

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK COMMUNICATIONS,
LLC

Respondent.

DOCKET UT-181051

PUBLIC COUNSEL’S MOTION TO
STRIKE CERTAIN TESTIMONY
AND EXHIBITS FILED BY
CENTURYLINK
COMMUNICATIONS, LLC

I. INTRODUCTION

1 Pursuant to WAC 480-07-375(1)(d), the Public Counsel Unit of the Washington Attorney General’s Office (Public Counsel) moves to strike in its entirety Exhibit MDV-3C, Affidavit From Thomas McNealy, from the testimony of Martin D. Valence and portions of the testimonies of Valence, Stacy J. Hartman, and Steven E. Turner submitted by CenturyLink Communications, LLC (CenturyLink or Company) to the Washington Utilities and Transportation Commission (Commission) in Docket UT-181051. The Commission should strike this exhibit and related testimony without prejudice, because CenturyLink improperly presents McNealy’s affidavit as testimony without presenting McNealy as a witness. In the alternative, the Commission should order CenturyLink to call McNealy as a witness and submit the affidavit as testimony.

II. STANDARD

2 Under WAC 480-07-495(1), all relevant testimony is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. When ruling on the admissibility of evidence, the presiding officer will consider,

but is not required to follow, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts.

3 Under the Washington Administrative Procedure Act, RCW 34.05.452, evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.¹ The presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.² All testimony of parties and witnesses shall be made under oath or affirmation.³

4 Rule 703 of the Washington Rules of Evidence allows experts to rely on facts or data not admissible in evidence in forming their opinions or inferences.

III. DESCRIPTION OF TESTIMONY AND EXHIBITS AT ISSUE

5 CenturyLink submitted the response testimony of Martin D. Valence on March 31, 2022, and included the Affidavit of Thomas McNealy as an exhibit. Valence's testimony disagrees with Commission Staff witness James D. Webber, asserting that the packet storm experienced on CenturyLink's Red network in February 2018 was different from the December 2018 outage on the Company's Green network, and that the December outage was not foreseeable.⁴ Valence states that Infinera's technical expert, Thomas McNealy, also disagrees with Webber, and submits the Affidavit of Thomas McNealy as an exhibit. Valence describes the affidavit as follows:

I attach as Exhibit MDV-3C an affidavit from Thomas McNealy, a Senior Director

¹ RCW 34.05.452(1).

² RCW 34.05.452(2).

³ RCW 34.05.452(3).

⁴ Response Testimony of Martin D. Valence, Exh. MDV-1TC at 10:17–11:3.

at Infinera, who states that “To give context to why the Green Outage was not foreseeable or predictable I will briefly describe the Infinera equipment and how it operates.” Mr. McNealy then spends eight pages describing how the Red and Green Outages were very different, and how the December 2018 outage was not foreseeable.⁵

6 Infinera, a California corporation, is not a party to this proceeding. Valence offers McNealy’s affidavit as additional evidence regarding the circumstances of the two outages. McNealy’s affidavit describes Infinera’s network hardware and proprietary management channel, explains how the various components of Infinera hardware act together to send and receive network traffic across the country, describes the root causes of the outages in February and December 2018, and offers an opinion on why the December outage was unforeseeable.⁶ Valence quotes multiple paragraphs from McNealy’s affidavit⁷ that include assertions of fact that Valence does not otherwise mention or expand upon. Valence does not address all factual assertions McNealy includes in his affidavit, nor explain whether or how he relied upon McNealy’s affidavit to form his own opinion regarding the two outages.

7 CenturyLink witnesses Steven E. Turner similarly cites to McNealy’s affidavit and quotes passages from the document as statements of fact.⁸ CenturyLink witness, Stacy J. Hartman cites directly to McNealy’s affidavit as a source and refers to the testimonies of Valence and Turner, which in turn cite to sections or quote directly from McNealy’s affidavit.⁹

8 Public Counsel issued data requests to CenturyLink for an explanation of why McNealy

⁵ Valence, Exh. MDV-1TC at 11:6–12.

⁶ See Valence, Exh. MDV-3C.

⁷ See Valence, Exh. MDV-1TC at 12:11–36, 13:1–13, 14:15–22, 15:1–2, 18:2–21, 18:26–28, 19:1–13, 19:21–33, and 20:1–4.

