

Docket No. UT-170042 - Vol. III

In the Matter of CenturyLink

April 3, 2019



206.287.9066 | 800.846.6989

1325 Fourth Avenue, Suite 1840, Seattle, Washington 98101

www.buellrealtime.com

email: info@buellrealtime.com



In the Matter of the Notice of Transaction and Application of,)
CENTURYLINK) Docket No. UT-170042
For an Order Declining to Assert Jurisdiction Over, or in the Alternative, Expedited Approval of the Indirect Transfer of Control of Level 3 Communications, LLC, Broadwing Communications, LLC, Wiltel Communications, LLC, Global Crossing Telecommunications, Inc., and Level 3 Telecom of Washington, LLC to CenturyLink, Inc.)

ADMINISTRATIVE LAW JUDGE GREGORY J. KOPTA

9:30 a.m.

REPORTED BY: TAYLER GARLINGHOUSE, CCR 3358

Buell Realtime Reporting, LLC
1325 Fourth Avenue, Suite 1840
Seattle, Washington 98101
(206) 287-9066 | Seattle
(360) 534-9066 | Olympia
(800) 846-6989 | National

A P P E A R A N C E S

ADMINISTRATIVE LAW JUDGE:

GREGORY J. KOPTA
Utilities and Transportation
Commission
1300 South Evergreen Park Drive SW
Olympia, Washington 98504
(360) 664-1160

FOR COMMISSION STAFF:

SALLY BROWN
Senior Assistant Attorney General
PO Box 40128
Olympia, Washington 98504
(360) 664-1193
sallyb@atg.wa.gov

HARRY FUKANO
Assistant Attorney General
PO Box 40128
Olympia, Washington 98504
(360) 586-5522
harry.fukano@utc.wa.gov

FOR PUBLIC COUNSEL:
(Via bridge)

LISA GAFKEN
Assistant Attorney General
Office of the Attorney General
800 - 5th Avenue, Suite 2000
Seattle, Washington 98104
(206) 464-6595
lisa.gafken@atg.wa.gov

FOR CENTURYLINK:

LISA ANDERL
Associate General Counsel
1600 - 7th Avenue, Room 1506
Seattle, Washington 98191
(206) 345-1574
lisa.anderl@centurylink.com

A P P E A R A N C E S (Cont.)

ALSO PRESENT:

SUSIE PAUL
Commission Investigator

* * * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 OLYMPIA, WASHINGTON; APRIL 3, 2019

2 9:30 A.M.

3 --000--

4 P R O C E E D I N G S

5
6 JUDGE KOPTA: Then let's be on the record in
7 Docket UT-132234, captioned Washington Utilities and
8 Transportation Commission versus CenturyTel of Inter
9 Island, Inc, d/b/a CenturyLink, Docket UT-140597, which
10 is captioned Washington Utilities and Transportation
11 Commission versus Qwest Corporation, d/b/a CenturyLink
12 QC, and Docket UT-170042, captioned In the Matter of the
13 Notice of Transaction and Application of CenturyLink for
14 an -- well, for a whole bunch of stuff involving level
15 3.

16 MS. BROWN: That works.

17 JUDGE KOPTA: I'm Gregory J. Kopta, the
18 administrative law judge who is presiding, and we are
19 here to discuss competing motions having to do with
20 access to confidential information provided in those
21 dockets, or at least two out of three of those dockets.

22 Let's start by taking appearances beginning
23 with the Company.

24 MS. ANDERL: Good morning, Your Honor. Lisa
25 Anderl, in-house attorney representing CenturyLink. And

1 I've provided my full contact information on my business
2 card to the court reporter.

3 JUDGE KOPTA: All right. Thank you.
4 And for Staff?

5 MS. BROWN: Sally Brown, Senior Assistant
6 Attorney General, appearing on behalf of Commission
7 Staff.

8 MR. FUKANO: Harry Fukano, Assistant
9 Attorney General, appearing on behalf of Commission
10 Staff.

11 JUDGE KOPTA: And anyone on the bridge line
12 wishing to make an appearance?

13 MS. GAFKEN: Yes, this is Lisa Gafken,
14 Assistant Attorney General, appearing on behalf of
15 Public Counsel.

16 JUDGE KOPTA: Anyone else? Hearing nothing,
17 we will proceed.

18 All right. First I wanted to clarify, as I
19 understand it, we are now only talking about Dockets
20 UT-140597 and UT-170042; is that correct? I'm seeing
21 head nods.

