BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GLICK, President, CONSIDER IT DONE, Ltd. Complainant v. VERIZON NORTHWEST INC., Respondent	)	DOCKET NO. UT-040535 PETITION FOR ADMINISTRATIVE REVIEW

This Petition challenges portions of the Memorandum/Discussion, and the following Conclusions of Law, of Order No. 02 ("Initial Order Granting, In Part, Verizon's Motion For Summary Determination") in the above-noted matter: Conclusions 4, 7, 9.

I. THE PRESIDING OFFICER HAS MISAPPLIED THE STANDARD GOVERNING GRANTS OF SUMMARY DETERMINATION.

At ¶ 20 of her Memorandum, the Presiding Officer (hereinafter "ALJ") describes as "not credible" an assertion whereby I explained a primary reason for not filing the present Formal Complaint sooner: *viz.*, the Commission's own categorical assertion – in response to an *informal* complaint centering on the same facts as the present matter – that the Commission lacks jurisdiction. Complaint at ¶ 37. The ALJ's statement is inappropriate and incorrect, in two respects. First, it is wholly inappropriate to purport to assess the credibility of an allegation, when the Respondent has stipulated to all facts as stated by the Complainant. Motion for Summary Determination at p. 2, l. 6-7. Second, the legal standards governing motions for summary judgment/determination not only require that there be "no genuine issue as to any material fact", but are those applicable to "a motion made under CR 56 of the Washington superior court's civil rules." WAC 480-07-380(2)(a). Under said standards, "it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in a light most favorable to the nonmovant. *Morris v. McNicol,* 83 Wn. 2d (1974), citing *Maki v. Aluminum Bldg. Prods.*, 73 Wn. 2d 23, 436 P.2d 186 (1968). Furthermore, "[i]n reviewing a denial or grant of summary judgment, [an appellate] court applies the same standard as a trial court: *construing the evidence in the light most favorable to the nonmoving party*, the court asks whether a reasonable jury could find in favor of that party. If the answer is yes, the motion for summary judgment should be denied. . . ." *Herron v. King Broadcasting,* 112 Wn. 2d 762, 776 P. 2d 98 (1989), citing *Wendle v. Farrow,* 102 Wn. 2d 380, 383, 686 P.2d 480 (1984). Emphasis added.

II. THE PRESIDING OFFICER HAS MISCHARACTERIZED THE PRAYER FOR RELIEF IN THIS MATTER, AND THE ASSERTED BASES THEREFOR.

In her ¶20, the ALJ has parsed the Complaint so as to bifurcate my allegations and argument in a manner that is not justified by the record, or by common sense. My narrative – summarizing the Company's refusal to answer questions, recognize attempts to escalate my service complaint, or seriously entertain a proposal for meaningful compensation – reveals breaches that are all part and parcel of the same fact pattern. My concerns and allegations were inherently intertwined and inseparable. In other words, there is no basis in law or fact for the ALJ to treat my interaction with Commission staff regarding "*Verizon's refusal to escalate [my] complaint*" (emphasis in Order) as somehow separate and distinct from '[my] request for a refund." It was precisely my desire to seek a meaningful (as opposed to token) refund that underlay my desire to know: (a) whether GTE, like Qwest, had a "claims" division to entertain such matters; and (b) to whom my initial GTE contact reported. Staff refusal to reply to these questions – indeed, to talk to me at all – was inseparable, factually and legally, from its refusal to offer a proper refund, as allowed by its tariff.

Unlike Respondent in its pleadings, the ALJ seems to, correctly, accept as true my testimony that I did not "misunderstand" Ms. Kanz to have stated that the Commission lacked jurisdiction over my concerns. However, to imply, as the ALJ does, that the Commission may have indicated lack of jurisdiction over my "customer service"concern, but *not* over my "refund" concern, is to impose a distinction that's nonsensical.

III. AMPLE FACTS SUPPORT TOLLING OF LIMITATIONS ON AN EQUITABLE BASIS.

a. The Complainant Exhibited Sufficient Diligence, and Was Lulled Into Complacence By The Erroneous Advice of Commission Staff.

