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2 INDEX OF EXHIBITS

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1 P R O C E E D I N G S

2 JUDGE WALLIS: This hearing will please come
3 to order. This is a brief adjudication in the matter of
4 Commission Docket Number UT-040572, which is a plea for
5 mitigation from a penalty assessment against Tel West
6 Communications.

7 Let's begin by asking for appearances on the
8 record, and by this I mean that the attorney or
9 representative of the petitioner here identify yourself
10 and your contact information.

11 MR. BUSCH: Very well, my name is Richard
12 Busch, B-U-S-C-H. I'm an attorney with the law firm of
13 Graham & Dunn in Seattle representing Tel West
14 Communications today. My mailing address is Pier 70,
15 2801 Alaskan Way, Seattle, Washington 98121. My phone
16 number is (206) 340-9679, and the E-mail address is
17 rbusch@grahamdunn.com.

18 JUDGE WALLIS: Thank you. And the person
19 with you, just introduce him.

20 MR. BUSCH: With me is Jim Schrank, he is the
21 controller for Tel West Communications.

22 JUDGE WALLIS: And how do you spell the last
23 name, please.

24 MR. BUSCH: S-C-H-R-A-N-K.

25 JUDGE WALLIS: Thank you.

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1 For Commission Staff.

2 MS. WATSON: Good afternoon, my name is Lisa
3 Watson, I'm an Assistant Attorney General here on behalf
4 of Commission Staff. My mailing address is P.O. Box
5 40128, Olympia, Washington 98504-0128. My telephone
6 number is (360) 664-1186, my fax number is (360)
7 586-5522, and my E-mail is lwatson@wutc.wa.gov.

8 JUDGE WALLIS: Thank you very much.

9 As we have noted, this is a very informal
10 procedure, and I would invite you, Mr. Busch, to begin
11 in as much as being the moving party you have the burden
12 in this situation. Please proceed.

13 MR. BUSCH: Very well, thank you, Your Honor.

14 In essence I would like to cover three broad
15 themes today. First, yes, Tel West did have some
16 practices and procedures that were not consistent with
17 the Commission's regulations, they have addressed those
18 issues with the assistance of Staff, and at this point
19 they are in compliance with the rules that were in
20 question. Second, Tel West is probably the only
21 Washington based facilities based CLEC, and they are
22 trying to grow the competitive telecommunications
23 industry in Washington state, and we would like the
24 Commission to take that into consideration when
25 reviewing the matter here. And the final general

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1 comment is that we don't believe that the proposed fine
2 is appropriate given the nature of the conduct here and
3 the type of offense that's been alleged by the Staff and
4 for a variety of reasons that we'll go through in
5 detail, whether it's the Commission's legal standards
6 for penalties or whether it's a constitutional standard,
7 the proposed finding is too large.

8 Going back then to the nature of the conduct,
9 yes, Tel West did not have the phrase, is it okay, in
10 the verification script when they were signing up new
11 customers. And over a period of time, Staff was
12 communicating with Tel West in a manner which was
13 confusing to Tel West, and ultimately once the company
14 found what the real problem was, they fixed it, they got
15 the script fixed, and all future communications with
16 customers when they were being signed up were in
17 accordance with the rules on placing a PIC freeze for
18 new customers.

19 We do have a few disagreements over specific
20 instances. You have read the materials, Your Honor, the
21 briefs, and I think the parties did a good job of
22 briefing the issues for you. I'm not going to go into
23 all of the details about whether certain violations
24 should be upheld or turned down, the documents talk
25 about that, but there are a few of them that are pretty

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1 obvious to us. For example, one of the violations was
2 because a response wasn't delivered on July 4th, a
3 national holiday. You know, when you review the
4 documents, we would appreciate if you look for things
5 like that. A Commission Staff member had found one
6 violation, but when the Staff report came back, the
7 Staff was then saying 53 violations. We don't think
8 that's fair under the circumstances. All of that
9 information is contained in the application for
10 adjudication.

11 Tel West was in the situation where it wasn't
12 in compliance with those rules because they were in a
13 high growth mode. Tel West is asking the Commission to
14 reduce the fine from \$140,000 approximately to something
15 dramatically less, because we think the Commission's
16 goal is to stimulate competition in this state from
17 competitive carriers, and Tel West is a small company
18 that should divert those funds not to a penalty in this
19 situation, but to continue to invest in the network in
20 Washington. Over the past 12 months, Tel West has
21 invested more than \$1 Million in facilities based
22 competition here in the state, actually facilities in
23 the field to serve customers. They market partly to
24 residential customers, and residential customers have
25 signed up for Tel West service because their service

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1 offering is less expensive than the primary competitor,
2 Qwest, so they are delivering value to customers, and
3 the customers appreciate that.

4 As a small company, \$140,000 is very, very
5 large to someone like Tel West. Financing is difficult
6 these days for CLECs. It's difficult to go find
7 financing to fund the network or replace the funds that
8 would be paid as a penalty here. We're asking the
9 Commission to make a decision here keeping in mind the
10 economic realities of the competitive marketplace. If
11 the Commission truly is encouraging competition, given
12 the nature of the conduct here, is it inappropriate to
13 have a fine of this magnitude. CLECs are not bringing
14 in cash like they were back in the late 1990's up to
15 2000. The Commission needs to recognize that this is
16 going to be a decision for the company, do we have to
17 pay a fine versus do we invest more in the network and
18 bring more services to competitors or to the customers
19 against competitors like Qwest. We don't want the
20 Commission to make a decision in a vacuum with that, so
21 we ask you to keep that in mind.

22 When we think about the factors that the
23 Commission has set forth in prior decisions, the nine or
24 ten factors, we have some strong disagreements with
25 Staff on how those should be evaluated. I put together

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1 a couple of tables that I would like to share with
2 everybody, which evaluates the PIC freeze penalty,
3 proposed penalty assessment, and the failure to respond
4 penalty assessment, taking into consideration the
5 factors that the Commission has set forth to be
6 considered. Can I approach the Bench and share that
7 with you?

8 JUDGE WALLIS: Please do.

9 Thank you. Counsel has handed me a two page
10 document entitled PIC, P-I-C, freeze, penalty of
11 \$103,400. With your permission, counsel, I would like
12 to mark this as Exhibit Number 1 just so that we can
13 keep track of it in our document process.

14 MR. BUSCH: Very well. I don't intend to
15 introduce it as an exhibit.

16 JUDGE WALLIS: Yes.

17 MR. BUSCH: But I certainly don't object to
18 it being represented as such.

19 What I attempted to do with Exhibit 1 is
20 identify first those factors that the Commission has
21 said should be taken into consideration, and second,
22 classify them as whether these factors should be
23 balanced in favor of mitigation or not in favor of
24 mitigation based upon our assessment of the case.

25 And when it comes to the PIC freeze penalty

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1 of \$103,400, the first factor is whether this is a
2 question of first impression or whether it's a new rule.
3 I think we would agree this is not a new rule, but I am
4 unaware of any time the Commission has addressed this
5 rule in this manner and issued a ruling. So when Tel
6 West initially started soliciting customers through a
7 telemarketing campaign, they didn't have the benefit of
8 any decisions from the Commission interpreting these
9 rules. And when we started receiving communications
10 from Commission Staff, they were assessing the
11 information brand new, you know, just reading the rule
12 and comparing it with what the Staff communication was
13 without the ability to go to a Commission decision and
14 see, okay, how does the Commission interpret this rule.
15 And so we think that the first one, is this a question
16 of first impression, that the Commission would be in
17 favor of mitigation.

