

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

PENALTY ASSESSMENT AGAINST  
TEL WEST COMMUNICATIONS, LLC,  
in the amount of \$143,100.00

DOCKET NO. UT-040572

STAFF RESPONSE TO  
APPLICATION FOR  
MITIGATION OF PENALTIES

1           The Commission assessed penalties on Tel West Communications, LLC, (Tel West) totaling \$143,100 for violations of WAC 480-120-147(5)<sup>1</sup> and WAC 480-120-166.<sup>2</sup> On July 9, 2004, Tel West filed an application for mitigation of penalties (Application). Pursuant to WAC 480-07-370(1)(c), Commission Staff submits the following response to the Application. Staff respectfully requests the Application be denied regarding penalties for the preferred carrier freeze violations. Staff supports mitigating penalties for failure to respond by \$500.

**I. BACKGROUND**

2           Tel West operates in Washington as a telecommunications company. Tel West reported 8,691 access lines and gross intrastate operating revenue of \$3.4

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<sup>1</sup> WAC 480-120-147(5) requires telecommunications companies to verify a customer's authorization of a preferred carrier freeze in the manner prescribed by WAC 480-120-147(1) and (2).

<sup>2</sup> WAC 480-120-166 prescribes the amount of time in which telecommunications companies are required to respond to Commission-referred customer complaints.

million for 2003.<sup>3</sup> Between July 2003 and April 2004, the Commission's Consumer Affairs Staff received 77 informal complaints from Tel West customers.<sup>4</sup>

Investigation into the informal complaints gave rise to violations of WAC 480-120-166, which outlines the response requirements for Commission-referred complaints. The informal complaints also alerted Staff to issues regarding Tel West's treatment of preferred carrier freezes.

3           The Commission's Business Practices Staff investigated Tel West's business practices relating to preferred carrier freezes and responding to Commission-referred complaints.<sup>5</sup> During that investigation, Staff requested a list of all new Tel West customers from September 2003, along with information about whether a preferred carrier freeze was placed on the new accounts. Staff's investigation resulted in 3,227 alleged violations: 2,830 violations of WAC 480-120-147(5)(c) (preferred carrier freeze) and 397 violations of WAC 480-120-166 (Commission-referred complaints).<sup>6</sup>

4           Staff summarized its investigation in a report titled "Staff Investigation into the Business Practices of Tel West Communications, LLC."<sup>7</sup> A copy of the report was sent to Tel West on May 14, 2004, and Staff met with the Company to discuss

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<sup>3</sup> Declaration of Betty Young, Exhibit A at 4.

<sup>4</sup> Declaration of Betty Young at ¶ 9 and Exhibit A at 4.

<sup>5</sup> Declaration of Betty Young at ¶ 5.

<sup>6</sup> Declaration of Betty Young, Exhibit A at 16.

<sup>7</sup> Declaration of Betty Young at ¶ 5 and Exhibit A.

the violations on May 20, 2004.<sup>8</sup> Staff added a footnote to the report as a result of the meeting and sent the revised report to Tel West on June 2, 2004.<sup>9</sup>

5           The Commission assessed penalties in the amount of \$143,100 for violations of WAC 480-120-147(5) occurring between December 1, 2003, and February 29, 2004, and for violations of WAC 480-120-166 occurring between July 2003 and April 2004.<sup>10</sup>

## II. ARGUMENT

6           This Response first discusses specific complaints Tel West addressed in its Application. Second, this Response addresses whether Tel West received proper notice of the violations on which the penalties are based. Third, this Response addresses equitable estoppel. Fourth, this Response addresses the Commission's legal standards regarding penalty assessments. Fifth, this Response addresses the Eighth Amendment of the United States Constitution.

### **A. The Penalty Against Tel West Should be Mitigated by No More Than \$500.**

7           Tel West argues the violations of WAC 480-120-166 associated with seven specific informal complaints should be reduced by 78%.<sup>11</sup> Staff reviewed the seven informal complaints and will address each one individually. Based on that review, Staff supports mitigation of \$500.

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<sup>8</sup> Declaration of Betty Young at ¶ 6-7.

<sup>9</sup> Declaration of Betty Young at ¶ 8.

<sup>10</sup> *Penalty Assessment Against Tel West Communications, LLC*, Docket No. UT-040572, Penalty Assessment Order at 2 (June 23, 2004).

