

**Exh. JHJ-12
Docket UT-181051
Witness: Jacque Hawkins-Jones**

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

**WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,**

Complainant,

v.

**CENTURYLINK
COMMUNICATIONS, LLC.,**

Respondent.

DOCKET UT-181051

**EXHIBIT TO
TESTIMONY OF**

JACQUE HAWKINS-JONES

**STAFF OF
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

*Wash. Utils. & Transp. Comm'n v. Qwest Corporation d/b/a CenturyLink QC,
Docket UT-140597, Order 03 (Feb. 22, 2016)*

December 15, 2021

[Service Date February 22, 2016]

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET UT-140597
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	ORDER 03
)	
v.)	
)	FINAL ORDER APPROVING
QWEST CORPORATION D/B/A)	SETTLEMENT AGREEMENT
CENTURYLINK QC,)	
)	
Respondent.)	

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BACKGROUND

- 1 On February 19, 2015, the Washington Utilities and Transportation Commission (Commission) through its regulatory Staff (Staff)¹ filed a complaint against Qwest Corporation d/b/a CenturyLink QC (CenturyLink or Company). The complaint alleges violations of RCW 80.36.080, WAC 480-120-450, and WAC 480-120-412 arising from a 911 service outage affecting Washington residents on April 9-10, 2014.
- 2 On September 10, 2015, CenturyLink and Staff filed a Settlement Agreement (Settlement) that would resolve all issues in this docket. The Settlement includes the following provisions:
 - CenturyLink admits it violated RCW 80.36.080, WAC 480-120-450, and WAC 480-120-412 for purposes of settlement.²

¹ In formal proceedings, such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of the proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See* RCW 34.05.455.

² Exh. SP-6 (Settlement) ¶¶ 25-28.

- CenturyLink agrees to pay a penalty of \$2,854,750 within 45 calendar days of the effective date of the Settlement.³
- CenturyLink will contemporaneously submit copies of all compliance reports filed with the Federal Communications Commission (FCC) in compliance with the consent decree the FCC adopted to resolve its investigation into the 911 outage.⁴
- CenturyLink will designate a compliance officer responsible for monitoring the Company's compliance with the Settlement.⁵
- Until all Public Safety Answering Points (PSAPs) in Washington have completed the transition to Next Generation 911 (NG911), CenturyLink will submit to Staff quarterly reports detailing (1) the maximum number of messages the Company's PSAP Trunk member (PTM) threshold counter can process; (2) the frequency of manual review (e.g., daily, weekly, monthly); and (3) the counter value as of the reporting date.⁶
- Until all Washington PSAPs have completed the transition to next generation 911 (NG911),⁷ CenturyLink will: (1) annually perform a 911 Circuit Diversity Audit as outlined in the FCC's Report and Order in PS Docket No. 13-75, issued on December 12, 2013 (FCC 13-158); and (2) report the results to Staff.⁸
- Until all Washington PSAPs have completed the transition to NG911, CenturyLink will submit to Staff annual IP transition status reports.⁹

3 On January 12, 2016, the Commission conducted a hearing on the Settlement (Settlement Hearing). In support of the Settlement, CenturyLink presented the testimony of Mark Reynolds, Tim Betsch, and Stacy Hartman, and Staff presented the testimony of Susie

³ *Id.* ¶ 29.

⁴ *Id.* ¶ 30.

⁵ *Id.* ¶ 31.

⁶ *Id.* ¶ 32.

⁷ NG911 is the provisioning of 911 services using Internet protocol (IP), rather than the time division multiplexing (TDM) telephone companies have traditionally used to provision this service.

⁸ *Id.* ¶ 33.

⁹ *Id.* ¶ 34.

Paul. Public Counsel opposes the Settlement and presented the testimony of David C. Bergmann, Thomas R. Orr, and Alicia Cappola in support of its position.

