

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 981008-TP
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 Request for arbitration :
 concerning complaint of :
 American Communications :
 Services of Jacksonville, Inc. :
 d/b/a e.spire Communications :
 Inc. and ACSI Local Switched :
 Services, d/b/a e.spire :
 Communications, Inc. against :
 BellSouth Telecommunications, :
 Inc. regarding reciprocal :
 compensation for traffic :
 terminated to internet :
 service providers :

VOLUME 1

PROCEEDINGS: HEARING

BEFORE: COMMISSIONER JULIA L. JOHNSON
 COMMISSIONER E. LEON JACOBS, JR.

DATE: Wednesday, January 20, 1999

TIME: Commenced at 9:30 a.m.

PLACE: Betty Easley Conference Center
 Room 148
 4075 Esplanade Way
 Tallahassee, Florida

REPORTED BY: Debra R. Krick
 Court Reporter

DOCUMENT NO.
 1-26-99
 01040-99

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10 Inc., d/b/a e.spire Communications, Inc.

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15 Inc.

16 BETH KEATING and CLINTINA WATTS, Florida
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19 32399-0870, appearing of behalf of the commission
20 staff.

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P R O C E E D I N G S

(Hearing convened at 9:30 a.m.)

COMMISSIONER JOHNSON: We're going to go on the record. Counsel, would you read the notice.

MS. KEATING: By notice issued December 21, 1998, and revised January 13, 1999, this time and place have been set for a hearing in Docket 981008-TP request for arbitration concerning the complaint of e.spire against BellSouth.

COMMISSIONER JOHNSON: We're going to stand in recess until 1:30.

(Thereupon, a recess was taken at 9:33 a.m. and the hearing reconvened at 1:30 p.m.)

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1 P R O C E E D I N G S

2 (Hearing reconvened at 1:30 p.m.)

3 COMMISSIONER JOHNSON: Okay. We are going to go
4 back on the record.5 I believe counsel has read the notice. So we
6 will take appearances.7 MS. KEYER: Good afternoon. Mary Keyer on
8 behalf of BellSouth Telecommunications Inc.; 675 West
9 Peachtree Street, Northeast, Suite 4300, Atlanta,
10 Georgia, 30375.

11 And also with me today is Nancy White.

12 COMMISSIONER JOHNSON: Okay.

13 MR. HORTON: I am Norman H. Horton, Junior, and
14 Floyd R. Self of Messer, Caparello and Self; P.O. Box
15 1876, Tallahassee, Florida; on behalf of e.spire.16 MS. KEATING: Beth Keating and Clintina Watts,
17 appearing for Commission staff.18 COMMISSIONER JOHNSON: Are there any preliminary
19 matters?20 MS. KEATING: Just a few, that staff is aware
21 of.22 First off, as I understand it, e.spire has asked
23 to substitute a witness for Kevin Cummings.24 MR. HORTON: That's correct, Commissioner. We
25 have Ms. Donna Talmage, who will be incorporating or

1 adopting the testimony of Mr. Cummings. And we would
2 also -- prehearing shows her going second. We would
3 like for her to go first.

4 COMMISSIONER JOHNSON: Have you discussed that with
5 the other party?

6 MR. HORTON: Yes, ma'am.

7 COMMISSIONER JOHNSON: There is no objection?

8 MR. HORTON: No.

9 COMMISSIONER JOHNSON: Okay.

10 MS. KEATING. Okay. The second thing is, as a
11 preliminary matter, staff has compiled a list of
12 orders that we would like to ask the Commission to
13 take official recognition of. The parties have
14 stipulated that these -- this can be entered into the
15 record as a staff exhibit, in lieu of reading each of
16 these into the record.

17 So at this time, I would ask that the official
18 recognition list be marked as Hearing Exhibit 1.

19 COMMISSIONER JOHNSON: We will mark that as Exhibit
20 1, and show the Commission taking official
21 recognition of the document stated in Exhibit 1.

22 (Whereupon, Hearing Exhibit No. 1 was marked for
23 identification.)

24 MS. KEATING: Is that moved, Exhibit 1?

25 COMMISSIONER JOHNSON: It will be admitted without

1 objection.

2 (Whereupon, Hearing Exhibit No. 1 was received
3 into evidence.)

4 MS. KEATING: Also, staff has compiled exhibits
5 of e.spire and BellSouth's responses to staff's
6 discovery request. And the parties have agreed that
7 these could also be entered into the record at this
8 time.

9 Therefore, staff would ask that e.spire's
10 responses to staff's first set of interrogatories and
11 first request for production of documents, be marked
12 as Hearing Exhibit 2.

13 COMMISSIONER JOHNSON: We'll mark that as Exhibit 2.

14 (Whereupon, Hearing Exhibit No. 2 was marked for
15 identification.)

16 MS. KEATING: And --

17 COMMISSIONER JOHNSON: And the short title, is that
18 that JCF-9? Am I looking at the right document?

19 MS. KEATING: Yes, that's correct. It's JCF-9.

20 COMMISSIONER JACOBS: That's the 5A part of it,
21 also?

22 MS. KEATING: Excuse me? I am sorry, I didn't
23 understand.

24 COMMISSIONER JACOBS: I'm sorry. That's a
25 different one.

1 MS. KEATING: That's the second one.

2 COMMISSIONER JACOBS: I see.

3 COMMISSIONER JOHNSON: We'll identify that as
4 JCF-9.

5 MS. KEATING: And we would also ask that
6 BellSouth's response to staff's first set of
7 interrogatories and first request for production of
8 documents, JDH-5, be marked as Hearing Exhibit 3.

9 COMMISSIONER JOHNSON: It will be marked as Exhibit
10 3.

11 (Whereupon, Hearing Exhibit No. 3 was marked for
12 identification.)

13 MS. KEATING: And staff moves Exhibit 2 and 3.

14 COMMISSIONER JOHNSON: Show those admitted without
15 objection.

16 (Whereupon, Hearing Exhibit Nos. 2 and 3 were
17 received into evidence.)

18 MS. KEATING: And those are all the preliminary
19 matters that I am aware of.

20 COMMISSIONER JOHNSON: Any other preliminary matters
21 from the other parties?

22 I note that the prehearing order stated that the
23 one pending motion has been ruled upon.

24 MS. KEATING: That's correct.

25 COMMISSIONER JOHNSON: And I understand that all of

1 the parties have a copy of the order.

2 MS. KEATING: That's correct.

3 MR. HORTON: Yes, ma'am.

4 COMMISSIONER JOHNSON: Okay. There are no other
5 preliminaries?

6 MR. HORTON: No, ma'am.

7 COMMISSIONER JOHNSON: Okay. Was there a request
8 for any oral opening statement?

9 MR. HORTON: No, ma'am.

10 MS. KEATING: No.

11 COMMISSIONER JOHNSON: No. Okay. Then I guess it
12 would be appropriate to swear in the witnesses at
13 this time.

14 If you are going to testify in the proceeding,
15 if you would stand and raise your right hand.

16 (Whereupon, the witnesses were administered the
17 oath.)

18 COMMISSIONER JOHNSON: Thank you. You may all be
19 seated.

20 I think we are prepared then to call the first
21 witness. And you said her last name was Talmage?

22 MR. HORTON: Talmage.

23 COMMISSIONER JOHNSON: Talmage.

24 MR. HORTON: Yes, ma'am. T-a-l-m-a-g-e.

25 DONNA TALMAGE

1 was called as a witness on behalf of e.spire
2 Communications and, having been duly sworn, testified as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. HORTON:

6 Q Could you please state your name, address and
7 title for the record, please?

8 A My name is Donna Talmage. My address is e.spire
9 Communications, Incorporated, 133 National Business
10 Parkway, Suite 200, Annapolis Junction, Maryland, 20701.

11 Q And what are your responsibilities with
12 e.spire?

13 A I am the director of carrier access billing and
14 reciprocal compensation.

15 Q Could you briefly give us a description of your
16 professional experience and background?

17 A I have 13 years of telecommunications
18 experience. I joined e.spire in January of this year.
19 From May 1991 to December 1998, I worked for MCI, MCI
20 WorldCom, holding various positions; most recently,
21 senior manager of marketing and operational analysis for
22 mass markets local services.

23 Prior to MCI, I worked for two years with Talet
24 Corporation. Tel provided access and finance-related
25 software to global exchange carriers.

1 From 1985 to 1989, I worked for Ernst and
2 Whinney's Telecommunications Consulting Group, where I
3 did regulatory consulting to local exchange carriers.

4 I have a Master's in business administration
5 from University of Rochester, and a Bachelor of arts from
6 Cornell University.

7 Q Have you testified before this Commission
8 before?

9 A No.

10 Q And what is the purpose of your testimony today?

11 A The purpose of my testimony is to explain how
12 e.spire calculates and bills reciprocal compensation.

13 Q Okay. Have you reviewed the testimony which was
14 pre-filed on behalf of Kevin Cummings in this docket?

15 A Yes, I have.

16 Q And it's your intent today to adopt that
17 testimony as your own?

18 A Yes, it is.

19 Q Have you any changes or modifications to make of
20 that testimony?

21 A Yes, I do. I would like to strike page one, and
22 lines one to three on page two. And then on page four,
23 there is a blank date that I would like to fill in. That
24 date should be December 1997. That's page four, line
25 five.

1 And then on page seven, line 19, I would like to
2 change a trunk group to trunk groups, strike the A and
3 add an S to group.

