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May 12, 1999

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RECORDS AND
REPORTING

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 Nos. 981008-TP

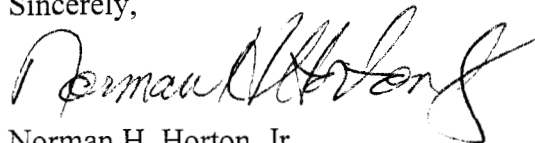
Dear Ms. Bayo:

Enclosed for filing on behalf of e.spire Communications, Inc. is an original and fifteen copies of the e.spire's Response to BellSouth's Petition on Proposed Agency Action in the above referenced 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.

AFA _____
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG _____
MAS _____
OPC _____
RRR _____
SEC _____
WAW _____
OTH _____

NHH/amb
Enclosure

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

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

~~98008-TP-100~~

FPSC-RECORDS/REPORTING

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: May 12, 1999

**e.spire COMMUNICATIONS, INC.'S RESPONSE TO
BELLSOUTH'S PETITION ON PROPOSED AGENCY ACTION**

COMES NOW, 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 and files this Response to BellSouth Telecommunications, Inc.'s ("BellSouth") Petition on Proposed Agency Action and states as follows:

1. By Order No. PSC-99-0658-FOF-TP issued April 6, 1999, the PSC resolved a complaint filed by e.spire against BellSouth. In the Order the PSC included a requirement that the parties determine the number of minutes originated by e.spire and terminated on BellSouth's system using actual information to derive the differential. (Order pp 15 - 18). BellSouth filed this protest to that requirement and has also filed a Motion for Reconsideration of other portions of the Order which is pending.

2. The directive of the PSC is intended to determine the specific amount owed by BellSouth to e.spire under the Interconnection Agreement. (Order p. 16). BellSouth has protested the requirement arguing that the action is not based on competent, substantial evidence and is an

improper attempt to supplement the record. BellSouth is mistaken on both counts. Not only is BellSouth mistaken with its arguments, there really is not anything about the directive that BellSouth can protest and, accordingly, this protest should not be allowed to proceed.

3. BellSouth states that it “protests the Commissions requirement that the parties determine the number of minutes originated by e.spire and terminated on BellSouth’s system using actual available information to derive the differential between what e.spire terminated on BellSouth’s system and what BellSouth terminated on e.spire’s system.” What BellSouth protests is precisely what is required of BellSouth by the Agreement — a calculation based on actual numbers. Why BellSouth would object to such a requirement is not clear. Neither does BellSouth suggest any other methodology, nor any evidence of its own as required by the contract, they simply object to the directive. In the Interconnection Agreement, BellSouth agreed to track usage for both companies but made no attempt whatsoever to do so. The usage to be tracked would have been actual usage. Because BellSouth failed to track usage, e.spire was required to do so and BellSouth agreed in a writing filed in this docket to use these reports. Now BellSouth objects saying there is no competent, substantial evidence to use actual figures which simply is not the case. As a threshold matter, it is critical to note BellSouth’s unmitigated gall in coming to the Commission with unclean hands—not to apologize for its blatant breach of contract—but to take the offensive to pursue frivolous and unrelenting litigation in order to erect yet another barrier to entry into the Florida local exchange markets. As an equitable matter, given its unclean hands, BellSouth is estopped from attacking the substantial evidentiary record compiled by e.spire on this point.

4. BellSouth also argues that this is an attempt to supplement the record in this case. Not so. In the complaint, e.spire requested that the PSC resolve essentially 3 basic issues; that pursuant to the Agreement traffic to ISPs is local traffic for purposes of reciprocal compensation, that the required differential in minutes was met so as to trigger payment to e.spire and that e.spire could use the Most Favored Nations (“MFN”) clause for the rate for reciprocal compensation. The Commission resolved these issues by finding that ISP traffic is local traffic, the required differential had been met and the MFN could be used for the rate. With these holdings, the amount owed to e.spire is nothing more than a calculation — essentially minutes of use times rate equals the amount owed. e.spire has invoiced BellSouth based on usage reports produced by TrafficMaster™ and what BellSouth owes e.spire is reflected by these invoices.

5. Whether the record is supplemented or not, what BellSouth owes e.spire is on the basis of the invoices. With this protest, BellSouth is simply trying to develop another last-ditch theory and reason for not paying e.spire. It is critical to note that BellSouth filed no discovery in this case, and failed to ask a single question in cross-examination regarding the detail of e.spire’s records and reports. The Commission has said traffic to an ISP is local traffic, what the rate for this traffic should be, that the required differential has been met, and that the traffic usage reports are acceptable. Given BellSouth’s recalcitrance in refusing to provide records of its own—records which to this day it has filed to produce—BellSouth has no basis to file its Petition.

6. BellSouth apparently does not want to pay invoices produced using these components and it would seem intends to refuse payment because of some suggested defect in the record. There may be billing disputes in the future but there certainly should not be any protest to doing just what the Agreement and ordinary business practices require; that is, to pay e.spire what is owed. There

is no defect in the record and BellSouth is only trying to inject a new issue after the proceeding has concluded and thereby prolong this matter. The Commission should not allow this.

7. In both this Protest and in the Motion for Reconsideration, BellSouth is advancing the argument that the Agreement requires e.spire to show that the 2 million minute differential is met each individual month and not simply once as the Agreement clearly requires. BellSouth would have this Commission believe that the Agreement requires that e.spire and BellSouth would negotiate a reciprocal compensation agreement for each individual month that the 2 million minute differential is met thus resulting in as many as 12 separate agreements per year. In the first place, that argument is totally inappropriate in this PAA as it has nothing to do with the issued identified for PAA. Secondly, and equally as important, BellSouth only recently developed this theory and they are improperly using the PAA process to now raise an issue which would have been raised in the main case. Thirdly, BellSouth's suggestion that the Commission lacks the injunctive authority to require BellSouth to abide by its contracts, in plain contravention of longstanding Commission precedents, suggests that its actual motive is to pursue every dilatory motion at its disposal to inhibit the erosion of its monopoly market share by new entrant competitors.

8. e.spire does not agree that BellSouth is entitled to any relief on this protest under Chapter 120, Florida Statutes. The Commission has not required anything of the parties that is not required by their Agreement. More importantly, however, is that BellSouth has a forum for its arguments with the Motion for Reconsideration and should be confined to that case. If, however, the Commission feels compelled to give BellSouth's protests any credence, any presentation should be limited to the very narrow issue identified in the order and BellSouth should not be allowed to

expand this. Moreover, if e.spire continues to prevail, the Commission should continue to award attorneys' fees to e.spire.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Norman Horton, Jr.", written over a horizontal line.

NORMAN H. HORTON, JR.
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(850) 222-0720

Attorneys for e.spire Communications, Inc.

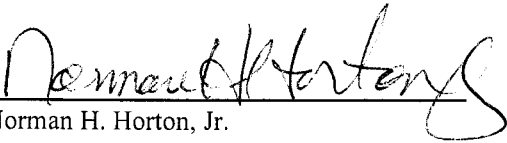
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of e.spire Communications, Inc.'s Response to Bellsouth's Petition on Proposed Agency Action have been served upon the following parties by Hand Delivery (*) and/or U. S. Mail this 12th day of May, 1999.

Beth Keating, Esq.*
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