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1       BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
2                               COMMISSION

3     In the Matter of PENALTY        )  
   ASSESSMENT AGAINST EXCEL         ) DOCKET NO. UT-050713  
4     TELECOMMUNICATIONS, INC.,       ) Volume I  
   in the amount of \$2,600.         ) Pages 1 - 29  
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7               A brief adjudicative proceeding in the above  
8     matter was held on September 7, 2005, at 9:30 a.m., at  
9     1300 South Evergreen Park Drive Southwest, Olympia,  
10    Washington, before Administrative Law Judge THEODORA  
11    MACE.

12  
13               The parties were present as follows:

14               EXCEL TELECOMMUNICATIONS, INC., by MELISSA  
15    DRENNAN (via bridge), In-House Counsel and VP of  
16    Litigation and Compliance, 2440 Marsh Lane, Carrollton,  
   Texas, 75006; telephone, (972) 478-3305.

17               WASHINGTON UTILITIES AND TRANSPORTATION  
18    COMMISSION, by LISA W. GAFKEN, Assistant Attorney  
   General, 1400 South Evergreen Park Drive Southwest,  
19    Post Office Box 40128, Olympia, Washington 98504-0128;  
   telephone, (360) 664-1186.

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   Kathryn T. Wilson, CCR

25    Court Reporter

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P R O C E E D I N G S

JUDGE MACE: Good morning. Let's be on the record in the matter of penalty assessment against Excel Telecommunications, Inc. This is Docket No. UT-050713. We are convened today for a brief adjudication proceeding under Commission Rule 480-07, I believe it's 610. Today's date is September 7th, 2005, and we are convened at the offices of the Washington Utilities and Transportation Commission in Olympia, Washington. My name is Theodora Mace. I'm the administrative law judge who has been assigned to this case.

I want to take the oral appearances of counsel now, and when I ask you for your appearance today, I'm going to ask for what we call the long form appearance, and that means you are going to state your name, who you represent, the address, the telephone number, the fax number, and your e-mail address, and I need to have you go slowly enough so that the reporter can record what you are saying. We use this information to make up a contact sheet. If we need to contact you, it's important for us to have accurate information. So I will begin with Excel. Excel is appearing by conference bridge, and Ms. Drennan, would

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1 you go ahead and give your oral appearance?

2 MS. DRENNAN: Certainly. Melissa Drennan.

3 I'm the vice president of litigation and compliance and  
4 counsel to Excel Telecommunications, Inc. The physical  
5 address for our offices is 2440 Marsh Lane in  
6 Carrollton, Texas, 75006, the same information that is  
7 correct in the initial notice of the adjudication  
8 hearing being set.

9 The phone number is (972) 478-3305. That's  
10 my direct line, and the fax is (972) 478-3301. My  
11 e-mail address is mdrennan@vartec.net.

12 JUDGE MACE: Thank you. Ms. Gafken?

13 MS. GAFKEN: Good morning. My name is Lisa  
14 W. Gafken. I'm appearing today on behalf of Commission  
15 staff. My address is 1400 South Evergreen Park Drive  
16 Southwest, PO Box 40128, Olympia, Washington,  
17 98504-0128. My telephone number is (360) 664-1186. My  
18 fax number is (360) 586-5522, and my e-mail address is  
19 lgafken@wutc.wa.gov.

20 JUDGE MACE: Thank you. Are there any other  
21 appearances? Let the record show there are none.

22 So we are here today for a brief adjudication  
23 proceeding, and the procedure that I would like to  
24 follow this morning is to allow each party an  
25 opportunity to address the issue here, which I believe

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1 is a proper mitigation of penalties in this case. My  
2 understanding is that the initial penalties recommended  
3 were \$2,600 assessed against Excel. Excel filed a  
4 request for mitigation of penalties, and Staff has  
5 responded supporting mitigation of \$800 worth of those  
6 penalties.

7 Before I begin though or before the parties  
8 begin to make their statements, I want to ask the  
9 parties if they have had an opportunity to discuss the  
10 resolution of this without need for us to go into this  
11 type of proceeding. Ms. Gafken?