<sup>11</sup> Application at 7-8.

**1. Complaint No. 85585.**

8 Tel West requests the violations associated with Complaint No. 85585 be reduced by 33. Tel West states it did not receive the email message from Staff dated September 26, 2003, and responded to the message received on October 14, 2003, ten business days later on October 28, 2003.

9 Complaint No. 85585 resulted in 93 alleged violations documented by Staff.<sup>12</sup> Tel West received four violations with respect to Staff's request for information on September 26, 2003. The complaint record indicates Tel West informed Staff that it did not receive the September 26, 2003, request for information. Staff re-sent the request, and Tel West responded on the same day.<sup>13</sup> Because it appears that Tel West did not receive the initial communication from Staff, the Commission should reduce the violations by four. Thus, the penalties should be mitigated by \$400.

10 Tel West received 36 violations with respect to Staff's request for information on October 14, 2003.<sup>14</sup> A response was due on October 17, 2003.<sup>15</sup> If Tel West had responded to Staff on October 28, 2003, it would have only received 7 violations.

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<sup>12</sup> Declaration of Betty Young at ¶ 21 and Exhibit A at 14.

<sup>13</sup> Declaration of Betty Young, Exhibit B at 25.

<sup>14</sup> It appears that there is a typographical error in Tel West's favor regarding Complaint No. 85585. At the end of the complaint record, Staff summarized the violations and stated that a response was received from Tel West on December 12, 2003. Declaration of Betty Young, Exhibit B at 32. However, the complaint record shows no activity on December 12, 2003. Rather, the complaint record demonstrates that Tel West responded to Staff's October 14, 2003 request for information on December 22, 2003. Declaration of Betty Young, Exhibit B at 26. Thus, the actual number of violations associated with the October 14, 2003 request for information should have been 43, rather than 36.

<sup>15</sup> Declaration of Betty Young, Exhibit A at 14.

However, the complaint record shows the only activity on October 28, 2004, was a message sent from Staff to Tel West requesting a response.<sup>16</sup> Staff has no record of a response from Tel West on October 28, 2003.<sup>17</sup> The penalty should not be mitigated.

**2. Complaint No. 86836.**

11 Tel West argues the violations associated with Complaint No. 86836 should be reduced by one because the wrong Tel West contact received the complaint and the correct contact responded within the required time after receiving the complaint.<sup>18</sup> The complaint record supports Tel West's claim.<sup>19</sup> Thus, the violations should be reduced by one and the penalties mitigated by \$100.

**3. Complaint Nos. 87418 and 87843.**

12 Tel West argues the violations associated with Complaint No. 87418 and Complaint No. 87843 should be reduced by three because Qwest, not a Tel West customer, filed the complaint.<sup>20</sup> Tel West received two violations for Complaint No. 87418 and one violation for Complaint No. 87843.<sup>21</sup>

13 Staff does not accept complaints filed by a company on behalf of a customer.<sup>22</sup> Complaint No. 87418 was filed by a customer located in Bremerton,

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<sup>16</sup> Declaration of Betty Young, Exhibit B at 26.

<sup>17</sup> Declaration of Betty Young at ¶ 22.

<sup>18</sup> Application at 7.

<sup>19</sup> Declaration of Betty Young at ¶ 23 and Exhibit B at 37-39.

<sup>20</sup> Application at 7.

<sup>21</sup> Declaration of Betty Young, Exhibit A at 14.

<sup>22</sup> Declaration of Betty Young at ¶ 24.

Washington.<sup>23</sup> Complaint No. 87843 was filed by a customer located in Centralia, Washington.<sup>24</sup> Neither complaint was filed by Qwest. Mitigation is not appropriate.

#### **4. Complaint No. 87759.**

14 Tel West argues violations associated with Complaint No. 87759 should be reduced by seven because Staff did not request information.<sup>25</sup> Staff's email to Tel West dated March 12, 2004, was a request for information.<sup>26</sup> Staff's March 12, 2004 message responded to an email from Tel West stating that the customer in question provided authorization.<sup>27</sup> Staff's message stated: "I listened to the TPV again. I did NOT hear the consumer authorize Tel West to place a local line freeze on the account in accordance with WUTC rules."<sup>28</sup> Placed in context, the March 12, 2004 message was a request for information. In addition, Tel West responded with information on March, 29, 2004, after two messages from Staff requesting a response to the March 12, 2004 email.<sup>29</sup> Mitigation is not appropriate.

