

1 BEFORE THE PUBLIC UTILITY COMMISSION

2 OF OREGON

3 UM 1908, UM 2206

4 In the Matters of

5 LUMEN TECHNOLOGIES,

6 Proposed Commission Action Pursuant to
7 ORS 756.515 to Suspend and Investigate
8 Price Plan (UM 1908), and

8 QWEST CORPORATION,

9 Investigation Regarding the Provision of
10 Service in Jacksonville, Oregon and
11 Surrounding Areas (UM 2206)

12 Hearing Relating to Order Nos. 22-340
and 22-422.

**CENTURYLINK'S POST-HEARING
BRIEF**

13 **I. INTRODUCTION**

14 Qwest Corporation dba CenturyLink ("CenturyLink") respectfully submits this post-
15 hearing brief demonstrating why Order No. 22-340 (the "Order"), issued under ORS 756.515(4)
16 without a hearing, should not remain in effect. The Order unlawfully imposes a new service
17 quality standard requiring CenturyLink to clear all trouble reports from customers in the
18 Jacksonville, Applegate, and surrounding areas in southern Oregon (the "Area") within 48 hours
19 of the creation of a ticket. The Order should not remain in effect because (1) it is unlawful and
20 exceeds the Commission's authority for several reasons; (2) CenturyLink has remedied all
21 service quality issues in the Area and is prepared to address any future issues as well; and (3) all
22 residents in the Area have alternatives to CenturyLink for communications in the event of an
23 emergency.

1 **II. DISCUSSION**

2 **A. The Commission Has the Burdens of Proof and Persuasion.**

3 This case arose from Staff and the Commission’s initiative to amend the price plan the
4 Commission approved in 2018 in Docket UM 1908 (the “Price Plan”) and to impose specific service
5 quality requirements and remedies on CenturyLink. The case proceeded under ORS 756.515, which
6 permits the Commission to investigate any service on its own motion. ORS 756.515(1). Typically, the
7 Commission would be required to furnish a public utility notice of the matters under investigation and to
8 schedule and hold a hearing. ORS 756.515(2). Those proceedings are to be conducted “as though
9 complaint had been filed with the commission.” ORS 756.515(3). The Commission may also issue an
10 order without conducting a hearing, ORS 756.515(4); however, in such a case, any aggrieved party
11 “may request the commission to hold a hearing to determine whether the order should continue in
12 effect.” ORS 756.515(5).

13 That is the posture of this case. It is not an appeal of the Commission’s Order; rather, it is a first
14 hearing on the issues the Commission investigated which proceeds as if a complaint had been filed. The
15 complaining party in this case is the Commission. Thus, the Commission has the burdens of proof and
16 persuasion. *Pub. Util. Comm'n of Oregon v. Baker*, Order No. 01-416, 2001 WL 34036261 (May 11,
17 2001) (where Commission filed complaint under ORS 756.500, “the applicable legal standard is that the
18 Commission has the burden of proof to demonstrate that the damage was a result of one of the listed
19 causes.”); *In the Matter of J.D. v. Portland General Electric Company*, Order No. 14-166, 2014 WL
20 2153821, at *1 (May 16, 2014) (“This docket is a complaint under ORS 756.500. Complainant has the
21 burden of proving that the relief requested should be granted.”).

22 CUB asserts in its pre-hearing brief (at 9-10) that CenturyLink bears both burdens, making the
23 broad statement “[i]n a utility proceeding, the burden of persuasion and the ultimate burden of producing
24 sufficient evidence to support its claims is always with the utility.” That is not correct. CUB cites
25 Commission Order No. 09-046 in support of its assertion. That case considered PGE’s application to
26 amortize certain deferred costs. The order states (at 7): “The burden of persuasion *in a deferral*

1 *amortization case* is always with the utility. The ultimate burden of producing enough evidence to
2 *support its claims* is also with the utility.” (Emphasis added.) The Commission ruled only that the utility
3 has the burdens of production and persuasion *where the utility filed claims* to amortize a deferral. It does
4 not stand for the broader proposition asserted by CUB that a utility always bears those burdens in any
5 case before the Commission, which is plainly incorrect.

6 For example, customers in complaint proceedings against utilities always bear the burdens of
7 proof and persuasion. *M.J. & C.H. v. Pacificorp, d/b/a Pacific Power*, Order No. 10-293, 2010 WL
8 8056533, at *2 (July 30, 2010) (“In a customer complaint case, the customer bears the obligation to
9 provide evidence to support the complaint.”) The same rule applies to petitioners and other parties
10 advancing claims in other utility cases, including CUB and the Commission. *Dan and June May v.*
11 *Portland General Electric Company*, Order No. 92-1769, 1992 WL 501195 (Dec. 15, 1992) (“CUB first
12 argues that the order incorrectly assigns the burden of proof in its holding that the complainants and
13 CUB failed to prove the allegations in their complaints (at 14). The Commission reviewed this assertion
14 as one of CUB's exceptions and remains convinced that the complainant has the burden of proof.”); *Pub.*
15 *Util. Comm'n of Oregon v. Baker, supra*. The burden in this case rests with the Commission.

16 **B. The Order Is Unlawful for a Number of Reasons.**

17 CenturyLink’s pre-hearing brief discusses the following reasons why the Order is unlawful:

- 18 1. The Commission acted beyond its authority under ORS 759.450 by imposing a heightened
19 service quality standard exclusively on CenturyLink and without following mandatory
20 rulemaking procedures. CenturyLink Pre-Hearing Br. at 2-7.
- 21 2. The Commission exceeded its statutory authority under ORS 759.450 and violated its own
22 regulation (OAR 860-023-0055(14)) by failing to allow CenturyLink the opportunity to
23 submit a corrective action plan to address any service quality issues. CenturyLink Pre-
24 Hearing Br. at 7-10.

- 1 3. The Commission exceeded its authority under ORS 759.255 by amending the Price Plan to
2 impose the new service quality measure. CenturyLink Pre-Hearing Br. at 10-13.
- 3 4. This new, ad hoc requirement exceeds the remedy for service interruptions in CenturyLink’s
4 Commission-approved tariffs, which have the force and effect of law and provide the
5 exclusive remedies for failure to repair service. CenturyLink Pre-Hearing Br. at 13-15.

