



Public Service Commission

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RECORDS AND REPORTING

DATE: 03/04/99

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYLOR)

FROM: DIVISION OF COMMUNICATIONS (FAVORS, ^{CRF}ILERI)
DIVISION OF LEGAL SERVICES (B. KEATING, ^{MSBK}WATTS) ^{CBV}

RE: DOCKET NO. 981008-TP - 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 BELL SOUTH TELECOMMUNICATIONS, INC. REGARDING RECIPROCAL COMPENSATION FOR TRAFFIC TERMINATED TO INTERNET SERVICE PROVIDERS.

AGENDA: 03/16/99 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF-ISSUE 5-PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\981008.RCM

TABLE OF CONTENTS

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?.....4

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?.....14

ISSUE 3:

In this instance, how should the reciprocal compensation rate, if any, be determined under the parties' Interconnection Agreement?.....18

ISSUE 4:

What action, if any, should the Commission take?.....22

ISSUE 5:

Should the Commission require the parties to use the methodology described in the staff analysis to estimate the number of minutes originated from e.spire and terminated on BellSouth's system? (PROPOSED AGENCY ACTION).....25

ISSUE 6:

Should this docket be closed?.....27

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 requested 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 was set for an administrative hearing on January 20, 1999.

Both parties presented testimony on traffic to Internet Service Providers (ISP) as it relates to their Interconnection Agreement. Staff notes that the generic issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation has been discussed in this recommendation only insofar as necessary to show what the parties might reasonably have intended at the time the parties entered into the contract.

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?

RECOMMENDATION: Yes. ISP traffic is included in the definition of "local traffic" as that term is defined in the Interconnection Agreement between BellSouth and e.spire. The preponderance of the evidence does not show that either party intended to exclude ISP traffic from the definition of "local traffic" during negotiation of their Interconnection Agreement. **(FAVORS)**

POSITION OF THE PARTIES

E. SPIRE: Yes. Section VI.A 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 service 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 holdings 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 ANALYSIS: This issue seeks to determine whether or not calls to ISPs are included in the term "local traffic" as defined in the Interconnection Agreement between the parties. The Interconnection Agreement defines local traffic as follows:

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. (BR 3)

Section VI(B) of the agreement reads as follows:

Compensation

The Parties agree that BellSouth will track the usage for both companies for the period of the Agreement. BellSouth will provide copies of such usage reports to [e.spire] on a monthly basis. For purposes of this Agreement, the Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such an event, the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis. (TR 41)

If calls made to ISPs are included in the term "local traffic," these calls will be included in determining whether the difference in minutes of use for terminating local traffic has exceeded two million minutes per state on a monthly basis. If the two million minute threshold has been met, the parties must then negotiate a traffic exchange agreement. Therefore, the inclusion of calls made to ISPs could have an impact in determining whether the two million minute threshold has been met.

Both parties offer arguments to address the generic issue of whether ISP traffic should be treated as local or interstate.

e.spire witness Falvey references the FCC Universal Service Order and states that the FCC views dial-up calls to ISPs as consisting of two components: "telecommunications" and "information." (TR 43) Witness Falvey also states that a call placed over the public switched network normally is considered "terminated" when it is delivered to the exchange bearing the called telephone number. (TR 44) Witness Falvey notes that the customers originating the calls to the ISPs over BellSouth's local network order service from BellSouth pursuant to local exchange tariffs, and that BellSouth bills the calls placed by its customers to ISPs as local calls. (TR 44)

BellSouth witness Hendrix explains that a call to an ISP does not "terminate" at the Internet local Point of Presence (POP). (TR 145-147) Witness Hendrix states that this traffic is jurisdictionally interstate. (TR 147) Witness Hendrix further cites the FCC 1987 Notice of Proposed Rulemaking in CC Docket No. 87-215 in which the FCC proposed to lift the ISP access charge exemption, and opines that if calls to ISPs were local, there would be no need to lift an access charge exemption. (TR pp. 150-152)

Staff notes that these same arguments have been presented to this Commission in earlier dockets regarding reciprocal compensation for ISP traffic which involved BellSouth and other parties. The Commission addressed these arguments in Order No. PSC-98-1216-FOF-TP. (EXH 1, Item 2) Nevertheless, staff emphasizes that there is no need for the commission to visit the issue of whether the jurisdiction of ISP traffic is local or interstate. That matter is currently pending before the FCC. The Commission need only determine the intent of the parties regarding ISP traffic during the negotiation of their Agreement, in view of the state of the law at that time¹.

