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February 8, 1999

BY HAND DELIVERY
Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 981008-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of e.spire Communications, Inc. is an original and fifteen copies of e.spire's Posthearing Brief in the above captioned docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Norman H. Horton, Jr.

NHH/amb
Enclosures
cc: James C. Falvey, Esq.
Parties of Record

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of e.spire Communications, Inc.'s Posthearing Brief have been served upon the following parties by Hand Delivery (*) and/or U. S. Mail this 8th day of February, 1999.

Beth Keating, Esq.*
Division of Legal Services, Room 370
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Ms. Nancy White
c/o Ms. Nancy Sims
BellSouth Telecommunications, Inc.
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301

Norman H. Horton, Jr.

ORIGINAL

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 FILED: February 8, 1999

POSTHEARING BRIEF OF e.spire COMMUNICATIONS, INC.

American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. (collectively "e.spire" or the "Company"), through undersigned counsel, submits this posthearing brief.

I. BASIC POSITION

BellSouth has failed to comply with the clear and unambiguous language of the Interconnection Agreement with e.spire by failing to recognize e.spire's "Most Favored Nations" ("MFN") request, 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 the transport and termination of local traffic. The Agreement also provides that e.spire can select the most favorable compensation rate agreed upon between BellSouth and any other carrier. 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 the decisions of state and federal regulatory agencies, including the Florida Public Service Commission.

Ultimately, a deal is a deal, and BellSouth must abide by the terms of the contract which it voluntarily executed.

BellSouth's unilateral decision to refuse reciprocal compensation to e.spire for traffic terminated to ISPs is a direct violation of the e.spire-BellSouth Interconnection Agreement ("Contract") and the orders of the Commission. The record in this case conclusively demonstrates that the e.spire-BellSouth Agreement is not ambiguous, and it requires BellSouth to compensate e.spire for terminating traffic to ISPs on a nondiscriminatory basis. BellSouth's refusal to recognize e.spire's MFN request to be compensated at the same rate as MFS must be redressed by this Commission, by requiring compensation at the MFS rate of 0.9 cents, from March 1998 forward with interest, attorneys' fees, and compensation for the additional costs imposed by BellSouth upon e.spire. Moreover, the Commission should reject BellSouth's efforts to continue to delay, and to obfuscate the issues in this case.

II. 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?

SUMMARY OF POSITION: *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 of any regulatory agency.*

ANALYSIS AND ARGUMENT: To determine whether ISP traffic is included in the definition of local traffic in the Agreement one must look only to the Agreement. Section VIA of the Agreement states:

A. Exchange of Traffic

The Parties agree for the purpose of this Agreement only that local interconnection is defined as the delivery of local traffic to be terminated on each party's local network so that customers of either party have the ability to reach customers of the other party, without the use of any access code or delay in the processing of the call. The Parties further agree that the exchange of traffic on BellSouth's Extended Area Service (EAS) shall be considered local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section.

Attachment B to the Agreement defines local traffic to mean:

> telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

This definition of local traffic is the same as found in the Intermedia-BellSouth Agreement which this Commission has already determined includes ISP traffic. (Order No. PSC-98-1216-FOF-TP, issued Sept. 15, 1998 at pages 21-22).

One of the fundamental tenets of contract law is the requirement that a court must first look solely within the four corners of the contract to resolve any dispute regarding the meaning and effect of the contract's language. If the contract is clear and unambiguous on its face, then the court must give full effect to the words in the contract. Board of Public Instruction of Dade County v. Fred Howland, Inc., 243 So.2d 221, 223 (Fla. 3d DCA 1971), cert. den., 248 So.2d. 167 (Fla. 1971). Only if the court finds that the plain meaning of the contract is ambiguous, then and only then may the court look to extrinsic evidence in order to interpret the contract. Gulf Cities Gas Corp. v. Tangelo Park Service Co., 253 So.2d 744, 748 (Fla. 4th DCA 1971). The rationale for this approach is simple: "It is the law in Florida that the language used in a contract is the best evidence of the

intent and meaning of the parties." Boat Town U.S.A., Inc. v. Mercury Marine Div., 364 So.2d 15, 17 (Fla. 4th DCA 1978).

The language in the e.spire-BellSouth Agreement is clear and unambiguous on its face. The reciprocal compensation provisions of Section VIA of the Agreement and the definitions are clear and simple. Calls which originate and terminate in the same exchange or an EAS exchange are local calls.

The definition of local traffic in the Agreement does not contain any exceptions or exclusions for ISP traffic and nowhere within the Agreement is there any language that could be construed as constituting an exception for ISP calls from the requirements for reciprocal compensation or the definition of local traffic.

