ORDER NO. 18 238

ENTERED JUN 27 2018

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1891

In the Matter of QWEST CORPORATION, dba CENTURYLINK QC, Petition for Approval of 2017 Additions to Non-Impaired Wire Center List.	ORDER

DISPOSITION: PETITION FOR WIRE CENTER RECLASSIFICATION APPROVED

I. SUMMARY

We grant the petition filed by Qwest Corporation, dba CenturyLink QC (CenturyLink), to reclassify the Oregon City and Corvallis wire centers. We conclude that: (1) the Oregon City wire center should be reclassified to Tier 1; and (2) the Corvallis wire center should be reclassified to Tier 2.

II. BACKGROUND

To promote competition in the telecommunications industry, the Telecommunications Act of 1996, 47 USC § 251 et seq., requires incumbent local exchange carriers (ILECs), such as CenturyLink, to make high-capacity unbundled network elements (UNEs) available to competitive local exchange carriers (CLECs), such as Eschelon Telecom of Oregon, Inc.; Integra Telecom of Oregon, Inc.; Advanced TelCom, Inc.; and Electric Lightwave, LLC (collectively Integra). ILECs are required to provide high-capacity UNEs until such time as it can be demonstrated that the failure to provide UNEs would no longer impair the ability of CLECs to provide telecommunications services to the public.

In its Triennial Review Remand Order (TRRO)[1], the Federal Communications Commission (FCC) set objective measures for determining when wire center conditions

[1] Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling 25 Obligations of Incumbent Local Exchange Carriers, Order on Remand, CC Docket No. 01-338, WC Docket No. 04-313, 20 FCC Rcd 2533 (2005) (Triennial Review Remand Order or "TRRO"), aff'd, Covad Communications Company v. FCC, 450 F3d 528 (DC Cir 2006).

indicate non-impairment sufficient to relieve an ILEC of the obligation to provide UNEs to a requesting CLEC. One measure provides that when the number of business lines served by a wire center or the number of "fiber-based collocators" at a wire center reaches a certain number, the wire center is no longer considered impaired. For purposes of determining whether an ILEC must provide unbundled access to dedicated transport on a particular route, the FCC classifies wire centers into three tiers based on the number of fiber-based collocators, business lines served, or both:

(1) Tier 1: ILEC wire centers contain at least four fiber-based collocators, at least 38,000 business lines, or both.
(2) Tier 2: ILEC wire centers contain at least three fiber-based collocators, at least 24,000 business lines, or both.
(3) Tier 3: Wire centers that do not qualify as either Tier 1 or Tier 2.

An ILEC's obligation to provide UNEs for a particular transport route depends on classification of the wire centers at both ends of the route, with the ILEC's obligations being lessened or eliminated when the wire centers are reclassified to higher tiers. For example, unless the wire centers on both ends of a route are classified as Tier 1, an ILEC must unbundle DS1 transport. For dedicated DS3 transport, however, an ILEC must unbundle if either wire center is classified as Tier 3.

Last August, CenturyLink petitioned to reclassify several Oregon wire centers, arguing each had a sufficient number of fiber-based collocators to justify the requested reclassification. In Order No. 18-008, we adopted a partial stipulation among CenturyLink, Commission Staff, and Integra that resolved all issues except the following questions: (1) whether the Oregon City wire center should be further reclassified from Tier 2 to Tier 1; and (2) whether the Corvallis wire center should be reclassified from Tier 3 to Tier 2.

In Order No. 18-008, we acknowledged the stipulated facts set forth below to be used to brief these two remaining issues. Staff and the parties submitted opening and reply briefs on the remaining questions on January 17, 2018, and February 7, 2018 respectively.

III. FACTS

The stipulated facts we acknowledged in Order 18-008 are, as follows:

> CenturyLink identifies at least three fiber-based collocators in the Oregon City wire center and at least two in the Corvallis wire center. In each of these two wire centers, CenturyLink identifies another carrier, called the

"Disputed Carrier," alleged to meet the criteria to be a fiber-based collocator. Integra disagrees.