4 Q With those changes, and after reviewing the
5 questions and answers, if I were to ask you the questions
6 in that pre-filed testimony, would your answers be the
7 same as contained therein?

8 A Yes, they would.

9 Q Attached to Mr. Cummings' testimony were two
10 exhibits, KAC-1 and KAC-2. Have you reviewed those
11 exhibits?

12 A Yes, I have.

13 Q And you are familiar with those exhibits?

14 A Yes, I am.

15 Q Do you have any changes or corrections to make
16 to those exhibits?

17 A Yes, I do. On KAC-1, which is page one -- there
18 is just one page -- on the right-hand side, offices is
19 misspelled. I would like to correct that. There are
20 three places on the exhibit.

21 Q Let me ask you to refer -- just for
22 clarification, would you refer to KAC-2, page one and
23 two. Do you have that?

24 A Yes.

25 Q And what is that? What are those two pages?

1 A Those are an invoice dated June 15th, that was
2 sent to BellSouth.

3 Q All right. Do those pages contain information
4 with respect to switches, other than Jacksonville?

5 A Yes, they do.

6 Q And it is -- are those switches, other than
7 Jacksonville, at issue today?

8 A No, they are not.

9 Q All right. Are there other places in that
10 exhibit that contain information with respect to other
11 switches, other than Jacksonville?

12 A Just the additional invoices that are contained
13 within the exhibit.

14 Q Okay. And just to make sure it is clear, we are
15 only concerned with the Jacksonville switch?

16 A That is correct.

17 Q And how would that be identified?

18 A It would be identified through the CLLI code,
19 JCVLFW -- FLWFDCO.

20 Q Thank you.

21 MR. HORTON: Commissioner, could I request at
22 this time that Ms. Talmage's direct pre-filed
23 testimony be inserted into the record as though read?

24 COMMISSIONER JOHNSON: It will be inserted into the
25 record as though read.

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

3 ~~A. My name is Kevin A. Cummings. I am Director of Billing Operations/Revenue~~
4 ~~Assistance for e.spire Communications, Inc. ("e.spire"), formerly American~~
5 ~~Communieations Services, Inc. ("ACST"). My business address is 133 National~~
6 ~~Business Parkway, Suite 200, Annapolis Junction, Maryland 20701.~~

7 ~~Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE AND~~
8 ~~BACKGROUND.~~

9 ~~A. I have worked at e.spire since October 1997 as Director of Billing~~
10 ~~Operations/Revenue Assistance. In this capacity, I am responsible for end user,~~
11 ~~and carrier access billing. Prior to taking this position, I was Director of Strategic~~
12 ~~Operations for LightCom International, Inc. ("LightCom") from June 1997 to~~
13 ~~October 1997. Before working at LightCom, I held several successive positions~~
14 ~~at AT&T in marketing, finance and billing, beginning in June 1990 and~~
15 ~~culminating as International Product Marketing Manager from June 1995 to June~~
16 ~~1997. I have a bachelor of Arts degree from Hampton University, and a Master of~~
17 ~~Science degree in Management from Hampton University.~~

18 ~~Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS COMMISSION?~~

19 ~~A. No.~~

20 ~~Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE ANY OTHER STATE~~
21 ~~COMMISSION?~~

1 ~~A. Yes. Earlier this year, I testified in a proceeding before the Georgia Public~~
2 ~~Service Commission with respect to another complaint against BellSouth related~~
3 ~~to reciprocal compensation for ISP traffic.~~

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

5 A. The purpose of my testimony is to explain the manner in which e.spire has
6 calculated and billed BellSouth for local reciprocal compensation.

7 **Q. HOW DID E.SPIRE ARRIVE AT THE TOTAL AMOUNT TO BILLED**
8 **BELLSOUTH FOR RECIPROCAL COMPENSATION?**

9 A. The billing for reciprocal compensation is based on a straightforward calculation
10 in which the minutes of use are multiplied by the reciprocal compensation rate.

11 The reciprocal compensation rate is discussed in the testimony of James C.
12 Falvey. The minutes of use or MOUs are the minutes of traffic from BellSouth
13 end users terminated on e.spire's network. Minutes of use for billing reciprocal
14 compensation have been obtained from e.spire's monthly usage reports.

15 **Q. WHEN DID E.SPIRE BEGIN BILLING BELLSOUTH FOR**
16 **RECIPROCAL COMPENSATION?**

17 A. e.spire's first reciprocal compensation bill to BellSouth in Florida was for traffic
18 terminated by e.spire in March 1998. Pursuant to e.spire's Interconnection
19 Agreement with BellSouth, there is to be no cash compensation for transporting
20 and terminating each other's traffic unless the difference in minutes of use
21 exceeds 2 million minutes per state on a monthly basis. e.spire's usage reports

1 show that this 2 million minutes of use difference occurred in March 1998 and has
2 continued to occur each month thereafter.

3 **Q. WAS BELLSOUTH OBLIGATED TO REPORT LOCAL MINUTES OF**
4 **USE TO E.SPIRE?**

5 A. Yes. Pursuant to Section VI.B of the Interconnection Agreement between e.spire
6 and BellSouth, BellSouth was required to report local minutes usage to e.spire.
7 The relevant portion of the Interconnection Agreement provides: "The Parties
8 agree that BellSouth will track the usage for both companies for the period of the
9 Agreement. BellSouth will provide copies of such usage reports to ACSI on a
10 monthly basis."

11 **Q. HAS BELLSOUTH ADMITTED THAT IT HAS FAILED TO TRACK**
12 **LOCAL USAGE?**

13 A. Yes. BellSouth admitted in its letter dated January 8, 1998 that it has agreed to
14 track local usage but "that it has failed to provide these reports." A copy of
15 BellSouth January 8 letter is attached to the testimony of James Falvey market
16 Exhibit No. JCF-5. BellSouth further committed in that letter that, "[b]ecause of
17 the absence of such reports BellSouth agrees to use ACSI's usage reports for
18 determining the local traffic differentials."

19 **Q. HAS BELLSOUTH EVER REPORTED THESE LOCAL MINUTES TO**
20 **E.SPIRE?**

21 A. No. Even today, when BellSouth has admitted that it has failed to meet its
22 obligation to e.spire, BellSouth is not sending local traffic reports to e.spire.

1 **Q. DID BELLSOUTH'S OBLIGATION TO TRACK LOCAL USAGE**
2 **DEPEND UPON REACHING A THRESHOLD OF LOCAL MINUTES?**

3 A. No, it did not. The obligation to track local usage began as soon as the parties
4 began exchanging local traffic. BellSouth and e.spire began exchanging local
5 traffic in Florida in ~~[date]~~ *December 1997*.

6 **Q. IN YOUR OPINION, DOES BELLSOUTH HAVE SYSTEMS IN PLACE**
7 **TODAY THAT COULD TRACK LOCAL USAGE?**

8 A. I cannot state with certainty what systems BellSouth actually has in place today to
9 track local usage. I can state with certainty that other local exchange companies
10 have in place today software in their switches that generates traffic reports to
11 indicate how much traffic flows over each of their trunk groups.

12 **Q. HAVE ANY STATE REGULATORY AUTHORITIES CONCLUDED**
13 **THAT BELLSOUTH COULD TRACK LOCAL USAGE?**

14 A. Yes, in fact the Hearing Examiner handling e.spire's complaint regarding
15 reciprocal compensation for ISP traffic before the Georgia Public Service
16 Commission specifically stated that:

17 BellSouth has admitted that it failed to perform its contractual
18 obligation to track and report to e.spire local minutes usage (or
19 local traffic) under Subsection VI.B of the [e.spire/BellSouth
20 Interconnection Agreement]. Moreover, [BellSouth's] counsel at
21 hearing did not contest the accuracy of e.spire's
22 TrafficMASTER™ reports, although he refused to stipulate such
23 reports as accurate, pending audit to eliminate ISP traffic. The
24 unrefuted testimony of e.spire's witnesses at hearing demonstrated
25 that e.spire used TrafficMASTER™ software to track local
26 minutes of usage only on local trunks in Georgia. In light of the
27 demonstrated capability of other Regional Bell Operating
28 Companies to track local traffic and in view of [BellSouth's]

1 failure to explain satisfactorily or sufficiently its nonperformance
2 in this matter, it is difficult for the [Georgia Public Service
3 Commission] to understand why [BellSouth] has not measured and
4 reported local traffic for and to e.spire as it was obligated to do
5 under the Interconnection Agreement. Moreover, it is precisely
6 because of [BellSouth's nonperformance in this area that e.spire
7 was put to the effort and expense of measuring such local traffic
8 (i.e., of performing in [BellSouth's] stead or of curing
9 [BellSouth's] nonperformance). *e.spire Communications, Inc. v.*
10 *BellSouth Telecommunications, Inc. Regarding Reciprocal*
11 *Compensation for Traffic Terminated to Internet Service*
12 *Providers*, Docket No. 9281-U, Initial Decision of the Hearing
13 Officer, Georgia Public Service Commission, p. 23 (October 19,
14 1998) (appended to the testimony of James C. Falvey at Exhibit
15 JCF-8.

16
17 As a result, the Hearing Examiner ordered BellSouth to pay compensatory
18 damages in the amount of e.spire's incurred costs in reconstructing and
19 monitoring local traffic (including ISP traffic). *Id.*

20 **Q. HAS BELL SOUTH STATED WHETHER IT HAS THE CAPABILITY TO**
21 **MEASURE LOCAL TRAFFIC?**

22 A. BellSouth has repeatedly asserted that it cannot measure local traffic. e.spire's
23 good faith estimates should therefore serve as the basis for a Commission decision
24 that BellSouth should pay e.spire's bills plus interest for the large quantities of
25 local traffic terminated to e.spire's network.

