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February 19, 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

RECORDS AND REPORTING
FEB 19 PM 11:39

Re: Docket No. 990036-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of e.spire Communications, Inc. are an original and fifteen copies of e.spire's Response to Motion to Dismiss 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.
Norman H. Horton, Jr.

ACK _____

AFA _____ NHH/amb

APP _____ Enclosure

cc: James C. Falvey, Esq.
Parties of Record

CF *Falvey*

CFR _____

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FPSC-RECORDS-REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of e.spire Communications, Inc. for)	
Enforcement of its Interconnection Agreement)	Docket No. 990036-TP
With BellSouth Telecommunications, Inc.)	Filed: February 19, 1999
_____)	

RESPONSE TO MOTION TO DISMISS

Comes now American Communications Services, Inc. - Jacksonville, Inc., d/b/a e.spireTM Communications, Inc. ("e.spire"), and files this Response to the Motion to Dismiss filed by BellSouth Telecommunications, Inc. ("BellSouth"). As basis e.spire would show:

1. On January 8, 1999, e.spire filed a complaint requesting in part, that the Commission direct BellSouth to make available to e.spire particular combinations of elements as described in the Complaint. BellSouth, on January 28, filed a Motion to Dismiss asserting that the claims for relief are barred because similar claims are pending in an arbitration proceeding and that e.spire has no contractual right to relief.

2. In disposing of a Motion to Dismiss the Commission must assume the facts in the complaint to be true. Connolly v. Sebaco, Inc. 89 So. 2d 482 Fla. (1956). The Complaint puts before the Commission a dispute which requires resolution. BellSouth has not submitted any basis warranting dismissal of the complaint; they have merely taken exception to the pleading and the Motion should be denied.

I. **e.spire's Claims For Prospective Relief Are Not Barred.**

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FPSC-RECORDS/REPORTING

3. BellSouth asserts that e.spire's claims for prospective relief in this proceeding are barred under Florida law because such claims are also pending in e.spire's petition for arbitration before the Commission under the Act.

4. The e.spire - BellSouth Interconnection Agreement, as amended, was approved by this Commission on December 12, 1996 (the "Agreement"). The term of the Agreement was two years beginning September 1, 1996. Article XVII.C of the Agreement provides that the parties will continue to exchange traffic pursuant to the terms and conditions of the Agreement pending the effectiveness of a new agreement, whether the new agreement is reached by arbitration or negotiation between the parties. The terms, conditions and prices of the new agreement that are ultimately ordered by the Commission, or negotiated by the parties will be retroactive to September 1, 1998. Thus, as of today, e.spire and BellSouth are operating under the terms and conditions of their original Agreement.

5. The terms of the original Agreement, that are in effect today, provide that e.spire can order and provision UNE combinations as specified by e.spire. Today, BellSouth is not complying with these provisions of the Agreement. The purpose of the e.spire's complaint is to obtain relief today under the currently effective Agreement between the parties. e.spire is being injured today, and seeks relief for such damages today. e.spire should not have to wait for the

outcome of its arbitration proceeding against BellSouth to obtain relief that it is entitled to today under the terms of the currently effective Agreement between the parties.

6. The claims are different, but even if the Commission deems them the same, the remedy is not dismissal but, as BellSouth acknowledges, abatement of the complaint. Dhondy v. Schimpeler, 528 So.2d 403 (Fla. 3d DCA 1988). BellSouth would have the Commission dismiss the complaint thus depriving e.spire of the opportunity to present the case to the PSC and this the Commission should not permit.

II. Agreement Specifically Provides for UNE Combinations.

7. Despite BellSouth's assertions that the Agreement does not provide e.spire the right to purchase UNE combinations, the Agreement at Article IV.C.3 - C.5 specifically provides for UNE combinations as follows:

C.3 "Particular combinations of elements, hereafter referred to as combinations, identified and described by ACSI [e.spire] can be ordered and provisioned as combinations, and not require the enumeration of each element within that combination in each provisioning order, consistent with OBF or other mutually agreed upon procedures.