4 Mr. Reynolds is Vice-President Public Policy for CenturyLink, Mr. Betsch is Customer Team Director at Intrado Communications, Inc. (Intrado), CenturyLink's 911 vendor, and Ms. Hartman is a Director in the Company's Public Policy organization. These three witnesses provided joint testimony in which they described the 911 outage, its cause, and the actions CenturyLink and Intrado have taken to resolve the issues that caused the outage and reporting failures. They also describe the Settlement and the measures the Company has agreed to take to ensure that such an incident will not recur and to keep the Commission informed of the Company's progress in meeting its obligations.

5 Ms. Paul is a Compliance Investigator in the Commission's Consumer Protection section, and she described the 911 outage and Staff's subsequent investigation and report on the incident. She explained how Staff calculated the penalty in the Settlement and the public interest benefits of imposing a penalty in that amount, as well as the reporting obligations to which the Company has agreed in the Settlement.

6 Mr. Bergmann is principal of Telecom Policy Consulting for Consumers, a Columbus, Ohio-based private consulting company, and an attorney formerly with the Ohio Office of the Consumers' Counsel. His testimony on behalf of Public Counsel was based on his review of the discovery and documents filed in this docket and the related proceeding at the Federal Communications Commission (FCC). He concurs with the findings and conclusions in the Staff Report with respect to the Company's liability, but he believes the penalty in the Settlement is too low. He recommends that the Commission reject the Settlement and impose a penalty of \$11,495,000. He contends that his analysis of the factors the Commission considers when taking enforcement action supports the maximum possible penalty for the Company's 11,495 violations, rather than the lesser penalty amount in the Settlement.

7 Mr. Orr is the Executive Director of the North East King County Regional Public Safety Communications Agency. He described his agency's experience with the 911 outage at issue in this docket. Ms. Cappola is a private citizen, and she recounted her emergency situation on April 10, 2014, and her repeated unsuccessful 911 call attempts.

DISCUSSION AND DECISION

8 "The commission will approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public

interest in light of all the information available to the commission.”¹⁰ The Commission may approve the Settlement, with or without conditions, or reject it. The Commission concludes that it should approve the Settlement without conditions.

9 The outage on April 9-10, 2014, was a potentially life-threatening incident. The citizens of this state reasonably rely on their ability to access emergency services by dialing 911. Their inability to do so for even a brief period of time poses a serious threat to public health, safety, and welfare, not just a violation of statute and Commission rules. The Settlement and supporting evidence, however, demonstrate that CenturyLink recognizes the gravity of the outage and the critical importance of ensuring the continuous availability of the 911 service it provides.

10 The Commission’s ultimate objective in any enforcement action is to obtain compliance with applicable law. CenturyLink admits that it violated RCW 80.36.080, WAC 480-120-450, and WAC 480-120-412. The Company and its vendor identified the software deficiency that caused the violations and have taken action to remedy that problem and to improve communications during an outage.¹¹ CenturyLink and Intrado have agreed with the FCC to develop and implement extensive compliance plans to address all potential 911 issues, not just those that caused the outage in April 2014.¹² The Settlement requires the Company to provide Staff with all reports required under those plans at the same time they are filed with the FCC,¹³ and to submit additional reports on the status of operations pending full transition to NG911 service.¹⁴ CenturyLink has also agreed to pay a penalty of \$2,854,750,¹⁵ one of the highest penalties the Commission has ever assessed, calculated as \$250 for each of the 5,684 documented missed calls (at two violations per call) and \$250 for each failure to notify the 51 public service answering points (PSAPs) that the complaint alleges the Company failed to notify.¹⁶

11 We are satisfied that the Settlement appropriately reflects the severity of the April 2014 outage and resulting violations and furthers the goal of compliance with the statute and Commission rules. We conclude that approval of the Settlement is lawful, the settlement

¹⁰ WAC 480-07-750(1).

¹¹ Exh. CTL-1T (CenturyLink Joint Testimony) at 7-9.

¹² Exh. SP-2 (FCC Consent Decree with CenturyLink); Exh. SP-3 (FCC Consent Decree with Intrado).

¹³ Exh. SP-6 (Settlement) ¶ 30.

¹⁴ *Id.* ¶¶ 32-34.

¹⁵ *Id.* ¶ 29.

