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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 In re the Matter of)
) Docket No. UT-001532
4 Penalty Assessment Nos.) Volume I
UT-001532 and UT-001533) Pages 1 - 41
5 Against Electric Lightwave, Inc.)

6
7 An oral argument in the above matter
8 was held on February 20, 2001, at 10:15 a.m., at 1300
9 South Evergreen Park Drive Southwest, Olympia,
10 Washington, before Administrative Law Judge WILLIAM E.
11 HENDRICKS.

12 The parties were present as follows:

13 WASHINGTON UTILITIES AND TRANSPORTATION
14 COMMISSION, by JONATHAN THOMPSON, Assistant Attorney
General, 1400 South Evergreen Park Drive Southwest,
15 Post Office Box 40128, Olympia, Washington 98504.
Also Present: Glenn Blackmon

16 ELECTRIC LIGHTWAVE, INC., by CHARLES L. BEST,
17 Vice President and General Counsel, 4400 Northeast 77th
Avenue, Vancouver, Washington 98662.
18 Also Present: Timothy H. Peters

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25 Kathryn T. Wilson, CCR
Court Reporter

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INDEX OF EXHIBITS

3

4 EXHIBIT: MARKED: ADMITTED:

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6 A 9 10

7 Subpart 9, Ex. A 28 28

8 B 29 29

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22
23
24
25

INDEX OF WITNESSES

WITNESS:	PAGE:
GLENN BLACKMON	
Examination by Mr. Best	11
Examination by Mr. Thompson	28

00004

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P R O C E E D I N G S

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JUDGE HENDRICKS: The hearing will please
3 come to order. My name is Tre Hendricks, and I will be
4 the presiding administrative law judge today. The
5 Washington Utilities and Transportation Commission has
6 set this brief adjudicated proceeding in Docket Nos.
7 UT-001532 and UT-001533 upon due and proper notice to
8 all parties. This hearing is being held at the offices
9 of the Utilities and Transportation Commission in
10 Olympia, Washington on February 20th, 2001.

11

I'll take appearances at this time beginning
12 with Commission staff. If you could please state for
13 the record your name, who you represent, your address,
14 telephone number, fax, and e-mail, if you use one.

15

MR. THOMPSON: Jonathan Thompson, assistant
16 attorney general representing Commission staff. My
17 address is 1400 South Evergreen Park Drive Southwest,
18 and it's Olympia, 98504. My telephone number is (360)
19 664-1225, and e-mail is jthompso@wutc.wa.gov.

20

JUDGE HENDRICKS: Thank you. For Electric

21

Lightwave?

22

MR. BEST: Thank you, Your Honor. Charles L.

23

Best, Electric Lightwave, 4400 Northeast 77th Avenue,

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Vancouver, Washington, 98662; telephone, (360)

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816-3311; fax, (360) 816-0999; e-mail,

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1 charles best@eli.net.

2 JUDGE HENDRICKS: Is there anyone else that
3 wishes to make an appearance in this matter? Let the
4 record show there is no response. Are there any
5 preliminary matters that we need to discuss before we
6 proceed?

7 Why don't we begin with Electric Lightwave
8 then for its presentation.

9 MR. BEST: Thank you, Your Honor. You would
10 like a brief opening statement?

11 JUDGE HENDRICKS: Yes.

12 MR. BEST: Essentially, the facts of this
13 case, we believe, are uncontroverted. Our written
14 statement of evidence basically contains, we believe,
15 all the facts. There is no dispute that Electric
16 Lightwave failed to comply with WAC 480-120-027(3a),
17 which requires us to file contracts within five
18 business days of their execution.

19 Essentially what happened here was the system
20 that the Company had for filing contracts broke down.
21 We acknowledged that. Staff brought to our attention
22 that a contract had not been filed. We discovered on
23 our own that many contracts had not been filed and
24 basically alerted Staff to that fact. We took efforts
25 to get back into compliance, and even through our

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1 efforts, two contracts were filed late. That is the
2 gist of why we are here today.

3 When we received notice that the Commission
4 was going to assess penalties, we were somewhat
5 troubled because the Commission has a history, we
6 believe, of not assessing penalties except in the most
7 serious of circumstances. We question whether that was
8 an appropriate thing for the Commission to do, and at
9 that point undertook sort of our own internal review of
10 the Commission's previous orders on penalties. What we
11 discovered was the Commission does rarely issue
12 penalties, and in fact, they seem to issue penalties in
13 circumstances in which there has been customer harm,
14 competitor harm, or intentional conduct on the part of
15 the actor who has violated the rules, and in our
16 written statement, you will notice that we do cite
17 several cases in which the Commission has taken action
18 and also several cases in which the Commission declined
19 to take action.

20 We believe that the case in which the
21 Commission was looking to assess U S West penalties for
22 its service quality violations pretty much gives the
23 Commission a road map as to when penalties are
24 appropriate and when they are not. In that case, they
25 declined to assess penalties basically saying that

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1 although they had the authority to do so, they chose
2 not to do so because they could not really determine if
3 there was intentional or knowing conduct on U S West's
4 part.

