BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GLICK, Complainant, v. VERIZON NORTHWEST INC., Respondent.	DOCKET NO. UT-040535 **VERIZON'S ANSWER TO COMPLAINANT'S PETITION FOR ADMINISTRATIVE REVIEW**

I. INTRODUCTION

1. On August 6, 2004, Administrative Law Judge Ann Rendahl (the "ALJ") issued Order No. 2 in this matter, granting in part Verizon's Motion for Summary Determination and dismissing the remainder of the claims as voluntarily resolved or moot. See generally Order No. 2. Pursuant to Washington Administrative Code 480-07-825, complainant Jeffrey Glick filed a Petition for Administrative Review specifically challenging three conclusions of law and generally challenging multiple unspecified conclusions and rulings. For the following reasons, Verizon Northwest Inc. ("Verizon") respectfully requests that the Washington Utilities and Transportation Commission (the "Commission" or the "WUTC") deny Mr. Glick's Petition.

2. Additionally, pursuant to WAC 480-07-825(4)(c), Verizon here challenges a single conclusion of law and its attendant reasoning, and requests that the Commission overturn the ALJ's conclusion and reasoning on this single issue.

II. ISSUES PRESENTED FOR REVIEW

3. Mr. Glick's Petition specifically challenges the following conclusions of law set forth in Order No. 2: Conclusion of Law No. 4 (barring Mr. Glick's claim for compensation as

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untimely), Conclusion of Law No. 7 (finding that Verizon did not violate the customer service requirements of former WAC 480-120-101, now WAC 480-120-165(2)), and Conclusion of Law No. 9 (barring Mr. Glick's First Amendment claim). See Complainant's Petition for Administrative Review ("Pet. Admin. Rev.") at 1. The Petition also generally challenges several unspecified portions of the Memorandum/Discussion section of Order No. 2. Pet. Admin. Rev. at 1. To the extent that they are discernable, Verizon responds to these issues in the order Mr. Glick presents them.

4. Notwithstanding Mr. Glick's proffered arguments, the Commission should deny review of the challenged issues, on the following grounds:

- Standard Governing Summary Determination: Mr. Glick failed to set forth any facts reasonably supporting his explanation for failing to file his compensation claim in a timely manner. As a result, the ALJ's assessment of the credibility of Mr. Glick's proffered explanation is permissible under the governing standard for summary determination. See *infra* Section III.A.

- Standard Governing Summary Determination: The standard governing summary determination is clear: a party cannot create issues of fact sufficient to defeat summary determination by putting forth evidence that contradicts other evidence already entered into the record by that same party. Mr. Glick has already testified that he failed to file his Complaint in a timely manner due to his own laziness. He cannot now defeat summary determination by setting forth contradictory explanations. See *infra* Section III.A.

- Characterization of Facts and Claims: The ALJ correctly interpreted Mr. Glick's claims and prayer for relief, and based solely on the facts as presented by Mr. Glick, she correctly denied his request for compensation. See *infra* Section III.B.

- Compensation Claim: Mr. Glick's claim for compensation under Verizon's Tariff WN U-17 is barred as untimely. Mr. Glick filed his Complaint well over two years after the applicable statute of limitations had run, and there is no equitable reason to toll the statute. See *infra* Section III.C.

- Request for Additional Damages: Mr. Glick's compensation claim was untimely. Furthermore, although it was not required to do so, Verizon has

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already provided Mr. Glick with a full refund as he requested. Mr. Glick is not entitled to any further damages under Verizon's tariff. See *infra* Section III.D.

- Customer Service Claim: Under the facts as identified by Mr. Glick, Verizon fully complied with the customer service requirements of former WAC 480-120-101. See *infra* Section III.E.

- First Amendment Claim: Mr. Glick's First Amendment claim is outside the jurisdiction of the WUTC, and, even if it was not, former WAC 480-120-101 permits written communication and does not require direct oral communication. See *infra* Section III.F.

- Request for Penalties: Mr. Glick's request for penalties for Verizon's alleged violation 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) for failure to provide itemized billing of local calls is now moot. Mr. Glick discontinued his service with Verizon. Furthermore, by unilaterally withholding payment for that particular service, Mr. Glick has already achieved all that he would be entitled to receive. See *infra* Section III.G.

5. Pursuant to WAC 480-07-825(4)(c), Verizon challenges the conclusion and reasoning set forth in paragraph 36 and Conclusion of Law No. 5 stating that the statutes of limitation set forth in RCW chapter 4.16 do not apply to questions of violation of Commission statutes and rule. Order No. 2 ¶ 36, Concl. Law No. 5. See *infra* Section III.H. Washington law makes clear that, unless a different limitation is prescribed by a statute not set forth in RCW chapter 4.16, adjudicative actions such as this matter, filed by private parties, can be commenced only within the time periods set forth in chapter 4.16. See RCW 4.16.005.