26 **Q. ASSUMING THAT BELL SOUTH DOES NOT HAVE THIS CAPABILITY**
27 **TODAY, COULD IT IMPLEMENT A SYSTEM SUCH AS THE TRAFFIC**
28 **MASTER SYSTEM IMPLEMENTED BY E.SPIRE TO TRACK THE**
29 **VOLUME OF LOCAL TRAFFIC TERMINATED TO E.SPIRE?**

1 A. Yes. e.spire has implemented the TrafficMASTER™ Software to track usage
2 over the local trunk groups terminating to e.spire's switch. BellSouth is a much
3 larger corporation than e.spire. If, for some reason, BellSouth does not currently
4 have the capability to track local usage flowing to e.spire, I am aware of no reason
5 why BellSouth could not implement the necessary software to track the volume of
6 this traffic.

7 **Q. WHAT ARE THE BENEFITS OF HAVING BELLSOUTH MONITOR**
8 **THIS TRAFFIC?**

9 A. There are several. First, BellSouth could comply with its obligations under the
10 Interconnection Agreement with e.spire. Second, we would have a BellSouth
11 record as to when the 2 million minute threshold was reached. Third, we would
12 have a BellSouth record of the exact volume of local minutes on a month by
13 month basis flowing between the two networks. As it is, we only have one set of
14 reports – those generated by e.spire.

15 **Q. PLEASE DESCRIBE E.SPIRE'S USAGE REPORTS.**

16 A. When it became apparent to e.spire that BellSouth would not provide the usage
17 reports pursuant to its obligation under the Interconnection Agreement, e.spire
18 was forced to develop its own usage reports. e.spire selected TrafficMASTER™,
19 a software product developed by Objective Systems Integrator, Inc. ("OSI") for
20 its usage reporting. e.spire implemented TrafficMASTER™ in November 1997.

1 Q. DID E.SPIRE'S USAGE REPORTS INDICATE THAT THE DIFFERENCE
2 IN THE MINUTES OF USE EXCEEDED 2 MILLION MINUTES IN
3 FLORIDA?

4 A. Yes.

5 Q. PLEASE EXPLAIN HOW E.SPIRE DETERMINED MONTHLY USAGE
6 RECIPROCAL COMPENSATION BILLS.

7 A. The process is very simple. When e.spire generates a bill for reciprocal
8 compensation, e.spire relies upon local usage reports generated by the
9 TrafficMASTER™ software which captures the data from its Lucent 5ESS switch
10 located in Jacksonville. TrafficMASTER™ performs the function of analyzing the
11 amount of traffic coming into the switch. This software provides e.spire with a
12 report of "peg counts" (or number of local calls) and local usage or minutes of use
13 received at e.spire's switch on a trunk group by a trunk group basis. e.spire and
14 BellSouth have established multiple trunk groups that carry exclusively local
15 traffic. These trunk groups have been designated as local trunk groups pursuant to
16 Section V.D.1.A of the Interconnection Agreements. A diagram of the e.spire-
17 BellSouth trunk groups in Jacksonville is attached as Exhibit No. KAC-1.
18 TrafficMASTER™ can distinguish between local and all other types of traffic
19 because local traffic is carried over ~~4~~ separate trunk groups, and the software
20 measures traffic terminating to the e.spire switch on a trunk group by trunk group
21 basis. By measuring the traffic coming into e.spire's switch over these trunk

1 groups, e.spire can determine how many local minutes are terminated to e.spire's
2 customers.

3 **Q. PLEASE PROVIDE FURTHER DETAIL AS TO HOW THESE REPORTS**
4 **ARE DEVELOPED.**

5 **A.** The Lucent 5ESS switch creates a Division of Revenue report which details all
6 local calls. A copy of the Division of Revenue report is attached to my testimony
7 marked Exhibit No. KAC-2. This report details the length of calls, but not by
8 minutes of use. This report details the length of calls in units known as "CCS", or
9 100 call seconds. In order to arrive at minutes of local usage, the usage, measured
10 in CCS, is multiplied by 1.66 (converting blocks of 100 seconds into blocks of 60
11 seconds or minutes). This provides the total minutes of use. This calculation is
12 completed on a spread sheet. A spread sheet is included in Exhibit No. KAC-2.

13 **Q. WERE THERE ANY GAPS IN THE DATA PROVIDED BY**
14 **TRAFFICMASTER™?**

15 **A.** Yes. There were individual dates for which there was no data. By way of
16 example, in March 1998, there were a total of 3 days without any data. e.spire
17 was forced to estimate the traffic data for these dates by examining the
18 immediately preceding and succeeding days, weeks, and months. The dates for
19 which traffic data was estimated are shaded and where no data was available,
20 listed as zero on the spread sheets in Exhibit No. KAC-2. The trend has generally
21 been that there has been less lost data with each passing month.

1 **Q. DOES THE INTERCONNECTION AGREEMENT BETWEEN E.SPIRE**
2 **AND BELLSOUTH PROVIDE DIRECTION AS TO HOW THE PARTIES**
3 **SHOULD PROCEED IN THE EVENT OF A LOSS OF DATA?**

4 **A.** Yes. Section VII.D.10 of the Agreement provides that “in the event of a loss of
5 data, both Parties shall cooperate to reconstruct the lost data and if such
6 reconstruction is not possible, shall accept a reasonable estimate of the lost data
7 based upon three (3) to twelve (12) months of prior usage data.” Given that
8 BellSouth has claimed that it has no data to share, e.spire’s approach to these
9 minor gaps is consistent with the Interconnection Agreement.

10 **Q. HOW DID YOU ARRIVE AT THE TOTAL AMOUNT TO BILL TO**
11 **BELLSOUTH?**

12 **A.** As described more fully in the Testimony of James C. Falvey, e.spire billed local
13 reciprocal compensation to BellSouth at the rate of .90 cents/minutes.
14 Accordingly, the total minutes of use was multiplied by this per minute rate to
15 determine the total amount owed by BellSouth. This total does not include
16 interest that has accrued on BellSouth’s past due account.

17 **Q. HAS BELLSOUTH PAID E.SPIRE ANY OF THE AMOUNTS OWED**
18 **UNDER THESE BILLS?**

19 **A.** No. BellSouth has made negligible payments to date. It is unclear as to what the
20 payment is for or how it is calculated.

21 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

22 **A.** Yes, it does.

1 BY MR. HORTON:

2 Q And you had no rebuttal, did you?

3 A No, I did not.

4 MR. HORTON: And could I ask that Exhibit KAC-1
5 and KAC-2 be identified?

6 COMMISSIONER JOHNSON: They will be identified as
7 Composite Exhibit 4, with short title KAC-1, KAC-2.

8 (Whereupon, Hearing Exhibit No. 4 was marked for
9 identification.)

10 BY MR. HORTON:

11 Q Ms. Talmage, do you have a summary of your
12 testimony?

13 A Yes, I do.

14 Q Could you please give that?

15 A It is my job to bill reciprocal compensation.
16 Pursuant to the interconnection agreement between e.spire
17 and BellSouth, when the difference in local minutes
18 terminating over each other's network exceeded two
19 million minutes, cash compensation would begin.

20 BellSouth had also agreed in the interconnection
21 agreement to provide monthly traffic reports to track
22 this usage. Although the interconnection agreement was
23 signed in July of 1996, and the Jacksonville switch came
24 up in December 1997, e.spire has yet to receive any
25 reporting from BellSouth. Because e.spire did not

1 receive this reporting, we implemented Traffic Master --
2 a software program -- in 1997, in order to begin to track
3 the usage.

4 Based upon the Traffic Master reporting, which
5 BellSouth has agreed in writing to use, the two million
6 minute differential in Jacksonville was exceeded in March
7 1998, and e.spire began billing at that time.

8 Traffic Master captures peg counts or number of
9 calls and minutes of use NCCS, which is hundred call
10 seconds, for traffic on e.spire's trunk groups. Specific
11 trunk groups were set up between e.spire and BellSouth to
12 carry the local traffic originated by BellSouth end users
13 and terminated to e.spire customers.

14 As explained in my testimony, a simple calculation is
15 performed where the minutes of use on these trunk groups
16 -- after being converted from CCSs -- are multiplied by
17 the reciprocal compensation rate to arrive at the billed
18 amount. The bills were sent to BellSouth beginning in
19 June 1998 through -- which contained March through May
20 usage, and then monthly thereafter.

21 We have not received any significant payments
22 for these invoices.

23 This concludes my summary.

24 MR. HORTON: Ms. Talmage is available.

25 COMMISSIONER JOHNSON: Okay.

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CROSS EXAMINATION

BY MS. KEYER:

Q Good afternoon, Ms. Talmage. I have a few questions for you.

Is it true that included in e.spire's minutes that were billed to BellSouth -- when you say that e.spire exceeded the two million minutes of use -- that number includes ISP traffic; does it not?

A Yes, it does, to the extent that ISP traffic is carried over the local trunks.

Q And you stated in your summary that, pursuant to the interconnection agreement, when the difference in the local minutes exceeds two million minutes -- and I am going to quote this. You said, the agreement requires that cash compensation begin. Can you show us in the agreement where that is?

COMMISSIONER JOHNSON: While she's doing that, did you say that was in her testimony, you were citing that?

MS. KEYER: It's in her summary.

COMMISSIONER JOHNSON: Oh, in her summary.

