BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. CENTURYLINK COMMUNICATIONS, LLC, Respondent.	DOCKET NO. UT-181051 CENTURYLINK COMMUNICATIONS, LLC'S OPPOSITION TO STAFF'S MOTION TO AMEND COMPLAINT

1 CenturyLink Communications, LLC ("CLC") opposes Commission Staff's ("Staff") Motion to Amend Complaint ("Motion") to add as additional respondents Qwest Corporation d/b/a CenturyLink QC, CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest (collectively, "Affiliates") for the reasons set forth below.

I. INTRODUCTION

2 Staff seeks leave from the Commission to amend its complaint to add as respondents in this proceeding several entities that are affiliates of CLC. Staff claims this request is "in the interest of clarity," as though implicating the legal rights of five new individual entities as this litigation is nearing its end is merely a clerical matter. Staff has been aware of the facts giving rise to this litigation and the identities of all relevant parties

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since December 2018, when the network event occurred. Yet, curiously, Staff posits that it was seemingly unaware that it was obligated to name as respondents all entities it intended to seek penalties from until CLC submitted testimony acknowledging that CLC is the only named respondent. Staff's motion ignores, and through it Staff seeks to end run, Washington's two year statute of limitations by naming five additional companies as respondents 15 months after the limitations period lapsed.

II. FACTS

3 On December 27-28, 2018, a network event led to some Washington PSAPs (all served by Comtech, not CLC or the Affiliates) to experience a 911 outage. Staff filed a complaint naming CLC as the sole respondent on December 22, 2020—only five days before the statute of limitations ran. Staff did not name Comtech and did not name any of the Affiliates as respondents in the complaint. Staff submitted its direct testimony on December 15, 2021, and CLC submitted responsive testimony on March 31, 2022. Mot. ¶ 4. Hearing is set for August 10–11, 2022.

4 At all times, Staff has been aware of the existence and identities of the Affiliates. *See* Mot. n.3 and n.4 (acknowledging contracts and filings listing the Affiliates). At no point prior to April 6, 2022 did Staff attempt to name any respondent other than CLC.

III. LEGAL STANDARD

5 Pursuant to WAC 480-07-395(5): "The commission may allow amendments to pleadings, motions, or other documents on such terms as promote fair and just results." The rule parallels CR 15(a), which states that "leave shall be freely given when justice so requires." Even though courts often grant motions for leave to amend complaints, there are two instances where they do not: (a) when the amendment would be futile, and (b) when unfair prejudice would result.

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IV. ARGUMENT

A. AMENDING THE COMPLAINT WOULD BE FUTILE.

6 Case law is replete that a party cannot amend the complaint when doing so would be futile. *See, e.g., Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 142, 937 P.2d 154 (1997) ("A trial court may consider whether the new claim is futile or untimely."). It is black letter law that one basis to find futility is when the statute of limitations would act as a bar to adding the new claims or parties. *See e.g., Gildon v. Simon Property Group, Inc.*, 123 Wash. App. 1004 (Wash.App. 2004) (affirmed denial of motion to amend complaint because adding claim would be futile because the statute of limitations had run).

7 Here, Staff seeks to add new parties to the dispute over 15 months after the two-year statute of limitations passed. RCW 4.16.030 ("An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."); *The Lummi Nation, Complainant v. Verizon Nw. Inc., & Qwest Corp., Respondent*, UT-0601147, 2006 WL 2095144, at *1 (Wash. U.T.C. June 7, 2006) ("Indeed, since there is no limitations period explicitly defined for actions under RCW 80.04.440, it appears the default two-year limitation period under RCW 4.16.040 applies.").

8 When a party seeks to amend the complaint to add a new party, the amended complaint only relates back to the date of the original complaint if the party seeking to amend—here Staff—proves that it has satisfied three conditions: (1) the new party (here, the Affiliates) received notice of the institution of the action so that it is not prejudiced in making a defense on the merits; (2) the new party (again, the Affiliates) knew or should have known that but for a mistake concerning the proper party's identity, the claimant would have brought the action against it; and (3) the claimant's delay was not due to inexcusable neglect. *Segaline v. State, Dep't of Lab. & Indus.*, 238 P.3d 1107, 1112

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(Wash. 2010) (en banc). "The party seeking to amend its complaint has the burden to prove these three conditions were satisfied." *Id.*; *see also* CR 15(c).[1]

9 In this case, Staff's Motion fails to meet its burden on any of these requirements, let alone all three. First, Staff makes a bald assertion that the Affiliates had actual knowledge of the Complaint, but fails to point to evidence to support the notion that the Affiliates were on notice that any of them was the subject of the allegations in the complaint. Mot. ¶ 9. When the evidence is evaluated, it actually shows the exact opposite.