III. ARGUMENT

A. The ALJ Correctly Applied the Standard Governing Summary Determination.[1]

6. In paragraph 11 of Order No. 2, the ALJ set forth the standard upon which she ruled on Verizon's motion for summary determination:

[1] This section discusses the issues presented for review in section I of Mr. Glick's Petition.

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> [T]he Commission will consider the standards applicable to a motion for summary judgment under Washington superior court Civil Rule 56 when evaluating motions for summary determination. *See WAC 480-07-380(2)(a). Verizon Motion at 5.* If the responding party does not show specific facts showing a genuine issue of material fact in dispute, summary determination, or determination as a matter of law, is appropriate. *See CR 56(e).*

Order No. 2 ¶ 11. It is undisputed that this is the correct standard. Mr. Glick asserts in his Petition, however, that the ALJ failed to appropriately apply this standard by "assess[ing] the credibility of [his] allegation" that he did not pursue a timely claim due to misinformation given to him by the Commission staff that the WUTC lacked jurisdiction over his claims. Pet. Admin. Rev. at 1; Order No. 2 ¶ 20. But Mr. Glick's argument is inapposite.

7. The facts are clear.[2] Mr. Glick openly admits that:

- He failed to file a timely complaint due to his own laziness. Complaint, attached Mar. 20, 2004 letter from Mr. Glick to State of Washington Utilities & Transportation Commission at 1 ("I have decided, reluctantly, to pursue the Complaint, which I'd shelved for many months as much out of a distaste for reopening an unpleasant subject as out of my own laziness.") (internal parentheses omitted)).

- He "attended law school in a prior life." Complaint, attached Mar. 20, 2004 letter at 2.

- He "practiced law . . . [and considers himself] a would-be champion of the underdog (especially consumers)." Complaint ¶ 1.

- He is familiar with WUTC procedure. Id. ¶ 17 ("I am aware that the WUTC lacks jurisdiction to order compensation . . ."); id. ¶ 25 ("I knew from experience that WUTC has only limited jurisdiction . . .").

Furthermore, as the ALJ found, Mr. Glick never asserts that the Commission staff told him that the Commission lacked jurisdiction over his compensation claim, which is the only claim the

[2] Both in his Complaint and at the pre-hearing conference, Mr. Glick confirmed that his Complaint, including its attachments, set forth only true and correct facts that should be considered equivalent to sworn testimony. Complaint at 15; May 25, 2004 Prehearing Conference Transcript at 11, 16, 18-19, Glick v. Verizon Northwest, Inc., Dckt. No. UT-040535.

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ALJ found to be untimely and thus the only claim to which the ALJ's assessment is applicable. See Order No. 2 ¶ 20.

8. Based upon the facts as given by Mr. Glick himself, the ALJ correctly determined that Mr. Glick's assertion that he did not file his compensation claim in a timely manner due to misinformation given to him by Commission staff is factually unsupported, and therefore less than credible. Id. Such assessments are plainly permissible when the party opposing summary judgment fails to set forth any facts reasonably supporting its assertions. Molsness v. City of Walla Walla, 84 Wn. App. 393, 397, 928 P.2d 1108 (1996) (party opposing summary judgment may not rely on unsupported assertions); Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 680 (9th Cir. 1985) ("A party opposing summary judgment is entitled to the benefit of only reasonable inferences that may be drawn from the evidence put forth. The district court must therefore undertake some initial scrutiny of the inferences . . . ." (emphasis and citations omitted)).

9. Moreover, Mr. Glick is attempting to defeat summary determination by raising conflicting accounts as to why he failed to file his claims in a timely manner. As discussed above, he first asserted that he failed to file his claims in a timely manner due to his own laziness. Complaint, attached Mar. 20, 2004 letter at 1 ("I have decided, reluctantly, to pursue the Complaint, which I'd shelved for many months as much out of a distaste for reopening an unpleasant subject as out of my own laziness." (internal parentheses omitted)). He now asserts that he failed to file his claims due to misinformation given to him by the WUTC staff. Pet. Admin. Rev. at 1; Order No. 2 ¶ 20. But the standard governing summary judgment is clear: a party cannot create issues of fact sufficient to defeat summary judgment by putting forth evidence that contradicts other evidence already entered into the record by that same party, which is what Mr. Glick is trying to do here. Selvig v. Caryl, 97 Wn. App. 220, 225 (1999); Radobenko v. Automated Equip. Corp., 520 F.2d 540, 543-44 (9th Cir. 1975).

