

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

Complainant

v.

CENTURYLINK COMMUNICATIONS,
LLC,

Respondent.

DOCKET NO. UT-181051

**CENTURYLINK COMMUNICATIONS, LLC'S
OPPOSITION TO PUBLIC COUNSEL'S
MOTION FOR PARTIAL SUMMARY DETERMINATION**

November 17, 2022

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1 CenturyLink Communications, LLC (“CLC”) responds to Public Counsel’s Motion for Partial Summary Determination (“Motion”), and respectfully requests that the Commission deny the Motion in its entirety.

I. INTRODUCTION

2 Public Counsel seeks partial summary determination against CLC claiming that a purported breach of contract leads inexorably to a finding of liability in this complaint case. Respectfully, Public Counsel’s argument is wrong on every level. Specifically: (1) none of the causes of action in the Complaint allege breach of contract, but instead violations of various statutes or rules; (2) the Commission does not even have jurisdiction over breach of contract claims; (3) none of the statutes/rules underlying the claims in the Complaint are violated simply because a contract was breached (which it wasn’t); (4) Public Counsel does not even identify the claim(s) for which it seeks partial summary determination, and thus does not discuss (much less meet) the standard for finding that a statutory/rule violation occurred; (5) Public Counsel fails to give meaning to the principal provisions of the contract on which it relies, completely invalidating its argument; (6) Public Counsel ignores the testimony of CLC’s witnesses, which shows there is genuine dispute about the key facts underlying Public Counsel’s argument; (7) Public Counsel fails to mention, let alone analyze, the facts that show Comtech—the Covered 911 Service Provider for the PSAPs that had unsuccessful 911 calls during the December 2018 outage—designed an inherently unreliable 911 network, which is what ultimately caused the 911 calls to not complete; and (8) the disputed facts, in and of themselves, bar summary determination. For all of these reasons, the Commission should deny the Motion.

II. BACKGROUND FACTS

3 On December 27, 2018, an unexpected outage occurred on one of CenturyLink’s national transport networks (specifically, the Infinera Green network).¹ At the time of the outage, the state of Washington was transitioning away from CenturyLink² to a new Covered 911 Service Provider, Comtech.³ At the time of the outage, Comtech was serving 47 PSAPs in Washington, and CenturyLink was serving the remaining 15.⁴ During the outage, thousands of 911 calls destined for Comtech-served PSAPs did not complete; however, none of the 911 calls destined for CenturyLink-served PSAPs failed to complete as a result of the outage.⁵

4 Before the Washington Military Department (“WMD”) selected Comtech as the new Covered 911 Service Provider for Washington, CenturyLink filled that role for the entire state of Washington. FCC regulations define “Covered 911 Service Provider” as:

Any entity that . . . [p]rovides 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 § 9.3.⁶

¹ CenturyLink operates six different transport networks. *See* Declaration of Charles W. Steese (“Steese Declaration”), *Exhibit 1C* (Valence Response Testimony) at 4. The outage on the Infinera Green network impaired four DS-1 circuits being leased by Comtech and its SS7 provider in support of Comtech’s Washington 911 network. The impaired circuits were interstate services and CenturyLink was unaware Comtech was utilizing them as SS7 links for their 911 network. *Id.* at 23-24. All exhibits referenced in this Opposition are attached to the Steese Declaration.

² CLC differentiates between CLC, the party to this case, and CenturyLink, the Covered 911 Service Provider in 2009, because several CenturyLink entities worked jointly to provide the 911 service to the State of Washington under the 2009 agreement with the Washington Military Department.

³ *Exhibit 2* (Stockman Response Testimony) at 25:3-28:2.

⁴ *Exhibit 1C* (Valence Response Testimony) at 2-3.

⁵ *Exhibit 3C* (Klein Response Testimony) at 11:5-12:9. In its pre-filed testimony, Staff alleges, although not based on reliable evidence, that a small number of 911 calls also failed to reach CenturyLink-served PSAPs. *See* Webber Direct Testimony at pp. 44-60. CLC refuted Staff’s incorrect analysis in its pre-filed response testimony. *Exhibit 3C* (Klein Response Testimony) at 11:5-12:9.

⁶ 47 C.F.R. § 9.19 (a)(4)(i)(A) (emphasis added).

In addition, the FCC recognizes that a Covered 911 Service Provider has the following responsibilities:

Covered 911 service providers *are required to take* reasonable measures to provide reliable 911 service in three specific respects: *circuit diversity*, central office backup power, and diverse network monitoring. They must also “*certify annually* whether they have, within the past year, audited *the physical diversity of critical 911 circuits* or equivalent data paths to each PSAP they serve, tagged those circuits to minimize the risk that they will be reconfigured at some future date, and eliminated all single points of failure.”⁷

Thus, the Covered 911 Service Provider has an obligation to take reasonable measures to ensure “the physical diversity of critical 911 circuits.” Even Public Counsel’s own expert witness acknowledges that best practices for a Covered 911 Service Provider are to ensure network and/or carrier diversity for critical 911 circuits.⁸

5 Public Counsel’s Motion ignores these facts and instead focuses on a 2009 contract between WMD and CenturyLink, when CenturyLink was the Covered 911 Service Provider.⁹ The Motion, however, largely ignores the 2016 contract amendment (Amendment M) executed to accommodate the transition to Comtech.¹⁰ Specifically, Amendment M defines the role of the “Covered 911 Service Provider” during the transition of 911 service, and makes plain that Comtech was the “Covered 911 Service Provider” for the PSAPs that had been migrated to Comtech, which comports with the regulation that defines Covered 911 Service Provider as the entity directly serving PSAPs.

