

**BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,  
Complainant,

v.

CENTURYLINK COMMUNICATIONS,  
LLC,  
Respondent.

DOCKET UT-181051

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION  
STAFF'S RESPONSE TO  
CENTURYLINK  
COMMUNICATIONS, LLC'S  
OPENING POST-HEARING BRIEF

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## I. INTRODUCTION AND RELIEF REQUESTED

1. CenturyLink continues to try to make this case about another service provider instead of its own failures. The straightforward story here is that CenturyLink agreed to provide services related to Washington's 9-1-1 system. It used its Green Network to meet those promises, but maintained that network in a way that left it vulnerable to a packet storm. When the packet storm happened, knocking out access to 9-1-1 in a majority of Washington State, CenturyLink's promise was broken, and it was broken in a way that violated Washington State law about how telecommunications companies need to provide services, need to transmit messages, and need to provide 9-1-1 service. Further, CenturyLink did not notify even its own Public Safety Answering Points (PSAPs) of the outage, leaving them in the dark about what was happening.

2. These serious violations of law require a Commission response. 9-1-1 is central to the safety and security of everybody in Washington State. CenturyLink's deviation from the standard that Washington State law requires in such an important an area as the 9-1-1 system calls out for penalties. As laid out in Staff's opening brief, the Commission should hold CenturyLink liable, and impose penalties in the amount of [REDACTED].

## II. LEGAL STANDARD

3. The burden of proof Staff must meet in this proceeding is a preponderance of the evidence. Preponderance of the evidence is "the ordinary burden of proof to resolve a dispute in an administrative proceeding." *Thompson v. State, Dept. of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999). And there is no basis rooted in the Due Process clause or otherwise that would cause the standard of evidence here to be any different.

4. CenturyLink confusingly suggests two evidentiary standards in its opening brief.<sup>1</sup> It first argues that the burden Staff must meet to prove its case is “according to caselaw . . . by a preponderance of the evidence.” *Id. citing Nguyen v. State, Dept. of Health, Med. Quality Assur. Comm’n*, 99 Wn. App. 96, 102, 994 P.2d 216 (1999). But it then contradicts itself, saying that because the immediate action was brought via a complaint by Staff, and Staff seeks to fine CenturyLink “the standard of proof is arguably by clear and convincing evidence.” *Id. at p. 43 citing Nguyen v. State, Dep’t of Health Med Quality Assur. Comm’n*, 144 Wn.2d 516, 529, 29 P.3d 689 (2001).

5. CenturyLink misunderstands this State’s jurisprudence concerning burden of proof. “Rights that touch on fundamental areas of human concern require the State to justify its action by clear and convincing evidence.” *Hardee v. State, Dept. of Soc. and Health Servs.*, 172 Wn. 2d 1, 8, 256 P.3d 339 (2011). In some instances, a professional license that enables a person to engage in the profession of their choice requires clear and convincing evidence for its revocation. *See Nguyen*, 144 Wn. 2d at 526 (holding revocation of license to practice as a medical doctor requires clear and convincing evidence). Usually, it does not though, and most professional licenses can be revoked by regulatory bodies based on a preponderance of the evidence. *See Hardee*, 172 Wn. 2d at 9.

6. Here, no professional license is at stake. Instead, the stake is a civil fine—mere money. This sort of interest is adequately protected by application of the preponderance standard. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n. 11 (1991) (holding that

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<sup>1</sup> CenturyLink P.H. Br. at pp. 42-43

the preponderance of the evidence standard was constitutional for the purposes of imposing punitive damages); *In re Exxon Valdez*, 270 F.3d 1215, 1232-33 (9th Cir. 2001) (same); *Eidson v. State, Dept. of Licensing*, 108 Wn. App. 712, 718, 32 P.3d 1039 (2001) (holding preponderance standard appropriate for license suspension and imposition of a \$300 fine against a real estate appraiser).