The factual characteristics of the Disputed Carrier are not contested. The parties agree that the Disputed Carrier: (1) is unaffiliated with CenturyLink; (2) maintains collocation arrangements within CenturyLink's Oregon City and Corvallis wire centers, each of which has an active electrical supply; and (3) operates a fiber-optic cable that terminates at collocation arrangements within CenturyLink's Oregon City and Corvallis wire centers. The cables owned and operated by the Disputed Carrier connect the Disputed Carrier's collocation spaces in CenturyLink's relevant central offices to end-user customer premises. These customer premises are outside the Oregon City and Corvallis wire centers but within the CenturyLink wire center exchange boundary.

The Disputed Carrier also leases unbundled dark fiber from CenturyLink, on a non-IRU[2] basis, that connects to the Disputed Carrier's collocation arrangements within CenturyLink's central offices. This leased dark fiber also connects to the Disputed Carrier's own fiber network through collocation spaces in other CenturyLink end offices not addressed in this proceeding.

IV. POSITIONS

All parties agree that to answer the two open questions, we must decide whether the Disputed Carrier in each wire center at issue qualifies as a fiber-based collocator by interpreting 47 C.F.R. § 51.5 and the FCC's discussion of that rule. A fiber-based collocator is defined in 47 C.F.R §51.5 as follows:

> A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an

[2]In the context of dark fiber, an IRU, or Indefeasible Right of Use, is a right to use the fiber that cannot be taken away. It generally refers to dark fiber that has been purchased, rather than leased.

> indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

In the TRRO, the FCC stated: "[w]e define fiber-based collocation simply. For purposes of our analysis, we define fiber-based collocation as a competitive carrier collocation arrangement, with active power supply, that has a nonincumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center"[3]

As stipulated, all parties agree that the Disputed Carrier is unaffiliated with CenturyLink and maintains collocation arrangements within CenturyLink's Oregon City and Corvallis wire centers, each having an active electrical supply. They dispute, however, whether the cable operated by the Disputed Carrier "leaves the wire center."

A. CenturyLink

CenturyLink represents that the Disputed Carrier in both wire center operates a fiber optic cable meeting each of separate requirements of 47 C.F.R. § 51.5: (1) the fiber terminates in the collocation space; (2) it leaves the wire center premises; and (3) it is owned by the collocator who is unaffiliated with CenturyLink. For this reason, CenturyLink asks us to reclassify its Oregon City wire center from Tier 2 to Tier 1, and to reclassify its Corvallis wire center from Tier 3 to Tier 2.

CenturyLink contends that 47 C.F.R. § 51.5 requires that only the cable itself, and not its traffic, leave the wire center. CenturyLink explains that, given that the "clear and plain language of the rule states that the requirement pertains *to the cable itself*, not the traffic on the cable,"[4] "[a]nd given that Integra concedes that the cable exits the wire center to serve an end-user, outside of the wire center, Integra must agree that the fiber optic cable leaves the center," leaving no real quarrel in this case.[5]

To the question of whether a fiber optic cable really leaves a wire center when it serves an end user, CenturyLink responds that the FCC does not explicitly exclude a fiber-based collocation that serves only an end-user, even though it could have easily done so. In fact, CenturyLink observes, the FCC did not place any limits on the nature of the service

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[3] TRRO ¶ 102.
[4] CenturyLink Opening Brief at 4 (Jan 17, 208) (*emphasis* in original).
[5] *Id.* citing Stipulated Facts ¶ 3.

provided over a cable, stating that "we find that a competing carrier's collocation facilities shall count toward the qualification of a wire center for a particular tier *irrespective of the services that the competing carrier offers* because the fiber-based collocation indicates an ability to deploy facilities and because it would exponentially complicate the process of counting such collocation arrangements."[6]

CenturyLink also contends that the Disputed Carriers have an "entrance facility" in each wire center, and that the FCC has definitely stated that entrance facilities are a type of transport.[7] Thus, CenturyLink dismisses any suggestion that the Disputed Carriers' connections to end-users are not a transport facility.

Finally, CenturyLink relies on the FCC's intent that the non-impairment test be self-effectuating, meaning that an ILEC should be able to validate the criteria without consultation with each of the collocators.[8] If Integra's interpretation is adopted, CenturyLink observes that an ILEC would need to consult with every collocator to determine if its cable serves an end-user.