18 Our position is that the Staff in its
19 communications had misstated the PIC freeze rules. We
20 discussed it at great length in the briefing. The
21 Commission Staff used terminology interchangeably
22 authorization versus verification, and Staff is
23 advocating that it's all the same, you can't distinguish
24 between authorization and verification. I don't think
25 that's the status of the law, whether it be Federal or

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1 State. I think the Feds and the State clearly
2 distinguish between an authorization and a verification,
3 because they can not take place at the same time. Under
4 Federal and State rules, the two steps may not take
5 place at the same time. And I think this is frankly the
6 first time that Staff had to think the rules through to
7 this level of detail, and the Staff was confused, and
8 the Staff claims in the Staff report that Staff are the
9 experts, but I beg to differ in this particular
10 situation. Everybody was learning for the first time.

11 And so Staff unfortunately was using the two
12 phrases interchangeably when they should not have, and
13 when Tel West was receiving the communications talking
14 about authorization, they knew that they were getting
15 the customers' authorization. It was the verification
16 piece that wasn't taking place through the third party
17 verification process. When you look through the
18 communications and the Staff report and you count up the
19 number of times that Staff referred to authorization
20 versus verification -- and frankly if you look at the
21 Commission's penalty assessment, even the Commission
22 three times referred to it as authorization and one time
23 referred to it as verification, so I would suggest that
24 the order when it was drafted carried forward that
25 confusion between the two terms.

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1 When you count them up, the Staff got it
2 right 26% of the time. And before the Commission
3 determines that it's appropriate to penalize Tel West
4 for failing to comply with the rules, I think the
5 Commission ought to get it right too. So my suggestion
6 would be that if the Commission finds that any penalty
7 is appropriate, because of the confusion over the rules
8 the penalty should not exceed 26% of whatever it could
9 be, because that's the best that Staff did and the
10 Commission did when it was preparing all its documents.

11 The next two factors below relate to the
12 knowledge of Tel West and whether they either knew their
13 conduct was a violation or should have known that the
14 conduct was a violation. The Staff in its reply brief
15 indicated that while Tel West E-mails indicated that Tel
16 West knew this was a violation, well, they referred to
17 Case Number 86836 and 86904. I don't think we need to
18 look at the communications, but if you look at the
19 Staff's brief and see where the Staff says Tel West knew
20 that it was not in compliance, when you trace all those
21 citations back to the root E-mail from Tel West, you
22 will see that Tel West said that we didn't have the
23 customers' authorization, they were repeating back the
24 language that came from Staff when the parties really
25 were talking about we didn't have the verification, but

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1 they were still confused at the time. If they had
2 understood the difference between the two at the time,
3 Tel West staff would not have said, we don't have
4 authorization, we didn't get the customer's
5 authorization, they would have said, we didn't verify
6 the customer's authorization. So I don't think the
7 Staff's brief accurately talks about the facts as it's
8 stated in the E-mails from Tel West. So I don't believe
9 until the end of February when they finally changed the
10 script that they knew the real problem was a
11 verification process.

12 The next element on the checklist is whether
13 the conduct was gross or malicious, and I don't believe
14 that Staff is advocating that the conduct was malicious
15 in any way, but they did indicate that they believed it
16 was gross. And there's no definition of gross provided
17 in the rules or in the Staff's brief, but when you take
18 a look at what could have happened or what happened, how
19 gross is normally used, the conduct we're talking about
20 here is not gross by any means. We're not talking about
21 someone being injured, we're not talking about someone
22 losing their life, we're not talking about serious
23 property damage, we're not even talking about someone
24 whose phone service was interrupted without notice or
25 didn't have phone service or the installation was

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1 delayed or anything like that. Staff takes the position
2 that it's gross because it happened many times. Well, I
3 would agree that the frequency was high, the number of
4 alleged violations was high, but that doesn't
5 necessarily make it gross. I think you need to focus on
6 the impact on the customer, the impact on the user, the
7 impact on, you know, the Commission in its ability to
8 fulfill its obligations, not frequency necessarily. So
9 when you compare this to other types of violations, this
10 doesn't fit into the category of gross.

11 The next element is the Commission had
12 previously found violations. The Commission had not
13 found violations of this rule in the past, so that's not
14 a factor for this particular proceeding. Yes, there had
15 been one negotiated settlement a couple of years earlier
16 over I think it was the service to low income
17 individuals, wholly unrelated to the rules in question
18 here. Staff is saying that, well, because there was a
19 prior violation, we think you should not have any
20 mitigation at all. But I don't believe that's a correct
21 interpretation of the Commission's order when you apply
22 these mitigation factors. I think you will find that
23 the Commission is focusing on like in the Pacific Power,
24 which case was it, the food case, the pipeline violation
25 case, where they had an existing order where they had

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1 found violations, and then one year later they hadn't
2 remedied the situation so they were fined again. That's
3 the type of existing violation that the Commission is
4 looking for in the mitigation factors.

5 The next few factors deal with whether the
6 offending conduct had improved and whether remedial
7 steps were undertaken. I think clearly once the company
8 understood the communication from the Staff and hired
9 additional resources to make sure that they could
10 respond in a timely manner, all of the issues were taken
11 care of, so I think on both of those the factors do
12 favor mitigation.

13 The next factor was added I think in a
14 Pacific Power case, rough proportion of seriousness of
15 offense and the company's willingness to comply. My
16 interpretation of that new element in 1999 was it was in
17 response to the Supreme Court's case on the excessive
18 penalties clause. So I kind of apply the last two
19 factors on the sheet to the Constitutional standard of
20 excessive fines or penalties. Under the, I might not
21 pronounce the name right so I'm going to look at my
22 sheet here, Bajakajian case, U.S. versus Bajakajian
23 case, a leading case on the excessive fines clause, the
24 Supreme Court focused in on the nature of the violation.
25 In the Bajakajian case, the violation was a failure to

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1 report the attempted transport of \$350,000 in cash out
2 of the country. It wasn't an allegation of hiding
3 money, it wasn't an allegation of unlawful export, it
4 was a failure to report. So the Supreme Court focused
5 clearly on the report that wasn't filed, and does that
6 justify the \$350,000 forfeiture.

7 When we take a look at the situation here
8 when you look at Tel West's conduct, the two specific
9 charges that we're talking about are number one, did
10 they get verification of the customer's authorization.
11 It's not slamming, it's not fraud, it's not
12 disconnecting service without notice, it's not even did
13 you get their authorization, because in the script they
14 did get the authorization. It was just the last
15 verification piece. And when you look at the failure to
16 get verification, where are the damages? Who is harmed?
17 You know, you can't point to anyone who suffered
18 financial loss, physical loss, any type of loss as a
19 result of the failure to verify a prior authorization.
20 So, you know, for the Staff to say that a penalty of
21 \$103,000 is appropriate for failing to ask, is this
22 okay, there is no rationale, there is no proportionality
23 at all, and the Staff hasn't proven any type of
24 financial loss. So it's just, you didn't ask a simple
25 phrase, therefore the penalty is \$100,000, that will not

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1 clear Constitutional muster, nor will I think it meet
2 the Commission's standard of rough proportions to the
3 seriousness of the offense.

4 And then ultimately the company's willingness
5 to comply, they have come into compliance.

6 For the PIC freeze penalty, I do believe that
7 the one factor that doesn't weigh in our favor is
8 repeated violations. I think that the Commission had
9 not found a violation, but this happened numerous times,
10 and we are not going to disagree with that. I would
11 like to point out that it's not like they made the
12 decision every day that they're going to violate the
13 Commission's rules. They set up the third party
14 verification script, revised it two times, and finally
15 got into compliance, so it was set up the process, let
16 it work, sign up the customers, and there were actually
17 only two decision points which generated all of the
18 concerns from the Staff rather than 1,000 decisions made
19 over the course of several months.

