

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

|   |   |                                     |
|---|---|-------------------------------------|
| Shaffer Lombardo Shurin,                        | ) |                                     |
|   | ) |                                     |
| Complainant,                                    | ) |                                     |
|   | ) |                                     |
| v.  | ) | <b><u>Case No. TC-2005-0266</u></b> |
|   | ) |                                     |
| Xspedius (formerly espire) (sic <sup>1</sup> ), | ) |                                     |
|   | ) |                                     |
| Respondent.                                     | ) |                                     |

**ANSWER TO COMPLAINT AND MOTION TO DISMISS**

Comes now Xspedius Management Co. Switched Services, LLC, d/b/a Xspedius Communications ("Xspedius Communications"), pursuant to 4 CSR 240-2.070(8), and for its Answer to the Complaint and Motion to Dismiss, states:

1) Xspedius Communications was served by the Commission with Notice of Complaint dated February 8, 2005, at its offices in Overland Park, Kansas. Future correspondence notices, inquiries, and orders in this case should be addressed to:

Julie Plowman  
Xspedius Communications, LLC  
5555 Winghaven Blvd., Suite 300  
O'Fallon MO 63366  
Telephone: (636) 625-7566  
Fax: (301) 361-1281  
Email: julie.plowman@xspedius.com

and

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<sup>1</sup> 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.

Mary Ann (Garr) Young  
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2) Xspedius Communications denies any liability to Complainant for alleged overbilling which occurred prior to Xspedius' acquisition of the assets and customers of the e.spire Operating Entities subsequent to Commission approval in Case No. TM-2002-1155.

3) Xspedius also denies the Complainant's identification of Respondent as "Xspedius (formerly espire)". Xspedius is not the legal successor to e.spire, nor any of e.spire's Operating Entities.

4) This Commission approved the transfer of substantially all of the assets and customers of ACSI Local Switched Services, Inc., and American Communication Services of Kansas City, Inc., (the e.spire Operating Entities) to Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Kansas City, LLC, (the Xspedius Operating Entities) in Case No. TM-2002-1155 by its ORDER APPROVING TRANSFER OF ASSETS AND GRANTING WAIVER OF 4 CSR 240-33.150, issued July 9, 2002. The transaction arose out of the e.spire Operating Entities' Chapter 11 bankruptcy proceeding, under the direction of the bankruptcy court<sup>2</sup>. The terms of the

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<sup>2</sup> Xspedius Communications, LLC, successor to Xspedius Management Co. LLC, acquired substantially all of the assets of e.spire Communications, Inc. ("e.spire") effective August 30, 2002. The bankruptcy court approved the sale of the e.spire assets to Xspedius in an order dated June 5, 2002, In re: e.spire Communications, Inc., et al., Debtors, Case No. 01-974 (RB) (U.S. Bankr. Ct., D. Del.). The Notice of Closing of the Transaction was filed on August 26, 2002, in Case No. 01-974 (RB), and the transaction closed on August 30, 2002.

transaction between e.spire and Xspedius were memorialized in an “Asset Contribution Agreement” between parent companies, which is attached hereto as Exhibit 1.

5) Exhibit 1, Section 1.2, Contribution of Assets by the e.spire Entities, specifies that Xspedius Management Company (XMC), parent company of the Xspedius Operating Entities will acquire the Assets of e.spire, including "all contractual rights and claims of the e.spire Entities relating to the [Assets] . . . (but shall specifically exclude the Excluded Assets set forth in Section 1.3). 1.2(m) includes among the Assets acquired by Xspedius “all customer contracts.”

6) Section 1.3, Excluded Assets, specifies that “the following assets and rights are not included in the Assets transferred to XMC and shall be retained by the e.spire Entities . . . : (c) all causes of action arising prior to the Closing Date including under Chapter 5 of the Bankruptcy Code. . . . (e) all other assets set forth on Section 1.3 of the e.spire Disclosure Schedule. . . .” Section 1.3 of the e.spire Disclosure Schedule is attached hereto as Exhibit 2. It provides that receivables from e.spire’s end user customers that accrued prior to the transfer of the Assets to Xspedius are excluded assets which will not be transferred to Xspedius.

7) Section 1.4 of Exhibit 1, Assumed Liabilities, specifies that XMC assumes only those obligations under the Assumed Contracts that arise after the Contribution Date (i.e., the date the transaction closed, or August 30, 2002).

8) Section 1.5 of Exhibit 1, Excluded Liabilities, in subsection (a) specifies that XMC does not assume any liabilities that arise with respect to the Assets prior to the Closing Date.

9) The transaction approved by the Commission in TM-2002-1155 closed on August 30, 2002 (Closing Date).

