

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc. regarding reciprocal compensation for traffic terminated to internet service providers.

DOCKET NO. 981008-TP
ORDER NO. PSC-99-0086-PHO-TP
ISSUED: January 14, 1999

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on Wednesday, January 6, 1999, in Tallahassee, Florida, before Commissioner E. Leon Jacobs, as Prehearing Officer.

APPEARANCES:

Norman H. Horton, Jr., Esquire, Messer, Caparello & Self, P.A., Post Office Box 1876, Tallahassee, FL 32302-1876.
On behalf of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc.

Brad E. Mutschelknaus, Esquire, Kelley, Drye, & Warren, LLP, 1200 19th Street, NW, Suite 500, Washington, D.C. 20036.
On behalf of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc.

Nancy B. White, Esquire, 150 South Monroe St., Suite 400, Tallahassee, FL 32301
On behalf of BellSouth Telecommunications, Inc.

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FPSC-RECORDS/REPORTING

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Beth Keating, Esquire, and Clintina Watts, Esquire,
Florida Public Service Commission, 2540 Shumard Oak
Boulevard, Tallahassee, FL 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

On August 6, 1998, American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. (e.spire) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, e.spire requests enforcement of its interconnection agreement with BellSouth regarding reciprocal compensation for traffic terminated to Internet Service Providers. On August 31, 1998, BellSouth filed its Answer and Response to e.spire's Petition. This matter has been set for an administrative hearing on January 20, 1999.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.

- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties (and Staff) has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so

answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct and Rebuttal</u>		
James C. Falvey	e.spire	1-4
Kevin Cummings*	e.spire	2
Jerry D. Hendrix	BellSouth	All
Albert Halprin**	BellSouth	All

* Direct Testimony only

** Witness Halprin's Direct and Rebuttal Testimony is currently the subject of a Motion to Strike filed by e.spire. See Section X of this Order.

VII. BASIC POSITIONS

E. SPIRE:

BellSouth has failed to comply with its Interconnection Agreement with e.spire by failing to record usage, refusing to recognize traffic terminating to ISPs as local, declining to establish a compensation rate and refusing to pay e.spire millions of dollars. The Interconnection Agreement between e.spire and BellSouth requires the parties to exchange traffic and compensate each other for termination of local traffic. The Agreement also provides that the compensation rate is to be agreed upon between the parties. Despite the clear language of the agreement, BellSouth has not recognized calls terminated by e.spire to ISPs as local traffic. This is contrary to the Agreement and decisions of regulatory

agencies, including the Florida Public Service Commission. Furthermore, BellSouth has refused to establish a rate for this traffic, again, contrary to the requirements of the Agreement and Act.

BELLSOUTH:

ISP traffic is not local traffic under the Interconnection Agreement, but is exchange access traffic that is jurisdictionally interstate. The difference in e.spire's Florida monthly minutes of use for terminating local traffic did not exceed 2,000,000 minutes. Then, and only then, would the parties be required to negotiate a reciprocal compensation rate. e.spire is not entitled to take the reciprocal compensation rate of another ALEC without first negotiating with BellSouth a traffic exchange agreement for the payment of reciprocal compensation on a going-forward basis in compliance with the Interconnection Agreement and then without taking the other ALEC's agreement in its entirety.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE 1: Is ISP traffic included in the definition of "local traffic" as that term is defined in the Interconnection Agreement between BellSouth and e.spire?

POSITIONS

E. SPIRE:

Yes. Section VIA of the Agreement and Attachment B define local traffic as calls that originate in an exchange and terminate in that exchange or in a corresponding EAS exchange. Calls to ISPs are not excluded under the Agreement or under any decision.

BELLSOUTH:

No. Calls made by an end-user customer to access the Internet or other services offered by an Internet Service Provider ("ISP") do not constitute local traffic. These calls are in the nature of exchange access traffic that is jurisdictionally interstate.

The Interconnection Agreement negotiated between BellSouth and e.spire in this proceeding requires the termination of calls on either party's network for the traffic to be considered local traffic. Call termination does not occur when an ALEC, serving as a conduit, places itself between BellSouth and an ISP. ISP traffic is not jurisdictionally local because the Federal Communications Commission ("FCC") has concluded that enhanced services providers, of which ISPs are a subset, use the local network to provide interstate services.

The FCC has long held that the jurisdictional nature of traffic is determined by the end-to-end nature of a call. In a recent memorandum and order, the FCC reiterated its previous holding by stating that the FCC "traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." CC Docket No. 98-79, ¶17. As such, calls to an ISP constitute exchange access traffic, not local telephone exchange service subject to reciprocal compensation consideration. Based on the foregoing, ISP traffic is clearly not local traffic as defined under the parties' Interconnection Agreement.

STAFF: Staff has no position at this time.

ISSUE 2: Did the difference in e.spire's minutes of use for terminating local traffic exceed two million minutes in Florida on a monthly basis?

POSITIONS

E. SPIRE:

Yes. Pursuant to the Agreement, BellSouth was required to report local minutes of use but has failed to provide these

reports. According to reports generated by e.spire, traffic has exceeded 2 million minutes. BellSouth has agreed to these reports and they should be used absent BellSouth's compliance with the Interconnection Agreement.

BELLSOUTH:

No. As stated above, ISP traffic is not local traffic. BellSouth believes e.spire is including ISP traffic in its alleged minutes of use for terminating local traffic in Florida. If such is the case, the difference in minutes of use for terminating local traffic in Florida on a monthly basis did not exceed 2,000,000 minutes.

STAFF: Staff has no position at this time.

ISSUE 3: In this instance, how should the reciprocal compensation rate, if any, be determined under the parties' Interconnection Agreement?