20 Do you have any questions on our view of the
21 PIC freeze penalty?

22 JUDGE WALLIS: No, thank you.

23 MR. BUSCH: Thank you.

24 Okay, I would like to move then to the second
25 page of Exhibit 1, which talks about the response times.

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1 And similarly as far as known and intentional
2 violations, I want to go back to the days when I Love
3 Lucy was on TV. And if my hunch is correct, some of us
4 in the room remember the scene when Lucy was trying to
5 keep up with the chocolates that were coming out of the
6 factory, and they were falling all over, and she was
7 trying to keep up and would stuff a few in her mouth and
8 stuff a few in her pockets and so on. When you work in
9 a competitive telecommunications company, life is
10 somewhat like that.

11 I started in telecom in 1978. I have worked
12 in the ILEC business, I have worked in the wireless
13 business, and now I'm outside counsel to the
14 communications industry. And I can tell you when you
15 work in a competitive business like wireless or the CLEC
16 business, everything moves fast, there is so much to be
17 done, and it's a question of which projects get
18 prioritized today. And it's not like you make a
19 decision that these other projects don't get worked,
20 it's just that you never get that far through your
21 inbox, you never get that far through, I mean fill in
22 the blank, the reports sitting on the desk, the mail in
23 the inbox.

24 There's no allegations and Tel West didn't
25 make a conscious decision every day to ignore inquiries

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1 from Staff, they were just trying to keep up with the
2 flow of a competitive business trying to grow the
3 business and serve customers. Again, was the conduct
4 gross or malicious? We're not talking about people
5 being injured, we're not talking about customers being
6 out of service, we're talking about a failure to respond
7 to an E-mail within three or five days. Had the
8 Commission previously found violations? Just like in
9 our last conversation on the PIC freeze, no, there had
10 been no prior violations found by the Commission.

11 Next two items, was the offending conduct
12 improved and remedial steps ever taken? Absolutely.
13 They hired Don Taylor, and ever since Don has been on
14 board in mid April, the company has been responding in a
15 timely manner.

16 The next item is the rough proportion of the
17 seriousness of the offense and the company's willingness
18 to comply. Again, how serious is the offense? Now we
19 do take communications very seriously from the
20 Commission, I don't want to send a misleading message
21 here. But when we compare it to is someone out of
22 service, is there a person that has medical needs that
23 the phone has been disconnected inappropriately, that's
24 not what we're talking about. We're talking about the
25 ordinary communications between Staff and a

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1 telecommunications company about whether, and then fill
2 in the blank, there were some other, and then the issues
3 were PIC freeze or billing questions and so on. So the
4 harm that was being caused isn't gross or malicious,
5 it's just failure to respond in a timely manner. So the
6 penalty of roughly \$40,000 is way too large for the type
7 of nonresponsiveness that we had here. My suggestion
8 would be on this one that we look at each individual
9 complaint as one instance of failure to respond in a
10 timely manner rather than adding up 73 or 56 or whatever
11 it is for each individual case.

12 Now as far as the factors that don't weigh in
13 favor of mitigation for the response time penalty, I
14 don't believe this is a question of first impression, I
15 don't believe that Tel West should not have known the
16 conduct was a violation. I don't think that weighs in
17 our favor, and it did happen numerous times, we're not
18 going to dispute that.

19 Do you have any questions about our concerns
20 over the response time penalty?

21 JUDGE WALLIS: No.

22 MR. BUSCH: Thank you.

23 As a final series of comments, it struck me
24 when reading through the documents, the Staff response
25 to application for mitigation of penalties, I would like

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1 you to see if you can find that in your file, Your
2 Honor, the Staff response.

3 JUDGE WALLIS: Yes.

4 MR. BUSCH: Thank you.

5 As I would read through the Staff's response,
6 there were times when I thought, are we really talking
7 about the same case here. Some of the arguments made by
8 Staff in my mind were so far away from either the facts
9 or the proper application of the law I felt compelled to
10 page through and identify for myself as well as for you,
11 Your Honor, where I thought there was a misunderstanding
12 either of the facts or of the application of the law.

13 What I would like to do now is just flip through and
14 comment on a variety of matters in the Staff's response.

15 I would like to start on page 6 in Paragraph
16 14 just as an example of how we disagree with Staff over
17 whether this is a violation or not. In Paragraph 14,
18 line 5, Staff had sent the E-mail message to Tel West,
19 and we don't dispute this, Staff said:

20 I listened to the TPV again, I did not
21 hear the customer authorize Tel West to
22 place a local line freeze on the account
23 in accordance with WUTC rules.

24 And then Staff takes a position, placed in
25 context, the March 12th, 2004, message was a request for

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1 information. There's no question there. The Staff did
2 not ask a question, they just responded, I didn't see
3 proof. And when the Staff claims that circumstances
4 like this warrant a fine, I have a serious problem with
5 that. I don't think that's a request for information,
6 that's just a response without asking for anything
7 further. When you read through the materials submitted,
8 I would like you to look for things like this where we
9 think the number of alleged violations should be
10 dramatically reduced.

11 And this is just another example of what I
12 think is a misstatement of what the facts are or I
13 should say not arguing what the facts really state that
14 they are. On page 7 starting with the last line on the
15 page, Staff is arguing that the distinction between
16 authorization and verification is not as defined as Tel
17 West argues. Maybe it's just me, but I don't understand
18 why this is so difficult. The FCC rules and this
19 Commission's rules clearly distinguish between the two
20 steps, and Staff in a confusing way argues that they're
21 the same, but at times that they seem to say that they
22 are different. When you go down to page 8, Paragraph
23 18, in the 4th line, Staff takes the position toward the
24 end of the 4th line, authorization simply can not be
25 proved without verification. I mean the unfortunate

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1 thing is that Tel West proved that you can have an
2 authorization without a verification. I think what
3 Staff really is trying to say is that in order to
4 properly place a PIC freeze on a customer's line, you
5 need to have authorization plus verification. So to put
6 it in algebraic terms that my 8th grader will
7 understand, it's A plus B equals C, and I agree with
8 that, that the C is lawful implementation of a PIC
9 freeze. You can have an A without the B, but then you
10 don't get the C. And what we're saying is that we need
11 to be consistent with the terms, authorization is not
12 the same as verification. Even though the rules are
13 confusing, we all understand now what they say, and
14 hopefully the Commission will issue an order that
15 clarifies that for us.

16 On page 14, Paragraph 34 of the Staff's
17 response, the last two sentences refer to what I
18 mentioned earlier about Staff takes the position that,
19 quote the last sentence in Paragraph 34:

20 The company made several unequivocal
21 statements regarding not having
22 authorization to place preferred carrier
23 freezes. See Footnote 60.

24 When you go and take a look at Exhibit C to
25 the declaration of Ms. Young, you will see that it

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1 wasn't an unequivocal statement about verification, it
2 was a statement about authorization at a time in January
3 that they were still confused. So the E-mail which
4 Staff relies upon does not support its argument, and I
5 want to make sure that that's not misleading to the
6 Commission.

7 When you review the Staff's brief on page 17
8 where we talk about -- we start talking here about the
9 factors under the Commission's legal standards for
10 penalties and whether they should be mitigated, at the
11 top of page 17, Staff takes the position that this case
12 does not involve offending conduct associated with new
13 requirements of first impression. I agree with that
14 statement, but that's not the statement of the law. The
15 statement of the law is, mitigation is appropriate if
16 this is an issue of first impression, not a requirement
17 of first impression. And like we discussed earlier this
18 afternoon or I discussed earlier this afternoon, I
19 believe this is the first time this issue has been
20 brought to the attention of the Commission, and we're
21 requesting a clarification of the rule on this.

