

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

**COMMISSION STAFF'S RESPONSE TO
LUMEN'S PETITION FOR ADMINISTRATIVE
REVIEW**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 1

III. ARGUMENT 5

 A. The Commission should affirm the penalty imposed because the ALJ based his penalty factor determinations on the record evidence and he weighed the factors appropriately 6

 1. The penalty factors to which Lumen assigns no errors justify the maximum penalty, regardless of the Commission’s disposition of the arguments it makes on the other factors..... 6

 2. The ALJ properly weighed Lumen’s lack of intentional conduct against its uncontested negligence and determined factor two should be weighed neutrally 8

 3. The ALJ had the discretion to weigh factor four and the other penalty factors according to the circumstances 10

 4. The ALJ properly determined that Lumen failed to take all reasonable steps to correct its violations and could not remedy the effects of those violations and weighed factor five against it..... 12

 5. The ALJ properly weighed Lumen’s failure to make changes to its practices against the sunseting of the proclamation and determined that factor eight should be accorded neutral weight 15

 6. The ALJ properly weighed Lumen’s compliance history against the nature of the violations and accorded factor nine neutral weight..... 17

 7. The ALJ reasonably accorded Lumen’s compliance program little weight given that the program broke down here 18

 B. The Commission Should Affirm the ALJ’s Refusal to Suspend a Portion of the Penalty 21

IV. CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases

City of Vancouver v. Pub. Emp't Relations Comm'n,
180 Wn.2d 333, 325 P.3d 213 (2014)..... 20

In re Discipline of Simmons,
59 Wn.2d 689, 369 P.2d 947 (1962)..... 6

Int'l Union of Operating Engineers, Local 286 v. Port of Seattle,
176 Wn.2d 712, 295 P.3d 736 (2013)..... 6

PacifiCorp v. Wash. Utils. & Transp. Comm'n,
194 Wn. App. 571, 376 P.3d 389 (2016)..... 11

Paterson v. Paterson,
70 Wn.2d 204, 422 P.2d 474 (1967)..... 11

State v. Stuttard,
151 Wash. 694, 277 P. 83 (1929)..... 6

State v. Williams,
137 Wn.2d 746, 975 P.2d 963 (1999)..... 20

Statutes

RCW 34.05.455 13

RCW 80.04.010(23)..... 10

RCW 80.04.010(28)..... 14

RCW 81.04.010(11), (16)..... 10

RCW 9A.08.010..... 8

Regulations

WAC 480-100-358, -373 10

WAC 480-110-365..... 10

WAC 480-120-172..... 8

WAC 480-120-172(3)..... 1

WAC 480-120-172(3)(a) 2

WAC 480-120-402..... 10

WAC 480-15-560, -570 10

WAC 480-30-221, -222, -226..... 10

WAC 480-31-100, -120, -130..... 10

WAC 480-51-075..... 10

WAC 480-60-035, -040, -050, -060, -080 10

WAC 480-62-200, -205, -210, -225, -230, -235, -255, -278, -281, -290.....	10
WAC 480-66-200 to -480	10
WAC 480-70-201.....	10
WAC 480-75-100 to -660	10
WAC 480-93-015 to -250	10

Other Authorities

1 Senate Journal, 47th Leg., Reg. Sess., at 635 (Wash. 1981).....	8
Black’s Law Dictionary (11th ed. 2019).....	8
<i>In re Determining the Proper Carrier Classification of and Complaint for Penalties Against Boubacar Zida, Docket TV-091498, Order 05 (Aug. 30, 2010)</i>	12
<i>In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Dolly, Inc., Docket TV-171212, Order 04 (May 18, 2018).....</i>	7
<i>In re Determining the Proper Carrier Classification of, and Complaint for Penalties Against Ghostruck, Inc., Docket TV-161308, Order 05 (May 31, 2017).....</i>	8, 13
<i>In re Penalty Assessment Against Qwest Corp., Docket UT-220397, Order 02 (Nov. 17, 2022)</i>	22
<i>In re the Enforcement Policy of the Wash. Utils. & Transp. Comm’n, Docket A-120061, Enforcement Policy Statement of the Wash. Utils. & Transp. Comm’n (Jan. 7, 2013)</i>	passim
Louis W. Hensler III, Civil Reconciliation Tort Theory: Making Torts Private Again, 90 UMKC L. R. 313 (Winter 2021).....	9
Proclamation by Governor Jay Inslee, No. 20-23.16 – Ratepayer Assistance and the Preservation of Essential Services, (July 2, 2021).....	1
Proclamation by Governor Jay Inslee, No. 20-23.2 – Ratepayer Assistance and Preservation of Essential Services (Apr. 17, 2020)	1, 14
RESTATEMENT (SECOND) OF TORTS § 281 cmt. E (1965)	9
<i>Wash. Utils. & Transp. Comm’n v. Advanced Tel. Group, Inc., Docket UT-033011, Order 21, 23 ¶ 65 (Feb. 28, 2005).....</i>	7

Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC,
Docket UT-210902, Order 01 (May 24, 2022)..... 13

Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC,
Docket UT-210902, Order 03 (July 29, 2022)..... 2

Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC,
Docket UT-210902, Order 04 (June 29, 2023)..... passim

Wash. Utils. & Transp. Comm’n v. Puget Sound Energy,
Docket PG-160924, Order 04 (June 19, 2017) 6, 22

Wash. Utils. & Transp. Comm’n v. Qwest Corp.,
Docket UT-190209, Order 03 (June 25, 2020)..... 17

I. INTRODUCTION

1 In Order 04 in this docket, the presiding administrative law judge (ALJ) imposed the maximum allowed penalty on the named respondents (collectively “Lumen”) for their violations of the Commission’s discontinuance of service rule¹ while Governor Inslee had forbidden disconnections pursuant to a gubernatorial proclamation. Lumen now petitions for review of that penalty.

