

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

vs.

CENTURYLINK COMMUNICATIONS,
LLC,

Respondent.

DOCKET NO.: UT-181051

**CENTURYLINK COMMUNICATIONS,
LLC’S OPPOSITION TO COMMISSION
STAFF’S MOTION FOR PROTECTIVE
ORDER**

CenturyLink Communications, LLC (“CLC”) opposes Commission Staff’s (“Staff”) Motion for Protective Order for the reasons set forth below:

INTRODUCTION

- I.* Commission rule allows parties to depose any witness to the case.¹ Public Counsel used this exact process to request and depose three of CLC’s five witnesses in this case. Those depositions took place in August, and all parties including Commission Staff attended. No party, including Commission Staff, objected.
- 2.* Here, CLC seeks to depose one of Staff’s three witnesses: Dr. Robert Akl, a PhD electrical engineer, and professor at the University of North Texas. Dr Akl did not present pre-filed direct testimony in December 2021. He presented testimony for the first time on August 31, 2022. Dr. Akl is a retained technical expert, whose CV, which is 50 pages long, identifies 168 prior engagements and numerous publications.

¹ WAC 480-07-410(1)

3. The Commission has set aside two days for hearing in this case for December 5 and 6, and the parties collectively have 14 witnesses. Given the limited hearing time, there may not be adequate time to probe all areas raised by this new witness without a deposition. The deposition will allow CLC to focus its cross-examination of Dr. Akl at the hearing.
4. In sum, Dr. Akl is an identified witness, offering technical testimony about what he claims is the cause of the December 2018 outage. CLC wants to depose him, so it better understands the scope, meaning and limits of his testimony. CLC respectfully requests that the Commission deny the Motion for Protective Order.

FACTS

5. On December 15, 2021, Staff and Public Counsel filed their pre-filed direct testimony in this case. Staff submitted the testimony of two witnesses: Ms. Hawkins-Jones and Mr. Webber. Public Counsel submitted testimony of five witnesses, including three consumers.
6. On March 31, 2022, CLC submitted responsive testimony from five witnesses. On July 27, 2022, the Affidavit of Thomas McNealy was re-submitted in the form of responsive testimony, making Mr. McNealy CLC's sixth witness.
7. In June 2022, Public Counsel requested the right to depose three CLC witnesses: (1) Steve Turner, an outside technical expert; (2) Carl Klein, a fact witness; and (3) Martin Valence, an in-house technical expert. Those depositions took place on August 17, 19, and 23, respectively. All parties including Commission Staff (who did not object) attended the depositions. Thus, Public Counsel deposed two of CLC's technical experts.
8. On August 31, Staff and Public Counsel presented their Cross-Answer testimony. Public Counsel's witnesses remained the same. Staff, however, added a new witness: Dr. Akl.

9. In Dr. Akl’s testimony, he evaluates “(1) the causes of the outages on [CLC’s] Red network in February 2018 and Green network in December 2018, as well as the relationship between those two events; (2) the foreseeability of the Green network outage after the occurrence of the Red network outage; and (3) CenturyLink’s responsibility for failing to take the necessary action, following the February 2018 Red network outage, that it knew or should have known would have prevented the Green network outage, and therefore the resulting Washington E911 service outage, in December of 2018.”² He also proposes “additional insights into why [Witness Webber’s] conclusions are [supposedly] correct.”³
10. On September 9, 2022, CLC requested the deposition of Dr. Akl. On September 13, Staff responded stating: “After consulting with Dr. Akl regarding his schedule, Staff could potentially make him available for a deposition on the following three dates:
- October 4th
 - October 7th
 - October 11th”
11. The next day, Commission Staff moved for a protective order to prohibit the deposition of Dr. Akl.
12. Discovery in this matter closes on October 14, 2022.
13. The virtual evidentiary hearing in this matter has been set for December 5 and 6, 2022 since May 17, 2022.