22 In Paragraph 43 on the same page 17, toward
23 the end of that paragraph Staff takes the position that
24 Tel West had actual knowledge that its conduct
25 constituted a violation, and the second and third

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1 factors do not support mitigating or forgoing the
2 penalty in this case. I don't see any evidence here
3 that Tel West acknowledged before we started talking
4 with Staff before the end of February that they
5 understood that this was a problem. They were confused
6 by the nature of we have authorization, why do they keep
7 talking about authorization. And then from time to time
8 the word verification shows up in the correspondence,
9 about 26% of the time if my math is right. And that
10 just adds to the confusion.

11 Further down on page 17 Staff takes the
12 position in the last sentence of Paragraph 44:

13 The number of violations and the length
14 of time the violations continued support
15 a finding that the violations in this
16 case are gross and the penalty is
17 proper.

18 It's just a bold statement of the Staff's
19 position without any real analysis of what is it that is
20 gross, is it the impact on the customer that's gross, or
21 is it that there's just a large frequency of
22 insignificant errors. And I would advocate that this is
23 just a large frequency of insignificant errors, and that
24 doesn't amount to gross conduct.

25 On page 18, Paragraph 46, when Tel West

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1 finally got the message, they fixed it, they hired more
2 people, they revised their processes. And the
3 Commission has said that when the conduct is improved,
4 it should be used in considering mitigation for the
5 penalty. Yet in Paragraph 46 at the end, the Staff
6 advocates that the Commission should decline to mitigate
7 the penalty because the factors in the case support the
8 level of penalty. There's no detailed analysis as to
9 why the company's improvement in conduct should not be
10 used to mitigate the penalty. I understand this is just
11 good advocacy, but I was expecting to hear a more
12 detailed explanation as to why the improvement in
13 conduct should be ignored here.

14 Again, in Paragraph 47 on page 18, Staff
15 argues that yes, the Commission had not found the
16 company in violation of these specific rules before, and
17 that would support mitigation under the Commission's
18 rules, but they want to ignore that, and they want to
19 say because we had one penalty in a prior case you don't
20 get any benefit of this being the first violation for
21 you. I don't think that's what the Commission has in
22 mind, and I encourage you to exercise your own judgment
23 on that.

24 For example, on the top of page 19, first
25 sentence in Paragraph 48:

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1 The Commission is not required to allow
2 companies a free pass for first
3 violations of each regulatory
4 requirement.

5 I agree with that, they're not required to,
6 but what we're talking about are the factors for
7 mitigation and what the Commission should take into
8 consideration when dealing with a telecommunications
9 company.

10 On the same page 19 at the end of Paragraph
11 49, Commission Staff just makes the simple statement,
12 violations of this rule, referring to the third party
13 verification script, constitute serious violations.
14 With all due respect, that analysis isn't very helpful.
15 I would suggest that the Commission should look at the
16 seriousness of the impact of the violation and not
17 simply say any violation of the Commission's rules is a
18 serious violation or frequent violations or repeated
19 violations of the Commission's rules is a serious
20 violation. We need to look at the impact on the
21 customer or the Commission Staff. And again, when you
22 go back and look at the impact of these, the failure to
23 verify a PIC freeze that was authorized, those aren't
24 serious violations because there was no harm to anyone
25 in the process.

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1 On page 20 toward the end of Paragraph Number
2 50, there's a discussion about some of Tel West's
3 customers not being able to migrate from Tel West
4 service to service provided by other telecommunications
5 companies. My understanding after talking to Staff and
6 counsel for Staff is that there was only one instance
7 where one customer was unable to have their service
8 migrated from Tel West to a different carrier, Qwest,
9 and the Staff was able to investigate the reason for
10 that, and the reason for that was that Qwest's order
11 processing system prevented the order from being
12 processed. I did talk with Ms. Watson a couple of days
13 ago or yesterday about the possibility of Staff
14 stipulating that that was, in fact, the results of the
15 investigation, because that was the one fact that I
16 thought was not in the record, and I would like to ask
17 if Staff is willing to stipulate to that at this point?

18 MS. WATSON: That wasn't what I remember us
19 talking about, so I guess if you want to explore that a
20 little bit more, that would be fine, whether it was just
21 one customer that was able to migrate, I thought we were
22 talking about something different.

23 MR. BUSCH: Okay, that's fine, then I'm not
24 going to pursue that type of stipulation.

25 JUDGE WALLIS: Perhaps on a break.

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1 MR. BUSCH: You bet.

2 What I would like to do though is point out
3 here that when you trace again Footnote 79 refers to
4 Ms. Young's declaration, Paragraph 19, when you trace
5 all of the evidence back, you will find some customers
6 is actually an example of one customer, and we will work
7 on some type of stipulation if possible. If not, then
8 the record is what the record is.

9 That same argument is made by Staff also on
10 page 23 toward the end of Paragraph 62, Your Honor,
11 where there's an allegation by Staff that Tel West had
12 held customers, plural, captive, and there's a statement
13 that the harm is much greater than that in the reporting
14 case, I have to look at my cheat sheet here, Bajakajian
15 case, the U.S. Supreme Court case on the excessive fines
16 clause. But I think you will find that numerous
17 customers were not held hostage, if anyone was held
18 hostage at all by Tel West. And I think we will see if
19 we can work out the real cause of the customer not being
20 able to have their service switched from one carrier to
21 another.

22 Finally, I would like to talk about the other
23 fines that have been considered either under the
24 excessive fines clause of the U.S. Constitution or other
25 fines that have been issued by the Commission.

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1 Commission Staff in its response on page 24 points to
2 the Vasudeva case. I don't know why all these names are
3 so hard to pronounce to me. But in the Vasudeva case it
4 was the food stamp brokering investigation by the
5 federal government where they went to a series of
6 7-Elevens to find out whether there was any brokering in
7 food stamps. They did find several instances of
8 improper trafficking of food stamps, and the fines were
9 levied or quoted here in Paragraph 64 on page 24, the
10 fines were \$5,000, \$20,000, and \$17,000 for basically
11 stealing from the government under the food stamp
12 program. Staff cites this in support of its claim that
13 these fines against Tel West are appropriate. Well, if
14 the fines against Tel West were \$5,000, \$20,000,
15 \$17,000, quite frankly we wouldn't be here today,
16 because the fine against Tel West is dramatically higher
17 than these. And I would suggest that it's a totally
18 different Constitutional question if the fines are
19 \$5,000 or \$20,000 than when they're \$140,000.

20 When we look to the other disproportionate
21 fine, examples that I have, I have quoted some of these
22 in the briefing, Your Honor, but the MCIMetro versus U S
23 West case from the 1990's where the Commission in a very
24 difficult decision decided not to fine Qwest at all for
25 having slowed down the growth of competition in the CLEC

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1 business, failing to invest in the network, failing to
2 process orders by competitive local exchange carriers
3 for new service. You know, the harm to specific
4 companies was far greater there than here, and there was
5 no fine issued.

6 The American Water case, which I believe may
7 still be pending here before the Commission. Mr. Fox
8 had been taking funds from a Commission ordered bank
9 account that was supposed to be held for the benefit of
10 customers, diverted them to pay I believe taxes it was.
11 Happened for 15 months for thousands of customers every
12 month, and the fine was \$3,700. There there was a
13 financial loss of funds, and the Commission had a fine
14 of \$3,700.

15 PacifiCorp cited in our petition failed to
16 file a draft RFP for 113 days, so it was a long term 113
17 violation penalty, and the Commission in its order
18 mitigated the penalty down to \$5,000, an example of
19 where it's not gross to have numerous violations of the
20 same rule from one act.

