

**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 FOR PARTIAL
SUMMARY DETERMINATION
(WAC 480-07-380(2))**

October 28, 2022

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I. INTRODUCTION

1. The 9-1-1 system is essential to public health and safety, because Washingtonians rely on 9-1-1 to work when dialed to reach police, fire departments, and paramedics during moments of need. 9-1-1 outages are not merely inconvenient, but they pose potential danger to the public. 9-1-1 providers must take steps to guard against service outages. While periodic outages may occur that do not cause violations, other outages are much more serious and require penalties to hold companies accountable. One serious outage occurred in December 2018, that lasted approximately 49 hours and during which Washington's 9-1-1 system received approximately 34 percent fewer calls compared to historical averages.
2. During the December 2018 outage, Washington was transitioning its 9-1-1 system from CenturyLink Communications, LLC f/k/a Qwest Communications Company, LLC (CenturyLink) to a new 9-1-1 service provider. There is no dispute that CenturyLink was a 9-1-1 provider for the state of Washington at the time of the outage, and the contract governing its obligations makes clear that CenturyLink was responsible for the outage on two distinct bases.
3. The December 2018 outage was not CenturyLink's first significant 9-1-1 outage. Indeed, a statewide outage lasting approximately six hours occurred in April 2014.¹ Liability for the December 2018 outage can be established through the unambiguous terms of the contract, and there are no genuine issues of material fact. Accordingly, the Commission must reject CenturyLink's *ex post facto* attempts to avoid liability and hold CenturyLink responsible for its failure to maintain a fully operable 9-1-1 network.

¹ *Wash. Utils. & Transp. Comm'n v. Qwest Corp.*, Docket UT-140597, Order 03 Final Order Approving Settlement Agreement (Feb. 22, 2016). The Commission penalized CenturyLink for 11,000 violations.

II. RELIEF REQUESTED

4. The Public Counsel Unit of the Washington Office of the Attorney General (Public Counsel) requests that the Washington Utilities and Transportation Commission (UTC or Commission) grant this Motion for Partial Summary Determination on the issue of CenturyLink’s liability for the December 2018 9-1-1 outage.

III. STATEMENT OF FACTS

A. Washington experienced a significant 9-1-1 outage in December 2018.

5. On December 27, 2018, CenturyLink experienced a network outage impacting a variety of telecommunications services, most notably the 9-1-1 system, which disrupted emergency and public safety communications across Washington State.² During the outage, 9-1-1 calls placed by some Washington residents could not reach Public Safety Answering Points (PSAPs).³ As a result, 9-1-1 call agents could not dispatch emergency services, leaving some Washingtonians without assistance.⁴
6. At the time of the outage, and since 2009, CenturyLink provided Internet Protocol-enabled 9-1-1 services to Washington under contract with the Washington Military Department (WMD).⁵ In 2016, WMD awarded a new contract for 9-1-1 services to TeleCommunication

² Decl. of Lisa W. Gafken, Exh. A (Direct Testimony of Brian Rosen, Exh. BR-1CTr at 6:3–6 [citing Investigation Report, CenturyLink Communications, LLC, UT-181051, Staff Investigation, Consumer Protection and Regulatory Services at 3 (filed Dec. 2020) (henceforth “Staff Investigation Report”)]).

³ Decl. of Lisa W. Gafken, Exh. A, Rosen (Exh. BR-1CTr at 6:6–8).

⁴ See, Decl. of Lisa W. Gafken, Exh. B (Direct Testimony of Angela White, Exh. AW-1T); Decl. of Lisa W. Gafken, Exh. C (Direct Testimony of David White, Exh. DW-1T); Decl. of Lisa W. Gafken, Exh. D (Direct Testimony of Samantha Hovey, Exh. SH-1T); and Decl. of Lisa W. Gafken, Exh. E (Direct Testimony of Victor Barajas, Exh. VB-1T).

⁵ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C [WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196]).

