

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,

v.

CENTURYLINK COMMUNICATIONS,
LCC,
Respondent.

DOCKET UT-181051

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION
STAFF'S OPPOSITION TO
RESPONDENT CENTURYLINK
COMMUNICATION'S MOTION TO
COMPEL

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I. RELIEF REQUESTED

1. Commission Staff respectfully request that the Commission deny CenturyLink Communications, LLC's (CLC) motion to compel further responses to CLC data requests (DRs) 28, 31, 32, 34(c-d), 35, and 37-42. DRs 28, 35, 38, and 39 have been fully responded to, and CLC has no basis for dissatisfaction with Staff's response.

2. The remaining DRs are contrary to WAC 480-07-400(1)(c)(iii) because they would "require creation of new data or documents" and CLC has shown no compelling need for such information. They are also outside the scope of expert discovery under analogous civil rules used in state trial courts because they seek discovery of expert opinions to which those experts did not testify.

II. STATEMENT OF FACTS

3. CLC propounded DRs 21-44 to Staff on September 15, 2022.¹ Staff responded to this set of DRs on September 22, 2022, with responses and objections.² On September 23, 2022, counsel for CLC emailed counsel for Staff requesting to meet and confer regarding the responses.³ The meet and confer was held on Wednesday, October 5, 2022.⁴

4. At the meet and confer, counsel for Staff agreed to supplement Staff's response to DR 28, and also investigate responses to DRs 33 and 44 to determine if supplementation was required.⁵ Counsel for Staff sent counsel for CLC an email reiterating these agreements.⁶ Otherwise, counsel for CLC indicated general dissatisfaction to other DR responses Staff had

¹ See Motion to Compel ¶ 5.

² Motion to Compel, Exh. C.

³ Declaration of William McGinty (McGinty decl.), ¶ 1.4.

⁴ McGinty decl. ¶ 1.5.

⁵ McGinty decl. ¶ 1.5-1.6.

⁶ McGinty decl., Exh. 1.

made and asked if Staff would stand on their responses and objections.⁷ Counsel for CLC indicated that there was no necessity to go through the responses item by item, but asked if Staff would be willing to supplement its responses generally.⁸ Counsel for Staff indicated that Staff would stand on its objections and responses except as indicated above.⁹ Counsel for CLC represented that CLC would file a motion to compel.¹⁰

5. On Friday, October 7, 2022, Staff supplemented its responses to DRs 28 and 33.¹¹ On Tuesday, October 11, 2022, counsel for CLC took the deposition of Dr. Robert Akl.¹² CLC now brings a motion to compel further responses to DRs 28, 31, 32, 34(c-d), 35, and 37-42.¹³

III. LEGAL ISSUES

A. DRs 28, 35, 38, and 39 Have Been Fully Responded To

6. DRs 28, 35, 38, and 39 have been fully responded to; CLC is wrong that further response is required.

7. DR 28 is set out in CLC's motion to compel and exhibits thereto.¹⁴ Generally, the DR is a four-part request for admission, which asks that Staff admit to four separate, but related, allegations. One of CLC's allegations in this matter has been that Comtech bears primary responsibility for the December 2018 911 outage because Comtech failed to secure appropriate carrier diversity. CLC provided expert testimony from Steven Turner in support

⁷ McGinty decl. ¶ 1.7.

⁸ McGinty decl. ¶ 1.7.

⁹ McGinty decl. ¶ 1.7.

¹⁰ McGinty decl. ¶ 1.5.

¹¹ Motion to Compel, Exh. G.

¹² McGinty decl., Exh. 2.

¹³ Motion to Compel ¶ 9.

¹⁴ Motion to Compel, ¶ 20; Motion to Compel, Exh. C at 9.

of this argument.¹⁵ Staff disagrees, and also provided expert testimony from James Webber to rebut Witness Turner’s opinion.¹⁶ DR 28 requests that Staff admit that if Comtech had designed its network in a different way, then the 911 outage would not have occurred.¹⁷ Staff denied, citing Witness Webber’s testimony concerning this point as well as the testimony of CLC’s own expert, who acknowledged that supplier diversity does not equate to route diversity.¹⁸ It is unclear what else CLC wants Staff to do to respond to this DR. Staff’s confusion is exacerbated by the fact that Staff agreed to supplement its response to DR 28 at the October 5, 2022, meet and confer, did supplement, and CLC’s motion to compel is the first Staff has heard that CLC was unhappy with the supplementation.¹⁹ DR 28 has been fully responded to, but even if it had not, a motion to compel further response should be denied for failure to comply with the meet and confer requirement. WAC 480-07-425.

