

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of PENALTY  
ASSESSMENT AGAINST EXCEL  
TELECOMMUNICATIONS, INC., in the  
amount of \$2,600.00

DOCKET NO. UT-050713

COMMISSION STAFF'S  
RESPONSE TO EXCEL'S  
APPLICATION FOR  
MITIGATION

1 Pursuant to WAC 480-07-310(1)(c), Commission Staff submits this response to  
Excel Telecommunications, Inc.'s (Excel) Application for Mitigation (Application).

**I. BACKGROUND**

2 The Washington Utilities and Transportation Commission (Commission) assessed  
penalties totaling \$2,600.00 against Excel Telecommunications, Inc. (Excel) in a Notice  
of Penalties Incurred served on June 29, 2005. The penalties were assessed for alleged  
violations of WAC 480-120-166, which prescribes the amount of time in which a  
telecommunications company must respond to commission-referred complaints. On July  
21, 2005, Excel filed an Application for Mitigation (Application).

3 Excel operates in Washington as a telecommunications company. Excel reported  
gross intrastate operating revenue of \$3.8 million for 2004. Between January and  
December 2004, the Commission's Consumer Affairs Staff received 28 informal  
complaints from Excel's customers.<sup>1</sup> The Commission's Business Practices Staff  
investigated the 28 complaints filed in 2004 and seven complaints filed in 2005.<sup>2</sup> As a  
result of the investigation, Staff documented 26 violations of WAC 480-120-166 and

---

<sup>1</sup> Declaration of Betty Young, Attachment A at 5.

<sup>2</sup> *Id.*

recommended penalties for the violations.<sup>3</sup> The Commission imposed a \$100.00 penalty for each of the 26 violations for penalties totaling \$2,600.00.<sup>4</sup> Commission Staff recommends that the Commission grant Excel's motion in part and mitigate penalties by \$800.00.

## II. ARGUMENT

4 Excel argues that the penalties associated with three informal complaints should be mitigated to 20 or less.<sup>5</sup> Excel also notes company changes and its bankruptcy.<sup>6</sup> Staff address the three informal complaints, the company changes, and the company's bankruptcy.

### A. The Penalties Should be Mitigated by \$800.00, Thus the Total Penalties Assessed Against Excel Should Be \$1,800.00.

5 Based on Staff's review of three informal complaints, Complaint No. 87463, Complaint No. 90484, and Complaint No. 91531, Staff supports mitigation of eight penalties, reducing the total penalties assessed by \$800.00. The reduction in penalties applies to penalties assessed for Complaint No. 90484.

#### 1. Complaint No. 87463

6 Commission Staff sent Complaint No. 87463 to Excel on January 28, 2005, and Excel was to respond to the complaint on or before February 5, 2005, pursuant to WAC 480-120-166(7). Staff received a response from Excel on February 6, 2005, and noted one violation for the late response.

---

<sup>3</sup> *Id.* at 4.

<sup>4</sup> Notice of Penalties Incurred and Due for Violations of Laws, Rules, and Regulations against Excel Telecommunications, Inc., Docket No. UT-050713, June 28, 2005.

<sup>5</sup> Application at 5.

<sup>6</sup> *Id.* at 4-5.

7           Excel states that its records reflect the same information as the Commission Staff's records, *i.e.*, that the response was sent on February 6, 2005.<sup>7</sup> However, Excel argues that the email transmission was sent on February 5, 2005, but that the transmission itself did not occur until the following day.<sup>8</sup>

8           The penalty for Complaint No. 87463 should not be mitigated. Excel's records confirm that it responded late to the complaint. Excel has not provided proof that a transmission error caused the response to be delayed. Moreover, Staff informed Excel that its response was due on or before February 5, 2005, when Staff passed the complaint to Excel on January 28, 2005.<sup>9</sup> Excel did not dispute the violation noted by Staff during the complaint<sup>10</sup> and has not shown that mitigation is appropriate now.

## 2.     **Complaint No. 90484**

9           Complaint No. 90484 involved numerous contacts between Staff and Excel over four months.<sup>11</sup> A total of 10 violations were assessed for late responses to three of the communications.<sup>12</sup> Excel argues that it responded timely and that it was confused by the open, closed, and reopened expectations.<sup>13</sup>

10          During the complaint, Excel never expressed confusion regarding WAC 480-120-166 requirements.<sup>14</sup> In addition, although Excel states that the complaint was opened on August 17, 2004, and closed on August 19, 2004, Staff neither closed the complaint nor took any other documented action on August 19, 2004.<sup>15</sup> Excel sent a response to Staff

---

<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> Declaration of Betty Young at ¶ 8, Attachment B at 1.

<sup>10</sup> Declaration of Betty Young at ¶ 8, Attachment B at 5.

<sup>11</sup> *See* Declaration of Betty Young, Attachment C.

<sup>12</sup> Declaration of Betty Young, Attachment A at 8.

<sup>13</sup> Application at 2-3.

<sup>14</sup> Declaration of Betty Young at ¶ 10, Attachment C.

<sup>15</sup> Declaration of Betty Young at ¶ 11, Attachment C at 1-6.

on August 19, 2004,<sup>16</sup> but the company's response does not close a complaint. A complaint is not closed until Staff informs the company involved that the complaint is closed under WAC 480-120-166(10).