¹As noted by the Commission in Order No. PSC-98-1216-FOF-TP, issued September 15, 1998, BellSouth itself has argued in the past that service to an ISP should be treated ". . . like any other local exchange service." Order No. PSC-98-1216-FOF-TP at page 15, citing Order 21815, issued September 5, 1989, in Docket No. 880423-TP. In Order 21815, the Commission agreed with BellSouth's position that

calls should continue to be viewed as local exchange traffic terminating at the ESP's [Enhanced Service Provider's] location.

Order at p. 24.

BellSouth witness Hendrix states that BellSouth would have had no reason to consider ISP traffic to be anything other than jurisdictionally interstate traffic when it negotiated these agreements. (TR 156) Witness Hendrix further states:

Further, had BellSouth understood that e.spire considered ISP traffic to be local traffic subject to reciprocal compensation, the issue would have been discussed at length. During the negotiations of the agreement with e.spire, as well as with any ALEC, no party questioned the local traffic definitions referenced in the GSST and utilized in the agreements or whether ISP traffic should be considered local traffic. (TR 156)

e.spire witness Falvey counters:

It was not incumbent upon e.spire to list all types of traffic that would be considered local. The purpose of a general definition, like the definition of local traffic in e.spire's Interconnection Agreement, is to obviate the necessity to provide an exhaustive list of services. Indeed, e.spire did not list ISP traffic as local traffic. Nor did it list as included in the definition of local traffic other types of high volume call recipients, such as calls to airline reservation desks, call-in centers, radio stations, or ticket companies, as local calls. There was no need to provide an exhaustive list of types of local calls because a general definition of local calls was included in the Agreement. (TR 79)

BellSouth witness Hendrix states that e.spire should have known BellSouth's position on ISP traffic because he negotiated the agreement with Mr. Richard Robertson of e.spire. Witness Hendrix notes that Mr. Robertson was an employee of BellSouth just months before negotiating the agreement for e.spire, and was well aware of BellSouth's policies. (TR 191) Staff would note that Mr. Robertson was not a witness in this case and did not present any evidence.

DOCKET NO. 981008-TP.
DATE: 03/04/99

Therefore, staff can not make any determinations as to Mr. Robertson's knowledge or intentions.

Witness Hendrix states that BellSouth advised the ALEC industry by letter dated August 12, 1997, that pursuant to current FCC rules regarding enhanced service providers (ESPs), of which ISPs are a subset, ISP traffic is jurisdictionally interstate, not local. The letter also stated that due to this fact, BellSouth will neither pay nor bill reciprocal compensation for this traffic. (TR 142-143) BellSouth, however, did not have a method to track ISP traffic at the time this letter was sent. (Hendrix TR 207)

e.spire witness Talmage states that e.spire and BellSouth have established multiple trunk groups that carry exclusively local traffic, and that these trunk groups have been designated as local trunk groups pursuant to Section V.D.1.A of the Interconnection Agreement. (TR 20) Witness Talmage states that the minutes of use billed to BellSouth for reciprocal compensation include ISP traffic to the extent that this traffic was carried over the local trunks. (TR 25)

BellSouth witness Hendrix states that e.spire was not only using strictly local trunks, but also trunks that carry interlata traffic and other types of traffic. (TR 207) Witness Hendrix references a letter dated January 8, 1998, from BellSouth to e.spire, which reads in part:

...during our meeting in November, you indicated that ACSI used combined trunks for its traffic. In order to ensure that the 2 million minute threshold has been reached, BellSouth would like to audit the process used by ACSI to jurisdictionalize its traffic between local and interexchange on these combined trunks. (TR 167)

e.spire witness Talmage, however, states that the usage reports generated by e.spire to bill BellSouth for reciprocal compensation were based on calls terminated to trunk groups designated to carry exclusively local traffic. (TR 20)

Conclusion

As emphasized by the Commission in Order No. PSC-98-1216-FOF-TP, circumstances that existed at the time the contract was entered into by BellSouth and e.spire, and the subsequent actions

of the parties should be considered in determining what the parties intended. In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953), the Florida Supreme Court referred to Contracts, 12 Am.Jur. § 250, pages 791-93, for the general proposition concerning contract construction:

Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language . . . Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred . . . An interpretation which is just to both parties will be preferred to one which is unjust.