It is irrelevant that, in the Complaint, I conceded my awareness that "WUTC lacks jurisdiction to order compensation for 'lost business'" and that "WUTC has only limited jurisdiction to order compensation." Complaint at ¶¶ 5, 7, cited in Order at ¶20. The ALJ seizes upon these statements as if to demonstrate their support for the lack of "credibility"on the jurisdiction question, and lack of support for my delay in filing a Formal Complaint. Quite to the contrary, the statements do quite the opposite. I included them in the Complaint in order to explain why, despite the record of previous errors by the Commission's Consumer Division, I was inclined to *believe* Ms. Kanz' categorical assertion about lack of jurisdiction over the circumstances of my GTE experience (another factor being my assumption that a basic jurisdictional question was well within the usual knowledge and expertise of a veteran staffer). Complaint at ¶ 37. (I.e., because I already knew that the UTC's jurisdiction is not unlimited.) Moreover, at the time I submitted my informal complaint regarding *measured local calls* (and Verizon's refusal to provide requested bill detail) – Complaint at ¶¶ 45-46 – I was unaware of the provision that *guaranteed* the Commission's jurisdiction over my "customer service/refund" matter: *viz.*, Tariff WN U-17, Section 2, 2nd Revised Sheet 29, "Rules and Regulations" at C (7)(e), "Liability". It was only happenstance that I learned of that compensation provision – and Ms. Kanz' attendant error – after submitting the later-arising bill detail question to the Consumer Division's John Cupp. (The Commission may take judicial notice of the date of that informal complaint, as it is readily available from the Consumer Division's assistant director Vicki Elliott.)

My Complaint also included a description of the likely nature and extent of harm to my business over the 22-month period in question (Complaint at ¶¶ 16-17) – despite the lack of provisions for "lost business" compensation – in order to illustrate that the extent and consequences of Verizon's omissions and misconduct were anything but trivial. The ALJ, at ¶ 20, offers no explanation of the relevance of her focus upon that part of my Complaint; in point of fact, all mentions of "lost business" are irrelevant except to the extent I included them to provide a complete context for my Complaint. (See more on "lost business", *infra.*)

The ALJ's Order, like Respondent's submissions, seems to find lack of "due diligence" in my failure, as an erstwhile attorney, to have unearthed all applicable Commission rules. To the contrary, however, there is no authority offered for the proposition that a Complainant with legal training is penalized for those credentials – i.e., held to some higher standard, presumably applied to seasoned attorneys with experience in consumer and utilities law. Although admitting to a personal interest in those areas, and a concern for the public interest and economic justice in general, I never professed to be an expert in those practice areas; nor do I have any professional experience in them. In fact, I was as baffled as any lay person when I attempted, on my own, to locate various Verizon tariff provisions – even with the help of computers. In the course of determining, to my own satisfaction, whether I had "a leg to stand on" with regard to my bill-detail issue, I asked Mr. Cupp (and later his more experienced colleague, Suzanne Stillwell), for "any and all" tariff sections addressing the matter. (I made the request on or shortly after October 1, 2003 – the date on which I began my informal complaint about local call detail; Ms. Elliott, and Mr. Stephen King, are fully aware of my dissatisfaction with the manner in which the request was addressed.) Rather than treat the request with the promptness, and in the manner, required by the Records Act – or, alternatively, as the Consumer Division had previously handled all tariff requests made in the context of an informal complaint – Cupp and Stillwell refused to even *attempt* to identify provisions that would satisfy it. (They argued that the request was "potentially" too broad in scope, but offered no help, or hints, in narrowing the request.) My own online efforts, at Verizon's *and* WUTC's web sites – both before and after my interaction with Cupp and Stillwell – yielded nothing useful, as I was unable to locate an online version of the tariff including any "key word" search capabilities. (When, much later, I stumbled upon what I wanted – in a procedure I'd be at a loss to duplicate now – the pertinent section turned out to be concise indeed: Section 4, 1st Revised Sheet 4(B), cited in my Complaint.)

Moreover, with regard to WAC or RCW provisions regarding the scope of Commission "jurisdiction" or authority, the few obviously pertinent ones are general indeed; none would have, or did, shed any light – either for the lay person or the seasoned attorney – upon the question of whether Ms. Kanz' categorical denial of jurisdiction in September 2001 was correct.

Last – but most emphatically not least – ample diligence was evinced in my promptly contacting the Commission, with *informal complaints*, regarding both major components of my later Formal Complaint: bill detailing, and the call forwarding "customer service/refund" experience. Both of those contacts were initiated well before expiration of the allegedly applicable limitations periods. Moreover, the very Order here challenged indicates that my Complaint, to a significant degree, was either not subject to a limitations period, or to no period of less than two years. (More, *infra.*)

b. The Only Applicable Limitations Requirements Provide For A Two Year Filing Period.