10 Second, Staff cannot claim that it mistakenly failed to name the Affiliates as respondents. Staff intentionally framed the complaint to focus on the actions of CLC, and made no allegations about the actions of the five ILECs Staff now seeks to add as respondents. Further, from the outset of this dispute, CLC consistently raised concerns about it being named as a party. In its discovery responses, it frequently stated as follows:

> CLC objects to this data request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. This data request seeks to investigate an outage on CLC's national transport network. The outage did not directly affect CLC's or its affiliates' remaining 911 network in Washington. Instead, it affected CLC's national transport network. More specifically, the outage affected *interstate DS-3 circuits* purchased by a vendor of Comtech on behalf of Comtech (for the provision of SS7 functionality), the responsible Washington 911 provider for the PSAPs that experienced a 911 outage. The interstate and non-regulated services provided on CLC's national transport network, and the facilities utilized to provide such services,

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[1] In its entirety, CR 15(c) reads:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the original party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the new party will not be prejudiced in maintaining her or his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the new party.

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> are not regulated by the Commission, and the Commission lacks jurisdiction over them. *In Re AT&T Commc'ns of the Pac. Nw.,* No. 04, 2003 WL 23341214 (Wash. U.T.C. Dec. 1, 2003) ("AT&*T's proposed language would encompass facilities-access purchased out of federal tariffs over which the Commission lacks jurisdiction.*") (citing 34th Supplemental Order; Order Regarding Qwest's Demonstration of Compliance with Commission Orders, *Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Dkt. Nos. UT-003022, UT-003040, ¶ 22 (May 2002)); *MilleniaNet Corp. v. Pennsylvania Pub. Util. Comm'n*, No. 990 C.D. 2008, 2009 WL 9104922 (Pa. Commw. Ct. Apr. 30, 2009) (complaint dismissed because the "the PUC does not have jurisdiction over interstate telecommunications services."). Without waiving its objections, CLC responds as follows.

See, e.g., Direct Testimony of James D. Webber, Exhibit JDW-6C. CLC has consistently made clear that Staff's investigation and this complaint focused on the wrong party, because the outage occurred on Comtech's network and only affected calls to PSAPs being served by Comtech, not the PSAPs served by any CenturyLink entity. Staff's attempt to name additional CenturyLink affiliates now raises all kinds of questions about why. Staff's testimony does not identify any conduct by any of these parties that should have put CLC, let alone the Affiliates, on notice that Staff seeks penalties from the Affiliates or believes that the Affiliates violated Washington statute or Commission rule. Staff's window to name the Affiliates closed when it allowed the two-year statute of limitations to run.

11 Third, Staff's delay was inexcusable for several reasons. Staff was obviously aware of the existence and identity of the Affiliates, and it acknowledges as much in its brief. *See* Mot. n.3 and n.4. Indeed, in prior 911 outrages before the transition to Comtech, Staff consistently named Qwest Corporation, the ILEC, as a respondent. *See, e.g.,* Dockets UT-190209 and UT-140597. In the instant case, it appears that Staff consciously took a different approach, likely because it was aware that there was no failure on CenturyLink's 911 network. Staff's focus is and has been on CLC in its capacity as a

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transport provider and as Comtech's SS7 vendor's vendor. There are no allegations of ILEC misconduct or error.

12 Given the history of naming Qwest Corporation in prior complaints, it is impossible for Staff to establish—as it must—excusable neglect for waiting 15 months after the statute of limitations passed to add five new parties, one of which is Qwest Corporation. Instead, Staff feigns ignorance—as though it did not know it is required to name in a complaint all entities it intends to pursue penalties from—arguing that the Complaint and investigation report "demonstrate an intent to allege violations against the Affiliates." This allegation does not bear out. Not only does the complaint not name the Affiliates, neither do the references supplied by Staff as evidencing its purported intent.

13 Moreover, as described above, CLC consistently raised concerns about why it was being named as a Respondent, and Staff never responded with an explanation such as that it meant "CenturyLink and all of its affiliates." In other words, CLC's testimony did not raise anything that should have surprised Staff; it simply reiterated what it has been saying from the outset of the dispute.

14 Staff argues that CLC attempts to "artificially narrow the scope of the Commission's investigation and hearing" by observing that it is the only named respondent. *Id.* at ¶ 10. This allegation likewise does not bear out. From the outset of this case, CLC has raised concerns that the Staff did not fully investigate the outage, and gave insufficient attention to Comtech, the actual 911 service provider to the PSAPs which experienced outages due to Comtech's poor network design. CLC tried to obtain third-party discovery from Comtech to flesh this out (prior to Comtech intervening); Staff opposed. Thus, far from trying to narrow the scope of the proceeding, CLC has tried to ensure that the outage was properly investigated even if Staff refused. CLC hasn't narrowly construed anything. Staff, after a two year investigation, named CLC alone. Abiding by Staff's clear decision

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is neither unusual nor nefarious.

15 Thus, it is Staff, not CLC, who "artificially narrowed" the scope of these proceedings from the outset. As Ms. Stacy Hartman states in her response testimony, Staff's singular focus on CLC has been the problem all along:

a. "Staff and Public Counsel almost exclusively focused on CLC in both their investigations (before and after the complaint was filed in December 2020) and in their Direct Testimony." Exh. SJH-1TC, p. 9.

b. "Staff's hyper-focus on CenturyLink (and apparent refusal to consider that Comtech may have been directly responsible for the failed 911 calls) continued during the discovery phase of this case." Exh. SJH-1TC, p. 11.

