

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK COMMUNICATIONS,
LLC,

Respondent

DOCKET NO. 181051

**CENTURYLINK
COMMUNICATIONS, LLC'S
MOTION TO COMPEL**

Pursuant to WAC 480-07-375 and -425, CenturyLink Communications, LLC (“CLC”) moves to compel Commission Staff (“Staff”) to respond to CLC’s data requests for the reasons set forth below:

I. INTRODUCTION

1. CLC is regrettably before the Commission again with another discovery dispute. Commission Staff sponsored two technical witnesses: Mr. James Webber and Dr. Robert Akl, both of whom attempt to explain why CLC caused certain 911 calls to not complete during a network outage in December 2018. CLC believes both witnesses’ testimonies contain significant gaps and logical leaps. As a result, CLC propounded data requests (“DRs”) to Staff seeking to understand the scope of these witnesses’ opinions. Instead of responding, Staff objected in total claiming that because the witnesses were not Commission Staff employees, Staff need not respond. Not only is this contrary to the law, this position is undermined by Staff’s own conduct in this case. CenturyLink has one

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outside expert, Steven Turner. Staff propounded several DRs that went directly to his testimony, and CLC responded to those DRs. Staff also effectively refused to respond to narrowly-crafted questions, not on the basis that the DRs seek information that is not reasonably calculated to lead to the discovery of admissible evidence, but because the Staff witness had not opined directly on the issue in his pre-filed testimony. CLC has every right to explore Staff's expert witnesses' opinions on core matters that are squarely relevant to this proceeding. CLC respectfully requests that the Commission order Commission Staff to respond to DRs 28, 31, 32, 34(c-d), 35, and 37-42.

II. FACTS

2. 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. Mr. Webber described the scope of his testimony as:

This testimony presents my understanding of the causes and impacts of the major service outage experienced by the Washington state Enhanced 911 ("E911") public safety communications network during December 27-29, 2018."

3. On August 31, 2022, Staff and Public Counsel pre-filed their Cross-Answer testimony. Staff also added a new witness, Dr. Akl, who purports to evaluate:

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." He also proposes "additional insights into why [Witness Webber's] conclusions are [supposedly] correct."

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4. Both Public Counsel and Staff issued DRs to CLC, seeking information regarding CLC witnesses' opinions, including the opinions of Steve Turner, an outside expert. For example:

- Staff DR 38 asked for Mr. Turner's prior testimony in two states;
- Staff DR 39 asked for Mr. Turner's materials from an arbitration;
- Staff DR 49 asked for support for Mr. Turner's statement about Comtech's SS7 network design;
- Staff DR 50 asked for support from Mr. Turner that it was customary for telecommunications providers to rely upon equipment vendors about how to best deploy equipment the vendor manufactured.¹

Public Counsel propounded an entire set of fourteen DRs specific to testimony proffered by Mr. Turner.² CLC responded fully to those requests. In addition to these, both Staff and Public Counsel propounded numerous DRs asking about the scope of CLC's other witnesses' testimony.

5. On September 15, 2022, CLC issued Data Requests 21 to 44 to Staff, which generally propound questions regarding the scope of Mr. Webber's and Dr. Akl's testimony. On September 22, 2022, Staff submitted its responses to CLC's Data Requests, effectively objecting to DRs 21–24, 26–27, 31–32, 34(c-d), 35, 37–42.³ Instead, Staff responded that Mr. Webber and Dr. Akl's opinions are contained in their pre-filed testimonies. But CLC's DRs seek to understand the scope of those opinions by posing questions *unanswered* in the testimonies. CLC's requests are reasonably calculated to lead to the

¹ See Ex. A.

² See Ex. B.

³ See Ex. C.

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discovery of admissible evidence and Staff has no defensible basis for refusing to answer. That CLC's DRs explore the failings of Staff's testimony is not a sufficient basis for objection or obstreperousness.