⁷ *Exhibit 4 ¶ 6* (emphasis added).

⁸ *See Exhibit 5C* (Rosen Direct Testimony) at 20:10-21:10 and 32:9-33:7; *Exhibit 6C* (Public Counsel’s responses to DRs 32(C), 34).

⁹ *See Exhibit 7C* (2009 WMD-CenturyLink Contract).

¹⁰ *See Exhibit 8C* (Amendment M to WMD-CenturyLink Contract).

6 Moreover, Section 11(a)(1) of Amendment M states in its entirety:

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.¹¹

7 While Public Counsel references this provision in its Motion, noticeably absent is any discussion of the bolded language, which makes Comtech responsible for call routing on its side of the demarcation point. In other words, Amendment M makes plain that, during the transition, CenturyLink’s obligations on 911 calls destined for PSAPs served by Comtech ended at the demarcation point.

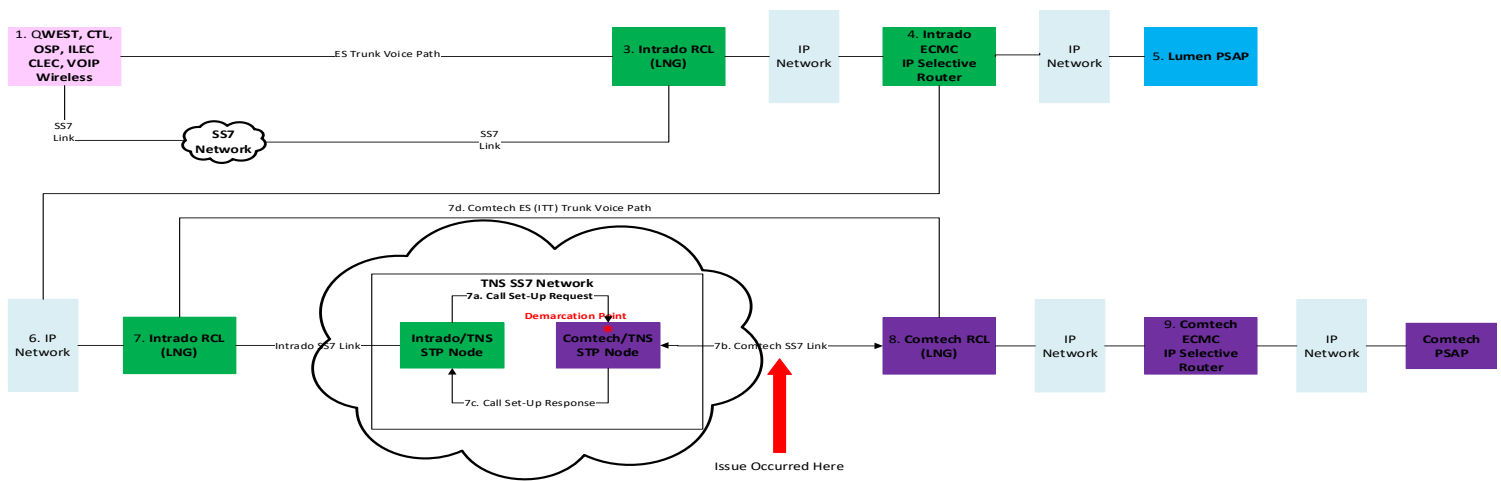
8 As Public Counsel recognizes, the demarcation “is a point where one party’s responsibility ends and another’s begins.”¹² Public Counsel’s entire motion is premised on the notion that, because Amendment M did not explicitly identify the demarcation

¹¹ See *id.*; see also Exhibit 9C (Turner Response Testimony) at 37–38, quoting Amendment M (emphasis added).

¹² Motion at ¶ 10; Exhibit 9C (Turner Response Testimony) at 38–39; see also *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd. 3696, ¶ 169 (Rel. Nov. 5, 1999) (“our rules define the demarcation point as that point on the loop where the telephone company’s control of the wire ceases”); see also Exhibit 10C (Turner Dep.) at 60:6–11 (industry defines demarcation point as the point where one provider’s responsibility ends and the other’s begins).

point, the location of the demarcation point was non-existent.¹³ Testimony from CLC witnesses and Comtech documents shows otherwise.