⁸ See *infra* Table 1. Testimony and Exhibits Affected by this Motion.

⁹ *Id.*

presents information through a declaration rather than through testimony.¹⁰ CenturyLink stated, “The purpose of Mr. McNealy’s affidavit is to document a technical explanation of the circumstances surrounding the third party service provider’s network event and response. It was offered to correct Staff’s testimony, which attempts to draw inferences based on Infinera’s out-of-court statements (isolated communications between Lumen and Infinera).”¹¹

9 Public Counsel also asked CenturyLink whether McNealy would testify at the evidentiary hearing as a witness and sought additional explanation as to why the affidavit was an exhibit to Valence’s testimony.¹² CenturyLink responded,

CLC does not presently intend to call Mr. McNealy as a witness. Mr. McNealy is an employee of Infinera, and CLC cannot direct him to testify. Should Public Counsel be interested in seeking information directly from Infinera, the Commission has mechanisms to formally request third party discovery.

The purpose of Mr. McNealy’s affidavit is described in CLC’s response to data request PC-67. CLC’s expert witnesses are entitled to rely on Mr. McNealy’s affidavit in support of their testimony. *See e.g., In re Detention of Leck*, 180 Wash. App. 492, 513 (2014) (“ER 703 permits an expert to base his opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field.” (citation omitted)).¹³

10 Commission Staff issued data requests regarding the facts asserted in McNealy’s affidavit. CenturyLink responded to four of the requests by quoting from McNealy’s affidavit with a line or two of summary information.¹⁴ In three of the four responses, CenturyLink failed to identify any witness testifying on behalf of the Company who could respond to questions

¹⁰ See Exhibit A to the Declaration of Nina M. Suetake (CenturyLink Response to Public Counsel Data Request 67) filed herewith.

¹¹ *Id.*

¹² See Suetake Decl. Exh. A at 2 (CenturyLink Response to Public Counsel Data Request 68).

¹³ *Id.*

¹⁴ See Suetake Decl. Exh. B at 1–10 (CenturyLink Responses to Commission Staff Data Requests 44C, 45C, 48C, and 49C).

concerning the data request response, as required by WAC 480-07-405(7)(a)(iii), and listed merely CenturyLink Legal as the respondent.¹⁵ In the fourth instance, CenturyLink identified as respondents a principal network engineer, who also is not a testifying witness, in addition to CenturyLink Legal.¹⁶

11 Staff also requested all documents and communications in McNealy's possession, custody or control related to Docket UT-181051, including any such material supporting the affidavit.¹⁷ In response, CenturyLink merely stated that it was unaware if McNealy had any such documents in his possession, and directed Staff to Infinera's outside counsel.¹⁸

IV. ARGUMENT

A. The protections of Evidentiary Rule 703 are not applicable to CenturyLink's use of McNealy's affidavit.

12 The Commission's rules generally allow all relevant evidence, including hearsay evidence, to be admitted into the record if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness.¹⁹ The Administrative Procedure Act (APA) similarly regards such evidence admissible if it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.²⁰ Both the Commission's rules²¹ and the APA²² direct the presiding officer to consider

¹⁵ See Suetake Decl. Exh. B at 1–10 (CenturyLink Responses to Commission Staff Data Requests 44C, 45C, 48C, and 49C).

¹⁶ See Suetake Decl. Exh. B at 3–5 (CenturyLink Responses to Commission Staff Data Request 45C).

¹⁷ Suetake Decl. Exh. B at 11–12 (CenturyLink Supplemental Response to Commission Staff Data Request 52).

¹⁸ *Id.*

¹⁹ WAC 480-07-495(1).

²⁰ RCW 34.05.452(1).

