

BEFORE THE WASHINGTON  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

DOCKET UT-210902

V.

CENTURLINK COMMUNICATIONS  
LCC d/b/a LUMEN TECHNOLOGIES  
GROUP; QWEST CORPORATION;  
CENTURYTEL OF WASHINGTON, INC.;  
CENTURYTEL OF INTER ISLAND, INC.;  
CENTURYTEL OF COWICHE, INC.;  
UNITED TELEPHONE COMPANY OF  
THE NORTHWEST

COMMISSION STAFF'S MOTION FOR PARTIAL  
SUMMARY DETERMINATION  
OF LUMEN'S LIABILITY FOR VIOLATIONS OF  
WAC 480-120-172(3)(a)

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## I. INTRODUCTION

1           Between late-March 2020 and September 2021, Governor Inslee forbade utility companies, including telecommunications companies, from disconnecting service to customers for non-payment pursuant to the state of emergency he proclaimed due to the spread of the SARS-CoV-2 virus (COVID-19). The named respondents (collectively Lumen) admit that while that proclamation was in effect, they cut off service to 923 of their customers for non-payment through processes called suspension and disconnection.

2           The Commission should conclude that those suspensions or disconnections violated its rules governing service discontinuance because the Governor's proclamation invalidated the terms and conditions upon which Lumen relied to discontinue service. The Commission should, accordingly, grant Staff partial summary determination as to Lumen's liability for the regulatory violations alleged in the complaint and allow the parties to focus their efforts on the appropriate penalty at the hearing set for this matter.

## II. RELIEF REQUESTED

3           Staff requests that the Commission grant this motion for partial summary determination of the issue of Lumen's liability for 923 violations of WAC 480-120-172(3)(a).

## III. STATEMENT OF FACTS

4           In February 2020, Governor Inslee declared a state of emergency in all of Washington's counties due to a then-novel coronavirus.<sup>1</sup> Pursuant to that state of

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<sup>1</sup> See generally Proclamation by Governor Jay Inslee, No. 20-05 (Feb. 29, 2020).

emergency, he took actions intended to limit both the spread of COVID-19 and the impacts of that spread.

5           The Governor chose as one means of limiting the severity of the pandemic’s impacts the exercise of emergency powers to assist utility customers. On March 18, 2020, the Governor issued Proclamation 20-23, UTC - Ratepayer Assistance, to

waive or suspend specified statutes that prevent, hinder, or delay necessary action in coping with the economic impacts to utility customers throughout the state of Washington resulting from the COVID-19 State of Emergency, and to help preserve and maintain life, health, property, or the public peace by prohibiting certain utility low income accounts from being used during this crisis for any purpose other than to support community action agencies in providing services to address the consequences of the COVID-19 pandemic.<sup>2</sup>

The Governor in Proclamation 20-23 “strongly encourage[d] all utilities to take reasonable actions to mitigate economic impacts of the COVID-19 pandemic on their utility customers,” including, but not limited to, “acting to prevent the disconnection of services due to non-payment during the term of the statewide emergency declaration.”<sup>3</sup>

6           Unfortunately, the initial measures designed to curtail the spread of COVID proved insufficient. On March 23, 2020, the Governor issued Proclamation 20-25 to “prohibit[] all people in Washington State from leaving their homes or participating in social, spiritual, or recreational gatherings of any kind regardless of the number of participants, and all non-essential businesses in Washington State from conducting business.” The stay-at-home order

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<sup>2</sup> Proclamation by Governor Jay Inslee, No. 20-23, UTC - Ratepayer Assistance, at 2 (Mar. 18, 2020); *see id.* at 3.

<sup>3</sup> *Id.* at 3.

originally lapsed on April 6, 2020,<sup>4</sup> but the Governor later extended it so that Washington reopened to social and economic activity in phases over the spring and summer of 2020.<sup>5</sup>

7           In April 2020, the Governor transformed Proclamation 20-23’s “strong encouragement” into a requirement of law by issuing Proclamation 20-23-.2, which he titled “Ratepayer Assistance and the Preservation of Essential Services.”<sup>6</sup> In Proclamation 20-23.2, the Governor made several findings relevant here. First, he determined that “telecommunications . . . companies regulated by the Utilities and Transportation Commission under Title 80 RCW” provided “essential utility services.”<sup>7</sup> Second, he determined that “preserving and maintaining essential utility services to vulnerable populations during” the COVID-19 pandemic would “support the fundamental public purpose of protecting public health and welfare.”<sup>8</sup> Based on those findings and pursuant to RCW 43.06.220(1)(h) the Governor “prohibit[ed] . . . all . . . telecommunications . . . providers in Washington State” from “disconnecting any residential customers from . . . telecommunications . . . service due to non-payment.”<sup>9</sup>