9 CLC witnesses uniformly define the demarcation point using the following diagram (CLC’s network is in green and Comtech’s is in purple):¹⁴



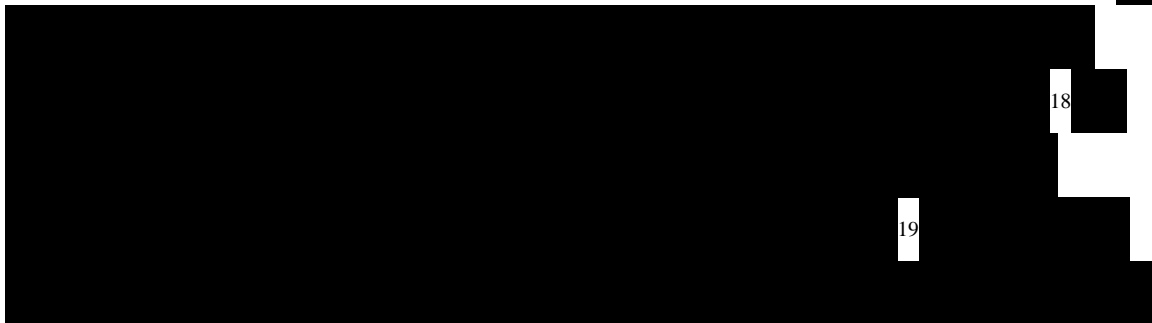
10 The reason for defining the demarcation point at this location is simple. When setting up a 911 call, CenturyLink’s signaling transfer point (“STP”) would send an initial address message (“IAM,” also referred to as a call setup request) to Comtech’s STP (hosted by TNS). This is identified as step 7a on the above diagram. Once that message was received, before a call could complete, Comtech’s network had to send a return message (step 7c) identifying the trunk group on Comtech’s inter-tandem trunk (“ITT”), the trunk that carried the voice portion of the emergency call from CenturyLink’s 911 network to Comtech’s 911 network to put the 911 call on. To identify the available ITT channel, a query would be sent (step 7b) between Comtech’s STP and Comtech’s local network gateway (LNG) (step 8). These messages traversed SS7 links that Comtech designed,

¹³ In order to support its position, Public Counsel is forced to take the extreme and unsupportable position that “CenturyLink” was legally responsible for all aspects of call completion during the 911 transition, even in scenarios where calls failed because of failures on the networks of other providers, including Comtech. *See Exhibit 6C* (Public Counsel Response to DR 45).

¹⁴ *Exhibit 9C* (Turner Response Testimony) at 39:30-40:10; *Exhibit 3C* (Klein Response Testimony) at 5:10-9:7.

ordered and maintained. Once CenturyLink sent the IAM, the call was on Comtech’s side of the network. In this case, CenturyLink’s network consistently sent IAMs—and Comtech’s network consistently failed to respond.¹⁵ Specifically, Comtech’s SS7 links (all of which it knowingly placed on the same CLC transport network without advising CLC or WMD, and without seeking readily-available network diversity from CLC) failed when the Infinera Green network experienced the packet storm outage in December 2018.¹⁶ Thus, 911 calls did not complete because Comtech’s network failed—a failure that took place on Comtech’s side of the demarcation point, beyond the control of CenturyLink.

II Comtech’s own documents validate this point. Comtech developed a document entitled “State of Washington E-911 Transition Call Flows between CenturyLink/West-Intrado and Comtech TCS ESInets,”¹⁷ which unambiguously identifies the demarcation point:



¹⁵ *Exhibit 3C* (Klein Response Testimony) at 5:10-9:7.

¹⁶ *Exhibit 9C* (Turner Response Testimony) at 57:7-58:4.

¹⁷ Burton, Victor, Telecommunication Systems, State of Washington E-911 Transition Call Flows between CenturyLink/West-Intrado and Comtech TCS ESInets, November 21, 2016. *See Exhibit 11C* (Exhibit SET-7C to Turner Response Testimony).

¹⁸ *Exhibit 9C* (Turner Response Testimony) at 43:1-17; *Exhibit 11C* (Exhibit SET-7C to Turner Response Testimony) § 1.1.

¹⁹ *See Exhibit 12C* (Stockman Response Testimony Exhibit SJH-5C). This discussion is related to SIP signaling messages as opposed to SS7 signaling messages. The exchange of information that occurs for SIP and SS7 is virtually the same. However, despite the fact that Comtech devised these standards for how CenturyLink and Comtech would interconnect using SIP signaling, ultimately Comtech indicated in writing to CenturyLink that it wanted to utilize SS7 signaling. The bottom line is that the similarity between SIP and SS7 signaling confirms that the demarcation is when the INVITE (SIP) or IAM (SS7) message was sent from CenturyLink to Comtech. And for the purposes of understanding the importance on defining the demarcation, the technology differences are irrelevant. *Exhibit 9C* (Turner Response Testimony) at 43:1-17.

[REDACTED] After that point, Comtech was responsible to take the calls. This is also the logical demarcation point, consistent with FCC precedent, as it is the handoff between CenturyLink’s control and Comtech’s control of the network message and the facilities it traversed. CenturyLink did not (and could not) design, construct or manage Comtech’s SS7 network. Comtech, with the assistance of its SS7 vendor (Transaction Network Services (“TNS”)), did so. CenturyLink had no visibility into Comtech’s design decisions, nor could it direct Comtech in any respect. Once the IAM reached Comtech’s STP, *Comtech’s SS7 network* was to carry the message to and from the *Comtech gateway* to determine the available trunk group so that the 911 voice call could traverse the ITT. CenturyLink had no role with or control over that portion of the SS7 infrastructure or functionality.

