

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Shaffer Lombardo Shurin,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2005-0266
)	
Xspedius (formerly espire) ¹)	
)	
Respondent.)	

STAFF INVESTIGATION

COMES NOW the Staff of the Public Service Commission, and provides its investigation in this matter to the Commission. Addressing that investigation, Staff further states:

1. Shaffer Lombardo Shurin has filed a complaint against “Xspedius (formerly espire)” and that has been deemed to be against Xspedius Management Co. Switched Services, LLC d/b/a Xspedius Communications (“Xspedius Communications”). In its complaint, Shaffer Lombardo Shurin alleges that a number of lines that it wanted to have transferred to “e.spire” were not transferred. Xspedius Communications has filed an answer indicating that it does not have legal liability for any of the allegations in Shaffer Lombardo Shurin’s complaint, and the Commission has directed its Staff to investigate the circumstances underlying the complaint and, “in addition to its other findings advise the Commission whether any of the carriers involved in this matter violated any statute or Commission rule or order or tariff provision.” *Order Directing Filing* at 3.

¹ In its *Answer to Complaint and Motion to Dismiss*, counsel for Xspedius Communications stated: “Xspedius Communications, as further described in the body of this pleading is not certificated by this Commission as simply ‘Xspedius’, and is also not ‘formerly espire’. Thus, if this case is not dismissed upon consideration of this pleading, it should be restyled to name respondent as Xspedius Management Co. Switched Services, LLC, d/b/a Xspedius Communications.” This statement is correct and Staff agrees with this point.

2. In the request for relief section of its complaint, Shaffer Lombardo Shurin stated that “[w]e are asking for a refund of the duplication of payments in the amount of \$19,710.27.” To be able to grant such a request, the Commission must have the jurisdiction and authority to make an award of this amount. Staff respectfully notes that the Commission has not been granted jurisdiction or authority to do so.

3. Generally, issues falling within areas of administrative expertise are heard before an administrative tribunal before the related disputes may reach the circuit courts. This fundamental principle of “primary jurisdiction” in administrative law has been repeatedly verified in Missouri’s public utility law. “This doctrine [of primary jurisdiction] is based on a judicial policy of self-restraint and calls upon a court to defer to and give an administrative agency the first right to consider and act upon a matter which calls for factual analysis or the employment of special expertise within the scope of the agency's responsibility entrusted to it by the legislature.” *Main Line Hauling Co., Inc., v. Public Service Comm’n*, 577 S.W.2d 50, 51 (Mo.App. 1978). *See also Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. 1991); *MCI Metro Access Transmission Serv., Inc. v. City of St. Louis*, 941 S.W.2d 634, 644 (Mo.App. E.D. 1997).

4. To determine whether the Commission has subject matter jurisdiction over this case, it must determine the nature of the issues before it. If the issues involve the “construction of a contract or of a rate schedule upon which a contract is based,” relative to a claim of overcharging, for example, then jurisdiction lies with the circuit court. *Wilshire Construction Co. v. Union Electric Co.*, 463 S.W.2d 903, 905 (Mo. 1971). On the contrary, if the issues involve the “regulation and fixing of rates or charges for public utilities, and the classification of the users or consumers to whom the rates are chargeable,” then the Commission has exclusive

jurisdiction and should hear this matter. *Inter-City Beverage Co. v. Kansas City Power & Light Co.*, 889 S.W.2d 875, 877 (Mo.App. W.D. 1994). *See also State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1045 (Mo.banc 1943).

5. Based on Shaffer Lombardo Shurin's complaint, the relief requested is a refund of money paid for services that were not desired. Section 386.390 RSMo. (2000) authorizes the Commission to hear complaints that set forth "any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility" Thus, the Commission may consider whether the utilities involved have violated any statutes, rules, orders or tariffs. However, "[t]he Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund." *DeMaranville, et al. v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo.App. 1978).

6. Aside from the points raised in Xspedius Communications' *Answer to Complaint and Motion to Dismiss* regarding the disposition of the assets of ACSI Local Switched Services, Inc. and American Communication Services of Kansas City, Inc. (doing business under the unregistered fictitious name of "e.spire"), the Commission may not grant the relief requested regardless of whether liability lies upon Xspedius Communications because the dispute involves construction of contracts and an associated factual dispute, and the outcome of that dispute involves a pecuniary reparation or refund. The Commission simply may not provide this type of relief. *Wilshire Construction Co.* 463 S.W.2d at 905; *DeMaranville*, 573 S.W.2d at 676.