In Order No. PSC-98-1216-FOF-TP, the Commission also agreed that, in the construction of a contract, the circumstances in existence at the time the contract was made are evidence of the parties' intent. Triple E Development Co. v. Floridagold Citrus Corp., 51 So.2d 435, 438, rhq. den. (Fla. 1951). What a party did or omitted to do after the contract was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rhq. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958). See Order No. PSC-98-1216-FOF-TP at p. 16. (EXH 1, Item 2)

Staff believes that the evidence of record does not indicate that the intent of the parties during negotiation of their Interconnection Agreement was to exclude ISP traffic from the definition of "local traffic". In determining the parties' intent when the Interconnection Agreement was entered into, staff examined the parties' actions subsequent to entering into the agreement. While BellSouth witness Hendrix unequivocally states that it was not BellSouth's intent for ISP traffic to be subject to reciprocal compensation, the evidence does not substantiate this claim. (TR

145) First, BellSouth did not have the capability of tracking traffic to ISPs. (Hendrix TR 207) In fact, BellSouth currently can only track minutes of use to ISPs if it has the ten-digit terminating numbers for the ISPs. Otherwise, BellSouth can only make an estimate based on call holding times. (EXH 3) Further, witness Hendrix states that e.spire cannot distinguish on a call-by-call basis whether the call is an ISP call. He thought, however, that e.spire should be able to do so by using the NXX associated with the ISP. (TR 211) Staff finds it difficult to reconcile how either party intended to exclude ISP traffic from local traffic when neither party had a means to track such traffic. Further, BellSouth witness Hendrix admits that ISP traffic was not discussed during negotiations. (TR 194)

Second, BellSouth notified the ALEC industry by letter dated August 12, 1997 that it would neither pay nor bill reciprocal compensation for calls to ISPs. (TR pp. 142-143) This was more than a year after BellSouth entered into the Interconnection Agreement with e.spire. Further, if BellSouth did not have a means of tracking this traffic, they could not have known whether they were paying or billing for this traffic. This situation is identical to that addressed by the Commission in Order No. PSC-98-1216-FOF-TP, where the Commission stated:

This is perhaps the most telling aspect of the case. BellSouth made no effort to separate out ISP traffic from its own bills until the May-June 1997 time frame. . . . Prior to that time, BellSouth may have paid some reciprocal compensation for ISP traffic, and based on their position that the traffic should be treated as local, this is as one would expect. In some cases the contracts were entered into more than a year before this time period. (EXH 1, Item 2)

In addition, BellSouth treats its own ISP traffic as local traffic. e.spire witness Falvey states:

BellSouth consistently has: (1) charged all such calls under its local tariffs; (2) treated such calls as local in separations reports and state rate cases; (3) treated such calls as local when they are exchanged among adjacent ILECs; and (4) routed such calls to e.spire over interconnection trunks reserved for local calling. (TR 59)

These claims went largely unrefuted by BellSouth except for witness Hendrix's unsubstantiated statements that e.spire uses combined trunks for its usage reports. (TR 143)

e.spire points out in its brief that Attachment B of the Interconnection Agreement between BellSouth and e.spire defines local traffic as:

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. (BR 3)

e.spire further points out that this definition is the same as found in the Intermedia-BellSouth Agreement that this Commission addressed in Order No. PSC-98-1216-FOF-TP. Staff agrees. In regard to the Intermedia-BellSouth Agreement, this Commission stated "[t]he evidence shows that no exceptions were made to the definition of local traffic to exclude ISP traffic in the Intermedia-BellSouth Agreement." (EXH 1, Item 2) After reviewing similar arguments and actions of the parties in this proceeding, staff also believes that no exceptions were made by these parties to exclude ISP traffic from the definition of local traffic.