BellSouth argues that calls to an ISP are not local because they do not terminate locally, an argument which was made by BellSouth but not accepted in Order No. 98-1216. As explained by Mr. Falvey, termination of a call occurs when it is delivered to the exchange bearing the called telephone number (Tr. 44). A customer dials a 7-digit number to access an ISP and that call is terminated when a connection is established with the exchange. It does not matter if a caller dials a number that is received by voice grade service, an answering machine, fax or modem; termination occurs essentially when the call is answered.

In this case there is no ambiguity as to the definition of local traffic nor is there any suggestion within the Agreement — which BellSouth voluntarily signed — that ISP traffic was meant to be excluded from the definition of local traffic.

Even if the Agreement is somehow considered ambiguous, reciprocal compensation is still required for ISP traffic. Basic contract law requires that a court may look behind the words used in

a contract if and only if the ambiguity exists on the face of the document. Boat Town U.S.A., 364 So.2d at 17. There should be no dispute over the plain meaning of this Agreement, especially given the lack of any exceptions to exclude ISP traffic from the reciprocal compensation obligations. However, in the event that the Commission believes that there is some ambiguity in the words used in this Agreement, the extrinsic evidence of record only further substantiates BellSouth's obligation to pay reciprocal compensation for calls terminating to an ISP.

Both e.spire and BellSouth agree that the subject of reciprocal compensation for ISP traffic was never openly discussed during any of the negotiations. Falvey, Tr. 123; Hendrix, Tr. 194. However, the parties dispute why this subject never arose. Mr. Hendrix testified that BellSouth never considered these calls to be local traffic, and that it was e.spire's obligation to raise this as an issue. Hendrix, Tr. 156. Mr. Falvey acknowledged that e.spire did not list ISP traffic as local but neither did e.spire list as local other types of high volume call recipients. As Mr. Falvey testified, there was simply no reason to do so. Indeed, the 29 state decisions ruling that such calls are local — as opposed to ruling otherwise — emphasize that a contract would have to explicitly except such calls if they are not to be considered local. In short, the contractual definition is an inclusive one and e.spire interprets it that way; if BellSouth has a more limited interpretation, the burden clearly rests with BellSouth to support that interpretation. BellSouth was fully aware at the time that this Agreement was signed that traffic could flow heavily toward an ALEC network (Tr. 82-83) and if any party had an obligation to speak out to include or exclude any matter it was BellSouth. Simple logic and common sense reveal that the duty to separately address this issue lay squarely with BellSouth, and that BellSouth's failure to explicitly address this traffic does not exempt BellSouth from its obligation to pay reciprocal compensation.

That the duty lay with BellSouth is further underscored given other circumstances. For example, in Order No. 21815 issued in 1989 in Docket No. 880423-TP, this Commission specifically found that calls to enhanced service providers, which includes ISPs, constitute local traffic. (Exh. 1, Order No. 98-1216, p. 14). The Commission in that proceeding found that calls to information service providers which includes Internet service providers should be treated like any other local exchange service, and this finding was based in part on testimony from BellSouth witnesses. (Order 21815, pp 24 and 25; Order No. 98-1216, p. 14). Mr. Hendrix attempts to dismiss this order on the theory that it was only an interim order based upon BellSouth's then position, and now asserts this position has been overruled. (Tr. 161). However Mr. Hendrix has not identified any order of this Commission implementing a different policy, nor has he identified any FCC or judicial order that expressly overrules the Commission's order. BellSouth's belief that the 1989 Florida order has been overruled and can now be ignored simply is not true, as the Commission found in Order No. 98-1216. The conclusion that ISP traffic was local in Order No. 21815 was the law of the contract at the time of execution of this Interconnection Agreement.

BellSouth further attempts to justify their conduct by referring to some implicit, unspoken understanding between the parties relying upon telepathic exchanges with Richard Robertson, e.spire's negotiator. (Tr. 194-197). Since Mr. Robertson had been an employee of BellSouth prior to joining e.spire, Mr. Hendrix attempted to transfer knowledge of "policies" to e.spire and Mr. Falvey, despite Mr. Falvey's statement that he never worked for Mr. Robertson. (Tr. 107). The exchanges regarding Mr. Robertson clearly do not constitute any type of credible evidence upon which this Commission may rely. The purpose of a contract is to reduce all understandings to writing. Even if there was some reason to consider what may or may not have been in the mind of

Mr. Robertson, the parties agreed that the written Agreement constituted the entire understanding between the parties (Paragraph 30 of the Agreement, Tr. 217) — particularly where there is no ambiguity in the contract — it matters not what may or may not have been said during talks; the agreement clearly defines local traffic and that is what controls.

