

BEFORE THE WASHINGTON STATE
UTILITIES & TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Complainant,

v.

QWEST CORPORATION d/b/a CENTURYLINK QC,

Respondent.

DOCKET UT-140597

DIRECT TESTIMONY OF DAVID C. BERGMANN (EXHIBIT NO. DCB-1T)

ON BEHALF OF

PUBLIC COUNSEL

OCTOBER 27, 2015

DIRECT TESTIMONY OF DAVID C. BERGMANN (DCB-1T)
DOCKET NO. UT-140597

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EXHIBIT LIST

- Exhibit No. DCB-2 Curriculum Vitae of David C. Bergmann
- Exhibit No. DCB-3 October 2014 FCC Report: “April 2014 Multistate 911 Outage: Cause and Impact”
- Exhibit No. DCB-4 CenturyLink’s Response to Public Counsel Data Request No. 7
- Exhibit No. DCB-5 CenturyLink’s Response to Staff RS-9
- Exhibit No. DCB-6C CenturyLink’s Supplemental Confidential Response to Staff RS-4(d)
- Exhibit No. DCB-7C CenturyLink’s Confidential Response to Staff RS-4(a)
- Exhibit NO. DCB-8C CenturyLink’s Confidential Response to Staff RS-53
- Exhibit No. DCB-9 CenturyLink’s Response to Staff RS-55
- Exhibit No. DCB-10 CenturyLink’s Response to Staff RS-69
- Exhibit No. DCB-11 CenturyLink’s Response to Staff RS-49
- Exhibit No. DCB-12 CenturyLink’s Response to Staff RS-39
- Exhibit No. DCB-13 CenturyLink’s Response to Staff RS-56
- Exhibit No. DCB-14 CenturyLink’s Response to Staff RS-64(c)
- Exhibit No. DCB-15 CenturyLink’s Response to Staff RS-48
- Exhibit No. DCB-16 CenturyLink’s Response to Staff RS-12
- Exhibit No. DCB-17 CenturyLink’s Response to Staff RS-1
- Exhibit No. DCB-18C CenturyLink’s Confidential Response to Staff RS-3
- Exhibit No. DCB-19C CenturyLink’s Confidential Response to Public Counsel Data Request No. 13
- Exhibit No. DCB-20 CenturyLink’s Supplemental Response to Staff RS-77

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EXHIBIT LIST (Continued)

Exhibit No. DCB-21 CenturyLink's Response to Staff CP-1

Exhibit No. DCB-22 July 17, 2015, Letter of Dow Constantine to CenturyLink and Intrado

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I. INTRODUCTION / SUMMARY

Q: Please state your name and business address.

A: My name is David C. Bergmann. My business address is 3293 Noreen Drive, Columbus OH 43221.

Q: By whom are you employed and in what capacity?

A: I am the Principal of Telecom Policy Consulting for Consumers.

Q: On whose behalf are you testifying?

A: I am testifying on behalf of the Public Counsel Unit of the Washington Attorney General’s Office (“Public Counsel”). I have been retained by Public Counsel to analyze penalties that should be imposed on Qwest Corporation d/b/a CenturyLink QC (“CenturyLink”) by the Washington Utilities and Transportation Commission (“Commission” or “UTC”) for the April 2014 statewide 911 (“E911”) outage. I present Public Counsel’s recommendations for an appropriate penalty. I also present Public Counsel’s opposition to the Multi-Party Settlement Agreement (“Multi-Party Settlement”) between UTC Staff and CenturyLink, filed on September 10, 2015.

Q: Please describe your professional qualifications.

A: I obtained my law degree from the University of Michigan in 1975. In 1982, I was employed by the Ohio Office of the Consumers’ Counsel (OCC), the Ohio state government agency that represents the interests of residential utility consumers. I began at OCC as the Consumer Services Attorney, handling consumer complaints and issues. I later worked on energy and telecommunication rate regulation, and I was OCC Legal Director for six years,

1 during which time I earned an MBA from Ohio State. In 1992, I stepped down as
2 Legal Director and moved to specialize in telecommunications. I continued that
3 specialization until my retirement from OCC in 2011. From 2002 to 2011, I was
4 chair of the telecommunications committee of the National Association of State
5 Utility Consumer Advocates (“NASUCA”).¹ In 2011, after my retirement from
6 OCC, I began doing business as Telecom Policy Consulting for Consumers. I
7 provide consulting services to consumer advocates in state and federal matters,
8 and operate a website at www.tpc4c.net. A more detailed CV is attached as
9 Exhibit No. DCB-2 to my testimony, and can also be accessed on my website.

10 I am admitted to the practice of law in Ohio (active) and Michigan
11 (inactive) and am admitted to the U.S. Courts of Appeal for the District of
12 Columbia and Tenth Circuits. I am not admitted to the practice of law in
13 Washington.

14 **Q: Have you ever testified at a public utility commission?**

15 A: No. While I have not presented testimony, I have extensive experience in a wide
16 variety of regulatory proceedings, at both the federal and state levels. My
17 experience ranges from the consumer complaint cases I litigated in my first years
18 at OCC, to a GTE rate case in the late 1980s in which statewide service quality
19 was a major issue, to the development and implementation beginning in the 1990s

¹ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., offices such as Public Counsel, which is a NASUCA member and is a division within the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

1 of alternative telecommunication regulation at the Public Utility Commission of
2 Ohio (including rulemakings, cases, and appeals that followed those rules). I
3 have also been involved with the unbundling of telephone network elements, and
4 with extended area service. My federal experience includes work in Federal
5 Communications Commission (“FCC”) rulemaking and other proceedings on
6 issues such as universal service, consumer protection, intercarrier compensation,
7 unbundled network elements, the transition to Internet protocol (“IP”), and
8 network neutrality.

9 **Q: What have you reviewed in preparation of this testimony?**

10 A: I reviewed the filings in this docket and the filings in Federal Communication
11 Commission PS Docket No. 14-72. I reviewed the parties’ discovery, including
12 that provided by CenturyLink and Intrado. I reviewed the Investigation Report
13 prepared by Commission Staff in December 2014² after Staff investigated
14 whether CenturyLink complied with Washington law and UTC rules during the
15 April 2014, 911 outage. I reviewed the Multi-Party Settlement Agreement
16 entered into by CenturyLink and Commission Staff. I also reviewed the
17 testimony in support of the Multi-Party Settlement Agreement filed by
18 Commission Staff and CenturyLink on October 13, 2015.

19 **Q: What exhibits are you sponsoring in this proceeding?**

20 A: I sponsor the following exhibits:

21 Exhibit No. DCB-2 Curriculum Vitae of David C. Bergmann

² Commission Staff Investigation Report, filed in the docket on December 2, 2014, and referred to herein as “Staff Report.”

1	Exhibit No. DCB-3	October 2014 FCC Report: “April 2014 Multistate
2		911 Outage: Cause and Impact”
3	Exhibit No. DCB-4	CenturyLink’s Response to Public Counsel Data
4		Request No. 7
5	Exhibit No. DCB-5	CenturyLink’s Response to Staff RS-9
6	Exhibit No. DCB-6C	CenturyLink’s Supplemental Confidential Response
7		to Staff RS-4(d)
8	Exhibit No. DCB-7C	CenturyLink’s Confidential Response to Staff
9		RS-4(a)
10	Exhibit NO. DCB-8C	CenturyLink’s Confidential Response to Staff
11		RS-53
12	Exhibit No. DCB-9	CenturyLink’s Response to Staff RS-55
13	Exhibit No. DCB-10	CenturyLink’s Response to Staff RS-69
14	Exhibit No. DCB-11	CenturyLink’s Response to Staff RS-49
15	Exhibit No. DCB-12	CenturyLink’s Response to Staff RS-39
16	Exhibit No. DCB-13	CenturyLink’s Response to Staff RS-56
17	Exhibit No. DCB-14	CenturyLink’s Response to Staff RS-64(c)
18	Exhibit No. DCB-15	CenturyLink’s Response to Staff RS-48
19	Exhibit No. DCB-16	CenturyLink’s Response to Staff RS-12
20	Exhibit No. DCB-17	CenturyLink’s Response to Staff RS-1
21	Exhibit No. DCB-18C	CenturyLink’s Confidential Response to Staff RS-3
22	Exhibit No. DCB-19C	CenturyLink’s Confidential Response to Public
23		Counsel Data Request No. 13

1 both omit relevant facts and analysis, particularly the Commission’s penalty-
2 calculation factors and justification of the amount of penalties per violation.⁵ The
3 testimony fails to establish that the Multi-Party Settlement Agreement penalty is
4 in the public interest. As shown in my testimony, both the Staff Report and the
5 Settlement Agreement amounts are inadequate to protect the public interest.