5 So we believe circumstances are much the same
6 here. While there is a technical violation of the
7 rule, we made every effort to comply. We missed
8 compliance by a matter of days, and that's what caused
9 the penalties to be assessed. Based on the evidence,
10 we think, before the Commission, this is a case in
11 which they should exercise their discretion and not
12 assess penalties.

13 It's also interesting to note that prior to
14 our case, the Commission did not assess penalties on
15 late contract filings. I don't know why that is.
16 Maybe we will find out today, but what's even more
17 interesting to us is that since we filed this petition
18 and since we asked for a waiver of the existing
19 administrative rule, several other people or two other
20 people have now been fined, and we suspect the
21 Commission has made a determination itself to get into
22 compliance and be consistent with its rule, because as
23 near as we can tell, we were the first ones to be
24 apparently singled out under the new enforcement of
25 this rule.

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1 So again, we are looking for a consistency.
2 We understand that Staff is now trying to become more
3 consistent, but again, the rules, we think, were
4 somewhat different previous to our being penalized.

5 JUDGE HENDRICKS: Mr. Best, will you be
6 calling witnesses at this point?

7 MR. BEST: I would be calling Mr. Blackmon.
8 I'd like an opportunity to question him.

9 JUDGE HENDRICKS: If we could, at this point,
10 talk about the exhibits, both the prefiled exhibits,
11 your written statement and evidentiary document, and
12 then the documents that you distributed prior to the
13 hearing and take care of those.

14 MR. BEST: Essentially, we filed on February
15 9th a written statement in evidence which also contains
16 six exhibits. The written statement, is, I believe,
17 six pages. The exhibits are labeled 1 through 6.
18 Would you like me to go through the exhibits and
19 reference them?

20 JUDGE HENDRICKS: Yes.

21 MR. BEST: Exhibit 1 is Commission order in
22 Docket No. UT-971163, which was an order granting
23 complaint and assessing penalties against Destiny
24 Telecom. Exhibit 2 is an order in Docket UT-980338,
25 Third Supplemental Order granting WorldCom's complaint

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1 granting Staff's penalty proposal and denying GTE's
2 counterclaim.

3 Exhibit 3 is a Commission order in Docket No.
4 UT-000067, Commission order accepting settlement in
5 WUTC versus USLD Communications. Exhibit 4 is a draft
6 open meeting memo dated November 30th, 1999, regarding
7 recommendation issuing complaints against several
8 independent companies for failure to comply with RCW
9 80.04.530.

10 Exhibit 5 is Commission order in Docket
11 UT-971063, Commission decision and final order denying
12 petition to reopen, modifying initial order in part and
13 affirming in part regarding MCI Metro Access
14 Transmission Services, Inc., versus U S West
15 Communications, and I believe Exhibit 6 is a printout
16 of the Commission's home page regarding the currently
17 as of, whenever this was printed out, 1/29/2001. It
18 purports to be a list of the competitive local exchange
19 companies regulated by the WUTC.

20 That was the initial package filed on
21 February 9th. Subsequently, we discovered that the
22 filing we had had a couple of pages missing in our
23 written statement of evidence. The next exhibit is, in
24 fact, a correct copy of the written statement of
25 evidence that has the two missing pages in it, and the

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1 final exhibit is dated November 2nd, 2000. It's a
2 two-page document. It's a request for modification of
3 WAC 480-120-027, in which Electric Lightwave requests
4 that the five-day requirement to file business
5 contracts be either waived entirely for Electric
6 Lightwave or that it be extended to at least 15 days,
7 and that was filed November 2nd of 2000. Those are the
8 exhibits that Electric Lightwave would offer.

9 JUDGE HENDRICKS: Thank you, Mr. Best. The
10 document we just spoke about we'll mark as a whole as
11 Exhibit A, Subparts 1 through 9, including ELI's
12 statement and the cases mentioned by Electric
13 Lightwave, which are Subparts 2, 3, 4; an open meeting
14 memo, Subpart 5; another case regarding MCI Metro
15 Access as Exhibit 6; a copy of a home page Web Site
16 printout, which is from the Commission's Web site,
17 listing the competitive local providers in Washington
18 state; Subpart 7, corrected pages or supplemental
19 additional pages, I believe, 2, 3, and 4 of ELI's
20 statement that were missing in the original filing, and
21 a request of a waiver of the requirements of
22 WAC 480-120-027, which have come in another docket in a
23 Commission case.

24 Is there any objection to admitting these
25 exhibits?

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1 MR. THOMPSON: No objection.
2 JUDGE HENDRICKS: The exhibit is admitted.
3 Mr. Best, you may continue.
4 MR. BEST: We would ask to be allowed to ask
5 Mr. Blackmon some questions regarding this case.
6 JUDGE HENDRICKS: Is there any objection to
7 questions?
8 MR. THOMPSON: No.
9 JUDGE HENDRICKS: Before we begin, I would
10 like to swear in the witness.
11 (Witness sworn.)
12

13 E X A M I N A T I O N

14 BY MR. BEST:
15 Q. Mr. Blackmon, do you know how long
16 WAC 480-120-027 has been in existence?
17 A. Do you mean in its current form?
18 Q. In its current form, do you know when it was
19 last modified?
20 A. I don't remember. It's been for the last few
21 years.
22 Q. But it's been in existence for several years?
23 A. There has been a provision on the filing of
24 price lists and contracts since shortly after those
25 were permitted by the legislature in 1985.

