

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF CenturyLink QC's Service)	REGULATORY DIVISION
Quality and Its Response to Notice of)	
Commission Action in Docket N2014.3.38,)	DOCKET NO. D2014.11.91
Including Petition for Waiver of Admin. R.)	
Mont. 38.5.337197)(b))	
)	
IN THE MATTER OF the Request of Staff of the)	
Montana Public Service Commission for)	
CenturyLink Network Upgrade Information)	DOCKET NO. N2014.4.38

* * * * *

CENTURYLINK QC
BRIEF

Qwest Corporation d/b/a CenturyLink QC ("CenturyLink QC") files this brief to explain why the Commission should not seek penalties against CenturyLink QC in district court for alleged violations of ARM 38.5.3371(7)(b) ("OOS Rule"). Because CenturyLink QC is making progress towards compliance with the OOS Rule and penalties would detract from that effort and other efforts to improve service, CenturyLink QC urges the Commission not to seek penalties. In addition, the OOS Rule is vague and should not be relied upon to impose penalties, particular in the manner that Staff has suggested. However, if the Commission does seek penalties,

CenturyLink QC urges the Commission not to use the Staff's calculation because the OOS Rule and the record do not support it.

I. THE COMMISSION SHOULD NOT FILE A COMPLAINT IN MONTANA DISTRICT COURT AND SEEK A COURT ORDER FOR PENALTIES

The Commission lacks statutory authority to impose fines or penalties in response to Residents' request and therefore the Residents' request should be denied.¹

In January of 2015, the Missouri River Residents (Residents) requested a hearing, contending that information provided in this proceeding is sufficient for the Commission to find CenturyLink QC "in violation of service quality rules, and to determine an appropriate monetary penalty." *Request for Hearing*, ¶ 4, D2014.11.91 (Jan. 21, 2105). Residents made two requests for relief: 1) that "information already provided by CTL-QC could be received into an evidentiary record," and; 2) that "[t]he Commission could then proceed to calculate a fine for CTL-QC's continuing refusal to comply with the service quality rules." *Request for Hearing*, at ¶ 14.

¹ Residents should be dismissed for lack of standing. Standing before an administrative agency depends on the language of the statute and regulations which confer standing before that agency. *Williamson v. Mont. Pub. Serv. Commn.*, 2012 MT 32, ¶ 30, 364 Mont. 128, 272 P.3d 71. Standing before the Commission is conferred upon any person to complain that he or she is "**directly affected**" by any service that is inadequate. MCA 69-3-321(1)(c). Residents complain of "poor sound quality, failure of telephones to ring, and absence of dial tone for extended periods." *Request for Hearing*, at ¶ 7. Sound quality and call completion standards are found in ARM 38.5.3371(5) and (6). Residents do not aver that those standards have been violated and the record contains no evidence of such violations. Instead, Residents request that fines be imposed based on alleged violation of ARM 38.5.3371(7)(b), which pertains to out of service repair standards. Nothing before the Commission shows that Residents are directly affected by alleged violations of the out of service repair standards. Therefore Residents lack standing in this matter.

A hearing was conducted in May 21, 2015 to consider Residents' request. At hearing, CenturyLink QC presented testimony and urged the Commission not to pursue penalties. CenturyLink QC also requested an opportunity to submit this post-hearing brief to address certain legal issues pertinent to Residents' request. No waiver is intended and CenturyLink QC expressly reserves the right to assert all defenses and claims available to it in the event the Commission elects to pursue penalties.

By statute, a public utility that fails to obey any lawful requirement is subject to penalty prescribed by 69-3-206.² CenturyLink QC is alleged to have violated ARM 38.5.3371(7)(b). In argument presented below CenturyLink QC explains why ARM 38.5.3371(7)(b) is not a lawful requirement due to vagueness.³ Assuming for the purpose of discussion only that ARM 38.5.3371(7)(b) does impose a lawful requirement, penalties may only be awarded in a civil action by a court of competent jurisdiction.⁴

² §69-3-209, MCA.