22 Is that your understanding, Ms. Anderl?

23 MS. ANDERL: I've been advised by Staff that
24 they are no longer seeking information in the 1-3
25 docket.

1 JUDGE KOPTA: Okay. Then at least we've
2 narrowed the scope a little bit.

3 Also, I have read the pleadings and it
4 appears that there is not a dispute as to what
5 CenturyLink has provided in its motion, which is that
6 what Staff is requesting is outside the bounds of the
7 protective orders that were issued in those two dockets;
8 is that correct? Is Staff contesting whether that is an
9 issue?

10 MR. FUKANO: No, we would I think both agree
11 as to that point.

12 JUDGE KOPTA: All right. So then really
13 what it boils down to it seems to me is Staff wants its
14 expert witness to be able to review certain confidential
15 information that was provided in those dockets and has
16 proposed a couple of ways of doing that. And also,
17 yesterday, I have received and have all the parties
18 received a list from Staff of the documents that it
19 seeks at this point for its experts to review in
20 conjunction with the investigation that Staff is
21 undertaking of a recent 911 outage involving the
22 company; is that correct, Mr. Fukano?

23 MR. FUKANO: That is correct.

24 JUDGE KOPTA: Um...

25 MS. ANDERL: Your Honor, if I can just

1 clarify. It's not established on the record that
2 CenturyLink provision of 911 was impaired or
3 interrupted.

4 JUDGE KOPTA: I was not intending to say one
5 way or the other. I was simply referencing that that's
6 the subject matter of the investigation.

7 MS. ANDERL: I just want to be really
8 careful.

9 JUDGE KOPTA: Understood, and I accept and
10 appreciate that clarification. Ms. Anderl, do you --
11 have you had a chance to consult with your client about
12 the list of documents that Staff wants to have its
13 expert be able to review?

14 MS. ANDERL: Not -- not really. We -- we
15 got it at 3:30 yesterday afternoon, and I had no time to
16 reach out to anybody. Most people are in time zones to
17 the East. But I'm very familiar with all of the
18 documents and very familiar with and -- and -- and
19 comfortable with the position that the Company would
20 take on those documents.

21 JUDGE KOPTA: All right. And as I
22 understand it from Staff's pleading, there is a
23 nondisclosure agreement in place between the Company and
24 Staff; is that true?

25 MS. ANDERL: No, there is a nondisclosure

1 agreement in place between the Staff and its expert.

2 JUDGE KOPTA: I see. So there is nothing
3 between the Company and Staff?

4 MS. ANDERL: Not other than the protective
5 orders in these closed dockets, that's right. No,
6 there's no protective order in the hidden docket,
7 181051.

8 JUDGE KOPTA: Have there been any
9 discussions between the Company and Staff about entering
10 into such an agreement?

11 MS. ANDERL: I offered -- before filing my
12 motion to enforce the protective agreement, I offered to
13 work through documents on a document-by-document basis,
14 but until I got this yesterday, I had not received a
15 response to that offer.

16 JUDGE KOPTA: Okay. And from Staff's
17 perspective -- well, I'm not going to ask that you
18 negotiate with the Company as we're sitting here this
19 morning. That doesn't make sense.

20 MS. ANDERL: Well, Your Honor, I'm -- I'm
21 kind of happy to cut to the chase on some of this if you
22 would like?

23 JUDGE KOPTA: I -- I would like, because
24 I'm -- I'm not really comfortable with any of the
25 options that are before me right now so...

1 MS. ANDERL: Okay. So here you go. I had
2 my whole long argument prepared, and I won't give it
3 unless you want it, but needless to say, in both of
4 these dockets there were countless -- well, not
5 countless, because we can count them, but confidential
6 documents filed, many of which were made a part of the
7 Commission's record. Many more of which were provided
8 in discovery and not made a part of the record, but
9 which would be available to the expert if the protective
10 order will modify per Staff's request.