6 Staff Testimony describes the penalty amount provided for in the
7 Multi-Party Settlement Agreement as “sufficiently punitive.”⁶ The Staff Report
8 stated that the maximum statutory penalty of \$1,000 per violation would be
9 “unduly punitive.”⁷ But, as I will discuss later in my testimony, the maximum
10 penalty is appropriate in this case, particularly because:

- 11 • CenturyLink’s failure resulting in the outage was preventable, and the
12 outage was a “sunny day” outage, one that occurred without a major
13 weather event or other external events.⁸ 911 is a critical service, one that
14 connects people to emergency services. The inability to quickly access
15 critical emergency services puts the public in grave danger because both
16 lives and property are vulnerable.
- 17 • CenturyLink failed to promptly communicate with Washington’s public
18 safety answering points (“PSAPs”). Prompt communication from the 911
19 provider to PSAPs during 911 outages is very important because it allows
20 the PSAPs to respond and to take action at the local level.

⁵ *Enforcement Policy of the Washington Utilities and Transportation Commission* (Docket A-120061).

⁶ Testimony of Susie Paul (October 13, 2015), Exhibit SP-11 (“Staff Testimony”) at 6:12-13.

⁷ Staff Report at 28.

⁸ Both the Staff Report and the Staff Testimony supporting the Settlement Agreement acknowledge these facts. Staff Report at 28; Staff Testimony at 5:15-17. Notably, CenturyLink’s testimony avoids this subject.

1 • As discussed in Section IV below, the factors outlined by this Commission
2 in its policy statement in Docket A-120061 support a maximum penalty in
3 this case. The same factors do not support the penalty amounts proposed
4 in the Staff Report and presented in the Multi-Party Settlement
5 Agreement.

6 The State of Washington was fortunate that no lives were reported lost as
7 a result of the April 2014, 911 outage. The entire impact of the outage may never
8 be known. Despite that, the potential negative impact of a prolonged 911 outage
9 is easily imagined. Failures like CenturyLink's, and such extended, preventable
10 911 outages, cannot be tolerated.

11 I calculate the maximum penalty in this case to be \$11,495,000. As I will
12 describe later in my testimony, I base my penalty calculation on 5,684 violations
13 of RCW 80.36.080,⁹ 5,684 violations of WAC 480-120-450(1), and 127
14 violations of WAC 480-120-412.¹⁰

15 II. CUSTOMER RELIANCE ON 911

16 **Q: Please describe the history of 911.**

17 A: 911 is the short, simple, and uniform emergency telephone number used
18 throughout the United States to reach critical emergency services, such as fire,
19 police, and emergency medical personnel. Before 911 was implemented, people
20 were required to call the particular fire or police department that served their area.
21 During the late 1960s, the FCC and AT&T developed 911 as a way to quickly dial

⁹ I accept Staff's calculation of the number of failed Washington calls. Staff Testimony at 7:4-8:3.

¹⁰ The Staff Report asserts that there were 51 violations of WAC 480-122-412. Staff Report at 5, 17-21, and 30. I believe, as discussed below, that there should be a violation for each of the 127 public service answering points (PSAPs) in the State of Washington.

1 for emergency services. Congress passed legislation in 1968 establishing 911 as
2 the national emergency number, and today nearly all Americans have access to
3 911.¹¹

4 **Q: Is the public justified in relying on 911 service?**

5 A: Yes. 911 service is a legal and equitable right.¹² In Washington, the right is
6 enshrined in RCW 80.36.555 and RCW 80.36.560, which require E911 service to
7 residential and business customers.¹³ At the federal level, public safety is one of
8 the “enduring values” of the federal telecom statutes.¹⁴ The public (individuals,
9 businesses, and government as well) expect that the 911 system will function, and
10 if it does not function, that the problems will be communicated and fixed as soon
11 as possible.¹⁵

12 Further, when 911 is not available, people must find alternate ways to
13 make emergency calls. During an emergency, this is far from easy, given the
14 difficulty of quickly finding the alternatives, because we have come to rely on 911
15 as the main way to get critical help.

16 III. THE APRIL 2014 OUTAGE

17 A. Overview.

18 **Q: Please describe what happened to the Washington 911 system on April 9-10,**
19 **2014.**

20 A: Washington experienced a six-hour outage of CenturyLink’s 911 service
21 beginning at 11:54 p.m. on April 9, 2014, and ending at 6:06 a.m. on April 10,

¹¹ See <https://www.nena.org/?page=911overviewfacts>.

¹² See <https://www.fcc.gov/encyclopedia/9-1-1-and-e9-1-1-services>.

¹³ See Staff Testimony at 6:10-13.

¹⁴ See WC Docket No. 10-90, et al., Report and Order, FCC No. 14-190 (rel. December 18, 2014) (“*CAF II Order*”), ¶ 9, https://apps.fcc.gov/edocs_public/attachmatch/DOC-325054A1.pdf.

¹⁵ See WAC 480-120-412.

1 2014.¹⁶ Each of Washington’s 39 counties were affected by the outage. During
2 the outage, Washington’s 7,061,530 residents¹⁷ were left without access to 911
3 services.¹⁸

4 Both Staff and CenturyLink testimony in support of the settlement
5 acknowledge that the outage was not caused by natural disaster, weather
6 conditions, or other external event. Instead, the outage was the result of human
7 error.¹⁹ As the FCC Report on this outage states, “So-called “sunny day” outages
8 are on the rise. That’s because, as 911 has evolved into a system that is more
9 technologically advanced, the interaction of new and old systems is introducing
10 fragility into the communications system that is more important in times of dire
11 need.”²⁰

12 **Q: Who provides 911 service in Washington?**

13 A: CenturyLink is the sole wireline provider of 911 service in Washington.²¹
14 CenturyLink provides 911 service under contract with the Washington Military
15 Department, Emergency Management Division.²² To actually deliver the service,
16 however, CenturyLink contracts with a third-party provider, Intrado.²³

17 **Q: Was the April 2014 outage limited to Washington?**

18 A: No. Portions of California, Florida, Minnesota, North Carolina, Pennsylvania,

¹⁶ See Staff Testimony at 2:22-3:1; Staff Report at 3.

¹⁷ See <http://quickfacts.census.gov/qfd/states/53000.html>.

¹⁸ Staff Report at 3.

¹⁹ Staff Testimony at 5:15-17; CenturyLink Testimony at 7:8-15.

²⁰ Exhibit No. DCB-3, FCC April 2014 Multistate 911 Outage: Cause and Impact Report and Recommendations, October 2014, PS Docket No. 14-72, PSHSB Case File Nos. 14-CCR-0001-0007 (FCC Report), at 1.

²¹ Staff Report at 7.

²² *Id.* at 8; FCC Report at 6. CenturyLink is the successor to Qwest, which had the original contract.

²³ Exhibit No. DCB-4, CenturyLink’s Response to Public Counsel Data Request No. 7.

1 and South Carolina were also affected by the outage.²⁴ In total, 11 million
2 Americans were without 911 service during the outage, and approximately 6,600
3 911 calls failed.²⁵

4 **Q: Did CenturyLink provide the 911 service in all of the affected states?**

5 A: No. CenturyLink provided 911 service in Washington, North Carolina, and
6 Minnesota. Verizon provided 911 service in California, and Intrado provided 911
7 service in South Carolina, Pennsylvania, and Florida.²⁶

8 **B. Impact of the Outage on Washington.**

9 **Q: What was the impact on Washington?**

10 A: All seven million people in Washington lost the ability to complete calls to 911
11 PSAPs.²⁷ Of the 11 million people affected nationwide, Washington's residents
12 accounted for approximately 64 percent of the affected population. During the
13 outage, 5,684 calls to 911 failed in Washington.²⁸ This equates to approximately
14 940 calls placed each hour, or 15 calls per minute. Of the 6,600 calls that failed
15 nationally, Washington's failed calls account for 86 percent of the total. On a
16 per-capita basis, the impact on Washington was substantially greater than the
17 impact to other states.