Moreover, the FCC historically has classified ISP traffic as local traffic. On several different occasions, the FCC has affirmed that calls from Internet subscribers to the ISPs local points of presence are local calls. The FCC has long held that local calls to ISPs must be treated as local calls by LECs regardless of whether the ISP subsequently reformats or retransmits the information received over such calls to or from further interstate destinations. In the fourteen years since the FCC originally addressed the issue, calls going between an end user and ISP within a local calling area have been treated as local for the purpose of end user tariffs and assessment of access charges. Again, if any party should have sought clarification it was BellSouth not e.spire. All of the contemporaneous situations would cause one to consider ISP as local traffic and if BellSouth did not then they should have spoken up. They did not.

BellSouth has cited an October 30, 1998 FCC Order in FCC Docket No. 98-79 (GTE ADSL Tariff Order) to argue that ISP traffic is not local. This Order has no bearing on the issue of reciprocal compensation for ISP traffic. In fact, the FCC declined to decide whether dial-up calls to ISPs are jurisdictionally interstate or are subject to reciprocal compensation. The FCC explicitly stated that:

> [t]his Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs. Unlike GTE's ADSL tariff [at

> issue here], the reciprocal compensation controversy implicates: the applicability of the separate body of Commission rules and precedent regarding switched access service, the applicability of any rules and policies relating to intercarrier compensation when more than one local exchange carrier transmits a call from an end user to an ISP, and the applicability of interconnection agreements under section 251 and 252 of the Communications Act, as amended by the Telecommunications Act of 1996, entered into by incumbent LECs and competitive LECs that state commissions have found, in arbitration, to include such traffic. Because of these considerations, we find that this Order does not, and cannot, determine whether reciprocal compensation is owed, on either a retrospective or prospective basis, pursuant to existing interconnection agreements, state arbitration decisions, and federal court decisions.

(FCC Order, CC Docket 98-79, pages 1-2). e.spire's complaint concerns precisely this type of traffic, "circuit switched dial-up traffic originated by interconnecting LECs." (Tr. 65.) Accordingly, the October 30 FCC Order is completely inapposite to this case, which is entirely concerned with dial-up traffic to Internet service providers.

The Federal Telecommunications Act of 1996 ("1996 Act") requires that local exchange carriers such as BellSouth "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under the Agreement, reciprocal compensation obligations apply to "local traffic," which is defined in Attachment B as "telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange." The FCC has a similar definition. See 47 C.F.R. § 51.701 ("Local traffic is traffic that originates and terminates within a local service area"). As Mr. Falvey discussed in his testimony, even if the Commission does look to extrinsic evidence, all of the surrounding facts and circumstances demonstrate BellSouth's obligation to pay reciprocal compensation for calls the terminate to ISPs.

Under any approach, this Commission can only conclude, as it has done in a previous case and as has at least 25 other states[1] (Exh. 1) that ISP traffic is and was intended to be treated as

[1] *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with U S West Communications, Inc.*, Opinion and Order, Arizona Corporation Commission, Docket Nos. U-2752-96-362 and E-1051-96-362, Decision No. 59872 (dated October 29, 1996).

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Rulemaking 95-04-043, *Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, Investigation 95-04-044, Decision 98-10-057, California Public Utilities Commission (October 22, 1998).

Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with U S West Communications, Inc., Decision Regarding Petition for Arbitration, Colorado Public Utilities Commission, Docket No. 96A-287T (dated November 5, 1996).

Petition of Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Service Provider Traffic, Final Decision, State of Connecticut, Department of Public Utility Control, Docket No. 97-05-22 (dated September 17, 1997).

Petition of MCI Telecommunications Corp. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc., Arbitration Award, Delaware Public Service Commission, Docket No. 97-323 (dated December 16, 1997).

e.spire Communications, Inc. v. BellSouth Telecommunications, Inc., Initial Decision of the Hearing Officer, Georgia Public Service Commission, Docket No. 9281-U Regarding Reciprocal Compensation for Traffic Terminated to Internet Service Providers (dated October 19, 1998)

Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois: Complaint As to Dispute Over A Contract Definition, Opinion and Order, Illinois Commerce Commission, Docket No. 97-0404, *aff'd sub nom., Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.*, Memorandum Opinion and Order, No. 98-C-1925, 1998 U.S. Dist. LEXIS 11344 (N.D. Ill. 1998).

American Communications Services of Louisville d/b/a e.spire v. BellSouth Telecommunications, Inc., Order, Kentucky Public Service Commission, Docket No. 98-212 (dated June 16, 1998).