12 MS. GAFKEN: We didn't discuss settlement in  
13 so many words. I think the way that the parties, their  
14 positions are right now, Excel is requesting 600,  
15 specifically, more if the Commission decides that's  
16 appropriate.

17 JUDGE MACE: I'm not sure I understand what  
18 you mean, "600 more."

19 MS. GAFKEN: They specifically say 600 in  
20 their application for mitigation as an appropriate  
21 number, but then they also ask for further mitigation  
22 if the Commission so deems, and I don't want to put  
23 words in Excel's mouth, so they can certainly address  
24 that.

25 Staff's position is that we support \$800 to

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1 be mitigated from the penalty for a total penalty of  
2 \$1,800. So the way the positions are now, Staff is  
3 supporting a little higher of a specific number than  
4 Excel is presenting, but we haven't sat down with  
5 Excel. We did speak with them, but it was about  
6 something different.

7 JUDGE MACE: It seems even within that range  
8 it's very close, and just in terms of proper  
9 utilization of resources, it seems like it might be  
10 beneficial to have the parties talk about a way they  
11 could come to a compromise. Ms. Drennan?

12 MS. DRENNAN: Yes.

13 JUDGE MACE: Would you address this? Have  
14 you thought about the possibility of settlement without  
15 the need for us to go into this type of proceeding?

16 MS. DRENNAN: We've thought about it. We  
17 have had an informal conference with the Staff, but I  
18 do think it may be instructive to proceed with the  
19 hearing for this reason -- actually, two reasons.

20 One is that we are in a state of bankruptcy.  
21 As you may have read from our papers, we filed for  
22 bankruptcy November of last year, and as a result, it's  
23 a little bit difficult for us to come to any settlement  
24 or compromise without the machinations that result from  
25 being in bankruptcy with the various constituencies and

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1 having to seek court approval and so forth if we were  
2 to compromise or settle any issue, versus if there is  
3 an adjudication, that number is already liquidated and  
4 it's a sum certain, and it would be a claim then in our  
5 bankruptcy proceeding. So perhaps it is helpful to go  
6 ahead, assuming that this hearing is going to be  
7 relatively short, and on our end, we anticipate that it  
8 may be. In that light, we would like to proceed.

9           The other piece is that after having talked  
10 to Staff, as they indulged us a few weeks ago to talk  
11 through some of the facts so we could better understand  
12 the issues so that we could modify any business  
13 practices as needed, it occurred to us that the Staff's  
14 interpretation of the rules are pretty strict as far as  
15 identifying technical violations, and Your Honor, the  
16 argument that we would be making today is more of an  
17 equitable argument, so it maybe difficult. I'm not  
18 sure if Staff has the latitude. They didn't indicate  
19 they had any latitude to further reduce or mitigate the  
20 violations based on equitable considerations.

21           JUDGE MACE: In response to what you said --  
22 and I don't know enough about bankruptcy law. I  
23 certainly wouldn't hold myself out as expert in that  
24 area -- even if you settled the case with Staff, you  
25 would get a Commission order. There would be an order

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1 that would come from the Commission that would set the  
2 amount. Even if you settle it, there would be a  
3 Commission order you could take.

4 MS. DRENNAN: I appreciate that. The issue  
5 is really more our latitude and ability to engage in  
6 the settlement discussion where we would be under  
7 scrutiny from the creditors that perhaps we could have  
8 negotiated or further settled for too little when if we  
9 had gone full-blown through the hearing, the judge  
10 maybe would grant us more. So you get into some  
11 factual issues about how hard we tried or how  
12 sufficient the settlement actually is in the eyes of  
13 the creditors.

14 JUDGE MACE: Very well. Well, it sounds like  
15 then we probably need to go forward. I would propose  
16 that Staff make their presentation first and then  
17 Excel, but it can be the reverse. This is an informal  
18 type of proceeding, and I would hear comment from you  
19 whether that's acceptable.

