

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK COMMUNICATIONS,
LLC,

Respondent.

DOCKET NO. UT-181051

**CENTURYLINK COMMUNICATIONS,
LLC'S OPPOSITION TO PUBLIC
COUNSEL'S AMENDED MOTION TO
STRIKE**

INTRODUCTION

- I. CenturyLink Communications, LLC (“CLC”) opposes Public Counsel’s Amended Motion to Strike Attachment 1 and Portions of the Opening Brief of CenturyLink Communications, LLC (“Motion”) for the reasons set forth below. This is Public Counsel’s second motion to strike in this proceeding and, like its first, it should be denied. Public Counsel incorrectly claims that CLC’s arguments and several references from its Opening Brief are an attempt to add *evidence* after the hearing is closed. Public Counsel misinterprets CLC’s persuasive authority as evidence and misapplies Washington statutes and the Commission’s evidentiary and procedural rules in an attempt to play gatekeeper of information the Commission may consider in its deliberations. Public Counsel’s Motion contradicts the Commission’s rules, Commission precedent, and longstanding Commission practice. For these reasons, as explained in more detail below, the Commission should deny Public Counsel’s Motion.

FACTS

2. Public Counsel argues that an article written by Public Counsel's expert witness Brian Rosen (but strangely not disclosed by Mr. Rosen or Public Counsel) and references to a separate Geekwire article should be stricken from CLC's Opening Brief because neither article was previously included as an exhibit to any of CLC's filed testimonies or as a cross-examination exhibit.¹ CLC never claimed that either article should be considered part of the evidentiary record in this proceeding; it did not request their admission, and CLC did not request that either article be treated as admissible factual evidence. Rather, the articles were referenced and attached as persuasive authority and were identified in CLC's Table of Authorities in its Opening Post Hearing Brief. Like any technical journal, the Rosen article was attached as persuasive authority to show how experts in the industry evaluate the true cause of 911 outages.² It also undermines Public Counsel's advocacy in this litigation which strongly diverts from Mr. Rosen's conclusions as articulated in the appended article. The Geekwire article was referenced, just like any newspaper article can be. The Commission's rules, Commission precedent, and longstanding practice recognize the difference between support for arguments in a brief and the evidentiary record in a proceeding. These differences require the Commission to deny Public Counsel's Motion.

AUTHORITY AND ARGUMENT

- A. Commission rules expressly authorize CLC's use of Mr. Rosen's and the Geekwire articles as persuasive authority in support of CLC's positions.**
3. All parties in this proceeding were required to file briefs in this proceeding pursuant to the prehearing conference order,³ the presiding officer's instruction at hearing,⁴ and WAC 480-07-390:

The commission may permit or require the parties to a proceeding to present their arguments and authority in support of their positions

¹ Motion at ¶¶ 2, 8

after the conclusion of any evidentiary hearing. Such a presentation may be in the form of written briefs, oral argument at the close of the hearing, or both.

4. The two articles Public Counsel wants stricken from CLC’s brief were presented as two of CLC’s multiple authorities in support of its arguments following the evidentiary hearing. Pursuant to WAC 480-07-395(1)(c)(vi) and (vii), CLC is authorized to file a courtesy copy of Mr. Rosen’s article as an attachment to its Opening Brief. CLC properly identified the two articles as supporting authority in its Table of Authorities,⁵ and CLC properly cited the two articles as supporting authority rather than evidence from the record⁶ pursuant to WAC 480-07-395(1)(c)(vi), which states:

Citation to authority. Parties must use the citation formats specified in the current edition of the style sheet of the Washington supreme court reporter of decisions. The presiding officer may require parties to file copies of the text of authorities that are cited in parties’ briefs and upon which parties place substantial reliance. Unless excused by the presiding officer, parties must include a table of cited authorities, with the full citation of each reference and its location in the brief.

5. Public Counsel’s claim that CLC is attempting to add “evidence” to the record is without support and is contradicted by CLC’s brief. CLC did not request admission of either

² Notably, Public Counsel should have disclosed Mr. Rosen’s article in discovery and did not. CLC propounded a data request to Public Counsel, which stated:

DATA REQUEST NO. 13. On page 13 of his Direct Testimony, Mr. Rosen states that “generally advise[s] that supplier diversity be used to guard against the kind of failure that occurred here.” Provide all literature, standards, statutes, regulations or decisional law of which you are aware that make a similar suggestion.

Public Counsel did not reference *Mr. Rosen’s own article*, which certainly was responsive and should have been disclosed. *See* Exh. BR-52X.

³ *See* Order 01 (Prehearing Conference Order) at Appendix B (Feb. 24, 2021).

⁴ Tr. 506:13-18.

⁵ *See* CLC’s Opening Post-Hearing Brief at iv (Table of Authorities).