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B. The ALJ Correctly Analyzed the Facts Supporting Complainant's Compensation Claim.[3]

10. As discussed above, in granting summary determination on Mr. Glick's compensation claim, see Order No. 2 ¶ 21, the ALJ found that Mr. Glick failed to put forth any evidence showing that the WUTC staff gave him misinformation regarding the compensation claim. Id. ¶ 20. Mr. Glick now complains that his "concerns and allegations were inherently intertwined and inseparable," and that the ALJ incorrectly "bifurcate[d his] allegations and argument in a manner that is not justified by the record, or by common sense." Pet. Admin. Rev. at 2. But Mr. Glick's argument is nonsensical. The ALJ accepted the facts presented by Mr. Glick as true, and nowhere in his Complaint does Mr. Glick ever aver that the WUTC gave him misinformation as to his claim for compensation. Order No. 2 ¶ 20. He cannot now create factual issues by merely asserting that the facts proffered by him directly relating to his other claims also apply to his compensation claim. See Geppert v. State, 31 Wn. App. 33, 40, 639 P.2d 711 (1982) ("Through summary judgment procedure, courts pierce the formal allegations pleaded. The whole purpose of summary judgment would be defeated if a case could be forced to trial by a mere assertion that an issue exists without a showing of evidence." (citation omitted)).

C. The ALJ Applied the Correct Statute of Limitations to Mr. Glick's Compensation Claim, and There Is No Equitable Reason to Extend the Limitation Period.[4]

11. The only claim the ALJ found to be barred by a statute of limitations is Mr. Glick's claim for compensation. See Order No. 2 ¶ 21, Concl. Law No. 4. In his Complaint, Mr. Glick sought compensation or credit from Verizon for what he asserted was an undisclosed limitation on a call-forwarding feature, as well as the potential lost business due to calls not

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[3] This section discusses the issues presented for review in section II of Mr. Glick's Petition.

[4] This section discusses the issues presented for review in section III of Mr. Glick's Petition.

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forwarded to voice mail. Order No. 2 ¶ 14; Complaint, Prayer for Relief ¶ I (Mr. Glick requests "lump-sum compensation" in amount "not to exceed the total cost of [both business lines] plus all taxes and fees"). As the ALJ found, this claim had to be brought before the Commission on the basis of RCW 80.04.220, which allows reparations for unreasonable billings. Order No. 2 ¶ 19. The limitation period for this type of claim is six months:

> All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates ***shall be filed with the commission within six months in cases involving the collection of unreasonable rates*** and two years in cases involving the collection of lawful rates from the time the cause of action accrues. . . .

RCW 80.04.240 (emphasis added); see also Order No. 2 ¶ 19. Because Mr. Glick filed his Complaint with the Commission in March 2004, two and a half years after the incident in question, his claim for reparations was rightly dismissed as untimely.

12. In his petition, Mr. Glick appears to be arguing that a two-year limitation period applies to his compensation claim. Pet. Admin. Rev. at 4. Even if the Commission accepted this argument as true, which it is not, Mr. Glick's Complaint would still be time-barred. And Mr. Glick even admits this is so: "My Formal Complaint bears a date a little more than six months beyond the expiration of that period." Id. Thus, again, his claim was rightly dismissed as untimely.

13. Recognizing that his claim was untimely, Mr. Glick also argues that the applicable statutes of limitation should be equitably tolled. But the law is clear: equitable tolling of a statute of limitations is inappropriate when a plaintiff has not exercised due diligence in pursuing his or her rights. Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 811-12, 818 P.2d 1362 (1991); see also Rouse v. R.C. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (equitable tolling is appropriate only when extraordinary circumstances beyond petitioner's control prevent him from complying with statutory limits). Mr. Glick plainly admits that he delayed filing his Complaint due to his distaste for the subject matter and his own laziness. Complaint, attached

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Mar. 20, 2004 letter at 1. (admitting that delay was "as much out of a distaste for reopening an unpleasant subject as out of my own laziness"). Furthermore, Mr. Glick admits that he is familiar with WUTC procedure. Complaint ¶ 17 ("I am aware that WUTC lacks jurisdiction to order compensation . . . ."); id. ¶ 25 ("I know from experience that WUTC has only limited jurisdiction . . . ."). He further acknowledges his familiarity with Commission regulations through numerous informal complaints he leveled against US West/Qwest before moving to Bellevue in 1999. Complaint ¶ 52. And if he was not familiar with the applicable procedure, as a former attorney and "would-be champion of the underdog (especially consumers)," id. ¶ 1, Mr. Glick should have known that his claims would be subject to some statute of limitations. He could easily have figured out the appropriate jurisdiction and statute of limitations. Thus the limiting statute should not be tolled.[5]

D. Mr. Glick Is Not Entitled to Damages Under Verizon's Tariff.[6]

14. As discussed, Mr. Glick's compensation claim was untimely. Even if it were not, Mr. Glick still would not be entitled to damages under Verizon's tariff, as he argues in his Petition. Pet. Admin. Rev. at 5. Mr. Glick ordered two business lines that operated as promised, but he is basing his claim for a refund on his assumption that his call-forwarding service should have been able to forward more than one call at a time. Complaint ¶¶ 5, 9. Such a capability was never discussed. Id. ¶ 12. Furthermore, even though his call-forwarding did forward calls, Verizon granted Mr. Glick a full refund for the call-forwarding service for the entire 22 months since his service began. Id. ¶¶ 9, 14, 35.