Systems, Inc. d/b/a Comtech Telecommunications Corp. (Comtech) that would ultimately transfer 9-1-1 services from CenturyLink to Comtech.⁶ To facilitate the transition to a new 9-1-1 vendor, the 2009 contract between WMD and CenturyLink was amended (Amendment M) to add transition services and a scope of work for the additional transition services.⁷ Because the transition of 9-1-1 services from CenturyLink to Comtech was not completed by December 2018, Amendment M was in effect during the outage.⁸

7. The cause of the outage is not in dispute. Specifically, equipment on CenturyLink’s nationwide optical network generated malformed packets that continuously transmitted in a feedback loop.⁹ This packet flooding¹⁰ prevented equipment from appropriately routing and transmitting data, causing multiple voice, Internet Protocol (IP), and transport outages across CenturyLink’s nationwide network.¹¹ CenturyLink’s national optical network failure disrupted routing of 9-1-1 calls from CenturyLink to Comtech, and many calls made to Comtech-controlled PSAPs could not be completed.¹²

⁶ Decl. of Lisa W. Gafken, Exh. G (Hawkins-Jones, Exh. JHJ-1CT at 4:8–12); Decl. of Lisa W. Gafken, Exh. H (Hawkins-Jones, Exh. JHJ-3C at 9).

⁷ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C [WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196, Amendment M]).

⁸ Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 7:4–16); Decl. of Lisa W. Gafken, Exh. H (Hawkins-Jones, Exh. JHJ-3C [Staff Investigation Report]).

⁹ Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 6:8–14 [citing Pub. Safety and Homeland Sec. Bureau, December 27, 2018 CenturyLink Network Outage Report, 6–8 (F.C.C., Aug. 19 2019) (henceforth “FCC Report”), <https://docs.fcc.gov/public/attachments/DOC-359134A1.pdf>]).

¹⁰ Packets are units of data routed between an origin and a destination on a network. The packets in this instance included instructions on how to route the information contained in the packet. Because those instructions were flawed, it caused the packets to be sent repeatedly, overwhelming the system. Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 6, n.6).

¹¹ Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 6:11 to 7:3 [citing FCC Report]).

¹² *Id.*

B. CenturyLink was contractually obligated to provide 9-1-1 infrastructure during the period when Amendment M was in effect.

8. The 2009 contract between CenturyLink and WMD required CenturyLink to provide an IP-enabled 9-1-1 system that “must include, but is not limited to, network, transport, PSAP interfaces, 911 trunk support, selective routing and ALI interfaces.”¹³

Figure 1: Excerpt from 2009 Contract between WMD and CenturyLink

To accommodate Next Generation 911 and provide the citizens of Washington State with a modern internet protocol system that will allow the 911 system to accept information from a wide variety of communication devices from consumers in emergencies, it is first necessary to update the network used to transfer voice/data information from the consumer to the Public Safety Answering Point (PSAP). To accomplish this, there must be a switch from the antiquated legacy analog telephone system to a system as used in cellular and computer voice over internet (VOiP) protocols by telephone and communication providers. The Emergency Services Internet Protocol Network (ESINet) will also allow the transportation of Automatic Location Information (ALI) database information meeting the current National emergency Number Association (NENA) standard 4.xx XML format. This solution must include, but is not limited to, network, transport, PSAP interfaces, 911 trunk support, selective routing and ALI interfaces. The system must be scalable, affordable, reliable, redundant, and capable of resolving the limitations of the current legacy system.

Under the contract, CenturyLink was responsible for each separate component of the 9-1-1 system.

9. Under Amendment M, 9-1-1 services transferred through a phased transition plan where PSAPs transitioned from CenturyLink to Comtech. This transition plan was slated to occur over a period of at least two years.¹⁴ Amendment M specified that, (1) during the transition, CenturyLink was responsible for routing calls to PSAPs not yet transitioned onto Comtech’s

¹³ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C at 15 [WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196 at 14]).

