

business practices of New Access based on six consumer complaints filed with the Commission alleging New Access changed the consumers' local and long distance service without the consumers' authorization in violation of WAC 480-120-139. It appeared that New Access, in telemarketing consumers for changes to local and long distance service, violated the provisions of WAC 480-120-139, in addition to other rules of the Commission related to the operation of Telephone Companies.

4 Staff completed its investigation on August 1, 2001. On December 7, 2001, the Commission authorized the filing of a Complaint. The Complaint alleges that New Access failed to obtain consumer confirmation of changes of the consumer's local and long distance telecommunications providers (WAC 480-120-139(1)(c) and (2)); failed to provide documentation of consumer confirmation of changes (WAC 480-120-139(3)); failed to respond in a timely way to Staff's request for information (WAC 480-120-101(5)); disconnected telecommunications services to customers who complained to the Commission (WAC 480-120-081(5)(g)); and failed to bill its customers in accord with published rates and charges (RCW 80.36.130).

5 **Settlement Agreement.** On April 9, 2002, prior to any hearing on the Complaint, New Access and Commission Staff filed a proposed Settlement Agreement that would resolve all contested issues raised by the Complaint. On April 19, 2002, the Commission convened a hearing before Chairwoman Marilyn Showalter, Commissioner Richard Hemstad, Commissioner Patrick J. Oshie, and ALJ Theodora M. Mace. The Commission heard testimony from Staff witness Vicki Elliott, who explained the Agreement.

6 Under the terms and conditions of the Settlement Agreement, admitted into the record as Exhibit 1 and attached to this Order as Appendix A, New Access would:

- Pay penalties and Commission investigation costs totaling \$72,806. This amount represents approximately \$59,977 in penalties for 173 admitted violations of various rules and statutes, as well as \$12,829 to reimburse the Commission for the cost of investigation.
- Be subject to an additional penalty of \$49,073, imposition of which would be suspended on the condition that New Access meets certain compliance benchmarks within six months from the date of the Settlement Agreement. The penalty would be imposed only if New Access fails to achieve the compliance benchmarks.
- Notify the Commission immediately in writing if it resumes telemarketing in Washington.
- Refund all amounts charged to customers determined by Staff to have had a valid slamming complaint filed with the Commission prior to the date of the Settlement Agreement.
- Refund amounts charged to any future complainant who files a slamming complaint determined by Staff to be valid.

- Refund amounts to all customers who paid rates and charges prior to the Agreement for services that were not recognized in the Company's price list on file with the Commission or were in excess of the rates and charges on file.
- Respond to all consumer contacts within 24 hours.
- Accurately respond to all consumer inquiries regarding dial-around long distance carrier services.
- Process daily loss and completion reports received from Qwest and use its best efforts to accurately reflect termination dates when billing customers.
- Comply with all applicable Commission rules and statutes.

7 Attachment 1 to the Settlement Agreement outlines how the \$49,073 in suspended penalties would be assessed against New Access:

- If the Commission receives two or more slamming complaints, determined by Staff to be valid, during the six-month suspension period, a suspended penalty of \$15,750 would be payable.
- If Staff determines that any third-party verification tape materially deviates from the Staff-approved script, New Access must pay \$24,750 of the suspended penalty.
- Other lesser penalty amounts would be imposed for New Access' failure to respond to informal complaints, failure to provide customers with copies of verification tapes, disconnection of any customer's service while that customer has a pending complaint with the Commission, or billing of a customer for rates or charges not in the company's tariff or price list.

8 Commission Staff and New Access ask the Commission to approve the Settlement Agreement.

II. DISCUSSION AND DECISION

A. PENALTIES AND COSTS PAYABLE IMMEDIATELY

9 Based on our review of the Settlement Agreement and the record developed in this proceeding, we find that the penalties assessed that are due and payable immediately for violations of rules and statutes uncovered as a result of Staff's prior investigation of this complaint, are reasonable. Furthermore, it is reasonable to assess the costs of the investigation against New Access. Imposition of these penalties and costs are appropriate sanctions for New Access's violations, and will send a signal to other telecommunications companies that such actions are unacceptable. This will serve to protect telecommunications customers in the state of Washington.

10 Likewise, we find reasonable the settlement provisions calling for refunds due to past slamming complaints and due to complaints that customers paid rates and charges not

in filed prices, rates or charges. We further require, however, that Staff must file a report, within six months of this Order, showing which customers received refunds and how much they received and indicating whether all customers eligible for refunds received them.

- 11 In accepting and adopting this part of the settlement, we find that the result is consistent with the public interest and that it saves time, effort and expense for the Commission, the company, and Staff, of a fully adjudicated proceeding. Acceptance of the settlement, however, is done without the detailed examination and the close study of partisan arguments on contested issues that produce informed decisions on each litigated issue. The Commission therefore observes, consistent with similar observations in other proceedings, that this Order does not constitute a ruling on any underlying issue that might have been litigated.