7. In its *Answer to Complaint and Motion to Dismiss*, counsel for Xspedius Communications has outlined the transaction approved by the Commission in Case No. TM-2002-1155, when Xspedius Management Co. Switched Services, LLC and Xspedius

Management Co. of Kansas City, LLC purchased the assets of ACSI Local Switched Services, Inc. and American Communication Services of Kansas City, Inc. under the auspices of the bankruptcy court in Delaware. Xspedius Communications' analysis appears to be correct based upon the information available.

8. Specifically, Exhibit 1 to the *Answer to Complaint and Motion to Dismiss* is an executed version of the Asset Contribution Agreement that governs the transfer of assets between the so-called "e.spire" entities and the Xspedius entities. In Section 1.2 of that agreement, the Xspedius entities acquired "all of the e.spire Entities' rights, title, and interests in and to the Assets, free and clear of all Encumbrances ...and all contractual rights and claims of the e.spire Entities relating to the foregoing, including, without limitation, those assets that are described below (but shall specifically exclude the Excluded Assets set forth in Section 1.3: ... all customer contracts."

9. Section 1.4 of the Asset Contribution Agreement specifies that the Xspedius entities assume only obligations of the e.spire entities "(a)(i) ... that by the terms of such Assumed Contracts, arise after the Contribution Date and relate to periods following the Contribution Date and are to be observed, paid, discharged or performed, as the case may be, in each case, at any time after the Contribution Date" The "Contribution Date" was later determined to be August 30, 2002. By that date, the errors related to Shaffer Lombardo and Shurin's complaint had already transpired, been discovered, and been corrected and only the claim for damages remained.

10. Likewise, Section 1.5 of the Asset Contribution Agreement specifies that the Xspedius entities will not "assume, or in any way be liable or responsible for, any liabilities, commitments, or obligations, whether known or unknown, disclosed or undisclosed, absolute,

contingent, inchoate, fixed or otherwise, of the e.spire Entities, including, without limitation, all liabilities, commitments or obligations relating to or arising from the Assets or the use thereof” This Section also explicitly indicates that e.spire Entities “shall remain fully responsible for the following liabilities, commitments, or obligations ... (a) any liabilities, commitments or obligations that arise with respect to the Assets or the use thereof on or prior to the Closing Date or relate to periods on or prior to the Closing Date or are to be observed, paid, discharged or performed on or prior to the Closing Date”

11. Accordingly, the parties to the transaction appear to have intended to have liability under any contracts arising prior to the date of the transaction, and relating to service provided before the date of the transaction, to remain with the “e.spire” entities (ACSI Local Switched Services, Inc. and American Communication Services of Kansas City, Inc.).

12. As discussed in the attached Staff Investigation, the Staff has concluded that none of the carriers potentially involved, including Southwestern Bell Telephone, L.P. d/b/a SBC Missouri, have “violated any statute or Commission rule or order or tariff provision,” as directed by the Commission’s *Order Directing Filing* of April 19, 2005. Moreover, the Staff Investigation contains the conclusion that SBC Missouri appears to have followed its own procedures. The Commission in its *Order Directing Filing* indicated that “the present Complaint was brought against Xspedius, and not SBC, possibly due to the erroneous advice of an employee of the Consumer Services Section of this Commission.” The Staff notes that it does not provide legal advice to members of the public and that the Regulatory Law Judge’s statement in an order of this nature, before considering all aspects of this case, serves no useful purpose.

13. In light of the discussion above regarding the Commission’s jurisdiction and the nature of the transaction between Xspedius Management Co. Switched Services, LLC and

Xspedius Management Co. of Kansas City, LLC and ACSI Local Switched Services, Inc. and American Communication Services of Kansas City, Inc., it appears that the Commission cannot grant the relief the complainant has requested and, accordingly, this case should be dismissed.

14. The Staff's Investigation is attached to this pleading as Appendix A. As called for by the Commission's rule at 4 CSR 240-2.070(10), it is being filed confidentially. However, Staff does not believe any information contained within its report falls within the scope of confidential information, and that no harm would result if the Commission made the report publicly available.

WHEREFORE the Staff submits its investigation for the Commission's consideration.

Respectfully submitted,

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/s/ David A. Meyer

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 26th day of April 2005.

/s/ David A. Meyer