8           Proclamation 20-23.2’s disconnection prohibition was retroactively effective to the date the Governor issued the stay-at-home order,<sup>10</sup> and he initially intended it to end on May 4, 2020.<sup>11</sup> However, the course of the pandemic prompted him to amend Proclamation 20-

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<sup>4</sup> Proclamation by Governor Jay Inslee, No. 20-25, Stay Home – Stay Healthy, at 2-3 (Mar. 23, 2020).

<sup>5</sup> *E.g.*, Proclamation by Governor Jay Inslee, No. 20-25.4, Transition from “Stay Home – Stay Healthy” to “Safe Start – Stay Healthy” County-By-County Phased Reopening, at 3 (May 31, 2020); Proclamation by Governor Jay Inslee, No. 20-25.2, Adjusting Stay Home – Stay Healthy to May 4, 2020, at 2 (Apr. 27, 2020).

<sup>6</sup> Proclamation by Governor Jay Inslee, No. 20-23.2, Ratepayer Assistance and Preservation of Essential Services, at 1 (Apr. 17, 2020) (Proclamation No. 20-23.2).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

23.2 numerous times to extend the prohibition’s term.<sup>12</sup> It ultimately did not terminate until 11:59 p.m. on September 30, 2021.<sup>13</sup>

9           In the fall of 2021, Staff began reviewing telecommunications companies’ responses to the COVID-19 pandemic to determine whether measures were needed to assist customers deal with the fallout from the pandemic. In doing so, Staff sent data requests to the telecommunications companies operating in Washington. Lumen was among these.<sup>14</sup>

10           One of Staff’s data requests asked telecommunications companies to “provide the number of customers disconnected for late payment or lack of payment each month during the period from March 2020 to August 2021.”<sup>15</sup> Lumen, in response, identified 407 disconnections. It noted, however, that it had already suspended 243 of those disconnected customers before Proclamation 20-23.2 became effective, meaning that they experienced no new loss of service.<sup>16</sup>

11           Lumen’s note about “suspended” customers raised questions for Staff. It issued another round of data requests to Lumen to obtain answers.<sup>17</sup>

12           In that round, Staff first asked Lumen to “confirm that telephone services become unavailable to customers placed in suspended status.”<sup>18</sup> Lumen confirmed that understanding, stating that “a ‘suspended’ customer is one whose service can’t be

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<sup>12</sup> *E.g.*, Proclamation by Governor Jay Inslee, No. 20-23.16, Ratepayer Assistance and Preservation of Essential Services, at 3 (July 2, 2021) (the final extension); Proclamation by Governor Jay Inslee, No. 20-23.3, Ratepayer Assistance and Preservation of Essential Services, at 4 (May 5, 2020) (the first extension).

<sup>13</sup> Proclamation by Governor Jay Inslee, No. 20-23.16, at 3.

<sup>14</sup> *E.g.*, Letter from Adam Sherr to Amanda Maxwell, Docket U-200281, at 1 (sent Oct. 12, 2021).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *See generally* email from Jacque Hawkins-Jones to David Namura (sent Jan. 27, 2022) (the email is included as Attachment E to Staff’s investigative report in this matter).

<sup>18</sup> *Id.* at 1.

accessed/utilized, but who remains on the company’s network.”<sup>19</sup> Lumen qualified its answer by stating that it believed that “the Governor’s Proclamations did not restrict utilities from suspending customers for non-payment.”<sup>20</sup>

13 Staff also asked Lumen to provide a breakdown of suspensions and disconnections during the effective period of Proclamation 20-23.2, by operating company.<sup>21</sup> Lumen responded by revising the number of disconnections slightly upwards, identifying a total of 423 disconnections spread among the various operating companies.<sup>22</sup> It also identified 743 suspensions, with those suspensions again spread among the various operating companies.<sup>23</sup>

14 Based on the data provided by Lumen, the Commission, through its Staff, complained against Lumen, alleging that disconnection or suspension of those 923 customers violated WAC 480-120-172(3)(a), which governs company-initiated discontinuances of telecommunications services.<sup>24</sup> The complaint sought penalties for each violation.<sup>25</sup>

15 In its answer, Lumen admitted the relevant facts. It conceded that each of the named respondents operates as a telecommunications company in Washington.<sup>26</sup> It admitted that it had disconnected or suspended for non-payment the number of customers alleged by Staff.<sup>27</sup>

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<sup>19</sup> Email from Adam Scherr to Jacque Hawkins-Jones, at 2 (sent Feb. 22, 2022) (the email is included as Attachment F to Staff’s investigative report in this matter).

