

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: DECEMBER 5, 2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE SERVICES (FONDO/M.WATTS) *ONE*
DIVISION OF LEGAL SERVICES (ELLIOTT) *dir*

RE: COMPLIANCE INVESTIGATION FOR APPARENT VIOLATION OF
SECTION 364.183 (1), F.S., ACCESS TO COMPANY RECORDS.

DOCKET NO. 011574-TX - XSPEDIUS CORP.
DOCKET NO. 011575-TX - YIPES TRANSMISSION, INC.
DOCKET NO. 011576-TX - ZEPHION NETWORKS COMMUNICATIONS,
INC.

AGENDA: 12/17/2001 - REGULAR AGENDA - PROPOSED AGENCY ACTION -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\011574.RCM

DOCUMENT NUMBER: DATE

15036 NOV 30 2001

FPSC-COMMISSION CLERK

DOCKET NOS. 011574-TX, 011575-TX,
011576-TX
DATE: DECEMBER 5, 2001

CASE BACKGROUND

- July 6, 2001 - Staff mailed a certified letter, return receipt requested, to each of the certificated Alternative Local Exchange Company (ALEC) providers listed in Attachment A. Staff's letter requested information necessary for inclusion in the local competition report required of the Commission by Section 364.386, Florida Statutes, Reports to the Legislature. Staff's letter emphasized that responses were due no later than August 17, 2001, and that failure to respond could result in the Commission assessing penalties pursuant to Section 364.285(1), Florida Statutes.
- July 9-11, 2001 - The certified letter return receipts (Attachment B) from the July 6, 2001, mailings were signed by each of the companies listed in Attachment A.
- November 27, 2001 - Staff received a response from Yipes Transmissions, Inc. to the 2001 ALEC Data Request. The company's response was received after the Docket No. 011575-TX was opened on November 14, 2001.

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.183, 364.285, and 364.386, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

DOCKET NOS. 011574-TX, 011575-TX,
011576-TX
DATE: DECEMBER 5, 2001

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission fine each of the companies listed in Attachment A \$5,000 or cancel each company's respective certificate, as listed in Attachment A, for apparent failure to provide the Commission access to information pursuant to Section 364.183(1), Florida Statutes, Access to Company Records?

RECOMMENDATION: Yes. The Commission should fine each of the companies listed in Attachment A \$5,000 or cancel each company's respective certificate, as listed in Attachment A, if the fine is not received by the Commission within five business days after the issuance of the Consummating Order. The fine should be paid to the Florida Public Service Commission and forwarded to the Office of the Comptroller for deposit in the General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested and the fine is not received within five business days after the issuance of the Consummating Order, then each company's respective certificate should be canceled administratively. **(FONDO/M.WATTS/ELLIOTT)**

STAFF ANALYSIS: Pursuant to Section 364.285, Florida Statutes, the Commission may impose a fine or cancel a certificate if a company refuses to comply with Commission rules or statutes. Section 364.183(1), Florida Statutes, Access to Company Records, states:

364.183 Access to company records. --

(1) The commission shall have access to all records of a telecommunications company that are reasonably necessary for the disposition of matters within the commission's jurisdiction. The commission shall also have access to those records of a local exchange telecommunications company's affiliated companies, including its parent company, that are reasonably necessary for the disposition of any matter concerning an affiliated transaction or a claim of anticompetitive behavior including claims of cross-subsidization and predatory pricing. The commission may require a telecommunications company to file records, reports or other data directly related to matters within the commission's jurisdiction in the form specified by the commission and may require such company to retain such information for a designated period of time. Upon request

DOCKET NOS. 011574-TX, 011575-TX,
011576-TX
DATE: DECEMBER 5, 2001

of the company or other person, any records received by the commission which are claimed by the company or other person to be proprietary confidential business information shall be kept confidential and shall be exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

Based on the certified letter return receipts (Attachment B) staff received from the United States Postal Service, it appears that the companies listed in Attachment A received the data request and could have responded. It is imperative that the Commission receive 100% participation to accurately reflect the status of local telecommunications competition to the Legislature. Staff requested the information in order to comply with Section 364.386, Florida Statutes, Reports to the Legislature, which states in part:

364.386 Reports to the Legislature. --

(1) The commission shall submit to the President of the Senate, the Speaker of the House of Representatives, and the majority and minority leaders of the Senate and the House of Representatives, on December 1, 1996, and on an annual basis thereafter, a report on the status of competition in the telecommunications industry and a detailed exposition of the following:

(a) The overall impact of local exchange telecommunications competition on the continued availability of universal service.

(b) The ability of competitive providers to make functionally equivalent local exchange services available to both residential and business customers at competitive rates, terms, and conditions.

(c) The ability of consumers to obtain functionally equivalent services at comparable rates, terms, and conditions.

(d) The overall impact of price regulation on the maintenance of reasonably affordable and reliable high-quality telecommunications services.

(e) What additional services, if any, should be included in the definition of basic local telecommunications services, taking into account advances in technology and market demand.

(f) Any other information and recommendations which may be in the public interest.