20 MS. GAFKEN: If that's the way you would like  
21 it, that would be fine. It occurs to Staff though that  
22 Excel bears the burden of showing that mitigation is  
23 appropriate, so it might be more appropriate that they  
24 go first. That way, they have the opportunity to  
25 respond at the end.

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1 MS. DRENNAN: We are comfortable proceeding  
2 in that fashion.

3 JUDGE MACE: You go first? All right. I  
4 would ask for Excel to make their presentation first.

5 MS. DRENNAN: We would like to thank Your  
6 Honor for presiding over this hearing this morning and  
7 would like to present just a few brief points, and as I  
8 mentioned earlier, I think our argument bears on the  
9 issue of equity here.

10 We appreciate that the Staff has reviewed our  
11 initial mitigation response and further reduced their  
12 initial penalty assessment, but we would ask for  
13 further reductions based upon Your Honor's  
14 interpretation of any equitable considerations that  
15 might also come into play.

16 For instance, and the specific example  
17 related to one of the informal complaints that is at  
18 issue in this proceeding, and that's Complaint No.  
19 87463. That's the first in the laundry list of a  
20 couple of the complaints that the Staff had noted for  
21 potential violation.

22 This is an example where pure human error and  
23 inadvertent mistake has caused us to incur an  
24 additional violation. In this instance, there was a  
25 complaint that was due on February 5th, and it was



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1 received by the Staff on February 6th, so there is a  
2 one-day violation.

3 Our concern is that the rules are being  
4 interpreted to basically compel the Company and any  
5 other party that's subject to purview of the UTC there  
6 in Washington to a strict standard of perfection,  
7 essentially. We disclosed in our mitigation papers  
8 that this was the result of basically human error.  
9 Somebody left the office on one afternoon thinking that  
10 they had sent an e-mail, and it hadn't been sent and  
11 the next morning immediately sent it.

12 As a practical matter, the e-mail  
13 correspondence to submit the complaint timely, had it  
14 been sent at 11:59 the night before, the Staff would  
15 not have received it until the following morning for  
16 their practical purposes, and in this case, it was  
17 still received by 6:11 in the morning, well before they  
18 reached the office.

19 So looking at it from a pragmatic standpoint,  
20 a more practical standpoint, it's the same net effect,  
21 but again, it illustrates this hypertechnical  
22 compliance, if you will, and the basis for one of the  
23 violations that's a part of the penalties has been  
24 assessed against Excel.

25 To that extent, there was no harm to the UTC

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1 in the process because in the same time as they would  
2 have the following morning as if we had sent it later  
3 in the afternoon our time. There was no harm  
4 ultimately to the customer. There was no change in the  
5 content of the response or otherwise any response from  
6 the Staff that it was insufficient, so there was no  
7 follow-up or no issues.

8 In the sense that violations should be  
9 assessed against a party in order to help curtail  
10 conduct or to enforce compliance, this is one of those  
11 instances of an inadvertent mistake, and we feel it's a  
12 bit extreme and hypertechnical in its application. For  
13 that reason, we would like to request that that one  
14 violation be removed from our laundry list of  
15 violations, which would again mitigate the amount to  
16 \$1,700 instead of \$1,800.

17 In support of the point of equity, moving to  
18 a broader second point, in our papers, we reflected  
19 that in the year 2005, we have had what's called a  
20 violation-free period. So for a period of nine months,  
21 or three quarters of the year almost, you can see that  
22 by our track record, it's not necessary to enforce this  
23 kind of penalty against us in order to get the desired  
24 effect that the Commission staff would have in order to  
25 insure compliance.

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1           We had taken in the past and have continued  
2 to take additional measures, and I would call them  
3 extraordinary measures, above and beyond what is normal  
4 or reasonable business conduct, in order to indicate  
5 our commitment to the Staff of the Commission that we  
6 don't like to be in the situation of receiving  
7 violations or notices of violations. We take it very  
8 seriously.