18 **Q: Were any Washington 911 calls completed during the outage?**

19 A: Yes. According to CenturyLink's April 14, 2014, statement, 770 calls to 911

²⁴ Staff Report at 3, n. 2; *see also* Staff Testimony at 2:4-5.

²⁵ FCC Report at 1.

²⁶ *Id.* at 5. Details of the impact of the outage in these other states can be found in the FCC's report.

²⁷ Exhibit No. DCB-5, CenturyLink's response to Staff Data Request RS-9.

²⁸ Staff Report at 3; Staff Testimony at 7:8-14 (correcting the original count of 5,840 to 5,684 based on certain calls included in the original count being out-of-state calls); CenturyLink's testimony asserts that there were 5,627 call failures, but does not explain why the number is different from that used by Commission Staff. CenturyLink Testimony at 7:3; *see also*, Exhibit No. DCB-6C, CenturyLink's Supplemental Response to Staff Data Request RS-4(d).

1 were completed.²⁹ A few more completed calls were identified since then in
2 discovery during the pendency of this matter.³⁰ Based on my review of the Staff
3 Report and discovery, the completed calls were the result of good fortune and were
4 not the result of any corrective action by CenturyLink or Intrado.

5 **C. Causes of the Outage.**

6 **Q: What caused the six-hour CenturyLink 911 outage of April 2014?**

7 A: According to the FCC Report and the Staff Report, and confirmed in the
8 settlement testimony, the service failure was caused by a preventable software
9 coding error in Intrado's Englewood, Colorado Emergency Call Management
10 Center (ECMC).³¹ Intrado has two ECMCs, one in Englewood, and one in
11 Miami, Florida. The outage did not affect the Miami ECMC.³² Unfortunately, at
12 the time of the outage, all of Washington's 911 calls were routed through the
13 Englewood ECMC.³³

14 The Staff Report and the FCC Report indicate that the software
15 configuration error occurred on the call-routing hub owned and operated by
16 Intrado.³⁴ The hub software was designed to track the trunk assignment for 911
17 calls assigned to PSAPs that relied on centralized automatic messaging
18 accounting (CAMA) trunking.³⁵ When the software counted 40 million calls, it

²⁹ Staff Report at 16.

³⁰ Exhibit No. DCB-7C, CenturyLink's Response to Staff Data Request RS-4(a), which states that there were 792 successful calls. *See also*, CenturyLink Testimony at 7:4.

³¹ Staff Report at 3-4; FCC Report at 7; CenturyLink Testimony at 6:21-7:15.

³² Staff Report at 10.

³³ Exhibit No. DCB-8C, CenturyLink's Response to Staff Data Request RS-53. The majority of the successful calls were routed through the Miami ECMC. *See* Staff Testimony at 2:16-23.

³⁴ FCC Report at 1; Staff Report at 4.

³⁵ *See* CenturyLink Testimony at 7:8-15.

1 stopped assigning calls to PSAPs that used CAMA trunking.³⁶ All of
2 Washington's PSAPs were affected by the outage because all of the PSAPs still
3 relied on CAMA trunks and had not yet converted to IP.³⁷

4 **Q: Did internal issues delay resolution of the outage?**

5 A: Yes. As the FCC report and the Staff Report show, and as not really addressed by
6 Staff or CenturyLink testimony, inadequate alarm management resulted in
7 significant delays in uncovering the problem and restoring 911.³⁸ The alarm was
8 not specific and the appropriate severity level was not clear.³⁹ This delayed
9 Intrado employees from understanding the nature and severity of the failure,
10 causing both Intrado and CenturyLink to inadequately respond.⁴⁰

11 Additionally, a simultaneous outage in Oregon confused matters in that
12 Intrado (and maybe CenturyLink) employees thought that the Washington outage
13 was related to the Oregon outage. This turned out to not be the case, and the lack
14 of clarity delayed resolution of the Washington outage.⁴¹

15 **Q: How did the Staff Report describe the causes of the outage?**

16 A: The Staff Report states:

- 17 • CenturyLink's 911 vendor relied on a call threshold counter
18 that was limited to processing a total of 40 million 911 calls and
19 the threshold counter was not properly managed to ensure that the
20 limit would not be exceeded;

³⁶ FCC Report at 3.

³⁷ See Exhibit No. DCB-9, CenturyLink's Response to Staff Data Request RS 55.

³⁸ FCC Report at 3; Staff Report at 11-12 and Appendix E.

³⁹ See Exhibit No. DCB-10, CenturyLink's Response to Staff Data Request RS-69; Exhibit No. DCB-11, CenturyLink's Response to Staff Data Request RS-49. Exhibit No. DCB-10 details the alarm system, but does not answer the question regarding what alarm category the threshold counter triggered.

⁴⁰ Intrado has enhanced its alarm system since the outage. Exhibit No. DCB-12, CenturyLink's Response to Staff Data Request RS-39. See also, Exhibit No. DCB-13, CenturyLink's Response to Staff Data Request RS-56, and Exhibit No. DCB-14, CenturyLink's Response to Staff Data Request RS-64(c).

⁴¹ FCC Report at 8. See also, Exhibit No. DCB-15, CenturyLink's Response to Staff Data Request RS-48.

- 1 • Automatic rerouting capabilities did not function as
2 designed and Washington's 911 calls were not rerouted from the
3 Colorado ECMC to the Florida ECMC in a timely manner;
- 4 • CenturyLink's 911 vendor did not properly manage
5 network alarms designed to signal system issues or outages; and
- 6 • The primary route designation for Washington's 911 traffic
7 was to the Colorado ECMC rather than being shared between the
8 Colorado and Florida centers. This lack of traffic balancing
9 between the two centers magnified the impact of the outage that
10 centered on functionality in the Colorado ECMC.⁴²

11
12 Further, "Staff ... determined that the emergency system design and
13 implementation failed to perform as required, and the state 911 system did not
14 have a reliable infrastructure network."⁴³ None of this is contradicted in the
15 Multi-Party Settlement Agreement or the testimony supporting the Settlement.

16 **D. The Human Impact of the Outage.**

17 **Q: What was the impact on those who could not complete calls to 911?**

18 A: We may never know the full impact of the 911 outage because we will never
19 know the reason why each of the failed 5,684 calls were made. Many people
20 dialing 911 during the six-hour outage have not shared their stories, and in the
21 case of cell phone callers, identifying each of the callers has proven futile.⁴⁴

22 The impact of the outage could have been far worse than it was. The
23 outage was not caused by weather or other external event, either in Colorado or
24 Washington. One can easily imagine that the impact to Washington residents
25 would have been even more acute if there had been major storms in the state at

⁴² Staff Report at 4, 10-13.

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 24 (discussion of pseudo-ANIs).

1 the time of the outage, like those of late August 2015,⁴⁵ or wildfires like those this
2 past summer.⁴⁶

3 The Staff Report recounts in detail some of the impacts resulting from the
4 outage:

5 **Cowlitz Co. PSAP:** Reported an assault victim tried to call 911
6 from a wireless telephone after being assaulted by multiple
7 subjects outside a tavern. He was not able to get through.

8 **King Co. Valley COM Center:** Reported a person attempted to
9 call 911 from a wireless telephone to report a vehicle crash. When
10 the caller could not get through to 911, he went to a pay phone.
11 The call was transferred through a relay service, which then
12 connected the call to 911 dispatch.

13 **Kitsap Co. PSAP:** Reported an aid car witnessed a motor vehicle
14 collision. The collision victims reported they had tried to call 911
15 but were unable to get through. Kitsap Co. PSAP noted they
16 documented the call at 12:19 a.m., and notified CenturyLink.

17 **Kitsap Co. PSAP:** Reported Harrison Hospital called Kitsap's 10-
18 digit number to report an overdose patient had attempted and failed
19 to reach 911. The overdose call was reported as serious.

20 **Mason Co. PSAP** – A patient with chest pain called 911 but was
21 not able to get through. The patient called the hospital, which in
22 turn contacted the PSAP who dispatched Advanced Life Support.
23 The medical issue was reported as serious.