11 And many of those, particularly in the
12 merger docket, have absolutely no bearing on even the
13 provision of telecommunication service much less the
14 provision of 911. There's information in there about
15 our pro forma adjusted revenue, EBITDA, Capex, debt
16 levels, free cash flow, their access line counts,
17 there's broadband penetration numbers.

18 That is all very sensitive business
19 information. It is inconceivable to me that Staff's
20 expert would have a need to see any of that. And, in
21 fact, none of that information is on the document that
22 Mr. Fukano just provided. So that's good.
23 Nevertheless, as I said, modifying the protective order
24 in the way that Staff requests would -- would not
25 protect against disclosure of that.

1 I do not understand why Staff wants its
2 expert to see the compliance reports or the diversity
3 audits filed in Docket 140597. I do not understand the
4 relevance of any of the NORS outage reports.

5 I do, however, agree that the root cause
6 analysis, the last document on the list filed on or
7 about February 12th, 2019, regarding the December 27th
8 and 28th network event is something that if they are
9 conducting an investigation into that network event,
10 their expert should see.

11 It was filed, you know, basically for
12 convenience in the merger docket, because there was no
13 place else to put it. If, you know, Docket 181051 were
14 a novel informal public docket, you could issue a
15 protective order in that, maybe you still can do that.
16 And we would be happy to file that root cause analysis
17 in that docket thereby allowing Staff's expert access to
18 that.

19 The other two documents that are at issue
20 are the confidential version of the settlement agreement
21 in the merger docket. I'm -- I didn't have time to
22 review that, but in my recollection is that, the
23 confidential information did not have any bearing on 911
24 or the military department. And so I don't know why
25 we'd need a confidential version of the settlement

1 agreement with attachments to be provided to the expert.

2 And with regard the Washington State
3 Military Department, amendment M, that is confidential.
4 It's a provision between the Company and Military. I
5 think Military asked for it to be confidential. With
6 Military's consent, we would obviously refile it in the
7 181051 docket if a -- if a protective order were issued
8 there, and we wouldn't object to that.

9 So boils down to Staff is proposing 30
10 documents with a caveat that the list is potentiality
11 subject to change. We would agree to two of them.

12 JUDGE KOPTA: Okay. And from your
13 perspective, you would want a protective order to be
14 able to do that as opposed to a nondisclosure agreement
15 between you and Staff, for example?

16 MS. ANDERL: That's right. I think a
17 protective order is -- I'm not sure a nondisclosure
18 agreement, a public entity can even enter into that and
19 have it be enforceable. If somebody were to submit a
20 request for public records, I think a protective order
21 gives us more protection.

22 JUDGE KOPTA: All right. Let's hear from
23 Staff. What's -- you've heard from what the Company
24 has -- has said. I'm loath to get into a back and forth
25 in terms of how necessary these documents are since

1 there are at least two that the Company has agreed are
2 appropriate to provide to your expert and relay the
3 issue. Before me at the moment is whether and under
4 what circumstances the Commission can do something to
5 allow that I guess is the easiest way to say it. But
6 I'll let you respond, Mr. Fukano.

7 MR. FUKANO: Well, I believe that the
8 Commission has two possible methods of doing that, as
9 I've detailed in my motion. And I think the -- the
10 protective orders in Dockets UT-170042 and UT-140597
11 form the basis for CenturyLink's objection in this
12 matter. And those both -- orders both state absent a
13 protective order, a significant risk exists that
14 confidential information might become available to
15 persons who have no legitimate need for that information
16 and that in- -- that injuries to the information
17 provider may result.

18 The language of the protective order suggest
19 that the limitation on access to confidential
20 information serves two purposes; first, that it will
21 prevent access to persons who have no legitimate need
22 for that information; and second and relatedly, to
23 prevent such persons from disclosing that sensitive
24 information thereby causing injury to the provider.

25 Staff would argue that Mr. Roach does have a

1 legitimate need to review that information filed in
2 docket -- in this docket and that sufficient safeguards
3 have been and will be put in place to preserve the
4 confidentiality of that information.

