

Decision No. R22-0811

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 22R-0122T

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IN THE MATTER OF THE PROPOSED AMENDMENTS TO RULES IN 4 CODE OF COLORADO REGULATIONS 723-2 MODIFYING THE COMMISSION RULES REGARDING BASIC EMERGENCY NETWORK RELIABILITY.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
CONOR F. FARLEY  
ADOPTING RULES AND CLOSING PROCEEDING**

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Mailed Date: December 22, 2022

**I. STATEMENT**

**A. Background**

1. The Colorado Public Utilities Commission issued Decision No. C22-0174, which was a Notice of Proposed Rulemaking (NOPR) to amend the Rules Regarding Basic Emergency Service Network Reliability (Basic Emergency Network Reliability Rules), on March 21, 2022. The NOPR initiated this proceeding. The NOPR proposed significant changes to the Basic Emergency Network Reliability Rules, described those changes in detail and the justification therefor, attached the Rules in legislative (*i.e.*, strikeout/underline) format and in a clean version, established deadlines of April 22, 2022 and April 29, 2022 for initial comments and response comments concerning the proposed rules, respectively, and scheduled a hybrid hearing for May 9, 2022 at 9:00 a.m. for oral comments regarding the proposed rules.<sup>1</sup> The NOPR also

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<sup>1</sup> A hybrid hearing is one in which the ALJ conducts the hearing from a hearing room at the Commission and the participants appear either in-person or remotely via the Zoom web conferencing platform.

referred this proceeding to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

2. Boulder Regional Telephone Service Authority (BRETSA), Colorado Council of Authorities (CCOA), CTIA – The Wireless Association, Lumen, doing business as CenturyLink QC (CenturyLink), Intrado Safety Communications, Inc. (Intrado), and the Office of the Utility Consumer Advocate (UCA) submitted initial comments and response comments. BRETSA, CenturyLink, Intrado, and UCA filed response comments.

### **B. Hybrid Public Comment Hearing**

3. At 9:00 a.m. on May 9, 2022, the ALJ held the hearing noticed in the NOPR. The ALJ discussed the proposed rules and the initial and response comments with the participants at the hearing. Based on the input of the participants at the hearing, the ALJ proposed a workshop process in which the commenters would more clearly identify areas of consensus and differences and work towards submitting to the Commission revised proposed rules that reflect areas of consensus. The participants at the hearing agreed with the ALJ that, due to the wide diversity of views regarding the proposed rules expressed in the initial and response comments, a workshop process open to all participants would be the most efficient method of reaching the end result of the final rules. The ALJ and the participants thus agreed to continue the hybrid public comment hearing until June 9, 2022 at 11:30 a.m. to provide time for the workshop process to take place.

4. On May 13, 2022, Decision No. R22-0297-I issued that memorialized the decisions made at the May 9, 2022 hybrid public comment hearing. Specifically, Decision No. R22-0297-I continued the hybrid public comment hearing to June 9, 2022 at 11:30 a.m. and

ordered a status report to be filed by June 6, 2022 informing the ALJ of the results of the workshop process as of that date.

5. On June 6, 2022, the participants in the workshop process filed the requested Status Report, which stated that the parties: (a) had met four times to that point; (b) had made good progress but needed more time to complete the process; (c) believed there is a possibility that they will complete the workshop process and be able to file a final report by the week of July 12; and (d) requested that this hybrid public comment hearing be continued until no earlier than July 18, 2022.

**C. First Continued Hybrid Public Comment Hearing**

6. On June 9, 2022, the ALJ held the first continued hybrid public comment hearing. After discussion with the participants, the ALJ ordered a status report be filed by July 15, 2022, and continued the hybrid public comment hearing until August 5, 2022 at 11:30 a.m.

7. On July 6, 2022, the ALJ issued Decision No. R22-0404-I that memorialized the decisions made at the June 9, 2022 continued hybrid public comment hearing and formally scheduled the second continued hybrid public comment hearing for August 5, 2022 at 11:30 a.m.