Do you know where she said that in her testimony, because she does -- maybe not those exact words, but --

WITNESS TALMAGE: I don't have the

1 interconnection agreement. Someone can provide
2 that.

3 MS. KEYER: Commissioner Johnson, I don't
4 recall that being in her testimony.

5 COMMISSIONER JOHNSON: Okay. Thank you.

6 WITNESS TALMAGE: I believe my testimony,
7 though, refers to the interconnection agreement. And
8 the interconnection agreement in Section 6(b), under
9 compensation, states that, for purposes of this
10 agreement, the parties agree that there will be no
11 compensation exchanged by the parties during the term
12 of this agreement, unless the difference in minutes
13 used for terminating local traffic exceeds two
14 million minutes per state on a monthly basis.

15 BY MS. KEYER:

16 Q Will you continue and read the next sentence?

17 COMMISSIONER JOHNSON: Could you read it slowly?

18 WITNESS TALMAGE: Sorry.

19 In such an event, the parties will thereafter
20 negotiate the specifics of a traffic exchange
21 agreement, which will apply on a going forward
22 basis.

23 BY MS. KEYER:

24 Q Now, Ms. Talmage, do you know what a traffic
25 exchange agreement is?

1 A No. I do not specifically know what is
2 incorporated in a traffic exchange agreement.

3 Q In reading the language you just read, would you
4 agree that where it says, in such an event, that that
5 language refers to the point at which the difference in
6 minutes of use for terminating local traffic exceeds two
7 million minutes per state on a monthly basis?

8 A I am sorry. Can you repeat the question?

9 Q That sentence that you read that said, in such
10 an event, the parties will thereafter negotiate, would
11 you agree that the event referred to therein is the point
12 at which the difference in minutes of use for terminating
13 local traffic exceeds two million minutes per state on a
14 monthly basis?

15 A Yes. And as per my testimony, that happened in
16 March of 1998.

17 Q And doesn't the agreement, that sentence that
18 you just read, further state that thereafter -- after
19 that occurs, the parties will negotiate the specifics of
20 a traffic exchange agreement?

21 A Yes. And you may want to take that up with Mr.
22 Falvey. I believe he tried to negotiate that with
23 BellSouth.

24 Q So as you read this agreement, there is nothing
25 in here that states that cash compensation will begin at

1 the point that the difference in minutes of use exceeds
2 two million minutes, is there?

3 A That's not my reading of it, but --

4 Q Well, can you show the Commission where in the
5 agreement it states that cash compensation will begin at
6 that point?

7 A To me, the sentence before that says that cash
8 compensation will begin after two million minutes is
9 exceeded.

10 Q So you're relying on the sentence that states
11 there will be no cash compensation exchanged; is that
12 correct?

13 A Yes. However, this is a reading of the
14 contract. That's not my expertise.

15 Q So you really, then, don't know whether or not
16 the agreement provides for cash compensation to begin at
17 that point?

18 A Per my interpretation, per my reading of the
19 contract, it says that as -- after two million minutes --
20 the difference is two million minutes -- cash
21 compensation will commence.

22 Q Okay. How do you interpret, from your reading,
23 that last sentence, that says the parties will thereafter
24 negotiate the specifics of a traffic exchange agreement?

25 A That a -- the rates will be entered into at that

1 time; which Mr. Falvey tried to do through his letters to
2 BellSouth, and can discuss that with you.

3 Q Okay. Are you familiar with bill and keep
4 arrangements?

5 A Yes, I am.

6 Q Is that a traffic exchange agreement?

7 A I do not believe so.

8 Q Is that an arrangement which there is no
9 compensation exchange between the parties?

10 A That is my understanding of it, yes.

11 Q And that is, in fact, what the parties agreed to
12 in this agreement, initially?

13 A I -- I am sorry, I do not know.

14 Q Okay. And, in fact, the parties could continue
15 to agree to an arrangement such as that if they wanted
16 to, couldn't they?

17 A I -- that's a contractual issue. I can't answer
18 that.

19 Q Well, if the parties negotiated it. They could
20 agree to that, couldn't they?

21 A If the parties negotiated it, they could agree
22 to whatever they wanted to.

23 Q Ms. Cummings --

24 COMMISSIONER JOHNSON: On your first question --
25 actually, it's a couple of questions ago -- you

1 asked -- you said, isn't that what the -- you were
2 talking about bill and keep. You said, isn't that
3 what the parties agreed to. And she stated that she
4 wasn't sure.

5 And then your second question was, could the
6 parties continue to agree to bill and keep. And I --
7 your response -- I, first of all, don't know if they
8 have billing.

9 WITNESS TALMAGE: I don't believe we are under a
10 bill and keep at this point.

11 COMMISSIONER JOHNSON: But your answer was, if they
12 negotiated bill and keep.

13 WITNESS TALMAGE: Correct.

14 COMMISSIONER JOHNSON: Actually, my question is
15 directed to you more so, just for clarification where
16 your coming from with this.

17 Not -- you are not suggesting that bill and keep
18 was negotiated outside of this contract? You said
19 they negotiated bill and keep before?

20 MS. KEYER: Yes, Commissioner Johnson.

21 If you look at Section 6(b) of the agreement,
22 where the parties agreed that there will be no cash
23 compensation --

24 COMMISSIONER JOHNSON: Uh-huh.

25 MS. KEYER: -- up --

1 COMMISSIONER JOHNSON: Up until that point.

2 MS. KEYER: To me, that is basically a bill and
3 keep arrangement.

4 COMMISSIONER JOHNSON: Okay. And then your other
5 question was whether or not traffic -- a traffic
6 exchange agreement could mean bill and keep?

7 MS. KEYER: Well, if a bill and keep arrangement
8 is not, in fact, a type of traffic exchange agreement
9 or arrangement.

10 COMMISSIONER JOHNSON: Okay.

11 BY MS. KEYER:

12 Q Can you answer that question, Ms. Talmage?

13 A Excuse me?

14 Q If a bill and keep arrangement is a type of
15 traffic exchange agreement.

16 A Since I am not entirely sure what's meant by
17 traffic exchange agreement, I can't answer that with 100
18 percent certainty.

19 Q Yet, you've interpreted it to mean that it would
20 be cash compensation; is that right?

21 A Yes.

22 Q Okay. On page five of your testimony, lines 17
23 to 19?

24 A Yes.

25 Q It indicates that the hearing examiner -- and I

1 believe you are referring to Georgia -- ordered BellSouth
2 to pay compensatory damages; is that correct?

3 A I am not up-to-date on the Georgia -- but, yes,
4 that was in the preliminary document from -- in the state
5 of Georgia.

6 Q Are you aware that the Georgia Public Service
7 Commission just yesterday eliminated the compensatory
8 damages and ordered that they would not be due?

9 A No, I am not.

10 Q Would you accept that, subject to check?

11 A I think that's a subject better taken up with
12 Mr. Falvey.

13 Q You addressed this in your testimony; did you
14 not?

15 A It was addressed on a preliminary basis. I have
16 not kept up with what is happening in the Georgia
17 proceeding.

18 Q Have you reviewed the complaint in this case,
19 Ms. Talmage?

20 A I -- I am not sure what you mean by, the
21 complaint, but I have read various documents, yes.

22 Q Well, there was a document filed August 6th,
23 1998, which started this proceeding and started this
24 docket. And it's entitled, complaint of e.spire
25 Communications, comma, Inc.

1 A Can I get a copy of that, please?

2 No, I have not read this.

3 Q So you don't know whether your company requested
4 compensatory damages --

5 A No, I do not.

6 Q -- for the tracking report?

7 A No, I do not.

8 Q Would you accept, subject to check, that it did
9 not include a claim for compensatory damages for the
10 Traffic Master?

11 A I think that would be better taken up with Mr.
12 Falvey.

13 Q Okay. The -- on page nine of your direct
14 testimony, you indicated that e.spire -- this is on lines
15 12 and 13 -- e.spire billed local reciprocal compensation
16 to BellSouth at the rate of .90 cents per minute; is that
17 correct?

18 A Uh-huh.

19 Q Was that a yes?

20 A Yes.

21 Q The .90 cents a minute was not agreed to by the
22 parties, was it?

23 A I believe that's -- the actual rate to be
24 applied should be taken up with Mr. Falvey. He addresses
25 that in his testimony.

1 Q So you just applied whatever rate Mr. Falvey
2 told you to apply?

3 A I applied the rate that I am given by
4 regulatory.

5 MS. KEYER: I don't have any further questions
6 of this witness.

7 COMMISSIONER JOHNSON: Okay.
8 Staff?

9 CROSS EXAMINATION

10 BY MS. WATTS:

11 Q Yes. Good afternoon, Ms. Talmage. My name is
12 Tina Watts, and I just have a few questions on behalf of
13 Commission staff.

14 On page seven of your direct testimony, you
15 stated that the Traffic Master software provides e.spire
16 a report of local calls and local usage, or minutes
17 received at e.spire's switch, on a trunk group basis.
18 You also stated that e.spire and BellSouth have
19 established mostly trunk groups that carry exclusively
20 local traffic; is that correct?

21 A Correct.

22 Q And to your knowledge, are calls to ISPs carried
23 to these designated local trunk groups?

24 A Yes. They would be, to the extent that
25 BellSouth passes that traffic over those trunk groups.

1 Q Okay. Now, the traffic in dispute in this case
2 involves calls to ISPs in which the ISP and the
3 originating customer in this same local exchange,
4 correct?