²¹ *Id.*

²² RCW 34.05.452(2).

the Washington State Court Rules of Evidence (ER) when ruling on the admissibility of evidence. As CenturyLink noted in response to Public Counsel’s data request,²³ ER 703 “permits an expert to base his opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field.”²⁴ Washington courts, however, have limited the admission of evidence under this rule, stating that “[t]he otherwise inadmissible facts or data underlying an expert’s opinion is admissible for the limited purpose of explaining the basis for an expert’s opinion, but is not substantive evidence.”²⁵ The admission of those facts for that limited purpose is not proof of the facts themselves.²⁶

13 CenturyLink asserts that its expert witnesses are entitled to rely on McNealy’s affidavit in support of their testimony under ER 703.²⁷ At no point, however, does Valence explain how McNealy’s affidavit forms the basis of Valence’s opinion on the two outages that occurred on CenturyLink’s Red and Green networks. Valence merely states that McNealy agrees with his assessment that the Green outage was not foreseeable but does not suggest that he relied upon McNealy’s affidavit to form this opinion. Instead, Valence submits facts presented in McNealy’s affidavit as substantive evidence about the Red network outage. Valence quotes five paragraphs directly from McNealy’s affidavit describing the Red network outage, with no additional commentary or conclusions.²⁸

14 Similarly, Turner cites to McNealy and quotes passages from the affidavit as if they are

²³ See Suetake Decl. Exh. A at 2 (CenturyLink Response to Public Counsel Data Request 68).

²⁴ See e.g., *In re Det. of Leck*, 180 Wn. App. 492, 513 (2014) (citing *In re Det. of Marshall v. State*, 156 Wn.2d 150, 162, 125 P.3d 111 (2005)) (provided as Attachment A to this motion); see also *Allen v. Asbestos Corp.*, 138 Wn. App. 579 (2007) (provided as Attachment B to this motion).

²⁵ *Allen v. Asbestos Corp.*, 138 Wn. App. 579 (2007).

²⁶ *Id.*

²⁷ See Suetake Decl. Exh. A at 2 (CenturyLink Response to Public Counsel Data Request 68).

²⁸ Valence, Exh. MDV-1TC at 12:8–13:13.

statements of fact regarding the causes of the February and December 2018 outages. Hartman either cites directly to McNealy's affidavit as a source or appears to rely on passages from Valence's testimony that quote factual assertions made by McNealy.

15 CenturyLink inappropriately applies ER 703 protections to McNealy's affidavit in an attempt to offer the statement as substantive evidence regarding disputed facts without having to present McNealy as a witness. Valence does not appear to rely on McNealy's affidavit to form his opinion, but offers McNealy's statements as rebuttal testimony. Indeed, CenturyLink admits that it offered the affidavit as a technical explanation to correct Staff's assertions.²⁹

16 As discussed previously, the courts have held that the otherwise inadmissible facts underlying an expert's opinion are not substantive evidence.³⁰ McNealy's affidavit statement itself is not admissible as evidence merely because Valence's opinion is admissible. Because the protections generally afforded to facts underlying an expert witness's testimony do not apply to CenturyLink's use of McNealy's affidavit, the Commission should strike it, along with the portions of Valence, Turner, and Hartman's testimonies that refer to and quote it.

B. CenturyLink's improper presentation of evidence through McNealy's affidavit is unduly prejudicial to parties and prevents a thorough examination of McNealy's assertions.

17 Under the Commission's rules, the presiding officer has broad discretion to admit all relevant testimony if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. In general, the best evidence rule is satisfied when a party presents a witness, and parties and the Commission have the opportunity

²⁹ See Suetake Decl. Exh. A at 1 (CenturyLink Response to Public Counsel Data Request 67).

³⁰ *Allen v. Asbestos Corp.*, 138 Wn. App. 579 (2007).

to cross-examine that witness regarding their assertions.

18 McNealy’s affidavit contains substantive evidence regarding Infinera’s network hardware and proprietary management channel, as well as information regarding the February and December 2018 outages. CenturyLink uses the facts in McNealy’s affidavit as evidence, and uses the assertions it contains to challenge Staff’s testimony. CenturyLink admits that it does not intend to call McNealy as a witness and directs queries to Infinera’s counsel.³¹

19 Moreover, CenturyLink’s discovery responses further illustrate its improper use of McNealy’s affidavit. For example, when asked about McNealy’s affidavit, CenturyLink fails to identify any testifying witness to sponsor data request responses.³² Indeed, CenturyLink does not offer Valence as a witness to answer questions about the affidavit, despite the Company asserting that it intends the affidavit to be a basis for Valence’s expert opinion.