7. CenturyLink does not seriously engage in an analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976), and so Staff will not either.<sup>2</sup> *State v. Blilie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997). The above authorities are more than sufficient to determine that preponderance of the evidence (i.e., more likely than not) is the burden of proof that Staff must meet in this action.

### III. ARGUMENT

#### A. The Commission Has Jurisdiction Because CenturyLink Was Providing Intrastate Services Related to Washington State's 9-1-1 System

8. CenturyLink ignores its own responsibilities related to 9-1-1 in Washington State when it argues that the Commission lacks jurisdiction in this case. CenturyLink's syllogism is straightforward and easily refuted: the Green Network was an interstate network; the Commission lacks jurisdiction over interstate services; therefore the Commission lacks jurisdiction over any failure occurring on the Green Network.

9. But what CenturyLink fails to account for is that it agreed to provide *intrastate* services incident to the Washington State 9-1-1 system. It agreed to: 1), route calls to the demarcation point between ESInet I and ESInet II to ensure that 9-1-1 voice calls could get

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<sup>2</sup> CenturyLink P.H. Br. at 43

from Washington State callers to Washington State PSAPs; 2) provide network services in support of Washington State's 9-1-1 system; and 3) provide transport services in support of Washington State's 9-1-1 system.<sup>3</sup> These services were all intrastate in nature and the Commission certainly has jurisdiction to enforce Washington State law with respect to them.

10. The fact that CenturyLink used its interstate Green Network to provide these intrastate services does not remove CenturyLink's failures from the Commission's purview. The Washington State Military Department contracted with CenturyLink to connect Washington State 9-1-1 callers with Washington State PSAPs, which CenturyLink *agreed to do*.<sup>4</sup> It then used its Green Network to fulfill those contractual obligations.<sup>5</sup> Accordingly, the FCC's end-to-end analysis applies. *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22412, ¶ 16 (2004). Such an analysis *excludes* the signaling networks that may be used to connect voice trunks. *In the Matter of Connect America Fund et al.*, 26 FCC Rcd. 17663, 17893 n. 1206 (November 18, 2011) (“[A] call’s jurisdiction is typically not determined until after the call signaling process occurs.”).

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<sup>3</sup> Exh. BR-4C at 15 (“This solution must include, but is not limited to, network, transport, PSAP interfaces, 911 trunk support, selective routing and ALI interfaces.”).

<sup>4</sup> *Id.*

<sup>5</sup> CenturyLink claims to have been unaware that the circuits provided via the Green Network were being used to support 9-1-1 services in Washington State (CenturyLink Br. at 42), but Witness Webber provided testimony that CenturyLink would have been expected to know that was the case given the nature of those circuits' orders. Staff P.H. Br. at 17-18.



11. Because CenturyLink utilized its Green Network to provide 9-1-1 services in Washington State, it is subject to the Commission's jurisdiction for its failure to administer the Green Network according to Washington State law.

**B. The Contractual Language, Not Unexpressed Subjective Intent, Must Determine the Location of the Demarcation Point (if any)**

12. CenturyLink relies primarily on the testimony of Witness Turner for the proposition that the demarcation point between ESInet I and ESInet II was at the Comtech STP on the TNS network, ignoring the contractual language almost entirely.<sup>6</sup> Witness Turner ignored the contract too, and opined that the demarcation point was at the Comtech STP on the TNS network based solely off of his experience in the industry,<sup>7</sup> acknowledging that the demarcation point “wasn't defined in the contract.”<sup>8</sup>

13. But that does not mean that the contractual language becomes irrelevant. Rather, when a term in a contract is left undefined, a court may use extrinsic evidence to help define it, but that evidence cannot “contradict or modify the written word.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 4893, 503, 115 P.3d 262 (2005). Here, the contractual language uses “the demarcation point” in the singular.<sup>9</sup> And, in order to make CenturyLink's argument that a demarcation point existed at the Comtech STP on the TNS network make sense, then there must have been a demarcation point at the *Intrado STP* on the TNS network too, and also a demarcation point in between the

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<sup>6</sup> CenturyLink P.H. Br. at pp. 17-21.

