BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant v. CENTURYLINK COMMUNICATIONS LCC d/b/a LUMEN TECHNOLOGIES GROUP; QWEST CORPORATION; CENTURYTEL OF WASHINGTON, INC.; CENTURYTEL OF INTER ISLAND, INC.; CENTURYTEL OF COWICHE, INC.; UNITED TELEPHONE COMPANY OF THE NORTHWEST, Respondents	DOCKET UT-210902

STAFF'S RESPONSE TO LUMEN'S CROSS-MOTION FOR SUMMARY DETERMINATION, PUBLIC COUNSEL'S RESPONSE IN SUPPORT OF STAFF MOTION FOR PARTIAL SUMMARY DETERMINATION, AND LUMEN COMPANIES' MOTION TO STRIKE PORTIONS OF PUBLIC COUNSEL'S RESPONSE IN SUPPORT OF STAFF MOTION FOR SUMMARY DETERMINATION

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TABLE OF CONTENTS

TABLE OF CONTENTS

Washington Statutes and Legislative Materials

Washington Regulations

Federal Cases

Washington Cases

Other Authorities

I. INTRODUCTION

1 There is no dispute between the Commission's regulatory staff (Staff) and the named respondents (collectively Lumen) about the facts material to the Commission's complaint here. During the state of emergency that Governor Inslee proclaimed because of the SARS-CoV-2 (COVID-19) pandemic, Lumen disconnected or suspended 923 customers despite a gubernatorial proclamation explicitly forbidding it from doing so.

2 Instead, the dispute between Staff and Lumen is one of law. Lumen cross-moves for summary determination, claiming that the Governor's disconnection proclamation, Proclamation 20-23.2, and the proclamations extending the duration of Proclamation 20-23.2,[1] did not render the terms and conditions of service that Lumen relied upon to disconnect or suspend those customers inoperative while Proclamation 20-23.2 was in effect. Accordingly, Lumen contends, it did not violate WAC 480-120-172(3)(a) when it discontinued service to those customers.

3 The Commission should deny Lumen's cross-motion. Long-standing principles of contract law provide that contract terms that violate a statute or public policy are unenforceable. The Governor's disconnection moratorium rendered the terms that Lumen relied upon to disconnect its customers illegal and in violation of public policy. Lumen could not rely on them to curtail service, and therefore no cognizable legal theory entitles Lumen to summary determination here.

4 As regards Public Counsel's request to adjudicate claims related to Lumen's assessment of disconnection and late fees in violation of other provisions in Proclamation 20-

[1] This response uses "Proclamation 20-23.2" to collectively refer to the original Proclamation 20-23.2 and the proclamations that amended it to extend its term, except in Background section where the response quotes directly from the original Proclamation 20-23.2.

23.2, and Lumen's motion to strike that request, the Commission should deny Public Counsel's request. Its claims either belong before the superior court or lack merit. This would effectively render Lumen's motion to strike moot.

II. RELIEF REQUESTED

5 Staff respectfully requests that the Commission deny Lumen's cross-motion for summary determination, deny Public Counsel's request to set other allegations for hearing, and deny Lumen's motion to strike as moot.

III. BACKGROUND

6 In April 2020, the Governor issued Proclamation 20-23.2 pursuant to the state of emergency he declared due to the outbreak of the COVID-19 pandemic. In that proclamation, which he based on his statutory authority under RCW 43.06.220(1)(h) and his findings that public health and welfare necessitated the order,[2] Governor Inslee forbade, among other activities, "telecommunications . . . providers in Washington State from," among other activities, "disconnecting any residential customers from . . . telecommunications . . . service due to nonpayment."[3]

7 Lumen admits that it suspended or disconnected 923 customers in spite of that prohibition.[4] Lumen also admits that both of what it calls "suspensions" and

[2] Proclamation by Governor Jay Inslee, No. 20-23.2 – Ratepayer Assistance and the Preservation of Essential Services, at 2 (Apr. 17, 2020) ("[w]hereas, maintaining provision of utility services during this crisis is an essential tool in sustaining and protecting the health and welfare of our people and businesses as a critical part of the overall response to the COVID-19 pandemic"); *id.* at 3 (stating that the disconnection moratorium was intended to "help preserve and maintain life, health, property or the public peace"); *id.* at (finding that "[p]reserving and maintaining essential utility services to vulnerable populations during this crisis supports the fundamental public purpose of protecting public health and welfare.").

