

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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RECORDS AND REPORTING
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DATE: FEBRUARY 22, 2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAY)

FROM: DIVISION OF COMPETITIVE SERVICES (M. WATTS)
DIVISION OF LEGAL SERVICES (STERN/KEATING)

RE: DOCKET NO. 991989-TX - CANCELLATION BY FLORIDA PUBLIC SERVICE COMMISSION OF ALTERNATIVE LOCAL EXCHANGE TELECOMMUNICATIONS CERTIFICATE NO. 5678 ISSUED TO INTERNETU, INC. FOR VIOLATION OF RULE 25-4.0161, F.A.C., REGULATORY ASSESSMENT FEES; TELECOMMUNICATIONS COMPANIES.

DOCKET NO. 000227-TX - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST INTERNETU, INC. FOR APPARENT VIOLATION OF SECTION 364.183(1), F.S., ACCESS TO COMPANY RECORDS.

AGENDA: 03/06/01 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\991989R1.RCM

CASE BACKGROUND

- December 1, 1998 - InternetU, Inc. (InternetU) was mailed the 1998 regulatory assessment fee (RAF) notice. When full payment had not been received by the due date, the Division of Administration mailed a delinquency notice to the company.
- June 25, 1999 - InternetU was mailed a certified letter requesting information necessary for inclusion in the local competition report required of the Commission by Section 364.386, Florida Statutes.

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- July 6, 1999 - The return receipt from the June 25, 1999, certified letter referenced above was received at the Commission.
- December 1, 1999 - Staff sent a second certified letter requesting that InternetU respond to the data request no later than December 22, 1999.
- December 9, 1999 - The return receipt from the December 1, 1999, certified letter referenced above was received at the Commission.
- December 21, 1999 - Docket No. 991989-TX was opened to cancel InternetU's Alternative Local Exchange Company (ALEC) certificate for apparent violation of Rule 25-4.0161, Florida Administrative Code, Regulatory Assessment Fees; Telecommunications Companies.
- February 21, 2000 - Docket No. 000227-TX was opened to show cause InternetU for apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.
- April 13, 2000 - The Commission issued Order No. PSC-00-0693-SC-TX for Docket No. 000227-TX ordering InternetU to show cause why it should not be fined \$10,000 or have its certificate canceled for apparent violation of Section 364.183(1), F.S., Access to Company Records.
- April 28, 2000 - Proposed Agency Action (PAA) Order No. PSC-00-0844-PAA-TX was issued for Docket No. 991989-TX canceling InternetU's ALEC certificate for failure to pay RAFs.
- May 3, 2000 - DURO Communications, Inc. (DURO) responded to Order No. PSC-00-0693-SC-TX for Docket No. 000227-TX with a letter explaining the relationship of DURO to InternetU. DURO explained that it acquired assets of digital.net, l.l.c. on March 26, 1999; prior to that digital.net l.l.c. had acquired assets of InternetU.
- May 19, 2000 - DURO Communications, Inc. (DURO) filed a protest to Order No. PSC-00-0844-PAA-TX for Docket No. 991989-TX.
- May 30, 2000 - Staff met with counsel for DURO to explore whether it had any liability for or interest in InternetU with respect to Commission action taken in Docket No. 000227-TX, Initiation of show cause proceedings against InternetU, Inc. for apparent violation of Section 364.183(1), F.S., Access to

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Company Records. DURO asked that staff delay action on both dockets until the matter was investigated by staff and DURO's standing was determined.

The Commission is vested with jurisdiction over these matters pursuant to Sections 364.183, 364.285 and 364.336, Florida Statutes. Accordingly, staff believes that the following recommendations are appropriate.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission, on its own motion, dismiss DURO Communications, Inc.'s protest of Order No. PSC-00-0844-PAA-TX and reinstate the Order as a Final Order?

RECOMMENDATION: Yes. DURO Communications, Inc.'s protest of Order No. PSC-00-0844-PAA-TX should be dismissed, because it does not have standing to protest the Order in this proceeding. **(Stern/Keating)**

STAFF ANALYSIS: DURO has no standing to protest the proposed agency action in Docket 991989-TX, because the proceeding does not affect DURO's substantial interests. Thus, DURO has failed to state a cause of action upon which relief can be granted. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993).

An entity's substantial interests are affected by a proceeding when the entity will suffer actual and immediate injury as a result of the proceeding, and when the injury is of a type or nature that the proceeding is designed to protect against. See Agrico Chemical Co. V. Dep't of Environmental Protection, 406 So. 2d 478, 482 (Fla 2d DCA 1981). Since DURO did not acquire the certificate proposed to be cancelled by Order No. PSC-00-0844-PAA-TX, DURO will not suffer an actual injury of a type that the cancellation proceeding was designed to protect. As such, it has stated no cause of action. Thus, staff believes dismissal of the protest is appropriate.