8. On July 15, 2022, the participants in the workshop process filed the second status report, which stated that the parties: (a) had met an additional six times since the last status report; (b) continued to make good progress but needed more time to complete the process; and (c) believed there is a possibility that they will complete the workshop process and be able to file a final report before the continued hybrid public comment hearing on August 5, 2022.

**D. Second Continued Hybrid Public Comment Hearing**

9. On August 5, 2022, the ALJ held the second continued hybrid public comment hearing. The participants in the workshop process reported that they were close to completing the process and filing a Final Report, but they needed more time. After discussion with the participants, the ALJ ordered the workshop participants to file a final report by September 7, 2022, established deadlines for initial and response comments concerning the Final Report and the rules appended thereto of September 19 and 30, 2022, respectively, and continued the hybrid public comment hearing until October 13, 2022 at 11:30 a.m.

10. On August 11, 2022, the ALJ issued Decision No. R22-0467-I that memorialized the decisions made at the second continued hybrid public comment hearing by formally scheduled the third continued hybrid public comment hearing and establishing the deadlines for the Final Report and the final initial and response comments that had been orally communicated at the second continued hybrid public comment hearing.

11. On September 6, 2022, the participants in the workshop process filed the Final Report and two attachments, which included a redlined version of the proposed rules issued with the NOPR showing the changes proposed by the workshop participants to the proposed rules, and a clean version of the proposed rules containing the same revisions (Consensus Rules). The Final Report stated that the workshop participants had met fourteen times (May 17, 24, and 31; June 7, 21, and 28; July 5, 6, 12, and 26; and August 9, 16, 23, and 30, 2022) to discuss the rules, with most meetings being scheduled for several hours. The State 911 Program Manager (Daryl Branson) facilitated the meetings, as directed by the ALJ. Lumen, CCOA, BRETSA, CTIA, UCA, and Intrado attended most or all of the meetings. While the Consensus Rules filed with the Final Report included “significant changes . . . to nearly every section. . . the workshop

participants were able to resolve all issues of major disagreement” and “[t]here were no adamant objections by any of the participants to any portion of the consensus rules.”<sup>2</sup>

12. On September 19, 2022, Lumen filed Initial Comments Regarding the Consensus Rules in which it proposed changes to Consensus Rules 2143(k)(I)(A) and 2143(k)(1)(C). Otherwise, Lumen “commend[ed] the workshop process [and] supports generally the Consensus Rules.”<sup>3</sup>

13. On September 30, 2022, CCOA and UCA filed separate Response Comments. CCOA opposes Lumen’s suggested changes to Consensus Rules 2143(k)(I)(A) and 2143(k)(1)(C) and UCA “has no objection to Lumen’s proposed changes.”<sup>4</sup>

#### **E. Third Continued Hybrid Public Comment Hearing**

14. On October 13, 2022, the ALJ held the third continued hybrid public comment hearing starting at 11:30 a.m. The workshop participants discussed the changes proposed by Lumen and the response thereto by CCOA. The ALJ also gave any participant in the third continued hybrid public comment hearing the opportunity to comment about any other proposed change to the Basic Emergency Network Reliability Rules. At the end of the hearing, the ALJ adjourned the public comment hearing and stated that a Recommended Hearing addressing the proposed changes to the Basic Emergency Network Reliability Rules would be forthcoming.

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<sup>2</sup> Final Report at 3-4 (¶¶ 11, 12).

<sup>3</sup> Initial Comments Regarding the Consensus Rules at 4.

<sup>4</sup> UCA’s Response Comments at 1.

## II. DISCUSSION

### A. Introduction

15. In rendering this Decision, the ALJ has carefully reviewed and considered all the comments filed in this Proceeding and provided at the public comment hearing, even if this Decision does not specifically address every comment made, or every nuance of each comment.

### B. Analysis

#### 1. Consensus Rule 2143

16. Lumen proposes to make the following changes to consensus Rule 2143(k):

(k) Commission staff shall commence an informal investigation regarding each apparent basic emergency service outage meeting criteria established by the 9-1-1 Advisory Task Force, despite the dispute resolution process set forth in the BESP's tariff, if any. The 9-1-1 Advisory Task Force may participate in the investigation.