[3] Proclamation by Governor Jay Inslee, No. 20-23.2 – Ratepayer Assistance and the Preservation of Essential Services, at 4.

[4] *Wash. Utils. & Transp. Commission v. CenturyLink Communications LCC*, Docket UT-210902, Lumen Companies' (1) Opposition to Staff's Motion for Partial Summary Determination and (2) Cross-Motion for Summary Determination, 2 ¶¶ 5-6 (July 6, 2022) (hereinafter the Cross-Motion).

"disconnections" constitute disconnections within the meaning of the Governor's prohibition.[5]

IV. ISSUES PRESENTED

8 Should the Commission (1) deny Lumen's cross-motion for summary determination because the Governor's exercise of powers to prohibit disconnections pursuant to RCW 43.06.220(1)(h) and enforceable under RCW 43.06.220(5) made the terms and conditions that Lumen relied upon to disconnect customers inoperative while Proclamation 20-23.2 was in effect because the terms were unlawful or in violation of public policy, or both, (2) deny Public Counsel's request to set other allegations for hearing because those claims belong in superior court or lack merit, and (3) deny Lumen's motion to strike Public Counsel's request given that it should deny Public Counsel's request?

V. ARGUMENT

9 As the parties agree on the material facts as to Lumen's cross-motion, the Commission must only determine whether Lumen is entitled to judgment as a matter of law. That question turns on whether any cognizable legal theory supports Lumen's contentions that Proclamation 20-23.2 did not render the terms and conditions that it relied upon inoperative. No theory does, however, because those terms directly conflict with Proclamation 20-23.2, rendering them illegal and in violation of public policy while the proclamation was in effect. The Commission should, consequently, deny Lumen's cross-motion.

[5] Cross-Motion at 5-6 ¶ 13.

10 As to Public Counsel's request to set certain allegations for hearing, and Lumen's motion to strike that request, the Commission should deny Public Counsel's request on the merits because most of the allegations it wants set for hearing belong in superior court, and the others involve penalizing Lumen for disconnections that effectively occurred before Proclamation 20-23.2 was in effect. Given that, the Commission should deny Lumen's motion to strike as moot.

A. The Standards Governing Summary Determination

11 The Commission may grant a party summary determination "if the pleadings filed in the proceeding, together with any properly admissible evidentiary support[,] . . . show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[6] As the parties agree to the material facts,[7] the Commission must thus simply determine whether any cognizable legal theory supports Lumen's request for judgment as a matter of law.

B. Proclamation 20-23.2 Rendered Lumen's Terms Of Service Inoperative While It Was Effective

12 Lumen contends that Proclamation 20-23.2 could not render the disconnection provisions in Lumen's terms of service unlawful,[8] nor render them in violation of public policy, because "the Proclamation is not a statute."[9] Lumen's illegality argument is overly

[6] WAC 480-07-380(2)(a).
[7] Cross-Motion at 2 ¶¶ 5-6.
[8] Lumen repeatedly indicates that Staff contends that Proclamation 20-23.2 "negated customers' obligation to pay for telecommunication services furnished by the company." Cross-Motion at 7 ¶ 16; *id.* at 10 ¶ 21, 12 ¶ 24. Staff does not. The Proclamation left customers' obligation to pay intact, Proclamation by Governor Jay Inslee, No. 20-23.2 – Ratepayer Assistance and the Preservation of Essential Services, at 5, and Staff does not contend otherwise. Staff instead contends that Proclamation 20-23.2 rendered the provisions authorizing Lumen to disconnect service inoperative during its term. *E.g., Wash. Utils. & Transp. Commission v. CenturyLink Communications LCC*, Docket UT-210902, Commission Staff's Motion for Partial Summary Determination of Lumen's Liability for Violations of WAC 480-120-172(3)(a), 15-16 ¶ 41, 17 ¶ 44 (June 16, 2022) (hereinafter the Motion).
[9] Cross-Motion at 11 ¶ 22.

formalistic, and its public policy argument is a non-sequitur. Both arguments fail: Proclamation 20-23.2 rendered the terms and conditions Lumen relied upon both unlawful and in violation of public policy, as described below.

1. The relevant terms and conditions were illegal during Proclamation 20-23.2's term.

13 Lumen contends that Proclamation 20-23.2 is not a statute, and that the doctrine of illegality does not apply, entitling it to summary determination.[10] That argument is overly formalistic, ignoring the statutory scheme that authorized and governed the Governor's proclamation. Given that statutory scheme, Lumen's violations of Proclamation 20-23.2 were violations of a statute and thus illegal while Proclamation 20-23.2 was in effect.

