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December 10, 1998

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket No. 981008-TP

Dear Mrs. Bayo:

Enclosed are an original and 15 copies of BellSouth Telecommunications, Inc.'s Rebuttal Testimony of Albert Halprin and Jerry Hendrix. Please file these documents in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

Mary K. Keyer
Mary K. Keyer

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LW

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Hendrix
DOCUMENT NUMBER-DATE
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CERTIFICATE OF SERVICE

Docket No. 981008-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 10th day of December, 1998 to the following:

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Mary.K. Keyer

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BELLSOUTH TELECOMMUNICATIONS, INC.
DIRECT REBUTTAL TESTIMONY OF ALBERT HALPRIN
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 981008-TP
December 10, 1998

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. Albert Halprin, 1100 New York Avenue, N.W., Suite 650 East, Washington, D.C., 20005.

Q. ARE YOU THE SAME ALBERT HALPRIN WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING ON NOVEMBER 12, 1998?

A. Yes, I am.

Q. WHAT IS THE PURPOSE OF THIS TESTIMONY?

A. The purpose of my testimony is to rebut assertions contained in the direct testimony of James C. Falvey, filed on behalf of e.spire Communications, Inc. ("e.spire"). Specifically, my rebuttal testimony will demonstrate that there is no basis in fact or law for Mr. Falvey's claim that Internet communications that take place through an Internet service provider ("ISP") "terminate" on the

1 network facilities of the local exchange carrier that provides local exchange
2 service to the ISP.

3

4 **Q. AT PAGES 5-8, MR. FALVEY CITES VARIOUS FACTS AND STATEMENTS FROM**
5 **FCC ORDERS IN SUPPORT OF HIS ASSERTION THAT ISP INTERNET**
6 **COMMUNICATIONS ARE "LOCAL" CALLS THAT "TERMINATE" AT THE ISP.**
7 **PLEASE COMMENT.**

8

9 A. The Federal Communications Commission ("FCC") orders Mr. Falvey cites do
10 not stand for the proposition for which he claims they stand. In two recent
11 orders, the FCC has explicitly rejected Mr. Falvey's tortured interpretation of
12 these orders. In its ruling allowing GTE to tariff its DSL service at the
13 interstate level, the FCC stated the Internet communications that take place
14 through an ISP are jurisdictionally interstate "from the end user to a distant
15 Internet site" and "do not terminate at the ISP's local server."^{1/} The FCC
16 subsequently incorporated the reasoning set forth in the *GTE DSL Order* in a
17 separate order allowing the Bell Atlantic Telephone Cos., BellSouth
18 Telecommunications, Inc., GTE System Telephone Cos., and Pacific Bell
19 Telephone Co. to tariff their DSL services at the interstate level.^{2/}

20

21

22 ^{1/} See *GTE Tel. Operating Cos. GTOC Transmittal No. 1148*, Memorandum
23 Opinion and Order, CC Docket No. 98-79, FCC 98-292 (rel. Oct. 30, 1998) ("*GTE*
DSL Order").

24

25 ^{2/} See *Bell Atlantic Telephone Cos., et al.*, Memorandum Opinion and Order, CC
Docket 98-168 et seq., FCC (8-317 (rel. Nov. 30, 1998).

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Mr. Falvey dismisses the FCC's DSL orders as irrelevant to this proceeding because they addressed dedicated access services. That is incorrect. It is a fact that the FCC's orders, issued in the context of tariff investigations, applied to the specific dedicated access services at issue in the tariffs. As a matter of law, the only matter the FCC could decide in the DSL orders was whether the services could lawfully be tariffed at the interstate level. However, that in no way renders irrelevant the reasoning and conclusions in the orders regarding the jurisdictional nature of ISP Internet communications. On the contrary, the FCC's jurisdictional analysis, and its conclusion that ISP Internet communications do not terminate at the ISP, necessarily apply to the communications at issue in this proceeding. Whether an ISP Internet communication is initiated over a dedicated service or a dial-up service has no effect whatsoever on the jurisdictional nature of the communication, and does not change the answer to the question of where the call terminates. In the *GTE DSL Order*, the FCC stated that it analyzes "ISP traffic as a continuous transmission from the end user to a distant Internet site."^{3/} It did not qualify this statement, because there is no difference in the analysis depending on whether the end user connects to the Internet over a dedicated access service or a dial-up service.

