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December 10, 1998

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:

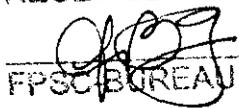
Enclosed for filing in the above captioned docket on behalf of e.spire Communications, Inc. are an original and fifteen copies of the Rebuttal Testimony of James C. Falvey.

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.

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Sincerely,


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Norman H. Horton, Jr.

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cc: James C. Falvey, Esq.
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DOCUMENT NUMBER-DATE

13909 DEC 10 98

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

IN RE: REQUEST FOR ARBITRATION CONCERNING)
COMPLAINT OF AMERICAN COMMUNICATIONS)
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)

Docket No. 981008-TP

REBUTTAL TESTIMONY

OF

JAMES C. FALVEY

ON BEHALF OF

E.SPIRE COMMUNICATIONS, INC.

AND ITS SUBSIDIARIES

December 10, 1998

DOCUMENT NUMBER-DATE

13909 DEC 10 88

FPSC-RECORDS/REPORTING

REBUTTAL TESTIMONY OF JAMES C. FALVEY

1 **Q. PLEASE STATE YOUR NAME, POSITION AND BUSINESS**
2 **ADDRESS.**

3 A. My name is James C. Falvey. I am Vice President-Regulatory Affairs for
4 e.spire Communications, Inc., formerly known as American
5 Communications Services, Inc. My business address is 133 National
6 Business Parkway, Suite 200, Annapolis Junction, Maryland 20701.

7 **Q. ARE YOU THE SAME JAMES C. FALVEY WHO FILED DIRECT**
8 **TESTIMONY IN THIS PROCEEDING ON NOVEMBER 12, 1998?**

9 A. Yes, I am.

10 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

11 A. The purpose of my testimony is to rebut various claims made by BellSouth
12 witnesses Halprin and Hendrix in their testimony in this proceeding.
13 Messrs. Halprin and Hendrix would—through legal gymnastics—deprive
14 e.spire of critical revenues at a time when e.spire sorely needs such
15 revenues to enter BellSouth markets and prove its business plan to its
16 investors. While other ILECs are—as discussed in Mr. Cummings’
17 testimony—beginning to pay or actually paying e.spire’s reciprocal
18 compensation bills, BellSouth is steadfastly refusing payment. The
19 Commission should order BellSouth to make payment to e.spire for the
20 outstanding reciprocal compensation billings, including interest, make
21 continuing payments in the future, and reimburse e.spire’s legal fees and
22 costs incurred in pursuing this collection action.

1 **Q. WHAT IS YOUR GENERAL REACTION TO MR. HALPRIN'S**
2 **DIRECT TESTIMONY?**

3 A. I find most of Mr. Halprin's testimony puzzling and irrelevant. By his
4 own admission, he is not an economist or an engineer. Thus, I presume
5 that he cannot be appearing as an "expert" on economic or technical issues
6 with respect to the Internet or local networks. Also, to the extent Mr.
7 Halprin professes to be an expert on e.spire's costs, his testimony is not
8 supported by one scintilla of evidence. Since he is not employed by
9 BellSouth, I also presume that he is not appearing as the company's
10 spokesman. Indeed, it is important to realize that Mr. Halprin and his law
11 firm regularly advise BellSouth and other ILECs in connection with FCC
12 and other related regulatory proceedings. Thus, I surmise that Mr. Halprin
13 is appearing on BellSouth's behalf in his capacity as BellSouth's attorney,
14 advocating BellSouth's legal position. Remarkably, even as an attorney,
15 Mr. Halprin manages to pontificate at length on what is essentially a black
16 letter contracts case, with nary a mention of the contractual commitments
17 made by BellSouth to e.spire. In e.spire's view, this is a matter more
18 appropriately left for post-hearing legal briefs and we will respond to
19 much of Mr. Halprin's "testimony" in our legal briefing as well as in
20 appropriate motions. Nevertheless, I will respond briefly to several of his
21 points at this time.

22 **Q. HOW DO YOU RESPOND TO MR. HALPRIN'S CONTENTION**
23 **THAT ACCESS CALLS PLACED TO ISPs DO NOT**

1 **“TERMINATE” AS THE ISP’S LOCAL SERVER (HALPRIN**
2 **DIRECT, p. 3)?**

3 A. Mr. Halprin’s testimony simply ignores nearly 15 years of FCC precedent,
4 the decisions of 24 other state commissions, the orders of 3 U.S. District
5 Courts, and, most importantly, the plain language of the
6 Telecommunications Act itself. Contrary to Mr. Halprin’s assertion, the
7 weight of law and policy of the FCC for well over a decade has favored
8 treating dial-up calls placed to access ISPs as “local” calls, regardless of
9 whether the ISP subsequently retransmits the information received to or
10 from further interstate destinations.¹ As Mr. Halprin observes, the FCC
11 traditionally has determined whether a call is intrastate or interstate based
12 on where the call originates and terminates. However, Mr. Halprin
13 conveniently ignores the fact that ISPs have consistently been categorized
14 as end users and that calls placed to them “terminate” when they reach the
15 ISP point-of-presence (“POP”).

16 Specifically, the FCC traditionally has viewed dial-up calls to ISPs
17 as consisting of two distinct components: “telecommunications” and
18 “information.” As the FCC stated in its *Universal Service Order*, “[w]e
19 agree with the Joint Board’s determination that Internet access consists of
20 more than one component. Specifically, we recognize that Internet access
21 includes a network transmission component, which is the connection over

¹ See generally, *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶¶ 341-348 (1997) (hereinafter “*Access Charge Reform Order*”).

1 a LEC network from a subscriber to an Internet Service Provider, in
2 addition to the underlying information service.”² The FCC also observed
3 that “[w]hen a subscriber obtains a connection to an Internet service
4 provider via voice grade access to the public switched network, that
5 connection is a telecommunications service and it is distinguishable from
6 the Internet service provider’s service offering.”³

7 This view of ISP calls was reinforced by Congress in the 1996 Act
8 where it carefully defined “telecommunications” as something distinct
9 from “information services.”⁴ Indeed, the FCC has observed that
10 “Congress intended ‘telecommunications service’ and ‘information
11 service’ to refer to separate categories of services” despite the appearance
12 from the end user’s perspective that it is a single service because it may
13 involve telecommunications components.⁵ In fact, the FCC has expressly
14 concluded that “when an entity [such as an ISP] offers subscribers the
15 capability for generating, acquiring, storing, transforming, processing,
16 retrieving, utilizing, or making available information via

² *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 83 (rel. May 8, 1997).

