

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of)	DOCKET NO. UT-040572
)	
PENALTY ASSESSMENT AGAINST)	
TEL WEST COMMUNICATIONS, LLC.)	COMMISSION ORDER ON
)	BRIEF ADJUDICATION
)	GRANTING, IN PART,
)	MITIGATION OF PENALTIES
.....)	

1 **Synopsis:** *The Commission grants, in part, a petition for mitigation of penalties, finding that the assessed penalties should be mitigated from \$143,100 to a total of \$94,400.*

2 **NATURE OF PROCEEDING:** This matter is an assessment of penalties by the Commission against Tel West Telecommunications, LLC, for alleged violations of laws and rules relating to preferred carrier freezes and for failure to respond to Commission Staff inquiries in a timely manner.

3 **Procedural History:** On July 9, 2004, Tel West Communications, LLC, filed with the Commission an Application for Mitigation of Penalties. It asserted errors in the assessment and calculation of penalties, and proposed mitigation based on extenuating circumstances.

4 **Brief adjudication:** The Commission convened a brief adjudication on October 14, 2004, at Olympia, Washington before Administrative Law Judge C. Robert Wallis pursuant to WAC 480-07-610. Richard J. Busch, attorney, Seattle, represented petitioner Tel West Communications, LLC. Lisa Watson, Assistant Attorney General general, Olympia, represented Commission Staff. The parties waived an initial order and waived the requirement that an order be entered within 15 days after the adjudication.

5 **Summary:** The Commission grants the petition for mitigation, in part, and mitigates the penalties for PIC freeze violations by 50%, from \$103,400 to \$51,700, but declines to mitigate the penalties of \$42,700 for failure to respond to Commission inquiries. The total penalties due and owing are reduced from \$143,100 to a total of \$91,400.

I. DISCUSSION

A. Background and context.

6 Tel West is a facilities-based competitive local exchange carrier in Washington State. It served 8,691 access lines in this state and reported gross intrastate operating revenue of \$3.4 million during 2003. During 2003, it engaged the services of telemarketing and verification contractors to increase its business within the state.

7 **PIC freeze.** In response to consumer complaints that telecommunications companies were improperly replacing other carriers without customer permission (called “slamming”), a process was developed at the Federal and state levels to institute a “preferred carrier freeze” or “PIC freeze.” Tel West included PIC freeze provisions in its marketing and verification scripts because some of its customers had been “slammed” to other providers.

8 To become a “frozen” preferred carrier, a company must first secure the customer’s authorization to institute a PIC freeze and then must secure a third-party verification of the customer’s authorization. *WAC 480-120-147(5)*.

- 9 When a number of “frozen” customers sought to leave Tel West, they found that, with the PIC freeze in place, they could not easily accomplish the transition.¹ When the new company sought to make transfer arrangements with Tel West, it was told about the PIC freeze and told that the customer must remove the freeze before Tel West would assist with the transfer.
- 10 Tel West customers faced with barriers to changing carriers began seeking information or assistance from the Commission Staff about problems the customers encountered. Staff reports dealing with 77 such complaints between July 2003 and April 2004. Many of the customers asserted that they had not authorized a PIC freeze.
- 11 **Tel West’s violations.** Tel West did not have an adequate PIC freeze authorization process in place until February 25, 2004, when customers were clearly advised of the freeze and given the option to decline it during verification. That was accomplished by inserting into the verification script the question, “Is that okay?” with reference to imposition of the freeze. From December 2, 2003, until February 25, 2004, the verification scripts mentioned the line freeze, but did not ask the customers if they consented to the freeze. Tel West makes no contention that prior to December 2, 2003, the verification either mentioned or asked approval of the proposed PIC freeze.
- 12 Tel West is cited for violations only with regard to specific complaints made to the Commission by 77 customers whose transition to other carriers was impeded by inadequate PIC freeze procedures (and for the number of days during which the violation continued), for a total of 1034 assessed penalties. It is not cited for

¹ The evidence indicates that it was especially difficult to transfer service to Qwest because of the latter company’s processes.

violations for each customer for whom it instituted a freeze without an adequate verification process.²

13 **Excessive response time.** The second category of violation was the time required for Commission Staff to secure information from Tel West about the circumstances of individual customers. When the Commission Staff made inquiry to Tel West about customers who called the Commission for information or assistance, its inquiries often went unanswered for days or weeks, and involved repeated contacts that are detailed in extensive materials submitted to the record. The penalty assessment reflects 427 days in excess of times set out in WAC 480-120-166 – the equivalent of 14 months during which Commission inquiries about customer concerns remained unanswered.