C.4 Appropriate ordering/provisioning codes will be established for each identified combination, consistent with OBF or other mutually agreed upon procedures.

C.5 When combinations are ordered where the elements are currently interconnected and functional, those elements will remain interconnected and functional (except for the integrated SLC)."

7. The fundamental flaw with BellSouth's motion to dismiss is that it completely ignores the above quoted contract language as if it does not exist. Accordingly, for this reason alone, BellSouth's motion to dismiss must fail.

A. Collocation Provisions of Agreement Do Not Subsume UNE Combination Provisions.

8. BellSouth's arguments that e.spire cannot purchase UNE combinations under the Agreement because the Agreement provides for physical interconnection to BellSouth's network via collocation is misleading and misplaced. BellSouth would have the Commission give absolutely no effect to Articles IV.C.3 - C.5 of the Agreement, which specifically provide that e.spire may order UNE combinations.

9. Articles IV.B.1, B.2 and B.4, which BellSouth relies on, deal with BellSouth's obligations to provide for collocation, not UNE combinations. The essence of BellSouth's argument is simply to divert attention from the articles of the Agreement that this complaint is based on. Florida case law provides that specific language in a contract prevails over general terms. Bystra v. Federal Land Bank of America, 90 So. 478 (Fla. 1921); Raines v. Palm Beach Leisureville Community Assoc., 317 So.2d 814 (Fla. 4th DCA 1975).

10. The Agreement, like the 1996 Telecommunications Act (the "Act"), imposes separate and distinct unbundling and collocation obligations on BellSouth. Articles IV.B.1, B.2 and B.4 of the Agreement deal with BellSouth's obligations to provide physical collocation to e.spire. Whereas, Articles IV.C.3 - C.5 address BellSouth's obligation to provide certain

unbundled element combinations to e.spire upon request. The obligations are separate and distinct.

11. BellSouth's reading of the Agreement is contrary to its plain terms. Under the Agreement, BellSouth has an obligation to provide e.spire with UNE combinations in addition to BellSouth's separate obligation under the Agreement to allow e.spire to interconnect its network with BellSouth's network through collocation. The plain language of the Agreement and general rules of contract interpretation support the view that providing UNE combinations and collocation are separate and distinct obligations of BellSouth under the Agreement.

12. Subsections B.1, B.2, B.4 and C.3, C.4, C.5 of Article IV of the Agreement work together to describe how e.spire may interconnect with BellSouth's network and how e.spire may order and provision UNE combinations purchased from BellSouth. By its plain terms, Articles IV.B.1, B.2 and B.4 of the Agreement require BellSouth to permit e.spire to place equipment on BellSouth's premises to interconnect with the BellSouth network. Articles IV.C.3 - C.5 of the Agreement place a separate obligation on BellSouth to provide e.spire with the ability to order and provision particular combinations of elements identified and described by e.spire to provide finished telecommunications service. These separate subsections of the same Article of the Agreement work together to outline BellSouth's obligation to permit e.spire to interconnect with BellSouth's network and to lease portions of BellSouth's network to provide end-to-end service.

13. Nowhere in Articles IV.C.3 - C.5, which provide e.spire the right to purchase UNE combinations, is the word "collocation" mentioned. Indeed, BellSouth's collocation obligations under the Agreement are substantively different than its obligations to provide e.spire

with UNE combinations. Collocation permits e.spire to physically connect its network with BellSouth's network. Beyond linking up networks, the UNE combination provisions enable e.spire to actually order and provision certain combinations of elements purchased from BellSouth's network to provide telecommunications service. Thus, any claim by BellSouth that its Articles IV.B.1,B.2 and B.4 collocation obligations subsume completely its Articles IV.C.3 - C.5 obligations to provide UNE combinations runs contrary to the plain meaning of the Agreement.

