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January 5, 1999

BY HAND DELIVERY

Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket Nos. 981008-TP

Dear Ms. Bayo:

Enclosed for filing is an original and fifteen copies of a Motion to Strike Direct and Rebuttal Testimony of Albert Halprin in the above-referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Norman H. Horton, Jr.
Norman H. Horton, Jr.

- ACK _____
- AFA _____
- APP _____
- CAF _____
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DOCUMENT NUMBER-DATE

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TPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning)
complaint of American Communication)
Services of Jacksonville, Inc. d/b/a)
e.spire Communications, Inc. and ACSI)
Local Switched Services, Inc. d/b/a e.spire)
Communications, Inc. against BellSouth)
Telecommunications, Inc. regarding)
reciprocal compensation for traffic)
terminated to Internet service providers.)

DOCKET NO. 981008-TP
FILED:

MOTION TO STRIKE DIRECT AND REBUTTAL TESTIMONY
OF ALBERT HALPRIN

American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, and
ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. (collectively "e.spire" or the
"Company"), through undersigned counsel, moves to strike the direct and rebuttal testimony of
BellSouth's witness, Albert Halprin, and in support thereof, states:

1. On November 12 and December 10, 1998, BellSouth filed the Direct and Rebuttal
Testimony respectively of Albert Halprin in the above-styled proceeding. Mr. Halprin is both a
lawyer and an adjunct law professor.

2. Mr. Halprin's testimony, both direct and rebuttal, is substantively and wholly legal
in nature. It offers legal argument and legal conclusions that are improper for testimony, more
properly reserved for a post-hearing briefs. Further, without such legal argument and conclusions,
Mr. Halprin's testimony is devoid of information that will be useful to the parties or to this
Commission in resolving this matter.

3. Rule 28-106-213, Florida Administrative Code, provides that evidence presented
before the Public Service Commission will ". . . be admitted if it is the sort of evidence which is

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normally admissible in civil trials in Florida *or* which reasonably prudent persons are accustomed to relying upon in the conduct of their affairs.” (emphasis added). Of the two types of evidence discussed in the rule, the latter covers otherwise inadmissible evidence relied upon and necessary to experts in formulating their opinion. The former type is the general requirement that evidence will only be admissible in the PSC if it would be admitted pursuant to the Florida Rules of Evidence.

4. Section 90.703, Florida Statutes (1997), provides guidance on when an expert will be permitted to testify as to ultimate issues in a proceeding. When an expert is asked to express an opinion which applies a legal standard to a set of facts, the opinion testimony is generally inadmissible. *Ehrhardt*, Florida Evidence, §703.1, p.524, 1996 ed.; Town of Palm Beach v. Palm Beach County, 460 So.2d 879, 882 (Fla. 1984) (holding that if the witness’ conclusion tells the trier of fact how to decide the case, and does not assist it in determining what has occurred, then it is inadmissible).

5. The danger is that the witness will apply a standard or definition which is different from that defined by the applicable law. *Ehrhardt*, Florida Evidence, §703.1, p.524-25, 1996 ed. The application of an erroneous legal standard results in the opinion testimony being misleading and not helpful to the jury. Id.

6. Thus, an evidentiary bar exists in civil matters precluding testimony like that proffered by BellSouth and Mr. Halprin. For that reason alone, pursuant to Rule 28-106.213, Florida Administrative Code, this Commission should strike Mr. Halprin’s testimony.

7. In addition, this Commission has previously adhered to the principal that testimony offering legal argument is impermissible. Order No. PSC-94-1363A-PCO-WS, issued November 21, 1994, In Re: Investigation into Florida Public Service Commission Jurisdiction Over

SOUTHERN STATES UTILITIES, INC. in Florida; Order No. PSC-94-1520-PCO-WS, issued December 9, 1994, In Re: Investigation into Florida Public Service Commission Jurisdiction Over SOUTHERN STATES UTILITIES, INC. in Florida.

8. The Commission's order in PSC-94-0371-PCO-WS provides the most guidance for how Mr. Halprin's testimony should be treated. In that order, the Commission struck the testimony of Robert T. Mann, which essentially consisted of legal opinion concerning the constitutionality of uniform rates and legal opinion concerning Commission jurisdiction to establish conservation rates under Florida law. Order No. PSC-94-0371-PCO-WS, issued March 30, 1994, In Re: Investigation Into the Appropriate Rate Structure for SOUTHERN STATES UTILITIES, INC. For All Regulated Systems in Bradford, Citrus, Clay Collier, Duval, Hernando, Highlands, Lake, St. Johns, St. Lucie, Volusia, and Washington Counties. The Commission, in its discussion, states:

It has not been Commission practice to allow expert testimony on legal issues. I concur. 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. Legal argument is more appropriately reserved for argument of counsel in a party's brief. For this reason, the portion of Mr. Mann's testimony that addresses the Commission's authority to consider conservation when setting rates is not appropriately raised in the testimony.

9. Mr. Halprin's testimony is similarly appropriate in a party's brief and not a part of the evidentiary hearing. And similar to Mr. Mann's testimony in the above-cited case, in the pertinent portions of Mr. Halprin's testimony, the only expertise he employs is his legal opinion.

10. Finally, pursuant to Rule 28-106.307, Florida Administrative Code, BellSouth will be afforded an opportunity to file a post-hearing brief to include, if it desires, legal argument and

conclusions. That being so, BellSouth will not be denied due process of law when such testimony is appropriately struck.

WHEREFORE, American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc., respectfully requests that the Commission strike the direct and rebuttal testimony of BellSouth's witness, Albert Halprin.

Dated this 20th of January, 1999.

Respectfully submitted,

MESSER, CAPARELLO & SELF, P.A.



NORMAN H. HORTON, JR.

FLOYD R. SELF

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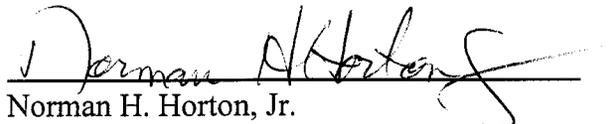
Attorneys for e.spire Communications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Motion to Strike Testimony of Albert Halprin was provided this 5th day of January, 1999, by hand delivery (*) and/or regular U.S. mail to:

Beth Keating, Esq.*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
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