15. Even if the call-forwarding feature was required to do something more than it did – a claim Verizon rejects – Mr. Glick is entitled to no further remedy. This is because Verizon's

[5] Mr. Glick also argues that the statutes of limitations should not apply to his customer service claim or his request for penalties and fines. Verizon addresses these issues in Sections III.G and III.H below.

[6] This section discusses the issues presented for review in section IV of Mr. Glick's Petition.

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tariff limits its liability for such an alleged failure to "an amount equivalent to the proportionate charge to the customer for the period of service" during which such alleged failure occurs. Tariff WN U-17 § 2, Second Revised Sheet 29; see also Allen v. Gen. Tel. Co. of Northwest, 20 Wn. App. 144, 578 P.2d 1333 (1978) (upholding tariff limitation; awarding only proportionate damages of $2.05-per-month listing fee for defendant's failure to list plaintiff in yellow pages). Mr. Glick has already received such a refund, and the limitation in Verizon's lawfully approved tariff binds Mr. Glick as a matter of law. Given the facts as stated in the Complaint, Mr. Glick is not entitled to a refund beyond the amount already granted by Verizon.

E. Verizon Complied with the Customer Service Requirements of Former WAC 480-120-101.[7]

16. The ALJ found that Verizon fully complied with the customer service requirements set forth in former WAC 480-120-101:

- WAC 480-120-101 does not require company personnel to provide the name of a company contact, except for the name of a supervisor. Ms. Gallentine was named as the supervisor in the call Mr. Glick made to Ms. Cooper, and based on the fact that Mr. Glick then called Ms. Gallentine, a phone number was provided to Mr. Glick. Thus, Verizon complied with the terms of WAC 480-120-101(2) to provide access to a name or department, as well as a telephone number, for seeking consideration of an earlier decision. Order No. 2 ¶ 38.

- It is clear that Mr. Glick sought a refund or compensation for the call-forwarding problem, resolution of the problem, and recourse to a supervisor. Although he was dissatisfied with the supervisor's resolution, the rules do not provide recourse to ever-higher levels of management. Rule 480-120-101 does provide for recourse to the Commissions for review of consumer complaints, which recourse Mr. Glick availed himself. It does not appear, however, that any rule violations occurred. Id. § 39.

- The facts presented in the Complaint are not in dispute, and the allegations of violation of WAC 480-120-101, the rule in effect at the time, are appropriate for summary determination as a matter of law. The Complaint does not support a finding of violations of WAC 480-120-101. Id. § 40.

[7] This section discusses the issues presented for review in section V of Mr. Glick's Petition.

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Mr. Glick challenges these rulings in his Petition. Pet. Admin. Rev. at 6-8. Yet the facts as presented by Mr. Glick plainly show that Verizon fully complied with the applicable requirements.[8]

17. Under former WAC 480-120-101, a company is required to provide a complainant with only the name or department, and telephone number, of supervisory personnel if the complainant is dissatisfied with the initial resolution of his or her complaint:

> Any complaint or dispute involving a telecommunications company and a subscriber shall be treated in the following manner:
>
> . . . .
>
> (2) 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. The applicant or subscriber shall be provided with the name or department of such supervisory personnel and a telephone number by which they may be reached.

Former WAC 480-120-101.

18. Mr. Glick states that in early September 2001 he called Verizon employee Darcie Cooper to complain about his service. Complaint ¶¶ 10, 12. He then states that on September 7, 2001, he voiced his concerns to Ms. Gallentine, Ms. Cooper's supervisor to whom he had been referred. Id. ¶ 19. Assuming for the purposes of his Petition that the facts as stated in the Complaint are true, Mr. Glick plainly had access to a supervisor to appeal his complaints and was plainly given the requisite information to contact the supervisor. Nevertheless, Mr. Glick is upset that Ms. Gallentine did not, in turn, provide an opportunity to appeal to a higher supervisor. Id. ¶ 19. But the regulation requires only an appeal to "a supervisor," not to ever-higher-level supervisors. Verizon complied with the regulation, so Mr. Glick's claim is without merit.

