

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

v.

CENTURYLINK
COMMUNICATIONS, LLC 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

DOCKET UT-210902

ORDER 03

INITIAL ORDER GRANTING
STAFF MOTION FOR PARTIAL
SUMMARY DETERMINATION;
DENYING LUMEN CROSS-
MOTION FOR SUMMARY
DETERMINATION; DENYING
MOTION TO STRIKE;
DECLINING TO EXPAND SCOPE
OF PROCEEDING OR ISSUE
ADVISORY OPINION ON
JURISDICTION

BACKGROUND

- 1 On April 6, 2022, the Washington Utilities and Transportation Commission (Commission) issued a Complaint and Notice of Prehearing Conference (Complaint) concerning CenturyLink Communications, LLC d/b/a Lumen Technologies Group, Qwest Corporation, CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest (collectively Lumen or Company). The Complaint alleges violations of WAC 480-120-172(3)(a) governing involuntary discontinuance of telecommunications service.
- 2 On May 24, 2022, the Commission entered Order 01, Prehearing Conference Order, establishing a procedural schedule, including evidentiary hearings on March 24, 2023.
- 3 On June 16, 2022, Commission regulatory staff (Staff)¹ filed a Motion for Partial Summary Determination of Lumen's Liability for Violations of WAC 480-120-172(3)(a)

¹ In formal proceedings such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

(Staff Motion). Staff contends that the Company concedes that it suspended or disconnected service to 923 of its customers for nonpayment between March 23, 2020, and September 30, 2021. During that time, Governor Inslee’s Proclamation 20-23.2 (Proclamation) prohibited all telecommunications providers in Washington from disconnecting any residential customers from telecommunications service due to nonpayment. Staff argues that the Proclamation applies to both “suspension” and “disconnection” of service and that it temporarily invalidated the terms and conditions of the service agreements that authorized Lumen to discontinue providing service for nonpayment. WAC 480-120-172(3)(a) authorizes regulated telecommunications companies to discontinue service based on the customer’s failure to comply with its service terms and conditions. Staff maintains that Lumen violated this rule for each of the affected 923 customers because the Proclamation invalidated the terms and conditions that authorized their suspension or disconnection. Staff urges the Commission to find that Lumen committed 923 violations of WAC 480-120-172(3)(a) and allow the parties to try the issue of the appropriate penalty at the hearing.

4 On July 6, 2022, the Public Counsel Unit of the Washington Attorney General’s Office (Public Counsel) filed a response in support of the Staff Motion (PC Support). Public Counsel agrees with Staff that the Commission should find Lumen committed 923 violations of WAC 480-120-172(3)(a). Public Counsel also claims that the Commission should find an additional 243 violations based on the information in Staff’s investigation report and should determine Lumen’s liability and appropriate penalties for imposing late fees and reconnection fees in violation of the Proclamation. If the Commission declines to exercise jurisdiction over the late fees and reconnection fees, Public Counsel represents that it may refer the matter to the Consumer Protection Division of the Attorney General’s Office for action under the Consumer Protection Act, Chapter 19.86 RCW.

5 On July 6, 2022, Lumen filed its Opposition to Staff’s Motion for Partial Summary Determination and Cross Motion for Summary Determination (Lumen Cross-Motion). The Company acknowledges that it performed 923 involuntary disconnections or suspensions from March 2020 through August 2021 and does not dispute that “suspensions” can be treated as “disconnections” for purposes of this motion. Lumen, however, relies on the Court of Appeals’ decision in *Gonzales v. Inslee*,² for the proposition that the Proclamation was a temporary prohibition of specific, enumerated

² 21 Wn. App. 2d 110, 504 P.3d 890 (2022).

actions and represented only a delay of a contract remedy, not invalidation of that remedy. According to Lumen, then, the Proclamation did not invalidate or render ineffective any of the Company's service terms and conditions, and those terms and conditions authorized the disconnections under WAC 480-120-172(3)(a).