¹⁴ Amendment M was executed in July 2017, and the expiration date for CenturyLink’s contract was extended through Dec. 31, 2019. Decl. of Lisa W. Gafken, Exh. F (Rosen, BR-4C at 19–20).

system, and (2) CenturyLink was the “Covered 911 Service Provider”¹⁵ for such calls.¹⁶ Among other obligations, a Covered 9-1-1 Service Provider is responsible for delivering calls to PSAPs.

10. Under Amendment M, CenturyLink was responsible for routing calls destined for PSAPs that had already transitioned onto Comtech’s system to a demarcation point between CenturyLink and Comtech. A demarcation point is an agreed upon point on a network where responsibility shifts from one party to another.¹⁷ Under Amendment M, once a call destined for a PSAP on Comtech’s system reached the demarcation point, Comtech became the “Covered 9-1-1 Service Provider” and would bear responsibility for routing calls from the demarcation point to the migrated PSAP.

¹⁵ At the time Amendment M to the WMD and CenturyLink contract was executed, the FCC definition of “Covered 9-1-1 Service Provider” was found at 47 C.F.R. §12.4(a)(4). Today the definition is found at 47 C.F.R. §9.19(a)(4). The definitions are substantively the same, differing only in the internal references to other code sections.

§9.19(a)(4) Covered 911 service provider.

(i) Any entity that:

(A) Provides 911, E911, or NG911 capabilities such as call routing, automatic location information (ALI), automatic number identification (ANI), or the functional equivalent of those capabilities, directly to a public safety answering point (PSAP), statewide default answering point, or appropriate local emergency authority as defined in § 9.3; and/or

(B) Operates one or more central offices that directly serve a PSAP. For purposes of this section, a central office directly serves a PSAP if it hosts a selective router or ALI/ANI database, provides equivalent NG911 capabilities, or is the last service-provider facility through which a 911 trunk or administrative line passes before connecting to a PSAP.

(ii) The term “covered 911 service provider” shall not include any entity that:

(A) Constitutes a PSAP or governmental authority to the extent that it provides 911 capabilities; or

(B) Offers the capability to originate 911 calls where another service provider delivers those calls and associated number or location information to the appropriate PSAP.

¹⁶ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C at 19 [WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196, Amendment M at 1]).

¹⁷ Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 25:14); *see also* Decl. of Lisa W. Gafken, Exh. K (Response Testimony of Steven Turner, Exh. SET-1TC at 40:1).

11. Amendment M is silent regarding who bears responsibility for certain individual components of the 9-1-1 system, including “network” and “transport,” and contains no language expressly relieving CenturyLink of its responsibility for those services.
12. WMD interprets CenturyLink’s obligations under Amendment M as retaining “a role, and thus an obligation, under the Washington Military Department (WMD) and CenturyLink, Contract No. E09-196, until there were no parts of the originating network nor the terminating network connected to the CenturyLink/Intrado ESInet.”¹⁸

C. Amendment M did not define a point of demarcation.

13. Amendment M specifies that Comtech became solely responsible for routing 9-1-1 calls to migrated PSAPs once calls reached the demarcation point.¹⁹ CenturyLink concedes that Amendment M and the attached Scope of Work do not specify the location of the demarcation point.²⁰ WMD was not privy to any discussions that identified any point of demarcation.²¹
14. CenturyLink asserts that Comtech identified a demarcation point that places the network components impacted on Comtech’s side of the demarcation point.²² Comtech clarified that the documentation CenturyLink relied upon was a proposed network configuration that CenturyLink

¹⁸ Decl. of Lisa W. Gafken, Exh. I (Rosen, Exh. BR-27 [WMD Supplemental Response to Public Counsel Data Request No. 7]).

¹⁹ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C at 19 [WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196, Amendment M at 1]).

²⁰ Decl. of Lisa W. Gafken, Exh. J (Hartman, Exh. SJH-1TC at 28:5–6); Decl. of Lisa W. Gafken, Exh. K (Turner, Exh. SET-1T at 43:1–17); *see* Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 29:11).