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[8] Complainant's discussion of violations of WAC 480-120-165 is irrelevant. As he himself acknowledges, Pet. Admin. Rev. at 6, this provision was not in effect at the time of the events giving rise to this matter.

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19. To overcome the facts plainly asserted in his Complaint revealing that he talked to Ms. Cooper and her supervisor Ms. Gallentine, Mr. Glick now argues that "Ms. Cooper, along with Ms. Gallentine, her supervisor, ***served jointly as the 'personnel engaged in initial contact'*** with me." Pet. Admin. Rev. at 7 (emphasis added). He bases his conclusion on the unfounded proposition that "[t]he latter[, Ms. Gallentine,] was present when the former[, Ms. Cooper,] put me on hold and, moments later, merely relayed Ms. Galantine's $36 offer to me." Id. (emphasis in original). But, in fact, Mr. Glick admits that he has no basis for this allegation when he admits that it only "***appear[ed]*** that [Ms. Cooper's] supervisor was standing by in close proximity (or at least reachable on a second line)." Id. at 6 (emphasis added). Even so, former WAC 480-120-101 requires only that Mr. Glick "has the right to have that problem considered and acted upon by supervisory personnel," which he admits took place when his complaints were acted upon by Ms. Gallentine. Complaint ¶ 19, Exh. 3.

F. Complainant's First Amendment Claim Is Outside the Jurisdiction of the Commission.[9]

20. Mr. Glick argues that Verizon violated his First Amendment right to free speech. Complaint ¶ 32; Pet. Admin. Rev. at 8-13. His argument is based upon Verizon's request that Mr. Glick limit his communications with the company to written contact (with the exception of calls for repair, which were explicitly permitted) and Verizon's suggestion that it would file a civil lawsuit against Mr. Glick if he failed to cease his telephone harassment. Complaint, Exhs. 3, 5.

21. The ALJ granted summary determination for Verizon on this matter, finding that:

- The Commission's rules allow for oral *or* written communication between customers and telecommunications companies, and do not require direct oral communication. *See WAC 480-120-165(2); see also former WAC 480-120-101.* Order No. 2 ¶ 46.

[9] This section discusses the issues presented for review in section VI of Mr. Glick's Petition.

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- Claims for infringement of the freedom of speech apply only to state action, and Verizon is a private company. Id. ¶ 47.

- Although the Commission has jurisdiction to determine whether Verizon may limit the ***form*** of communication, it lacks jurisdiction to adjudicate allegations of infringement of First Amendment rights. Id. ¶ 48.

Mr. Glick also challenges these rulings. Pet. Admin. Rev. at 8-13.

1. The Commission Lacks Jurisdiction to Adjudicate Allegations of Infringement of First Amendment Rights.

22. Notwithstanding Mr. Glick's attempt to turn the Commission into a court of general jurisdiction, see Pet. Admin. Rev. at 9, it is well established that "[a]n administrative agency [such as the Commission] is limited in its powers and authority to those which have been specifically granted by the legislature." Wash. Water Power Co. v. Wash. State Human Rights Comm'n, 91 Wn.2d 62, 65, 586 P.2d 1149 (1978); Cole v. Wash. Util. & Transp. Comm'n, 79 Wn.2d 302, 306, 485 P.2d 71 (1971) (same). RCW 80.01.040 makes this plain when it limits the Commission to exercising only those powers specifically set forth in law:

> The utilities and transportation commission shall:
>
> (1) Exercise all the powers and perform all the duties ***prescribed therefore by*** this title and by Title 81 RCW, or by any other law.

(Emphasis added.)[10]

23. In accordance with that provision, RCW 80.01.040(3) grants the Commission power to:

[10] Mr. Glick argues that the clause "any other law" in this provision grants the Commission authority to determine all legal issues, similar to a court of general jurisdiction. Pet. Admin. Rev. at 9. This is simply wrong. Rather than granting the Commission broad powers, RCW 80.01.040 limits the jurisdiction of the Commission to those areas in which it is specifically granted power. See Wash. Indep. Tel. Ass'n v. Telecommunications Ratepayers Ass'n for Cost-Based & Equitable Rates, 75 Wn. App. 356, 363, 880 P.2d 50 (1994) ("Administrative agencies are creatures of the legislature without inherent or common-law powers, and they may exercise only those powers conferred on them either expressly or by necessary implication" (citation and internal quotation marks omitted)).

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> 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 . . . telecommunications . . . .