5 A Correct.

6 MS. WATTS: Okay. Thank you. No more
7 questions.

8 COMMISSIONER JOHNSON: Commissioner Jacobs?

9 COMMISSIONER JACOBS: None.

10 COMMISSIONER JOHNSON: Redirect?

11 MR. HORTON: No redirect.

12 COMMISSIONER JOHNSON: Exhibits?

13 MR. HORTON: I would move Composite Exhibit 4.

14 COMMISSIONER JOHNSON: I show that admitted without
15 objection.

16 Thank you, ma'am.

17 (Whereupon, Hearing Composite Exhibit No. 4 was
18 received into evidence.)

19 MR. HORTON: And e.spire would call Mr. Jim
20 Falvey.

21 One second, Commissioner, I have misplaced a
22 document.

23 COMMISSIONER JOHNSON: Okay.

24 JAMES C. FALVEY

25 was called as a witness on behalf of e.spire

1 Q Do you have any changes or corrections to make
2 to your testimony at this time?

3 A No, I don't.

4 Q If I were to ask you the questions contained in
5 that rebuttal testimony today, would your answers be the
6 same?

7 A Yes, they would.

8 MR. HORTON: Madame Chairman, portions of that
9 rebuttal testimony have been stricken. It's
10 reflected in the order. But we are not seeking to
11 insert that at this time. But I would request that
12 his pre-filed direct testimony and rebuttal testimony
13 be inserted in the record as though read.

14 COMMISSIONER JOHNSON: It will be so inserted.

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

3 A. My name is James C. Falvey. I am Vice President – Regulatory Affairs for
4 e.spire Communications, Inc. (“e.spire”), which formerly was known as American
5 Communications Services, Inc. My business address is 133 National Business
6 Parkway, Suite 200, Annapolis Junction, Maryland 20701.

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

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

19 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS COMMISSION?**

20 A. Yes, I have.

21 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE OTHER STATE**
22 **COMMISSIONS?**

1 A. Yes, I have. I have testified before the state commissions in Alabama, Georgia,
2 Kentucky, Louisiana, Mississippi, South Carolina and Tennessee.

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

4 A. I am testifying on behalf of e.spire and its Florida operating subsidiaries, namely
5 American Communication Services of Jacksonville, Inc. d/b/a e.spire
6 Communications, Inc., and ACSI Local Switched Services, Inc. d/b/a e.spire
7 Communications, Inc. e.spire, through its operating subsidiaries, provides a full
8 range of local and long distance telecommunications services in Florida.

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

10 A. The purpose of my testimony is to explain the process by which e.spire began
11 billing BellSouth for reciprocal compensation as well as the basis for e.spire's
12 belief that BellSouth must compensate it for terminating ISP traffic.

13 **Q. ARE YOU TESTIFYING TO MATTERS OF LAW IN THIS**
14 **PROCEEDING?**

15 A. No, I am not. Although I am an attorney, the purpose of my testimony is to
16 explain a portion of the factual predicate for the legal arguments that e.spire will
17 make in this docket. I note, however, that in order to explain the basis for
18 e.spire's belief that it is entitled to compensation for terminating ISP traffic, I will
19 need to reference some legal decisions.

20 **Q. WHAT IS THE CONTRACTUAL BASIS FOR E.SPIRE'S CLAIM THAT**
21 **BELLSOUTH SHOULD PAY IT RECIPROCAL COMPENSATION?**

1 A. On July 25, 1996, e.spire and BellSouth entered into an Interconnection
2 Agreement for the state of Florida. This Interconnection Agreement was filed
3 with the Commission on August 20, 1996. On December 12, 1996, the
4 Commission approved the Interconnection Agreement by Order No. PSC-96-
5 1509-FOF-TP. Hereinafter, I will refer to the approved Interconnection
6 Agreement as the "Agreement." A copy of the relevant portions of the
7 Agreement are appended to my testimony marked as Exhibit No. JCF-1.

8 Section VI(A) of the Agreement provides as follows for the exchange of
9 local traffic:

10 A. Exchange of Traffic

11 The Parties agree . . . that local interconnection is defined as the
12 delivery of local traffic to be terminated on each party's local
13 network so that customers of either party have the ability to reach
14 customers of the other party, without the use of access codes or
15 delay in the processing of a call. The Parties further agree that the
16 exchange of traffic on BellSouth's Extended Area Service ("EAS")
17 shall be considered local traffic and compensation for the
18 termination of such traffic shall be pursuant to the terms of this
19 section.

20
21 Attachment B of the Agreement defines "local traffic" as "telephone calls
22 that originate in one exchange and terminate in either the same exchange, or a
23 corresponding Extended Area Service ("EAS") exchange." This definition does
24 not discriminate among types of end users, nor does it exclude calls from end
25 users to other end users in the same local calling area that happen to be ISPs.

26 Section VI(B) of the Agreement provides that e.spire and BellSouth
27 initially will compensate each other through a "bill and keep" arrangement,

1 whereby each party would transport and terminate the other's local traffic without
2 charge. Section VI(B) provides for a transition to reciprocal compensation as
3 follows:

4 Compensation

5 The Parties agree that BellSouth will track the usage for both
6 companies for the period of the Agreement. BellSouth will
7 provide copies of such usage reports to [e.spire] on a monthly
8 basis. For purposes of this Agreement, the Parties agree that there
9 will be no cash compensation exchanged by the parties during the
10 term of this Agreement unless the difference in minutes of use for
11 terminating local traffic exceeds 2 million minutes per state on a
12 monthly basis. In such an event, the Parties will thereafter
13 negotiate the specifics of a traffic exchange agreement which will
14 apply on a going-forward basis.

15 The Agreement does not contain a rate per minute for reciprocal
16 compensation, however, pursuant to the terms of the Agreement, e.spire may elect
17 to replace any of the material terms of the Agreement, including rates, with the
18 corresponding provision of any other local interconnection agreement that
19 BellSouth enters with another carrier. Section XXII(A) of the Agreement, which
20 grants e.spire "most favored nation" status, states:
21

22 If as a result of any proceeding before any Court, Commission or
23 the FCC, any voluntary agreement or arbitration proceeding
24 pursuant to the Act, or pursuant to any applicable federal or state
25 law, BellSouth becomes obligated to provide interconnection,
26 number portability, unbundled access to network elements or any
27 other services related to interconnection, whether or not presently
28 covered by this Agreement, to another telecommunications carrier
29 operating within a state within the BellSouth territory at rates or on
30 terms and conditions more favorable to such carrier than the
31 comparable provisions of this Agreement, then [e.spire] shall be
32 entitled to add such network elements and services, or substitute
33 such more favorable rates, terms or conditions for the relevant
34 provisions of this Agreement, which shall apply to the same states

1 as such other carrier and such substituted rates, terms or conditions
2 shall be deemed to have been effective under this Agreement as of
3 the effective date thereof to such other carrier.
4

5 **Q. WHY DO YOU BELIEVE THAT CALLS PLACED TO ISPS FIT THIS**
6 **DEFINITION?**

7 A. There are a number of reasons why I believe that calls terminated by e.spire to
8 ISPs fit the contractual definition of "local" traffic.

9 First, while this matter is more appropriate for legal briefing, the FCC has
10 repeatedly ruled that ISPs are end users that may order their inbound services
11 under local exchange tariffs. Indeed, e.spire's ISP customers all ordered service
12 from e.spire pursuant to e.spire's applicable local exchange tariffs. Specifically,
13 the FCC has stated that "[a]s a result of the decisions the Commission made in the
14 *Access Charge Reconsideration Order*, ISPs may purchase services from
15 incumbent LECs under the same intrastate tariffs available to end users." *In re*
16 *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 342 (1997).

17 The FCC also has noted that

18 ISPs do pay for their connections to incumbent LEC networks by
19 purchasing services under state tariffs. Incumbent LECs also
20 receive incremental revenue from Internet usage through higher
21 demand for second lines by consumers, usage of dedicated lines by
22 ISPs, and subscriptions to incumbent LEC Internet access services.
23 To the extent that some intrastate rate structures fail to compensate
24 incumbent LECs adequately for providing service to customers
25 with high volumes of incoming calls, incumbent LECs may
26 address their concerns with state regulators. *Id.* at ¶¶ 345-46.
27

1 In addition, the FCC has consistently viewed dial-up calls to ISPs as consisting of
2 two components: “telecommunications” and “information.” For instance, the
3 FCC stated in the Universal Service Order that “[w]e agree with the Joint Board’s
4 determination that Internet access consists of more than one component.
5 Specifically, we recognize that Internet access includes a network component,
6 which is the connection over a LEC network from a subscriber to an Internet
7 Service Provider, in addition to the underlying information service.” *In the*
8 *Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC
9 Docket No. 96-45 ¶ 83 (rel. May 8, 1997). The FCC also observed that “[w]hen
10 a subscriber obtains a connection to an Internet service provider via voice grade
11 access to the public switched network, that connection is a telecommunications
12 service and it is distinguishable from the Interstate service provider’s service
13 offering.” *Id.* at ¶ 789. Thus, in a switched communications system, the service
14 termination point generally is the point at which the common carrier service ends
15 and user-provided service begins, *i.e.*, the interface point between the
16 communications system equipment and the user equipment, under applicable
17 tariffs.

18 This view of ISP calls was reinforced by Congress in the 1996 Act where
19 it carefully defined “telecommunications” as something distinct from
20 “information services.” 47 U.S.C. §§ 153(48), 153(20). Indeed, the FCC has
21 observed that “Congress intended ‘telecommunications service’ and ‘information
22 service’ to refer to separate categories of services” despite the appearance from

1 the end user's perspective that it is a single service because it may involve
2 telecommunications components. *Federal-State Board on Universal Service*,
3 Report to Congress, Docket 96-45, FCC 98-67 ¶ 58 (rel. April 10, 1998).