24 **Puyallup COM Center:** Reported that at 1:39 a.m., a woman
25 flagged down a police officer to report domestic violence. The
26 woman reported to the officer that she was unable to get through to
27 911.

28 **Snohomish Co. (SNOPAC):** The PSAP received a call from
29 Lifeline Medical Alert with a report that an individual had passed
30 away at a private residence. Lifeline stated that the reporting party
31 was unsuccessful in his attempts to call 911, so he activated the
32 deceased's Lifeline Medical Alert.

⁴⁵ See, e.g., <http://www.komonews.com/weather/blogs/scott/Some-statistics-that-highlight-how-unusual-the-August-storm-was--323398251.html>.

⁴⁶ See <http://www.kgw.com/story/news/local/2015/06/15/oregon-and-washington-wildfire-updates/71264920/>.

1 **Snohomish Co.:** A *Daily Mail* article reported an intruder entered
2 a woman’s home in the early hours of April 10 and she made 37
3 attempts to reach 911. When the caller could not get through to
4 911, she used the Internet to locate a 10-digit law enforcement
5 number to call. By the time the caller reached 911, the intruder had
6 left her residence.

7 **Spokane:** The *Spokesman Review* newspaper reported in the early
8 morning hours on April 10, a propane tank in a truck with an
9 overhead camper exploded in the Hillyard area of Spokane.
10 According to the news article, the blast shattered six windows of a
11 nearby residence and the resident was hit in the face by the glass of
12 a broken window. The explosion shook windows of homes as far
13 as six blocks away. Debris was thrown onto rooftops and melted
14 tar. Emergency services reported they did receive a 911 call and
15 the fire department responded. Witnesses at the scene stated that
16 they were not able to reach 911.

17 **Whitman Co. PSAP:** The PSAP reported that it was unaware of
18 the outage when they received a call about a heart attack patient
19 who called the fire department directly because he could not get
20 through to 911.⁴⁷

21 These ten examples reinforce how serious a 911 outage can be. The absence of
22 911 when it is needed is stressful to the caller. Because the public has a
23 reasonable expectation that 911 be reliable, it is highly possible that people
24 calling 911 during the outage were surprised when they did not get through, and
25 believed that they had done something wrong in dialing.

26 The Staff Testimony indicates that a penalty is in the public interest
27 because “the April 2014 outage seriously damaged the public’s faith in
28 CenturyLink’s ability to provide 911 services and that a “severe” penalty “is
29 needed to restore that trust.”⁴⁸ The long-term damage to the public’s faith
30 coupled with the immediate threat to public safety makes the Settlement
31 Agreement’s proposed penalty not appropriately punitive, as discussed below.

⁴⁷ Staff Report at 22-23.

⁴⁸ Staff Testimony at 6:10-12.

1 **IV. VIOLATIONS AND PENALTIES**

2 **A. CenturyLink's Violations.**

3 **Q: What requirements did CenturyLink violate as a result of the April 2014, 911**
4 **outage?**

5 A: I concur with the Staff Report and the Multiparty Settlement Agreement regarding
6 the regulatory requirements CenturyLink violated. CenturyLink violated
7 RCW 80.36.830, WAC 480-120-450(1), and 480-120-412.⁴⁹ I have not reviewed
8 the outage for violation of other Washington statutes and rules.

9 **Q: Please describe how CenturyLink violated RCW 80.36.080.**

10 A: RCW 80.36.080 requires:

11 the service so to be rendered any person, firm or corporation by
12 any telecommunications company shall be rendered and performed
13 in a prompt, expeditious and efficient manner and the facilities,
14 instrumentalities and equipment furnished by it shall be safe, kept
15 in good condition and repair, and its appliances, instrumentalities
16 and service shall be modern, adequate, sufficient and efficient.

17 CenturyLink admits to violations of RCW 80.36.080 in the Multi-Party
18 Settlement Agreement, and in testimony.⁵⁰ The outage resulted in 911 service not
19 being “rendered and performed in a prompt, expeditious and efficient manner”
20 and the service was not adequate, sufficient, or efficient. Moreover,
21 CenturyLink’s facilities failed – or, more precisely, the facilities of CenturyLink’s
22 third-party vendor failed. Critical software would not process calls after the 40
23 millionth call, causing subsequent calls to fail. As CenturyLink conceded to the
24 FCC, and described in Section VIII.A. below, CenturyLink is responsible for the

⁴⁹ CenturyLink admits to these violations. CenturyLink Testimony at 2:9-11. The admissions are “for settlement purposes only.” Id. at 2:12-13. Yet, violations of law and rule are fundamental to the penalties that Staff and CenturyLink support. See Staff Testimony at 6:10-13; CenturyLink Testimony at 2:14-16.

⁵⁰ Settlement Agreement at ¶25; CenturyLink Testimony at 2:9.

1 failures of its third-party vendor.⁵¹ In this regard, CenturyLink’s facilities,
2 instrumentalities, and equipment were not kept in good condition and repair, as
3 required by RCW 80.36.080.

4 **Q: Please describe how CenturyLink violated WAC 480-120-450(1).**

5 A: CenturyLink admits violations of WAC 480-120-450(1) in the Multi-Party
6 Settlement Agreement, and in testimony.⁵² WAC 480-120-450(1) requires that
7 local exchange companies (“LECs”) provide enhanced 911 services.⁵³ Callers
8 statewide lost the ability to call 911 during the six-hour 911 outage and carriers
9 lost the ability to provide 911 service to their customers.⁵⁴

10 As stated earlier, CenturyLink is the sole provider of 911 service in
11 Washington pursuant to a contract with the State.⁵⁵ As the sole provider of 911
12 service, CenturyLink is responsible for the 911 system in Washington. The
13 outage resulted from a defect in a portion of the 911 system that CenturyLink’s
14 third-party vendor controlled, and as a result, the responsibility rests with
15 CenturyLink.⁵⁶ The portion of the system that failed was not under the control of
16 any other phone company in Washington, and no other phone company could
17 affect the scope or duration of the outage. Only CenturyLink and Intrado could
18 resolve the April 2014 outage.

19 **Q: Please describe how CenturyLink violated WAC 480-120-412(2).**

⁵¹ CenturyLink, Inc., File No.: EB-SED-14-00017187, Acct. No.: 201532100004, FRN: 0018626853, Order, DA 15-406 (April 6, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DA-15-406A1.pdf (“FCC CenturyLink Order”), Consent Decree at ¶ 4. This order is provided as Commission Staff Exhibit SP-2.

⁵² Settlement Agreement at ¶ 26; CenturyLink Testimony at 2:10.

⁵³ WAC 480-120-450 stems from RCW 80.36.555 and RCW 80.36.560, which require Enhanced 911 service for residential and business customers, respectively.

⁵⁴ Exhibit No. DCB-16, CenturyLink’s Response to Staff Data Request RS-12.

⁵⁵ See also Settlement Agreement at ¶ 5-12.

⁵⁶ See Section VIII.A., below.

1 A: CenturyLink admits violations of WAC 480-120-412(2) in the Multi-Party
2 Settlement Agreement and in testimony.⁵⁷ WAC 480-120-412(2) requires that
3 when a company receives notice of or detects a major outage, it must “notify the
4 commission and any PSAP serving the affected area as soon as possible.”
5 CenturyLink first received notice that there was a problem with its 911 service
6 when the NORCOM PSAP contacted CenturyLink and relayed to the Company
7 that it was not receiving 911 calls.⁵⁸

8 The Staff Report shows that CenturyLink’s notifications were delayed or
9 did not occur.⁵⁹ Indeed, “Staff was not able to find a single documented report
10 that CenturyLink first notified a PSAP of the outage.”⁶⁰ Because the outage
11 affected the entire State of Washington, and because all of Washington’s PSAPs
12 were using CAMA trunks at the time of the outage,⁶¹ it can be fairly concluded
13 that all of Washington’s 127 PSAPs were affected.⁶² In reviewing the data
14 provided by CenturyLink, I did not find evidence that CenturyLink adequately
15 communicated with the PSAPs that had not proactively contacted CenturyLink.⁶³
16 Only the 51 PSAPs that contacted CenturyLink were listed in the Staff Report on
17 pages 19-20.

