

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK COMMUNICATIONS,
LLC

Respondent.

DOCKET UT-181051

PUBLIC COUNSEL’S MOTION TO
STRIKE ATTACHMENT 1 AND
PORTIONS OF THE OPENING
BRIEF OF CENTURYLINK
COMMUNICATIONS, LLC
AMENDED FEBRUARY 2, 2023

I. INTRODUCTION

1 Pursuant to Washington Administrative Code (WAC) 480-07-375(1)(d), the Public Counsel Unit of the Washington Attorney General’s Office (Public Counsel) moves to strike in its entirety Attachment 1 to CenturyLink Communications, LLC’s (CenturyLink or Company) Opening Post-Hearing Brief filed with the Washington Utilities and Transportation Commission (Commission) in Docket UT-181051 as well as associated portions of the brief. Public Counsel also moves to strike sections of the brief related to the GeekWire article included in footnote 38 of CenturyLink’s brief.

2 The Commission should strike Attachment 1 and the brief sections described above because neither the attachment nor the article is part of the record of this proceeding. The Company’s introduction of this extra-record evidence in its brief is untimely and inappropriate. Allowing CenturyLink to introduce this evidence at this point in the proceeding would violate the Commission’s evidentiary and procedural rules and harm the integrity of the adjudicative process. Furthermore, parties including Public Counsel are unfairly prejudiced by CenturyLink’s untimely presentation of this material. Public Counsel therefore respectfully requests the

Commission to strike Attachment 1 and certain portions of CenturyLink’s brief.

II. LEGAL STANDARDS

3 Under WAC 480-07-830(1), the evidentiary record in an adjudication closes at the
conclusion of the last day of hearing unless the Commission rules otherwise.¹ The rule allows for
exceptions for public comment exhibits and responses to bench requests the Commission
receives after the hearings conclude,² but neither exception applies in this instance. Any finding
of fact made by the Commission in its orders must be “based exclusively on the evidence of
record in the adjudicative proceeding and on matters officially noticed in the proceeding.”³

4 The Commission’s rule, WAC 480-07-830(2), states that a party may file a motion to
reopen the evidentiary record at any time after the record closes and before the Commission
enters a final order.⁴ The Commission “may reopen the record to allow receipt of evidence that is
essential to a decision and that was unavailable and not reasonably discoverable with due
diligence at the time of the hearing or for any other good and sufficient cause.”⁵ The moving
party must demonstrate that the evidence meets this standard.⁶ CenturyLink has not
demonstrated that it would meet the requirements of WAC 480-07-830(2).

III. DESCRIPTION OF ATTACHMENT 1 AND BRIEF SECTIONS

A. Description of Attachment 1

5 CenturyLink filed its Opening Post-Hearing Brief on January 17, 2023. In its brief,
CenturyLink quotes to an article purportedly written by Public Counsel’s witness, Brian Rosen,

¹ WAC 480-07-830(1).

² *Id.*

³ RCW 34.05.461(4).

⁴ WAC 480-07-830(2).

⁵ WAC 480-07-830(3).

⁶ *Id.*

and includes the article as Attachment 1.⁷ CenturyLink did not previously include this article as an exhibit to any of its filed testimonies or as a cross-examination exhibit. CenturyLink mischaracterizes a selected quote from this article to support its primary assertion that it is not responsible for the 9-1-1 calls completing during the December 2018 outage.⁸

B. Description of the GeekWire Article

6 CenturyLink also cites to an article published on December 28, 2018, on Geekwire.com titled, “Widespread 911 outage hits Washington as emergency alerts sent to smartphones.”⁹ CenturyLink does not include this article as an attachment but merely includes a website address for the article in a footnote.¹⁰ CenturyLink cites to this article to support its assertion that there was a spike in 911 calls “because of an emergency alert sent to smartphones by the State of Washington late in the evening on December 27, 2018.”¹¹ CenturyLink makes this factual assertion for the first time in its brief. The GeekWire article was not included as an exhibit to the testimonies of any CenturyLink witness nor was it introduced as a cross-examination exhibit during hearings.

IV. ARGUMENT

A. CenturyLink’s New Material Is Not Part of the Record of the Proceeding and thus Cannot Be Relied upon by the Commission.

7 Washington State law is clear that all findings of fact in an adjudication shall be based exclusively on the evidence of record.¹² The Commission’s rules are equally clear that the record

⁷ CenturyLink Communications, LLC’s Opening Post-Hearing Brief, at 1.

⁸ *Id.* ¶ 2; *id.* ¶ 19; *id.* ¶ 99.

⁹ *Id.* at 12, n.38.

¹⁰ *See id.* ¶ 22.

¹¹ *Id.* ¶ 22.

¹² RCW 34.05.461(4).

of an adjudication closes at the conclusion of the last day of evidentiary hearings.¹³ In prior proceedings, the Commission has stated that it “will consider new evidence after a record is closed only when late submission was proposed and approved before the record was closed, or in conjunction with a motion to reopen stating reasons and subject to answer by other parties.”¹⁴ The Commission has also stated, “it is inappropriate to cite to facts that are not in the record”¹⁵ and that “because the Commission cannot lawfully consider evidence outside the record, it cannot allow parties to recite such asserted ‘facts’ for its consideration.”¹⁶

8 CenturyLink, however, seeks to introduce the two documents described above for the first time in its brief. Neither CenturyLink’s Attachment 1 nor the GeekWire article were included in the final exhibit list for this docket,¹⁷ and none of CenturyLink’s witnesses relied upon to these articles in their testimony. CenturyLink did not attempt to introduce either of these documents as cross-examination exhibits during the hearing. CenturyLink has had ample opportunity to introduce these documents throughout this proceeding, but failed to do so.

