

**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

PUBLIC COUNSEL
RESPONSE IN OPPOSITION OF
LUMEN PETITION FOR
ADMINISTRATIVE REVIEW

I. INTRODUCTION

1. Pursuant to WAC 480-07-825(2)(c), the Public Counsel Unit of the Washington Attorney General's Office files this response to the Petition for Administrative review filed by CenturyLink Communications, LLC d/b/a Lumen Technologies Group, Qwest Corporation, CenturyTel of Washington, Inc., CenturyTel of Inter Island, Inc., CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest (collectively "Lumen").
2. Public Counsel opposes Lumen's Petition for Administrative Review. Public Counsel strongly recommends that the Utilities and Transportation Commission (Commission) deny the Petition and adopt the Initial Order Imposing \$923,000 Penalty, Order 04 (Initial Order).

II. LUMEN’S CLAIMS THAT THE ADMINISTRATIVE LAW JUDGE ERRED IN THE INITIAL ORDER ARE WITHOUT MERIT

3. The Commission may enter a final order that adopts, modifies, or rejects an initial order in response to a party’s petition for administrative review.¹ Lumen has not established that the Administrative Law Judge erred in the Initial Order, and the Commission should adopt the Initial Order without modification.
4. Lumen acknowledges that the Commission has “broad discretion” in determining the appropriate penalty in a complaint case.² Lumen further acknowledges that there is no strict formula for assessing the appropriate penalty, decisions must be based on substantial evidence, and decisions must be consistent with the law.³ Lumen proceeds to find fault with the Initial Order, complaining that “yet no leniency was given.”⁴ Whether to provide leniency or whether to impose penalties for violations — and at what level — are well within the Commission’s discretion. The Administrative Law Judge appropriately considered the evidence in this case and weighed each of the enforcement factors.
5. Liability was determined in a previous order.⁵ Order 03 determined that Lumen lacked authority to suspend or disconnect customers between March 23, 2020 and September 30, 2021, and that Lumen’s suspension or disconnection of 923 residential customers during that time

¹ WAC 480-07-825(6).

² Lumen Petition for Administrative Review, ¶ 5 (filed Jul. 19, 2023).

³ *Id.*

⁴ *Id.*

⁵ *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC*, Docket UT-210902, Order 03, Initial Order Granting Staff Motion for Partial Summary Determination; Denying Lumen Cross-Motion for Summary Determination; Denying Motion to Strike; Declining to Expand Scope of Proceeding or Issue Advisory Opinion on Jurisdiction (July 29, 2022) (hereinafter “Order 03”). Order 03 was an initial order and became a final order by operation of law. WAC 480-07-825(1).

period violated WAC 480-120-172(3)(a).⁶ Lumen did not challenge Order 03. As a result, the number of violations and culpability were both established. The only issue left to be decided in Order 04 was the level of penalty appropriate to address the violations.⁷

6. Determining the level of penalties is squarely within the Commission’s discretion. Commission decisions must be based on substantial evidence. Substantial evidence is “evidence that is sufficient to persuade a fair-minded person of their truth.”⁸ In this case, there was ample evidence that Lumen should be subject to a substantial penalty. Moreover, the Administrative Law Judge carefully evaluated the 11 enforcement factors in light of the evidence presented by all parties.

A. Lumen Presents an Incomplete View of the Initial Order.

7. Lumen bases its Petition for Administrative Review on cherry picked statements in the Initial Order that are favorable to the Company. That the Initial Order contains findings that are both favorable and unfavorable to the Company illustrates the thorough, careful nature of the Administrative Law Judge’s decision presented in the Initial Order. Lumen’s arguments neither accurately portray the analysis, nor does it adequately address the findings that leaned heavily in support of imposing a strong penalty.

8. For example, Lumen takes issue with how the Initial Order weighed Factor Two, addressing whether a company’s violation is intentional. While Lumen points out that the Initial Order finds that Lumen’s actions were not intentional, the Company ignores that the Initial Order

⁶ Order 03, ¶¶ 31–32.

⁷ *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC*, Docket UT-210902, Order 04, Initial Order Imposing \$923,000 Penalty, ¶ 4 (June 29, 2023) (hereinafter “Order 04”).

⁸ *PacifiCorp v. Wash. Utils. & Transp. Comm’n*, 194 Wn. App. 571, 609, 376 P.3d 389, 408 (2016).

found that Lumen’s “clear priority was to resume disconnections and suspensions to the full extent it was permitted by laws and to interpret the Proclamation as narrowly as possible.”⁹

Evidence in the record support this finding, including the testimony of Corey Dahl for Public Counsel, the Staff Investigation Report, and the testimony of Peter Gose for Lumen.¹⁰ The Initial Order appropriately exercised discretion in weighing Factor Two.

9. Lumen merely complains that the Initial Order did not provide leniency with respect to its finding that the Company was sufficiently cooperative in evaluating Factor Four. Since the factors are not equally weighted and no one factor is conclusive,¹¹ absolute leniency is not required when any specific factor weighs in favor of leniency. On balance, the Initial Order demonstrates that the evidence and analysis supports the conclusion that Lumen should receive a stiff penalty in this case.

