

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,
Complainant,

DOCKET UT-181051

v.

CENTURYLINK COMMUNICATIONS,
LLC

Respondent.

REPLY BRIEF OF PUBLIC COUNSEL

February 10, 2023

Shaded Information is Designated Confidential per Protective Order in Docket UT-181051

REDACTED VERSION

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I. INTRODUCTION

1. The Public Counsel Unit of the Washington Attorney General’s Office (Public Counsel) continues to recommend that the Utilities and Transportation Commission (Commission) impose maximum statutory penalties on CenturyLink Communications, LLC f/k/a Qwest Communications Company, LLC (CenturyLink) for violations arising from a 49-hour 9-1-1 outage experienced across Washington in December 2018.
2. Public Counsel reiterates the arguments made in our January 17, 2023, Opening Brief by and through this reference. For brevity, the arguments are not repeated in this Reply Brief, unless necessary.

II. NO PARTY IS ASKING THE COMMISSION TO APPLY A STRICT LIABILITY STANDARD, BUT RATHER THAT THE COMMISSION HOLD CENTURYLINK ACCOUNTABLE FOR 9-1-1 VIOLATIONS.

3. CenturyLink argues that Public Counsel and Commission Staff “continue to press strict liability theories in this case.”¹ Public Counsel expressly states in its Opening Brief, “While failed calls do not in and of themselves result in violations (*failure of calls do not result in strict liability*), widespread outages caused by a failure to ensure that the 9-1-1 system was properly designed results in violations and supports a finding of regulatory liability.”² CenturyLink’s liability for regulatory penalties hinges on its actions and inactions in managing its obligations to provide 9-1-1 service to the state of Washington.

¹ CenturyLink Opening Brief, ¶ 95 (filed Jan. 17, 2023).

² Public Counsel Opening Brief, ¶ 52 (emphasis added) (citing *Wash. Utils. & Transp. Comm’n v. Qwest Corp.*, Docket UT-190209, Order 03 – Initial Order Dismissing Complaint, ¶ 28 (June 25, 2020)).

4. Public Counsel does not recommend maximum penalties simply because calls failed. A significant number of 9-1-1 calls failed in December 2018 because CenturyLink did not adequately design and maintain a 9-1-1 network for which it was responsible. The Administrative Law Judge in Docket UT-190209 stated, “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.”³ CenturyLink failed on all accounts and did not meet its obligations. As a result, CenturyLink should be liable for maximum statutory penalties to reflect the serious nature of the violations and the Company’s long history of compliance issues.⁴

III. THE APPLICABLE STANDARD IS PREPONDERANCE OF THE EVIDENCE, NOT CLEAR AND CONVINCING EVIDENCE.

5. CenturyLink states that the standard of proof in this case could “arguably” be clear and convincing evidence because “Staff seeks to punish [CenturyLink] by issuing fines.”⁵ The Commission appropriately applies a preponderance of evidence standard to complaint cases seeking penalties against regulated companies.⁶

6. CenturyLink cites *Nguyen v. State, Dep’t of Health Med. Quality Assurance Comm’n*,⁷ for the proposition that clear and convincing evidence “arguably” applies here. *Nguyen* involves

³ *Qwest Corp.*, Docket UT-190209, Order 03, ¶ 28.

⁴ Public Counsel Opening Brief, ¶¶ 58–80.

⁵ CenturyLink Opening Brief, ¶ 92.

⁶ *See, Wash. Utils. & Transp. Comm’n v. Puget Sound Energy, Inc.*, Docket PG-041624, Order 07, ¶ 11 (Oct. 7, 2005) (complaint for penalties against utility arising from a natural gas explosion in Bellevue; Commission cites “preponderance of evidence” standard).

