

**Dinsmore & Shohl** LLP  
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November 1, 2006

**Via Hand Delivery**

Hon. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
P. O. Box 615  
Frankfort, KY 40601

***Re: In the Matter of: Wispnet, LLC v. Xspedius Communications  
before the Public Service Commission of the Commonwealth of Kentucky,  
Case No. 2006-00413***

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Dear Ms. O'Donnell:

In compliance with the Commission's Order to Satisfy or Answer dated October 16, 2006, and in conjunction with our subsequent Motion for Extension of Time filed on October 30, 2006, I have enclosed for filing in the above-styled case the original and ten (10) copies of .of the Answer of Xspedius Communications, LLC and Counterclaim.

Please file stamp the additional copy and return in the self-addressed, postage prepaid envelope furnished herewith.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP

  
John E. Selent

JES/bmt  
Enclosure

1400 PNC Plaza, 500 West Jefferson Street Louisville, KY 40202  
502.540.2300 502.585.2207 fax www.dinslaw.com

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of: )  
WISPNET, LLC )  
Complainant )  
vs. )  
XSPEDIUS COMMUNICATIONS, LLC )  
Defendant )

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Case No. 2006-00413

**ANSWER OF XSPEDIUS COMMUNICATIONS, LLC AND COUNTERCLAIM**

Xspedius Communications, LLC (“Xspedius”), on behalf of its certificated subsidiaries, through its undersigned counsel, and pursuant to the Order to Satisfy or Answer of the Kentucky Public Service Commission (the “Commission”) dated October 16, 2006, respectfully files its answer to the Complaint of Wispnet, LLC.

In sum, this complaint case is about a contract that requires thirty days written notice to terminate service, and a customer’s (Wispnet’s) attempt to truncate summarily its payment obligations to its service provider (Xspedius) without adhering to the thirty days written notice requirement. Wispnet’s view is that it can pick up the phone and immediately terminate all payment obligations to Xspedius. But the contract signed by Wispnet with Xspedius provides a more formal, written process to ensure that Xspedius has proper notice of the termination of service such that it can take the necessary billing and circuit provisioning steps required in the event of a customer’s termination of services. As indicated below, Xspedius has attempted to work with this customer to resolve this issue. Despite Wispnet’s failure to provide proper

written notice, Xspedius has been willing to accept constructive notice as of December 26, 2005, and has issued credit in the amount of \$7,026.88. However, even after this concession, Wispnet still owes Xspedius \$7,415.22. Accordingly, Xspedius also files the below Counterclaim for the amount of \$7,415.22 plus interest.

### **RESPONSES TO SPECIFIC COUNTS**

(a) Xspedius submits that no response is required to paragraph (a) of the Complaint.

(b) Xspedius denies the allegations contained in paragraph (b) of the Complaint. By way of further answer, Xspedius states that the name and address of the respondent to this Complaint is:

Xspedius Communications, LLC  
5555 Winghaven Blvd.  
Suite 300  
O'Fallon, MO 63368-3626

(c) Xspedius denies the allegations contained in paragraph (c) of the Complaint. By way of further answer, Xspedius provides service to Wispnet under contract, which contract incorporates by reference additional terms and conditions of the Xspedius tariff. The contract signed by Mr. Hayes states in paragraph 9: "All requests to terminate services must be submitted in writing to Xspedius 30 days prior to the termination effective date." It is noteworthy that Wispnet has not provided any written termination notice with its complaint. In fact, Xspedius has never received any formal written termination notice from Wispnet. In fact, in paragraph (c), Wispnet still clings to the misunderstanding that it was incumbent upon Xspedius to issue him a Letter of Authorization ("LOA") in order for Wispnet to terminate its contract with Xspedius. This view is not supported by the language of the parties' contract.

Despite the lack of such a notice, Xspedius did enter into what Xspedius considered to be confidential settlement negotiations with Mr. Hayes on April 18, 2006. Mr. Hayes has arguably breached that confidentiality in his complaint. However, in an ongoing effort to work with Mr. Hayes, and because Mr. Hayes has already placed certain information into the public domain, Xspedius is willing to waive such confidentiality surrounding these prior discussions in order to respond to the Wispnet Complaint allegations, provided that future settlement negotiations are properly treated as confidential by Mr. Hayes and his attorney.