^{3/} *GTE DSL Order* at para. 20.

1 The core of Mr. Falvey's contention is that an ISP Internet communication
2 somehow consists of two calls or "two components." The FCC's DSL orders
3 categorically dismiss the two-call theory and its variations. Mr. Falvey
4 contends that ISP Internet communications consist of "two components": a
5 "local" call from the end user to the ISP, which he defines as
6 "telecommunications," and an information service that commences at the ISP,
7 which he defines as "information." As explained in my direct testimony, the
8 FCC consistently has rejected this and all other variations of the two-call
9 theory, and its approach has been upheld by the courts. Under these
10 established precedents, the jurisdictional nature of a communication is
11 determined on an end-to-end basis, from the point of inception to the point of
12 completion. The FCC again rejected Mr. Falvey's two-call theory in the *GTE*
13 *DSL Order*, expressly rejecting Mr. Falvey's interpretation of its *Universal*
14 *Service Order*. The Commission explained that it distinguished in the
15 *Universal Service Order*
16
17 between the "telecommunications services component" and the "information
18 services component" of end-to-end Internet access for purposes of determining
19 which entities are required to contribute to universal service. Although the
20 Commission concluded that ISPs do not appear to offer "telecommunications
21 service," and thus are not "telecommunications carriers" that must contribute to
22 the Universal Service Fund, it has never found that "telecommunications" ends
23 where "enhanced" information service begins ... We, therefore, analyze ISP
24 traffic as a continuous transmission from the end user to a distant Internet site.^{4/}
25

^{4/} *Id.*

1 Again, the FCC's analysis, while provided in the context of an order addressing
2 a tariff for a dedicated access offering, unquestionably applies to the traffic at
3 issue in this proceeding. Indeed, the previous decisions cited by the FCC in
4 rejecting the two-call theory, including the *MemoryCall Order*,^{5/} *Teleconnect*
5 *Order*,⁶ and *Southwestern Bell Order*,^{7/} all concern switched, dial-up services.
6 It is simply untenable to argue, as Mr. Falvey appears to do, that although an
7 ISP Internet communication is not segregable into "two components" when the
8 end user accesses the ISP using a dedicated access service, it is segregable
9 when the end user uses a dial-up service. The notion that the Commission's
10 holding rejecting the two-call theory applies only to dedicated services,
11 notwithstanding the fact that it was formulated in the context of dial-up
12 services, is absurd.

13
14 Mr. Falvey also dwells on the fact that the FCC has treated ISPs as end users
15 for purposes of interstate access charges, and appears to believe that this
16 renders ISP Internet traffic "local" and he argues that this means that such

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19 ^{5/} See *Petition for Emergency Relief and Declaratory Ruling Filed by the*
20 *BellSouth Corporation*, Memorandum, Opinion and Order, 7 FCC Rcd 1619 (1992)
21 (*"MemoryCall Order"*).

22 ^{6/} See *Teleconnect Co. v. Bell Telephone Co. of Pennsylvania et al*, 10 FCC Rcd
23 1626, 1629-30 (1995) (*"Teleconnect Order"*), *aff'd*, *Southwestern Bell Telephone Co.*
24 *v. FCC*, No. 95-119 (D.C. Cir. June 27, 1997).

25 ^{7/} See *Southwestern Bell Tel. Co. Transmittal Nos. 1537 and 1560 Revisions to*
Tariff F.C.C. No. 68, Order Designating Issues for Investigation, 3 FCC Rcd. 2339
(1988) at 2341 (*"Southwestern Bell Order"*).