4 Second, a call placed over the public switched network normally is
5 considered "terminated" when it is delivered to the exchange bearing the called
6 telephone number. Call termination occurs when a connection is established
7 between the caller and the telephone exchange service to which the dialed number
8 is assigned, answer supervision is returned, and a call record is generated. This is
9 true whether the call is received by a voice grade phone, a fax machine, an
10 answering machine, or, as in this case, an ISP modem. Indeed, the FCC has
11 defined call termination for purposes of reciprocal compensation obligations as
12 "the switching of traffic . . . at the terminating carrier's end office switch . . . and
13 delivery of that traffic from that switch to the called party's premises." *In the*
14 *Matter of Implementation of the Local Competition Provisions of the*
15 *Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶
16 1040 (1996). There is no question that e.spire provided terminating switching
17 services and terminated the calls to the ISP premises.

18 Third, I note that the customers originating the calls to the ISPs over
19 BellSouth's local network order service from BellSouth pursuant to local
20 exchange tariffs. Moreover, BellSouth bills the calls placed by its customers to
21 ISPs as "local" calls.

1 Fourth, BellSouth routes calls placed by its end users to ISPs served by
2 e.spire over the trunk groups expressly reserved for the exchange of "local"
3 traffic. Separate trunk groups are available for interexchange calls, and BellSouth
4 uses them to transmit access services traffic. When BellSouth routes calls to
5 e.spire over the "local" traffic trunk groups, e.spire completes the traffic in good
6 faith per BellSouth's instructions, and justifiably expects to be compensated for
7 the service.

8 Finally, BellSouth's refusal to compensate e.spire for terminating ISP
9 traffic is inconsistent with BellSouth's own treatment of such traffic. BellSouth
10 itself treats calls to ISPs as "intrastate" when compiling cost studies and making
11 jurisdictional separations. BellSouth should not be able to reclassify traffic
12 jurisdictionally on a unilateral basis for its own benefit in each situation.

13 **Q. DOES THE FCC'S RECENT ORDER REGARDING THE GTE DSL**
14 **TARIFF HAVE ANY IMPACT ON THIS PROCEEDING?**

15 A. No. The GTE DSL tariff order was limited to a dedicated service, and
16 specifically did not address dial-up calls. All of e.spire's traffic constitutes dial-
17 up traffic and is therefore not impacted by this order.

18 **Q. DID E.SPIRE INCUR COSTS IN TERMINATING THIS TRAFFIC FOR**
19 **BELLSOUTH?**

20 A. Yes. In fact, e.spire has incurred, and continues to incur, substantial costs related
21 to the provision of transport and termination for this traffic. e.spire, like other
22 CLECs, has invested a great deal of money in the development of facilities that

1 are capable of handling this traffic. Since e.spire, like other LECs, is prohibited
2 from charging ISPs switched access charges, if e.spire is not compensated for
3 transport and termination of this traffic under the reciprocal compensation
4 provisions of its Agreement with BellSouth, e.spire will not be compensated at
5 all. Effectively, e.spire will be forced to provide free transport and termination of
6 ISP traffic to BellSouth's customers. This would be an impossible situation for
7 e.spire, and an unjustifiable windfall for BellSouth. Obviously, such an outcome
8 is not only unfair and inequitable, but also anticompetitive.

9 **Q. HAS E.SPIRE CONTACTED BELLSOUTH CONCERNING ITS**
10 **OBLIGATION TO COMPENSATE E.SPIRE FOR TERMINATING**
11 **BELLSOUTH LOCAL TRAFFIC?**

12 A. Yes, it has. By correspondence dated November 14, 1997, e.spire informed
13 BellSouth that e.spire had not yet received any usage reports from BellSouth as
14 required by the Agreement. A copy of that correspondence is appended to my
15 testimony marked as Exhibit No. JCF-2. e.spire informed BellSouth that it would
16 begin to bill BellSouth for reciprocal compensation based upon e.spire's reports
17 of local traffic differentials in each state beginning with the month in which the
18 differential exceeded 2 million MOUs. e.spire proposed an amendment to the
19 Agreement setting the termination rate for Florida at \$0.009 per minute pursuant
20 to the most favored nations provision of the Agreement. Pursuant to the
21 correspondence and the Agreement, this rate would be effective from the date that
22 the monthly usage exceeded 2 million minutes. The reciprocal compensation rate

1 of \$0.009 per minute is contained in the Partial Interconnection Agreement
2 between MFS and BellSouth. A copy of the relevant portion of the MFS
3 Interconnection Agreement is appended to my testimony marked as Exhibit No.
4 JCF-3.

5 BellSouth did not respond to e.spire's November 14, 1997 letter. e.spire
6 then wrote to BellSouth again on the subject by letter dated December 23, 1997,
7 and again by letter dated January 8, 1998. Copies of these letters are appended to
8 my testimony marked as Exhibit No. JCF-4. These letters reiterated the terms of
9 the Agreement and informed BellSouth that e.spire would take legal action if
10 BellSouth continued to breach the Agreement.

11 **Q. WHAT WAS BELLSOUTH'S RESPONSE TO E.SPIRE'S**
12 **CORRESPONDENCE CONCERNING RECIPROCAL COMPENSATION?**

13 A. BellSouth did not respond to e.spire's correspondence until January 8, 1998. A
14 copy of BellSouth's response is appended to my testimony as Exhibit No. JCF-5.
15 In its response, BellSouth conceded that it had failed to provide e.spire with the
16 required usage reports and agreed to use e.spire's reports. BellSouth also stated
17 that it would not pay the bills submitted by e.spire because it does not believe that
18 ISP traffic is "local traffic." Moreover, BellSouth proposed a rate of \$0.002 for
19 terminating local traffic.

20 **Q. DID YOU REPLY TO BELLSOUTH'S JANUARY 8, 1998 LETTER?**

21 A. Yes, I did. On March 17, 1998, I wrote BellSouth once again. A copy of that
22 letter is appended to my testimony as Exhibit No. JCF-6.

1 Q. DID YOU ATTEMPT TO NEGOTIATE A RECIPROCAL
2 COMPENSATION RATE WITH BELLSOUTH?

3 A. Yes, I did. I began the negotiation with a rate proposal which was the lowest
4 e.spire would accept, given that e.spire is entitled to that amount under the most
5 favored nations provision of the Agreement. BellSouth only responded to this
6 proposal six weeks later, and never responded to e.spire with a serious rate
7 proposal that met or exceeded the amount to which e.spire is entitled.

8 Q. HAS THERE BEEN A DECISION IN FLORIDA THAT ADDRESSES THE
9 SAME OR SIMILAR ISSUES THAT ARE RAISED IN THIS
10 PROCEEDING?

11 A. Yes, in fact quite recently. On September 15, 1998, the Florida Commission
12 issued a decision which specifically addressed the issue of "whether ISP traffic
13 should be treated as local or interstate for purposes of reciprocal compensation . .
14 ." *In re: Complaint of WorldCom Technologies, Inc. against BellSouth*
15 *Telecommunications, Inc. for Breach of Florida Partial Interconnection*
16 *Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996*
17 *and Request for Relief*, Docket No. 971478-TO, Order No. PSC-98-1216-FOF-
18 TP, Florida Public Service Commission, at 3 (Sept. 15, 1998) (appended hereto as
19 Exhibit No. JCF-7. Looking at the language of the WorldCom/BellSouth
20 Interconnection Agreement, the Commission said:

21 Upon review of the language of the agreement, and the evidence
22 and testimony presented at hearing, we find that the Agreement
23 defines local traffic in such a way that ISP traffic clearly fits the
24 definition. . . . There is no ambiguity, and there are no specific

1 exceptions for ISP traffic. Since there is no ambiguity in the
2 language of the agreement, we need not consider any other
3 evidence to determine the parties' obligations under the agreement.
4 *Id.* at 5.
5

6 After reviewing all of the arguments, the Commission further stated,
7 "while there is some room for interpretation, we believe the current law weighs in
8 favor of treating the traffic as local, regardless of jurisdiction, for purposes of the
9 Interconnection Agreement. *Id.* at 15. Moreover, the Commission noted, among
10 other things, that BellSouth rates the traffic of its own ISP customers as local
11 traffic, and that "[i]t would hardly be just for BellSouth to conduct itself in this
12 way while treating WorldCom differently." *Id.* Predictably, BellSouth has
13 appealed the Commission's decision, *see BellSouth v. WorldCom Technologies,*
14 *Inc., et al.*, Case No. 4:98 CV 352-WS (N.D. Fla. 1998).

15 BellSouth is doing to e.spire the same thing that it did to WorldCom, and
16 with just as little justification. The Commission already has found that the law
17 favors treating ISP traffic as local traffic, regardless of jurisdiction, for purposes
18 of the Interconnection Agreement. The language in the e.spire/BellSouth
19 Agreement is very clear and does not exclude ISP traffic from the definition of
20 local traffic. Importantly, the definition of "local traffic" interpreted by the
21 Commission in the *WorldCom* decision (Section 1.40) is essentially identical to
22 the definition included in the Agreement between e.spire and BellSouth.