³ *Id.* at ¶ 789.

⁴ 47 U.S.C. §§ 153(48), 153(20).

⁵ *Federal-State Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 58 (rel. April 10, 1998) (“Report to Congress”).

1 telecommunications, *it does not provide telecommunications, it is using*
2 *telecommunications.*⁶

3 As calls placed over the public switched network normally are
4 considered “terminated” when they are delivered to the exchange bearing
5 the called telephone number, the “telecommunications” component of an
6 ISP call is “terminated” when it reaches the ISP POP. Call termination
7 occurs when a connection is established between the caller and the
8 telephone exchange service to which the dialed number is assigned,
9 answer supervision is returned, and a call record is generated. This is true
10 whether the call is received by a voice grade phone, a fax machine, an
11 answering machine, or, as in this case, an ISP modem. Indeed, the FCC
12 has defined call termination for purposes of reciprocal compensation
13 obligations as “the switching of traffic . . . at the terminating carrier’s end
14 office switch . . . and delivery of that traffic from that switch to the called
15 party’s premises.”⁷ Because ISPs do not provide “telecommunications”
16 to their subscribers, “telecommunications” service ends at the ISP POP.
17 Thus, when the “telecommunications” component of a dial-up access call

⁶ *Id.* at ¶ 41. The FCC further observed that, “[u]nder *Computer II*, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service . . . The information service provider, indeed, is itself a user of telecommunications; that is, telecommunications is an input in the provision of an information service.” *Id.* at n. 138.

⁷ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1040 (1996).

1 placed to an ISP originates and terminates in a single local calling area, it
2 is properly regarded as a “local” call.

3 In other states, BellSouth has relied heavily on the FCC’s
4 *BellSouth MemoryCall Order* to support its position that access calls
5 placed to an ISP and the ISP connection to distant information databases
6 should be treated as a single end-to-end communication. In the *BellSouth*
7 *MemoryCall Order*, the FCC considered whether calls placed from out-of-
8 state to BellSouth’s voice mail platform should be treated as a single
9 interstate communications or as two separate calls (*i.e.*, an interstate call
10 from the caller to the BellSouth switch and a second local call from
11 BellSouth’s switch to its voice mail platform). The FCC ruled that the
12 call placed from the out-of-state caller to the voice mail platform
13 constituted a single interstate communication.⁸ In so doing, the FCC
14 stated that:

15 [w]hen the caller is out-of-state, there is a
16 continuous path of *communications* across state
17 lines between the caller and the voice mail service,
18 just as there is when a traditional out-of-state long
19 distance voice telephone call is forwarded by the
20 local switch to another location in the state and
21 answered by a person, a message service bureau or
22 customer premises answering machine.⁹

⁸ *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, ¶ 9 (1992) (“*BellSouth MemoryCall Order*”), *aff’d sub nom.*, *Georgia Public Service Commission v. FCC*, 5 F.3d 1499 (11th Cir. 1993).

⁹ *Id.* (emphasis added).

1 Critically, the FCC made clear that an enhanced service provider's
2 ("ESP")¹⁰ "facilities and apparatus" constitute the relevant end point of a
3 telecommunications service.¹¹ Thus, the "telecommunications service"
4 ends at the facilities of the ESP, precisely where provision of the enhanced
5 services begins. In sum, the *BellSouth MoneyCall Order* stands for the
6 principle that jurisdiction over a telecommunications service depends on
7 the end points of the *telecommunications* service.

8 **Q. IS THIS POSITION CONSISTENT WITH E.SPIRE'S POSITION**
9 **IN THIS CASE?**

10 This analysis is perfectly consistent with e.spire's position in this
11 case. The end point of a call placed to an ISP is the ISP POP (*i.e.*, its
12 "facilities and apparatus"). Once the call is delivered to the ISP, the ISP's
13 handling of the transmission is an "information service." The jurisdiction
14 of the access call should be determined – just as was done in the *BellSouth*
15 *MemoryCall Order* – by comparing the points where the
16 "telecommunications service" originated (the calling party's premises) and
17 where it terminated (the ISP POP). Importantly, unlike the situation in the
18 *BellSouth MemoryCall Order*, in this case the calling party's premise and
19 the ISP POP are both in the same state.

20 Therefore, the *BellSouth MemoryCall Order* is completely
21 consistent with the proposition that physically intrastate

¹⁰ ESPs and ISPs are treated identically by the FCC for purposes of jurisdictional analysis.

¹¹ *BellSouth MemoryCall Order* at ¶ 12.

1 telecommunications between a caller and an ISP POP are not transformed
2 into interstate telecommunications when the ISP subsequently provides an
3 information service to that caller. The local access call to the ISP is an
4 intrastate (*i.e.*, "local") telecommunications service, and the ISP service
5 itself is an interstate "information service."

6 **Q. HOW DOES MR. HALPRIN'S POSITION THAT ISP TRAFFIC IS**
7 **INTERSTATE COMPART WITH BELLSOUTH'S OWN**
8 **PRACTICES?**

9 A. It doesn't. Importantly, treatment of ISP traffic as "local traffic" is
10 consistent with BellSouth's own existing practices. For instance,
11 BellSouth consistently has: (1) charged all such calls under its local tariffs;
12 (2) treated such calls as local in separations reports and state rate cases; (3)
13 treated such calls as local in ARMIS reports; (4) treated such calls as local
14 when they are exchanged among adjacent ILECs; and (5) routed such calls
15 to e.spire over interconnection trunks reserved for local calling. In his
16 testimony, Mr. Halprin failed to articulate why access calls to ISPs are
17 treated as "local" when it is advantageous to BellSouth, but not when it
18 triggers a reciprocal compensation obligation by BellSouth. BellSouth
19 should not be permitted to unilaterally reclassify whole categories of
20 traffic when it is personally convenient for it to do so, and when it
21 conflicts with BellSouth's classifications of such traffic for nearly all other
22 purposes, particularly when the result is to deprive its competitors of
23 compensation for services rendered.

