

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

v.

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

DOCKET UT-210902

**LUMEN COMPANIES’  
(1) OPPOSITION TO STAFF’S MOTION FOR  
PARTIAL SUMMARY DETERMINATION AND  
(2) CROSS MOTION FOR SUMMARY DETERMINATION**

July 6, 2022

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## I. INTRODUCTION AND RELIEF REQUESTED

1 CenturyLink Communications LLC d/b/a Lumen Technologies Group; Qwest Corporation; CenturyTel of Washington, Inc.; CenturyTel of Inter Island, Inc.; CenturyTel of Cowiche, Inc., and United Telephone Company of the Northwest (collectively, “Lumen Companies”) hereby respond in opposition to Commission Staff’s (“Staff”) Motion for Partial Summary Determination (“Motion”) and move for cross summary determination pursuant to WAC 480-07-380(2)(c).

2 The COVID-19 crisis had, as it did for all individuals and businesses, drastic and unexpected effects on the Lumen Companies. The company endured significant headcount reductions and was required to shift its focus to address needs and priorities spawned by COVID-19. These challenges notwithstanding, the company takes its responsibilities towards its customers and employees very seriously. It gave great attention to voluntarily participating in the Keep Americans Connected Pledge and abiding by the many, varying, ever-changing state-specific requirements and restrictions imposed across the country.

3 The Lumen Companies respectfully acknowledge their inadvertent errors in disconnecting and suspending a relatively small number of customers during the period of the Governor’s disconnection moratorium. While (as Staff is aware) the overwhelming number of such involuntary disconnections were suppressed by the company’s efforts, a relatively small number slipped through each month.<sup>1</sup>

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<sup>1</sup> Staff Investigative Report, Attachment F at p. 3.

4           Notwithstanding these errors, the Commission should grant the Lumen Companies’  
Motion for Summary Determination and dismiss the complaint in this proceeding because the  
Lumen Companies did not violate WAC 480-120-172(3)(a) when it inadvertently disconnected  
such customers.

## II. STATEMENT OF FACTS

5           For purposes of this motion, the Lumen Companies do not dispute the facts as described  
by Staff. The material facts arise from the Governor’s Proclamations 20-23 and 20-23.2,  
which prohibited the following activities during their effective period:

- (1) Disconnecting any residential customers from energy, telecommunications, or water service to due nonpayment on an active account, except at the request of the customer;
- (2) Refusing to reconnect any residential customer who has been disconnected due to nonpayment;
- (3) Charging fees for late payment or reconnection of energy, telecommunications, or water service; and
- (4) Disconnecting service to any residential customer who has contacted the utility to request assistance from that utility’s COVID-19 Customer Support Program.

6           The Lumen Companies acknowledge that it performed a total of 923 involuntary  
disconnections or suspensions<sup>2</sup> during the period from March 2020 to August 2021, despite  
efforts to suppress the same. During the same period, the companies prevented tens of  
thousands of involuntary suspensions and disconnections.<sup>3</sup> In addition to the undisputed facts  
set out by Staff, the Lumen Companies set forth the following facts:

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<sup>2</sup> In its complaint, Staff lumps together service suspensions with service disconnections. While the Lumen Companies believe they are distinct steps in the collections process, the company will not dispute that such suspensions can be treated as “disconnections” for purpose of this motion.

<sup>3</sup> Staff Investigative Report, Attachment F at p. 3.

7           The Lumen Companies operate pursuant to an alternative form of regulation (“AFOR”), under which the Commission largely treats the Lumen Companies as if they provided competitively classified services. The Commission does, however, exercise authority over the Lumen Companies regarding the customer disconnect rules. Pursuant to WAC 480-120-172(3)(a), the Lumen Companies are authorized to disconnect service for nonpayment if the company determines the customer has violated rates, terms or conditions of competitively classified services. Specifically, WAC 480-120-172(3)(a) authorizes the Lumen Companies to disconnect a customer if the company determines that the customer has not paid its bills.

