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RECORDS AND REPORTING

May 12, 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 on behalf of e.spire Communications, Inc. is an original and fifteen copies of the e.spire's Response to BellSouth's Motion for Reconsideration 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.

- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
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NHH/amb  
Enclosure  
cc: James C. Falvey, Esq.  
Parties of Record

RECEIVED & FILED  
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DIVISION OF RECORDS

DOCUMENT NUMBER-DATE  
~~06867~~ MAY 12 99  
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: May 12, 1999

**e.spire COMMUNICATIONS, INC.'S RESPONSE TO  
BELLSOUTH'S MOTION FOR RECONSIDERATION**

COMES NOW, 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 and files this Response to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Reconsideration and states as follows:

1. By Order No. PSC-99-0658-FOF-TP issued April 5, 1999 the FPSC resolved a complaint filed by e.spire against BellSouth with respect to the Interconnection Agreement ("Agreement") between the parties. In the complaint, e.spire asserted that local traffic as defined in the Agreement for purposes of reciprocal compensation included traffic to ISP's, that the differential in usage required to trigger reciprocal compensation had been met and that e.spire appropriately used the Most Favored Nations ("MFN") clause in the Agreement to establish a rate. The Commission agreed with e.spire and BellSouth has now filed this Motion for Reconsideration, rearguing their position and adding a new argument. BellSouth has not shown that the Commission misconstrued or overlooked any law or evidence thus the Motion should be denied.

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FPSC-RECORDS/REPORTING

2. BellSouth has requested reconsideration of Order No. PSC-99-0658-FOF-TP by the full Commission thus presenting a procedural issue to be addressed at the outset. This case was heard and decided by a panel of Commissioners and only the same panel can dispose of the request for reconsideration. Section 350.01(5), Florida Statutes, states: “. . . A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding.” Consequently, the request to have the full Commission rule on the Motion should be rejected.

3. As to the substance of BellSouth’s Motion, it is nothing more than a reargument of points and positions previously presented to the Commission by BellSouth. In reaching its decision in this case, the Commission panel did precisely what BellSouth says it must do; that is, the panel relied upon evidence placed before them and rendered a decision based upon that evidence and applicable law. Other than expressing disagreement with the outcome, BellSouth has not demonstrated that the Order is not based on competent, substantial evidence or that any applicable law or evidence was overlooked or not considered. To the contrary, the Commission Order clearly and fully recites the evidence and basis for the decision and the Motion should be denied.

**I. The Commission Correctly Interpreted the Contract in Light of the Evidence and Historical and Recent States and Federal Decisions.**

4. With its Motion, BellSouth seeks reconsideration of the decisions that: 1) ISP traffic is local for purposes of reciprocal compensation, 2) the Most Favored Nations (“MFN”) clause was available for purposes of establishing a rate, and 3) the two million minute threshold was met on a monthly basis. Each of these challenges were addressed by BellSouth in testimony and pleadings and, except for the argument with respect to the monthly threshold issue, there is nothing new in BellSouth’s motion.

5. With respect to whether ISP traffic is local, the Commission clearly considered the evidence and law and the basis for the finding that it is local is well articulated in the Order (pp 3 - 10). BellSouth states that the Commission erred in considering the intent of the parties and further that the actual terms of the Agreement exclude ISP traffic from the definition of local traffic. The Agreement does not exclude ISP traffic from the definition of local traffic and, in fact, makes no explicit reference to ISP traffic. Moreover, the determination that ISP traffic is local is consistent with the testimony of Mr. Falvey, and more importantly, is consistent with the decisions of this Commission entered as early as 1989 (in large part based on testimony by BellSouth) and as recently as 1998, with decisions of at least 29 other jurisdictions, and with recent FCC decisions.

Despite their position that the Agreement is clear, BellSouth presented evidence and testimony as to the intent of the parties and still does so. BellSouth selectively reads recent FCC decisions to conclude that they can be relied upon to determine the intent of the parties in March through July of 1996 when the contract in question was negotiated. BellSouth and e.spire, at the time of these negotiations, were clearly not privy to the FCC orders of late 1998 and 1999. Accordingly, BellSouth's argument that we should ignore the intent behind the language of the contract negotiated and signed in 1996 because the plain language of the contract has somehow been retroactively elucidated by these 1998 and 1999 orders clearly fails. In fact, as amply demonstrated in e.spire's testimony and briefs in this docket, the intent ascribed by e.spire is fully supported by the regulatory decisions written at the time.

Moreover, the intent ascribed by e.spire is fully supported by the most recent decisions of the FCC.

6. BellSouth points to recent rulings of the FCC (p. 6 and 7) as controlling in this case. However, the Commission specifically considered and rejected both of these orders (pp 9 and 10) and correctly so. In addition, several states including Alabama, Nevada, Ohio, Oregon, and Washington have rendered decisions since the entry of the FCC order and have concluded that ISP traffic was intended to be treated as local. (Alabama: Emergency Petitions of ICG Telecom Group Inc. and ITC DeltaCom Communications, Inc. for a Declaratory Ruling, Docket No. 26619, Order (rel. March 4, 1999); Nevada: Petition of PAC-WEST Telecomm, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Nevada Bell; Petition of Advanced Telecom Group, Inc. for Arbitration of an Interconnection Agreement with Nevada Bell Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket Nos. 98-10015 & 99-1007, Order Adopting Revised Arbitration Decision; Ohio: In the Matter of the Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom of Ohio, L.P. v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation, Case Nos. 97-1557-TP-CSS, 97-1723-TP-CSS, 98-308-TP-CSS, Entry on Rehearing; Oregon: Electric Lightwave, Inc. v. U. S. West Communications, Inc., UCC377, Order (entered April 26, 1999); Washington: Petition for Arbitration of an Interconnection Agreement between Electric Lightwave, Inc. and GTE Northwest Incorporated Pursuant to 47 USC Section 252, Docket No. UT-980370, Arbitrator's Report and Decision (Mar. 22, 1999).