1 **Q. WHAT WOULD BE THE FINANCIAL IMPACT OF ACCEPTING**
2 **MR. HALPRIN'S VIEW?**

3 A. Acceptance of Mr. Halprin's position would present BellSouth with an
4 undeserved windfall, and enable BellSouth to free-ride on e.spire's
5 networks. Under long standing FCC policy, ISPs are exempt from the
6 payment of interexchange access charges.¹² They are expressly permitted
7 to order service from ILECs as end users under local exchange tariffs to
8 receive access calls from their subscribers.¹³ ILECs are compensated by
9 their customers for routing and terminating such dial-up traffic to ISPs
10 pursuant to the terms of their local exchange tariffs. Since end users pay
11 ILECs through their monthly phone bills for originating such traffic, and
12 CLECs are not able to charge access fees to ISPs for receiving such calls,
13 e.spire must look to BellSouth for reimbursement of its cost of terminating
14 traffic sent to it by BellSouth for termination. Any other result would put
15 e.spire in the untenable position of providing termination services to
16 BellSouth at no charge. The anticompetitive nature of allowing BellSouth
17 to free-ride on e.spire's network investment is apparent.

18 **Q. DOES MR. HALPRIN'S OPINION THAT ISP TRAFFIC IS**
19 **"INTERSTATE" REPRESENT THE MAJORITY VIEW?**

¹² See *Access Charge Reform Order* at ¶ 341.

¹³ *Access Charge Reform Order* at ¶ 342 (“[a]s a result of the decisions the [FCC] made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users.”).

1 A. No. Every state commission that has addressed this issue, (including
2 Florida¹⁴) has held that ISP traffic should be classified as “local” traffic.
3 In fact, 25 state commissions, including this Commission, and those of
4 Arizona,¹⁵ California,¹⁶ Colorado,¹⁷ Connecticut,¹⁸ Delaware,¹⁹ Georgia,²⁰
5 Illinois,²¹ Kentucky,²² Maryland,²³ Massachusetts,²⁴ Michigan,²⁵

¹⁴ *In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for Breach of Florida Partial Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief*, Docket No. 971478-TO, Order No. PSC-98-1216-FOF-TP, Florida Public Service Commission (Sept. 15, 1998) (“*Florida Order*”).

¹⁵ *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).

¹⁶ *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).

¹⁷ *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).

¹⁸ *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).

¹⁹ *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).

²⁰ *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) (“*Georgia Decision*”).

²¹ *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois: Complaint As to Dispute Over A Contract Definition*,
(continued...)

1 Minnesota,²⁶ Missouri,²⁷ New York,²⁸ North Carolina,²⁹ Ohio,³⁰
2 Oklahoma,³¹ Oregon,³² Pennsylvania,³³ Tennessee,³⁴ Texas,³⁵ Virginia,³⁶

(...continued)

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).

²² *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).

²³ Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission (dated September 11, 1997).

²⁴ *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).

²⁵ *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).

²⁶ *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).

²⁷ *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).

²⁸ *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).

²⁹ *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).

1 Washington³⁷ and West Virginia,³⁸ have addressed this issue and have
2 concluded that ISP traffic is properly characterized as “local.” Moreover,
3 these state decisions have been upheld on appeal in each case where a

(... continued)

³⁰ *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).

³¹ *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).

³² *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).

³³ *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).

³⁴ *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).

³⁵ *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).

³⁶ *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).

³⁷ *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).

³⁸ *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).

1 ruling has been issued. For instance, the U.S. District Court in Texas
2 upheld the Texas Public Utility Commission's decision that ISP traffic is
3 "local" stating:

4 this Court's agreement with the Texas PUC's
5 decision that modem calls to ISPs are "local," and
6 not interstate, does not ignore nor contradict case
7 law finding that Internet transactions may involve
8 interstate commerce or that the "nature" of a
9 communication, not the physical location of
10 telecommunication facilities, is the determinative
11 factor in determining FCC jurisdiction. Indeed,
12 because the PUC is merely regulating the local
13 telecommunications component of Internet access,
14 the FCC and Congress still have interstate
15 jurisdiction over the Internet's information service
16 component and the "transactions" that occur over it.
17 The FCC has recognized that an identifiable
18 technological line divides Internet service into an
19 information and a telecommunications component.
20 It is that same line that also creates jurisdiction for
21 the PUC in this case.³⁹

22 Similarly, the U.S. District Court in Illinois upheld the Illinois Commerce
23 Commission's decision finding that ISP traffic is "local" traffic, observing
24 that "[t]he FCC has repeatedly made it clear that 'telecommunications'
25 and 'information services' are 'mutually exclusive' categories."⁴⁰

26 **Q. DOES THE GTE ADSL TARIFF ORDER HAVE ANY**
27 **APPLICATION TO E.SPIRE'S CASE?**

³⁹ *Southwestern Bell Telephone Company v. Public Utility Comm'n of Texas*,
MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938, p. 23-24 (W.D. Tex.
1998).

⁴⁰ *Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom
Technologies, Inc.*, No. 98 C 1925, 1998 U.S. Dist. LEXIS 11344, p. 11
(N.D. Ill. 1998).

1 A. No, the *GTE ADSL Tariff Order*⁴¹ is completely inapposite. All of
2 e.spire's traffic for which it claims reciprocal compensation is dial-up
3 traffic, not dedicated traffic.

4 **Q. THEN IS MR. HALPRIN INCORRECT IN ASSERTING THAT**
5 **THE *GTE ADSL TARIFF ORDER* SETTLED THE ISP TRAFFIC**
6 **ISSUE IN FAVOR OF DECLARING IT INTERSTATE AND FREE**
7 **OF RECIPROCAL COMPENSATION OBLIGATIONS (HALPRIN**
8 **DIRECT, pp. 3-6 AND 11-18)?**

9 A. Yes, he is incorrect. The *GTE ADSL Tariff Order* filing has no bearing on
10 the issue of reciprocal compensation for ISP traffic. Relying on that
11 decision, Mr. Halprin asks the Commission to reverse its prior decision in
12 the MFS proceeding determining that ISP traffic is "local" in nature.
13 However, *while the FCC permitted GTE to file interstate tariffs in the*
14 *GTE ADSL Tariff Order, it specifically declined to decide whether dial-up*
15 *calls to ISPs are jurisdictionally interstate or are subject to reciprocal*
16 *compensation. Indeed, the FCC specifically stated that:*

17 [t]his Order does not consider or address issues
18 regarding whether local exchange carriers are
19 entitled to receive reciprocal compensation when
20 they deliver to information service providers,
21 including Internet service providers, circuit-
22 switched dial-up traffic originated by
23 interconnecting LECs. Unlike GTE's ADSL tariff
24 [at issue here], the reciprocal compensation
25 controversy implicates: the applicability of the
26 separate body of Commission rules and precedent

⁴¹ *In the Matter of GTE Telephone Operating Companies*, Memorandum Opinion and Order, CC Docket No. 98-79, 1998 FCC LEXIS 5594 (Oct. 30, 1998) ("*GTE ADSL Tariff Order*").