14. Moreover, support for this interpretation is found in the FCC's repeated rejections of BellSouth's interLATA long distance applications. In its most recent rejection,¹ the FCC held that "BellSouth can not limit a competitive carrier's choice to collocation as the only method for gaining access to and recombining network elements."² The FCC found that BellSouth's offering in Louisiana of collocation as the sole method for combining network elements is inconsistent with section 251(c)(3) of the Act.³

B. Parties Agreed to Rates UNE Combination Rates Under the Agreement.

¹ Memorandum Opinion and Order, *In the Matter of Application of BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121 (October 13, 1998).

² Louisiana II Decision, paras. 164 - 168.

³ Id. at para. 168 ("Nothing in the language of section 251(c)(3) limits a competing carrier's right of access to unbundled network elements to the use of collocation arrangements.") See also para. 169 ("Our rules implementing sections 251(c)(3) also make clear that incumbent LECs can not offer collocation as the sole method for gaining access to and combining unbundled network elements.").

15. As its second contractual basis for its motion to dismiss, BellSouth states that e.spire and BellSouth have not agreed to the rate that e.spire would pay for a combined loop and transport UNE combination. Again, BellSouth ignores a fundamental provision of the Agreement, which defeat its motion to dismiss. Article XXII.A of the Agreement, the “Most Favorable Provisions,” provides [emphasis added]:

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 ACSI [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.

16. This provision of the Agreement allows e.spire to incorporate into its Agreement with BellSouth more favorable provisions of interconnection agreements that BellSouth entered with other telecommunications carriers following the execution of the e.spire Agreement. The rates, terms or conditions so adopted by e.spire into its Agreement are deemed effective as of the effective date to the carrier in the other agreement.

17. Through the Agreement’s most favorable provisions, e.spire is in the process of requesting a formal amendment to the Agreement to add an unbundled transport rate contained in

an interconnection agreement between BellSouth and another carrier. This rate will be effective retroactive back to the effective date of the other agreement.

18. Whether viewed as adding a new service and associated rate where none existed, or substituting a rate of \$X for a rate of \$0.00, the most favorable provisions language plainly allows e.spire to substitute or add an unbundled transport rate from an interconnection agreement between BellSouth and another carrier. Accordingly, e.spire's complaint cannot be dismissed based on BellSouth's assertion that there is no current rate in the Agreement for unbundled transport.

19. Moreover, prior to filing the instant complaint, BellSouth agreed with e.spire that pricing for unbundled transport would apply if e.spire ordered unbundled transport from BellSouth. *See Affidavits of James C. Falvey and Mark Sadler of e.spire attached hereto.* BellSouth agreed that such pricing would apply across the BellSouth region. At this time, BellSouth made no mention of need for e.spire to amend its interconnection agreement in order to purchase unbundled transport in Florida, or any other state.

20. BellSouth also agreed that BellSouth would accept orders for unbundled transport in combination with unbundled loops in each state throughout the BellSouth region. e.spire ordered such combinations at a DS-1 transmission level. *See Affidavit of David White of e.spire attached hereto.* Upon information and belief, e.spire's combination orders, including unbundled transport, were provisioned by BellSouth, including at least one order in Florida. These orders are currently in place as "live", operational circuits.

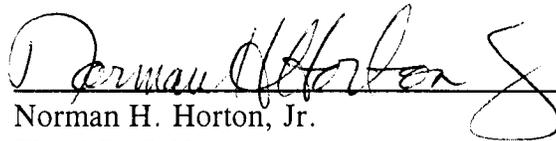
21. However, e.spire experienced difficulty in getting these orders processed by BellSouth. These difficulties stemmed from the fact that e.spire had to order loops and transport

from separate BellSouth ordering centers, and e.spire had to coordinate these orders through the two separate ordering centers. This coordination unduly delayed the provisioning of these orders, made the ordering process prohibitively expensive for e.spire, and rendered it impossible for e.spire to place such orders on a routine basis.

