

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK COMMUNICATIONS,
LLC

Respondent.

DOCKET UT-181051

PUBLIC COUNSEL’S PETITION
FOR RECONSIDERATION
(WAC 480-07-850)

PETITION FOR LEAVE TO
ADDRESS MATERIALS SUBJECT
TO OFFICIAL NOTICE IN ORDER
08 (RCW 34.05.452 and
WAC 480-07-495)

**I. PUBLIC COUNSEL REQUESTS THE COMMISSION RECONSIDER THE
LEVEL OF PENALTY IMPOSED ON CENTURYLINK**

1. The Public Counsel Unit of the Washington Attorney General’s Office (Public Counsel) petitions for reconsideration of the Final Order in the above-captioned docket pursuant to WAC 480-07-850 and petitions for leave to respond to materials subject to official notice pursuant to RCW 34.05.452 and WAC 480-07-495.
2. The Washington Utilities and Transportation Commission (Commission) issued its final order on June 9, 2023.¹ The Commission found CenturyLink Communications, LLC (CenturyLink) liable for violations stemming from the 9-1-1 outage spanning 49 hours and 32 minutes between December 27, 2018 and December 29, 2018, and imposed a penalty of

¹ *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns, LLC*, Docket UT-181051, Order 08, Final Order Granting Motion to Strike; Imposing Penalties (June 9, 2023) (hereinafter ‘Order 08’).

\$1,315,000.² In doing so, the Commission took official notice of evidence outside the record without notifying parties, relied upon a level of company annual revenue that is too low, and acted inconsistently with its treatment of CenturyLink’s 2014 9-1-1 outage. As a result, the Commission should now allow parties to respond to the materials subject to official notice and reconsider the level of penalty ordered in Order 08. The Commission should increase the penalty accordingly.

II. THE COMMISSION RELIED ON EVIDENCE OUTSIDE THE RECORD

3. In Order 08, the Commission mentions the “Company’s 2022 Annual Report” in which it “claimed a total gross operating revenue of \$17,619,947.63.”³ The Commission concludes that Public Counsel’s recommendation to assess the maximum statutory penalty on CenturyLink is too punitive because such penalties would be 74 percent of the Company’s 2022 gross operating revenue.⁴ CenturyLink’s 2022 Annual Reports are not part of the record in this case.

4. Agency action in adjudicative proceedings must be based exclusively on the agency record.⁵ The agency record includes “evidence received or considered”⁶ and “a statement of matters officially noticed.”⁷ The Commission may take official notice of “any judicially cognizable fact” including “tariffs, classifications, and schedules regularly established by, or filed with, the commission as required or authorized by law.”⁸ The plain language of WAC 480-07-495 makes clear that the Commission has discretion over whether to take official notice of

² *Id.* ¶¶ 69 and 86.

³ *Id.* ¶ 82.

⁴ *Id.* ¶ 85.

⁵ RCW 34.05.476(3).

⁶ RCW 34.05.476(2)(d).

⁷ RCW 34.05.476(2)(e).

⁸ WAC 480-07-495(2)(a)(i)(C).

information, including “judicially cognizable” facts,⁹ technical or scientific facts within the Commission’s specialized knowledge,¹⁰ codes or standards,¹¹ and government records.¹²

5. Annual reports may be the type of document of which the Commission could take official notice. However, in order to take official notice, the presiding officer “will notify parties of documents or information of which the commission takes official notice and the source of that information.”¹³ Parties are then afforded “an opportunity to contest facts and material of which the commission takes official notice.”¹⁴ A statement of the matters officially noticed becomes part of the agency record.

6. The Commission has taken official notice of information in several orders. For example, the Commission has taken official notice of a party’s current tariff,¹⁵ prior hearing records,¹⁶ documents filed in the proceeding,¹⁷ and its own records.¹⁸ Accordingly, the Commission has demonstrated that it must affirmatively state it is taking official notice of information if it uses that information to make a finding of fact.

⁹ WAC 480-07-495(2)(a)(i).

¹⁰ WAC 480-07-495(2)(a)(ii).

¹¹ WAC 480-07-495(2)(a)(iii).