8. DR 35 is not addressed in CLC’s motion at all, and CLC’s motion to compel further response should be denied on this basis alone.²⁰ But a quick review of Staff’s response to DR 35 shows that CLC’s request has been fully satisfied.²¹ CLC asked, essentially, why Staff took the position that a reoccurrence was likely even though CLC no longer provides 911 services and even though the network vulnerability that led to the outage has now been fully remediated.²² Staff referred CLC to previously filed testimony and exhibits directly

¹⁵ See, e.g., Turner, TR. 57:9-59:24.

¹⁶ See, e.g., Webber, TR. 6:3-15:10 (August 31, 2022).

¹⁷ Motion to Compel, ¶ 20; Motion to Compel, Exh. C at 9.

¹⁸ *Id.*

¹⁹ McGinty decl. ¶ 1.5.

²⁰ See generally Motion to Compel.

²¹ Motion to Compel, Exh. C at 18.

²² *Id.*

addressing this issue.²³ This response fully answers the data request, CLC has not said otherwise, and no motion to compel further response should be granted.

9. DRs 38 and 39 were fully answered with reference to Witness Webber’s previously filed testimony. DR 38 asks generally “[d]oes 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 delivery of 911 calls?”²⁴ Witness Webber specifically addressed issues of carrier diversity as applied to Comtech’s SS7 links in his cross-answering testimony.²⁵ Witness Webber testified, among other things that, “carrier diversity does not guarantee that facilities are deployed in such a manner as to avoid no single point of failure given that carriers often purchase and resell capacity from one another.”²⁶ He also testified that the particular 911 outage at issue in this case occurred during a time that Comtech was

[REDACTED]

[REDACTED] To the extent that CLC’s DR 38 asks for an opinion unmoored from the facts of the case, it is outside the scope of discovery. WAC 480-07-400(3). To the extent that CLC’s DR 38 asks for the basis of Witness Webber’s opinion that any alleged failure on Comtech’s part to provide adequate carrier diversity in its SS7 links is not the cause of the 911 outage, that is fully answered.

²³ Motion to Compel, Exh. C at 18.
²⁴ Motion to Compel, Exh. C.
²⁵ Webber, Exh. JDW-33CT 7:3-15:10.
²⁶ *Id.* at 14:20-15:3.
²⁷ [REDACTED]

10. DR 39 asks for the basis on which “Mr. Webber conclude[s] that the Comtech SS7 links were physically diverse and lacked a single point of failure.”²⁸ This is also fully answered in Witness Webber’s cross-answering testimony. Witness Webber was specifically asked in that testimony, “On what basis do you conclude that the [REDACTED] circuits at issue did not share a single physical point of failure and therefore must have had had physical route diversity?”²⁹ The following two pages of his testimony address specifically this point.³⁰ CLC cannot simply rephrase a question that Witness Webber was actually asked in his testimony and then complain when Staff refers CLC to the testimony which answers the question. Moreover, Witness Webber’s previously filed *direct* testimony, also answers this question.³¹ CLC may disagree with Witness Webber’s conclusions, but they cannot persuasively state they do not have the full basis of his opinion that the SS7 links at issue were physically diverse and did not share a single point of failure.

B. CLC’s DRs 31, 32, and 40-42 Regarding Witness Akl’s and Witness Webber’s Opinions Ask for Staff to Create New Data Contrary to WAC 480-07-400

11. Each of CLC’s DRs 31, 32, 37, and 40-42 ask that Staff submit a new question to its expert witnesses for analysis and response. CLC characterizes these questions as concerning the “scope” of Witness Akl’s and Witness Webber’s testimonies,³² but they instead request expert opinion that these witnesses did not testify to. Staff’s objections and responses directing CLC that their opinions are contained in their testimonies is entirely appropriate and no further response should be compelled.

²⁸ Motion to Compel, Exh. C.

²⁹ Webber, Exh. JDW-33CT at 8:15-8:17.

³⁰ *Id.* at 8:18-10:13.

³¹ Webber, Exh. JDW-1CT at 38:15-43:10.

³² *See, e.g.*, Motion to Compel ¶ 18.

12. WAC 480-07-400(1)(c)(iii) protects a party from having to create analyses or new information except under specific circumstances. It states in part:

If a party relies on a cost study, model, or proprietary formula or methodology, the party must be willing, on request, to rerun or recalculate the study, model, formula, or methodology based on different inputs and assumptions, subject to subsection (3) of this section [dealing with the scope of discovery]. *The commission otherwise will not order a party to respond to a data request that would require creation of new data or documents unless there is a compelling need for such information.*

WAC 480-07-400 (emphasis added).

