

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant

v.

CENTURYLINK COMMUNICATIONS,
LLC,

Respondent

DOCKET NO. UT-181051

RESPONDENT CENTURYLINK
COMMUNICATIONS, LLC'S
RESPONSE TO PUBLIC COUNSEL'S
MOTION TO STRIKE UNTIMELY
RESPONSE TESTIMONIES

- 1 CenturyLink Communications, LLC ("CLC"), by and through undersigned counsel, submits this Response to Public Counsel's Motion to Strike Untimely Response Testimonies of CenturyLink Communications, LLC. CLC respectfully requests that the Commission deny Public Counsel's Motion to Strike and grant CLC's parallel Motion for Leave to Accept Late-Filed Testimony, filed April 1, 2022.
- 2 CLC has asked the other parties to this proceeding whether they oppose CLC's submission of pre-filed testimony on March 31, 2022. The Washington Military Department and Commission Staff took no position on the issue. Public Counsel and Comtech opposed the request, and believe the testimony should be stricken.

- 3 As CLC explained in its Motion for Leave to Accept Late Filed Testimony, CLC mistakenly docketed the date for its responsive pre-filed testimony for March 31, 2022. This was obviously an error, as the scheduling order set the date for submission on March 30, 2022.
- 4 A brief review of the pre-filed testimony submitted by CLC on March 31, 2022 shows that CLC had been working on the submission for an extended period. CLC submitted testimony from five different witnesses that is collectively approximately 180-pages long, not including voluminous exhibits. CLC is obviously taking this proceeding very seriously and with great respect. CLC sought and obtained no benefit from submitting its testimony on March 31, rather than March 30. CLC made an unintentional error, one it regrets and for which it takes full responsibility.
- 5 The Complaint underlying this case was filed on December 22, 2020, and shortly thereafter a scheduling order issued setting hearing for January 11-12, 2022. *Order 01 (Feb. 24, 2021)*. At the request of Commission Staff, the schedule, including the hearing date, was extended because Comtech intervened in the proceeding late, and the Commission wanted to ensure that all parties' pre-filed testimony took all facts into consideration. *See Order 03 (Aug. 9, 2021)* ¶ 19 (“Given the late intervention of TSYS [Comtech], we find it reasonable to suspend and adjust the procedural schedule to allow all parties time to request and review relevant materials that [Comtech] may provide.”). As a result, this proceeding has already been extended, and the hearing is now scheduled for August 2022.
- 6 Given this schedule, the submission of testimony on March 31 instead of March 30 will not prejudice anyone. Indeed, Public Counsel does not even attempt to argue prejudice, nor could it. Public Counsel’s testimony was due on December 15, 2021. On December

16, 2021, Public Counsel sought leave to modify its testimony to significantly increase its penalty recommendation. In its Motion, Public Counsel stated that, “This request does not prejudice any party to this matter. The original testimony was filed just one day ago on December 15, 2021. The revisions are filed three months before CenturyLink’s testimony is due” The ALJ authorized the filing due to the lack of prejudice and due to Public Counsel’s prompt action “after discovering the errors in its initial filing.” *Order 04 (Dec. 28, 2021)* ¶¶ 4, 6.

7 The exact same is true here. CLC inadvertently filed its testimony one day after the deadline. Cross-Answering testimony is not due until June 1, 2022—two months after CLC submitted its pre-filed responsive testimony. There is no impact on the case, and in fact CLC indicated that it would support a one-day extension of that deadline (to June 2, 2022) if the parties perceive prejudice. No party has expressed that any exists. On the issue of promptness, CLC filed its motion for leave to accept late-filed testimony within hours of discovering that it had inadvertently missed the deadline. A good portion of that time was spent awaiting responses from the other parties to whom CLC provided a courtesy notice of its discovery and of its intention to file its motion. Public Counsel, aware of CLC’s unintentional mistake and intention to immediately rectify it, nevertheless filed a motion to strike, claiming that CLC was disrespecting the Commission and intentionally flouting the Commission’s scheduling order. Motion ¶ 7.

8 Instead of arguing prejudice, Public Counsel argues that “CenturyLink’s failure to address the issue suggests it assumes it can ignore a deadline with impunity; this apparently nonchalant violation of the Commission’s rules expresses a disrespect for the Commission and its rules as well as to parties in this proceeding, and if it is allowed can only encourage similar future behavior and place every party’s discovery rights in jeopardy.” Motion ¶ 7. As an initial matter, CLC did not “ignore the deadline” nor

believe it could unilaterally submit the testimony whenever it wanted. The late submission was caused by an innocent docketing error. CLC's actions throughout this case show that it is taking both the dispute and the associated deadlines seriously.

9 Public Counsel rests its motion on a purported violation of WAC 480-07-385, which requires a party seeking an extension of time to file a motion at least five days in advance of the deadline, or make an oral request for continuance at least two days prior to the deadline. Motion ¶ 2. As an initial matter, this rule presumes that CLC knew that it would file its testimony after the deadline. Obviously, CLC did not believe that it needed an extension. It submitted the testimony on the date it mistakenly thought the testimony was due. In addition, however, this not the first time WAC 480-07-385 has been referenced in this case.¹ As a result of Comtech's late intervention, Staff requested an extension of the schedule, and did so two days before its testimony was due. The ALJ authorized the late filed request explaining:

[T]he Commission, in response to a motion or on its own initiative, may modify application of its own rules if that modification is in the public interest and is not inconsistent with the purpose underlying the regulation or applicable statutes. Here, we waive the five-day requirement and grant Staff's request to allow all parties to meaningfully participate in this proceeding in light of TSYS's late intervention.

