

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK COMMUNICATIONS,
LLC,

Respondent.

DOCKET UT-181051

RESPONSE TO MOTION TO STRIKE
CERTAIN TESTIMONY AND
EXHIBITS FILED BY
CENTURYLINK
COMMUNICATIONS, LLC

I. INTRODUCTION

1 Staff of the Washington Utilities and Transportation Commission (Commission) submits this response to the Public Counsel Unit of the Washington Attorney General’s Office’s (Public Counsel) Motion to Strike Certain Testimony and Exhibits Filed by CenturyLink Communications, LLC (CLC or Company) (Motion to Strike).

II. RELIEF REQUESTED

2 Commission Staff (Staff) requests that the Commission grant Public Counsel’s Motion to Strike and strike the affidavit from Thomas McNealy (Exh. MDV-3C) and the portions of CLC’s testimony that rely on Exh. MDV-3C for the reasons stated in Public Counsel’s motion. However, Staff disagrees with Public Counsel’s alternative requested relief, specifically that the Commission to order the Company to file additional testimony from McNealy and make McNealy available for hearing. Such relief will require further delay of the proceedings, leading to additional expense and prejudice for Staff and other cross-answering parties. Therefore, if the Commission does not strike Exh. MDV-3C and the portions of CLC’s testimony that rely on Exh. MDV-3C, the Commission should deny the

alternative relief and instead, for the purpose of this proceeding, evaluate the weight of the affidavit and related testimony in all of the circumstance and arguments developed at hearing and in briefing.

III. STATEMENT OF FACTS

3 On March, 31, 2022, CLC filed its response testimony in Docket UT-181051, which included Exh. MDV-3C, an Affidavit from Thomas McNealy, a Senior Director at Infinera Corporation.¹ On June 16, 2022, Public Counsel filed its Motion to Strike, requesting that the Commission strike Exh. MDV-3C from the testimony of Martin D. Valence, as well as portions of other CLC witnesses' testimony that cite to or rely upon Exh. MDV-3C.² On June 17, 2022, the Company filed a Motion for Continuance Regarding the Motion to Strike. On June 21, 2022, the Commission issued a notice extending the deadline to respond to Public Counsel's Motion to Strike to July 7, 2022.

IV. STATEMENT OF ISSUES

4 Whether the Commission should: (1) grant Public Counsel's Motion to Strike and strike Exh. MDV-3C and the portions of CLC's testimony that rely on Exh. MDV-3C, as identified by Public Counsel;³ or (2) deny Public Counsel's alternative request for relief, specifically that the Commission order CLC to provide testimony from McNealy.

V. EVIDENCE RELIED UPON

5 Staff relies on material already on file in Docket UT-181051.

VI. ARGUMENT

6 Staff supports the arguments made by Public Counsel regarding Exh. MDV-3C and the portions of CLC's testimony that rely on Exh. MDV-3C. However, if the Commission

¹ Valence, Exh. MDV-3C at 1, ¶ 1.

² Motion to Strike at 10, Table 1.

³ See Motion to Strike at 10, Table 1.

does not strike Exh. MDV-3C and the portions of CLC’s testimony that rely on Exh. MDV-3C, the Commission should not grant Public Counsel’s alternative remedy of requiring the Company to file testimony on behalf of McNealy and provide him as a witness at this stage of the proceeding, for three reasons.

7 First, allowing additional testimony from McNealy would require the Commission to further extend the procedural schedule for the case in order to provide the cross-answering parties time to review the new testimony and issue discovery. CLC filed its response testimony over three months ago, during which time CLC has not provided discovery responses regarding McNealy’s affidavit.⁴ Allowing additional testimony from McNealy by CLC, without affording the cross-answering parties additional time for discovery, would prejudice the cross-answering parties by depriving them of the time that the parties could have used for discovery had CLC originally filed McNealy’s statements as testimony.

8 Second, and relatedly, extending the procedural schedule to afford cross-answering parties sufficient time to respond to any discovery issued regarding McNealy’s testimony and potentially make changes or updates to existing testimony would result in additional delay and expense. RCW 34.05.449(2) provides that “[t]o the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.” In this case, the Commission’s prehearing conference order does not contain any limitation on discovery.⁵ Therefore, if CLC is allowed to file testimony from McNealy, the cross-answering parties should be entitled to additional time to issue

⁴ Suetake Decl., Exh. B at 11-12.

⁵ See *Wash. Utils. & Transp. Comm. v. CenturyLink Communications, LLC*, Docket UT-181051, Order 01 (Feb. 24, 2021).

additional discovery and to respond to the material change in the anticipated record evidence. However, this further extension of the procedural schedule will prejudice Staff and the other cross-answering parties insofar as the extension will require additional delay and expense.

9 Third, allowing CLC to now file testimony from McNealy would essentially condone CLC's initial strategic decision to file McNealy's statements as an affidavit, rather than testimony. CLC is a sophisticated litigant and is familiar with the Commission's adjudicatory process, as either it or its affiliates have appeared before or been subject to regulation by the Commission for years. Allowing CLC to file testimony from McNealy after initially filing only an affidavit would encourage other litigants to pursue similar approaches in the future, resulting in further delay and expense in other proceedings.

10 As such, if the Commission does not strike Exh. MDV-3C and the portions of CLC's testimony that rely on Exh. MDV-3C, the Commission should not order CLC to file testimony on behalf of McNealy. Rather, the Commission should, for the purpose of this proceeding, evaluate the weight of the affidavit and related testimony in all of the circumstance and arguments developed at hearing and in briefing.

VII. CONCLUSION

Commission Staff requests that the Commission grant Public Counsel's Motion to Strike and strike Exh. MDV-3C and the portions of CLC's testimony that rely on Exh. MDV-3C.

DATED this 7th day of July 2022.

Respectfully submitted,

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