<sup>7</sup> Turner, TR 391:14.

<sup>8</sup> Turner, TR 392:3.

<sup>9</sup> Exh. BR-4C at 19.

Intrado RCL and the Comtech RCL for the voice part of the call.<sup>10</sup> In other words, where the contract clearly anticipates one hand-off, at which point Comtech would be “solely responsible for routing all calls from the Demarcation Point between ESINet I and ESINet II to [the] Migrated PSAPs”, CenturyLink’s version would have *three* handoffs.<sup>11</sup> This is plainly inconsistent with the contract, and shows that its preferred interpretation cannot be correct.

14. For the same reason, CenturyLink’s reliance on communications made before or after the contract was executed,<sup>12</sup> cannot change what the contract actually says. The contract says there is one demarcation point “at ESINet II.”<sup>13</sup> The contract then has a picture, helpfully identifying ESINet I, the SS7 network, and ESINet II as separate logical spaces.<sup>14</sup> Comtech and the WMD each expressed their opinion that the demarcation point was at the Comtech RCL, consistent with the contractual language.<sup>15</sup> If there was a demarcation point at all in the absence of an explicit agreement in the contract, only Comtech’s and WMD’s opinion is consistent with the contractual language. The failure that led to the December 2018 9-1-1 Outage was, therefore, CenturyLink’s responsibility.

**C. Faulty Network Design Caused the Green Network Outage, Not Malformed Packets**

15. CenturyLink incorrectly argues that Staff are attempting to hold it to a version of strict liability because the packet malformation which set off the Green Network packet storm was not foreseeable. In CenturyLink’s view, regardless of the fragility of its network

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<sup>10</sup> Turner, TR 382:13-386:18.

<sup>11</sup> Exh. BR 4C at 20.

<sup>12</sup> CenturyLink P.H. Br. at 19-20.

<sup>13</sup> Exh. BR-4C at 19.

<sup>14</sup> Exh. BR-4C at 29.

<sup>15</sup> Exh. BR-32C; Exh. BR-28.

design, if the immediately preceding cause could not have been predicted, it cannot be held responsible for any network outage.

16. But this mischaracterizes Staff’s argument and would set a dangerous rule for telecommunication companies. As acknowledged by CenturyLink witnesses, network equipment does not always function as it was designed to function.<sup>16</sup> Sometimes, due to equipment faults or external factors such as electromagnetic interference, equipment can act in unexpected ways and produce malformed packets.<sup>17</sup> It is just a fact of life that sometimes stuff breaks.

17. Therefore, even if the particular kind of malformation is not foreseeable, it is foreseeable that unexpected traffic can be generated.<sup>18</sup> CenturyLink’s decision to leave the IGCCs enabled and unconfigured allowed this malformation to wreak havoc on its Green Network.<sup>19</sup> Witnesses Webber, Akl, Rosen, and the FCC all identified this decision as a critical failure on CenturyLink’s part that enabled the outage of Washington State’s 9-1-1 system to occur.<sup>20</sup>

18. And while CenturyLink’s expert, Steven Turner, did not share this opinion, he did opine generally that network design failures take priority over component failures when

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<sup>16</sup> Turner TR 394:19-396:18.

<sup>17</sup> Turner TR 394:19-395:2 (“It could be external factors that cause a bit to change from a zero to a one. You could have . . . an issue with . . . electromechanical noise that could cause part of the packet to be suppressed. I mean, there’s – there’s any number of things that could – could happen that would potentially cause a packet to change from what you’re expecting to something that’s malformed.”; McNealy TR 470:5-471:11.

<sup>18</sup> Akl TR 254:2-254:13.

<sup>19</sup> See, e.g., Exh. JDW-4 at 15 (“Leaving the channel enabled created vulnerability in the network that, in this case, contributed to the outage by allowing malformed packets to be continually rebroadcast across the network.”).