20 Further, when asked for information underlying McNealy’s affidavit, CenturyLink stated it was unaware of any documents in McNealy’s possession and directed Staff to Infinera’s counsel.³³ CenturyLink offers the facts in McNealy’s affidavit in a manner that prevents parties and the Commission from examining the facts or questioning McNealy directly about his assertions. Additionally, it appears that Valence cannot be questioned directly about McNealy’s assertions either.

21 The Commission's paramount interest in every case is to have the best possible record for its decision.³⁴ To develop such a record, the Commission should rely on the best available

³¹ See Suetake Decl. Exh. A at 2 (CenturyLink Response to Public Counsel Data Request 68).

³² See *supra* ¶ 9.

³³ See Suetake Decl. Exh. B at 11–12 (CenturyLink Supplemental Response to Staff Data Request 52).

³⁴ *In re the Joint Application of MidAmerican Energy Holdings Co. and PacifiCorp for an Order Authorizing Proposed Transaction*, Docket UE-051090, Order No. 5, ¶ 11 (Nov. 10, 2005).

evidence that is subject to full examination by the Commission and parties. In this instance, the best evidence of the facts regarding Infinera's network hardware and the two outages would be for CenturyLink to call McNealy as a witness and submit McNealy's affidavit as McNealy's own testimony. Because CenturyLink seeks to use McNealy's assertions as substantive evidence, CenturyLink must present McNealy as a witness.

22 CenturyLink's attempt to present substantive evidence under the pretense of supporting Valence's expert opinion through McNealy's affidavit is fundamentally unfair and unduly prejudicial to parties. CenturyLink's approach prevents a thorough examination of facts asserted and obstructs development of a full record. Parties cannot cross-examine McNealy regarding the assertions of fact in the affidavit despite the fact multiple CenturyLink witnesses cite to the affidavit as a source of asserted facts and quote the affidavit directly. Requiring parties to request third party discovery of McNealy is unreasonable and unduly burdensome, particularly since CenturyLink presents McNealy's statements as evidence while declining to call McNealy as a witness. Conversely, McNealy's testimony should be reasonably obtainable for CenturyLink given the Company has already submitted an affidavit written by McNealy.

23 CenturyLink's presentation of evidence in McNealy's affidavit is improper, and the Commission should strike from the record McNealy's affidavit and the portions of Valence, Turner, and Hartman's testimonies that refer to it. In the alternative, the Commission should order CenturyLink to call McNealy as a witness and submit the affidavit as testimony.

V. TESTIMONY AND EXHIBITS AFFECTED BY THIS MOTION

24 Table 1 contains a list of the portions of the response testimony and exhibits filed by CenturyLink affected by this motion.

Table 1. Testimony and Exhibits Affected by this Motion

Exhibit	Description	Items to be stricken (page: lines)
Valence, Exhibit MDV-1TC	Response Testimony of Martin D. Valence	p. 11: 6–12, p. 12: 11–36, p. 13: 1–13, p. 14: 15–22, p. 15: 1–2, p. 18: 2–21 and 26–28, p. 19: 1–13 and 21–33 p. 20: 1–4
Valence, Exhibit MDV-3C	Exhibit of Martin D. Valence, Affidavit From Thomas McNealy	Entire exhibit
Hartman, Exhibit SJH-1TC	Response Testimony of Stacy J. Hartman	p. 39: 18–20 p. 40: 3–5 p. 42: 4–7 p. 55: 15-16
Turner, Exhibit SET-1TC	Response Testimony of Steven E. Turner	p. 51: 15 to 52: 8 p. 52: 12–18 p. 53: fn. 70 p. 55: 5–16 p. 55: 21–22 p. 56: 2–15 p. 56: 22–23

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VI. CONCLUSION

25 For the reasons set forth above, Public Counsel respectfully requests that the Commission grant its Motion to Strike Certain Testimony and Exhibits Filed by CenturyLink Communications, LLC, and strike without prejudice the portions of the testimonies of Martin D. Valence, Stacy J. Hartman, and Steven E. Turner identified above, and the entirety of Exhibit MDV-3C. In the alternative, the Commission should order CenturyLink to call McNealy as a witness and file the affidavit as testimony.

DATED this 16th day of June 2022.

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