¹² WAC 480-07-495(2)(a)(iv).

¹³ WAC 480-07-495(2)(c).

¹⁴ WAC 480-07-495(2)(c). *See also*, RCW 34.05.452(5):

Official notice may be taken of (a) any judicially cognizable facts, (b) technical or scientific facts within the agency’s specialized knowledge, and (c) codes or standards that have been adopted by an agency . . . Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed and the sources thereof, including any staff memoranda and data, and they shall be afforded an opportunity to contest the facts and material so noticed.

¹⁵ *In re App. of Backcountry Travels, LLC*, Docket TS-180677, Order 04, ¶ 13 (May 23, 2019).

¹⁶ *Wash. Utils. & Transp. Comm’n v. Puget Sound Energy, Inc.* Dockets UE-072300 & UG-072301, Order 13: Final Order, at 3, n.5 (May 25, 2012).

¹⁷ *In re Penalty Assessment against Monroe Transp. Ltd.*, Docket TE-061282, Order 01, ¶ 13 (Dec. 4, 2006).

¹⁸ *In re Determining Proper Carrier Classification of, & Complaint for Penalties Against: Washington, Carl J.*, Docket TV-120425, Order 03, at 1 (Oct. 23, 2012).

7. Thus, to make a finding of fact based on an annual report, either the report must be included in the agency record as evidence or the Commission must notify the parties that it took official notice of the report and such notice must be included as a statement in the record. Unfortunately, that did not happen in this case. Thus, the Commission should grant leave to parties now to address the Annual Reports of which the Commission appeared to take official notice in Order 08. Public Counsel addresses the Annual Reports in the next section.

III. THE 2022 ANNUAL REPORTS SHOW A MUCH HIGHER LEVEL OF REVENUE THAN CONTEMPLATED IN ORDER 08, CONSISTENT WITH THE LEVEL OF REVENUE STATED IN THE STAFF INVESTIGATION REPORT

8. The Staff Investigation Report stated that CenturyLink’s total company revenues for 2019 was \$245 million, and Public Counsel witness, Stephanie Chase reasonably relied on that figure in her testimony.¹⁹ Upon review of Order 08, Public Counsel sought copies through a public records request of the Annual Reports filed with the Commission in 2022 by CenturyLink. CenturyLink submitted a separate Annual Report for each of its five operating companies.²⁰ Table 1 below shows the revenue reported by each CenturyLink operating company.

Table 1: 2022 Annual Reports for CenturyLink Operating Companies

CenturyLink Operating Company	2022 Annual Report Intrastate Revenues
CenturyLink Communications, LLC	\$17,619,947.63 ²¹
Qwest Corporation	\$182,821,728.89 ²²
United Telephone Company of the Northwest	\$9,079,291.78 ²³

¹⁹ Staff Investigation Report at 25; Response Testimony of Stephanie Chase, Exh. SKC-1Tr at 15:17–19.

²⁰ Declaration of Lisa W. Gafken, Exhibits A through E.

²¹ Declaration of Lisa W. Gafken, Exhibit A.

²² Declaration of Lisa W. Gafken, Exhibit B.

²³ Declaration of Lisa W. Gafken, Exhibit C.

CenturyLink Operating Company	2022 Annual Report Intrastate Revenues
CenturyTel of Inter-Island, Inc.	\$2,489,807.45 ²⁴
CenturyTel of Cowiche, Inc.	\$360,596.22 ²⁵

9. In 2022, CenturyLink’s total company revenues were \$212,371,371.97, which is comparable to the 2019 revenues reflected in the Staff Investigation Report. It appears that the Commission relied on the revenues reported for only CenturyLink Communications instead of the total company revenues or revenues reported for Qwest Corporation.²⁶

10. The record is clear that Qwest Corporation is the legacy 9-1-1 contract holder, and CenturyLink Communications becomes linked to the contract by the time Amendment M was executed. Since 2009, the company subject to the complaint in this docket provided 9-1-1 services to Washington under contract with the Washington Military Department.²⁷ The contractor named in the 2009 contract is Qwest Communications Company, LLC f/k/a Qwest Communications (QCC).²⁸ Amendment M addressed the transition of 9-1-1 services from CenturyLink to TeleCommunication Systems, Inc. d/b/a Comtech Telecommunications Corp. (Comtech). The contractor named in Amendment M is CenturyLink Communications Company, LLC f/k/a Qwest Communications, LLC (CenturyLink), its Affiliates including Qwest

²⁴ Declaration of Lisa W. Gafken, Exhibit D.

