

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

CENTURYLINK COMMUNICATIONS LCC
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 PUBLIC COUNSEL

May 12, 2023

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I. PUBLIC COUNSEL CONTINUES TO REQUEST MAXIMUM PENALTIES

1. The Washington Utilities and Transportation Commission (Commission), having previously determined liability in this matter,¹ should impose the maximum statutory penalty of \$923,000 on CenturyLink Communications, LLC d/b/a Lumen Technologies Group, Qwest Corporation, CenturyTel of Inter Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest (collectively, Lumen or Company) for 923 violations of WAC 480-120-172(3)(a).

2. In this Reply Brief, the Public Counsel Unit of the Washington Attorney General's Office (Public Counsel) will not repeat arguments from our Opening Brief,² unless necessary, to avoid undue duplication. Public Counsel's Opening Brief is incorporated herein with this reference. Public Counsel responds to the Opening Brief filed by Lumen.

II. THE COMMISSION SHOULD FIND LUMEN'S ARGUMENTS UNPERSUASIVE

3. As each party recognizes, the Commission's Enforcement Policy established 11 non-exclusive factors the Commission will consider in determining the level of penalty to be imposed.³ Those factors are (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) whether the company promptly corrected the violations and remedied the impacts; (6) the number of violations; (7) the number of customers impacted; (8) the likelihood of recurrence; (9) the company's past performance regarding

¹ *Wash. Utils. & Transp. Comm'n v. CenturyLink*, Docket UT-210902, Order 03 (July 29, 2022).

² Public Counsel Opening Brief.

³ *In re Enf't Pol'y of the Wash. Utils. & Transp. Comm'n*, Docket A-120061, ¶ 15 (Jan 7, 2013) (hereinafter Enforcement Policy).

compliance, violations, and penalties; (10) the company’s existing compliance program; and (11) the size of the company. The Commission evaluates each case on a case-by-case basis, and no one factor is determinative.⁴ Rather, the Commission considers the facts and circumstances of each case. The Commission considers whether each factor is an aggravating factor or a mitigating factor to inform the appropriate regulatory reaction to a company’s violations.⁵

4. Lumen confuses and misconstrues Public Counsel’s and Staff’s arguments in this case. Lumen characterizes the arguments as “[proceeding] throughout this case as if the Commission has already assessed and ordered the maximum penalty” and that the “only issue remaining is whether to mitigate down from that assessed penalty.”⁶ This characterization is incorrect. As stated by both Public Counsel and Staff, the only remaining issue in this case is determining the appropriate penalty for Lumen’s violations.⁷ Lumen asks that the Commission not impose the statutory maximum and that the Commission set no penalty or an insignificant penalty. In contrast, Public Counsel and Staff advocate for maximum penalties. Put another way, Lumen seeks leniency and mitigation, while Public Counsel and Staff urge accountability.

A. Lumen’s Analysis of the Commission’s Enforcement Policy Factors is Flawed.

5. Lumen asserts that the enforcement factors support no or minimal penalties. However, the opposite is true under the facts and circumstances of this case.

⁴ *Id.* ¶¶ 4, 21.

⁵ See *Wash. Utils. & Transp. Comm’n v. Qwest Corp.*, Docket UT-140597, Order 03: Final Order Approving Settlement Agreement (Feb. 22, 2016).

⁶ CenturyLink’s Opening Brief ¶¶ 15–16.

⁷ Public Counsel Opening Brief ¶ 1; Commission Staff Initial Brief ¶ 2.

1. Lumen downplays the seriousness and harmfulness of the penalties.

6. Lumen states that it deeply regrets that customers were “mistakenly disconnected” while the Governor’s Proclamation was in place.⁸ The Company continues to assert that because it disconnected “only a very small percentage of the company’s Washington customers,” the Commission should approach the violations with leniency.⁹ The Company also avers that the Commission should “note the lack of public response/comment” regarding Lumen’s unlawful actions.¹⁰ The public does not always comment on violations, even when they are serious and harmful. These particular violations occurred when Washingtonians were heavily burdened with a myriad of considerations during the COVID-19 pandemic. Lack of public comment should not be interpreted to indicate a lack of impact.

7. In responding to whether the violations were serious and harmful, Lumen sidesteps the issue and addresses intent and the size and scope of violations instead. Lumen does not address whether the violations were serious and harmful, except to recognize that any improper disconnection “is important and problematic.”¹¹

8. Lumen is correct that unauthorized disconnections are generally important and problematic. The disconnections and suspensions in this case were done during the global COVID-19 pandemic, during a time when telecommunication services offered by the Company were identified as essential services necessary to preserve public health and welfare. These violations occurred despite the Company assuring the Commission and the public that it would

⁸ CenturyLink Opening Brief ¶ 18.