Finally, this Commission found that:

. . . [W]hile there is some room for interpretation, we believe that the current law weighs in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement. We also believe that the language of the Agreement itself supports this view. We therefore conclude on the basis of the plain language of the Agreement and of the effective law at the time the Agreement was executed, that the parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls; else one would expect the definition of local calls in the Agreement to set out an explicit exception. (Order No. PSC-98-1216-FOF-TP, p.20)

BellSouth argues in its brief that the Commission's decision noted that the FCC had not yet ruled on the jurisdictional nature of ISP traffic, and that it has now done so. (BR 26) BellSouth states that by allowing GTE to file its ADSL tariff at the federal level and treating it as part of an end-to-end interstate communication, the FCC also determined that ISP Internet traffic has always been interstate traffic. (BR 26) Staff must point out, however, that the FCC also said as part of that Order:

We emphasize that we decide here only the issue designated in our investigation of GTE's federal tariff for ADSL service, which provides specifically for a dedicated connection, rather than a circuit-switched, dial-up connection, to ISPs and potentially other locations. This issue involves the applicability of Commission rules and precedent regarding the provision by one incumbent local exchange carrier (LEC) of special access service. This 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, 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 inter-carrier 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 sections 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 a prospective basis, pursuant to existing interconnection agreements, state

arbitration decisions, and federal court decisions. We therefore intend in the next week to issue a separate order specifically addressing reciprocal compensation issues. (FCC 98-292, ¶2)

The FCC explicitly stated that the GTE ADSL Order does not address the subject at issue in this proceeding. Nevertheless, as previously indicated, staff recommends that the Commission need not decide what the state of the law is currently with regard to reciprocal compensation for traffic to ISP. Instead, the Commission must decide what the parties intended to address in their agreement. The state of the law at the time the parties entered into their agreement is a factor that should be considered in reaching that decision, as well as the plain language of the contract. (BR e.spire 4-6) Staff agrees with e.spire that ISP traffic was considered local traffic at the time the parties executed the agreement. (BR e.spire 6)

Based on the evidence of record, staff does not believe that either party intended to exclude ISP traffic from "local traffic" as that term is defined in their Interconnection Agreement. Staff, therefore, believes that the Commission should find that ISP traffic is included in the definition of "local traffic" for purposes of settling this contract dispute.

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?

RECOMMENDATION: Yes. Staff recommends that the Commission find that the difference in e.spire's minutes of use for terminating local traffic exceeded two million minutes in Florida on a monthly basis if the Commission approves staff's recommendation in Issue 1. If the Commission denies staff's recommendation in Issue 1, staff recommends that the Commission order the parties to determine the amount of ISP traffic that was included in e.spire's monthly usage reports, remove that traffic from the usage reports, and determine whether the two million minute differential has been met. **(FAVORS)**

POSITION OF THE PARTIES

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 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 ANALYSIS: Section VI.B. of the Interconnection Agreement between e.spire and BellSouth reads as follows:

Compensation

The Parties agree that BellSouth will track the usage for both companies for the period of the Agreement. BellSouth will provide copies of such usage reports to [e.spire] on a monthly basis. For purposes of this Agreement, the Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such

an event, the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis. (TR 41)

This issue seeks to determine whether the two million minute differential for terminating local traffic has occurred in Florida.