12 No one disputes that CenturyLink sent the IAMs to Comtech on the 911 calls that did not complete (step 7a), and Comtech did not send the return message (step 7c).²⁰ The reason is that Comtech obtained four circuits to act as SS7 signaling links and unilaterally decided to place all four circuits on CLC’s Green Infinera network, the network that experienced the December 2018 outage.²¹ Even Public Counsel admits that Comtech never informed CLC that the circuits would be used for signaling, let alone that they would be used to support a mated pair of STPs—and certainly not that they would be used to support 911 calling.²² Nor did Comtech avail itself of the opportunity to obtain diverse circuits from CLC.²³ As described above, as a Covered 911 Service Provider, Comtech was required to take reasonable measures to ensure circuit diversity, and

²⁰ *Exhibit 9C* (Turner Response Testimony) at 47:9-48:1.

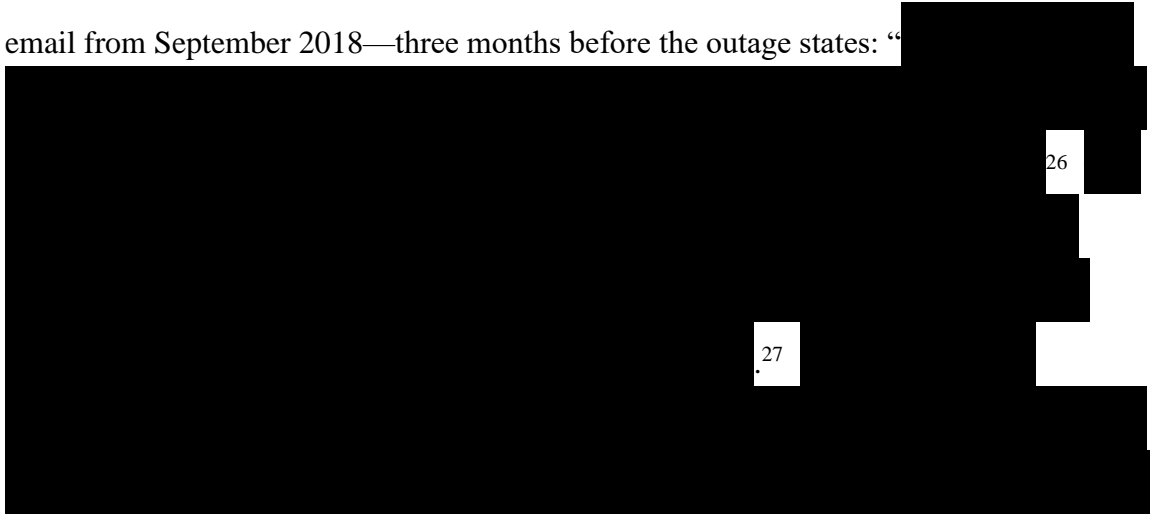
²¹ *Exhibit 5C* (Rosen Direct Testimony) at 20-21; *Exhibit 1C* (Valence Response Testimony) 5:7-14.

²² *Exhibit 6C* (Public Counsel Response to DRs 37 and 39).

²³ *See id.*; *see also Exhibit 1C* (Valence Response Testimony) at 7:2-7 (Lumen had capacity on different networks to provision SS7 links on different networks ensuring network diversity).

conduct audits to verify that circuits used to support 911 calling are diverse. The evidence in this case (all of which Public Counsel overlooks in the Motion) establishes that Comtech completely ignored the FCC standards and best practices. To make matters worse, CLC had a process that would have permitted Comtech to request diverse circuits, and CenturyLink had capacity on different networks to provision circuits using network diversity.²⁴ The problem is Comtech never used this tool or told CLC anything about how the circuits would be used or that they were related to one another.²⁵

13 Comtech knew this was a problem well before the December 2018 outage. A Comtech email from September 2018—three months before the outage states: “



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²⁴ See *Exhibit 1C* (Valence Response Testimony) at 20-22.

²⁵ See *Exhibit 1C* (Valence Response Testimony) at 23-24; *Exhibit 6C* (Public Counsel Response to DRs 37 and 39).

²⁶ See *Exhibit 9C* (Turner Response Testimony at 35:17-37-4; *Exhibit 13C* (pages from Exhibit SJH-12-C to Stockman Response Testimony).

²⁷ *Id.* Public Counsel’s argument that Comtech and CLC did not agree on the location of the demarcation point is contrary to many facts in the record. First, CLC’s witness Steve Turner testified that “I don’t think there was a confusion between Comtech as to where the demarc was at. . . . I think they understood where one party’s responsibilities ended and the other one had to take over and respond with, you know, what I’ve referred to there as an “acknowledge message.” *Exhibit 10C* (Turner Depo.) at 63:3–21. Second, to claim disagreement about location of the demarcation point, Public Counsel relies upon a diagram contained in data request response provided by Comtech. See Rosen Cross-Answer Testimony at 19:17-20:11 (citing Exhibit BR-32C). However, as CLC’s witness Carl Klein testified, the diagram Public Counsel relies upon does not depict the actual network deployed in Washington, as it contains multiple additional STPs. Once the diagram is modified to account for the actual network that existed, Comtech and CLC agree on the location of the demarcation point. *Exhibit 14C* (Klein Depo.) at 78:12-83:14.