² Reply Testimony of Robert Akl, D.Sc. on behalf of Staff of Wash. Util. & Transp. Comm’n, 1 (August 31, 2022).

³ *Id.* at 2.

ARGUMENT

- 14.** The arguments Staff puts forward for precluding the deposition of Dr. Akl are misguided. Most importantly, Commission rule gives CLC the right to take the deposition. Beyond that, deposing Dr. Akl is fair, efficient, and necessary in light of the (a) impending close of discovery and evidentiary hearing, (b) precedent for taking depositions in this matter, and (c) the technical nature of the content of Dr. Akl's testimony.
- 15.** As Staff acknowledges, Washington Commission rule states that "[a] party may depose any person identified by another party as a potential witness."⁴ The rule does not require a party to exhaust written discovery before entitling it to depose a witness. Staff's motion seems to suggest that written discovery and depositions are mutually exclusive. The rules do not support such a view. CLC recently issued written discovery to explore certain aspects of Dr. Akl's testimony. That fact does not preclude CLC from also deposing Dr. Akl. Indeed, a deposition will allow CLC to efficiently follow up on Staff's answers to written discovery, as well as explore other areas of Dr. Akl's testimony, knowledge and experience.
- 16.** Before a party can depose someone *not* identified as a potential witness, the Presiding Officer must approve the deposition based on a conclusion that the person appears to possess information significant to the deposing party's case.⁵
- 17.** Instead of focusing on situations where a party has clear authority to depose a witness, Commission Staff cites to authority that has no applicability to CLC's requested deposition of Dr. Akl.

⁴ Motion ¶ 9; WAC 480-07-410(1).

⁵ WAC 480-07-410(1).

18. For example, Staff cites *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.*, Dockets UE-130137 & UG-130138, Order 05, (Apr. 16, 2013), for the idea that depositions are uncommon.⁶ That Order, however, considered whether to allow Public Counsel's deposition of a non-witness. The Commission allowed the deposition, despite its indication that the deposition of a non-witness was "unprecedented," after finding that the non-witness possessed information significant to the Public Counsel's case.⁷
19. Similarly, Staff cites *In re Application of Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington for an Extension of Certificate G-237 for a Certificate of Convenience and Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Service*, Docket TG-120033, Order 06, (Nov. 5, 2012), for the idea that depositions are allowed only where they are the most efficient and least burdensome means of obtaining information.⁸ However, the Commission there based its holding on its own previously entered discovery limitations. The Commission found that the witnesses the party sought to depose a witness about subjects that the Commission had already ruled were outside the scope of discovery that would be allowed in the case.⁹
20. The instant case differs significantly from this authority. Unlike the potential deponent in *Puget Sound Energy*, Dr. Akl is a witness, and unlike *In re Application of Waste Management of Washington, Inc.*, the Commission has not precluded discovery on the topics contained in Dr. Akl's testimony. To the contrary, both Public Counsel and Staff have propounded significant discovery about the subjects contained in Dr. Akl's testimony. Moreover, Public Counsel has deposed both of CLC's technical experts in

⁶ Motion ¶ 9.

⁷ *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.*, Dockets UE-130137 & UG-130138, Order 05, ¶¶ 16, 17 (Apr. 16, 2013).

⁸ Motion ¶ 9.

⁹ *In re Application of Waste Management of Washington, Inc. d/b/a WM Healthcare Solutions of Washington for an Extension of Certificate G-237 for a Certificate of Convenience and Necessity to Operate Motor Vehicles in Furnishing Solid Waste Collection Service*, Docket TG-120033, Order 06, ¶ 6 (Nov. 5, 2012).

this case (depositions Commission Staff attended).