<sup>20</sup> *Id.* at 2.

<sup>21</sup> Email from Jacque Hawkins-Jones to David Namura, at 1.

<sup>22</sup> Email from Adam Scherr to Jacque Hawkins-Jones, at 3.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *See generally Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC d/b/a Lumen Tech. Group*, Docket UT-201902, Order 01 (Apr. 6, 2022) (“Complaint”).

<sup>25</sup> *Id.* at 5-6 ¶¶ 31-38.

<sup>26</sup> *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC d/b/a Lumen Tech. Group*, Docket UT-201902, Answer & Affirmative Defenses, 2-3 ¶ 14 (Apr. 26, 2022) (“Answer”).

<sup>27</sup> *Id.* at 1-2 ¶¶ 3-6.

And it conceded that both disconnection and suspension resulted in the customer losing telecommunications services.<sup>28</sup>

#### **IV. STATEMENT OF ISSUES**

16 Should the Commission conclude that:

(1) there is no genuine material issue of fact concerning whether: (a) Lumen disconnected or suspended 923 customers during the term of Proclamation 20-23.3, and (b) suspended and disconnected customers lost access to telecommunications services, given that Lumen admits those facts;

(2) Proclamation 20-23.2 applied to both “suspensions” and “disconnections,” as Lumen uses those terms, given its plain text and purpose;

(3) Proclamation 20-23.2 invalidated, while it was effective, the terms of service upon which Lumen relied to suspend and disconnect customers for non-payment given that those terms violated the law or public policy, or both; and

(4) Lumen violated WAC 480-120-172(3)(a) 923 times by suspending and disconnecting customers for non-payment during the term of Proclamation 20-23.2 because the terms and conditions upon which it relied to justify the discontinuance of service were invalidated by the proclamation?

#### **V. EVIDENCE RELIED UPON**

17 Staff relies on the evidence on file in this docket, including Staff’s investigative report and the attachments thereto.

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<sup>28</sup> *Id.* at 2 ¶ 12, 2-3 ¶ 14.

## VI. ARGUMENT

18           “The material facts are not in dispute” here.<sup>29</sup> Lumen admits that it suspended or disconnected 923 customers while Proclamation 20-23.2 was in effect, and that each of those customers lost access to telecommunications services that the proclamation found to be essential to customers. The Commission therefore must only determine the “legal effects of those facts.”<sup>30</sup> Those legal effects turn on three interrelated questions: (1) did Proclamation 20-23.2 apply to Lumen’s suspension of customers for non-payment, as well as its disconnection of customers for that same reason; (2) did Proclamation 20-23.2 render ineffective the terms and conditions upon which Lumen relied to suspend or disconnect customers; and (3) did Lumen violate WAC 480-120-172(3)(a) for each of the suspensions or disconnections during the pandemic when it relied on those ineffective terms and conditions to discontinue service to the relevant customers?

19           As discussed below, each of those is a question of law, and the answers to them are, respectively, yes, yes and yes. The Commission should conclude as much and grant Staff partial summary determination on the issue of Lumen’s liability for violations of WAC 480-120-172(3)(a).

### A. Standards for Summary Determination

20           The Commission may grant summary determination when “the pleadings filed in the proceeding, together with any properly admissible evidentiary support show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

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<sup>29</sup> *Clawson v. Grays Harbor College Dist. No. 2*, 148 Wn.2d 528, 531, 61 P.3d 1130 (2003).

<sup>30</sup> *Clawson*, 148 Wn.2d at 531.

matter of law.”<sup>31</sup> Accordingly, any party moving for summary judgment must show two things.