Washington courts have made clear that this provision grants the Commission the authority to regulate the "rates, services, facilities, and practices" of telecommunications providers, but only as provided by the "public service laws," and the interest of the public that is protected here is likewise limited to the utilities customers' interests in those "rates, services, facilities, and practices." See Cole, 79 Wn.2d at 306 (public interest is limited to customers of utilities and areas in which Commission is specifically granted power); Prescott Tel. & Tel. Co. v. Wash. Util. & Transp. Comm'n, 30 Wn. App. 413, 416, 634 P.2d 897 (1981) (WUTC is charged with regulating "in the public interest" rates, services, facilities, and practices of utility service companies).[11]

24. Although there are other specifically listed grants of power to the WUTC in the RCW and the WAC, as the ALJ concluded, there is plainly no law granting the Commission authority to adjudicate Mr. Glick's First Amendment claim, Order No. 2 ¶ 48 (proper jurisdiction is superior court), which is why Mr. Glick fails to point to any RCW or WAC provision that grants the Commission power to adjudicate such claims. In short, the Commission plainly lacks jurisdiction over this issue. See Cole, 79 Wn.2d at 306 (where WUTC has not been granted authority, it lacks jurisdiction to determine matter).

25. Mr. Glick's assertion that "[t]he ALJ has asserted jurisdiction over those claims by entertaining them" is absurd. Pet. Admin. Rev. at 8. Adjudicating bodies do not gain or lose subject-matter jurisdiction by entertaining questions regarding their jurisdiction. See Billingsley

[11] Mr. Glick's argument that the phrase "public interest" encompasses constitutional issues such as free speech grossly mischaracterizes the grant of authority under this provision. As discussed, RCW 80.01.040 plainly limits the authority of the Commission to the listed areas, none of which grants the Commission jurisdiction to adjudicate First Amendment issues.

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v. Comm'r I.R.S., 868 F.2d 1081, 1085 (9th Cir. 1989) ("[I]t would border on absurdity to erect a jurisdictional bar to the Tax Court's capacity to consider its own jurisdiction.").

2. First Amendment Restrictions Do Not Apply to Private Parties Such as Verizon.

26. Even if the Commission has jurisdiction to hear First Amendment claims, which it plainly does not, "[t]he [U.S.] Constitution does not prohibit a private person's infringement of another's First Amendment rights: 'It forbids only such infringements which may properly be attributable to the State.'" State v. Noah, 103 Wn. App 29, 48, 9 P.3d 858 (2000) (citation omitted). Noah is instructive. There, the Washington Court of Appeals rejected an attempt to claim that judicial enforcement of a private agreement restricting a person's speech activities constituted state action sufficient to bring the agreement within the prohibitions of the First Amendment. Id. at 50. Washington courts are clear: "[a] First Amendment violation requires state action." Id. at 48. Verizon is a private party; thus Mr. Glick's First Amendment claim against Verizon is wholly misplaced.

27. Mr. Glick attempts to make Verizon a "state actor" by alleging that the Everett Police Department acts at "Verizon's direction," and that the WUTC assisted in this supposed conspiracy to deprive Mr. Glick of his First Amendment rights by "(1) fail[ing] to discourage either the police department of [sic] the Company from their course of conduct; and (2) *encourag[ing]* that conduct." Pet. Admin. Rev. at 11-13 (emphasis in original). Yet, Mr. Glick has failed to set forth a single fact showing that "the State is significantly intertwined with the acts of" Verizon. Noah, 103 Wn. App. at 48. Resorting to legal enforcement does not make a party a joint actor with the state. See Dennis v. Sparks, 449 U.S. 24, 28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980) (resorting to legal enforcement "does not make a party a co-conspirator or a joint actor" with state, whereas corrupt conspiracy involving bribery of judge does rise to level of state action); Noah, 103 Wn. App. at 50 (same). There is absolutely no proffered evidence that

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Verizon, the Everett Police Department, and the WUTC colluded to deprive Mr. Glick of any right.

28. Furthermore, even if Verizon were a state actor, which it plainly is not, limitations on constitutional free speech rights in the context of speech over the telephone may be enforced by the state if the limitations are reasonable in light of the forum and are viewpoint-neutral. City of Seattle v. Huff, 111 Wn.2d 923, 927, 767 P.2d 572 (1989) ("Speech over the telephone . . . may be regulated if 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" (citation omitted)). Mr. Glick admits in his Complaint and his Petition that in the course of his phone calls to Verizon he became angry and shouted obscenities at Verizon personnel. Complaint ¶ 26; Pet. Admin. Rev. at 11. He further admits to harassing behavior – he "phoned right back each time *in a continued attempt to be heard*" after Verizon personnel disconnected his calls. Complaint ¶ 19 (emphasis in original). Even more important, Verizon did not limit Mr. Glick's ability to communicate with the company or the content of his communications; it simply requested that Mr. Glick communicate in writing. Complaint, Exhs. 3, 5. As the ALJ noted in her order, this is plainly permitted by former WAC 480-120-101 (now WAC 480-120-165(2)). Given Mr. Glick's anger and the alternative customer service approach of written communication, the limitations Verizon placed upon Mr. Glick are reasonable and content-neutral.