2 The Commission should deny Lumen’s petition. The ALJ imposed the penalty, no portion of which he suspended, after careful consideration of the penalty factors set out in the Commission’s policy statement on enforcement² in light of the unique facts of this case. Lumen’s claims of error rest almost universally on ignoring much of what the ALJ said with regard to the relevant factors, and the analysis that Lumen glosses over explains the tenable bases for the ALJ’s determinations and his weighing of the penalty factors.

II. BACKGROUND

3 Between March 25, 2020, and September 30, 2021, pursuant to a state of emergency declared due to the COVID-19 pandemic, Governor Inslee forbade utility companies, including telecommunications companies, from disconnecting service to customers for non-payment.³ He based that order on his finding that maintaining access to utility services was “an essential tool in sustaining and protecting the health and welfare of” Washingtonians “as a critical part of the overall response to the COVID-19 pandemic.”⁴

¹ WAC 480-120-172(3).

² *In re the Enforcement Policy of the Wash. Utils. & Transp. Comm’n*, Docket A-120061, Enforcement Policy Statement of the Wash. Utils. & Transp. Comm’n (Jan. 7, 2013) (Policy Statement).

³ Proclamation by Governor Jay Inslee, No. 20-23.2 – Ratepayer Assistance and Preservation of Essential Services (Apr. 17, 2020); *see* Proclamation by Governor Jay Inslee, No. 20-23.16 – Ratepayer Assistance and the Preservation of Essential Services, (July 2, 2021) (Proclamation 20-23.2).

⁴ Proclamation 20-23.2 at 2; *id.* at 4 (finding that “preserving and maintaining essential utility services to vulnerable populations during this crisis supports the fundamental public purpose of protecting public health and welfare”).

4 The Commission, through its regulatory staff (Staff), conducted an investigation into whether utility companies complied with the Governor’s proclamation and, after finding noncompliance, complained against Lumen for disconnecting customers while the Governor’s proclamation was in effect.⁵ That complaint alleged 923 violations of WAC 480-120-172(3)(a), the Commission rule governing the discontinuance of service.⁶

5 The parties agreed that no material issue of fact existed with regard to the underlying conduct, and, consequently, both Staff and Lumen sought partial summary determination on the issue of liability. The Commission granted Staff’s motion and denied Lumen’s cross-motion,⁷ concluding that Lumen had committed 923 violations of WAC 480-120-172(3)(a), and leaving for later determination the appropriate penalty.⁸

6 After consideration of the parties’ opening and rebuttal testimony, the presiding ALJ imposed on Lumen the maximum authorized penalty, \$923,000.⁹ In reaching that penalty amount, the ALJ applied the factors from the Commission’s policy statement on enforcement as follows:

- Factor One – the ALJ found that the violations were serious and harmful, and weighed the factor in favor of a heavy penalty.¹⁰
- Factor Two – The ALJ determined that Lumen did not intentionally commit any violations, but also concluded that Lumen resumed disconnections nationally with an “ad

⁵ *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC*, Docket UT-210902, Complaint and Notice of Prehearing Conference, 5 ¶¶ 35-36 (Apr. 6, 2022) (Complaint).

⁶ Complaint at 5 ¶¶ 35-36.

⁷ *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC*, Docket UT-210902, Order 03, 4 ¶ 11, 8 ¶ 34, 9 ¶ 35 (July 29, 2022) (Order 03).

⁸ See Order 03 at 9 ¶ 38.

⁹ *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC*, Docket UT-210902, Order 04, 13 ¶ 43 (June 29, 2023) (Order 04).

¹⁰ Order 04 at 3-4 ¶¶ 11-12.

hoc, manual, admittedly flawed system to prevent disconnections in Washington.”¹¹ The ALJ concluded that this amounted to negligence, and thus some culpability on Lumen’s part, and did not weigh the factor for or against Lumen.¹²

- Factor Three – the ALJ found that Lumen did not self-report the violations and weighed the factor in favor of a large penalty.¹³
- Factor Four – the ALJ viewed Lumen as having been cooperative and weighed the factor in favor of a lighter penalty.¹⁴
- Factor Five – the ALJ determined that Lumen did not take all reasonable steps to correct its violations and could not remedy the effects of its violations by the time it discovered them. He weighed the factor in favor of a heavy penalty.¹⁵
- Factor Six – the ALJ found that Lumen committed a significant number of violations, 923, and weighed the factor in favor of a heavy penalty.¹⁶
- Factor Seven – the ALJ concluded that Lumen’s violations affected a significant number of customers and weighed the factor in favor of a heavy penalty.¹⁷
- Factor Eight – the ALJ concluded that Lumen had not changed its practices in any meaningful way to prevent any repeat violations, but recognized that the Proclamation had lapsed, which meant that repeat violations were not currently possible.¹⁸

Accordingly, the ALJ declined to weigh this factor either direction.¹⁹

¹¹ Order 04 at 4 ¶ 15.

¹² Order 04 at 4-5 ¶¶ 13-15.

¹³ Order 04 at 5 ¶¶ 16-19.

¹⁴ Order 04 at 5-6 ¶ 20.

¹⁵ Order 04 at 6-7 ¶¶ 21-24.

¹⁶ Order 04 at 7 ¶¶ 25-26.

¹⁷ Order 04 at 7-8 ¶¶ 27-28.

¹⁸ Order 04 at 8-9 ¶¶ 29-31.

¹⁹ Order 04 at 8-9 ¶¶ 30-31.