9           For that reason, I had Becky Gipson, who is  
10 the director of regulatory affairs and one of my direct  
11 reports, join me in today's hearing, and if the Court  
12 will indulge me, I would like to have her, since she's  
13 firsthand and, if you will, as a witness in this  
14 proceeding, discuss briefly the radical changes that we  
15 have put into effect at the Company to address uniquely  
16 for the State of Washington any issues regarding  
17 complaints to avoid any future violations for lateness  
18 and use that information in support of our plea for  
19 some additional equitable mitigation of damages. Would  
20 that be appropriate, Your Honor, to allow Becky to  
21 address the Court?

22           JUDGE MACE: Is there objection to that?

23           MS. GAFKEN: No objection, Your Honor.

24           JUDGE MACE: Ms. Gipson, why don't you state  
25 your name and let us know what your position is with

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1 the Company.

2 MS. GIPSON: Thank you, Your Honor. My name  
3 is Becky Gipson, and I'm the director of regulatory  
4 affairs here at Excel Telecommunications.

5 JUDGE MACE: Go ahead.

6 MS. GIPSON: First of all, just to reiterate  
7 a point that Melissa raised, certainly we have had no  
8 late complaints with the UTC since Complaint No. 91531,  
9 and that includes the entire year for 2005 and as well  
10 the end of '04, and that's based on our own internal  
11 audit of our record as well as information contained in  
12 the UTC's report.

13 I am currently reviewing all UTC complaints  
14 that come to the Company. So if a complaint is sent to  
15 the regulatory affairs e-mail box, which is typically  
16 where they go, I see that complaint, and when it's  
17 assigned to a particular analyst, it's actually  
18 assigned to me so that I will be the person that is  
19 responsible for that response and will send it within  
20 the designated time frame. Of course, if sooner than  
21 not will do that.

22 This is, of course, is unique to our  
23 department's standard procedures and something that we  
24 set up specifically for Washington to make sure our  
25 commitment is clear to making sure we are compliant

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1 with this deadline issue.

2           In the event there is a follow-up or  
3 additional communication related to a particular  
4 complaint, I will make sure that there is a response  
5 sent saying that I understand that you want additional  
6 information and that the deadline is X, and I will  
7 indicate what that deadline is and will ask if I'm  
8 incorrect to please be advised. With these steps, I'm  
9 obviously hoping that there will be no chance for a  
10 late complaint, either through error and certainly none  
11 that would be intentional.

12           Also just as a side note, and Melissa may  
13 have mentioned this, that the employees that were  
14 involved in some of these complaints from before, and I  
15 think there is a short list of them here, none of those  
16 employees are with the Company at this point, and they  
17 can no longer impact our ability to respond in a timely  
18 manner and can no longer be the cause of a violation  
19 due to a failure to respond.

20           So with those three elements in mind, I would  
21 ask you to consider that and again understand the  
22 extraordinary measures that I think we've put in place  
23 here to make sure that we absolutely cannot be late. I  
24 also run a report every morning to see what the  
25 outstanding complaints are, and in the event that there

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1 is one -- again, it's assigned to me, so I will be  
2 looking at my own report -- and it somehow slips  
3 through, that is another way for me to check I've got a  
4 Washington complaint because that's assigned to me on  
5 that daily report. So again, just another measure to  
6 let you know about.

7 JUDGE MACE: All right. Thank you.

8 Ms. Drennan, anything further on behalf of Excel?

9 MS. DRENNAN: Just as a summary remark, I  
10 think at the outset, we presupposed that Your Honor had  
11 a general understanding that the nature of the  
12 violations that we are looking at here are in the  
13 nature of late-complaint responses, just for  
14 clarification.

15 So for that reason, we focused on the  
16 measures that we've taken internally to insure that as  
17 on a go-forward basis and as have been proven effective  
18 throughout 2005, that we have the internal protocols  
19 and measures in place, and so would ask for Your Honor  
20 to as a matter of equity make a discretionary  
21 determination as to further reducing the violation  
22 penalties that the Commission staff has proposed to  
23 Your Honor, and so for those reasons and any additional  
24 questions that you might have, that concludes our  
25 presentation.

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1 JUDGE MACE: Thank you. Ms. Gafken?