⁶ *Compare* WAC 480-07-395(1)(c)(v)(b)(Citations to record, Exhibits) to WAC 480-07-395(1)(c)(vi) (Citation to authority).

article, it did not refer to either article as an exhibit or using exhibit citations. Instead, CLC referenced the articles as authority in support of its positions, as contemplated and expressly authorized by WAC 480-07-390.

B. The Commission Has Denied Similar Motions to Strike.

6. Commission precedent also illustrates that CLC’s use of Mr. Rosen’s article and the Geekwire article is appropriate. In *WUTC v. Pac. Power & Light Co.*, the Commission determined that Boise White Paper, LLC’s citations to materials that were not in the record were “offered merely as persuasive argument,” and were therefore appropriate for briefing.⁷ The Commission determined that a party is free to cite such authorities for its position, and it is the Commission’s decision whether those authorities are useful in its deliberations.⁸ The Commission concluded: “Boise is entitled to advance that view, and we will afford it weight relative to the degree that we find it relevant to the matters before us.”⁹ Advancing its view with supporting authority is exactly what CLC has done in its Opening Brief. It is hard to imagine that the Commission will not find the articles relevant to the matters before it, especially Mr. Rosen’s article, which opines on the very event at issue in this proceeding. But again, that is for the Commission, not Public Counsel, to decide.
7. Public Counsel’s mistake of confusing argument with evidence demonstrates that the Commission should deny Public Counsel’s Motion on procedural grounds, as well as substantive grounds. The Commission denied a motion to strike in another case for a similar procedural error to the one Public Counsel makes here. In *In the Matter of the Petition of PSE*, the company attempted to strike portions of Staff’s brief under WAC 480-07-375(1)(d)—the same rule Public Counsel relies on here. But the Commission

⁷ *WUTC v. Pac. Power & Light Co.*, Docket UE-161204, Final Order 06 at ¶¶ 51-59 (Oct. 12, 2017).

⁸ *Id.* at ¶ 59.

⁹ *Id.*

recognized that WAC 480-07-375(1)(d) refers only to motions related to evidence in a record of a proceeding. “Motions related to evidence are *requests to limit or add to the record in a proceeding*.”¹⁰ The Commission determined that a brief is not evidence in the record of a proceeding.¹¹ Therefore, when PSE requested to strike portions of Staff’s brief, its motion was procedurally flawed because striking any portion of a brief would not limit or add to the record in the proceeding.

Briefs are required to include argument, citations to authority, and citations to the record. Briefs cite to evidence, but they are not themselves evidence. A motion to strike portions of a brief under the authority PSE cites accordingly is procedurally inappropriate and we deny PSE’s motion to strike.¹²

8. Public Counsel seeks to strike portions of CLC’s Opening Brief under the same rule and with the same procedural defect as PSE’s motion. Striking any portion of CLC’s brief will not change the record in this proceeding because, as stated above, neither Mr. Rosen’s article nor the Geekwire article is evidence. Therefore, a motion to strike under WAC 480-07-375(1)(d) is procedurally faulty, and Public Counsel’s Motion should be denied.

C. Public Counsel’s Brief Also Cites Authority Outside this Proceeding.

9. Finally, Public Counsel’s own practice before the Commission in this very proceeding supports CLC’s position. Public Counsel cited authority outside this proceeding in support of its position, just like CLC. Public Counsel referenced a letter from Staff in a completely unrelated tax proceeding.¹³ This letter was not admitted as evidence in this

¹⁰ WAC 480-07-375(1)(d) (emphasis added).

¹¹ *In the Matter of the Petition of Puget Sound Energy for (i) Approval of A Special Contract for Liquefied Nat. Gas Fuel Serv. with Totem Ocean Trailer Express, Inc. & (II) A Declaratory Order Approving the Methodology for Allocating Costs Between Regulated & Non-Regulated Liquefied Nat. Gas Servs.*, Order 04 at ¶ 12 (Dec. 18, 2015).

¹² *Id.*

¹³ See Public Counsel Opening Brief at ¶ 72, n. 205. It is important to note that the letter Public Counsel cites contradicts Public Counsel’s claim in its brief. In paragraph 72,

proceeding, and it is certainly not binding legal authority. Accordingly, and under Public Counsel's argument, its own citation should be stricken. But no party moved to strike that reference because the other parties in this proceeding understand the longstanding practice that the Commission decides what authority is relevant to the matters at issue before it, and the Commission decides what weight to give such authority.

CONCLUSION

- 10.** For the reasons set forth above, CLC respectfully requests that the Commission deny Public Counsel's Amended Motion to Strike.

Respectfully submitted this 6th day of February, 2023.

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

Public Counsel references the letter as support for its claim that “the Commission has brought actions against CenturyLink alleging *** improperly billing customers a city tax...” Yet the letter, from the Director of Consumer Protection, recommends no action following Staff's investigation of CenturyLink's customer billings. The full title of the letter as docketed is, “UT-200982 - Letter to Amanda Maxwell Closing Docket,” and no Commission action was taken.