⁷ *Nguyen v. State, Dep’t of Health Med. Quality Assurance Comm’n*, 144 Wn.2d 516, 29 P.3d 689 (2001).

a doctor and the potential revocation of his medical license. Unlike Commission penalty cases, medical disciplinary proceedings are “quasi-criminal.”⁸ While the Washington Court of Appeals, Division 1 applied the preponderance standard in *Nguyen*,⁹ the Washington Supreme Court remanded the matter to be decided under a clear and convincing standard of proof.¹⁰

7. This case is distinguishable from *Nguyen*. Penalties assessed by the Commission pursuant to RCW 80.04.380 (\$1,000 per violation) and RCW 80.36.220 (\$500 per violations relating to a telecommunications company refusing to transmit messages) are not quasi-criminal, but rather are civil regulatory penalties. Indeed, separate statutes govern criminal liability, such as RCW 80.04.387 and RCW 80.04.390, which are not at issue in this Docket. While clear and convincing was appropriate for *Nguyen*, preponderance is the appropriate standard to apply in this case.

IV. THE COMMISSION HAS JURISDICTION TO HOLD CENTURYLINK ACCOUNTABLE.

8. CenturyLink argues that the Commission lacks jurisdiction to scrutinize CenturyLink’s provision of interstate services on its national transport network.¹¹ CenturyLink ignores the fact that regulatory liability stems from its role as one of Washington’s 9-1-1 service providers, its responsibility over the 9-1-1 network, and its failure to meet its obligations for the 9-1-1 network. Parties are not asking the Commission to hold CenturyLink accountable for an event on

⁸ *Nguyen*, 144 Wn.2d at 528–530.

⁹ *Nguyen v. State, Dep’t of Health, Med. Quality Assur. Comm’n*, 99 Wn. App. 96, 994 P.2d 216 (1999), *vacated and remanded sub nom. Nguyen v. State, Dep’t of Health Med. Quality Assurance Comm’n*, 144 Wn.2d 516, 29 P.3d 689 (2001).

¹⁰ *Nguyen*, 144 Wn.2d at 534.

¹¹ CenturyLink Opening Brief, ¶¶ 87–90.

its national transport network. The event impacted Washington’s 9-1-1 system and is therefore relevant to understanding what occurred. However, parties are asking the Commission to hold CenturyLink accountable for its inability to appropriately manage the 9-1-1 system.

9. The state 9-1-1 provider must ensure that it complies with RCW 80.36.080 and provide “prompt, expeditious and efficient” service using “facilities, instrumentalities and equipment” that is safe, in good condition, modern, adequate, efficient, and sufficient. All telecommunication providers, including the state 9-1-1 provider, must transmit messages without delay or discrimination under RCW 80.36.220. The Commission is charged with enforcing Title 80 RCW.¹² Additionally, the Commission has promulgated agency rules that it enforces and that the 9-1-1 provider must follow, including WAC 480-120-412 and WAC 480-120-450.¹³ The Commission has authority and jurisdiction to assess regulatory penalties in this case.

V. THE SCOPE OF THIS PROCEEDING IS WHETHER CENTURYLINK IS RESPONSIBLE FOR THE OUTAGE; WHETHER COMTECH IS ALSO RESPONSIBLE FOR THE OUTAGE IS BEYOND THE SCOPE.

10. Throughout its brief, CenturyLink points to TeleCommunication Systems, Inc. d/b/a Comtech Telecommunications Corp.’s (Comtech) potential responsibility for the December 2018 outage. The issue in this Docket is whether CenturyLink bears responsibility for the December 2018 outage. Indeed, in granting Comtech’s petition for intervention, the Commission noted that “the issue in this proceeding is whether CenturyLink violated any statutes or Commission rules resulting in the December 2018 [9-1-1] network outage.”¹⁴ The Commission stated that allowing

¹² RCW 80.01.040.

¹³ RCW 80.01.040.

¹⁴ *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns, LLC*, Docket UT-181051, Order 03, ¶ 15 (Aug. 9, 2021).

Comtech to participate in the docket would not result in broadening the scope of the proceeding to address its liability or contractual obligations.¹⁵ The Commission should reject CenturyLink's attempt to deflect responsibility and to broaden the scope of this proceeding.