5 So it's further detailed in the pending
6 stage of the motion, the Commission has hired Mr. Glenn
7 Roach to act as a consultant for the purpose of Docket
8 UT-181051, and as part of this arrangement, Mr. Roach
9 will be responsible for preparing a report related to
10 the December 2019 991 service outage, assisting Staff
11 with discovery requests and preparing testimony in
12 addition to other matters. Given that Mr. Roach will
13 participate extensively in the investigation and
14 potential hearing in Docket UT-181051, Staff would
15 maintain that Mr. Roach does have a legitimate need to
16 review the information.

17 Secondly, Staff would contend that there are
18 sufficient safeguards to preserve confidentiality of
19 CenturyLink information for three reasons; first, as
20 discussed earlier, Staff has entered into a
21 nondisclosure agreement with Mr. Roach, the terms of
22 which are detailed in Appendix B, which prohibit
23 Mr. Roach from disclosing any of the information that
24 Staff provides him.

25 Second, Staff would anticipate and support

1 the Commission issuing an additional protective order in
2 Docket 181 as we've been discussing to provide
3 additional confidentiality protection on the same terms
4 of similar terms as those already entered into Docket
5 UT-17 and UT-14.

6 And third, Staff would like to clarify that
7 the independent consultant would not have any unfettered
8 access to rummage through the Commission SharePoint
9 internal system. Rather, Staff would not intend to
10 allow the independent consultant to go on a fishing
11 expedition through the materials that it would be -- he
12 would be able to access anything he wanted. That
13 material would have to come through Staff and be
14 provided to the independent consultant.

15 And while Staff would be amenable to either
16 alternative suggested in its motion, it would prefer to
17 modify the protective order, and we would prefer that
18 for three reasons. The first would be that it would
19 avoid duplicative, accumulative refiling of the same
20 information.

21 The second would be that modification of the
22 protective order would permit Staff to add- --- to
23 provide the consultant with additional confidential
24 information if that information was determined to be
25 relevant after reviewing the information that Staff has

1 already requested.

2 And third, as a general matter, Staff would
3 prefer to review the information that it already
4 possesses rather than requesting that information,
5 because the Company -- rather than asking the Company
6 for -- for a State company for documents because the
7 request to the Company presents the Company an
8 opportunity to essentially characterize or influence
9 Staff's review of those documents. That is, a company
10 is given additional opportunity to lobby Staff about the
11 content of those documents. And this is not, to
12 clarify, a reflection on CenturyLink but just a general
13 investigative concern that Staff has presented.

14 And so in summary, it doesn't appear as
15 though it is an issue as to whether Mr. Roach could
16 access the confidential information, but it appears to
17 be how Mr. Roach will access that confidential
18 information. Staff would assert that the Commission
19 should modify the protective order in Docket 14 and 17
20 to permit Mr. Roach to review the confidential
21 information as Mr. Roach has a legitimate need to access
22 the information, and Commission safeguards will be put
23 in place to maintain confidentiality of CenturyLink's
24 information. In the alternative, we would request a
25 subpoena under the statutory authority as listed in my

1 motion.

2 MS. ANDERL: Your Honor, if I may respond?

3 JUDGE KOPTA: In just a moment.

4 I have a couple of concerns. One is, the
5 protective order in both of those dockets requires
6 confidential information to be returned to the person
7 who provided it except for counsel records, which are
8 exhibits, and the Commission will have whatever is on
9 file. So theoretically, and I won't ask whether this is
10 in true practice, it's not possible to rummage through
11 files for discovery, because all of that information
12 should have been destroyed or returned.

13 The more pressing issues are, Staff is
14 asking me to do something the Commission has never done
15 before, and that is to modify a protective order to
16 allow someone who is not involved in the actual dockets
17 to review confidential information, or alternatively, to
18 enter a protective order in a docket that is not yet an
19 adjudication, which the Commission has consistently
20 declined to do in other circumstances, for example, in
21 Integrated Resource Plan dockets.

22 So I'm a little bit uncomfortable going that
23 step. I understand your arguments, Mr. Fukano, and I
24 understand Staff's desire for its expert to be able to
25 review this information. I'm just not comfortable at

1 this point how the Commission can best accommodate that.