BellSouth's position is that e.spire is including ISP traffic in determining minutes of use for terminating local traffic in Florida. BellSouth contends that ISP traffic is not local traffic and should not be included. e.spire does not contest the fact that they are including traffic to ISPs in determining minutes of use for terminating local traffic in Florida. In fact, e.spire witness Talmage admits that to the extent ISP traffic is carried over local trunks, it was included. (TR 25)

Local Usage Reports

As Section VI(B) of the agreement states, BellSouth is responsible for tracking the usage for both companies and providing copies of usage reports to e.spire on a monthly basis. BellSouth, however, has failed to do so. BellSouth witness Hendrix states that representatives of BellSouth and e.spire met on November 3, 1997, and in that meeting, BellSouth informed e.spire that it was not yet technically capable of providing local traffic usage reports. (TR 166) Witness Hendrix states that once BellSouth agreed to track local usage for e.spire, BellSouth initiated plans to develop this equipment and the processes to produce the tracking reports. However, due to the complexity of BellSouth's network and the fact that they were attempting to track local minutes of use, originating and terminating, it has taken longer than expected. (TR 168-169) Witness Hendrix states that BellSouth is currently capable of tracking local minutes of use, originating and terminating. (TR 167)

e.spire witness Talmage states that once it became apparent that BellSouth would not provide usage reports, e.spire was forced to develop its own usage reports. (TR 19) e.spire implemented the TrafficMASTER software product in November 1997 for its usage reporting. (Talmage TR 19)

BellSouth witness Hendrix states that BellSouth informed e.spire by letter dated January 8, 1998, that they agreed to use e.spire's usage reports for determining the local traffic differentials. (TR 166) Witness Hendrix further states that BellSouth expressed its desire to audit the process used by

e.spire's TrafficMASTER to jurisdictionalize traffic. Witness Hendrix states that the purpose of such an audit was because "to the extent ACSI [now d/b/a e.spire] is categorizing ISP traffic as local traffic, BellSouth's position is that it should not be counted toward the 2 million minute threshold." (TR 166)

Local Traffic Differentials

Staff must point out that the Interconnection Agreement between e.spire and BellSouth refers to the difference in local traffic exchanged by the parties. Section VI.B. of the agreement states in part:

For purposes of this Agreement, the Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. (emphasis added)

This means that the minutes of local traffic originating on e.spire's network and terminating on BellSouth's network minus the minutes of local traffic originating on BellSouth's network and terminating on e.spire's network, or vice versa, must exceed two million minutes per month in Florida before the parties will negotiate a traffic exchange agreement.

BellSouth argues in its brief that e.spire has not proven that this difference in minutes of use has been met. (BR 7) e.spire witness Talmage states that the differential occurred in March 1998 and has continued to occur each month thereafter. (TR 16) Witness Hendrix states that the report he viewed only showed traffic terminating from BellSouth to e.spire. (TR 208) e.spire has provided reports that show traffic terminated to e.spire's Jacksonville, Florida, switch for the months of May 1998 through September 1998. (EXH 4) The Jacksonville switch is the only switch at issue in this proceeding. (Talmage TR 13) e.spire also provided summary reports of local traffic, both originating and terminating, at its Jacksonville switch for March and April 1998. These summary reports show that the differential threshold in minutes of use for terminating local traffic was exceeded in both of these months. (EXH 4)

Conclusion

Staff believes that the evidence of record shows that the two million minute differential for terminating local traffic in Florida did occur in March 1998. (EXH 4) The evidence of record also shows that e.spire did include traffic to ISPs in determining that this threshold has been met. (EXH 4) While BellSouth disputes that the two million minute differential threshold has been met, it has not presented any evidence to prove that e.spire's usage reports are incorrect.

Staff's recommendation on this issue is contingent upon the Commission approving staff's recommendation in Issue 1, to include ISP traffic in the definition of local traffic. e.spire readily admits that ISP traffic was included in its determination that the two million minute differential has been met in Florida. (Talmage TR 25) If the Commission denies staff's recommendation in Issue 1, staff recommends that the Commission order BellSouth and e.spire to determine the amount of ISP traffic that was included in e.spire's monthly usage reports, remove that traffic from consideration, and determine whether the two million minute differential has occurred.