8           On June 16, 2020, the Commission conducted a special virtual open meeting in Docket U-200281 to address issues related to the COVID-19 pandemic in response to the Governor’s Proclamation 20-23.<sup>4</sup> Following the open meeting, the Commission formed a COVID-19 response workgroup of stakeholders to facilitate the development of guidelines for “ensuring that customers experiencing economic hardship as a result of the COVID-19 pandemic maintain access to essential services after Proclamation 20-23 expires and the moratorium on disconnections and late fees is no longer in effect.”<sup>5</sup> The workgroup members included stakeholders from electric and gas utilities, consumer, social justice, and environmental advocates, and Staff. Telecommunications and water utilities were not part of the COVID-19 workgroup or its process. On October 20, 2020, the Commission issued Order 01 in that proceeding. Order 01 established terms for *energy companies* to implement or otherwise comply with related to customer access to *energy services*.

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<sup>4</sup> *In the Matter of Response to the COVID-19 Pandemic*, Docket U-200281, Notice of Opportunity for Comment (September 17, 2020).

<sup>5</sup> *In the Matter of Response to the COVID-19 Pandemic*, Docket U-200281, Order 01 at ¶ 34 (Oct. 20, 2020).

9           Approximately a year later, “Recognizing the need to create similar guidance for regulated water companies,” the Commission presented the UTC Staff Water Utility Operations COVID-19 Recovery Term Sheet to *water utilities* and asked them to provide feedback on its contents. After receiving feedback, the Commission issued Order 05 in Docket U-200281 similarly directing *water companies* to implement or otherwise comply with terms related to customer access to *water services*. Docket U-200281 remains open and pending, yet the Commission has not extended any such order, term sheet, guidance, or direction to any telecommunications company. Unsurprisingly, Staff does not allege violation of any Commission mandate adopted in the wake of the Governor’s Proclamations. Instead, relying on the Proclamations, it rests its complaint entirely on WAC 480-120-172(3)(a).

### III. STATEMENT OF ISSUES

10           Should the Commission deny Staff’s Motion and instead conclude that:

- (1) Proclamation 20-23.2 did not invalidate or render ineffective, any rates, terms or conditions of any of the Lumen Companies’ competitively classified services;
- (2) The Lumen Companies did not violate WAC 480-120-172(3)(a) because the rates, terms, and conditions of service upon which they relied were not invalidated or rendered ineffective by Proclamation 20-23.2.

### IV. EVIDENCE RELIED UPON

11           The Lumen Companies rely on the documents filed in this docket.

## V. STANDARD FOR SUMMARY DETERMINATION

12 Pursuant to WAC 480-07-380(2), a party may move for summary determination if 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 the moving party is entitled to judgment as a matter of law. In considering a motion made under WAC 480-07-380(2), the Commission will consider the standards applicable to a motion made under Civil Rule 56 of the Civil Rules for Superior Court. Civil Rule 56 is the summary judgment rule and provides that a party against whom a claim is asserted may move for summary judgment in its favor as to all or any part thereof. Summary judgment is appropriate where, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>6</sup>

## VI. ARGUMENT

### A. Summary of Argument

13 Staff's Motion is narrow and simple. Staff claims that from March 23, 2020 through September 30, 2021, Proclamation 20-23.02 effectively terminated the Lumen Companies' terms and conditions of services related to nonpayment of services. And, since WAC 480-120-172(3)(a) authorizes the Lumen Companies to disconnect for nonpayment only after a determination of nonpayment under their terms and conditions of services, then every

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<sup>6</sup> CR 56(c); *see also* *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990) and *Sheehan v. Central Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) (citation omitted).

disconnection for nonpayment during that time automatically violated that Commission rule.

Staff argues that its Motion is based on the answers to 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?