Specifically, DURO acquired the assets of InternetU and most of InternetU's transferable licenses and permits through a series of acquisitions, including the acquisition of digital.net, l.l.c. However, DURO did not obtain or have transferred InternetU's ALEC certificate, nor did digital.net, l.l.c. Because DURO has no ownership interest in InternetU's ALEC certificate, it will not be harmed by cancellation of the certificate and, therefore, has no standing in this proceeding. As such, the Commission should dismiss DURO Communications, Inc.'s protest of Order No. PSC-00-0844-PAA-TX, and reinstate the Order as a Final Order.

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ISSUE 2: If Issue 1 is approved, should the Commission cancel ALEC certificate no. 5678, issued to InternetU, Inc., in accordance with Commission Order No. PSC-00-0844-PAA-TX?

RECOMMENDATION: Yes. If Issue 1 is approved, the Commission should cancel certificate no. 5678, issued to InternetU, Inc., in accordance with Commission Order No. PSC-00-0844-PAA-TX. The Commission should refer the collection of past due fees to the office of the Comptroller for further collection efforts. The effective date of the cancellation should be May 19, 2000. **(M. Watts)**

STAFF ANALYSIS: InternetU did not remit its Regulatory Assessment Fees with penalty and interest, it did not remit the fine imposed, and it did not respond in any manner to PAA Order No. PSC-00-0844-PAA-TX. The only protest filed was by DURO. Therefore, if the Commission approves staff's recommendation in Issue 1, ALEC certificate number 5678 should be canceled. The effective date of the cancellation should be May 19, 2000, since this is the date that the certificate would have been canceled if DURO had not filed a protest.

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ISSUE 3: Should the Commission vacate Show Cause Order No. PSC-00-0693-SC-TX, issued April 13, 2000, in Docket No. 000227-TX, ordering InternetU, Inc. to show cause why it should not be fined \$10,000 or have its certificate canceled for apparent violation of Section 364.183(1), F.S., Access to Company Records?

RECOMMENDATION: Yes. The Commission should vacate Order No. PSC-00-0693-SC-TX, issued April 13, 2000, for Docket No. 000227-TX, ordering InternetU, Inc. to show cause why it should not be fined \$10,000 or have its certificate canceled for apparent violation of Section 364.183(1), F.S., Access to Company Records.
(Stern/Keating)

STAFF ANALYSIS: Pursuant to Commission Order No. PSC-00-0693-SC-TX, issued April 13, 2000, InternetU, Inc. was ordered to show cause why it should not be fined \$10,000 or have its certificate canceled for apparent violation of Section 364.183(1), F.S., Access to Company Records. DURO Communications, Inc., through a series of corporate acquisitions, obtained the rights to the trademark "InternetU." DURO filed a response to the show cause order explaining that the acquisition contract indicates that DURO acquired assets of InternetU but did not acquire its ALEC certificate. If the Commission finds that DURO has no standing to protest Order No. PSC-00-0844-PAA-TX (Issue 1) and if the Commission cancels InternetU's ALEC certificate for failure to pay RAFs (Issue 2), then the Commission should vacate the Show Cause Order. Given that the ultimate penalty in Docket No. 000227-TX for InternetU's failure to respond to the Commission's Order was cancellation of its ALEC certificate and given that, if Issue 2 is approved, the ALEC certificate is canceled, then the action proposed by Order No. PSC-00-0693-SC-TX will be rendered moot. Therefore, the Commission should vacate Order No. PSC-00-0693-SC-TX, issued April 13, 2000, for Docket No. 000227-TX.

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ISSUE 4: Should these dockets be closed?

RECOMMENDATION: Yes. If staff's recommendations in Issues 1 and 2 are approved, then certificate no. 5678, issued to InternetU, Inc. should be canceled in accordance with Order No. PSC-00-0844-PAA-TX, effective May 19, 2000, and Docket No. 991989-TX should be closed.

If staff's recommendation in Issue 3 is approved, then Docket No. 000227-TX should be closed. **(Stern/Keating)**

STAFF ANALYSIS: If staff's recommendations in Issues 1 and 2 are approved, then certificate no. 5678, issued to InternetU, Inc. should be canceled in accordance with Order No. PSC-00-0844-PAA-TX, effective May 19, 2000, and Docket No. 991989-TX should be closed.

If staff's recommendation in Issue 3 is approved, then Docket No. 000227-TX should be closed because the order will have been vacated.