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

RECOMMENDATION: Staff interprets the parties' Interconnection Agreement to require that the reciprocal compensation rate be determined pursuant to Section XXII of the Agreement, the Most Favored Nations (MFN) clause, from the time it is determined that e.spire met the two-million-minute differential threshold and after the effective date of the other CLEC's agreement. Therefore, staff recommends that the Commission should determine the rate to be the .9 cents a minute rate requested by e.spire pursuant to Section XXII of the parties' Interconnection Agreement. (ILERI)

POSITION OF PARTIES

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 ANALYSIS: Section VI(B) of the Interconnection Agreement between e.spire and BellSouth states

For the purposes of this Agreement, the Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such an event, the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis. (TR 41, 141)

Witness Talmage indicated that the Hearing Examiner handling e.spire's complaint regarding reciprocal compensation for ISP traffic before the Georgia Public Service Commission specifically stated that:

BellSouth has admitted that it failed to perform its contractual obligation to track and report to e.spire local minutes usage (or local traffic) under Subsection VI(B) of the [e.spire/BellSouth Interconnection Agreement]. Moreover, [BellSouth's] counsel at hearing did not contest the accuracy of e.spire's TrafficMASTER™ reports, although he refused to stipulate such reports as accurate, pending audit to eliminate ISP traffic. The unrefuted testimony of e.spire's witnesses at hearing demonstrated that e.spire used TrafficMASTER™ software to track local minutes of usage only on local trunks in Georgia. In light of the demonstrated capability of other Regional Bell Operating Companies to track local traffic and in view of [BellSouth's] failure to explain satisfactorily or sufficiently its nonperformance in this matter, it is difficult for the [Georgia Public Service Commission] to understand why [BellSouth] has not measured and reported local traffic for and to e.spire as it was obligated to do under the Interconnection Agreement. (TR 17-18)

Witnesses from e.spire and BellSouth indicated that BellSouth could not provide reports to e.spire. (TR 86, 90, 166, 209) BellSouth witness Hendrix indicated that BellSouth entered into the Interconnection Agreement in July 1996, and on November 3, 1997, BellSouth met with e.spire and indicated that BellSouth was not yet technically capable of providing such reports. (TR 209) As Section

VI(B) of the agreement states, BellSouth is responsible for tracking the usage for both companies and providing copies of usage reports to e.spire on a monthly basis. BellSouth witness Hendrix agrees that BellSouth failed to provide local traffic usage reports due to technical reasons. (TR 166)

Section XXII(A) of the Interconnection Agreement also specifies

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 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 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. (TR 73)

e.spire witness Falvey argued that this agreement allows e.spire to adopt rates, terms, or conditions of another CLEC's agreement. (TR 73) Witness Falvey also stated that when e.spire determined that the two-million-minute differential threshold had been reached, e.spire sent BellSouth a so-called Most Favored Nations request for a rate of .9 cents per minute. (TR 89) Witness Falvey also contended that e.spire has the ability to rely upon its Most Favored Nations (MFN) clause instead of negotiating the rate to be applied to the traffic. (TR 89) BellSouth witness Hendrix stated:

...it [The MFN clause] states that, then ACSI shall be entitled to add such network elements and services, or substitute such favorable rates, terms and so forth. (TR 197)

Based on the testimony of witnesses from e.spire and BellSouth, staff believes that the reciprocal compensation rate should be determined pursuant to the Most Favored Nations (MFN) clause of the Interconnection Agreement from the time it is determined that

e.spire met the two-million-minute differential threshold and after the effective date of the other CLEC's agreement, as set forth in Section XXII of the Agreement.

Under common principles of contract interpretation, the more specific language of Section VI(B) would control in this agreement. South Florida Beverage Corporation V. Efrain Figueredo, 409 So. 2d 490, 495 (Fla. 3rd DCA 1982), citing Hollerbach v. U. S., 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898 (1914); Bystra v. Federal Land Bank of Columbia, 82 Fla. 472, 90 So. 478 (1921); and 4 Williston on Contracts § 618 (3rd ed. 1961). It is clear from the evidence presented that the negotiations between the parties quickly failed. As stated by e.spire's witness Falvey,

There was a negotiation that took place, but it was initiated by this provision. . . . I wouldn't expect to get anything less than I am entitled to, .9 cents a minute under my MFN clause. So take that as a stating point. Their counter to that was .2 cents a minute, which is, I believe, lower than any carrier that I know of gets in this state. (TR 98-99)

The witness also indicated that he agreed that negotiation was required under Section VI(B) of the Agreement, but that the negotiations "foundered, because we couldn't agree on some very basic things." (TR 114) Once the negotiations required under the specific provisions of Section VI(B) broke down, staff believes that the more general provisions of Section XXII of the agreement were properly invoked by e.spire. e.spire opened negotiations with BellSouth pursuant to Section VI(b) of the agreement. BellSouth responded by offering a rate of .2 cents a minute. No agreement was reached. There is nothing in the agreement that suggests that anything more was required. Therefore, the Commission should resolve the disagreement by enforcing the MFN provisions of the agreement.