G. Verizon Should Not Be Subject to Administrative Penalties.[12]

29. Lastly, Mr. Glick argues that the ALJ found that Verizon had violated "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)," and therefore the ALJ should have subjected Verizon to administrative penalties. Pet. Admin. Rev. at 13. His argument is without merit.

[12] This section discusses the issues presented for review in section VII of Mr. Glick's Petition.

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30. Mr. Glick's claim at issue relates to a request for itemized billing of local calls. And as the ALJ points out, this issue is moot. Order No. 2 ¶ 64. Mr. Glick discontinued his line with Measured Local Service in June, 2004. Complainant's Opp. To Verizon's Mot. Sum. Det., p. 9, l. 21. Furthermore, Mr. Glick withheld payment for all charges for Measured Local Service from his bills. Decl. of Stanley P. Tate ¶¶ 4-8, attached to Verizon's Reply in Sup. Mot. Sum. Det. Notwithstanding the inappropriateness of Mr. Glick's actions, Verizon voluntarily waived the $32.52 that Mr. Glick unilaterally withheld. Id.; see also Order No. 2 ¶ 87. As a result, through unilateral self-help, Mr. Glick has achieved all that he would be entitled to receive.

31. Mr. Glick also asserts that Verizon should be penalized for violations of former WAC 480-120-101. But again, as the ALJ found, and as discussed above, Verizon plainly did not violate that provision.

H. The ALJ Erred in Ruling That There Is No Provision Limiting the Time for Complaining of Violations of Commission Rule and by Failing to Find Mr. Glick's Customer Service Claims Untimely.

32. The ALJ concluded that the statutes of limitation set forth in RCW chapter 4.16 do not apply to questions of violation of Commission statutes and rule:

> [T]here is no provision in Title 80 RCW limiting the time for complaining of violations of Commission rule. If consumers or others were barred from questioning a Company's compliance with statute and rule under statutes of limitations governing court actions generally, presumably the Commission itself would be barred from filing a complaint against a regulated Company for past violations of statute and rule. ***For these reasons, the statutes of limitation in chapter 4.16 RCW do not apply to questions of violation of Commission statutes and rule.***

Order No. 2 ¶ 36 (emphasis added). This conclusion is also set forth in Conclusion of Law No. 5. Id., Concl. Law No. 5. The ALJ supported her conclusion by reasoning that if consumers such as Mr. Glick were timed-barred from bringing customer service claims, then presumably the Commission is also. Id. ¶ 36. But the ALJ's conclusion and reasoning plainly misapply Washington law. Pursuant to WAC 480-07-825(4)(c), Verizon challenges this single conclusion and its concomitant reasoning, and asks the Commission to overturn this part of the ALJ's Order.

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33. RCW 4.16.005 plainly states that, unless a different limitation is prescribed by a statute not set forth in RCW chapter 4.16, adjudicative actions can be commenced only within the time periods set forth in chapter 4.16:

> Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, ***actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.***

RCW 4.16.005 (emphasis added).

34. Violations of the customer service provisions of WAC 480-120-165 (and former WAC 480-120-101) are punishable by administrative penalties to the state under WAC 480-120-019, which Mr. Glick expressly seeks. His claim is thus a claim under RCW 4.16.100(2) for "action upon a statute for a . . . penalty to the state," see, e.g., U. S. Oil & Ref. Co. v. State, Dep't of Ecology, 96 Wn.2d 85, 90, 633 P.2d 1329 (1981) (finding statute applicable in case of civil penalties against oil company), and had to be brought within two years. See RCW 4.16.100(2). Consequently, because it was filed six months after the time to file elapsed, Mr. Glick's customer service claim should have been dismissed as time-barred.[13]

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[13] As argued in Verizon's motion for summary determination, if RCW 4.16.100(2) does not apply, then the two-year limitation in RCW 4.16.130 for "action for relief not otherwise provided for" applies. This is the only remaining limiting statute that is not explicitly precluded.

The three categories of claims with longer limitation periods are (1) actions on a written contract, RCW 4.16.040; (2) actions on an oral contract, RCW 4.16.080(3); and (3) actions for injury to the property or rights of another, RCW 4.16.080(2). The first and second options are precluded because the cause of action arose under the regulation, not under a contract. Urban Constr. Co. v. Seattle Urban League, 12 Wn. App 935, 938, 533 P.2d 392 (1975) (finding claim for unpaid wages not action on contract, but rather action on statute and thus subject to two-year limitation set by catch all RCW 4.16.130). At most, Mr. Glick's claim is based on the applicable tariff, but a tariff is not a contract. See W. Page Keeton et al., Prosser and Keeton on Torts § 92, at 663 (5th ed. 1984) ("In the light of this regulatory process, the civil liability is neither tortious nor contractual but is rather *sui generis*."). Tariffs enacted pursuant to WUTC regulation have the force of state law. Gen. Tel. Co. of Northwest v. City of Bothell, 105 Wn.2d 579, 583, 716 P.2d 879 (1986). Therefore, an action on a tariff is akin to an action on a law. See, e.g., MCI Telecommunications Corp. v. Graham, 7 F.3d 477, 479 (6th Cir. 1993) (action to enforce tariff arises under law, not "'mere contract[]'" (citation omitted)). In the present case, Mr. Glick's claim arises purely on the basis of the statute or the tariff, so the longer limitation periods for claims arising under a contract are inapplicable.