2 And with those reservations, Ms. Anderl,
3 would you like to respond to what Mr. Fukano said?

4 MS. ANDERL: Yes, Your Honor. I've been
5 trying to keep my -- level-headed about this, but, you
6 know, frankly, I am outraged by Staff's behavior so far.
7 I mean, we have I think already multiple violations of
8 this protec- -- these protective orders, which very
9 clearly in paragraph 7 state that no confidential
10 information distributed or obtained in this protec- --
11 under this protective order may be requested and
12 reviewed, used or disclosed by any party or counsel
13 except for purposes of this proceeding.

14 To the extent that we are already this far
15 along, that all of these outage reports have been
16 identified, I have to assume that Staff attorneys
17 reviewed them. These -- the two attorneys who sit
18 before you today, one of them I have no record of having
19 received an attorney Exhibit A in the docket. The
20 other, Ms. Brown, filed an attorney Exhibit A in January
21 of this year.

22 So it is clear that the -- but there's no,
23 of course, ability for us to object to the attorney
24 exhibits, only the expert exhibits. But the dockets
25 long closed have now been already opened by Staff and

1 information has been analyzed for purposes not of that
2 docket, but for purposes of a new investigation.

3 I find this to be outrageous and really
4 disconcerting. Staff's recommendation that you now
5 retroactively modify the protective order to somehow
6 sanction what they did is something that would be, I
7 think, horrible precedent. It would have an extremely
8 chilling effect on any company's ability or willingness
9 to disclose confidential information in a proceeding
10 with any degree of confidence that it would be properly
11 protected.

12 I think that you should deny Staff's motion
13 to modify the protective order, you should deny Staff's
14 motion for an investigative subpoena, and I'm -- as I
15 said, I am, in spite of being angry about this, willing
16 to work with Staff on those two documents that I believe
17 are incontrovertibly relevant to the investigation.
18 Fine, let's figure out how to protect them, but beyond
19 that, I do not believe that -- I do not believe that
20 Staff should be given any of the relief that it asks
21 for.

22 JUDGE KOPTA: All right.

23 MR. FUKANO: I have a brief response.

24 JUDGE KOPTA: Yes, you may.

25 MR. FUKANO: I'd like to clarify for the

1 record that although I included the NORS report and
2 other information to the request for Staff, I viewed
3 those through the SharePoint internal system and did not
4 view the content of those documents. And so I do not
5 know necessarily what those documents contain because I
6 have not signed a required confidentiality measures, but
7 I had those identified by Staff as being potentially
8 responsive to their investigation.

9 And I'd like to further add that Staff does,
10 under RCW 80.04.070, have the right to inspect the books
11 of any public service company, which would include
12 CenturyLink in this case. My request for a protective
13 order in that matter would be to help preserve any
14 confidentiality and add additional protection on top of
15 that. But I do believe that Staff would have the right
16 to access that information.

17 JUDGE KOPTA: Well, and that's true. And
18 obviously, RCW 80.04.095 specifically grants the
19 Commission the ability to review, to receive
20 confidential information, which implicitly means that
21 Staff can review that information. And there's always
22 been a bit of a debate about the necessity for Staff to
23 file the -- submit signature pages to the protective
24 orders since they already have the right to look at that
25 information. But that's a matter for a debate at

1 another day at another time.

2 I'm going to ask a practical question of
3 Staff and that's, if you don't get this information,
4 what happens? I mean, Staff can look at it, but the
5 expert can't. And so I know that much, but what --
6 how -- how is that going to or will it impair Staff's
7 investigation not to have the expert, your expert,
8 review this information?

9 MS. PAUL: Yes, as an investigator, that's
10 what I do and I investigate; however, I don't have the
11 technical expertise that we have contracted and the
12 assistance is necessary for us to have for me to be able
13 to do a thorough investigation and understand all the
14 issues.

15 JUDGE KOPTA: And --

16 MS. BROWN: May I add something, Your Honor?

17 JUDGE KOPTA: Yes, you may.

18 MS. BROWN: That is a gross understatement.
19 If -- if the Commission Staff's expert witness is denied
20 access to exhibits that were filed in previous dockets
21 that are now closed, that will have a very negative
22 effect on Commission Staff's investigation of the
23 CenturyLink 911 outage.