- 6 On July 18, 2022, Lumen filed a Motion to Strike Portions of Public Counsel's Response in Support of Staff Motion for Summary Determination (Motion to Strike). The Company seeks to strike or otherwise exclude from Commission consideration the portions of the PC Support that advocate the Commission address claims against Lumen for 243 additional disconnections, late fees, and reconnection fees. Lumen maintains that these allegations were not included in the Complaint, are beyond the scope of this proceeding, and are procedurally improper.
- 7 On July 25, 2022, Public Counsel filed a Response in Opposition to Respondents' Motion to Strike. Public Counsel argues that the additional 243 disconnections, late fees, and reconnection fees are part of Staff's investigation report on which the Complaint was based, and Public Counsel raised these allegations to preserve the issues for Commission consideration due to the limitations on the issues for hearing that Staff proposed in the Staff Motion. Public Counsel represents that, if necessary, it will bring a complaint against the alleged fee violations if the Commission believes the issues are within its jurisdiction.
- 8 On July 26, 2022, Staff filed its 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 (Staff Response). Staff contends that well-established legal principles provide that contract terms that violate a statute or public policy are unenforceable. The Proclamation, according to Staff, rendered the terms on which Lumen relied to suspend or disconnect service illegal and in violation of public policy, and *Gonzales* does not support a contrary conclusion. Accordingly, Staff maintains that no cognizable legal theory entitles Lumen to summary determination in its favor, and the Commission should deny the Lumen Cross-Motion.
- 9 Staff suggests that the Commission assume, without deciding, that the portions of the PC Support comprise a petition for the Commission to adjudicate Public Counsel's claims with respect to the additional 243 disconnections, late fees, and reconnection fees, instead

of a procedurally improper complaint. Staff recommends that the Commission then deny that request on the merits, rather than strike it as Lumen advocates.

10 Jeff Roberson, Assistant Attorney General, Lacey, Washington, represents Staff. Adam L. Sherr, in house counsel, Seattle, Washington, and Donna L. Barnett, Perkins Coie LLP, Bellevue, Washington, represent Lumen. Lisa W. Gafken, Assistant Attorney General, Seattle, Washington, represents Public Counsel.

DISCUSSION AND DECISION

11 “A party may move for summary determination of one or more issues if . . . there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”³ All parties agree that there is no genuine issue of material fact with respect to the issue of whether Lumen violated WAC 480-120-172(3)(a). Staff and Lumen disagree, however, on which party is entitled to judgment on that issue as a matter of law. The Commission concludes that Staff is that party and that Lumen is liable for 923 violations of WAC 480-120-172(3)(a).

12 The Proclamation expressly prohibited all telecommunications providers in Washington from disconnecting any residential customers from telecommunications service due to nonpayment. Whatever basis on which Lumen was authorized to suspend or disconnect those customers was not operative while the prohibition was in effect. WAC 480-120-172(3)(a) authorizes a telecommunications company to discontinue service involuntarily only if the company has an effective legal right to do so. Lumen did not have such a right between March 23, 2020, and September 30, 2021. Accordingly, Lumen violated WAC 480-120-172(3)(a) when it suspended or disconnected the telecommunications service of 923 customers during that time.

13 Lumen argues that it had the contractual right to suspend or disconnect nonpaying customers and that the Proclamation could not abrogate that right. Relying on *Gonzales*, the Company characterizes the Proclamation as a temporary prohibition of specific, enumerated actions that delayed the exercise of a contractual right but did not invalidate that right. Because Lumen retained the right to suspend or disconnect service for nonpayment, the Company claims it remained authorized to discontinue service under WAC 480-120-172(3)(a).

14 This argument fails for several reasons. Lumen does not identify any provision in its service agreements that expressly authorizes the Company to involuntarily discontinue service to

³ WAC 480-07-380(2)(a).

nonpaying customers. The record in this docket does not include any evidence of the terms and conditions of those agreements, nor does Lumen cite to any price list or other document on file with the Commission that contains those terms and conditions. The Company thus has not demonstrated that it has any contractual right to involuntarily disconnect service for nonpayment.

- 15 Lumen appears to argue that customers' obligation to pay for service includes the Company's right to discontinue that service for nonpayment. Entitlement to payment and enforcement of that entitlement, however, are separate rights. Assuming for purposes of the motions that the service agreements require customers to pay for the services Lumen provides, violation of that term could trigger the Company's ability to involuntarily discontinue service under WAC 480-120-172(3)(a). The Proclamation, however, prohibited Lumen from taking such action. The Proclamation did not absolve customers of their obligation to pay for service. They continue to owe the Company for the telecommunications service Lumen provided to them. Lumen, however, could not enforce that obligation by suspending or disconnecting service as long as the Proclamation was in effect. Lumen's "right" to discontinue service for nonpayment – as opposed to its right to payment – derived from a Commission rule, not contract, and Lumen makes no claim that the Proclamation could not temporarily suspend the operation of an administrative rule.
- 16 Even if Lumen's service agreements included a term authorizing the Company to discontinue service for nonpayment, *Gonzales* does not support Lumen's position. The court in that case found that the Governor's moratorium on evictions merely delayed landlords' ability to take such action and did not unconstitutionally impair their contract rights. "The moratorium was temporary, and *following its expiration* landlords retained all available remedies for nonpayment of rent."⁴ The court thus upheld the Governor's authority to preclude the landlords from exercising their contractual rights until after the moratorium expired.
- 17 Similarly here, the Proclamation prohibited Lumen from exercising any contractual rights to discontinue service for nonpayment until that prohibition expired. Lumen does not distinguish between having a right and the ability to exercise that right. The Company correctly asserts that the Proclamation did not invalidate any contractual right Lumen had to discontinue service for nonpayment, but the Company erroneously maintains that having the right alone is sufficient. Lumen lacked the authority to exercise that right while the Proclamation was in effect. A contractual right that may not be exercised cannot be a legal