Complaint of WorldCom Technologies, Inc. Against New England Telephone and Telephone Company d/b/a Bell Atlantic-Massachusetts for Alleged Breach of Interconnection Terms, Order, Massachusetts Department of Telecommunications and Energy, Docket No. 97-116 (dated October 21, 1998).

Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan, Opinion and Order, Michigan Public Service Commission, Case Nos. U-11178, U-11502, U-11522, U-11553 and U-11554, *aff'd sub nom. TCG v. Michigan Bell Telephone Company d/b/a Ameritech Michigan*, Order of Mandamus (6th Cir. 1998).

Consolidated Petitions of AT&T Communications of the MidWest, Inc., MCIMetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with U S West Communications, Inc., Order Resolving Arbitration Issues, Minnesota Public Utilities Commission, Docket No. P-442, 421/M-96-855 (dated December 2, 1996).

local traffic for this Agreement. It is significant that several states have determined that ISP traffic

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Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms and Conditions and Related Arrangements for Interconnection with Southwestern Bell Telephone Company, Arbitration and Order, Missouri Public Service Commission, Case No. TO-98-278 (dated April 23, 1998).

Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Order Closing Proceeding, New York Public Service Commission, Case Nos. 97-C-1275, 93-C-0033, 93-C-0103, 97-C-0895, 97-C-0918, 97-C-0979 (dated March 19, 1998).

In the Matter of Enforcement of Interconnection Agreement Between Intermedia Communications, Inc. and BellSouth Telecommunications, Inc., Order Concerning Reciprocal Compensation for ISP Traffic, North Carolina Utilities Commission, Docket No. P-55, Sub 1096 (Nov. 4, 1998).

ICG Telecom Group, Inc. v. Ameritech Ohio Regarding Reciprocal Compensation, Opinion and Order, Ohio Public Utilities Commission, Case No. 97-1557-TP-CSS (dated August 27, 1998).

In the Matter of Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating to Internet Service Providers and Enforcing Compensation Provision of the Interconnection Agreement with Southwestern Bell Telephone Company, Order No. 423626, Oklahoma Corporation Commission, Cause No. PUD 970000548 (dated June 3, 1998).

Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms and Conditions, Order No. 96-324, Oregon Public Utility Commission, ARB 1 (dated December 9, 1996).

Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2 of Its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc., Opinion and Order, Pennsylvania Public Utility Commission, Docket No. P-00971256 (dated May 21, 1998).

Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief, Order Affirming the Initial Order of Hearing Officer, Tennessee Regulatory Authority, docket No. 98-00118 (dated August 17, 1998).

Complaint and Request for Expedited Ruling of Time Warner Communications, Order, Texas Public Utility Commission, Docket No. 18082, *aff'd sub nom., Southwestern Bell Telephone Company v. Public Utility Commission of Texas*, Order, Docket No. MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938 (W.D. Tex. 1998).

Petition of Cox Virginia Telecom, Inc. for Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers, Final Order, Virginia State Corporation Commission, Case No. PUC970069 (dated October 24, 1997).

Petition for Arbitration of an Interconnection Agreement between MFS Communications Company, Inc. and U S West Communications, Inc., Arbitrator's Report and Decision, Washington Utilities and Transportation Commission, Docket No. UT-960323 (1996) *aff'd sub nom., U S West Communications, Inc. v. MFS Intelenet, Inc.*, Order on Motions for Summary Judgment, Docket No. C97-222WD (W.D. Wash. 1998).

MCI Telecommunications Corporation Petition for Arbitration of Unresolved Issues for the Interconnection Negotiation between MCI and Bell Atlantic, Order, West Virginia Public Service Commission, Case No. 97-1210-T-PC (dated January 13, 1998).

was intended to be treated as local traffic since the FCC issued its GTE ADSL tariff order.

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?

SUMMARY OF POSITION: *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 given BellSouth's failure to comply with the Interconnection Agreement.*

ANALYSIS AND ARGUMENT: The only evidence in this proceeding that minutes of use for terminating local traffic exceeded 2 million minutes in Florida on a monthly basis is that submitted by Ms. Donna Talmage of e.spire. In her testimony and exhibits, Ms. Talmage explains how the traffic was recorded and the results of that tracking. According to Ms. Talmage, the differential first occurred in Florida in March 1998, and has continued to occur each month thereafter (Tr. 15). Her exhibit contains summaries of those usage reports and those numbers confirm that the difference exists.