14 As conceded by Lumen,[11] contractual terms are "illegal and unenforceable" where they are "contrary to the terms and policy of an express legislative enactment."[12] As Staff noted in its motion for partial summary determination, such illegality occurs where contractual terms "direct[ly] conflict with state law."[13]

15 Chapter 43.06 RCW controls states of emergency in Washington.[14] RCW 43.06.210 authorizes the governor to proclaim a state of emergency. RCW 43.06.220 prescribes the powers that the governor may exercise pursuant to such a proclamation. Among these, the governor may "issue an order prohibiting . . . activities [that] he or she reasonably believes should be prohibited to help preserve and maintain life, health, property, or the public

[10] Cross-Motion at 11 ¶ 22.
[11] Cross-Motion at 10-11 ¶ 22.
[12] *Leander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 414, 377 P.3d 199 (2016).
[13] *Jordan v. Northstar Mortgage, LLC*, 185 Wn.2d 876, 894, 374 P.3d 1195 (2016).
[14] RCW 43.06.200-.270.

peace."[15] Willful violations of such an order are, by express legislative enactment, criminal offenses.[16]

16 In short, as Washington's courts have recognized, a gubernatorial emergency proclamation like Proclamation 20-23.2 "flows from a statutory grant of authority."[17] And, more importantly for the issues presented here, the legislature, by statute, outlawed the violation of an emergency proclamation.

17 Lumen's terms and conditions, by conflicting with Proclamation 20-23.2, conflict with RCW 43.06.220(5), the statute criminalizing violations of the proclamation. The relevant terms and conditions purport to authorize Lumen to do exactly what Proclamation 20-23.2, and by extension RCW 43.06.220(5), forbade it from doing. Those terms and conditions were illegal during the term of Proclamation 20-23.2.

18 Because the relevant terms and conditions were illegal and unenforceable during the term of Proclamation 20-23.2, Lumen could not use them as a basis to make the finding necessary for it to disconnect customers in accordance with WAC 480-120-172(3)(a). Because it could not do so, no cognizable legal theory supports its defense. The Commission, accordingly, should conclude that Lumen has no entitlement to judgment as a matter of law and deny the company's cross-motion for summary determination.

2. The relevant terms and conditions violated public policy during the term of Proclamation 20-23.2.

19 Lumen also contends that its terms and conditions could not violate public policy because they do not violate a statute, again entitling it to summary determination. Setting

[15] RCW 43.06.220(1)(h).
[16] RCW 43.06.220(5). Indeed, underscoring the seriousness of such a violation, the state must try any person over the age of 16 who violates a proclamation issued under RCW 43.06.220 as an adult. RCW 43.06.260.
[17] *In re Millspaugh*, 14 Wn. App. 2d 137, 140, 469 P.3d 336 (2020).

aside whether the terms and conditions violate a statute—and they do, as just discussed—Lumen's terms and conditions violate the public policy expressed in Proclamation 20-23.2. That suffices to render them unenforceable while the proclamation was effective.

20 Contract terms that violate public policy are unenforceable.[18] While a statute may provide the basis for finding a contract in violation of public policy, public policy may come from other sources.[19] This results from the fact that "[t]he underlying inquiry when determining whether a contract violates public policy is whether the contract has a tendency to be against the public good, or to be injurious to the public."[20] In line with that underlying inquiry, to determine whether something provides "public policy in the context of contract enforceability," Washington's courts look to whether that source "is primarily intended to promote the public good or protect the public from injury, and whether it was issued by an entity with the legal power and authority to set public policy in the relevant context."[21]

21 Proclamation 20-23.2 satisfies the first prong of the public policy test. In Proclamation 20-23.2, the Governor noted that "maintaining provision of utility services during [the COVID pandemic] is an essential tool in sustaining and protecting the health and welfare of [Washington's] people and business as a critical part of the overall response to the COVID-19 pandemic."[22] He then specifically found that "[p]reserving and maintaining essential utility services to vulnerable populations during this crisis supports the fundamental