B. SUSPENDED PENALTIES AND FUTURE REFUNDS

- 12 We reject those portions of the Settlement Agreement associated with suspended penalties (Attachment 1), as well as those related to refunds to future complainants whose slamming complaints are found valid by Staff (Paragraph 10). Imposition of the suspended penalties would be triggered if Staff determined without further opportunity for fact-finding that new slamming violations had occurred. The triggering of future refunds also rests solely on Staff's determination that valid slamming complaints have been made. We are concerned that provisions of this type constitute an improper delegation of Commission authority to Staff. These provisions preclude an opportunity for the Company to contest before the Commission future facts. They purport to eliminate Commission discretion (but not staff discretion) in handling future potential violations in situations that may not merit the level of penalty dictated by the settlement provision.
- 13 In reaching our conclusions, we do not intend categorically to exclude suspended penalties as a possible enforcement tool. Rather, by this Order, we voice our concerns about delegation of our authority and justification for terms of such penalty provisions.
- 14 We are aware that without the suspended penalty and without the specified Staff role in future disputes, the parties would likely have arrived at a different settlement agreement, or no settlement at all. It is the prerogative of the parties to withdraw from the proposed Settlement Agreement, as amended by this order. We are prepared, however, to approve the Settlement Agreement, as modified, and face any future alleged violations at a future time.
- 15 Accordingly, the Commission accepts and adopts those portions of the Settlement Agreement assessing penalties and costs associated with past violations of

Commission rules and statutes and rejects those portions of the Settlement Agreement imposing suspended penalties and requiring refunds for future slamming complaints.

III. FINDINGS OF FACT

- 16 Having discussed above all matters material to our decision, and having stated our findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.
- 17 (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, practices, and accounts of public service companies, including telecommunications companies.
- 18 (2) New Access is registered as a telecommunications company providing service within the state of Washington as a public service company.
- 19 (3) On April 9, 2002, Commission Staff and New Access filed a Settlement Agreement with the Commission requesting approval of the Agreement.

IV. CONCLUSIONS OF LAW

- 20 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.
- 21 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, these proceedings. *RCW 80.01.040.*
- 22 (2) New Access is a public service company as defined in *RCW 80.04.010.*
- 23 (3) The Settlement Agreement as contained in Appendix A, *without* paragraph 7 (the unlabeled paragraph between paragraphs 6 and 8), Attachment A, and paragraph 10, satisfactorily resolves those issues in dispute in this proceeding pertaining to past violations of Commission rules and statutes and, to that extent, is consistent with the public interest. *RCW 80.01.040.*
- 24 (4) Those portions of the Settlement Agreement as contained in Appendix A that pertain to suspended penalties and future refunds related to future violations of

Commission rules, i.e., paragraph 7, Attachment A, and paragraph 10, are rejected as not consistent with the public interest. *RCW 80.01.040*.

- 25 (5) The Commission should retain jurisdiction over the subject matter of and the parties to this proceeding to effectuate the provisions of this Order.

V. ORDER

THE COMMISSION ORDERS That:

- 26 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of and the parties to these proceedings;
- 27 (2) Paragraph 7, Attachment A, and paragraph 10, the Settlement Agreement (Appendix A to this Order) are rejected;
- 28 (3) All other parts of the Settlement Agreement (Appendix A to this Order) are approved, adopted, and made part of this Order;
- 29 (4) The Parties must notify the Commission within 10 days of entry of this Order whether they will exercise the right to withdraw from the Settlement Agreement. After that time, if the Parties accept the terms of this Order approving the Settlement Agreement in part and rejecting it in part, the Complaint in this matter is hereby dismissed without prejudice and the docket is closed. If either or both of the Parties withdraw from the Settlement Agreement, the docket will remain open and the Commission will schedule such proceedings as may be necessary.

30 THE COMMISSION ORDERS FURTHER That it retains jurisdiction over the subject matter and the Parties to effectuate the provisions of this Order.

DATED at Olympia, Washington, and effective this ____ day of May, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

COMMISSIONER PATRICK J. OSHIE, concurring in part and dissenting in part.

For reasons stated therein, I concur in the opinion of the majority that provisions of the Settlement Agreement delegating to staff the authority to impose future penalties upon New Access are improper. However, respectfully, I dissent from the opinion of the majority that the affected sections of the Settlement Agreement should be rejected in total.

In my opinion, the Commission can cure the Settlement Agreement by requiring the parties to bring before the Commission any alleged violations of statute, rule or the Settlement Agreement itself. Once the Commission has heard the matter, it can determine the appropriate penalty or remedy, which would include the suspended penalties proposed by the parties and any additional penalties resulting from the additional violations. This result avoids the problem I see with the majority's solution – that striking the suspended penalties forces the parties to accept what they did not bargain for or to withdraw the proposed agreement.

PATRICK J. OSHIE, 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).