#### **5. Complaint No. 87670.**

15 Tel West argues violations associated with Complaint No. 87670 should be reduced by 28 because it provided information on February 11, 2004, and that Staff

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<sup>23</sup> Declaration of Betty Young, Exhibit B at 48-50.

<sup>24</sup> Declaration of Betty Young, Exhibit B at 94-95.

<sup>25</sup> Application at 7-8.

<sup>26</sup> Declaration of Betty Young at ¶ 25.

<sup>27</sup> *Id.*

<sup>28</sup> Declaration of Betty Young, Exhibit B at 91.

<sup>29</sup> Declaration of Betty Young at ¶ 25.

had the software necessary to access the information.<sup>30</sup> The violations arose for a lack of response, not for the format in which sound files were produced.<sup>31</sup> Thus, no mitigation is required.

#### **6. Complaint No. 88017.**

16 Tel West argues the violations associated with Complaint No. 88017 should be reduced by six because Staff's email dated March 12, 2004, was a request for a favor for the customer, not a request for information.<sup>32</sup> Staff's message dated March 12, 2004, requested information regarding how Tel West was willing to resolve the informal complaint.<sup>33</sup> In addition, Staff sent follow-up messages to Tel West when the Company failed to respond to the March 12, 2004 request for information.<sup>34</sup> Tel West responded on March 25, 2004, with the requested information.<sup>35</sup> No mitigation is appropriate.

#### **B. The Penalty Assessment Order Provided Tel West with Sufficient Notice**

17 Tel West argues it did not have fair notice about the claim or the grounds upon which the claim rests because the words "authorization" and "verification" were used interchangeably.<sup>36</sup> The distinction between authorization and

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<sup>30</sup> Application at 8.

<sup>31</sup> Declaration of Betty Young at ¶ 26 and Exhibit B at 75-78.

<sup>32</sup> Application at 8.

<sup>33</sup> Declaration of Betty Young at ¶ 27 and Exhibit B at 102.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Application at 4-6.

verification is not as defined as Tel West argues. Moreover, Tel West had sufficient notice regarding the violations asserted in the penalty assessment.

18 Authorization and verification cannot exist without the other; they are part of the same process. Verification cannot be accomplished without authorization because the purpose of the third party verification is to verify authorization given by the customer to the telecommunications company. Authorization simply cannot be proved without verification. Authorization without verification is hollow because both authorization and verification must occur before a telecommunications company may place a preferred carrier freeze on a customer's account.<sup>37</sup> Thus, using authorization and verification interchangeably did not deprive Tel West of notice of the claims against it.

19 Even if the distinction between authorization and verification is as clear as Tel West argues, the Penalty Assessment provided the Company with sufficient notice of the violations for which penalties were assessed. In describing the basis of the penalties assessed for violations of WAC 480-120-147(5), the Penalty Assessment states, "The Commission believes that Tel West was provided with sufficient information to correct its *third party verification process* to include authorization of

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<sup>37</sup> WAC 480-120-147(5)(c) states: "No local exchange carrier may implement a preferred carrier freeze unless the customer's request to impose a freeze has first been confirmed in accordance with the procedures outlined for confirming a change in preferred carrier, as described in subsections (1) and (2) of this section."



the preferred carrier freeze no later than the end of November 2003.”<sup>38</sup> The Penalty Assessment also describes the similarity between Washington State requirements and Federal Communications Commission (FCC) requirements regarding verification of the authorization received from a customer.<sup>39</sup>

20           In addition, Staff’s report provided Tel West with notice of the violations. Staff’s report specifically cites WAC 480-120-147(5)(c) as the section Tel West violated.<sup>40</sup> Tel West received a copy of the report on May 14, 2004.<sup>41</sup> Staff met with Tel West on May 20, 2004, and discussed the violations with the Company.<sup>42</sup> Staff explained the violations and why the Company incurred them.<sup>43</sup> Thus, not only did the Penalty Assessment provide sufficient notice of the claims against Tel West, but the Company had actual knowledge of the basis for the violations.