Although the ALJ states that, regarding my prayer for compensation, I "appear[] to seek a refund for unreasonable charges under RCW 80.04.220" (Order at 19), no authority is offered in support of that contention; nor has Respondent offered any. I never cited this RCW provision as the basis of my claim, and have never characterized any Company charges as "unreasonable". If any RCW limitations provision applies, it is Sec. 4.16.130, "actions not otherwise provided for," with its two-year limitation.

This provision is all the more applicable in light of the fact that my prayer for compensation was grounded upon the *WAC* Liability provision cited earlier. *Supra* at p. 2, l. 39; Complaint at ¶17; Opposition to Summary Determination at II. My Formal Complaint bears a date a little more than six months beyond the expiration of that period. In light of my having promptly contacted the Commission on an informal basis, and having received misleading information, ample circumstances exist to support an equitable tolling of the limitation.

As Respondent recognizes, my allegations of misconduct in violation of WAC "Complaints and Disputes" provisions – if bound by any limitations provision – would likewise be governed by RCW 4.16.130 ("actions not otherwise provided for") or 4.16.100(2) ("action upon a penalty to the state"). Both impose a two-year limitation.

c. Neither the Prayer for Compensation nor the Allegation of Misconduct Should be Governed By Any Limitation.

Notwithstanding the discussion above, the ALJ notes, at 36 of the Order, that "there is no provision in Title 80 RCW limiting the time for complaining of violations of Commission rule," and "the statutes of limitation in chapter 4.16 RCW do not apply to questions of violation of Commission statutes and rule."

Therefore, with regard to my allegations of misconduct under the WAC "Complaints and Disputes" provisions, clearly the inapplicability of any limitation would leave the Commission free to make findings, even absent equitable considerations.

With regard to my argument urging administrative penalties and fines, the situation is less clear. Obviously, reliance upon WAC 480-120-019 alone (Complaint at ¶53) would raise no limitations issue. However, penalties are *specified* in RCW 80.04.380 and 80.04.405. *Id.*

With regard to the prayer for compensation, reliance is solely upon the *tariff* Liability provision WN U-17 2nd Revised Sheet 29. While company tariffs may be submitted to the Commission, in draft/proposed form, by regulated companies themselves, it is the Commission that gives final approval of all tariffs, and renders them effective. Hence, although Respondent recognizes that tariffs carry "the force of state law" (Motion for Summary Determination at p. 9, l.10), there is no authority offered for the subsequent conclusion that "an action on a tariff is akin to an action on a law" (i.e., a statute passed by the Legislature). *Id.* To the contrary, Commission-approved

tariffs are more nearly the equivalent of Commission-adopted WAC provisions, and hence Commission actions to enforce them should not be governed by any limitation.

IV. THE ALJ HAS ERRED REGARDING THE AWARDING OF DAMAGES UNDER VERIZON'S TARIFF.

For all of the reasons cited above, the Commission can address the merits of the prayer for compensation.

In their equitable functions, courts and administrative agencies can and do consider application of provisions and concepts "by analogy." This is the spirit in which I cited the Uniform Commercial Code concept of a product "failing of its essential purpose". This phrase aptly describes the sense in which the GTE call-forwarding feature ("Busy/Don't Answer") sold to my company caused "defects in transmission" – just one of the several applicable elements of the tariff's Liability section. Complaint at ¶17; Opposition to Summary Determination at II. Even when functioning correctly and as designed, the feature, incredibly, resulted in numerous callers, over the 22 months in question, hearing nothing but endless ringing, at all times of day including normal business hours. This is not a situation that any rational customer – residential or, especially, business – would want or expect. The rational, reasonable customer expects, for good reason based upon normal, everyday experience, to hear a *busy signal* when a line is occupied. It is one thing for a company to fail to *disclose* a limitation that precludes second, and third, calls from going to voice mail. It is quite another, far worse matter, to fail to disclose that callers would not even hear a busy signal. (Hence the failure of Company sales staff to fully assess my needs, and fully discuss the properties of their product – especially in light of other, available products that would enable forwarding of more than one call – also amounted to "mistakes" and "omissions" under the terms of the Liability provision.) Opposition to Summary Determination, at p. 5, ll. 30-32.