²⁵ Declaration of Lisa W. Gafken, Exhibit E.

²⁶ Order 08, ¶¶ 82 and 85.

²⁷ Brian Rosen, Exh. BR-4C, at 2 (WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196, with Amendment M).

²⁸ Brian Rosen, Exh. BR-4C, at 2 (WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196, with Amendment M).

Corporation d/b/a CenturyLink QC (CenturyLink QC).²⁹ The corporate headquarters address for each entity is identical: 1801 California Street, Denver, Colorado.³⁰

11. By only considering revenue for CenturyLink Communications, the Commission is not considering the correct level of revenue. The Commission should consider the annual revenues for the total company (\$212 million), Qwest Corporation (\$182 million), or Qwest Corporation *and* CenturyLink Communications (\$200 million).
12. When considering the appropriate level of annual revenue, Public Counsel's recommendation for maximum penalties is not "unduly punitive." Instead of being 74 percent of annual revenue, maximum penalties of approximately \$13 million become 6.1 percent of total company revenue,³¹ 7.1 percent of Qwest Corporation's annual revenue,³² or 6.5 percent of Qwest Corporation's and CenturyLink Communication's combined annual revenue.³³ Compare these results with the Commission's \$1,315,000 penalty in Order 08. The ordered penalty is 7.6 percent of the \$17 million annual revenue for CenturyLink Communication the Commission considered in setting the penalty.³⁴ The Commission should adjust the penalty to a more appropriate level. Imposing maximum penalties is not unduly punitive, but rather appropriate and justified in light of how the Commission analyzed its enforcement factors.³⁵

²⁹ Brian Rosen, Exh. BR-4C, at 19 (WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196, with Amendment M).

³⁰ Brian Rosen, Exh. BR-4C, at 2 and 19 (WMD Response to Public Counsel Data Request No. 3, Attachment Washington State Military Department Contract E09-196, with Amendment M).

³¹ 13 million is 6.1 percent of 212 million.

³² 13 million is 7.1 percent of \$182 million.

³³ 13 million is 6.5 percent of \$200 million.

³⁴ 1.3 million is 7.6 percent of 17 million.

³⁵ Order 08, ¶¶ 74–81.

IV. ORDER 08 IS INCONSISTENT WITH THE COMMISSION’S TREATMENT OF CENTURYLINK IN DOCKET UT-140597

13. The Commission issued penalties against CenturyLink³⁶ for a 9-1-1 outage that took place in April 2014.³⁷ While that case was resolved through a multi-party settlement, the Commission must approve, reject, or approve with conditions any settlement that parties present for consideration.³⁸ In this regard, the Commission does not delegate decision-making authority to parties, but rather determines whether the settlement should become the Commission’s resolution.³⁹

14. With respect to the 2014 outage, the Commission accepted CenturyLink’s admission of violations of RCW 80.36.080, WAC 480-120-450, and WAC 480-120-412.⁴⁰ The 2014 outage lasted six hours, resulted in 5,684 failed 9-1-1 calls, and was a serious violation of statute and Commission rules.⁴¹ The Commission stated that the outage “posed an unacceptable threat to the public health, safety, and welfare.”⁴² The Commission found that a penalty of \$2,854,750, which was calculated as a penalty of \$250 applied to each violation, “*appropriately reflects the severity of the April 2014 outage and resulting violations* and furthers the goal of compliance with the statute and Commission rules.”⁴³

³⁶ The case was against CenturyLink’s predecessor as it occurred prior to CenturyLink’s acquisition of Qwest and the other operating companies.

