BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Petitioners, v. ADVANCED TELECOM GROUP, INC., et al., Respondents.	DOCKET NO. UT-033011 COMMISSION STAFF'S RESPONSE TO QWEST'S MOTION TO STRIKE TESTIMONY OF TIME WARNER

1 On October 4, 2004, Qwest filed its Motion to Strike Testimony of Timothy J. Gates (Motion to Strike). Qwest argues that Mr. Gates's testimony should be stricken because it impermissibly expands the scope of the case, Time Warner's claims are barred as a matter of law, and Mr. Gates's testimony is impermissibly late. Staff agrees that it is inappropriate for Time Warner to seek credits at this point in the proceeding, but does not necessarily concur with the reasoning contained in Qwest's Motion to Strike.[1] Therefore, Staff asks that Qwest's Motion to Strike be granted in part (only as to the portion of Mr. Gates's testimony which seeks credits) and asks that Time Warner's intervenor status be preserved.

A. The relief available under the Complaint does not include credits.

2 Although, the Amended Complaint did not limit the scope of potential relief simply to penalties, the Commission may only grant such relief as is it has authority under law to

[1] As discussed in its prior pleadings and oral argument on this issue, Staff specifically disagrees with Qwest's assertions that Time Warner's testimony was filed late.

grant. *Tuerk v. Department of Licensing*, 123 Wn.2d 120, 124 (1994). ("[A]dministrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority.") Here, the Commission only has authority to grant such relief as is properly plead and noticed under the complaint.

3 The amended complaint states that the Commission "will commence an adjudicative proceeding pursuant to Chapter 34.05 RCW and Chapter 480-09 WAC for the following purposes: (1) To determine whether the respondents or each of them have violated the statutes set forth in the allegations above; (2) To determine whether the Commission should impose monetary penalties against the respondents or each of them in an amount to be proved at hearing; and (3) *To make such other determinations and enter such other orders as may be just and reasonable* [emphasis added]." Amended Complaint, Lines 46 – 49. Lines (2) and (3) above are properly interpreted as setting out the remedies sought by the Commission through the complaint. Thus, the Commission is not limited to levying penalties and may grant such other relief "as may be just and reasonable." However, the operation of lines (2) and (3) above are necessarily conditioned upon a finding of violation pursuant to line (1). In other words, in order to levy penalties or levy any other remedy within the Commission's authority, the Commission must have determined whether or not a particular respondent has "violated the statutes set forth in the allegations above." As discussed in more detail below, the statutes set forth in the allegations in the complaint do not include claims under RCW 80.04.220 and RCW 80.04.230 (and Staff has been unable to find any other express or implied authority that allows the Commission to issue credits). Therefore, Staff believes that the Commission does not have authority to issue credits in this proceeding (at least at present).

4 To interpret the complaint as permitting the Commission to consider causes of action under RCW 80.04.220 and RCW 80.04.230 or the remedies provided within them without requiring another party to properly plead them would not be procedurally appropriate. RCW 80.04.220 and RCW 80.04.230 are not pure remedy statutes similar to RCW 80.04.380, the penalty provision properly pled in the complaint.[2] Therefore, the powers granted to the Commission by the remedy sections of these statutes may not be exercised pursuant to line (3) of the purpose section of the complaint absent proper pleading by the proper party. Thus, RCW 80.04.220 requires a complaint alleging and an ultimate by the Commission finding that "the public service company has charged an excessive or exorbitant amount" in order for reparations to be ordered for "any party complainant" and RCW 80.04.230 requires a complaint alleging and an ultimate finding by the Commission that "that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made" in order for a refund to be ordered for "the complainant." Furthermore, the Commission may not unilaterally adopt these remedies because it does not have the power to do so. RCW 80.04.220 and 80.04.230 require that a "complaint has been made to the commission." In this proceeding, the Commission is the complainant. Clearly, the Legislature did not intend to grant to the Commission the power to adopt these remedies without a party with proper standing filing a complaint with the Commission. *See Hopkins v. GTE Northwest*, 89 Wn. App. 1, 5 (1997). ("Under .220, when a complaint is made to the UTC about the reasonableness of any rate or charge

[2]In contrast to the remedies in RCW 80.04.220 and RCW 80.04.230, the remedy in RCW 80.04.380 (penalties), falls within the broad remedy language of the complaint. In RCW 80.04.380, the power of the Commission to levy penalties is conditioned upon the violation of *any* Commission order, rule, direction, demand, or requirement. The Commission also has other express or implied authority to levy sanctions for violations noticed in the complaint.

assessed, the WUTC has authority to investigate the complaint and, if the complaint has merit, award reparation or damages[.]")