Potential new customers of a business, hearing only endless ringing and having numerous other service providers to choose from, will of course call the others instead. Rather than being very likely to phone again, such callers can only feel baffled and frustrated by their experience with my business; they are far more likely to write its principals off as incompetent and unreliable, and perhaps more interested in being "Gone Fishin'" somewhere than in having their business.

As I argued previously (Complaint at ¶ 17; Opposition to Summary Determination at p. 5, ll. 3-15), it is unnecessary to plead "lost business", nor have I ever done so. In the absence of any *need*, let alone privilege, of arguing or documenting lost business, the cited "Liability" provision in Verizon's tariff essentially serves to *presume* damages. Opposition to Summary Determination, at II.

Notwithstanding Respondent's characterization of my position as being an inflexible, all-or-nothing one, I did in fact early on express my willingness to discuss a compromise amounting to some proportion of the total business exchange charges for the period in question. Exhibit 1 at p. 6; Exhibit 2 at "pg. 7" (i.e., 8th page of exhibit); Opposition to Summary Determination at p. 6, ll. 5-11. The language of the tariff section relied upon expressly allows for such a resolution, and does not limit parties to token refunds for unsatisfactory "features."

Although I initially relied incorrectly upon WAC 480-120-165 ("Customer Complaints", hereinafter "165") – Complaint at ¶32 – the predecessor provision, WAC 480-120-101 (hereinafter "101") did apply to the events and conduct here at issue. As I've already demonstrated, the conduct of Cooper, Gallentine and other Company staff violated 101; those arguments need not be repeated here. Opposition to Summary Determination, p.2, l.5-p.3, l.16. Contrary to Respondent's assertions, and the ALJ's implication, I have never sought "recourse to ever-higher levels of management." Order at ¶39. What I *did* seek, from the very moment Ms. Cooper relayed to me her superior's inadequate offer of $36, was the recourse guaranteed to me and all other customers by 101.

Common-sense reading of 165 and 101, guided by universally-accepted canons of construction whereby words are to be given their everyday, common meanings, reveals that even 101 was drafted with the intention to provide customers a right of *appeal.* Subsection 165, more concisely drafted than 101, included the first express use of the word "appeal", but any rational interpretation of 101 yields the conclusion that even 101 was intended to afford that right. Under 165, staff must inform dissatisfied customers that a "decision may be appealed to a supervisor at the company." Subsection 101 provided:

> Each telecommunications company shall ensure that *personnel engaged in initial contact with a dissatisfied or complaining applicant or subscriber* shall inform the applicant or subscriber that if dissatisfied with the decision or the explanation that is provided, the applicant or subscriber has *the right to have that problem considered and acted upon by supervisory personnel.*

Emphasis added. Obviously even 101 was intended to afford a process of review – one not afforded by *its* predecessor, WAC 480-120-180, which simply read, in relevant part:

> COMPLAINTS. (1) Each utility company shall make a full and Prompt investigation of all complaints made by its subscribers. When the circumstances indicate the need for corrective action, such action shall be taken promptly either to correct or to minimize the recurrence of the cause for the complaint.

The drafters of 101 obviously assumed that normal "initial" contacts were with staff *other* than supervisors. In the present matter, Ms. Cooper, along with Ms. Gallentine, her supervisor, served jointly as the "personnel engaged in initial contact" with me. The latter was present when the former put me on hold and, moments later, merely *relayed* Ms. Gallentine's $36 offer to me. Complaint at ¶14. Ms. Cooper was not the decision maker; Ms. Gallentine was. It is specious and absurd to suggest that Ms.Gallentine's adamant refusal to consider my position, or respond to any of my subsequent written points, amounted to an acceptable "review", of her *own* initial actions. It also flies in the face of 101's clear purpose to imply that Verizon satisfied 101 as a result of the fact that, through Ms. Cooper, I happened also to "reach" Ms. Gallentine, a supervisor!

The ALJ also assumed facts not in evidence when she stated, "It appears that, . . . as Mr. Glick subsequently called Ms. Gallentine, that he was provided with her telephone number." She has clearly concluded that this [assumed] disclosure of the phone number, by Ms. Cooper, was made in

a manner and at a time that satisfied 101. Order at ¶38. In actuality, I managed to contact Ms. Gallentine's office due to my own persistence, not Ms. Cooper's cooperation. Moreover, the ALJ's assumption is rendered absurd by the obvious fact that I asked Ms. Cooper whether Verizon had a claims department, and who Ms. *Gallentine's* supervisor was. A cooperative, logical response, made with intent to comply with legal requirements, would have been something along these lines: 'Our Customer Relations department serves as our Claims department, and Ms. Gallentine works there.' Saying only, "We're not going to have this discussion", and hanging up, is something very different.