6. In an effort to resolve this discovery dispute, CLC counsel met and conferred with Staff counsel on October 5, 2022. Counsel for Staff indicated that his interpretation of the Washington Commission Rules is that CLC can only issue DRs to a party, and since Mr. Webber and Dr. Akl are not parties, the information sought is not in Staff's possession. At the same time, Staff counsel recognized that the questions posed in the DRs could properly be asked of the witnesses during the hearing. When counsel for CLC noted that the rules of discovery existed to authorize the gathering of information that could lead to the discovery of admissible evidence, counsel for Staff said CLC simply served the wrong "party," meaning CLC should have served Mr. Webber and Dr. Akl with third-party discovery. This demonstrates a lack of understanding of Commission discovery practice.
7. This position stands in stark contrast to the position Commission Staff took before the Commission in trying to obtain a protective order to bar Dr. Akl's deposition. There, Staff argued that DRs, not depositions, were the appropriate vehicle to obtain information from the experts, and sought a protective order based on that position.
8. On October 11, 2022, CLC deposed Dr. Akl and got answers to many of the questions it had propounded as to him, although Dr. Akl (on advice of counsel) persisted in refusing to answer questions (although undeniably relevant to this case) that he deemed outside the scope of his written testimony. With a couple of exceptions, the focus of this Motion is on DRs directed to Mr. Webber. Notably, during the deposition of Dr. Akl, his services contract with the Commission Staff was discussed. That contract specifically states that

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one of the purposes for which he was retained was to help Commission Staff respond to DRs posed by other parties.⁴ This contract makes plain that Staff understands its witnesses must assist them in responding to DRs propounded by other parties.

9. Discovery in this matter closes on October 14, 2022. As a result, CLC moves for an order compelling responses to DRs 28, 31, 32, 34(c-d), 35 and 37–42.
10. The virtual evidentiary hearing in this matter is set for December 5 and 6, 2022. As such, time is of the essence in receiving responses to these DRs.⁵

III. ARGUMENT

11. DRs must “seek only information that is relevant to the issues in the adjudicative proceeding or may lead to the production of information that is relevant.”⁶ Commission rules allow parties issue DRs to another party to obtain “existing documents; an analysis, compilation, or summary of existing documents into a requested format; *a narrative response describing a party’s policy, practice, or position*; or the admission of a fact asserted by the requesting party.”⁷ It is standard practice to issue DRs to a party that seek information regarding the scope of the answering party’s witness’s opinions, just as Staff and Public Counsel did about CLC’s designated experts.
12. Importantly, Staff does not argue that the information CLC seeks is not relevant; to the contrary, Commission Staff admitted during the meet and confer that the information

⁴ See Ex. D at p. 1. (“Contractor will perform the following tasks: ... Prepare Commission Staff data requests to CenturyLink, and TeleCommunication Systems, Inc. (TSYS) d/b/a Comtech Telecommunications Corp., (Comtech) and other parties, and responses to Commission Staff data requests from CenturyLink and Comtech and other parties.”).

⁵ CLC did not intend to depose Mr. Webber; however, it has reserved that right. CLC hopes to be able to obtain fulsome DR responses instead of conducting another deposition. Staff has agreed to permit such a deposition in mid-November.

⁶ WAC 480-07-400(4).

⁷ WAC 480-07-400(1)(c)(iii) (emphasis added).

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sought is relevant. Staff has declined to answer numerous DRs on the theory that the outside experts are not Commission Staff employees and that, as a result, they are not in possession, custody or control of the requested information. Staff's interpretation of the rules is unfounded.

