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December 1, 2000

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

Re: FPSC Docket No. 000075-TP

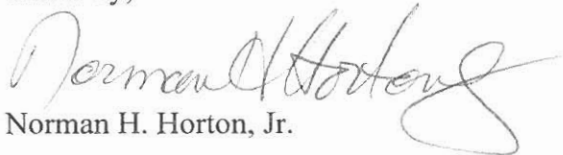
Dear Ms. Bayó:

Enclosed for filing on behalf of e.spire Communications, Inc. are an original and fifteen copies of the Direct Testimony of James C. Falvey 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.

NHH/amb
Enclosure

cc: James Falvey, Esq.
Parties of Record

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DOCUMENT NUMBER-DATE

15384 DEC-18

FPSC-RECORDS/REPORTING

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into appropriate)
methods to compensate carriers for)
exchange of traffic subject to Section 251)
of the Telecommunications Act of 1996)
_____)

Docket No. 000075-TP

DIRECT TESTIMONY

OF

JAMES C. FALVEY

ON BEHALF OF

E.SPIRE COMMUNICATIONS, INC.

Dated: December 1, 2000

DOCUMENT NUMBER-DATE

15384 DEC-18

FPSC-RECORDS/REPORTING

1 **Q. PLEASE STATE YOUR NAME, TITLE AND BUSINESS ADDRESS**
2 **FOR THE RECORD.**

3 A. My name is James C. Falvey. I am Senior Vice President – Regulatory
4 Affairs for e.spire Communications, Inc. (“e.spire”), which formerly was
5 known as American Communications Services, Inc. or “ACSI”. My
6 business address is 131 National Business Parkway, Suite 100, Annapolis
7 Junction, Maryland 20701.

8 **Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE AND**
9 **BACKGROUND.**

10 A. Prior to joining e.spire as Vice President – Regulatory Affairs in 1996, I
11 practiced law as an associate with the Washington, D.C. law firm of
12 Swidler and Berlin for two and a half years. In the course of my practice,
13 I represented competitive local exchange providers (“CLECs”),
14 competitive access providers, cable operators and other common carriers
15 before state and federal regulatory authorities. Prior to my employment at
16 Swidler and Berlin, I was an associate in the Washington, D.C. office of
17 Johnson & Gibbs, where I practiced antitrust litigation for three years. I
18 graduated from Cornell University in 1985 with honors and received my
19 law degree from the University of Virginia School of Law in 1990. I am
20 admitted to practice law in the District of Columbia and Virginia.

21 **Q. HAVE YOU TESTIFIED PREVIOUSLY ON MATTERS RELATED**
22 **TO THOSE TO WHICH YOU WILL TESTIFY TO TODAY?**

1 A. Yes, I have. I have testified before the state regulatory commissions in
2 Alabama, Georgia, Kansas, Kentucky, Louisiana, Mississippi, New York,
3 Pennsylvania, South Carolina, Tennessee, Texas, and before this
4 Commission, on various local interconnection and competition issues,
5 including the issue of whether reciprocal compensation is due for the
6 transport and termination of local calls placed to Internet Service
7 Providers (“ISPs”). I also have testified on the reciprocal compensation
8 issue before two separate American Arbitration Association panels.

9 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS**
10 **PROCEEDING?**

11 A. I am testifying on behalf of e.spire and its local operating subsidiaries in
12 the state of Florida. e.spire is a facilities-based CLEC that, through its
13 operating subsidiaries, provides a full range of local and long distance
14 telecommunications services in more than 30 markets throughout the
15 northeastern, southeastern and southwestern United States. In Florida,
16 e.spire competes with BellSouth and Verizon, (formerly known as GTE),
17 the incumbent local exchange carriers (“ILECs”), in major metropolitan
18 areas within Florida.

19 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

20 A. The purpose of my testimony in this proceeding is to explain why this
21 Commission should find that calls placed to Internet Service Providers
22 (“ISPs”) should continue to be subject to the reciprocal compensation

1 provisions of BellSouth's and Verizon interconnection agreements with
2 CLECs.