Lastly, as I've already documented, the record reflects that Gallentine never addressed any of my offers or contentions – including my proposed compromise settlement, or my specific contention regarding proper interpretation of the tariff's Liability section. Complaint at 35-36; Opposition to Summary Determination at p. 3, l. 28-p.4, l. 29; Exhibits 1-3.

The ALJ mischaracterizes my conduct when she implies, at 39 of the Order, that "incivility" on my part contributed to, or excused, the conduct, statements and decisions by Company staff: *viz.,* saying, "We're not going to have this discussion," refusing to answer my concise questions, refusing to speak to me, and repeatedly hanging up on me. The record reflects the sole instance of incivility on my part: my sole use of an expletive, while Mr. Tate was hanging up on me – which occurred *well after* the series of stonewalling behaviors just described, and specifically documented in the Complaint. Complaint at ¶¶20-27.

In short, Ms. Cooper's initial reply constituted a first violation of WAC 480-120-101, and the series of ongoing refusals to answer my questions or speak to me constituted a number of additional and ongoing violations by Ms.Gallentine, Mr. Tate and Bonnie Sanford ("Bonnie"; Complaint at ¶23.)

VI. THE ALJ HAS ERRED IN FINDING NO VIOLATION OF FREE SPEECH RIGHTS.

a. The Commission Has Jurisdiction To Adjudicate This Issue.

I previously averred, incorrectly, that the Commission lacks jurisdiction to consider my First Amendment arguments. Complaint, at attached cover letter, p. 4. The ALJ has asserted jurisdiction over those claims by entertaining them. Order at 46-48. She has also acknowledged that, "the Commission has authority to determine how a utility communicates with its customers" (¶46) and that "the Commission can properly determine whether Verizon may limit the Complainant's form of communication." ¶48.

Moreover, state law not only permits, but mandates that, like our Superior Courts, the Commission sitting as adjudicator may hear and address the Constitutional issues raised in this Complaint:

RCW 80.01.040
General powers and duties of commission.

The utilities and transportation commission *shall*:

(1) Exercise all the powers and perform all the duties prescribed therefor by this title and by Title 81 RCW, or by *any other law*. . . .

(3) Regulate in the *public interest*, as provided by the public service laws, the rates, services, facilities, and *practices* of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, . . . telecommunications companies. . . .

Emphasis added. "Any other law, stated categorically as it is, obviously includes – as it does for our Superior Courts – the U.S. Constitution, and federal cases interpreting it. It is also beyond dispute that free speech and other Constitutional questions are preeminently within the "public interest."

b. My Oral Attempts To Pursue My Complaint Constituted Protected Speech.

Despite Respondent's characterization of my phone contacts as "quintessentially harassing in nature" – Reply In Support of Motion For Summary Determination, at ¶13 – neither the Company nor the police have ever furnished evidence to support a contention that my behavior satisfied the statutory *elements* of either civil or criminal harassment. Review of the relevant statutes is instructive:

RCW 10.14.010
Legislative finding, intent.

The legislature finds that serious, personal harassment through *repeated invasions of a person's privacy* by acts and words showing a pattern of harassment *designed to coerce, intimidate, or humiliate the victim* is increasing. The legislature further finds that the prevention of such harassment is an important governmental objective. This chapter is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator.

RCW 10.14.020
Definitions. . . .

(1) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which *serves no legitimate or lawful purpose.* The course of conduct shall be *such as would cause a reasonable person to suffer substantial emotional distress*, and shall actually cause substantial

emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

(2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a *continuity of purpose.* "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."

RCW 10.14.030
Course of conduct -- Determination of purpose.

In determining whether the course of conduct serves any legitimate or lawful purpose, the court should consider whether:

(1) Any current contact between the parties was initiated by the respondent only or was initiated by both parties;
(2) The respondent has been given clear notice that all further contact with the petitioner is unwanted;
(3) The respondent's course of conduct appears *designed to alarm, annoy, or harass the petitioner*;
(4) The respondent is *acting pursuant to any statutory authority*, including but not limited to acts which are reasonably necessary to:
(a) Protect property or liberty interests;
(b) Enforce the law; or
(c) Meet specific statutory duties or requirements;
(5) The respondent's course of conduct has the purpose or effect of *unreasonably interfering with the petitioner's privacy* or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner;
(6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.