21           Tel West’s argument does not support mitigation. Because the Penalty Assessment provided sufficient notice of the claims against Tel West, the Commission should reject Tel West’s argument.

**C.     Equitable Estoppel Does Not Apply in This Case.**

22           Tel West argues that because the number of violations cited in Staff’s investigation report is different than the number of penalties cited by Staff in email

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<sup>38</sup> *Penalty Assessment Against Tel West Communications, LLC*, Docket No. UT-040572, Penalty Assessment Order at 2 (emphasis added).

<sup>39</sup> *Id.*

<sup>40</sup> Declaration of Betty Young, Exhibit A at 5.

<sup>41</sup> Declaration of Betty Young at ¶ 6.

<sup>42</sup> Declaration of Betty Young at ¶ 7.

<sup>43</sup> *Id.*

communications to Tel West, the penalty should be mitigated. Tel West bases its argument on equitable estoppel.<sup>44</sup>

23           Equitable estoppel applies when an admission, statement, or act has been made which has been justifiably relied upon to the detriment of another party.<sup>45</sup> To establish equitable estoppel, Tel West must show (1) an admission, act, or statement by the Commission inconsistent with a later claim; (2) Tel West's reasonable reliance on the admission, act, or statement; and (3) injury to Tel West would result if the Commission is allowed to contradict or repudiate the earlier admission, act, or statement.<sup>46</sup>

24           Equitable estoppel against the government is not favored.<sup>47</sup> Thus, in addition to the elements listed above, a party seeking to estop the government must establish that estoppel is necessary to prevent a manifest injustice and will not impair the exercise of government functions.<sup>48</sup> Proof of the estoppel elements must be by clear, cogent, and convincing evidence.<sup>49</sup> Tel West does not provide clear, cogent, and convincing evidence that equitable estoppel applies in this case.

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<sup>44</sup> Application at 6-7.

<sup>45</sup> *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 19, 43 P.3d 4 (2002).

<sup>46</sup> *Id.* at 19-20.

<sup>47</sup> *Id.* at 20.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

**1. No Prior Admission, Act, or Statement is Inconsistent with the Resulting Penalty Assessment.**

25 The statements made by Staff to the Company are not inconsistent with the Commission's Penalty Assessment.<sup>50</sup> When Staff cites a company with a violation, the purpose is to provide the company with technical assistance by informing the company of the areas in which it does not comply.<sup>51</sup> In this case, not only did Staff inform Tel West of the areas in which it did not comply, but Staff also informed Tel West of the potential for continuing violations on numerous occasions.<sup>52</sup>

26 Companies regulated by the Commission have notice that penalties may be assessed for each day a violation continues. RCW 80.04.405 provides that penalties may be assessed for each violation, and that "in the case of a continuing violation every day's continuance shall be and be deemed to be a separate and distinct violation."

27 The difference between the number of violations communicated to Tel West and the number of violations evidenced in Staff's report, and ultimately in the Penalty Assessment, is the number of days the violation continued. The number of days over which the violation continued determines how many violations are subject to penalty. Thus, Staff's communication with the Company prior to the

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<sup>50</sup> Tel West compares Staff's email communication with Staff's investigation report. However, the more appropriate comparison is between the email communication and the Penalty Assessment.

<sup>51</sup> Declaration of Betty Young at ¶ 14.

<sup>52</sup> Declaration of Betty Young at ¶ 15 and Exhibit D.

Penalty Assessment is consistent with the Penalty Assessment, and equitable estoppel is not appropriate.

**2. There was No Reasonable Reliance.**

28 In discussing the violations with the Company, Staff informed Tel West that the violations would be continuing violations. In addition, Tel West has an obligation to be familiar with the Commission's statutes and regulations affecting the Company.

29 Where both parties can determine the law and have knowledge of the underlying facts, equitable estoppel does not apply.<sup>53</sup> In this case, Tel West knew what behavior was subject to penalties. Tel West also knew, or should have known, the statutory and rule requirements. Thus, Tel West could not have reasonably relied on each violation being a single violation subject to a single penalty.