7. In FCC Order 98-292, cited by BellSouth to support their position, the FCC specifically did not consider the issue of whether reciprocal compensation would be due for traffic to ISPs. Again, in FCC Order 99-38 the FCC specifically avoided interfering with state commission

findings as whether ISP traffic is subject to reciprocal compensation pursuant to existing agreements. The FCC suggested several factors that state commissions might consider in determining whether the parties intended to apply reciprocal compensation to ISP traffic. Specifically, the FCC found:

Against the backdrop, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. For example it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. These factors are illustrative only; *state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions.* (emphasis added).

Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68, para. 24, released Feb. 26, 1999.

In the instant proceeding, the Florida Commission applied precisely the factors listed by the FCC above in determining that both BellSouth and e.spire considered ISP traffic as local traffic for the purposes of the parties' Interconnection Agreement. In this proceeding the Commission received

evidence consistent with the factors suggested by the FCC. BellSouth has charged calls to ISP providers under its local tariff, treated such calls as local for separations and routed calls over trunks reserved for local calls. (Order, p. 8). All of these are factors which the FCC suggested the states might examine and accordingly the FPSC decision consistent with the recent decisions.

**II. BellSouth has Withdrawn its Arguments in Section II of its Motion Pertaining to the MFN Clause**

8. e.spire has reached an understanding with BellSouth whereby BellSouth will withdraw Section III of its Motion pertaining to the MFN clause. If, for some reason, these arguments are not withdrawn in full, e.spire requests an opportunity to respond to these arguments as a later date.

**III. The Evidence in the Record Establishes that e.spire Met the Two Million Minute Threshold**

9. As a final issue, BellSouth argues that the Commission was wrong in finding that e.spire had met the two million minute differential threshold on a monthly basis. For the first time, BellSouth argues that e.spire must meet the differential on a month to month basis. The Commission has stated on multiple occasions that a motion for reconsideration is not the appropriate vehicle for introducing new arguments and issues not raised in the earlier proceeding by the party. Order No. PSC-97-0552-FOF-WS; Order No. PSC-97-0518-FOF-TP. BellSouth had ample opportunity to present this argument but did not do so until after the proceedings were closed. There was absolutely no testimony that this was BellSouth's interpretation of the Agreement and a review of the testimony by Mr. Hendrix imparts the impression that he considered this to be a one time prerequisite to the establishment of a rate. Even if BellSouth wants to argue that this is a legal issue, hence Mr.

Hendrix did not need to address it, the position and posthearing filings of BellSouth are totally devoid of any semblance of an argument on this point. BellSouth is grasping for a new issue and the Commission should not give any credence to this argument. This argument only serves to highlight the extremes to which BellSouth will go to avoid any payments to e.spire.

10. BellSouth correctly states that the Agreement requires the two million minute differential be met before payment of reciprocal compensation is due. BellSouth fails to point out that they agreed to record usage for purposes of this requirement and that they were unable to do so. Because BellSouth was unable to record usage, e.spire was required to do so. The record is very clear on this point and it is equally clear that BellSouth has not objected to the program used by e.spire. Significantly, had e.spire not had the capability to record usage, BellSouth would not now be in the position of owing e.spire because there would be no records. In fact, there are records and BellSouth owes e.spire, thus this effort at injecting a new issue should be recognized for what it is and rejected. Moreover, the Agreement clearly requires the payment of reciprocal compensation once the threshold has been met on a one-time monthly basis — not a repeated monthly basis or on a weekly, quarterly or annual basis. Once the threshold has been satisfied, reciprocal compensation provisions are initiated

11. As a final note, e.spire and BellSouth have recently concluded discussions and negotiations which have resulted in an amendment to the Interconnection Agreement which is to be filed with the Commission. e.spire believes that these discussions and agreements require modification of the Motion for Reconsideration by BellSouth and upon modification, e.spire will amend its response. Irrespective of whether any modification is filed, e.spire contends that the



agreements between the parties should control and that filing this response is not intended to abandon or waive any position as to agreements between the parties.

WHEREFORE, for the reasons cited, the Motion for Reconsideration should be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Norman H. Horton, Jr.", is written over a horizontal line.

NORMAN H. HORTON, JR.

FLOYD R. SELF

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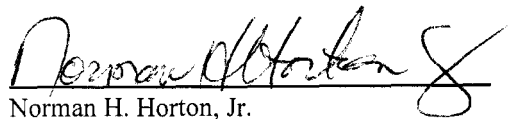
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of e.spire Communications, Inc.'s Response to Bellsouth's Motion for Reconsideration have been served upon the following parties by Hand Delivery (\*) and/or U. S. Mail this 12th day of May, 1999.

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