BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. CENTURYLINK COMMUNICATIONS, LLC d/b/a LUMEN TECHNOLOGIES GROUP; QWEST CORPORATION; CENTURYTEL of WASHINGTON, INC.; CENTURYTEL of INTER ISLAND, INC.; CENTURYTEL of COWICHE, INC.; UNITED TELEPHONE COMPANY of the NORTHWEST Respondents.	DOCKET UT-210902

REPLY BRIEF OF COMMISSION STAFF

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I. INTRODUCTION

1 The named respondents (collectively "Lumen") violated the Commission's discontinuation of service rule[1] 923 times by disconnecting customers for non-payment at a time when state law forbade them from doing exactly that. At issue here is Lumen's liability for those violations,[2] and Staff continues to recommend that the Commission impose the maximum penalty, or $1,000, for each of the violations.

II. ARGUMENT

2 The parties agree that the application of the penalty factors set out in the Commission's Enforcement Policy Statement[3] determine the appropriate penalty here.[4] Staff and Lumen disagree as to the application of factors one, two, three, six, seven, eight, nine, ten, and eleven. This brief addresses those disputes in order, save for factors two and eleven, as Staff addressed the arguments Lumen makes there in its initial brief.[5]

3 Lumen contends that the Commission should not weigh the first factor, which concerns the seriousness of the violations, in favor of a heavy penalty, although its argument is heavily caveated.[6] On the one hand, Lumen acknowledges that any disconnection was "important and problematic."[7] In making that acknowledgment, however, Lumen avoids admitting why that is

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[1] WAC 480-120-172.
[2] Lumen argues that Staff has mistaken the issue here by treating it as whether Lumen is entitled to mitigation for the penalty. *Wash. Utils. & Transp. Comm'n v. CenturyLink Communications, LLC*, Docket UT-210902, CenturyLink's Opening Br., 8 ¶ 15 (Apr. 21, 2023) (hereinafter "Lumen's Br."). Staff has made no such mistake. *E.g.*, *Wash. Utils. & Transp. Comm'n v. CenturyLink Communications, LLC*, Docket UT-210902, Initial Br. of Commission Staff, 1 ¶¶ 2-3 (Apr. 21, 2023) ("The only remaining issue, therefore, is the appropriate penalty . . . The Commission should impose the maximum allowed penalty of $1,000 for each of the 923 violations.") (hereinafter "Staff's Br.").
[3] *In re Enforcement Policy of the Wash. Utils. & Transp. Comm'n*, Docket A-120061, Enforcement Policy of the Wash. Utils. & Transp. Comm'n (Jan. 7, 2013) (hereinafter "Policy Statement").
[4] *Compare* Staff's Br. at 4 ¶ 11 *with* Lumen's Br. at 10 ¶ 17 *with Wash. Utils. & Transp. Comm'n v. CenturyLink Communications, LLC*, Docket UT-210902, Opening Br. of Public Counsel, 6 ¶ 12 (Apr. 21, 2023).
[5] Staff also addressed some of the arguments Lumen makes on the eighth factor in its opening brief. It will not repeat those arguments either, but will note them at the appropriate time.
[6] *See* Lumen's Br. at 10-11 ¶¶ 18-19.
[7] Lumen's Br. at 10 ¶ 18.

true, namely that Lumen's violations were "problematic" because they involved shutting off access to a service deemed essential at a time when the Governor determined that preserving public health and safety required continued access to that service.[8] On the other hand, Lumen urges the Commission to consider that very few of its customers accepted its offer to reconnect after Staff discovered the company's violations,[9] suggesting this means that its conduct was not serious.

4 The Commission should weigh this factor heavily against Lumen. No amount of silence on the part of Lumen's customers can change the fact that, as just mentioned, Lumen's violations of the Commission's rule also violated a gubernatorial proclamation intended to preserve public health and safety during a public health emergency. The Commission has indicated that violations occurring during emergencies warrant stiff penalties.[10] It should simply apply that common sense principle here and weigh this factor in favor of a substantial penalty.

5 Lumen requests that the Commission give it some credit when weighing the third factor, which concerns the self-reporting of violations. Specifically, although Lumen "concede[s] that it did not self-report a violation," it contends that the weighing of the third factor is unclear because "no one was aware of any disconnections or suspensions until [Lumen] discovered them and immediately reported them to Staff."[11] There are three problems with Lumen's argument.