⁴ 21 Wn. App. 2d at 141 (emphasis added).

basis on which a company can involuntarily discontinue service under WAC 480-120-172(3)(a).

- 18 Lumen also ignores the practical impact of its position. If, as the Company claims, the Proclamation could not prohibit telecommunications companies from disconnecting customers for nonpayment when their service agreements directly or indirectly authorized such action, the Proclamation would have had no force or effect on the discontinuation of telecommunications services. We will not interpret the Proclamation to be meaningless.⁵ Nor can Lumen credibly claim that it so construed the Proclamation while it was in effect. The Company describes the 923 suspensions or disconnections between March 23, 2020, and September 30, 2021, as “inadvertent errors” and represents that “the overwhelming number of such involuntary disconnections were suppressed by the company’s efforts.”⁶ Lumen would not have made such efforts if the Company believed that the Proclamation did not preclude disconnecting service to nonpaying customers during that time.
- 19 We therefore find that Lumen is liable for the suspension or disconnection of service to 923 customers between March 23, 2020, and September 30, 2021, in violation of WAC 480-120-172(3)(a). The only issue that remains for Commission resolution of the Complaint is the appropriate penalty for those violations.
- 20 Public Counsel, however, proposes that the Commission consider 243 additional service disconnections, as well as late fees and reconnection fees that Lumen charged while the Proclamation was in effect. We decline to do so in this docket. The Complaint established the scope of this proceeding and does not include any allegations with respect to these matters. We deny the Motion to Strike⁷ but need not strike portions of the PC Support to determine that they raise issues that are outside the parameters of this docket and that the Commission will not consider them here.⁸ Nor will the Commission issue an advisory opinion as to the

⁵ We also lack the authority to determine the validity of the Proclamation to the extent that Lumen challenges its constitutionality.

⁶ Lumen Cross-Motion ¶ 3; *accord id.* ¶ 6 (“During the same period, the companies prevented tens of thousands of involuntary suspensions and disconnections.”).

⁷ Lumen purports to base its Motion to Strike on “WAC 480-07-375(d)” (presumably intending WAC 480-07-375 (1)(d)) which merely defines evidentiary motions. Motions to strike are most appropriately made as to contested evidence, and the provisions of the PC Support to which the Company objects are argument, not evidence. Accordingly, we deny the motion but effectively grant the requested relief not to address Public Counsel’s claims in this docket.

⁸ We also do not accept Staff’s invitation to construe the PC Support as a proper petition and deny it on the merits. The PC Support includes insufficient information for the Commission to consider

Commission's jurisdiction to entertain those claims in another proceeding. We will address such issues if and when they arise in an appropriate setting.

- 21 We question whether the current procedural schedule is necessary for the Commission to make a penalty determination. The Staff investigation report includes a preliminary analysis of the factors on which the Commission relies to make such a determination. An additional ten months of testimony filings, evidentiary hearings, and post-hearing briefing appears to be excessive under the circumstances. Accordingly, the parties must confer and file by August 10, 2022, either a revised proposed procedural schedule or an explanation for why the current procedural schedule should remain in place.

FINDINGS OF FACT

- 22 (1) The Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.
- 23 (2) CenturyLink Communications, LLC d/b/a Lumen Technologies Group, Qwest Corporation, CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest are public service companies regulated by the Commission, providing service as telecommunications companies.
- 24 (3) Lumen involuntarily disconnected or suspended telecommunications service to 923 residential customers from March 23, 2020, through September 30, 2021.

