

1  
2  
3 **BEFORE THE PUBLIC UTILITY COMMISSION**  
4 **OF OREGON**

5 UM 1908

6 In the Matter of

7 LUMEN TECHNOLOGIES,

8 Proposed Commission action Pursuant to ORS  
9 756.515 to Suspend and Investigate Price Plan  
10 (UM 1908), and

11 QWESST CORPORATION,

12 Investigation Regarding the Provision of  
13 Service in Jacksonville, Oregon and  
14 Surrounding Areas (UM 2206),

15 Hearing Relating to Order Nos. 22-340 and  
16 22-422.

STAFF'S OPENING BRIEF

17 **I. INTRODUCTION**

18 This docket concerns Commission Order No. 22-340 as modified by Order No. 22-422  
19 (collectively the "Modified Order"). On September 23, 2022, the Commission issued Order No.  
20 22-340 opening an investigation into Lumen's price plan and requiring near term actions to  
21 address service quality issues in the Jacksonville area.<sup>1</sup> Lumen Technologies Inc. (Lumen or  
22 Company) requested a hearing to determine if Order No. 22-340 should continue in effect,  
23 challenging both the Commission's authority and compliance with applicable substantive and  
24 procedural requirements.<sup>2</sup>

25  
26 <sup>1</sup> Staff/100, Bartholomew/2 describes the Jacksonville area.

<sup>2</sup> Lumen is not challenging the Commission's investigation into the price plan. Docket No. UM. 1908, Issues List submitted by Lumen, Oct. 7, 2022.

1 The Modified Order is a lawful exercise of the Commission’s regulatory function. The  
2 Commission has authority to supervise and regulate every public utility, and “to do all things  
3 necessary and convenient in the exercise of such power.”<sup>3</sup> ORS 756.040(1) directs the PUC to  
4 obtain for the customers of a public utility and for the public generally “adequate service at fair  
5 and reasonable rates.” As an investor-owned public utility, Lumen has a concomitant duty to  
6 “furnish adequate \* \* \* service”<sup>4</sup>

7  
8 In 2021, the Commission opened an investigation into service issues in the Jacksonville area,  
9 citing historical and ongoing safety and reliability issues.<sup>5</sup> However, Staff has struggled to obtain  
10 complete and reliable information to appropriately assess the ongoing public safety threat posed  
11 by Lumen’s service quality issues in the Jacksonville area;<sup>6</sup> determine compliance with  
12 applicable service quality standards; or evaluate whether the Company still meets the  
13 requirements for regulation under a price plan.<sup>7</sup> Despite support from Staff, Lumen seems unable  
14 or unwilling to address near-term service quality issues in the Jacksonville area.<sup>8</sup> The Modified  
15 Order addresses the immediate public safety concerns, and disparity of information, in the  
16 following ways:  
17

- 18 1. requires Lumen to deploy a toll-free, 24/7 dedicated customer support line to support  
19 customers in Jacksonville, Applegate, and surrounding areas in southern Oregon, which  
20 must remain open for duration of Staff’s investigation;
- 21 2. requires Lumen to address all tickets received through the customer support line and  
22 make repairs within 48 hours of creation of the ticket;

23 <sup>3</sup> ORS 756.040(2).

24 <sup>4</sup> Under 759.506(1), a telecommunications utility with allocated territory is obligated to “[p]rovide  
25 adequate and safe service to the customers of this state;” see also ORS 759.035.

26 <sup>5</sup> See, Order No. 21-470; Per ORS 756.515(1), the Commission may, on motion, and without notice,  
summarily investigate any matter when the Commission “believes that any rate may be unreasonable or  
unjustly discriminatory, or that any service is unsafe or inadequate, or is not afforded, or that an  
investigation of any matter relating to any public utility or telecommunications utility or other person  
should be made.”

<sup>6</sup> Staff 104/ Bartholomew 12.

<sup>7</sup> Staff/100, Bartholomew/7-8.