The usage information is derived from a software program called TrafficMASTER™ which e.spire initiated. According to Section VIB of the Agreement, it was BellSouth's obligation to track usage and report local minute usage monthly. BellSouth failed to comply with this section. Mr. Hendrix acknowledged that in a meeting between BellSouth and e.spire in November 1997, BellSouth advised e.spire that it was not technically capable of providing local traffic usage reports to e.spire (Tr. 166). In a letter dated January 8, 1998, BellSouth admitted that it had agreed to track local usage but "that it failed to provide these reports." (Exhibit No. 5, JCF-5; Tr. 168). BellSouth further committed in that letter that, "[b]ecause of the absence of such reports BellSouth agrees to

use [e.spire's] usage reports for determining the local traffic differentials." (Exhibit 5; Tr. 166). (emphasis added). Even today, when BellSouth has admitted that it has failed to meet its obligation to e.spire, BellSouth is not sending local traffic reports to e.spire. BellSouth has repeatedly asserted that it cannot measure local traffic.

When it became apparent to e.spire that BellSouth would not provide usage reports pursuant to Agreement, e.spire was forced to develop its own usage reports. e.spire selected TrafficMASTER™, a software product developed for usage reporting. (Talmage, Tr.19) e.spire implemented TrafficMASTER™ in November 1997. In the absence of the usage reports proposed by BellSouth pursuant to the Agreement, e.spire's usage reports, which include good faith estimates as described below, must serve as the basis for a Commission decision that BellSouth should pay e.spire's reciprocal compensation bills plus interest for the large quantities of local traffic terminated to e.spire's new network.

TrafficMASTER™ software captures the data from e.spire's Lucent 5ESS switch located in Jacksonville, Florida and performs the function of analyzing the amount of traffic flowing in the switch. (Talmage, Tr. 20). This software provides e.spire with a report of "peg count" (or number of local calls) and usage or minutes of use received at e.spire's switch on a trunk group by trunk group basis. (Talmage, Tr.20). TrafficMASTER™ can distinguish between local and all other types of traffic because local traffic is carried over a separate trunk group, and the software measures traffic terminating to the e.spire switch on a trunk group by trunk group basis. (*Id.*). e.spire and BellSouth have established multiple trunk groups that carry exclusively local traffic. These trunk groups have been designated as local trunk groups pursuant to Section V.D.1.A. of the Agreement. To the extent other than local traffic was delivered to these trunk groups it was not at e.spire's

request and BellSouth would owe e.spire more not less, due to higher switched access rates. By measuring the traffic coming into e.spire's switch over these trunk groups, e.spire can determine how many local minutes are terminated to e.spire's customers. These local minutes are then multiplied by the rate per minute of use to determine the amount billed by e.spire to BellSouth for reciprocal compensation. (Talmage, Tr. 22).

e.spire's TrafficMASTER™ reports reflect a small number of individual dates for which data is lost or otherwise unavailable. (Talmage, Tr.21). The general trend is that more data is unavailable data with each passing month. (*Id.*). For the dates where data is unavailable, e.spire estimated usage by examining the immediately preceding and succeeding days, weeks, and months. (*Id.*). Section VII.D.10 of the Agreement provides that "in the event of a loss of data, both Paries shall cooperate to reconstruct the lost data and if such reconstruction is not possible, shall accept a reasonable estimate of the lost data based upon three (3) to twelve (12) months of prior usage data." In light of BellSouth's statements that it has no data to share, e.spire's approach to these minor gaps is consistent with the Agreement.

In contrast to the testimony on Ms. Talmage as to the ability of TrafficMASTER™ to correctly record traffic, BellSouth through witness Hendrix merely complained that e.spire used combined trunks (Tr. 207) and had not agreed to allow BellSouth to audit the TrafficMASTER™ reports. (Tr. 166). As to the statement that e.spire used "combined trunks" Mr. Falvey specifically rebutted that untruth (Tr. 78). e.spire utilizes separate trunk groups to receive local traffic and exchange access traffic from BellSouth. In correspondence dated March 17, 1998 (Exh. 5, JCF-6), Mr. Falvey specifically took issue with BellSouth's statement that e.spire used combined trunks for traffic and there is nothing in this record that establishes that to be a fact. Moreover, the

Interconnection Agreement states that e.spire would have to elect such combined trunks (Agreement Section V.D). Furthermore, there is no record evidence that e.spire has ever requested that its local trunk groups be converted to combined trunk groups. BellSouth's own correspondence confirms that it has routed almost entirely (97.5%) local traffic over these trunk groups.