POSITIONS

E. SPIRE: The rate should be established at \$.009, the rate provided to MFS and requested by e.spire pursuant to the MFN of the Agreement.

BELLSOUTH:

Since e.spire's minutes of use for terminating local traffic did not exceed 2,000,000 minutes in Florida on a monthly basis, no reciprocal compensation rate must be determined. In Section VI.B of the parties' Interconnection Agreement, BellSouth and e.spire agreed that once e.spire's minutes of use exceeded two million minutes for terminating local traffic in each state on a monthly basis, the parties "will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis." (Emphasis added.) Even if the Commission were to find e.spire's minutes of use in Florida for terminating local traffic on a monthly basis exceeded 2,000,000, which BellSouth denies, the parties must "negotiate" a traffic exchange agreement to apply on a "going-forward basis," pursuant to the terms of the Interconnection Agreement. e.spire is not entitled to take a rate from

another ALEC's agreement without first negotiating a rate with BellSouth and then without accepting the other ALEC's agreement in its entirety. See Iowa Utilities Bd. v. FCC, 120 F. 3d 753,801 (8th Cir. 1997), cert. granted 1998 U.S. LEXIS 662 (U.S. 1998). Regardless of how the reciprocal compensation rate, if any, is ultimately determined, the rate should only apply on a going-forward basis from the time it is determined e.spire met the two-million-minute threshold and at a minimum, from the date the parties began negotiating the rate. If it is determined that e.spire is entitled to take the reciprocal compensation rate of another ALEC's agreement, that rate should only be applied on a going-forward basis from the time it is determined e.spire met the two-million-minute threshold and then only after the effective date of the other ALEC's agreement.

STAFF: Staff has no position at this time.

ISSUE 4: What action, if any, should the Commission take?

POSITIONS

E. SPIRE:

The Commission should require BellSouth to comply with its agreement and recognize ISP traffic as local, establish a rate and pay e.spire the amounts due under the Agreement. Furthermore, since e.spire has been forced to incur expenses to record traffic due to BellSouth's failure to comply with its obligations, e.spire should be entitled to reimbursement for these expenses as well as interest and the expenses associated with this case.

BELLSOUTH:

The Commission should find that ISP traffic is not included in the definition of "local traffic" as defined under the parties' Interconnection Agreement because that traffic does not "terminate" on either party's network, as required in the definition of "local traffic" in the Interconnection Agreement.

The Commission should further find that e.spire's minutes of use for terminating local traffic in Florida on a monthly basis did not exceed 2,000,000 minutes.

Since e.spire did not meet the two-million-minute threshold, the Commission should find that no reciprocal compensation rate need be determined. If the Commission should determine e.spire met the two-million-minute threshold, which BellSouth denies, then the Commission should find that the parties must negotiate the appropriate reciprocal compensation rate to apply on a going-forward basis as provided for in the Interconnection Agreement. If the Commission should find that e.spire should be allowed to adopt the reciprocal compensation rate of another ALEC, then the Commission should find that that rate applies on a going-forward basis from the time e.spire met the two-million-minute threshold and only after the effective date of the other ALEC's agreement.

STAFF: Staff has no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Kevin Cummings	e.spire	_____ (KAC-1)	Diagram of e.spire-BellSouth trunk groups in Jacksonville
		_____ (KAC-2)	Lucent 5ESS Division of Revenue Report
James C. Falvey	e.spire	_____ (JCF-1)	Portions of Interconnection Agreement

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
		_____ (JCF-2)	Letter dated 11/14/97 from e.spire to BellSouth re: usage reports
		_____ (JCF-3)	Portions of MFS Interconnecti on Agreement
		_____ (JCF-4)	Letters dated 12/23/97 and 1/8/98 from e.spire to BellSouth re: usages reports
		_____ (JCF-5)	Letter dated 1/8/98 from BellSouth responding to e.spire's 1/8/98 letter re: usage reports
		_____ (JCF-6)	Letter dated 3/17/98 from e.spire to BellSouth replying to BellSouth's 1/8/98 letter
		_____ (JCF-7)	FPSC Order No. 98-1216- FOF-TP

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<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
		(JCF-8)	Initial Decision of the Hearing Officer in Georgia Docket No. 9281-U
Jerry D. Hendrix	BellSouth	(JDH-1)	Diagram Illustrating a Call to an ISP
		(JDH-2)	BellAtlantic Ex Parte Filing with the FCC (July 10, 1998)
		(JDH-3)	SBC Telecommunications, Inc., Ex Parte Filing with the FCC (August 14, 1998)
		(JDH-4)	BellAtlantic Ex Parte Filing with the FCC (November 4, 1998)

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

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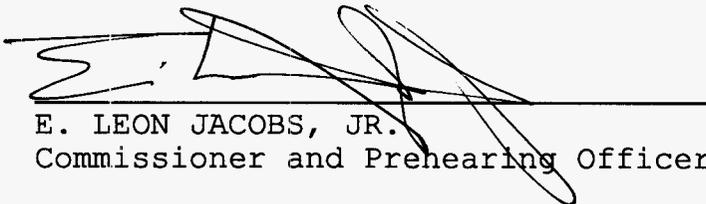
X. PENDING MOTIONS

On January 5, 1999, e.spire filed a Motion to Strike Direct and Rebuttal Testimony of Albert Halprin. At the time of the prehearing, BellSouth had not yet had an opportunity to respond to this motion. The Motion to Strike shall, therefore, be ruled upon at a later date, but prior to the January 20, 1999, hearing in this Docket.

It is therefore,

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 14th day of January, 1999.



E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative

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hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.