- Factor Nine – the ALJ concluded that Lumen’s compliance history weighed against it and in favor of a heavy penalty.²⁰
- Factor Ten – the ALJ viewed Lumen’s compliance program as ineffective, but also noted that the proclamation had lapsed, making repeat violations currently impossible and gave this factor little weight either way.²¹
- Factor Eleven – the ALJ found that Lumen’s size weighed in favor of a heavy penalty.²²

7 The ALJ also rejected Lumen’s request that the Commission suspend the penalty. With regard to the relevant factors, the ALJ analyzed them as follows:

- Factor One – the ALJ agreed with Lumen that these were first time offenses, which weighed in favor of suspension.²³
- Factor Two – the ALJ found that Lumen could not remedy the violations at issue and had taken no specific steps to prevent future violations, and thus weighed this factor against suspension.²⁴
- Factor Three – the ALJ determined that Lumen had not implemented a specific compliance plan and weighed this factor against suspension.²⁵
- Factor Four – the ALJ found that Lumen had neither agreed to a suspension period and follow-up review with Staff nor agreed to the imposition of the suspended portion of the penalty if repeat violations occurred and weighed this factor against suspension.²⁶ He did

²⁰ Order 04 at 9-10 ¶¶ 32-33.

²¹ Order 04 at 10-11 ¶¶ 34-36.

²² Order 04 at 11 ¶¶ 37-39.

²³ Order 04 at 13 ¶ 42.

²⁴ Order 04 at 13 ¶ 42.

²⁵ Order 04 at 13 ¶ 42.

²⁶ Order 04 at 13 ¶ 42.

not weigh the factor heavily, however, because he determined that the underlying conduct was no longer unlawful, making the factor less relevant.²⁷

- Factor Five – the ALJ noted that Lumen had not presented any other circumstances justifying suspension and weighed this factor against suspension.²⁸

Ultimately, the ALJ reasoned that:

[Lumen] argues that a suspended penalty would provide a sufficient incentive for the Company to prevent any repeat violations in the future, which is the Commission’s ultimate goal in any enforcement action. 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. We find this outcome would be at odds with the intent of the Policy Statement.²⁹

8 Lumen now petitions for review of the ALJ’s (1) decision to impose the maximum penalty amount, and (2) denial of its request to suspend some or all of the penalty.³⁰

III. ARGUMENT

9 Lumen seeks review of (1) the penalty imposed by the ALJ, and (2) the decision not to impose any portion of the penalty. It alleges that the ALJ failed to support certain findings with substantial evidence and abused his discretion in weighing certain penalty factors. But Lumen does not contest a sizable portion of Order 04, and the uncontested factors suffice to justify the penalty imposed in and of themselves. Regardless, the ALJ based his findings on the record evidence and inferences therefrom, and provided defensible reasons for his exercises of discretion. The Commission should affirm.

²⁷ Order 04 at 13 n.20.

²⁸ Order 04 at 13 ¶ 42.

²⁹ Order 04 at 11-12 ¶ 40.

³⁰ See generally CenturyLink’s Petition for Administrative Review (Petition).

A. The Commission Should Affirm the Penalty Imposed Because the ALJ Based His Penalty Factor Determinations on the Record Evidence and He Weighed the Factors Appropriately

10 Lumen first seeks review of the decision to impose the maximum penalty. The company contends that the ALJ erred when making certain findings with regard to factor five and when weighing factors two, four, eight, nine and ten. The Commission should reject those arguments because the record evidence supports the ALJ’s determinations, and his analysis in Order 04 provides reasonable and tenable explanations for each of his exercises of discretion.

1. The penalty factors to which Lumen assigns no errors justify the maximum penalty, regardless of the Commission’s disposition of the arguments it makes on the other factors.

11 Penalties, whether criminal or civil, serve to deter violations of the law.³¹ By doing so, they serve the Commission’s ultimate goal in any enforcement matter, ensuring that public service companies comply with the public service laws and the Commission’s rules and orders.³²

12 Lumen does not contest a substantial number of the penalty factors. It concedes that its violations were serious and harmful.³³ And they were. Lumen shut off services deemed essential to preserving the public health and welfare during a public health emergency.³⁴ Lumen further concedes that it did not self-report the violations.³⁵ And it did not, despite its earlier claims that

³¹ *E.g., Int’l Union of Operating Engineers, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 722, 295 P.3d 736 (2013) (“Federal courts and the Court of Appeals have held that employers must remedy harassment in such a way that persuades potential harassers to refrain from unlawful conduct . . . While the laws do not, and cannot, set standards as to the specific amount of discipline [that] is required for specific acts or patterns of harassment, the affirmative duty to sufficiently discipline harassers is well defined.”) (emphasis omitted); *in re Discipline of Simmons*, 59 Wn.2d 689, 706, 369 P.2d 947 (1962) (discipline of lawyers intended to “punish[] . . . the offender” sufficiently enough to “prevent reoccurrence” and also to “deter other practitioners from engaging in such conduct”); *State v. Stuttard*, 151 Wash. 694, 697, 277 P. 83 (1929) (“[p]unishment for crime is provided because of its deterrent effect on the commission of a crime, and the laws should not be construed as intending to prevent such punishment, unless no other alternative is permissible.”)

³² *Wash. Utils. & Transp. Comm’n v. Puget Sound Energy*, Docket PG-160924, Order 04 (June 19, 2017).

³³ Order 04 at 3-4 ¶¶ 11-12

³⁴ Order 04 at 3 ¶ 11.

³⁵ Order 04 at 5 ¶¶ 16-19.

somehow answering Staff's data requests constitutes self-reporting.³⁶ Lumen also concedes that it committed a significant number of violations³⁷ that affected a significant number of customers.³⁸ And, again, it did: Lumen disconnected nearly 1,000 customers during the time period covered by the Governor's proclamation. And, finally, Lumen concedes that it is sizable enterprise.³⁹

13 The uncontested penalty factors here in and of themselves justify the maximum penalty, regardless of how the Commission disposes of Lumen's arguments on the contested factors, in order to deter future failures to comply with the law by Lumen or others.⁴⁰ Lumen committed a substantial number of violations that endangered public health and welfare during a public health emergency. Such violations demand strong penalties to deter other such violations.⁴¹ And Lumen is a large company, something that demands a correspondingly large penalty to ensure the proportional treatment that the Commission strives for across its enforcement actions.⁴² Finally, by failing to self-report the violations, Lumen took out of consideration one of the primary reasons the Commission will offer leniency in an enforcement action.⁴³ In the totality-of-the-circumstances analysis the Commission applies to calculating penalties, those factors should predominate given the importance of signaling to regulated companies the importance of

³⁶ CenturyLink's Opening Br. at 16-17 ¶¶ 27-28.