⁹ *Id.*

¹⁰ *Id.* ¶ 19.

¹¹ *Id.* ¶ 18.

comply with the Governor’s proclamation. The pandemic makes these violations even more serious and harmful. When violations are both serious and harmful to the public, the Commission is more likely to find penalties appropriate.¹² Public Counsel continues to advocate that this factor weighs heavily in favor of maximum penalties.

2. Lumen attempts to frame its intentional actions as unintentional.

9. Lumen argues that “there is no doubt that [Lumen] intended to comply with the Proclamation.”¹³ Public Counsel argues that Lumen’s actions indicate a clear desire to disconnect for nonpayment during the pandemic, and the Company purposefully tested the bounds of the Proclamation.¹⁴

10. Lumen states that it received no technical assistance from Staff with respect to compliance with the Proclamation.¹⁵ There is no evidence in the record reflecting whether Staff provided technical assistance. Further, there is no evidence in the record that Lumen sought technical assistance. Rather, the evidence demonstrates Lumen’s assurances to the Commission that it would comply with the Proclamation and Lumen’s evaluation of what activities were and were not covered by the Proclamation.¹⁶ Public Counsel continues to advocate that this factor weighs heavily in favor of imposing maximum penalties.

¹² Enforcement Policy ¶ 15, subpart 1.

¹³ CenturyLink Opening Brief ¶ 20.

¹⁴ Public Counsel Opening Brief ¶¶ 15–17; Cross Answering Testimony of Corey J. Dahl, Exh. CJD-3T at 5:16–6:3.

¹⁵ CenturyLink Opening Brief ¶ 24.

¹⁶ Public Counsel Opening Brief ¶¶ 15–17.

3. Lumen incorrectly argues that Public Counsel, a statutory party in this matter, may not address self-reporting and cooperation.

11. Lumen argues that because Public Counsel was not the investigating party, it may not address whether Lumen self-reported violations or sufficiently cooperated with Staff's investigation.¹⁷ The Commission holds the authority to compel companies to provide it information outside of adjudication.¹⁸ Public Counsel does not have the same investigatory powers. The complaint in this case is based on the Staff Investigation Report, which presents a summary of Staff's investigation, the evidence relied upon, and Staff's conclusions. The Investigation Report is part of the record.

12. Public Counsel is a statutory party in Commission proceedings.¹⁹ While Public Counsel was not the investigator, we have full party status and may present evidence and argument to the Commission on all issues, including whether Lumen self-reported violations or sufficiently cooperated with Staff's investigation.

a. Lumen concedes that it did not self-report the violations.

13. While Lumen concedes that it did not self-report the violations, it attempts to justify the lack of self-reporting by stating that it was unaware of the violations until Staff inquired.²⁰ This argument is nonsensical, given that regulated companies are required to have compliance programs to detect, report, and correct violations. Public Counsel continues to argue that this factor is an aggravating, not mitigating, factor.

¹⁷ CenturyLink Opening Brief ¶¶ 28–31.

¹⁸ RCW 80.04.070.

¹⁹ RCW 80.01.100, RCW 80.04.510, and RCW 81.04.500.

²⁰ CenturyLink Opening Brief ¶ 28.

b. Lumen may have sufficiently cooperated, but this factor does not singularly mitigate the need for maximum penalties.

14. Commission Staff notes that “the company was reasonably cooperative and responsive during the investigation.”²¹ Public Counsel expressed concern regarding Lumen’s cooperation based on our reading of Attachments C and D to the Staff Investigation Report.²² Attachments C and D presents the only evidence of the informal data requests from Staff and Lumen’s responses and shows requests dated July 21, 2021, and responses dated October 12, 2021. There was no evidence of further requests or responses between July and October 2021. Additionally, Lumen provided late responses to Staff data requests, which also caused Public Counsel concern with respect to Lumen’s cooperation.²³ Even if Lumen was reasonably cooperative, this factor should not weigh heavily nor exclusively in favor of Lumen as regulated companies are required and expected to cooperate.

4. Lumen’s efforts to correct violations were incomplete and insufficient.

15. Lumen argues that it corrected the violations, that Staff concedes that this factor weighs in favor of Lumen, and that “Public Counsel was not content with [Lumen’s] efforts to reconnect customers.”²⁴ Lumen further argues that it could not have proactively reconnected customers because doing so would have been illegal slamming.²⁵

²¹ Commission Staff Initial Brief ¶ 19.

²² Direct Testimony of Corey J. Dahl, Exh. CJD-Tr at 17:13–18:5.

²³ *Id.* at 18:2–3.

²⁴ CenturyLink Opening Brief ¶¶ 32–33.