[18] *Malcolm v. Yakima County Consol. Sch. Dist. No. 90*, 23 Wn.2d 80.83-84, 159 P.2d 394 (1945).
[19] *LK Operating, LLC v. Collections Group, LLC*, 181 Wn.2d 48, 86, 331 P.3d 1147 (2014).
[20] *LK Operating*, 181 Wn.2d at 86 (internal quotation omitted).
[21] *LK Operating*, 181 Wn.2d at 86.
[22] Proclamation by Governor Jay Inslee, No. 20-23.2 – Ratepayer Assistance and Preservation of Essential Services, at 2 (Apr. 17, 2020).

purpose of protecting public health and welfare."[23] That preamble language[24] and those findings show that the Governor intended Proclamation 20-23.2 "primarily . . . to promote the public good or protect the public from injury."[25]

22 Proclamation 20-23.2 also satisfies the second prong of the public policy test. Governor Inslee issued Proclamation 20-23.2 pursuant to the statutes governing states of emergency in Washington. As the courts have recognized, "[t]he executive branch has historically led Washington's response to emergencies."[26] This reflects the fact that when "public emergencies arise, the center of governmental response is usually the governor's office" given its ability to promptly address those emergencies.[27] The statutes governing states of emergency provide legislative authorization for the governor to set public policy in the state's response to an emergency.[28]

23 To summarize, the terms and conditions Lumen invoked to disconnect its customers explicitly authorized what Proclamation 20-23.2 forbade. The terms and conditions violated the public policy embodied in the proclamation, and as such, they were unenforceable during the proclamation's term. In the absence of those terms and conditions, Lumen cannot establish a legal basis to justify the disconnections that occurred during the proclamation's term. Again, that means that no cognizable legal theory supports Lumen's claim to

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[23] Proclamation by Governor Jay Inslee, No. 20-23.2 – Ratepayer Assistance and Preservation of Essential Services, at 4.
[24] *See Gonzalez v. Inslee*, 21 Wn. App. 2d 110, 128, 504 P.3d 890 (2022) (discussing preamble language as evidence of the Governor's intent in issuing a proclamation).
[25] *LK Operating*, 181 Wn.2d at 86.
[26] *Colvin v. Inslee*, 195 Wn.2d 879, 895, 467 P.3d 953 (2020).
[27] *Cougar Bus. Owners' Assoc. v. State*, 97 Wn.2d 466, 474, 647 P.2d 481 (1982), *overruled in part on other grounds by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019) (quoting Comment, Constitutional and Statutory Bases of Governors' Emergency Powers, 64 Mich. L. Rev. 290, 290 (1956).
[28] *See Cougar Bus. Owners*, 97 Wn.2d at 474 ("[t]hese statutory powers evidence a clear intent by the legislature to delegate requisite police power to the governor in times of emergency. The necessity for such delegation is readily apparent.").

entitlement to judgment as a matter of law. The Commission should conclude as much and deny Lumen's cross-motion for summary determination.

3. Lumen's counterarguments and the Contracts Clause.

24 Lumen nevertheless argues that Proclamation 20-23.2 did not affect the relevant contract terms, relying on its reading of *Gonzalez v. Inslee*, 21 Wn. App. 2d 110, 128, 504 P.3d 890 (2022). There, the Court of Appeals rejected a Contracts Clause challenge to the Governor's eviction moratorium and described the landlords as "retain[ing]" their contractual remedies once the moratorium ended.[29] Lumen reads that language as meaning that the moratorium suspended the landlords' remedies, but did not suppress the underlying contractual terms while it was in effect.[30]

25 As just noted, *Gonzalez* presented a Contracts Clause challenge rather than the issue of what happens to contract terms that violate the law or public policy. That different context matters because a court considering a Contracts Clause challenge focuses on whether a state permanently affects a contractual term rather than the mechanics of what happens to a term temporarily rendered inoperative by law or public policy. This is because the threshold inquiry in any Contracts Clause challenge involves determining whether "the state law has operated as a substantial impairment of a contractual relationship."[31] When "making this assessment," a tribunal must "consider whether the contractual impairment is temporary or

[29] *Gonzalez*, 21 Wn. App. 2d at 141.
[30] Cross-Motion at 8-10 ¶¶ 18.21.
[31] *Sveen v. Melin*, ___ U.S. ___, 138 S.Ct. 1815, 1822, 201 L.Ed.2d 180 (2018) (internal quotation omitted).

permanent."[32] A permanent impairment may substantially impair a contractual relationship,[33] but a temporary one likely does not.[34]