(I) Each informal investigation under this paragraph should be handled as follows:

(A) Commission staff ~~shall~~ may refer an informal investigation form to the BESP for its written response on a standardized form developed by Commission staff for that purpose. This form shall include questions developed by and solicited from the affected governing body or PSAP and the 9-1-1 Advisory Task Force. The BESP shall respond in writing with complete responses within thirty days, or such lesser or greater period as Commission staff may require if such period is reasonable under the circumstances of the informal investigation. The ~~response request as appropriate to the circumstances may shall~~ include (i) the NOC call log entries and, if requested, (ii) copies of e-mails and transcripts or recordings of phone calls between the NOC and other parties related to the outage.

(B) The BESP's responses shall fairly meet the substance of each request. The BESP may not provide an incomplete response citing a lack of information or knowledge unless it states it has made diligent and reasonable inquiry and requests that Commission staff allow a reasonable

extension of time not to exceed fourteen days. Additional reasonable extensions of time may be granted upon request. Requests for any extensions shall be accompanied with estimates of when information may be provided.

- (C) Commission staff, the affected governing bodies or PSAPs, or the 9-1-1 Advisory Task Force may also request a meeting with the BESP, which may be recorded; provided that the recording cannot be used by any person for any purpose in subsequent litigation in any forum. The BESP should arrange for appropriate staff to participate in the meeting, including technical support, service, and management with relevant knowledge and sufficient level of authority or supervision.
- (II) During the pendency of an informal investigation, communications shall be in writing and copied to the BESP, Commission staff, the affected governing body or PSAP, and the Chair of the 9-1-1 Advisory Task Force or his or her designee. Commission staff shall maintain a complete file related to each informal investigation, including all communications and recordings, and access to and use of the file is subject to applicable Commission rules regarding information claimed to be confidential or highly confidential.
- (III) Commission staff will document in a report the closure of each informal investigation within sixty days of the outage, or such greater period as Commission staff may require if such period is reasonable under the circumstances of the informal investigation. The report should include whether the outage was a BES outage, whether the BESP handled the BES outage in a timely manner with the appropriate personnel, and whether the BESP has taken or committed to taking corrective action to prevent or mitigate a similar outage from occurring in the future, specifying the corrective action and the timeframe, if applicable. The report shall also document any non-compliance with Commission rules or the BESP's tariff, including the BESP's service quality plan. Within fourteen days, the 9-1-1 Advisory Task Force, the affected governing body or PSAP, or the BESP may submit to Commission staff written comments, which Commission staff shall append to the report and preserve in the informal investigation file.

(IV) At any time, Commission staff, the 9-1-1 Advisory Task Force, or the affected governing body or PSAP may commence a proceeding before the Commission, at which time the informal investigation process shall terminate, if not yet closed, other than Commission staff's preparation of the report. If the affected governing body or PSAP seeks relief in an alternative forum, then the informal investigation process shall terminate, if not yet closed, other than Commission staff's preparation of the report.<sup>5</sup>

17. The changes to each subsection are addressed in turn.

**a. Consensus Rule 2143(k)(I)(A)**

**(1) Lumen's Proposed Changes**

18. Lumen asserts that the purpose of its proposed change is to "mak[e] the process less rigid."<sup>6</sup> Lumen further believes that the change "will maintain the purpose behind investigating outages while allowing for adaptability and reducing burden both on the [Basic Emergency Service Provider] and the commission staff where appropriate."<sup>7</sup> In response to the potential concern voiced at the third continued hybrid public comment hearing that Lumen's proposed change would inject the opportunity for a BESP to object to the referral of the informal investigation standardized form to the BESP, thereby delaying (at a minimum) the informal investigation, Lumen states that a BESP always has the legal right to object to Commission requests for information and its proposed change thus will not increase the likelihood that a BESP will object to any request within an informal investigation.

**(2) Response**

19. CCOA opposes Lumen's proposed changes to Proposed Rule 2143(k)(I)(A). CCOA states that the new rule is designed to formalize a heretofore less formal process for

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<sup>5</sup> Lumen's Initial Comments Regarding Consensus Rules at 3 (filed on September 19, 2022).