6 CenturyLink identified each of these legal issues in its Request for Hearing filed Sept. 27, 2022.
7 Some of the other parties discussed the first three issues to some extent in their pre-hearing briefs, but
8 not the fourth. CenturyLink will summarize its arguments and respond to the other parties’ arguments
9 below. In the interest of brevity, CenturyLink incorporates the discussion in its pre-hearing briefs by this
10 reference and will not fully restate them here.

11 **1. The Commission may not impose a service quality standard uniquely on
12 CenturyLink or without following formal rulemaking procedures.**

13 The Commission acted beyond its authority when it imposed a modified service quality
14 standard exclusively on CenturyLink and without following rulemaking procedures. In its Order,
15 the Commission required CenturyLink to address all tickets and make repairs within 48 hours of
16 a ticket being created. Under OAR 860-023-0055, however, a telecommunications provider is
17 required only to “clear at least 90 percent of all trouble reports within 48 hours of receiving a
18 report for each repair center.” OAR 860-023-0055(6). The Commission’s deviation from the
19 service quality standard in OAR 860-023-0055 exceeds the Commission’s authority for three
20 reasons.

21 *First*, the Commission must use rulemaking procedures to modify an existing service
22 quality standard. The plain text of ORS 759.450 unambiguously provides that “minimum service
23 quality standards” may be modified only “by rule.” ORS 759.450(2). A minimum service quality
24 standard governing the “repair clearing time” for “trouble reports” already exists. To “modify”
25 that standard, as occurred here, requires the Commission to act “by rule.” ORS 759.450(2).
26 Because the Commission modified an existing service quality standard when it ordered

1 CenturyLink to address and resolve all service tickets within 48 hours, it erred by failing to
2 follow rulemaking procedures.

3 *Second*, when adopting or modifying minimum service quality standards, the
4 Commission must apply those standards to *all* telecommunications carriers. The plain and
5 unambiguous text of ORS 759.450 provides that “minimum service quality standards adopted
6 under this section shall apply to *all* telecommunications carriers” and must be
7 “nondiscriminatory.” ORS 759.450(1)-(2). Because the Commission modified a minimum
8 service quality standard when it ordered CenturyLink to address and resolve all service tickets
9 within 48 hours, it erred by applying that standard solely to CenturyLink.

10 *Third*, when adopting or modifying minimum service quality standards, the Commission
11 must consider certain statutory criteria, which it failed to do in this case. ORS 759.450 provides
12 that, “[i]n adopting minimum service quality standards, the commission shall, for each standard
13 adopted, consider” the following six factors: (1) “General industry practice and achievement,”
14 (2) “National data for similar standards,” (3) “Normal operating conditions,” (4) “The historic
15 purpose for which the . . . network was constructed,” (5) “Technological improvements and
16 trends,” and (6) “Other factors as determined by the commission.” ORS 759.450(3). Because the
17 Commission modified a minimum service quality standard when it ordered CenturyLink to
18 resolve all service tickets within 48 hours, it erred by failing to consider these criteria.

19 Staff admits in its pre-hearing brief (at 12-13) that the new service quality standard the
20 Commission imposed on CenturyLink in the Order was not adopted in accordance with
21 rulemaking procedures, is not a rule, and is not applicable to any entity other than CenturyLink.
22 Nevertheless, Staff argues in its pre-hearing brief (at 3-5) that the Commission’s imposition of a
23 48-hour repair requirement is authorized by ORS 756.040, 756.515, and 757.035(2). CUB asserts
24 in its pre-hearing brief (at 11-14) that the new standard is authorized by ORS 756.515 and the
25 Commission’s “broad regulatory authority” (at 14-16).

1 ORS 757.035(2) does not apply. ORS 757.035(1) authorizes the Commission to adopt
2 “reasonable rules or regulations” governing the construction, maintenance, and operation of
3 outside plant “for the protection of the health or safety of all employees, customers or the
4 public.” ORS 757.035 specifically requires the Commission to “adopt by rule as the standard of
5 such construction, operation and maintenance the 1973 edition of the American National
6 Standard, National Electrical Safety Code.” The rules authorized by ORS 757.035 plainly pertain
7 to the *safety of outside plant* and not to service quality for telephone customers. This is apparent
8 not only from the plain language of the statute, but also by the fact that the Commission cites
9 ORS 757.035 as its source of authority for rules that pertain to the safe construction and
10 operation of outside plant (*e.g.*, in Divisions 022 and 028 (Attachments), 024 (Safety Standards),
11 032 (Construction and Safety), and 300 (Wildfire Mitigation)) but not for its telephone service
12 quality rules (*i.e.*, Division 023).

13 Furthermore, the general authority mentioned in ORS 756.040 and 756.515 may not
14 supplant the more specific statutory requirement under ORS 759.450 to regulate service quality
15 for telecommunications carriers by promulgating regulations that apply to all carriers on a non-
16 discriminatory basis. ORS 759.450 provides detailed substantive and procedural instructions for
17 modifying service quality standards, including the requirement that such standards be adopted
18 “by rule,” apply to “all” carriers, and reflect the consideration of specific criteria. It also provides
19 a detailed remedial scheme for addressing violations of those standards. It is undisputed that the
20 Commission did not comply with these requirements when, contrary to an existing service
21 quality standard, it ordered CenturyLink to clear all trouble reports within 48 hours. If the
22 Commission were to find that it acted within its authority despite this fact, it would render
23 ORS 759.450 superfluous. That is, it would allow the Commission to rely on general grants of
24 authority—not specific to modifying service quality standards—to override and ignore the more
25 specific requirements in ORS 759.450.