VI. CENTURYLINK CANNOT UNILATERALLY DETERMINE THE POINT OF DEMARCATION.

11. CenturyLink mischaracterizes Public Counsel's argument regarding the identification of the point of demarcation. CenturyLink states, "Amendment M does not explicitly define the 'Demarcation Point' between CenturyLink and Comtech networks during Phase 1. From this, Public Counsel contrives that there was no demarcation and that CenturyLink remained responsible for every aspect of the call completion all the way to the Comtech PSAP." Public Counsel's argument is that there was no clear agreement regarding the location of the point of demarcation, and therefore responsibility for routing and delivering calls did not transition from CenturyLink to Comtech.

12. Comtech identified a different point of demarcation in a diagram provided in response to discovery.¹⁶ CenturyLink's witness [REDACTED] [REDACTED] on the diagram.¹⁷ CenturyLink's assertion that there were [REDACTED]¹⁸ is otherwise unsupported by evidence in the record and as Public Counsel's witness Brian Rosen stated, "[REDACTED]"

¹⁵ Docket UT-181051, Order 03, ¶ 15.

¹⁶ Rosen, Exh. BR-33C.

¹⁷ James D. Webber, Exh. JDW-87CX (Deposition of Carl D. Klein at 55:1-10).

¹⁸ *Id.*

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...¹⁹ Additionally, in Rosen’s opinion, the location CenturyLink identifies for the point of demarcation is unreasonable because it is a point in the middle of the TNS network, a point at which neither CenturyLink nor Comtech had any control, visibility, or influence.²⁰ This dispute and the differences of opinion further demonstrate that the point of demarcation was not clearly identified, and the Commission should not accept CenturyLink’s unilateral identification of its preferred point of demarcation as fact.

13. CenturyLink dismisses Public Counsel’s argument stating, “Public Counsel argues that there was no demarcation point because the contract did not define one. Public Counsel puts forward no precedent for this proposition; it merely relies on the unsupported testimony of Mr. Rosen . . .”²¹ Basic contract law provides ample precedent for Public Counsel’s argument. “It is black letter law of contracts that the parties to a contract shall be bound by its terms.”²² Basic principles apply when construing a written contract.²³ First, the intent of the parties controls.²⁴ Second, the tribunal ascertains the intent from reading the contract.²⁵ Third, the tribunal will not read ambiguity into a contract that is otherwise clear and unambiguous.²⁶ A contract provision is not ambiguous simply because a party suggests opposing meanings.²⁷

¹⁹ Rosen, TR. 301:12–14.

²⁰ Rosen, Exh. BR-30CT at 20:6–11.

²¹ CenturyLink Opening Brief, ¶ 40.

²² *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2004), as corrected (Jan. 7, 2005).

²³ *Dice v. City of Montesano*, 131 Wn. App. 675, 683–684, 128 P.3d 1253, 1257–1258 (2006).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 684.

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14. In this instance, while there appears to be intent in the contract to use the point of demarcation to shift responsibility between the two companies, it is undisputed fact that the point of demarcation was not identified in the contract or attached Scope of Work. CenturyLink's assertions are merely unilateral attempts to define the demarcation point now. The parol evidence rule in Washington was summarized by the Supreme Court in *Hollis v. Garwall, Inc.* In *Hollis*, the Court said in a dispute arising out of a written contract, the parol evidence rule bars evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term.²⁸

15. CenturyLink also dismisses Rosen's opinion, referring to his [REDACTED] [REDACTED].²⁹ Rosen, however, is an expert on 9-1-1 systems who consults with states and local governments on the deployment of 9-1-1 systems and is currently the co-chair of the National Emergency Number Association i3 Architecture working group, which developed system standards for Next Generation 9-1-1.³⁰ Rosen has extensive experience reviewing and advising clients relating to contracts denoting a point of demarcation and, in his opinion, "the fact that there is not an agreed upon point of demarcation means that CenturyLink cannot claim the outage is all Comtech's responsibility."³¹

VII. THE COMMISSION SHOULD DISREGARD CENTURYLINK'S ATTEMPT TO AVOID RESPONSIBILITY FOR THE DESIGN OF THE SS7 INTERCONNECT.