³⁷ Order 04 at 7 ¶¶ 25-26.

³⁸ Order 04 at 7-8 ¶¶ 27-28.

³⁹ Order 04 at 11 ¶¶ 37-39.

⁴⁰ *In re Determining the Proper Carrier Classification of and Complaint for Penalties Against Dolly, Inc.*, Docket TV-171212, Order 04 (May 18, 2018) (“[t]he penalty amount is supported by the evidence in the record and is proportionately punitive in light of the Company’s past conduct.”); see *Wash. Utils. & Transp. Comm’n v. Advanced Tel. Group, Inc.*, Docket UT-033011, Order 21, 23 ¶ 65 (Feb. 28, 2005).

⁴¹ See *Wash. Utils. & Transp. Comm’n v. Qwest Corp.*, Docket UT-140597, Order 03, 6 ¶ 16.

⁴² Policy Statement at 9 ¶ 15(11).

⁴³ Policy Statement at 8 ¶ 15(3).

complying with rules intended to protect consumer and public safety, like WAC 480-120-172, to deter future violations of the public service laws or the Commission’s rules.⁴⁴

2. The ALJ properly weighed Lumen’s lack of intentional conduct against its uncontested negligence and determined factor two should be weighed neutrally.

14 Turning now to the factors Lumen contests, Lumen first argues that the ALJ erred when weighing factor two by considering matters other than the company’s intent.⁴⁵ In making its claim of error, Lumen ignores half of the ALJ’s analysis, which provides defensible and reasonable bases for his refusal to credit Lumen much under the second factor despite finding that Lumen had not acted intentionally.

15 The policy statement’s second factor concerns the public service company’s state of mind. It provides that “[a] company that willingly and intentionally violates a Commission requirement may be dealt more severely than a company that unknowingly committed a violation.”⁴⁶ The factor reflects the general principle that intentional conduct is more culpable⁴⁷ than unintentional conduct.⁴⁸ Importantly, however, culpability extends beyond purely intentional conduct, encompassing conduct that is negligent or reckless.⁴⁹

⁴⁴ *In re Determining the Proper Carrier Classification of and Complaint for Penalties Against Ghostruck, Inc.*, Docket TV-161308, Order 05 (May 31, 2017) (“[t]hat penalty amount is sufficient to deter future violations, appropriately punitive for the Company’s past conduct, and reasonably mitigated given the evidence in the record.”).

⁴⁵ Petition at 3-4 ¶¶ 6-7.

⁴⁶ Policy Statement at 8 ¶ 15(2).

⁴⁷ See Black’s Law Dictionary (11th ed. 2019) (defining culpability to mean “[m]oral blameworthiness”);

⁴⁸ *E.g.*, RCW 9A.08.010 (setting out the states of mind necessary for criminal culpability and defining intentional conduct as the most culpable); *cf.* 1 Senate Journal, 47th Leg., Reg. Sess., at 635 (Wash. 1981) (discussing the states of mind at issue for civil culpability and defining negligence, gross negligence, recklessness, and willful and wanton misconduct as less culpable than intentional conduct).

⁴⁹ *E.g.*, RCW 9A.08.010 (establishing criminal culpability for reckless and criminally negligent conduct).

16 As Lumen notes, the ALJ rejected arguments made by Staff and Public Counsel and determined that Lumen had not acted intentionally with respect to some or all of the disconnections at issue.⁵⁰

17 But the ALJ’s determination that Lumen did not act intentionally did not end his analysis. He reasoned that:

Lumen’s clear priority was to resume disconnections and suspensions to the full extent it was permitted by law and to interpret the Proclamation as narrowly as possible. In its eagerness to involuntarily disconnect customers in states that had not enacted local protection, it executed an ad hoc, manual, admittedly flawed system to prevent such disconnections in Washington. The system had no secondary or back-up check on whether such disconnections complied with the Proclamation.⁵¹

Based on those facts, the ALJ decided that “Lumen, at a minimum, was negligent in its attempted compliance with the Proclamation.”⁵² The ALJ therefore determined that Lumen had at least some culpability, and he refused to weigh the factor heavily in either direction.⁵³

18 Lumen does not contest the ALJ’s determination that the company acted negligently.⁵⁴ By failing to do so, Lumen concedes that it has some culpability here. The Commission should not, on review, reverse the ALJ’s refusal to weigh the second factor in Lumen’s favor given that culpability.

19 Indeed, Lumen’s argument raises significant public health and safety concerns. The law makes non-intentional conduct, such as negligent conduct, culpable to disincant that conduct.⁵⁵ But Lumen basically asks the Commission to free it from all culpability unless it acts intentionally. Because the Commission should strive to treat similarly situated entities similarly,

⁵⁰ Order 04 at 4 ¶¶ 14-15.

⁵¹ Order 04 at 4 ¶ 15.

⁵² Order 04 at 4 ¶ 15.

⁵³ See Order 04 at 4-5 ¶ 15.

⁵⁴ See generally Petition at 1-15 ¶¶ 1-33.

⁵⁵ See e.g., RESTATEMENT (SECOND) OF TORTS § 281 cmt. E (1965); Louis W. Hensler III, Civil Reconciliation Tort Theory: Making Torts Private Again, 90 UMKC L. R. 313, 342-43 (Winter 2021).

what the Commission does with Lumen it must do with the wide range of other public service companies it regulates.⁵⁶ The Commission, in administering the public service laws, has adopted some fairly critical safety regulations applicable to those companies.⁵⁷ Those regulations are quite literally intended to ensure callers are connected with emergency services or to prevent accidents, explosions, electrocutions, or the escape of hazardous materials that would otherwise injure or kill people and destroy property. The Commission should do nothing to incent all possible compliance with those rules.

