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ORIGINAL

April 27, 2000

BY FEDEX

Blanca Bayó  
Director  
Division of Records & Reporting  
Florida Public Service Commission  
Capital Circle Office Center  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: ATI Telecom, Inc.; Docket No. 000217-TX;  
Response to Order No. PSC-00-0648-SC-TX

Dear Ms. Bayó:

Enclosed for filing is an original and eight (8) copies of ATI Telecom, Inc.'s ("ATI's") Response to the Commission's Order to Show Cause in the above-captioned matter.

Due to a delay in obtaining the original Verification from ATI, a faxed copy of the Verification is being filed so that ATI may meet the April 28, 2000 deadline. The original copy will be filed with the Commission as soon as it is received.

Please acknowledge receipt of this filing by file-stamping and returning the extra copy in the self-addressed, stamped envelope for this purpose.

AFA \_\_\_\_\_  
APP \_\_\_\_\_  
CAF \_\_\_\_\_  
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Mr  
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Done 5/01/00

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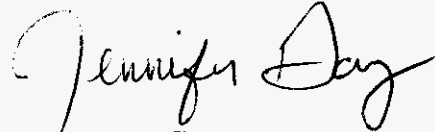
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Blanca Bayó  
April 27, 2000  
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All communications concerning this filing should be directed to the undersigned.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Gorny".

Thomas K. Crowe  
Jennifer Gorny,  
Counsel for ATI Telecom, Inc.

Enclosures

cc: Melinda Watts, Florida Public Service Commission (via fax)  
Tim Vaccaro, Florida Public Service Commission (via fax)

**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

**ORIGINAL**

In re: Initiation of show cause proceedings	)	
against ATI Telecom, Inc. for apparent	)	Docket No. 000217-TX
violation of Section 364.183(1), F.S.,	)	Order No. PSC-00-0648-SC-TX
Access to Company Records	)	

**RESPONSE**

ATI Telecom, Inc. ("ATI") by its counsel, hereby responds to the Florida Public Service Commission's ("Commission's") Order to Show Cause ("Order") issued on April 7, 2000 in the above-captioned matter. As demonstrated below, given the circumstances of the instant case, ATI should not be penalized for failure to respond to the Commission's local competition questionnaire ("ALEC Data Request").

**I. INTRODUCTION**

1. Incorporated in the State of New York, ATI was authorized by the Commission in 1997 to operate as an interexchange telecommunications service carrier and an alternative local exchange carrier within the State of Florida. ATI does not own or operate any telecommunications facilities in the State of Florida. Currently, ATI only offers resold 1+ and prepaid long distances services within the State of Florida; it does not provide any local exchange services.

2. Commission Staff recommends that a substantial levy be imposed on ATI, totaling \$10,000.00 for failure to provide access to company records in accordance with Section 364.183(1) Florida Statutes, Fla. Stat. ch. 364.183(1) (1999) ("Section 364.183(1)"). In particular, ATI is charged with refusing to or willfully failing to respond to the ALEC Data Request sent by Commission staff on June 25, 1999 ("First ALEC Data Request") and

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December 6, 1999 ("Second ALEC Data Request"), which poses questions regarding local competition in Florida. Commission staff also recommends that the Commission cancel ATI's operating license in Florida.

3. As shown below, ATI lacked the requisite intent to not respond to the First ALEC Data Request and never even received the Second ALEC Data Request. Thus, a violation of Section 364.285 of the Florida Statutes, Fla. Stat. ch. 364.285 (1999) ("Section 364.285") cannot be established. Mitigating circumstances exist in the instant case to make the imposition of a penalty, including cancellation of ATI's license, improper.

## II. DISCUSSION

4. The Commission has the authority under Section 364.285 to impose penalties of no more than \$25,000 against those entities "which [are] found to have refused to comply with or to have willfully violated any lawful rule or order of the commission . . ." According to the Commission, a willful act encompasses any *intent* to do an act.<sup>1</sup>

### A. ATI Did Not Refuse to, or Willfully Intend Not to, Respond

5. Even if ATI violated Section 364.183(1) as Commission staff suggests, ATI did not *intend to do an act* within the meaning of Section 364.285. Specifically, as shown below, ATI lacked the requisite intent to not respond to the First ALEC Data Request and never physically or constructively received the Second ALEC Data Request. Therefore, ATI cannot be found to have committed a willful act justifying imposition of the proposed penalties.

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<sup>1</sup> See *In re* Initiation of show cause proceedings against C.I.O., Inc. for apparent violation of Rule 25-24.805, F.A.C., Certificate of Public Convenience and Necessity Required, Section 364.183, F.S., Access to Company Records and Section 364.185, Investigations and Inspections, Opinion in Docket No. 991663-TX; Order No. PSC-00-0050-SC-TX (Jan. 7, 2000).