21 First, the party must establish the absence of a genuine material issue of fact.<sup>32</sup> To do so, the moving party must initially show such an absence through admissible evidence.<sup>33</sup> If it does so, then the non-moving party must present evidence that creates a genuine material issue of fact.<sup>34</sup> The non-moving party must “set forth specific facts showing that there is a genuine issue for trial” and may not rest on mere allegations in its pleadings.<sup>35</sup> The Commission considers all evidence, and any reasonable inferences arising therefrom, in the light most favorable to the non-moving party when determining whether a material issue of fact exists.<sup>36</sup>

22 Second, the moving party must establish its “entitle[ment] to judgment as a matter of law.”<sup>37</sup> To do so, the moving party must show that a “legal theory or doctrine supports the movant’s position that judgment should be entered.”<sup>38</sup>

23 While summary determination is generally intended to avoid a useless hearing,<sup>39</sup> the Commission does not treat summary determination as an all-or-nothing procedural mechanism. Accordingly, it may grant partial summary determination on specific issues, but

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<sup>31</sup> WAC 480-07-380(2)(a). In adjudicating motions for summary determination, “the Commission . . . consider[s] the standards applicable to a motion for summary judgment made under Washington Civil Rule 56.” *Id.* Washington courts treat federal authority concerning Federal Rule of Civil Procedure 56 as persuasive authority for the interpretation and application of Civil Rule 56. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

<sup>32</sup> WAC 480-07-380(2)(a).

<sup>33</sup> *Young*, 112 Wn.2d at 225.

<sup>34</sup> *Atherton Condo Ass’n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

<sup>35</sup> *LaPlante v. State*, 85 Wn.2d 154, 158, 51 P.2d 299 (1975).

<sup>36</sup> *Atherton Condo Ass’n*, 115 Wn.2d at 516.

<sup>37</sup> WAC 480-07-380(2)(a); *LaPlante*, 85 Wn.2d at 158.

<sup>38</sup> 10A C. Wright & A. Miller, *Federal Practice* § 2725.3 (4th ed. April 2022 update).

<sup>39</sup> *LaPlante*, 85 Wn.2d at 158.

not others.<sup>40</sup> Thus it may, as relevant here, grant summary determination as to liability and leave the issue of the appropriate penalty for resolution at hearing.<sup>41</sup>

**B. Telecommunications Companies' Obligation to Serve, and Proclamation 20-23.2**

24 The Commission regulates “the rates, services, facilities, and practices of all persons engaging within” Washington “in the business of supplying any utility service or commodity to the public for compensation.”<sup>42</sup> The revised code refers to these suppliers of utility services as “public service corporation[s],”<sup>43</sup> a term that includes within it “telecommunications company[ies].”<sup>44</sup> A “telecommunications company” is any “corporation, company, association, joint stock association, partnership, and person, their lessees, trustees or receivers appointed by any court whatsoever, and any city or town owning, operating, or managing any facilities used to provide telecommunications for hire, sale, or resale to the general public” within Washington.<sup>45</sup> As Lumen acknowledges, each of the named respondents is a telecommunications company.<sup>46</sup>

25 As public service companies, telecommunications companies enjoy certain privileges<sup>47</sup> and owe certain public service duties.<sup>48</sup> One of these duties is the obligation to serve.<sup>49</sup> Specifically, under RCW 80.36.090, “[e]very telecommunications company shall,

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<sup>40</sup> *E.g.*, *Wash. Utils. & Transp. Comm’n v. Advanced Telecom Group, Inc.*, Docket UT-033011, Order 05, 16, ¶ 45 (Feb. 12, 2004).

<sup>41</sup> *Cf.* CR 56(c) (“[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”).

<sup>42</sup> RCW 80.01.040(3).

<sup>43</sup> RCW 80.04.010(23).

<sup>44</sup> RCW 80.04.010(23).

<sup>45</sup> RCW 80.04.010(28).

<sup>46</sup> Complaint at 1 ¶¶ 3-6; Answer at 1-2 ¶¶ 3-6.

<sup>47</sup> *E.g.*, RCW 80.36.010 (eminent domain), .020 (right of entry), .040 (use of rights of way).

<sup>48</sup> *E.g.*, RCW 80.36.090 (duty to provide service), .220 (duty to transmit messages).

<sup>49</sup> *E.g.*, LAWS OF 1911, ch. 117, § 35 (“[e]very telephone company shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communications and furnish telephone service as demanded.”); RCW 80.36.090.

upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto suitable and proper facilities and connections for telephonic communication and furnish service as demanded.”

