

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK  
COMMUNICATIONS, LLC,

Respondent.

DOCKET UT-181051

ORDER 06

DENYING MOTION TO STRIKE  
TESTIMONY; GRANTING  
ALTERNATIVE RELIEF

**BACKGROUND**

- 1 On December 22, 2020, the Washington Utilities and Transportation Commission (Commission) on its own motion and through its regulatory staff (Staff)<sup>1</sup> issued a complaint against CenturyLink Communications, LLC, (CenturyLink or Company) regarding interruptions in 911 service on December 27, 2018. The Commission convened a prehearing conference on February 9, 2021, and on February 24, entered Order 01, Prehearing Conference Order; Notice of Hearing (Order 01). On August 27, 2021, the Commission issued a notice revising the procedural schedule.
- 2 Pursuant to the procedural schedule, Staff and the Public Counsel Unit of the Washington Attorney General’s Office (Public Counsel) filed initial testimony on December 15, 2021.
- 3 On December 20, 2021, Public Counsel filed a Motion for Leave to File Revised Testimony, explaining that it discovered an error in the recommended penalty amount. On December 28, 2021, the Commission granted Public Counsel’s Motion for Leave to File Revised Testimony, finding good cause with no objecting parties.

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<sup>1</sup> In formal proceedings such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

4 On March 31, 2022, CenturyLink filed Response Testimony, the day after Response  
Testimonies and Exhibits were due as outlined in the September 3, 2021, Notice of Errata  
to Notice Revising Procedural Schedule.

5 On April 1, 2022, Public Counsel filed a Motion to Strike Untimely Response  
Testimonies of CenturyLink. Also on April 1, 2022, CenturyLink filed a Motion for  
Leave to Accept Late-Filed Testimony.

6 On April 7, 2022, CenturyLink filed its opposition to Public Counsel's Motion to Strike,  
and Public Counsel filed its opposition to CenturyLink's Motion for Leave.

7 On April 6, 2022, Staff filed a Motion to Amend Complaint, requesting the Commission  
allow an amendment to the original complaint in these proceedings to include  
CenturyLink's affiliates.

8 On April 13, 2022, CenturyLink filed its opposition to Staff's Motion to Amend.

9 On April 26, 2022, the Commission entered Order 05, Denying Motion to Strike  
Testimony; Granting Motion for Leave to File Late Testimony; and Denying Motion to  
Amend Complaint.

10 On June 16, 2022, Public Counsel filed a Motion to Strike Certain Testimony and  
Exhibits Filed by CenturyLink (Motion to Strike). Public Counsel argues that the  
Commission should strike Exhibit MDV-3C, Affidavit from Thomas McNealy (McNealy  
Affidavit), from the testimony of Martin D. Valence and portions of the testimonies of  
Valence, Stacy J. Hartman, and Steven E. Turner (Testimonies) referring to the affidavit.  
In the alternative, Public Counsel asks that the Commission direct CenturyLink to refile  
Exhibit MDV-3C as testimony and make Thomas McNealy available for the hearing.

11 Public Counsel acknowledges that all testimony may be considered by the presiding  
officer.<sup>2</sup> Public Counsel asserts, however, that proffering the McNealy Affidavit as an  
exhibit rather than filing it as initial testimony is an unfair interpretation of Rule 703 of  
the Washington Rules of Evidence, which allows experts to rely on facts or data not  
admissible in evidence in forming their opinions or inferences. Public Counsel  
additionally states that CenturyLink evaded Staff's and its data requests directed to the  
McNealy Affidavit, and CenturyLink has made no witnesses available to answer those  
requests.

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<sup>2</sup> WAC 480-07-495.

- 12 On June 17, 2022, CenturyLink filed a Motion for Continuance because the Company's primary counsel was unavailable. Public Counsel agreed to the continuance. On July 21, 2022, the Commission issued Notice Extending Deadline for CenturyLink to Respond to Public Counsel's Motion to Strike.
- 13 On July 7, 2022, CenturyLink filed an Opposition to Public Counsel's Motion to Strike. The Company argues that the McNealy Affidavit is the kind of evidence on which reasonably prudent persons are accustomed to relying in the conduct of their affairs pursuant to RCW 34.05.452(1). Furthermore, CenturyLink asserts that this evidence would likely be admissible in a civil bench trial before the Washington superior courts, and the Commission should consider the rules of evidence governing general civil proceedings.<sup>3</sup>
- 14 Also on July 7, 2022, Staff filed a Response to Public Counsel's Motion to Strike (Staff Response). Staff's Response supports Public Counsel's motion to strike but does not support the alternative request to file the McNealy Affidavit as testimony and make Thomas McNealy available as a witness. Staff argues this would delay the procedural schedule and prejudice the non-Company parties who have unanswered data requests related to the McNealy Affidavit.
- 15 On July 11, 2022, CenturyLink filed a Motion for Leave to Reply. The Company argues that Staff misstated important facts and improperly reframes Public Counsel's Motion to Strike.
- 16 On July 18, 2022, Staff file a Response to CenturyLink's Motion for Leave to Reply in which Staff contends that CenturyLink fails to justify why a reply is necessary by either raising new facts or legal argument that would require a reply.<sup>4</sup> Staff requests the Commission deny CenturyLink's Motion for Leave to Reply.

