

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,)	
)	DOCKET NOS. UT-001532 and
Complainant,)	UT-001533
)	
v.)	SUPPLEMENTAL ORDER DENYING
)	MITIGATION OF PENALTIES
)	
ELECTRIC LIGHTWAVE, INC.,)	
)	
Respondent)	
)	
.....		

1 **Synopsis.** This Order denies the request of Electric Lightwave, Inc. (ELI) to mitigate penalty assessments totaling \$1300.

2 **Background.** On October 30, 2000, the Commission issued a Notice of Penalties Incurred and Due for Violations of Laws Rules and Regulations (Notice). *See Appendix 1.* The Commission assessed the penalties under Penalty Assessment Nos. UT-001532 and UT-001533, pursuant to RCW 80.04.405. According to RCW 80.04.405, violations of a Commission rule “shall incur a penalty of one hundred dollars for every violation . . . and in the case of continuing violation every day’s continuance shall be and is deemed to be a separate and distinct violation.”

3 The Notice informed ELI of the penalty assessments against it for 13 separate violations of WAC 480-120-027(3)(a), which the Commission adopted pursuant to RCW 80.36.150(1). The Commission assessed the penalties as follows:

On October 9, 2000, Electric Lightwave, Inc. filed a business contract (Advice No. 00-019) with the Washington Utilities and Transportation Commission. This contract was filed 17 days after the effective date. This is a violation of WAC 480-120-027(3)(a). such conduct supports a penalty in the amount of \$1000.

On October 9, 2000, Electric Lightwave, Inc. filed a business contract (Advice No. 00-021) with the Washington Utilities and Transportation Commission. This contract was filed 10 days after the effective date. This is a violation of WAC 480-120-027(3)(a). such conduct supports a penalty in the amount of \$1000.

4 On November 16, 2000, the Commission received an Application for Mitigation of Penalties (Application) from ELI. The Application requested a brief adjudicative proceeding, under WAC 480-09-500, to allow ELI to present mitigating evidence.

5 The Commission granted ELI's request for a mitigation hearing and, on January 16, 2001, issued a Notice of Brief Adjudication. That notice set a schedule for written statements and evidence and set a time for oral statements. On February 20, 2001, the parties appeared before the Commission to present oral statements.

6 **Parties.** Charles L. Best, Vice President and General Counsel, Oregon, represents ELI. Jonathan C. Thompson, Assistant Attorney General, Olympia, represents Commission Staff.

I. DISCUSSION

7 The facts in this case are undisputed. ELI admits that it committed the violations alleged in the Penalty Assessments. *Tr.*, at p. 5. ELI argues, however, that the Commission should remit or, in the alternative, mitigate the Penalty Assessments because 1) the violations are not shown to have harmed ELI's customers or its competitors 2) the Penalty Assessments are inconsistent with the Commission's prior actions, and 3) its misconduct was not willful and intentional. *Written Statement and Evidence For Electric Lightwave, Inc.*, at p. 5-6; *Tr.*, at p. 38. In addition, ELI argues that assessing penalties against it fails to serve the public good, because it does not promote competition. ELI requests that the Commission remit, or mitigate, the Penalty Assessments.

A. What effect does the filing requirement in WAC 480-120-02(3)(a) have on the competitors and consumers?

8 ELI makes the policy argument that the Penalty Assessments are inappropriate because, "using the Commission's regulatory authority to impose sanctions on a competitive provider like ELI under these circumstances does not enhance a competitive environment and fails to serve the public good." *Written Statement and Evidence For Electric Lightwave, Inc.*, at p. 5. ELI maintains that the Commission has only assessed penalties for violations that involved consumer complaints and substantial harm to customers. *Written Statement and Evidence For Electric Lightwave, Inc.*, at p. 4. In this case, argues ELI, the violations did not result in any harm to its customers or its competitors and, therefore, the Commission should remit or mitigate the Penalty Assessments. *Id.*, at 5.

9 The filing requirements benefit the public interest and promote competition in the telecommunications industry by assuring that information about rates and conditions of service are available to competitors and consumers. Companies that do not file contracts could derive some advantage over, and cause harm to, companies that do comply with the filing requirement.

10 There is no evidence as to whether ELI's competitors or customers were harmed, or not harmed, by its misconduct. Lack of actual harm from violations of a rule

designed to prevent harm is not a test for deciding whether to mitigate a penalty. The Commission is directed by the legislature to require that telecommunications companies file contracts, and the public interest is furthered and competition in the telecommunications industry are furthered by enforcement of the filing requirements. The Commission therefore rejects ELI's contention that the Penalty assessments are inappropriate based on public policy considerations.