¹⁶ Exh. SP-1T (Paul Direct) at 8:1-3; Exh. SP 4T (Paul Rebuttal) at 6:14 – 7:4.

terms are supported by an appropriate record, and the result is consistent with the public interest in light of all the information available to the Commission.

- 12 Public Counsel disagrees, although only in part. Public Counsel does not take issue with, or present any evidence on, the steps CenturyLink and Intrado have taken and agreed to take to remedy the software problem that caused the outage, to prevent a future outage, and to improve their ability to respond promptly and appropriately should a future outage occur. Rather, Public Counsel believes that the Commission should impose the maximum penalty of \$1,000 per violation,¹⁷ rather than the \$250 per violation in the Settlement, based on Mr. Bergmann's analysis of the factors the Commission evaluates when considering whether and how to take enforcement actions.¹⁸
- 13 Based on the record evidence, including testimony provided at the hearing, we find that Mr. Bergman has no particular technical expertise in the provision of 911 services. While his professional experience includes administrative proceedings involving telecommunications companies, it does not include any involvement in the assessments of penalties in general or specifically with respect to the relationship between the amount of a penalty and the likelihood of a repeated violation of the same statute or rule.¹⁹ Mr. Bergmann's testimony, therefore, is essentially his legal interpretation of Washington state rules regarding the appropriate level of enforcement action. The Commission finds his views are not entitled to greater weight than those of other witnesses, and that his testimony demonstrated less familiarity with 911 services and Commission enforcement policies than found in other testimony and record evidence in this proceeding.

¹⁷ Public Counsel appears to have revised its advocacy in its closing statement following the evidentiary hearing, requesting "that the Commission modify the multiparty settlement agreement to increase the penalty to an amount commensurate with the serious nature of this case, and *up to* the maximum penalty." TR 171:11-14 (emphasis added). Because Public Counsel's testimony and other statements consistently urge the Commission to impose the maximum penalty, we construe that as Public Counsel's official position.

¹⁸ Public Counsel also proposes that the Commission assess a penalty for failure to timely notify all 68 PSAPs in Washington of the outage, not just the 51 covered in the Settlement. The complaint, however, alleges only 51 violations based on the information available to Staff. Consistent with due process, the Commission cannot assess penalties for additional violations without amending the complaint and receiving evidence to prove those violations. We decline to take that action at this stage of the proceedings.

¹⁹ TR 148-52 (Bergmann).

14 The Commission considers at least 11 factors when determining whether to take enforcement action and if so, the amount of any penalty assessed for violations of applicable law.²⁰ We generally concur with Staff's analysis of the nine factors it considered in this case,²¹ but we focus our discussion on the four factors that weigh most heavily in our review of the penalty to which Staff and the Company have agreed in the Settlement: (1) the seriousness or harmfulness of the violations; (2) whether the violations were intentional; (3) whether the Company promptly corrected the violations and remedied the impact; and (4) the likelihood of recurrence. We address each of those factors below.

Seriousness of the Violations

15 All parties agree that the unavailability of 911 service for six hours on April 9-10, 2014, was a serious violation of statute and Commission rules and posed an unacceptable threat to the public health, safety, and welfare. Mr. Bergmann opines that "[t]he seriousness of the violations is an aggravating circumstance and calls for maximum penalties."²² A 911 outage unquestionably warrants a substantial monetary fine, but we do not find that the nature of the violations alone justifies the maximum penalty in this case.

16 As 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. We by no means belittle the distress that Ms. Cappola and others felt when they were unable to complete 911 calls. Their experience informs our assessment of the seriousness of the violations. We find that this is an aggravating factor, but does not constitute the exclusive factor the Commission will consider when determining the penalty amount.

Whether the Violations Were Intentional

17 Like all other parties in this proceeding, Mr. Bergmann agrees that "[i]t does not appear that the outage was intentionally caused by CenturyLink."²³ Nonetheless, he argues that this is an aggravating factor, saying that the lack of intent "does not excuse or obscure the

²⁰ *In re Enforcement Policy of the Commission*, Docket A-120061, Enforcement Policy at 7-9.

²¹ Exh. SP-5 (Staff Report) at 28-30.

²² Exh. DCB-1T (Bergmann Direct) at 23:12-13.