<sup>20</sup> Webber, JDW-1CT at 21:9-21:11; Akl, RA-1CT at 7:7-7:10; Rosen, BR-30CT at 15:20-17:18; Exh. JDW-4 at 15.

deciding what the root cause of a failure is.<sup>21</sup> He testified that “[i]f a higher-level requirement of the network is violated from a design standpoint and an outage occurs, the root cause of the outage rests with the higher-level design flaw, rather than on any individual component of the network.”<sup>22</sup> During the hearing, Witness Turner elaborated and agreed that the decision not to disable the IGCCs was a network design decision.<sup>23</sup> He further testified that network equipment can generate malformed packets for any number of reasons and that “to the extent you can design for them, you attempt to design for the unexpected, but there are situations where things happen that you do not design for, and then you have to work to solve the problem and adapt.”<sup>24</sup> He further stated that “you try to create higher-level network or system designs that will allow for the unexpected to occur, which is exactly what the case is with the signaling networks....”<sup>25</sup>

19. Witness Turner’s testimony about network design was in support of his opinion that Comtech failed to design its signaling network with network diversity, and so Comtech was at fault for the Washington State 9-1-1 outage.<sup>26</sup> But it is equally applicable to CenturyLink’s decision to leave the IGCCs enabled and unconfigured. CenturyLink was not using the IGCCs to do any useful network function.<sup>27</sup> The cost of disabling the IGCCs to prevent any unexpected traffic from entering them was low.<sup>28</sup> It is a known phenomenon that

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<sup>21</sup> Turner, 1CT at 10:11-10:23.

<sup>22</sup> *Id.*

<sup>23</sup> Turner TR 393:20-393:24.

<sup>24</sup> Turner TR 397:10-397:14.

<sup>25</sup> Turner TR 397:21-397:25.

<sup>26</sup> Turner TR 397:25-398:3.

<sup>27</sup> Webber, JDW-1CT at 20:3-10:11.

<sup>28</sup> *See, e.g.,* McNealy, TR 486:22-486:25.

network equipment does not always do the expected, and sometimes unexpected traffic occurs.<sup>29</sup> Therefore, especially after the Red Network outage in which unexpected traffic also entered the IGCCs causing a packet storm,<sup>30</sup> it fell well below industry standards for CenturyLink to leave the IGCCs enabled and unconfigured.<sup>31</sup> This network design decision takes precedence over the individual component of the network that failed in determining what caused the Green Network, and therefore the Washington State 9-1-1 system, to fail.

20. CenturyLink focuses on what it did not control (whether or not a malformed packet would generate and how) to distract the Commission from what it did control: whether to disable the IGCCs. Disabling the IGCCs was clearly called for, not just in hindsight, but well before the Green Network packet storm occurred. CenturyLink's failure to disable IGCCs constituted a misstep and a violation of Washington State's telecommunications laws and regulations. The Commission should so conclude and impose appropriate penalties.

**D. Comtech's Responsibility for the 9-1-1 Outage (if any) is Irrelevant**

21. Most of CenturyLink's argument proceeds on the faulty assumption that if Comtech is responsible, then CenturyLink is not. Perhaps everything that CenturyLink says about Comtech's network design is accurate. None of it is material to these proceedings.

22. In granting Comtech's petition to intervene, the Commission was careful not to broaden the scope of this proceeding. The Commission wrote at that time: "We also note that the issue in this proceeding is whether CenturyLink violated any statutes or Commission rules resulting in the December 2018 network outage. The participation of [Comtech] in this

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<sup>29</sup> See, e.g., Turner TR 394:19-395:2.

<sup>30</sup> Akl, RA-1CT at 7:7-7:10.