21 The Basin Frozen Food case is the one I was
22 referring to earlier about the natural gas pipeline
23 safety and documentation regulations. This is the one
24 that shocked me in the sense that, number one, Basin
25 Frozen Foods was penalized \$40,000 because they violated

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1 an existing Commission order. And when we're talking
2 about natural gas pipelines, we're talking about public
3 safety, we're talking about people who could be injured
4 or killed if there's a problem with the maintenance or
5 the records, and the fine there was \$40,000. The
6 proposed fine here against Tel West where there's
7 absolutely no public safety or health issues at all is
8 roughly almost four times the size of this fine. So I
9 think the Commission should apply a standard of fairness
10 amongst all of the fines that it issues against the
11 industry to send the right message to the industry.

12 Thank you. Do you have any questions that I
13 can answer?

14 JUDGE WALLIS: Yes, I do, I would like to ask
15 several questions at this time.

16 MR. BUSCH: Please.

17 JUDGE WALLIS: Let's begin with the last
18 point that you're making.

19 MR. BUSCH: Yes.

20 JUDGE WALLIS: One of the factors that's
21 cited in deciding whether a penalty is appropriate is
22 its effect on other potential violators. And I'm
23 wondering whether a low fine would provide the incentive
24 for someone who unlike Tel West had an evil motive in
25 violating the rule and desired to keep customers unless

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1 the penalty were relatively substantial.

2 MR. BUSCH: If the Commission found that
3 someone had evil intent and violated the Commission's
4 rules numerous times, I think it's appropriate to fine
5 them in that same way. I don't believe we have that
6 here. I think it was the I Love Lucy scenario where the
7 company was so busy with its growth strategy that these
8 were inadvertent violations. In addition, I think the
9 amount of the fine is not the only economic cost of the
10 penalty process. Obviously we are here, there are costs
11 to the Commission, there are costs to Tel West. I think
12 every communications company knows that if you are in a
13 penalty proceeding with the Commission, it is not a no
14 cost proceeding. And if the fine against Tel West here
15 were say \$5,000, other actors or other potential bad
16 actors that want to have some malicious intent, they
17 would realize that there's -- it's not just a \$5,000
18 fine, but there's more at risk than that. And if the
19 Commission order finds that these errors were
20 inadvertent, the company that intends to act with evil
21 intent would know that we wouldn't fit into that
22 category, so they would probably not expect to have
23 similar treatment from the Commission.

24 JUDGE WALLIS: This apparently went on
25 depending on the issue for a period of three to nine

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1 months. Didn't Tel West have some concern that they
2 kept receiving notifications from the Commission over an
3 extended period? Wasn't there a desire on their part to
4 resolve things? Why did it go on so long in both of
5 these instances?

6 MR. BUSCH: Let's take them one at a time if
7 we could. I honestly think that the delay on the third
8 party verification script was total confusion, because
9 the messages, when the message would come in from Staff
10 talking about authorization, and they knew they had
11 authorization, it was there, frankly their reaction was
12 probably, these people don't know what they're talking
13 about. And then when the subsequent messages come in
14 interchanging the terms of authorization versus
15 verification, at that point you've just said they're
16 confused, something's wrong, and there needs to be a
17 break in the chain.

18 You go back to communication, whether it's
19 with kids or managers or co-workers, if you get into a
20 routine like a tennis match, volleying back and forth,
21 if you want to get out of that routine, somebody has to
22 say, stop, don't communicate in the same way, E-mail,
23 pick up the phone and call, they're obviously not
24 communicating. I heard a great definition of insanity
25 once, and that is engaging in the same behavior and

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1 expecting a different outcome, you know, and that's what
2 we have here. Everybody was engaging in the same back
3 and forth behavior but expecting a different outcome
4 every time, and that's when somebody has to stop, get
5 aware of what's going on here and say stop, we need to
6 discuss this verbally rather than keep sending E-mails
7 back and forth.

8 JUDGE WALLIS: Why was it that early in that
9 process Tel West who, to continue the line of analogies
10 here, is getting bitten by these little mosquitoes
11 regularly, why didn't they say, stop, let's find out
12 what's going on so we can stop all these annoying
13 messages from coming in that we have to deal with and
14 spend our time on?

15 MR. BUSCH: I understand, that's a good
16 question. I honestly don't have an answer for that.
17 That initiative could have come from either side, and
18 all I can do is go back to my days when I was in
19 management in a wireless company when you don't even
20 have time to, fill in the blank, get through your inbox.
21 You're prioritized taking care of customers, and the
22 confusing items that take a long time to resolve just
23 don't get to the top of the inbox.

24 JUDGE WALLIS: My next question could be
25 interpreted in a negative fashion, and I don't want it

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1 to be taken that way, but when the Commission considers
2 mitigation, you have offered as one of the reasons for
3 mitigation that the company was very busy at the time,
4 and it strikes me that that really isn't an excuse for a
5 continuing violation, that in fact the factors
6 supporting mitigation should be others of the kinds of
7 factors that you have mentioned, the harm to the public
8 and the Commission's responsibilities, the company's
9 responsibilities to avoid the actual or potential harm.
10 Why is it then except indirectly that you are citing to
11 the preoccupation of the company?

12 MR. BUSCH: Quite frankly because I think you
13 and the Commission are human, and you need an answer to
14 why. And in the absence of a rational business
15 explanation, my fear is that the Commission and/or you
16 may fill in bad intent. So what I'm trying to do is
17 provide a snapshot into what life is like at Tel West or
18 any other competitive carrier for that example, for that
19 matter, and allow you to check the box of no, this isn't
20 malice, this isn't bad intent. I'm not saying that
21 we're busy is a reason to give us a zero in that column.
22 What I am saying is that's not a reason to multiply it
23 up to the top. So I'm recognizing that whether it's
24 from jury trials or having served on a jury, people want
25 answers, and they don't like to be stuck in a position

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1 of deciding a matter like this without having an answer
2 to that question.

3 JUDGE WALLIS: Do you have a specific figure
4 in mind to which you would request that the penalty be
5 mitigated?

6 MR. BUSCH: No, but as I was talking about
7 the different elements today, I suggested a couple of
8 calculations which I could do now. I don't have a
9 formal offer or suggestion from the company, but when I
10 think about it from an equity standpoint if you need to
11 look to external factors separate from the simple math
12 of X number of violations times \$100. If the Staff got
13 it right 26% of the time, then I think that's a number
14 that we can point to objectively and say then 26% of X
15 is appropriate. And then when you look at the number of
16 complaints separate from the number of violations, if
17 it's one violation per complaint, I don't remember how
18 many complaints there were quoted, but one violation per
19 complaint rather than one violation per day of delay I
20 think would be appropriate. If you would like us to
21 provide you with those numbers, we can do it after a
22 break.

23 JUDGE WALLIS: Very well.

24 MR. BUSCH: We will do that.

25 JUDGE WALLIS: And just so I'm very clear, it

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1 is your contention that there was never a violation
2 regarding authorization but only in terms of
3 verification; is that correct?

4 MR. BUSCH: I want to be very careful with
5 the words I choose. There were no allegations -- well,
6 I take that back. I had a -- I skipped over in my notes
7 making a point here, because I didn't think it would be
8 necessary, but you raise it, so let's talk about it.

9 The third party verification script and the
10 sales script which preceded it mentions authorization
11 and that there would be a PIC freeze placed on the line.
12 Assuming that the scripts are followed consistently
13 every time, then every customer who signed up for
14 service would have been informed that a PIC freeze would
15 be applied. Two things, one, in the Staff report there
16 were allegations that numerous people were unaware that
17 they had a PIC freeze or were unaware of how to get rid
18 of the PIC freeze. And my suggestion there is that even
19 though a customer might not know they had a PIC freeze
20 or remember that it was discussed or know how to remove
21 the PIC freeze, that doesn't mean that it wasn't
22 necessarily discussed.

