



**CenturyLink™**

**Jason D. Topp**  
Senior Corporate Counsel - Regulatory  
(651) 312-5364

September 6, 2013

Dr. Burl W. Haar  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7th Place East, Suite 350  
St. Paul, MN 55101

**Re: Possible Amendment to Rules Governing Utility Proceeding, Practice, and Procedure, Minnesota Rules Chapter 7829, excluding part 7829.2550, which is subject to a separate pending rulemaking MPUC Docket No. U-999/R-13-24**

Dear Dr. Haar:

Enclosed please find CenturyLink's Comments regarding the above-referenced matter.

Very truly yours,

/s/ Jason D. Topp

Jason D. Topp

JDT/bardm

Enclosures

cc: Service List



First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Julia	Anderson	Julia.Anderson@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 449 Minnesota St St Paul, MN 551012134	Electronic Service	Yes	OFF_SL_13-24_Official
Linda	Chavez	linda.chavez@state.mn.us	Department of Commerce	85 7th Place E Ste 500 Saint Paul, MN 55101-2198	Electronic Service	No	OFF_SL_13-24_Official
Ian	Dobson	ian.dobson@ag.state.mn.us	Office of the Attorney General-RUD	Antitrust and Utilities Division 449 Minnesota Street, BRM Tower St Paul, MN 55101	Electronic Service 1400	No	OFF_SL_13-24_Official
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 500 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_13-24_Official
Burt W.	Haar	burt.haar@state.mn.us	Public Utilities Commission	Suite 350 121 7th Place East St. Paul, MN 551012147	Electronic Service	Yes	OFF_SL_13-24_Official
Charles	Hudak	chudak@fn2.com	FRIEND, HUDAK & HARRIS, LLP	3 Ravinia Dr Ste 1450 Atlanta, GA 303462131	Electronic Service	No	OFF_SL_13-24_Official
John	Lindell	agorud.ecf@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St Paul, MN 551012130	Electronic Service	Yes	OFF_SL_13-24_Official
Michael R.	Moore	michael.moore@chartercom.com	Charter Communications, Inc.	12405 Powerscourt Drive St Louis, MO 63131	Paper Service	No	OFF_SL_13-24_Official
Carol A.	Overland	overland@legalelectic.org	Legalelectic - Overland Law Office	1110 West Avenue Red Wing, MN 55066	Electronic Service	No	OFF_SL_13-24_Official
Ron	Spangler, Jr.	rspangler@olpcc.com	Otter Tail Power Company	215 So. Cascade St P.O. Box 496 Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_13-24_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Sageona	Thompson	Regulatory_Records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	No	OFF_SL_13-24_Official
Jason	Topp	jason.topp@centurylink.com	CenturyLink	200 S 5th St Ste 2200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-24_Official
Kennard B.	Woods	kwoods@fn2.com	FRIEND, HUDAK & HARRIS, LLP	Suite 1450 Three Ravinia Drive Atlanta, GA 303462117	Electronic Service	No	OFF_SL_13-24_Official

**STATE OF MINNESOTA  
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION**

Beverly Jones Heydinger	Chair
David Boyd	Commissioner
Nancy Lange	Commissioner
J. Dennis O'Brien	Commissioner
Betsy Wergin	Commissioner

**Possible Amendment to Rules Governing  
Utility Proceeding, Practice, and Procedure,  
Minnesota Rules Chapter 7829, excluding  
part 7829.2550, which is subject to a separate  
pending rulemaking**

**MPUC Docket No. U-999/R-13-24**

**CENTURYLINK'S COMMENTS**

**Introduction**

CenturyLink submits these comments in response to the Commission's Notice of Comment Period on Possible Amendments to Rule Chapter 7829, Excluding Part 7829.2550 ("Notice"). Through these comments, CenturyLink argues that (1) the proposed rule extending electronic filing deadlines to midnight imposes a significant burden on parties, and more importantly on administrative staff responsible for making those filings; (2) the proposed language related to sanctions is unnecessary and without statutory authority; and (3) proposed modifications of the rules related to staff advocacy raises due process concerns and potentially undermines the quality of Commission decisions. CenturyLink respectfully suggests that all three of these proposed rule modifications be rejected.

**Discussion**

CenturyLink appreciates the opportunity to comment in response to the Commission's Notice. For the vast majority of the proposed rules, CenturyLink supports the changes suggested by the Commission and applauds the effort to make the rules fit more squarely

with today's practice environment and statutes. However, CenturyLink respectfully suggests a few modifications to the proposed rules.

**I. Filing Deadline**

The Notice asks for comments regarding "any issue arising from the draft of possible amendments . . . as an attachment to Staff Briefing Papers on July 25, 2013." Among the proposed rules is a change to Rule Part 7829.0400 that would allow parties to file documents electronically by midnight:

A. If submitted and accepted into the commission's electronic filing system, documents are considered filed at the time of electronic submission, regardless of whether the submission occurred during regular business hours.

CenturyLink respectfully opposes this proposed rule change. Parties frequently file documents near the deadline. Such timing can be for the purpose of making last minute corrections. Such timing can also be for strategic reasons. In the case of simultaneous filings, an early filing can disadvantage a party by giving opposing parties an opportunity to review and amend its filing to address arguments made by others.

Filing documents late in the evening imposes significant burdens on parties appearing before the Commission. Support staff will be required to work overtime hours. Personal commitments in the evening are more difficult to maintain. Costs necessarily increase.

Furthermore, in the case of expedited proceedings, late filings further squeeze tight deadlines for responses to pleadings. Frequently, responses to filings are due within ten calendar days. Sometimes the due date spans two weekends, leaving six business days to respond to very large briefs written by a large number of parties. The additional evening time for reviewing those filings can be critical in allowing a party to (1) understand the filing; (2) consult with clients during normal business hours and (3) prepare a response.