16. CenturyLink minimizes its role in shaping the design of the SS7 interconnection for the two ESInets and accuses Public Counsel of fabricating an unsupported narrative regarding

²⁸ *Hollis v. Garwall, Inc.* 137 Wn.2d 683, 695, 974 P.2d 836, 843 (1999).

²⁹ Rosen, TR. 299:17-19.

³⁰ See Rosen, Exh. BR-2.

³¹ Rosen, Exh. BR-30CT at 22:5-8.

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CenturyLink's actions.³² Public Counsel does not dispute that the companies worked together with Washington Military Department (WMD) to design the transition plan to shift Washington's 9-1-1 service to Comtech.³³ CenturyLink characterizes the design process as "collaborative,"³⁴ but it is clear that such collaboration did not require either company to agree to every proposal or request made by the other company. Public Counsel asked Comtech why the interconnection was an SS7 interconnect instead of an IP interconnect and Comtech responded, "TSYS initially planned on and sought to use IP interconnection (SIP) between ESinet 1 and ESinet 2. CenturyLink, however, would not interconnect with TSYS using SIP, forcing TSYS to interconnect to ESinet 1 using SS7."³⁵

17. Public Counsel also asked Comtech if the design was initially proposed as IP and, if so, why the design was changed. Comtech responded, "Yes, the interconnect was initially proposed as IP. The design was changed due to CenturyLink's refusal to interconnect using IP. CenturyLink also refused to interconnect directly, requiring TSYS to utilize a third-party for the SS7 interconnection."³⁶ If CenturyLink agreed to use a reasonable IP connection, as Comtech proposed, the failure likely would not have happened.³⁷ CenturyLink's refusal to do so was unilateral. The Commission should disregard CenturyLink's attempt to minimize its role in the design of the SS7 interconnection between the two companies.

³² See CenturyLink Opening Brief, ¶¶ 30 and 31.

³³ See CenturyLink Opening Brief, ¶ 30.

³⁴ See CenturyLink Opening Brief, ¶ 30.

³⁵ Rosen, Exh. BR-18C at 1; see also Rosen, Exh. BR-17.

³⁶ *Id.*

³⁷ Rosen, Exh. BR-30CT at 18:17–19.

VIII. CONCLUSION

18. The December 2018 outage of Washington's 9-1-1 system was not just a technical problem that needed to be fixed. During the outage, 9-1-1 calls placed by Washington residents could not get through to Public Safety Answering Points (PSAPs), leaving some Washingtonians without assistance when they most needed it. CenturyLink was responsible for the 9-1-1 outage and should be penalized at the maximum statutory amount.
19. Under the contract between CenturyLink and WMD, CenturyLink was required to provide network and transport services throughout the 9-1-1 system. CenturyLink was not relieved of its responsibility to provide network and transport services by Amendment M to the contract nor did the amendment specify that the Company's responsibility for those services terminated at the point of demarcation between CenturyLink and Comtech. At the point of demarcation, Comtech became the Covered 9-1-1 Service Provider and was responsible for routing and delivering calls to transitioned PSAPs, but CenturyLink maintained its responsibility to provide network and transport services.
20. Additionally, it is an undisputed fact that Amendment M to the contract and the attached Scope of Work did not clearly define a point of demarcation and therefore, responsibility for any services could not transition from CenturyLink to Comtech. CenturyLink's assertions and technical diagrams are merely unilateral attempts to define a point of demarcation after the fact. Finally, CenturyLink was responsible for the impact of the national transport network outage on Washington 9-1-1 services because the network design and implementation decisions made by CenturyLink during the transition of the 9-1-1 system to Comtech exacerbated the impact of the national outage on Washington 9-1-1 service.

21. For the reasons stated above and in Public Counsel’s testimonies and opening brief, Public Counsel recommends that the Commission impose maximum statutory penalties for violations of RCW 80.36.080, RCW 80.36.220, WAC 480-120-450, and WAC 480-120-412. Based on Public Counsel’s call analysis and the number of PSAP notifications alleged in the Complaint, violations in this case total 32,271 and maximum penalties total \$26,865,000. If the Commission determines a different number of violations, it should apply maximum statutory penalties to those violations.

DATED this 10th day of February, 2023.

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