²¹ Decl. of Lisa W. Gafken, Exh. L (Rosen, Exh. BR-28 [WMD Supplemental Response to Public Counsel Data Request No. 6 at 1]).

²² Decl. of Lisa W. Gafken, Exh. J (Hartman, Exh. SJH-1TC at 28:6–19).

refused to implement.²³ As a result, the demarcation point CenturyLink attempted to identify was not the demarcation point agreed to by the two 9-1-1 providers.²⁴

IV. STATEMENT OF ISSUES

15. (1) Whether CenturyLink is liable for the December 2018 9-1-1 outage when Contract E09-196 as amended by Amendment M required CenturyLink to provide network and transportation services, and when Amendment M did not relieve CenturyLink of the obligation to provide network and transportation services.
16. (2) Whether CenturyLink is liable for the December 2018 9-1-1 outage when Amendment M failed to identify a point of demarcation between CenturyLink and Comtech.

V. EVIDENCE RELIED UPON

17. Public Counsel relies upon the testimony and evidence filed in this Docket and the Declaration of Lisa W. Gafken and its attached exhibits.

VI. ARGUMENT

A. Summary Determination Standards

18. Under WAC 480-07-380, a party may move for summary determination of one or more issues 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

²³ Decl. of Lisa W. Gafken, Exh. M (Rosen, Exh. BR-32C [Comtech’s Response to Public Counsel Data Request No. 31]).

²⁴ *Id.*

entitled to judgment as a matter of law.” The Commission will consider the standards applicable to a motion made under Washington Superior Court Civil Rule (CR) 56.

19. Summary judgment under CR 56 is proper where no issue of material fact exists and the moving party is entitled to judgment as a matter of law.²⁵ To defeat summary judgment, the non-moving party must demonstrate that there is an issue of fact to be tried.²⁶ To prove that a triable issue remains, the non-moving party must produce actual facts that dispute the movant’s material facts.²⁷ Importantly, the non-moving party may not rely on mere allegations, conclusions, opinions, or immaterial factual disputes.²⁸ While the Commission will view the evidence in the light most favorable to the non-moving party, the non-moving party “may not rely on speculation or on argumentative assertions that unresolved factual issues remain.”²⁹

20. “It is black letter law of contracts that the parties to a contract shall be bound by its terms.”³⁰ Basic principles apply when construing a written contract.³¹ First, the intent of the parties controls.³² Second, the tribunal ascertains the intent from reading the contract.³³ Third, the tribunal will not read ambiguity into a contract that is otherwise clear and unambiguous.³⁴ A contract provision is not ambiguous simply because a party suggests opposing meanings.³⁵

²⁵ *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884, 889 (2000).

²⁶ *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182, 187 (1989); *see also Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562, 564 (1990).

²⁷ *Id.*

²⁸ *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359–61, 753 P.2d 517, 518–20 (1988).

²⁹ *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396, 402 (1997).

³⁰ *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2004) (*as corrected* Jan. 7, 2005).

³¹ *Dice v. City of Montesano*, 131 Wn. App. 675, 683–684, 128 P.3d 1253, 1257–58 (2006).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 684.

21. Here, the issue is whether CenturyLink is liable under contract for the 2018 9-1-1 outage. Even if the Commission were to consider extrinsic evidence, summary judgment is still appropriate when only one reasonable inference can be drawn from the evidence.³⁶ Likewise, “When the contract provisions at issue are unambiguous, the court's interpretation of the contract is a question of law which may be decided on summary judgment.”³⁷

22. When a contract contains specialized or technical terms, “the general rule is that such language is to be given its technical meaning when used in a transaction within its technical field.”³⁸ However, when it would assist the trier of fact, expert testimony “may be admitted to assist a trier of fact in construing an ambiguity in a technical or scientific written instrument,” and expert testimony can be used to explain the meaning of technical terms and terms of art.³⁹

B. The contract between CenturyLink and the State required CenturyLink to provide network and transport services related to 9-1-1, and Amendment M did not relieve CenturyLink of obligations to provide network and transport.