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1 Q. So it's existed in some form since the mid
2 '80's?

3 A. Yes.

4 Q. With respect to special contracts and their
5 required filing, do you know why that rule exists with
6 public policy observed?

7 A. RCW 80.36.130 along with 100 and maybe 110
8 together create a requirement that telecommunications
9 companies publish all rates that they charge and that
10 they charge only the rates that they publish. So
11 through a combination of a price list and contracts,
12 which the point is there is a departure from that price
13 list, a contract is filed, it achieves that legal
14 requirement of publication of all rates.

15 Q. Isn't the reason for the requirement to make
16 sure that number one, the public is protected from
17 rates that are too high?

18 A. Not necessarily, no.

19 Q. Is that one reason or not a reason?

20 A. No. I would think that is certainly not one
21 of the most important reasons.

22 Q. What are the most important reasons then for
23 that rule to exist regarding the filing special
24 contracts?

25 A. The requirement that rates be published comes

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1 essentially out of the concern about undue preference
2 or discrimination.

3 Q. That is important because why?

4 A. Well, the legislature historically going back
5 to the 1800's has had a concern with utilities and
6 shippers, for that matter, in the transportation
7 industry creating preferential rates to their largest
8 customers using that as a technique, essentially, to
9 evade the price regulation that the legislature had
10 adopted as a public policy.

11 Q. So the reason for the rule really rose out of
12 the need to regulate prices and potential preferences
13 and prejudices because of a monopoly environment; is
14 that fair?

15 A. Certainly that's how it arose, yes.

16 Q. Would you agree in this case that Electric
17 Lightwave is certainly not a monopoly?

18 A. Yes.

19 Q. And whether Electric Lightwave discriminates
20 amongst its customers doesn't really create any concern
21 for the Commission, does it?

22 A. Yes, it does.

23 Q. Why does it?

24 A. Because the law says that 80.36.170 and 180
25 apply to Electric Lightwave unless the Commission

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1 waives those statutes, which it has not.

2 Q. But as a matter of policy, would you agree
3 that the risk to the public is either nonexistent or
4 certainly minimal in Electric Lightwave somehow being
5 able to manipulate the market through its existence as
6 a telecommunications provider?

7 A. I missed how we got to manipulating the
8 market in this discussion.

9 Q. I think we discussed the fact that the rule
10 exists because of a monopoly environment. When
11 somebody controls the market, they can dictate prices;
12 is that right?

13 A. You didn't ask me why the rule exists. You
14 asked me how it arose.

15 Q. I thought I asked what the purposes were for
16 the rule.

17 A. You asked that, yes, but you also asked me
18 how it arose, not why it exists.

19 Q. Do you see a difference between why it exists
20 and the purpose for the rule?

21 A. No, not between those two.

22 Q. But you did explain that the purpose for the
23 rule, as I recall, was that it was to prevent unlawful
24 preferences, I guess, in a monopoly environment; is
25 that correct?

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1 A. The purpose for the rule is so that we can
2 insure that companies comply with 80.36.130, 100 and
3 110, which requires that all rates be published. So
4 the purpose for the rule is so that we can insure that
5 companies publish their rates as the law requires.

6 Q. Would you agree that the reasoning, the
7 underlying purpose for the rule arose in a monopoly
8 environment?

9 A. The requirement that all rates be published
10 arose in the monopoly environment, and the legislature
11 in 1985 decided to apply it in the competitive
12 environment as well.

13 Q. Again, as a matter of policy, what harm,
14 other than it being a violation of the law, what harm
15 would befall customers if Electric Lightwave was able
16 to discriminate amongst them, charge different prices?

17 A. I'm not sure exactly what public policy
18 objectives the legislature had when it imposed that
19 requirement. My sense is that the public policy that
20 they set out at that time was one in which they felt
21 that it was important that similarly situated customers
22 be treated similarly and that they did not believe that
23 the fault should be that that applies only to monopoly
24 companies but that if we were, "we" being the
25 Commission, to choose to eliminate that requirement for

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1 comparable treatment that we do so very deliberately by
2 waiving 80.36.170 and 180.

3 Q. Basically, I gather what you are telling me
4 is that you don't really know what the policy is. You
5 are just following what the legislature says; is that
6 right?

7 A. I'm certainly not speaking for the
8 legislature in terms of why it adopted the policy it
9 did. I believe the legislature had a concern about
10 similarly situated customers being treated differently.

11 Q. Let's talk about these facts in particular.
12 Based on the fact that these contracts were filed late,
13 did any harm befall any of ELI's customers?

14 A. I don't know.

15 Q. Would that be important to know?

16 A. First of all, it's not the test. The
17 question -- I might investigate it for some reason and
18 conclude that no harm befell any of Electric
19 Lightwave's customers, and yet, the legislature could
20 still have a perfectly valid reason for wanting that
21 contract published, because it could be that the harm
22 would fall to companies that are not customers of
23 Electric Lightwave but who might have chosen to be had
24 they known what rates were being offered by Electric
25 Lightwave.