22. Because BellSouth expressly agreed to provide e.spire unbundled pricing for unbundled transport in combination with unbundled loops as a UNE combination under the Agreement, BellSouth should not now be heard to complain about having to adhere to that Agreement.

WHEREFORE, for the reasons given e.spire requests the Motion to Dismiss be denied.

Respectfully submitted,



Norman H. Horton, Jr.

Floyd R. Self

Messer, Caparello & Self, P.A.

215 S. Monroe Street, Suite 701

P.O. Box 1876

Tallahassee, FL 32302-1876

(850) 222-0720

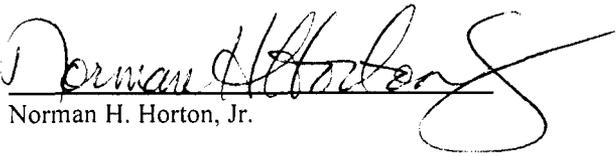
Attorneys for e.spire Communications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the e.spire Communications, Inc.'s Response to Motion to Dismiss in Docket No. 990036-TP have been served upon the following parties by Hand Delivery (*) and/or U. S. Mail this 19th day of February, 1999.

Will Cox, Esq.*
Division of Legal Services, Room 370
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Ms. Nancy White
c/o Ms. Nancy Sims
BellSouth Telecommunications, Inc.
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301


Norman H. Horton, Jr.

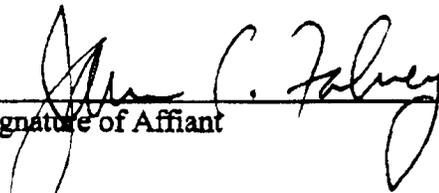
AFFIDAVIT

THIS INSTRUMENT HEREBY ACKNOWLEDGES that the undersigned, James C. Falvey, ("affiant"), is of legal age, and does hereby swear and affirm that the following is true and accurate, to the best of his knowledge, under penalty of perjury:

1. I, James C. Falvey, am the Vice President- Regulatory Affairs for e.spire Communications, Inc.
2. Prior to the filing of the complaint in this proceeding I participated on a conference call with William French, Vice President, Interconnection Services, for BellSouth.
3. On that call, Mr. French agreed that unbundled pricing for unbundled transport would apply if e.spire ordered unbundled transport from BellSouth. Mr. French agreed that such pricing would apply across the BellSouth region. Mr. French made no mention of a need for e.spire to amend its interconnection agreement in order to purchase unbundled transport in Florida, or any other state.
4. Mr. French also agreed that BellSouth would accept orders for unbundled transport in combination with unbundled loops in each state throughout its region.

5. Upon information and belief, e.spire did, in fact, order such combinations, including unbundled transport from BellSouth in Florida.
6. Upon information and belief, e.spire's combination orders, including unbundled transport, were, in fact, provisioned by BellSouth, including at least one order in Florida. These orders are currently in place as "live", operational circuits.

Signed to this 19th day of February, 1999.



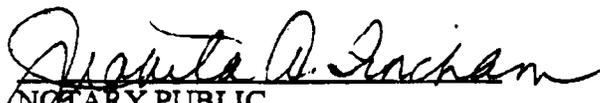
Signature of Affiant

James C. Falvey

Print Name of Affiant

STATE OF Maryland
COUNTY OF Anne Arundel

In Annapolis Junction on the 18th day of February, 1999, before me, a Notary Public in and for the above state and county, personally appeared James C. Falvey, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he or she executed said instrument for the purposes therein contained as his or her free and voluntary act and deed.



