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December 28, 2004

STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

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FedEx

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504

**Re: In the Matter of Tel West Communications, LLC
Docket No. UT-040572**

Dear Ms. Washburn:

Attached for filing is the original and 20 copies of Tel West's Motion To Vacate Order Or In The Alternative Motion To Correct Order ("Motion") in the above-referenced matter. Please return a conformed copy of the Motion to me in the envelope provided. Thank you for your assistance in this matter. Should you have any questions, feel free to call.

Very truly yours,

GRAHAM & DUNN PC



Richard J. Busch

RJB

Enclosures

cc: Lisa Watson (w/ Encl)
Simon ffitich (w/ Encl)

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

TEL WEST COMMUNICATIONS, LLC

DOCKET NO. UT-040572

TEL WEST'S
MOTION TO VACATE ORDER
OR, IN THE ALTERNATIVE,
MOTION TO CORRECT ORDER

INTRODUCTION

1 The Washington Utilities and Transportation Commission (“Commission”) entered its Order on Brief Adjudication Granting, in Part, Mitigation of Penalties (“Order”) on December 15, 2004, in this matter. Tel West Communications, LLC (“Tel West”) hereby moves the Commission for an order vacating the Order and dismissing this proceeding because the Commission’s deadline to issue the Order expired on November 15, 2004.

2 In the alternative, without waiving any right to a timely decision from the Commission, if the Commission does not vacate the Order Tel West brings this Motion for an order correcting errors in the Order.

DISCUSSION

3 The statutory deadline for the Order was November 15, 2004. The Brief Adjudicative Hearing was conducted on October 14, 2004. At the hearing, the parties waived the administrative law judge’s initial order in the matter (Transcript, page 57). In addition, the administrative law judge asked the parties to extend the statutory time frame for the

Commission's order to 30 days, and the parties waived the deadline and extended it to 30 days. (Transcript, page 58.) Therefore, the Commission's Order was to be issued within 30 days from October 14, 2004. RCW 34.05.491(4) and WAC 480-07-610(8). Since the 30 day deadline was Saturday, November 13, 2004, the final deadline for the issuance of the Commission's Order was Monday, November 15, 2004. (WAC 480-07-130(1).)

4 The November 15, 2004 due date for the Order is mandatory, and the Commission does not have the discretion to issue the Order after the due date. The Commission derives its statutory authority to conduct brief adjudicative proceedings from RCW 34.05.482 - .494. The statutory due date for the Commission's Order upon review of the penalty assessment is set forth in RCW 34.05.491(4), which states:

The order on review must be in writing, must include a brief statement of the reasons for the decision, and must be entered within twenty days after the date of the initial order or of the request for review, whichever is later. (*Emphasis added.*)

As discussed above, the parties agreed to extend the deadline to 30 days. As a matter of statutory construction, when the word "must" is used in a statute, the statute's requirement is mandatory and the Commission does not have the discretion to issue an order after the deadline. *Kelleher v. Ephrata School District*, 56 Wn.2d 866 (1960).

5 Staff might argue that statute's use of the word "must" does not create a mandatory obligation as a matter of law. However, courts presume that mandatory language like "must" and "shall" impose a mandatory obligation unless a contrary legislative intent is apparent. *Erection Co. v. Department of Labor & Industries*, 121 Wn.2d 513, 852 P.2d 288 (1993). When the Legislature uses mandatory language ("shall") and discretionary language ("may") in the same statute, courts conclude that the two words have different meanings and "may" is discretionary

and “shall” is mandatory. In the statute at issue in this proceeding (RCW 34.05.491), the Legislature uses “may” “must” and “shall” throughout the statute. As stated in *State v. Krall*, 125 Wn.2d 146, at 148 (1994) where the Legislature used the words “shall” and “may” in the same statute: “In fact, the statute as a whole shows the Legislature drew a clear distinction between mandatory and discretionary provisions.” Therefore, it is clear here that the Legislature intended to create a mandatory deadline for the issuance of orders after brief adjudicatory proceedings.