2 MS. GAFKEN: The time period that we are  
3 looking at with this case is January through December  
4 of 2004 and then January through June, I believe, of  
5 2005, so we are looking at a 17-month time period.  
6 During that time period, which is 2004, there were 28  
7 complaints, and in 2005, there were seven complaints.  
8 The violations we are dealing with in this case are 26  
9 violations that were incurred during three complaints.  
10 I believe all of those complaints were in the 2004  
11 calendar year.

12 The Commission did assess the \$2,600 penalty  
13 in its penalty assessment, and the WAC that's involved  
14 in this case is 480-120-166, Subsections 6, 7, and 8,  
15 which deal with -- well, those subsections prescribe  
16 that the amount of time a company has to respond. So  
17 for a service-affecting complaint, the company must  
18 respond within two days. A nonservice-affecting  
19 complaint, the company must respond within five days,  
20 and all other inquiries within those complaints from  
21 the Commission staff, the company must respond within  
22 three days. So the rule is pretty clear about the  
23 length of time the company has to respond to a  
24 particular type of complaint or request for  
25 information.

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1           I'm going to go through the three complaints  
2 briefly, not necessarily the content but the time  
3 periods involved in the three complaints. The first  
4 complaint Excel did address in their presentation, and  
5 that was Complaint 87463, which resulted in one  
6 violation and the \$100 penalty.

7           They did talk about the e-mail transmission  
8 error in the application for mitigation, but there  
9 wasn't any evidence presented to demonstrate that there  
10 was an e-mail transmission error. No evidence appears  
11 in the Commission's complaint record either that a  
12 transmission error occurred, but what does appear in  
13 the complaint record, and this is Attachment B to the  
14 declaration of Betty Young on Page 1, the Company was  
15 informed in the initial admission from the Staff of the  
16 complaint that a response was due on or before February  
17 5th, so --

18           JUDGE MACE: Let me interrupt you though.  
19 The response was received on February 6th; is that  
20 right?

21           MS. GAFKEN: That's correct, so it was one  
22 day late, which is why the one penalty was assessed.

23           So the record as it stands shows that they  
24 were informed of the due date. The response wasn't  
25 received until the 6th. In that regard, Staff



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1 recommends that the penalties remain.

2           The next complaint is Complaint No. 90484,  
3 and that complaint resulted in ten violations that were  
4 associated with three requests for information, so in  
5 other words, three requests were made within those  
6 three requests. Excel responded ten days late in  
7 total, and I'm going to use the response date when I  
8 refer to these, so the dates that the Commission  
9 received a response from Excel.

10           There is one response that Staff believes  
11 that the penalties should remain, and then there is two  
12 responses that we concede or the record is slightly  
13 unclear as to whether violations occurred. I'll  
14 address the two first because they are a little easier.

15           The responses received on September 8th of  
16 2004 and November 30th of 2004, those are the two that  
17 I'm looking at. So the response received on September  
18 8th was two days late, which resulted in two  
19 violations, and the response on November 30th was  
20 received six days late, or at least that's the  
21 allegation. The record is slightly unclear, so Staff  
22 does concede that those two are appropriate for  
23 mitigation.

24           The third response was made on November 9th  
25 of 2004, and that one resulted in two violations

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1 because it was received two days late. The record with  
2 regard to that particular response is clear. The Staff  
3 requested information, and this complaint is found in  
4 the Attachment C to Betty Young's declaration, and on  
5 Page 16 of that Attachment C, it shows the Staff  
6 requesting the information from Excel, and in that  
7 request, Staff informed the Company that under  
8 Subsection 8 of the WAC that a response was due on a  
9 certain date, and that's found on Page 17 of  
10 Attachment C. Excel didn't respond, so Staff again  
11 requested a response, and that second request is found  
12 on Page 18 of Attachment C. Excel did respond after  
13 Staff's second inquiry.

14           So in this instance, the record is clear that  
15 there were a couple of requests for the same  
16 information made. The response date was clearly set  
17 out in the request for information, and so Staff  
18 recommends that the two violations associated with  
19 responses that was received on November 9th be upheld.

