

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

PENALTY ASSESSMENT AGAINST
TEL WEST COMMUNICATIONS, LLC,
in the amount of \$143,100.00

DOCKET NO. UT-040572

STAFF'S RESPONSE TO TEL
WEST'S MOTION TO VACATE
OR MOTION TO CORRECT
ORDER

1 Tel West Communications, LLC, filed a motion to vacate order, or in the
alterative, motion to correct order (Motion) on December 29, 2004. Commission
Staff respectfully submits the following response. Staff recommends the
Commission deny Tel West's motion to vacate and deny in part Tel West's motion
to correct order.

I. DISCUSSION

A. Waiver of Statutory Deadline Was Inconsequential.

2 Tel West argues that the Commission was required to enter an order by
November 15, 2004, based on a waiver made by the parties at the brief adjudicative

proceeding (BAP) held on October 14, 2004.¹ Tel West argues further that the Commission Order on Brief Adjudication Granting, in Part, Mitigation of Penalties² is invalid because it was entered after November 15, 2004.³

3 During the BAP, Administrative Law Judge (ALJ) C. Robert Wallis requested a waiver from the parties to extend the statutory deadline for an order to 30 days.⁴ The parties agreed to the waiver and extended the statutory deadline to 30 days.⁵

4 Upon closer review of the applicable statutes and rules, Staff argues that there was no statutory deadline to waive in this case. As such, the waiver had no operation. To explain Staff's position, this Response will review the statutes and rules governing BAPs before the Commission and apply those statutes and rules to the present case.

5 Under the Washington Administrative Procedures Act (APA), chapter 34.05 RCW, agencies are permitted to use BAPs to resolve matters if certain conditions are met. Those conditions require, *inter alia*, that the agency promulgate rules adopting RCW 34.05.482 thru RCW 34.05.494 and identify categories of matters

¹ Motion at 1-5.

² *In the Matter of Penalty Assessment Against Tel West Communications, Inc.*, Docket No. UT-040572, Commission Order on Brief Adjudication Granting, in Part, Mitigation of Penalties (December 15, 2004) (Mitigation Order).

³ Motion at 3-5.

⁴ Tr. 57:25 to 58:3.

⁵ Tr. 58:4-6.

subject to BAPs.⁶ WAC 480-07-610, the rule governing BAPs before the Commission, provides that petitions for mitigation of penalty assessments under RCW 80.04.405 may be resolved using a BAP.

6 Before taking action, the agency must give each party an opportunity to be informed of the agency's view of the matter, and each party must be permitted an opportunity to explain its view of the matter.⁷ In this case, the Penalty Assessment serves as notice of the Commission's view of the matter.⁸ The parties had the opportunity to present their positions in the pleadings filed and at the BAP held on October 14, 2004.⁹

7 Under RCW 34.04.485(3), the presiding officer must provide a brief written statement to the parties within 10 days of any unfavorable action. This seems to anticipate agency action that occurs separately from the brief written statement, which serves as the initial order. If, however, the brief written statement is the agency action, the 10-day statutory requirement does not seem to apply.

8 Under the Commission's rule, WAC 480-07-610(6), the presiding officer is required to provide a brief written statement addressing the issues raised within 10 days of the BAP. The Commission did not adopt the language regarding

⁶ RCW 34.05.482.

⁷ RCW 34.05.485(2).

⁸ *Notice of Penalties Incurred and Due for Violations of Laws, Rules, and Regulations* (Tel West Communications, Inc.), Docket No. UT-040572 (June 23, 2004) (Penalty Assessment).

⁹ See, e.g., Tel West's Application for Mitigation of Penalties (July 9, 2004); Staff's Response to Application for Mitigation of Penalties (August 4, 2004); Tr. 1:1 to 58:19.

“unfavorable language” contained in the APA.¹⁰ The brief written statement serves as the initial order under the Commission’s rule, as it does under the APA. In this case, the parties waived the initial order.¹¹

9 The statutes and rules address the timing of a final order following an initial order. For example, if no review of an initial order is taken, the initial order becomes the final order.¹² Review of an initial order may be taken 21 days after the initial order is entered.¹³ If review is taken, the Commission must enter a final order within 20 days of the request for review.¹⁴ However, the statutes and rules are silent regarding the timeframe in which a final order must be entered when an initial order is waived in a BAP.