3 **Q. DOES THE COMMISSION HAVE THE JURISDICTION TO**
4 **ADOPT AN INTERCARRIER COMPENSATION MECHANISM**
5 **FOR THE DELIVERY OF ISP-BOUND TRAFFIC?**

6 A. Yes. In March of this year, the District of Columbia Circuit Court of
7 Appeals vacated a ruling of the FCC that left intact the ability of state
8 commissions to determine how local traffic should be compensated. As
9 you are aware, in February 1999, the FCC issued an order in which it
10 determined that despite the fact that it has required states to treat ISP-
11 bound traffic t as local traffic, "at least a substantial portion of dial-up ISP-
12 bound traffic is interstate[.]" (*See Implementation of the Local*
13 *Competition Provisions in the Telecommunications Act of 1996, Inter-*
14 *Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 at ¶ 20
15 (1999).) Thus, the FCC reasoned that ISP-bound traffic is not governed by
16 the reciprocal compensation obligation in Section 251(b)(5) of the
17 Telecommunications Act of 1996 ("Telecommunications Act" or "Act").
18 Recognizing the potential void created by its assertion of jurisdiction over
19 ISP-bound traffic, the FCC noted that given its longstanding history of
20 treating ISP-bound traffic as local, parties to pre-existing interconnection
21 agreements likely agreed to treat ISP-bound traffic as local traffic. In
22 addition, the FCC opened a new rule making in which it intended to adopt

1 a new prospective compensation mechanism for ISP-bound traffic. In the
2 interim, the FCC advised states that they were free to interpret the
3 contractual obligations contained in existing interconnection agreements
4 and to require the payment of reciprocal compensation for ISP-bound
5 traffic in new agreements.

6 The FCC also indicated that the states were free to adopt some
7 other compensation mechanism, if they chose not to require reciprocal
8 compensation for the payment of ISP-bound traffic. Cognizant of this
9 FCC decision, at least eleven state commissions, including several that
10 affect Verizon and its affiliated companies (Texas, California, Illinois and
11 Ohio) already have determined that reciprocal compensation should apply
12 to ISP-bound traffic, at least until the FCC establishes an alternate
13 compensation mechanism.

14 **Q. DOES THE COMMISSION HAVE THE JURISDICTION TO**
15 **ADOPT SUCH AN INTERCARRIER COMPENSATION**
16 **MECHANISM THROUGH A GENERIC PROCEEDING?**

17 A. Yes. The Commission need not await a particular dispute between carriers
18 to address the issue of intercarrier compensation. The FCC and the D.C.
19 Court of Appeals agreed that in the interim period during which the FCC
20 will consider a new compensation mechanism for ISP-bound traffic, states
21 are free to require the payment of reciprocal compensation for ISP-bound
22 traffic in new agreements. As I mentioned above, the FCC already

1 indicated that states were also free to adopt another compensation
2 mechanism, if they chose not to require reciprocal compensation for the
3 payment of ISP-bound traffic.

4 **Q. IS DELIVERY OF ISP-BOUND TRAFFIC SUBJECT TO**
5 **COMPENSATION UNDER SECTION 251 OF THE**
6 **TELECOMMUNICATIONS ACT OF 1996?**

7 A. Yes. Section 251(b)(5) of the Act requires that carriers establish
8 reciprocal compensation arrangements “for the transport and termination
9 of telecommunications.” A caller’s dial-up call to an ISP is
10 “telecommunications” as defined in the Act (*See* 47 U.S.C. §153(43)) and
11 is therefore subject to reciprocal compensation. In interpreting the
12 reciprocal compensation obligations specified in section 251, the FCC
13 preserved its existing access charge regime. Thus, in its First Report and
14 Order in CC Docket 96-98, the FCC appeared to limit the obligation to
15 pay reciprocal compensation to “local” traffic not encompassed by the
16 access charge regime.

17 Generally speaking, there are two established means of recovering
18 costs associated with completing traffic directed to one carrier by another.
19 Those means are (1) access charges and (2) reciprocal compensation.
20 Access charges are assessed to carriers by the terminating local exchange
21 carrier for the completion of the originating carrier’s toll calls.
22 Traditionally, access charges have allowed carriers to recover more than

1 their costs and have served as a mechanism to support Universal Service
2 and to subsidize residential rates for local exchange service. In 1983, the
3 FCC determined that ISPs were exempt from access charges and were
4 entitled to purchase their connections to the public switched telephone
5 network as end users, as opposed to carriers.