Further, based on the evidence provided by both parties, it appears that BellSouth failed to meet the requirements of the Interconnection Agreement by not providing and exchanging reports with e.spire for proper billing of all traffic. Therefore, staff recommends that the Commission should require BellSouth to compensate e.spire according to the rate that e.spire has requested pursuant to Section XXII of the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding.

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

RECOMMENDATION: As set forth in the previous issue, staff recommends that the reciprocal compensation rate be set at \$.009 as determined pursuant to Section XXII, the Most Favored Nations clause, of the parties' Interconnection Agreement. Staff recommends, therefore, that the Commission require BellSouth to compensate e.spire based upon the rate requested by e.spire according to Section XXII of the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding. Staff also recommends, consistent with the parties' Interconnection Agreement, that the Commission order BellSouth to pay e.spire's reasonable attorney's fees and legal expenses associated with this case. **(ILERI)**

POSITION OF PARTIES

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 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 ANALYSIS: As indicated in Issue 2, staff has reviewed Exhibit 4 in which e.spire provided reports that show traffic terminated to e.spire's Jacksonville, Florida switch for the months of May 1998 through September 1998. The Jacksonville switch is the only switch at issue in this proceeding. (Talmage TR 13) e.spire also provided summary reports of local traffic, both originating and terminating, at its Jacksonville switch for March and April 1998. These summary reports show that the differential in minutes of use for terminating local traffic was exceeded in both of these months. (EXH 4) Calls terminated to ISPs should be subject to reciprocal compensation under the e.spire and BellSouth Interconnection Agreement as explained in Issue 3. Under Issue 3, staff indicated that BellSouth did not meet the requirements of the Interconnection Agreement by not providing proper reports of all traffic. Therefore, staff has relied upon e.spire's reports as the only evidence of record to determine how much traffic was terminated to BellSouth.

Based on the testimony of witnesses from e.spire and BellSouth, staff has recommended in Issue 3 that the reciprocal compensation rate is to be determined pursuant to the Most Favored Nations (MFN) clause of the Interconnection Agreement from the time it is determined that e.spire met the two-million-minute differential threshold and after the effective date of the other CLEC's agreement. Therefore, staff recommends that the reciprocal compensation rate be set at \$.009 as determined pursuant to the Most Favored Nations clause of the Interconnection Agreement.

Staff also reviewed the reports provided by e.spire to determine how much traffic originated from BellSouth's system and terminated on e.spire's system. There is, however, insufficient evidence in the record to determine how many minutes of traffic originated from e.spire and terminated on BellSouth. Thus, staff has included a proposed agency action Issue 5 in this recommendation.

In its Complaint, e.spire also asked that the Commission award e.spire attorney's fees and costs associated with this case. e.spire reiterated its request in its brief. (BR 25). In its brief, e.spire indicated that it was seeking attorney's fees pursuant to the parties' agreement. (BR 25). e.spire did not, however, refer to a specific portion of the agreement in support of its request.

Staff has reviewed the agreement and believes that the pertinent section of the agreement is Section XXV (A), Arbitration, which states in part

Any controversy or claim arising out of, or relating to, this Contract or the breach thereof shall be settled by arbitration. . . . Provided, however, that nothing contained herein shall preclude either Party from filing any complaint or other request for action or relief with the FCC or the appropriate state commission, including any appeals thereof. The Party which does not prevail shall pay all reasonable attorney's fees and other legal expenses of the prevailing Party.