26 Given that context, the *Gonzalez* court did not use the term "retained" to mean that the moratorium had no effect on the landlords' rights, because the exact effect was irrelevant to its analysis.[35] The court instead used the term to mean that the moratorium did not extinguish the landlords' rights—it was temporary, and the landlords possessed their rights at the end of the moratorium.[36] For that reason the *Gonzalez* court used the "retained" language in the context of looking at whether the moratorium allowed the landlords to "safeguard and *reinstate* their rights."[37] And, indeed, other courts explicitly looking at the impact of COVID-19 moratoria on contract terms while those moratoria were in effect *have* found that the moratoria rendered those terms inoperable during the moratoria.[38]

27 Lumen, nevertheless, reads *Gonzalez* as recognizing a "distinction between the activity" forbidden by a gubernatorial proclamation and "the right or capacity to do so."[39]

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[32] *Melendez v. City of New York*, 503 F.Supp.3d 13 (S.D.N.Y 2020), *rev'd on other grounds by* 16 F.4th 992, 1016 (2d Cir. 2021); *cf. Block v. Hirsh*, 256 U.S. 135, 157, 41 S.Ct. 458, 65 L.Ed. 865 (1921) ("[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.").
[33] *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433-34, 54 S.Ct. 816, 78 L.Ed. 1344 (1934); *Melendez v. City of New York*, 16 F.4th 992, 1033 (2d Cir. 2021) ("[u]nder the Guarantee Law, if a tenant fails to pay rent owed for any time between March 7, 2020, and June 30, 2020, the landlord can never seek to recover those amounts from the guarantor. Not during the pandemic period. Not after the emergency declaration is withdrawn. Not ever. This substantially undermines the contractual bargain, interferes with his reasonable expectations, and prevents him from safeguarding or ever reinstating rights to which he was entitled during a sixteen-month period.").
[34] *Gallo v. Dist. of Columbia*, ___ F.Supp.3d ___, 2022 WL 2208934 at *6 (D.D.C. June 21, 2022); *Gonzalez*, 21 Wn.2d at 138-39.
[35] *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 35, 133 S.Ct. 511, 184 L.Ed.2d 417 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821)) (statements in an opinion are read in context of the opinion").
[36] *Gonzalez*, 21 Wn. App. 2d at 141.
[37] *Gonzalez*, 21 Wn. App. 2d at 141.
[38] *E.g.*, *Baptiste v. Kennealy*, 490 F.Supp.3d 353 (D. Mass. 2020) ("in deciding whether plaintiffs are reasonably likely to prove a substantial impairment of their leases, the court must also consider whether the Moratorium prevents [them] from safeguarding or reinstating [their] rights. Here the Moratorium is likely, as a practical matter to deprive the landlords of their contractual right to receive the rent they are owed. However, their related right to evict for failure to pay rent has only been temporarily suspended and, absent new legislation, will be reinstated soon after the Moratorium ends.").
[39] Cross-Motion at 9-10 ¶¶ 19-20.

There is every reason to believe that *Gonzalez* did no such thing. As discussed, contractual terms explicitly purporting to authorize what the governor's emergency proclamations directly forbid violate those proclamations, RCW 43.06.220(5), and the public policy found in the proclamations. Based on common law principles adopted by the Supreme Court, those contractual terms thus became unenforceable.[40] To create the distinction Lumen reads into it, the *Gonzalez* court would have needed to do three things, all of which are either legally erroneous, or at least disfavored. First, it would have needed to overturn binding Supreme Court precedent regarding the effects of illegality or a violation of public policy on contractual terms. It could not have done so.[41] Second, it would have needed to overturn that precedent, already an impossibility, silently. The law presumes that courts do not do so.[42] Third, the court would have needed to decide an issue not presented, not briefed by the parties, and which the court did not really discuss. But, again, the law presumes that courts do not do that.[43] The Commission should reject the strained reading of *Gonzalez* that Lumen offers.