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1 Q. To your knowledge, were any of ELI's
2 competitors harmed by the late filing of these
3 contracts?

4 A. I don't have any knowledge of specific harm,
5 but I think the potential exists.

6 Q. What would the potential be?

7 A. It could be that Electric Lightwave's
8 competitors, by following the law, are unable to
9 separate customers into distinct subgroups, pricing
10 differently to different customers, without the mutual
11 knowledge of the individual customers and thereby
12 having -- where Electric Lightwave could have
13 customer-specific prices that allows it to achieve an
14 overall higher revenue level than a competitor who is
15 following the law would be able to achieve.

16 Q. Would you agree that in a competitive
17 environment there would be no regulation of prices at
18 all?

19 A. No.

20 Q. In a purely competitive environment, you
21 think there is a place for regulation?

22 A. I believe that in a purely competitive
23 environment where the Consumer Protection Act applies,
24 the companies do not have unlimited freedom to set
25 prices as they choose.

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1 Q. Are you talking about with respect to the
2 Commission, or are you talking with respect to other
3 laws, like antitrust laws, like consumer protection
4 laws?

5 A. I believe I took your question to be whether
6 there should be any sort of regulation of prices.
7 That's the way I answered it.

8 Q. With respect to the Washington Utilities and
9 Transportation Commission, would you agree that in a
10 perfectly competitive environment or even a partial
11 competitive environment that the needs regulating
12 prices is probably somewhat lessened?

13 A. Yes. Electric Lightwave and many other
14 companies have found that effective competition exists,
15 and we do virtually nothing in the way of regulating
16 the prices that they charge.

17 Q. But I thought we just talked about the fact
18 that some harm could have come in this case because we
19 didn't file contracts with our prices. Did I
20 misunderstand you?

21 A. Yes, that's correct.

22 Q. You think that fits with what your current
23 statement is?

24 A. Yes.

25 Q. How is that? I'm just not following.

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1 A. Well, there is a difference between a
2 requirement that rates be set at a particular level
3 versus a requirement that rates be published. The
4 publication of rates -- economists differ about whether
5 owned net that's better or worse for success of
6 competition, but publication of rates certainly makes
7 it easier for customers to know what their alternatives
8 are. It makes it easier for them to make good choices
9 about which company or which service within a company's
10 portfolio they choose to purchase. So publication of
11 rates may have its own benefit separate from any
12 requirement about how those rates may be set.

13 Q. Wouldn't you agree that with that logic,
14 publication of any consumer rates would be an
15 advantage, wouldn't it, in any field, cars, mattresses?

16 A. Cars, I just bought a car, and I wish there
17 were more information available about what the dealers
18 had sold the same vehicle previously, but I also know
19 that there are arguments on both sides of that, and
20 it's not -- I can understand why the legislature might
21 have decided not to require the publication of all
22 prices for every service everywhere in the economy but
23 still have required it for telecommunication services.

24 Q. Okay. Can I assume that you received no
25 complaints from any of ELI's customers regarding this

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1 issue that we are here on today?

2 A. Not from the customers.

3 Q. Did you receive any complaints from its
4 competitors?

5 A. When we had the original contract where
6 Electric Lightwave had sold service in Spokane and had
7 sold off a lot of telephone prefixes over there to a
8 customer, we heard informal complaints at that time.

9 Q. From what companies?

10 A. Qwest -- well, it wasn't Qwest then. It was
11 U S West -- GTE. There is a group of companies that
12 are involved in planning for area code relief, and
13 virtually every company that was involved in that
14 process expressed informal complaints about Electric

15 Lightwave having done that without filing its contract.
16 Q. Are we talking about complaints regarding the
17 number of numbers that were being reserved or
18 complaints about the fact that the prices were not
19 published?

20 A. The latter. It was the former too, but it
21 was both.

22 Q. So how did these complaints come in,
23 officially in writing?

24 A. No. They were informal. Companies
25 expressing concern that if Electric Lightwave were

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1 doing something like that that didn't appear to be an
2 offering within its tariff. We all struggled for a
3 period of weeks to figure out how that had come to be
4 because we would have expected to see a contract on
5 file here for something like that.

6 Q. That would cause you to inquire with Electric
7 Lightwave with respect to why its contract hadn't been
8 filed?

9 A. Yes.

10 Q. Would you agree that when this issue arose
11 that Electric Lightwave came back to Staff and
12 acknowledged the contract had not been filed?

13 A. Yes.

14 Q. Would you agree that throughout this process
15 that Electric Lightwave has made attempts to get into
16 compliance with the rule?

17 A. Yes. I think that they made a good-faith
18 effort last year to go through and find all the
19 contracts that they had failed to file previously.

20 Q. Now, with respect to the administrative code,
21 Section 120-027, were the contracts that Electric
22 Lightwave filed late, were those the first ones that
23 had ever been filed late?

24 A. No. Electric Lightwave filed about 20 late
25 before that.

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1 Q. No. I mean by any company.