²⁵ *Id.*

16. Of Lumen’s 923 violations, 743 were associated with customers who Lumen discontinued service through its suspension process. The remaining 180 violations were associated with customers Lumen discontinued service through its disconnection process.
17. Staff witness Brigit Feeser testified that Staff was unaware of Lumen correcting the disconnections and suspensions, suggesting that Staff is not completely satisfied that Lumen promptly addressed the violations.²⁶ As discussed in Public Counsel’s Opening Brief, Lumen utterly failed to address the 743 customers who had been suspended, leaving unmitigated the harm from these violations.²⁷ Additionally, Lumen’s outreach to disconnected customers was inadequate, largely unsuccessful, and occurred only after Staff uncovered the violations.²⁸
18. Public Counsel engaged in discovery on the outreach efforts and presented evidence to the Commission through its witness, Corey Dahl.²⁹ Public Counsel asked Lumen to describe the communications and outreach process to reach affected customers. Lumen responded that it “sent a total of 535 letters to the residential customers in Washington who had been disconnected.”³⁰ As noted in Public Counsel’s Opening Brief, the discrepancy in the number of letters and the number of impacted customers is not explained. While only 180 disconnections are subject to this complaint, Lumen disconnected a total of 423 customers during the moratorium and suspended a total of 743 customers.³¹ Lumen sent 535 letters.

²⁶ Direct Testimony of Bridgit Feeser, Exh. BF-1T, at 6:12–13; Dahl, Exh. CJD-1Tr at 18:6–8.

²⁷ Public Counsel Opening Brief ¶ 20.

²⁸ *Id.* ¶¶ 21–24.

²⁹ Dahl, Exh. CJD-3T at 9:6–10:12; Dahl, Exh. CJD-6 (CenturyLink Response to Public Counsel Data Request No. 3, Attachment PC-3).

³⁰ Dahl, Exh. CJD-6 at 1.

³¹ Dahl, Exh. CJD-1Tr at 5:13–14; Dahl, Exh. CJD-3T at 9:12–35; Public Counsel Opening Brief at 10, n.51.

19. Of those 535 letters, only 10 to 15 percent of customers contacted reconnected service. This means 53 to 80 customers reconnected service.³² This represents approximately six to nine percent of affected customers being reconnected.³³ The vast majority of violations remained uncorrected.
20. Conducting better, more effective outreach with less onerous requirements for customer action would not have resulted in slamming. The Federal Communications Commission’s (FCC) slamming rules protect customers from being switched to a different service or carrier without permission.³⁴ If a carrier unlawfully changes a customer’s service and collects charges from that customer, the carrier is liable “to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber.”³⁵ Here, Lumen unlawfully and involuntarily discontinued customer service for nonpayment. The customers did not choose or request to be disconnected. Had Lumen restored service to these customers—i.e., reversed the unlawful action—it would have restored services the customers had in place prior to the unlawful disconnection. The carrier previously selected by the subscriber would have been Lumen. Lumen would have not switched customers to a different service or provider without the customers’ permission.
21. Instead, as described in Public Counsel’s Opening Brief, Lumen sent an ambiguous letter to some of the customers it harmed by discontinuing service unlawfully. The letter provided no explanation for discontinuation of service and that suggested to customers that Lumen was

³² $535 \times 10\% = 53.50$; $535 \times 15\% = 80.25$.

³³ 53 is 5.74% of 923; 80 is 8.66% of 923.

³⁴ See 47 U.S. Code § 258.

³⁵ 47 U.S. Code § 258(b).

simply trying to “win them back.” Lumen neither adequately nor promptly remedied its 923 violations, and Public Counsel continues to advocate that this factor weighs strongly in favor of maximum penalties.

5. Lumen continues to argue that 923 violations is small, distorting the impact of Lumen’s violations.

22. While Lumen asserts that Public Counsel and Staff fail to provide context or reference for the number of violations,³⁶ Public Counsel’s witness Corey Dahl expressly testified about the impact of Lumen’s violations. In particular, Dahl testified, “Each violation represents a customer who was deprived of essential services during the COVID-19 pandemic, in direct violation of the Governor’s Proclamation.”³⁷ For comparison, Roy, Washington, located in Pierce County, has a population of 910. Public Counsel also provides additional context in our Opening Brief.³⁸ The number of violations and the number of customers impacted are significant. They are material, especially in light of the pandemic during which these violations occurred. Public Counsel continues to advocate that this factor weighs heavily in favor of imposing maximum penalties.

6. Lumen unreasonably argues that the likelihood of recurrence is zero.

23. In its Opening Brief, Lumen argues that the likelihood of recurrence is zero. Lumen reasons that the violations occurred because it “involuntarily discontinued service to customers when it temporarily had no authority to do so,” but that its “authority to discontinue service was restored.”³⁹ This view is too narrow.

³⁶ CenturyLink Opening Brief ¶ 35.