28 Lumen's reading of *Gonzalez* creates yet another problem under the facts here. As discussed above, those terms explicitly purported to authorize conduct that Proclamation 20-23.2 made unlawful or violative of public policy, or both. If the activity/right distinction Lumen reads into *Gonzalez* exists, then the *Gonzalez* court recognized contracting parties'

[40] *E.g.*, *Leander*, 186 Wn.2d at 414; *LK Operating*, 181 Wn.2d at 86.
[41] *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 479, 146 P.3d 423 (2006) (inferior tribunals must follow the precedent of superior tribunals).
[42] *See State v. Putman*, 21 Wn. App. 2d 36, n.13, 504 P.3d 868 (2022) (collecting cases holding that tribunals presume against the silent overturning of precedent).
[43] *See State ex rel. Wash. Nav. Co. v. Pierce County*, 184 Wash. 414, 424, 51 P.2d 407 (1935) (rejecting the argument that a case stood for an application of a constitutional provision when the case neither "cited, mentioned, nor discussed" the provision).

right to violate the law and public policy, but forbade them from exercising that right. That cannot be the law.

29 Lumen nevertheless contends that its interpretation of *Gonzalez* is necessary to avoid a Contracts Clause violation.[44] Lumen does not explain why reading the Proclamation as simply forbidding the exercise of contractual rights does not violate the Contracts Clause, but that reading the Proclamation as rendering the terms ineffective does. Both produce the exact same effect. Regardless, any such challenge would likely fail on the first[45] or second[46] prongs

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[44] Lumen discusses the Contracts Clause of article I, section 23 of the Washington State Constitution. That provision is coextensive with Contracts Clause of article I, section 10 of the United States Constitution. *Lenander*, 186 Wn.2d at 414.

[45] As noted above, in the first part of the Contracts Clause analysis, a court must determine "whether the state law has operated as a substantial impairment of a contractual relationship." *Sveen*, 138 S.Ct. at 1821-22. In doing so, the court must consider "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S.Ct. at 1822. Proclamation 20-23.2 would not substantially impair Lumen's contractual rights given those factors.

First, the moratorium does not upset Lumen's expectations. The contract at issue is the exchange of telecommunications services for payment. The disconnection moratorium did extinguish customers' obligation to pay, but rather curtailed Lumen's ability to use a contractual enforcement mechanism. The *Gonzalez* court held that the similar effect of the eviction moratorium "did not undermine . . . [the] contractual bargain." 21 Wn. App. 2d at 139. The same should be true here. *See id.*

Second, Lumen operates in a regulated industry, which informs its reasonable expectations. *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 413, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). The public service laws have applied to it and its forerunners since 1911, *e.g.*, LAWS OF 1911, ch. 117, § 35, and it has shouldered an obligation to serve since that year. *Id.* The Commission regulates its ability to discontinue service to its customers, WAC 480-120-172(3), and has for at least 50 years. David M. Shelton, The Shutoff of Utility Services for Nonpayment: A Plight of the Poor, 46 U. Wash. L. R. 745, 754 (1971). Given that, Lumen understood, or should have understood, that its disconnection provisions were subject to alteration. *Energy Reserves Group*, 459 U.S. at 416.

Third, as discussed above, courts have held that the COVID-19 moratoria do not prevent parties from safeguarding or reinstating their rights. *Gonzalez*, 21 Wn. App. 2d at 141; *Gallo*, 2022 WL 2208934 at *6; *Baptiste*, 490 F.Supp.3d at 384-85. This results from the fact that the moratoria end, and at that point those rights are restored, unimpaired. The same thing happened here.

[46] In the second step of the Contracts Clause analysis, a court must examine "the means and ends" of the law at issue. *Sveen*, 138 S.Ct. at 1822.Specifically, the court must look to "whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Id.*

Here, courts have recognized the legitimacy of combating COVID-19, *Apartment Assoc. of Los Angeles County v. City of Los Angeles*, 10 F.4th 905 (9th Cir. 2021) (internal quotation omitted), and the Supreme Court has recognized the legitimacy of combating the harmful effects of economic shocks. *Blaisdell*, 290 U.S. at 444-48. Disconnection moratoriums do both. *See generally* Kay Jowers, Christopher Timmins, Nrupen Bhavsar, Gihui Hu, & Julia Marshall, HOUSING PRECARITY & THE COVID-19 PANDEMIC: IMPACTS OF UTILITY DISCONNECTION AND EVICTION MORATORIA ON INFECTIONS AND DEATHS ACROSS US COUNTIES, National Bureau of Economic Research, Working Paper 28394, 9-13 (Jan. 2021).

In a Contracts Clause challenge, courts defer to the political branches when reviewing the means used are reasonable when the government itself is not a contracting party. *Gonzalez*, 21 Wn. App. 2d at 141-42 ("this

of a Contracts Clause challenge given that: (1) Proclamation 20-23.2 did not extinguish customers' obligation to pay for service even as it forbade disconnections, (2) Lumen operates in a regulated field, (3) the moratorium was temporary, and (4) the Governor issued the moratorium to address the emerging COVID-19 pandemic.