23 I think about my poor dad who has had a son
24 in telecom since 1978, and he still doesn't know what a
25 LATA is. And about two months ago he wanted to change

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1 some features in his phone service, and I had to walk
2 him through yet again, and he's in his late 70's. There
3 are a significant number of people who don't eat, drink,
4 sleep telecom that are users of telecom service and are
5 still totally baffled by the concept of a LATA. And
6 when we start getting down to the PIC freeze, it's just
7 gone. You could talk to them at length about it, and
8 they wouldn't understand what you were talking about.

9 Second thing is when you listen to some of
10 the wave files from the third party verification script,
11 which I did, you will find that the script readers
12 follow the script, but you will also hear a surprising
13 amount of confusion about LATA. And they would go back
14 and talk about it again, and they would go back and talk
15 about it again. Then finally the person on the other
16 end of the line would just say, okay, because I got the
17 message that I don't understand it, but I'm going to go
18 ahead anyway because I want the reduced pricing from Tel
19 West.

20 So you asked me the question, this is a long
21 winded answer to your question, you asked me the
22 question whether I am saying there were no violations in
23 the authorization part. Given all those assumptions and
24 given that some people don't remember what happens and
25 the callers don't understand what LATAs are or

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1 authorizations are, my understanding is they complied
2 with that portion of it. Whether it was 100% of the
3 time, I can't guarantee that.

4 JUDGE WALLIS: Very well.

5 MR. BUSCH: Did that answer your question?

6 JUDGE WALLIS: Yes, thank you.

7 Ms. Watson, do you wish to proceed now?

8 MS. WATSON: If we could, I would like to
9 take a moment just to organize some of my thoughts.

10 JUDGE WALLIS: Very well, let's take a ten
11 minute break, please.

12 (Recess taken.)

13 JUDGE WALLIS: Let's be back on the record,
14 please, following a brief recess.

15 Ms. Watson.

16 MS. WATSON: I'm sorry, just a moment, I
17 apologize, Your Honor. I think the way that I'm going
18 to organize my remarks is to go through some of what
19 Mr. Busch stated and then if I need to go to my prepared
20 remarks at the end, so it may not be perfectly
21 organized, but we'll proceed.

22 JUDGE WALLIS: Fine, please proceed.

23 MS. WATSON: One of the things that came up
24 was a stipulation, and I wanted to address that first.
25 What I had heard was that there was one customer and

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1 that there were certain problems with that customer
2 being able to transfer, and that wasn't what I had
3 understood the stipulation to be, and I don't think
4 that's the important point that Tel West was trying to
5 make, but rather that there were certain issues with
6 Qwest and how Qwest operates, and they placed an order
7 freeze on the account, and so there were certain issues
8 that Qwest may have increased the number of days that
9 were involved there. If that's what we're stipulating
10 to, that's fine, Staff can do that.

11 I did want to address the one customer being
12 affected by the freeze violations. As far as Staff
13 knows, there were 77 complaints, and out of the 77
14 complaints there were 32 customers that contacted Staff
15 saying, we have a freeze on our account and we don't
16 know how to take it off, we don't know how it was placed
17 in the first place. And those customers, it ranged from
18 two weeks to five months that they were unable to figure
19 out how to remove this freeze. So as far as Staff
20 knows, there's about 32 customers that were affected.

21 And moving on to the authorization and
22 verification discussion, there's been a lot of
23 discussion about --

24 JUDGE WALLIS: Let's pause for just a minute
25 if we may and ask counsel whether this resolves the

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1 issue regarding the stipulation.

2 MR. BUSCH: Thank you, Your Honor. I believe
3 the stipulation that we propose is that to the extent
4 that customers were unable to switch their service from
5 Tel West to another carrier, most likely Qwest, Qwest's
6 order processing system prevented the PIC freeze from
7 being released by Tel West. So if a customer who signed
8 up for Tel West service, this is going on longer than I
9 expected, if a customer had signed up for Tel West
10 service and a PIC freeze was placed and then that
11 customer wanted to switch say to Qwest, they would
12 usually call Qwest first and say, I would like to switch
13 to your service. At that time, Qwest freezes all order
14 activity on that account. Subsequently, Qwest learns
15 that there's a freeze, a PIC freeze on the account. The
16 customer is notified that they have to contact Tel West
17 to remove the freeze. Tel West would promptly write the
18 order to remove the PIC freeze, and Qwest would reject
19 the order because there was a lock on that account. So
20 collectively we were learning about Qwest processes, and
21 customers were delayed in getting switched back. I
22 don't know how many customers there were. My impression
23 was it was less, but we don't need to make that a part
24 of the stipulation.

25 Is that accurate?

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1 MS. WATSON: So long as we're not saying that
2 that happened in every case, and I think that we can
3 agree that that was an issue in at least some of the
4 cases.

5 MR. BUSCH: That's fine.

6 JUDGE WALLIS: Is that sufficient for your
7 purposes?

8 MR. BUSCH: Yes, Your Honor.

9 JUDGE WALLIS: Very well.
10 Please proceed, Ms. Watson.

11 MS. WATSON: Okay. Now I would like to talk
12 about the authorization verification argument. The
13 argument that Tel West makes is extremely technical, and
14 I do understand what they are saying. In practice,
15 however, those concepts aren't viewed as separate as the
16 argument that we're making here today. When Staff and
17 Tel West discusses the PIC freezes and the authorization
18 verification, that process, there's two components, but
19 it's one process, and those concepts are married to the
20 point where they're not really independent processes.
21 There's two pieces, yes, it's one process.

22 There's been a lot of discussion about Tel
23 West being confused by this, and I wanted to direct your
24 attention to Ms. Young's declaration which was attached
25 to Staff's response to the application for mitigation of

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1 penalties. And I'm looking at page 3 of that
2 declaration, it's Paragraph 12, and there's typed out A
3 through it goes on to the next page 4, so A through L,
4 there's a number of statements there that have been
5 typed out. Those are statements from Tel West, and they
6 say things, for example, we do not have any
7 documentation regarding the lack of freeze
8 authorizations, we don't have any record of this
9 customer authorization. They're talking about the
10 record of that authorization, and that's verification.
11 As I said before, it's one process, the concepts are
12 married. I don't believe that Staff and Tel West staff
13 who they were communicating with separates them out to
14 the degree that perhaps we would here in a hearing room.
15 So there really wasn't a confusion when it came to
16 violations of the WAC.

17 The next thing that I would like to address
18 is the seriousness of the violations. There's been a
19 lot of argument that the violations in this case simply
20 aren't serious, therefore the penalty should be
21 mitigated significantly. The violations in this case
22 are serious. There is customer impact, there is an
23 impact on the Commission, and I will explain what those
24 are. With regard to the preferred carrier freeze,
25 customers were held captive. Whether there was

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1 malicious intent or not, that's something that is left
2 open to decide, but customers weren't able to transfer
3 from one carrier to another. That's a direct impact.
4 There was an impact on the Commission's ability to
5 investigate. Some of those investigations dealt with
6 service affecting complaints, and whether they're
7 service affecting or non-service affecting, they have
8 different response times. But the service affecting
9 complaint consisted of, at least 5 of the complaints, 5
10 of the 77 complaints that Staff received and they
11 correspond with 43 of the violations, and those are
12 violations of WAC 480-120-166, which is the response
13 time WAC. So there was real harm to customers, there
14 was harm to the Commission, these are serious
15 violations. And Staff isn't saying that every violation
16 of every rule is equally damaging to either the public
17 or the Commission. In this case, Staff believes that
18 they are serious violations, and that should be weighed
19 when the Commission is deciding whether and how much to
20 mitigate the penalty in this case.

