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Legal Department

E. EARL EDENFIELD
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20 AUG 20 PM 3:21

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150 South Monroe Street
Room 400
Tallahassee, Florida 32301
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RECORDS AND
REPORTING

August 20, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 981008-TP (e.spire Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Stay Pending Appeal, which we ask that you file in the captioned matter.

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 to the parties shown on the attached Certificate of Service.

Sincerely,

E. Earl Edenfield (cc)
E. Earl Edenfield

- AFA _____
- APP _____
- CAF _____
- CMU 1 _____
- CTR _____
- EAG _____
- LEG 2 _____
- MAS 2 _____
- OPC _____
- PAI _____
- SEC 1 _____
- WAW _____
- OTH _____

EEE/vf
Enclosures

cc: All parties of record
Marshall M. Criser III
R. Douglas Lackey

RECEIVED & FILED
[Signature]
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

09975 AUG 20 99

FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 981008-TP

I HEREBY CERTIFY that a copy of the foregoing has been furnished by

U.S. Mail this 20th day of August, 1999 to:

Beth Keating
Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

e.spire Communications, Inc.
131 National Business Parkway
#100
Annapolis Junction, MD 20701
Tel. No. (301) 361-4200
Fax. No. (301) 361-4277

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Norman Horton
P.O. Box 1876
Tallahassee, FL 32302
Tel. (850) 222-0720
Fax. (850) 224-4359
Represents e.spire


E. Earl Edenfield

BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

COMPLAINT OF e.spire)	Docket No. 981008-TP
COMMUNICATIONS, INC. AGAINST)	
BELLSOUTH TELECOMMUNICATIONS,)	
INC. REGARDING RECIPROCAL)	
COMPENSATION FOR TRAFFIC)	
TERMINATED TO INTERNET SERVICE)	
PROVIDERS)	
<hr/>		Filed: August 20, 1999

**BELLSOUTH TELECOMMUNICATIONS INC.'S
MOTION FOR STAY PENDING APPEAL**

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to FLA. ADMIN. CODE r. 25-22.061 (1982), respectfully requests that the Florida Public Service Commission ("Commission") stay its Order No. PSC-99-0658-FOF-TP dated April 5, 1999, ("Order"), pending judicial review of that Order to the United States District Court for the Northern District of Florida.

I. BACKGROUND

In accordance with the terms of the Telecommunications Act of 1996 ("1996 Act"), BellSouth executed an interconnection agreement with e.spire Communications, Inc.¹ ("e.spire") on December 20, 1996. Thereafter, a dispute arose between the parties as to how calls transiting Internet Service Providers ("ISPs") should be treated pursuant to the terms of the Interconnection Agreements in question. According to e.spire, traffic transiting ISPs constitutes a local call under the reciprocal compensation provisions of the Interconnection Agreements; BellSouth contends such traffic is non-local interstate traffic that is outside of the reciprocal compensation provisions.

¹ The Interconnection Agreement at issue was between BellSouth and American Communication Services, Inc., which now does business as e.spire Communications, Inc.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

On August 6, 1998, e.spire filed a complaint with the Commission alleging BellSouth failed to pay e.spire reciprocal compensation for ISP traffic. The Commission conducted an administrative hearing on January 20, 1999, and, on April 5, 1999, issued the Order that is the subject of this Motion to Stay. Between the date of the hearing and issuance of the Order, the Federal Communications Commission (“FCC”) issued a declaratory ruling² expressly finding that ISP traffic is non-local interstate traffic, as it does not terminate at the ISP’s point of presence (“POP”). On April 21, 1999, BellSouth filed a Motion for Reconsideration of the Commission’s Order, and, on April 26, 1999 filed a Petition on the Proposed Agency Action (“PAA”) portion of the Commission’s Order. The Commission denied BellSouth’s Motion for Reconsideration in an Order dated July 26, 1999.

BellSouth intends to seek judicial review of the Commission’s Order under the provisions of Section 252(e)(6) of the 1996 Act. Thus, BellSouth respectfully requests that the Commission stay its Order pending judicial review, for the reasons set forth below.

II. ARGUMENT

A. BellSouth Is Entitled to a Stay Under the Provisions of Rule 25-22.061(2).

BellSouth is entitled to a stay pending judicial review in accordance with Rule 25-22.061(2). There is no legal test applicable to the Commission’s consideration of a stay under the provisions of Rule 25-22.061(2). The Commission, however, *may* consider, among other things, whether BellSouth is likely to prevail on appeal; whether BellSouth has demonstrated that

² Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98 and *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, dated February 26, 1999 (ISP Order”).

it is likely to suffer irreparable harm if the stay is not granted; and whether the delay will cause substantial harm or is contrary to the public interest. If the Commission deems it appropriate to consider the factors enumerated in Rule 25-22.061(2), then the Commission should grant the stay for the reasons set forth below.

1. BellSouth is Likely to Prevail on Appeal

Subsequent to the hearing on this case, the FCC issued its ISP Order, which expressly confirmed long-standing legal precedent that: (1) traffic bound for the internet through ISPs is non-local interstate traffic, and (2) ISP traffic does not terminate at the ISP's POP. Although the Commission acknowledged the FCC's ISP Order, some of the Commission's primary findings and conclusions are directly controverted by the FCC. For instance, the Commission found:

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.

Order, at 10. (Emphasis added). Clearly, the Commission's findings as to the effective law at the time the agreement was executed and that the traffic at issue terminates at the ISP is directly contrary to the express findings made by the FCC in the ISP Order. Although the Commission attempts to cast its Order in terms of intent of the parties, the Commission's analysis of the parties' intent is based on erroneous assumptions of law and fact. Thus, BellSouth contends that it has a significant likelihood of prevailing on the merits of the appeal.

2. BellSouth is likely to suffer irreparable harm if the stay is not granted.

BellSouth will be irreparably harmed should the Commission Order not be stayed pending judicial review. Specifically, BellSouth will be required to pay substantial amounts of money to e.spire, some of which it may not be able to recoup should BellSouth prevail on its

appeal, which it believes it will. This is especially true considering that e.spire's financial statements continue to reflect net losses. Clearly, there is a substantial risk that BellSouth would not be able to recover any amounts paid to e.spire if the Commission's Order were eventually overturned. In that instance, BellSouth would be irreparably harmed by having paid money it did not owe and could not then recover.

3. Delay will Neither Cause Substantial Harm, nor is it Contrary to the Public Interest.

Delay will not cause substantial harm to e.spire or be contrary to the public interest. The moneys allegedly due e.spire can be distributed appropriately, if necessary, upon an ultimate determination of this matter. Thus, neither e.spire nor the public will be harmed or prejudiced by the granting of a stay. The harm to the public if a stay is granted will be inconsequential in contrast to the harm to BellSouth if a stay is not granted.

B. No Bond Should Be Required.

Rule 25-22.061(2), Florida Administrative Code, permits the Commission to require BellSouth to post or issue some other corporate undertaking as a condition of the stay. BellSouth recommends that the bond should be set at zero. No bond is necessary because some of the moneys at issue have already been escrowed by and will be available for payment should BellSouth's appeal be unsuccessful. Any non-escrowed amounts will also be available should BellSouth not prevail on appeal. Neither e.spire nor the public will be harmed by the lack of a bond.

For all the reasons discussed herein, BellSouth requests the Commission issue a stay of its Order No. PSC-99-0658-FOF-TP, including the PAA portion, pending judicial review.

Respectfully submitted this 20th day of August 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White (cc)

NANCY B. WHITE

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c/o Nancy Sims

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