³⁷ *Wash. Utils. & Transp. Comm’n v. Qwest Corp.*, Docket UT-140597, Final Order 03 Approving Settlement Agreement (Feb. 22, 2016).

³⁸ WAC 480-07-750.

³⁹ *See, Wash. Utils. & Transp. Comm’n v. Puget Sound Energy*, Docket UE-220066 and UG-220067, Final Order 24, ¶¶ 61–62 (Dec. 22, 2022); *Wash. Utils. & Transp. Comm’n v. Cascade Nat. Gas Corp.*, Docket 210755, Final Order 09 (Aug. 23, 2022).

⁴⁰ Docket UT-140597, Order 03, ¶ 2.

⁴¹ *Id.* ¶¶ 10–15.

⁴² *Id.* ¶ 15.

⁴³ *Id.* ¶ 10–11 (emphasis added).

15. In Order 08 of the instant proceeding, the Commission affirmed important language from the 2014 outage. Specifically, “The citizens of this state reasonably rely on their ability to access emergency services by dialing 911. Their inability to do so for even a brief period of time poses a serious threat to public health, safety, and welfare, not just a violation of statute and Commission rules.”⁴⁴ The Commission also weighed several of its enforcement factors against CenturyLink.⁴⁵ Despite this, the Commission imposed a much lower penalty of \$100 per violation, totaling \$1,315,000 for a 9-1-1 outage lasting 49 hours and 32 minutes, resulting in over 13,000 failed calls. The penalty here is less than half of the per-violation penalty issued in Docket UT-140597, even as the present outage is substantially greater.⁴⁶

16. In this case, the Commission states that CenturyLink no longer provides 9-1-1 service, so a penalty cannot serve to deter future violations.⁴⁷ On the other hand, the Commission correctly states that a penalty “provides an incentive for the Company to comply with its current and future legal obligations.”⁴⁸ Additionally, the Commission correctly notes that the “likelihood that [CenturyLink] may contract for services again still exists.”⁴⁹ The Commission fails to explain why imposing a much lower penalty for a much larger and longer outage is appropriate and not too lenient. Indeed, subsequent violations should receive stricter, not more moderate, treatment.

⁴⁴ Order 08, ¶ 34 (citing Docket UT-140597, Order 03, ¶ 9).

⁴⁵ Order 08, ¶ 74–82.

⁴⁶ Docket UT-140597, Order 03, ¶ 10.

⁴⁷ Order 08, ¶ 85.

⁴⁸ Order 08, ¶ 86.

⁴⁹ Order 08, ¶ 80.

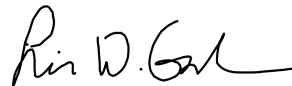
As a result, the Commission should reconsider the penalty ordered in Order 08 and increase the penalty to the statutory maximum.⁵⁰

V. CONCLUSION

17. The Commission should grant leave to address materials of which it took official notice. Additionally, the Commission should grant Public Counsel's Petition for Reconsideration regarding the level of penalty ordered in Order 08 and impose a higher, more appropriate penalty. Public Counsel strongly recommends that the Commission modify Order 08 to impose the statutory maximum penalty, which totals \$13,015,000 based on the number of violations.

DATED this 20th day of June, 2023.

ROBERT W. FERGUSON
Attorney General

/s/ 

LISA W. GAFKEN, WSBA No. 31549
Assistant Attorney General

NINA M. SUETAKE, WSBA No. 53574
Assistant Attorney General

JOHN NELSON, WSBA No. 45724
Assistant Attorney General

Attorneys for Public Counsel Unit

Public Counsel Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

Lisa.Gafken@ATG.WA.GOV
Nina.Suetake@ATG.WA.GOV
John.Nelson@ATG.WA.GOV

⁵⁰ The Commission has the discretion to impose a penalty *up to* the statutory maximum. Public Counsel's Petition for Reconsideration shows that a penalty of \$100 per violation is too low as set against the correct levels of Company revenues and in comparison to the penalty assessed in Docket UT-140597. Public Counsel continues to advocate for maximum penalties and believe such penalty is justified. However, Public Counsel also acknowledges that the Commission could increase the per violation penalty without imposing the maximum within its discretion.