2 A. I doubt it, but I can't tell you a specific
3 contract that was filed late before that.

4 Q. If contracts had been filed late previously,
5 would Staff have taken action on them?

6 A. Not necessarily. It would depend upon the
7 circumstances.

8 Q. So it's possible that many contracts were
9 filed late and Staff just never took action; is that
10 fair?

11 A. Anything is possible. I don't know what you
12 mean, is it fair.

13 Q. Is the question fair?

14 A. It's a fair question that that is possible
15 because it's not impossible.

16 Q. To your knowledge, there are no other staff
17 documents or any Commission orders in which any fines
18 or penalties have been assessed based on late-filed
19 contracts prior to the case we are in here for today;
20 right?

21 A. I can't think of any that are based on the
22 late filing of contracts.

23 Q. Is my understanding correct that the rule
24 requires all companies and competitors to file
25 contracts?

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1 A. All companies are required to file them. The
2 time period differs depending on the type of company.

3 Q. Would you agree that the exhibit, the list of
4 CLECs, there are approximately 146 CLECs?

5 A. I don't have a number in my head.

6 Q. The exhibit speaks for itself. Would you
7 agree that all those companies have the same obligation
8 to file contracts as Electric Lightwave?

9 A. Yes.

10 Q. Do you know how many of those companies of
11 the 146 actually filed contracts?

12 A. I don't know how many have ever filed a
13 contract. I know of a couple that come to mind that
14 have filed contracts, including XO Communications and
15 TCG.

16 Q. Out of that number of CLECs, whatever the
17 number is, are there some that maybe should be filing
18 contracts and aren't?

19 A. Not necessarily. As long as a company
20 charges the prices that it publishes in its price list,
21 there is no requirement that they file a contract. So
22 the contract may well exist, and it may set out the
23 terms under which the service is provided, but as long
24 as the company's price list covers that service, there
25 is no requirement that contracts be filed.

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1 Q. But if there is a contract, it varies from
2 the price list they are required to file; is that
3 correct?

4 A. Yes.

5 Q. My question is, to your knowledge, are there
6 any companies out there who should be filing contracts
7 and who are not?

8 A. I can't think of any knowledge that I have of
9 that, no.

10 Q. Does Staff check on that?

11 A. I can't think of any time we've checked on
12 it, no.

13 Q. It's possible then that there could be 100
14 companies for all you know that should be filing
15 contracts and are not.

16 A. Anything is possible.

17 Q. I'm curious regarding the filing that Staff
18 made. Apparently, this issue came up back in October
19 with Electric Lightwave, at least with the penalty
20 assessment, and Staff in its filing has now indicated
21 that subsequently, two other companies have been fined
22 for not filing contracts on time; is that right?

23 A. Yes.

24 Q. Can you tell us why the change in
25 enforcement?

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1 A. I'm sorry. Was there a change in
2 enforcement?

3 Q. We had Electric Lightwave, I think we
4 discussed, in October or so. Prior to that, as I
5 understand it, you don't know of any enforcement and
6 activity where penalties were assessed.

7 A. Right.

8 Q. Then Electric Lightwave was assessed
9 penalties. We asked for this hearing, and I think in
10 February, two other companies have now been brought and
11 penalized for not filing contracts. Has there been any
12 change in the enforcement that the Commission staff has
13 engaged in?

14 A. I think that over time, we have become more
15 diligent about insuring that companies comply with this
16 particular requirement. We have continued to work with
17 companies wherever possible to try to bring them into
18 compliance, so enforcement has never been our first
19 option, but both Verizon and XO Communications, we
20 found that in some cases those informal efforts did not
21 eliminate the problem, so we made a decision to assess
22 penalty in those cases as well.

23 Q. Now, you are aware, are you not, that
24 Electric Lightwave, November 2nd, I think, pursuant to
25 input from Staff, requested a waiver of the special

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1 contract filing provision; is that right?

2 A. I'm aware that they made that request for a
3 waiver, yes.

4 Q. Subsequent to that, has Staff actually
5 initiated a rule-making regarding price list filings
6 and special contracts?

7 A. No. We initiated that rule-making prior to
8 the date you gave.

9 MR. BEST: I don't have this marked, Your
10 Honor. I ask just to show it to the witness. I think
11 you can take judicial notice. We need to make copies.
12 Mr. Blackmon, I'm going to hand you -- it's not been
13 marked --

14 JUDGE HENDRICKS: Let me see what it is.
15 This is a notice of opportunity to file written
16 comments in Docket No. U-991301 related to rules,
17 related to priced lists and Commission general tariffs.
18 The WAC is 480-80-035. Mr. Thompson?

19 MR. THOMPSON: Thank you.

20 MR. BEST: Again, if I could approach the
21 witness.

22 Q. (By Mr. Best) Mr. Blackmon, have you seen
23 this document before?

24 A. Yes, I have.

25 Q. Is that essentially a notice of proposed

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1 rule-making from the Commission?

2 A. No, it's not.

3 Q. What is that?

4 A. It's a notice of opportunity to file written
5 comments and a notice of a workshop. There was a
6 notice of proposed rule-making issued on January 3rd,
7 2001, according to the first sentence in the document.

8 Q. That would have been subsequent to Electric
9 Lightwave's November 2nd filing; is that correct?

10 A. That notice would have been, yes, but that
11 was not the filing that initiated this rule-making
12 effort. We don't start with a CR 102. You can see by
13 the date that document number itself is U-991301. That
14 docket would have to have been initiated in 1999.