**3. Estoppel is Not Necessary to Prevent Manifest Injustice.**

30 When a regulated company commits violations of statute, rule, or Commission order, it is subject to penalties.<sup>54</sup> Tel West committed numerous violations of WAC 480-120-147(5) and WAC 480-120-166 over the course of several months. Violations of WAC 480-120-147(5) are documented from September 2003 through February 2004.<sup>55</sup> Violations of WAC 480-120-166 are documented from July

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<sup>53</sup> *Schoonover v. Dept. of Social and Health Services*, 116, Wn. App. 171, 180, 64 P.3d 677 (2003).

<sup>54</sup> RCW 80.04.405; RCW 80.04.380.

<sup>55</sup> Declaration of Betty Young, Exhibit A at 10-11.

2003 through March 2004.<sup>56</sup> Penalties for these violations could total as much as \$322,700.<sup>57</sup>

31 Penalties were reasonably imposed for violations of WAC 480-120-147(5) occurring between December 1, 2003, and February 29, 2004. Likewise, penalties were reasonably imposed for violations of WAC 480-120-166 occurring between July 2003 and April 2004. The total penalty assessed was \$143,100, which is considerably less than the total possible penalties. Tel West has not demonstrated manifest injustice justifying equitable estoppel in this case.

**4. Application of the Equitable Estoppel Doctrine Would Impair the Exercise of Government Functions.**

32 The Commission's authority to impose penalties for violations of statute, rule, and Commission order is an important function. It provides an incentive to regulated companies to operate within the regulatory framework. It allows the Commission and the companies to address compliance issues. To allow unnecessary equitable estoppel would severely chill the use of the Commission's penalty authority.

33 Tel West has not established that equitable estoppel is appropriate. Rather the record demonstrates that equitable estoppel is not proper in this case.

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<sup>56</sup> Declaration of Betty Young, Exhibit A at 14-15.

<sup>57</sup> Declaration of Betty Young, Exhibit A at 16.

## 5. Additional Arguments Also Do Not Support Mitigation

34 Tel West offers three arguments in addition to equitable estoppel in support of mitigation.<sup>58</sup> The first argument is Tel West failed to respond in a timely manner because it was confused by Staff's assertions that the Company did not have customer authorization to place line freezes. Not only did Tel West fail to seek clarification,<sup>59</sup> it appears that Tel West was not confused regarding Staff's inquiries. The Company made several unequivocal statements regarding not having authorization to place preferred carrier freezes.<sup>60</sup>

35 Tel West also argues its tremendous growth caused some of the violations.<sup>61</sup> This is not a mitigating factor because telecommunications companies are required to comply with statutes and rules even during times of growth.

36 Tel West argues it has now hired a regulatory manager who is solely responsible for responding to Commission inquiries. Since doing so, Tel West asserts that it has timely responded to Commission inquiries.<sup>62</sup> Although compliance is the ultimate goal, the facts of this case demonstrate that mitigation is not appropriate.

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<sup>58</sup> Application at 8.

<sup>59</sup> Declaration of Betty Young at ¶ 12 and Exhibit C.

<sup>60</sup> *Id.*

<sup>61</sup> Application at 8.

<sup>62</sup> Application at 8.

**D. The Penalty is Appropriate Under the Commission's Legal Standards.**

37 Tel West argues the penalty is inappropriate under the Commission's legal standards on imposing penalties. To the contrary, the penalty is proper under the Commission's legal standards.

38 The purpose behind assessing penalties for violations is to secure compliance by "incenting reasonable and appropriate conduct by the offending party."<sup>63</sup> The Commission has developed a list of non-exclusive factors to consider when evaluating whether to impose a penalty. Those factors are whether:

1. the offending conduct was associated with new requirements or issues of first impression,
2. the offending party should have known its conduct constituted a violation,
3. the offending conduct was knowing or intentional,
4. the offending conduct was gross or malicious,
5. repeated violations occurred,
6. the Commission previously had found violations,
7. the offending conduct improved, and

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<sup>63</sup> *MCImetro Access Transmission Services, Inc., v. US WEST Communications, Inc.*, Docket No. UT-971063, Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, in Part, and Affirming, in Part at ¶ 154 (February 9, 1999).