24 JUDGE KOPTA: If you were conducting this
25 investigation in the absence of these other dockets, are

1 these the sorts of documents that you would be asking
2 for as part of your investigation?

3 MS. PAUL: Yes.

4 JUDGE KOPTA: When you investigated the
5 previous incident involving 911, were these documents
6 that you -- same type of documents that you requested
7 from the Company?

8 MS. PAUL: I believe so, yes, but that was
9 from regulatory services. But yes, we did request those
10 documents.

11 MS. ANDERL: Your Honor, I -- I would
12 absolutely object. These NORS reports only started
13 being filed in the 170 docket. They were never provided
14 to Commission Staff on -- to my recollection in the 2014
15 911 outage. The circuit diversity audit and the FCC
16 compliance reports that were filed in the 911 docket
17 were filed after that docket was closed as part of the
18 settlement agreement. So these documents I do not
19 believe are similar to what was requested in prior
20 investigations.

21 MS. BROWN: That's -- that's -- Your Honor,
22 that's wholly irrelevant. These are called outage
23 reports. Central to this whole investigation in the
24 CenturyLink 911 outage. I know Ms. Anderl went on at
25 length about that these documents are in her -- in her

1 view are irrelevant to Staff's investigation and perhaps
2 not -- would not be likely to lead to the discovery of
3 admissible evidence. That's not what we're here to
4 discuss this morning.

5 The issue is whether or not Commission
6 Staff's expert, hired expert, is able to have access --
7 well, no, let me rephrase that.

8 The question is not whether or not this
9 particular -- Mr. Glenn Roach, the Commission Staff's
10 expert, will have access to these records. That's a
11 given. That will happen. The question is -- is how,
12 the means by which that will occur.

13 JUDGE KOPTA: And when.

14 MS. BROWN: Well, and when, sure. So I
15 mean, if we wait until this is no longer a hidden
16 docket, Commission Staff can propound data requests on
17 CenturyLink for every single one of these dockets -- on
18 every single one of these documents, not just two that
19 the Company is going to design to -- to allow that
20 Commission Staff may share with its expert.

21 So it may -- it will elongate the
22 proceeding, but I personally have no heartburn about
23 that, because the Federal Government is also
24 investigating this outage. So it's a que- -- it's a
25 question of -- of when, but not -- not if. And if the

1 Commission chooses to hamper Commission Staff's
2 investigation that -- talk about horrible precedent and
3 having a chilling effect. That would be the ultimate
4 outcome.

5 And it seems to me that there are -- there
6 are methods, the protective orders by their own terms
7 include a provision for modification of the existing
8 protective orders. And let's not overlook the
9 administrative law permits investigative subpoenas. So
10 that's -- that's another path to victory here. I -- I
11 can see this is somewhat problematic because we haven't
12 had a prehearing conference in UT-181051, but we're not
13 there yet.

14 JUDGE KOPTA: I know, and -- and that's what
15 I'm wrestling with is, I -- I take your point, that it
16 is a practical issue of when, not if, and yet at the
17 same time, doing what Staff has requested would be
18 something different than the Commission has done before,
19 and I have to keep in mind how that will play out in the
20 future if -- if we do what you've asked.

21 Let's go off the record for a moment.

22 (A break was taken from
23 9:58 a.m. to 10:57 a.m.)

24 JUDGE KOPTA: Let's be back on the record.
25 After some discussion off the record and some

1 consultation that I made with the Commissioners,
2 ultimately, we've decided to take this matter under
3 advisement, and we will issue an order resolving the
4 issues that have been presented in Staff's request.

5 But just so I understand, counsel for Staff
6 or Ms. Paul, have there been other circumstances in
7 which Staff has used an expert in an investigation
8 before it's become an adjudication; do you know?