20           The third complaint is Complaint No. 91531,  
21 and that complaint resulted in 15 violations, and Staff  
22 also recommends that the 15 violations with regard to  
23 this complaint be upheld. The record is pretty clear  
24 about the time frames involved here. The complaint was  
25 forwarded on October 29th, 2004. Excel didn't have all

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1 the information it needed to process the complaint so  
2 it requested additional information from the Staff, and  
3 the Staff provided that information on November 17th of  
4 2004, and when they provided the additional  
5 information, they also said, Excel, we need a response  
6 to the complaint. This is found in Attachment D to  
7 Betty Young's declaration.

8           Excel didn't respond after receiving the  
9 information they requested, so Staff sent supplemental  
10 requests on December 3rd and December 10th, and in the  
11 December 10th transmission, the Staff did cite to the  
12 WAC, Subsection 8, and noted that the response was  
13 tardy. Excel did respond on December 13th, which was  
14 15 days late from when the response was originally due.  
15 Given the multiple requests and that the rule was set  
16 out for the Company, the 15 violations should be upheld  
17 with regard to Complaint No. 91531.

18           So I guess in conclusion, Staff does support  
19 an \$800 mitigation of the penalties for total penalties  
20 of \$1,800. Excel did make some equity arguments, and  
21 it is within the Commission's discretion to consider  
22 those arguments. However, Staff does not make any  
23 comment with regard to the equity arguments.

24           JUDGE MACE: I guess I appreciate that Staff  
25 doesn't make any comment, but if the purpose of this

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1 whole method of regulation is to get the Company to be  
2 more responsive to complaints, if the Company has put  
3 in place a system that would insure greater  
4 responsibility and accountability and if the Company  
5 has, in quotes, "cleaned up" its act since early this  
6 year, what would Staff's position be with regard to  
7 further mitigation, assuming that the purpose of all  
8 this is to encourage the Company to comply?

9 MS. GAFKEN: Staff believes that the \$800  
10 mitigation is sufficient. There is a fairly long time  
11 period. It can either be measured at the 12-month  
12 level through 2004 or the 17-month level through the  
13 middle of 2005. It's probably more appropriate to  
14 measure it at the 12-month level because that's when  
15 the violations in this case occurred. That is a  
16 significant amount of time in order to clean up one's  
17 act.

18 The communications within at least these  
19 three complaints, and I didn't go back and look at all  
20 28 complaints, but the communications within the three  
21 complaints that are at issue in this matter were fairly  
22 clear. The Staff cited the dates the responses were  
23 due. Maybe not in every single instance but at least  
24 in the ones that are relevant in this matter. They set  
25 out the WAC.

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1           It was pretty clear, and the responses that  
2 the Commission received from the Company were fairly  
3 sophisticated responses. They were well thought out.  
4 They were intelligent responses, and so they never  
5 indicated any confusion with regard to when a response  
6 was due or just the WAC in general. They never  
7 indicated any confusion until after the penalties were  
8 assessed.

9           I think that the policies that they have in  
10 place now will probably go a long way for future  
11 compliance, but it took kind of an extraordinary effort  
12 on the Commission's part to get them to that point, and  
13 that effort was assessing the penalty.

14           JUDGE MACE: Okay. Ms. Drennan, do you have  
15 any response?

16           MS. DRENNAN: Yes, I do, briefly, Your Honor.  
17 Two things that I would note factually: One, I do want  
18 to point out with respect to the very last remark just  
19 made by counsel with respect to that it took the Staff  
20 an extraordinary effort to put together the notice of a  
21 penalty assessment in order to, if you will, get us to  
22 clean up our act.

23           We take issue with that factually since the  
24 notice of the penalties incurred was not received by  
25 the Company, and no prior notice, verbally or

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1 otherwise, had been received until June 29th of this  
2 year. We've already shared with the Court that we  
3 don't have any violations on our records nor do we have  
4 any record of the Staff themselves having any record of  
5 any other violations since the beginning of 2005.