26           This obligation to serve:

encompasses both positive and negative obligations. The positive obligation requires, if reasonable, affirmative actions to extend a utility’s service to customers within its franchise area. Related to the duty to extend service is its opposite, an obligation to continue with existing service once it has commenced, or negative restrictions on the abandonment or termination of service.<sup>50</sup>

Most states regulate the “negative obligation,” meaning they restrict service discontinuance.<sup>51</sup> Washington is one of these. The Commission prescribes when and how telecommunications companies may cease providing service to customers.<sup>52</sup> As relevant, WAC 480-120-172(3) authorizes telecommunications companies to discontinue service upon proper notice if, and only if, the company makes one of a specified set of internal determinations.<sup>53</sup> One of these is that “the customer has violated a rule, statute, service agreement, filed tariff, or rates, terms and conditions of competitively classified services.”<sup>54</sup>

27           The Governor may proclaim a state of emergency.<sup>55</sup> Such a proclamation authorizes the Governor to exercise certain emergency powers.<sup>56</sup> One of these is the power to

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<sup>50</sup> Jim Rossi, THE COMMON LAW “DUTY TO SERVE” AND PROTECTION OF CONSUMERS IN AN AGE OF COMPETITIVE RETAIL PUBLIC UTILITY RESTRUCTURING, 51 VNLR 1233, 1257 (1998).

<sup>51</sup> See Rossi, 51 VNLR at 1260 (“in most states utility obligations regarding service continuation are reinforced by statutes and/or regulations.”).

<sup>52</sup> WAC 480-120-171, -172, -173, -174.

<sup>53</sup> WAC 480-120-172(3)(a).

<sup>54</sup> WAC 480-120-172(3)(a).

<sup>55</sup> RCW 43.06.010(12).

<sup>56</sup> RCW 43.06.220.

“prohibit[] . . . [s]uch . . . activities” as the Governor “reasonably believes should be prohibited to help preserve and maintain life, health, property, or the public peace.”<sup>57</sup>

28           The Governor proclaimed a state of emergency arising from the COVID-19 pandemic on February 29, 2020.<sup>58</sup> Pursuant to that state of emergency, Governor Inslee issued Proclamation 20.23.2 to prohibit telecommunications companies, “from disconnecting any residential customers from . . . telecommunications . . . service due to non-payment.”<sup>59</sup>

**C.     There is no Material Issue of Fact as to Whether Lumen Suspended or Disconnected 923 Customers While Proclamation 20-23.2 was in Effect and that these Suspensions or Disconnections Deprived the Affected Customers of Service**

29           The Commission should conclude that Staff has met the movant’s burden of demonstrating the absence of a material issue of fact because Lumen admits the facts material here:<sup>60</sup>

- Staff alleges that Lumen suspended 743 customers during the effective term of Proclamation 20-23.2.<sup>61</sup> Lumen admits those 743 suspensions.<sup>62</sup>
- Staff alleges 180 disconnections during the effective term of Proclamation 20-23.2.<sup>63</sup> Lumen admits those 180 disconnections.<sup>64</sup>

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<sup>57</sup> RCW 43.06.220(1)(h).

<sup>58</sup> See generally Proclamation by Governor Jay Inslee, No. 20-05.

<sup>59</sup> Proclamation No. 20-23.2 at 4.

<sup>60</sup> See WAC 480-07-380(2)(a).

<sup>61</sup> *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC d/b/a Lumen Tech. Group*, Docket UT-201902, Complaint, 2 ¶ 14 (Apr. 6, 2022) (“Complaint”).

<sup>62</sup> Answer at 2-3 ¶ 14 (Apr. 26, 2022); accord *Wash. Utils. & Transp. Comm’n v. CenturyLink Commc’ns LLC d/b/a Lumen Tech. Group*, Docket UT-201902, Staff Investigative Report, Attachment F, at 2 (dated Mar. 2022) (“Investigative Report”).

<sup>63</sup> See Complaint at 2 ¶ 12.

<sup>64</sup> See Answer at 2 ¶ 12; Investigative Report, Attachment F, at 3.

- Staff alleges that both suspension and disconnection result in the affected customer losing service.<sup>65</sup> Lumen admits that this is so.<sup>66</sup>

30 Lumen and Staff’s agreement leaves the Commission to decide only whether Staff is entitled to judgment as a matter of law.<sup>67</sup> As noted above, that determination turns on three questions, and Staff now turns to those.

**D. Proclamation 20-23.2 Applied to both “Suspensions” and “Disconnections” as Lumen uses those Terms**

31 The first question is whether Proclamation 20-23.2 forbade what Lumen calls “suspension” as well as what it calls “disconnection.” That question is one of law,<sup>68</sup> and the Commission should grant Staff judgment as a matter of law on the issue because all evidence indicates that the Governor intended the proclamation to cover all cessation of utility service for non-payment, rather than only those cessations specifically denominated “disconnections” by the utility alone.