B. Plea for Mitigation; Response; Decision.

14 Tel West seeks mitigation of the total \$143,100 penalty to a much smaller but unspecified figure. It cites both legal and factual matters that it contends justify a reduction in the total penalty.

15 **Alleged errors.** Tel West first identifies several specific penalty assessments and alleges errors that add 78 violations (or \$7800 in penalties) that should be corrected by complete mitigation. Commission Staff reviewed the plea for mitigation and agreed that errors may have occurred in two cited matters for a total of 5 assessed penalties. Staff therefore supports mitigation in the amount of \$500, but no more.

² Commission Staff states that its investigation resulted in the discovery of 3,227 possible violations, including 2,830 violations of WAC 480-120-147(5)(c), preferred carrier freeze. The potential total penalties thus could have been \$283,000 merely for instituting a PIC freeze on customer accounts, without considering the number of days each violation continued.

- 16 We have reviewed the documentation relating both to Tel West's allegation of errors and the Commission Staff's response of the allegations. We find that errors occurred in only five instances, and agree that mitigation for errors in the allegations of violations should total five penalties, or \$500.
- 17 **"Authorization / verification."** Tel West argues that the word "authorization" is a term of art that applies only to permission to change carriers, and not to the verification process. It acknowledges that Commission Staff repeatedly advised Company representatives that the Company did not have customer authorization for a PIC freeze, but it contends that its staff was confused by the term, thinking that Staff meant authorization to change carriers. Only in about a quarter of Staff messages, Tel West argues, did Staff specifically use the term "verification."
- 18 Staff responds that authorization is the process by which a PIC freeze is implemented, and that verification is merely a step in that process. It argues that staff members were correct in citing to violations relating to authorization.
- 19 In context, we think that there is no ambiguity whatever in use of the terms. There was no challenge to the customers' authorizations to change carriers. Neither Staff nor Tel West challenge the customers' authorization to Tel West to provide telecommunications services.
- 20 In order to secure a valid authorization of a preferred carrier freeze, however, the third-party verifier must verify the customer's authorization *for the PIC freeze*. Staff's communications to Tel West repeatedly cite to the lack of proof (verification) of the customer's *authorization* of the freeze. Tel West reflected no confusion in its responses to the messages, and at the hearing was unable to identify any reason why, if it was confused about the repeated messages

regarding violations, it failed to ask Commission Staff to clarify the issue.³ Use of the terms “authorization” and “verification” provides no basis for mitigation of the penalties.

21 **Equitable estoppel.** Tel West contends that the Commission may not assess a penalty unless it has first cited a carrier for a violation, under principles of equitable estoppel. It argues that while the Staff cited Tel West for 397 violations of the timely response rules, Staff previously told Tel West about only 325 violations and is therefore barred from assessing the remaining 72 asserted violations.

22 Staff opposes this argument, contending that no equitable estoppel occurred here.

23 We find no equitable estoppel in this situation. Equitable estoppel is disfavored in application to government in the performance of a governmental (as opposed to a proprietary) function; here, petitioner seeks to apply it to enforcement of regulatory provisions that protect the public, a decidedly governmental function.