1 traffic terminates at the ISP. The fact that the FCC has exempted ISPs and
2 other interstate enhanced service providers ("ESPs") from interstate access
3 charges and allows them to provide their interstate services over state-tariffed
4 local exchange lines in no way transforms their traffic into "local" traffic. Nor
5 does this fact in any way alters the point of termination of such traffic. In the
6 *GTE DSL Order*, the FCC, citing its past orders addressing the ESP exemption,
7 stated that

8
9 The fact that ESPs are exempt from certain access charges and purchase their
10 PSTN links through local tariffs does not transform the nature of traffic routed
11 to ESPs. That the Commission exempted ESPs from access charges indicates
its understanding that they in fact use interstate access service; otherwise, the
exemption would not be necessary.^{8/}

12 In so stating, the FCC in no way distinguished between ESPs that use dedicated
13 access services and ESPs that provide service over switched, dial-up services.

14 It is disingenuous for Mr. Falvey to pretend that the FCC's statement has no
15 bearing on this proceeding. On the contrary, the FCC's discussion clearly
16 supports BellSouth's position that the ISP Internet traffic at issue in this
17 proceeding is interstate and, therefore, not "local" traffic.
18

19

20 **Q. AT PAGES 11-12, MR. FALVEY REFERS TO THE FLORIDA PSC'S**
21 **SEPTEMBER 15, 1998, DECISION IN THE WORLDCOM CASE.**
22 **WHAT, IF ANY, DIFFERENCES EXIST BETWEEN THAT CASE AND**
23

24 ^{8/} *Id.* at para. 21.
25

1 **THE e.spire. COMPLAINT THAT SHOULD LEAD THE PSC TO**
2 **REACH A DIFFERENT DECISION?**

3
4 A. In its September 15, 1998, decision, the Florida PSC stated carefully that its
5 decision reflected its conclusion that "the current law" at the time of its
6 decision "weigh(ed) in favor" of treating ISP Internet traffic as "local traffic"
7 for reciprocal compensation purposes.^{9/} The Florida PSC noted that the FCC
8 had not yet ruled on the jurisdictional nature of ISP Internet traffic.^{10/} That
9 decision was rendered before the FCC issued its DSL orders, which clarified
10 the issues on which the Florida PSC found "some room for interpretation." In
11 my opinion, the "current law" at the time of the PSC's September 15, 1998,
12 Order weighed in favor of finding that ISP Internet traffic was interstate traffic.
13 But there can be no question now that the "current law" clearly weighs in favor
14 of a finding that ISP Internet traffic is jurisdictionally interstate traffic on an
15 end-to-end basis, and does not include a "local" component that terminates at
16 the ISP.

17
18 **Q. AT PAGE 9, MR. FALVEY ARGUES THAT IF ISP INTERNET**
19 **TRAFFIC IS NOT SUBJECT TO RECIPROCAL COMPENSATION,**

20
21 _____
22 ^{9/} See *Complaint of WorldCom Technologies, Inc., et al., v. BellSouth*
23 *Telecommunications Inc.*, Final Order Resolving Complaints, Docket Nos. 980184-
 TP, 980495-TP, and 980499-TP (Sept. 15, 1998) ("*WorldCom v. BellSouth*").

24 ^{10/} *Id.* at 18.

25

1 **"e.spire WILL NOT BE COMPENSATED AT ALL." DO YOU**
2 **AGREE?**

3
4 A. No, I do not. Reciprocal compensation is not the only means, nor is it the most
5 appropriate means, for e.spire to recover the costs it incurs to serve its ISP
6 customers. Nothing precludes e.spire, for instance, from charging ISPs for
7 terminating traffic. Indeed, as I noted in my direct testimony, the National
8 Association of Regulatory Utility Commissioners ("NARUC") has suggested in
9 a working paper that this is one of the approaches that could be considered to
10 recover the cost of carrying ISP traffic.^{11/} To the extent that e.spire incurs
11 costs in carrying ISP traffic, it should be allowed to recover the actual costs
12 involved in carrying ISP Internet traffic that originates on BellSouth's network,
13 including a reasonable profit. But reciprocal compensation is not an
14 appropriate mechanism to ensure recovery of such cost.

15
16 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

17
18 A. Yes, it does.

19
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22 _____

23 ^{11/} See NARUC Internet Working Group, *Policies on Pricing and Universal*
24 *Service for Internet Traffic on the Public Switched Network*, National Regulatory
25 Research Institute (April 1998).