13. CLC has not found any authority supporting Staff's interpretation of the rules. In fact, case law directly contradicts this position, as courts interpret "possession, custody or control" as including information within the possession, custody or control of a party's agent.⁸ Moreover, DRs must be directed to another party, and Mr. Webber and Dr. Akl are not parties.⁹ Staff's reading of the rule would prevent parties from ever propounding DRs to better understand any outside witness's opinion.
14. This Motion thus presents the question of whether a party can propound DRs to better understand comments made by a witness in prefiled testimony. The answer to that question is a resounding yes. In *Wash. Utils. & Transp. Comm'n v. Points Recycling & Refuse, LLC*, 2009 WL 1277882 (May 5, 2009), Commission Staff propounded DRs to understand the testimony of the President of one of the Respondents. In granting the Staff's motion to compel, the Commission stated:

Complainants have argued that these serious accusations demand that Mr. Wilkowski show proof of their accuracy.²⁵ According to Complainants, these claims "go to the heart of [their] complaint that [Mr. Wilkowski] is manipulating public opinion."²⁶ Mr. Wilkowski, by voicing these accusations in his prefiled testimony, opened the door to Complainants to pursue confirmation of their legitimacy. The information requested is relevant to Mr. Wilkowski's theory of the case. Thus, Complainants'

⁸ See, e.g., *Shippensburg Urban Developers v. United States*, No. 19-4775, No. 19-4976, 2022 WL 2356771, at *2 (E.D. Penn. June 30, 2022) ("Plaintiffs are obligated to produce all responsive documents that are under their 'custody, possession, or control,' including those possessed by agents."); *Unified Sch. Dist. 467 v. Gray Architects, LLC*, No. 14-1025, 2016 WL 2727281, at *1 (D. Kan. May 6, 2016) ("[T]he responding party must include in its answer all information within its possession, custody, or control—including information known by the responding party's agents.").

⁹ WAC 480-07-400(1)(c)(iii).

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motion to compel Points to produce information relating to this data request is granted, and Points must respond completely to this data request.¹⁰

DRs relating to the scope of a party's witness's opinions are therefore entirely appropriate. Staff should not be permitted to withhold important, admissible information.

15. In this case, CLC has responded to DRs from both Staff and Public Counsel seeking more information about its witnesses' opinions. Staffs should be compelled to provide the same.
16. The information CLC seeks from Mr. Webber and Dr. Akl is central to this case. Commission Staff tries to paint CLC as responsible for 911 calls not completing in the State of Washington during an outage on the CLC green network in December 2018. At the time, the State of Washington was going through a transition from CenturyLink as the covered 911 service provider to Comtech. At the time of the outage, Comtech was responsible for 47 of the State's public service answering points (PSAPs), and CenturyLink was responsible for the remaining 15 PSAPs. During the network outage, some 911 calls destined for Comtech's PSAPs failed to complete, but no 911 calls to CenturyLink's PSAPs failed to complete as a result of the network event. This of course raises the question of why some 911 calls to Comtech's PSAPs did not complete.
17. CLC witnesses have focused on the requirements of being a covered 911 service provider. The FCC recognizes that:

Covered 911 service providers are required to take reasonable measures to provide reliable 911 service in three specific respects: circuit diversity, central office backup power, and diverse network monitoring. They must also "certify annually whether they have, within the past year, audited the physical diversity of critical 911 circuits or equivalent data paths to each PSAP they serve, tagged those circuits to minimize the risk that they will

¹⁰ See, e.g., *Wash. Utils. & Transp. Comm'n v. Points Recycling & Refuse, LLC*, 2009 WL 1277882 (May 5, 2009) (granting motion to compel response to data request seeking that witness "explain comments he made in prefiled testimony").

