

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK COMMUNICATIONS,
LLC,

Respondent.

DOCKET UT-181051

COMMISSION STAFF RESPONSE
TO MOTION FOR THIRD PARTY
DISCOVERY

1 On July 9, 2021, CenturyLink Communications, LLC (CenturyLink) filed a Motion for Third Party Discovery (Motion) with the Washington Utilities and Transportation Commission (Commission), requesting that the Commission order TeleCommunication Systems, Inc. d/b/a Comtech Telecommunications Corp. (Comtech) and Transaction Network Services, Inc. (TNS), which are not parties to the current docket, to make documents and witnesses available for discovery and depositions. Although Commission Staff (Staff) acknowledges that the Commission has the power to compel Comtech and TNS to engage in discovery, it should not do so. Under the current procedural schedule, Staff is required to file testimony by July 29, and therefore Staff would be substantially prejudiced by having to file in the absence of any additional information that may be provided by Comtech and TNS. Therefore, the Commission should deny CenturyLink’s Motion. Alternatively, if the Commission grants CenturyLink’s Motion, the Commission should modify the procedural schedule in order to afford all parties to this docket sufficient time to actively participate in such discovery, ensure that any new discovery is subject to confidentiality protection, and provide Comtech and TNS with an opportunity to respond or intervene.

I. STANDARDS

2 Under WAC 480-07-400, subpoenas are available as a means of discovery as provided in Title 80 or 81 RCW and chapter 34.05 RCW. RCW 34.05.446(1) further provides that “the presiding officer may issue subpoenas A subpoena may be issued with like effect by the agency or the attorney of record on whose behalf the witness is required to appear.” The Commission has interpreted this provision as “permissive – for both the agency and participating counsel – and imposes no obligation on the Commission to issue a subpoena under any circumstances.” *Stericycle of Washington, Inc. v. Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*, Docket TG-121597, Order 06, 4 ¶ 13, n.9 (December 12, 2013). Therefore, the issuance of a subpoena is a discretionary matter for the Commission.

3 WAC 480-07-410(1) states in part:

A party may depose a person who has not been identified as a potential witness only if the presiding officer approves the deposition. The presiding officer may approve the deposition of a person who has not been identified as a potential witness on a finding that the person appears to possess information that is necessary to the party’s case, the information cannot reasonably be obtained from another source, and the probative value of the information outweighs the burden on the person proposed to be deposed. The Commission is an agency of the state of Washington authorized by statute to regulate the rates, services, facilities, and practices of public service companies, including telecommunications companies.

4 The Commission has previously noted that deposition of third parties that have not been designated as witnesses is an extraordinary discovery request. *Stericycle of Washington, Inc. v. Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington*, Docket TG-121597, Order 06, 5 ¶ 15 (December 12, 2013) (“We agree with Staff that deposing third parties who have not been designated as potential witnesses is an extraordinary form of discovery in Commission proceedings.

Indeed, Stericycle cites no proceeding in which the Commission has ordered the depositions of such persons.”).

II. ARGUMENT

5 Although Staff does not favor use of third party discovery as a matter of policy, Staff acknowledges that under the specific circumstances of this case third party discovery may be warranted. Nevertheless, Staff opposes CenturyLink’s Motion as presented because Staff will not have an opportunity to participate in and review the additional discovery of Comtech and TNS prior to filing its initial testimony. Staff’s initial testimony is due this month, and Staff will be substantially prejudiced by having to file initial testimony without the benefit of the additional discovery sought by CenturyLink. Allowing for the filing of supplemental testimony at a later date would be an inadequate remedy in this context because the issues subject to discovery are likely to be relatively technically complex and would benefit from being oriented within Staff’s testimony overall. Therefore, the Commission should deny CenturyLink’s Motion. Alternatively, the Commission should grant CenturyLink’s Motion only if the requested additional discovery is subject to the following three modifications and/or clarifications:

6 First, if the Commission grants CenturyLink’s Motion, Staff requests that the Commission also modify the procedural schedule to allow Staff an opportunity to actively participate in the discovery process and review any additional discovery produced by Comtech and/or TNS prior to the filing of its testimony. Staff maintains that if information in the possession of Comtech and/or TNS is sufficiently material to this proceeding to warrant extraordinary third party discovery, then Staff, at a minimum, should have the benefit of that information prior to filing its testimony.

7 Second, if the Commission grants the Motion, Staff requests that the Commission modify the terms of the protective order in this case (Order 02) to allow Comtech and/or TNS to benefit from the confidentiality protections afforded in the Order. Staff anticipates that CenturyLink's questions to both Comtech and TNS would involve sensitive business information that would not normally be available to the public. Therefore, in order to prevent inadvertent disclosure of confidential material, the Commission should extend confidentiality protection to Comtech and/or TNS's discovery responses.

8 Third, insofar as neither Comtech nor TNS is a current party to the proceeding, Staff suggests that Comtech and TNS have an opportunity to respond to CenturyLink's motion, in the interest of procedural fairness. Finally, Comtech and TNS should be given an opportunity to either intervene in the case directly, or to participate as a witness for one of the parties, both of which would require a continuance.

III. CONCLUSION

9 The Commission should deny CenturyLink's Motion. If the Commission grants CenturyLink's Motion, it should only do so subject to the three modifications/clarifications identified above.

Respectfully submitted,

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