15 Q. So this has been kicking around for two
16 years?

17 A. This rule-making started in 1999.

18 Q. I guess if that's true, that's true. Would
19 you agree, however, that this document, the notice of
20 proposed rule-making, proposes to amend the rules for
21 filing special contracts?

22 A. Yes, it does.

23 Q. Would you agree that the new rule would
24 require contracts be filed within 15 days rather than
25 five?

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1 A. Yes, that's correct.

2 Q. Would you agree that in November, Electric
3 Lightwave actually requested that the rule be waived or
4 it be allowed to file within 15 days?

5 A. Yes.

6 MR. BEST: Do you want a copy of this?

7 JUDGE HENDRICKS: We can make a copy
8 afterwards.

9 MR. BEST: I just don't want to forget about
10 it.

11 JUDGE HENDRICKS: What we will do is, if
12 there is no objection, add that as a Subpart 9 to
13 Exhibit A. Mr. Thompson?

14 MR. THOMPSON: Fine.

15 MR. BEST: That's all I have.

16 JUDGE HENDRICKS: Thank you. Mr. Thompson?

17 MR. THOMPSON: I just want to clarify one
18 matter.

19

20 E X A M I N A T I O N

21 BY MR. THOMPSON:

22 Q. Mr. Blackmon, Mr. Best was asking you about
23 whether or not there were complaints from competitors
24 that may have given rise to this penalty, and there was
25 a discussion about a situation in Spokane?

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1 A. Yes.

2 Q. The contract that we are talking about in
3 Spokane there, that's not the one for which these
4 penalties were issued; correct?

5 A. No, it's not.

6 Q. That was about January of 2000?

7 A. That date sounds about right. The contract
8 itself may have been earlier than that.

9 Q. Then wasn't there an investigation following
10 that? I'm just trying to tie this together with your
11 declaration.

12 JUDGE HENDRICKS: Before we begin, could we
13 just specifically refer to this declaration and assign
14 it an exhibit number? We are referring to a prefiled
15 document, the declaration of Dr. Glenn Blackmon in
16 opposition to ELI's application for mitigation penalty,
17 and also prefiled with that declaration was WUTC staff
18 written statement and evidentiary documents, and we'll
19 assign that Exhibit No. B, Subpart 1 as the
20 declaration, and 2 being the written statement. Is
21 there any objection to admitting these as exhibits?

22 MR. BEST: No.

23 JUDGE HENDRICKS: Then they are admitted.

24 Please proceed.

25 Q. (By Mr. Thompson) So following the filing of

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1 the contract that there was discussion about earlier in
2 Spokane, it was after that the 19 or 20-some contracts
3 were filed; is that right?

4 A. Yes, that's correct. I believe that after we
5 identified this contract service in Spokane, Electric
6 Lightwave produced a contract for us at first not as a
7 filing of contract under WAC 480-120-027 but just more
8 in the form of informal discovery response.

9 They then later made a formal filing of that
10 contract and reviewed their records and found, I
11 believe, it was 19 other contracts that should have
12 been filed but had not been. None of those are
13 involved as the penalty today. This penalty comes
14 after that process and after Electric Lightwave's
15 commitment to bring itself in compliance with the rule
16 on a going-forward basis.

17 MR. THOMPSON: I think that's all I have.

18 JUDGE HENDRICKS: Did you wish to make any
19 other statement?

20 MR. THOMPSON: Yes. I'd just like to make a
21 comment with regard to Mr. Best's opening remarks, and
22 I think he is correct. What we have in this
23 application is basically an argument about policy and
24 about a matter that's within the discretion of the
25 Commission. There is no disagreement about the facts,

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1 and there really is no disagreement about the
2 application of the law. I think it's legitimate to
3 make this kind of policy argument within the framework
4 that's set up by statute for these applications for
5 remission or mitigation penalties as it's set out in
6 the particular statute that will ask for these penalty
7 rules in this way.

8 However, Staff does disagree with the policy
9 argument as stated by ELI, and we would urge the
10 Commission to deny the application for mitigation of
11 penalty, and I want to summarize why exactly that is. I
12 think it can't be denied that this violation for which
13 ELI is being penalized here was not as grave as some of
14 the other instances in which the Commission has issued
15 penalties, and Mr. Best did a good job of finding
16 pretty egregious things that other telecommunications
17 companies had done and been penalized for, but by the
18 same token, these penalties are not as large as in
19 those instances either, and we are not talking about a
20 huge sum of money here, and as was also noted by
21 Mr. Best, the Commission has subsequently issued two
22 more very similar notices and penalties against
23 companies for failing to file contracts in a timely
24 manner.

25 As I said in my written statement, if the

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1 Commission were always held to be consistent with its
2 past actions, it would be difficult for us to change
3 its policy if it decided it needed to do so for
4 whatever reason. This is also not a case of Staff
5 being robotic or unreasonable in its enforcement
6 practices either. Staff could have imposed penalties,
7 pretty considerable penalties, back in May of 2000 when
8 ELI produced the additional 19 for a total of 20
9 contracts that had not been filed, and in fact, 10 of
10 those, I believe, were so old as to not even be
11 effective anymore. At that time, Staff met with
12 representatives of the Company and was assured that the
13 Company would come into compliance with the rule.