3. The ALJ had the discretion to weigh factor four and the other penalty factors according to the circumstances.

20 Lumen next assigns error to the ALJ's weighing of the fourth factor. Specifically, Lumen contends that the ALJ had no choice but to impose a less severe penalty after finding that Lumen cooperated with Staff's investigation.⁵⁸ Related, Lumen argues that general principle is true for the other factors that the ALJ weighed neutrally as well. Lumen's arguments ignore the discretion explicitly built into the policy statement and offers no reason for reversing the ALJ's weighing of the factor.

21 The policy statement's fourth factor concerns whether the public service company cooperates with or obstructs the Commission as the Commission carries out its regulatory functions. It provides that "[t]he Commission may consider the company's cooperation and

⁵⁶ See RCW 80.04.010(23) (listing the public service companies subject to regulation under Title 80); RCW 81.04.010(11), (16) (listing the common carriers subject to regulation under Title 81).

⁵⁷ E.g., WAC 480-15-560, -570; WAC 480-30-221, -222, -226; WAC 480-31-100, -120, -130; WAC 480-51-075; WAC 480-60-035, -040, -050, -060, -080; WAC 480-62-200, -205, -210, -225, -230, -235, -255, -278, -281, -290; WAC 480-66-200, -210, -220, -230, -300, -310, -320, -330, -400, -410, -420, -430, -440, -450, -460, -470, -480; WAC 480-70-201; WAC 480-75-100 to -660; WAC 480-93-015 to -250; WAC 480-100-358, -373; WAC 480-110-365; WAC 480-120-402.

⁵⁸ Petition at 4 ¶ 8.

responsiveness during an investigation when it considers enforcement action after an investigation is completed.”⁵⁹

22 Lumen’s argument concerning the fourth factor fails based on the plain text of the policy statement (as do Lumen’s related arguments that the ALJ had to impose a less severe penalty based on other findings).⁶⁰ As just noted, the fourth factor states that the Commission “may” consider cooperation and responsiveness when considering penalizing a company. The term “may” is generally used permissively,⁶¹ and the Commission made clear that it used the word in that sense in the policy statement. It announced that “[a]s part of its official policy regarding enforcement practices, the Commission explicitly reserves discretion in applying any stated portion of the policy.” The ALJ had the discretion to weigh the fourth factor, and any of the others as dictated by the circumstances, regardless of whatever he found with regard to the factor.

23 Given that the ALJ had discretion to weigh Lumen’s cooperation in calculating a penalty, Lumen needs to show that he weighed the factor untenably to show an abuse of discretion.⁶² But Lumen does not even offer any argument on that score, leaving the Commission no reason to accord its cooperation any more weight than the ALJ did. And, regardless, nothing in the record suggests that Lumen did anything other than simply answer Staff’s DRs,⁶³ meaning this is not a

⁵⁹ Policy Statement at 8 ¶ 15(4).

⁶⁰ Petition at 8-9 ¶¶ 18-19.

⁶¹ *Paterson v. Paterson*, 70 Wn.2d 204, 204, 422 P.2d 474 (1967).

⁶² See *PacifiCorp v. Wash. Utils. & Transp. Comm’n*, 194 Wn.App. 571, 587, 376 P.3d 389 (2016).

⁶³ Feeser, Exh. BF-1T at 3:13-20.

case where Lumen's cooperation was extraordinary.⁶⁴ The Commission should find no abuse of discretion.

4. The ALJ properly determined that Lumen failed to take all reasonable steps to correct its violations and could not remedy the effects of those violations and weighed factor five against it.

24 Lumen also assigns error to the ALJ's determination that Lumen failed to both correct the violations and to remedy the violations' impacts, claiming his findings as to each lack substantial supporting evidence.⁶⁵ The Commission should reject those challenges, which ignore what the ALJ actually said and did.

25 The fifth factor concerns a company's efforts to correct its violations and make customers whole for the impacts of those violations. In it, the Commission states that it "may be more lenient when a company promptly corrects a violation, and any underlying system problems, when these are pointed out by Staff."⁶⁶ This can include refunds or any other steps necessary to "remedy any other harm."⁶⁷

26 Lumen first faults the ALJ for refusing to accept Staff's determination that Lumen had remedied the violations and "determin[ing] that the legality of any hypothetical reconnection is outside the scope of this proceeding, then proceed[ing] to rule in favor of Public Counsel anyway."⁶⁸ Lumen claims the ALJ's findings here were contrary to the evidence in the docket. There are two problems with this argument.

⁶⁴ See, e.g., *in re Determining the Proper Carrier Classification of and Complaint for Penalties Against Boubacar Zida*, Docket TV-091498, Order 05 (Aug. 30, 2010) ("[s]taff states that Mr. Zida was cooperative at hearing, forthright in notifying the Commission that he was closing his moving business, and followed through on his commitment to remove the online advertising that was the basis for penalties in the first place.").

⁶⁵ Petition at 9-11 ¶¶ 20-24.

⁶⁶ Policy Statement at 8 ¶ 15(5).

⁶⁷ Policy Statement at 8 ¶ 15(5).

⁶⁸ Petition at 10 ¶ 22.

27 First, to the extent that Lumen suggests that Staff’s recommendation should be definitive, it misunderstands Staff’s role here. Staff is a party,⁶⁹ just like Lumen or Public Counsel. An ex parte wall separates it from the Commission’s decision makers,⁷⁰ and it does not have the authority to bind the Commission.⁷¹ The ALJ was, and the Commission is, free to reject Staff’s opinion and testimony.