6 *The Commission’s Order dated December 15, 2004 is invalid because the Order was issued after the mandatory statutory deadline.* The Commission issued the Order on December 15, 2004, which is 30 days after the mandatory deadline of November 15, 2004. Under Washington law, the Commission’s Order is invalid because it was issued after the mandatory statutory deadline. *State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994); *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996); *State v. Johnson*, 96 Wn. App. 813, 981 P.2d 25 (1999); and *State v. Dennis*, 101 Wn. App. 223, 6 P.3d 1173 (2000). In each of these cases, the trial courts were required by statute to issue criminal restitution orders within a specified period of time. (See, e.g., *State v. Krall*, 125 Wn2d 146 (1994), at 148: “When restitution is ordered, the court *shall* determine the amount of restitution due at the sentencing hearing or *within sixty days*. (Italics ours.) RCW 9.94A.142(1).”) In each of these cases, the courts held that since the trial court failed to issue the restitution order before the mandatory statutory deadline, the courts’ orders were invalid. Likewise, because the Commission’s Order in this penalty assessment was issued 30 days after the mandatory statutory deadline, the Order is invalid and must be vacated.

7 The Washington Supreme Court recognized that this result might seem unfair or unjust, but when vacating the order of restitution, the Court explained the public policy for its holding:

We are aware that one effect of holding that restitution is barred when the order is entered too late is that the victim of the offense does not receive compensation under the restitution statutes. That result necessarily follows in each case where the State's delay precludes compliance with the mandatory time limit and defendant has not waived a timely determination of the amount of restitution, as in this case. Our unanimous holding in *Krall* recognizes that the statutory time mandate prevails over victims' rights to restitution. In *Krall*, we examined the statutory scheme and the legislative history of the restitution statute, and concluded that when the Legislature said restitution shall be determined within sixty days of sentencing, that is what it meant. *Krall*, at 148-49. . . .

The principle that time limits exist which may bar compensation to injured persons is not a novel concept in our jurisprudence. At some point, rights will be cut off. It is inappropriate to hold a defendant accountable by imposing restitution . . . when the State failed in its burden to comply with the statutory 60-day time requirement.

State v. Moen, 129 Wn.2d 535 (1996) at 542.

8 The restitution cases cited above rely upon the law of statutory construction, and the public policy in favor of time limits for claims. Likewise, the law of statutory construction and the public policy in favor of time limits for claims also applies to this penalty assessment proceeding before the Commission. Therefore, the Commission's Order is invalid and should be vacated by the Commission.

9 The Washington Supreme Court has created one exception to the series of statutory construction cases cited above, and the one exception does not apply to this matter before the Commission. The one exception applies to the speedy disposition of criminal sentencing cases before the Superior Courts. The Washington Supreme Court has held that if a criminal defendant has plead guilty to a crime but has not been sentenced in a timely manner, an

automatic dismissal of the case is not warranted. *State v. Martin*, 137 Wn.2d 149 (1999). The Court reasoned that the Superior Court is a court of general jurisdiction, and a Superior Court judge has authority to issue orders unless expressly prohibited by law. *State v. Martin*, 137 Wn.2d 149 (1999) at 156. The exception in *State v. Martin, id.* does not apply to this proceeding before the Commission because the Commission does not have the general jurisdiction authority of the Superior Court, and this is not a criminal sentencing case. Therefore, the Commission should vacate the Order in this proceeding.

10 *In the alternative, the Commission should amend the Order to correct certain inaccuracies.*

Without waiving Tel West's right to an order from the Commission in a timely manner, if the Commission does not vacate the Order dated December 15, 2004, Tel West hereby brings this Motion to Correct Order as follows:

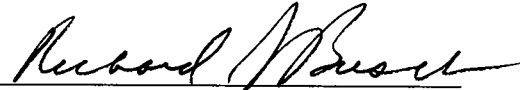
a. Amending the last sentence of Paragraph 4 of the Order to read as follows: "The parties waived an initial order, waived the requirement that an order be entered within 15 days after the adjudication and extended the deadline for the entry of the order to 30 days after the adjudication." The administrative law judge requested an extension of time for the order to 30 days, and all parties to the proceeding stipulated to extend the deadline for the order to 30 days after the adjudication. The parties did not stipulate to an open ended date for the issuance of the Order. (Transcript, pages 57-58.)

b. Adding the following to the Findings of Fact at the end of Paragraph 50 of the Order: "The Commission conducted a brief adjudicative proceeding on October 14, 2004. The parties waived the initial order, waived the requirement that an order be entered within 15 days after the adjudication and extended the deadline for the entry of the order to 30 days after the

adjudication.

c. The items raised in the Staff's Motion to Correct Order dated December 17, 2004.

DATED this 28th day of December 2004.



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