²³ *Id.* at 24:1.

seriousness of the violations, which were foreseeable and preventable.”²⁴ Mr. Bergmann states, “The facts that the outage was caused by a software coding defect and the appropriate precautions and alarm systems did not exist, tip the balance in favor of this being an aggravating circumstance.”²⁵

18 Such an argument misconstrues the purpose of the Commission’s review of a violator’s intent. First, the seriousness of the violation is a separate factor, which we have already discussed above. Second, the Commission’s policy states, “[a] company that willingly and intentionally violates a Commission requirement may be dealt with more severely than a company that unknowingly committed a violation.”²⁶ In determining whether a violation is intentional, the Commission considers whether the company has ignored Staff’s technical assistance, previously violated the same requirement, is hiding or obscuring facts, or demonstrably knew of and failed to correct the violation.²⁷ A higher penalty may be appropriate in such circumstances to reinforce the importance of complying with regulatory obligations and to provide a greater incentive for a company not only to correct its behavior but to modify its attitude toward complying with the law.

19 No such enhanced penalty is required when a company’s violations are unintentional but foreseeable and preventable. All or virtually all violations of Commission requirements are foreseeable and preventable, particularly when viewed in hindsight. CenturyLink could and should have been more aware of the vulnerabilities of the systems and processes on which the Company relied to provision 911 service. That lack of awareness, however, is not an intentional, willing, or even knowing violation of applicable law. Under the circumstances presented here, the CenturyLink’s intent with respect to the violations is neither an aggravating nor a mitigating factor in our assessment of the appropriate penalty.

²⁴ *Id.* at 24:2-3.

²⁵ *Id.* at 24:13-15.

²⁶ Enforcement Policy at 8.

²⁷ *Id.*

Prompt Corrective Action

20 “The Commission may be more lenient when a company promptly corrects a violation, and any underlying system problems, when these are pointed out by Staff.”²⁸ Neither Staff nor Mr. Bergmann addressed this factor, but we find it significant.

21 As soon as CenturyLink became aware of the outage, it began working with the PSAPs to identify and correct the cause.²⁹ The Company and its vendor restored service and began a review of the 911 provisioning and notification systems.³⁰ CenturyLink and Intrado developed and implemented multiple system changes, several of which were in place before Staff filed its Investigation Report in February 2015.³¹

22 The primary purpose of a penalty is to provide an additional incentive to prevent violations and promptly correct any that occur in the future. No additional incentive is necessary to encourage CenturyLink to remedy 911 outages immediately if they should occur. The Company did so in this instance, and we have no reason to believe it will not do so again. Accordingly, we find that this is a mitigating factor in determining the appropriate penalty amount.

Likelihood of Recurrence

23 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.”³² 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.³³ We find that CenturyLink requires no additional incentive in the form of a higher penalty to take remedial action.

²⁸ *Id.*

²⁹ TR 81:2-5 (Reynolds).

³⁰ Exh. CTL-4 (Major Outage Report) at 2.

³¹ Exh. CTL-1T at 7-9 (Betsch).

³² Enforcement Policy at 9.

³³ Exh. CTL-1T at 7-9 (Betsch); TR 81:6 - 82:10 (Hartman & Betsch).

- 24 Public Counsel argues that these actions are insufficient. It concedes that there may not be another outage due to the software issue that caused the April 2014 incident “because it does appear that the Company has addressed that particular failure in their system,” but “software systems don’t run at 100 percent, and there could be other software glitches in the system.”³⁴ Mr. Bergmann believes “CenturyLink should be conducting an overall risk assessment regarding its 911 service to detect other potential preventable errors.”³⁵
- 25 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 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.
- 26 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.³⁶ 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.

Conclusion

- 27 We have reviewed the Settlement in light of all the factors in the Commission’s Enforcement Policy. We agree with Staff and the Company that the \$2,854,750 penalty appropriately reflects the nature and extent of the violations, as well as CenturyLink’s actions in the wake of the 911 outage that gave rise to those violations. We conclude that

³⁴ TR 169:8-13 (Public Counsel).