21. The deposition CLC seeks therefore fits neatly into the first scenario of WAC 480-07-410(1): CLC “may” depose Dr. Akl, a person identified by another party as a potential witness. No further analysis is required.
22. In any event, the deposition of Dr. Akl should be allowed for several reasons. First, as the Commission in *Puget Sound Energy* notes, the “key threshold question under WAC 480-07-410(1) is whether [the potential deponent] ‘appears to possess information significant to the [deposing] party’s case.’”¹⁰ Here, Dr. Akl possesses information at issue in the case, and about which CLC has presented testimony through Messrs. Turner and Valence (both of whom were deposed). Dr. Akl’s testimony, in his own words, provides an “evaluation of: (1) the causes of the outages on [CLC’s] Red network in February 2018 and Green network in December 2018, as well as the relationship between those two events; (2) the foreseeability of the Green network outage after the occurrence of the Red network outage; and (3) CenturyLink’s responsibility for failing to take the necessary action, following the February 2018 Red network outage, that it knew or should have known would have prevented the Green network outage, and therefore the resulting Washington E911 service outage, in December of 2018.”¹¹ He also proposes “additional insights into why [Witness Webber’s] conclusions are [supposedly] correct.”¹² Dr. Akl’s position and the information he possesses is clearly “significant” to CLC’s case given that it forms the basis of Staff’s positions that CLC violated Washington law.

¹⁰ *Puget Sound Energy*, ¶ 17.

¹¹ Reply Testimony of Robert Akl, 1 (August 31, 2022).

¹² *Id.* at 2.

23. Second, a deposition of Dr. Akl is not unduly burdensome or expensive, and Staff has not shown that a deposition is *not* an efficient means of discovery here. Given the parties' precedent in this case of taking depositions, and the quickly approaching close of discovery and two-day evidentiary hearing, a deposition of Dr. Akl provides a very efficient and effective way of discovering the relevant information he possesses. This is especially true given Dr. Akl's very recent introduction to the case. A deposition allows immediate follow-up to answers. The deposition dates put forward by Commission Staff are just days before discovery closes on October 14. In contrast, it takes weeks to get follow up answers through data requests. With data requests, there may be time for one round of follow up questions before October 14, but with technical subject matter, that is often inadequate.
24. Third, the evidentiary hearing is scheduled for only two days. Given the technical nature of Dr. Akl's testimony, it may take significant amount of examination to ensure that counsel and the technical witness are on the same page before addressing the key substantive matters through cross-examination. There is likely insufficient time in the scheduled two-day hearing to conduct this type of examination of Staff's new witness before the Commission. In short, a deposition of Dr. Akl will allow CLC to conduct a focused cross-examination at the December 5-6 hearing.
25. Staff argues that data requests directed to Dr. Akl might be cheaper for Staff, noting "depositions ... generally are reserved for circumstances in which that form of discovery is the most efficient and least burdensome means of obtaining relevant information,"¹³ Staff cites no example where this dicta determined the outcome of a request to depose an actual witness to a case. Again, the Commission's decision in *In re Application of Waste Management of Washington, Inc.*, denying a party's leave to take certain depositions,

¹³ *In re Application of Waste Management of Washington, Inc.*, ¶ 5.

rested solely on the fact that the witnesses' testimony was outside the scope of allowable discovery.¹⁴ The Commission in *Puget Sound Energy* did not even analyze whether there were other, more cost-effective options than deposing the non-witness in granting the party's request to do so, despite that Order's "unprecedented," "extraordinary step" in allowing a non-witness deposition.¹⁵

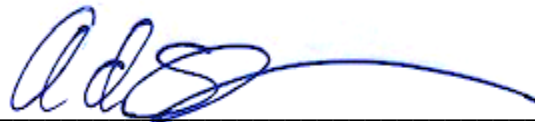
26. Staff has not shown that Dr. Akl's deposition is unduly burdensome or expensive. Nor has Staff addressed the fundamental right to both written and deposition discovery pursuant to the Commission's rules.

CONCLUSION

27. CLC respectfully requests that the Commission deny the Commission Staff's Motion for Protective Order in its entirety.

Respectfully submitted this 21st day of September 2022.

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¹⁴ *Id.* ¶ 6.

¹⁵ *Puget Sound Energy*, ¶ 16, 20.