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

- 1 3. requires Lumen to report on actions taken to resolve service issues in docket UM 2206  
2 every two weeks through December 31, 2022; and,  
3 4. announces the Commission's intention to level penalties for violations of the Modified  
4 Order, for each instance, in amounts not to exceed \$50,000 per day.

5 Notably, the Modified Order is limited both geographically and in duration.

6 An agency order will be upheld unless the agency's exercise of discretion is outside the  
7 range of discretion delegated to the agency by law; inconsistent with an agency rule, an officially  
8 stated agency position, or a prior agency practice, if the inconsistency is not explained by the  
9 agency; otherwise in violation of a constitutional or statutory provision; or not supported by  
10 substantial evidence in the record.<sup>9</sup> The Modified Order is a within the range of discretion  
11 delegated to the agency and supported by substantial evidence in the record. Lumen's assertions  
12 that the Modified Order is inconsistent with Lumen's price plan or an enforcement of minimum  
13 service quality standards under ORS 759.450 and OAR 860-023-0055 are misplaced.

14 **II. THE MODIFIED ORDER IS A LAWFUL EXERCISE OF THE**  
15 **COMMISSION'S AUTHORITY**

16 Service quality issues are squarely within the purview of the Commission. The service  
17 quality issues with Lumen service in the Jacksonville area raises both reliability and public safety  
18 concerns.<sup>10</sup> Provisions of the Modified Order require Lumen to create a reliable way for  
19 customers to report service quality issues, have those issues addressed promptly by the  
20 Company, and provide the Commission reports on how issues are being addressed. These  
21 requirements are within the Commission's range on discretion under ORS 756.040, ORS  
22 756.515, ORS 757.035, and ORS 756.105.

- 23  
24 a. The Modified Order is a permissible exercise Commission of authority under  
25 756.515.

26 \_\_\_\_\_  
<sup>9</sup> ORS 183.484.

<sup>10</sup> Staff 100/Bartholomew 6; Staff/200, Nottingham/15.

1 As part of its investigatory authority under ORS 756.515 the Commission may, without  
2 notice or hearing, make any findings and orders it deems justified or required by the results of an  
3 investigation. Because the investigation by the Commission demonstrated that Lumen’s records  
4 do not reflect the experience of its customers nor the extent and severity of service quality issues  
5 in the Jacksonville area, the investigation supports the Modified Order, which requires the  
6 Company to take steps addressing the immediate public safety concerns and provide the  
7 Commission with reports detailing how Lumen is addressing issues in the Jacksonville area.  
8

9 b. The Modified Order is a permissible exercise Commission of authority under  
10 756.040.

11 Under ORS 756.040, the Commission has authority to direct Lumen to take action to  
12 provide adequate service for its customers. Courts recognize that ORS 756.040 and other  
13 enabling statutes give the Commission extremely broad authority “for the exercise of [its]  
14 regulatory function.”<sup>11</sup> Requiring a utility to collect and provide information necessary to assess  
15 compliance with applicable service quality and safety statutes and rules are within the range of  
16 discretion delegated to the agency by the legislature when it charged the Commission with the  
17 duty to secure adequate service for customers. Requiring utility action to protect public safety  
18 and access to emergency services is within the Commission’s general regulatory authority to  
19 secure adequate service under ORS 756.040 even when insufficient information exists to  
20 determine compliance with articulated service quality standards.  
21

22 c. The Modified Order is a permissible exercise Commission of authority under  
23 757.035.  
24  
25  
26

---

<sup>11</sup> *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, 534 P2d 984, rev den (1975).

1 The Commission further has authority under ORS 757.035(2) to require Lumen to take  
2 action that is necessary for the protection of health and safety of its customers. Under ORS  
3 757.035(2), the Commission may require the operator, a person engaged in the operation of  
4 telephone lines, plant, system, equipment, or apparatus, to take action that is necessary for the  
5 protection and safeguarding of the health and safety of its customers and the public.<sup>12</sup> The record  
6 demonstrates that the actions required by the Modified Order are necessary for protecting public  
7 safety.  
8

9 d. The Modified Order is a permissible exercise Commission of authority under  
10 756.105.