28 Second, to the extent that Lumen contends the ALJ should not have accepted Public Counsel’s position, it misreads what he did. In Order 04, the ALJ did not, as Lumen contends, fault Lumen for failing to automatically reconnect customers, as Public Counsel argued it should have done.⁷² He instead found that Lumen had failed to take some of the steps that it could have in order to remedy its violations. These untaken steps included seeking guidance about whether the company could automatically reconnect service from either the Federal Communications Commission or from this Commission.⁷³ Based on the failure to take those actions, the ALJ concluded that Lumen had not taken “all reasonable actions that it could have taken to correct the violations,”⁷⁴ and he weighed the factor against the company.

29 Substantial evidence supports the ALJ’s finding that Lumen sought no guidance about reconnecting customers. Lumen never claimed that it automatically reconnected customers, and it admits that roughly 85 percent of those whose service it cut off never reconnected with the company.⁷⁵

⁶⁹ *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC*, Docket UT-210902, Order 01, 2 n.1 (May 24, 2022).

⁷⁰ RCW 34.05.455.

⁷¹ *Ghostruck*, Docket TV-161308, Order 05, 5 ¶ 15.

⁷² Opening Br. of Public Counsel at 10 ¶ 21.

⁷³ Order 04 at 6 ¶ 22.

⁷⁴ Order 04 at 6 ¶ 22.

⁷⁵ Gose, PGT-1T at 9:3-8.

30 Substantial evidence also supports the ALJ’s determination that Lumen failed to take all reasonable steps to correct the violations. If the company had obtained the FCC’s or the Commission’s approval, automatic reconnection would have served as a complete correction to the violations, and nothing indicates that the automatic restoration of service would have been burdensome.⁷⁶

31 Given those determinations, as well as Lumen’s frank admission that most of its customers never reconnected service, the ALJ properly found that Lumen had failed to take all reasonable steps to correct its violations. The Commission should affirm that determination.⁷⁷

32 Lumen’s larger complaint, however, is with the ALJ’s determination that it failed to remedy the effects of its violations. Again, Lumen misreads the order, ignoring what the ALJ actually determined with regard to whether Lumen remedied the effects of its violations.

33 The Governor in Proclamation 20-23.2 found that “telecommunications companies” like Lumen⁷⁸ provided “essential utility services.”⁷⁹ The Governor also determined that “[p]reserving and maintaining essential utility services to vulnerable populations during [the COVID-19] crisis supports the fundamental public purpose of protecting health and welfare.”⁸⁰

34 The ALJ analyzed Lumen’s violations against the backdrop of the Governor’s findings. He determined “that because of the nature of the violations, the impact was for the most part irremediable by the time of the discovery. The affected customers were without telephone service during a critical period, and we can only speculate about the economic and personal

⁷⁶ See Gose, PGT-1T at 9:3-8.

⁷⁷ *In re Discipline of McGrath*, 178 Wn.2d 280, 308 P.3d 615 (2013) (courts look to whether substantial evidence supports factual findings, and then whether legal conclusions flow from the findings).

⁷⁸ See RCW 80.04.010(28).

⁷⁹ Proclamation 20-23.2 at 4.

⁸⁰ Proclamation 20-23.2 at 4.

impact that may have caused.”⁸¹ This meant that “the impact of the time they were without service remains unaddressed,” even for customers for whom Lumen reconnected service.⁸² And those un-remedied impacts caused the ALJ to weigh this factor heavily against Lumen.⁸³

35 Lumen rests its claim of error here on the evidence that showed that it offered to reconnect services and refund any related fees related to the disconnection,⁸⁴ which it contends showed that it “addressed” the impacts of its violations.⁸⁵ But that evidence is irrelevant to what the ALJ determined. As the ALJ recognized, restoring service some period of time after severing it does nothing to make each of Lumen’s customers, regardless of whether they eventually reconnected or not, whole for the lost service.⁸⁶ Those customers were without service at a “critical period,” and nothing Lumen did addressed that fact.

5. The ALJ properly weighed Lumen’s failure to make changes to its practices against the sunset of the proclamation, and determined that factor eight should be accorded neutral weight.

36 Lumen maintains that the ALJ erred by not imposing a less severe penalty after allegedly finding that “violations are not likely to recur.”⁸⁷ Lumen’s argument again ignores the actual analysis applied by the ALJ, which was a reasoned way to deal with the unusual facts at issue here.

37 The eighth factor looks at whether a company has made operational changes to address earlier violations or changed its practices after incurring the violations before the Commission. It

⁸¹ Order 04 at 6 ¶ 23.

⁸² Order 04 at 7 ¶ 23.

⁸³ Order 04 at 6-7 ¶¶ 23-24.

⁸⁴ Petition at 9 ¶ 20.

⁸⁵ Petition at 10 ¶ 22.

⁸⁶ Order 04 at 6 ¶ 23 (“[w]e find that because of the nature of the violations, the impact was for the most part irremediable by the time of discovery. The affected customers were without telephone service during a critical period, and we can only speculate about the economic personal impact that may have caused.”); *cf.* Initial Brief of Commission Staff at 8 ¶ 20 (Lumen “did not do anything to compensate the customers for the lost service.”).

⁸⁷ Petition at 4-6 ¶¶ 9-12.

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 an enforcement action.”⁸⁸

38 Lumen focuses its claim of error on the ALJ’s recognition that the Governor’s disconnection prohibition has lapsed, which, as the ALJ noted, makes repeat violations impossible “at the current time.”⁸⁹ But Lumen ignores the ALJ’s determination that the Commission could have “little confidence that should a similar situation arise, we would not be faced with a similar and highly concerning ‘small number of human errors’ on Lumen’s part.”⁹⁰ That is because Lumen repeatedly testified that it would do nothing different in any future case where disconnections were prohibited.⁹¹ As those steps did not suffice to prevent disconnections here, they will not prevent repeat violations if the Legislature, Governor or the Commission prohibited disconnections again.⁹²

39 The ALJ’s decision to give this factor no weight reflects a reasonable treatment of the unusual facts at issue here. As Lumen argues, as things currently stand, it cannot commit repeat violations. But it has done nothing to prevent those violations if matters change. Giving the factor no weight squares the reality of the end of the proclamation with the spirit and purpose of the eighth factor.