Staff claims that if the answers to the above questions are yes, yes, and yes, then the Commission should grant Staff partial summary determination on the issues of liability for violations of WAC 480-120-172(3)(a). As the Lumen Companies have acknowledged and Washington law has established, however, the answers to the above questions are yes, no, and no, respectively. Therefore, the Commission should deny Staff's Motion and dismiss this case.

14 For purposes of this motion, the Lumen Companies do not dispute the material facts presented by Staff in its Motion. Instead, an analysis of those facts considering the plain language of the proclamations, the Commission's rules, and applicable case law results in a different legal conclusion than the one purported by Staff.

15 The appropriate legal questions at issue are:

- (1) Did Proclamation 20-23.2 render ineffective the terms and conditions upon which Lumen relied to involuntarily suspend or disconnect customers, and
- (2) Did Lumen violate WAC 480-120-172(3)(a) for each of the suspensions or disconnections during the pandemic when it relied on those terms and conditions to involuntarily disconnect service to the relevant customers?

The answer to both questions is “No” and, therefore, the Commission should deny Staff’s Motion, grant summary determination in favor of the Lumen Companies, and dismiss the complaint in this proceeding.

**B. The Proclamation Did Not Render Ineffective Any Term or Condition of Service**

16 Staff’s Motion hinges entirely on the legal conclusion that Proclamation 20-23.2 invalidated or rendered ineffective the terms and conditions relied on by the Lumen Companies to suspend or disconnect customers. Staff states in its Investigative Report that “CenturyLink violated WAC 480-120-172(3)(a) by discontinuing telecommunication services to 923 Washington customers for nonpayment when Governor Proclamation 20-23.2 suspended the terms used by CenturyLink to authorize the discontinuances.”<sup>7</sup> Staff, therefore, must establish that Proclamation 20-23.2 suspended the terms and conditions of the Lumen Companies’ competitively classified services. If it cannot do so – by establishing as a matter of law that Proclamation 20-23.2 negated customers’ obligation to pay for telecommunications services furnished by the company – then the Lumen Companies did not violate WAC 480-120-172(3)(a).

17 There has been significant litigation regarding the scope and extent of authority of the Governor’s COVID-19 proclamations, and the courts have conclusively answered this question. Proclamation 20-23.2 did not render ineffective or invalidate the terms and conditions of the Lumen Companies’ services; therefore, the Proclamation did not alter the Lumen Companies’ authority under WAC 480-120-172(3)(a) to disconnect for nonpayment. Rather, Proclamation 20-23.2 prohibited specific disconnection activities on the part of the

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<sup>7</sup> Staff Investigative Report at p. 9.

Lumen Companies. The Washington Court of Appeals recently reached this conclusion in *Gonzales v. Inslee*, a case in which landlords challenged the Governor’s temporary prohibition on residential evictions.<sup>8</sup> The Court carefully analyzed the basis, scope, extent, and effect of the Governor’s prohibition of certain activities during the COVID-19 pandemic, and the conclusions in that case are directly applicable here.

**1. The Proclamation did not change any contract term, right, or obligation.**

18 In *Gonzales*, the Court determined that the language banning eviction-related activities was only a temporary prohibition of specific, enumerated actions. The Court distinguished a *delay* of a contract remedy from *invalidation* of that remedy, finding that the COVID proclamations merely delayed a party’s remedy. In *Gonzales*, a group of landlords and the Washington Landlord Association brought an action against the State and Governor Inslee seeking a declaration that the Governor lacked statutory authority to issue proclamations placing a temporary moratorium on most residential evictions during the COVID-19 pandemic and that the moratorium violated various constitutional provisions, including takings and contracts clauses.<sup>9</sup> The eviction moratorium (Proclamation 20-19 and its extensions) was issued under RCW 43.06.220(1)(h) and prohibited landlords from conducting certain activities such as issuing a notice of eviction.<sup>10</sup> In the case at hand, the disconnection moratorium was based on the same statute and contained an almost identical provision as the eviction moratorium:

ACCORDINGLY, in recognition of the above findings, and to help preserve and maintain life, health, property or the public peace under

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<sup>8</sup> *Gonzales v. Inslee*, 21 Wn. App. 2d 110, 115-16, 504 P.3d 890, 894-95 (2022).