[8] Proclamation by Governor Jay Inslee, No. 20-23.2, Ratepayer Assistance and Preservation of Essential Services, at 1, 4 (Apr. 17, 2020).
[9] Lumen's Br. at 10-11 ¶ 19. Staff will address who discovered the violations in greater depth below.
[10] *See Wash. Utils. & Transp. Comm'n v. Qwest Corp.*, Docket UT-140597, Order 03, ¶ 16 (Feb. 22, 2016) (hereinafter "*Qwest I*") ("[a]s bad as the outage was, it could have been much worse. It did not occur during a storm or a natural or man-made disaster, nor are we aware that anyone died or suffered serious bodily harm or property loss as a result of the outage.").
[11] Lumen's Br. at 16-17 ¶¶ 27-28.

6 First, Lumen did not "discover[]" the violations in the relevant sense of the word.[12] Lumen was not looking for them, and Lumen did not independently find them. Lumen instead turned the violations up after Staff asked it to specify how many customers it had disconnected during the moratorium.[13] Lumen, accordingly, did nothing but comb through the data that it had in its exclusive possession at the direction and prompting of Staff. Put otherwise, Staff discovered the violations, with Lumen acting as its proxy.

7 Second, Lumen did not "report[]" the violations, at least not in the way contemplated by the policy statement. As just noted, Lumen produced information (read: admitted to the violations) in response to a data request from Staff, and it was required to do so.[14] The third penalty factor contemplates "self-reporting" in the lay sense, namely public service companies voluntarily disclosing their violations to the Commission in return for less serious punishment.[15] Lumen did nothing of the kind, and thus should receive no leniency.

8 Given those two realities, Lumen cannot square its arguments here with the Commission's past practice. The Commission has never – *never* – treated violations discovered during a Staff review as "self-reported,"[16] and, consequently, has weighed the third factor in favor of a substantial penalty in such cases. That effectuates the purpose of the third factor: the Commission tries to incent companies to discover and report violations on their own so that

[12] Lumen's Br. at 17 ¶ 28.
[13] Feeser, Exh. BF-2; Feeser, Exh. BF-3.
[14] *E.g.*, RCW 80.04.080(4).
[15] Policy Statement at 8 ¶ 15(3).
[16] *E.g.*, *Wash. Utils. & Transp. Comm'n v. Shuttle Express, Inc.*, Docket TC-200151, Order 04, (Nov. 25, 2020) (ALJ Order); *Wash. Utils. & Transp. Comm'n v. Shuttle Express*, Docket TC-120323, Order 03, (Nov. 1, 2013) (ALJ Order).

those violations can either be prevented or quickly remedied. Companies that produce data during a staff investigation do none of those things, and should not receive leniency.[17]

9 Staff and Lumen contest factors six and seven, the number of violations and the number of customers affected, respectively. Lumen acknowledges that "even one inadvertent disconnection or suspension is significant."[18] Yet Lumen also argues that "the real number of violations and customers affected should be viewed relative" to the number of disconnections or suspensions it claims that it successfully prevented.[19] Lumen was correct the first time, not the second, for three reasons, and the Commission should weigh the sixth and seventh factors against it.

10 First, the text of the Enforcement Policy Statement appears to foreclose Lumen's arguments. With regard to the sixth factor, the policy statement provides that "[w]hile numbers alone do not determine appropriate enforcement actions, the more violations the Commission finds, the more likely it is to take an enforcement action."[20] With regard to the seventh factor, it provides "[t]he more customers affected by a violation, the more likely the Commission will take enforcement action."[21] Both thus focus on the absolute numbers involved, with a greater number warranting a heavier penalty.[22] And, indeed, the number of violations at issue here, and the number of customers affected, exceeds what the Commission typically considers a significant number.[23]

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[17] *In re Penalty Assessment Against Frontier Commc'ns Nw., Inc.*, Docket UT-121925, Order 01, (Dec. 18, 2013) (delegated order by Executive Director).
[18] Lumen's Br. at 20 ¶ 35. By quoting that material, Staff does not concede that the suspensions of various Lumen customers during the moratorium were inadvertent.
[19] Lumen's Br. at 21 ¶ 35.
[20] Policy Statement at 9 ¶ 15(6).
[21] Policy Statement at 9 ¶ 15(7).
[22] *See* Policy Statement at 9 ¶ 15(6), (7).
[23] *E.g., in re Investigation of, and Penalty Assessment Against Bigfoot Moving Serv.*, Docket TV-220015, Order 01, (Feb. 25, 2022) (ALJ Order); *In re Investigation of Safe to Go Movers LLC*, Dockets TV-190515 & TV-190514,

11 Second, by Lumen's logic, if it issues a total of ten million bills over the course of a year, and complies with the Commission's billing rules 98 percent of the time,[24] its conduct does not warrant penalties.[25] Left unsaid there is that Lumen would have issued bills that violated the Commission's rules *200,000 times* under those facts. The Commission should not put itself in a position of being forced to label an astronomically large number of violations insignificant, and accepting Lumen's argument is the first step down the path to doing so.