11 Finally, the Commission has authority to require Lumen to provide information on the  
12 trouble tickets created for the Jacksonville area and how these issues are being addressed by the  
13 Company.<sup>13</sup> As part of its investigation, Staff issued information requests to Lumen. Despite  
14 being granted an extension to do so, the Company has still not provided all of the information  
15 requested.<sup>14</sup> In some instances Lumen was unable to provide the information requested by  
16 Staff.<sup>15</sup> Moreover, the information Lumen was able to provide relating to issues in the  
17 Jacksonville area is marred by complaints from customers detailing challenges in reporting  
18  
19  
20  
21

---

22 <sup>12</sup> Though ORS 757.035 requires a hearing the August 30, 2022 Special Public Meeting met the statutory  
23 requirement, which does not require a contested case hearing process; *see G.A.S.P. v. Env't Quality*  
24 *Comm'n*, 198 Or. App. 182, 189, 108 P.3d 95, 99 (2005) (noting that while the statute required a hearing,  
25 the public meetings conducted by the Environmental Quality Commission met the statutory requirement  
26 and that the hearing was necessary to act in the public interest as a whole, not to determine legal rights,  
duties, or privileges of specific parties.)

<sup>13</sup> ORS 756.105 requires Lumen to furnish requested information to the Commission; *see also*, ORS  
756.115.

<sup>14</sup> Staff/100, Bartholomew/7-8.

<sup>15</sup> Staff/103, Confidential IR 04 and 07.

1 issues,<sup>16</sup> fatigue with creating multiple repair tickets,<sup>17</sup> and having trouble tickets being closed by  
2 the Company without resolution of the issue or communication with customers.<sup>18</sup> Lumen’s  
3 inability to provide accurate information to the Commission hampers the Commission’s ability  
4 to fully assess the scope of, or remedies to, the service quality issues in the Jacksonville area,  
5 much less compliance with applicable service quality standards or the price plan. Lumen should  
6 not be allowed to escape its obligations to provide safe and adequate service by refusing to  
7 provide accurate and reliable information to the Commission.  
8

### 9 III. THE MODIFIED ORDER IS SUPPORTED BY THE RECORD

10 The record demonstrates the Jacksonville area has experienced consistent, serious service  
11 issues and that adequate service is necessary for public health and safety in this area, including  
12 access essential emergency and medical services. As articulated in ORS 183.484(5)(c),  
13 “substantial evidence exists to support a finding of fact when the record, viewed as a whole,  
14 would permit a reasonable person to make that finding.” Substantial-evidence review determines  
15 only whether the facts permit the agency’s decision, not whether they compel it.<sup>19</sup>  
16

17 Contrary to Lumen’s assertion, the Commission is permitted to consider public comments  
18 and consumer complaints as evidence, even where not submitted under oath. The Commission is  
19 entitled to rely on evidence that “is of a type commonly relied upon by reasonably prudent  
20 person in the conduct of their serious affairs, which can include hearsay information . . .”<sup>20</sup> The  
21 Commission regularly relies upon public comments and consumer complaints in exercising its  
22

---

23 <sup>16</sup> Staff/200, Nottingham/10; Staff/202, Nottingham/135, 139, 147; In some instances, Lumen reported no  
24 issues when the PUC received multiple reports of service outages, *see e.g.*, Staff/202, Nottingham/158-  
160.

25 <sup>17</sup> Staff/200, Nottingham/10-11; *see also* Staff/202, Nottingham/94 and 118.

26 <sup>18</sup> Staff/200, Nottingham 14; *see also* Staff/202, Nottingham/103, 124, 164.