8. remedial steps were undertaken.<sup>64</sup>

39 The penalty should be in rough proportion to the seriousness of the offense and the Company's demonstrated willingness to comply with the Commission's statutes and rules.<sup>65</sup>

40 Tel West argues that, although the requirements in WAC 480-120-147(5) are not new, the first time they applied to Tel West was when the Company initiated its telemarketing campaign in 2003.<sup>66</sup> This is not accurate because the rules regarding preferred carrier freezes apply to all telecommunications companies regulated by the Commission unless a waiver is granted.<sup>67</sup> All LECs must offer preferred carrier freezes and must inform customers once a year of the availability of the freezes.<sup>68</sup>

41 In addition, although the rule regarding Commission-referred complaints was amended effective July 1, 2003, the obligation to report to Staff regarding Commission-referred complaints was not new. The difference between the old rule, WAC 480-120-101, and WAC 480-120-166 is the number of days in which the Company must respond.<sup>69</sup>

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<sup>64</sup> *Id.* at ¶ 158.

<sup>65</sup> *In re Penalty Assessment No. UE-031942 Against Pacificorp, d/b/a Pacific Power and Light Company*, Docket No. UE-031942, Order No. 02, Order Mitigating Penalty, in Part, to \$5,000 at ¶ 11 (February 12, 2004).

<sup>66</sup> Application at 9.

<sup>67</sup> WAC 480-120-011.

<sup>68</sup> WAC 480-120-147(5), text before subsection (a); WAC 480-120-147(5)(a).

<sup>69</sup> A copy of the old rule, WAC 480-120-101, is attached to this Response as Attachment A.



42            Thus, this case does not involve offending conduct associated with new requirements of first impression. This factor does not weigh in favor of mitigating or foregoing the penalty.

43            Tel West argues it relied upon the advice received from its third party verification (TPV) vendor and acknowledges that the ultimate responsibility for the content of its verification script belongs to the Company. Staff provided the Company with information regarding the rule requirements. Thus, Tel West had actual knowledge that its conduct constituted a violation, and the second and third factors do not support mitigating or foregoing the penalty in this case.

44            Tel West argues its conduct was not gross or malicious and notes that no allegations of fraud, slamming, or cramming have been made.<sup>70</sup> Violations are not required to be malicious for penalties to be valid. In this case, penalties were assessed on violations that continued for three months regarding WAC 480-120-147(5) and for ten months regarding WAC 480-120-166. Also, the number of violations subject to penalty in this case is extremely high; penalties were assessed on 1,431 violations. The number of violations and the length of time the violations continued support a finding that the violations in this case are gross, and the penalty is proper.

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<sup>70</sup> Application at 9.

45           Tel West argues the repeated violations arose from two versions of the telemarketing script and that the scripts were revised twice in two months to address Staff's concerns. The number of violations in this case is serious. The fifth factor supports the penalty.

46           Revising the script applies to the seventh and eight factors, improved conduct and remedial steps. Tel West asserts the conduct was completely corrected and no harm resulted. Staff first contacted Tel West regarding its WAC 480-120-147(5) violations in September 2003.<sup>71</sup> Staff first contacted Tel West regarding WAC 480-120-166 in July 2003.<sup>72</sup> Staff had numerous contacts with Tel West regarding the violations.<sup>73</sup> Although the Commission has recognized "untimely" compliance as a mitigating factor,<sup>74</sup> the Commission should decline to mitigate the penalty in this case. The vast majority of the factors in this case support the level of penalty assessed.

47           Tel West argues the penalty should be mitigated because the Commission has not previously found the Company in violation of WAC 480-120-147(5) or WAC 480-120-166. Although Tel West has not previously received violations of WAC 480-120-147(5) or WAC 480-120-166, the penalty assessed in this case is not the first incurred by Tel West. In Docket No. UT-020577, Tel West was penalized for

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<sup>71</sup> Declaration of Betty Young, Exhibit A at 6.

<sup>72</sup> Declaration of Betty Young, Exhibit A at 12.

<sup>73</sup> Declaration of Betty Young, Exhibit A.

<sup>74</sup> *Pacificorp*, Docket No. UE-031942, Order No. 02 at ¶ 11.

violations of statutes and rules, albeit different sections than those involved in the current docket. Docket No. UT-020577 was resolved by settlement.

48           The Commission is not required to allow companies a “free pass” for first violations of each regulatory requirement. The Commission should consider a company’s compliance history when determining whether to mitigate penalties. Tel West’s history indicates mitigation is inappropriate.

