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 PUBLIC COUNSEL'S MOTION TO STRIKE

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

REDACTED
SHADED INFORMATION IS CONFIDENTIAL PER PROTECTIVE ORDER IN DOCKET UT-181051

TABLE OF CONTENTS

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

CenturyLink Communications, LLC ("CLC") opposes Public Counsel's Motion to Strike certain testimony and exhibits filed by CLC for the reasons set forth below:

INTRODUCTION

1 From the outset of this dispute, Commission Staff and Public Counsel have claimed that an outage on Washington's 911 network in December 2018 was caused by CLC's failure to properly design the 911 network, thereby making the December 2018 outage foreseeable. In their pre-filed testimony, Staff and Public Counsel pursued very different theories in reaching this conclusion.

2 Public Counsel claimed that CenturyLink should have designed the 911 network with route and supplier diversity. In its responsive testimony, CenturyLink explained that it did design its 911 network with route and supplier diversity, and for that reason not one 911 call destined for CenturyLink PSAPs failed to complete as a result of the network event. In contrast, Comtech (the successor 911 provider in Washington) failed to design its network properly, and for that reason all of the 911 calls that failed to complete as a result of the network event were destined for Comtech PSAPs, not CenturyLink PSAPs.

3 Staff, on the other hand, focused on a February 2018 outage on the "Red" Infinera network (the "Red Outage"). Specifically, Staff stated that CLC experienced an outage due to a packet storm on its Red (i.e., legacy Level 3) Infinera network in February 2018, which should have led CenturyLink to close a "management channel" on its Green (i.e., legacy CLC) Infinera network—the network that experienced the outage in December 2018 (the "Green Outage"). *See* Response Testimony of Martin D. Valence (March 31, 2022) ("Valence Testimony") at 10.

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

4 In their responsive testimony, Messrs. Valence and Turner explain the fundamental flaws in Staff's position, explaining that the cause of the Red Outage was a software upgrade that could not have impacted the version of software operating on the Green network, and (based on the guidance of Infinera, the equipment manufacturer) that there were no indications of the need to augment the Green network. The packet storm that led to the Green Outage was caused by very different circumstances that required an entire series of improbabilities to occur. For that reason, both Messrs. Valence and Turner testified that the December 2018 outage on the Green network was not foreseeable. *See* Valence Testimony at 10-11; Response Testimony of Steven E. Turner (March 31, 2022) ("Turner Testimony") at 54-56. In support of their testimony, Messrs. Valence and Turner reference an affidavit provided by James McNealy, a Senior Director and technical lead at Infinera, the company who designed the equipment that experienced both packet storms.

5 Although Public Counsel never provided any testimony about the Red Outage or how the Red and Green Outages were purportedly related, Public Counsel—not Staff—moves to strike the Affidavit of Thomas McNealy (Exhibit MDV-3C) claiming it is inadmissible hearsay information; in the alternative, they ask that Mr. McNealy be required to appear for cross-examination at the hearing. Public Counsel's argument is fundamentally flawed for many reasons. CLC therefore respectfully requests that the Commission deny the Motion to Strike in its entirety.

LEGAL STANDARD

6 As Public Counsel acknowledges, all relevant testimony is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. WAC 480-07-495(1). When ruling on the admissibility

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

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. Under the Washington Administrative Procedure Act, 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 on, in the conduct of their affairs. RCW 34.05.452(1). If not inconsistent with RCW 34.05.452(1), the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings. RCW 34.05.452(2). All testimony of parties and witnesses shall be made under oath or affirmation. RCW 34.05.452(3).

ARGUMENT

A. The McNealy Affidavit is "the Kind of Evidence on Which Reasonably Prudent People Would Rely Upon."

7 Under the Commission's rules, the presiding officer has broad discretion to admit all relevant testimony, including hearsay evidence, if "in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely on in the conduct of their affairs." RCW 34.05.452(1).