<sup>19</sup> *See Drew v. Psychiatric Security Review Board*, 322 Or 491, 499, 909 P2d 1211 (1996) (describing the  
“critical question” as whether the facts permit the administrative choice involved).

<sup>20</sup> OAR 860-001-0450.

1 regulatory functions. Public comments are an integral part of the public meeting process and are  
2 regularly considered and noted by the Commission in making decisions. Likewise, Consumer  
3 Services relies on consumer complaints on a regular basis. Assuredly, the entire complaint  
4 investigation process hinges on the ability to rely on consumer complaints as indication of issues  
5 in need of investigation.<sup>21</sup>

6 The record demonstrates that Lumen’s service quality issues created reliability and public  
7 safety concerns,<sup>22</sup> which supports the Commission’s decision in the Modified Order. Customers  
8 in the Jacksonville area have been experiencing issues with outages and intermittent service  
9 since 2014.<sup>23</sup> In 2017, the Commission placed Lumen on an ORS 759.450(5) performance plan,  
10 based in part on the Jacksonville Area Case Study performed by Staff.<sup>24</sup> Unfortunately earlier  
11 efforts failed to provide durable solutions to these issues and in December 2021, the Commission  
12 opened docket UM 2206 to investigate Lumen’s provision of services in the Jacksonville area.<sup>25</sup>

13  
14 At the February 22, 2022 Public Meeting, Lumen’s representative, Peter Gose, attributed  
15 many of the service quality issues in the Jacksonville area to the age of infrastructure, noting that  
16 it included a copper network, “very old outdated plant,” and vintage terminal.<sup>26</sup> The Company  
17 addressed the infrastructure issues by hardening of cable plant inside its pedestals and  
18 replacement of backup batteries in the remote terminal, which Lumen asserted would address the  
19 ongoing service quality issues.<sup>27</sup> Despite being informed by the Company that service quality  
20  
21

22  
23 <sup>21</sup> Staff/200, Nottingham/2-3.

24 <sup>22</sup> Staff/100, Bartholomew/6-7 and 18-19; Staff/200, Nottingham/15

25 <sup>23</sup> Staff/100, Bartholomew/4; Staff/105, Bartholomew/2-16.

26 <sup>24</sup> Staff/100, Bartholomew/4; Staff/105, Bartholomew/2-9 and 16-32. (noting that Staff’s recommendation  
for a performance plan was based in part on the Jacksonville Area Case Study).

<sup>25</sup> *Id.*

<sup>26</sup> Staff/100; Bartholomew/14; *see also* Lumen/100, Gose/6-8 (describing impacts of network component  
age and primary causes of service issues in the Little Applegate Road Area).

<sup>27</sup> Staff/100, Bartholomew/8-9; Staff/104, Bartholomew/7 and 12-13.

1 issues have been adequately addressed, Staff found Lumen’s efforts insufficient. Staff provided  
2 Lumen with and a six-step cable plant restoration process to bring the cable plant to “like new”  
3 condition, but Lumen chose not to take any of these steps.<sup>28</sup> Lumen asserts provision of fiber-to-  
4 home will resolve Jacksonville’s service quality issues. This infrastructure will not be completed  
5 until at least the second or third quarter of 2023 and Lumen has provided no plan to address the  
6 near-term service quality issues threatening public safety.<sup>29</sup>

7  
8 As part of the investigation Staff evaluated and advised the Commission on consumer  
9 complaints and public comments received from customers in the impacted area.<sup>30</sup> Customers  
10 report significant issues with outages and intermittent service including difficulty reporting  
11 outages and having service restored by Lumen.<sup>31</sup> Significantly, customers reported the impacts  
12 of unreliable service on their safety.<sup>32</sup>

- 13 a. The record demonstrates prolonged service quality issues in the Jacksonville area  
14 and difficulties remain.