23 In addition, Section XXX of the Agreement contains a standard "entire
24 agreement" clause which specifies that the written language of the Agreement
25 contains the entire agreement between the parties and requires that any

1 modifications to the Agreement be made in writing and signed by a duly
2 authorized representative of the parties. Thus, to the extent that BellSouth relies
3 on extrinsic evidence to demonstrate that ISP traffic should not be included within
4 the definition of "local traffic," e.spire believes that such evidence is not relevant
5 because the language of the Agreement is unambiguous. Therefore, e.spire
6 respectfully submits that the Commission should conclude that ISP traffic is local
7 traffic under the Agreement.

8 **Q. HAVE ANY OTHER JURISDICTIONS ISSUED DECISIONS FINDING**
9 **THAT ISP TRAFFIC IS LOCAL TRAFFIC SUBJECT TO RECIPROCAL**
10 **COMPENSATION UNDER E.SPIRE'S INTERCONNECTION**
11 **AGREEMENT WITH BELLSOUTH?**

12 A. Yes. On October 19, 1998, the Hearing Officer presiding over the
13 e.spire/BellSouth complaint before the Georgia Public Service Commission
14 issued an Initial Decision in favor of e.spire. *e.spire Communications, Inc. v.*
15 *BellSouth Telecommunications, Inc. Regarding Reciprocal Compensation for*
16 *Traffic Terminated to Internet Service Providers*, Docket No. 9281-U, Initial
17 Decision of the Hearing Officer, Georgia Public Service Commission (Oct. 19,
18 1998)(appended hereto as Exhibit No. JCF-8. In this Initial Decision, the Hearing
19 Officer found, among other things, that ISP traffic is local traffic subject to
20 reciprocal compensation, *Id.* at 16-19, that the language of the e.spire/BellSouth
21 Agreement is unambiguous, *Id.* at 19-21, and that e.spire is contractually entitled
22 under the most favored nation clause in its Agreement (Section XXII.A) to collect

1 the \$0.0087 per minute rate adopted from the interconnection agreement between
2 BellSouth and another carrier, *Id.* at 22. Notably, this is consistent with the
3 decisions of at least 23 other states that have determined that termination of calls
4 placed to ISPs are subject to the payment of reciprocal compensation.

5 **Q. IS YOUR AGREEMENT WITH BELL SOUTH IN FLORIDA THE SAME**
6 **AS THE AGREEMENT FOR GEORGIA?**

7 A. Yes, the Interconnection Agreements between BellSouth and e.spire for Florida
8 and Georgia is a single, regionwide agreement.

9 **Q. ULTIMATELY, WHAT RELIEF ARE YOU SEEKING FROM THE**
10 **COMMISSION?**

11 A. e.spire requests that the Commission: (1) determine, as a matter of law, that calls
12 terminated to ISPs should be subject to reciprocal compensation under the
13 e.spire/BellSouth Interconnection Agreement; (2) enforce the “most favored
14 nation” provision of the e.spire/BellSouth Interconnection Agreement by ordering
15 a rate for reciprocal compensation of \$0.009; (3) order payment of all outstanding,
16 overdue bills for reciprocal compensation plus interest; (4) require payment of
17 attorneys’ fees pursuant to the express language of the Agreement; and (5) require
18 the recovery of the costs of implementing the Traffic Master systems, as awarded
19 in Georgia.

20 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

21 A. Yes, it does.

REBUTTAL TESTIMONY OF JAMES C. FALVEY

1 **Q. PLEASE STATE YOUR NAME, POSITION AND BUSINESS**
2 **ADDRESS.**

3 A. My name is James C. Falvey. I am Vice President-Regulatory Affairs for
4 e.spire Communications, Inc., formerly known as American
5 Communications Services, Inc. My business address is 133 National
6 Business Parkway, Suite 200, Annapolis Junction, Maryland 20701.

7 **Q. ARE YOU THE SAME JAMES C. FALVEY WHO FILED DIRECT**
8 **TESTIMONY IN THIS PROCEEDING ON NOVEMBER 12, 1998?**

9 A. Yes, I am.

10 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

11 A. The purpose of my testimony is to rebut various claims made by BellSouth
12 witnesses Halprin and Hendrix in their testimony in this proceeding.
13 Messrs. Halprin and Hendrix would—through legal gymnastics—deprive
14 e.spire of critical revenues at a time when e.spire sorely needs such
15 revenues to enter BellSouth markets and prove its business plan to its
16 investors. While other ILECs are—as discussed in Mr. Cummings’
17 testimony—beginning to pay or actually paying e.spire’s reciprocal
18 compensation bills, BellSouth is steadfastly refusing payment. The
19 Commission should order BellSouth to make payment to e.spire for the
20 outstanding reciprocal compensation billings, including interest, make
21 continuing payments in the future, and reimburse e.spire’s legal fees and
22 costs incurred in pursuing this collection action.

1 **Q. WHAT IS YOUR GENERAL REACTION TO MR. HALPRIN'S**
2 **DIRECT TESTIMONY?**

3 A. I find most of Mr. Halprin's testimony puzzling and irrelevant. By his
4 own admission, he is not an economist or an engineer. Thus, I presume
5 that he cannot be appearing as an "expert" on economic or technical issues
6 with respect to the Internet or local networks. Also, to the extent Mr.
7 Halprin professes to be an expert on e.spire's costs, his testimony is not
8 supported by one scintilla of evidence. Since he is not employed by
9 BellSouth, I also presume that he is not appearing as the company's
10 spokesman. Indeed, it is important to realize that Mr. Halprin and his law
11 firm regularly advise BellSouth and other ILECs in connection with FCC
12 and other related regulatory proceedings. Thus, I surmise that Mr. Halprin
13 is appearing on BellSouth's behalf in his capacity as BellSouth's attorney,
14 advocating BellSouth's legal position. Remarkably, even as an attorney,
15 Mr. Halprin manages to pontificate at length on what is essentially a black
16 letter contracts case, with nary a mention of the contractual commitments
17 made by BellSouth to e.spire. In e.spire's view, this is a matter more
18 appropriately left for post-hearing legal briefs and we will respond to
19 much of Mr. Halprin's "testimony" in our legal briefing as well as in
20 appropriate motions. Nevertheless, I will respond briefly to several of his
21 points at this time.

22 **Q. HOW DO YOU RESPOND TO MR. HALPRIN'S CONTENTION**
23 **THAT ACCESS CALLS PLACED TO ISPs DO NOT**

1 **“TERMINATE” AS THE ISP’S LOCAL SERVER (HALPRIN**
2 **DIRECT, p. 3)?**

3 A. Mr. Halprin’s testimony simply ignores nearly 15 years of FCC precedent,
4 the decisions of 24 other state commissions, the orders of 3 U.S. District
5 Courts, and, most importantly, the plain language of the
6 Telecommunications Act itself. Contrary to Mr. Halprin’s assertion, the
7 weight of law and policy of the FCC for well over a decade has favored
8 treating dial-up calls placed to access ISPs as “local” calls, regardless of
9 whether the ISP subsequently retransmits the information received to or
10 from further interstate destinations.¹ As Mr. Halprin observes, the FCC
11 traditionally has determined whether a call is intrastate or interstate based
12 on where the call originates and terminates. However, Mr. Halprin
13 conveniently ignores the fact that ISPs have consistently been categorized
14 as end users and that calls placed to them “terminate” when they reach the
15 ISP point-of-presence (“POP”).

16 Specifically, the FCC traditionally has viewed dial-up calls to ISPs
17 as consisting of two distinct components: “telecommunications” and
18 “information.” As the FCC stated in its *Universal Service Order*, “[w]e
19 agree with the Joint Board’s determination that Internet access consists of
20 more than one component. Specifically, we recognize that Internet access
21 includes a network transmission component, which is the connection over

¹ *See generally, In re Access Charge Reform*, First Report and Order, 12
FCC Rcd 15982, ¶¶ 341-348 (1997) (hereinafter “*Access Charge Reform*
Order”).

1 a LEC network from a subscriber to an Internet Service Provider, in
2 addition to the underlying information service.”² The FCC also observed
3 that “[w]hen a subscriber obtains a connection to an Internet service
4 provider via voice grade access to the public switched network, that
5 connection is a telecommunications service and it is distinguishable from
6 the Internet service provider’s service offering.”³

7 This view of ISP calls was reinforced by Congress in the 1996 Act
8 where it carefully defined “telecommunications” as something distinct
9 from “information services.”⁴ Indeed, the FCC has observed that
10 “Congress intended ‘telecommunications service’ and ‘information
11 service’ to refer to separate categories of services” despite the appearance
12 from the end user’s perspective that it is a single service because it may
13 involve telecommunications components.⁵ In fact, the FCC has expressly
14 concluded that “when an entity [such as an ISP] offers subscribers the
15 capability for generating, acquiring, storing, transforming, processing,
16 retrieving, utilizing, or making available information via

² *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 83 (rel. May 8, 1997).

³ *Id.* at ¶ 789.

⁴ 47 U.S.C. §§ 153(48), 153(20).

⁵ *Federal-State Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 58 (rel. April 10, 1998) (“Report to Congress”).