B. Should the Commission mitigate the Penalty Assessments because it has not assessed penalties in the past for other rule violations?

11 ELI asserts that the Penalty Assessments are inconsistent with prior Commission actions and that, therefore, the Commission should not assess penalties in this case. ELI says in its Written Statement that "the Commission has assessed very few penalties and only in the most egregious cases." *Written Statement and Evidence For Electric Lightwave, Inc., at p. 2.*

12 Commission Staff argues that the Commission is authorized by law to impose penalties. Commission Staff states that, "there is no requirement that the Commission have precedent for a decision to enforce a valid rule by imposing penalties. If there were, the Commission would never be able to define new enforcement policies for itself." *WUTC Staff Written Statement and Evidentiary Documents, at p. 3.*

13 A prolonged failure to assert an agency power does not destroy it. *United States v. Morton Salt Co., 338 U.S. 632, 647-648, 70 S. Ct. 357, 366, 94 L. Ed. 401 (1950).* In *Morton*, Morton Salt disputed an action by the Federal Trade Commission on the basis that it was novel and unprecedented in the FTC's practice and that it introduced a new method of investigating compliance. *Id.* The Supreme Court rejected Morton Salt's argument, stating:

The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescribed by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. *Id.*

14 ELI does not assert that the Commission's power to assess penalties is nonexistent and the statute clearly provides the Commission with authority to assess penalties for violations of the Commission's rules:

In addition to all other penalties provided by law every public service company subject to the provisions of this title and every officer, agent or employee of any such public service company

who violates or who procures, aids or abets, in violation of any provision of this title or any order, rule, regulation or decision of the commission shall incur a penalty of one hundred dollars for every such violation. *RCW 80.04.405.*

15 The Commission rejects ELI's argument that the Commission should mitigate or remit the Penalty Assessments based on ELI's assertion that the Commission has changed its enforcement practice. No evidence was produced at the hearing indicating a change in the Commission's enforcement practice. There is no evidence in the record of Commission decisions assessing penalties for similar rule violations, nor is there any evidence that the Commission has refused to assess penalties for similar violations. Regardless of the Commission's prior practice, enforcing the filing requirements in this case is appropriate because doing so furthers the public interest and enhances competition in the telecommunications industry.

C. Under what circumstances does the Commission assess penalties?

16 ELI maintains that in prior orders the Commission has not assessed penalties when the alleged violator was not engaged in willful and intentional misconduct. *Written Statement and Evidence For Electric Lightwave, Inc., at p. 5.* ELI suggests that, because it was "forthcoming and took immediate steps to correct the situation," its misconduct was not intentional and willful. *Id.* ELI concludes, therefore, that the Commission should reconsider its decision to assess penalties in this case.

17 ELI quotes a passage from a Commission order, in which the Commission refused to impose penalties, which states as follows: "Once a violation is found, the Commission may consider whether conduct was knowing or intentional in assessing and mitigating penalties. Here the Commission concludes that U S WEST has not engaged in a concerted patter of willful and intentional *misconduct* as argued by MCImetro." *Written Statement and Evidence For Electric Lightwave, Inc., at p. 4-5; citing MCImetro Access Transmission Svcs., Inc. v. U S WEST Communications, Inc., Commission Decision and Final Order, Docket No. UT-971063 (February 10, 1999)(emphasis in original).* That passage, read alone, does not accurately portray the reasoning that the Commission used when it decided not to assess penalties against U S WEST in *MCImetro*.

18 Although the Commission based its decision, in part, on whether the misconduct involved was intentional and willful, it also considered other factors. For example, in determining whether to assess penalties for service order delays, the Commission reasoned that because compliance with the terms of its order "should prevent violations from recurring; accordingly," there was no need to assess penalties. *MCImetro Access v. U S WEST, Inc., Docket No. UT-971063, at ¶ 166.*