As to whether e.spire would or would not allow an audit of the reports, this is much ado about nothing. BellSouth agreed to the use of TrafficMASTER™ and expressed a desire to "audit the process used by [e.spire] to jurisdictionalize its traffic between local and interexchange" (Exh. 5, JCF-5) but further reasserted the position that ISP traffic should not be counted toward local traffic. The audit BellSouth requested to perform, and which was refused by e.spire is not an audit of the accuracy of the numbers but merely a continuation of their erroneous assertion that ISP traffic should not be included in the totals. Moreover, e.spire filed this complaint to permit such an audit to take place in a docketed proceeding. In response to BellSouth's request, e.spire stated that an audit of the process would be premature until such time as BellSouth conceded that it owed e.spire for all local traffic (Exh. 5, JCF-6).

Critically, BellSouth has had ample opportunity to conduct discovery in this public proceeding to audit e.spire's reports. While e.spire has refused an audit to determine the jurisdictional nature of this traffic, the reports have been available in proceedings here and in Georgia for months. BellSouth has never once inquired into the reports. While e.spire trusts in the accuracy of these reports, BellSouth should not be permitted to audit these reports and delay payment to e.spire any longer. They have forfeited the opportunity — now that the public evidentiary hearings have concluded — and further audits represent an attempt to delay further the payment of its contractual obligations.

In reflecting on this situation, it is important to remember that the responsibility — the contractual obligation — under the Agreement to track usage was on BellSouth, not e.spire. It was only when BellSouth failed to comply with the Agreement that e.spire was forced to track usage. BellSouth's complaints simply have no basis.

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

SUMMARY OF POSITION: *The rate should be established at $.009, the rate provided to MFS and requested by e.spire pursuant to the MFN clause of the Agreement.*

ANALYSIS AND ARGUMENT: When e.spire and BellSouth entered into their interconnection agreement, the parties voluntarily agreed to include a Most Favorable Nations ("MFN") provision. MFN provisions in contracts are not unusual nor are they difficult to understand. Simply put, an MFN permits a party to incorporate provisions which are more favorable to the party into a contract between the parties. In some instances, the MFN works for either party but, in this case, the MFN was an option available only to e.spire and not to BellSouth.

The MFN is a cornerstone of the Agreement — indeed it is so crucial that Mr. Falvey stated that, without the provision, e.spire would not have signed the contract (Tr. 90). e.spire was one of the first carriers to sign an agreement with BellSouth and inclusion of the MFN in the e.spire agreement afforded some protection from the possibility that BellSouth would agree to more favorable terms in later agreements, thus placing e.spire in a disadvantageous position. The MFN, which constitutes several paragraphs in the Agreement ensures nondiscriminatory treatment of e.spire vis-a-vis other carriers and is especially important in an evolving environment such as existed in the telecommunications industry in 1996.

e.spire elected to exercise its right under the MFN in this instance in order to establish a rate for purposes of reciprocal compensation. The Agreement does not contain a rate per minute for reciprocal compensation. Accordingly, pursuant to the terms of the Agreement, e.spire elected to adopt the more favorable reciprocal compensation rate from BellSouth's interconnection agreement with MFS. Specifically, Section XXII.A of the Agreement, granting e.spire most favored nation status, provides:

> If as a result of any proceeding before any Court, Commission, or the FCC, any voluntary agreement or arbitration proceeding pursuant to the Act, or pursuant to any applicable federal or state law. [BellSouth becomes obligated to provide interconnection, number portability, unbundled access to network elements or any other services related to interconnection, whether or not presently covered by this Agreement] to another telecommunications carrier operating within a state within the BellSouth territory at rates or on terms and conditions more favorable to such carrier than the comparable provisions of this Agreement, then [e.spire] shall be entitled to add such network elements and services, or substitute such more favorable rates, terms or conditions for the relevant provisions of this Agreement, which shall apply to the same states as such other carrier and such substituted rates, terms or conditions shall be deemed to have been effective under this Agreement as of the effective date thereof to such other carrier.

e.spire exercised its MFN contractual rights in correspondence dated November 14, 1997, informing BellSouth that, since e.spire had not received any usage reports from BellSouth as required by the Agreement, e.spire would begin to bill BellSouth for reciprocal compensation based upon e.spire's usage reports (See issue 2). (Exh. 5, JCF-1.) e.spire also proposed an amendment to the Agreement setting the reciprocal compensation rates for Florida at $.009 per minute pursuant to the most favored nation provision of the Agreement. The reciprocal compensation rate of $.009

per minute is contained in the Partial Interconnection Agreement between MFS Communications Co., Inc. and BellSouth. (Exh. 5, JCF-3).