14 When a few months later then the Commission
15 received the two contracts that are the subject of this
16 penalty, it requested the Commission to issue the
17 penalty for \$1,300. That's not an outrageous amount.
18 I think it's pretty well calculated to get the
19 Company's attention and let the Company know that the
20 Commission does take the ruling seriously and expects
21 compliance with the Company.

22 I would also note that ELI has subsequently
23 filed three additional contracts late since the two
24 contracts in this case, and that's something, I
25 believe, the Commission can take notice of. I included

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1 copies on my statement of the docket sheets for those
2 three contracts, and I think on their face, it's
3 obvious the effective date is more than five days prior
4 to the filing date.

5 Now, a large part of what ELI seems to be
6 saying is that this is a burdensome and unnecessary
7 rule, and therefore, they should be cut some slack in
8 complying with it. And it is true that the Commission
9 is considering revising the rule to allow 15 days for
10 filing, and it's also true that the Commission is
11 seeking a legislation that would allow them the
12 flexibility to weigh the contract filing requirement as
13 well. But even though those two things are true, I
14 would just submit that the Commission would be remiss
15 in its charge from the legislature as contained in the
16 statute pertaining to filing of contracts; that if it
17 were to just sort of wink at the competitive companies
18 and say, Yes, we have this law in the books and we have
19 a rule as well enforcing it, but you don't have to take
20 that seriously, I think would do a disservice to the
21 legal structure that's set up for the Commission to
22 operate within, and I think where there is such a
23 repeated example of a company not complying with the
24 rule and so much under the nose of Staff, as it were,
25 that the Commission has to draw a reasonable line

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1 somewhere, and I would say that the record displays
2 that Staff has drawn a reasonable line, and the
3 Commission should stick to that and deny Electric
4 Lightwave's application for mitigation of that penalty.

5 JUDGE HENDRICKS: Thank you, Mr. Thompson.
6 Mr. Best, do you have a statement in closing?

7 MR. BEST: Yes, I do. First of all, I'm a
8 little concerned about Mr. Thompson's characterization
9 of Staff imposing penalties. It's my understanding
10 that the Commission imposes penalties, not Staff, and
11 that's really why we are here. Electric Lightwave
12 wants the Commission to take a very hard look at this.
13 The facts are not in dispute. We have violated the
14 rule. We acknowledge we violated the rule. When we
15 found out we were violating the rule, we did our best
16 to get into compliance. We weren't filing anything at
17 all. We made sure those procedures got back in place.

18 Now, the rule says you've got to file within
19 five business days, and what I would ask you to do is
20 look at our waiver request, because in that, we fairly
21 well detail what the problem is. Our salespeople
22 essentially deal with the customer. They are supposed
23 to send a contract for regulatory review. We've got
24 five business days to get all that done. All that now
25 Staff is complaining about is not that we are not doing

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1 it, it's that they are late, and they are a few days
2 late.

3 Mr. Thompson is absolutely right. What we
4 are looking for -- I'm not looking for the Commission
5 to ignore the law, but the truth of the matter is, is
6 this the kind of offense that merits penalties? We are
7 very troubled by the fact that we bent back through all
8 the Commission's order for the last five years. The
9 only orders issuing penalties were the ones we've
10 listed. It wasn't like I just picked out the worst
11 ones. The Commission is not imposing penalties for
12 these kinds of violations.

13 It's also interesting to note that prior to
14 our case, Staff wasn't apparently paying attention to
15 these issues or had done nothing about them previously.
16 Now all of a sudden because we've raised a stink about
17 it, they are enforcing the rule with everybody else.
18 Maybe that's okay. I don't know. But the point is, we
19 want the Commission to take a hard look at this and
20 decide in the competitive environment, do you need to
21 penalize companies that cannot harm customers or
22 competitors by being late a few days in filing
23 contracts? We think it's inappropriate. We think it's
24 not pro competitive, and we believe the Commission here
25 would be seeking retribution it really doesn't need.

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1 In fact, it puts a chilling impact on the competitive
2 environment.

3 We also believe, quite frankly, that of the
4 140 CLECs or however many there are, that there are a
5 large, large number that aren't filing anything at all
6 and probably should be, but yet because we are trying
7 to comply with the rule, and it is under Staff's nose,
8 we are the ones getting singled out because we are
9 trying to comply in good faith. We have made every
10 attempt to comply. The truth is, we are probably going
11 to have more late contracts. I'm not going to tell you
12 we aren't. We are doing our best. The problem is we
13 can't completely control it. Five days is not very
14 much time.

15 Our other option is to add more people to
16 Electric Lightwave basically to comply with regulatory
17 requirements, and I find it hard to believe the
18 Commission really would want that. Maybe they do, and
19 maybe they will tell us that. All we are asking the
20 Commission to do is look at this in light of all the
21 other things it's done in the past, the things it wants
22 to do in the future.