15 Public comments and consumer complins show ongoing outages in the Jacksonville area.  
16 Customers report being with no phone service from one to 21 days<sup>33</sup> as well as intermittent  
17 service quality issues, such as dropped calls, busy signals, and static on the line.<sup>34</sup>

18 Public comments demonstrate customer struggles in reporting service quality issues  
19 including difficulty reporting outages without phone service,<sup>35</sup> prolonged wait times,<sup>36</sup>

22  
23 <sup>28</sup> *Id.*

24 <sup>29</sup> Staff/100, Bartholomew/16-18.

25 <sup>30</sup> Staff/104, Bartholomew/22.

26 <sup>31</sup> Staff/200, Nottingham/9-10 and 14.

27 <sup>32</sup> Staff/200, Nottingham/10 and 14; *see also*, Staff/104, Bartholomew/6-8, 17-18, 41-47.

28 <sup>33</sup> Staff/200, Nottingham/14.

29 <sup>34</sup> Staff/200, Nottingham/14; *see also*, Staff/202, Nottingham/121, 150, 156, 163, 164.

30 <sup>35</sup> Staff/104, Bartholomew/20.

31 <sup>36</sup> *Id.*; *see also*, Staff 202/Nottingham 147.



1 representatives reporting no outages in the area,<sup>37</sup> repair tickets being “cleared” or closed despite  
2 ongoing service outages,<sup>38</sup> and having technicians fail to keep scheduled appointments.<sup>39</sup> At the  
3 February 22, 2022 Public Meeting and August 30, 2022 Special Public Meeting, Jacksonville  
4 customers testified to continuing service issues, frustration with Lumen’s response, and concern  
5 for their safety.

6           b. The record demonstrates that service quality issues pose a threat to public safety  
7           in the Jacksonville area.

8           The Jacksonville area is a rural community located in a small river valley, where many  
9 customers do not have alternative communications service options at homes.<sup>40</sup> Customers  
10 explain that without a cell tower serving their area, ability to make and receive emergency calls  
11 is tied to their landline service. Customers have stated to the Commission, “our lives depend on  
12 our landlines.”<sup>41</sup> The residents describe how this danger is heightened by the areas location in a  
13 high fire-risk zone, noting that with logging operations required to prepare for fire season people  
14 in their area who are working with chainsaws and heavy equipment need a reliable way to call  
15 911 in case of an emergency.<sup>42</sup> In September 2022, customers in the Jacksonville faced another  
16 multi-day outage while simultaneously dealing with nearby wildfires, thick smoke, and a  
17 summer heatwave, putting the lives of these residents at risk.<sup>43</sup>

18  
19  
20  
21 ///

22  
23 \_\_\_\_\_  
24 <sup>37</sup> Staff/104, Bartholomew/20.

25 <sup>38</sup> Staff/200, Nottingham/8; Staff/203, Nottingham/18-23.

26 <sup>39</sup> Staff/104, Bartholomew/20; Staff/202, Nottingham/94, 107, 112.

<sup>40</sup> Staff/104, Bartholomew/16.

<sup>41</sup> Staff/104, Bartholomew/16 and 19; UM 2206, *See* Video Recording, Public Meeting Sep 20, 2022, at 21:31 (Comments of Priscilla Weaver).

<sup>42</sup> Staff/104, Bartholomew/19; *see also* Staff/202, Nottingham/136.

<sup>43</sup> *Id.*

1           **IV.    LUMEN’S ARGUMENTS MISCHARACTERIZES THE MODIFIED ORDER**

2           Lumen makes several arguments that the Modified Order is inconsistent with an agency rule,  
3 an officially stated agency position, or otherwise in violation of a constitutional or statutory  
4 provision. Primarily the Company relies on mischaracterization of the Modified Order as an  
5 alteration of Lumen’s price plan, enforcement of price plan requirements, a change to the  
6 minimum service quality standards for large telecommunications carriers found in ORS 759.450  
7 and OAR 860-023-0055, or enforcement of those standards. Lumen also objects to the provision  
8 of Order No. 22-340 requiring repairs be made to the satisfaction of customers.<sup>44</sup>  
9

10           a.   The Modified Order contains an updated repair standard.