BellSouth did not respond to e.spire's November 14, 1997 letter. Accordingly, thus e.spire wrote to BellSouth again on the subject by letter dated December 23, 1997, and again by letter dated January 8, 1998. (Exh. 5). On January 8, 1998, BellSouth finally responded to e.spire's correspondence. (Exh. 5). In its response, BellSouth stated that it would not pay the bills because it does not believe that ISP traffic is "local traffic." (*Id.*). Moreover, BellSouth proposed a rate of $0.002 for terminating local traffic. (*Id.*). This rate was based on another rate in the Agreement, the rate for transmitting traffic, and rates afforded other ALECs. This represented a rather feeble attempt at a reverse MFN which is not permitted by the Agreement.

In this proceeding, BellSouth has attempted to shift the focus from the MFN to other topics, agreeing first, that the MFN is not available to e.spire because the parties have to negotiate a rate and secondly, that e.spire can not "pick" the MFS rate without the entire document — an argument that was wrong at the time and inapplicable now because of the decision in AT&T v. Iowa Utilities Board, ____ S. Ct. ____ 1999 WL 24568 (U.S.).

BellSouth witness Hendrix argues that, pursuant to Section VI.B of the Agreement, e.spire should have negotiated with BellSouth regarding the terms of reciprocal compensation rather than exercising its rights under the most favored nation language. However, e.spire did in fact negotiate, and the reciprocal compensation rate in the MFS Interconnection Agreement merely set the standard for that negotiation. Because e.spire was entitled to the MFS rate under its most favored nation status, e.spire would not have agreed to anything less. Nor is it likely that BellSouth would have offered to pay more. BellSouth suggests that negotiation would have allowed the parties to consider

various alternative reciprocal compensation arrangements. It is significant that in addition to these negotiations, e.spire has negotiated with BellSouth on this issue since March 1998 in the context of negotiating the parties' second interconnection agreement with no progress. BellSouth's arguments in this proceeding are not good faith differences that BellSouth raised with e.spire at the time the request was made. Rather, they are part of an ongoing rearguard action to delay payment by every argument conceivable. Likewise, to the extent BellSouth had a different interpretation of the MFN clause.

BellSouth did not reveal it at that time. Nor did BellSouth take issue with e.spire in any constructive manner. By way of example, had BellSouth stated that the MFN clause only permitted a section-by-section MFN, e.spire could have opted for that. BellSouth's complete silence on this issue has stymied any constructive progress toward agreement. The plain language of the contract requires the opposite result. The MFN applies to all interconnection services, "whether or not presently covered by this Agreement." That includes the transport and termination of local traffic. and there is no contrary limiting language anywhere else in the contract.

Had BellSouth desired to negotiate such an arrangement, however, it could have made such a suggestion or counterproposal in response to e.spire's correspondence exercising its most favored nation right. Instead, BellSouth's only response was to counteroffer with a rate of $.002 per minute -- less than a quarter of the rate e.spire was entitled to under the most favored nation provision. The Commission should reject BellSouth's argument that the provision for negotiation in the reciprocal compensation section of the Agreement somehow excludes that section from most favored nation treatment. Nowhere in the Agreement is such an exclusion made express.

BellSouth witness Hendrix also claims that the Eighth Circuit's decision in Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) precludes e.spire from adopting a single rate from the MFS Interconnection agreement without adopting the entire agreement. (Hendrix, Tr. 143). That position is no longer tenable in light of the recent decision by the U.S. Supreme Court in AT&T v. Iowa Utilities Board, ____ S. Ct. ____ 1999 WL 24568 (U.S.). In addressing the "pick and choose" rule, the Supreme Court said "the FCC's interpretation is not only reasonable it is the most readily apparent." The "pick and choose" rule of the FCC was reinstated by the Supreme Court. The rule promulgated by the FCC provides:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection service, or network element only to those requesting carriers serving a comparable class of subscriber or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

Notwithstanding the Supreme Court decision, BellSouth's argument concerning Iowa Utilities is further flawed because e.spire's adoption of the MFS reciprocal compensation rate under the most favored nation provision of the Agreement is not made pursuant to 47 U.S.C. § 252(i) or FCC rule 47 C.F.R. § 51.809. e.spire's Agreement with BellSouth was signed on July 25, 1996, two weeks prior to the issuance of the FCC's rule in the August 8, 1996 First Report and Order. The most favored nation language in e.spire's Agreement is the result of voluntary contractual negotiations between e.spire and BellSouth. In light of the fact that e.spire was one of the earlier CLECs to enter an interconnection contract with BellSouth, it was reasonable for e.spire to reserve

its right to adopt more favorable terms that BellSouth later offered to other CLECs. BellSouth entered the MFS Interconnection Agreement on August 10, 1996, after BellSouth signed the Agreement with e.spire. e.spire has done nothing more than to exercise its contractual rights which were agreed to by BellSouth.

