

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	DOCKET NO. UT-050713
	)	
PENALTY ASSESSMENT AGAINST	)	ORDER NO. 01
EXCEL TELECOMMUNICATIONS,	)	
INC.	)	
	)	INITIAL ORDER ON BRIEF
	)	ADJUDICATION GRANTING,
	)	IN PART, MITIGATION OF
.....	)	PENALTIES

*Synopsis:* This order proposes to grant, in part, a petition for mitigation of penalties, reducing the penalty amount from \$2,600 to \$1,600.

1 **Nature of Proceeding.** This matter is a request for mitigation of an assessment of penalties by the Commission against Excel Telecommunications, Inc. (Excel) for alleged violations of laws and rules relating to reporting the results of its investigations of service complaints in a timely manner.

2 **Procedural History.** On June 28, 2005, the Commission assessed penalties on Excel Telecommunications, Inc. (Excel or the Company) in the amount of \$2,600.00, including a \$100 penalty for each of 26 alleged violations of WAC 480-120-166, which requires telecommunication companies to: 1) report the results of its investigation of service-affecting informal complaints to Commission Staff within two business days from the date Commission Staff passes the complaint; 2) report the results of non-service-affecting informal complaints to Commission Staff within five business days from the date the Commission Staff passes the

complaint; and, 3) to respond to requests from Commission staff for additional information on pending complaints within three days.

3 On July 21, 2005, Excel filed with the Commission an Application for Mitigation of Penalties. Excels asks that the Commission dismiss and/or waive the penalties assessed against the Company or significantly reduce the assessment.

4 On August 10, 2005, Commission Staff filed its response to Excel's Application for Mitigation. Commission Staff recommends and supports mitigating \$800.00 of the penalties assessed against Excel due to eight of the alleged violations, and requests that the Commission deny any further mitigation of penalties.

5 **Brief Adjudication.** The Commission convened a brief adjudication on September 7, 2005, at Olympia, Washington before Administrative Law Judge Theodora M. Mace pursuant to WAC 480-07-610. Melissa Drennan, in-house counsel, represented Excel. Lisa W. Gafken, Assistant Attorney General, Olympia, Washington, represents Commission Staff. The parties waived the deadline for filing an initial order, extending the date until September 27, 2005.

## I. MEMORANDUM

6 **Background.** Excel has been operating in Washington since May 1991 as a competitive telecommunications company.<sup>1</sup> For 2004, Excel reported gross intrastate operating revenues of \$3.8 million.<sup>2</sup> However, on November 1, 2004, Excel filed for Chapter 11 bankruptcy protection.<sup>3</sup>

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<sup>1</sup> See, Docket No. UT-910017.

<sup>2</sup> Staff's Response to Excel's Application (Staff Response), ¶ 3.

<sup>3</sup> *Application for Mitigation at 5.*

7 Between January and December 2004, the Commission's Consumer Affairs Staff received 28 informal complaints from Excel's customers.<sup>4</sup> The Commission's Business Practices Staff investigated the 2004 complaints plus seven complaints filed in 2005.<sup>5</sup> Due to this investigation, Staff found 26 violations of WAC 480-120-166 resulting from three complaints filed in 2004,<sup>6</sup> and recommended penalties for the violations.

8 Excel responded to the penalty assessment with an Application for Mitigation of Penalties. In its application, Excel sought mitigation of the number of violations from 26 to 20 or fewer or a penalty reduction of \$600.<sup>7</sup> In support, Excel pointed out that none of the personnel who handled the violations complained of were any longer employed by the company;<sup>8</sup> that the company had responded timely in all 2005 complaints investigated by Staff;<sup>9</sup> and, that the filing of Chapter 11 bankruptcy might prevent the company from paying the penalties assessed.<sup>10</sup>

9 Staff, in turn, filed a response to Excel's application for mitigation, stating that Staff agreed to the mitigation of eight of the violations, bringing the penalty assessment to \$1,800.

10 The following sections of this order identify the rule Excel allegedly violated and discuss whether further mitigation of the violations still at issue should be granted.

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<sup>4</sup> Declaration of Betty Young, attached to Staff Response, at 5.

<sup>5</sup> *Id.*

<sup>6</sup> WAC 480-120-166 provides that the company must respond to certain types of informal complaints or requests for information within a specified number of days. Thus, the company's delay in responding to Staff may result in multiple violations due to the number of days the company delays in responding beyond the deadline date. The three or five-day deadlines specified in the rule may be extended by Staff depending on the circumstances.

<sup>7</sup> Application for Mitigation at 5; Excel requested a reduction of half or all penalties during the hearing on September 7, 2005..

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 5.