Because it is critical to make sure clients understand and sign off on advocacy positions, receiving a filing at midnight essentially eliminates the opportunity to engage in an informed dialogue the following day.

Finally, documents filed by a party to a proceeding are not deemed “accepted” until they are “accepted” by the Department of Commerce. Until a filing is “accepted” by the DOC it is available only to parties on the formal service list. Thus, unlike the federal court system, filings do not become publically available as soon as they are electronically filed. Rather, their availability is limited to a select list of individuals even though they are public documents. Lastly, the period of time between electronic filing and acceptance by the DOC is variable. It may range from several minutes to several days depending upon the date and time of the filing as well as the work load of the DOC staff processing the filing. This variability actually limits rather than increases the time available to respond to pleadings that may significantly affect participants.

For these reasons, CenturyLink respectfully suggests that electronic filings be required to be made by the current 4:30 pm deadline. To the extent the deadline imposes a burden, the Commission could reserve the authority to authorize a different deadline in a particular case.

## **II. Proposed Rules Related to Representations of Law or Fact**

The Commission’s Notice solicits comments related to its proposed rule regarding representations of law or fact.

- What should the Commission consider when deciding whether to include language that discusses possible sanctions for violations of the proposed Commission rule governing representations of fact or law to the Commission (Part 7829.0250)?
- Assuming that the Commission were to decide that a sanctions provision is appropriate, the Commission seeks comment on the following proposed language:

**Subp. 2. Sanctions.** If, after notice and an opportunity for comment and reply, the commission determines that subpart 1 has been violated, the commission may impose a sanction on any party or participant who violated subpart 1 or is responsible for the violation. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

CenturyLink respectfully suggests that language related to sanctions is both unnecessary and problematic.

The proposed language is unnecessary because the vast majority of individuals appearing before the Commission are attorneys. Rule 3.3 of the Minnesota Rules of Professional Conduct provides:

**RULE 3.3: CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Rule 3.9 of the Rules of Professional Conduct specifically applies Rule 3.3 to attorneys advocating before administrative agencies. Violating these obligations subjects an attorney to potential disciplinary action. Accordingly, any Commission rule imposing additional sanction is not needed.



Beyond being unnecessary from a legal perspective, it is unclear what factual reason exists for this rule change. CenturyLink is unaware of any violations of the proposed rule that give rise to a need for further sanctioning authority. The number of parties that appear before the Commission is relatively small and the individuals who appear before the Commission work with each other regularly. Misrepresenting facts to the Commission would have severe professional repercussions outside of any formal sanction.

Finally, the Commission should consider whether or not it has statutory authority to impose sanctions. In several contexts, state and federal courts have reversed Commission actions that have not been authorized by Minnesota Statutes, Chapter 237. In doing so, the Minnesota Supreme Court has noted "[h]istorically, we have been reluctant to find implied statutory authority' in the context of the MPUC's remedial power. . . . As a general rule, we resolve any doubt about the existence of an agency's authority against the exercise of such authority."<sup>1</sup> It does not appear that any provision in Chapter 237 gives the Commission the authority to impose sanctions on parties appearing in Commission proceedings.

In short, CenturyLink respectfully suggests that the Commission should reject proposed rules allowing it to impose sanctions for violations of Proposed Rule 7829.0250.

### **III. Proposed Rule Modifications Related to Staff Advocacy**

The notice also asks for comment on whether it should amend rule part 7829.2600 to read "if commission staff recommended action not advocated by any party, at the request of any party **and to the extent practicable**, all parties must be granted an opportunity to comment . . ." (emphasis added). CenturyLink opposes the underlined language above because it raises

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<sup>1</sup> *In re Qwest's Wholesale Serv. Quality Stds.*, 702 N.W.2d 246, 259 (Minn. 2005) citing *In re N. States Power Co.*, 414 N.W.2d 383, 387 (Minn. 1987).

the possibility that the Commission could take an action opposed by the party without any opportunity to provide input.

Such an approach raises significant due process concerns. The Fourteenth Amendment to the United States Constitution and article I, section 7 of the Minnesota Constitution provide that no person shall be deprived of life, liberty, or property without due process of law.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.<sup>2</sup>" "Due process requires that a defendant must be given adequate time to investigate the charges and prepare its defense."<sup>3</sup> "Notice and an opportunity to be heard are universally recognized as essential to due process. A fair hearing is a fundamental requisite."<sup>4</sup>

The proposed rule modification raises the potential that the Commission could violate these requirements in a future proceeding by reaching a decision based on a recommendation for which a party did not have notice and did not have an opportunity to be heard.

CenturyLink respectfully suggests that this proposed language should be eliminated. In the alternative, existing language in the rule guaranteeing an opportunity to provide oral comment should be retained.

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<sup>2</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18 (1976)

<sup>3</sup> *In re License of W. Side Pawn*, 587 N.W.2d 521, 523 (Minn. App. 1998), *review denied* (Minn. Mar. 30, 1999).

<sup>4</sup> *Juster Bros., Inc. v. Christgau*, 214 Minn. 108, 119 (Minn. 1943)

**Conclusion**

CenturyLink appreciates the Commission's efforts to update its rules and respectfully requests the Commission take into consideration its suggested modifications contained in these comments.

Dated this 6th day of September, 2013.

**QWEST CORPORATION DBA  
CENTURYLINK QC**

/s/ Jason D. Topp

Jason D. Topp  
200 South Fifth Street, Room 2200  
Minneapolis, MN 55402  
(651) 312-5364