## **DISCUSSION**

- 17 **Motion for Leave to Reply.** Pursuant WAC 480-07-370(5)(b), a motion for leave to reply is deemed denied unless the Commission grants the motion within five business days after the movant files it. Having not granted CenturyLink's motion by July 18, 2022, the Commission effectively denied the motion and declines to address the arguments

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<sup>3</sup> WAC 480-07-495(1)

<sup>4</sup> WAC 480-07-370(5)(b).

presented by the CenturyLink reply and Staff's Response to CenturyLink's Motion for Leave to Reply. We find the prior record sufficient to make a determination.

18 **Motion to Strike.** We deny Public Counsel's Motion to Strike. However, we direct  
CenturyLink to refile the McNealy Affidavit, as is, as initial testimony and make Thomas  
McNealy available as a witness at the hearing.

19 Pursuant to 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 before Washington superior courts.

20 The Commission rarely, if ever, allows an affidavit to be filed as an exhibit to a witness's  
testimony because doing so can deny other parties their rights to due process, particularly  
if the sponsoring party refuses to respond to data requests seeking information about the  
contents of that affidavit. Only if the affidavit provides facts that are or can be generally  
accepted as true should the Commission accept it as evidence of those facts without  
making the affiant available for cross-examination.

21 The McNealy Affidavit is not such an affidavit. It contains a description of events from  
one person's perspective. While that person may be an expert on what he describes, his  
statements do not have a sufficient inherent indicium of reliability such that the  
Commission is willing to accept them without an opportunity for cross-examination.

22 At the same time, we do not find that the McNealy Affidavit and corresponding  
references necessarily should be stricken entirely. CenturyLink shows in its Response to  
Public Counsel's Motion to Strike that the affidavit was contemporaneously used to  
support decisions that are relevant to the issues in this proceeding.<sup>5</sup> Such evidence may  
be useful to the Commission in rendering its decision if Thomas McNealy appears as a  
witness and presents his affidavit as testimony, providing parties and the Commission  
with the opportunity to cross-examine that testimony.<sup>6</sup> We appreciate Staff's concern that  
this may impact the procedural schedule in light of parties' past inability to obtain  
information about the McNealy Affidavit through discovery, but we find that such  
concerns do not outweigh the potential utility of the evidence contained in that affidavit.

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<sup>5</sup> CenturyLink Communications, LLC's Opposition to Public Counsel's Motion to Strike, at 5:13-14.

<sup>6</sup> Public Counsel's Motion to Strike, at 7:17-8:18.

23 Accordingly, if CenturyLink wishes to have the Commission consider Exhibit MDV-3C, CenturyLink must refile it, without modification, as initial testimony and make Thomas McNealy a witness available for cross-examination and responses to discovery. The Company must make this refiling by July 27, 2022, or the Commission will consider Exhibit MDV-3C and corresponding references withdrawn.<sup>7</sup> CenturyLink must also promptly respond to all outstanding data requests seeking information about Thomas McNealy or the information contained in his testimony, including data requests to which the Company objected or otherwise declined to provide a substantive response on the basis that he was not a witness. We will address any issues with delays in providing that information and the impact on the procedural schedule as they arise.

**ORDER**

**THE COMMISSION ORDERS:**

- 24 (1) The Commission DENIES Public Counsel’s Motion to Strike Testimony.
- 25 (2) The Commission DENIES CenturyLink Communications, LLC’s Motion for Leave to Reply.
- 26 (3) CenturyLink Communications, LLC, must refile Exhibit MDV-3C as initial testimony by July 27, 2022, or the exhibit and references to it in the testimony of other witnesses will be deemed withdrawn.

Dated at Lacy, Washington, and effective July 25, 2022.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

*/s/ Samantha Doyle*  
SAMANTHA DOYLE  
Administrative Law Judge

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<sup>7</sup> See Public Counsel’s Motion to Strike, Table 1 Testimony and Exhibits Affected by this Motion, at 10.