18 In the Settlement Agreement, CenturyLink admits 51 violations of

⁵⁷ Settlement Agreement at ¶ 4; CenturyLink Testimony at 2:11.

⁵⁸ Exhibit No. DCB-17, CenturyLink’s Response to Staff Data Request RS-1.

⁵⁹ Staff Report at 18-21; *see also* Exhibit No. DCB-18C, CenturyLink’s Response to Staff Data Request RS-3; Exhibit No. DCB-19C, CenturyLink’s Response to Public Counsel Data Request No. 13.

⁶⁰ Staff Report at 21.

⁶¹ *Id.* at 3; Exhibit No. DCB-9.

⁶² The list of PSAPs with call failures was provided, *see* Exhibit No. DCB-6C. But, all customers served by all Washington PSAPs were placed at risk during the outage.

⁶³ For the PSAPs who did proactively contact CenturyLink, some of them experienced significant wait times when they contacted CenturyLink’s 911 Repair Center. These long wait times were due to the “extremely high volume of calls coming in to the Center.” Exhibit No. DCB-20, CenturyLink’s Supplemental Response to Staff Data Request RS-77.

1 WAC 480-120-412(2).⁶⁴ However, nothing provided by CenturyLink in response
2 to discovery or in support of the settlement indicates that the Company adequately
3 communicated with the PSAPs that did not contact the Company during the
4 outage. The admission of failing to communicate with 51 PSAPs does not absolve
5 CenturyLink of liability for its failure to meet the requirements with the remaining
6 76 PSAPs.

7 **B. The Number of Violations.**

8 **Q: Please describe how violations of RCW 80.36.080 and WAC 480-120-450(1)**
9 **should be calculated.**

10 A: Violations of RCW 80.36.080 and WAC 480-120-450(1) should be on a per-call
11 basis, as described in the Staff Report.⁶⁵ Per-call is appropriate because each call
12 was a failure to comply with statute and rule. With respect to RCW 80.36.080,
13 CenturyLink's facilities failure resulted in 5,684 calls failing during the six-hour
14 outage.⁶⁶ With respect to WAC 480-120-450(1), CenturyLink failed to provide
15 911 service, resulting in 5,684 calls failing.

16 Each call that failed during the 911 outage was individually and equally
17 important because the caller needed 911 to obtain critical assistance. Each call
18 was urgent. The fact that callers may have called 911 more than once during the
19 outage does not diminish the importance of each and every call.

20 Further, accurate call data exists for the April 2014 outage, so it is possible
21 to know how many calls failed. In a general outage, we may or may not know the
22 number of calls that failed, so it might be more appropriate to assess violations

⁶⁴ Multi-Party Settlement Agreement at 2.

⁶⁵ E.g., Staff Report at 30.

⁶⁶ See Staff Testimony at 7:4-14.

1 using a different metric (e.g., number of access lines or population affected).
2 Because data shows how many 911 calls failed, the Commission knows with
3 certainty how many incidences of failure occurred, and how many times
4 CenturyLink violated both RCW 80.36.080 and WAC 480-120-450(1).

5 Alternates to per-call penalties, such as per-caller, are not appropriate
6 measures of penalties in this case. With respect to per-caller, the data on how
7 many individual callers were involved is not reliable. The Staff Report points out
8 that the number of wireless callers in particular were inaccurate because of the use
9 of “pseudo-ANIs” and the reluctance of some wireless providers to provide actual
10 telephone numbers.⁶⁷ Staff did not have reliable data to determine how many
11 unique callers attempted to reach critical services through 911.⁶⁸

12 The Commission should rely on per-call data, which is accurate and
13 reliable, and because each call was a failure to provide service and maintain
14 facilities.

15 **Q: Please describe how violations of WAC 480-120-412 should be calculated.**

16 A: CenturyLink committed a violation for each PSAP it failed to notify regarding the
17 outage.⁶⁹ Staff calculated 51 violations based on PSAP reports that they were not
18 informed of the outage by CenturyLink.⁷⁰ Staff’s testimony states that
19 “CenturyLink failed to provide timely notification to 51 Washington PSAPs....”⁷¹
20 Yet, CenturyLink itself states that there are 127 PSAPs in the state of

⁷³ Staff Report at 24.

⁷⁴ *Id.*

⁶⁹ *Id.* at 20.

⁷⁰ *Id.* at 21, and table at 19-20; *see also* Staff Testimony at 2.

⁷¹ Staff Testimony at 2:21-22.

1 Washington.⁷² As mentioned above, CenturyLink has not shown that it did
2 provide notice to the other 76 PSAPs. Given Staff’s finding that CenturyLink did
3 not notify **any** PSAPs,⁷³ there was a violation for each of the 127 PSAPs in the
4 State.

5 **Q: How many total violations do you calculate?**

6 A: In total, I calculate 11,495 violations of statute and rule in this case. That is 5,684
7 violations of RCW 80.36.080; 5,684 violations of WAC 480-120-450(1); and 127
8 violations of WAC 480-120-412.

9 **V. RECOMMENDED PENALTIES AND COMMISSION ACTIONS**

10 **A. Calculation of Penalties.**

11 **Q: What is the Commission’s authority to impose penalties for violations of**
12 **statutes and rules?**

13 A: RCW 80.04.380 establishes that authority, and states that penalties are to apply to
14 “each and every offense,” and continuing violations are considered a “separate
15 and distinct offense” for each day’s continuance.⁷⁴ The Commission considers
16 specific factors in determining penalties in enforcement cases. As noted in the
17 Staff Report,

18 Per the *Enforcement Policy of the Washington Utilities and*
19 *Transportation Commission* (Docket A-120061), commission staff
20 considered the following factors to determine the recommended
21 penalty amount:

⁷² Staff Report at 16.

⁷³ *Id.* at 20. The table in the Staff Report does not show any PSAP having been notified, much less whether the notification was made “as soon as possible,” as WAC 480-120-412 requires.

⁷⁴ RCW 80.04.380. Public Counsel does not recommend separate violations be applied for both April 9 and 10, 2014. Although two calendar days were involved, the outage began six minutes before midnight and was resolved by 6:06 AM. On the other hand, Staff found 55 violations of RCW 80.04.380 in CenturyLink’s failure to timely and fully respond to data requests (Staff Report at 27), but did not recommend penalties for those violations. The Multi-Party Settlement Agreement does not address these violations.

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- 1. How serious or harmful the violation is to the public.**
- 2. Whether the violation is intentional.**
- 3. Whether the company self-reported the violation.**
- 4. Whether the company was cooperative and responsive.**
- 5. The number of violations and the number of customers affected.**
- 6. The likelihood of recurrence.**
- 7. The company’s past performance regarding compliance, violations and penalties.**
- 8. The company’s existing compliance program.**
- 9. The size of the company.⁷⁵**

The Staff Report, the Multi-Party Settlement Agreement, the CenturyLink settlement testimony, and the Staff settlement testimony all fail to explain how the Commission’s factors were relied upon in arriving at the recommended \$250 per violation of RCW 80.36.830, WAC 480-120-450(1), and WAC 480-120-412. As I discuss further below, a calculus on these factors calls for a higher, indeed the maximum, penalty to be assessed on CenturyLink.

The Staff Report states that the maximum penalty of \$1,000 per violation would be “unduly punitive.”⁷⁶ The Staff Report is incorrect in this regard. Staff’s Testimony refers to the penalty as “appropriately punitive,”⁷⁷ and describes it as “severe,”⁷⁸ but does not explain how or why. The testimony is also incorrect. I

⁷⁵ Staff Report at 30.

⁷⁶ *Id.* at 28.

⁷⁷ Staff Testimony at 9:17.

⁷⁸ *Id.* at 6:11.

1 will discuss each of the UTC’s nine factors *seriatim*, to show how the maximum
2 penalty is appropriate.