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be reconfigured at some future date, and eliminated all single points of failure.”¹¹

CenturyLink designed the signaling network supporting its Washington 911 network with diverse circuits, such that the outage on the CLC green network did not prevent 911 calls from completing. In stark contrast, Comtech (unknown to CenturyLink) utilized the same CLC network for all of its signaling links; thus, when the December 2018 network event occurred, Comtech’s 911 calls failed to complete.¹² In addition, Comtech

[REDACTED]

”¹³ The reason the transition did not occur sooner was because “

[REDACTED]

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18. Commission Staff’s testimony all but ignores Comtech’s reckless 911 network design, the lack of circuit diversity, and how that lack of diversity caused the 911 calls to not complete. Commission Staff is singularly focused on what caused the outage on the CLC green network, and whether that event was foreseeable. Ignoring for a moment that CenturyLink’s use of the CLC network for signaling did not prevent 911 calls from completing to its PSAPs thereby showing Staff is analyzing the wrong issue, CLC is entitled to explore the scope of Staff’s opinions and whether the lack of circuit diversity was the true cause of 911 calls not completing. Dr. Akl has taught network design for two

¹¹ See Ex. E at ¶ 6.

¹² Notably, Comtech never informed CLC that it was using CLC’s circuits to support 911 calling. CLC had no idea how Comtech, or its agent TNS, were using the circuits.

¹³ See Ex. F.

¹⁴ *Id.*

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decades, purporting to be an expert, yet refuses to answer CLC DRs addressing the obvious flaws in Comtech’s 911 network.

19. CLC propounded several DRs relating to the scope of Dr. Akl’s and Mr. Webber’s testimony. Staff refused to respond to the following:

a. DR 31 asks “Does Mr. Akl believe it was “human negligence” by Comtech [REDACTED]
[REDACTED]
[REDACTED]? (see Exhibit SH-12C, pp. 8/92 – 10/92). If your answer is other than yes, fully explain your response.”

b. DR 32 asks “ Does Mr. Akl believe it was “human negligence” by Comtech [REDACTED]
[REDACTED]
[REDACTED] (see Exhibit SH-12C, pp. 8/92 – 10/92). If your answer is other than yes, fully explain your response.”

c. DR 37 asks “If the Commission Staff had initiated a complaint relating to the December 2018 outage against Comtech on the basis of its failure to obtain sufficient diversity for its SS7 links, would Mr. Webber support an argument by Comtech that is not legally responsible for failed 911 calls because its sole SS7 link vendor experienced an outage on its transport network? If your answer is other than no, fully explain your response.”

d. DR 38 asks “Does Mr. Webber agree that network diversity for SS7 links, in addition to geographic diversity, is likely to provide greater assurance that an outage will not impair the delivery of 911 calls? If your answer is other than yes, fully explain your response.”

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- e. DR 39 asks “At page 7 of his Cross Answer Testimony, Mr. Webber testifies that “[t]hese four specific circuits had the intent and effect of creating geographic redundancy and diversity in the signaling paths of the TSYS ESInet II system.” On page 8 of his Cross Answer Testimony, Mr. Webber testifies that “[i]t does not appear that the circuits shared a single physical point of failure, which is a key criterion cited by the [FCC] for route diversity for public safety purposes...” Please refer to CLC’s response to Staff data request 57C, in which CLC indicates that multiple of Comtech’s SS7 links “mux up to an OC 192 with the SCID Code of NTCM12.” Aware of CLC’s response to Staff data request 57C, on what basis does Mr. Webber conclude that the Comtech SS7 links were physically diverse and lacked a single physical point of failure”? Identify all facts and produce all documents supporting your response.”
- f. DR 40 asks “At page 9 (lines 10-16) of his Cross Answer Testimony, Mr. Webber refers to Comtech’s alleged desire for ESInet1 and ESInet2 to be interconnected via SIGTRAN IP instead of TDM/SS7. Mr. Webber states “[h]ad CenturyLink agreed to implement the initial proposal, as requested by TSYS [Comtech], it is highly unlikely that 911 services in Washington would have been impacted by the December 2018 outage on the CenturyLink’s Green network.” Does Mr. Webber likewise believe that, if Comtech had accepted TNS’ August 2018 proposal to replace two of the CenturyLink TDM SS7 links with TNS’ SIGTRAN IPX Connectivity, that is highly unlikely that 911 services in Washington would have been impacted by the December 2018 outage on the CenturyLink’s Green network.”
- g. DR 41 asks “Does Mr. Webber believe it was “human error and negligence” by Comtech [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (see Exhibit SH-12C, pp. 8/92 – 10/92). If your answer is other than yes, fully explain your response.”