DOCKET NOS. 011574-TX, 011575-TX,
011576-TX
DATE: DECEMBER 5, 2001

By Section 364.285, Florida Statutes, the Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 for each offense, if such entity is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission, or any provision of Chapter 364. Utilities are charged with knowledge of the Commission's rules and statutes. Additionally, "it is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

Staff believes that the conduct of each of the companies listed in Attachment A, by not providing staff access to company records, in apparent violation of Section 364.183(1), Florida Statutes, has been "willful" in the sense intended by Section 364.285, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, In re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating to Tax Savings Refund for 1988 and 1989 for GTE Florida, Inc., having found that the company had not intended to violate the rule, the Commission nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "In our view, willful implies intent to do an act, and this is distinct from intent to violate a rule." Thus, any intentional act, such as the conduct of each of the companies listed in Attachment A at issue here, would meet the standard for a "willful violation."

The companies listed in Attachment A did not respond to staff's request for information by the August 17, 2001, deadline established in staff's July 6, 2001, correspondence. In Docket No. 011575-TX, Yipes Transmissions, Inc. did provide a response on November 27, 2001, however, the response was untimely. All have been certificated in Florida since at least April 13, 2001. The companies have not reported any revenues and are apparently not providing telecommunications services in Florida. Nevertheless, they are still subject to the Commission's rules and Florida Statutes governing Alternative Local Exchange Companies.

Therefore, staff recommends that the Commission should fine each of the companies listed in Attachment A \$5,000 or cancel each company's respective certificate, as listed in Attachment A, if the fine is not received by the Commission within five business days

DOCKET NOS. 011574-TX, 011575-TX,
011576-TX
DATE: DECEMBER 5, 2001

after the issuance of the Consummating Order. The fine should be paid to the Florida Public Service Commission and forwarded to the Office of the Comptroller for deposit in the General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the Commission's Order is not protested and the fine is not received within five business days after the issuance of the Consummating Order, then each company's respective certificate should be canceled administratively.

DOCKET NOS. 011574-TX, 011575-TX,
011576-TX
DATE: DECEMBER 5, 2001

ISSUE 2: Should these dockets be closed?

RECOMMENDATION: The Order issued from this recommendation will become final upon issuance of a Consummating Order, unless a person whose substantial interests are affected by the Commission's decision files a protest within 21 days of the issuance of the Proposed Agency Action Order. The dockets should then be closed upon receipt of the fines or cancellation of the certificates. A protest in one docket should not prevent the action in a separate docket from becoming final. (ELLIOTT)

STAFF ANALYSIS: Whether staff's recommendation on Issue 1 is approved or denied, the result will be a Proposed Agency Action Order. If no timely protest to the Proposed Agency Action is filed within 21 days of the date of the issuance of the Order, these dockets should be closed upon receipt of the fines or cancellation of the certificates. A protest in one docket should not prevent the action in a separate docket from becoming final.

DOCKET NOS. 011574-TX, 011575-TX,
011576-TX
DATE: DECEMBER 5, 2001

ATTACHMENT A

Docket No.	Company	Code	Certification No.	Certification Date	Reported Revenue 2000
011574-TX	XSPEDIUS Corp.	TX479	7583	10/20/00	\$0.00
011575-TX	Yipes Transmission, Inc.	TX444	7500	7/18/00	\$0.00
011576-TX	Zephion Networks Communications, Inc.	TX558	7789	4/13/01	\$0.00

DOCKET NOS. 011574-TX, 011575-TX,
 011576-TX
 DATE: DECEMBER 5, 2001

ATTACHMENT B

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Received by (Please Print Clearly) <u>Freddie Brown</u>	B. Date of Delivery <u>07/10/01</u>
1. Article Addressed to: XSPEDIUS Corp. TX479 P. O. Box 2105 Lake Charles, LA 70602-2105	C. Signature <input checked="" type="checkbox"/> <u>Freddie Brown</u>	<input type="checkbox"/> Agent <input type="checkbox"/> Addressee
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
TX 479		
2. Article Number (Copy from service label) <u>7000 11070 0012 86414245</u>		
PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952		

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Received by (Please Print Clearly)	B. Date of Delivery <u>01-09-01</u>
1. Article Addressed to: Yipes Transmission, Inc. TX444 114 Sansome Street, 9th Floor San Francisco, CA 94104-3803	C. Signature <input checked="" type="checkbox"/> <u>X S. M. SANTILLANA</u>	<input type="checkbox"/> Agent <input type="checkbox"/> Addressee
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
TX 444		
2. Article Number (Copy from service label) <u>7000 11070 0012 86414238</u>		
PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952		

DOCKETS NO.. 011574-TX, 011575-TX,
 011576-TX
 DATE: DECEMBER 5, 2001

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SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<p>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</p> <ul style="list-style-type: none"> Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Received by (Please Print Clearly)</p>	<p>B. Date of Delivery 7/11/01</p>
<p>1. Article Addressed to: Zephion Zephion Networks Communications, Inc. 558 50 Gallows Road Falls Church, VA 22042-1018</p>	<p>C. Signature <input checked="" type="checkbox"/> <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p>	
<p>TX 558</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>2. Article Number (Copy from service label) 700011070001286414214</p>	<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p>	
<p>PS Form 3811, July 1999</p>	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	<p>102595-00-M-0952</p>