6. Evidence produced by Commission staff that the company received and signed for the First ALEC Data Request does not firmly establish that the company *intended* not to respond to the ALEC Data Request. Specifically, it appears that the First ALEC Data Request (although signed for by a representative of the company) was either accidentally misplaced and inadvertently neglected or otherwise inadvertently mishandled during an office relocation. In May 1999, ATI staff began relocating from its former address of 110-72 Corona Avenue, Corona, New York 11368 to its new offices and address at 22 Cortlandt St., 33<sup>rd</sup> Floor, New York City, New York 10007. By July 1999, the relocation had been substantially completed. The First ALEC Data Request was apparently forwarded to ATI on June 25, 1999, when ATI was still in the midst of relocation. While ATI places a high degree of importance on responding to all regulatory notices on a timely basis and otherwise complying fully with all Commission requirements, its failure to respond to the First ALEC Data Request was not an intentional act but rather the result of inadvertence and confusion caused by the office relocation.

7. As for the Second ALEC Data Request, ATI never--to the best of its knowledge--physically received this request. All mail sent to ATI's previous address of Corona, New York was to be forwarded by the U.S. Postal Service to ATI's new address of New York City, New York. It is possible that regulatory notices forwarded to ATI's old address were never properly forwarded by the U.S. Postal Service to the new address. Significantly, Commission staff has not produced evidence, such as a company-signed receipt, establishing that the company received the Second ALEC Data Request, much less more compelling evidence that ATI had refused to or intended not to respond to it. Thus, it is apparent that ATI never

actually received the Second ALEC Data Request in December, 1999 and therefore, there could not have been an intentional failure to respond to it.

8. In fact, ATI's management was effectively unaware of the questionnaires until after they received notice of the show cause proceedings on March 28, 2000, the same day the Commission issued the Order. Once ATI's management learned of the proceedings, the company promptly responded to resolve the situation. ATI's legal counsel contacted Commission staff by telephone on March 29, 2000 regarding the Order; requested a copy of the ALEC Data Request; and timely submitted the instant Response.

9. Thus, ATI never even received the Second ALEC Data Request and while it physically signed for the First ALEC Data Request, it inadvertently and unintentionally neglected—due to the chaos of an office move—to respond to it. Even if the Commission deems ATI's signing for the First ALEC Data Request to be convincing evidence of a violation of Section 364.285, it never received any notice whatsoever of the second follow-up request. ATI submits that under these circumstances, it cannot be deemed to have *refused to comply or intended not to act* within the meaning of Section 364.285.

**B. ATI's Failure to Respond Caused No Harm  
Since It Has Not Operated as an ALEC**

10. Although ATI does not seek to excuse its unintentional failure to respond to the ALEC Data Request, its failure to respond has had no material impact on the report to the Governor and the Legislature, and thus, has caused no harm.

11. Pursuant to Section 364.386, Florida Statutes, the Commission is required to provide a "report on the status of competition in the telecommunications industry" including

the local exchange market.<sup>2</sup> It was pursuant to this statutory obligation that the Commission issued the ALEC Data Request to ATI.

12. It is important that the Commission understand that the company's response to the ALEC Data Request would likely have been immaterial in this case for the Commission's report to the Governor and the Legislature. Although ATI is authorized to offer local exchange services in Florida, it has never initiated the provision of local exchange services and has no immediate plans to do so. Because the ALEC Data Request focused in large part on matters related to local exchange carriers currently providing services in Florida, ATI's responses would have produced very little relevant information for the Commission's report. While ATI takes its obligations as a certificated carrier seriously and does not advance this point as an excuse, the immateriality of ATI's response—had it filed one—should be deemed a mitigating factor.

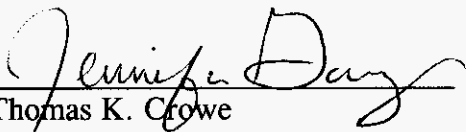
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<sup>2</sup> Fla. Stat. ch. 364.386 (1999).

### III. CONCLUSION

13. For the reasons indicated above, the Commission should not levy any penalty, including a fine or revocation of license, on ATI for its failure to respond to the Commission's local competition questionnaire.

Respectfully submitted,



Thomas K. Crowe  
Jennifer Gorny,  
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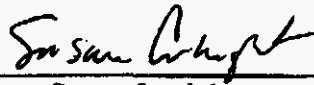
COUNSEL FOR ATI TELCOM,  
INC.

April 27, 2000



**VERIFICATION**

I, Susan Cutright, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief, and that I expect to be able to prove the same at a hearing held in this matter.



\_\_\_\_\_  
Susan Cutright  
Secretary,  
ATI Telecom, Inc.

Date: 4-27-00