



Public Service Commission
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COMMISSION
CLERK

DATE: APRIL 11, 2002

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

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (FONDO) *AK BW*
OFFICE OF THE GENERAL COUNSEL (DODSON) *AK BW*

RE: DOCKET NO. 020186-TX - COMPLIANCE INVESTIGATION OF SMART
CITY NETWORKS FOR APPARENT VIOLATION OF SECTION
364.183(1), F.S., ACCESS TO COMPANY RECORDS.

AGENDA: 04/23/02 - REGULAR AGENDA - PROPOSED AGENCY ACTION -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\020186.RCM

CASE BACKGROUND

- March 13, 1999 - Smart City Networks (Smart City) obtained Florida Public Service Commission Alternative Local Exchange Company (ALEC) Certificate Number 5795.
- February 21, 2000 - Because the company failed to respond to staff's request for information needed to complete the 1999 local competition report, staff opened Docket No. 000215-TX against Smart City for apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.
- June 22, 2000 - In Docket No. 000215-TX, the Commission issued Order No. PSC-00-1134-AS-TX to accept Smart City's \$1,000 settlement offer to resolve the apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

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- July 6, 2001 - Staff mailed a certified letter requesting information necessary for inclusion in the 2001 local competition report required of the Commission by Section 364.386, Florida Statutes. Staff requested a response by August 17, 2001.
- July 9, 2001 - A Smart City representative signed the certified letter return receipt.
- February 1, 2002 - After receiving no response to its July 6, 2001, certified letter, staff opened this docket to initiate a Compliance Investigation of Smart City for an apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.
- February 21, 2002 - In its Regulatory Assessment Fee filing, Smart City reported no intrastate revenues in 2001.

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

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission impose a penalty of \$5,000 or cancel Smart City's ALEC Certificate No. 5795 for its 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 impose a penalty of \$5,000 or cancel Smart City's ALEC Certificate No. 5795 if payment of the imposed penalty, including docket number and company name, is not received by the Commission within 14 calendar days after the issuance of the Consummating Order. The payment of the penalty 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 if payment of the penalty is not received within 14 calendar days after the issuance of the Consummating Order, then Smart City's certificate should be canceled administratively. **(FONDO, DODSON)**

STAFF ANALYSIS: This is Smart City's second offense for the apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records.

Pursuant to Section 364.285, Florida Statutes, the Commission may impose a penalty 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

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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 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 receipt, Attachment A, staff received from the United States Postal Service, it appears that Smart City 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.

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 Smart City, 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 penalized, 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 Smart City, would meet the standard for a "willful violation."

This is the second docket staff has opened to initiate an investigation of Smart City for failure to provide information, in apparent violation of Section 364.183(1), Florida Statutes, Access to Company Records. Due to mitigating factors, the Commission accepted Smart City's settlement offer of \$1,000 for its first offense. Settlements accepted by the Commission in other dockets for the same apparent violation, were \$3,500 for the first offense. Since this is the company's second offense, staff recommends imposing a penalty of \$5,000.

Therefore, staff recommends that the Commission should impose a penalty of \$5,000 or cancel Smart City's ALEC Certificate No. 5795 if payment of the imposed penalty, including docket number and company name, is not received by the Commission within 14 calendar days after the issuance of the Consummating Order. The payment of

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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 if payment of the penalty is not received within 14 calendar days after the issuance of the Consummating Order, then Smart City's certificate should be canceled administratively

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ISSUE 2: Should this docket 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 docket should then be closed upon receipt of the penalty or cancellation of Smart City's certificate. (DODSON)

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, this docket should be closed upon receipt of the penalty or cancellation of Smart City's certificate.

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Attachment A

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 youAttach 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 7/9
	C. Signature X <i>Jennifer Malin</i> <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee	
1. Article Addressed to Smart City Networks TX252 28 West Grand Avenue Montvale, NJ 07645-2132	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 checked="" type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt <input type="checkbox"/> Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Other	
	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
2. Article Number (Copy from service label) TX 252 7000 11670 0012 8641 5204		

PS Form 3811, July 1999

Domestic Return Receipt

102595-00-M-0952