³ Residents' incorrectly assert that compliance with regulatory service quality standards constitutes a "duty enjoined upon" CenturyLink. *Request for Hearing at ¶ 10*. Each reported case where the Supreme Court has addressed a duty enjoined upon a court or a party, it has done so in the context of constitutional or statutory duties. See e.g., *Bryant v. Board of Examiners*, 130 Mont. 512, 305 P. 2d 340, 346 (1956) (duty enjoined upon courts under statute governing statutory interpretation); *Cleverly v. Stone*, 141 Mont. 204, 378 P. 2d 653, 654 (1962) (duty enjoined upon courts by child custody laws places primary emphasis on the interests of the child); *State v. Krieg*, 145 Mont 521, 402 P. 2d 405, 408 (1965) (injunction against public officials performing a duty enjoined upon must be based upon constitutionality of the statute under which the officials are acting); *Harrer v. Northern Pacific Railway Company*, 147 Mont. 130, 410 P. 2d 713, 714 (1966) (examining duty enjoined upon railroad under R.C.M. 1947, § 72-205, subd. 5).

⁴ § 69-3-206(2), MCA; See also *Montana Power Co. v. Public Service Com'n*, 206 Mont. 359, 671 P. 2d 604, 613 (1983) ("The Commission's standing to seek civil remedies and its ratemaking authority are the only tools specifically provided by statute as methods by which the Commission may supervise, regulate and control utilities").

Whether to file a civil action for the purpose of recovering penalties presumably falls within the Commission's discretion. As the Supreme Court said "The Commission, therefore, has discretion in choosing the means by which it will accomplish its functions."⁵ However, in analyzing the exercise of powers not expressly or impliedly granted by the Legislature, the Court afforded the Commission no discretion under the Administrative Procedures Act to impose penalties.⁶ In addition, any award of penalties by a court would be subject to the standard of proof applicable in civil actions.

This understanding of the Commission's authority is reflected in *State of Montana v. US West Communications, Inc.*, CDV-94-1877 (1994), the only case known to CenturyLink QC in which the Commission sought fines and penalties under §69-3-206(2), MCA. In that case the Commission made no determination or calculation of penalties. Instead the Commission filed a complaint asking the district court for an award of penalties in an amount to be determined at trial. Based on the foregoing it is apparent that the Residents' request for relief cannot be granted and should be denied.

With respect to appeal and review of any imposition of penalties by a district court, findings of fact are subject to a clearly erroneous standard; conclusions of law are subject to a correctness standard.⁷ The abuse of discretion standard will be applied to

⁵ *Montana Power Co.*, 671 P.2d at 613.

⁶ *Id.*

⁷ *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 803 P. 2d 601, 603-04 (1990)

rulings “encompassing the power of choice among several courses of action, each of which is considered permissible.”⁸ In addition, the validity of an agency rule may be challenged in a counterclaim seeking declaratory judgment action on the grounds that (1) its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff, or (2) it was “adopted with an arbitrary or capricious disregard for the purpose of the authorizing statute as evidenced by documented legislative intent.”⁹ By law, “declaratory judgment may be rendered whether or not the [party] has requested the agency to pass upon the validity or applicability of the rule in question.”¹⁰ Any objection to a Commission rule or the application of a rule, as outlined below in this brief, or otherwise, would be subject to these procedures and standards of review.

II. THE COMMISSION SHOULD NOT SEEK PENALTIES, BUT EVEN IF IT DOES, THE STAFF CALCULATION OF PENALTIES IS NOT ACCURATE

Staff also asserted on August 6, 2014, in a memorandum it provided to the Commission in Docket N2014.4.38 (“*August Memorandum*”) that the Commission should be prepared to proceed to district court to fine CenturyLink QC for alleged failure to comply with ARM 38.5.3371(7)(b) (“OOS Rule”), which is the main issue in this case. Assuming a court were to deem the OOS Rule to be sufficiently clear, the Commission should not seek an order from the district court imposing penalties. And even if the

⁸ *Id.* citing Aldisert, *The Judicial Process*, 1976, page 759.

⁹ § 2-4-506 (1) and (2), MCA.