9 The Commission’s rules also allow parties to file a motion to reopen the record for the receipt of new evidence. However, CenturyLink has not shown that the evidence was unavailable or not reasonably discoverable at the time of the hearing, nor provided good and sufficient cause to allow this evidence into the record. CenturyLink has offered no reasonable grounds on which to allow the inclusion of this untimely new evidence. CenturyLink cannot simply introduce these

¹³ WAC 480-07-830(1).

¹⁴ *Wash. Utils. & Transp. Comm’n. v. Olympic Pipe Line Co.*, Docket TO-011472, Eighth Supplemental Order, ¶ 12 (Mar. 29, 2002); *see also id.* ¶ 34 (where the Commission denied the Company’s attempt to submit an affidavit as evidence after the record was closed).

¹⁵ *Wash. Utils. & Transp. Comm’n. v. Wash. Nat. Gas Co.*, Docket UG-940814, Seventh Supplemental Order, at 4 (May 11, 1995).

¹⁶ *Id.*

¹⁷ Docket UT-181051 Final Exhibit List.

documents in its brief in the hope that the Commission and parties do not notice the evidence is not in the record of this proceeding.

B. Allowing CenturyLink to Rely upon this New Evidence Would Be Prejudicial to Parties, Including Public Counsel.

10 CenturyLink’s introduction of Attachment 1 and the GeekWire article in its brief is untimely and unduly prejudicial to parties. CenturyLink could have timely included both documents in the record as cross-examination exhibits at the evidentiary hearing, but declined to do so. As a result, CenturyLink failed to lay the proper foundation for either article, and parties have not had an opportunity to respond to the evidence. CenturyLink’s untimely introduction of this evidence also deprives parties the ability to cross-examine the Company’s witnesses on the material.

V. PORTIONS OF BRIEF AFFECTED BY THIS MOTION

11 Public Counsel’s motion would impact Attachment 1, portions of CenturyLink’s brief that rely upon the Attachment, and all references to the GeekWire article in the brief. Table 1 contains a list of the portions of CenturyLink’s brief that would be affected by this Motion.

Table 1. Sections of CenturyLink’s Brief Affected by this Motion

Document	Location in Brief	Lines to be struck from the brief
Attachment 1 Article titled “Analysis of CenturyLink Dec 2018 outage: Transport Operator/Supplier Diversity is Critical”	Pages 1–2, ¶ 2	<ul style="list-style-type: none"> • “It is not just CLC who says this. Shortly after the outage, Public Counsel’s expert wrote an article about the outage and concluded: “[T]he root cause of CALL failures, which is what we and the FCC really care about, was lack of diversity. That was foreseeable that was preventable, and that is almost universally a critical design fault of 9-1-1 networks, including NG9-1-1 networks today.”” • Footnote 2

Document	Location in Brief	Lines to be struck from the brief
Attachment 1	Page 10, ¶19	<ul style="list-style-type: none"> • “Indeed, shortly after the December 2018 outage, Mr. Rosen wrote an article stating: “[CenturyLink] is a fine network operator, Infinera is generally well thought of. There is no reason to think that any other network operator, or any other vendor would be better at this kind of thing. They all are dependent on humans, and humans make mistakes. What is wrong is relying entirely on CL, or any other single network operator, for all of your paths.” ”So, to me, the root cause of this particular NETWORK failure was coding bugs in the switch complicated by the configuration issue. But the root cause of CALL failures, which is what we and the FCC really care about, was lack of diversity. That was foreseeable, that was preventable, and that is almost universally a critical design fault of 9-1-1 networks, including NG9-1-1 networks today.”” • Footnote 25 (This footnote appears to mistakenly cite to Attachment 2C.)
Attachment 1	Page, 14, Footnote 45	<ul style="list-style-type: none"> • “Mr. Rosen has made it clear that the 911 calls in Washington failed because of this lack of diversity. <i>See</i> Attachment 2C.” (This footnote appears to mistakenly cite to Attachment 2C.)
Attachment 1	Page 46, ¶99	<ul style="list-style-type: none"> • “As described above, Public Counsel’s witness has already published an article on this exact outage and stated that “the root cause of CALL failures, which is what we and the FCC really care about, was lack of diversity. That was foreseeable, that was preventable, and that is almost universally a critical design fault of 9-1-1 networks, including NG9-1-1 networks today.” <i>See</i> paragraph 2 above.”
GeekWire Article Article titled “Widespread 911 outage hits Washington as emergency alerts sent to smartphones”	Page 12, ¶ 22	<ul style="list-style-type: none"> • “–perhaps because of the emergency alert sent to smartphones by the State of Washington late in the evening on December 27, 2018–” • Footnote 38

VI. CONCLUSION

12 Allowing CenturyLink to introduce new evidence in its brief would violate the Commission's rules regarding the reopening of the record and state law regarding the evidentiary basis for the Commission's findings of fact. Public Counsel therefore respectfully requests that the Commission grant its Motion to Strike Attachment 1 and Portions of the Opening Brief of CenturyLink Communications, LLC.

DATED this 30th day of January 2023.

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