3 **1. The seriousness of the violations weighs in favor of maximum penalties.**

4 **Q: The first factor identified above is how serious or harmful the violation is to**
5 **the public. How would you assess the seriousness of these violations?**

6 A: The Staff Report states that the outage was unprecedented in scope and duration.⁷⁹
7 Every person in Washington was affected. The outage placed the public in a
8 situation that put lives and property at risk. As Staff notes, “the potential impact
9 was mitigated only by the fact that no major natural or human-caused disasters or
10 incidents occurred during the timeframe of the outage.”⁸⁰

11 Flaws that make the 911 system inaccessible or inoperable should not be
12 tolerated, especially avoidable flaws. The seriousness of the violations is an
13 aggravating circumstance and calls for maximum penalties, not the \$250 per
14 violation – one-quarter of the statutory maximum – included in the Multi-Party
15 Settlement Agreement. Minor disagreements over the number of violations are
16 less important than the penalty per violation, and do not diminish the seriousness
17 of the violations.

18 **2. The violations may not have been intentional, but were avoidable and**
19 **foreseeable.**

20 **Q: The second factor is whether the violation is intentional. How would you**
21 **assess intent in this case?**

⁷⁹ Staff Report at 28.

⁸⁰ *Id.* As discussed above, the fact that a small number of calls eventually did get through to PSAPs (*id.* at 17) appears to have been more a matter of fortune than of preparation or corrective activity.

1 A: It does not appear that the outage was intentionally caused by CenturyLink.⁸¹ Yet
2 that does not excuse or obscure the seriousness of the violations, which were
3 avoidable and foreseeable, according to the Staff Report.⁸² As the Staff Report
4 succinctly states,

5 The fact that the call counter reached an arbitrary limit of 40
6 million calls should have been known well in advance and
7 procedures should have been in place to increase the call capacity
8 as necessary. When the calls to 911 were not being routed an alarm
9 activated, notifying technicians of the error. The alert message was
10 not understood by employees and they were unaware of the
11 significance of this failure.⁸³

12 The facts that the outage was caused by a software coding defect and the
13 appropriate precautions and alarm systems did not exist, tip the balance in favor
14 of this being an aggravating circumstance. This factor supports increasing the
15 penalty level in this case.

16
17 **3. Centurylink's reporting was inadequate.**

18 **Q: The third factor is whether the company self-reported the violation. How**
19 **would you assess CenturyLink's reporting of the outage?**

20 A: The Staff Report indicates that CenturyLink first made a single media call an hour
21 and fifty-one minutes after the outage began, and posted on Facebook half an hour
22 later.⁸⁴ CenturyLink did not report to Commission Staff until one hour and thirty-
23 nine minutes after the outage ended, using standard e-mail protocols.⁸⁵ A more
24 complete notice was not given until two hours later.⁸⁶ Nothing in Staff or

⁸¹ An intentional 911 outage with no notice would justify criminal charges.

⁸² Staff Report at 14-15.

⁸³ *Id.* at 28. See also Settlement Agreement at 3, lines 16-17.

⁸⁴ Staff Report at 15.

⁸⁵ *Id.* at 17.

⁸⁶ *Id.* at 29.

1 CenturyLink testimony contradicts these original Staff findings or the rest of the
2 reporting issues.

3 Indeed, although in normal outage situations the e-mail notice would
4 suffice, in an incident of this magnitude (a statewide 911 outage of hours
5 duration), it was inappropriate for the first live contact with CenturyLink to have
6 been initiated by Staff. Like the failures of notification to PSAPs, this reticence
7 on CenturyLink's part demonstrates that the Company was not treating the outage
8 with the proper level of seriousness. This is an aggravating circumstance, not a
9 mitigating circumstance.

10 Moreover, CenturyLink's notifications were incomplete and incorrect.
11 Staff states that CenturyLink sent an outage report at 6:24 a.m. on April 10, 2014,
12 via email to the Commission's telecom outage e-mail address.⁸⁷ The outage
13 report stated that the outage had ended at 4:45 a.m., listed the reason for the
14 outage as that "multiple PSAPs reported no service," and listed the location of the
15 outage as Castle Rock.⁸⁸ CenturyLink followed up at 8:27 a.m. with another
16 report indicating that the outage was statewide. Staff contacted CenturyLink by
17 phone at 8:30 a.m.

18 CenturyLink failed to notify the Commission of the scope and duration of
19 the outage in its first report, which was sent only after the outage had been
20 resolved. This may indicate that CenturyLink did not have personnel with
21 sufficient training to perform the task of notifying the Commission when outages
22 occur. In any event, this demonstrates unresponsiveness on the part of

⁸⁷ *Id.* at 17.

⁸⁸ CenturyLink later admitted that the technician issuing the outage report did not know how to fill out the report. *Id.*

1 CenturyLink and is an aggravating circumstance that weighs in favor of an
2 increased penalty.

3 **4. Centurylink’s level of responsiveness did not materially help the**
4 **investigation.**

5 **Q: The fourth factor is whether the company was cooperative and responsive.**

6 **How would you assess CenturyLink’s responsiveness to the Staff**
7 **investigation?**

8 A: The Report notes that “some of the data request responses were incomplete and
9 staff had to resubmit requests for data.”⁸⁹ This is certainly not a mitigating factor.
10 Although Staff notes that CenturyLink was “generally responsive,”⁹⁰ that should
11 be a minimum expectation. Companies are expected to cooperate with
12 Commission investigations. Companies should be especially cooperative in cases
13 such as this statewide 911 outage, where the public risk and harm are high. A
14 high level of cooperativeness allows for full review of what occurred,
15 development of solutions, and proper regulatory oversight.

16 Further, Staff found 55 violations of RCW 80.04.380 in CenturyLink’s
17 failure to timely and fully respond to data requests, but did not recommend
18 penalties for those violations.⁹¹ These violations, also not discussed in Staff
19 Testimony, should be considered an aggravating factor.

20 **5. All Washingtonians were affected and the number of violations is high.**
21

⁸⁹ *Id.* at 29. One glaring example is CenturyLink’s equivocal responses to the question about the **number** of affected customers: Exhibit No. DCB-21, CenturyLink’s Response to Staff Data Request CP-1 (“all customers”), Exhibit No. DCB-5 (“all customers”).

⁹⁰ Staff Report at 29.

⁹¹ *Id.* at 27.

1 **Q: The fifth factor is the number of violations and the number of customers**
2 **affected. How would you assess “the number of violations and the number of**
3 **customers affected”?**

4 A: The number of consumers affected is a key issue for this factor. CenturyLink’s
5 failures put all seven million people in Washington at risk, along with billions of
6 dollars in personal, commercial, and industrial property in the state. Additionally,
7 there were 11,495 statutory and rule violations in this case. This factor weighs in
8 favor of a maximum penalty.

9 **6. The likelihood of recurrence.**

10 **Q: The sixth factor is the likelihood of recurrence. How would you assess the**
11 **likelihood of recurrence for assessing penalties?**

12 A: The Staff Report provides little assurance that, without strong action by this
13 Commission, CenturyLink will be properly motivated to ensure no recurrence of
14 systemic 911 failure.⁹² Likewise, the Settlement Agreement provides little
15 assurance. Given the importance of 911, there must be a strong disincentive to
16 such violations. Imposing a strong penalty in this case will provide a deterrent to
17 future violations. Staff Testimony notes this need, but does not provide any basis
18 that the Settlement Agreement will be sufficient for deterrence.⁹³

19 CenturyLink’s discovery responses indicate that there is an ongoing
20 architectural review of the 911 system.⁹⁴ CenturyLink should be conducting an
21 overall risk assessment regarding its 911 service to detect other potential
22 preventable errors. In the time since the outage, CenturyLink’s 911 service

⁹² See *id.* at 29-30.

⁹³ Staff Testimony at 6:8, 9:17-18.

⁹⁴ Staff Report at 45; see also CenturyLink Testimony at 7:17-9:4.

1 continued to have issues. As explained in a July 17, 2015, letter from King
2 County Executive Dow Constantine, 911 outages on May 28, 2015, June 15,
3 2015, and July 8, 2015, had troubling notification aspects.⁹⁵ This raises concerns
4 that other, preventable issues may arise in the future. Because the risk of
5 recurrence and danger to the public is high, this factor weighs in favor of an
6 increased penalty.

7 **7. The company's past performance.**

8 **Q: The seventh factor is the company's past performance regarding compliance,**
9 **violations, and penalties. How would you assess CenturyLink's past**
10 **performance "regarding compliance, violations and penalties"?**

11 **A:** As described in the Staff Report, the consumer protection performance of
12 CenturyLink (and its predecessor, Qwest) has been problematic since 2008.⁹⁶ In
13 2008, Staff found that Qwest violated 11 consumer protection laws and rules. In a
14 2010 follow-up, Staff found violations of ten statutes and rules, recommended a
15 formal complaint and recommended a penalty of \$69,000.