6 Reciprocal compensation, on the other hand, is a concept based in
7 the Telecommunications Act of 1996 (“Telecommunications Act” or
8 “Act”). Section 251 of the Act requires local exchange carriers (“LECs”)
9 such as BellSouth or Verizon and e.spire to interconnect their networks so
10 that customers of each carrier can place calls to customers of the other
11 carrier. As a result, today, customers of e.spire can place calls to
12 customers of BellSouth, and vice versa. To make this happen, BellSouth
13 and e.spire must exchange traffic between their networks. Thus, when a
14 BellSouth customer makes a call to an e.spire customer, BellSouth directs
15 and hands-off the call to e.spire and e.spire then connects the call to its
16 customer. This call completion function performed by e.spire (or
17 BellSouth, depending on whose customer is being called by a customer of
18 the other carrier) is known as “transport and termination”. Notably, the
19 functionality provided does not differ based on whether or not the end user
20 of one LEC called by an end user of another LEC is a pizza parlor or an
21 ISP. In both cases, the terminating carrier must accept hand-off of the call
22 originated on the other carrier’s network, and must deliver the call to its

1 destination. The equipment used is the same on both the originating and
2 terminating sides, and the costs of originating and terminating the calls are
3 the same. Since this transaction requires use of the terminating carrier's
4 resources, it is appropriate to compensate that carrier for its efforts.
5 Otherwise, this service is being provided to the originating carrier for free,
6 something that does not make economic sense whether the originating
7 carrier is BellSouth or e.spire.

8 **Q. WHAT ACTIONS SHOULD THE COMMISSION TAKE, IF ANY,**
9 **WITH RESPECT TO ESTABLISHING AN APPROPRIATE**
10 **COMPENSATION MECHANISM FOR ISP-BOUND TRAFFIC IN**
11 **LIGHT OF CURRENT DECISIONS AND ACTIVITIES OF THE**
12 **COURTS AND THE FCC?**

13 A. As you are aware, the FCC is currently considering the best manner in
14 which to address the issue of intercarrier compensation. In the wake of the
15 FCC's February 1999 Order, in March of this year, the United States
16 Court of Appeals for the District of Columbia Circuit vacated the FCC's
17 February 26, 1999 decision (that found that dial-up calls to ISPs are
18 substantially interstate in character) and remanded the matter back to the
19 FCC for lack of reasoned decision making. *Bell Atlantic v. FCC*, 206 F.3d
20 1 (D.C. Cir. 2000). Significantly, the Court called into question the FCC's
21 application of its "end-to-end" jurisdictional analysis for the purpose of
22 determining whether ISP-bound traffic is local and rejected the FCC's

1 conclusion that such traffic was not local and therefore not encompassed
2 by the reciprocal compensation obligations of the Act. In rejecting the
3 FCC's analysis, the Court noted that *under the FCC's own definition*, a
4 call from an end user to an ISP "terminates" at an ISP. The Court also
5 found that the FCC failed to explain adequately its conclusion that ISP-
6 bound traffic is "exchange access" rather than "telephone exchange
7 service" under the Communications Act.

8 In response to this turn of events, e.spire believes this Commission
9 should move forward as many other state commissions already have done,
10 by finding in this proceeding that ISP-bound traffic should continue to be
11 subject to reciprocal compensation at the cost-based local call transport
12 and termination rates approved by the Commission. This preserves a
13 tried-and-true mechanism that allows carriers to be compensated for
14 resources they devote to delivering calls originated on other carriers'
15 networks while avoiding "jumping the gun" pending adoption of a
16 definitive federal rule. Since, as noted above, the basic transaction is
17 functionally the same whether the call is delivered to a pizza parlor or an
18 ISP, it would make sense to treat the transaction the same from an
19 economic standpoint, unless and until the FCC rules otherwise.

20 **Q. WHAT POLICY CONSIDERATION SHOULD INFORM THE**
21 **COMMISSION'S DECISION IN THIS DOCKET?**

1 A. The Commission should consider the effect reciprocal compensation for
2 ISP traffic has on e.spire and other new facilities-based competitors in the
3 Florida market. e.spire and other carriers need to be assured of a means of
4 recovering costs incurred in delivering ISP-bound calls originated and
5 directed to them by BellSouth, Verizon and other local carriers. As I
6 stated above, when a Verizon end user places a local call to an end user
7 served by e.spire, e.spire terminates the call originated by Verizon and
8 provides the same functionality to Verizon, regardless of whether the
9 Verizon end user dials an ISP or any other e.spire local services end user.
10 Thus, the compensation mechanism – reciprocal compensation at
11 Commission-approved cost-based rates – for the transport and termination
12 of local traffic, should be the same. Both calls use the same path and the
13 same equipment to reach their ultimate destination. Most importantly,
14 from the point of view of the terminating carrier, the costs to deliver the
15 calls made to the customer and the ISP customer are the same. There is no
16 logical justification to single out the call delivered to the ISP and suggest
17 that *no compensation* (or significantly reduced compensation) should be
18 paid to the carrier that delivers the call, while a different (presumably cost-
19 based) rate is applied to other calls with identical technical and cost
20 characteristics. For this reason, the rates associated with recovering those
21 costs should also be the same.