B. Integra

At the outset, Integra reminds us that changing the non-impairment classification of an ILEC's wire center is a permanent action that is not reversible. The changes requested by CenturyLink would permanently alter the availability of UNEs such as dark fiber, unbundled DS3 transport, and unbundled DS1 transport, Integra explains. For this reason, Integra urges us to take care when determining whether CenturyLink meets the FCC's criteria for the requested reclassifications.

The FCC measures the competitive potential of each wire center, Integra explains, "based either on the line density of the wire center or whether competitors have deployed alternative transport facilities out of that wire center,"[9] using business line counts as a proxy for line density, and fiber-based collocations as a proxy for alternative fiber-transport providers. Integra argues that "a fair reading of the FCC's fiber-based collocation rule and its intent demonstrates that the intent was not to allow the presence of end user fiber (*i.e.*, non-transport fiber) alone to support a conclusion that an ILEC's obligation to provide unbundled transport facilities should be relaxed."[10] Integra argues that a fiber optic cable that connects an end user customer to a collocation space, as

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[6] *Id.* quoting TRRO, ¶ 102 (*emphasis* added).
[7] CenturyLink Reply Brief at 3 (Feb 7, 2018), citing TRRO ¶ 138, and FN 384.
[8] *Id.*, at 5 citing TRRO, ¶ 3 ("[w]e believe that the impairment framework we adopt is self-effectuating, forward-looking, and consistent with technology trends that are reshaping the industry."
[9] Integra Opening Brief at 2 (Jan 17, 2018).
[10] *Id.* at 3.

deployed by the Disputed Carrier in each of CenturyLink's wire centers, may not be used as a competitive fiber transport, and therefore should not be considered be a fiber-based collocator under the FCC's rules.

Integra maintains that transport fiber and end user fiber are different facilities, not different services. Integra acknowledges the FCC's statement that "facilities shall count toward the qualification of a wire center for a particular tier irrespective of the services that the competing carrier offers," but explains that the FCC's determination that the carriers' collocation facilities shall count regardless of services provided is a reference to a carrier using fixed-wireless or some other technology for transport, rather than fiber, not a reference to the equality of transport and end-user facilities."[11]

In any case, Integra alleges that the Disputed Carriers fail to qualify as a fiber-based collocator because neither *operates* "a fiber-optic cable that can be said to leave the incumbent LEC wire center premises."[12] Integra asserts that the conclusion that any fiber-optic cable that physically leaves a wire center premises must also terminate at a collocation arrangement within the wire center conflates the criteria.

In order to uniquely read the termination and leaving conditions, Integra argues that each must be understood as a subset of the overarching requirement that a carrier *operate* a fiber-optic cable or a comparable transmission facility. Operating a fiber-optic cable means placing traffic over that cable, Integra asserts. Integra quotes the Oregon Supreme Court's interpretation of "operate," for support: "a company operates a cable communications system by causing the system to function—that is, to send or receive electronic or electrical signals over a cable communications system."[13] Integra concludes that, "[b]ecause the fiber-optic cable in question is dedicated to an end-user, rather than a transport facility, the traffic originated by the end user over this fiber never leaves the wire center premises." Rather, Integra argues that originating traffic from end user customers within the disputed wire center and associated with the disputed fiber-based collocator leaves the wire center premises on unbundled dark fiber, which does not count as fiber for the purpose of determining whether a carrier is a fiber-based collocator.

Integra also counters CenturyLink's self-effectuating argument that "suggest[s] every fiber-based collocation is simply derived, uncomplicated, and does not require verification,"[14] asserting that it is "contrary to actual implementation of the TRRO and

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[11] *Id.* at 5.
[12] *Id.* at 8.
[13] Integra Reply Brief at 3-4 (Feb 7, 2018), quoting *City of Eugene v. Comcast of Oregon*, 359 Or 528 (2016).
[14] *Id.* at 2, quoting CenturyLink Opening Brief, p. 5.

the process laid out in the TRRO Settlement Order."[15] Integra charges that it is also not uncommon for CenturyLink to withdraw a fiber collocator claim when challenged.