5 Additionally, the Legislature intended RCW 80.04.220 and RCW 80.04.230 to work in conjunction with RCW 80.04.240 as a whole remedy.[3] If the proper procedural steps are not followed pursuant to each, the administrative remedies are not exhausted and the procedures contemplated by RCW 80.04.240 do not take effect and are not available to the complainant. *Hopkins*, 89 Wn. App. at 6. ("RCW 80.04.240 then sets forth the exclusive procedures that a customer may pursue. The statute mandates that all complaints concerning overcharges resulting from the collection of amounts in excess of lawful rates shall be filed with the WUTC. If a company fails to comply with an order of the WUTC to repay an overcharge determined then the customer may institute an action in superior court to recover the amount of the overcharge with interest."). Thus, the procedures set out in those statutes are more than just mere formalities.

6 Furthermore, even if Time Warner's intervention and subsequent pleadings were construed as roughly complying with the procedures set in out in RCW 80.04.220 and RCW 80.04.230, subsuming these claims within the complaint is not consistent with Commission statutes setting forth notice requirements. RCW 80.04.110(1) states "Complaint may be made by the Commission of its own motion or by any person or corporation . . . by petition or complaint in writing, *setting forth any fact or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law* [emphasis added], or of any order or rule of the commission[.]" RCW 80.04.110(2) states "[a]ll matters upon which complaint may be founded may be joined in one hearing . . . :

[3] In fact, the prior section 8626-91, Rem. 1915 Code married the provision in RCW 80.04.220 and RCW 80.04.240 into a single statute.

PROVIDED, all grievances to be inquired into shall be plainly set forth in the complaint."[4] It is clear, therefore, that in order for the Commission to consider these causes of action, they must be properly noticed.

7 Thus, even if RCW 80.04.220 and RCW 80.04.230 were applicable to the facts alleged in the complaint, they are not properly pled and should not be considered.

B. It is not clear that RCW 80.04.220 and RCW 80.04.230 are applicable to the facts alleged in the complaint.

8 The provisions set out in these statutes may not specifically relate to the facts set out in the pleadings. RCW 80.04.230 specifically refers to rates in excess of "the lawful rate in force at the time such charge was made." In relation to adoption of interconnection agreements, it is not entirely clear that there is any one specific "lawful rate in force." Instead, there are various lawful rates (those set out in interconnection agreements). It is true, that rates contained in unfiled interconnection agreements may be *unlawful* rates because they are not filed or because they constitute undue preference or discrimination. However, unlawfulness of one rate does not necessarily imply that rates charged to others lawfully are excessive rates. Similarly, RCW 80.04.220 requires a finding of "excessive or exorbitant" rates. The fact that a rate is unlawful because it is not filed does not necessarily imply that a lawful rate is "excessive or exorbitant." A determination of excessiveness would require a broader analysis. In summary, unlawful activity does not necessarily imply that lawful activity must be remedied. Furthermore, the Commission need not reach this issue due to the procedural defects in pleading these statutes as described above.

[4] Additionally, RCW 80.04.110(3) states "The commission shall enter its final order with respect to complaint filed by any entity or person other than the commission within ten months from the date of filing of the complaint, unless the date is extended for cause." This provision, of course, is easily waived. However, its substance does emphasize the point that it is entirely unclear when Time Warner's complaint on this issue was filed, if ever.

C. The Proper Scope of the Complaint.

9 This is not a case, like a rate case, where the Commission is called upon to split up the regulatory pie by balancing the competing interest of the parties. Here, the Commission is acting in its role as prosecutor to penalize parties for unlawful conduct. As the Chairwoman said in her dissent in *WUTC v. Puget Sound Energy*, Docket No. UG-001116, Commission Order Accepting Settlement, paragraph 33:

> Enforcement of safety regulations is an exercise of the police power, that is, of the authority of the government to impose restrictions for the sake of public welfare, order, and security. Violation of these regulations is subject to civil penalties (or in the case of criminal laws, to criminal penalties). Usually, the regulator, who has the job of enforcing the regulations, enjoys some degree of discretion in deciding whether to investigate a violation, and in deciding whether to bring a complaint or charge. *The regulator enjoys judicial discretion in deciding what kind of fine or other sanction may be appropriate.* (emphasis added)."