1 Costs recovered through reciprocal compensation generate revenue
2 critical to the ability of new entrants such as e.spire to implement network
3 construction and develop product offerings necessary to compete
4 effectively with incumbents such as Verizon and BellSouth. Eliminating
5 the ability of a CLEC to recover the costs associated with delivering traffic
6 to ISPs can be expected to adversely affect e.spire's cost of doing business
7 and is likely to distort an increasingly competitive local exchange market.
8 Without Commission action, Verizon and BellSouth will not agree to any
9 compensation mechanism for the mutual recovery of costs associated with
10 completing ISP-bound traffic and e.spire will be forced to file a separate
11 petition for arbitration that further increases costs and delays competitive
12 market entry.

13 **Q. IS THE COMMISSION REQUIRED TO SET A COST-BASED**
14 **MECHANISM FOR DELIVERY OF ISP-BOUND TRAFFIC?**

15 A. Yes. Section 252(d)(2) of the Act provides that a state commission shall
16 not consider the terms and conditions for reciprocal compensation to be
17 just and reasonable unless the terms and conditions provide for the mutual
18 reciprocal recovery by each carrier of costs associated with transport and
19 termination of calls that originate on another carrier's network. Section
20 252(d)(2) states further that the terms and conditions for reciprocal
21 compensation are just and reasonable if those terms and conditions

1 determine such costs on the basis of a reasonable approximation of the
2 additional costs or terminating such calls.

3 **Q. WHAT FACTORS SHOULD THE COMMISSION CONSIDER IN**
4 **SETTING THE COMPENSATION MECHANISMS FOR**
5 **DELIVERY OF ISP-BOUND TRAFFIC?**

6 A. e.spire advises the Commission to consider factors that are in accord with
7 the governing FCC rules regarding intercarrier compensation. Thus, the
8 Commission should consider a compensation mechanism that is (i)
9 consistent with cost causation; (ii) composed of rates based on forward-
10 looking cost principles; (iii) composed of rates that reflect the ILEC's
11 costs; and (iv) symmetrical. The consideration of cost causation as a
12 factor is eminently logical. If the end user customer of a carrier causes a
13 second carrier to incur – by receiving and delivering the call to the
14 destination of the calling party's choosing – a cost, then it follows that
15 compensation is due to the second carrier. e.spire urges the Commission
16 further to consider already approved forward-looking cost rates to
17 establish reciprocal compensation rates for ISP-bound traffic.

18 **Q. SHOULD INTERCARRIER COMPENSATION FOR DELIVERY**
19 **OF ISP-BOUND TRAFFIC BE LIMITED TO CARRIER AND ISP**
20 **ARRANGEMENTS INVOLVING CIRCUIT-SWITCHED**
21 **TECHNOLOGIES?**

1 A. No. To the degree that ISP-bound traffic includes non-circuit-switched
2 technologies, such as voice-over-IP, the costs incurred by competitive
3 carriers for delivering traffic directed toward the internet backbone are the
4 same as those for traffic transported over circuit-switched networks. For
5 consumers to receive the potential benefits promised by non-circuit-
6 switched technologies, they are still required, initially, to utilize the
7 circuit-switched network. The equipment that competitive and incumbent
8 carriers utilize to transport and terminate traffic over a circuit-switched
9 network is the same equipment carriers use to provide the initial phases of
10 non-circuit-switched service offerings. Competitive carriers still incur a
11 cost in completing transport and termination of this traffic and should be
12 compensated for the use of their resources in doing so. It would therefore
13 be unfair to penalize competitive carriers for providing innovative,
14 advanced services to the marketplace. If the Commission were to exclude
15 non-circuit switched technologies from compensation, it is likely that
16 competitive carriers would have little or no financial incentive to provide
17 such services. Ultimately, Florida consumers would be the losers, because
18 their menu of service options and pricing arrangements would be
19 truncated.