10) At the time the Application was filed in Case No. TM-2002-1155, the Xspedius Operating Entities did not have certificate of service authority to operate in Missouri. Applications were filed in Case Nos. CA-2002-1153 (Xspedius Management Co. Switched Services, LLC – basic local exchange) and Case No. XA-2002-1154 (Xspedius Management Co. of Kansas City – IXC and (Non-Switched) Local Exchange authority) simultaneously with the transfer of asset application on June 24, 2002, and in Case No. LA-2003-0001 (Xspedius Management Co. Switched Services, LLC – IXC and (Non-Switched) Local Exchange authority) on July 2, 2002.

11) According to statements in the Complaint and attachments thereto, the alleged improper billing which gave rise to this complaint (a) was discovered and discussed by Complainant with Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri (SBC), and (b) the services (10 lines) were terminated by action of SBC no later than June 26, 2002. All of these actions preceded Xspedius' acquisition of the assets of e.spire and preceded the date that Xspedius was authorized to provide telecommunications services in Missouri. By Complainant's own admission, the lines for which improper billing is alleged were fully disconnected and paid for in June 2002, prior to August 30, 2002 (the Closing Date). In the transaction between Xspedius and e.spire, it was e.spire that received the benefit of all customer receivables accrued prior to the Closing Date and it was e.spire that maintained any liability arising from the relationship with end users prior to the Closing Date.

12) Complainant was not a customer of Xspedius during the period of alleged improper billing. In addition, Xspedius did not receive any of the funds alleged to have been overbilled to Complainant, nor did Xspedius assume any liabilities of e.spire which might have accrued to the Complainant prior to the Closing Date. Hence, Xspedius is not the proper party Respondent.

13) The Complaint does not allege any action of Xspedius that violates Public Service Commission Law, Public Service Commission rules, or Xspedius' tariffs. In fact, none of the alleged improper billing for which Complainant seeks relief relates to any period of time in which Complainant was a customer of Xspedius. The Commission is without jurisdiction to transfer to Xspedius any liability of e.spire that may or may not have accrued to Complainant for alleged improper billing. The Commission also lacks authority to impose liability upon Xspedius that may have been released by a final, nonappealable order issued by a federal bankruptcy judge<sup>3</sup>.

14) It should also be noted that even taken in the light most favorable to Complainant, the Complaint herein does not establish that e.spire was responsible for the alleged overbilling. Instead, the Complaint raises factual questions whether failure by SBC to implement service changes requested at the time Complainant became a customer of e.spire was the primary cause of any overbilling, and it appears that SBC was a recipient of the funds in question. It would appear that the only entities with possible liability to Complainant are e.spire and SBC, who are not parties to this case.

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<sup>3</sup> In re: e.spire Communications, Inc., et al., Debtors, Case No. 01-974 (RB) (U.S. Bankr. Ct., D. Del.).

15) Based on the facts stated in the Complaint, the record before the Commission in the cases regarding Xspedius' certification and the acquisition of assets, and the provisions of the attached documents which governed the asset transfer, there is no basis for the Commission to grant relief in favor of Complainant against Xspedius. Therefore, this Complaint against Xspedius should be dismissed.

16) Further, the instant Complaint should be dismissed for failure to comply with the Commission's Rules of Practice and Procedure in 4 CSR 240-2.070 (5), in that the Complaint does not include the telephone number or facsimile number of the Complainant except on a cover letter thereto (where three are provided to choose from). The Complaint contains no electronic mail address for the Complainant or its counsel, and makes no statement regarding the jurisdiction of the Commission over the subject matter of the complaint, in violation of 4 CSR 240.070 (5) (A) and (F).

WHEREFORE, Xspedius hereby moves the Commission to dismiss this Complaint. However, in the event the Commission does not dismiss this Complaint, Xspedius moves the Commission to join the e.spire trustee in bankruptcy and Southwestern Bell as necessary parties, schedule an early prehearing conference for further exploration of the facts regarding the alleged improper billing, and set a date for responses of all parties. Xspedius reserves the right to seek to be dismissed from the case after the parties who may have legal liability to Complainant are joined.

Respectfully submitted,

/s/Mary Ann Young  
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William D. Steinmeier, P.C.  
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COUNSEL FOR XSPEDIUS MANAGEMENT  
CO. SWITCHED SERVICES, LLC, D/B/A  
XSPEDIUS COMMUNICATIONS

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically served on the General Counsel of the Missouri Public Service Commission (gencounsel@psc.mo.gov), the Office of the Public Counsel (opcservice@ded.mo.gov), and Complainant (Charles H. Stitt, hstitt@sls-law.com) this 10<sup>th</sup> day of March 2005.

/s/Mary Ann Young  
Mary Ann (Garr) Young