<sup>6</sup> *Id.* at 2.

investigating outages. CCOA believes that requiring a BESP to provide at least the NOC call log entries for every outage that satisfies the criteria for an informal investigation would be beneficial to understanding and correcting the outage and preventing future outages. CCOA also does not believe that requiring BESP's to provide such information in an informal investigation is burdensome.

20. BRETSA supports allowing Staff to have discretion in determining whether to request NOC call logs. BRETSA believes that such discretion is necessary to ensure that unnecessary costs are not imposed on BESP's, which BRETSA believes may be transferred to ratepayers. However, BRETSA believes that any Staff decision not to initially request NOC call logs should not prohibit Staff from subsequently requesting the logs if Staff deems them necessary.

21. UCA stated at the third continued hybrid public comment hearing that it does not oppose changing "shall" to "may" in the first sentence of Proposed Rule 2143(k)(I)(A). UCA also supports language in the last sentence that provides discretion to Commission Staff to determine whether to request the NOC call logs. Finally, UCA does not support using language that provides discretion to the BESP to determine whether to provide the information if requested.

### (3) Analysis

22. The ALJ will incorporate the following change to Consensus Rule 2143(k)(1)(A):

Commission staff shall refer an informal investigation form to the BESP for its written response on a standardized form developed by Commission staff for that purpose. This form shall include questions developed by and solicited from the affected governing body or PSAP and the 9-1-1 Advisory Task Force. The BESP shall respond in writing with complete responses within thirty days, or such lesser

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

or greater period as Commission staff may require if such period is reasonable under the circumstances of the informal investigation. If requested, ~~the~~ response shall include: (1) the NOC call log entries; and, ~~if requested~~, (2) copies of e-mails and transcripts or recordings of phone calls between the NOC and other parties related to the outage.

23. The ALJ finds and concludes that the changes noted above balances the concerns of the parties that submitted comments regarding Proposed Rule 2143(k)(I)(A). It provides flexibility to Commission Staff to request both NOC call log entries and copies of e-mails and transcripts or recordings of phone calls between the NOC and other parties related to an outage when Commission Staff decides in its sole judgment that such information is necessary. It does not provide BESP with Commission Rule-based discretion to decide whether providing such information is necessary under the circumstances of the outage that is the subject of an informal investigation. The change adopted by the ALJ allows Commission Staff to consider and balance the need for such information under the circumstances of a particular outage versus the burdensomeness of the request on the BESP.

**b. Consensus Rule 2143(k)(1)(C)**

**(1) Lumen's Proposed Change**

24. Lumen states that “the use of any recordings made during the informal process should be limited to the confines of the informal investigation to ensure prompt, open and robust communication.”<sup>8</sup> At the third continued hybrid public comment hearing, Lumen conceded that it is unlikely the Commission has the authority to preclude state and federal courts from using any recorded conversation as evidence in their cases. Lumen thus advocated for a restriction on at least the Commission's use of such a recording in its proceedings.

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<sup>8</sup> *Id.* at 2-3.

25. Lumen's understanding of the purpose of using a recording device is to allow participants who cannot attend a meeting to listen to the recorded discussion. Lumen fears that the presence of a recording device in meetings with a BESP will inhibit and/or alter the conversation because participants (and particularly participants on behalf of BESPs) will fear that such recordings could be used against them in subsequent Commission proceedings. Lumen does not want the presence of a recording device to turn such meetings into depositions in which participants are focused not on solving problems, but on the legal consequences of what they say.

**(2) Response**

26. CCOA contends that:

Recordings should be available for any use - in that particular informal investigation, in any future informal investigations, and outside the informal investigation process. The BESP should be forthcoming and provide complete and accurate information and explanations about its network or an outage at all times in any setting. Others should be able to rely upon and learn from the BESP. Colorado's migration to the BESP's ESInet is still relatively new. Recordings aid better understanding of the BESP's ESInet and basic emergency service. Candid communication by the BESP, both orally and in writing, during an informal investigation or an outage is expected and encouraged. Oral statements should not be treated any differently than written statements, and any necessary qualification can be made at the time of an oral statement that is recorded. CCOA disagrees with CenturyLink that, if the use of recordings is not limited to the confines of the informal investigation, there will not be prompt, open, and robust communication.