1 Relying on a general grant of authority to supersede more specific statutory mandates is
2 improper for several reasons. *First*, “when multiple statutory provisions are at issue in a case, [a]
3 court, if possible, must construe those statutes in a manner that ‘will give effect to all’ of them.”
4 *Powers v. Quigley*, 345 Or 432, 438 (2008) (quoting ORS 174.010). The only way to give effect
5 to both the Commission’s general authorities and the specific requirements in ORS 759.450 is to
6 find that the latter limits the former in the specific circumstances to which it applies. This
7 reading is consistent with how courts have previously avoided conflicts between the
8 Commission’s general authorities and more specific statutory directives. *See, e.g., Citizens’ Util.*
9 *Bd. v. Pub. Util. Comm’n*, 154 Or App 702, 715–17 (1998) (“[W]here statutes containing
10 specific provisions . . . are applicable, they control and narrow PUC’s general authority in the
11 specific circumstances to which they apply.”).

12 *Second*, “[w]hen a general statute and a specific statute both purport to control an area of
13 law,” the specific statute “take[s] precedence over an inconsistent general statute related to the
14 same subject.” *State ex rel. Juv. Dep’t of Multnomah Cnty. v. M.T.*, 321 Or 419, 426 (1995); *see*
15 *also Powers*, 345 Or at 438 (“[I]f two statutes are inconsistent, the more specific statute will
16 control over the general one.”). Finally, statutes must be read to avoid an “unreasonable result.”
17 *State v. Bordeaux*, 220 Or App 165, 175 (2008). It would be unreasonable to find that the
18 Legislature enacted a detailed scheme governing service quality standards knowing that the
19 Commission could simply ignore that scheme. *See, e.g., State v. Vasquez-Rubio*, 323 Or 275, 282
20 (1996) (holding that it would be “an absurd result” to read one statute in a way that would render
21 another “a nullity”).

22 CUB’s pre-hearing brief (at 14-16) improperly relies on *Pac. Nw. Bell Tel. Co. v. Katz*,
23 116 Or App 302 (1992), to assert that “the Price Plan law [ORS 759.255] does not limit the
24 Commission’s authority to issue corrective action in other circumstances.” CUB Pre-Hearing Br.
25 at 15. CUB’s argument is mistaken. First, CUB makes a faulty comparison. CUB points only to
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1 the price plan statute, ORS 759.255, in arguing the provisions pertaining to service quality *in that*
2 *statute* do not limit the Commission’s authority to impose service quality requirements on one
3 carrier only and not through rulemaking. CUB completely ignores ORS 759.450 in its argument.
4 In contrast to ORS 759.255, ORS 759.450 comprehensively addresses the imposition of service
5 quality standards and does not leave the Commission with any residual authority to impose
6 service quality standards without following rulemaking procedures. *See Citizens’ Util. Bd. v.*
7 *Pub. Util. Comm’n, supra.*

8 Second, the *Katz* holding is much narrower than CUB implies. *Katz* holds that the
9 existence of a statute (ORS 759.185(4)) that requires refunds under specific, narrow
10 circumstances does not deprive the Commission of power to order refunds in other
11 circumstances not addressed by that statute. ORS 759.185(4) applies only to a narrow
12 circumstance, when a utility files new proposed, increased rates which the Commission does not
13 suspend and allows to go into effect pending the conclusion of a rate case and the final, approved
14 rates are lower than those proposed rates. In those circumstances, ORS 759.185(4) requires the
15 utility to refund the amounts it had collected. The *Katz* court held that this statute does not
16 restrict the Commission from ordering a “refund of amounts over collected under temporary
17 rates that failed to comply with an ordered revenue reduction.” 116 Or App at 310. The
18 circumstances addressed by ORS 759.185(4) were completely different from those presented in
19 *Katz* so there was no conflict between the two statutes at issue. The court was also persuaded by
20 the fact that the dispute concerned utility rates, a matter over which the Commission has broad
21 power. *Id.* at 309-10.

22 In contrast to *Katz* and CUB’s argument, this case concerns ORS 759.450 which
23 comprehensively addresses service quality and imposes clear restrictions on the Commission’s
24 authority to regulate service quality, including requiring rules that apply to all carriers on a
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1 nondiscriminatory basis. *Katz* has no application here because it considered two different types
2 of refunds whereas both ORS 759.450 and the Order address the same service quality measure.

3 Staff and CUB appear to think that the Commission is free to ignore statutorily-mandated
4 minimum service quality rules anytime it wants to hold a particular carrier to a higher standard
5 without comporting with appropriate rulemaking procedures and complying with explicit
6 statutory requirements. The Commission does not have that freedom and acted beyond its
7 authority when, in contravention of the controlling requirements in ORS 759.450, it imposed a
8 modified minimum service quality standard exclusively on CenturyLink and without following
9 rulemaking procedures.

10 **2. The Commission exceeded its statutory authority and violated its own**
11 **regulations by failing to give CenturyLink the opportunity to submit a**
corrective action plan.

12 Not only did the Commission violate ORS 759.450 when it created a new minimum
13 service quality standard applicable to CenturyLink alone and without following rulemaking
14 procedures, it also violated that statute by not affording CenturyLink the opportunity to submit a
15 corrective action plan. Moreover, the Commission violated the plain requirements of its own
16 rules.

17 The only lawful service quality standards that apply to CenturyLink and other large
18 telecommunications utilities are found in OAR 860-023-0055. The specific standard at issue here
19 is for repair ticket clearing, under which “a large telecommunications utility must clear at least
20 90 percent of all trouble reports within 48 hours of receiving a report for each repair center.”
21 OAR 860-023-0055(6).

22 If the Commission determines that CenturyLink is not complying with an effective
23 standard, then the controlling statute and the Commission’s service quality rule specify the
24 remedies that are available and the procedures that must be followed to enforce that standard.
25 ORS 759.450(5) provides that the Commission “*shall require* a ... telecommunications utility ...
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1 that is not meeting the minimum service quality standards to submit a plan for improving
2 performance to meet the standards.” (Emphasis added.) Similarly, OAR 860-023-0055(14)(a)
3 provides that “the Commission *must require* the large telecommunications utility to submit a
4 plan for improving performance as provided in ORS 759.450.” (Emphasis added.)

