

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
ORDER NO. PSC-99-0099-PCO-TP
ISSUED: January 20, 1999

ORDER ON MOTION TO STRIKE

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 requests 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 has been set for an administrative hearing on January 20, 1999.

On January 5, 1999, e.spire filed a Motion to Strike the Direct and Rebuttal Testimony of Albert Halprin. The company asserts that Mr. Halprin's testimony is completely legal in nature and is, therefore, inadmissible. On January 12, 1999, BellSouth filed its response to e.spire's motion. BellSouth argues that Mr. Halprin's testimony is substantively factual in nature, and that Mr. Halprin's consideration of the legal definitions and concepts does not change the nature of his testimony.

Specifically, e.spire states that Mr. Halprin is a lawyer and an adjunct law professor. The company asserts that all of Mr. Halprin's testimony is legal argument, which offers no factual information that would be useful to the parties or the Commission

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in this proceeding. e.spire also asserts that under Section 90.703, Florida Statutes, the type of evidence offered by Mr. Halprin is opinion testimony that is inadmissible.¹ e.spire further asserts that this Commission has found legal testimony to be impermissible in the past.² e.spire emphasizes that in Order No. PSC-94-0371-PCO-WS, issued March 30, 1994, in Docket No. 930880-WS, the prehearing officer noted that, generally, we have not allowed expert testimony on legal issues. In that Order, the prehearing officer further stated that

The most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument in support of their position on the issue. Cross-examination of a witness on legal opinion is not contemplated by Section 120.57, Florida Statutes, which provides for a fact finding proceeding.

Order at 94 FPSC 3:726. Therefore, the prehearing officer struck the testimony at issue, because it addressed the legal question of the Commission's authority, which was an issue that had been determined was not appropriate for the proceeding.

For these reasons, e.spire argues that the direct and rebuttal testimony of BellSouth's witness Halprin should be stricken.

In its response, BellSouth states that Mr. Halprin is a regulatory expert by virtue of his past positions with the FCC. BellSouth notes that Mr. Halprin has testified on similar issues in various other state proceedings.

¹e.spire also cites Town of Palm Beach v. Palm Beach County, 460 So. 2d 879, 882 (Fla. 1984) for the proposition that a witness's testimony is inadmissible if it tells the trier of fact how to decide the case without helping in the determination of what has occurred.

² Citing Order No. PSC-94-1363A-PCO-WS, issued November 21, 1994, in Docket No. 930945-WS, and Order No. PSC-94-1520-PCO-WS, issued December 9, 1994, in Docket No. 930945-WS.

BellSouth asserts that Mr. Halprin's testimony is actually substantive in nature, instead of just legal opinion, as argued by e.spire. BellSouth further asserts that the factual issue upon which Mr. Halprin offers testimony is where Internet communications that are placed through Internet Service Providers (ISPs) terminate. BellSouth agrees that Mr. Halprin's testimony includes some legal analysis associated with this issue, but argues that the essential nature of Mr. Halprin's testimony is, nevertheless, factual.

BellSouth further argues that Mr. Halprin has extensive expertise in this regulatory area, which qualifies him as an expert witness. BellSouth emphasizes that e.spire will have an opportunity to cross-examine Mr. Halprin at the hearing. BellSouth further emphasizes that the Commission is not bound by the rules of evidence in conducting its hearings. BellSouth states that the Commission may choose to allow this testimony and simply give it the weight that we believe it is due.

In addition, BellSouth notes that e.spire has presented the testimony of James Falvey, an attorney. BellSouth asserts that Mr. Falvey's testimony also provides legal opinions, although BellSouth has not moved to strike Mr. Falvey's testimony.

For all of these reasons, BellSouth asks that e.spire's Motion to Strike the Direct and Rebuttal Testimony of Albert Halprin be denied.

Upon consideration of the arguments presented and review of the testimony at issue, e.spire's Motion to Strike shall be granted, in part and denied, in part. I find that Mr. Halprin's Direct and Rebuttal testimony is a combination of fact testimony and legal opinion. While legal opinion is, generally, more appropriately expressed through post-hearing briefs, we do have the discretion of allowing such testimony to be presented and simply giving it the weight that it is due in our deliberations. Mr. Halprin's testimony, however, contains an extensive amount of legal analysis and opinion that appears to extend beyond the scope of the issues in this case. This testimony focuses on the FCC's Memorandum Opinion and Order, issued in CC Docket 98-79, on October 30, 1998, regarding GTE Telephone's ADSL tariff. The relevance of this testimony regarding an FCC ruling, which was issued some 22 months after the Agreement between these parties was approved by this Commission, is not readily apparent. Therefore, the following

portions of Mr. Halprin's Direct and Rebuttal testimony shall be stricken:

WITNESS HALPRIN'S DIRECT TESTIMONY

Page 3, line 3 (beginning with the word "I") through Page 6, line 12.

Page 9, line 7 through page 15, line 3.

Page 15, line 22 through page 20.

Page 21, lines 14-19 (beginning with the sentence "The FCC has now acted on the issue.")

Page 22, line 12 (beginning with the sentence "That guidance has now been provided.") through page 25, line 22.

Page 31, line 9 (beginning with the phrase "The FCC's recent Order. . .") through page 31, line 14 (ending with the word "jurisdiction.")

WITNESS HALPRIN'S REBUTTAL TESTIMONY

Page 2, line 12 (beginning with the phrase "In its ruling. . .") through page 3, line 20.

Page 4, line 2 (beginning with the phrase "The FCC's DSL orders. . .") through page 5, line 12.

Page 6, line 5 (beginning with the phrase "In the. . .") through page 6, line 18.

Page 7, lines 8 through 10 (the sentence "That decision was rendered before the FCC issued its DSL orders, which clarified the issued on which the Florida PSC found 'some room for interpretation.'")

In the interest of fairness, I find that much of Witness Falvey's rebuttal testimony shall be stricken as it pertains to the portions of Witness Halprin's testimony that are stricken. Thus, the following portions of Witness Falvey's testimony shall be stricken:

WITNESS FALVEY'S REBUTTAL TESTIMONY

Page 2, line 22 through page 8, line 5.

Page 9, line 18 through page 17, line 18.

Page 21, line 5 through page 21, line 9 (ending with the phrase ". . . 'hands off.'").

These portions of the witnesses' testimony shall be stricken. To the extent, however, that the parties believe that the information contained in the stricken testimony is, in fact, pertinent to the issues to be decided in this proceeding, the

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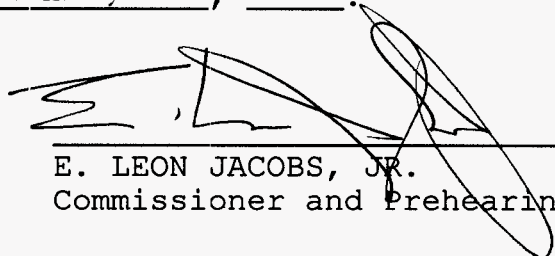
parties shall be allowed to fully address these matters through their post-hearing briefs.

It is therefore

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that the Motion to Strike the Direct and Rebuttal Testimony of Albert Halprin filed by 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. is granted, in part, and denied, in part, as set forth in the body of this Order. It is further

ORDERED that portions of the Rebuttal Testimony of James C. Falvey are also stricken as set forth in the body of this Order.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 20th Day of January, 1999.



E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.