12 Third, to the extent that the Commission wishes to put the number of violations in context, it should consider the first, sixth, and seventh factors together. It has done this in the past.[26] Doing so only makes sense, as a smaller number of more dangerous violations are more worthy of sanction than even a very large number of trivial violations. Here, as explained above, Lumen's disconnection violations also violated a gubernatorial proclamation intended to preserve public health and safety during a state of emergency. In that context, nearly 1,000 violations is an unacceptably large number, warranting a significant penalty.

13 Staff and Lumen also contest the eighth factor, the likelihood of recurrence. The parties' different weighing of the factor stems from a fundamental difference about what the Commission intends the factor to focus on: Lumen treats it as mechanically concerned with the potential for identical, repeat violations;[27] Staff treats the factor as focused on changes to company practices to prevent recurrences of similar violations.[28] Staff's reading of the eighth factor is supported by

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Order 01 (Aug. 12, 201) (ALJ Order); *Wash. Utils. & Transp. Comm'n v. All Staff Transfer*, Docket TV-180236, Order 01 (Nov. 8, 2018) (ALJ Order); *In re Penalty Assessment Against Frontier Commc'ns Nw., Inc.*, Docket UT-121925, Order 01 (Dec. 18, 2013).

[24] *E.g.*, WAC 480-120-161.

[25] *Cf.* Lumen's Br. at 21 ¶ 36 (claiming that Lumen's violations represented two percent of the total number of expected disconnections).

[26] *Wash. Utils. & Transp. Comm'n v. BNSF Ry. Co.*, Docket TR-150284, Order 02 (Dec. 7, 2015) ("The settlement covers 239 serious violations by a very large company that has violated its regulatory obligations in the recent past").

[27] Lumen's Br. at 22-25 ¶¶ 37-45.

[28] Staff's Br. at 9 ¶ 24.

administrative precedent; Lumen's is not. The Commission, accordingly, should weigh the factor against the company.

14 The Commission should, again, begin with the text of its Enforcement Policy Statement. With regard to the eighth factor, the policy statement provides that "[i]f the company has not changed its practices, or if the violations are repeat violations made known to the company in the course of an earlier inspection or investigation, the Commission will be more likely to take enforcement action."[29] The text of the policy statement thus focuses on the changes the company has made to prevent future unlawful conduct.[30] As Staff has explained, Lumen has not offered any credible changes to its practices that will prevent future violations if the company is prohibited from disconnecting customers again.[31] That should weigh against Lumen.

15 Lumen claims to find support for its cramped reading of the eighth factor in the docket-terminating orders in *Washington Utilities & Transportation Commission v. Qwest Corporation*[32] (*Qwest I*) and *Washington Utilities & Transportation Commission v. Qwest Corporation*[33] (*Qwest II*). It misreads both.

16 Lumen cites *Qwest I*, claiming the case supports its contention that with the eighth factor the Commission does not consider hypothetical scenarios involving similar, albeit not identical, violations in assessing the likelihood of recurrence.[34] But *Qwest I* actually supports Staff's application of the eighth factor.

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[29] Policy Statement at 9 ¶ 15(8).
[30] *E.g.*, *compare In re Penalty Assessment Against Local Access LLC*, Docket UT-140897, Order 01 (July 8, 2014) (delegated order by Executive Director) (low likelihood of recurrence because the public service company fired the vendor committing the violations on its behalf) *with Wash. Utils. & Transp. Comm'n v. Ghostruck*, Docket TV-161308, Order 05 (June 1, 2017) (likelihood of recurrence, despite claims that the company had gone out of business, because it did not shut down its website).
[31] Feeser, Exh. BF-4T at 7:1-9.
[32] *See generally Qwest I*.
[33] Docket UT-190209, Order 03 (June 25, 2020) (ALJ Order) (hereinafter "*Qwest II*").
[34] Lumen's Br. at 24 ¶ 44.