1 regarding switched access service, the applicability
2 of any rules and policies relating to intercarrier
3 compensation when more than one local exchange
4 carrier transmits a call from an end user to an ISP,
5 and the applicability of interconnection agreements
6 under sections 251 and 252 of the Communications
7 Act, as amended by the Telecommunications Act of
8 1996, entered into by incumbent LECs and
9 competitive LECs that state commissions have
10 found, in arbitration, to include such traffic.
11 Because of these considerations, we find that this
12 Order does not, and cannot, determine whether
13 reciprocal compensation is owed, on either a
14 retrospective or prospective basis, pursuant to
15 existing interconnection agreements, state
16 arbitration decisions, and federal court decisions.⁴²

17 In other words, Mr. Halprin would have the Commission reverse itself on
18 the basis of a decision which the FCC itself states does not address the
19 issue in this case.

20 e.spire expects the FCC eventually to confirm that reciprocal
21 compensation should be paid for dial-up calls placed to ISPs. But, in any
22 event, the FCC's recent *GTE ADSL Tariff Order* provides no basis for the
23 Florida Commission to reverse its prior conclusions since the FCC
24 specifically declined to resolve the reciprocal compensation issue, and the
25 Florida Commission's decision is fully consistent with Congress' decision
26 in the Telecommunications Act to differentiate between the provision of
27 "telecommunications" and "information" services. I also note that

⁴² *GTE ADSL Tariff Order* at ¶ 2. Importantly, although the FCC did indicate that it expected to issue an order "in the next week," that was approximately five weeks ago, and there is no indication as yet that issuance of the FCC's decision is imminent.

1 NARUC and others have asked the FCC to reconsider its *GTE ADSL*
2 *Tariff Order*.

3 **Q. SINCE THE *GTE ADSL TARIFF ORDER* DOES NOT APPLY TO**
4 **THE ISSUE OF RECIPROCAL COMPENSATION FOR ISP**
5 **TRAFFIC, WHAT BEARING SHOULD IT HAVE ON THE**
6 **FLORIDA COMMISSION?**

7 A. The *GTE ADSL Tariff Order* has no bearing on the prior or future
8 decisions of the Florida Commission, or any other state commission, with
9 respect to reciprocal compensation for ISP traffic.

10 **Q. IS MR. HALPRIN'S VIEW CONTRARY TO PRIOR DECISIONS**
11 **OF THE FLORIDA COMMISSION?**

12 A. Yes. As in this case, in the complaints brought by WorldCom
13 Technologies and other CLECs, this Commission evaluated whether calls
14 to ISPs fell within the definition of "local traffic" as set forth in the
15 relevant interconnection agreements. Looking at the contract language
16 itself and other factors, the Commission concluded that the definition of
17 local traffic set forth in the interconnection agreements under dispute was
18 broad enough to include ISP traffic. The language at issue was virtually
19 identical to the language in the e.spire/BellSouth Interconnection
20 Agreement ("Interconnection Agreement") which specifically defines
21 "local traffic" as "telephone calls that originate in one exchange and
22 terminate in either the same exchange, or a corresponding Extended Area

1 Service (“EAS”) exchange.”⁴³ This definition does not differentiate
2 among types of end users, nor does it exclude calls from end users to other
3 end users in the same local calling area that happen to be ISPs. The
4 language of the e.spire/BellSouth Interconnection Agreement is
5 unambiguous.

6 Notably, the impact of BellSouth’s refusal to compensate CLECs
7 such as e.spire for terminating ISP traffic was itself critical to the
8 Commission’s decision finding that ISP traffic is “local” traffic subject to
9 reciprocal compensation. As the Commission noted in its order, a witness
10 for TCG summarized the impact that permitting BellSouth to prevail on
11 this issue would have:

12 As competition grows, the smaller, leaner [CLECs]
13 may well win other market segments from ILECs.
14 If each time this occurs, the ILEC, with its greater
15 resources overall, is able to fabricate a dispute with
16 [CLECs] out of whole cloth and thus invoke costly
17 regulatory processes, local competition could be
18 stymied for many years.⁴⁴

19 **Q. HOW DO YOU RESPOND TO MR. HALPRIN’S CONTENTION**
20 **THAT RECIPROCAL COMPENSATION PAYMENTS ARE**
21 **UNFAIR TO BELLSOUTH AND POOR PUBLIC POLICY**
22 **(HALPRIN DIRECT, pp. 26-28)?**

23 **A.** Mr. Halprin himself answers this question by stating that “the purpose of
24 reciprocal compensation for local traffic is to ensure that a LEC is able to

⁴³ e.spire/BellSouth Interconnection Agreement, Attachment B.

⁴⁴ *Florida Order* at 18.

1 recover its actual costs of terminating local traffic that originates on
2 another LEC's network . . ." (Halprin Direct, p. 28) That is all we are
3 trying to do. Thus, Mr. Halprin's accusation that e.spire is being
4 compensated unfairly is not only irrelevant but, coming from a BellSouth
5 witness, the height of hypocrisy. As a threshold matter, this is a contracts
6 case. BellSouth has breached its negotiated and agreed commitments to
7 e.spire. To the extent public policy is implicated, the issue in dispute is
8 whether one party to a contract can unilaterally refuse to perform its
9 obligations under the contract without penalty. If the Commission views
10 this case with an eye toward the broader questions involved, it will see that
11 compensating e.spire as per its Interconnection Agreement with BellSouth
12 is eminently fair and appropriate.

13 **Q. MR. HALPRIN REPEATEDLY REFERS TO E.SPIRE**
14 **RECOVERING MORE THAN ITS COSTS, TO "SUBSIDIES"**
15 **BEING GIVEN BY BELL SOUTH TO E.SPIRE, AND EVEN TO**
16 **E.SPIRE PRICING ABOVE ITS COSTS (SEE HALPRIN DIRECT,**
17 **pp. 26-31). ARE THESE COST ISSUES IRRELEVANT TO THIS**
18 **PROCEEDING?**

19 **A.** Yes, these costs are irrelevant to this case because a mechanism was
20 established in the Interconnection Agreement to set rates for reciprocal
21 compensation, regardless of e.spire's or BellSouth's costs. Nonetheless,
22 from a policy perspective, e.spire fully expects that the rates established
23 contractually are, if anything, a conservative estimate of its costs to

1 transport and terminate such traffic. Accordingly, there is no “windfall” to
2 e.spire.