32 The Commission must interpret Proclamation 20-23.2, issued by the Governor pursuant to RCW 43.06.220(1),<sup>69</sup> using the same principles it employs to interpret a statute.<sup>70</sup> It must attempt to discern and give effect to the Governor’s intent in issuing the proclamation,<sup>71</sup> finding, if possible, that intent through the plain meaning of the words it used.<sup>72</sup> In doing so, the Commission must give undefined terms their ordinary dictionary

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<sup>65</sup> Complaint at 2 ¶¶ 10, 11, 13.

<sup>66</sup> Answer at 2 ¶¶ 10, 11, 13.

<sup>67</sup> WAC 480-07.380(2)(a).

<sup>68</sup> See *State v. Zach*, 2 Wn. App. 2d 667, 672-74, 413 P.3d 65 (2018).

<sup>69</sup> E.g., Proclamation No. 20-23.2, at 2 (citing RCW 43.04.220(2)(g)), *id.* at 3-4 (citing RCW 43.04.220(1)(h)).

<sup>70</sup> *In re Millspaugh*, 14 Wn. App. 2d 137, 140, 469 P.3d 336 (2020).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

definitions absent evidence that the Governor used them as terms of art<sup>73</sup> and read the proclamation as a whole when assigning meaning to its provisions.<sup>74</sup>

33           The Governor did not define the term “disconnection,” in the proclamation, and nothing in the text of the proclamation indicates that *the Governor* used the term as one possessed of a technical definition.<sup>75</sup> Accordingly, the Commission must attempt to find the plain meaning of the term “disconnection” by recourse to the dictionary and examining the proclamation as a whole. Both of those sources of meaning indicate that the two processes for ceasing service used by Lumen constituted what the Governor called “disconnection.”

34           The dictionary definition strongly indicates that the word “disconnection” encompasses both what Lumen calls suspension and what it calls disconnection. As regards to services, the dictionary defines the term “disconnect” to mean “the action of stopping the supply of a service such as electricity, gas, water, or phone to a place, especially because money has not been paid.”<sup>76</sup> The suspensions and disconnections at issue here both patently fall within that definition.

35           The remainder of Proclamation 20-23.2 also strongly suggests that the Governor intended the term “disconnect” to encompass both what Lumen refers to as suspension and disconnection. The Governor based the disconnection prohibition on his findings that “telecommunications . . . companies” provide “essential utility services” and that “[p]reserving and maintaining essential utility services to vulnerable populations during” the

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<sup>73</sup> Cf. *Am. States Ins. Co. v. DeLean’s Tile & Marble, LLC*, 179 Wn. App. 27, 319 P.3d 38 (2013).

<sup>74</sup> See *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (a tribunal discerns legislative intent by reviewing from “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question”).

<sup>75</sup> See generally Proclamation 20-23.2.

<sup>76</sup> Cambridge Dictionary (defining “disconnection”), available at <https://dictionary.cambridge.org/dictionary/english/disconnect> (last visited April 25, 2022).

pandemic would “support[] the fundamental public purpose of protecting public health and welfare.”<sup>77</sup> A suspension, no less than something called a disconnection, involves the loss of services the Governor deemed essential and that he deemed the continued provision of necessary to the protection of the public health and welfare. The Commission should conclude the same and read the term “disconnecting” more broadly than Lumen has urged in order to effectuate the Governor’s purposes.

36           Indeed, reading the term “disconnection” otherwise would produce strained or absurd consequences. If the term “disconnect” includes only that which a utility itself calls a disconnection, utilities could nullify the substantive protections intended by the Governor through the simple expedient of calling a disconnection something else. The law does not permit an interpretation that so easily frustrates the Governor’s manifest purposes.<sup>78</sup>

37           Given the plain meaning of “disconnect,” the Commission should conclude that Lumen’s suspensions and disconnections were “disconnect[ions]” within the meaning of Proclamation 20-23.2. Both involved Lumen “stopping the supply of . . . phone [service] to” households because “money ha[d] not been paid.” Proclamation 20-23.2 applied to forbid both.

**E.     Proclamation 20-23.2 Rendered Ineffective During the Relevant Time Period the Terms and Conditions Governing Lumen’s Service that Required Customers to Pay their Bills or Face Suspension or Disconnection**

38           The next question presented is whether Proclamation 20-23.2 invalidated the terms and conditions of service authorizing Lumen to suspend and disconnect its customers for

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<sup>77</sup> Proclamation No. 20-23.2 at 4.