8 To frame this issue and to show why the McNealy Affidavit is admissible, imagine a slightly different scenario. After the Red Outage, Messrs. Valence and Turner asked Mr. McNealy, "Should CLC close the management channel on the Green network?" In response to that question, Mr. McNealy sent an email describing all of the information contained in his affidavit, and in their written testimony Messrs. Valence and Turner appended the email and explained that "this is what Infinera's technical lead, Mr. McNealy said and what he told CLC to do." This would unquestionably be admissible because it is the kind of evidence on which a reasonably prudent person would

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

rely on in the conduct of their affairs.

9 If this scenario occurred, would Public Counsel similarly move to strike such testimony? It appears not because, as discussed below, Staff offered precisely that type of testimony—appending emails and other documents from Infinera and theorizing (erroneously) about the meaning of those documents—yet Public Counsel remained silent.

10 The distinction between Staff's use of Infinera emails and CLC's use of an Infinera affidavit is non-existent. In both circumstances the Infinera witness is unavailable for cross-examination, yet it is commonplace to allow reliance upon this type of information in Commission proceedings.

11 The evidentiary question is whether it is the kind of evidence on which reasonably prudent persons would rely. The answer to this question is a resounding "yes." After describing the Red Outage, Mr. McNealy's Affidavit states "[redacted]" Exhibit MDV-3 (McNealy Aff.) at ¶ 20 (emphasis added).

12 This is also what Mr. Valence testified to:

Q. DID INFINERA GIVE CENTURYLINK ADVICE ABOUT WHAT TO DO WITH THE IGCC ON ITS GREEN NETWORK?

A. Yes. [redacted]

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

REDACTED

SHADED INFORMATION IS CONFIDENTIAL PER PROTECTIVE ORDER IN DOCKET UT-181051

[redacted] (footnote omitted)

Valence Testimony at 13-14.

13 Likewise, Mr. Turner testified that "In my experience, when vendors of sophisticated equipment tell the carrier how to use the equipment, carriers typically follow the guidance of the equipment vendor." Turner Testimony at 54.

14 Thus, the information in the McNealy Affidavit is not only what a reasonably prudent person would rely upon, but what CLC *actually did* rely upon. For this reason alone, it was perfectly permissible for CLC witnesses to reference and utilize the McNealy Affidavit to support their testimony, just as it is permissible for Staff witnesses to rely on emails and other materials shared between Infinera and CLC.

B. Messrs. Valence and Turner's Reliance Upon Mr. McNealy's Affidavit Would be Admissible in a Non-Jury Case Using Traditional Evidentiary Rules.

15 "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." WAC 480-07-495(1) (emphasis added). In bench trials, hearsay evidence is often admitted and the Court gives it whatever weight it deserves. *See, e.g., Ark-Mo Farms, Inc. v. United States*, 530 F.2d 1384, 1386 (Ct. Cl. 1976) (trial court's ruling to admit study and expert testimony over

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

the objection that the data and calculations had been made by parties not present in court, were upheld on the basis that the trial court had residual exception to admit into evidence, hearsay found to be best evidence reasonably available and having assurances of accuracy and reliability); *see also Johnson v. Big Lots Stores, Inc.*, No. CIV.A. 04-3201, 2008 WL 1930681, *5 (E.D. La. Apr. 29, 2008) (denying defendant's motion to exclude expert witness report, noting that the Fed. R. Evid. 703 and advisory committee notes focus on screening from the *jury*, and that "[c]ommentary upon which the Advisory Committee has relied has noted that a 'court sitting without a jury will seldom hesitate to admit a survey in evidence,' giving the survey and related report whatever weight they are worth.").

16 Even in jury trials—where the rules of evidence are the strictest—Washington courts "permit experts to base their opinion testimony on facts or data that is not admissible in evidence '[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]' The 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." *Allen v. Asbestos Corp. Ltd.*, 157 P.3d 406, 413 (Wash. App. 2007). As the Washington Court of Appeals explained:

> "Thus, the rule allows expert opinion testimony based on hearsay data that would otherwise be inadmissible in evidence." *Marshall,* 156 Wash.2d at 162, 125 P.3d 111. In addition, ER 705 grants the trial court discretion to allow the expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for his expert opinion, subject to appropriate limiting instructions.