11           Lumen’s challenge to the Commission’s authority to require repairs be made customer  
12 satisfaction is a moot issue. Order No. 22-340 required that Lumen performed repairs “make  
13 repairs to the satisfaction of customers \* \* \*.” After Lumen’s request for a hearing, this language  
14 was amended by Order No. 22-422, which modifies the second sentence of the second paragraph  
15 of Order No. 22-340 to read:  
16

17           Lumen must address all tickets and make repairs in a manner that results in a  
18 consistent and functional dial tone and ability to reliably make and receive calls,  
19 or provide the customer with a functionally equivalent substitute service, as  
20 defined by Lumen's current tariffs, at no additional customer cost, within 48 hours  
21 of creation of the ticket until service issues in the area are remedied. Where  
22 repairs are not feasible because of a customer-premise issue preventing such dial  
23 tone and the ability to receive and make calls, Lumen must provide  
24 documentation of such issue to the customer and the Commission's Consumer  
25 Services Division.

26           Because the Modified Order does not contain the requirement for repairs to be made to the  
27 satisfaction of customers, the issue of the Commission’s authority to require such a standard is

28 \_\_\_\_\_  
<sup>44</sup>Docket No. UM. 1908, Lumen Request for Hearing Pursuant to ORS 756.515(5), p.2 ln 3-4, September 27, 2022.

1 moot.<sup>45</sup> Likewise, so is Lumen's argument that Order No. 22-340 impermissibly delegates  
2 Commission authority to customers. Indeed, all Lumen's arguments on this provision are moot.

3 b. The Modified order does not alter the price plan or seek to enforce its service  
4 quality standards.

5 Lumen argues that the Modified Order is unlawful under ORS 759.255, authorizing the  
6 Commission to establish price plans, and otherwise fails to comply with appropriate procedural  
7 and substantive requirements for altering the Company's price plan. The only provision of the  
8 Modified Order which could be considered an adjustment to the price plan is the nine-month  
9 extension of the price plan's original term, which was explicitly supported by Lumen at the  
10 September 20, 2022, Public Meeting<sup>46</sup> and is not being challenged by the Company.<sup>47</sup>

11 Provisions of the Modified Order are not enforcement of service quality standards under  
12 the price plan. The price plan incorporates the service quality standards found in ORS 759.450 or  
13 OAR 860-023-0055. As discussed below, the Modified Order is not enforcement of the  
14 minimum service quality standards.

15  
16 c. The Modified Order does not alter or seek to enforce minimum service quality  
17 standards.

18 ORS 759.450 required the Commission to set minimum service quality standards for  
19 telecommunications carriers. Found in OAR 860-023-0055, these rules serve as a floor for  
20  
21  
22

---

23 <sup>45</sup> An issue becomes moot when a court's decision will no longer have practical effect on rights of parties.  
24 see *E. Oregon Mining Ass'n v. Dep't of Env't Quality*, 360 Or. 10, 376 P.3d 288 (2016) (providing that a  
25 case will be dismissed as moot, if court's decision no longer will have a practical effect on or concerning  
26 the rights of the parties, applies to judicial review proceedings involving challenges to administrative  
agency action.); see also *State v. Moore*, 308 Or. App. 724, 482 P.3d 222 (2021), *citing* Or. Const. art. 7,  
§ 1. (noting that a court is constrained by the state Constitution from deciding a matter no longer is a  
controversy between the parties).

<sup>46</sup> See Video Recording, Public Meeting Sep 20, 2022, at 21:31 (Comments of Peter Gose).

<sup>47</sup> Docket No. UM. 1908, Issues List submitted by Lumen, Oct. 7, 2022.