NOTARY PUBLIC

JUANITA A. FINCHAM
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires September 12, 2001

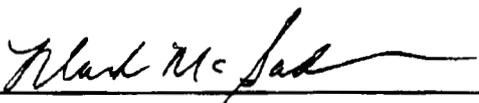
AFFIDAVIT

THIS INSTRUMENT HEREBY ACKNOWLEDGES that the undersigned, Mark Sadler, ("affiant"), is of legal age, and does hereby swear and affirm that the following is true and accurate, to the best of his knowledge, under penalty of perjury:

1. Prior to the filing of the complaint in this proceeding I participated on a conference call with William French, Vice President, Interconnection Services, for BellSouth.
2. On that call, Mr. French agreed that unbundled pricing for unbundled transport would apply if e.spire ordered unbundled transport from BellSouth. Mr. French agreed that such pricing would apply across the BellSouth region. Mr. French made no mention of a need for e.spire to amend its interconnection agreement in order to purchase unbundled transport in Florida, or any other state.
3. Mr. French also agreed that BellSouth would accept orders for unbundled transport in combination with unbundled loops in each state throughout its region.
4. Upon information and belief, e.spire did, in fact, order such combinations, including unbundled transport from BellSouth in Florida.

5. Upon information and belief, e.spire's combination orders, including unbundled transport, were, in fact, provisioned by BellSouth, including at least one order in Florida. These orders are currently in place as "live", operational circuits.

Signed to this 18th day of February, 1999.



Signature of Affiant

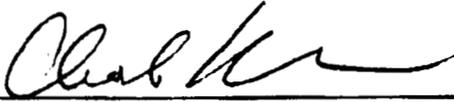
Mark Sadler

Print Name of Affiant

STATE OF Maryland
COUNTY OF Anne Arundel

In Annapolis Junction, on the 18th day of February, 1999, before me, a Notary Public in and for the above state and county, personally appeared Mark Sadler, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he or she executed said instrument for the purposes therein contained as his or her free and voluntary act and deed.

CHARLES H.N. KALLENBACH
Notary Public, State of Maryland
Qualification Anne Arundel County
Commission Expires 5/16/00



NOTARY PUBLIC

AFFIDAVIT

THIS INSTRUMENT HEREBY ACKNOWLEDGES that the undersigned, David White, ("affiant"), is of legal age, and does hereby swear and affirm that the following is true and accurate, to the best of his knowledge, under penalty of perjury:

1. Prior to the filing of the complaint in this proceeding, as the e.spire Vice President responsible for Provisioning, I worked with BellSouth to order combinations of unbundled transport and unbundled loops at a DS-1 transmission level.

2. I supervised the ordering of these combinations from BellSouth. e.spire experienced difficulty in getting these orders processed by BellSouth. These difficulties stemmed from the fact that e.spire had to order loops and transport from separate ordering centers, and e.spire had to take an active role in pursuing the coordination of these orders through the two separate ordering centers. This coordination unduly delayed the provisioning of these orders, made the ordering process prohibitively expensive for e.spire, and rendered it impossible for e.spire to place such orders on a routine basis.

3. The orders in question included unbundled transport, in combination with unbundled loops. The unbundled transport piece of these orders, with the difficulties discussed above, was placed by e.spire, accepted by BellSouth, provisioned by BellSouth, turned up by BellSouth and, to my knowledge, continues to be an operational, "live" circuit today.

4. At no point throughout this process did BellSouth state that e.spire needed to amend its Interconnection Agreement in order to order and turn up unbundled transport.

Signed to this 19th day of February, 1999.



Signature of Affiant

David White

Print Name of Affiant

STATE OF Maryland
COUNTY OF Anne Arundel

In Annapolis Junction on the 18th day of February, 1999, before me, a Notary Public in and for the above state and county, personally appeared David White, known to me or proved to be the person named in and who executed the foregoing instrument, and being first duly sworn, such person acknowledged that he or she executed said instrument for the purposes therein contained as his or her free and voluntary act and deed.


NOTARY PUBLIC

JUANITA A. FINCHAM
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires September 12, 2001