¹⁰ § 2-4-506 (3), MCA.

Commission does seek penalties, Staff's calculation of penalties is not supported by even a generous reading of the rule or by the record in the case.

A. Applicable Law

The Commission must first decide whether it should impose any penalties at all under the statutes and the OOS Rule. Montana Code Annotated § 69-3-209 provides:

If any public utility violates any provision of this chapter, does any act herein prohibited, or fails or refuses to perform any duty enjoined upon it, fails to place in operation any rate or joint rate, or *fails, neglects, or refuses to obey any lawful requirement or order made by the commission or any court, then for every such violation*, failure, or refusal the public utility is subject to the penalty prescribed by 69-3-206. (Emphasis added)

For such violations MCA § 69-3-206 authorizes the Commission to seek fines:

(1) Any officer, agent, or person in charge of the books, accounts, records, and papers or any of them of any public utility who shall refuse or fail for a period of 30 days to furnish the commission with any report required by the provisions of this chapter and any officer, agent, or person in charge of any particular books, accounts, records, or papers relating to the business of such public utility who shall refuse to permit any commissioner or other person duly authorized by the commission to inspect such books, accounts, records, or papers on behalf of the commission shall be subject to a fine of not less than \$100 or more than \$1,000.

(2) Such fine shall be recovered in a civil action upon the complaint of the commission in any court of competent jurisdiction. Each day's refusal or failure on the part of such officer, agent, or person in charge shall be deemed a separate offense and be subject to the penalty herein prescribed.

Therefore, a company that violates a rule may be subjected to penalties. But the Commission has discretion in whether to seek penalties, which are not *required* when there is a violation. The OOS Rule provides:

(7) Customer trouble reports regarding local exchange service must meet, at the minimum, the following requirements:

* * *

(b) Ninety percent of out of service trouble reports shall be cleared within 24 hours, excluding Sunday (except where access to the customer's premises is required but not available, or where interruptions are caused by unavoidable causalities and acts of God affecting large groups of customers).

Under the OOS Rule, a violation only occurs when the company fails to repair 90% of repair tickets in 24 hours. Nothing in the rule suggests that a violation occurs for each ticket that may have contributed to a failure to meet the standard. Therefore, even assuming for argument's sake the rule is not void, for reasons described below, Staff's calculation of potential penalties in its *August Memorandum* is excessive and finds no support in the rule.

B. The Commission should not Seek to Impose Penalties because CenturyLink QC's Performance under the OOS Rule has Improved, Penalties Will not Benefit Customers and will Hamper CenturyLink's Efforts to Improve Service, and the Customers Generally Demand High Quality Broadband Service, not Plain Old Telephone Service

As noted above, the Commission can decide not to seek penalties even it determines that CenturyLink QC has violated the OOS Rule. And, in fact, imposing penalties would not be consistent with the public interest. CenturyLink has already made substantial progress towards complying with the OOS Rule, as set forth in the plan it filed on April 13, 2015 ("Plan"). The Plan includes four elements:

1. Effective March 29, 2015, CenturyLink temporarily reassigned the responsibilities of three network technicians in Montana from construction activities to repair activities.
2. Effective April 1, 2015, CenturyLink's Montana Vice President of Operations responsible for CenturyLink QC operations in Montana directed his Montana area operations managers to schedule work assignments of CenturyLink QC's outside plant workforce so that restoral of out of service conditions takes a higher priority than other activities, with the aim of achieving the standard established in Admin. R. Mont. 38.5.3371(7)(b).
3. Vice President of Operations for Montana authorized additional scheduling of technicians to work on Saturdays as necessary and authorized additional overtime to clear OOS trouble reports.
4. Vice President of Operations for Montana authorized the recruiting and hiring of additional people qualified to become network technicians.

The Commission should not seek to penalize CenturyLink QC when it has taken positive steps towards addressing service quality issues.