13. Analogous provisions of the civil rules create similar protections, especially in regard to expert witnesses. Under the Washington Civil Rules applicable in Superior Courts, parties have no obligation to provide discovery about expert opinion that will not be testified to. *Estate of Depsey by and through Smith v. Spokane Washington Hospital Co. LLC*, 1 Wn. App. 2d 628, 640-41, 406 P.3d 1162 (2017).

Civil Rule 26(b)(5)(A)...expressly limits written discovery to (1) the identity of the testifying expert, (2) the subject matter on which the expert is expected to testify, (3) the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and (4) any other information about the expert as may be discoverable under these rules.

Id. at 640. To the extent an expert will not testify to a given opinion, discovery regarding that opinion is improper. *See id.* at 640-41 (“But to the extent Dr. Simons prepared *draft* opinions, because he will not testify about draft opinions, we cannot infer that he waived work product protections to those draft opinions, and they are not discoverable.”).

14. Here, each of CLC’s DRs 31, 32, 37, and 40-42, would require Staff to pose new or additional questions to its experts, who would then need to evaluate the information at their disposal, gather whatever additional evidence they needed, and analyze the available facts to come to a conclusion. They are therefore contrary to WAC 480-07-400(1)(c)(iii). They

also seek opinions from Staff's experts that the experts did not testify to, and seek protected work product information. *See Estate of Dempsy*, 1 Wn. App. 2d at 460-61.

15. This is most obvious with respect to DR 37, although they all fit this general mold. DR 37 asks, generally, whether Staff had brought a complaint against Comtech, instead of against CLC, for the 911 outage, what Witness Webber's opinions would be about Comtech's legal responsibility.³³ Such a question is obviously impossible to respond to. First, there is no such complaint; in order to answer this question an expert would need Staff's counsel to draw up a hypothetical complaint for the purposes of evaluating legal liability under it. That clearly treads on work product and attorney client privileged information outside the scope of discovery. Second, it impermissibly asks for a legal opinion. But, fundamentally, it conflicts with WAC 480-07-400(1)(c)(iii), because it would require Staff to pose this question to Witness Webber and get his expert opinion regarding a subject that Staff never asked him to testify about.

16. Each of DRs 31, 32, and 40-42 are similar. DRs 31 and 32 ask Witness Akl to evaluate whether certain conduct by Comtech amounted to "human negligence."³⁴ Witness Akl's testimony concerned the causes of the failures on the CLC network, whether those failures were reasonably foreseeable, and whether CLC should have taken additional action given information it knew before the December 2018 outage.³⁵ Witness Akl never opined about anything having to do with Comtech, or even the ultimate cause of the 911 outage.³⁶ Predictably, then, when asked these questions in his deposition [REDACTED]

³³ Motion to Compel, Exh. C.

³⁴ *Id.*

³⁵ Akl, Exh. RA-1CT 1:17-2:2.

³⁶ *See generally Id.*

[REDACTED].³⁷ Witness Akl also testified, contrary to CLC’s unsupported assertion,³⁸ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED].⁴⁰ It is contrary to Commission rule to compel Staff to ask these questions of Witness Akl, provide him with whatever material he needs to form an opinion, and then provide that opinion to CLC. WAC 480-07-400(1)(c)(iii).

17. DRs 40-42 are similar to DRs 31 and 32, except addressed to Witness Webber instead of Witness Akl. DR 40 asks whether Witness Webber believes “that, if Comtech had accepted TNS’ August 2018 proposal to replace two of the CenturyLink TDM SS7 links with TNS’ SIGTRAN IPX Connectivity, that it is highly unlikely that 911 services in Washington would have been impacted by the December 2018 outage on the CenturyLink’s Green Network.”⁴¹ But Witness Webber’s opinion is that Comtech “had a reasonable expectation that its circuits were redundant and diversely routed for this aspect of its E911 system.”⁴² And that carrier diversity is not an industry standard required or recommended by industry groups or regulatory bodies.⁴³ Further, even if carrier diversity is obtained, that “does not guarantee that facilities are deployed in such a manner as to avoid no single point of failure given that

³⁷ McGinty decl. Exh. 2 at 79:3-79:25.
³⁸ Motion to Compel ¶ 8.
³⁹ [REDACTED]
⁴⁰ McGinty decl. Exh. 2 at 79:3-79:11.
⁴¹ Motion to Compel, Exh. C.
⁴² Webber, Exh. JDW-33CT 8:1-8:3.
⁴³ *Id.* at 14:12-15:3.

carriers often purchase and resell capacity from one another.”⁴⁴ In short, whether or not the acceptance of the TNS proposal in August of 2018 would have avoided the 911 outage is irrelevant to Witness Webber’s opinion, and would require additional analysis and evaluation. Staff have no obligation to put additional questions to their experts in order to answer CLC’s questions, and the Commission should not order Staff to respond to DR 40. *See* WAC 480-07-400(1)(c)(iii).