10. Lumen complains that the Administrative Law Judge weighed Factor Five, whether the Company corrected the violations, in favor of maximum penalties.¹² Lumen indicates that the decision should have been made in line with Staff’s position on Factor Five, pointing to the Investigation Report, testimony of Bridget Feeser, and Staff’s Opening Brief.¹³ In all, or nearly all, Commission orders, the Commission includes a footnote explaining regulatory staff’s role stating,

In formal proceedings such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure

⁹ Order 04, ¶ 15.

¹⁰ See Opening Brief of Public Counsel, ¶¶ 15–17 (filed Apr. 21, 2023); Reply Brief of Public Counsel, ¶¶ 9–10 (filed May 12, 2023).

¹¹ *In re: the Enforcement Policy of the Washington Utilities and Transportation Commission*, Docket A-120061, *Enf’t Pol’y*, ¶ 15 (Jan. 7, 2013) (hereinafter “*Enf’t Pol’y*”).

¹² Lumen Petition for Administrative Review, ¶¶ 20–24.

¹³ Lumen Petition for Administrative Review, ¶ 21.

fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of this proceeding with regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.¹⁴

11. Staff is a party that carries a significant amount of credibility with the Commission, but it functions as any other party in Commission proceedings. The Commission has both accepted and rejected Staff arguments and advocacy across the many cases that come before it.
12. On Factor Five in particular, Public Counsel witness Corey Dahl presented testimony and evidence refuting Lumen's claim that it corrected and remedied the violations.¹⁵ That evidence included the numbers of customers contacted, the number of customers reconnected, and the number of customers impacted overall.¹⁶ Dahl's testimony included criticisms regarding the paltry numbers reached, and Public Counsel argued that Lumen's efforts were inadequate.¹⁷
13. The Administrative Law Judge took issue with all of the parties' focus on Lumen's actions or inactions, pointing out that whether Lumen actually remedied the impacts was an important focus for this factor.¹⁸ The Administrative Law Judge's analysis centered the experience of the customer. In doing so, the Administrative Law Judge did not ignore the evidence, but rather drew upon the evidence in making the ruling. "For 85-90 percent of the affected customers, no correction or remedy for the violations was actually provided, and for the minority that accepted Lumen's offer, the impact of the time they were without service remains unaddressed."¹⁹ The Initial Order appropriately addressed Factor Five.

¹⁴ Order 03, at 1, n.1.

¹⁵ *See* Public Counsel Opening Brief, ¶¶ 20–24; Public Counsel Reply Brief, ¶¶ 15–21.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Order 04, ¶ 23.

¹⁹ *Id.*

14. In addressing Factor Eight, likelihood of recurrence, Lumen highlights that the Commission values compliance when issuing penalties. Lumen grouses that the Initial Order states that hypothetical situations cannot serve as the basis for strict penalties.²⁰ However, Lumen fails to acknowledge that the Initial Order *weighed* Lumen’s lack of change in its practices, and the resulting skepticism that Lumen would perform any better in a future situation, with the determination that the violations were “first time violations.”²¹ The exercise in weighing the evidence and conclusions is an appropriate exercise of discretion.

15. Lumen mischaracterizes the Initial Order’s analysis of Factor Nine on past performance.²² As Lumen quotes, the Initial Order clearly states, “We agree with Staff and Public Counsel that Lumen’s history of compliance violations weighs against the Company.”²³ The Initial Order weighed Lumen’s lengthy compliance history against the particular circumstances of this case, and exercised its discretion to give this factor less weight, even though it argued against leniency.²⁴ The Initial Order was not cavalier in its evaluation of Factor Nine, as Lumen portrays.

16. Lumen is similarly misleading with respect to Factor Ten addressing compliance programs.²⁵ Lumen largely ignores the balancing conducted in the Initial Order. The Initial Order considered that the Proclamation has expired, but that the Company also failed to have a system in place to check for compliance while the Proclamation was in place.²⁶ Additionally, the Initial

²⁰ Lumen Petition for Administrative Review, ¶¶ 9–11.

²¹ Lumen Petition for Administrative Review, ¶¶ 9–12; Order 04, ¶¶ 30–31.

²² Lumen Petition for Administrative Review, ¶¶ 13–14.

²³ Order 04, ¶ 33.

²⁴ *Id.*

²⁵ Lumen Petition for Administrative Review, ¶ 15.

²⁶ Order 04, ¶ 35.

Order agreed with Public Counsel that “a proper compliance program is a preventative one.”²⁷ The Initial Order expressed skepticism that Lumen did not appear “to accept responsibility for implementing a program that allowed for the possibility of such human error without any compliance program in place.”²⁸ Despite this skepticism, the Initial Order agreed with Lumen that the factor “carried little weight on the issue of penalty in this case.”²⁹ That is because the Initial Order accepted Lumen’s testimony that it had learned lessons and would perform better in a future scenario.³⁰ The Initial Order demonstrates that the Administrative Law Judge considered the evidence and arguments by the parties in making his determination.