BellSouth would want this Commission to consider e.spire as at fault in this case. Nothing could be further from the truth, e.spire has never concealed the fact it was exercising its rights under the MFN; e.spire has never made a secret of the fact that the company expected compensation for all local traffic. By contrast, BellSouth has delayed resolution of this issue because BellSouth owes e.spire millions of dollars. The longer BellSouth can delay or avoid payment, the better for BellSouth. This is demonstrated throughout this case. For example, prior to the filing of e.spire's Complaint, BellSouth did not inform e.spire that it disagreed with e.spire's most favored nation request. BellSouth's correspondence confirms that BellSouth has, until this proceeding, completely ignored e.spire's repeated most favored nation request. (Exh. 5). If there was a legitimate difference in legal interpretation, BellSouth did not make an effort to negotiate this issue in good faith with e.spire. By ignoring e.spire's repeated most favored nation requests, BellSouth forced e.spire to come to the Commission for relief. Although silent on the most favored nation issue in correspondence, BellSouth now raises this legal issue for the first time in this proceeding. Likewise, BellSouth raised for the first time at hearing that e.spire requested a reciprocal compensation rate for Florida prior to March 1998 when the 2 million minute mark was reached. Yet e.spire entered extensive negotiations — including written BellSouth proposals — long after March 1998. these negotiations have not proven fruitful due to BellSouth's refusal to recognize e.spire's MFN requests.

The extremes to which BellSouth will go are highlighted with BellSouth's attempts to avoid application of the most favored nation provisions of the Agreement through a semantics exercise. Mr. Hendrix concludes, that because there is no reciprocal compensation rate in the agreement, e.spire's attempt to adopt the MFS rate is not the addition of a new service or a substitution of more favorable rates, term and conditions as contemplated in the MFN. (Hendrix, Tr. 144). Mr. Hendrix's strained reading of the most favored nation provision is contrary to the plain meaning of that language. Whether viewed as adding a new service and associated rate where none existed, or substituting a rate of $.009 for a rate of $0.00, the most favored nation language plainly allows e.spire to substitute or add the rate in the MFS Interconnection Agreement to the Agreement. The absurdity of this position is clear from consideration of a hypothetical. Assuming Mr. Hendrix is correct and the MFN is not available now, e.spire could have agreed to the $.002 rate offered by BellSouth on day 1, and then on day 2 exercised the MFN of choice. It simply is not necessary to have done this however, e.spire did not "circumvent" anything by activating the MFN. Rather e.spire exercised their right under their agreement.

The Commission should recognize BellSouth's efforts for what they are — a clear attempt to avoid their contractual obligations. Mr. Hendrix plainly explained why BellSouth does not want to live up to their agreement — it will cost them money. That may not be acceptable to BellSouth but they are bound by their contractual agreements just as are other parties, and the Commission should not allow them to avoid their obligations in this case.

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

SUMMARY OF POSITION: *The Commission should require BellSouth to comply with its agreement and recognize ISP traffic as local, establish a rate of $.009 and require BellSouth

to 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.*

ANALYSIS AND ARGUMENT: e.spire has requested that the Commission:

(a) Determine that telephone calls placed within the same local calling area from a BellSouth end user to an e.spire ISP end user qualify as "local traffic" as defined in the Agreement;

(b) Establish the rate for the transport and termination of local traffic between e.spire and BellSouth at $.009 pursuant to the Most Favored Nations provision of the Agreement;

(c) Order BellSouth to pay e.spire all amounts due, with interest, and owing in the future to e.spire pursuant to the Agreement;

(d) Issue an order directing BellSouth to provide reports of local traffic usage to e.spire;

(e) Order BellSouth to cease and desist from continuing to take the action described herein;

(f) Order attorneys fees as explicitly required by Section XXVA of the Agreement ("The Party which does not prevail shall pay all reasonable costs of the arbitration or other formal complaint proceeding, including reasonable attorney's fees and other legal expenses of the prevailing Party");

(g) Order such other relief as the Commission deems appropriate.

e.spire exercised its MFN rights under the Agreement and BellSouth should have begun paying reciprocal compensation at that time. e.spire has provided invoices to BellSouth since the threshold was exceeded and should be required to pay those invoices to BellSouth. As Mr. Falvey

explained, the amount due e.spire is a determinable number because the period of time is a fixed period (Tr. 115). BellSouth has refused to pay amounts owing to e.spire and continued delay simply rewards BellSouth to the detriment of e.spire.

The Commission should also require BellSouth to reimburse e.spire for costs associated with TrafficMASTER™ and attorneys fees pursuant to the terms of the contract. Had BellSouth complied with the Agreement, this complaint would not have been necessary.

Dated this 8th of February, 1999.

Respectfully submitted,

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