16 Then in 2014, Staff performed an investigation reviewing 144 consumer
17 complaints filed against Qwest and CenturyLink from September 1, 2011, to
18 August. 31, 2012. Staff found several repeat violations, and recommended the
19 Commission issue a formal complaint against the company and impose penalties
20 of up to \$313,000.

⁹⁵ Exhibit No. DCB-22.

⁹⁶ Staff Report at 30.

1 In August 2014, Staff released its investigative report on CenturyLink's
2 November 2013 voice and data outage in the San Juan Islands. Staff
3 recommended the Commission order more than \$170,000 in penalties.

4 It does not appear that previous enforcement mechanisms have materially
5 improved CenturyLink's compliance performance. Thus, especially to prevent
6 public safety violations like those that occurred in the 2014 statewide 911 outage,
7 substantial penalties are needed beyond those outlined in the Staff Report and the
8 Multi-Party Settlement Agreement.

9 Crucially, neither Staff nor CenturyLink testimony discusses this history
10 of under-performance in weighing either seriousness or likelihood of recurrence,
11 or as an independent factor in weighing the penalty amount. This further
12 accentuates the inadequacy of the penalty recommended in the Multi-Party
13 Settlement Agreement.

14 Looking further back in Qwest's history, in 2005 the Commission
15 approved a \$7.8 million penalty against Qwest in Docket UT-033011, related to
16 the Company's intentional and fraudulent failure to timely file interconnection
17 agreements with the Commission. Staff's Testimony refers to the settlement
18 amount in this docket as the second largest ever, after the UT-033011 penalty.⁹⁷

19 There are two things to note regarding the penalties in Docket UT-033011
20 as they relate to this case. First, in terms of the harm to the public interest,
21 CenturyLink's violations here are arguably more severe than Qwest's regulatory
22 misdeeds, and thus merit a similarly severe, or greater, penalty. Second, it is
23 noteworthy that since the Commission imposed the penalty in the earlier docket,

⁹⁷ Staff Testimony at 7:1-2.

1 that there have not been significant recurrences of the problematic behavior that
2 prompted the Commission to penalize Qwest, and therefore, the larger penalty
3 was likely effective.

4 CenturyLink's history of inadequate compliance is an aggravating factor
5 for penalties regarding the 911 violations. Most particularly, as Staff states, "This
6 is the second time in little more than one year that staff has found CenturyLink's
7 external communications lacking."⁹⁸

8 **8. The company lacks an existing compliance program.**

9 **Q: The eighth factor is the company's compliance program. How does the Staff**
10 **Report describe CenturyLink's existing compliance program?**

11 A: The Staff Report quite succinctly stated: "Staff is not aware of any existing
12 compliance program."⁹⁹ CenturyLink's testimony does not address this
13 statement. This should be treated as an aggravating factor and weighs in favor of
14 an increased penalty. The fact that CenturyLink has now agreed to compliance
15 measures¹⁰⁰ does not excuse its prior lack of a compliance program.

16 **9. The size of the company.**

17 **Q: The ninth factor identified above is the size of the company. How would you**
18 **assess the "size of the company" in assessing penalties?**

19 A: The Staff Report states on this factor only that "[t]he company reported total
20 intrastate operating revenues of \$475,609,089 in 2013."¹⁰¹ This figure is not in
21 context.

⁹⁸ Staff Report at 29.

⁹⁹ *Id.* at 30.

¹⁰⁰ See Settlement Agreement at ¶¶ 30-34.

¹⁰¹ Staff Report at 30.

- 1 • The Staff Report’s proposed \$2.938 million penalty represents only **six-**
2 **tenths of one percent** of those revenues.¹⁰² The \$2.855 million in the
3 Settlement Agreement is even less.
- 4 • “Reported total intrastate revenue” is only a subset of the revenues
5 CenturyLink gets from Washington customers who were put at risk by the
6 outage.
- 7 • And CenturyLink is part of a company that has one-third of the total
8 access lines in the nation, across 37 states.¹⁰³ In 2014, CenturyLink had
9 \$18 billion in revenues.¹⁰⁴

10 Here again, neither Staff nor CenturyLink testimony provides the necessary
11 context required by the Commission’s enforcement policies.

12 **VI. MITIGATING FACTORS**

13 **Q: Are you aware of any mitigating factors that might justify a lesser penalty?**

14 A: No. All of the factors discussed above weigh in favor of an increased penalty,
15 and, in totality, for a maximum penalty. The Staff Report does not identify any
16 mitigating factors, and neither do Staff or CenturyLink testimony supporting the
17 Multi-Party Settlement Agreement. Indeed, CenturyLink states it is “not asking
18 for any mitigation or reduction in” the recommended penalty.¹⁰⁵ Staff’s
19 recommendation already mitigates penalties when no mitigation is warranted. A

¹⁰² The statutory maximum represents only 2.4 percent of total intrastate revenues.

¹⁰³ See <https://en.wikipedia.org/wiki/CenturyLink>.

¹⁰⁴ See <http://centurylink.uberflip.com/i/490093-2014-letter-to-shareholders>.

¹⁰⁵ CenturyLink Testimony at 4:20-21.

1 maximum penalty is far from being “unduly punitive.”¹⁰⁶ It is appropriate.
2 Imposing one-fourth of the maximum is unduly lenient.

3 VII. NON-MONETARY ISSUES

4 **Q: Should imposing penalties be the extent of this Commission’s action?**

5 A: No. It is important that the Commission also require CenturyLink to ensure (if
6 not insure) that the chances of recurrence will be slight. To that end, Public
7 Counsel supports adopting the technical recommendations and reporting
8 requirements provided in the Multi-Party Settlement Agreement. In particular,
9 the reporting requirements from the Staff Report which have been refined in the
10 Settlement Agreement, the contemporaneous filing of reports submitted to the
11 FCC, and the appointment of a Compliance Officer are reasonable to impose on
12 CenturyLink.

13 VIII. OTHER CONSIDERATIONS IN SETTING THE PENALTY

14 **A. CenturyLink Must be Held Accountable for the Failures of its Agent,**
15 **Intrado.**

16 **Q: It appears that the root cause of the 911 outage in Washington was a failure**
17 **of Intrado’s router in Colorado.¹⁰⁷ Does this absolve CenturyLink from**
18 **being penalized?**

19 A: No, as demonstrated by the Multi-Party Settlement Agreement and the supporting
20 testimony. It is the Washington-related impact of the failures and the danger to
21 Washingtonians resulting from the April 2014, 911 outage. This Commission’s
22 primary role is to regulate Washington utilities and their service to

¹⁰⁶ CenturyLink describes the Multi-Party Settlement Agreement amount as “significant.” *Id.* at 5:9. Relative to the size of this company and its operations (see the discussion of the UTC’s ninth factor above), the significance is questionable.

¹⁰⁷ Staff Report at 10-13.

1 Washingtonians. CenturyLink is a Washington utility, and Washingtonians were
2 put at risk. And CenturyLink, as a Washington utility, should not be able to
3 “contract away” its duties under Washington law and policy.¹⁰⁸ CenturyLink does
4 not deny this responsibility in its testimony.

5 Further, as part of the FCC 911 outage settlement with CenturyLink,
6 CenturyLink “fully acknowledge[d] that it is responsible for complying with
7 applicable [FCC] rules regardless of any alleged failures by its subcontractors.”¹⁰⁹

8 **B. Federal implications of the outage.**

9 **Q: Since this was an outage impacting multiple states, is the FCC addressing the**
10 **issues?**

11 A: The FCC opened a docket (PS 14-72), in response to the April 2014 multi-state
12 911 outage. The FCC file contains the October 2014 “Report and
13 Recommendations” on the April 2014 multi-state 911 outage by the FCC’s Public
14 Safety and Homeland Security Bureau (“PSHS”).¹¹⁰ The PSHS review was
15 national and forward-looking, not state-specific.