[REDACTED], it is a highly unlikely that any Comtech 911 calls would have failed in Washington as a result of the December 2018 Infinera network outage. That Public Counsel wholly ignores this irrefutable fact is baffling.

14 The lack of diversity in Comtech’s SS7 signaling circuits is ultimately the reason why thousands of 911 calls did not complete to Comtech PSAPs. By contrast, even though CenturyLink used the same Infinera network for two of its signaling links, the mated pair were provisioned on a separate network ensuring there was no single point of failure on CenturyLink’s side of the demarcation point that could cause 911 calls to not complete.²⁸ Commission Staff’s own witness, Dr. Robert Akl, admitted that it is a central requirement for all signaling networks to ensure no single point of failure exists:

Q. Do you also teach about the importance when designing an SS7 signaling network to make sure that there is no single point of failure that would cause both mated pair to be out simultaneously?

A. Yes. Single point of failure is covered in SS7 and in my other courses in terms of—but specifically related to SS7, a single point of failure is something that we—that I discuss in this course and my other courses.

Q. When discussing a single point of failure, do you talk about it in terms of making sure that there is nothing either physical or software related that if there’s an occurrence it could cause both STPs to go out at the same time?

A. We cover—or I cover in those courses or I’ve covered in those courses ways to—both in terms of routing, link management, placement, adding redundancy, ensuring quality of service, latency, throughput, load balancing, those are some of the topics that I’ve addressed or I’ve covered in my—in this course to explain those concepts to my students.²⁹

²⁸ *Exhibit 1C* (Valence Response Testimony) at 5:16-7:1.

²⁹ *Exhibit 15C* (Akl Depo.) at 40:18–41:13.

15 Thus, Comtech’s flawed network design—not the outage on CLC’s Green network—is what caused 911 calls to not complete in December 2018.³⁰

III. ARGUMENT

A. PUBLIC COUNSEL’S ARGUMENT THAT CLC BREACHED A CONTRACT WITH WMD IS FLAWED BOTH SUBSTANTIVELY AND PROCEDURALLY.

1. *All Claims in the Complaint Allege Statutory or Rule Violations; None Alleges a Breach of Contract.*

16 The Complaint Staff served in this case contains four causes of action, all of which are founded on alleged violation of statutes or rules enforceable by the Commission. The Complaint does not even mention the words “contract” or “agreement.” Public Counsel itself admitted that “the scope of this docket is limited to whether CenturyLink violated any statutes or Commission rules.”³¹ Yet here, Public Counsel seeks to impose liability based on an alleged breach of contract—a legal theory asserted nowhere in the Complaint. See, for example, the Motion at Paragraph 20, where Public Counsel rattles off Washington contract interpretation principles, after which (in Paragraph 21) Public Counsel unabashedly proclaims: “Here, the issue is whether CenturyLink is liable under contract for the 2018 9-1-1 outage.” To finalize its point, Public Counsel asserts that “[i]dentifying 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.” Public Counsel is not hiding that, even two years into this proceeding, it views this regulatory complaint case as one based on an alleged breach of contract. The complaint, as well as fundamental principles of Commission jurisdiction, would beg to differ. While CenturyLink recognizes that aspects of the 2009 contract, specifically Amendment M, are important to consider when

³⁰ *Exhibit 1C* (Valence Response Testimony) at 7:2-10:18.

³¹ *See Exhibit 16* (PC Response to CLC DR No. 2(a)).

evaluating the operative statutes and rules underlying the Complaint, it should be plainly obvious that any breach of contract claim between WMD and CLC can only be brought in a court with jurisdiction to hear the dispute.

17 To compound the issue even further, Public Counsel does not even identify the cause of action in the Complaint for which is seeks partial summary determination. When seeking summary judgment, “a movant shall ‘identify[] each claim or defense—or the part of each claim or defense—on which summary judgment is sought’ and demonstrate that the ‘movant is entitled to judgment as a matter of law.’” *Bolton v. Bank of Am., N.A.*, No. CV-10-204-JLQ, 2011 WL 1044485, at *2 (E.D. Wash. Mar. 18, 2011) (quoting Fed. R. Civ. P. 56(a)); *see also United States for Use of N. Coast Elec. Co. v. Safari Elec., LLC*, No. 2:19-CV-00763-RAJ, 2021 WL 1758808, at *3 (W.D. Wash. May 4, 2021) (denying summary judgment motion that “simply fails to identify under which claim or defense it is moving”); *Lane v. Skamania Cnty.*, 164 Wash. App. 490, 499–500 (2011) (Federal Rules of Civil Procedure provide “persuasive authority” when interpreting “substantially similar” Washington State Superior Court Rules).