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

<sup>10</sup> *Id.* at 122.

RCW 43.06.220(1)(h), I continue to prohibit all energy, telecommunications, and water providers in Washington State from conducting the following activities:<sup>11</sup>

19 The *Gonzales* Court carefully explained the distinction between the *activity* of evicting someone and the right or capacity to do so, finding that the eviction proclamation addressed only an activity, not any right nor ability. “The moratorium did not extinguish the contractual obligations of tenants to pay rent. Instead, the moratorium temporarily delayed landlords’ ability to exercise the remedy of eviction for nonpayment of rent.”<sup>12</sup> In other words, the landlords retained their right to evict a non-paying tenant, but the moratorium temporarily postponed the landlords’ exercising of that right. “The moratorium was temporary, and following its expiration landlords retained all available remedies for nonpayment of rent. The moratorium merely delayed the exercise of those remedies.”<sup>13</sup>

20 Note that the Court used the word “retained” when describing the remedy of eviction. Had the proclamation extinguished, rendered ineffective, or invalidated the landlords’ remedy of eviction, an accurate word would be “renewed”, “reinstated”, “reestablished”, or something similar. Yet the Court used the word “retained”, highlighting the fact that the landlords’ remedy was never lost. Since the disconnection proclamation used the same words as the eviction proclamation, namely prohibiting “activities” and recognizing the ongoing obligation to pay for utility services, the conclusion is the same in this case. The remedies related to nonpayment of services were never suspended, rendered ineffective, or invalidated. They were

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<sup>11</sup> Staff Investigative Report, Attachment A at p. 8.

<sup>12</sup> *Gonzales*, 21 Wn. App. 2d at 139.

<sup>13</sup> *Id.* at 141.

retained by the Lumen Companies. As in *Gonzales*, the moratorium merely delayed the exercise of those remedies.

**2. An Executive Proclamation cannot make a contract “illegal” or “inoperative”.**

21 Staff claims that the underlying contractual provisions of the Lumen Companies’ terms and conditions of service (namely the obligation to pay for services furnished by the company) became instantly illegal and ineffective the moment the Governor issued Proclamation 20-23, “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.”<sup>14</sup> Staff’s reasoning is not realistic. In practice, Staff’s position would create serious constitutional issues. Article 1, section 23 of the Washington Constitution provides that “[n]o ... law impairing the obligations of contracts shall ever be passed.”<sup>15</sup> If the Governor’s proclamation acted to invalidate the Lumen Companies’ contracts, then Staff’s argument would mean that the Proclamation conflicts with the State Constitution’s contract clause. That, however, is not the case because the Proclamation does not invalidate any term of a contract.

22 Staff’s “direct conflict” argument fails at the outset because the authority Staff relies on for its position is not applicable in this case. The case cited by Staff concerns a contract provision that conflicts with a statute, passed by the legislative branch, instead of an emergency proclamation, passed by the executive branch. “[I]t is the general rule that a contract which is contrary to the terms and policy of an express legislative enactment is illegal

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<sup>14</sup> Motion at ¶ 41.