21 The next thing that I would like to discuss
22 is the comparison between this case and other cases that
23 are either currently before the Commission or have been
24 completed. We can't simply look at the dollar amounts
25 involved. Granted that is one easy way to compare the

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1 cases, but there's a lot more that goes on, especially
2 when a case is settled. A lot of times there are
3 additional requirements placed on the company in lieu of
4 a monetary penalty. Without having analyzed all the
5 cases that were cited here today, there very well could
6 have been additional requirements such as reporting
7 requirements or, you know, there's a whole slew of
8 things that could be imposed on a company besides a
9 monetary penalty. At this point, I don't know what they
10 are in those particular cases. In addition, the
11 Commission can only issue as high of a penalty as the
12 statute allows. And if in a given case the action is
13 something that perhaps logically you would think that
14 you would want to place a higher penalty on but the
15 statute says you can only place X dollar amount, that's
16 what the Commission is bound by. They can't overstep
17 that authority. So that's another thing that could also
18 be going on in some of those cases. So a direct
19 comparison with other cases I think is hard to do
20 without taking a more in-depth look.

21 I do agree with Tel West that the penalty
22 should be roughly proportionate with the conduct, and
23 Staff believes that the penalty in this case should be
24 mitigated to an extent. Staff is advocating \$500.
25 Staff also acknowledges that there has been improvement

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1 in Tel West's operations since Mr. Taylor joined the
2 company. At this point, Staff really isn't in the
3 position to quantify what that improvement is, and we
4 don't really have a recommendation for further
5 mitigation of the penalty besides the \$500 that we're
6 advocating. One thing that Staff does want to make
7 clear though about our position is that if the
8 Commission finds that mitigation further than that \$500
9 is appropriate in this case that the penalty amount
10 remain at a level that reflects the seriousness of the
11 violations.

12 One of the reasons for a penalty assessment
13 is to deter future violations and to encourage future
14 compliance. And in this case, Tel West is arguing that
15 many of the violations are, if not all of the
16 violations, were caused by substantial growth in the
17 company and that they have now solved the problems.
18 They also maintain that the violations were minor.
19 Staff believes that they weren't minor. Tel West has
20 had some past compliance issues, and Staff believes that
21 that is an issue for the Commission to consider in
22 determining how much to mitigate the penalty. In my
23 mind it's a little akin to the criminal system where the
24 first time you get a lesser sentence, the second time
25 not so much. And I'm not saying that these are criminal

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1 matters or that there's any bad culpability, that sort
2 of thing, that's not what I'm trying to imply by making
3 that analogy. But what I am trying to say is that the
4 level of penalty should take into account the company's
5 past acts.

6 JUDGE WALLIS: What specific past acts do you
7 have in mind?

8 MS. WATSON: Well, there was the negotiated
9 settlement that Tel West mentioned earlier, and Staff
10 fully acknowledges that that was a different rule all
11 together. Those, oh, let's see, that case involved
12 disconnections, refunds, and rate and charges
13 violations. So they were different in nature, but it
14 does -- it's a factor that the Commission should
15 consider, because it demonstrates the company's ability
16 to comply with regulatory requirements. So in this
17 case, a larger rather than a smaller penalty may be
18 appropriate in order to deter future violations and to
19 encourage future compliance. As I said before, Staff
20 doesn't have a number that we can give you.

21 One other thing that I wanted to address was
22 the Baja --

23 JUDGE WALLIS: That Supreme Court case.

24 MS. WATSON: Yes, thank you. You know, I was
25 able to say it before we were on the record.

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1 The nature of the violation in that case, it
2 was one instance of a failure to report. The dollar
3 amount looks somewhat similar to this case because it
4 was six figures, it was 300 some odd thousand dollars,
5 but it was one instance of a failure to report. It was
6 the impact of that failure to report was very minimal.
7 No third parties were impacted, it was -- that case was
8 properly decided. In this case we have over 1,400
9 violations of the rules. A lot of those violations come
10 from continuing violations, so it is a number of days
11 function of the penalty rule that increases the number
12 of the violations, but we have over 1,400 violations.
13 We have an impact on the Commission's ability to
14 investigate, which affects customers, because we're
15 investigating customer complaints about Tel West
16 service. We have a direct impact on customers' ability
17 to switch companies if they would like to. This case is
18 remarkably different than that Supreme Court case.

19 I don't want to go through all of the areas
20 of Staff's response that Tel West discussed, but there
21 are a few items that I would like to address, one of
22 those being page 14, or I'm sorry, Paragraph 14 on page
23 6. That's the complaint, and the issue there is whether
24 Staff is requesting information. I have a cite in the
25 brief where you can go to to look at Ms. Young's backup

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1 materials for the argument.

2 JUDGE WALLIS: Yes.

3 MS. WATSON: However, if you took that
4 statement out of context, I would agree that it doesn't
5 look like a request for information. However, this is
6 -- it's not the first E-mail in the line of
7 communications with Tel West, Staff and Tel West had
8 been discussing this particular complaint. Staff after
9 they didn't receive the response that they were
10 expecting from the company contacted Tel West again.
11 Going on memory, I admit I didn't go back to look at it
12 again, but going on memory I don't think they, in the
13 communication log, I don't believe that there was a
14 question stating, so where's, you know, I want X
15 information. I think that it was stated, so are you
16 going to respond to my message of the prior date, and at
17 that point Tel West did send some information. So Staff
18 doesn't believe that there was a confusion on the
19 company's part that that was a request for information.
20 Perhaps they didn't get to it because they were too
21 busy, Staff doesn't believe that that's a valid excuse,
22 but perhaps that's what happened in that case. So you
23 can't take that message out of context, you have to look
24 at it in the string of E-mails and place it in context
25 in order to understand that it was a request for

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1 information.

2 Tel West talked about in Staff's response
3 page 18, Paragraph 46, and Tel West was discussing that
4 they have fixed the problems that were occurring during
5 this time frame, and they mentioned the PacifiCorp case.
6 One of the things that Staff would like to highlight is
7 that fixing the problem, correcting the behavior, that's
8 not the determinative factor to whether there should be
9 a mitigation of the penalty. It's one factor, but it's
10 not the determining factor. In PacifiCorp, the penalty
11 was mitigated from \$11,300 to \$500, or I'm sorry,
12 \$5,000. That case dealt with a failure to file a
13 request for proposal timely. There was a lower level of
14 harm in that case. And that case stands for, and it's
15 cited in my response, but the PacifiCorp case stands for
16 the penalty being in rough proportion to the seriousness
17 of the offense. And Staff believes that while there may
18 be an additional mitigation that is appropriate, and
19 we're not saying whether there is or isn't, that a
20 higher penalty is probably more appropriate in this case
21 than a lower one.

22 And at this point I think I have actually
23 covered all the points that I wanted to make, perhaps
24 not as articulately as I had at first originally planned
25 to you, but I think everything has been covered.

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1 JUDGE WALLIS: Did I hear you correctly say
2 that Staff can not verify that the company is in
3 compliance now with the types of violations that are
4 alleged in the complaint that were the subject of the
5 penalties but that Staff does verify that the behavior
6 has improved?

7 MS. WATSON: I think that's fair. I think
8 that what we can look at is the number of complaints
9 that have come in and that sort of thing. There's a
10 system that Staff has available to them to track that.
11 Staff hasn't done any analysis in terms of what those
12 complaints are, but yes, there is a general feel that
13 the company has improved its operations.

14 JUDGE WALLIS: Do you track delays in
15 responses?

16 MS. WATSON: If I could have just a moment.
17 That is tracked. At this time Staff can't
18 tell you how the company is doing with that respect at
19 this time, but that is one thing that is tracked.