18 Public Counsel may argue that WAC 480-07-380 is broader than Washington Rule of Civil Procedure 56 in that it allows “for summary determination of one or more *issues*.” (emphasis added). But using the word “issues” instead of “claims” does not salvage this fatal flaw. WAC 480-07-380 requires that the “issue” for which summary determination is sought reference the “pleadings filed in the proceeding, together with any properly admissible evidentiary support.” Here, Public Counsel does not reference a single cause of action in the complaint. It is therefore not clear what “issue” in the Complaint that Public Counsel seeks summary determination on. The Commission should deny the Motion for this reason alone.

2. *Public Counsel's Presumption that a Breach of Contract Gives Rise to Liability is Fundamentally Flawed.*

19 It appears Public Counsel simply presumes that its theory that there has been a breach of contract—which is independently flawed for reasons CLC will spell out below—necessarily leads to liability in this case. *See* Motion at 14 (“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 argument appears to be, since CenturyLink was required to provide “network” and “transport” for 911 calls, if a call does not complete because of a network failure, this constitutes a breach of contract and CenturyLink is liable for regulatory penalties. The effect of Public Counsel’s theory would be to make CenturyLink strictly liable under Washington statutes and rules.

20 This interpretation is inconsistent with prior Commission decisional law, which held:

Staff and Public Counsel essentially argue that the mere existence of the outage is sufficient to prove the alleged violations and supports up to the maximum statutory penalty for each of the uncompleted calls. The Commission, however, has never interpreted the statute to impose strict liability for 911 call incompleteness. Companies must adequately maintain their networks and make all reasonable efforts to provide safe, modern, and efficient service, minimize the risk of disruptions, and quickly detect and remedy any outages. Failure to comply with those requirements results in liability. Meeting those obligations does not.

Commission rules are not to the contrary. WAC 480-120-450(1) requires that “[l]ocal exchange companies (LECs) must provide enhanced 9-1-1 (E911) services.” That requirement, like the statute, is a general obligation that does not expressly require the LEC to complete each and every call. That certainly is the goal. A single 911 call that is not completed is one call too many. The Commission, however, has never required perfection for a service provider to be in compliance with Commission rules. Rather, a company is responsible for call failures only to the extent that it has not taken all reasonable measures to prevent, limit, and remedy them. Based on the evidence presented, CenturyLink took such

measures in this case.³²

21 The standard applicable to the causes of action in the Complaint is therefore not whether a 911 call failed to complete, but whether CenturyLink took reasonable measures to prevent, limit, and remedy a 911 outage. Public Counsel’s Motion does not mention, let alone present evidence to satisfy, this legal standard. The Motion should be denied for this reason as well.

3. *The Commission Does Not Have Jurisdiction Over Breach of Contract Actions.*

22 Public Counsel’s presumption that a breach of contract leads to liability in this regulatory complaint case is also flawed because the Commission does not have jurisdiction over breach of contract causes of action. The Commission has authority to act only where such authority has been granted by statute, such as to conduct proceedings “contemplated for a state commission under the telecommunications act of 1996.” RCW 80.36.610. It does not have jurisdiction to hear claims alleging breach of a contract. *See Metro-Net Servs. Corp. vs. US W. Commc’ns*, No. U-88-2417-F, 1990 WL 10703431 (May 8, 1990) (noting that the Commission did not have jurisdiction over the “determination of breach of contract and remedies for asserted breach,” and “does not have jurisdiction to determine whether US WEST has entered and breached any contract, oral or written”). The Motion should be denied for this reason as well.

23 Even looking past the Commission’s lack of jurisdiction over breach of contract disputes, Public Counsel, which is not a party to the contract on which it premises its legal theories in this case, ignores that WMD has numerous remedies at its disposal. Should WMD conclude that CenturyLink breached the 2009 contract, as amended, the contract provides for Service Level Agreements (sometimes referred to as SLAs), which require the

³² UT-190209, Order No. 3 (Initial Order).

issuance of credits in the event of specified service quality issues. In fact, in early 2019, WMD availed itself of this contract provision and made a demand on CenturyLink for credits as a result of the December 2018 network event.³³ CenturyLink denied the request because the 911 outage occurred on Comtech’s network, not CenturyLink’s. WMD has not re-asserted its demand since the initiation of this complaint case.

B. THE FACTS STRONGLY SUPPORT A FINDING THAT COMTECH, NOT CENTURYLINK, FAILED IN ITS DUTIES AS A COVERED 911 SERVICE PROVIDER.

1. *During the December 2018 Outage, 911 Calls did not Complete to Comtech PSAPs Because Comtech Failed to Design its Network in Accordance with Industry Expectations – Not Due to Any Action by CLC.*

24 Public Counsel’s states in the Motion that “[t]he cause of the outage is not in dispute,”³⁴ falsely suggesting to the Commission that all parties agree that the packet storm on the Infinera Green network was “the cause of the outage.” Contrary to Public Counsel’s assertion, the undisputed facts show that thousands of Comtech 911 calls did not complete in December 2018, not because of the Infinera outage, but because of Comtech’s [REDACTED] network design.

25 In the Background section above, CLC details that Comtech was the Covered 911 Service Provider for 47 PSAPs in Washington as of December 2018. In that role, Comtech was *required* to take reasonable measures to establish diversity for all *critical 911 circuits*.