10 Tel West argues that RCW 34.05.491(4) and WAC 480-07-610(8) establish the statutory deadline the parties waived during the October 14, 2004, BAP.¹⁵ RCW 34.05.491(4) and WAC 480-07-610(8) govern review of final orders. Tel West’s reliance on RCW 34.05.491(4) and WAC 480-07-610(8) is incorrect because had the parties not waived initial order, ALJ Wallis would have entered an initial order, and the parties would have had the opportunity to request administrative review of that order under RCW 34.05.488 and WAC 480-07-610(7). For purposes of the BAP, the

¹⁰ Compare RCW 34.05.485(3) and WAC 480-07-610(6).

¹¹ Tr. 57:1-22.

¹² RCW 34.05.485(4); WAC 480-07-610(9).

¹³ RCW 34.05.488; WAC 480-07-610(7)(a).

¹⁴ RCW 34.05.491(5); WAC 480-07-610(8).

¹⁵ Motion at 2.

Penalty Assessment was not an initial order, but rather informed the parties of the Commission's view on the matter.

11 Thus, the Commission may exercise discretion regarding the timing of the
final order when parties waive an initial order in a BAP. Because the Commission
is not bound by a deadline imposed either by statute or rule, the waiver given by
the parties at the October 14, 2004, BAP was inconsequential.

12 Even assuming that the Commission was subject to a statutory deadline,
failure to enter a final order by that deadline does not render the Commission's
Mitigation Order invalid.

B. Assuming a Mandatory Deadline, the Mitigation Order Remains Valid.

13 Assuming, without conceding, that the Commission was subject to a
mandatory deadline for entering a final order in this case, the Commission's
Mitigation Order is valid.

14 There is no presumption or general rule that for every duty imposed upon
government entities there exists a corollary punitive sanction for each departure or
omission, even if negligent.¹⁶ Rather, courts acknowledge the "greater principle of
public policy, applicable to all governments alike, which forbids that the public

¹⁶ *United States v. Montalvo-Murillo*, 495 U.S. 711, 717, 110 S. Ct. 2072, 109 L. Ed. 2d 720 (1990).

interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.”¹⁷

15 When an agency fails to meet a statutory deadline, courts will not assume the Legislature intended the agency to lose its power to act when less drastic remedies are available.¹⁸ Indeed, the courts are “most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent action, especially when important public rights are at stake.”¹⁹

16 In *Montalvo-Murillo*, the Court evaluated whether a prisoner must be released as a remedy for failure to hold a detention hearing at the prisoner’s first appearance before the judicial officer, as required by statute.²⁰ The Court ruled that although the duty to hold the detention hearing at first appearance was mandatory, the sanction for breach is not the loss of all later powers to act.²¹ Release was not required because automatic release would contravene the object of the statute, which was to provide fair bail procedures while protecting the public and assuring that defendants likely to flee will appear at trial.²² The Court noted that a practical remedy was required, not one that stripped the government of all authority to act.²³

¹⁷ *Id.* at 718, citing *Brock v. Pierce County*, 476 U.S. 253, 260, 106 S. Ct. 1834, 90 L. Ed. 2d 248 (1986).

¹⁸ *Pierce County*, 476 U.S. at 260.

¹⁹ *Id.*

²⁰ *Montalvo-Murillo*, 495 U.S. at 716.

²¹ *Id.* at 718.

²² *Id.* at 720.

²³ *Id.* at 719.

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In this case, the Commission is charged with regulating in the public interest telecommunications companies providing service in the state of Washington.²⁴ The Commission is authorized by statute to penalize companies acting in violation of the statutes and rules governing the regulation of companies subject to the Commission's jurisdiction.²⁵ The provision of telecommunications service in Washington is affected with the public interest. As such, the Commission must exercise its authority to address statutory and rule violations by regulated companies. It is important that the Commission evaluate the evidence provided to it and exercise its discretion in mitigating penalties resulting from violations in appropriate cases.