11 **WAC 480-120-166.** This rule, attached as Appendix A to this Order, identifies what steps a company must take when Commission Staff refer an informal complaint to the company. The rule outlines the required timeframes for response to Staff. In summary, the rule requires telecommunications companies to:

- 1) report the results of investigations of service-affecting informal complaints to Commission Staff within two business days from the date Staff passes the complaint to the company. *WAC 480-120-166 (6).*
  
- 2) report the results of non-service-affecting informal complaints to Staff within five business days from the date the Staff passes the complaint to the company. *WAC 480-120-166(7).*
  
- 3) to respond to requests from Staff for additional information on pending complaints within three days. *WAC 480-120-166(8).*

12 **Alleged Violations.** Eliminating the alleged violations Staff agrees have been mitigated, the following alleged violations remain at issue in this proceeding:

	<b>Complaint #</b>	<b>Date Opened/ Information Requested</b>	<b>Date Response Due</b>	<b>Date Of Response</b>	<b>Days Beyond Response Due Date</b>
1	87463	1/28/04	2/5/04	2/6/04	1
2	90484	11/2/04	11/5/04	11/9/04	2
3	91531	11/17/04	11/22/04	12/13/04	15
Total					18

13 **Complaint # 87463.** This complaint relates to Excel's alleged switching of a Qwest customer's long distance service to Excel without permission.<sup>11</sup> At issue is a one day alleged violation and a penalty of \$100. The parties agree that the complaint was sent to Excel on January 28, 2004 and that the due date for a response was February 5, 2004. Excel asserts that the response was sent on February 5, 2004 but the electronic transmission did not occur until the following morning at 8:11 a.m. (CST) or 6:11 a.m. (PST).<sup>12</sup> Therefore, Excel argues, the response was sent on a timely basis and was received by Staff before the Commission opened for business on February 6, 2005.

14 Staff contends that there is no proof of a transmission error and that Staff had provided sufficient notice to Excel that its response was due on February 5, 2005. Therefore Staff asserts mitigation is not warranted.

15 **Discussion and decision.** Mitigation should be granted for this alleged violation. The evidence is unclear as to whether there was a transmission error causing this response to arrive late. Nevertheless, there is no dispute that the response arrived prior to the Commission's opening for business on February 6, 2004, so there was no actual harm caused by the delay. The penalty should be reduced by \$100.

16 **Complaint # 90484.** This complaint relates to a customer who experienced a series of service and billing problems.<sup>13</sup> At issue is Staff's claim that Excel should be assessed a \$200 penalty for a two-day delay in responding to the referral of the complaint.

17 Commission Staff traded a series of emails about the customer's problems with Excel representative Monica Rodriguez over a period of months from August

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<sup>11</sup> Attachment B to Declaration of Betty Young.

<sup>12</sup> Excel Application for Mitigation at 2.

<sup>13</sup> Attachment C to Declaration of Betty Young.

through December 2004. Although Staff agreed to the mitigation of penalties for a number of these alleged violations, Staff asserts that the two-day alleged violation related to a November 2, 2004 complaint referral remains at issue. In the November 2 email referral<sup>14</sup> Staff specified a response deadline of November 5, 2004. The company did not respond by November 5.

18 The Company points out that Ms. Rodriguez is no longer with Excel making it difficult to determine the facts related to the alleged violation. Excel also points out that starting November 1, 2004, Excel was in bankruptcy and this caused considerable disruption to the company's business operations that had an impact on the company's responses to complaints.

19 **Discussion and decision.** A review of the documents filed by the parties shows that mitigation of at least one of the two violation days is appropriate. In the series of emails related to the November 2, 2004 complaint, Staff initially specified a response deadline of November 5, 2004.<sup>15</sup> However, in a November 9, 2004 email exchange, Staff reminded Ms. Rodriguez that a response was due November 5, 2004 but stated that Staff would not record violations for the failure to respond.<sup>16</sup> Staff stated: "However, I'm not going to [record violations], but instead I'm going to record violations from November 8, 2004 instead and give you another opportunity to reply." Ms. Rodriguez then responded on November 9, 2004.<sup>17</sup> Thus, a only a one-day violation of the response time requirements is supported by the documentation, reducing the penalty assessment by a further \$100.

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<sup>14</sup> *Id.* at 17.

<sup>15</sup> Attachment C to Declaration of Betty Young at 16-17.

<sup>16</sup> *Id.* at 18.

<sup>17</sup> *Id.* at 18.

20 **Complaint # 91531.** This complaint concerns a “non-service affecting” bill credit that Excel was to have given to one of its customers.<sup>18</sup> At issue is a penalty assessment of \$1,500 for 15 violation days. The complaint was first referred to the company on October 29, 2004.<sup>19</sup> The company responded that it lacked sufficient information to act on the complaint.<sup>20</sup> On November 17, 2005, Staff provided the requested information and requested a response.<sup>21</sup> Under WAC 480-120-166(7), the company must provide a response to non-service affecting complaints within five business days, or by November 22.

