Likewise, *FTC v. Netscape Communs. Corp.*<sup>3</sup>, concerned a civil action initiated by the Federal Trade Commission regarding allegations of unfair competition. There, the court accepted the premise that §2703(c) applies equally to civil cases.<sup>4</sup> Similarly, in *Telecommunications Regulatory Board of Puerto Rico v. CTIA - The Wireless Association*, 752 F.3d 60 (1<sup>st</sup> Cir. 2014), the First Circuit was tasked with determining whether ECPA’s prohibitions pre-empted Puerto Rico’s civil statute requiring telecommunications companies to submit subscriber information for prepaid cellular phones without a subpoena or court order. The court concluded that “the SCA clearly prohibits communications providers from disclosing to the government basic subscriber information – including a customer’s name, address, and telephone number – without a subpoena” and federal preemption standards were met. *Id.* at 67. Finally, the House Judiciary Committee Report supports these conclusions as well. *See* House Judiciary Committee Report, H.R. 99-647, 99<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 26 (1986) (referencing when the federal government can get access to customer records, noting that such access is usually in connection with a criminal or **civil** investigation.)<sup>5</sup>

Despite this precedent, the OCA insists that neither it nor the Board are subject to the requirements of ECPA relying on a case interpreting the application of 18 U.S.C. § 3287 – the Wartime Suspension of Limitations” in which the Court found that the tolling statute only applied to criminal offenses partially because it was found in Title 18,

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<sup>3</sup> *Federal Trade Comm’n v. Netscape Commc’ns Corp.*, 196 F.R.D. 559, 560 (N.D. Cal. 2000).

<sup>4</sup> “At the hearing on the motion the parties further agreed that section 2703(c)(1)(C) applies to civil cases, even though the statute is drafted in such a manner that clearly anticipates the criminal context. The issue the court must decide, then, is whether the FTC’s subpoena, issued during the pre-trial discovery phase of the underlying civil action, constitutes a “trial subpoena” as contemplated by section 2703(c)(1)(C).” *Id.* at 559.

<sup>5</sup> Cited in *In re: Matter of Grand Jury Subpoenas to Southwestern Bell mobile Systems, Inc.*, 894 F.Supp. 355, 358 (W.D. Mo. 1995); *FTC v. Netscape Communications Corp.*, *infra* at 560.

but mostly because the term “offenses” related to criminal acts only. *Kellog Brown & Root Services v. United States ex rel. Carter*, 135 S.Ct. 1970 (2015). There is nothing on point or relevant about this case.

Yes, Title 18 contains criminal statutes. Yes, violation of the provisions of ECPA constitutes a criminal act. Despite this, the exceptions to the prohibitions in Chapter 121 (the SCA) are not limited to law enforcement or criminal investigations; instead, they have specific implications in civil settings such as we have before the Board. Thus, the ECPA/SCA clearly applies to both the OCA and the Board.

### **B. CenturyLink’s Application of ECPA Requirements**

The OCA contends that in the past, CenturyLink has not required subpoenas from the OCA or the Board and that CenturyLink did not require the FCC to submit a subpoena for the data at issue in its Motion to Compel. It is true that CenturyLink, in the past, has not consistently required subpoenas for customer information across its various states or affiliates. But 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 (*e.g.*, such as receipt of customer consent, provision of information to protect its right or property). And, as a general matter, CenturyLink routinely requests subpoenas from the FCC regarding subscriber record information and it receives them. CenturyLink’s past conduct with respect to state activity does not constitute a waiver of its statutory obligations.

Further, the Order asked CenturyLink to explain whether it followed the ECPA in providing the disputed information to the FCC. CenturyLink did. Under 18 U.S.C §2702(c), there are a list of exceptions for the voluntary disclosure of customer records. This subsection states that a provider may disclose information relating to a subscriber,

other than the contents of a communication: “(1) as otherwise authorized in section 2703” – which applies to the matter currently before the Board; or “(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of the service.” The FCC has determined the requirements for meeting Safe Harbor standards in its Rural Call Completion Order.<sup>6</sup> Accordingly, the FCC is the only regulatory entity in a position to determine whether a provider has complied with those Safe Harbor requirements.