RCW 9.61.230
Telephone harassment.

(1) Every person who, with *intent* to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
(a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
(b) *Anonymously* or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
(c) *Threatening* to inflict injury on the person or property of the person called or any member of his or her family or household;
is guilty of a gross misdemeanor. . . .

Emphases added.

Legislative intent focusing upon privacy rights, and threats of harm, are expressed. *Intent* is either an implied requirement (conduct "designed to. . .") or an express one – as in "telephone harassment". Most salient by its *absence*, as noted in my pleadings, was any intent on my part to accomplish any of the delineated outcomes, as required by the telephone harassment or other statutes. Clearly, my purpose was legitimate, lawful and protected.

(Technically, this applies even to the one instance of my having cursed, as saying "Fuck off!" in the heat of anger is profanity, *not obscenity* as long defined in the established First Amendment jurisprudence.) Verizon's entire course of conduct, beginning with Ms. Cooper's pronouncement, through the stonewalling, hang-ups, and threats of lawsuit and arrest, was designed to chill my protected speech. This limitation was addressed thoroughly in my pleadings. Opposition to Summary Determination, at p. 7, l.6-p.8, l. 17.

c. Though Characterized As Trivial, the Limitation Upon the Form of Communication Available To Me Was Not Content-Neutral; It Was Therefore Impermissible.

Respondent has admitted that "oral communication is standard for the convenience of both customers and telephone companies." Motion for Summary Determination at p. 15, ll. 13-14. In commanding me, indefinitely, to communicate only in writing, on pain of arrest and lawsuit, the Company imposed costs and inconveniences – in dollars, resources, time and delay – that are not imposed upon most customers who, like myself, have done nothing wrong and have accounts in good standing.

The proscription was motivated by the content of my communication (and attempted communication), and is therefore not properly content-neutral; it also amounts to an unlawful prior restraint. Motion In Opposition, at III.

d. Police Department and WUTC Intervention Constituted State Action.

The First Amendment, as is well known, applies to the states via the Fourteenth Amendment. "State action" is required to implicate the First Amendment in the context of limitations imposed by an otherwise *private* party. It is long established and settled that "state action" means much more than actions by or with the involvement of *state government* officials; municipal officers as well can, by their involvement with an otherwise private party, give rise to the requisite state action.

Verizon (and the Everett Police Department, at Verizon's direction) threatened me in ways calculated to chill my protected speech. As noted in my pleadings, the Company categorically threatened to sue me if I continued in my efforts to ask staff about the chain of command, and whether it has an appeals department. Exhibit 3. My Complaint documented widespread recognition of the unwelcome phenomenon known as the SLAPP suit: an actual or threatened libel or other suit, calculated to silence critics of various businesses and other powerful entities. Complaint, at attached cover letter, p. 2. The record also reflects the overbearing, prejudiced manner in which an Everett Police Department officer contacted me – refusing to disclose the nature of

allegations made about me, while asking me to provide "my version". The officer also categorically stated, in the broadest possible terms, that her Department would issue an arrest warrant if I "called the Company" any more. Complaint at ¶¶28-29; Opposition to Summary Determination at p. 6, l. 27-p.7, l. 5.

A Court of Appeals case from the Second Circuit elaborated upon factors wherein actions of a municipal police officer can give rise to "state action". In *Barrett v. Harwood,* 189 F.3d 297 (2nd Cir. 1999), petitioner had alleged that a repossession was accomplished without due process, and with the assistance of an officer. Although at one point the officer said to the creditor (petitioner), "If you start any trouble here, you'll be going in the back seat of my car", his involvement in repossession of petitioner's truck was held to *not* constitute "state action". However, the court viewed the officer's conduct as "no more than the carrying out of his duty to prevent violence in the event of a breach of the peace"; he did not "affirmatively assist in the repossession over the debtors' objection or intentionally intimidate him so as to prevent him from exercising his legal right to object to the repossession." The court thereby implied that, in contrast, "affirmative assistance" by an officer can be, and is viewed as, constituting state action.