23. CenturyLink’s contractual obligation to the State stems from a contract first entered into in 2009⁴⁰ and amended several times thereafter. One of the amendments, Amendment M,

³⁶ See *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301, 1310 (1996) (citing *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428, 433 [1993]). See also, *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220, 1223 (2005) (citing *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77, 81 [1985] [“Questions of fact may be determined as a matter of law ‘when reasonable minds could reach but one conclusion’”]).

³⁷ *Truck Ctr. Corp. v. Gen. Motors Corp.*, 67 Wn. App. 539, 543, 837 P.2d 631, 634 (1992).

³⁸ *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222, 230 (1990) (citing *Keeton v. Dep’t of Social & Health Servs.*, 34 Wn. App. 353, 361, 661 P.2d 982, review denied, 99 Wn.2d 1022 [1983]; Restatement (Second) of Contracts § 202(3)(b) [1981]).

³⁹ *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 120, 362 P.3d 974, 984 (2015) (trial court properly permitted health care provider to testify concerning meaning of medical phrase used in infection control policy).

⁴⁰ CenturyLink’s predecessor company first entered into contract to provide 9-1-1 services to Washington in 2004. The 2009 contract involved transitioning the legacy system to an internet protocol based system. Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 7:6–7). See also, Decl. of Lisa W. Gafken, Exh. G (Hawkins-Jones, Exh. JHJ-1CT at 3:14–21).

extended the 2009 contract through the transition from CenturyLink to Comtech.⁴¹ The 2009 contract tasked CenturyLink with modernizing Washington’s 9-1-1 system and continuing to provide 9-1-1 service to the State. The contract is quite specific regarding the services the State required of CenturyLink. Those services included, but were not limited to, “network, transport, PSAP interfaces, 911 trunk support, selective routing and ALI interfaces.”⁴² The contract states further that, “The system must be scalable, affordable, *reliable*, redundant, and capable of resolving the limitations of the current legacy system.”⁴³

24. Identifying responsibility for “network” and “transport” is key to the Commission’s consideration of this Motion because the contract established explicit obligations with respect to those specific components of the 9-1-1 system. The term “network” generally refers to “the signaling and voice path, plus the interconnects for auxiliary services, such as location.”⁴⁴ The “network” is distinguished from the “*services* that ride on the network.”⁴⁵

25. Importantly, one such service that rides on the network is “Covered 9-1-1 Service Provider,” a term used by the FCC to define the service provider who delivers calls to a PSAP.⁴⁶ Under Amendment M, CenturyLink’s obligations as a Covered 9-1-1 Service Provider and its obligations to provide “network” and “transport” were separate and distinct obligations. Amendment M did not relieve CenturyLink of its obligations to provide network and transport.⁴⁷

⁴¹ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C).

⁴² Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C at 15 [WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196 at 14]).

⁴³ *Id.* (emphasis added).

⁴⁴ Decl. of Lisa W. Gafken, Exh. O (Rosen, Exh. BR-30CT at 22:14–16).

⁴⁵ Decl. of Lisa W. Gafken, Exh. O (Rosen, Exh. BR-30CT at 22:16 [emphasis in original]).

⁴⁶ Decl. of Lisa W. Gafken, Exh. O (Rosen, Exh. BR-30CT at 22:18 to 23:1).

⁴⁷ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C at 19–20); Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 23:14–15).

The plain language of the contract demonstrates that WMD believed it was crucial that CenturyLink be responsible for network and transport *in addition* to being the Covered 9-1-1 Service Provider.⁴⁸ There can be no argument to the contrary.