18. DRs 41 and 42 ask whether Comtech’s failure to ensure carrier diversity for its SS7 links amounted to “human error and negligence”⁴⁵ and likewise require no further response. In response to both DRs, Staff referred CLC to Witness Webber’s previously filed testimonies.⁴⁶ As just explained, Witness Webber’s opinion is that Comtech had a reasonable expectation that its circuits were redundant and diversely routed and that it was following all applicable industry standards and regulatory guidelines.⁴⁷ Witness Webber was directly asked “Did TSYS violate the prevailing industry standards for redundancy and route diversity by not having carrier diversity for those SS7 links at the time of the December 2018 outage?”⁴⁸ He answered: “No.”⁴⁹ To the extent this does not answer CLC’s questions, and it wants Witness Webber to opinion whether, in his professional opinion, Comtech’s actions or omissions amounted to “human error and negligence,” such an opinion would require additional analysis and the creation of new information, contrary to Commission rule. *See*

⁴⁴ *Id.*

⁴⁵ *See* Motion to Compel Exh. C.

⁴⁶ Motion to Compel, Exh. C.

⁴⁷ Webber, Exh. JDW-33CT 6:1-15:10.

⁴⁸ *Id.* at 13:23-13:25.

⁴⁹ *Id.* at 14:1.

WAC 480-07-400(1)(c)(iii). It also seeks information protected by the work product privilege. *Estate of Dempsey*, 1 Wn. App. 2d at 460-61.

C. DR 34(c) and (d) Request Information Not in Staff’s Possession and Protected by the Attorney Client and Work Product Privileges, Respectively

19. DR 34(c) requests information that Staff does not have and 34(d) requests information privileged from disclosure. CLC’s motion to compel should not be granted as to either DR.

20. CLC’s DR 34(c) asks Staff to identify “the PIC’d long distance provider for” certain Public Safety Answering Points (PSAPs).⁵⁰ But Staff never asked the PSAPs who their long-distance providers were. The questionnaire that Staff sent to the PSAPs is in the record, and does not request this information.⁵¹ It is contrary to WAC 480-07-400(1)(c)(iii) to compel Staff to acquire and then produce this information to CLC.

21. DR 34(d), then, asks Staff whether it believes that the “Commission has jurisdiction to penalize CLC for long distance calls that failed to complete?”⁵² Nowhere in Staff’s Complaint does it allege that CLC should be penalized for such a failure.⁵³ The testimony of Witness Hawkins-Jones about the ValleyCOM PSAP being unable to make long distance 10-digit phone calls⁵⁴ is relevant to Staff’s third cause of action, that CLC violated WAC 480-120-412(2) “by failing to notify the affected PSAPs it served of the December 2018 major outage as soon as possible after receiving notice of or detecting the December 2018 major outage.”⁵⁵ WAC 480-120-412(2) requires that “[w]hen a company receives notice of a

⁵⁰ Motion to Compel, Exh. C.

⁵¹ See, e.g., Hawkins-Jones, Exh. JHJ-15.

⁵² Motion to Compel, Exh. C.

⁵³ See Complaint ¶¶ 24-35.

⁵⁴ Hawkins Jones, Exh. JHJ-17CT at 3:6-3:12.

⁵⁵ See Complaint ¶ 31.

major outage, it must notify the commission and any PSAP serving the affected area as soon as possible.” CLC’s DR 34(d), which asks for a legal analysis of a jurisdictional issue not relevant to the current action, is clearly barred by applicable work product and attorney client privileges. *See, e.g.*, RCW 5.60.060.

IV. EVIDENCE

22. This opposition relies on the testimony and exhibits already on file, the attachments to CLC’s Motion to Compel, and the declaration of William McGinty, filed herewith.

V. CONCLUSION

23. For the reasons stated above, CLC’s Motion to Compel should be denied in its entirety.

DATED at Olympia, Washington on October 21, 2022.

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