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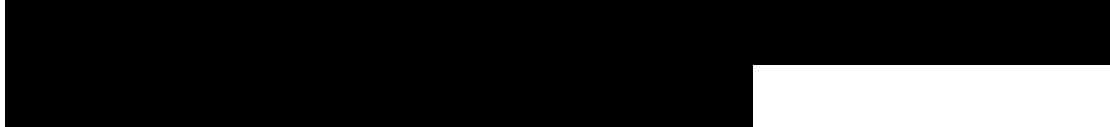
[REDACTED]

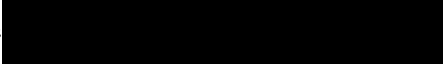
³⁵ An understatement, to say the least.

³³ *Exhibit 17* (demand letter).

³⁴ Motion at ¶ 7.

³⁵ *Exhibit 9C* (Turner Response Testimony) at 35:17-37:4 (quoting relevant documents).



27 Public Counsel tries to overcome this problem by saying CenturyLink was responsible for all “network” and “transport,” but even Comtech recognizes this is wrong. Comtech describes the circuits that lacked diversity as being “”³⁶ This is why thousands of 911 calls to Comtech’s PSAPs did not complete, while no 911 calls to CenturyLink’s PSAPs failed as a result of the outage.

2. *Comtech, not CenturyLink, Failed to Exercise Reasonable Diligence.*

28 Given these facts, Staff’s decision to bring this case against CLC instead of Comtech is mysterious. Why did Staff pursue CLC for millions of dollars in fines when all 911 calls to CenturyLink’s PSAPs completed? Why did Staff not pursue Comtech when thousands of calls to its PSAPs failed to complete? And why, to this day, does Staff step out of its way to excuse or ignore Comtech’s faulty network design and decision making that even Public Counsel acknowledges was flawed?

29 Staff will retort that it filed this complaint against CLC because an outage occurred on CLC’s transport network. While it is true that an outage occurred on one of CLC’s national transport networks, to ensure 911 calls complete during an outage, the FCC requires Covered 911 Service Providers to take reasonable measures to ensure *circuit diversity*. Diversity is so central that the FCC requires providers to “*certify annually . . . the physical diversity of critical 911 circuits.*” Thus, the central question in this case is not what caused the outage on CLC’s Green network, but what caused 911 calls in Washington to fall incomplete during the outage. Once framed properly, the answer is obvious: Comtech’s network design was the problem. CenturyLink had signaling links

³⁶ *Exhibit 9C* (Turner Response Testimony) at 35:17-37:4 (quoting relevant documents).

on this Green network too, yet calls to its PSAPs completed because, unlike Comtech, CenturyLink designed its network appropriately.

30 Look again to the Commission’s standard for the causes of action in the Complaint: did the Covered 911 Service Provider take reasonable measures to prevent, limit, and remedy a 911 outage? Comtech did not; it failed to take reasonable steps to prevent a 911 outage when it placed all SS7 signaling links on the same network—a fact [REDACTED], and which ultimately caused thousands of 911 calls to fail. But CenturyLink did, by appropriately designing its network with the necessary circuit diversity and thereby ensuring its 911 calls completed. The Motion should be denied for this reason as well.

3. *Public Counsel Fails to Give Meaning to the Provisions of CenturyLink’s Contract with WMD on Which it Relies.*

31 There is an additional reason why the Commission should reject Public Counsel’s Motion. Its entire flawed argument hinges on one isolated provision in a 2009 contract between WMD and CenturyLink, which it references but nowhere quotes. That provision states:

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. (emphasis added)³⁷

Contract provisions are to be given their ordinary meaning. *See Nishikawa v. U.S. Eagle High, LLC*, 138 Wash. App. 841, 849, 158 P.3d 1265, 1268 (2007) (“When interpreting a contract, we give undefined terms their plain, ordinary, and popular meaning”). This language is in the “Introduction” section of the contract’s Statement of Work, and merely states that CenturyLink’s 911 service solution must include “network, transport, PSAP interfaces, 911 trunk support, selective routing and ALI interfaces.” There is no question that it did. Neither Public Counsel nor WMD has asserted that CenturyLink’s 911 solution lacked any of those elements. As a matter of basic logic, no 911 calls would have completed in Washington over the decade that the contract was in effect if CenturyLink’s solution lacked “network” or “transport” (whatever those generic terms may mean in this context).

32 This provision—a single high-level sentence of which Public Counsel relies upon as the basis for its Motion—does not indicate that the failure of any individual 911 call constitutes a breach of the agreement. This provision seems to merely provide a general description of the service offering itself. Public Counsel offers no specific explanation or basis, let alone one that is agreed upon by all parties to this case, that a failure on Comtech’s SS7 network—one it designed, constructed and managed—created any contractual or regulatory liability for CenturyLink. As mentioned above, the contract provides for SLAs in the event of specified service quality outages or issues. Public Counsel also ignores this fact.

³⁷ *See Exhibit 7C; see also Exhibit 9C* (Turner Response Testimony) at 37–38, quoting Amendment M (emphasis added).