<sup>15</sup> *Lenander v. Washington State Dep’t of Ret. Sys.*, 186 Wn.2d 393, 414, 377 P.3d 199, 210 (2016).

and unenforcible [sic].”<sup>16</sup> The Governor’s Proclamation is not an express *legislative* enactment, and the *Gonzales* court recognized this. “The legislature cannot delegate purely legislative functions to other branches of government. These nondelegable powers include the power to enact, suspend, and repeal laws.”<sup>17</sup> Because the Proclamation is not a statute, Staff’s argument does not apply here. For this same reason, Staff’s similar argument regarding public policy fails. Staff cannot point to any proclamation that has rendered any contract illegal, because Washington law stands for the contrary position. The COVID-19 proclamations do not invalidate or render ineffective the terms of a contract; they only prohibit certain activities.<sup>18</sup>

23           The Proclamations even expressly preserve the contractual obligations of the Lumen Companies’ customers. Proclamation 20-23.2 states, “Additionally, these prohibitions do not relieve a utility customer from the obligation to pay for utilizes services.”<sup>19</sup> Like rent, the obligation to pay for telecommunications services arises from contract. The disconnection moratorium expressly left that contract untouched, and the Proclamation temporarily delayed the companies’ ability to exercise the remedy of disconnections.

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<sup>16</sup> Motion at ¶ 40, citing *Jordan v. Nationstar Mortgage, LLC*, 185 Wn.2d 876, 883, 374 P.3d 1195, 1199 (2016) (emphasis added).

<sup>17</sup> *Gonzales*, 21 Wn. App. 2d at 130.

<sup>18</sup> The Court of Appeals in Division 1 applied the same analysis as *Gonzales* in a case published just days ago. There, the Court confirmed that the COVID eviction ban was not an unconstitutional taking because the ban did not remove any control of the property from landlords. They could continue to rent properties, collect rents, and the landlords retained the right to evict tenants at the expiration of the COVID civil emergency. *Rental Hous. Ass’n v. City of Seattle*, 82469-4-I, 2022 WL 2206107, at \*10 (Wash. Ct. App. June 21, 2022).

Staff’s Motion requires the reverse finding. If, like Staff argues, the Proclamation suspended or invalidated the Lumen Companies’ service terms and conditions, that would mean that customers were not obligated to pay under those terms and conditions.

<sup>19</sup> Staff Investigative Report, Attachment A at p.5.

**3. The Proclamation did not change the Lumen Companies' authority to disconnect for nonpayment under WAC 480-120-172(3)(a).**

24 Further, the eviction moratorium did not affect the operation of any rule or statute. The *Gonzales* Court again emphasized that the proclamation only limited specific activities. “As noted above, none of the proclamations stated that the governor was suspending any statutes. And the proclamations did not suspend the operation of any statutes. Instead, the governor prohibited certain specific activities as RCW 43.06.220(1)(h) expressly authorized.”<sup>20</sup>

25 Staff argues that the Lumen Companies could not make the necessary internal determination before exercising the companies' authority to discontinue service under WAC 480-120-172(3)(a).<sup>21</sup> Staff's point is that, since the Proclamation invalidated the payment term, then the Lumen Companies could not have reached the conclusion that a customer violated such term. This, again, is directly contradicted in the Proclamation and Washington law. The customers were never released from their payment obligation, and the Proclamation expressly stated that customers still had to pay their bills.

**VII. CONCLUSION**

26 For the reasons set forth above, Staff's Motion for Partial Summary Determination should be denied and the Lumen Companies' Cross Motion for Summary Determination should be granted. This case should be immediately dismissed with prejudice.

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<sup>20</sup> *Gonzales*, 21 Wn. App. 2d at 130.

<sup>21</sup> Motion at ¶ 41.

Respectfully submitted this 6th day of July, 2022.

**CENTURYLINK COMMUNICATIONS,  
LLC**



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Adam L. Sherr, WSBA #25291  
Assistant General Counsel  
1600 - 7th Ave., Room 1506  
Seattle, WA 98191  
206 398 2507

**PERKINS COIE LLP**



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Donna L. Barnett, WSBA #36794  
10885 N.E. Fourth Street, Suite 700  
Bellevue, WA 98004-5579  
425 635 1400  
dbarnett@perkinscoie.com

Attorneys for CenturyLink Communications,  
LLC d/b/a Lumen Technologies Group