9 MS. BROWN: This is Sally with A -- Sally
10 Brown with the AG's office. I have been trying to think
11 of other examples and not coming up with any. No,
12 it's -- it's typically, for example, in rate cases, we
13 hire a cost of money expert, but that expert gets
14 underway with his or her investigation once the
15 prehearing conference has been held and the protective
16 order has been entered. But it would be an --
17 unfortunate, I think, if the ultimate outcome is that
18 the Commission cannot hire experts in investigations no
19 matter how complex they are if the Commission lacks the
20 necessary or requisite expertise on its own Staff.

21 So that's a -- you know, you may ultimately
22 see a series of motions to amend complaints. For
23 example, we might wind up with a fifth amended
24 complaint. So it's -- it's awkward and unwieldy, and I
25 appreciate your consideration of and taking it

1 seriously.

2 JUDGE KOPTA: Would you consider an expert
3 witness that Staff has retained to be the equivalent or
4 actually Staff for that limited purpose?

5 MS. BROWN: Well, I considered that earlier
6 today, in fact, thinking that perhaps we could argue
7 that the consultant is an extension of Commission Staff.
8 However, the agreements that we've entered into with --
9 and typically when we enter into agreements with
10 consultants and expert witnesses as we have with
11 Mr. Roach, there's an express provision that states that
12 he or -- he or her, they're not extensions of Commission
13 Staff in the sense that they're employees or substitutes
14 for or stand in shoes of. So I have not been able to
15 resolve that in my mind, but I also went there.

16 JUDGE KOPTA: Yeah, okay. Well, I mean,
17 obviously this statute says the Commission and Public
18 Counsel and to the extent that an expert can be
19 considered as just another member of Staff of the
20 Commission for that limited purpose. That was the
21 question that came up in terms of our discussions.

22 MS. BROWN: Right, and -- and I appreciate
23 the -- the interesting issues that are raised and the
24 issues of first impression, but I also have very present
25 to mind that I would like the Commission to have present

1 to mind the fact that CenturyLink -- that CenturyLink
2 been a regulated company in this jurisdiction by this
3 Commission for decades. CenturyLink knows what it's
4 like to provide discovery responses and response to data
5 requests. CenturyLink's no need to fight
6 unsophisticated to these proceedings before the
7 Commission.

8 And so I will use the word "unfortunate,"
9 but it's very disappointing that -- that we're even
10 here. I mean, I'm shocked we're even here, but we are
11 where we are and that's going to be the tone of this
12 litigation going forward. Thank you.

13 JUDGE KOPTA: Okay. Does CenturyLink have a
14 view in terms of whether an expert witness that Staff
15 has retained would be considered Staff for purposes of
16 the statute?

17 MS. ANDERL: Yes, we do, and I don't think
18 they would be. I think the contracts indicate they're
19 independent contractors, and I -- I don't see how the
20 mantle of Staff could kind of encompass that. I mean, I
21 kind of, you know -- well, I'll leave it at that.

22 JUDGE KOPTA: And is it your view -- your
23 position also that Commission Staff, even though these
24 documents are part of the Commission's records, anyone
25 who is not involved in that particular case and signed

1 the protective order would not be able to look at those
2 confidential documents?

3 MS. ANDERL: Well, you know, the -- the
4 protective order's pretty clear that the information is
5 only to be used for purposes of that proceeding. I
6 suppose it's a little bit gray and I -- I mean, I don't
7 want to weaken my -- my position by admitting to a gray
8 area, but, you know, if there's a new employee,
9 obviously they have to have some way to get
10 institutional knowledge, right? And that's knowing the
11 history of some of the dockets in the case. Do they
12 need to see the confidential information? I don't know.
13 Does the Staff educating themselves on confidential
14 information in a closed docket technically violate the
15 protective order? I think it does.

16 JUDGE KOPTA: Well, and this is not an issue
17 that we've had to grapple with until now that I'm aware
18 of.

19 MS. ANDERL: Right, and so, you know, I'm --
20 I'm disappointed that -- that Staff is, you know, so
21 annoyed at me, because everybody agrees that this is a
22 case of first impression. So it's not like -- not like
23 we're just kind of throwing up barriers willy-nilly,
24 this is a -- really an area that's, you know,
25 unexplored. And like I said, I was really surprised to

1 see that the expert Exhibit Bs come in, and so it's kind
2 of what prompted the whole thing.