3 Critically, despite Mr. Halprin’s repeated assertions, the record
4 reflects that Mr. Halprin has never worked for an ALEC. Thus, Mr.
5 Halprin does not have a basis for making factual claims about e.spire’s
6 costs, does not have access to the information necessary to establish
7 e.spire’s costs.

8 **Q. WHY DO YOU CALL MR. HALPRIN’S PUBLIC POLICY**
9 **STATEMENTS THE “HEIGHT OF HYPOCRISY”?**

10 **A.** The focus on reciprocal compensation is always on the terminating end of
11 the call – that is, the fact that e.spire has won over an Internet service
12 provider customer from BellSouth. The greatest market distortion fueling
13 this phenomenon, however, stems from the fact almost every call to an
14 Internet service providers in the BellSouth region is originated by a
15 BellSouth customer. BellSouth controls 99% of the residential market for
16 local telecommunications services, and 90% of the business market. Thus,
17 if the origination of calls were spread more evenly among ALECs and
18 BellSouth, this tremendous imbalance would not exist. Reciprocal
19 compensation, therefore, provides an incentive to BellSouth to open its
20 markets to greater competition.

21 BellSouth turns this argument on its head by arguing that
22 reciprocal compensation will create a disincentive for ALECs to pursue
23 customers because then they too would have to pay reciprocal

1 compensation for terminating traffic. This is absurd, however. e.spire has
2 been working day and night for each customer that it has, and is
3 committed to providing the quality of service and prices that will attract as
4 many more customers as are willing to select e.spire as their local carrier.

5 The limited success that e.spire and other ALECs have had in
6 attracting highly profitable customers, such as Internet service providers,
7 is the first real competition that BellSouth ever has faced. BellSouth
8 would rather deceive the Commission into thinking that compensating
9 ALECs for terminating this traffic is unfair – and thus to starve its
10 competitors to death by depriving them of compensation for services
11 rendered -- than to abide by its contractual commitments and compete for
12 these customers.

13 **Q. WHAT ABOUT MR. HALPRIN'S SUGGESTION THAT E.SPIRE**
14 **SHOULD SEEK REIMBURSEMENT FROM THE END USERS OR**
15 **ISPs INVOLVED?**

16 A. That simply is not a workable solution. The end users involved are
17 customers of BellSouth, and e.spire has no way of billing them. As for the
18 ISPs, BellSouth is prohibited by FCC rules from charging them access
19 charges. If e.spire begins to assess access charges on ISPs, most ISPs will
20 immediately switch-back to BellSouth as their local service provider.
21 Thus, this huge and fast-growing market segment will become the
22 monopoly province of BellSouth. A skeptic could imagine that such an

1 outcome is the true end game underlying BellSouth's aggressive strategy
2 of refusing to pay reciprocal compensation to CLECs for ISP traffic.

3 **Q. DO YOU HAVE ANY FINAL OBSERVATIONS REGARDING MR.**
4 **HALPRIN'S TESTIMONY?**

5 A. Mr. Halprin's position that all ISP traffic is interstate in nature really
6 represents an assertion that all aspects of Internet traffic should be subject
7 to the *exclusive* jurisdiction of the FCC. Given Mr. Halprin's history as a
8 federal regulator, it is not surprising that he believes that the FCC "knows
9 best," and that state regulators should keep their "hands off." However,
10 e.spire believes that state regulators should -- and do -- have extensive
11 jurisdiction over the local access segment of Internet traffic.

12 **Q. HOW DOES E.SPIRE RESPOND TO MR. HENDRIX'S**
13 **TESTIMONY THAT E.SPIRE MAY NOT USE THE MOST**
14 **FAVORED NATIONS PROVISIONS OF ITS**
15 **INTERCONNECTION AGREEMENT WITH BELLSOUTH TO**
16 **ADOPT A RECIPROCAL COMPENSATION RATE FROM**
17 **ANOTHER BELLSOUTH INTERCONNECTION AGREEMENT?**

18 A. The most favored nations provisions of e.spire's Interconnection
19 Agreement with BellSouth (the "Interconnection Agreement") provide as
20 follows:

21 *If as a result of any proceeding before any Court,*
22 *Commission, or the FCC, any voluntary agreement or*
23 *arbitration proceeding pursuant to the Act, or pursuant to*
24 *any applicable federal or state law, BellSouth becomes*
25 *obligated to provide interconnection, number portability,*
26 *unbundled access to network elements or any other services*

1 related to interconnection whether or not presently covered
2 by this Agreement to another telecommunications carrier
3 operating within a state within the BellSouth territory at
4 rates or on terms and conditions more favorable to such
5 carrier than the comparable provisions of this Agreement,
6 then [e.spire] shall be entitled to add such network elements
7 and services, *or substitute such more favorable rates, terms*
8 *or conditions* for the relevant provisions of this Agreement,
9 which shall apply to the same states as such other carrier
10 and such substituted rates, terms or conditions shall be
11 deemed to have been effective under this Agreement as of
12 the effective date thereof to such other carrier.
13

14 Section XXII(A) (emphasis added). e.spire has triggered this most
15 favored nations language to adopt the reciprocal compensation rate stated
16 in the partial interconnection agreement between BellSouth and MFS.
17 The Agreement permits e.spire to adopt “rates, terms, or conditions,” of
18 another CLEC’s agreement.

19 Mr. Hendrix claims that the Eighth Circuit’s decision in *Iowa*
20 *Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) precludes e.spire
21 from adopting a single rate from the MFS interconnection agreement
22 without adopting the entire agreement. But Mr. Hendrix is simply
23 incorrect that *Iowa Utilities Board* controls the application of the most
24 favored nations provision of the Interconnection Agreement. The most
25 favored nations provisions of our Interconnection Agreement were the
26 result of voluntary negotiations – not arbitration – and thus are unaffected
27 by the Eighth Circuit decision.

28 **Q. PLEASE DESCRIBE THE RELEVANT PORTION OF THE**
29 **EIGHTH CIRCUIT DECISION.**

1 A. The Court in *Iowa Utilities Board* interpreted the FCC's so-called "pick
2 and choose" rule. 47 C.F.R. § 51.809. That rule was promulgated by the
3 FCC on August 8, 1996, in its First Report and Order in CC Docket
4 No.96-98. (*Implementation of Local Competition Provisions in the*
5 *Telecommunications Act of 1996*, CC Docket No.96-98, First Report and
6 Order, Rel. August 8, 1996 (the "First Report and Order")). The rule
7 promulgated by the FCC provides:

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

22
23 47 C.F.R. § 51.809(a). The Eighth Circuit found the FCC's rule to be an
24 unreasonable interpretation of 47 U.S.C. § 252(i). (120 F.3d at 800-01).

