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-99-0658-FOF-TP ISSUED: April 6, 1999

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON
E. LEON JACOBS, JR.

APPEARANCES:

Norman H. Horton, Jr., Esquire, and Floyd R. Self, Esquire, Messer, Caparello, & Self, 215 South Monroe Street, Post Office Box 1876, Tallahassee, Florida 32302-1876.
On behalf of American Communication Services of Jacksonvile, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc.

Mary Keyer, Esquire, 675 West Peachtree Street, Northeast, Suite 4300, Atlanta, Georgia 30375.
On behalf of BellSouth Telecommunications, Inc.

Nancy B. White, Esquire, c/o Nancy Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301.
On behalf of BellSouth Telecommunications, Inc.

Beth Keating, Esquire, and Clintina Watts, Esquire, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.
On behalf of Commission staff.

ORDER RESOLVING COMPLAINT
AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER REQUIRING DETERMINATION OF TERMINATED TRAFFIC DIFFERENTIAL

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed in this Order, wherein we have required the parties to determine the number of minutes originated by e.spire and terminated on BellSouth's system and have required the parties to then use this information to derive the differential between what e.spire terminated on BellSouth's system and what BellSouth terminated on e.spire's system, is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

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I. 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 with us against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, e.spire asked us to enforce 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. We conducted an administrative hearing in this matter on January 20, 1999.

II. DEFINITION OF "LOCAL TRAFFIC"

The parties' dispute focused on the definition of the term "local traffic" in their agreement. e.spire believed that this term included traffic to ISPs, while BellSouth argued that it did not. In the parties' Interconnection Agreement, local traffic is defined 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.

It is important for us to determine whether or not the parties intended to cover traffic to ISPs within the definition of "local traffic" in their agreement, because the application of Section VI(B) of the parties' agreement is dependent upon "local traffic." Section VI(B) 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.

According to the terms of this provision, 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. Pursuant to Section VI(B), once the two million minute threshold was met, the parties were to enter into negotiations to establish a traffic exchange agreement.

Both parties offered arguments on whether ISP traffic should be treated as local or interstate. e.spire witness Falvey argued that the FCC believes that dial-up calls to ISPs consist of two components: 1) telecommunications and 2) information. Witness Falvey also argued 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. Witness Falvey maintained 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.

BellSouth witness Hendrix explained that a call to an ISP does not terminate at the Internet local Point of Presence (POP). Witness Hendrix stated that this traffic is jurisdictionally interstate. Witness Hendrix further cited 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. The witness maintained that if calls to ISPs were local, there would be no need to lift an access charge exemption.

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

> 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.

In response, e.spire witness Falvey argued that:

> 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.

BellSouth witness Hendrix maintained, however, that e.spire should have known BellSouth's position on ISP traffic, because witness Hendrix negotiated the agreement with Mr. Richard Robertson of e.spire. Witness Hendrix noted that Mr. Robertson was an employee of BellSouth just a few months prior to negotiating the agreement for e.spire, and that he was well aware of BellSouth's policies. We note, however, that Mr. Robertson was not called by either party to testify in this matter. Thus, no direct evidence regarding Mr. Robertson's knowledge or intentions was presented in this case.

Witness Hendrix also stated 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

would neither pay nor bill reciprocal compensation for this traffic. BellSouth did not, however, have a method to track ISP traffic at the time the August 12, 1997, letter was sent.

In addition, BellSouth witness Hendrix stated that e.spire was not just using strictly local trunks, but also trunks that carry interlata traffic and other types of traffic. Witness Hendrix also referred to a letter dated January 8, 1998, from BellSouth to e.spire, which stated 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.

e.spire witness Talmage disagreed and explained 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. Witness Talmage did agree that the minutes of use billed to BellSouth for reciprocal compensation included ISP traffic to the extent that this traffic was carried over the local trunks. e.spire witness Talmage emphasized, however, 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.

Determination

With regard to the arguments presented on the jurisdictional nature of traffic to ISPs, we addressed many of these same arguments in Order No. PSC-98-1216-FOF-TP. We note that the issue of the jurisdictional nature of traffic to ISPs is a matter that has recently been considered by the FCC. Nevertheless, it is not necessary for us to determine the jurisdictional nature of this traffic in order to resolve this complaint. We only need to determine the intent of the parties regarding ISP traffic during the negotiation of their Agreement. Therefore, we have considered these arguments only to the extent that they relate to the parties' intent at the time they entered into the agreement. As we

emphasized 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, we 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, rhg. 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, rhg. 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.