3 JUDGE KOPTA: Well, we -- we have had
4 situations in which interested parties have requested
5 access to confidential information, IRPs being the one
6 that immediately come to mind. And in those
7 circumstances, the Company generally works out an NDA
8 with those individuals.

9 And I understand that CenturyLink doesn't
10 want to do that in this instance and that is your right.
11 And at least at this point, it's not something that we
12 would compel the Company to do if -- assuming we would
13 have the ability or the legal authority to do that.

14 MS. ANDERL: Well, and nobody asked us to do
15 that.

16 JUDGE KOPTA: Well, what I was going to say
17 is, you referenced earlier that you would be willing to
18 work with Staff on the three documents that you agree
19 are germane to the investigation, and I would encourage
20 you to continue to do that pending what the Commission
21 decides. And I would hope that there would be some
22 level of cooperation between Staff and the Company. I'm
23 not going to cast dispersions on either side, but I
24 would hope that there would be some way to work out at
25 least some of these things so that we can move forward

1 and be as efficient and effective as we can be.

2 MS. ANDERL: Well, we are certainly willing
3 to do that, but I was seeing head shakes on the other
4 side of the counsel table in terms of whether we can
5 work together so --

6 JUDGE KOPTA: Well, I'm -- I'm simply --

7 MS. BROWN: This is absolutely ridiculous,
8 Your Honor. I'm very sorry we're even in the room here
9 today, but since we are, in terms of cooperation, since
10 CenturyLink has already indicated willingness to provide
11 the three documents, I would urge the Company to do that
12 as soon as possible. And we'll pass that along to the
13 Commission's selected expert witness.

14 JUDGE KOPTA: Well, and if that actually
15 does happen, then I would ask that you let us know that
16 that has happened, that there has been that cooperation
17 and that at least some of the documents are no longer at
18 issue.

19 MS. ANDERL: Well, and, Your Honor, if I
20 might suggest, because, you know, I just have no
21 interest in getting into a protracting war on this,
22 entertaining as that might be, if the Commission unhides
23 the docket, we would be willing to file those three
24 documents as confidential under the rule in that docket.

25 JUDGE KOPTA: Well, still the -- there still

1 is the issue of the fact that they're confidential, and
2 the expert would not have access to them unless there is
3 some agreement between the Company and that expert or
4 the Company and Staff on behalf of that expert to be
5 able to review that information and retain its
6 confidentiality. So that's where the cooperation I
7 think really the rubber meets the road.

8 MS. ANDERL: Sure, and I think the Company
9 would be willing to entertain that -- the notion of
10 receiving a letter from Staff signed by Staff and the
11 expert stating that they would agree to handle the
12 information in a manner as if it were protected by a
13 protective order, something like that. I think that's
14 something we did actually work out with Ms. Gafken as
15 she alluded to years ago where Public Counsel just said
16 we'll treat this as if it were under a protective order.
17 That's our -- that's our pledge.

18 JUDGE KOPTA: Well, whatever you all can
19 work out, the Commission would be appreciative of on --
20 on several levels so I just --

21 MS. ANDERL: Well, like I said, the only way
22 I think we can do that, though, is to unhide the docket,
23 because right now we can't file anything in that docket.

24 JUDGE KOPTA: Well, I will leave that to you
25 to work out with Staff. And in the meantime, as I say,

1 we will take -- at least I see your motion to enforce
2 the protective order as moot at this point because
3 there's no disagreement that what Staff is asking for
4 was not consistent with the protective orders. So
5 really the motion before me right now is to amend the
6 protective order, or in the alternative, to issue a
7 protective order in the new docket. And that is the
8 determination that I'm taking under advisement.

9 All right. Is there anything more that we
10 need to talk about today? Hearing nothing, we are
11 adjourned.

12 (Adjourned at 11:09 a.m.)
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF WASHINGTON

COUNTY OF THURSTON

I, Tayler Garlinghouse, a Certified Shorthand
Reporter in and for the State of Washington, do hereby
certify that the foregoing transcript is true and
accurate to the best of my knowledge, skill and ability.



Tayler Garlinghouse

Tayler Garlinghouse, CCR 3358