11 Staff believes there is sufficient disagreement between the information submitted by Excel in its Application and the complaint record regarding eight violations noted for Complaint No. 90484. Two violations were noted for a response that was received on September 8, 2004, and six violations were noted for a response that was received on November 30, 2004. Staff supports mitigating the penalties associated with the eight violations.

12 However, the complaint record demonstrates that the two violations noted for a response received on November 9, 2004, are valid and should not be mitigated. Staff requested information from Excel on November 2, 2004.<sup>17</sup> Because Staff had requested additional information, Excel was required to respond by November 5, 2004, under WAC 480-120-166(8). Excel did not respond until November 9, 2004, after Staff again requested the information.<sup>18</sup> Excel should incur the penalties associated with the two violations associated with the November 9, 2004, delayed response.

13 Thus, Staff supports mitigating a total of 8 penalties, reducing the total penalties incurred by \$800.00.

### 3. Complaint No. 91531

14 Staff passed Complaint No. 91531 to Excel on October 29, 2004.<sup>19</sup> Excel requested information from Staff.<sup>20</sup> Staff forwarded the requested information to Excel

---

<sup>16</sup> Declaration of Betty Young, Attachment C at 2.

<sup>17</sup> Declaration of Betty Young, Attachment C at 16.

<sup>18</sup> Declaration of Betty Young, Attachment C at 18-19.

<sup>19</sup> Declaration of Betty Young, Attachment D at 1.

on November 17, 2004, and requested that Excel respond to the complaint.<sup>21</sup> A response was due by November 22, 2004, but Excel did not respond until December 13, 2004.<sup>22</sup> Staff contacted Excel on December 3, 2004 and again on December 10, 2004, requesting a response from Excel. Staff cited and quoted WAC 480-120-166(8) in its December 10<sup>th</sup> communication with Excel.

15 Excel now argues that it was confused about the open and closed dates related to Complaint No. 91531.<sup>23</sup> Excel never expressed confusion during the complaint.<sup>24</sup> Rather, Excel simply never responded to the complaint after receiving the information it needed from Staff. Thus, the 15 penalties assessed for the delayed response should not be mitigated.

**B. The Changes Made by Excel are Encouraging, but Should Not Result in Further Mitigation of Penalties.**

16 Excel argues that it has recently made changes in the way Commission-referred complaints are handled, including assigning the complaints to senior staff and adjusting the processes of how the complaints are handled.<sup>25</sup> In addition, Excel points out that it has responded timely to complaints received in 2005.<sup>26</sup> Staff recommends that the Commission not mitigate penalties in this case further based on the improvements made by Excel.

---

<sup>20</sup> Declaration of Betty Young, Attachment D at 2.

<sup>21</sup> Declaration of Betty Young, Attachment D at 3.

<sup>22</sup> Declaration of Betty Young, Attachment A at 8, Attachment D at 3.

<sup>23</sup> Application at 3.

<sup>24</sup> Indeed, the chart in Staff's Report lists dates that complaints were either opened *or information requested*, which began the time requirements listed in WAC 480-120-166. Declaration of Betty Young at ¶ 14, Attachment A at 8

<sup>25</sup> Application at 4.

<sup>26</sup> *Id.*

17           The Commission first contacted Excel by letter about the requirements of WAC  
480-120-166 in July 2003, as a result of an investigation Staff conducted at that time.<sup>27</sup>  
The Commission's letter provided technical assistance regarding WAC 480-120-166.  
The letter also informed Excel that it could incur penalties for future violations. After the  
Commission's initial contact, Excel continued violating WAC 480-120-166 through  
December 2004.<sup>28</sup>

18           WAC 480-120-166 is not a complicated regulatory provision. If Excel was  
indeed confused about the requirements, it should have requested clarification. However,  
Excel never indicated that it did not understand what was required, either indirectly or  
directly. Because Excel took 17 months to correct its practices and ensure timely  
responses to Commission-referred complaints, the Commission should not mitigate the  
penalties any further than the \$800.00 Staff recommended above.

**C.   Excel's Bankruptcy Does Not Affect the Validity of the Penalties, Only the  
Commission's Ability to Collect.**

19           Excel notes its pending bankruptcy in its Application.<sup>29</sup> The bankruptcy does not  
affect the validity of the penalties, nor does it affect the Commission's ability to assess  
penalties. The bankruptcy does affect, however, the Commission's ability to collect the  
penalties assessed. The penalties would be considered a debt that would be discharged  
through the bankruptcy and, to the extent funds are available, would be paid after the  
bankruptcy court issues its order.

---

<sup>27</sup> Declaration of Betty Young at ¶ 17, Attachment A at 6.

<sup>28</sup> Declaration of Betty Young at ¶ 17.

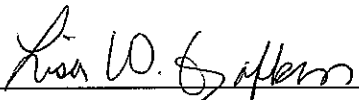
<sup>29</sup> Application at 5.

### III. CONCLUSION

20 Staff supports mitigating \$800.00 of the penalties assessed against Excel. Any further mitigation of penalties should be denied.

Dated this 10<sup>th</sup> day of August 2005.

ROB MCKENNA  
Attorney General

  
\_\_\_\_\_  
LISA W. GAFKEN  
Assistant Attorney General  
Counsel for Washington Utilities and  
Transportation Commission Staff  
(360) 664-1186