Upon consideration, the evidence in this case does not indicate that the parties intended to exclude ISP traffic from the definition of "local traffic" in their Interconnection Agreement. In determining the parties' intent, we examined the parties'

actions subsequent to entering into the agreement. While BellSouth witness Hendrix argued that BellSouth did not intend for ISP traffic to be subject to reciprocal compensation, the evidence does not support his assertions for several reasons. First, BellSouth's witness Hendrix conceded that BellSouth did not have the capability of tracking traffic to ISPs. 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 develop an estimate based on call holding times. Further, witness Hendrix asserted that e.spire cannot distinguish on a call-by-call basis whether the call is an ISP call. He indicated, however, that e.spire should be able to do so by using the NXX associated with the ISP. On these points, we find 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. In addition, BellSouth witness Hendrix acknowledged that ISP traffic was not discussed during negotiations. It seems reasonable to us that if the parties had intended to exclude traffic to ISPs from the definition of the term "local traffic," there would have been some discussion on the subject, particularly in view of the agreement's provisions on the tracking of traffic and the parties' decision to include a two-million-minute threshold in their agreement.

We also find it revealing that BellSouth notified the ALEC industry that it would neither pay nor bill reciprocal compensation for calls to ISPs by letter dated August 12, 1997. BellSouth sent this notification more than a year after BellSouth entered into the Interconnection Agreement with e.spire. Furthermore, BellSouth did not have a means of tracking this traffic; therefore, BellSouth could not have known whether it was paying or billing for this traffic. We note that this situation is identical to the situation we addressed in Order No. PSC-98-1216-FOF-TP, where we 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.

Order No. PSC-98-1216-FOF-TP at p. 19.

Also, BellSouth treats its own ISP traffic as local traffic. e.spire witness Falvey explained that:

> 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.

e.spire further argued in its brief that Attachment B of the parties' Interconnection Agreement 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.

e.spire emphasized that this definition is the identical definition found in the Intermedia-BellSouth Agreement that we addressed in Order No. PSC-98-1216-FOF-TP. In that Order, we found that the parties did not intend to exclude traffic to ISPs. Order at p. 24. After reviewing similar arguments and actions of the parties in this proceeding, we believe that BellSouth and e.spire did not intend to exclude ISP traffic from the definition of local traffic in their Interconnection Agreement.

Finally, in Order No. PSC-98-1216-FOF-TP, we 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 at p.20.

BellSouth noted in its brief that we acknowledged that the FCC had not yet ruled on the jurisdictional nature of ISP traffic. BellSouth stated that the FCC has now stated its position on this issue. BellSouth explained 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 determined that ISP Internet traffic has always been interstate traffic. We note, however, that the FCC also stated that:

> 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 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.

FCC Order 98-292 at ¶ 2.

The FCC further explained that

> . . . [W]e 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 Order 98-292 at ¶ 2.

On February 26, 1999, the FCC released its Declaratory Ruling and Notice of Proposed Rulemaking in FCC Docket 99-38 on the issue of ISP-bound traffic. Therein, the FCC determined that this traffic ". . . is jurisdictionally mixed and appears to be largely interstate." Order at p. 2. Nevertheless, the current state of the law has no impact on our resolution of this complaint. Based on the plain language of the agreement, the effective law at the time the agreement was executed, and the actions of the parties in effectuating the agreement, it is clear to us 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. If the parties intended otherwise, we believe that they would have set out an explicit exception in the definition of local calls in their Agreement.

III. TWO MILLION MINUTE DIFFERENTIAL

Again, we refer to Section VI(B) of the Interconnection Agreement between e.spire and BellSouth. This portion of the parties' agreement is set forth in full in the preceding section of this Order. Therein, the parties' agreed that they would not exchange cash compensation for traffic, "unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis." The parties did not agree that the two million minute differential had been met; therefore, we must make that determination. There are two main aspects of this dispute relating to local usage reports and the local traffic differentials that were to be derived from these reports.

BellSouth argued that e.spire included ISP traffic in its calculation of the minutes of use for terminating local traffic in Florida. BellSouth contended that ISP traffic is not local traffic and should not be included. e.spire did not contest the fact that they included traffic to ISPs in determining the minutes of use for terminating local traffic in Florida. In fact, e.spire witness Talmage stated that to the extent ISP traffic is carried over local trunks, it was included.