49           Tel West argues the penalty in this case is disproportional to the seriousness of the offense. Tel West argues its violations are not “serious” violations of the Commission’s rule, and that its only offending conduct was not including “Is it okay?” in the TPV script.<sup>75</sup> The Commission’s rules on preferred carrier freezes include a verification requirement to protect customers from potential abuses of the freeze mechanism by telecommunications companies. Violations of this rule constitute serious violations.

50           The Commission received 77 informal complaints regarding Tel West between July 2003 and April 2004.<sup>76</sup> In at least 32 of those complaints, Tel West customers stated they did not know the preferred carrier freeze existed, had never authorized the freeze, and had no idea how to remove the freeze.<sup>77</sup> Staff uncovered

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<sup>75</sup> Application at 10.

<sup>76</sup> Declaration of Betty Young at ¶ 17.

<sup>77</sup> Declaration of Betty Young at ¶ 17 and Exhibit E.

many more violations after reviewing the TPV files provided by Tel West.<sup>78</sup>

Customers receiving an unauthorized preferred carrier freeze on their accounts were held captive and were unable to choose freely in the competitive market.

Some of those customers were unable to migrate to other telecommunications companies for months due to the unauthorized freezes.<sup>79</sup> The harm in this case was real, not minimal or trivial.

51           Tel West argues the Commission should assess penalties only in proportion to other penalties assessed. Penalties are assessed based on the individual facts in each case. Assessing the dollar amount resulting from settlement agreements or completed mitigation proceedings to determine the validity of penalties in other, unrelated cases is not proper.

52           Even if evaluating the dollar amount of previous penalties assessed to other companies is proper, penalties assessed by the Commission can appropriately be quite large. For example, in Docket No. UT-990946, the Commission ordered 1-800-RECONEX to pay \$166,000 into the public service revolving fund as a result of the company not fulfilling its obligations under a settlement agreement.<sup>80</sup> In Docket

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<sup>78</sup> Declaration of Betty Young at ¶ 18.

<sup>79</sup> Declaration of Betty Young at ¶ 19.

<sup>80</sup> *WUTC v. 1-800-RECONEX, Inc.*, Docket No. UT-990946, Order Enforcing Settlement Agreement (September 19, 2001). The settlement agreement arose from a penalty assessment of \$372,000. The Commission was required to seek judicial enforcement of the Order Enforcing Settlement Agreement and ultimately collected \$65,956. *WUTC v. 1-800-RECONEX*, Thurston County Superior Court Cause No. 03-2-01095-0.

No. UT-000067, the Commission assessed a \$1 million penalty on USLD Communications, Inc., for improper billing and service practices.

53 Under the facts of this case, the penalty assessed against Tel West is roughly proportionate to the seriousness of the offense.

54 Tel West argues the level of penalty assessed in this case will be harmful to competition in Washington State. Tel West argues the penalty will result in a loss for its fiscal year. Although economic impact on a company may be considered when determining whether to mitigate penalties, Tel West has not provided sufficient evidence to demonstrate that mitigation is appropriate.

55 The penalty assessed in this case is proper and should be mitigated only to the extent described above in section II.A.

**E. The Penalty Complies with the Eighth Amendment of the United States Constitution.**

56 Tel West argues the penalty assessed in this case violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. However, the penalty in this case complies with the Eighth Amendment.

57 The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>81</sup> The

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<sup>81</sup> For purposes of this Response, Staff assumes that the Eighth Amendment applies to civil penalties issued by a government agency, although no case directly addresses this situation. Most civil penalty cases address civil forfeitures and focus on the in rem nature of the forfeitures. However, the United States Supreme Court has noted that the distinction between in rem proceedings and in personam proceedings would likely not yield different results: the Eighth Amendment would likely

Eighth Amendment is designed to curb governmental abuse of its prosecutorial power.<sup>82</sup> It was intended to limit fines directly imposed by, and payable to, the government.<sup>83</sup> The Eighth Amendment limits the government's power to extract payments, whether in cash or in kind, as punishment for an offense.<sup>84</sup>

58           The principle of proportionality is the touchstone of the analysis under the Eighth Amendment.<sup>85</sup> The amount of the fine must bear some relationship to the gravity of the offense it is designed to punish.<sup>86</sup> A fine is constitutionally excessive if it is grossly disproportional to the gravity of the punishable conduct.<sup>87</sup> The test is gross proportionality because judgment about the appropriate punishment belongs in the first instance to the legislature and any judicial determination of the gravity of an offense is inherently imprecise.<sup>88</sup>

59           In *Bajakajian*, the Supreme Court held forfeiture of \$357,144 for failing to report that the defendant was carrying that amount in cash out of the country was constitutionally excessive.<sup>89</sup> There are significant differences between the *Bajakajian* and this case.