16 Given these facts, Staff cannot possibly meet its burden to add five CLC affiliates as respondents. The statute of limitations acts as an absolute bar. Given that the amendment would be futile, it would be clear legal error to grant the Motion.

B. AMENDING AT THE ELEVENTH HOUR WOULD PREJUDICE CLC.

17 Even if Staff could establish (which it cannot) that the amendment won't be futile, undue delay is another basis for denying leave to amend when the delay creates prejudice to the nonmoving party. As Washington appellate courts have recognized, the "touchstone for denial of an amendment is the prejudice such amendment would cause." *Evergreen Moneysource Mortg. Co. v. Shannon*, 274 P.3d 375, 386 (Wash. App. 2012). Staff's attempt to add five new parties four months before hearing would severely prejudice CLC. The network event underlying this dispute took place on December 27–29, 2018. Staff waited almost exactly two years to file its complaint. Staff and CLC have filed their direct and responsive testimony. CLC personnel have spent hundreds or thousands of hours investigating and responding to what CLC believes are unfounded allegations.

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18 If new parties are added, the parties would have to retread old ground. It would prompt new discovery, and Staff has already recognized it may prompt the submission of additional testimony. This would be completely unfair and prejudicial to CLC and the Affiliates. *See Oliver v. Flow Int'l Corp.*, 155 P.3d 140, 145 (Wash. App. 2006) ("[defendant's] showing of prejudice was adequate to justify denial of the motion. A new round of discovery would have been necessary."); *Evergreen Moneysource*, 274 P.3d at 386 (upholding denial of motion to amend complaint where new discovery would be required).

19 Staff's suggestion that prejudice to CLC and the Affiliates can be avoided by potentially adding rounds of testimony (Mot. ¶ 10) is not a resolution. Neither Staff's complaint, even as they propose to amend it, nor Staff's or Public Counsel's testimony offers any specific allegations against the Affiliates. CLC has no reason or basis to supplement its responsive testimony. It should not be left to guess how the Affiliates are alleged to have violated Washington law, and it is simply too late for Staff to change directions to add new legal theories against new parties it failed to name or identify when it filed its complaint following its two-year investigation.

20 CLC is not the only party that would be prejudiced by amending the Complaint. Staff essentially argues that the Affiliates should have known the Complaint was directed at them. CLC can absolutely say this is news to them. For 15 months, Staff has prosecuted a case against CLC, even when CLC consistently said Staff was focused on the wrong party. It defies logic to argue that five other distinct entities should have known that they were legally implicated in any way. They were at no point involved in discovery, motions practice, or the submission of testimony; they had no notice of being the targets of the proceeding. To accept Staff's argument that the Complaint was directed at the Affiliates all along, the Commission would impliedly acknowledge that the Affiliates'

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rights were being litigated without their knowledge or presence. Of course, that cannot possibly be true.

C. WAC 480-07-395(4) DOES NOT JUSTIFY AMENDMENT.

21 Staff attempts to use WAC 480-07-395(4) ("Subsection 4") as a basis for adding the Affiliates, arguing that "the commission may consider the allegations against [CLC] in the complaint as applying to the Affiliates . . ." Staff misconstrues Subsection 4, which reads:

> The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission will consider pleadings and motions based primarily on the relief they request and will not rely solely on the name of the document. The commission, at every stage of any proceeding, will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties.

A plain reading of Subsection 4 indicates that the Commission may disregard the title of a document and focus on its substance—it does not indicate that the Commission can interpret a complaint as if it was brought against five unnamed companies. To do so would be a fundamental denial of due process, and would simply ignore the operation of the statute of limitations. The entire purpose of serving each party with the complaint is to protect their due process rights. *See Webb v. Washington State Univ.*, 15 Wash. App. 2d 505, 517, 475 P.3d 1051, 1058 (2020) ("The core of due process is the right to notice and a meaningful opportunity to be heard."); *Flores-Rodriguez v. Garland*, 8 F.4th 1108, 1113 (9th Cir. 2021) ("Notice and an opportunity to be heard are fundamental elements of due process that have been long established in our law."). Moreover, the first sentence of the statute says that the Commission can construe pleadings and motions "*among the parties*." The Affiliates are not those currently "among the parties." This rule is limited to those that are already parties. Subsection 4 has no bearing here.

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V. CONCLUSION

22 CLC respectfully requests that the Commission deny Staff's Motion to Amend because amendment at this stage of litigation would unjustifiably prejudice CLC and an amendment to add the Affiliates would be futile because the statute of limitations has run. Doing otherwise would constitute clear legal error.

Respectfully submitted this 13th day of April 2022.

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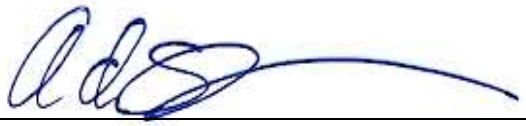

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