Given the obligations imposed by the FCC, 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 provided the customer information at issue here to the FCC.

No such similar regulatory structure exists with respect to the Board. Neither the OCA nor the Board have been delegated the responsibility of determining whether CenturyLink has complied with the FCC’s Safe Harbor requirements, and contrary to OCA’s statements in its Response (p. 5), there are no relevant “reporting requirements” for Safe Harbor in Iowa. The OCA seems to assume that its proposed solutions filed in this case already contain the full force and effect of law. This is a discovery dispute. It is not a required filing to determine compliance with the law and would not fall under the exception listed in § 2702(c)(3).

Finally, when a customer files a complaint with the Board or the FCC, CenturyLink does not impose a subpoena requirement on regulatory entities. Rather, it considers the complaining customer to have consented to the release of relevant

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<sup>6</sup> *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*”)

customer record information. Additionally, such release is associated with CenturyLink's protection of its rights. No similar analysis can be applied here. The information CenturyLink provided to the FCC in Exhibit 4, that the OCA wants access to, has nothing directly to do with the complaint at issue before the Board. 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.

## **II. Issuance of a Subpoena.**

CenturyLink does believe that the issuance of a subpoena for Iowa terminating call detail information will resolve the vast majority of this dispute. As noted in CenturyLink's Response to the Motion to Compel, CenturyLink would comply with a subpoena for intrastate terminating call detail information contained in Exhibit 4. CenturyLink continues to object to release of information unrelated to Iowa call data. Both Exhibit 3 and Exhibit 4 have national data unrelated to Iowa that is not relevant or necessary for OCA's purposes. Again, OCA purports to need the national data to determine CenturyLink's compliance with Safe Harbor, and the "reporting requirements for Iowa". The OCA has no responsibility to determine CenturyLink's compliance with Safe Harbor – that is within the purview of the FCC. And to CenturyLink's knowledge, there are no "reporting requirements for Iowa" at the time that this information is relevant to.

### **III. FCC's Provisions for Obtaining Iowa Data.**

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.<sup>7</sup> 47 C.F.R. § 64.2109(b) does state: “The Chief of the Wireline Competition Bureau will release information to states upon request, if the states are able to maintain the confidentiality of the information.” 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 IAC 199-1.9.

The OCA contends that it is much more efficient for the Board to order CenturyLink to provide the requested information, but continues to assert that OCA shouldn't have to wait for the FCC to identify a problem and that would also “reliev[e] the FCC of the sole responsibility to review and analyze the data”.<sup>8</sup> CenturyLink does not believe the OCA can step into the shoes of the FCC and enforce these federal rules and statutes. There is no allegation that the FCC cannot timely and adequately review the data submitted by CenturyLink and make its own conclusions about CenturyLink's compliance with Safe Harbor requirements. The FCC's procedures are adequate to protect the state's interests.

### **IV. Dumont's Access to Data.**

CenturyLink believes that should the Board issue a subpoena on behalf of the OCA for the records at issue, that Dumont Telephone Company would not have access

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<sup>7</sup> *Id.*

<sup>8</sup> OCA Reply on Motion to Compel Discovery filed Sept. 14, 2015.

unless Dumont acquired a subpoena for its own purposes. CenturyLink's standard procedure as a third party responder in civil cases where litigants are seeking customer records is to require each party to the civil suit to provide a separate subpoena for records. CenturyLink sees no difference in applying that procedure in this instance. And while Dumont has stated it would waive the need to access the records at issue, CenturyLink would advise that a separate subpoena is required should Dumont change its mind.

WHEREFORE, CenturyLink respectfully requests that the Board enter an order denying the Office of Consumer Advocate's Motion to Compel.

Dated: September 21, 2015

Respectfully submitted,

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