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35. The fact that Mr. Glick's claim is time-barred, however, does not mean that "the Commission itself would be barred from filing a complaint against a regulated Company for past violations of statute and rule," as the ALJ reasoned. Order No. 2 ¶ 36. RCW 4.16.160 provides:

> The limitations prescribed in [RCW chapter 4.16] shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: Provided, That, . . . ***there shall be no limitation to actions brought in the name or for the benefit of the state*** . . . .

(Emphasis added.) This statute plainly applies to entities such as the Commission, which possess specifically delegated powers to act as arms of the state. See U. S. Oil & Ref. Co., 96 Wn.2d at 89-90 (agreeing that RCW 4.16.160 applies to remedial claims asserted by state Department of Ecology). It specifically exempts actions that are brought by the state or the statutory entities to which the state delegates power, and for the benefit of the state, from the various statutes of limitations. See RCW 4.16.160. When an action arises out of the exercise of powers traceable to the sovereign powers of the state, it is said to be for the benefit of the state. Wash. Publ. Power Supply Syst. v. Gen. Elect. Co., 113 Wn.2d 288, 295, 778 P.2d 1047 (1989). On the other hand, when a governmental entity acts in a proprietary capacity, it is not acting for the benefit of the state. Id. In short, when the WUTC, based on the sovereign powers specifically granted to it by statute, brings a complaint on its own initiative, it is not subject to a statute of limitations; but, private parties such as Mr. Glick remain subject to the applicable limiting provisions. Cf. Peoples Natural Gas v. Pub. Util. Comm., 698 P.2d 255, 262-63 (Colo. 1985) (whereas two-year

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The "injury to the person or rights of another" statute of limitations, RCW 4.16.080(2), does not encompass Mr. Glick's customer service claim, because that category has been explicitly limited to tort-like claims. Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 837, 991 P.2d 1126 (2000) ("SPEEA"). The SPEEA court found that treating a claim for violation of a right created by statute as a tort-like claim "essentially eviscerates RCW 4.16.130 ['Action for relief not otherwise provided for']. Any action in court upholds a right of some sort." Id. Although that court still applied a three-year limitation based on a theory of unjust enrichment under an implied contract (under RCW 4.16.080(3)), it denied any broad interpretation of the "person or rights" language of RCW 4.16.080(2). 139 Wn.2d at 838. In the present case, Verizon has not been unjustly enriched in any fashion, so there is no possible application of RCW 4.16.080 and its three-year limitation.

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limitation applies to complaints made by private parties to commission, statutes of limitations do not apply to complaints filed by commission).

36. Thus the ALJ's conclusion that the statutes of limitations in RCW chapter 4.16 do not apply to questions of violation of Commission statutes and rule, and her supporting reasoning, should be stricken. The limiting statues plainly apply to private complaints. Moreover, the Commission should also find that Mr. Glick's customer service claim is time-barred under RCW 4.16.100(2).

IV. CONCLUSION

37. For the above-stated reasons, Mr. Glick's Petition for Administrative Review should be denied. The Commission should also overturn the ALJ's conclusion and reasoning set forth in paragraph 36 and Conclusion of Law No. 5 that the statutes of limitation in RCW chapter 4.16 do not apply to questions of violation of Commission statutes and rule, and find that under Washington law, unless a different limitation is prescribed by a statute not set forth in RCW chapter 4.16, adjudicative actions such as this matter can be commenced only within the time periods set forth in chapter 4.16.

DATED: October 14, 2004.

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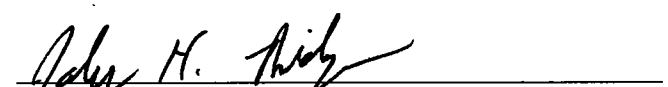

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CERTIFICATE OF SERVICE

I certify that on October 14, 2004, I caused a copy of Verizon's Answer to Complainant's Petition for Administrative Review to be served via facsimile and U.S. Mail to:

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Heidi L. Wilder
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Place: Seattle, Washington
Date: October 14, 2004

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