<sup>78</sup> *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007) (when “undertaking a plain language analysis,” courts “avoid interpreting a statute in manner that leads to unlikely, strained, or absurd results.”).

non-payment while the proclamation was effective. Again, that is a question of law,<sup>79</sup> and, again, the Commission should grant Staff judgment as a matter of law on the issue because Proclamation 20-23.2 invalidated those terms and conditions while it was effective, either because those terms were illegal, or because they violated public policy, or both.

39 In Washington, “parties may incorporate into a contract any provision that is not illegal or against public policy.”<sup>80</sup> The corollary to that legal principle is that parties may not incorporate provisions that are illegal or that violate public policy.<sup>81</sup> A contract term that is illegal or violates public policy is treated as severed from the contract.<sup>82</sup>

**1. The terms and conditions Lumen relied upon to suspend or disconnect customers directly conflicted with Proclamation 20-23.2, rendering them illegal and ineffective.**

40 In Washington, contractual “provisions” are illegal and thus “unenforceable where they are prohibited by statute.”<sup>83</sup> That occurs where the provision “direct[ly] conflict[s] with state law.”<sup>84</sup>

41 The Governor issued Proclamation 20-23.2 pursuant to RCW 43.06.220(1)(h). It forbade utilities from disconnecting customers for non-payment during its effective term,<sup>85</sup> making the act of doing so a criminal offense.<sup>86</sup> The company’s service provisions at issue

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<sup>79</sup> *Yaron v. Conley*, 17 Wn. App. 2d 815, 829, 488 P.3d 855 (2021) (whether a contractual term violates public policy is a question of law); see *Bankston v. Pierce County*, 174 Wn. App. 932, 940-41, 301 P.3d 495 (2013) (illegality can be decided as an issue of law where no material issue of fact exists).

<sup>80</sup> *Car Wash. Enters., Inc. v. Kampanos*, 74 Wn. App. 537, 543, 874 P.2d 868 (1994).

<sup>81</sup> *Id.*

<sup>82</sup> *E.g., Malcolm v. Yakima County Consol. Sch. Dist. No. 90*, 23 Wn.2d 80, 83-84, 159 P.2d 394 (1945) (where contractual terms violate public policy, the contract “stands as though such stipulation[s] had never been inserted”); *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 333, 828 P.2d 73 (1992), *overruled on other grounds by Waterjet Tech., Inc. v. Flow Intern. Corp.*, 140 Wn.2d 313, 996 P.2d 598 (2000) (“[c]ontractual provisions which conflict with the terms of a legislative enactment are illegal and unenforceable.”).

<sup>83</sup> *Jordan v. Northstar Mortgage, LLC*, 185 Wn.2d 876, 883, 374 P.3d 1195 (2016).

<sup>84</sup> *Jordan*, 185 Wn.2d at 894.

<sup>85</sup> Proclamation 20-23.2 at 4.

<sup>86</sup> RCW 43.06.220(5).

authorized Lumen to “disconnect” customers for non-payment through suspension or disconnection. Because the terms and conditions authorize what the proclamation explicitly forbade, they were “in direct conflict” with the proclamation. They were thus illegal and inoperative. Lumen could not base an internal determination that any suspended or disconnected customer had violated the terms or conditions governing service on them, and it cannot in this forum invoke those terms to justify having disconnected or suspended those customers.

**2. The terms and conditions Lumen relied on to suspend or disconnect customers violated the public policy effectuated by Proclamation 20-23.2, and were thus ineffective.**

42 In Washington, contractual terms are also ineffective when they violate public policy. When determining whether a contract term violates public policy, a tribunal must consider “whether the contract has a tendency to be against the public good, or to be injurious to the public.”<sup>87</sup> Thus, “whether something can be a source of public policy in the context of contract enforceability” depends on two considerations: (1) was it “primarily intended to promote the public good or protect the public from injury,” and (2) was it “issued by an entity with the legal power and authority to set public policy in the relevant context.”<sup>88</sup>

43 Proclamation 20-23.2 meets the criteria for establishing a public policy. The Governor issued it pursuant to RCW 43.06.220(1)(h), a statute that authorized him in the state of emergency caused by the then-emerging COVID-19 pandemic to forbid certain conduct to “preserve and maintain life, health, property, or the public peace.” The Governor

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<sup>87</sup> *LK Operating, LLC v. Collections Group, LLC*, 181 Wn.2d 48, 86, 331 P.3d 1147 (2014) (internal quotation omitted).