24 None of the requisites of equitable estoppel are met. (1) There is no statement or act alleged, merely the lack of Staff’s advance warning that the Commission in reviewing pertinent facts would find specific apparent violations. Estoppel cannot occur without a specific statement or act. (2) Because there is no government statement or action, there can be no reasonable reliance on any government statement or action. Respondent made no change of position and took no action in reliance any statement or action of the agency. (3) There is no injury to the respondent: the penalty assessment provided a detailed account of every instance of violation. Respondent had every opportunity to respond to the allegations of violation, and it has done so skillfully. (4) No manifest injustice

³ Transcript page 34, lines 8-23.

results from holding Respondent to the standards of law and rule—on the contrary it is just to do so. (5) Here, estoppel would impair the exercise of government functions, that is, the protection of the public. We find no reported case in which circumstances similar to those present in this docket give rise to the application of principles of equitable estoppel.⁴

25 **Standards for the assessment of penalties.** Tel West cites factors that the Commission has identified as proper to consider in determining the appropriate level of penalties,⁵ and it argues that on balance the assessed penalties are improperly high. Tel West addresses the following elements:

26 **(1) New Requirements of First Impression.** Tel West argues that while the rules were not new, they applied to Tel West for the first time when it began its marketing campaign and that this is the first time the Commission has interpreted the rules. We find these arguments unpersuasive. As Commission Staff notes and Tel West itself acknowledges, the rules have been effective at the state and national levels for long enough that they cannot be termed “new.” Whether or not they are of first interpretation by the Commission, Tel West does not argue that the rule is ambiguous or that the Commission’s interpretation is other than the proper application of clear language. Instead, it acknowledges that it has the responsibility to know and follow pertinent rules. We find no cause to consider mitigation on this basis.

⁴ See, *Metropolitan Park District of Tacoma v. State*, 85 Wn.2d 821, 539 P.2d 854 (1975); *Concerned Citizens v. Board*, 78 Wn. App. 333, 897 P.2d 1267 (1995), citing *Shafer v. State*, 83 Wn.2d 618, 539 P.2d 736 (1974).

⁵ *MCI Metro Access Transmission Services, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-971063, Final Order (February 9, 1999).

- 27 **(2) The offending party should have known its conduct constituted a violation.** Tel West groups this with the next factor below.
- 28 **(3) The offending conduct was knowing or intentional.** Here, Tel West notes that it relied on advice from its third-party verifier, but admits its responsibility to know and comply with pertinent rules. These factors do not support mitigation.
- 29 **(4) The offending conduct was gross or malicious.** Tel West denies that its conduct was gross or malicious, and it notes that Commission Staff does not allege fraud, slamming, or cramming.⁶ Commission Staff notes the total number of violations for which penalties are assessed—1,431—and the length of time they continued as evidence that the violations were gross.
- 30 Whether or not the conduct was gross is a matter of judgment. Definitions for “gross” include⁷ “glaringly obvious; flagrant,” as well as “unmitigated in any way; *gross incompetence*.” Here, the pattern of violations, which continued after many customer complaints and numerous indications by Commission Staff that they were occurring, appears to be glaringly obvious and flagrant. We also note that the number of potential violations is much larger than the number charged.⁸ This factor does not support mitigation.
- 31 We do not find the behavior to be malicious. This factor does not militate against mitigation.
- 32 **(5) Repeated violations occurred.** Here, Tel West acknowledges that there were repeated violations, but argues that it modified its verification script twice in two months to accommodate Staff concerns. We find it difficult to understand, given

⁶ “Cramming” is the practice of billing for services or products that were not ordered.

⁷ American Heritage Dictionary pp. 798-9 (3d ed. 1996).

⁸ See, footnote 2, above.

the volume of calls documented in the record, why it took over a thousand complaint-days for Tel West to bring itself into compliance. The Company says that it was busy gaining and arranging to serve customers. The Commission certainly does not want to hinder the growth of service options for Washington customers. But it is obvious that Tel West was not paying adequate attention to the need to ensure that its service to the public met clear and reasonable standards. This factor does not support mitigation.

33 **(6) The Commission had previously found violations.** The Commission has previously found violations against Tel West, but not for the subjects of the current violations and the matter was settled without apparent repetition. This factor is neutral on mitigation.