1 service quality.<sup>48</sup> Lumen argues that the Modified Order does not comply with the ORS 759.450  
2 procedural or substantive requirements for setting or enforcing minimum service quality  
3 standards. However, the Modified Order does not alter minimum service quality standard nor is  
4 it enforcement of such standards.<sup>49</sup>

5 The Modified Order is not an enforcement of the minimum service quality standards.  
6 Because of the discrepancies between the information provided by Lumen and the information  
7 reported by customers in the Jacksonville area, it is apparent to Staff that incomplete or  
8 inaccurate information exists to assess compliance with the minimum service quality standards.  
9 Likewise, the Modified Order does not alter those standards.  
10

11 While administrative rules may only be promulgated or altered in compliance with the  
12 procedures articulated in the Oregon Administrative Procedures Act, the Modified Order does  
13 not create or alter administrative rules. ORS 183.310(9) defines a rule as, “any agency directive,  
14 standard, regulation or statement of *general applicability* that implements, interprets or  
15 prescribes law or policy, or describes the procedure or practice requirements of any agency.”  
16 (Emphasis added).  
17

18 The provisions of the Modified Order, by definition, are not rules but rather agency action  
19 directed at a named person, in this case Lumen.<sup>50</sup> The Modified Order does not create standards  
20 of general applicability and does not alter the minimum service quality standards applicable to  
21 large telecommunications utilities generally. As clear from its text, The Modified Order does not  
22

---

23  
24 <sup>48</sup> See generally, OAR 860-023-0055, Oregon Retail Telecommunications Service Standards for Large  
Telecommunications Utilities, adopted in Order No. 00-303 (June 8, 2000).

25 <sup>49</sup> ORS 759.450 requires the Public Utility Commission to set minimum service quality standards that  
relate to the provision of retail telecommunications services to ensure safe and adequate service.

26 <sup>50</sup> The Modified Order is appropriately characterized as ‘orders’ consistent with the definition in ORS  
183.310(6) (defining an order as “any agency action expressed orally or in writing directed to a named  
person or named persons, other than employees, officers or members of an agency”).

1 apply to all investor-owned telecommunications utilities nor to all Lumen customers; rather it  
2 applies to a subset of Lumen’s service territory and applies only for a limited period of time.

3 **V. THE MODIFIED ORDER IS A LAWFUL EXERCISE OF PENALTY**  
4 **AUTHORITY**

5 The Commission has authority to assess penalties for violation of the Modified Order and to  
6 assess penalties separate violations. ORS 757.990, which permits penalties for violations of “any  
7 lawful requirement or order made by the commission.” In the Modified Order the Commission  
8 expressed that it, “intends to level penalties for violations of this order for each instance in  
9 amounts not to exceed \$50,000.”

10 The plain text of ORS 759.990 permits penalties for each violation of a Commission order,  
11 stating:

12 A telecommunications carrier, (\*\*\*) , shall forfeit a sum of not less than \$100 nor more than  
13 \$50,000 for *each time* that the carrier (\*\*\*) [f]ails to obey any lawful requirement or order  
14 made by the commission (emphasis added).

15 The methodology for statutory construction has been established by the Oregon Supreme Court.

16 Under this methodology, we first examine the text and context of the statute in question.<sup>51</sup> The  
17 best evidence of the legislature’s intent is the text of the statute itself.<sup>52</sup> When examining the text  
18 of a statute, courts presume that the legislature intended words of common usage to have their  
19 plain, natural, and ordinary meaning.<sup>53</sup> The text of ORS 759.990 provides that the  
20 telecommunications carrier shall forfeit a penalty for “each time” it fails to obey a Commission  
21 order. “Each” is a word of common usage and means “every one of two or more things,  
22  
23  
24

---

25 <sup>51</sup> *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993); *State v. Gaines*, 346 Or 160  
(2009); ORS 174.010.

26 <sup>52</sup> *State v. Gaines*, 346 Or 160, 171-72 (2009).