³⁵ Exh. DCB-1T at 27:20-22.

³⁶ Exh. SP-2 (FCC Consent Decree) at 6; TR 86:21 – 87:11 (Hartman).

the Settlement reasonably resolves the issues raised in the complaint, the Settlement terms are supported by an appropriate record, and the result is consistent with the public interest in light of all the information available to the commission. We also reject the assertion that imposing the maximum possible penalty, or any penalty greater than that agreed to in the settlement, would result in greater compliance with our rules. To the contrary, we conclude that imposing a greater penalty would be unnecessary and punitive. Accordingly, we approve the Settlement without additional conditions.

FINDINGS AND CONCLUSIONS

- 28 (1) The Commission is an agency of the State of Washington vested by statute with authority to regulate telecommunications companies in Washington, including CenturyLink.
- 29 (2) The Commission has jurisdiction over the subject matter of this proceeding and over CenturyLink.
- 30 (3) The unavailability of 911 service for six hours on April 9-10, 2014, was a serious violation of applicable law and posed an unacceptable threat to the public health, safety, and welfare.
- 31 (4) The seriousness of CenturyLink's violations of statute and Commission rules supports assessment of a higher penalty, but it is not the only factor the Commission will consider when determining the penalty amount.
- 32 (5) The deficiencies in CenturyLink's 911 systems that caused the outage were foreseeable and preventable, but the Company's failure to anticipate and correct those issues before the outage was not an intentional, willing, or knowing violation of applicable law.
- 33 (6) CenturyLink's conduct prior to the outage is not an aggravating factor in determining the size of the penalty the Commission assesses for the violations.
- 34 (7) CenturyLink promptly corrected the violations when the Company became aware of them and discovered their source. CenturyLink also began to develop and implement system changes to remedy the cause of the outage and potential future outages even before Staff released its Investigation Report.
- 35 (8) CenturyLink's conduct following the outage is a mitigating factor in determining the size of the penalty the Commission assesses for the violations.

- 36 (9) CenturyLink has implemented or agreed to implement changes to its 911 provisioning and notification systems that will minimize the risk of recurrence of a 911 outage.
- 37 (10) The software on which CenturyLink relies to provision 911 service is not infallible, but that fact alone does not present a high likelihood that a 911 outage will recur. No software or system is, or can be, foolproof. The Commission requires regulated companies to implement measures that are reasonable under the circumstances to minimize service disruptions and other violations of Commission requirements.
- 38 (11) CenturyLink's review of, and modifications to, its 911 systems are reasonable measures under the circumstances to minimize future service disruptions. Such actions are a mitigating factor in determining the size of the penalty the Commission assesses for the violations.
- 39 (12) The \$2,854,750 penalty amount in the Settlement is among the highest penalties the Commission has ever assessed, and that level appropriately reflects the nature and extent of the violations, as well as CenturyLink's actions in the wake of the 911 outage that gave rise to those violations.
- 40 (13) The Settlement is lawful and reasonably resolves the issues raised in the complaint. The Settlement terms are supported by an appropriate record, and the result is consistent with the public interest in light of all the information available to the commission. Accordingly, the Commission should approve the Settlement without additional conditions.

ORDER

THE COMMISSION ORDERS:

- 41 (1) The Commission approves the Settlement Agreement, which is attached as Exhibit A to, and incorporated into, this Order, and adopts the Settlement Agreement as the final resolution of the disputed issues in this docket.
- 42 (2) The Commission assesses a penalty of \$2,854,750 against Qwest Corporation d/b/a CenturyLink QC, which is due and payable within 10 business days from the date of this Order.
- 43 (3) Qwest Corporation d/b/a CenturyLink QC must comply with all reporting and other requirements in the Settlement Agreement.

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- 44 (4) The Commission retains jurisdiction to enforce the terms of this Order and delegates to the Executive Director and Secretary the authority to confirm compliance with it.

DATED at Olympia, Washington and effective February 22, 2016.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DAVID W. DANNER, Chairman

PHILIP B. JONES, Commissioner

ANN E. RENDAHL, Commissioner

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NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.

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Exhibit A
Settlement Agreement