6           So you see that we had actually already  
7 implemented many of these processes and had taken care  
8 of the staff members who were the individuals  
9 responsible for the majority of these issues and the  
10 lapses in appropriate response times had been  
11 terminated from employment back in March of 2005. So  
12 many of these measures in terms of us tracking their  
13 individual performance and setting performance metrics  
14 in place for them had already been put into effect.

15           So just from a factual standpoint, it's not  
16 the case that it took the notice itself to compel us or  
17 spur us to clean up our act. We were already doing  
18 that ourselves as an initiative that we were  
19 undertaking as a part of our bankruptcy, as a part of  
20 our restaffing and staff reorganization in general.

21           The second issue I would like to point out is  
22 the relevant time period that's being discussed on two  
23 of the complaints, the 9484 and the 91531, just to bear  
24 in mind again that the Company filed for bankruptcy  
25 November 1st of 2004, and one of the issues, the

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1 November 9th time frame, the two-day violations, on  
2 Complaint No. 9484, the Company and its employees was  
3 in a state of upheaval in terms of having filed for  
4 bankruptcy, the anxiety of the individuals, a lot of  
5 absenteeism, individuals just somewhat in a state of  
6 shock and worry and concern about their own employment  
7 and the health and welfare of the Company on a  
8 go-forward basis.

9           Again, just as an additional, if you will,  
10 mitigating factor, it wasn't normal times for the  
11 Company during this time frame, and as you may have  
12 realized in our opening remarks, we didn't take issue  
13 with the Complaint No. 91531 or 9484 because we  
14 understand that there are rules in place. We are  
15 supposed to comply, and yet at the same time, we want  
16 to ask the Court's indulgence as a matter of equity on  
17 the first complaint, the 87463, because we think it's a  
18 hypertechnical interpretation of the rules and also ask  
19 the Court's indulgence based upon our facts and  
20 circumstances and the extraordinary measures that Becky  
21 incurred, testimonial about what we are doing on a  
22 go-forward and would submit our case to the Court for  
23 determination.

24           JUDGE MACE: So, Ms. Drennan, exactly what  
25 are you requesting here in terms of mitigation? Is it

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1 the same as in your filing, or you are requesting \$600  
2 as a penalty; is that correct?

3 MS. DRENNAN: In our filing, we had requested  
4 that at a minimum of the total number of violations  
5 should have been reduced from 26 to 20 or fewer, and we  
6 believe that the Staff recognized some of the facts we  
7 point out, and in fact, they agreed to mitigate to, if  
8 you will, down to 18 violations.

9 We believe that the "or fewer" piece is the  
10 issue of an equitable determination. I would submit to  
11 the Court that on the one hand, all entire 18  
12 violations should be eradicated based on the radical  
13 protocols we have put in place by having the director,  
14 the head of the department, be solely responsible on a  
15 go-forward basis at this juncture in our bankruptcy and  
16 based upon having received the notice of violation to  
17 insure there is not a compliance issue for failure to  
18 respond, and I don't think that we've seen either in  
19 other circumstances with our peer industry leaders any  
20 such type of organization structured in order to meet a  
21 single state's expectations, and we are ready and  
22 willing to do that and would ask the Court to --

23 JUDGE MACE: Realistically, all 18 violations  
24 are not going to be eradicated. I need to be up front  
25 with you about that. I'm looking for your bottom line



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1 here.

2 MS. DRENNAN: Then we think it should be  
3 reduced in half in recognition of not only the one  
4 violation that we believe is hypertechnical but in a  
5 holistic viewpoint in recognition of the measures we've  
6 undertaken.

7 Also recognizing that we are in bankruptcy  
8 and are proceeding as best as we can. Much of whatever  
9 violation is imposed would be subject to the bankruptcy  
10 court, a proof-of-claim process and so forth. So we  
11 would ask that the total number of violations as agreed  
12 to, at least after the mitigation response by Staff, be  
13 reduced from 18 violations to nine violations for a  
14 total sum of \$900.