Figure 2: Excerpt from Amendment M to the Contract between WMD and CenturyLink

The existing contract is modified to add the following language to the Transition Services:

- a) Covered 911 Service Provider during PSAP Migration. The Department is transitioning the ESInet services to a successor provider via a phased cutover of PSAPs from Contractor's ESInet I to New Contractor's ESInet II ("PSAP Migration"). Prior to this cutover, Contractor shall route calls over ESInet I to the appropriate PSAPs and, as such, during this time, Contractor is a Covered 911 Service Provider as defined in 47 C.F.R. § 12.4(a)(i)(A) ("Covered 911 Service Provider") for all PSAPs in the State. Upon the Department's cut over of one or more PSAPs to ESInet II ("Migrated PSAPs"), the Department's successor provider shall be a Covered 911 Service Provider for such Migrated PSAPs and shall be solely responsible for routing calls from the Demarcation Point between ESInet I and ESInet II to such Migrated PSAPs. During the PSAP Migration Contractor remains responsible for routing calls to PSAPs that have not migrated to ESInet II ("Unmigrated PSAPs"), and for routing calls intended for Migrated PSAPs to the Demarcation Point at ESInet II, at which point the successor provider assumes responsibility for delivering such calls to Migrated PSAPs and is therefore the Covered 911 Service Provider.
- b) Contractor shall provide all services as stated in the attached Schedule 1 ("Transition from ESInet I to ESInet II - Scope of Work") and Schedule 2. Contractor shall provide all services as stated in the attached Schedule 1 ("Transition from ESInet I to ESInet II - Scope of Work") and Schedule 2 that are within Contractor's (including its employees, representatives or contractors (including West)) direct control within the timeframes on Schedule 2. Contractor shall be compensated for the services as stated in the attached Schedule 1 ("Transition from ESInet I to ESInet II - Scope of Work") and Schedule 2 pursuant to the fees listed in Schedule 3. Pricing for Contractor's (including its employees, representatives or contractors (including West)) transition services set forth in Amendment M is described in Schedule 3. To the extent the parties have any disputes regarding the services to be provided by Contractor or the timeframes in which those services must be provided by Contractor, the matter will be escalated to executive representatives of the parties for resolution. To the extent services set forth in Schedules 1 and 2 are completed earlier than planned in Schedule 2, the parties shall cooperate in good faith to accelerate other services on Schedules 1 and 2 to complete the transition earlier than planned on Schedule 2. To the extent the parties are able to accelerate the transition earlier than planned on Schedule 2, the fees in Schedule 3 shall be adjusted to ensure that the Department is only invoiced for services actually performed by Contractor.

26. Indeed, if the State intended to relieve CenturyLink of its network and transport obligations, it would have done so in Amendment M. However, Amendment M relieved CenturyLink only of its obligations to route calls to PSAPs that had already migrated to Comtech's system.⁴⁹ Accordingly, CenturyLink continued to be responsible for network and

⁴⁸ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C at 15, 19–20). WMD confirmed its understanding and intention. See Decl. of Lisa W. Gafken, Exh. I (Rosen, Exh. BR-27 at 3 [WMD Supplemental Response to Public Counsel Data Request No. 7 (WMD "believes CenturyLink retained a role, and thus an obligation under the Washington Military (WMD) CenturyLink, Contract No. E09-106, until there were no parts of the originating network nor the terminating network connected to the CenturyLink/Intrado ESInet.")])

⁴⁹ Decl. of Lisa W. Gafken, Exh. F (Rosen, Exh. BR-4C at 19 [Term 11, paragraph 1(a)]).

transport throughout the entire 9-1-1 system during the transition from its network to Comtech’s network. As a result, CenturyLink, as a matter of law, is responsible for the December 2018 outage and the violations identified in the Complaint.

C. Amendment M did not identify a clearly defined demarcation point, leaving CenturyLink responsible for 911 calls. Regardless, CenturyLink’s obligation to provide network and transport services carried through any demarcation point.

27. As Public Counsel’s expert witness, Mr. Rosen, testified, where two service providers interconnect, it is routine to describe a “point of demarcation” that defines when responsibility shifts from the one service provider to another.⁵⁰ Defining the point of demarcation is important “so that there’s clarity regarding who’s responsible if there’s an issue on one side or the other.”⁵¹ CenturyLink concedes that Amendment M and the attached Scope of Work failed to specify the location of the demarcation point.⁵² Because the point of demarcation constitutes an agreement between parties, one party cannot unilaterally identify where the point of demarcation is if no agreement exists.⁵³ Indeed, CenturyLink’s effort to create a point of demarcation years later is merely an *ex post facto* attempt to escape liability for its failure to maintain a reliable 9-1-1 network.