It is true that the Commission is enforcing a different type of standard in this particular proceeding (as is clear from the language quoted above, in the *PSE* case, the Commission was enforcing safety standards). However, the effect is the same. Here, the Commission is acting pursuant to delegated federal and state authority to penalize a wrongdoer. Order No. 05, paragraphs 50 – 55.

10 Prior to filing the Complaint and Amended Complaint, the Commission, as regulator, made a determination about what the appropriate relief should be. The proper procedure for broadening the relief sought by the Commission is to amend the complaint.[5] However, it is not appropriate to permit a third party to consolidate a private cause of action[6], even one properly before the Commission, at this late date in a Commission initiated penalty case

[5] The Commission retains the right to amend the complaint at any time. However, any amendment of the complaint at this stage in the proceeding would not be convenient for any party.
[6] *See* Moore v. Pacific Northwest Bell, 34 Wn. App. 448, 451 (the WUTC is not generally authorized to award damages), Bhatnagar v. US West Communications, Docket UT-900603, first supplemental order, 1991 WL 496938 (Wash. U.T.C. 1991) ("[t]he Commission does not have jurisdiction to award money damages").

such as this. Also, as discussed above, it is not procedurally appropriate for the result of the third party's intervention to be a de facto amendment of the Complaint.[7]

11 Additionally, allowing Time Warner's claims to be heard (at least in the procedural posture of this case at this particular instant) could unduly complicate this case. Civil Rule (CR) 42(a) states "the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim." Putting aside the fact that Time Warner has not followed the proper process for bringing its claim before the Commission, Staff believes that hearing Time Warner's claim would not be conducive to expedition and economy. The consequences of hearing Time Warner's claim could be additional discovery, a longer hearing, a blurring of the lines between regulation and private remedies, and could stand as a barrier to settlement (as the universe of private claims by CLECs are potentially infinite in both number, scope and remedy sought) and motivate or result in one or more parties filing an appeal lengthening the ultimate conclusion of this case all the more.[8]

12 All that being said, Staff believes it is important that Time Warner retain its status as an intervenor and that the portion of Mr. Gates's testimony relating to damage and harm (and not relating to seeking credits) be preserved. Staff asks, therefore, that if the Commission strikes any portion of Time Warner's testimony that it not be dismissed from

[7] Staff agrees with Qwest that Time Warner did not follow the proper procedures to bring its claims within this case. Time Warner did not set out the full scope of its intervention in its petition to intervene. Furthermore, Time Warner could have filed a complaint of its own and moved for consolidation, but chose not to do so. Lastly, Time Warner's testimony relating to credits (unlike the testimony of Eschelon and McLeodUSA) *really* isn't responsive to Staff's Amended Complaint and/or testimony.

[8] The Commission rules and CRs contain similar provisions relating to third party practice, severance and consolidation. *See* CR 14(a) ("[a]ny party may move to strike the third party claim, or for its severance or separate trial"), WAC 480-07-320 ("the commission may sever consolidated matters"), WAC 480-07-355 (Intervention).

this proceeding either at the request of Qwest or on its own motion pursuant to WAC 480-07-380(3).

13 All that being said, Staff believes it is important that Time Warner retain its status as an intervenor and that the portion of Mr. Gates's testimony relating to damage and harm (and not relating to seeking credits) be preserved. This testimony is certainly relevant to the Commission's determination of appropriate penalties. Limitations on the Commission's authority to require credits may require that it rely on greater penalties to punish Qwest's violations of state and federal law, and Time Warner's testimony as to the harm it has suffered should be considered by the Commission as it determines appropriate penalties. Staff asks, therefore, that if the Commission strikes any portion of Time Warner's testimony that it not be dismissed from this proceeding either at the request of Qwest or on its own motion pursuant to WAC 480-07-380(3).

DATED this 8th day of October, 2004.

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