33 WMD added Amendment M in 2016, and, as described above, stated that Comtech, as the “Covered 911 Service Provider,” “shall be *solely responsible* for routing calls from the Demarcation Point between ESInet I and ESInet II to [the] Migrated PSAPs.” Thus, as of December 2018, Comtech had sole responsibility for “Covered 911 Service Provider” duties beyond the demarcation point to all PSAPs that had transitioned—including the PSAPs whose 911 calls failed to complete during the network outage. There is no other way to interpret this provision, especially when as Public Counsel readily admits that the point of demarcation “defines when responsibility shifts from the one service provider to another.” Motion ¶ 27.

34 “An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.” *Washington Pro. Real Est. LLC v. Young*, 360 P.3d 59, 64 (Wash. App. 2015) (quoting *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 271 P.3d 850, 855–56 (2012)); see also *Nishikawa v. U.S. Eagle High, LLC*, 158 P.3d 1265, 1268 (2007) (“Our goal is to interpret the agreement in a manner that gives effect to all the contract’s provisions.”). Nevertheless, “[w]here there is an inconsistency between a general and a specific provision, the specific provision ordinarily qualifies the meaning of the general provision.” *Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 909 P.2d 1323, 1327 (1995) (citing *Washington Local Lodge No. 104 of Int’l Bhd. of Boilermakers v. International Bhd. of Boilermakers*, 28 Wash.2d 536, 541, 183 P.2d 504 (1947); Restatement of the Law of Contracts 327, § 236(c)). Here, Amendment M provides much more specific language on each parties’ obligations during the transition. Public Counsel’s interpretation strips this language of meaning, and for that reason is fatally flawed. Instead, Public Counsel merely points to the words “network” and “transport” and declares victory.

35 CLC’s interpretation not only gives meaning to this language, but is also consistent with FCC rules and decisions on the obligations of a Covered 911 Service Provider.

According to rule, a Covered 911 Service Provider must provide “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).”³⁸ In addition, Covered 911 Service Providers “are required” to take reasonable measures to provide reliable 911 service in three specific respects—circuit diversity, central office backup power, and diverse network monitoring—and certify annually the physical diversity of critical 911 circuits.³⁹ Comtech’s network design failed this most fundamental standard. CLC, by contrast, complied with these provisions, and thus did not breach the Agreement, even assuming the Commission had authority to decide a breach of contract dispute. The Motion should be denied for this reason as well.

4. *Issues of Material Fact Prohibit a Summary Determination.*

36 Finally, WAC 480-07-380 states that when ruling on a motion for summary determination, the “commission will consider the standards applicable to a motion made under Washington superior court civil rule 56.” WAC 480-07-380(2)(a). The standard applicable to a Rule 56 motion is well known. Summary judgment is proper only when the record on file with the court show “there is no genuine issue as to any material fact.” Wash. R. Civ. P. 56(c). The court must construe all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 500 P.2d 88, 90 (Wash. 1972); *Wilson v. Steinbach*, 656 P.2d 1030, 1033 (Wash. 1982). When material facts are in dispute, the motion must be denied, and it is reversible error to interpret the facts for the benefit of the moving party. *Keck v. Collins, DMD*, 325

³⁸ 47 CFR § 9.19 (a)(4)(i)(A).

³⁹ See *Exhibit 4* ¶ 6.

P.3d 306, 320 (Wash App. 2014).

37 CLC believes the undisputed facts are clearly in its favor, conclusively establishing that CLC complied with all of its obligations and that the complained-of issues arose not because of any failure on the part of CLC, but due to Comtech's faulty network design. At a minimum, there are genuine issues of material fact that preclude summary determination. Those include, among many others, the following:

- 1) Did CLC, the only respondent in this case, fail in its duty to exercise reasonable diligence concerning any intrastate services or facilities that are within the jurisdiction of the Commission?
- 2) Was the specific packet malformation that occurred on the Infinera Green network in December 2018 reasonably foreseeable or predictable?
- 3) Did CLC exercise reasonable diligence by relying upon the guidance of Infinera, the equipment manufacturer, with regard how to configure the Infinera Green network?
- 4) What is the meaning and relevance of the 2009 contractual obligation to provide "network" and "transport," and did CenturyLink violate the contract by virtue of a failure on Comtech's SS7 network during Phase 1 of the Washington 911 transition in 2018?
- 5) Did Comtech exercise reasonable diligence in the design, construction and management of the SS7 network supporting its Washington 911 services?
- 6) Did Comtech's network design cause the failure of 911 calls destined for Comtech-served PSAPs during the December 2018 network outage?
- 7) Did Comtech inform CenturyLink of its lack of diversity and could CenturyLink have remedied the flawed network design had Comtech informed them of this

fact?

- 8) Did any part of CenturyLink's 911 network fail, leading to 911 calls failing to complete, during the December 2018 network outage?

The Motion should be denied for this reason as well.

IV. CONCLUSION

38 For all these reasons, CLC respectfully requests that the Commission deny Public Counsel's Motion for Partial Summary Determination.

Respectfully submitted this 17th day of November 2022.

CENTURYLINK



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