25 **Q. WHY IS MR. HENDRIX'S ARGUMENT INCORRECT?**

26 A. e.spire's adoption of the MFS reciprocal compensation rate under the most
27 favored nations provision of the Interconnection Agreement is not made
28 pursuant to 47 U.S.C. § 252(i) or FCC rule 47 C.F.R. § 51.809. e.spire's
29 Interconnection Agreement with BellSouth was signed on July 25, 1996,
30 two weeks prior to the issuance of the FCC's rules in the August 8, 1996
31 First Report and Order. The most favored nations language in e.spire's

1 Interconnection Agreement is the result of voluntary contractual
2 negotiations between e.spire and BellSouth.

3 The *Iowa Utilities Board* decision does not expressly prohibit
4 application of a voluntarily negotiated most favored nations clause in a
5 CLEC interconnection agreement that allows a CLEC to pick and choose
6 from other interconnection agreements. On the contrary, the Eighth
7 Circuit's decision in *Iowa Utilities* clearly favors voluntary negotiation as
8 the preferred means of obtaining an interconnection agreement pursuant to
9 47 U.S.C. § 252(a). 120 F.3d at 801. Although the Eighth Circuit states
10 that making "pick and choose" available to all CLECs could thwart the
11 negotiation process, nothing in the *Iowa Utilities* decision suggests that
12 such a voluntarily negotiated provision in an individual CLEC's
13 interconnection agreement violates the Telecommunications Act of 1996.

14 Furthermore, in light of the fact that e.spire was one of the earlier
15 CLECs to enter an interconnection agreement with BellSouth, it was
16 reasonable for e.spire to reserve its right to adopt more favorable terms
17 that BellSouth later offered to other CLECs, such as the reciprocal
18 compensation rate included in the MFS interconnection agreement which
19 BellSouth entered on August 26, 1996, after BellSouth signed the
20 Interconnection Agreement with e.spire. If e.spire were to accept less than
21 MFS, it would be at a competitive disadvantage vis-a-vis MFS, or other
22 later entrants.

1 **Q. DID BELLSOUTH INITIALLY INFORM E.SPIRE THAT IT DID**
2 **NOT AGREE WITH E.SPIRE'S MOST FAVORED NATION**
3 **REQUEST?**

4 A. No. The correspondence attached to my Direct Testimony confirms that,
5 until e.spire commenced formal collections actions, BellSouth ignored
6 e.spire's repeated most favored nations request. If there was a legitimate
7 difference in legal interpretation, BellSouth did not make an effort to
8 negotiate this issue in good faith with e.spire. By ignoring e.spire's
9 repeated most favored nations requests, BellSouth forced e.spire to come
10 to the Commission for relief. Although silent on the most favored nations
11 issue in correspondence, BellSouth now raises this legal issue for the first
12 time in these proceedings. If BellSouth had a legitimate difference of
13 interpretation on this issue, it should have raised it months ago.

14 **Q. PLEASE COMMENT ON MR. HENDRIX'S CLAIM THAT**
15 **E.SPIRE IS NOT ADDING OR SUBSTITUTING A RATE.**

16 A. Mr. Hendrix attempts to avoid application of the most favored nations
17 provisions of the Interconnection Agreement through an exercise in
18 semantics in which he concludes that e.spire's attempt to adopt the MFS
19 reciprocal compensation rate does not constitute the addition of a new
20 service or the substitution of more favorable rates, terms and conditions.
21 (*Hendrix Direct*, p. 7). Mr. Hendrix's strained reading of the most favored
22 nations provision is contrary to the plain meaning of that language.
23 Whether viewed as *adding* a new rate where none existed, or *substituting* a

1 rate of \$0.009 for a rate of \$0.000, the most favored nations language
2 plainly allows e.spire to substitute or add the rate in the MFS
3 interconnection agreement to e.spire's Interconnection Agreement.

4 **Q. HOW DO YOU RESPOND TO MR. HENDRIX'S CONTENTION**
5 **THAT LOCAL TRAFFIC SENT BY BELLSOUTH TO E.SPIRE**
6 **FOR TERMINATION HAS NOT EXCEEDED 2 MILLION**
7 **MINUTES ON A MONTHLY BASIS?**

8 A. Mr. Hendrix has no basis to complain about e.spire's usage reports, which
9 show that the local traffic sent by BellSouth to e.spire for termination
10 exceeds the amount routed by e.spire to BellSouth by far more than
11 2 million minutes monthly. It is critical to remember that BellSouth is
12 expressly obligated under our agreement to track the traffic exchanged and
13 provide regular usage reports to e.spire. Nevertheless, BellSouth failed to
14 track the traffic, and never provided a single usage report to e.spire.
15 Consequently, e.spire was forced to develop its own local traffic
16 measurement system, and perform BellSouth's obligations under the
17 agreement. Thus, BellSouth has unclean hands, and should not be
18 complaining about e.spire's reporting, at least until it produces its own
19 traffic reports.

20 **Q. HAS BELLSOUTH CHALLENGED THE VALIDITY OF**
21 **E.SPIRE'S TRAFFIC MEASUREMENT SYSTEMS?**

22 A. No. As a matter of fact, in proceedings before the Georgia PSC, a
23 BellSouth witness conceded that it does not dispute e.spire's measurement

1 methodology or traffic reports, other than the fact that BellSouth believes
2 that minutes-of-use (“MOU”) attributable to local access calls placed to
3 ISPs should be subtracted from the total.

4 **Q. WHAT ABOUT MR. HENDRIX’S COMPLAINT (HENDRIX**
5 **DIRECT, p. 6) THAT E.SPIRE USED “COMBINED TRUNKS” TO**
6 **RECORD MOU?**

7 A. Mr. Hendrix’s statement is simply untrue. “Combined trunks” are used to
8 simultaneously route local service and exchange access traffic. That is not
9 how e.spire and BellSouth are interconnected. We utilize separate trunk
10 groups for routing local traffic and exchange access traffic. Our MOU
11 count is limited to the traffic routed by each party to the other over the
12 *local traffic* trunk groups. Thus, when counting the MOU sent by
13 BellSouth to e.spire for termination, we limited our counting to MOU
14 routed to us by BellSouth over the trunk groups reserved for local traffic.
15 Indeed, if BellSouth in fact routed ISP access calls to e.spire over these
16 local traffic trunk groups, it is a telling admission that BellSouth itself
17 regards such calling as “local” traffic for most purposes.