<sup>88</sup> *LK Operating*, 181 Wn.2d at 86.

exercised his authority to prohibit disconnections after finding that the prohibition was necessary to “support[] the fundamental public purpose of protecting public health and welfare.”<sup>89</sup> In short, Proclamation 20-23.2 was issued “primarily” to “promote the public good . . . or protect the public from injury” by an official “with the legal power and authority to set public policy” in the context of a state of emergency.<sup>90</sup>

44           The terms and conditions upon which Lumen relied to suspend or disconnect customers violated the public policy embodied in Proclamation 20-23.2. The Governor issued the proclamation to codify a policy of ensuring that all Washingtonians continued to receive essential services during the pandemic, even in the face of non-payment. The terms and conditions at issue directly contravened that public policy by authorizing Lumen to cease providing those essential services for non-payment. Lumen could not rely on those terms to suspend or disconnect customers while the Proclamation was in effect, and it cannot rely on them here to defend its cessation of service to the affected customers against claims of regulatory violations.

**F.     Lumen Violated WAC 480-120-172(3)(A) by Suspending and Disconnecting Customers Between March 23, 2020, and September 30, 2021**

45           The final question presented is whether Lumen violated WAC 480-120-172(3)(a) when it suspended or disconnected customers for non-payment while Proclamation 20-23.2 was effective. Again, the answer is yes.

46           As noted above, WAC 480-120-172(3)(a) provides that a telecommunications company “may discontinue service after providing proper notice . . . if, and only if . . . [t]he

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<sup>89</sup> *LK Operating*, 181 Wn.2d at 86.

<sup>90</sup> *LK Operating*, 181 Wn.2d at 86.

company determines the customer has violated a rule, statute, service agreement, filed tariff, or rates, terms, and conditions of competitively classified services.”

47 Lumen operates under an AFOR that effectively treats it as competitively classified for the services at issue here.<sup>91</sup> Under the AFOR then, Lumen does not file tariffs for those services.<sup>92</sup> Accordingly, the relevant provisions in WAC 480-120-172(3)(a) are those concerning violations of the “rates, terms, and conditions of competitively classified services,”<sup>93</sup> which the AFOR does not waive.<sup>94</sup>

48 WAC 480-120-172(3)(a)’s plain text required Lumen to make a certain internal determination before discontinuing service. Specifically, Lumen needed to determine that customers who had not paid their bills had violated the terms or conditions of service requiring such payments to avoid suspension or disconnection. But, as discussed above, Lumen could not determine that the suspended or disconnected customers violated those terms because Proclamation 20-23.2 invalidated them during its term. By nevertheless suspending or disconnecting 923 customers for non-payment, Lumen violated WAC 480-120-172(3)(a).

## VII. CONCLUSION

49 Lumen discontinued service to 923 customers during a public health emergency in spite of a governor’s order prohibiting it from doing exactly that. The Commission should

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<sup>91</sup> *E.g.*, in *re* *Petition of the CenturyLink Companies*, Docket UT-130477, Order 04, 2 ¶ 2 (Jan. 9, 2014) (“CenturyLink has petitioned the Commission for an alternative form of regulation (AFOR) that effectively would treat the Company as if it were classified as a competitive telecommunications company for the provision of most of the services it offers.”) (AFOR Order); *id.* at Attachment A, at 2 (listing the services remaining in tariff, and thus subject to traditional regulation).

<sup>92</sup> *AFOR Order* at 14-15 ¶ 45; WAC 480-121-063(1)(h) (waiving the filing of tariff schedules for competitively classified companies); *see* RCW 80.36.100 (statutory tariff filing requirements).

<sup>93</sup> WAC 480-120-172(3)(a).

<sup>94</sup> *AFOR Order* at 14-15 ¶ 45 (noting that, despite the waiver of “a number of regulations that apply to fully regulated companies,” competitively classified companies are “subject to other state regulatory statutes and rules governing general terms and conditions of service, service quality, and consumer protection.”).

grant Staff partial summary judgment as to Lumen's liability for violations of the Commission's rule on the discontinuance of service and allow the parties to try the issue of the appropriate penalty at hearing.

DATED at Lacey, Washington, and effective this 16<sup>th</sup> day of June, 2022.

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