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Just as requiring automatic release would have contravened the intent of the statute in *Montalvo-Murillo*, invalidating the Mitigation Order in this case would contravene the intent behind the Commission's authority to impose penalties for violations and to mitigate those penalties when deemed appropriate. In this case, the Commission considered substantial evidence and argument presented by both parties. There was no dispute that violations occurred. The parties differed sharply regarding the appropriate level of penalty. The Commission ultimately determined

²⁴ RCW 80.01.040

²⁵ RCW 80.04.405.

mitigation was appropriate. That the Mitigation Order was entered after a mandatory deadline – if one in fact exists – does not, in itself, invalidate the Order.

19 Less drastic sanctions than invalidating the Mitigation Order are available to Tel West. For example, judicial review is available under the APA. In addition, Tel West can seek administrative reconsideration pursuant to WAC 480-07-850. Further, before the deadline passed, nothing would have barred Tel West from enforcing the mandatory deadline through motion or inquiry. Just as less drastic remedies existed in *Pierce County*,²⁶ less drastic remedies exist in this case. Thus, the Commission should not assume that the Legislature intended the Commission lose its ability to act after the deadline expired. The Mitigation Order is valid.

20 Tel West cites several criminal restitution cases²⁷ for the proposition that an order entered after the mandatory statutory deadline is invalid.²⁸ The criminal restitution cases are inapposite because the question in those cases was whether restitution could be imposed in the first instance after a statutory deadline passed. Failure to impose restitution within the time period mandated by statute raises jurisdictional issues.²⁹

²⁶ 476 U.S. at 260, note 7.

²⁷ *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); *State v. Dennis*, 101 Wn. App. 223, 6 P.3d 1173 (2000).

²⁸ Motion at 3-5.

²⁹ *Moen*, 129 Wn.2d at 543.

21 In this case, the deadline does not raise jurisdictional issues. The Commission acted within its jurisdiction when it imposed a penalty of \$143,100 in its Penalty Assessment. The Commission, by imposing the Penalty Assessment, already determined that Tel West incurred violations and determined the level of penalties due. The issue to be resolved at the BAP was whether the penalty should be mitigated, not whether Tel West owed the penalty. Thus, the criminal restitution cases cited by Tel West are not controlling in this matter, and the reasoning in those cases does not result in invalidating the Commission's Mitigation Order.

22 In any event, if the Commission vacates the Mitigation Order, Tel West is not absolved from the obligation to pay the penalty assessed in the Penalty Assessment.

C. Vacating the Mitigation Order Results in the Total Penalty Assessment Amount Being Due

23 Vacating the Mitigation Order will not result in the Penalty Assessment being fully mitigated. Vacating the Mitigation Order would simply cause the order to no longer have effect. The effect of the Mitigation Order is to reduce the penalty owed by Tel West from \$143,100 to \$90,900.³⁰ If the Mitigation Order is vacated, the penalty amount increases to the original level because the Penalty Assessment would be the last valid Commission action on the merits.

³⁰ The Mitigation Order states the amount is \$94,400. However, with the corrections described in Staff's Motion to Correct Order, the amount due is \$90,900.

D. Motion to Correct

24 Tel West proposes two corrections in addition to those identified in Staff's Motion to Correct Order dated December 17, 2004.³¹ Both proposed corrections involve acknowledging the waiver made by the parties at the October 14, 2004, BAP. Staff recommends that the Commission deny Tel West's motion to correct items not identified in Staff's Motion to Correct Order and grant the motion to the extent it is consistent with Staff's motion. However, if the Commission grants Tel West's motion to correct and adds language regarding the waiver, the Commission should also state that the waiver was inconsequential as no statutory deadline governed entry of the final order in this case.

II. CONCLUSION

25 The Commission should deny Tel West's motion to vacate because the waiver made by the parties at the October 14, 2004, BAP was inconsequential, or in the alternative, because failure to meet the deadline did not render the Mitigation Order invalid. Additionally, the Commission should deny Tel West's motion to

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³¹ Motion at 5-6.

correct to the extent it proposes items not identified in Staff's Motion to Correct Order.

DATED this 5th day of January 2005.

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