28. Under the contract and Amendment M, Comtech becomes the Covered 9-1-1 Service Provider only *after* the point of demarcation and is then responsible for routing and delivering calls to transitioned PSAPs. Therefore, to avoid liability, CenturyLink attempts to unilaterally

⁵⁰ Decl. of Lisa W. Gafken, Exh. O (Rosen, Exh. BR-30CT at 19:7–10).

⁵¹ Decl. of Lisa W. Gafken, Exh. N (Turner, TR. 62:8–24). *See also*, Decl. of Lisa W. Gafken, Exh. N (Turner, TR 62:25–63:10); Decl. of Lisa W. Gafken, Exh. O (Rosen, Exh. BR-30CT at 19:14–16).

⁵² Decl. of Lisa W. Gafken, Exh. J (Hartman, Exh. SJH-1TC at 28:5–6); Decl. of Lisa W. Gafken, Exh. K (Turner, Exh. SET-1T at 43:1–17); *see* Decl. of Lisa W. Gafken, Exh. A (Rosen, Exh. BR-1CTr at 29:11).

⁵³ Decl. of Lisa W. Gafken, Exh. O (Rosen, Exh. BR-30CT at 19:13–14).

rewrite the contract to establish a point of demarcation that was neither agreed upon by the contract parties nor sufficiently defined in contract.⁵⁴ The Commission must reject such attempts.

29. Because there was no demarcation point established, responsibility could not transition from CenturyLink to Comtech. Thus, as a matter of basic contract interpretation and as a matter of law, CenturyLink was never relieved of its obligations with respect to the 9-1-1 calls made during the transition period.

30. Moreover, even assuming *arguendo* that the parties had clearly identified a point of demarcation, such an identification would not absolve CenturyLink of liability because CenturyLink continued to be responsible for network and transport, as discussed above. This is because the responsibility for network and transport would have carried through any point of demarcation.

31. The contract and its Amendment M created responsibilities for CenturyLink that it never relinquished, and the Commission must not allow a sophisticated, multi-billion dollar company to avoid accountability through self-serving testimony from its own employees and experts. CenturyLink is plainly responsible, as a matter of law, for the December 2018 9-1-1 outage and the resulting violations.

VII. CONCLUSION

32. The contract between CenturyLink and the State of Washington clearly identified CenturyLink's obligations relating to the State's 9-1-1 system. Even when Washington commenced the process to change 9-1-1 service providers, CenturyLink retained certain

⁵⁴ Decl. of Lisa W. Gafken, Exh. K (Turner, Exh. SET-7C); Decl. of Lisa W. Gafken, Exh. O (Rosen, Exh. BR-30CT at 19:19 to 22:8).

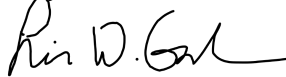
obligations during the transition from its system to its successor's system. Because CenturyLink retained the obligation to provide network and transport services through the transition period, and beyond any point of demarcation, CenturyLink is responsible for the 9-1-1 outage that occurred in December 2018 and the resulting violations.

33. Additionally, because no point of demarcation was agreed upon, CenturyLink's responsibilities could not shift from one service provider to another. While that may result in both service providers being liable, for purposes of this proceeding, the important effect is that CenturyLink was not relieved of any of its obligations regarding calls to the transitioned PSAPs.

34. As a result, Public Counsel requests that the Commission grant the Motion for Partial Summary Determination and find that CenturyLink is liable for the violations enumerated in the Complaint. The primary issue that would remain for decision if this Motion is granted would be the amount of penalties CenturyLink must pay.

DATED this 28th day of October, 2022.

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