In re Detention of Leck, 334, P.3d 1109, 1120 (Wash. App. 2014) ("ER 703 permits an expert to base his opinion on facts that are not otherwise admissible if they are of a type

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

reasonably relied on by experts in the particular field."). When trying a case in front of a jury, the material will come into evidence, but the jury will receive a limiting instruction about how to evaluate the evidence.

17 In attempting to strike the McNealy Affidavit, Public Counsel cites to the standard for permitting experts to rely upon hearsay information in jury trials, where the evidentiary standard is the strictest. However, the McNealy Affidavit would be admissible even before a jury. As described above, the information in the McNealy Affidavit is of the type that an expert would traditionally rely upon, and thus is admissible to support the opinions of Messrs. Valence and Turner.

18 Public Counsel states that the McNealy Affidavit is not admissible because "[Mr.] Valence merely states that [Mr.] McNealy agrees with his assessment that the Green Outage was not foreseeable but does not suggest that he relied upon [Mr.] McNealy's affidavit to form his opinion." This argument is spurious. Time and again, Mr. Valence provides his opinions, and explains how the McNealy Affidavit supports his opinions. For example, Mr. Valence provides his opinion of what caused the Red Outage (Valence Testimony at 11-12), and thereafter testifies that Mr. McNealy agrees with his opinion (*Id*. at 12-13). Similarly, Mr. Valence opines about the cause of the Green Outage, and thereafter states that Mr. McNealy agrees with his opinion (Id. at 17-18). This pattern is repeated throughout Mr. Valence's testimony. *See generally* Valence Testimony.

19 The same is true for Mr. Turner, who provides opinions that "The Outage on CenturyLink's Green Network Was Driven by Very Different Circumstances than the Outage on the Red Network," that "It Is Reasonable for Companies to Operate Equipment According to Factory Settings and Supplier Guidance," and that for many reasons the outage caused by the packet storm on the Green Network was not

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

foreseeable. *See* Turner Testimony at 48-56. Mr. Turner provides numerous facts in support of his opinions, including but certainly not limited to the McNealy Affidavit. This is exactly the way that experts are routinely permitted to rely upon hearsay information in court.

20 Thus, the Commission should permit Messrs. Valence and Turner to rely upon the Affidavit of Mr. McNealy.[1]

C. Commission Staff Opened the Door to CLC's use of McNealy's Affidavit and Precluding its Admission would Cause Unjustifiable Prejudice to CLC.

21 Public Counsel's motion lacks credibility, in that Public Counsel does not take issue with Commission Staff's reliance upon the hearsay information that prompted CLC to seek and obtain the McNealy Affidavit. While Public Counsel decries alleged prejudice stemming from CLC's presentation of Mr. McNealy's Affidavit, it apparently identifies no such prejudice in Staff's presentation of Infinera's emails and other materials attached to Staff's testimony.

22 Specifically, in his Direct Testimony, Staff's expert James Webber disagreed with a CLC data request response stating that "the February 2018 network event was that it was caused by the upgrade on the Red network to software version 16.3, prior versions of the software were not similarly impacted." Testimony of James D. Webber (Dec. 15, 2021) ("Webber Testimony") at 26-27. In challenging CLC's response, Mr. Webber referenced statements in documents provided by Infinera. These documents are hearsay plain and simple—out of court statements used for the truth of the matter asserted. Wash R. Evid

[1] CLC is aware that Public Counsel also seeks to strike certain portions of Ms. Hartman's testimony. However, Ms. Hartman largely provides an overview of CLC's case and does not discuss the substance of the McNealy Affidavit in detail.