The facts of *Barrett* are illustrative by their difference from those at issue here. The *Barrett* officer did not act or speak in any significant way – until petitioner had struck the debtor, *in his presence.* (In contrast, Officer Hughes of the Everett Police Department, reacting solely to Verizon's version of events that she was not privy to, intimidated and threatened me via a *prospective* promise of arrest, should I thereafter engage in a broadly defined scope of protected activity: "call[ing] the Company." As noted in my pleadings, this was an overbroad prior restraint. Motion in Opposition, at p. 7, l. 6-p.7, l.12. Moreover, although the *Barrett* petitioner testified that the officer had threatened to arrest him (and that he was thereby induced to remain passive), the officer's recorded statement did not expressly imply or mention *arrest* as a consequence, only detention or restraint. Without first hearing the facts of the matter, Officer Hughes threatened to arrest me. This was clearly a threat of additional, *affirmative assistance* to Verizon in their efforts to limit and stifle my communication (the initial assistance consisting of her phone call.)

In *Carlin Communications v. Mountain States Telephone and Telegraph*, 827 F.2d 1291 (9th Cir. 1987), a deputy county attorney's affirmative assistance, in a service disconnection, was held to constitute state action. The deputy attorney had advised Mountain Bell to terminate petitioner Carlin's service, *or face prosecution.* Clearly, this government official's level of involvement exceeded that which WUTC's Vicki Elliott is alleged to have had in the present matter. According to Officer Hughes, Ms. Elliott – who was not privy to my exchanges with Verizon staff, and had no knowledge yet of the nature of the Company's service omissions and errors – did two things: stated to the officer that (in the officer's words), "if Verizon continues to have problems with Glick, there are ways they can try to deal with him"; and, promised that "she would contact [Bonnie] Sanford concerning what their options are to solve this problem." Complaint, at attached cover letter, p. 3; new exhibit (Exhibit 7, Everett Police Department "Original Narrative, pg. 4 of 4."

Clearly, Ms. Elliott, assistant director of the Commission's Consumer Division, is not alleged to have "coerced" Verizon in any way. However, she apparently both: (1) failed to discourage either the police department of the Company from their course of conduct; and (2) *encouraged* that conduct, by her statements to Officer Hughes. (Obviously, Elliot's taking the *additional* step of

following through on her promise, and contacting Ms. Sanford, would constitute additional, overt encouragement. In response to a Records Act request, the Commission has stated that it has no record of Ms. Elliot's interactions with the Police Department or Ms. Sanford.)

Even were Ms. Elliot's involvement deemed insufficient, by itself, to create state action, the *Barrett* dictum strongly supports a finding that Officer Hughes' *was* sufficient; Ms. Elliot's, considering the totality of the circumstances, simply bolsters a finding of state action.

In summary, Respondent's intimidation, via threats of arrest and lawsuit, constitutes an unlawful abridgement of protected speech. Respondent should be ordered to cease and desist.

VII. ADMINISTRATIVE PENALTIES REMAIN TO BE ASSESSED.

a. The ALJ Has Failed To Order Required Penalties For A Recognized Violation.

Although finding violations of WAC 480-120-161(7)(b) and tariff WN U-17, Sections 4, 1st Revised Sheet 4(B) and 6, 4th Revised Sheet 3.5(D)(3), the ALJ has omitted any mention of the penalties mandated therefore; neither has she presented any reasons for declining to impose penalties. Order at ¶86.

> **WAC 480-120-019 Telecommunications performance requirements -- Enforcement.** The commission may enforce the performance requirements set forth in this chapter by imposing administrative penalties under RCW 80.04.405, 80.04.380 or other appropriate penalty statutes. . . .
>
> **RCW 80.04.405**
> **Additional penalties -- Violations by public service companies and officers, agents, and employees thereof.**
>
> In addition to all other penalties provided by law every public service company subject to the provisions of this title and every officer, agent or employee of any such public service company who violates or who procures, aids or abets in the violation of any provision of this title or any order, rule, regulation or decision of the commission *shall* incur a penalty of one hundred dollars for every such violation. Each and every such violation *shall* be a separate and distinct offense and in case of a continuing violation every day's continuance *shall* be and be deemed to be a separate and distinct violation. Every act of commission or omission which procures, aids or abets in the violation *shall* be considered a violation under the provisions of this section and subject to the penalty herein provided for. . . .

RCW 80.04.380
Penalties -- Violations by public service companies.