20 JUDGE WALLIS: I'm going to ask you the
21 counterpart of a question that, well, maybe it's the
22 exact same question that I asked Tel West, and that is,
23 these complaints and responses and issues are going back
24 and forth over an extended period, and to continue the
25 analogy it is kind of like swatting mosquitoes. Why

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1 didn't Staff take a step in getting the bug spray out
2 and try to contact the company and talk about the
3 repetitive violations and try to alleviate the burdens
4 that it was placing on Staff as well as the company?

5 MS. WATSON: Well, I think that to answer
6 your question it's important to look at how these
7 investigations proceed. You have one set of Staff who
8 is investigating who is working with the customer
9 directly and then talking to Tel West. And from what I
10 understand, most of that contact is done by E-mail.
11 That's just the standard way that it's done, so perhaps
12 at that level they didn't perceive a problem. The next
13 step is when the business practices staff gets the
14 bundle and they do a more in-depth investigation with
15 the company. And at that points there's, from what I
16 understand, a little bit more contact with the company,
17 there's more verbal contact with the company. I do know
18 that Staff sat down with the company on a number of
19 occasions to discuss these violations.

20 JUDGE WALLIS: I'm sorry, Staff did what?

21 MS. WATSON: Sat down with the company to
22 discuss these violations.

23 JUDGE WALLIS: Do you know the approximate
24 timing of those discussions?

25 MS. WATSON: Well --

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1 JUDGE WALLIS: Does that correspond with the
2 February date that Tel West has identified?

3 MS. WATSON: I'm not clear, which February
4 date?

5 JUDGE WALLIS: I think the reference was just
6 to February of this year.

7 MS. WATSON: I know that there's a February
8 2000 date when I think that that's when the violations
9 were completed, so that's basically when the first set
10 of Staff finishes what they're doing, and then that's
11 the package that's sent to the business practices staff.

12 JUDGE WALLIS: Thank you.

13 Tel West discussed problems interfacing with
14 Qwest. Is that something that was common to other
15 companies, and if so, is Staff able to identify how much
16 it contributed to the problems with Tel West?

17 MS. WATSON: I don't know if that's common of
18 other companies. Running the risk of overstating this,
19 I would assume that Qwest has the same process when they
20 switch over customers regardless of where those
21 customers come from. The ability to quantify how much
22 Qwest affected the ability to lift the freeze, I'm not
23 sure that we have that information. We can check, but
24 the thing that we would be checking are those complaint
25 records that are attached to Ms. Young's declaration.

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1 JUDGE WALLIS: Very well.

2 Mr. Busch, do you wish to respond?

3 MR. BUSCH: Yes, thank you, Your Honor.

4 First, to resume the topic that we had before the break,
5 and that is, is there a dollar amount that Tel West
6 would suggest for your consideration, the two components
7 would be the timely response penalty, and since there
8 were 34 complaints that I noticed in the Staff report,
9 my suggestion would be 34 complaints times \$100 or
10 \$3,400.

11 Concerning the PIC freeze, I'm going to
12 reiterate our position that we don't believe that until
13 Staff gets it right we should be penalized, so we
14 strongly advocate that there be no penalty at all for
15 the PIC freeze, but if the Commission feels that
16 something needs to be done, I would suggest that the cap
17 ought to be the 26% times the proposed \$103,400, and
18 that dollar amount we calculate as \$26,884. We are not
19 suggesting that that should be adopted by any means,
20 because we think it should be dramatically lower. But
21 that I think should be the cap given the numbers that
22 are there.

23 JUDGE WALLIS: Very well.

24 MR. BUSCH: And then finally the only other
25 comment I have in reply I guess is I think the driving

0055

1 question in the case is the seriousness of the violation
2 under the Bajakajian case. If you look very closely at
3 what the violation is, just like in the Bajakajian case,
4 the violation wasn't slamming or cramming, the violation
5 was a failure to verify an authorized freeze. And the
6 harm that flows from the simple failure to verify I
7 suggest is nil, because the customer had already
8 authorized it, it's just that third party verification
9 step that was missing. And if it's an authorized but
10 not verified freeze, the freeze was authorized by the
11 customer from a contractual standpoint. Granted, it
12 didn't comply with the rule, but from a contractual
13 standpoint with the customer. And the Staff simply
14 glosses over and says there's harm to the customer,
15 there's delay to the customer. Customers could still
16 make phone calls, they could still call 911. No one has
17 said that they lost service as a result of this, so
18 there are no provable damages resulting from it, and
19 therefore the violation doesn't support a high penalty.
20 Thank you.

21 JUDGE WALLIS: Thank you. That reminded me
22 of the other question that I had intended to ask Staff,
23 and that was whether as Mr. Busch suggested the vagaries
24 of human memory contribute to customer confusion about
25 whether they have verified and whether Staff is able to

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1 identify a proportionate number of complaints that might
2 be lodged or questions that might be raised by customers
3 that are attributable to the failure of memory rather
4 than the failure of authorization.

5 MS. WATSON: Well, I think that people
6 certainly can forget what they have agreed to. One
7 thing that I think that it's important to remember
8 though is that in order to have a valid freeze, you have
9 to have both pieces. So if they authorized but it's not
10 verified, the freeze can't be placed in the first
11 instance, so it's an invalid freeze. So if the company
12 didn't go through those two steps and the customer tries
13 to switch their service but can't because there's this
14 freeze on their account, whether they remember that they
15 originally said, oh, yeah, yeah, that's fine, I just
16 want the service, I think that it becomes a side issue,
17 one that's not dispositive of whether there is a
18 violation.

19 JUDGE WALLIS: Thank you.

20 Both of you have representatives of your
21 client present, do they wish to make any statement while
22 I have the opportunity?

23 MR. BUSCH: No.

24 MS. WATSON: No, Your Honor.

25 JUDGE WALLIS: Very well.

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1 The final thing that I would like to ask is
2 whether the parties would like an initial order from the
3 Administrative Law Judge or whether you would like to
4 pass the question along with the transcript to the
5 commissioners and have the commissioners decide with a
6 final order initially from which reconsideration rather
7 than administrative review would be taken. Do you have
8 a preference?

9 MR. BUSCH: I would like to understand the
10 process, Your Honor. Would you be drafting a
11 recommended order for the Commission's consideration, or
12 would you be passing the record without a
13 recommendation?

14 JUDGE WALLIS: I would be presenting a
15 recommendation.

16 MR. BUSCH: I don't believe I have a
17 preference, either process is fine with us.

18 MS. WATSON: Staff would be fine with waiving
19 the initial order.

20 JUDGE WALLIS: Very well, so I take it that
21 both of you would waive an initial order in this matter?

22 MR. BUSCH: Yes, Your Honor.

23 JUDGE WALLIS: Now the one final thing I hope
24 that I have is that we are now in a period of for some
25 reason extreme activity, and there is a statutory time

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1 frame for responding, but I would like to know if the
2 parties would waive the statutory time frame for an
3 order and extend it to 30 days.

4 MR. BUSCH: Tel West is willing to waive the
5 deadline and extend to 30 days.

6 MS. WATSON: As is Staff.

7 JUDGE WALLIS: Very well.

8 Is there anything further to come before the
9 Commission at this time?

10 MS. WATSON: No, Your Honor.

11 MR. BUSCH: No, Your Honor.

12 JUDGE WALLIS: Thank you very much.

13 I would like to compliment both counsel on
14 your presentations. It certainly helped to put things
15 in context and to understand your positions. Your
16 responses were well directed to the questions, and I
17 found it to be a very professional and helpful argument
18 on both parts.

19 MR. BUSCH: Thank you.

20 (Hearing adjourned at 3:15 p.m.)

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