In addition, CenturyLink QC has determined that it would cost tens of millions of dollars to replace the analog carrier systems that are used to provide service in certain rural exchanges in Montana.¹¹ Those systems are the only technology, other than fiber, available to provide wireline telephone service in these areas. CenturyLink

¹¹ CenturyLink QC Response to PSC-004.

is facing intense competition in both urban and rural exchanges and has demonstrated that it has lost significant market share across the state. Given this competition, it can no longer maintain artificially high prices in urban areas in order to subsidize service to ultra-high cost areas. There is simply no longer a mechanism in place to fund the wholesale (or even small-scale) replacement of analog telephone systems. Requiring CenturyLink QC to pay penalties will only reduce its ability to invest in service improvements.

C. Should the Commission Decide to Seek Penalties, it should not Follow Staff's Recommendation for Calculating the Amount

In paragraph 3 of the "Recommendations" section of the *August Memorandum*, Staff ascribes a penalty to each *ticket* on the report that it believes was not resolved within 24 hours. The *August Memorandum*, at paragraph 3, stated:

In the event CenturyLink QC fails to comply or does not meet its OOS<24 Hours milestones, the PSC should be prepared to proceed to district court to fine CenturyLink QC \$1,000 per day for each occurrence per MCA §69-3-209. For example, in 2013 CenturyLink QC received 4,637 OOS trouble reports. In order to meet the 90% target 4,173 of those reports needed to be cleared within 24 hours. CenturyLink cleared only 2,670 of those reports meaning there were 1,503 OOS reports that needed to be cleared within 24 hours to meet the 90% rule. If each of those 1,503 trouble reports not cleared was subject to a \$1,000 fine then the total 2013 fine would have been \$1,503,000.

The rule provides that a violation occurs when the company fails to repair 90% of trouble in 24 hours. It does not in any way suggest that a violation occurs for each ticket that may have contributed to a failure to meet the standard. At most, the

Commission could seek the maximum daily penalty for *each day* that CenturyLink QC did not meet the OOS Rule. Even if the Commission found that CenturyLink failed to meet the standard on a daily basis for every day over the previous two years (CenturyLink is only required to maintain data for two years under ARM 38.5.3360), that would result in a maximum of a \$1000/day penalty for a total of approximately \$712K in penalties, or approximately \$600K after excluding Sundays. However, the record falls far short of showing that a violation occurred every day of the year for the prior two years.

III. THE RULE IS VOID FOR VAGUENESS

The OOS Rule is void for vagueness because it fails to specify any time frame or provide any objective metric in which to gauge compliance or to calculate penalties. The Montana Supreme Court has explained that “[t]he due process test for vagueness of a statute is whether the law is so vague and uncertain that men of common intelligence must guess at its meaning.”¹² This due process requirement ensures that laws “adequately indicate what conduct is proscribed *and what penalty may be imposed*.”¹³ The Montana Supreme Court has explained that “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who

¹² *In re Montana Pac. Oil, Gas*, 189 Mont. 11, 17, 614 P.2d 1045, 1048 (1980); *see also, Rierson v. State*, 188 Mont. 522, 526, 614 P.2d 1020, 1023 (1980) (holding that a law “violates due process for vagueness when language used does not sufficiently define the required conduct, men of common intelligence must necessarily guess at its meaning.”).

¹³ *State v. Mainwaring*, 2007 MT 14, ¶ 18, 335 Mont. 322, 151 P.3d 53 (emphasis supplied).

apply them.”¹⁴ “Administrative agencies are not exempt from the constitutional restraints of due process requirements.”¹⁵ Accordingly, like statutes, administrative rules violate due process if they are unreasonably vague.¹⁶

A law may be challenged as violating the right to due process for its vagueness on two different bases: (1) the law is so vague that it is void on its face; or (2) the law is vague as applied in a particular situation.¹⁷ “To prove a statute is vague on its face, a party must show it is impermissibly vague in all of its applications. If a statute is ‘reasonably clear’ in its application to the conduct of the person challenging the statute, it is not void for vagueness.”¹⁸

A. The OOS Rule is Facially Vague.

The OOS Rule is unconstitutionally vague on its face because it gives no time frame for compliance. The OOS Rule, which is Subpart (b) of the trouble report standard, says “Ninety percent of out of service trouble reports shall be cleared within 24 hours.” But it never says “per day” or “per month” or “per year.” In contrast Subpart (a) of the trouble report standard specifies a monthly timeframe.