5 Staff concedes in its pre-hearing brief (at 11-12) that the Commission took no steps to
6 enforce its service quality rules. Staff attempts to justify this based on a lack of information.
7 “Because of the discrepancies between the information provided by Lumen and the information
8 reported by customers in the Jacksonville area, it is apparent to Staff that incomplete or
9 inaccurate information exists to assess compliance with the minimum service quality standards.”
10 Staff Pre-Hearing Br. at 12.

11 CenturyLink periodically reports its performance with respect to the Commission’s
12 service quality rules. If Staff thinks that information is incomplete, it has means at its disposal to
13 obtain more complete information. *See* Staff Pre-Hearing Br. at 5. Staff also complains in its pre-
14 hearing brief (at 5) about CenturyLink’s response to data requests; however, Staff undertook no
15 efforts to clarify CenturyLink’s response or to obtain additional information. Absence of
16 information is no excuse to ignore the remedial steps mandated by ORS 759.450 and enshrined
17 in OAR 860-023-0055(14).

18 ORS 759.450(5) uses a mandatory term, “shall require,” which does not leave any room
19 for Commission discretion. The Commission adhered to the statutory command in promulgating
20 OAR 860-023-0055(14)(a), which provides that “the Commission *must require* the large
21 telecommunications utility to submit a plan for improving performance as provided in
22 ORS 759.450.” Neither the statute nor the rule gives the Commission any discretion to bypass
23 this important requirement.

24 The Commission must abide by statutory commands. *See Citizens’ Util. Bd. v. Pub. Util.*
25 *Comm’n*, 150 Or App 702, 714-18 (1998) (holding that the Commission is prohibited from
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1 taking actions that are “specifically contrary” to a statutory directive); *see also Pac. Nw. Bell Tel.*
2 *Co. v. Katz*, 116 Or App 302, 309 n.5 (1992) (“Of course, PUC’s exercise of its authority is
3 limited by the boundaries of the legislature’s delegation.”). Nor may the Commission fail to
4 follow the plain and unambiguous terms of its own rules. *See Don’t Waste Or. Comm. v. Energy*
5 *Facility Siting Council*, 320 Or 132, 142 (1994) (holding that an agency’s interpretation of its
6 own rules may not “be inconsistent with the wording of the rule itself”). A reviewing court
7 would summarily reverse the Order because both the controlling statute and the Commission’s
8 own rules compel the Commission to require CenturyLink to prepare and submit a corrective
9 action plan. ORS 183.482(8)(a). *Id.* (holding that a court’s authority under ORS 183.482(8)(a) to
10 review an agency’s “erroneous interpretation of law” includes interpretations of both statutes and
11 rules).

12 Submission of a corrective action plan is not a mere formality or empty gesture. As
13 Staff’s own testimony shows, CenturyLink previously addressed service quality issues in the
14 Jacksonville area through submission and performance of a corrective action plan, which was
15 successfully completed on November 30, 2018. Staff/100, Bartholomew/5-6, 43. At that time,
16 Staff correctly observed that under ORS 759.450(5), “*the Commission is required to direct a*
17 *telecommunications carrier, utility or competitive provider that is not meeting the minimum*
18 *service quality standards to submit a plan for improving performance to meet the standards. The*
19 *Commission is further required to approve or disapprove the plan.” Order No. 17-075,*
20 *Appendix A at 1 (Staff/105, Bartholomew/2) (emphasis added).*

21 Intervenor Priscilla Weaver attempts to impugn CenturyLink’s performance of that plan
22 in 2017-18, asserting that requiring another plan would be “futile.” Weaver Pre-Hearing Br. at 3.
23 CUB recites facts regarding the 2017-18 price plan, concluding “[t]here is no record that this
24 compliance report was filed in docket UM 1836.” CUB Pre-Hearing Br. at 4. It’s unclear what
25 CUB’s point is, but if CUB’s intention is to imply that requiring a performance plan in this case
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1 would be futile, that is not supported by the record. The only evidence in the record is that
2 CenturyLink successfully remedied the issues addressed in that performance plan and that the
3 Commission never sought to penalize CenturyLink for failing to meet the goals of the plan.

4 The Commission did precisely what the governing statute and its own rules forbid. Rather
5 than require CenturyLink to submit a corrective action plan, the Commission ignored the
6 statutory command and its own rules and summarily ordered CenturyLink *immediately* to repair
7 all trouble reports within 48 hours, under threat of penalties of \$50,000 *each day*.

8 The Commission began its investigation of service quality issues in the Area in
9 December 2021 when it opened Docket UM 2206. At no time during the nine months before the
10 Commission issued the Order did it order CenturyLink to prepare and submit a corrective action
11 plan for review and approval. Lumen/100, Gose/17. In fact, the Commission took no formal
12 action whatsoever in that service quality docket. Instead, it issued the Order in a completely
13 different case, UM 1908, which was opened in 2017 to consider CenturyLink’s Price Plan.

14 The Commission may have concluded that submission of a corrective action plan was not
15 even necessary to address these service quality issues. As Mr. Gose states in his testimony, and
16 as discussed in more detail below (*see* Section II.C), CenturyLink worked steadily to improve
17 service quality in the Area since it first became aware of such issues in August 2021.

18 Lumen/100, Gose/8-10. By August 2022, those services were functioning well. *Id.* at 11. And, on
19 August 30, 2022, both Mr. Gose and Mr. Bartholomew of Staff reported to the Commission at an
20 open meeting that the restorative efforts “appeared to have corrected the issues.” *Id.* at 12. Thus,
21 CenturyLink was able to resolve the outstanding concerns by working cooperatively with Staff.

22 Nevertheless, three weeks later, the Commission summarily issued the Order. If the
23 Commission was dissatisfied with CenturyLink’s remedial efforts, it was required to order
24 CenturyLink to submit a corrective action plan for review. However, it bypassed that
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1 requirement without explanation in the Order. Thus, the Commission's action is plainly unlawful
2 and the Order may not remain in effect.