17 In *Qwest I*, the Commission set up the analysis of the eighth factor as follows:

> The Commission is more likely to take enforcement action or assess a larger penalty "[i]f the company has not changed its practices, or if the violations are repeat violations made known to the company in the course of an earlier inspection or investigation." Again, a penalty should be set at a level that encourages companies to remedy known problems that result in violations of applicable law, if such encouragement is necessary. Here, CenturyLink has changed, and is changing, its practices and systems to prevent or mitigate 911 outages, both as a result of the Company's independent initiatives and in compliance with the FCC consent decree. We find that CenturyLink requires no additional incentive in the form of a higher penalty to take remedial action.[35]

The Commission then applied that framework, stating:

> We reject the argument that the violations are highly likely to recur because 911 provisioning relies on software that is not infallible. No system is foolproof, whether it depends on computers, people, or a combination of both. Errors will inevitably occur in software coding, for example, both in its development and in its deployment in actual 911 operating systems. What is important for our review is to ensure that CenturyLink has adequate management and oversight systems in place to both reduce the risks of such errors occurring and also to have systems in place to provide awareness of outages and to restore 911 service as rapidly as possible. This applies both to the Company itself and to to any contractor or vendor such as Intrado. In other words, we require regulated companies to implement measures that are reasonable under the circumstances to minimize service disruptions and other violations of Commission requirements.
>
> The record before us demonstrates that the Company has done so here. CenturyLink agreed with the FCC to undertake a multi-sector risk assessment methodology, developed by the National Institute of Standards and Technology, which Mr. Bergmann himself proposes. Based on our staff investigation and detailed review, we conclude that CenturyLink has developed and implemented revised processes consistent with that obligation. Public Counsel offered no evidence to demonstrate that CenturyLink could or should do anything more to ensure, to the best of its ability, that no future 911 outages will occur. Accordingly we find that the Company's actions mitigate the amount of the penalty the Commission should assess.[36]

18 The Commission should focus on what it did and did not say in *Qwest I*. When Public Counsel argued that Lumen could commit similar violations, the Commission did not dismiss

[35] *Qwest I* at 8 ¶ 23.
[36] *Qwest I* at 9 ¶¶ 25-26 (emphasis added).

that argument on the ground that the Commission would not consider scenarios involving similar, but not identical, repeat violations.[37] Instead, the Commission focused on whether penalties were warranted to signal to Qwest the need to put into place "revised processes" for "adequate management and oversight systems," meaning systems designed to prevent and detect violations from occurring."[38] The Commission determined that penalties were unneeded because the company was already putting those systems in place.[39]

19 The situation here differs meaningfully from the one before the Commission in *Qwest I*. Lumen "should"[40] do more to prevent these types of violations in the future because there are any number of situations where the Legislature, the Governor, or the Commission might forbid disconnections again. Some of these concern public health, as did the moratorium underlying these violations.[41] Others concern attempts to implement the Legislature's focus on equity.[42] Lumen's failure to plan for those types of events ensures that, if there is a future prohibition on disconnections, the company is likely to end up before the Commission again. And Lumen "could"[43] do more to detect or prevent future violations. As discussed above, Lumen was not looking for these violations, and nothing indicates that Lumen has modified or put into place systems for detecting unlawful disconnections. Staff investigated the outages and Lumen's response for what even Lumen acknowledges was a significant period of time.[44] At the end of its review, Staff concluded that Lumen's plans were to simply continuing applying the processes

[37] *Qwest I* at 9 ¶¶ 25-26.
[38] *Qwest I* at 9 ¶¶ 25-26.
[39] *Qwest I* at 9 ¶ 26.
[40] *Qwest I* at 9 ¶ 26.
[41] *See* Dan Diamond, "Disease Experts Warn White House of Potential for Omicron-Like Wave of Illness", Washington Post (May 5, 2023), *available at* https://www.washingtonpost.com/health/2023/05/05/covid-forecast-next-two-years (last visited May 8, 2023); *cf.* Laws of 2023, ch. 105, §§ 1-9, RCW 43.006.220(1)(h).
[42] *Cf.* Docket U-210800.
[43] *Qwest I* at 9 ¶ 26.
[44] Lumen's Br. at 18 ¶ 30.

that broke down here.[45] Staff determined those efforts were doomed to fail, as they failed in the first instance.[46] Relying on broken processes cannot constitute "reasonable efforts" under the eighth factor, and Lumen's failure to plan to prevent similar outcomes in similar future situations necessitates a significant penalty.[47]

20 Lumen cites *Qwest II* in support of its contention that the Commission will not impose penalties for violations of a no-longer-applicable substantive requirement. Staff addressed this argument in its opening brief, and will here address only Lumen's claim that *Qwest II* is indistinguishable from the instant facts.