³⁷ Dahl, Exh. CJD-1Tr at 19:1–3.

³⁸ Public Counsel Opening Brief ¶¶ 25–27.

³⁹ CenturyLink Opening Brief ¶ 37.

24. As Public Counsel argues in our Opening Brief, the recurrence at issue is whether Lumen can meet its regulatory obligations under changing circumstances.⁴⁰ The Commission should not have confidence that Lumen will be able to do so based on the evidence in this record. Public Counsel continues to argue that this factor weighs in favor of imposing the maximum penalty.

7. Lumen’s past performance clearly supports a strong regulatory response in this case.

25. Lumen characterizes Public Counsel’s listing of its compliance dockets as “an attempt to tarnish [Lumen’s] past compliance performance.”⁴¹ Lumen’s past compliance history speaks for itself and illustrates that a strong regulatory response to the current violations is warranted.⁴²

8. Lumen concedes that it does not maintain a compliance program, but argues incorrectly that it does not need one.

26. Lumen accuses Public Counsel of applying a strict liability standard, pointing out that Public Counsel characterized the Company’s efforts to prevent suspensions and disconnections as clearly inadequate.⁴³ Nowhere does Public Counsel argue that strict liability is the standard in this case. However, Public Counsel explains why Lumen is mistaken in its belief that compliance programs are only necessary after violations occur to prevent future similar violations and shows why that mistaken belief is unreasonable.⁴⁴ Public Counsel also provides evidence of how Lumen approaches its regulatory responsibilities and explains why it is inadequately tracking regulatory requirements.⁴⁵

⁴⁰ Public Counsel Opening Brief ¶¶ 28–31.

⁴¹ CenturyLink Opening Brief ¶ 46.

⁴² Public Counsel Opening Brief ¶¶ 32–33; Dahl, Exh. CJD-1Tr at 20:11–12.

⁴³ CenturyLink Opening Brief ¶ 48.

⁴⁴ Public Counsel Opening Brief ¶ 34.

⁴⁵ *Id.* ¶¶ 35–37.

27. Lumen complains that Public Counsel did not recognize the efforts it took to avoid disconnections. Lumen further complains that Public Counsel did not explain what it could have done differently. Neither criticism is accurate or meaningful. Public Counsel acknowledged that Lumen’s witness testified that numerous potential disconnections were avoided.⁴⁶ When asked in discovery to provide workpapers or additional analysis to support the Company’s projections, Lumen was unable to provide any.⁴⁷ Because Lumen’s projections are unverifiable, they should be rejected.⁴⁸ With respect to what the Company could have done differently, it could have had a meaningful, robust compliance plan that was focused on Washington.⁴⁹

28. As Lumen recognizes, even one unlawful disconnection would be bad.⁵⁰ However, the Commission should impose maximum penalties to address not only Lumen’s unlawful behavior, but also Lumen’s lackadaisical approach to regulatory compliance, which led to nearly 1,000 customers being disconnected during the pandemic. This factor in particular highlights Lumen’s overall approach to its regulatory compliance, and Public Counsel continues to argue that it weighs heavily in favor of maximum penalties.

9. Lumen’s argument that it is complex to operate in many jurisdictions is irrelevant.

29. Lumen argues that operating in 36 states with changing pandemic rules and regulations was a “complex undertaking.”⁵¹ Lumen is required, just as every other multijurisdictional regulated company, to comply with the requirements specific to Washington State. It is

⁴⁶ Dahl, Exh. CJD-3T at 6:14–17.

⁴⁷ Dahl, Exh. CJD-3T at 7:1–5. Public Counsel Opening Brief ¶ 26.

⁴⁸ Dahl, Exh. CJD-3T at 7:3–5.

⁴⁹ Public Counsel Opening Brief ¶¶ 7–11 and ¶¶ 34–37.

⁵⁰ CenturyLink Opening Brief ¶¶ 18, 35, 36.

⁵¹ *Id.* ¶ 54.

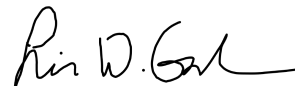
undoubtedly complex to track requirements across multiple states; however, Lumen chose to operate in many jurisdictions and is responsible for meeting all regulatory requirements imposed on it. Moreover, Lumen is not a new company in Washington. Rather, it is a large company that has decades of regulatory experience in Washington and elsewhere. This factor continues to weigh in favor of imposing a penalty of \$923,000.

III. CONCLUSION

30. The purpose of Governor Inslee's disconnection moratorium was to keep people connected to vital and essential services, including telecommunication services, during a time of unprecedented crisis. Lumen denied access to these essential services to 923 households. As shown in Public Counsel's testimony, exhibits, Opening Brief, and this Reply Brief, the Commission should impose the maximum statutory penalty of \$923,000.

DATED this 12th day of May, 2023.

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