3 **3. The Commission exceeded its authority in amending the Price Plan to impose**
4 **the new service quality measures.**

5 CenturyLink showed in its pre-hearing brief (at 10-13) that the Commission exceeded its
6 authority in amending the Price Plan to impose the new service quality measures because the
7 Commission's minimum service quality rules provide the applicable measure of service quality
8 for the Price Plan and submission of a corrective action plan is the remedy the Commission must
9 pursue for any violations. Only Staff addressed this issue in its pre-hearing brief (at 11), asserting
10 that only one provision of the Order modified the Price Plan, but the Commission's imposition of
11 a 48-hour repair requirement was not a modification of the Plan.

12 Staff ignores the fact that the Order was issued *only* in the Price Plan docket (UM 1908)
13 and not in the service quality investigation (UM 2206). Moreover, Staff's meeting memo
14 appended to the Order describes the issue presented as follows:

15 Whether further adjustments to or termination Lumen's Price Plan is
16 required by the public interest according to the criteria set forth in ORS
17 759.255 due to issues that Lumen customers and Staff have reported in
18 Docket No. 2206, Investigation Regarding the Provision of Service in
19 Jacksonville, Oregon, and Surrounding Areas.

20 Order, Appendix A at 1. It also states:

21 Additionally, the terms of the Plan state that the Commission may open an
22 investigation at any time pursuant to ORS 756.515 to determine whether
23 further adjustments to the Plan or termination of the Plan is required by
24 the public interest, according to the factors set forth in ORS 759.255(2).
25 The Commission may order further adjustments to the Plan or termination
26 of the Plan only after providing Centurylink with notice and the
opportunity for a hearing.

Order, Appendix A at 3. Thus, it is apparent that all of the provisions of the Order should be considered
modifications of the Price Plan even if the Order was issued under ORS 756.515.

The Price Plan contemplated an opportunity for review every four years based on the
performance report CenturyLink is required to file by the end of year three of each four-year

1 term. Order 18-359, Appendix A at 10. As required, CenturyLink duly filed the first report on the
2 third anniversary of the Plan, September 28, 2021. Nevertheless, the Commission did not
3 identify any potential adjustments based on that report or otherwise raise the specter of adjusting
4 the Plan until September 14, 2022, only two weeks before the Plan automatically renewed on
5 September 28, 2022. Regardless of the delay, the issues upon which the Commission relied in the
6 Order to adjust the Plan are not valid considerations and the Commission did not provide
7 CenturyLink with adequate notice of the adjustments it ultimately made.

8 A price plan under ORS 759.255 addresses how rates are set for utility services, and the
9 flexibility offered by a price plan is intended to strike “the appropriate balance between the need
10 for regulation and competition” and to “simplify[y] regulation.” ORS 759.255(2)(c) & (d).
11 ORS 759.255(2)(b) permits considering whether a price plan “[e]nsures high quality of existing
12 telecommunications services and makes new services available.” However, the Commission
13 agreed that the Commission’s minimum service quality rules provide the measure of service
14 quality for purposes of the Price Plan, and that development of a corrective action plan is the
15 remedy identified in the Price Plan Order and the Price Plan for any failure to comply with
16 service standards:

17 The parties state that CenturyLink will continue to be subject to
18 our service quality rules and will continue its reporting practices as
19 prescribed by the rules. These reports provide the means to
20 monitor CenturyLink’s service quality and compare it with those
21 competitors also subject to reporting requirements. In the event
22 that CenturyLink is found to be out of compliance with individual
23 service quality standards, the parties explain that our service
24 quality rules provide for the development of a corrective action
25 plan.

26 Order No. 18-359 at 5.

Adjustments to the Price Plan are not to be made to address isolated service quality
issues. As the Commission ruled in Order No. 18-359, CenturyLink’s service quality under the
Price Plan must be evaluated and addressed under the Commission’s service quality rules and

1 also compared to that of competitors subject to reporting requirements under those rules.
2 Adjustments to the Price Plan are not intended, and are not well-suited, to address isolated
3 service quality issues as the Commission has attempted to do in the Order.

4 The Commission amended the Price Plan to impose an unlawful service quality measure
5 without providing CenturyLink adequate notice and an opportunity for hearing. The Commission
6 did not identify any potential adjustments to the Plan based on the performance report
7 CenturyLink filed in September 2021, nor did it or Staff otherwise raise the specter of adjusting
8 the Plan until September 14, 2022. Even then, the only adjustments Staff recommended at that
9 time in its public meeting memo were extending the Plan for nine months and requiring
10 CenturyLink to implement a dedicated customer service line. Order No. 22-340, Appendix A
11 at 9. Other than those two adjustments, Staff recommended that the Commission “[o]pen an
12 investigation [into] CenturyLink’s Price Plan to determine whether the Price Plan is in the public
13 interest according to the criteria set forth in ORS 759.255(2); and if not, what modifications may
14 enable a finding that such a modified plan is in the public interest”. *Id.*

15 Staff also correctly stated in that memo that “[u]nder the terms of the Price Plan, the
16 Commission must provide the Company with notice and the opportunity for a hearing before
17 ordering further adjustments to the Plan. This public meeting memo and public meeting provide
18 the Company with the required notice and hearing before this temporary adjustment goes into
19 place, satisfying the term of the Price Plan.” While CenturyLink disagrees that the Sept. 14, 2022
20 memo provided CenturyLink with adequate notice and opportunity for hearing on the
21 adjustments proposed in the memo, it most certainly did not provide CenturyLink with any
22 notice or opportunity for hearing on the 48-hour repair requirement, which was not mentioned or
23 even hinted at in the memo or otherwise.

24 The first time CenturyLink received notice that the Commission would adopt the
25 unlawful service quality measure was when the Commission entered the Order on September 23,
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1 2022, memorializing its September 20, 2022 open meeting ruling, at which point CenturyLink
2 had no recourse but to request a hearing.¹ The Commission departed from its decades-long
3 practice of announcing and allowing for input and dialogue on significant regulatory actions.
4 Regardless, the Commission may order adjustments to the Plan only after providing CenturyLink
5 with notice and the opportunity for a hearing. ORS 759.255(1); Order No. 18-359, Appendix A
6 at 10. Absent notice and an opportunity for hearing, the Order is unlawful and may not remain in
7 effect.