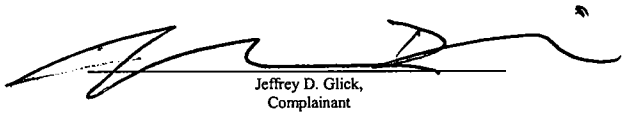
> Every public service company, and all officers, agents and employees of any public service company, shall obey, observe and comply with every order, rule, direction or requirement made by the commission under authority of this title, so long as the same shall be and remain in force. Any public service company which shall violate or fail to comply with any provision of this title, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, *shall* be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense. Every violation of any such order, direction or requirement of this title *shall* be a separate and distinct offense, and in case of a continuing violation every day's continuance thereof *shall* be and be deemed to be a separate and distinct offense.

Emphases added.

b. Penalties Should Be Imposed For Violation of WAC 480-120-101.

For all of the reasons cited above, the Commission should find that Respondent has willfully violated the mandatory Complaints and Disputes provisions of the Administrative Code, and impose penalties accordingly. Those violations were several; they were committed by more than one individual; they were ongoing. *Supra* at V.

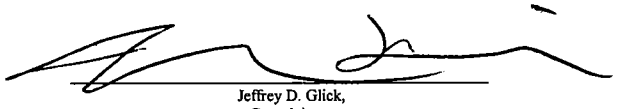
UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON, I DECLARE THE FOREGOING TO BE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.
Signed this 25th day of September, 2004, in Bellevue, WA.



Jeffrey D. Glick,
Complainant

I hereby certify that I have this day served this document upon Respondent in this proceeding, by First Class U.S. mail, postage prepaid.

Dated at Bellevue, WA this 25th day of September, 2004.



Jeffrey D. Glick,
Complainant

EXHIBIT 7

Everett Police Department

☐ FOLLOW-UP REPORT ☒ ORIGINAL NARRATIVE

INCIDENT	CASE NUMBER	
Phone Harassment	DD 01-18448	
☐A ☐C ☐A ☐C ☐A ☐C ☐A ☐C ☐A ☐C ☐A ☐C		REPORT DATE: 9-7-01
INCIDENT RECLASSIFIED TO:	DATE OF RECLASSIFICATION	RELATED CASE NUMBER(S)/W. S. P. CONTROL NO

This officer spoke with Bonnie Sanford who works for Verizon in the Customer Relations Department. She said that they have had problems with a customer who has been calling continually to attempt to get a refund on the service he has had since 1999. She said they had a complaint from him some time ago about a service he was not pleased with and had finally given him a refund on it in order to get him to leave them alone. Now he wants more money back on his main service and they have refused to give it to him. She said as far as they are concerned, they have checked into the complaint and have made their decision on it. Sanford said the customer has been advised that if he disagrees with their decision, he should speak with the Utilities Commission.

Sanford said that the customer, Jeff Glilck, seems to go in waves where they will not hear from him for awhile and then he starts calling again continually. She said he yells at the people he talks to and uses a lot of vulgar language with them. They have been instructed to end the conversation when he uses the vulgar language but he just calls right back. She said sometimes he purposely ties up all 4 lines that come in to the Customer Relations Office so that no one else is able to call in. He has made statements to the employees that he is going to continue to call them until he gets what he wants.

Sanford said that during one phone call, Glick used the name Bill Slater to try to get through to a particular employee. She suspected it was Glick when advised that a Bill Slater was calling and so had them put the call through to her voice mail. On the voice mail he gave his name as Jeff Glick.

In circumstances like this, Verizon usually sends a letter to the person who is being a problem and advises them that all communication with them will have to be in writing from now on. She said they have not sent a letter to Glick yet but are planning to. I advised Sanford to send the letter to Glick and that if the phone calls continue after the letter is sent, we would look into citing Glick for harassment.

I did attempt to call Glick at both his home phone and on his business phone. He did not answer at either number. I did leave a message on Glicks business line warning him not to contact Verizon by phone anymore or he may be charged with Harassment. I advised him that if he needs to contact Verizon, he should do so by mail from now on.

I did contact the Utilities Commission and was advised that if Verizon continues to have problems with Glick, there are ways they can try to deal with him. Vicki, from the Utilities Commission, said she would contact Sanford concerning what their options are to solve this problem.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (RCW 9A.72.085.)

OFFICER SIGNATURE	DATE	
C. Hayden P0004	9-7-01	
OFFICER NAME/NUMBER	UNIT	APPROVED BY:/PERS.NO.
		CJ 1140

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☐ ENTERED RMS ____/____ DATE INITIALS ☐ ENTERED WACIC / NCIC ____/____ DATE INITIALS ☐ CLEARED WACIC / NCIC ____/____ DATE INITIALS