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apply to the in personam proceedings as well. *Austin v. United States*, 509 U.S. 602, 616 (n. 9), 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993).

<sup>82</sup> *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989).

<sup>83</sup> *Id.* at 268.

<sup>84</sup> *Austin*, 509 U.S. at 609-610.

<sup>85</sup> *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L.Ed.2d 314 (1998).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 336.

<sup>89</sup> *Id.* at 324, 337.

60 In *Bajakajian*, the defendant's only crime was a single reporting offense.<sup>90</sup> In this case, Tel West violated two of the Commission's rules. More importantly, Tel West committed a significant number of violations of each rule.

61 In *Bajakajian*, the defendant did not fit in the class of persons for whom the statute was intended.<sup>91</sup> In this case, Tel West is exactly the class for whom the rules and statute were intended. The rules, WAC 480-120-147(5) and WAC 480-120-166, apply to telecommunications companies, and the penalty statute, RCW 80.04.405, applies to public utilities. Telecommunications companies are public utilities, and Tel West is a telecommunications company.

62 In *Bajakajian*, the harm caused by the offense was minimal, and there was no fraud or public loss due to the offense. In this case, Tel West failed to timely respond to Commission-referred customer complaints, which dealt with topics such as disconnections issues,<sup>92</sup> preferred carrier freezes, and billing disputes.<sup>93</sup> Also, Tel West held customers captive by imposing preferred carrier freezes on their accounts without authorization. The harm in this case was much greater than that in *Bajakajian*.

63 Thus, while the penalty in *Bajakajian* violated the Eighth Amendment, the penalty assessed in this case does not.

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<sup>90</sup> *Id.* at 337.

<sup>91</sup> *Id.* at 338.

<sup>92</sup> Declaration of Betty Young, Exhibit B at 1.

<sup>93</sup> Declaration of Betty Young, Exhibit B at 25-32.

The courts have upheld large fines challenged with Eighth Amendment claims. For example, fines of several thousands of dollars were imposed on storeowners whose employees were trafficking in food stamps.<sup>94</sup> *Vasudeva* involved three storeowners, none of whom were aware that their employees were violating the food stamp laws,<sup>95</sup> and the fines varied depending on the individual facts. The fines imposed were \$5,280, \$19,920, and \$17,160.<sup>96</sup> The storeowners argued the fines were grossly disproportional in light of their culpability and the government's loss.<sup>97</sup> The fines were upheld because the government has a substantial interest in preventing trafficking in food stamps.<sup>98</sup> In addition, the court noted that fines for food stamp violations could be "quite large," but that the fines in *Vasudeva* were within the caps set by Congress and could "reasonably be deemed necessary to deter trafficking."<sup>99</sup>

In this case, the Commission has a substantial interest in receiving timely responses to Commission-referred complaints and in preventing abuses of the preferred carrier freeze mechanism. In addition, this penalty assessment is not the first penalty assessed against Tel West, so a larger penalty could reasonably be deemed necessary to prevent further violations by the Company.

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<sup>94</sup> *Vasudeva v. United States*, 3 F.Supp.2d 1138, 1141-1142 (1998).

<sup>95</sup> *Id.* at 1141.

<sup>96</sup> *Id.* at 1142.

<sup>97</sup> *Id.* at 1145.

<sup>98</sup> *Id.* at 1146.

<sup>99</sup> *Id.*



The penalty assessment in this case is not grossly disproportional to the offending conduct. As such, the penalty complies with the Eighth Amendment.

### III. CONCLUSION

Staff supports mitigating \$500 of the penalty imposed on Tel West. The remainder of the penalty is proper, and Tel West has not established sufficient mitigating factors.

DATED this 4<sup>th</sup> day of August 2004.

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