21 On December 3, 2004, Staff again asked the company to respond to the complaint. On December 10, 2004, Staff advised the company that a violation was being recorded for failure to respond to the December 3 request for additional information within three business days. On December 13, 2004, the company provided a full response. Staff alleges Excel was 15 days late in responding for a total penalty assessment of \$1,500.<sup>22</sup>

22 Excel admits that it did not respond to the Complaint until December 13, 2004,<sup>23</sup> but states that the series of emails associated with the complaint are confusing with regard to the deadlines for response.

23 **Discussion and decision.** With regard to this complaint, the documentation does not support any mitigation of the \$1,500 penalty. As of November 17, 2004, the company had sufficient information to investigate the complaint. Under

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<sup>18</sup> Attachment D to Declaration of Betty Young.

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> It is not clear from the documents filed in this case how Staff is calculating the 15 violations. Staff exercises significant discretion in determining whether daily violations will be cited or only one violation no matter how many days late the response is. See Staff Investigation into the Business Practices of Excel Telecommunications, Inc. at 7. However, Ms. Young’s Declaration indicates that Excel’s response was delayed far longer than 15 days.

<sup>23</sup> *Application for Mitigation at 3.*

WAC 480-120-166 it should have responded by November 22, 2005. Staff further prodded the company on November 17, 2004 and again on December 3, 2004 that a response was required.<sup>24</sup> Staff could have, but did not, cite Excel for a lengthier period of violation than it did. The \$1,500 penalty assessed for a 15-day violation of 480-120-166(8) is justified in this instance.

24 **General Request for Mitigation.** Excel argues that further mitigation of penalties is warranted because the provisions of WAC 480-120-166 are vague and Staff's communications to the company with regard to deadlines were not clear. Further, the company asserts that it has improved its handling of service complaints since the beginning of 2005 and has put in place systems and personnel to prevent future violations. Finally, the company warns that its status in bankruptcy may render it unable to pay the Commission's penalty assessment.

25 **Discussion and decision.** In the body of this Order, mitigation has been found where the facts warrant it. While the Commission appreciates that the company has improved its track record in handling complaints and has instituted measures to avoid future violations, it appears that these improvements may not have occurred absent the threat of recorded violations and penalties. The Commission's penalty assessment is related to violations of Commission rules and is not (and cannot be) influenced by whether or not the company is in bankruptcy. The Commission acknowledges that a filing of bankruptcy may have an impact on whether the company will be able to pay the penalty, but expects that Excel will provide documentation from the bankruptcy court if the company is prevented from paying the penalty for that reason.

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<sup>24</sup> Attachment D to Declaration of Betty Young at 3.



**FINDINGS OF FACT**

- 26 (1) The Washington Utilities and Transportation Commission is an agency of  
the State of Washington charged by law with the regulation of  
telecommunications companies, including Excel.
- 27 (2) Excel is a telecommunications company, operating within the State of  
Washington.
- 28 (3) The Commission assessed a penalty of \$2,600 against Excel due to 26  
alleged violations of WAC 480-120-166 for failure to respond to consumer  
complaints passed on to the company by Commission Staff and for failure  
to provide additional information to Staff.
- 29 (4) On July 21, 2005, Excel filed an Application for Mitigation of Penalties.
- 30 (5) On August 10, 2005, Staff responded to the Application, agreeing that  
mitigation of eight of the violations was appropriate, reducing the penalty  
to \$1,800 for 18 alleged violations, related to three separate Complaints:  
No. 87463; No. 90484; and No. 91531.
- 31 (6) On September 7, 2005, the Commission convened a Brief Adjudicative  
Proceeding to address the Application for Mitigation.
- 32 (7) In Complaint No. 87463 Excel responded prior to the beginning of the  
business day on the date Staff would have reviewed the response if it had  
been filed the on the due date, requiring mitigation of the \$100 penalty for  
a one-day violation.

- 33 (8) In Complaint No. 90484 Excel responded within one day of the deadline imposed by Staff, thus reducing the alleged violations from two to one, requiring mitigation of \$100 of the penalty assessed.
- 34 (9) In Complaint No 91531 Excel failed to respond in a timely manner to a non-service affecting complaint and no mitigation of the \$1,500 assessed penalty is warranted.
- 35 (10) Penalties for failure to respond in a timely manner to Commission-referred complaints or requests for additional information should be mitigated in the amount of \$1,000, leaving in effect the remaining \$1,600 penalty assessment.