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b. Few, if any, of the 911 calls intended for Comtech PSAPs on December 27-28, 2018 would have failed notwithstanding the Infinera green network event IF Comtech had deployed two of its four SS7 links (supporting the inter-tandem trunk connecting ESInet1 and ESInet2) via CLC’s Infinera green network and the other two via **transport circuits on an AT&T network.**

c. Few, if any, of the 911 calls intended for Comtech PSAPs on December 27-28, 2018 would have failed notwithstanding the Infinera green network event IF Comtech had deployed two of its four SS7 links (supporting the inter-tandem trunk connecting ESInet1 and ESInet2) via CLC’s Infinera green network and the other two via **transport circuits on another of CenturyLink/Lumen’s stand-alone optical networks.**

d. Few, if any, of the 911 calls intended for Comtech PSAPs on December 27-28, 2018 would have failed notwithstanding the Infinera green network event IF Comtech had deployed two of its four SS7 links (supporting the inter-tandem trunk connecting ESInet1 and ESInet2) via CLC’s Infinera green network and the other two via [REDACTED]
[REDACTED]
[REDACTED]. (see Exhibit SH-12C, pp. 8/92 – 10/92).

Staff responded as follows: “Staff denies each of the requests for admission numbered 28.a, 28.b, 28.c, and 28.d. The alleged facts Staff are asked to admit are speculative and counterfactual. *See* Cross Answering Testimony of James Webber, 6:1-15:10; Response Testimony of Steven E. Turner, 25 n. 17.”¹⁵

21. In deposition, CLC’s counsel asked Dr. Akl these questions and he refused to answer them. A simple review of the Comtech emails referenced above show these question are anything but “counter-factual.” Staff denied them; as a result, the DRs require Staff to

¹⁵ See Ex. G.

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“fully explain your answer and identify and produce all documents that support your answer.” This they have not done. CLC asks the Commission to compel a response to this DR as well.

22. Finally, DRs 34(c) and (d) ask:

At pages 2-3 of her Cross-Answer Testimony, Ms. Hawkins-Jones discusses four CenturyLink-served PSAPs (ValleyCom, NORCOM, South Sound 911-Puyallup, Colville

a. Identify, describe and produce all information and documents demonstrating that any 911 calls destined for any of these four PSAPs failed to complete as a result of the Infinera outage.

b. Identify, describe and produce all documents demonstrating that any of these four PSAPs experienced an inability to forward calls to CenturyLink-served PSAPs during the Infinera outage.

c. Who was the PIC'd long distance provider for each of the PSAPs listed above?

d. If CLC was the PIC'd long distance provider for the PSAPs listed above, does Commission Staff believe that the Commission has jurisdiction to penalize CLC for long distance calls that failed to complete? If your answer is other than no, fully explain and support your response.

e. Exhibit JHJ-18 states that “[s]ome 911 texts did not go through.” Please fully describe Staff’s understanding of what “911 texts” are being referred to, how many failed to go through, from whom the texts were sent and to whom the texts were directed.

23. Staff argues that certain PSAPs Comtech was responsible for could not originate long-distance calls—these are not 911 calls—during the December 2018 outage. CLC seeks to

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learn the identity of the long-distance carrier the PSAP selected, so the reason these calls did not originate can be investigated. Given that Staff has inserted this issue into the case, it is fair for CLC to posit questions about it.

24. 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 witnesses' pre-filed testimony without adequate discovery. Thus, answers to these DRs is particularly important.

IV. CONCLUSION

25. CLC respectfully requests that the Commission compel Commission Staff to respond in full to DRs 28, 31, 32, 34(c-d), 35 and 37-42.

Respectfully submitted this 14th day of October 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

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