15 JUDGE MACE: All right. Anything further?

16 MS. GAFKEN: Staff would request an  
17 opportunity to make two points.

18 JUDGE MACE: Go ahead.

19 MS. GAFKEN: Back in July of 2003, Excel did  
20 receive a letter from the Commission signed by Carol  
21 Washburn, the executive director, stating that there  
22 had been prior issues with regard to response time, and  
23 Excel was notified at that time that it could receive  
24 penalties if this problem continued.

25 Also, my second point is with regard to the

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1 bankruptcy. Yes, Excel is in bankruptcy, and that will  
2 make it a little more difficult for the Commission to  
3 collect the penalties. However, the bankruptcy doesn't  
4 affect the validity of the penalties or the  
5 Commission's ability to assess the penalties.

6 JUDGE MACE: Thank you. My review of the  
7 rule says that I have to have an initial order out in  
8 ten days, and that's what I aspire to do, and then you  
9 will have recourse based on the rule. I believe the  
10 rule requires petition for review, if, of course, you  
11 seek review, and sets out the time frames, and I would  
12 just turn your attention to the rule.

13 Is there anything else we need to address at  
14 this point?

15 MS. GAFKEN: Understanding that Your Honor  
16 intends to meet the ten-day deadline, Staff would be  
17 willing to make that waiver if Excel would also be  
18 willing to do so.

19 JUDGE MACE: The ALJ would certainly  
20 appreciate having some additional time. Ms. Drennan,  
21 I'm wondering if you would be willing to let me have an  
22 additional ten days beyond the ten-day period?

23 MS. DRENNAN: Absolutely, Your Honor, and if  
24 I may supplement in response to Counsel's last remark  
25 about the letter in 2003, I would like to just

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1 supplement that at least based on what we were provided  
2 as Appendix D to the original notice of violation, the  
3 letter from 2003 relates to electronic letters of  
4 authorization and whether or not we have valid LOA's,  
5 and it does not appear to us, at least right now as we  
6 are trying to understand what letter they are referring  
7 to, Becky has just showed me another letter from July  
8 1st of 2003 that makes reference to our review of  
9 informal complaints and that the Staff would continue  
10 to monitor it, but it doesn't cite any particular  
11 complaint.

12           So if those letters are going to be used for  
13 the Judge's determination, we would ask that the Judge  
14 dismiss those as being irrelevant since they are not  
15 during the same time period. But, Your Honor, to your  
16 question of time period, whatever time period that you  
17 need in order to make your determination for  
18 convenience or otherwise is certainly fine with us.

19           JUDGE MACE: I'm not going to go beyond 20  
20 days, but that would be very helpful to me if I could  
21 have 20 days.

22           I want to make sure the parties are aware  
23 that in addition to what I've heard today, I'm going to  
24 review all the filings you've made with regard to this  
25 particular docket. To the extent that that letter you

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1 refer to is in the docket, it will be part of what I  
2 consider. It doesn't mean I necessarily will base my  
3 decision on it, but I'm taking all this information  
4 into account.

5 MS. GAFKEN: I also apologize, but I wasn't  
6 entirely clear as to which letter, and I didn't cite  
7 for the record. It is in the record. It's Page 26 of  
8 Attachment A to Betty Young's declaration. So I do  
9 apologize for being unclear about that.

10 JUDGE MACE: Ms. Drennan, is that the letter  
11 you are referring to, Page 26?

12 MS. DRENNAN: I believe it's probably the  
13 same letter. It's an Attachment D. The letter we are  
14 referencing is the July 1st, 2003, Attachment D to the  
15 Staff's initial notice that was sent to us.

16 MS. GAFKEN: That's correct. Attachment D to  
17 the Staff report. The Staff report is Attachment A to  
18 Betty Young's declaration, so I think we are on the  
19 same page.

20 MS. DRENNAN: We are; thank you.

21 JUDGE MACE: Anything else? Thank you very  
22 much, I appreciate your presentations, and I will be  
23 timely. It's possible I may get the initial order out  
24 sooner than the 20 days, but I do appreciate that you  
25 are willing to give me the latitude to get it out in 20

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1 days. Thank you.

2 (Brief Adjudicative Proceeding concluded at 10:15 a.m.)

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