#### CONCLUSIONS OF LAW

- 36 (1) The Commission has jurisdiction over this matter and the parties to this proceeding.
- 37 (2) The Commission should grant the Application for Mitigation for ten of the 26 alleged penalties assessed against Excel.
- 38 (3) The Commission should deny the Application for Mitigation for 16 of the 26 alleged penalties.
- 39 (4) The penalty assessment of \$2,600 should be mitigated to \$1,600.
- 40 (5) The mitigated penalty assessment should be paid within 30 days of service of this order unless Excel is prevented from doing so by the bankruptcy court, subject to Excel providing proof from the court of the prohibition on or delay of payment.

**ORDER**

41 The Commission grants mitigation of \$1,000 of the \$2,600 penalty assessment, conditioned upon payment of the remaining \$1,600 penalty within 30 days of the date of this order, or as soon thereafter as is permitted due to Excel's status in bankruptcy, subject to Excel's providing proof from the court of any prohibition on or delay of payment.

DATED at Olympia, Washington and effective this 23rd day of September, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

THEODORA M. MACE  
Administrative Law Judge

## NOTICE TO THE PARTIES

**This is a Brief Adjudicative Proceeding. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.**

**WAC 480-07-610(7) provides that any party to this proceeding has twenty-one (21) days after the entry of this Initial Order to file a *Petition for Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-610(7). WAC 480-07-610(7) states that any party may file a *Response* to a Petition for Review within seven (7) days after service of the Petition. WAC 480-07-610(8) provides that the final order on review will notify the parties of any further available administrative review.**

# APPENDIX A

R-516), § 480-120-147, filed 1/10/05, effective 2/10/05. Statutory Authority: RCW 80.01.040, 80.04.160, 81.04.160, and 34.05.353. 03-22-046 (Docket No. A-030832, General Order No. R-509), § 480-120-147, filed 10/29/03, effective 11/29/03. Statutory Authority: RCW 80.01.040 and 80.04.160. 03-01-065 (Docket No. UT-990146, General Order No. R-507), § 480-120-147, filed 12/12/02, effective 7/1/03.]

**WAC 480-120-166 Commission-referred complaints.** (1) Each company must keep a record of all complaints concerning service or rates for at least two years and, on request, make them readily available for commission review. The records must contain complainant's name and address, date and the nature of the complaint, action taken, and final result.

(2) Each company must have personnel available during regular business days to respond to commission staff.

(3) Applicants, customers, or their authorized representatives, may file with the commission an informal complaint as described in WAC 480-07-910 (Informal complaints) or a formal complaint against a company when there are alleged violations of statutes, administrative rules, or tariffs as provided by WAC 480-07-370 (Pleadings -- General).

(4) When the commission staff refers an informal complaint to a company, the company must:

(a) Stop any pending action involving the issues raised in the complaint provided any amounts not in dispute are paid when due (e.g., if the complaint involves a disconnect threat or collection action, the disconnect or collection must be stopped);

(b) Thoroughly investigate all issues raised in the complaint and provide a complete report of the results of its investigation to the commission, including, if applicable, information that demonstrates that the company's action was in compliance with commission rules; and

(c) Take corrective action, if warranted, as soon as appropriate under the circumstances.

(5) Commission staff will ask the customer filing the informal complaint whether the customer wishes to speak directly to the company during the course of the complaint, and will relay the customer's preference to the company at the time staff opens the complaint.

(6) Unless another time is specified in this rule or unless commission staff specifies a later date, the company must report the results of its investigation of service-affecting informal complaints to commission staff within two business days from the date commission staff passes the complaint to the company. Service-affecting complaints include, but are not limited to, nonfunctioning or impaired services (i.e., disconnected services or those not functioning properly).

(7) Unless another time is specified in this rule or unless commission staff specifies a later date, the company must report the results of its investigation of nonservice-affecting informal complaints to commission staff within five business days from the date commission staff passes the complaint to the company. Nonservice-affecting complaints include, but are not limited to, billing disputes and rate quotes.

(8) Unless another time is specified in this rule or unless commission staff specifies a later date, the company must provide complete responses to requests from commission staff for additional information on pending informal complaints within three business days.

(9) The company must keep commission staff informed when relevant changes occur in what has been previously communicated to the commission and when there is final resolution of the informal complaint.

(10) An informal complaint opened with the company by commission staff may not be considered closed until commission staff informs the company that the complaint is closed.

[Statutory Authority: RCW 80.01.040 and 80.04.160. 05-03-031 (Docket No. UT 040015, General Order No. R-516), § 480-120-166, filed 1/10/05, effective 2/10/05; 03-24-028 (General Order R-510, Docket No. A-010648), § 480-120-166, filed 11/24/03, effective 1/1/04; 03-01-065 (Docket No. UT-990146, General Order