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January 7, 2004

VIA FEDERAL EXPRESS

Ms. Carol J. Washburn
Executive Secretary
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

Subject: Advanced TelCom, Inc.'s Reply to Staff and Public Counsel;
WUTC –v- Advanced Telecom Group, Inc., et al;
DOCKET NO. UT-033011

Dear Ms. Washburn:

Enclosed are an original and 12 copies of above referenced reply dated January 7, 2004. Please do not hesitate to call me if you have any questions or comments. Thank you.

Sincerely,



William R. Connors

Enclosures

cc: Docket No. UT-033011 Service List

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3
4 BEFORE THE WASHINGTON UTILITIES AND
5 TRANSPORTATION COMMISSION

6 WASHINGTON UTILITIES AND)
7 TRANSPORTATION COMMISSION)

) Docket No. UT- 033011

8 Complainant)

) ADVANCED TELCOM, INC.'S REPLY
) TO STAFF AND PUBLIC COUNSEL

10 vs.)

11 ADVANCED TELECOM GROUP, INC.;)
12 ALLEGIANCE TELECOM, INC.; AT&T)
CORP; COVAD COMMUNICATIONS)
13 COMPANY; ELECTRIC LIGHTWAVE)
INC.; ESCHELON TELECOM, INC. f/k/a)
14 ADVANCED TELECOMMUNICATIONS,)
INC.; FAIRPOINT COMMUNICATIONS)
15 SOLUTIONS, INC.; GLOBAL CROSSING)
LOCAL SERVICES, INC.; INTEGRA)
16 TELECOM, INC.; MCI WORLDCOM, INC.;)
QWEST CORPORATION; XO)
17 COMMUNICATIONS, INC. f/k/a)
NEXTLINK COMMUNICATIONS, INC.)

18 Respondents.)
19 _____)

20 Advanced TelCom Inc., d/b/a Advanced TelCom Group, ("ATG"), is still a party
21 to this docket because Staff refuses to accept the Federal Communications Commission's
22 ("FCC") determination that Internet-bound traffic is (a) excluded from the reciprocal
23 compensation provisions of 47 U.S.C. § 251(b)(5); (b) interstate in nature; and (c) not subject to
24 WUTC jurisdiction. There has been and continues to be significant national debate and resultant
25 confusion on this issue. As it now stands, however, under federal law rate provisions for
26

ADVANCED TELCOM, INC.'S REPLY TO STAFF AND
PUBLIC COUNSEL - 1

1 Internet-bound traffic are not "interconnection agreements" that must be filed with the WUTC
2 for approval. Even assuming for the sake of argument that the WUTC determines otherwise,
3 ATG's recent bankruptcy discharged any monetary penalties that may arise from this matter,
4 despite unsupported statements by Staff and Public Counsel to the contrary.
5

6 **I. RATE PROVISIONS FOR INTERNET-BOUND TRAFFIC ARE NOT**
7 **"INTERCONNECTION AGREEMENTS" THAT MUST BE FILED WITH THE**
8 **WUTC FOR APPROVAL.**

9 Effective June 30, 2000, ATG and Qwest¹ executed a Confidential Settlement
10 Agreement ("Settlement Agreement")² that included the following provision for reciprocal
11 compensation:

12 4.1 The parties hereby agree to forego reciprocal compensation, and will
13 provide services through a Bill and Keep arrangement, in all states where the
14 parties currently have an interconnection agreement except for the state of
15 Washington. The reciprocal compensation rate for Internet-bound traffic in the
16 state of Washington will be \$0.001 per minute of use. The reciprocal
17 compensation rate for all other traffic in the state of Washington will remain
18 unchanged from the existing interconnection agreement.

19 Even though the Washington intrastate reciprocal compensation rates did not change,
20 Staff argues that the establishment of a reciprocal compensation rate for Washington
21 ISP-bound traffic is subject to WUTC jurisdiction and, as such, the Settlement
22 Agreement should have been filed for approval.³ Staff ignores the FCC's determination
23 that the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5) exclude Internet-

24 ¹ ATG refers to Qwest even though some of the material in question may list U.S. West as the
25 party to the agreement.

26 ² Without admitting that the Settlement Agreement is an interconnection agreement, ATG
submitted the Settlement Agreement to the WUTC on November 7, 2003, under Docket No.
UT-980390 for approval as an accommodation in an attempt to resolve the disputed issues in this
matter.

³ Commission Staff's Response to Motions to Dismiss or for Summary Determination, ¶ 36.