30 Finally, Lumen contends that *Gonzalez* recognized that the eviction moratorium at issue "did not affect the operation of any rule or statute"[47] or its customers' obligation to pay.[48] Those arguments are misplaced. While Lumen correctly notes that *Gonzalez* held that the eviction moratorium did not suspend the operation of any statute or rule, it did so in response to the appellants' argument that the proclamation unlawfully did just that.[49] Staff has made no similar claim here, but instead applies long used common law principles concerning contractual terms that violate the law or public policy. Nor did Staff make the argument that Proclamation 20-23.2 "released customers from the payment obligation."[50] Staff instead contends that Lumen's terms and conditions of service governing disconnection were unlawful and in violation of public policy, and thus inoperative while Proclamation 20-23.2 was in effect. Because those terms were inoperative, Lumen could not rely on them to discontinue service under WAC 480-120-172(3)(a).

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case does not involve government contracts, so we must defer to the governor's judgment as to the best way to achieve the compelling governmental purpose") (citing *Energy Reserves Group*, 459 U.S. at 413). Here, the Governor determined that keeping utility services available to Washingtonians through the critical stages of the pandemic would help preserve the public health and welfare. The data showing that disconnection moratoria reduced the spread and mortality of COVID-19 validates that judgment. *See* Jowers, Timmins, Bhavsar, Hu, & Marshall, HOUSING PRECARITY & THE COVID-19 PANDEMIC: IMPACTS OF UTILITY DISCONNECTION AND EVICTION MORATORIA ON INFECTIONS AND DEATHS ACROSS US COUNTIES, National Bureau of Economic Research, Working Paper 28394, 9-13.

[47] Cross-Motion at 12 ¶ 24.

[48] Cross-Motion at 12 ¶ 25.

[49] *Gonzalez*, 21 Wn. App. 2d at 128-30 (analyzing the issue through the lenses of statutory authorization and separation of powers).

[50] Cross-Motion at 12 ¶ 25.

C. Public Counsel's Request For A Declaration Concerning The Commission's Jurisdiction And Lumen's Motion To Strike

31 Finally, Public Counsel requests that the Commission either set for hearing Lumen's assessment of reconnection and late fees in violation of other provisions of Proclamation 20-23.2 or decline to exercise jurisdiction so that it may refer the matter to the Consumer Protection Division of the Attorney General's Office.[51] It also asks the Commission to set for hearing its allegation that Lumen disconnected 243 customers that it had already suspended from service before the Governor issued Proclamation 20-23.2.[52] Lumen moves to strike those requests as an improper motion to amend Staff's complaint.[53] The Commission should give both parties a part of the relief they seek by assuming, without deciding, that Public Counsel has filed a proper petition[54] and denying its request.[55]

1. The Commission should conclude that Public Counsel's fee claims belong before the superior court.

32 Turning first to Public Counsel's fee claims, Staff did not plead any allegations related to Lumen's assessment of reconnection and late fees because Lumen operates under an alternative form of regulation (AFOR). That AFOR treats Lumen as if it operated in a competitive marketplace for the services at issue.[56] Lumen, accordingly, does not file tariffs

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[51] *Wash. Utils. & Transp. Commission v. CenturyLink Communications LCC*, Docket UT-210902, Public Counsel's Response in Support of Staff Motion for Partial Summary Determination, 4 ¶ 13, 7-9 ¶¶ 21-25 (July 6, 2022) (PC's Motion).
[52] PC's Motion at 4 ¶ 13, 5-7 ¶¶ 16-20.
[53] *See generally Wash. Utils. & Transp. Commission v. CenturyLink Communications LCC*, Docket UT-210902, Lumen Companies' Motion to Strike Portions of Public Counsel's Response in Support of Staff's Motion for Summary Determination, (July 18, 2022).
[54] WAC 480-07-370(3).
[55] Staff answers Public Counsel's request on the timeline required for a petition and asks the Commission to continue the date for Staff's response to Lumen's motion one day or waive the provisions of WAC 480-07-375(4) to allow Staff to consolidate its responses to the various proceedings, reducing administrative burden. WAC 480-07-110. No party is prejudiced by such a delay.
[56] *In re Petition of the Petition of the CenturyLink Companies*, Docket UT-130477, Order 04, 2 ¶ 2 (Jan. 9, 2014); *see id.* at Attachment A at 2 (listing the services remaining in tariff, and thus subject to traditional rate-base/rate-of-return regulation).

governing the provisions of its services.[57] Rather, the terms and conditions in the company's contracts with its customers govern its relationship with its customers.