¹⁴ *State v. Stanko*, 1998 MT 321, ¶ 23, 292 Mont. 192, 974 P.2d 1132.

¹⁵ *Montana Power Co. v. Pub. Serv. Comm’n*, 206 Mont. 359, 368, 671 P.2d 604, 609 (1983).

¹⁶ See *Yurczyk v. Yellowstone Cnty.*, 2004 MT 3, ¶ 35, 319 Mont. 169, 83 P.3d 266 (declaring a zoning regulation void for vagueness where “on-site construction” was not defined in the regulation, and noting that there was no indication as to what percentage of a home’s construction had to occur on-site); *Fair Hearing of Galinkin*, 1995 Mont. Dist. LEXIS 813, *22 (Mont. Dist. Ct. 1995) (voiding an administrative rule for vagueness because it “fails to convey a sufficiently definite warning as to the proscribed conduct”); *State v. Johnston*, 263 Mont. 179, 182, 867 P.2d 1090, 1091 (1994) (upholding an agency rule against a vagueness challenge because “anyone of ordinary intelligence would understand the [rule]”).

¹⁷ *State v. Britton*, 2001 MT 141, ¶¶ 5, 306 Mont. 24, 25, 30 P.3d 337.

¹⁸ *State v. Samples*, 2008 MT 416, ¶ 17, 347 Mont. 292, 198 P.3d 803.

(7) Customer trouble reports regarding local exchange service must meet, at the minimum, the following requirements:

(a) Service shall be maintained by the carrier in such a manner that the monthly rate of all customer trouble reports, excluding reports concerning interexchange calls or nonregulated customer premises equipment, does not exceed six per 100 local access lines per month per exchange.

(b) Ninety percent of out of service trouble reports shall be cleared within 24 hours, excluding Sunday (except where access to the customer's premises is required but not available, or where interruptions are caused by unavoidable causalities and acts of God affecting large groups of customers) .

Subpart (a) requires that a utility not exceed 6 trouble reports per 100 local access lines per month. Under that rule, a utility that receives 6/100 trouble reports in January and 7/100 in February, has violated the standard in February but not in January.

Importantly, nothing in Subpart (a) suggests that 8/100 trouble reports in February would mean that the utility can be charged with two violations. A percentage based standard is either met or it is not.

The same is true for Subpart (b). However, Subpart (b) contains no timeframe so it is not possible to determine when a violation has occurred or how many have occurred over any given time period. Consequently it is not possible to determine "what penalty may be imposed."¹⁹ In the *August Memorandum* Staff says that CenturyLink received 4,637 OOS trouble reports received in 2013 and that if it had cleared 4,173 of those in less than 24 hours it would have met the standard. But, the OOS Rule provides nothing to support Staff's conclusion that violations are based on

¹⁹ *State v. Mainwaring*, 2007 MT 14, ¶ 18, 335 Mont. 322, 151 P.3d 53 (emphasis supplied).

annual performance. If the standard did depend on annual performance then the failure of CenturyLink QC to clear 4,173 OS trouble reports in less than 24 hours would be considered one violation. According to the *August Memorandum*, CenturyLink QC did not meet the 90 percent standard during any month of 2013. If there was a monthly time period in the rule persons of common intelligence would understand that there were 12 violations in 2013 and could calculate the possible penalties. Staff's recommendation is not based on annual performance or monthly performance, it is based on the number of OOS trouble reports, which serves to demonstrate the constitutional deficiency of the rule. As written, the OOS Rule provides no way to tell how many violations occur over what time frame, making it impossible for persons of common intelligence to determine what penalties might be imposed when the standard is unmet.