1 bound traffic.⁴ This would, in turn, exclude any WUTC interconnection agreement filing
2 requirement arising from this provision. Moreover, Internet rates are properly classified
3 as *interstate*, not *intrastate*, and are not subject to WUTC jurisdiction.⁵
4

5 ATG acknowledges that there has been and will continue to be a
6 significant amount of debate and confusion regarding Internet-bound rates. Despite these
7 problems, the controlling FCC position supports ATG's argument that the Settlement
8 Agreement is not an interconnection agreement that must be filed with the WUTC for
9 approval.

10 In February 1999, the FCC found that reciprocal compensation should not
11 include Internet-bound traffic.⁶ The FCC gave state utility commissions some leeway
12 and input to help establish interim reciprocal Internet rates between the incumbent local
13 exchange carrier and competitive local exchange carriers pending issuance of a final
14 administrative rule.⁷ However, on March 24, 2000, the D.C. Circuit Court of Appeals
15 vacated the Declaratory Ruling and remanded it to the FCC for redetermination.⁸ This
16 occurred several months before ATG and Qwest executed the Settlement Agreement.
17
18

19 ⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications*
20 *Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and
21 Order ("ISP Order"), CC Docket Nos. 96-98 and 99-68, 16 FCC Rcd 9151, FCC 01-131 (adopted
22 Apr. 18, 2001) (affirming *Declaratory Ruling*, 14 FCC Rcd 3689 (1999), on different grounds),
23 remanded for further proceedings but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429
24 (D.C. Cir. 2002).

25 ⁵ ISP Order, ¶ 52.

26 ⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications*
27 *Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC
28 Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 ("Declaratory
29 Ruling"), CC Docket Nos. 96-98 and 99-68, 14 FCC Rcd 3689, FCC 99-38 (Adopted Feb. 25,
30 1999).

31 ⁷ Declaratory Ruling, ¶ 21.

32 ⁸ *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

1 The matter was still in flux for ATG and Qwest until April 27, 2001, when
2 the FCC issued the ISP Order that affirmed the Declaratory Ruling on different grounds.
3 The FCC again found that Internet-bound traffic is an interstate activity subject to FCC
4 jurisdiction under 47 U.S.C. 201 rather than state jurisdiction⁹ and is not included in or
5 subject to the reciprocal compensation requirements of 47 U.S.C. 251(b)(5).¹⁰ There
6 cannot be any statutory filing requirement imposed on ATG by the WUTC due to a
7 contract provision that is not subject to or included in the applicable statute. This is even
8 more apparent given the FCC's elimination of the state commissions' future roles in
9 setting Internet-bound rates.¹¹

11 The FCC also made it clear that companies may no longer invoke
12 47 U.S.C. 252(i) to opt into an existing interconnection agreement regarding rates paid
13 for Internet-bound traffic.

15 [A]s of the date this Order is published in the Federal Register, carriers
16 may no longer invoke section 252(i) to opt into an existing interconnection
17 agreement with regard to the rates paid for the exchange of ISP-bound
18 traffic. Section 252(i) applies only to agreements arbitrated or approved
19 by state commissions pursuant to section 252; it has no application in the
20 context of an intercarrier compensation regime set by [the FCC] pursuant
21 to section 201.¹²

22 Likewise, any filing requirement asserted by the WUTC under 47 U.S.C. § 252 no longer has
23 application to Internet-bound traffic rates under existing federal law. Moreover, if carriers do not

24 ⁹ ISP Order, ¶¶ 39-40, 52-65.

25 ¹⁰ ISP Order, ¶¶ 3, 23.

26 ¹¹ ISP Order, ¶ 82 (“This Order does not preempt any state commission decision regarding
compensation for ISP-bound traffic for the period prior to the effective date of the interim regime
we adopt here. Because we now exercise our authority under section 201 to determine the
appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no
longer have authority to address this issue.”)

1 have the opportunity to pick and choose rate provisions for Internet-bound traffic, there is no
2 need to file specific Internet provisions with the WUTC for approval.

3 On May 3, 2002, the D.C. Circuit Court of Appeals remanded the ISP
4 Order to the FCC for further proceedings but did *not* vacate the order.¹³ Thus, the ISP
5 Order is still valid and supports ATG's position that the Settlement Agreement's Internet-
6 bound rate provision is not an "interconnection agreement" that must be filed with the
7 WUTC for approval.

9 **II. BANKRUPTCY DISCHARGED CLAIMS THAT THE WUTC MAY HAVE HAD**
10 **AGAINST ATG, AND THOSE CLAIMS ARE BARRED AS A MATTER OF**
11 **LAW.**

12 Public Counsel states that "[i]t is impossible to determine the legal basis of ATG's
13 [bankruptcy] assertions given the lack of specific legal argument and the general nature of the
14 assertions contained in ATG's *Motion for Summary Determination*, pp. 6-7. Without specific
15 arguments the Commission cannot determine the precise nature of the claimed preclusion under
16 the Bankruptcy Code."¹⁴ Public Counsel's argument overlooks pages 9-10 of ATG's motion,
17 which clearly demonstrated that monetary penalties, if any, imposed by the WUTC would be
18 dischargeable through Section 1141(d) of the U.S. Bankruptcy Code in accordance with *Ohio v.*
19 *Kovacs*.¹⁵

23 ¹² *Id.*

24 ¹³ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).