33 The Supreme Court has indicated that once a regulatory commission detariffs a service, the commission can no longer enforce a legislative prescription that public service companies collect only fair, just, or reasonable rates or charges for service.[58] Instead, state law governing fair practices become the mechanism for deterring or remediating unreasonable or unfair rates or charges.[59]

34 The market-based regulation the AFOR imposes on Lumen means that Public Counsel's fee claims belong before the superior court. To bring its claims before the Commission, Public Counsel would need to argue that Proclamation 20-23.2 made the assessment of reconnection and late fees unreasonable, and thus a violation of RCW 80.36.080. But because Lumen does not file tariffs, the Commission cannot enforce the reasonableness requirements found in RCW 80.36.080. Public Counsel, or another related entity, must bring those claims under Washington's Consumer Protection Act (CPA) to vindicate consumers' rights.[60]

2. The Commission should conclude that Public Counsel's disconnection claims lack merit.

35 Turning next to Public Counsel's request that the Commission should also set for hearing the allegations regarding the 243 customers disconnected after previous suspension,

[57] *In re Petition of the Petition of the CenturyLink Companies*, Docket UT-130477, Order 04, 14-15 ¶ 45; see RCW 80.36.100.
[58] *MCI Telecommc'ns Corp. v. Am. Tel. & Tel.*, 512 U.S. 218, 229-31 & n.4, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994).
[59] *Ting v. AT&T*, 319 F.3d 1126, 1141, 1142 (9th Cir. 2003).
[60] *Ting v. AT&T*, 319 F.3d at 1141 (noting that state consumer protection laws protect customers once a commission detariffs a service); *see generally* chapter 19.86 RCW (Washington's CPA).

Staff did not plead those claims given its contention that "suspension" and "disconnection" are the same thing for purposes of Proclamation 20-23.2.

36 As just noted, Staff contends that "suspensions" and "disconnections" as Lumen understands those terms are both "disconnections" within the meaning of Proclamation 20-23.2. Both Lumen and Public Counsel agree with that contention. Thus, by suspending those customers before Proclamation 20-23.2 became effective, Lumen "disconnected" them in the manner relevant here. Public Counsel's allegations thus effectively require the Commission to penalize the company for disconnections occurring before Proclamation 20-23.2 went into effect, or otherwise believing that Lumen could disconnect the same customer twice without first reconnecting them. The Commission should not accept either of those two alternatives.

37 As for Public Counsel's claim that Lumen violated Proclamation 20-23.2 by failing to reconnect customers, that claim has no basis in the proclamation. Proclamation 20-23.2 forbade telecommunications companies from "refusing to reconnect any residential customers who ha[d] been disconnected due to non-payment."[61] Thus, Lumen had no general duty to reconnect customers without a request to do so, and neither Staff nor Public Counsel have evidence that Lumen refused any such request.

3. The Commission should deny Public Counsel's motion on the merits.

38 Given the analysis above, the Commission should assume, without deciding, that Public Counsel's request amounts to a proper petition rather than a procedurally improper and defective complaint and simply deny Public Counsel's requests. And it should do so in a written order setting out its reasoning based on the analysis described above.[62] This would

[61] Proclamation 20-23.2 at 4.
[62] RCW 34.05.461 ("[i]nitial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all material issues of fact, law, or discretion presented on the record.").

give Public Counsel some of the relief it seeks; it would answer any questions about the Commission's active regulation of Lumen's charges and fees, and thereby dispense with any questions about the Commission's primary jurisdiction.

39 This would also give Lumen some of the relief that it seeks. While denying Public Counsel's request would make Lumen's motion to strike moot, it would also mean that the Commission would not hear the allegations at issue in the request, the ultimate relief that Lumen's motion to strike would provide.

VI. CONCLUSION

40 For the reasons discussed, the Commission should deny Lumen's cross-motion for summary determination, deny Public Counsel's request to set allegations other than those alleged in the complaint for hearing, and deny Lumen's motion to strike as moot.

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Respectfully submitted,

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