8 **4. The Commission-ordered remedies are unlawful because they exceed those**
9 **found in CenturyLink’s tariffs.**

10 Although CenturyLink affirmatively raised this issue in its Sept. 27, 2022 Request for Hearing,
11 no other party addressed it in their pre-hearing briefs. Thus, CenturyLink’s arguments in its pre-hearing
12 brief (at 13-15) are unrebutted and should be sustained.²

13 For the Jacksonville, Oregon wire center that is served under the terms, conditions and rates as
14 set forth in Qwest Corporation P.U.C. Oregon No. 33 tariff, approved by the Commission, customers
15 may obtain credit for lines that are out of service. Lumen/100, Gose/16.³ The available credits include
16 the following:

17 **2.3.4 ADJUSTMENT OF CHARGES**

18 A. Upon request by the customer, the Company will allow customers
19 credit in all cases where exchange access lines are “out of service”, except
20 when the “out of service” is due to the fault of the customer or to a
21 temporary discontinuance for nonpayment of a bill. When the period of
22 interruption is at least 24 hours after notification to the Company, the
charges for the service(s) affected will be adjusted on a pro rata basis for
the duration of the service outage. In no case will the credit allowance for
any period exceed the total bill for exchange service for that period. The
Company’s liability for any failure or interruption to service, shall be

23 ¹ The Commission first mentioned the 48-hour repair requirement during its deliberation at the Sept. 20,
24 2022 open meeting following a closed executive session and with no further opportunity for CenturyLink to
comment on the proposal.

25 ² If any party addresses this issue for the first time in its post-hearing brief, CenturyLink reserves the right
to request the opportunity to respond.

26 ³ The tariffs may be found at https://www.centurylink.com/tariffs/or_qc_ens_t_no_33.pdf. CenturyLink
respectfully requests that the Commission take official notice of the tariffs pursuant to OAR 860-001-0460.

1 limited to the credit allowance provided for in this regulation, except as
2 provided in B., following.

3 B. Where exchange access service lines are “out of service” and the out of
4 service condition is not restored within 48 hours of notification to the
5 Company, the customer will automatically receive a credit based on the
6 monthly rate for the service interrupted. Where a specific service's terms
7 and conditions includes an out of service credit which is exclusive to that
8 service, this credit may not apply. The credit applies only to out of service
9 conditions found in the Company's network. Disruption caused by the
10 fault of the customer or their agent, or by natural disaster, or from damage
11 to the Company network affecting large groups of customers that is caused
12 by a third party unaffiliated with the Company will not be eligible. The
13 credit will be based on the tariffed monthly rate for all exchange access
14 line services furnished by the Company rendered useless (monthly rate)
15 and will be calculated as follows:

DURATION:		CREDIT
CONSECUTIVE DAYS		
• 48 hours through 5 days	=	1/30th of the total monthly rate for each day the service was interrupted.
• 6 days through 10 days	=	one-half of the total monthly rate.
• 11 days through 15 days	=	one month's total monthly rate.
• 16 days through 30 days	=	one and one-half months total monthly rate.
• 31 days or more	=	two months total monthly rate for each 30 days the service is rendered useless

18 These Commission-approved credits provide the exclusive lawful remedy to customers when
19 lines are “out of service” for more than 48 hours of notification to the Company. The Order’s
20 requirement that CenturyLink “make repairs in a manner that results in a consistent and functional dial
21 tone and ability to reliably make and receive calls, or provide the customer with a functionally
22 equivalent substitute service, as defined by CenturyLink’s current tariffs, at no additional customer cost,
23 within 48 hours of creation of the ticket until service issues in the area are remedied”⁴ requires
24 additional remedies beyond those provided in CenturyLink’s tariff and is therefore contrary to law.

25
26

⁴ Order No. 22-422 at 9.

1 Moreover, the tariff contemplates that customers could be out of service for 31 days or more, so the
2 requirement to restore all service within 48 hours plainly contradicts the lawful tariff provisions.

3 The filed-rate doctrine, as codified in ORS 759.205 for telecommunications utilities, not only
4 requires a utility to charge its filed rates; it also prohibits a commission or court from ordering a remedy
5 that is inconsistent with a utility's tariff. As explained by the Commission:

6 The filed rate doctrine, of which ORS 757.225 is an example, is based on
7 the idea that the rate filed with a commission "is the only lawful charge"
8 and that "[d]eviation from it is not permitted upon any pretext." Rates
9 filed with a commission bind both utilities and customers "with the force
10 of law." The Oregon Supreme Court recognized the doctrine in *Oregon-
Washington R. & Nav. Co. v. Cascade Contract Co.*, and applied the
11 doctrine in *McPherson v. Pacific Power & Light Cos.*, when it found the
12 "the Commission has no authority to award any reparations, either for
13 unreasonable or unjustly discriminatory rates, or for overcharges."

14 Order No. 08-487 at 33. Accordingly, the Commission's requirement that CenturyLink make repairs or
15 provide a functionally equivalent substitute service at no additional customer cost within 48 hours of a
16 customer's opening a trouble ticket is inconsistent with CenturyLink's Commission-approved tariff and,
17 therefore, unenforceable.

18 **5. No party asserts that penalties may be assessed on a "per-day" basis.**

19 CenturyLink asserted in its Request for Hearing (at 2-3) that the Commission's stated intention
20 to level penalties on CenturyLink and to consider each day a separate violation exceeds the
21 Commission's authority. However, because the Commission has not yet acted on that intention,
22 CenturyLink stated in its pre-hearing brief (at 2, n.1) that the Commission does not need to address the
23 validity of those provisions of the Order in the pending hearing and that CenturyLink reserves the right
24 to raise all available challenges to the imposition of penalties for violation of the Order should that ever
25 come to pass.