A. Local Usage Reports

In accordance with Section VI(B) of the agreement, BellSouth was responsible for tracking the usage for both companies and providing copies of usage reports to e.spire on a monthly basis. BellSouth failed to meet this requirement. BellSouth witness Hendrix explained 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. Due to the complexity of BellSouth's network and the fact that it was attempting to track originating and terminating local minutes of use, the witness asserted that developing the means to produce these reports took longer than expected. Witness Hendrix stated that representatives of BellSouth and e.spire met on November 3, 1997. In that meeting, BellSouth informed e.spire that BellSouth was not yet technically capable of providing local traffic usage reports.

e.spire witness Talmage further explained that once it became apparent that BellSouth would not provide usage reports, e.spire was forced to develop its own usage reports. The witness stated that e.spire implemented the TrafficMASTER software product in November 1997 for its usage reporting. BellSouth witness Hendrix added that BellSouth informed e.spire by letter dated January 8, 1998, that BellSouth would agree to use e.spire's usage reports for determining the local traffic differentials. Witness Hendrix further stated that BellSouth expressed its desire to audit the process used by e.spire's TrafficMASTER. Witness Hendrix asserted that BellSouth wanted to have such audit capabilities, because BellSouth wanted to be able to determine the extent to which e.spire was including ISP traffic in calculating the two million minute threshold.

B. Local Traffic Differentials

Section VI(B) of the Interconnection Agreement between e.spire and BellSouth refers to the difference in local traffic exchanged by the parties. In accordance with Section VI(B), the difference between 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 argued in its brief that e.spire has not proven that this difference in minutes of use has been met. Witness Hendrix testified that the report he viewed only showed traffic terminating from BellSouth to e.spire.

e.spire witness Talmage asserted, however, that the differential occurred in March, 1998, and has continued to occur each month thereafter. 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, which is the only switch at issue in this proceeding. 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.

Determination

Upon consideration, we find that the evidence demonstrates that the two million minute differential for terminating local traffic in Florida did occur in March, 1998. We agree with BellSouth that the evidence also shows that e.spire included traffic to ISPs in determining that this threshold had been met. e.spire's inclusion of the ISP traffic in its calculation of the differential was, however, appropriate in view of our determination that the parties did not intend to exclude traffic to ISPs from the definition of "local traffic" within their agreement. Although BellSouth argued that the two million minute differential threshold had not been met, it has not presented any evidence to show that e.spire's usage reports are incorrect.

IV. RECIPROCAL COMPENSATION RATE

Pursuant to Section VI(B) of the Interconnection Agreement between e.spire and BellSouth, the parties were required to negotiate the specifics of a traffic exchange agreement once the two million minute threshold was met. BellSouth argued that we should require the parties to negotiate a rate on a going-forward basis if we determine that the two-million-minute threshold has been met. e.spire's witness Falvey responded by explaining that e.spire and BellSouth had attempted to negotiate a rate, but that the negotiations quickly failed. Therefore, e.spire believed it should be allowed to obtain a rate from another party's Interconnection Agreement with BellSouth in accordance with Section

XXII of the e.spire/BellSouth agreement, also known as the Most Favored Nations clause (MFN). Pursuant to Section XXII, e.spire argued that we should set the reciprocal compensation rate at $.009, the rate provided to MFS/WorldCom in its agreement with BellSouth.

Specifically, e.spire witness Falvey argued that Section XXII of the parties' agreement allows e.spire to adopt rates, terms, or conditions of another CLEC's agreement. Witness Falvey also stated that when e.spire determined that the two-million-minute differential threshold had been reached, e.spire sent BellSouth a Most Favored Nations request for a rate of .9 cents per minute. Witness Falvey contended that e.spire had the ability to rely upon its Most Favored Nations clause instead of negotiating the rate to be applied to the traffic.

BellSouth's witness Hendrix argued that e.spire had not negotiated with BellSouth, but had, instead, simply identified rates to which e.spire was willing to agree. Witness Hendrix further asserted that Section XXII was not intended to supersede the negotiation provisions of Section VI(B). He added that the parties had never intended to pay each other during the term of the agreement.

Section XXII(A) of the Interconnection Agreement specifies that:

> 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.

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). Nevertheless, it is clear from the evidence presented that the parties did attempt to negotiate a rate, but 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.

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." Once the negotiations required under the specific provisions of Section VI(B) broke down, we believe 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, we shall resolve the dispute by enforcing the MFN provisions of the agreement. The reciprocal compensation rate shall be effective from the date that we have determined that e.spire met the two-million-minute differential threshold, March, 1998, and after the effective date of the agreement from which e.spire elected to take the rate, as set forth in Section XXII of the e.spire/BellSouth Agreement. The evidence demonstrates that e.spire elected the rate in the MFS/WorldCom agreement with BellSouth. Thus, the reciprocal compensation rate shall be set at $.009.

