

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 2nd day of June, 2005.

Shaffer Lombardo Shurin,	)	
	)	
Complainant,	)	
	)	
vs.	)	<b><u>Case No. TC-2005-0266</u></b>
	)	
Xspedius (formerly espire)	)	
	)	
Respondent.	)	

**ORDER DISMISSING COMPLAINT  
AND CLOSING CASE**

Issue Date: June 2, 2005

Effective Date: June 12, 2005

***Statement of the Case:***

On February 7, 2005, Shaffer Lombardo Shurin, a law firm with offices in Kansas City and St. Louis, filed its Complaint against "Xspedius (formerly espire)," alleging as follows:

In 2001 Shaffer Lombardo Shurin contracted with espire (now Xspedius) to be our phone vendor. Shaffer Lombardo Shurin notified espire (Xspedius) to disconnect 11 lines effective 5/11/01. espire (Xspedius) reported they notified SBC to disconnect these lines effective 5/11/01. These lines were not disconnected and customer did not discover this until May of 2002. Duplicate payments were made to SBC on these lines for a year. Our office went through an administrative change in late 2001 and this duplication was discovered through an audit of utility charges in early 2002; however neither espire nor SBC wanted to take responsibility. Neither party

can produce a document that the service was to be disconnected from SBC.<sup>1</sup>

Shaffer Lombardo Shurin seeks "a refund of the duplication of payments in the amount of \$19,710.27" and no other relief.

Xspedius Management Co. Switched Services, LLC, doing business as Xspedius Communications, timely filed its Answer and Motion to Dismiss on March 10. Xspedius avers that, while it acquired the assets and customers of e.spire Communications, Inc., as of August 30, 2002, it did not acquire any of e.spire's liabilities. Xspedius further avers that the conduct complained of occurred before Xspedius acquired e.spire's assets and customers and before Xspedius was even certificated in Missouri. Xspedius asserts that the duplicate payments complained of were paid to e.spire and not to Xspedius. Xspedius also states that Complainant has erred in referring to it as "Xspedius (formerly espire)" because it avers that it is not a successor of e.spire. Xspedius moved the Commission to dismiss the Complaint because it fails to comply with Commission Rule 4 CSR 240-2.070(5) and fails to comply with Section 386.390.1, RSMo 2000.<sup>2</sup>

Shaffer Lombardo Shurin did not file a reply to Xspedius' Answer and Motion to Dismiss.

On April 19, the Commission directed its Staff to investigate the circumstances surrounding the Complaint and to report back in one week. Staff timely filed its report on April 26. Therein, Staff states that Shaffer Lombardo Shurin decided to change the

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<sup>1</sup> Complaint, p. 1. Attached to the unverified Complaint are 99 pages of notes, e-mails, letters, bills, and other documents relating to the transaction at issue. These documents are not part of the Complaint and are not properly before the Commission at this stage of the proceedings. However, both Xspedius and Staff refer to these documents extensively in their filings.

<sup>2</sup> All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

provider of 6 of its 17 telephone lines from SBC to e.spire and to disconnect the other 11 lines, effective May 11, 2001. According to Staff, only 2 lines were actually ported to e.spire and only one SBC line was disconnected.<sup>3</sup> Eleven SBC lines remained active and SBC continued to bill Shaffer Lombardo Shurin, and Shaffer Lombardo Shurin continued to pay SBC for these 11 lines over the following 13 months. However, Staff states that Shaffer Lombardo Shurin did not also pay e.spire for these lines and that, consequently, there was no "duplicate payment" as alleged by Shaffer Lombardo Shurin. Rather, Staff states that Shaffer Lombardo Shurin paid SBC approximately \$20,000 for 11 unwanted lines. Staff further states its opinion that (1) Xspedius did not acquire from e.spire whatever liability it may have had to Shaffer Lombardo Shurin in this matter; (2) the Commission is without jurisdiction to grant the relief sought by Shafer Lombardo Shurin; (3) the Primary Jurisdiction Doctrine does not apply in this case; and (4) none of the carriers involved violated any statute or any Commission rule or order.

***Discussion:***

Xspedius raises a number of factual defenses or avoidances to the Complaint that must be established at hearing. However, Xspedius also seeks dismissal because the Complaint fails to "allege any action of Xspedius that violates Public Service Commission Law, Public Service Commission rules, or Xspedius' tariffs." Section 386.390.1 authorizes the Commission to determine complaints as to "any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.]" By its express terms, a complaint brought under this authority necessarily must include an allegation of a

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<sup>3</sup> Staff's report accounts for only 14 of the original 17 lines. The fate of the other three is unknown.

violation of a law or of a Commission rule, order or decision.<sup>4</sup> Because the Complaint does not include such an allegation, it fails to state a claim upon which relief can be granted. For this reason, the Complaint must be dismissed.

The Commission's Staff pointed out another infirmity in the Complaint. The only remedy sought is money damages. The Commission is without authority to award money damages.<sup>5</sup> Because the Commission lacks jurisdiction over the requested remedy, the Commission lacks subject matter jurisdiction over the complaint.<sup>6</sup> Nothing in the Complaint or Answer suggests that this case is one of those which the Commission has jurisdiction to hear under the Primary Jurisdiction Doctrine despite its inability to grant the requested remedy:

Under the primary jurisdiction doctrine, courts will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision: (1) where administrative knowledge and expertise are demanded; (2) to determine technical, intricate fact questions; (3) where uniformity is important to the regulatory scheme.<sup>7</sup>

The matters raised herein do not require agency knowledge or expertise or the determination of technical, intricate factual questions; nor is regulatory uniformity important.

For these reasons, the Complaint will be dismissed.

**IT IS THEREFORE ORDERED:**

1. That the Complaint filed by Shaffer Lombardo Shurin on February 7, 2005, is hereby dismissed without prejudice.

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<sup>4</sup> *St. ex rel. Ozark Border Electric Cooperative v. Pub. Serv. Comm'n*, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

<sup>5</sup> *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943).

<sup>6</sup> J. Devine, *Missouri Civil Pleading & Practice* § 9-1 (1986), citing *St. Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. banc 1982).

<sup>7</sup> *Killian v. J & J Installers*, 802 S.W.2d 158, 160 (Mo. banc 1991).

2. That this Order shall become effective on June 12, 2005.
3. That this case may be closed on June 13, 2005.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, and Appling, CC., concur.  
Gaw and Clayton, CC., dissent.

Thompson, Deputy Chief Regulatory Law Judge