18 **Q. HOW DOES E.SPIRE RESPOND TO MR. HENDRIX’S**
19 **TESTIMONY THAT ISP TRAFFIC IS NOT SUBJECT TO**
20 **RECIPROCAL COMPENSATION?**

21 A. Mr. Hendrix provides lengthy legal arguments regarding BellSouth’s
22 position that ISP traffic is not subject to reciprocal compensation.
23 (Hendrix Direct, pp. 7-15). However, these are the same arguments

1 advanced by BellSouth to defend the complaints brought by WorldCom,
2 TCG, Intermedia, and MCI, and which were rejected by the Commission
3 in Order No. PSC-98-1216-FOF-TP on September 15, 1998. This
4 Commission's ruling in that case is consistent with the decisions of at least
5 24 other state Commissions and at least three federal courts.

6 **Q. WHAT IS E.SPIRE'S RESPONSE TO MR. HENDRIX'S**
7 **STATEMENT THAT NO REPRESENTATIVE OF E.SPIRE EVER**
8 **INDICATED THAT E.SPIRE CONSIDERED ISP TRAFFIC TO BE**
9 **SUBJECT TO RECIPROCAL COMPENSATION IN THE**
10 **NEGOTIATION OF THE INTERCONNECTION AGREEMENT**
11 **(HENDRIX DIRECT, p. 8)?**

12 **A.** It was not incumbent upon e.spire to list all types of traffic that would be
13 considered local. The purpose of a general definition, like the definition
14 of local traffic in e.spire's Interconnection Agreement, is to obviate the
15 necessity to provide an exhaustive list of services. Indeed, e.spire did not
16 list ISP traffic as local traffic. Nor did it list as included in the definition
17 of local traffic other types of high volume call recipients, such as calls to
18 airline reservation desks, call-in centers, radio stations, or ticket
19 companies, as local calls. There was no need to provide an exhaustive list
20 of types of local calls because a general definition of local calls was
21 included in the Agreement. ISP-terminated calls fall squarely within that
22 definition, as confirmed by 24 other state commissions and 3 federal
23 courts.

1 Q. HOW DO YOU RESPOND TO MR. HENDRIX'S STATEMENTS
2 (HENDRIX DIRECT, pp. 8 & 19-20) THAT BELL SOUTH DID NOT
3 INTEND TO INCLUDE ISP TRAFFIC WITHIN THE SCOPE OF
4 "LOCAL" TRAFFIC SUBJECT TO RECIPROCAL
5 COMPENSATION OBLIGATIONS?

6 A. First, let me state that I have discussed this matter with the persons who
7 negotiated the Interconnection Agreement on behalf of e.spire, and they
8 have assured me that e.spire did in fact intend that ISP traffic be included
9 as "local" traffic for purposes of paying reciprocal compensation. Indeed,
10 they have told me that the definition of "local traffic" was intentionally
11 made broad enough to include this and many other types of traffic.

12 However, we do not believe that such statements are relevant. The
13 Interconnection Agreement speaks for itself. And we believe that the
14 obligations of the parties on this point must be gleaned from the language
15 of the Interconnection Agreement itself and not by reference to the some
16 alleged inconsistency between the contract language and the parties'
17 intent.

18 I note with interest that Mr. Hendrix states (Hendrix Direct, pp. 18-
19 19) that BellSouth was aware of FCC rulings espousing a "two-call"
20 theory for ISP traffic during the negotiation of the Interconnection
21 Agreement. If BellSouth believed so strongly that ISP traffic should not
22 be included as "local," then one must wonder why BellSouth did not insist
23 either that the definition of "local traffic" expressly exclude ISP traffic or

1 that the definition of "switched access" expressly include ISP traffic. In
2 our view the answer is simple. This issue was not addressed because both
3 parties accepted the prevailing view that calls placed via tariffed local
4 exchange services to ISPs were to be treated as "local" calls.

5 **Q. DOES THE INTERCONNECTION AGREEMENT BETWEEN**
6 **E.SPIRE AND BELL SOUTH SUPERSEDE ALL PRIOR**
7 **DISCUSSIONS BETWEEN THE PARTIES?**

8 A. Yes. Section XXX of the Interconnection Agreement is an "Entire
9 Agreement" clause that expressly provides that the written agreement will
10 control over the statements or, in this case, the recollections of one of
11 BellSouth's several negotiators to the Interconnection Agreement.
12 Moreover, there is no question that BellSouth was aware that traffic could
13 become imbalanced. Before I arrived at e.spire in May 1996, I was well
14 aware that there were advantages to a CLEC to having a usage-based rate
15 for reciprocal compensation. I was aware of this through my participation
16 in public proceedings in Pennsylvania, Florida, and elsewhere. As
17 discussed below, BellSouth also was acutely aware of these issues at this
18 time, as evidenced by the record in at least one Florida proceeding. In any
19 event, the language of the Interconnection Agreement concerning the
20 definition of local traffic governs. BellSouth cannot get out of a particular
21 provision of the Interconnection Agreement simply because it finds this
22 particular provision unfavorable. There are certainly other provisions of
23 the Interconnection Agreement that favor BellSouth, such as the

1 unbundled loop rates, which are among the highest in the country. e.spire
2 pays those rates, however, and stands by the bargain it struck with
3 BellSouth. The Commission should ensure that BellSouth does the same.

4 **Q. DID BELLSOUTH UNDERSTAND THAT TRAFFIC COULD**
5 **BECOME IMBALANCED?**

6 A. Yes. BellSouth undoubtedly was aware that, in one way or another, traffic
7 could become imbalanced. I participated in a proceeding before this
8 Commission in an interconnection docket in late 1995 and early 1996, as
9 an attorney for MFS. The witness for BellSouth in that proceeding was
10 Robert Scheye, to whom Jerry Hendrix reported, and who was one of
11 BellSouth's initial negotiators of the Interconnection Agreement. As a
12 result of this Florida proceeding, BellSouth, as a corporation, was fully
13 aware that traffic could flow heavily in either direction. BellSouth had
14 taken precautions against this very issue in the Stipulation it signed in
15 Florida with Time Warner on December 8, 1995, which stated:

16 under the terms of the Stipulation, the parties pay each
17 other BellSouth's terminating switched access rates,
18 exclusive of the RIC and CCL elements of the
19 switched access rate, on a per-minute-of-use basis of
20 \$0.01052 for terminating local traffic on each other's
21 network. *A local exchange provider is not required to*
22 *compensate another local exchange provider more*
23 *than one hundred five percent (105%) of the total*
24 *minutes-of-use of the local exchange provider with the*
25 *fewer minutes-of-use in the same month.*⁴⁵

⁴⁵ *In Re: Resolution of Petition(s) to Establish Nondiscriminatory Rates, Terms, and Conditions for Interconnection Involving Local Exchange Companies and Alternative Local Exchange Companies Pursuant to Section 364.162, Florida Statutes, Docket No. 950985-TP, Order No. PSC-96-0445-FOF-TP, p. 9 (1996).*

1
2 This proposal was in fact offered to e.spire, but e.spire and BellSouth
3 eventually negotiated the language contained in the Interconnection
4 Agreement. e.spire chose not to negotiate a cap similar to the one
5 accepted by Time Warner. This is one indication that BellSouth was fully
6 apprised of the possibility that traffic could flow heavily in one direction
7 or another, but chose not to negotiate a similar provision with e.spire.

8 **Q. HOW ELSE WAS BELLSOUTH AWARE THAT TRAFFIC**
9 **COULD FLOW HEAVILY TOWARDS CLEC NETWORKS?**

10 A. In the same Florida proceeding the only record evidence on traffic flows
11 was from an MFS witness who stated that "MFS was terminating more
12 traffic than it originated. BellSouth, however, offered no practical
13 experience as to whether traffic would be balanced or not."⁴⁶ The Florida
14 Commission concluded, "[w]e believe that it is highly speculative to
15 predict that traffic will be imbalanced to BellSouth's detriment such that
16 BellSouth terminates far more ALEC traffic than it sends to them."⁴⁷

17 **Q. PLEASE EXPLAIN, IN THIS ENVIRONMENT, THE TERMS TO**
18 **WHICH BELLSOUTH AND E.SPIRE AGREED.**

19 A. The Interconnection Agreement is simple: the parties would negotiate a
20 rate once the traffic flow exceeded 2 million minutes per month in any
21 given state. Once BellSouth agreed to the rate of \$0.009 cents per minute

⁴⁶ *Id.*

⁴⁷ *Id.*

1 with MFS, however, it established the rate that it would have to offer to
2 e.spire through the most favored nations clause in the Interconnection
3 Agreement that was negotiated between e.spire and BellSouth.

4 **Q. WAS JERRY HENDRIX THE SOLE NEGOTIATOR FOR**
5 **BELLSOUTH?**

6 A. No. Initially, Robert Scheye was the chief negotiator. He was supported
7 by a team of subject matter experts and attorneys on issues for which he
8 needed assistance. Mr. Hendrix's understanding of the issues may not be
9 representative of the entire team, or what the BellSouth corporation clearly
10 knew as evidenced by the Florida order. The bottom line is that BellSouth
11 struck a deal, and it must abide by it.

12 **Q. HOW DO YOU RESPOND TO MR. HENDRIX'S ALLEGATION**
13 **THAT BELLSOUTH CONCEIVABLY COULD END UP PAYING**
14 **E.SPIRE MORE IN RECIPROCAL COMPENSATION THAN IT**
15 **RECEIVES FROM ITS OWN END USERS FOR THE**
16 **ASSOCIATED LOCAL EXCHANGE SERVICE (HENDRIX**
17 **DIRECT, pp. 20-22)?**

18 A. I suppose that this is possible, but it is neither relevant nor proven. In any
19 event, given the fact that BellSouth continues to dominate the local
20 market, the huge revenues derived from its embedded customer base
21 would have to be considered.

22 **Importantly, the Telecommunications Act requires interconnecting**
23 **LECs to reimburse each other for the additional costs that they incur in**

1 terminating traffic routed to one another for completion. Such *cost*
2 reimbursement is a critical safeguard to ensure that neither party is
3 permitted to free-ride the other carrier's network – as BellSouth seeks to
4 do here. The revenue derived by the carrier routing the traffic for
5 completion is immaterial.

6 I also note that this potential dilemma exists equally for e.spire. If
7 an e.spire end user places numerous calls to an ISP served by BellSouth, it
8 is equally possible that e.spire's reciprocal compensation obligations to
9 BellSouth could exceed the revenue obtained by e.spire from the
10 associated end user. The answer to this problem – if it exists at all – is for
11 both parties to rationalize their end user pricing, and make sure that high
12 volume Internet users are placed on appropriate local exchange pricing
13 plans. Certainly the answer is not for BellSouth to reap a windfall by
14 retaining all end user revenues and utilizing e.spire's network free-of-
15 charge.

16 **Q. HAS ANY OTHER STATE COMMISSION ADDRESSED THE**
17 **SPECIFIC INTERPRETATION OF THE INTERCONNECTION**
18 **AGREEMENT URGED BY MR. HENDRIX?**

19 **A.** Yes. A complaint identical to the one at issue in this proceeding already
20 has been decided by a Hearing Officer for the Georgia Public Service
21 Commission.⁴⁸ The Hearing Officer decided that: (1) the “entire
22 agreement” clause of the Interconnection Agreement bars Mr. Hendrix's

1 attempted use of parole evidence; (2) local access calls are included in the
2 definition of "local traffic" contained in the Interconnection Agreement;
3 (3) BellSouth violated the terms of the Interconnection Agreement by
4 failing to measure and report local traffic; (4) e.spire's own local traffic
5 measurement system is valid; (5) the most favored nations clause of the
6 Interconnection Agreement was valid and operative; and (6) e.spire
7 properly invoked the most favored nations clause by electing the MFS rate
8 for reciprocal compensation. The Hearing Officer ordered BellSouth to
9 pay all resulting damages plus interest.

10 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

11 **A. Yes it does.**

(...continued)

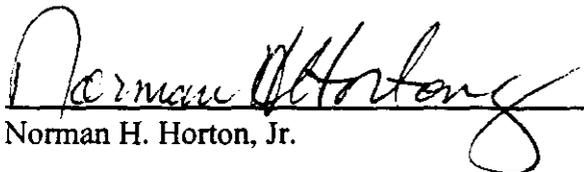
⁴⁸ See *Georgia Decision, supra*, note 20 (appended to the Direct Testimony of James C. Falvey as Exhibit No. _____ (JCF-8)).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Rebuttal Testimony of James C. Falvey was provided this 10th day of December, 1998, by hand delivery (*) and/or regular U.S. mail to:

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