<sup>31</sup> Akl, TR 253:18-253:22.

docket will not broaden the scope of the proceeding to address its or any other nonregulated entity's liability or contractual obligations.”<sup>32</sup> Thus, the sole question before the Commission remains whether CenturyLink violated RCW 80.36.080, RCW 80.36.220, WAC 480-120-412, and WAC 480-120-450.<sup>33</sup>

23. None of these statutes or rules require one and only one telecommunications company to be at fault for any outage or failure. RCW 80.36.080, generally speaking, requires telecommunications companies to provide their services and keep their equipment in a way that is “modern, adequate, sufficient, and efficient.” CenturyLink can (and did) violate this statute even if Comtech should have had diverse links between its RCL and the TNS SS7 network but did not. This same analysis applies to RCW 80.36.220, WAC 480-120-412, and WAC 480-120-450. None of the elements of a violation of any of the laws that Staff has charged CenturyLink with violating are negated if Comtech also bears responsibility for the December 2018 9-1-1 Outage.

24. Witness Rosen's testimony is illustrative here. Testifying particularly to the communication between Comtech and CenturyLink and whether Comtech could have arranged for network diversity in its links, Witness Rosen testified: “[T]his whole interconnection never had been done the way it was done [sic]. So there's so many reasons why this thing could have been avoided and wasn't. You're [(CenturyLink's counsel)] picking on one. You're right. If they [(Comtech)] had done it right, they would not—we would not have had this problem. But there are so many places where we could say the same thing.”<sup>34</sup>

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<sup>32</sup> Order 03 at ¶ 15.

<sup>33</sup> See generally Complaint.

<sup>34</sup> Rosen TR 294:19-294:25.

25. It is an adage taught to children that two wrongs do not make a right. Just because Comtech may have been wrong here, that does not make right CenturyLink's own failures.

**E. The Commission Should Find That CenturyLink Violated RCW 80.36.080, RCW 80.36.220, WAC 480-120-450, and WAC 480-120-412**

26. As detailed in Staff's Post-Hearing Brief, each of its allegations has been proven by a preponderance of the evidence.<sup>35</sup> Nothing CenturyLink says should dissuade the Commission from so holding.

27. CenturyLink's violations of RCW 80.36.080, RCW 80.36.220, and WAC 480-120-450 stem from the same basic failures: it promised to get calls from ESInet I to ESInet II and did not; it promised to provide network services to support Washington State's 9-1-1 system and did not; it promised to provide transport services to support Washington State's 9-1-1 system and did not. Staff is not relying on a theory of strict liability. Staff submitted extensive evidence, which the FCC agreed with, that CenturyLink's failure to disable the IGCCs on the Green Network was an avoidable cause of the Green Network outage which should have been apparent to a reasonable telecommunications company.<sup>36</sup> Because CenturyLink used its Green Network to fulfill its obligations to provide 9-1-1 services in Washington State, its failure to maintain the Green Network appropriately led directly to violations of Washington State law.

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<sup>35</sup> Staff P.H. Br. at 28-33.

<sup>36</sup> Webber, JDW-1CT at 21:9-21:11; Akl, RA-1CT at 7:7-7:10; Exh. JDW-4 at 15.

28. CenturyLink argues that it cannot be held responsible for a packet storm where it could not have predicted that packet malformation would occur in the way that it did.<sup>37</sup> But, as argued above, CenturyLink’s failure was keeping the IGCCs enabled and unconfigured, even though disabling them would have been easy and even though responsible telecommunications companies know that packet malformation can and does occur in unpredictable ways. An architect may not know that lightning will strike, or when, but that does not prevent buildings from being built with lightning rods. Here, CenturyLink’s failure to take the straightforward and simple step of disabling the IGCCs caused the services it provided to be less than “modern, adequate, sufficient and efficient” as required by RCW 80.36.080.

29. Similarly, by failing to disable the IGCCs and rendering the Green Network vulnerable to a packet storm, CenturyLink negligently failed to transmit messages for WMD, Comtech, and 9-1-1 callers trying to reach a Comtech served PSAP in violation of RCW 80.36.220. CenturyLink complains that the statute they violated dates to the 1890s<sup>38</sup>, but does not present a compelling reason why it does not fit this exact circumstance in which CenturyLink promised to transmit such messages and then did not because the network it used for that purpose was negligently maintained and broke.