(EXH 1, Official Recognition List, Item 1, Order No. PSC-96-1509-FOF-TP). Based upon Section XXV (A) of the parties' agreement, it appears that e.spire is entitled to reasonable attorney's fees relating to this case if the Commission approves staff's recommendation that e.spire should prevail. Staff recommends, therefore, that the Commission order BellSouth to pay e.spire all of e.spire's reasonable attorney's fees and legal expenses associated with this case, in accordance with the provisions of Section XXV(A) of the parties' Agreement.

DATE: 03/04/99

ISSUE 5: Should the Commission require the parties to use the methodology described in the staff analysis to estimate the number of minutes originated from e.spire and terminated on BellSouth's system? (PROPOSED AGENCY ACTION)

RECOMMENDATION: Yes. The parties should be required to use the methodology described in the staff analysis to estimate the number of minutes originated from e.spire and terminated on BellSouth's system. Upon estimating the number of minutes originated from e.spire and terminated on BellSouth's system, the differential between what e.spire terminated on BellSouth's system and what BellSouth terminated on e.spire's system may be easily derived by the parties. The parties should report to the Commission once they have determined the amount owed by BellSouth to e.spire based on the rate recommended in Issue 4, and the amount has been paid to e.spire. The parties should be required to report to the Commission in a period not to exceed 4 months from the date of the Commission's vote. (ILERI, B. KEATING)

STAFF ANALYSIS: In order to determine the specific amount owed by BellSouth to e.spire under the terms of the parties' agreement, it is necessary to determine the differential between the minutes of use (MOU) originated from e.spire and terminated at BellSouth's system and the MOU originated from BellSouth and terminated at e.spire's system. As set forth in Issue 4, the number of minutes originated from BellSouth and terminated at e.spire may be easily determined by review of hearing Exhibit 4. There is, however, insufficient evidence in the record to determine the number of minutes originated from e.spire and terminated at BellSouth. Thus, it is not possible to determine the differential between the traffic terminated on each company's system. Consequently, staff is unable to recommend the specific amount owed by BellSouth to e.spire under the agreement.

Staff has, however, developed a methodology whereby the parties can input the information that is available in the record and calculate an estimated differential between the traffic terminated on each company's system. Once this estimation is made, the parties can easily calculate the specific amount owed by BellSouth to e.spire under the agreement. The parties should report to the Commission once they have determined the amount owed by BellSouth to e.spire and the amount that has been paid to e.spire. Staff believes that the calculation is relatively simple, thus, the parties should be required to report to the Commission in a period not to exceed 4 months from the date of the Commission's vote.

The methodology proposed by staff is set forth below:

Recommended Staff Methodology:

The amount of traffic over a network consists of incoming and outgoing calls over a company's lines. In the case of the e.spire and BellSouth arbitration, staff believes the amount of traffic over e.spire's lines in any month, both originating from e.spire and terminating on BellSouth, and originating from BellSouth and terminating on e.spire, can be assumed to be relatively consistent over the months in question. For the months of March and April of 1998 in which e.spire provided both incoming and outgoing usage, an average value for usage per line can be calculated. This average value (k), can be used to estimate how much traffic was originated from e.spire and terminated on BellSouth's system. For a particular month in the past, an estimate of the traffic from e.spire to BellSouth may be calculated by multiplying e.spire's lines for that month by the average value (k) and then subtracting the known BellSouth to e.spire traffic.

DOCKET NO. 981008-TP
DATE: 03/04/99

ISSUE 6: Should this docket be closed?

RECOMMENDATION: If no person whose substantial interests are affected by the Commission's proposed agency action decision in Issue 5 files a protest within 21 days of the issuance date of the Order, the docket should be placed on monitor status until the parties provide the report required in Issue 5. Once the report has been provided, the docket should be closed after the time for filing an appeal of the Commission's decisions in Issues 1-4 has run. **(B. KEATING, WATTS)**

STAFF ANALYSIS: If no person whose substantial interests are affected by the Commission's proposed agency action decision in Issue 5 files a protest within 21 days of the issuance date of the Order, the docket should be placed on monitor status until the parties provide the report required in Issue 5. The docket should be closed 32 days after issuance of the order to allow the time for filing an appeal of Issues 1-4 to run.