C. Staff

Staff supports CenturyLink's request for tier reclassifications. Staff contends that the Disputed Carrier in each wire center meets the plain text and structure of 47 C.F.R. § 51.5 to qualify as a fiber-based collocator. This conclusion, Staff asserts, is also consistent with the FCC's intent to use fiber-based collocators as a proxy by which it measures competitive potential, rather than as a direct measure of existing competition.

Staff notes that, although the phrase "wire center premises" is not defined, each of the terms "wire center" and "premises" are individually defined. A "wire center" means "the location of an [ILEC] local switching facility containing one or more central offices * * *." [16] "Premises" encompasses: (1) an ILEC's central offices and serving wire centers; (2) all ILEC buildings or similar structures containing an ILEC's network facilities; (3) all structures holding an ILEC's facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures; and (4) all land owned, leased, or otherwise ILEC controlled that is adjacent to these central offices, wire centers, buildings, and structures.[17]

In context of these definitions, Staff argues that the fiber optic cable of each Disputed Carrier leaves the ILEC wire center premises. Staff explains:

> The relevant "premises" are the building containing the central office equipment and its immediate environs. The Disputed Carrier owns cables that connect the Disputed Carrier's collocation spaces in those central office buildings to end-user customer premises located outside them. The cables therefore leave the wire center premises.[18]

Staff asserts that the fact that each customer location reached by the cables exists within a CenturyLink wire center so that no inter-office transport occurs is irrelevant. According to Staff, the federal definition of "fiber-based collocator" calls for the more general

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[15] *Id.* citing *In the Matter of Covad Communications Company; Eschelon Telecom of Oregon, Inc.; Integra Telecom of Oregon, Inc.; McLeodUSA Telecommunications Services Inc.; and XO Communications Services, Inc. Request for Commission Approval of Non-Impairment Wire Center List*, Docket No. UM 1251, Order No. 07-328 approving settlement agreement, Attachment 1, July 31, 2007 (TRRO Settlement Order).

[16] C.F.R. § 51.5.

[17] *Id.*

[18] *Id.* quoting Stipulated Facts ¶ 3.

classification of "transmission facilities," not a more specific category such as "transport facilities" or "interoffice facilities." Staff contends "[i]t would not be consistent with this text to read into the rule an additional requirement that the CLEC cable be used for inter-office transport in order to qualify as fiber based collocation."[19] Staff adds that the FCC explicitly stated that "facilities shall count toward the qualification of a wire center for a particular tier irrespective of the services that the competing carrier offers."[20] Staff explains that the FCC ignores the type of service for two reasons: (1) factoring in the type of service "would exponentially complicate the process of counting such collocation arrangements;"[21] and (2) any type of "fiber-based collocation indicates an ability to deploy facilities," no matter the service provided.[22]

Staff contends its statutory interpretation is consistent with that reached by the New Hampshire and Vermont commissions. Both were presented with a request by the CLEC Association of Northern New England (CANNE) to adopt a broad interpretation of "wire center premises" that would include the entire geographic area served by a wire center. This request, Staff indicates, would have had the effect of requiring CLEC facilities to leave the wire center exchange boundary rather than just the wire center building to qualify as a fiber-based collocator, and "echoes Integra's position, as a practical matter, as the definition would exclude facilities that leave the wire center building and go to an end user within the wire center exchange boundary."[23]

Both commissions denied the request. The New Hampshire Public Utilities Commission concluded that a CLEC "should be counted as a fiber based collocator if it operates a fiber optic cable * * * extending from its collocation facility within the wire center to a termination point located within the wire center area that is not owned or controlled by [the ILEC] (e.g., a fiber loop extending to a business), and meets all other criteria under the FCC definition."[24] Similarly, the Vermont Public Service Commission concluded that the proper interpretation of the rule must be that leaving the wire premises means leaving the "discrete facilities of an ILEC: buildings, structures, and realty."[25] Although