25 ¹⁴ Public Counsel's Response to All Dispositive Motions Pending as of December 5, 2003 at 8.
Staff argues that bankruptcy provides no reason to dismiss the allegations against ATG.
Commission Staff's Response to Motions to Dismiss or for Summary Determination, ¶ 36.

26 ¹⁵ 469 U.S. 274, 105 S.Ct. 705 (1985)

1 Under the principles of bankruptcy law, any action by a state commission, to the
2 extent that it seeks payment of damages or fines,¹⁶ constitutes a “claim” dischargeable under
3 Section 1141(d) of the U.S. Bankruptcy Code.¹⁷ Specifically, all state regulators' claims for
4 monetary damages arising from the failure of an entity to comply with state regulatory
5 requirements, are “claims” for Bankruptcy Code purposes, and thus dischargeable under
6 bankruptcy law.¹⁸

8 On August 9, 2002, the Northern District of California Bankruptcy Court
9 (“Bankruptcy Court”) sent the WUTC notice¹⁹ that required the WUTC to file a proof of claim in
10 the ATG bankruptcy proceeding by October 29, 2002. The WUTC did not file any proof of
11 claim. The Settlement Agreement that purportedly gives rise to the remaining WUTC’s claims
12 against ATG in this docket all pre-date the ATG bankruptcy. The WUTC had actual knowledge
13 of the Settlement Agreement not later than June 13, 2002, through Qwest's supplemental
14 responses to Bench Request No. 46 in the Qwest 271 Docket No. UT-003022/UT-003040.

16 As a matter of law, any and all WUTC potential monetary claims have been
17 discharged by the Bankruptcy Court on May 13, 2003, when it approved the ATG plan of
18 reorganization.²⁰ Since the WUTC failed to assert its grievances against ATG during the
19

20 ¹⁶ Through its Amended Complaint, the WUTC seeks to determine whether to “impose monetary
21 penalties against [ATG] in an amount to be proved at hearing.” Amended Complaint, ¶ 48.

22 ¹⁷ 11 U.S.C. § 1141(d). A claim is defined as a “right to payment, whether or not such right is
23 reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,
undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5)(A).

24 ¹⁸ *See Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 709-710 (1985).

25 ¹⁹ *See In re Advanced TelCom Group, Inc.*, Supplemental Notice of Chapter 11 Bankruptcy Cases
and Deadlines for Proofs of Claim, including Certificate of Mailing, Case No. 02-11073, (Aug. 9,
2002).

26 ²⁰ *See In re Advanced TelCom Group, Inc.*, Order Confirming First Amended Joint Plan of
Reorganization, As Modified, Case No. 02-11073, ¶ 12 (May 13, 2003). Notice of the Order

1 bankruptcy claims process, the WUTC's potential claims have been discharged by the
2 Bankruptcy Court. Accordingly, the WUTC is barred as a matter of law from pursuing any
3 monetary claims asserted against ATG in the Amended Complaint.
4

5 For the most part, Public Counsel argues against bankruptcy discharge of
6 penalties by claiming that the WUTC continues to have jurisdiction over ATG as a regulated
7 Washington telecommunications carrier. ATG never asserted that bankruptcy discharges WUTC
8 jurisdiction over any regulated entity, including ATG. Bankruptcy does, however, discharge
9 monetary claims or penalties asserted by a regulatory body, such as the WUTC, against ATG
10 that arise out of pre-petition matters. Thus, there is no reason to keep ATG in this docket, as no
11 further adjudication is possible.
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26 Confirming First Amended Joint Plan of Reorganization, As Modified was issued on May 15,
2003, ("Confirmation Order").

ADVANCED TELCOM, INC.'S REPLY TO STAFF AND
PUBLIC COUNSEL - 7

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III. CONCLUSION.

Based on the foregoing, ATG's Motion for Summary Determination, and ATG's Answer to Staff's Motion for Partial Summary Determination, ATG respectfully requests that the WUTC dismiss all claims asserted against ATG as a matter of law.

DATED January 7, 2004.

**ADVANCED TELCOM, INC.
D/B/A ADVANCED TELCOM GROUP**

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**CERTIFICATE OF SERVICE
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I hereby certify that I have served a true and correct copy of ATG's Reply to Staff and Public Counsel via the method(s) noted below, properly addressed as follows:

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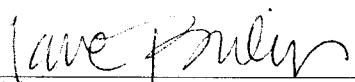
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