- 19 The Commission also stated in the *MCImetro* decision that, in addition to whether misconduct is willful and intentional, the Commission considers whether 1) the offending conduct was associated with new requirements, 2) the offending party should have known its conduct constituted a violation, 3) the conduct was gross or malicious, 4) repeated violations occurred, 5) the Commission previously had found violations, 6) the offending conduct improved, and 7) remedial steps were taken. *Id.*, at ¶ 158.
- 20 ELI's offending conduct was not associated with new requirements. As Commission Staff's witness testified, the rule in question has been in effect in substantially the same form since the mid-1980s. *Tr. at p.12*. ELI was aware of the rule at the time of the violations. Moreover, ELI's violations of WAC 480-120-027 that gave rise to the Penalty Assessments were not the first by ELI. According to Commission Staff's witness, ELI violated the rule in January of last year, for which Commission Staff initiated an investigation, in Docket No. UT-000736. ELI did not contest the existence of those prior violations and, in fact, admitted that they occurred. Although ELI was forthright in bringing to the Commission's attention certain late-filed contracts, ELI's failed to remedy its misconduct and continues to violate the filing requirements in the Commission's rules.
- 21 ELI attributes its noncompliance to its internal procedures. ELI suggests that five days is not a sufficient amount of time to complete its internal review. *Transcript, at p. 34-35*. This is a poor excuse for noncompliance with the law. ELI does not demonstrate that its internal process may not be modified to allow compliance with proper training of its employees, attention to Commission rules, and respect of the law.
- 22 According to credible testimony by Commission Staff's witness, ELI continues to file contracts in violation of WAC 480-120-027. *Tr., at p. 32-33*. ELI also admitted that it recently filed three contracts in violation of WAC 480-120-027(3)(a).¹ *Tr., at p. 38*.
- 23 There is sufficient evidence in the record to find that ELI's misconduct was intentional and willful. ELI admits that it violated WAC 480-09-120 on several occasions, in addition to the violations that are at issue in this proceeding. ELI admits that it violated the rules with full knowledge of their existence. Thus, even under the "willful and intentional" test that ELI contends the Commission should use, penalties are still be warranted. Furthermore, ELI continues to file contracts in violation of the rule. Considering the circumstances surrounding the Penalty Assessments, the Commission finds that the Penalty Assessments are appropriate.

¹ Mr. Best noted that although ELI filed the three contracts in violation of the rule, it had requested a waiver of the rule for each of those contracts.

24 The Commission finds that the legislature has clearly granted it the authority to
impose penalties for violations of WAC 480-120-027(3)(a), the Commission's
decision in the Penalty Assessments was valid, the circumstances surrounding the
violations do not persuade the Commission it should mitigate the penalties, and there
are sound policy reasons in this case for enforcing WAC 480-120-027(3)(a).

II. FINDINGS OF FACT

- 25 (1) The Washington Utilities and Transportation Commission is an agency of the
State of Washington, vested by statute with authority to regulate rates, rules,
regulations, and practices of public service companies, including
telecommunications companies.
- 26 (2) ELI provides telecommunication services to customers in the state of
Washington.
- 27 (3) On October 30, 2000, the Commission assessed penalties in the amount
of \$1300 against ELI, in Docket Nos. UT-001532 and UT-001533.
- 28 (4) On November 16, 2000, the Commission received an Application for
Mitigation of Penalties from ELI. The Application requested a brief
adjudicative proceeding, under WAC 480-09-500, to allow ELI to present
mitigating evidence.
- 29 (5) ELI admitted that it committed the violations that are the subject Penalty
Assessments UT-001532 and UT-001533.
- 30 (6) ELI's misconduct was not associated with new filing requirements.
- 31 (7) ELI knew its conduct constituted a violation.
- 32 (8) ELI's conduct was intentional and willful.
- 33 (9) The violations in this matter are part of series of violations by ELI.
- 34 (10) ELI's continues to file contracts in violation of the Commission's rules and
statutes.
- 35 (11) ELI did not take remedial steps to correct its pattern of misconduct.

III. CONCLUSIONS OF LAW

- 36 (1) The Commission has jurisdiction over the parties to and the subject matter of
this proceeding.

- 37 (2) Telecommunications companies must file contracts within 5 days of
execution, in accordance with RCW 80.36.150 and WAC 480-120-027(3)(a).
- 38 (3) The Commission has the authority to impose penalties for violations of its
rules, pursuant to RCW 80.04.405.
- 39 (4) ELI committed the violations that resulted in Penalty Assessment Nos. UT-
001532 and UT-001533.
- 40 (5) ELI's plea for mitigation should be rejected.

IV. ORDER

41 THE COMMISSION ORDERS That the Application of Electric Lightwave, Inc. for
Mitigation of Penalties is denied.

42 THE COMMISSION ORDERS FURTHER That ELI must pay penalties in the
amount of \$1300, pursuant to Penalty Assessment Nos. UT-001532 and UT-001533,
within 15 days of the date of this Order.

DATED at Olympia, Washington and effective this day of March, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairman

RICHARD HEMSTAD, Commissioner

NOTICE TO PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).