27. BRETSA believes that recording meetings in informal investigations may inhibit robust communication, which is vital to understanding and fixing a problem that led to the information investigation. BRETSA thus understands the motivation behind Lumen's proposed change. But BRETSA also fears that not being able to use recordings in subsequent proceedings may encourage a lack of candor in those meetings. BRETSA thus recommends that the

recordings be available for impeachment purposes, disciplinary proceedings, and other actions for material and intentional misrepresentations.

### (3) Analysis

28. The ALJ will incorporate the following change to Consensus Rule 2143(k)(1)(C):

Commission staff, the affected governing bodies or PSAPs, or the 9-1-1 Advisory Task Force may also request a meeting with the BESP, which may be recorded; provided that the recording may not be used by any person for any purpose in subsequent proceedings before the Commission. The BESP should arrange for appropriate staff to participate in the meeting, including technical support, service, and management with relevant knowledge and sufficient level of authority or supervision.

29. The ALJ finds and concludes that the foregoing changes balance the interests of all involved and provides the greatest likelihood that communications in meetings in the context of informal investigations will be as fulsome and informative as possible. Such communication is important because it will allow the participants to correct any problems that led to the informal investigation in the first place and ensure that such problems do not recur. If a lack of candor at one or more such meetings is alleged in a subsequent Commission proceeding, it is likely that there will be multiple witnesses who can testify regarding the allegation. As a result, not being able to use a recording in a subsequent Commission proceeding should not encourage a lack of candor in meetings concerning informal investigation and/or prevent the Commission from determining whether any communication in such a meeting strayed from the truth.

30. The changes proposed by the ALJ also recognize the limits of the authority of the Commission. The rule thus does not seek to impose evidentiary restrictions on the use of recordings outside of the Commission. The parties appear to agree that the Commission has no such authority.

31. Lumen is correct that a prosecutorial environment in such informal investigations could lead representatives of BESPs to be more reticent in their communications. Such reticence inhibits communication and could serve as an impediment to the understanding of the problem and its cause(s) that led to the informal investigation. Placing the foregoing restriction on the use of recordings will hopefully decrease the likelihood of the development of a prosecutorial environment and correspondingly increase the likelihood of robust and fulsome communication by all participants.

32. Accordingly, based on the foregoing, the ALJ finds and concludes that the changes shown above are consistent with the Commission's authority, will encourage honest and robust communication, and will not unduly hamstring the Commission in carrying out its duties to the public.

**c. Consensus Rules 2143(b) and 2143(b)(VII)**

33. Consensus Rule 2143(b) states in part: "On or before January 15, 2023, and each two years thereafter, each BESP shall file an improvement plan application or amendment." Similarly, Consensus Rule 2143(b)(VII) states: "On or before January 15 every two years following the filing of the original improvement plan, unless otherwise approved by the Commission, the BESP shall file a proposed amendment to the improvement plan extending it for an additional two years or a new proposed improvement plan for a two-year period, including additional projects." Because it is unclear whether these Rules will go into effect before January 15, 2023, the deadline for filing the initial improvement plan application or amendment application and the deadline for filing the subsequent proposed amendments thereto or new proposed plans will be moved to February 15.

**III. RECOMMENDED DECISION**

34. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following Order.

**IV. ORDER**

**A. The Commission Orders That:**

1. The Rules Regarding Basic Emergency Service Network Reliability attached to this Recommended Decision are adopted.

2. The rules in redline legislative format (showing changes to current rules) are attached to this Recommended Decision as Attachment A. The rules in final format are attached to this Recommended Decision as Attachment B. They are also available in the Commission's E-Filings system at:

[https://www.dora.state.co.us/pls/efi/EFI.Show\\_Docket?p\\_session\\_id=&p\\_docket\\_id=22R-0122T](https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=22R-0122T).

3. Proceeding No. 22R-0122T is closed.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission

upon its own motion, the Recommended Decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script, appearing to read "G. Harris Adams".

G. Harris Adams,  
Interim Director