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[19] *Id.* at 8-9.
[20] *Id.* at 9, quoting TRRO ¶ 102.
[21] TRRO ¶ 102 (*emphasis* added).
[22] *Id.*
[23] Staff's Opening Brief at 9.
[24] Staff's Opening Brief at 10 (Jan 17, 2018), *citing Northern New England Telephone Operations, LLC d/b/a Fairpoint Communications - NNE, 25 Order Reclassifying Certain Wire Centers and Extending Transition Period*, Order No. 25,580, DT 12-337, 2013 WL 5674162, at *14 (New Hampshire Public Utilities Commission Oct. 7, 2013), *clarification denied*, 2014 WL 1826759, at *4 (Feb. 21, 2014).
[25] *Id. at* 10, citing *Petition of CLEC Association of Northern New England, Inc and its Affected Members for Review of Proposed Wire Center Reclassifications*, Order, Docket No. 7958, 2014 WL 2702702, 24 at *16-*20 ("The definition of `wire center premises' clearly applies only to the physical structure, not to the broader area in which service is provided.").

finding it logical that "the capability of providing transport, in economic terms, might be pegged to collocation arrangements involving facilities that themselves involve transport," Staff indicates that the Vermont board determined, "there is simply no basis to conclude this is what the FCC intended."[26]

Staff concludes that, not only does each Disputed Carrier meet the legal definitional criteria to qualify as a fiber-based collocator, this qualification is also consistent with the FCC's intent to develop a proxy that measures competitive potential instead of using a direct measure of actual competition for inter-office transport. Staff explains that the FCC chose not to require direct measurement of deployment of competitive inter-office transport alternatives as an impairment standard, but rather determined that the "best and most readily administrated indicator of the potential for competitive deployment is the presence of fiber-based collocators in a wire center."[27] Although requiring fiber-based collocators to have deployed alternative inter-office transport facilities may be intuitively appealing, Staff states, it is inconsistent with the FCC's proxy approach for estimating the potential for deployment, and would convert the proxy into an actual measure.

V. RESOLUTION

To determine whether the Disputed Carrier in each of CenturyLink's wire centers at issue qualifies as a fiber-based collocator by interpreting 47 C.F.R. § 51.5 and the FCC's discussion of that rule, we must, like the New Hampshire and Vermont commissions before us, examine the text and intent of the FCC. When we do that, we are persuaded by the arguments presented by CenturyLink and Staff that the Disputed Carrier, in CenturyLink's Oregon City and Corvallis wire centers, meets all of the criteria under the plain text and structure of 47 C.F.R. § 51.5 to qualify as a fiber-based collocator.

In context of Staff's analysis of the relevant federal rule definitions, we agree that the fiber optic cable of each Disputed Carrier leaves the ILEC wire center premises. While logically compelling on its face, Integra's argument that end-user fiber alone should not obviate an ILEC's duty to provide unbundled transport facilities because it does not constitute competitive fiber transport is not supported by the plain language of the FCC's rule. We agree with Staff that there is no textual basis for construing additional

[26] *Id.* In its brief, Staff acknowledges that it came across contrary statements, but concludes that it is not on point because those analyses address a different issue regarding whether cross-connected carriers meet the criteria to qualify as fiber-based collocators. Staff explains that because cross-connects do not leave the wire center building or structure, they do not present the same legal question raised in this proceeding.
[27] *Id. at* 11, citing TRRO at ¶ 93 (*emphasis* added).

requirements (e.g., that an ILEC's fiber optic cable must be used for inter-office transport) than those clearly set forth in the rule.

In any case, reinterpreting the rule to have us determine that a fiber-based collocation actually deployed alternative transport facilities would, we conclude, extend beyond the role given to this Commission under federal law. The FCC developed the proxy test based on fiber-based collocator and business lines after judicial rejection of the FCC's subdelegation to state commissions to conduct granular, route-by-route impairment analyses.[28]

Concluding that the Disputed Carrier in CenturyLink's Oregon City wire center is a fiber-based collocator, we find that four fiber-based collocators exist there and the wire center should be reclassified as Tier 1. Similarly, concluding that the Disputed Carrier in CenturyLink's Corvallis wire center is a fiber-based collocator, we find that three fiber-based collocators exist there and the wire center should be reclassified as Tier 2.

VI. ORDER

IT IS ORDERED that:

1. CenturyLink's Oregon City wire center is reclassified from Tier 2 to Tier 1;

2. CenturyLink's Corvallis wire center is reclassified from Tier 3 to Tier 2.

Made, entered, and effective JUN 27 2018.

Megan W. Decker
Chair

Stephen M. Bloom
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

[28] *United States Telecom Assn. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 313 (2004).