16 On April 6, 2015, the FCC Enforcement Bureau released an Order that
17 adopted a Consent Decree – i.e., a settlement – between CenturyLink and the
18 Enforcement Bureau.¹¹¹ CenturyLink agreed to a fine of \$16 million, and to a

¹⁰⁸ See, e.g., *Wash. Util. and Trans. Comm’n. v. Cascade Nat. Gas Co.*, Docket UG-060256, Order (August 16, 2007), 2007 WL 2383017 (Wash. U.T.C.), ¶ 9; *Wash. Util. and Trans. Common. v. Puget Sound Energy, Inc.*, Docket PG-060215, Order (April 3, 2008), 2008 WL 946034 (Wash. U.T.C.) at 2.

¹⁰⁹ FCC CenturyLink Order, Consent Decree at ¶ 4.

¹¹⁰ Exhibit No. DCB-3. The PSHS review indicated that its release ended the FCC investigation.

¹¹¹ Exhibit No. SP-2, FCC CenturyLink Order; see also Staff Testimony at 3:2-8.

1 wide-ranging compliance plan.¹¹² In addition, Verizon and Intrado were also
2 fined by the FCC.¹¹³

3 The FCC stated that more than 11 million people nationwide were affected
4 by the outage.¹¹⁴ Washington's seven million people at risk were 70 percent of
5 those at risk nationally. (Notably, however, the missed Washington 911 calls
6 were 86 percent of the total missed calls nationwide.)

7 **Q: How should the FCC's resolution on the outage inform the UTC's**
8 **determinations?**

9 A: First, the FCC docket did not deal with violations of state law, which is the focus
10 of this UTC proceeding. The FCC proceedings do not preclude state action
11 against CenturyLink. The states have their own authority to regulate
12 telecommunications companies and services provided by those companies.

13 Second, the maximum statutory penalty of \$11.5 million in Washington is
14 just about 70 percent of the FCC's penalty for CenturyLink. The violations of
15 state and federal law were violations in different jurisdictions, but it is appropriate
16 for the penalties to be commensurate. By comparison, the Multi-Party Settlement
17 Agreement's proposed \$2.855 million penalty is minimal.

18 Staff's view of the FCC consent decree is equivocal.¹¹⁵ The Staff
19 Testimony does not conflict with my assessment in this regard.

¹¹² Exhibit No. SP-2, FCC CenturyLink Order, at ¶ 11-13, 16.

¹¹³ E.g., Intrado Communications Inc., File No.: EB-SED-14-00017191, Order, FCC DA 15-421 (rel. April 6, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DA-15-421A1.pdf.

¹¹⁴ FCC Report at 1.

¹¹⁵ Staff Testimony at 8:7 ("Q. Does the fact that the FCC imposed a \$16 million fine on CenturyLink impact Staff's view of the Settlement Agreement in the present docket? A. Yes and no.")

1 **Q: Does another recent FCC 911 proceeding put the possible Washington**
2 **penalties into perspective?**

3 A: Yes. On July 17, 2015, the FCC announced a settlement with T-Mobile regarding
4 a 911 outage that lasted three hours and affected T-Mobile's 51 million customers
5 nationwide. Failure to notify PSAPs was also an issue in the T-Mobile case. The
6 settlement was for \$17.5 million.¹¹⁶ This further shows the minimal nature of the
7 Staff/CenturyLink settlement.

8 **IX. COMMISSION DISCRETION TO SET A PENALTY**

9 **Q: Please describe the UTC's discretion in setting penalties.**

10 A: The UTC has considerable leeway to impose a penalty on violators of Washington
11 utility statutes. WAC 80.04.380 states,

12 Every public service company, and all officers, agents and
13 employees of any public service company, shall obey, observe and
14 comply with every order, rule, direction or requirement made by
15 the commission under authority of this title, so long as the same
16 shall be and remain in force. Any public service company which
17 shall violate or fail to comply with any provision of this title, or
18 which fails, omits or neglects to obey, observe or comply with any
19 order, rule, or any direction, demand or requirement of the
20 commission, **shall be subject to a penalty of not to exceed the**
21 **sum of one thousand dollars for each and every offense.** Every
22 violation of any such order, direction or requirement of this title
23 shall be a separate and distinct offense, and in case of a continuing
24 violation every day's continuance thereof shall be and be deemed
25 to be a separate and distinct offense.

26 (Emphasis added.)

28 There must be a strong disincentive to avoidable lapses – especially avoidable 911
29 lapses – such as those that put the State of Washington at risk. Assessing the

¹¹⁶ Re: T-Mobile, Inc., FCC File No.: EB-SED-15-00018025, DA 15-808, Order (rel. July 15, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0717/DA-15-808A1.pdf.

1 statutory maximum penalty would provide such a disincentive.¹¹⁷ I agree with
2 Staff that this is an exceptional case.¹¹⁸ But the Settlement Agreement’s proposed
3 penalty – like that in the Staff Report –does not reflect the exceptional nature of
4 this case.

5 **X. OVERALL ASSESSMENT OF THE MULTI-PARTY SETTLEMENT**
6 **AGREEMENT**

7 **Q: Should the Commission accept the Multi-Party Settlement Agreement?**

8
9 A: No. As discussed in detail above, the terms of the Multi-Party Settlement
10 Agreement do not appropriately follow the UTC’s principles for determining
11 penalties for the violation of statutes and rules. In particular, the seriousness of
12 the violations of 911 statutes and rules; the number of violations and customers
13 affected; the likelihood of recurrence; the Company’s past performance; and the
14 size of the Company all support a penalty at the maximum, not the less-than-one-
15 quarter of the maximum contained in the Settlement Agreement. And, as
16 discussed above, none of the nine factors, nor any other factors, act in mitigation.
17 Further, the Settlement Agreement ignores the violations the Staff Report
18 identified but did not seek penalties for.¹¹⁹

19 This is not a close call; the Settlement Agreement penalty amount is not
20 severe, or appropriate. It is unreasonably lenient. The Staff Testimony states,
21 “Seldom in Commission proceedings does a settlement reflect the maximum
22 penalty sought by the Staff at the outset of the case.”¹²⁰ Staff’s original proposal

¹¹⁷ See Staff Report at 31.

¹¹⁸ Staff Testimony at 5:11. And Staff immediately thereafter relates the significance of the outage. *Id.* at 13-6:2.

¹¹⁹ Staff Report at 27.

¹²⁰ Staff Testimony at 6:5-7.

1 was for one-quarter of the statutory maximum, which is still the case in the
2 Settlement Agreement.

3 The non-monetary portions of the Settlement Agreement consist mostly of
4 requirements to provide information that Staff would be entitled to in the normal
5 course of CenturyLink's business.¹²¹ Moreover, the appointment of a Compliance
6 Officer¹²² is what a reasonable company responsible for a statewide 911 outage
7 would do. Public Counsel supports explicitly requiring CenturyLink to report to
8 the Commission to the extent the reporting provides more timely added
9 accountability of the Company to its regulators, stakeholders, and the public it
10 serves.

11 Settlements are a regular part of regulatory processes, both state and
12 federal. They can add value and certainty. The certainty added here is minimal,
13 including because of the potential for recurrence. Further, in this case, the value
14 added by the Settlement Agreement is inadequate in light of the magnitude of the
15 statewide failure of 911 service, and is not consistent with the public interest.¹²³

16 XI. CONCLUSION

17 **Q: What is your recommendation?**

18 A: I recommend that the Commission modify the Multi-Party Settlement Agreement
19 and impose the maximum statutory penalty on CenturyLink, for a total of
20 \$11,495,000, based on a failure of CenturyLink's facilities, a failure to provide
21 911 service, and a failure of notification to all Washington PSAPs. The

¹²¹ See *id.* at 8:17-9:3, CenturyLink Testimony at 2:18 (CenturyLink will provide reports "filed" with the FCC), 10:14-14:7.

¹²² CenturyLink Testimony at 10:17-19.

¹²³ See Staff Testimony at 1:10-14.

1 Commission should also require CenturyLink to file the PSAP trunk number
2 threshold counter quarterly reports and IP transition status reports, to submit to an
3 annual audit, contemporaneously provide reports filed with the FCC pursuant to
4 the FCC Consent Decree, and appoint a Compliance Officer, as required under the
5 Multi-Party Settlement.

6 **Q: Does that conclude your testimony?**

7 A: Yes.