17. Lumen attempts to manufacture an inconsistency within the Initial Order between Paragraphs 30 and 36. In Paragraph 30, the Initial Order discusses the potential for recurrence and notes that any future illegal disconnections would be a repeat violation of Commission rule. Paragraph 30 also notes that Lumen has not changed its practices, and there is no evidence that Lumen has made significant improvements. In Paragraph 36, the Initial Order gives the Company the benefit of the doubt and believes Lumen witness Peter Gose’s testimony that Lumen has learned from its mistakes. In accepting Gose’s testimony, the Initial Order expressed some trepidation, as indicated by its wording. “We also find Gose’s testimony credible and accept *for now* Lumen’s assertion that it has learned from its mistakes.”³¹ These paragraphs are consistent in that the Administrative Law Judge viewed Gose as credible, but also harbors some

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Order 04, ¶ 36 (emphasis added).

concern about Lumen’s practices. That Gose’s credibility did not result in leniency is not error, but rather indicative of how the Administrative Law Judge weighed the evidence.

B. Lumen Does Not Challenge Factors Weighing Heavily in Favor of Imposing Maximum Penalties.

18. Lumen does not refute the Initial Order’s analysis of Factor One on the serious nature of the violations, Factor Three on whether the Company self-reported the violations, Factors Six and Seven on the number of violations and number of customers impacted, and Factor 11 on the size of the Company. Each of these factors weighed heavily for maximum penalties and eclipsed any application of leniency. The fact that customers were denied access to service during a time when such service was deemed essential, and access was critical to protecting public health and well-being makes these violations even more serious and harmful than an “ordinary” unlawful disconnection.³² Lumen wholly ignores the context of its violations.

19. The Initial Order consistently centered the customer experience in the analysis. Lumen argued that the Commission should consider the numbers of customers that were not disconnected, but the Administrative Law Judge reasoned that it was the predicament of the customer who *were* disconnected that was the focus.³³ “When the Commission evaluates the number of violations, it considers the absolute number, not the greater potential for unrealized harm.”³⁴

20. With respect to Factor Three, the Initial Order states, “The Company did not spontaneously perform an internal compliance check or routinely confirm the legality of the

³² See Order 04, ¶ 11.

³³ Order 04, ¶¶ 12, 26–28.

³⁴ Order 04, ¶ 26.

disconnections it had performed during the time the Proclamation was in effect. Staff asked the questions and Lumen responded.”³⁵ The Administrative Law Judge noted that unprompted self-reporting was completed when considering whether a company self-reported a violation.³⁶ Despite Lumen’s arguments that it self-reported the violations, the Administrative Law Judge appropriately found that the Company did not.

III. THE INITIAL ORDER WAS CORRECT TO DENY SUSPENSION OF PENALTY

21. Lumen continues to absurdly argue for suspended penalties. Suspended penalties is a tool that can be used in appropriate cases to encourage and achieve compliance. Suspended penalties are not required, guaranteed, or appropriate in all cases. Here, Lumen argues that recurrence is all but impossible, yet it urges the Commission to suspend penalties to encourage future compliance.

22. Lumen argues that the Initial Order erred in noting that the Company would “escape a penalty entirely,” stating that the Initial Order missed a cornerstone of the Commission’s enforcement policy.³⁷ Lumen misrepresents the Initial Order. The Initial Order stated, “Because the Proclamation is no longer in effect, the ultimate result that Lumen undoubtedly foresees would be to escape a penalty entirely *without any active compliance or effort on the part of the Company*.”³⁸ The Initial Order was not focused on escaping penalty, but rather on the lack of compliance effort needed to avoid the suspended penalty. In essence, a suspended penalty in this case would not have the utility it usually has in garnering compliance. The Initial Order did not

³⁵ Order 04, ¶ 18.

³⁶ Order 04, ¶ 19.

³⁷ Lumen Petition for Administrative Review, ¶ 30.

³⁸ Order 04, ¶ 40 (emphasis added).

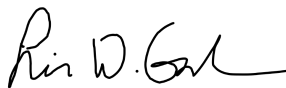
err with respect to whether to suspend Lumen’s penalties. Rather, the Initial Order evaluates the facts and circumstances of this case and presents a justified, reasoned, and rational result.

IV. CONCLUSION

23. The Administrative Law Judge carefully weighed the evidence before the Commission in this case and diligently considered the 11 non-exclusive enforcement factors. The Initial Order is supported by substantial evidence and complies with all relevant law. In developing its enforcement policy statement, the Commission explicitly reserved its discretion to apply enforcement actions on a case-by-case basis. “If circumstances exist that influence the Commission to take more lenient, or more severe, action than described within this policy, the Commission will do so without limiting itself to the confines of the stated policy.”³⁹ This case presents a very serious matter and the Initial Order is in line with both the Commission’s Enforcement Policy and the specific circumstances presented. The Commission should reject Lumen’s Petition for Administrative Review and adopt the Initial Order imposing \$923,000 in penalties without modification.

DATED this 31st day of July 2022.

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/s/ 

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³⁹ Enft Pol’y, ¶ 21.
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