26 Staff agreed in its pre-hearing brief (at 14, n.56) that "this issue is not ripe." Regardless, Staff
addressed penalties in its pre-hearing brief (at 13-14). While Staff argues that the Commission has
authority to impose penalties for "each violation" of a Commission order, Staff does not argue that each

1 day of a continuing violation is a separate violation. Thus, Staff does not address the issue CenturyLink
2 raised. CenturyLink does not retreat from its position that the Commission should not address this issue
3 now because it is not ripe; however, CenturyLink simply wishes to point out that Staff did not even
4 address the issue that CenturyLink raised.

5 **C. The Order Is Not Required To Remain in Effect Because CenturyLink Has Fully**
6 **Remedied the Service Quality Issues and Is Better Prepared To Address Any Future**
7 **Issues.**

8 The evidence adduced at the hearing establishes that CenturyLink has fully addressed all service
9 quality issues in the Area and is better prepared to address issues that may arise in the future. For these
10 additional reasons, the Commission should sunset the Order.

11 **1. CenturyLink has remedied service-impacting issues.**

12 CenturyLink's recent efforts to remedy service quality issues in the Area commenced in August
13 2021. At that time, CenturyLink replaced sections of cable along Little Applegate Road that were prone
14 to becoming wet during inclement weather. CenturyLink also placed new pedestals and connected the
15 remaining serviceable cable with the new cable segments. Lumen/100, Gose/8.

16 In November 2021, CenturyLink identified that batteries in the remote terminals had reached the
17 end of their useful lives. Tr. 128. Commencing in January 2022, CenturyLink replaced the batteries in
18 the remote terminal at 2900 Little Applegate Road with a temporary string. Lumen/100, Gose/8; Tr.
19 128-29. CenturyLink was unable immediately to procure new batteries because of nationwide and global
20 pandemic-related supply chain disruptions. CenturyLink installed new permanent batteries in May 2022.
21 Lumen/100, Gose/8.

22 In September 2022, CenturyLink performed an extensive review of the 13-mile T-1 span cable
23 plant from the Jacksonville central office all the way to the 2900 Little Applegate Road remote terminal.
24 That work consisted of a detailed inspection and, where necessary, correction of bonding, grounding,
25 and connections of the cable plant. The work also included testing of the cable pairs used for the T-1
26 spans, and, where necessary, the T-1 spans were cut over to different cable pairs at the repeaters. This

1 work required several days for completion because isolating faults on antiquated copper carrier systems
2 is a complex task. Lumen/100, Gose/9-10; Tr. 129-30.

3 CenturyLink also implemented switch software upgrades in the Jacksonville central office
4 devoted to remote terminal connectivity in September 2022. At the same time, in order to stabilize
5 communications between the central office switch in Jacksonville and the remote terminals, a central
6 office switch module was replaced. CenturyLink also reloaded software at the central office to the
7 remote terminals. After this work was completed, connections to remote terminals have been fully
8 functional. Lumen/100, Gose/9-10; Tr. 130.

9 CenturyLink worked hand-in-hand with Staff to address service quality issues. In December
10 2021, Mr. Bartholomew recommended a six-step plan to remedy the facilities. Tr. 122-23. CenturyLink
11 evaluated that recommendation, found it to be “basically industry standard,” and concluded that those
12 steps had already been implemented to rehabilitate some plant that had been problematic. Tr. 123; *see*
13 *also* Tr. 17, 20. Mr. Bartholomew conceded that he made that recommendation before he visually
14 inspected the plant in March 2022 (Tr. 17), and determined that it was not necessary following his visual
15 inspection:

16 The six-step was before I visually inspected. I had thoughts in my head
17 that when I went out there to inspect I was going to open these pedestals,
18 and it was going to be a rats nest, things were just -- if I was going to
19 touch it, it was going to break, which wasn't the case.

20 So if it had been that way, then yes, that six-step remediation would have
21 to take place or you're constantly going to have outages, but -- yeah.

22 Tr. 32-33. Mr. Bartholomew admitted that the two issues he observed in CenturyLink’s plant would not
23 be addressed by the six-point plan. Tr. 32. Mr. Bartholomew also recommended making certain bonding
24 and grounding repairs during that inspection. Tr. 17. Everything else in the remote terminals and
25 pedestals “looked good.” Tr. 38. He did not raise the six-point plan again. Tr. 20.

26 As a result of this work, telephone service in the Area was “functioning well” by May 2022.
Lumen/100, Gose/11. Indeed, there were few to no customer complaints about service quality from May

1 through August 2022. At a Commission meeting on August 30, 2022, both Staff and CenturyLink
2 represented to the Commission that the restorative efforts in the area described above appeared to have
3 corrected the service issues. Lumen/100, Gose/12. Mr. Bartholomew of Staff reported at the meeting
4 that service in the Area had “really improved” based, in part, on the fact that the Commission was
5 receiving far fewer complaints than it had in the past. Tr. 150-51. He also reported that CenturyLink’s
6 plant “looks really good”, “almost like it’s new plant.” Tr. 19-20.

7 Following that meeting, the T-1 spans that connect the 2900 Little Applegate Road remote
8 terminal to the Jacksonville central office experienced a condition referred to as “bouncing” wherein the
9 T-1 data circuit carrying voice and data communications had faults on the T-1 span lines that caused the
10 data stream to turn off and turn on, thus interrupting communications. CenturyLink investigated the T-1
11 span lines and made repairs to correct the bouncing which restored services. Lumen/100, Gose/12.

12 **2. CenturyLink has taken additional steps to be prepared to address future**
13 **issues.**

14 CenturyLink has taken other steps to ensure there are no delays in addressing future service
15 outages. It has acquired a large supply of replacement batteries so as not to be affected by a supply chain
16 problem in the future. Tr. 129. CenturyLink has also acquired a large supply of refurbished cards for the
17 remote terminals and for a few components in the Jacksonville central office. It now has replacement
18 cards on hand to swap out if one fails. Lumen/100, Gose/9; Tr. 129. It has also fine-tuned the alarm-
19 generation functions of the remote terminals so the company will be immediately notified if a remote
20 terminal requires service and may swiftly dispatch repair personnel. These steps have improved
21 CenturyLink’s ability to react to conditions before they impact telecommunications services.
22 Lumen/100, Gose/9.