40 Indeed, this sort of weighing of the eighth factor is necessary to protect the public interest in the rule of law. Lumen basically asks the Commission to handcuff itself and foreswear its ability to enforce any provision scheduled to, or that actually has, sunset, whether by the end of a

⁸⁸ Policy Statement at 9 ¶ 15(8).

⁸⁹ Order 04 at 9 ¶ 31.

⁹⁰ Order 04 at 9 ¶ 31.

⁹¹ Gose, Exh. PG-1T at 9:13-20.

⁹² Feeser, Exh. BF-1T at 7:3-9.

gubernatorial proclamation, the repeal or amendment of a statute or rule, or the loss of a contract to provide critical public services. But, again, the law relies on enforcement efforts to ensure compliance. The Commission should avoid giving public service companies free license to ignore the law under the circumstances just described.

41 Lumen also contends that the ALJ cannot square his decision here with an earlier CenturyLink order because in both cases Lumen no longer provides the services at issue. Lumen ignores the critical distinctions between the two matters. In the earlier matter, while the ALJ did note that it no longer provided 911 service, he hinged his analysis on the fact that Lumen had taken all reasonable steps to prevent violations, something he repeatedly mentioned.⁹³ Because it had done so, penalties could not incent it to take further steps.⁹⁴ Here, however, the ALJ concluded otherwise, determining that Lumen failed to take all reasonable steps to prevent and correct violations.⁹⁵ The finding of negligence readily distinguishes the two matters, and the earlier order does not control.

6. The ALJ properly weighed Lumen’s compliance history against the nature of the violations and accorded factor nine neutral weight.

42 Lumen also claims that the ALJ erred in weighing factor nine by failing to impose a less severe penalty given that the violations at issue were “first-time violations” different than those alleged “in any prior complaint.”⁹⁶ Lumen misreads the policy statement and what the ALJ did.

⁹³ *Wash. Utils. & Transp. Comm’n v. Qwest Corp.*, Docket UT-190209, Order 03, 11 ¶ 26, 11-12 ¶ 27, 12-13 ¶ 29, 13 ¶ 30, 13 ¶ 31 (June 25, 2020).

⁹⁴ *Qwest Corp.*, Docket UT-190209, Order 03, at 13 ¶¶ 30-31.

⁹⁵ Order 04 at 4-5 ¶ 15.

⁹⁶ Petition at 6 ¶¶ 13-14.

43 The ninth penalty factor concerns the public service company’s compliance history. It provides that “[t]he 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.”⁹⁷

44 The ALJ determined that Lumen’s history weighed toward a more serious penalty.⁹⁸ And the evidence supports that determination: in its petition, Lumen does not contest that it has a history of “commit[ing] regulatory violations or incurr[ing] penalties, some of them significant,”⁹⁹ The ninth factor focuses exactly on that overall compliance history,¹⁰⁰ theoretically looking to earlier enforcement actions because they indicate the need to impose harsher penalties to signal to the company the need to take its regulatory obligations more seriously.

45 Having said that, the ALJ did not weigh this factor heavily in favor of a larger penalty precisely because of the issue that Lumen raises here – these were first-time violations.¹⁰¹ Lumen’s argument essentially is that the ALJ should have given it more credit for these being first-time violations, but that claim of error is meritless given the policy statement’s focus on the company’s overall compliance history.

7. The ALJ reasonably accorded Lumen’s compliance program little weight given that the program broke down here.

46 Finally, Lumen assigns error to the ALJ’s weighing of factor ten. Lumen contends that, given his findings that it has a compliance program, the ALJ had no choice but to “reduc[e] the penalty to a mid-way, median, or ‘neutral’ amount,” and erred by not doing so.¹⁰² The

⁹⁷ Policy Statement at 9 ¶ 15(9).

⁹⁸ Order 04 at 9-10 ¶ 33.

⁹⁹ Order 04 at 9-10 ¶ 32.

¹⁰⁰ Policy Statement at 9 ¶ 15(9).

¹⁰¹ Order 04 at 9-10 ¶ 34.

¹⁰² Petition at 7 ¶ 15.

Commission should affirm the ALJ's determination on this factor given that he rooted it in a reasonable review of the record regarding Lumen's compliance program.

47 The policy statement's tenth factor looks to the public service company's compliance program. It states that "[t]he Commission is more likely to take enforcement action if the company does not have an active and adequate compliance program in place, or if the Commission has previously identified deficiencies with the company's compliance program and the company has not corrected the deficiencies."¹⁰³

48 The ALJ found Lumen's compliance program wanting. As he reasoned, "a proper compliance program is a preventative one."¹⁰⁴ The ALJ went on to recognize that Lumen did not have a program in place to check for compliance with the Proclamation, which caused its failure to detect any problem until Staff began sending data requests.¹⁰⁵ He also noted that Lumen "continues to emphasize that human error was the root cause of the violations without appearing to accept responsibility for implementing a program that allowed for the possibility of such human error without any compliance assurance program in place."¹⁰⁶ Given those facts, the ALJ concluded that Lumen's compliance program "does not provide much cause to expect more from the Company in other scenarios requiring compliance with state-wide regulatory requirements at odds with Lumen's existing procedures."¹⁰⁷

49 Lumen's argument that any ALJ finding that a public service company has a compliance program necessitates a less severe penalty presents the Commission with two problems.

¹⁰³ Policy Statement at 9 ¶ 15(10).

¹⁰⁴ Order 04 at 10 ¶ 35.

¹⁰⁵ Order 04 at 10 ¶ 35.