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

801. Mr. Webber then speculates about what the documents mean, and even goes so far as to question the accuracy of CLC's response:

> I also find it questionable that, in response to Staff Data Request No. 3, CenturyLink simultaneously claims that: (1) "Infinera advised [CenturyLink] that it need not close the management channel…."; and (2) "Infinera likewise advised [CenturyLink] to keep the management channel enabled because the Infinera network switching equipment in [CenturyLink]'s network was operating using software version 15.3.3." Those purported recommendations are not equivalent, and neither I nor the Commission can confirm which, if either, of these recommendations Infinera actually made without further evidence from CenturyLink.

Webber Testimony at 30.

23 By challenging the veracity of CLC's data request responses, Commission Staff opened the door to the McNealy Affidavit. Case law is replete that when an opposing party uses inadmissible evidence at trial, the door is opened to respond using otherwise inadmissible evidence. *See, e.g., McCormick on Evidence* § 57 (3d ed. 1984); *United States v. Whitworth,* 856 F.2d 1268, 1285 (9th Cir.1988), *cert. denied*, 489 U.S. 1084 (1989) (Under the "curative admissibility" doctrine, the introduction of inadmissible or irrelevant evidence by one party justifies or "opens the door to" admission of otherwise inadmissible evidence). In *Henderson v. George Washington University,* 449 F.3d 127 (D.C. Cir. 2006), the plaintiff wanted to introduce evidence of a hearsay report to rebut the testimony of various witnesses. The D.C. Circuit agreed, reversing a jury verdict, explaining:

> Appellees respond that the evidence has no foundation for admission for rehabilitative purposes because appellant failed to meet the threshold for the "curative admissibility" doctrine. Under this doctrine, "the introduction of inadmissible or irrelevant evidence by one party justifies or 'opens the door to' admission of otherwise inadmissible evidence." *United States v. Brown*, 921 F.2d 1304, 1307 (D.C.Cir.1990). In this case, appellees assert that their questioning of Dr. Balliro was strictly limited to the existence, or lack thereof, of a reference to a three-centimeter

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

> anastomosis in the *Henderson* post-surgery report. Thus, they claim that they did not "open the door" to the admission of otherwise inadmissible evidence, because they never mentioned the Jones Report. This argument is entirely unconvincing.
>
> There is little question that this is the kind of situation that the "curative admissibility" doctrine sought to "cure." As one of our sister circuits has noted, not only is the trial court granted discretion to permit a party to introduce otherwise inadmissible evidence on an issue "when the opposing party has introduced inadmissible evidence on the same issue," but it may also do so "when it is needed to rebut a false impression that may have resulted from the opposing party's evidence." *United States v. Rosa*, 11 F.3d 315, 335 (2d Cir.1993).

Id. at 140-41.

24 That is exactly the case here. Mr. Webber references various Infinera hearsay statements and documents and speculates—incorrectly—about their meaning. CLC responds with the McNealy Affidavit to address the false impression left by Mr. Webber's testimony.

25 Mr. Webber improperly opines that the Infinera documents show the two outages were caused by the same issue, and that the CLC's failure to foresee this issue left it vulnerable to reportedly the same problem. The testimony of Messrs. Valence and Turner referencing to Mr. McNealy's affidavit clearly show that this was not the case. To permit the Staff's expert to improperly opine about the meaning of hearsay documents, without permitting CLC to provide an affidavit explaining what those hearsay documents actually mean, would be unfair and unjustifiably prejudice CLC.

///

///

///

CenturyLink
1600 7th Ave., Suite 1506
Seattle, WA 98191
Telephone: (206) 398-2507

CONCLUSION

26 CLC respectfully requests that the Commission deny the Public Counsel's Motion to Strike Mr. McNealy's Affidavit in its entirety.

Respectfully submitted this 7th day of July 2022.

CENTURYLINK

Adam L. Sherr (WSBA # 25291)
Assistant General Counsel
1600 – 7th Ave., Room 1506
Seattle, WA 98191
206 398 2507
adam.sherr@lumen.com

Charles W. Steese
Armstrong Teasdale LLP
4643 South Ulster Street, Ste. 800
Denver, Colorado 80237
(720) 200-0677 Ext. 3805
csteese@atllp.com