34 **(7) The offending conduct is improved.** Tel West did improve its conduct and did adopt a script that clearly required customers to consent to a PIC freeze. The corrections are consistent with mitigation.

35 **(8) Remedial steps were taken.** Not only did Tel West correct the script, but also it brought in additional staff to attend to its compliance. Commission Staff notes that it first contacted Tel West about delayed responses in July, 2003, and about PIC freeze violations in September, 2003, but that the delays and violations continued until February 2004. Remediation argues in favor of mitigation, but is offset to a great degree by the volume of complaints and violations, and the length of the period over which they occurred.

36 **(9) The penalty should be in rough proportion to the seriousness of the offense and the company's demonstrated willingness to comply.**⁹ Here we have a clear disagreement between the parties. Tel West points out that no person lost telephone service as a result of the violations; no person paid

⁹ *In re Penalty Assessment No. UE-031942, PacifiCorp, d/b/a/Pacific Power & Light Company, Order No. 2, February 12, 2004*

unwarranted fees; no intent has been shown to commit the offenses.

Commission Staff responds that in at least 32 of the PIC freeze complaints, the customer denied authorizing a freeze and had no idea how to remove it to change carriers. Staff argues that the customers were thus held captive against their will.

37 We note that Tel West is operating as a competitive carrier and thus is aware how essential it is, if there is to be a transition to a truly competitive marketplace, to enforce regulations that preserve competition. The PIC freeze requirement is one that promotes competition by ensuring a choice for customers, by preventing improper actions by unscrupulous carriers, and by facilitating changes that customers request. Tel West's actions were of a sort that are damaging to competition. In addition, they left a trail of unhappy consumers and caused a substantial workload for the Company and Commission Staff that would have been avoided by compliance. We do not agree with the Company's contention that the violations were, in effect, trivial. This factor weighs against mitigation.

38 **A sufficient level to encourage compliance.** The Commission has in several orders indicated that one purpose of a penalty is to ensure compliance with rules and laws in the future by both the entity that has committed violations and other entities subject to the regulation. Here, we believe that a substantial penalty is warranted by the continuing violation, both as an incentive for this carrier to continue its improved compliance and as an incentive to other carriers to comply.

39 **Mitigation of the PIC freeze penalty.** We think that it is appropriate, considering all of the factors, to mitigate the PIC freeze penalty by 50%, from \$103,700 to \$51,850. This mitigation recognizes the acknowledgment of Commission Staff of inaccurately stated violations as well as all of the factors we discuss above. The mitigated penalty is proportional to the harm caused and it recognizes the importance of rules supporting competition in

telecommunications. It also provides encouragement to persons in similar situations to act quickly to address problems before they get out of hand.

40 **Penalties exceed Constitutional limits.** Tel West also contends that the level of penalties in this matter is so excessive that it is Constitutionally impermissible, in violation of the Eighth Amendment prohibition against excessive fines.¹⁰ Commission Staff responds that, assuming that the Eighth Amendment is applicable in this situation, there is no violation. In the situation in the *Bajakajian* case cited by petitioner, the United States government claimed forfeiture of \$357,144 for failure to report that the defendant was carrying that amount out of the United States. The court ruled that the forfeiture was excessive. There, the offense was a single violation of one reporting rule. Here, the Staff argues, there are multiple violations of two rules that directly affect citizens' ability to obtain the service they require.

41 The Commission finds that the assessed penalty is not unconstitutionally disproportionate to the offenses. The circumstances in which that principle has been applied to invalidate a penalty differ greatly from those in this proceeding. Here, many consumers were affected; the Commission was hindered in carrying out its governmental function; and the pattern of behavior lasted over a relatively long period. There is no violation of the Eighth Amendment.

C. Penalties for delayed response.

42 While all of the violations in this penalty assessment are associated with the PIC freeze violations, the penalty assessment separately records and penalizes violations of the Commission's requirements that regulated companies respond in a timely way to Staff inquiries about potential complaints. The materials supporting the penalty assessment and those opposing mitigation detail instance

¹⁰ Tel West cites *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L.Ed.2d 314 (1998).

after instance of Tel West's failure to respond, or to respond adequately, to Commission inquiries—despite notice after notice of violation and warning after warning that penalties might be assessed.