21 Lumen, in making its argument, claims that "[t]he presiding officer in Docket UT-190209 did not contemplate CenturyLink possibly resuming 911 services sometime in the future because that is not a relevant exercise in this factor's analysis."[48] That the ALJ did not consider the potential for Qwest to resume 911 service in *Qwest II* does not mean that the Commission cannot do so here. An opinion does not serve as precedent concerning an argument not addressed by the tribunal,[49] and the Commission did not consider penalties in light of the possibility that Lumen could resume service.[50] *Qwest II* does not control the outcome here, and the Commission *should* consider the potential for similar, future scenarios because, as discussed above, there are many situations that could involve future disconnection prohibitions.

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[45] Feeser, Exh. BF-4T at 7:1-9.
[46] Feeser, Exh. BF-4T at 7:1-9.
[47] *See In re Penalty Assessment Against Petland Cemetery, Inc.*, Docket TG-160177, Penalty Assessment (Feb. 22, 2016) (by ALJ) ("Similar violations were noted in previous compliance reviews. Unless the company makes lasting changes to its safety management controls, these or other similar violations are likely to reoccur.").
[48] Lumen's Br. at 24 ¶ 42.
[49] *State ex rel. Wash. Nav. Co. v. Pierce County*, 184 Wash. 414, 424, 51 P.2d 407 (1935) ("[w]hat was not presented or discussed in a decision was not decided.").
[50] *See generally Qwest II* at 1 ¶ 1 – 16 ¶ 52.

22 Second, and somewhat relatedly, analyzing the eighth factor in light of the need to signal to Lumen that it should address the systemic weaknesses that resulted in violations here comports with what the ALJ *did* say in *Qwest II*. The ALJ there focused on whether Qwest had made reasonable efforts to prevent problems as well as quickly detect and remedy those that did occur.[51] The ALJ ultimately imposed no penalty in that docket after concluding that Qwest had made those efforts. But, as discussed above in connection with *Qwest I*, Staff has determined that Lumen failed to make reasonable efforts to prevent a recurrence of these violations. The Commission should weight the penalty to recognize that fact.

23 Lumen contests weighing the ninth factor against it. The company's compliance history speaks for itself, so Staff notes only that Lumen's argument that the Commission should focus on the lack of nearly identical violations when looking at its compliance history[52] fails based on the plain text of the Enforcement Policy Statement.[53]

24 The company argues that the Commission should weigh the tenth factor, which concerns its compliance program, in its favor, claiming that no penalty is warranted absent Staff or Public Counsel identifying what it should do differently.[54] The Commission should reject that argument.

25 Staff *has* identified what Lumen needs to address. As Staff has explained, Lumen failed to address the system breakdowns in its processes. To prevent future disconnections, Lumen needs to fix those. That should suffice for the ninth factor: Lumen is responsible for the

[51] *See Qwest II* at 12 ¶ 28 ("[c]ompanies must adequately maintain their networks and make all reasonable efforts to provide safe, modern, and efficient service, minimize the risk of disruptions, and quickly detect and remedy any outages. Failure to comply with those requirements results in liability. Meeting those obligations does not."); *id.* at 13 ¶ 29 ("[r]ather, a company is responsible for call failures only to the extent that it has not taken all reasonable measures to prevent, limit, and remedy them.")
[52] Lumen's Br. at 26 ¶ 46 (Lumen "does not believe that Public Counsel has demonstrated that past compliance performance – especially in a context similar to this case – calls for maximum penalties").
[53] Policy Statement at 9 ¶ 15(9) ("The Commission will deal more harshly with companies that have a history of non-compliance, repeated violations of the same or other regulations, and previous penalties.").
[54] Lumen's Br. at 28-30 ¶¶ 51-53.

management of its operations,[55] and thus should make the decision on how best to fix the problems identified by Staff.

26 Further, while Lumen correctly notes that the Commission does not "demand perfection," it does demand that companies do something, and something "reasonable."[56] Lumen offers the Commission here nothing more than the processes that broke down during the COVID-19 pandemic, leading to the violations in the first place. Whatever that plan is, it is not reasonable, and the Commission should weigh the tenth factor accordingly.

III. CONCLUSION

27 The Commission should impose a penalty of $1,000 for each of Lumen's 923 violations, for a total penalty of $923,000.

Respectfully submitted, this 12th day of May, 2023.

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[55] *Cf. Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-150204 & UG-150205, Order 05 (Jan. 6, 2016).
[56] Lumen's Br. at 29 ¶ 52.