Order 03 ¶ 21.

¹ Public Counsel also claims that CLC violated WAC 480-07-365, which requires filings to be submitted electronically to the Commission before 5pm on the due date (WAC 480-07-365(2(a))), and sent to all parties by email "at the same time . . . or immediately thereafter." (*Id.* at (c)). Public Counsel claims the testimony was actually two days late because CLC submitted the five witnesses pre-filed testimony electronically with the Commission on March 31, 2022 between 3:49pm and 4:33pm, but the email containing the redacted testimony was not sent to the parties until 5:06pm and the confidential versions at 8:37pm. Respectfully, this is submission "immediately thereafter" as required by rule. The creation of links that include huge volumes of data takes significant effort. Indeed, when Staff submitted its Direct Testimony on December 15, 2021, it sent the parties exhibits at 8:00pm, and the corrected version of Mr. Webber's testimony at 7:28pm on the day of the filing. Due to difficulties with its electronic portal, Staff sent some of its exhibits to the parties the day after submission to the Commission. Just as with CLC, Staff's testimony was distributed to the parties "immediately thereafter" its submission to the Commission as required by rule. Public Counsel raised no concerns in connection with Staff's filing, but asks the Commission to strike CLC's testimony altogether.

- 10 It is undoubtedly in the public interest for the Commission to accept CLC’s pre-filed testimony. This is a serious case where the Staff and Public Counsel seek millions of dollars in fines. It would be extremely and arbitrarily prejudicial to CLC if the testimony was not accepted. It is therefore by definition in the public interest, just as it was to extend the schedule to accommodate the late intervention by Comtech. Likewise, as described above, this innocent one-day delay did not prejudice anyone. See also *BNSF Railway Co. v. City of Mt. Vernon*, Docket TR-070696, Order 04 (Order Granting Extension Of Time To File Prefiled Direct Testimony Of Dan Macdonald) (Oct. 10, 2007) (Good cause existed to submit late filed testimony because, inter alia, “[g]ranting the extension will not cause a change in the overall procedural schedule.”).
- 11 Commission decisions make plain that its “paramount interest is in having a full record with the best available evidence upon which to base its decisions.” *WUTC v. Puget Sound Energy*, UE-072300/UG-072301, Order 08 at ¶ 10 (May 5, 2008) (Order approving PSE’s motion to file supplemental testimony). See also *WUTC v. Puget Sound Pilots*, Docket TP-190976 Order 08, Denying Motion to Strike Rebuttal Testimony at ¶ 21 (Aug. 7, 2020) (“WAC 480-07-495(1) provides: All relevant evidence is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. The presiding officer will consider, but is not required to follow, the rules of evidence governing civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence. The Commission thus has broad discretion to consider any evidence it deems relevant, and, equally, to reject any evidence it deems irrelevant.”). CLC’s evidence is incredibly detailed, and goes to the heart of the dispute. Without this testimony, a full and complete record is impossible. Thus, permitting the testimony satisfies the Commission’s “paramount interest.”

- 12 While CLC is embarrassed by its docketing error, late filed testimony is not unusual. On several occasions, the Commission has accepted late-filed testimony. *See, e.g., In the Matter of the Review of: Unbundled Loop and Switching Rates; the Deaveraged Zone Rate Structure; and Unbundled Network Elements, Transport, and Termination*, Dockets UT-023003, 11th Supp. Order (granting Verizon’s motion to allow late-filed revised testimony because original disc contained bad files) (July 17, 2003); *In the Matter of the Application of Qwest Corporation Regarding the Sale and Transfer of Qwest Dex to Dex Holdings, LLC, a non-affiliate*, Docket UT-021120, 4th Supp. Order (Accepting Dex Holding’s late-filed testimony (Feb. 21, 2002) (accepting testimony filed one day late when delivery service did not perform as expected); *In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.’s Compliance With Section 271 of the Telecommunications Act of 1996*, Docket UT-003022, 16th Supp. Order (Admitting late-filed exhibit of AT&T) (Aug. 24, 2001) (granting motion to accept late filed exhibit).
- 13 Outside of the Commission, courts also authorize materials submitted after a date set in the scheduling order. “Where a party misses a deadline under the scheduling order, the court “may, for good cause, extend the time . . . if the party failed to act because of excusable neglect.” *McFarland v. BNSF Ry. Co.*, No. 4:16-CV-05024-EFS, 2017 WL 3026930, at *1 (E.D. Wash. Apr. 10, 2017) (quoting Fed. R. Civ. P. 6(b)(1)(B)). When addressing such issues, courts apply a flexible four-factor test, analyzing “(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith.” *Id.* (quoting *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010)). For all of the reasons set forth above, these factors clearly weigh in favor of allowing CLC’s March 31, 2022 testimony.

14 In denying a motion to strike, one court went so far as to find that striking the response brief filed two days late would “impose harsh sanctions” that would “substantially prejudice” the *filing* party. *Edifecs, Inc. v. Welltok, Inc.*, 2019 WL 5862771, at *3 (W.D. Wash. Nov. 8, 2019); see *Poore-Rando v. United States*, 2017 WL 5549580, at *2 (W.D. Wash. Nov. 17, 2017) (denying plaintiff’s motion to strike defendant’s late filed expert declaration where the first copy filed was unsigned and the signed version was filed a day late). The exact same is true here: striking the testimony would cause CLC substantial prejudice.

Respectfully submitted this 7th day of April 2022.

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