B. Staff's Proposal Demonstrates That the OOS Rule is Vague.

Even if the OOS Rule could be construed as facially constitutional, application of penalties in the manner recommended by Staff would not be constitutional. In the *August Memorandum* Staff calculates that in 2013 CenturyLink QC failed to clear 1,503 OOS trouble reports within 24 hours. Staff then posits that "If each of those 1,503 trouble reports not cleared was subject to a \$1,000 fine then the total 2013 fine would have been \$1,503,000." But the OOS Rule provides that 90 percent of out of service trouble reports shall be cleared within 24 hours, excluding Sunday. Nothing in the rule

describes individual trouble reports as a violation or links them to daily penalties.

Under Staff's formulation of the rule a utility that is performing at a higher standard could be penalized more. For example, one utility that cleared 65 percent of 100 OOS trouble reports within 24 hours would be subject to a maximum of \$25,000 in penalties, while another utility that cleared 85 percent of 1,000 OOS trouble reports within 24 hours would be subject to a maximum of \$50,000 in penalties. Such a formulation ignores the fact that under the OOS Rule both utilities violated the 90 percent standard exactly once.

In the absence of explicit standards required by the constitution, Staff is free to suggest that the OOS Rule be applied to each of the trouble reports. The simple fact that Staff can speculate about the application of the rule in such a way serves to illustrate that persons of common intelligence are forced to guess what penalties might be for any failure to meet the standard.²⁰

IV. CONCLUSION AND REQUEST FOR RELIEF

CenturyLink QC has committed to improving its performance under the OOS rule and has made substantial progress in that regard. In addition, penalties will not further the public interest and in fact will harm it by hampering CenturyLink QC's ability to invest in continued service improvement. Moreover, the rule as written is vague and the method of calculating penalties proposed by the Staff is erroneous.

²⁰ *In re Montana Pac. Oil, Gas*, 189 Mont. at 17; *Rierson*, 188 Mont. at 526.

CenturyLink QC therefore urges the Commission not to seek penalties before the district court, which would create uncertainty, undue expense and substantial effort that are associated with litigation.

DATED this 19th day of June 2015.

GOUGH, SHANAHAN, JOHNSON & WATERMAN, PLLP

By:  _____
Peter G. Scott, Attorneys for CenturyLink QC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were served on June 19, 2015, in the manner shown and addressed as follows:

Kate Whitney, Administrator
Utility Division
Montana Public Service Commission
1701 Prospect Avenue, P.O. Box 202601
Helena, MT 59620-2601
kwhitney@mt.gov

Phil Grate, Director Montana
Regulatory and Legislative Affairs
1600 7th Avenue, 15th Floor
Seattle WA 98191
phil.grate@centurylink.com

Monica Tranel, Esq.
Montana Consumer Counsel
PO Box 201703
111 North Last Chance Gulch, Ste. 1B
Helena MT 59620-1703
mtranel@mt.gov

Robert A. Nelson
Montana Consumer Counsel
PO Box 201703
111 North Last Chance Gulch, Ste. 1B
Helena MT 59620-1703
rnelson@mt.gov

Jason Williams, Esq.
Sr. Vice President and G. Counsel
Blackfoot Telephone Cooperative
1221 North Russell Street
Missoula MT 58808
jwilliams@blackfoot.com

Geoff Feiss, General Manager
Montana Telecomm Association
208 North Montana Avenue, Ste. 105
Helena MT 59601
gfeiss@telecomassn.org

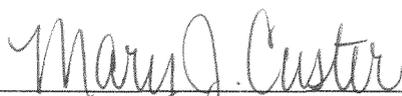
Dennis R. Lopach, PC
4 Carriage Lane
Helena MT 59691
Dennis.lopach@gmail.com

James Holbrook
IBEW Local 206
110 N. Warrant St, Ste. 2
Helena, MT 59601
James@ibew.org

Adrienne Kernaghan
2808 Old US Highway 91
Cascade, MT 59421
akernaghan@gmail.com

Dr. Robert Loube
Rolka, Loube and Saltzer Assoc.
10601 Cavalier DR
Silver Spring, MD 20901
bobloube@earthlink.net

William C. Ballard
Locationage
413 St. Lawrence Dr.
Silver Spring, MD 20901
Bill.ballard@locationage.com



Mary J. Custer, Legal Assistant