V. ATTORNEY'S FEES

We note that e.spire also asked that we award e.spire attorney's fees and costs associated with this case. e.spire reiterated its request in its brief. In its brief, e.spire indicated that it sought attorney's fees pursuant to the parties' agreement. e.spire did not, however, refer to a specific portion of the agreement in support of its request.

Having reviewed the agreement, we believe 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.

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 in view of our determination that e.spire should prevail in this matter. Therefore, BellSouth shall be required 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.

VI. PROPOSED AGENCY ACTION CALCULATION OF FULL TERMINATED TRAFFIC DIFFERENTIAL

As explained herein, e.spire provided reports that show traffic terminated to e.spire's Jacksonville, Florida, switch for the months of May, 1998, through September, 1998. e.spire also provided summary reports of originating and terminating local traffic at its Jacksonville switch for March and April, 1998. These reports clearly demonstrate that the two-million minute differential was exceeded in these months. There is not, however, sufficient evidence in the record of this proceeding to determine

how many minutes of traffic originated from e.spire and terminated on BellSouth's system for all of the months at issue in this proceeding, due in part to BellSouth's failure to provide traffic reports in accordance with the terms of the parties' agreement. e.spire's reports only provided sufficient information to calculate the minutes terminated on BellSouth's system for March and April, 1998. In order to determine the specific amount owed by BellSouth to e.spire under the terms of the parties' agreement, it is, therefore, necessary to determine the differential between the minutes of use (MOUs) that e.spire terminated on BellSouth's system and that which BellSouth terminated on e.spire's system. Only after the full differential is identified can the specific amount owed by BellSouth to e.spire be determined.

In order to determine the differential and the specific amount owed by BellSouth to e.spire, we shall require the parties to determine the number of minutes originated by e.spire and terminated on BellSouth's system using actual, available information. The parties shall then use this amount to derive the differential between what e.spire terminated on BellSouth's system and what BellSouth terminated on e.spire's system.

If actual information is not available for the parties to use to determine the number of minutes originated by e.spire and terminated on BellSouth's system, then the parties shall be required to use the methodology described below to estimate the number of minutes originated from e.spire and terminated on BellSouth's system. Using the methodology described, the parties can input the information that is available in the record and derive an estimate of the differential. Upon estimating the number of minutes originated from e.spire and terminated on BellSouth's system, the differential between what was terminated on both parties' systems may be derived.

Methodology:

The amount of traffic over a network consists of incoming and outgoing calls over a company's lines. Based on the information that is available in this case, it appears to us that 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. Using the information on incoming and outgoing usage provided by e.spire for the months of March and April, 1998, 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.

The parties shall report to us once they have determined the amount owed by BellSouth to e.spire based on the $.009 rate, and the amount has been paid to e.spire. The parties shall provide this report in a period not to exceed 4 months from the date of our vote at our March 16, 1999, Agenda Conference.

VII. CONCLUSION

We have based our determination herein upon the evidence presented, the briefs of the parties, and our staff's recommendation. We believe it is consistent with the agreement between the parties, which was approved by us pursuant to the Telecommunications Act of 1996, 47 U.S.C. §252(e).

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Complaint 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. against BellSouth Telecommunications, Inc. is resolved as set forth in the body of this Order. It is further

ORDERED that the parties shall report to us by July 16, 1999, the amount owed by BellSouth Telecommunications, Inc. to 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. based on the $.009 rate, and the amount has been paid to 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. It is further

ORDERED that the provisions of this Order requiring the parties to determine the number of minutes originated from 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. and terminated on BellSouth Telecommunications, Inc.'s system using actual information or using the methodology set forth herein if actual information is not available are issued as proposed agency action and shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that if no timely protest is received from a substantially affected person of the requirement to determine the number of minutes originated from 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. and terminated on BellSouth Telecommunications, Inc.'s system using actual information or using the methodology set forth herein if actual information is not available, this Docket shall be closed upon the filing of the parties' report on their determination of the amount owed and paid by BellSouth Telecommunications, Inc. to 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. based on the $.009 rate.

By ORDER of the Florida Public Service Commission this 5th day of April, 1999.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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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.

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.

The action proposed herein requiring the parties to determine the number of minutes originated from 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. and terminated on BellSouth Telecommunications, Inc.'s system using actual information or using the methodology set forth herein if actual information is not available is preliminary in nature. Any person whose substantial interests are affected by this proposed action may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on April 26, 1999.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the portion of this order requiring the parties to determine the number of minutes originated from 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. and terminated on BellSouth Telecommunications, Inc.'s system using actual information or using the methodology set forth herein if actual information is not

available becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

With regard to the other action taken in this order, any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.