30. In the same way, CenturyLink also violated WAC 480-120-450. By providing intrastate 9-1-1 services, CenturyLink was acting as a local exchange carrier and by failing to transmit calls from ESInet I to ESInet II it failed to provide 9-1-1 functionality. Again, Staff

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<sup>37</sup> CenturyLink P.H. Br. at 49-50.

<sup>38</sup> CenturyLink P.H. Br. at 52.



is not relying on a theory of strict liability—CenturyLink failed to disable the IGCCs when it should have, resulting in 9-1-1 calls that never made it to the PSAPs for which they were intended. CenturyLink can and should be held liable for this failure, which had a direct impact on public safety. Further, each and every 9-1-1 call that failed as a result of CenturyLink’s decision not to disable the IGCCs constitutes an independent breach of this rule. *Washington Utilities and Transp. Commn. V. Qwest Corp.*, Dkt. UT-190209 Order 03 (June 25, 2020) (“[I]f a systemic company, service, or network deficiency results in uncompleted calls, each such call is a separate violation of applicable law.”).

31. Finally, CenturyLink argues that it could not have violated WAC 480-120-412 because there was no “major outage” affecting the PSAPs that it served. But CenturyLink ignores that PSAPs do not only accept calls, but also must transfers calls to other PSAPs, including PSAPs on ESInet II. In fact, the contract CenturyLink entered into with WMD explicitly required this functionality.<sup>39</sup> Because PSAPs served by Comtech had a complete interruption in service, this was undoubtedly a major outage, and because PSAPs served by CenturyLink had to be able to call those PSAPs, CenturyLink PSAPs were affected by the outage. CenturyLink should have notified its PSAPs that the outage was occurring, but did not, and violated WAC 480-120-412.

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<sup>39</sup> Exh. BR-4C at 26-27.

**F. Commission Guidelines Support Penalties for CenturyLink’s Failure**

32. CenturyLink argues incorrectly that because all of the PSAPs have transitioned to Comtech at this point, penalties are unjustified even if CenturyLink did break the law. Such an argument is facetious.

33. The Commission’s guidelines for penalty imposition take many factors into consideration, only one of which is the likelihood of recurrence. *See Enforcement Policy of the Washington Utilities and Transportation Commission*, Docket A-120061 at 6 ¶ 9 (January 7, 2013). CenturyLink cites the order dismissing Staff’s complaint in docket number UT-190209, but that order provides no support for its position. There, the Commission observed that in order for penalties to provide an effective incentive to comply with the law “the Commission should inform the transgressor of the actions it needs to take to bring its services, network, or operations into line with its obligations.” *Washington Utilities and Transp. Commn. V. Qwest Corp.*, Dkt. UT-190209 Order 03 at 13 (June 25, 2020). Because in that case no party “identif[ied] anything CenturyLink or Intrado did improperly or could have done differently” penalties were not appropriate even if incomplete 9-1-1 calls without anything else did amount to technical violations of Washington State’s statutes or the Commission’s rules. *See id.* at 11, 13.

34. Here, Staff has identified something that CenturyLink should have done different, not incidentally the same thing the FCC identified: it should have locked the IGCCs on the Green Network.<sup>40</sup> As explained elsewhere, penalties are appropriate under the

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<sup>40</sup> *See, e.g.*, Exh. JDW-4 at 15.

Commission's guidelines.<sup>41</sup> But they also serve the important purpose of identifying the network failure in this case and persuading CenturyLink, and other telecommunications companies in Washington State, to avoid it.

#### IV. CONCLUSION

35. The Commission should rule that CenturyLink violated RCW 80.36.080, RCW 80.36.220, WAC 480-120-450(1), and WAC 480-120-412. Based on these rulings regarding liability, it should order CenturyLink to pay penalties of [REDACTED]

DATED this 10th day of February 2023, at Olympia, Washington.

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<sup>41</sup> Jones, JHJ-1CT at 13:1-18:18.