23 Again, we asked for a waiver back in November
24 of 2000. Oddly enough, whoever's proposal it is under
25 this new rule-making -- maybe it was back in 1999 --

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1 almost exactly mirrors our request, and yet, we are
2 telling you right now that we have missed this. We may
3 continue to miss it. We are doing our best, but just
4 to suggest that we are thumbing our nose at the law is
5 not the case. We believe that the Commission really
6 needs to take all the surrounding circumstances into
7 account here. It's my belief that the Commission did
8 not do that, and again, our reason for requesting this
9 hearing is to give them a chance to look at the whole
10 enchilada, if you will, look at all the facts in this
11 case and decide if assessing penalties is really
12 necessary here.

13 Have we been rapped on the wrist?

14 Absolutely. What we are saying is, don't single us
15 out, which is the way it was, quite frankly, when we
16 filed this, and now all of a sudden, we've got lots of
17 company, and I don't know what take the Commission is
18 going to have on that, but my view is that just because
19 we got fined doesn't mean they should throw everybody
20 else in the coosgow (phonetic) too. Let's let this
21 rule come into effect. Let's see if we can get
22 everybody in compliance, but to punish people in the
23 interim makes no sense. If the Commission has nothing
24 better to do, I've really got to question that.

25 That's basically our position. One last

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1 thing I want to point out is that for some reason now,
2 we are involved with the three late contracts that we
3 also recently filed. I'll acknowledge that right now.
4 I believe it's correct that they were late. However,
5 the thing that wasn't mentioned is not only do we have
6 this waiver out and pending, we filed three individual
7 waivers for each of those contracts too.

8 So we've made every effort to comply. We
9 knew they were late. Let's see if we can get a waiver
10 for these, so again, it's not like we are thumbing our
11 nose at the Commission. We are doing our very best,
12 and unless we are going to add more resources, which is
13 really for regulatory purposes only, it would be
14 difficult for us to make sure absolutely positively we
15 are going to get every single contract into the
16 Commission on time. So again, we would ask that the
17 Commission grant our mitigation petition and eliminate
18 the penalty.

19 JUDGE HENDRICKS: Thank you, Mr. Best. Just
20 to clarify, ELI then is asking for the Commission to
21 remit the penalty and not to mitigate.

22 MR. BEST: Correct. It's either/or, I guess.
23 If they won't remit, then we would like to mitigate it.

24 JUDGE HENDRICKS: Was ELI aware of rules
25 before it was given notice of penalties in the first

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1 instance?

2 MR. BEST: Yes, and it's my understanding we
3 had been complying and fell out of compliance due to
4 some internal changes within the Company. It just fell
5 through the cracks, is what I understand.

6 JUDGE HENDRICKS: Is there anything more to
7 come before the Commission?

8 MR. THOMPSON: There is the issue of -- I'm
9 not sure how it would work in this case, because there
10 has been an order issued by the Commission, that is,
11 the commissioners, already, and I don't know if the
12 procedure is for there to be an initial order from the
13 ALJ, unless we agree to skip that.

14 JUDGE HENDRICKS: I'll ask that now, if the
15 parties would like to waive the entry of an initial
16 order and move straight to a decision by the
17 Commission?

18 (Discussion held out of hearing range.)

19 MR. BEST: If I could, Your Honor, what would
20 the process be with respect to the final order then if
21 we were to waive the initial order?

22 JUDGE HENDRICKS: There is still an
23 opportunity to request reconsideration.

24 MR. BEST: No. What's the process by which
25 the order would be decided? I would understand that in

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1 an initial order, you would write that order, and now
2 the question becomes, if you are not going to write the
3 initial order, how would the process take place?

4 JUDGE HENDRICKS: The commissioners would
5 make a decision based on the record developed thus far.

6 MR. BEST: Would the ALJ have input into that
7 order, or do they pretty much take the record and go?

8 JUDGE HENDRICKS: The commissioners can
9 request input from the ALJ, and that often happens.

10 MR. BEST: It's not required?

11 JUDGE HENDRICKS: The ALJ would have
12 something to say with regard to the credibility of
13 witnesses and so forth.

14 MR. BEST: Since there is no factual dispute
15 here, let me cut right to the quick. I guess generally
16 my experience has been that the ALJ, even if the
17 Commission is doing the order, writes the order for the
18 Commission. Is that the case here or not?

19 JUDGE WALLIS: That's generally the case,
20 yes.

21 MR. BEST: I think then we would be willing
22 to waive the requirement for an initial order.

23 JUDGE HENDRICKS: Mr. Thompson?

24 MR. THOMPSON: That's our preference as well.

25 JUDGE HENDRICKS: Then we will have this

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1 moved directly to a Commission order. Is there
2 anything to come before the Commission at this time?

3 MR. BEST: One more thing. We did make
4 reference to this document. I don't know if you want
5 to put this in the record. I think it would be a good
6 idea.

7 JUDGE HENDRICKS: I think I did, and this is
8 the notice of opportunity to file written comments, and
9 I think I said at one point that we will have this
10 appear on the record as Subpart 9 to Exhibit A.

11 MR. BEST: You don't need a copy of that
12 then?

13 JUDGE HENDRICKS: We can get that after we
14 are finished. Is that all? All right then, this
15 matter is adjourned. Thank you for attending.

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17 (Conference concluded at 11:15 a.m.)

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