43 The supporting materials are replete with details of time after time in which the Commission Staff—and ultimately the customer—were figuratively put on hold by Tel West and their complaints or concerns unanswered.

44 Tel West pleads the press of business, as an excuse for the extended time for response to inquiry after inquiry, but it eventually demonstrated that it could (and it did) resolve the concern. As noted above, the penalties represent 427 days of delay—the equivalent of a year and two months—during which customers waited and Commission Staff was required to return again and again to the issue. We believe that this behavior may properly be characterized as “gross,” and the only potential mitigating factors we can find are (1) the lack of evidence that the carrier was intentionally delaying its responses and (2) the eventual employment of a staff person to respond to complaints.

45 The Commission is empathetic with the challenges of small businesses, and is charged with fostering competition. But it is also charged with protecting the interests of the public. To do so, it needs information about company operations promptly. Tel West's behavior operated to thwart the goals of protecting the public and facilitating competition, and it continually and repeatedly committed such violations over an extended period. We believe that the conduct is so clear, so serious, and so consistent over such a long period, that the full penalty should apply.

46 **Conclusion.** The Commission grants the petition and mitigates the penalties, in part, as identified above. The penalties for violating the PIC freeze rule, WAC 480-120-070, are mitigated from \$103,400 to \$51,700. The penalties of \$42,700 for

violating the delayed response rule, WAC 480-120-166, are not mitigated. The total penalty is thus mitigated to \$94,400.

II. FINDINGS OF FACT

- 47 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington charged by law with the regulation of telecommunications companies, including competitive local exchange companies and providers of intraLATA toll telecommunications services.
- 48 (2) Tel West is a local exchange telecommunications company, operating within the state of Washington.
- 49 (3) In securing customer permission to “freeze” Tel West as the customer’s provider of telecommunications services, Tel West’s verification script failed until February 25, 2004, to secure the customer’s specific authorization to the placement of a preferred carrier freeze. Therefore, even though customers authorized the change in service, and the company offered the freeze, the erroneous verification script rendered the freeze improper.
- 50 (4) The Commission received complaints from Tel West customers whose efforts to change to other telecommunications providers had been thwarted or delayed because of a PIC freeze in effect that the customer had not authorized. The Commission on June 23, 2004, assessed penalties of \$103,400 for violations of assessing a penalty for each day of continued violations. *WAC 480-120-147(5)*.
- 51 (5) The Company failed to respond to inquiries from Commission Staff about potential violations within the time specified in *WAC 480-120-166*. The total number of inquiries, plus the total number of days’ delay, equals 427.

The Commission assessed penalties in the amount of \$42,700 based on the number of days of continued violation.

- 52 (6) Tel West petitioned for mitigation of the penalties, urging that the penalties are excessive for the nature of the violations for reasons cited in the discussion portion of this order, above.
- 53 (7) The Commission finds that the penalties related to PIC freezes of customer accounts should be mitigated in the manner and to the extent identified in the discussion portion of this order, above.
- 54 (8) The Commission finds that penalties for failure to respond in a timely manner to Commission inquiries about possible violations should not be mitigated.

III. CONCLUSIONS OF LAW

- 55 (1) Commission has jurisdiction over this matter and the parties to this proceeding.
- 56 (2) The Commission should grant the petition for mitigation of the PIC freeze penalties in the amount of \$51,7000.
- 57 (3) The Commission should deny mitigation of penalties relating to failure to respond to Commission inquiries.
- 58 (4) The Commission should mitigate the total penalties to \$94,400 on condition that the resulting penalty is paid within thirty days after the date of service of this order.

IV. ORDER

59 The Commission grants mitigation of penalties totaling \$143,000 to the sum of \$94,400, conditioned upon payment of the resulting penalty within thirty days after the date of this order.

DATED at Olympia, Washington and effective this 15th day of December, 2004

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.