¹⁰⁶ Order 04 at 10 ¶ 35.

¹⁰⁷ Order 04 at 10 ¶ 35.

50 First, Lumen improperly “elevate[s] form over substance.”¹⁰⁸ As Lumen’s customers learned here to their hardship, and as the ALJ recognized, a dysfunctional compliance program is effectively no compliance program. If Lumen can receive credit for a broken compliance system, the tenth penalty factor serves no purpose, and any company can escape liability or a severe penalty through nominal efforts.

51 Second, Lumen asks for a mechanical application of the policy statement, something the Commission has long rejected. As noted, the policy statement explicitly preserves the Commission’s discretion in applying any of its provisions.¹⁰⁹ Lumen’s view of the weighing of the penalty factors runs contrary to the Commission’s long-held practice of applying a totality-of-the-circumstances test to the assessment of penalties. No one factor should have automatic effects on the calculation of a penalty; each penalty should reflect the ALJ’s or the Commission’s exercise of discretion guided by the penalty factors and the underlying circumstances.

52 Lumen also claims that the ALJ erred by making contradictory findings, with Order 04 generally stating that Lumen’s changes would not prevent future violations, but stating the opposite in the context of the discussion about its compliance program. Lumen misreads the order, and there is no contradiction. When discussing the tenth factor, the ALJ credits Lumen’s testimony “for now,” meaning within the context of that particular discussion.¹¹⁰ Put otherwise, he gave the company the benefit of the doubt in order to weigh the tenth factor neutrally; he did not conclude that Lumen’s program would effectively prevent violations outside of that factor.¹¹¹

¹⁰⁸ *State v. Williams*, 137 Wn.2d 746, 754, 975 P.2d 963 (1999).

¹⁰⁹ Policy Statement at 12 ¶ 21.

¹¹⁰ Order 04 at 10 ¶ 36.

¹¹¹ See Order 04 at 9 ¶¶ 30-31, 10 ¶ 35; cf. *City of Vancouver v. Pub. Emp’t Relations Comm’n*, 180 Wn.2d 333, 352-53, 325 P.3d 213 (2014) (orders that contain conflicting provisions are ambiguous, and the ambiguity is resolved by looking to what the agency actually did in the order).

B. The Commission Should Affirm the ALJ’s Refusal to Suspend a Portion of the Penalty

53 Lumen’s second overarching allegation of error involves the ALJ’s decision not to suspend some portion of the penalty. Lumen contests the ALJ’s application of the relevant portion of the policy statement and contends that the ALJ failed to consider Commission precedent regarding suspended penalties. The ALJ’s decision not to suspend a portion of the penalty reasonably applied the enforcement policy to the unique facts of this case, and the Commission should affirm it.

54 Lumen first argues that the ALJ erred in determining that it had not taken specific steps to remedy the violations and prevent future recurrences.¹¹² There are two problems with Lumen’s argument. First, Lumen fails to grasp that it did not remedy the violations because, as discussed above, it could not change the fact that the affected customers were without service during a critical period. Second, Lumen seems to argue that it is entitled to a suspension of the penalty as long as it takes some steps toward correcting its violations.¹¹³ That ignores the text of the policy statement, which requires the type of systemic changes Lumen has not made.¹¹⁴ It also elevates form over substance in that Lumen would require the Commission to suspend a penalty when a public service company takes minor or ineffective steps. An empty action is no action at all, and the Commission should conclude as much.

55 Lumen next argues that “[t]he next two factors, specific compliance plans and a follow-up investigation, are less relevant” because the proclamation sunset.¹¹⁵ Relatedly, Lumen argues

¹¹² Petition at 11-12 ¶¶ 26-27.

¹¹³ Petition at 11-12 ¶ 27.

¹¹⁴ Policy Statement at 11 ¶ 20(2) (looking to “[w]hether the company has taken specific actions to remedy the violations and avoid the same or similar violations in the future. Examples include purchasing new technology, making system changes, or training company personnel.”).

¹¹⁵ Petition at 12 ¶ 28.

that the failure to suspend the penalty misapplies “the Commission’s mission in enforcement actions” because the ALJ focused on whether Lumen would escape sanction.¹¹⁶ But Lumen has it backwards. Any suspension of penalties basically offers the penalized company a quid pro quo -- the company can escape paying a penalty that it would otherwise owe for noncompliance in return for taking steps to avoid further violations of the law.¹¹⁷ As the ALJ recognized, here there is no currently available “quid” for the “quo.” The proclamation has sunset, meaning that Lumen can gamble and take no action and still potentially avoid repeat violations, and suspending the penalty will not incent it to take steps to comply. Under those facts, suspension makes little sense and the Commission can best incent compliance with the law through the deterrent effect of a serious penalty for Lumen’s serious violations, as the ALJ determined.

56 Finally, Lumen argues that the Commission erred by declining to find that the pandemic provided “other circumstances” justifying suspension. Lumen has tried this argument in other contexts, and the Commission has rejected the notion that the pandemic’s effects somehow excuse or mitigate a public service company’s failure to comply with the Commission’s rules.¹¹⁸ The Commission should decline to suspend the penalty due to the factors cited by Lumen based on that precedent.

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¹¹⁶ Petition at 13-15 ¶¶ 30-31.

¹¹⁷ *Puget Sound Energy*, Docket PG-160924, Order 04, 8 ¶ 25.

¹¹⁸ *In re Penalty Assessment against Qwest Corp.*, Docket UT-220397, Order 02, 2 ¶ 6, 3 ¶¶ 10-11 (Nov. 17, 2022).

IV. CONCLUSION

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The Commission should deny CenturyLink's petition for review.

RESPECTFULLY Submitted, this 31st day of July, 2023.

ROBERT W. FERGUSON
Attorney General

/s/ Jeff Roberson, WSBA No. 45550
Senior Assistant Attorney General
Office of the Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 522-0614
jeff.roberson@atg.wa.gov