20 **Q. SHOULD ISP-BOUND TRAFFIC BE SEPARATED FROM NON-**
21 **ISP-BOUND TRAFFIC FOR PURPOSES OF ASSESSING ANY**
22 **RECIPROCAL COMPENSATION PAYMENTS? IF SO, HOW?**

1 A. No. The creation of separate compensation schemes for ISP-bound traffic
2 is unjustified because such an arrangement incorrectly assumes that there
3 are differences in the underlying costs for handling the traffic. ILECs use
4 the same equipment to originate, transport, and terminate ISP-bound
5 traffic as they do for traditional voice-grade traffic, often to similarly-
6 situated customers. Moreover, voice-grade calls to high volume users and
7 business customers are terminated using the identical facilities that CLECs
8 may use to terminate ISP-bound traffic. Therefore, the Commission
9 should not attempt to separate ISP-bound traffic from voice traffic because
10 the underlying costs of carrying each type of traffic are the same.

11 Furthermore, equal treatment of ISP-bound and non-ISP-bound
12 traffic generates the appropriate set of economic incentives for the ILEC
13 and the competitive carrier to cooperate in an efficient manner. The
14 Commission can help to encourage incumbents to operate their networks
15 efficiently and adopt newer technologies while at the same time allowing
16 competitive carriers to realize the benefits of establishing equally efficient
17 networks. The separation of ISP-bound traffic for reciprocal
18 compensation payments is likely to lead to a reduction of compensation
19 for this class of traffic, and therefore will result in the failure to encourage
20 efficient communications networks.

21 **Q. SHOULD THE COMMISSION ESTABLISH COMPENSATION**
22 **MECHANISMS FOR DELIVERY OF ISP-BOUND TRAFFIC TO**

1 **BE USED IN THE ABSENCE OF THE PARTIES REACHING AN**
2 **AGREEMENT OR NEGOTIATING A COMPENSATION**
3 **MECHANISM? IF SO, WHAT SHOULD BE THE MECHANISM?**

4 A. Yes. e.spire believes that in the interests of ensuring the development of
5 competition for local exchange services and the continued deployment of
6 advanced telecommunications services in the state of Florida, the
7 Commission should establish a default compensation mechanism. The
8 establishment of a default compensation mechanism will ensure that ISPs
9 will continue to have competitive alternatives for local exchange service
10 due to the continued growth of competitive carriers. Furthermore,
11 competitive carriers will be more willing to compete vigorously for end
12 user customers because they are assured of just compensation for
13 termination of all local calls on their network. Conversely, if no default
14 compensation mechanism is established, carriers will have few if any
15 benchmarks to agree on a reasonable level compensation. This will create
16 uncertainty in the market and will encourage incumbent carriers to attempt
17 to force competitive carriers to accept unfavorable terms in
18 interconnection agreements. Such unfavorable terms would discourage
19 competitive carriers from transporting and terminating ISP-bound traffic,
20 resulting in fewer competitive alternatives for ISPs and other end users. If
21 carriers cannot reach agreement, they are also more likely to seek
22 arbitration of the issue before the Commission, resulting in a never-ending

1 flow of same-subject proceedings. This could be avoided if a default
2 standard is set.

3 e.spire believes that the most appropriate default mechanism is to
4 employ the reciprocal compensation rate for non-ISP-bound local calls as
5 a proxy – on a symmetrical basis – unless and until the FCC rules
6 otherwise. This is appropriate, as I have stated before, because the
7 resources utilized by the originating and terminating carriers to deliver the
8 call to the ISP are the same as the resources used to deliver the call to a
9 pizza parlor, or for that matter, any local end-user. The costs are the same,
10 and the compensation should logically be the same, unless and until
11 federal law requires otherwise.

12 **Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

13 **A.** Yes, it does. Thank you.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Direct Testimony of James Falvey on behalf of e.s.pire Communications, Inc. has been served on the following parties by Hand Delivery (*) and/or U. S. Mail this 1st day of December, 2000.

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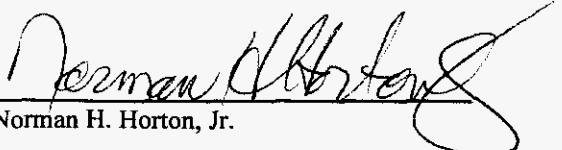
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