23 **3. CenturyLink has resolved all service complaints in the Area.**

24 Between September 28, 2022, when CenturyLink established the dedicated line, and November
25 23, 2022, when CenturyLink filed its direct testimony in this case, CenturyLink received a total of 10
26 repair tickets from customers served by the remote terminals located at 2900 Little Applegate Road and

1 2600 Upper Applegate Road. Lumen/100, Gose/13. Each and every ticket generated for voice grade
2 service repair over the dedicated line achieved a service resolution within 48 hours. Lumen/100,
3 Gose/15; Tr. 130. At the hearing, Staff counsel and Commissioner Tawney questioned that fact,
4 inquiring about one single ticket they believed had not been fully addressed. However, CenturyLink has
5 dispatched crews to that customer location several times and determined that there is no trouble all the
6 way from the central office to the company's side of the network interface device at the premises. Tr.
7 116.⁵

8 Moreover, the number of calls to the dedicated line and trouble tickets generated have fallen
9 significantly (Lumen/100, Gose/13-16; Tr. 51), and there have been no troubles on CenturyLink's
10 facilities in the Area for over two months. In November 2022, only two tickets were generated for the
11 Area and no trouble was found. Lumen/100, Gose/15. From that time through December 28, 2022, only
12 one ticket was generated for the Area which, upon investigation, did not show any trouble in
13 CenturyLink's facilities.⁶ For the four weeks prior to the Dec. 21, 2022 hearing, no alarms were
14 generated from any remote terminal. Tr. 130. Staff agrees that a declining number of complaints is
15 indicative of a substantial improvement in service quality. Tr. 151.

16 Even though CenturyLink has been able to resolve all service complaints within 48 hours, Mr.
17 Bartholomew of Staff acknowledged that some troubles may reasonably take a longer period to address.

18 Q Okay. And can you explain what an appropriate timeframe for
19 repairing those outages are?

20 A That is really dependent on the cause of the outage. If it's
21 something simple like a tip site (phonetic) is open, I would assume once
22 they found that out, it would be repaired within an hour or two, but if it's
23 something major, it could take a couple days or more depending on the
24 outage or the cause of the outage.

24 ⁵ While this is not in the record, CenturyLink has reported to Staff since the hearing that it did determine
25 the trouble was with the customer's inside wiring (which is not CenturyLink's responsibility to maintain) and has
26 been remedied.

⁶ See CenturyLink's January 3, 2023 filing in this docket. The cause of the service outage in that case was
a short on the inside wire within the residence, which is not CenturyLink's responsibility.

1 Tr. 49. It is apparent from the record that some troubles in the Area stem from what would be considered
2 “major” causes that could reasonably take more than 48 hours to address. Thus, the requirement to repair
3 100 percent of trouble tickets within 48 hours or face massive penalties is not only unnecessary, it is also
4 unreasonable and should be withdrawn.

5 **4. Customers in the Area have alternatives to CenturyLink for voice service.**

6 The evidence also establishes that all residents in the Area have alternative voice service
7 available to them, eliminating any public safety need for the Order to remain in place. One hundred
8 percent of the residents have access to satellite phone services from three different providers.
9 Lumen/100, Gose/17; Tr. 166. While Ms. Weaver critiqued the speed of some of their services, that may
10 be relevant to Internet access, but is not relevant to voice service. Tr. 77-78, 83. Satellite Internet service
11 is “reliable enough to call out and contact someone in an emergency”. Tr. 92; *see also* Tr. 96. Further, a
12 significant majority of residents in the Area have access to fixed wireless, wireline, and mobile service.
13 Lumen/100, Gose/17. According to Staff’s Mr. Bartholomew, “a lot of customers ... have the option to
14 get Internet, but they don’t necessarily have it.” Tr. 12.

15 While some witnesses denigrated the functionality of cell service, it is clear that residents in the
16 Area do have reliable cell phone service. For example, Staff’s exhibits state that on October 6, 2022,
17 Commission Staff member Kim Malm stated that the complainant “picked up her landline while I was
18 talking to her and stated there was still no dial tone.” Staff/202, Nottingham/129.⁷ On October 12, Ms.
19 Malm writes that the complainant disconnected her CenturyLink service and “switched to an internet
20 phone.” Staff/202, Nottingham/131. This customer clearly has the ability to make a voice call through
21 means other than a CenturyLink landline. These discrepancies in the statements of customers as
22 recorded in Staff’s notes show either Staff’s notes are incorrect and unreliable, or the customers’
23 statements, which are plainly hearsay, are not reliable. Such statements should be wholly discounted by
24 the Commission or at the least given little weight.

25 _____
26 ⁷ The pages of Staff Ex. 202 are not individually numbered. The page numbers used refer to the page
number of the pdf file that comprises Staff Exs. 200-203.

1 Moreover, even if a customer cannot make a voice call with their cell phone, they can still access
2 cellular data service for emails and texts. Staff/202, Nottingham/125 (“She said cell service does not
3 work at her house, but she is able to get emails because the data comes through.”). Email is another
4 alternative way for residents in the Area to communicate with emergency personnel. Tr. 93.

5 Further, CenturyLink serves only 75 subscribers in the Area while the number of households
6 there is at least double that figure if not higher. Tr. 147; *see also* Mr. Bartholomew’s testimony at Tr. 50
7 (“Q. Does CenturyLink serve all the homes in the Little Applegate area with telephone service? A No,
8 they do not.”). This is strong evidence that alternative service is available for residents to assure a voice
9 connection in emergencies such that maintenance of the Order is not required.

10 **III. CONCLUSION**

11 The foregoing discussion shows that the Order should not remain in place. First, it is unlawful
12 for several independent reasons. Second, there are no remaining service quality issues that require the
13 Commission’s unlawful and unreasonable 48-hour repair requirement to stay in place. Moreover, there
14 are service alternatives available to all residents of the Area if they desire voice service that is not
15 subject to the same disruptions that may naturally occur to wireline plant in the Area. Thus, the
16 Commission should allow the Order to expire immediately.

17 DATED: January 6, 2023

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