<sup>53</sup> *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993); *State v. Ziska*, 355 Or 799, 804-05  
(2014) (the plain meaning of the text at issue can be found in its dictionary definition).

1 considered individually.”<sup>54</sup> Therefore the legislature intended ORS 759.990 to authorize a  
2 penalty for *every violation, considered individually*.

3 Next, the Oregon Supreme Court requires that the text “each” be read in context, which can  
4 include its immediate context, the context of other provisions of the same statute, and the broader  
5 context of related statutes involving the same subject matter that existed at the time of the  
6 statute’s enactment.<sup>55</sup> When “each” is read in its immediate context, it is clear that the *sum of not*  
7 *less than \$100 nor more than \$50,000* must be forfeited for *every individual* violation of a  
8 Commission order. Additionally, Commission discretion as to the amount of penalty appropriate  
9 for each violation is informed by the statutory range of *not less than \$100 nor more than \$50,000*  
10 per violation. By limiting penalties to amounts in the Modified Order “not to exceed 50,000” the  
11 Commission ensured that any penalties assessed would not exceed the range of discretion  
12 provided for in statute.<sup>56</sup>

## 14 VI. CONCLUSION

15 The Modified Order is a lawful exercise of the Commission’s regulatory authority. The  
16 record demonstrates that service provided in the Jacksonville area poses significant reliability  
17 and public safety concerns.<sup>57</sup> Provisions of the Modified Order require Lumen to create a reliable  
18 way for customers to report service quality issues, through dedicated customer support line, and  
19

20  
21 \_\_\_\_\_  
22 <sup>54</sup> Webster’s Third New International Dictionary, Unabridged, “Each” (2016).

23 <sup>55</sup> ORS 174.010; *Oregonian Pub. Co. v. Portland Pub. Sch. Dist. No. 1J*, 329 Or 393, 400 (1999); *see also*  
24 *State v. Stamper*, 197 Or App 413, 418 (2005).

25 <sup>56</sup> Even if assessment of penalties exceeded the Commission’s range of discretion penalties have not yet  
26 been assessed. Consequently, this issue is not ripe. *See, Hill v. City of Portland*, 296 Or. App. 470, 476,  
439 P.3d 564, 567 (2019) (noting that ripeness is “ ‘an aspect of the doctrine of justiciability, specifically,  
the requirement that there be an actual, as opposed to a hypothetical, injury to the individual invoking the  
judicial power’ ”), *citing Beck v. City of Portland*, 202 Or. App. 360, 366, 122 P.3d 131 (2005), *quoting*  
*Coast Range Conifers v. Board of Forestry*, 192 Or. App. 126, 129, 83 P.3d 966 (2004), *rev’d on other*  
*grounds*, 339 Or. 136, 117 P.3d 990 (2005); *In U.S. West Communications v. City of Eugene*, 336 Or. 181,  
81 P.3d 702 (2003).

<sup>57</sup> Staff/100, Bartholomew/6.

1 hove those issues promptly addressed by the Company, within 48 hours of creation of the ticket.  
2 Additionally, Lumen is to provide the Commission reports on actions it took to resolve service  
3 issues through reports posted to the docket every two weeks. These requirements are within the  
4 Commission's authority and are necessary to appropriately assess the ongoing public safety  
5 threat posed by Lumen's service quality issues in the Jacksonville area, determine compliance  
6 with applicable service quality standards, and assists in the evaluation of whether the Company  
7 still meets the requirements for regulation under a price plan.  
8  
9  
10

11 .  
12 DATED this 13<sup>th</sup> day of December 2022.

13 Respectfully submitted,

14 ELLEN F. ROSENBLUM  
15 Attorney General

16 /s/Natascha Smith

17 \_\_\_\_\_  
18 Natascha Smith, OSB # 174661  
19 Assistant Attorney General  
20 Of Attorneys for Public Utility Commission of  
21 Oregon,  
22  
23  
24  
25  
26