Mr. James C. Falvey, Senior Vice President, Regulatory Affairs, and Ms. Barbara Harrington, Manager, Credit and Collections, both of Xspedius, participated in a settlement conference call with Mr. Mark Hayes of Wispnet, LLC on April 18, 2006. (No similar call took place on April 17, 2006 so this must be the call to which Wispnet alludes in his Complaint.) The purpose of the call was to address certain past due charges billed by Xspedius to Wispnet. On the call, the parties exchanged information about the circuits in question. At the end of the call, Xspedius committed to take the information back for review but, contrary to Mr. Hayes' misstatement in paragraph (c) of his complaint, Xspedius did not make a commitment to Mr. Hayes as to the amount of a refund, if any, that would be credited to Mr. Hayes' account. The overstated allegations in the Wispnet complaint represent an attempt to use the Commission's good offices to bully and bluster its way to a result favorable to him, but not warranted by the facts.

After the call, Ms. Harrington, in an attempt to resolve the issue, told Mr. Hayes that she would submit his full claim to attempt to gain corporate approval for the full

amount. She did in fact submit the claim for approval within Xspedius but, because the facts did not justify a full credit, the request for a full credit was denied.

Although Mr. Hayes never delivered formal notice of termination under the contract, Xspedius has been willing to consider constructive notice delivered by Mr. Hayes as of December 26, 2005, the date when certain underlying circuits were moved to ALLTEL. In fact, Xspedius has already issued a credit of \$7,026.88 to account for services rendered after January 26, 2006. After this credit, Wispnet owes Xspedius \$7,415.22 (*see* Counterclaim below). Mr. Hayes seems to think that he can ignore the terms of his contract and pick up the phone and immediately terminate payment obligations to Xspedius. In fact, the contract he executed requires ***30 days advance written notice*** of circuit termination. Mr. Hayes has not been willing to recognize that the notice must be in writing, and that it must be proffered 30 days in advance of the termination. This is the only manner in which Xspedius can process the order in due course and manage its business.

#### **REQUEST FOR RELIEF**

1. For the reasons stated above, Xspedius requests that the Commission deny Wispnet's corresponding request for relief. Wispnet never provided the requisite written termination notice. Xspedius has issued a credit of \$7,026.88 to account for services rendered after January 26, 2006. However, after this credit, Wispnet still owes Xspedius \$7,415.22. The Wispnet request for relief should therefore be denied by Xspedius and the Commission should grant the Xspedius counterclaim below.

#### **COUNTERCLAIM**

1. Xspedius hereby incorporates by reference the statements made above.

2. Xspedius files this claim to enforce its contract with Wispnet which requires 30 days written notice to terminate service. As discussed above, Xspedius is willing to accept the constructive notice provided when certain underlying circuits were moved to ALLTEL on December 26, 2005. Wispnet still owes Xspedius \$7,415.22 for services rendered through January 26, 2006.

**PRAYER FOR RELIEF**

Wherefore, Xspedius asks Wispnet, LLC to pay all past due charges on the circuits in question of \$7,415.22 plus interest.

By: \_\_\_\_\_



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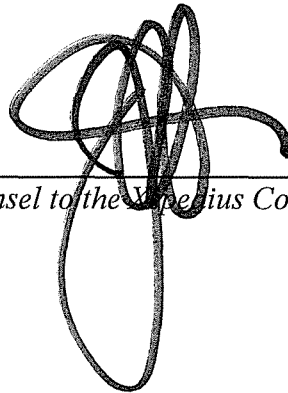
*Counsel for Xspedius Communications, LLC*

November 1, 2006

Certificate of Service

It is hereby certified that the foregoing was served by mailing a copy of the same by First Class United States Mail, postage prepaid to the parties shown on the attached service list this 1<sup>st</sup> day of November, 2006.

Margaret A. Miller  
Greenebaum Doll & McDonald PLLC  
300 W. Vine St., Suite 1100  
Lexington, KY 40507  
*Counsel for Wispnet, LLC*

A handwritten signature in black ink, consisting of several overlapping loops and a long vertical stroke at the bottom.

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*Counsel to the Xpedius Communications, LLC*