CONCLUSIONS OF LAW

- 25 (1) The Commission has jurisdiction over the subject matter of, and parties to, this proceeding.
- 26 (2) Governor Inslee's Proclamation 20-23.2 prohibited all telecommunications providers in Washington from disconnecting any residential customers from telecommunications service due to nonpayment between March 23, 2020, and September 30, 2021.

it as a petition, and we will not conduct the additional proceedings necessary to develop and address the merits of Public Counsel's claims in this docket.

- 27 (3) Suspensions of telecommunications service are equivalent to disconnections for purposes of Governor Inslee’s Proclamation 20-23.2.
- 28 (4) Governor Inslee’s Proclamation 20-23.2 did not absolve customers of their obligation to pay for telecommunications service. Rather, that proclamation suspended or delayed the effectiveness of any Commission rules or contract terms and conditions of telecommunications service that authorized telecommunications companies to try to enforce that obligation by disconnecting residential customers for nonpayment from March 23, 2020, to September 30, 2021.
- 29 (5) WAC 480-120-172(3)(a) authorizes telecommunications companies to discontinue service involuntarily after providing proper notice if and only if “[t]he company determines the customer has violated a rule, statute, service agreement, filed tariff, or rates, terms and conditions of competitively classified services.”
- 30 (6) From March 23, 2020, to September 30, 2021, any terms and conditions in Lumen’s service agreements with its residential customers that authorized the Company to suspend or disconnect service for nonpayment were suspended or delayed.
- 31 (7) From March 23, 2020, to September 30, 2021, Lumen lacked the authority to suspend or disconnect its residential customers for nonpayment.
- 32 (8) Lumen’s suspension or disconnection of 923 residential customers between March 23, 2020, and September 30, 2021, violated WAC 480-120-172(3)(a).
- 33 (9) Public Counsel’s claims concerning the legality of 243 additional disconnections and the late fees and reconnection fees that Lumen charged between March 23, 2020, and September 30, 2021, are beyond the scope of this proceeding, and the Commission should not consider them in this docket. Any determination of the Commission’s jurisdiction to litigate such claims in another proceeding would be an advisory opinion that the Commission should not issue.

ORDER

THE COMMISSION ORDERS that

- 34 (1) The Commission grants Commission Staff’s Motion for Partial Summary Determination of Lumen’s Liability for Violations of WAC 480-120-172(3)(a).

- 35 (2) The Commission denies the Cross Motion for Summary Determination of CenturyLink Communications, LLC d/b/a Lumen Technologies Group, Qwest Corporation, CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest.
- 36 (3) The Commission denies the Motion to Strike Portions of Public Counsel's Response in Support of Staff Motion for Summary Determination filed by CenturyLink Communications, LLC d/b/a Lumen Technologies Group, Qwest Corporation, CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest.
- 37 (4) The Commission declines to expand the scope of this proceeding beyond the allegations in the Complaint or to opine on the Commission's jurisdiction to consider additional claims in a separate proceeding.
- 38 (5) The parties must confer and make a filing by August 10, 2022, that either proposes a revised procedural schedule or explains the need to adhere to the current procedural schedule to develop a sufficient record to determine the appropriate penalty for the violations.

Dated at Lacey, Washington, and effective July 29, 2022.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ Gregory J. Kopta
GREGORY J. KOPTA
Administrative Law Judge

NOTICE TO PARTIES

Pursuant to WAC 480-15-450(4)(a), a carrier whose household goods permit has been cancelled involuntarily may apply for reinstatement if the carrier corrects all conditions that led to cancellation of the permit. To reinstate the permit within thirty (30) days of cancellation, the carrier must file an application for reinstatement and pay the applicable reinstatement fees as stated in WAC 480-15-230. If the carrier files an application for reinstatement after thirty (30) days of cancellation, the application will be considered in all aspects to be an application for new authority and will be subject to all terms and conditions specified in WAC 480-15-302 for new entrants.

This is an initial order. The action proposed in this initial order is not yet effective. If you disagree with this initial order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this initial order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2)(a) provides that any party to this proceeding has 20 days after the entry of this initial order to file a petition for administrative review (Petition). Section (2)(b) of the rule identifies what you must include in any Petition as well as other requirements for a Petition. WAC 480-07-825(2)(c) states that any party may file an answer (Answer) to a Petition within 10 days after service of the petition.

WAC 480-07-830 provides that before the Commission enters a final order any party may file a petition to reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. The Commission will not accept answers to a petition to reopen unless the Commission requests answers by written notice.

RCW 80.01.060(3) provides that an initial order will become final without further Commission action if no party seeks administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion.

Any Petition or Response must be electronically filed through the Commission's web portal as required by WAC 480-07-140(5).