1 telecommunications, *it does not provide telecommunications, it is using*
2 *telecommunications.*⁶

3 As calls placed over the public switched network normally are
4 considered “terminated” when they are delivered to the exchange bearing
5 the called telephone number, the “telecommunications” component of an
6 ISP call is “terminated” when it reaches the ISP POP. Call termination
7 occurs when a connection is established between the caller and the
8 telephone exchange service to which the dialed number is assigned,
9 answer supervision is returned, and a call record is generated. This is true
10 whether the call is received by a voice grade phone, a fax machine, an
11 answering machine, or, as in this case, an ISP modem. Indeed, the FCC
12 has defined call termination for purposes of reciprocal compensation
13 obligations as “the switching of traffic . . . at the terminating carrier’s end
14 office switch . . . and delivery of that traffic from that switch to the called
15 party’s premises.”⁷ Because ISPs do not provide “telecommunications”
16 to their subscribers, “telecommunications” service ends at the ISP POP.
17 Thus, when the “telecommunications” component of a dial-up access call

⁶ *Id.* at ¶ 41. The FCC further observed that, “[u]nder *Computer II*, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service . . . The information service provider, indeed, is itself a user of telecommunications; that is, telecommunications is an input in the provision of an information service.” *Id.* at n. 138.

⁷ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1040 (1996).

1 placed to an ISP originates and terminates in a single local calling area, it
2 is properly regarded as a “local” call.

3 In other states, BellSouth has relied heavily on the FCC’s
4 *BellSouth MemoryCall Order* to support its position that access calls
5 placed to an ISP and the ISP connection to distant information databases
6 should be treated as a single end-to-end communication. In the *BellSouth*
7 *MemoryCall Order*, the FCC considered whether calls placed from out-of-
8 state to BellSouth’s voice mail platform should be treated as a single
9 interstate communications or as two separate calls (*i.e.*, an interstate call
10 from the caller to the BellSouth switch and a second local call from
11 BellSouth’s switch to its voice mail platform). The FCC ruled that the
12 call placed from the out-of-state caller to the voice mail platform
13 constituted a single interstate communication.⁸ In so doing, the FCC
14 stated that:

15 [w]hen the caller is out-of-state, there is a
16 continuous path of *communications* across state
17 lines between the caller and the voice mail service,
18 just as there is when a traditional out-of-state long
19 distance voice telephone call is forwarded by the
20 local switch to another location in the state and
21 answered by a person, a message service bureau or
22 customer premises answering machine.⁹

⁸ *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619, ¶ 9 (1992) (“*BellSouth MemoryCall Order*”), *aff’d sub nom.*, *Georgia Public Service Commission v. FCC*, 5 F.3d 1499 (11th Cir. 1993).

⁹ *Id.* (emphasis added).

1 Critically, the FCC made clear that an enhanced service provider's
2 ("ESP")¹⁰ "facilities and apparatus" constitute the relevant end point of a
3 telecommunications service.¹¹ Thus, the "telecommunications service"
4 ends at the facilities of the ESP, precisely where provision of the enhanced
5 services begins. In sum, the *BellSouth MoneyCall Order* stands for the
6 principle that jurisdiction over a telecommunications service depends on
7 the end points of the *telecommunications* service.

8 **Q. IS THIS POSITION CONSISTENT WITH E.SPIRE'S POSITION**
9 **IN THIS CASE?**

10 This analysis is perfectly consistent with e.spire's position in this
11 case. The end point of a call placed to an ISP is the ISP POP (*i.e.*, its
12 "facilities and apparatus"). Once the call is delivered to the ISP, the ISP's
13 handling of the transmission is an "information service." The jurisdiction
14 of the access call should be determined – just as was done in the *BellSouth*
15 *MemoryCall Order* – by comparing the points where the
16 "telecommunications service" originated (the calling party's premises) and
17 where it terminated (the ISP POP). Importantly, unlike the situation in the
18 *BellSouth MemoryCall Order*, in this case the calling party's premise and
19 the ISP POP are both in the same state.

20 Therefore, the *BellSouth MemoryCall Order* is completely
21 consistent with the proposition that physically intrastate

¹⁰ ESPs and ISPs are treated identically by the FCC for purposes of jurisdictional analysis.

¹¹ *BellSouth MemoryCall Order* at ¶ 12.

1 telecommunications between a caller and an ISP POP are not transformed
2 into interstate telecommunications when the ISP subsequently provides an
3 information service to that caller. The local access call to the ISP is an
4 intrastate (*i.e.*, “local”) telecommunications service, and the ISP service
5 itself is an interstate “information service.”

6 **Q. HOW DOES MR. HALPRIN’S POSITION THAT ISP TRAFFIC IS**
7 **INTERSTATE COMPART WITH BELLSOUTH’S OWN**
8 **PRACTICES?**

9 A. It doesn’t. Importantly, treatment of ISP traffic as “local traffic” is
10 consistent with BellSouth’s own existing practices. For instance,
11 BellSouth consistently has: (1) charged all such calls under its local tariffs;
12 (2) treated such calls as local in separations reports and state rate cases; (3)
13 treated such calls as local in ARMIS reports; (4) treated such calls as local
14 when they are exchanged among adjacent ILECs; and (5) routed such calls
15 to e.spire over interconnection trunks reserved for local calling. In his
16 testimony, Mr. Halprin failed to articulate why access calls to ISPs are
17 treated as “local” when it is advantageous to BellSouth, but not when it
18 triggers a reciprocal compensation obligation by BellSouth. BellSouth
19 should not be permitted to unilaterally reclassify whole categories of
20 traffic when it is personally convenient for it to do so, and when it
21 conflicts with BellSouth’s classifications of such traffic for nearly all other
22 purposes, particularly when the result is to deprive its competitors of
23 compensation for services rendered.

1 **Q. WHAT WOULD BE THE FINANCIAL IMPACT OF ACCEPTING**
2 **MR. HALPRIN'S VIEW?**

3 A. Acceptance of Mr. Halprin's position would present BellSouth with an
4 undeserved windfall, and enable BellSouth to free-ride on e.spire's
5 networks. Under long standing FCC policy, ISPs are exempt from the
6 payment of interexchange access charges.¹² They are expressly permitted
7 to order service from ILECs as end users under local exchange tariffs to
8 receive access calls from their subscribers.¹³ ILECs are compensated by
9 their customers for routing and terminating such dial-up traffic to ISPs
10 pursuant to the terms of their local exchange tariffs. Since end users pay
11 ILECs through their monthly phone bills for originating such traffic, and
12 CLECs are not able to charge access fees to ISPs for receiving such calls,
13 e.spire must look to BellSouth for reimbursement of its cost of terminating
14 traffic sent to it by BellSouth for termination. Any other result would put
15 e.spire in the untenable position of providing termination services to
16 BellSouth at no charge. The anticompetitive nature of allowing BellSouth
17 to free-ride on e.spire's network investment is apparent.

18 **Q. DOES MR. HALPRIN'S OPINION THAT ISP TRAFFIC IS**
19 **"INTERSTATE" REPRESENT THE MAJORITY VIEW?**

¹² See *Access Charge Reform Order* at ¶ 341.

¹³ *Access Charge Reform Order* at ¶ 342 (“[a]s a result of the decisions the [FCC] made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users.”).

1 A. No. Every state commission that has addressed this issue, (including
 2 Florida¹⁴) has held that ISP traffic should be classified as “local” traffic.
 3 In fact, 25 state commissions, including this Commission, and those of
 4 Arizona,¹⁵ California,¹⁶ Colorado,¹⁷ Connecticut,¹⁸ Delaware,¹⁹ Georgia,²⁰
 5 Illinois,²¹ Kentucky,²² Maryland,²³ Massachusetts,²⁴ Michigan,²⁵

¹⁴ *In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for Breach of Florida Partial Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 and Request for Relief*, Docket No. 971478-TO, Order No. PSC-98-1216-FOF-TP, Florida Public Service Commission (Sept. 15, 1998) (“*Florida Order*”).

¹⁵ *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with U S West Communications, Inc.*, Opinion and Order, Arizona Corporation Commission, Docket Nos. U-2752-96-362 and E-1051-96-362, Decision No. 59872 (dated October 29, 1996).

¹⁶ *Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Service*, Rulemaking 95-04-043, *Order Instituting Investigation on the Commission’s Own Motion into Competition for Local Exchange Service*, Investigation 95-04-044, Decision 98-10-057, California Public Utilities Commission (October 22, 1998).

¹⁷ *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms and Conditions with U S West Communications, Inc.*, Decision Regarding Petition for Arbitration, Colorado Public Utilities Commission, Docket No. 96A-287T (dated November 5, 1996).

¹⁸ *Petition of Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Service Provider Traffic*, Final Decision, State of Connecticut, Department of Public Utility Control, Docket No. 97-05-22 (dated September 17, 1997).

¹⁹ *Petition of MCI Telecommunications Corp. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc.*, Arbitration Award, Delaware Public Service Commission, Docket No. 97-323 (dated December 16, 1997).

²⁰ *e.spire Communications, Inc. v. BellSouth Telecommunications, Inc.*, Initial Decision of the Hearing Officer, Georgia Public Service Commission, Docket No. 9281-U Regarding Reciprocal Compensation for Traffic Terminated to Internet Service Providers (dated October 19, 1998) (“*Georgia Decision*”).

²¹ *Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois: Complaint As to Dispute Over A Contract Definition*,
 (continued...)

- 1 Minnesota,²⁶ Missouri,²⁷ New York,²⁸ North Carolina,²⁹ Ohio,³⁰
 2 Oklahoma,³¹ Oregon,³² Pennsylvania,³³ Tennessee,³⁴ Texas,³⁵ Virginia,³⁶

(...continued)

- Opinion and Order, Illinois Commerce Commission, Docket No. 97-0404, *aff'd sub nom., Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.*, Memorandum Opinion and Order, No. 98-C-1925, 1998 U.S. Dist. LEXIS 11344 (N.D. Ill. 1998).
- ²² *American Communications Services of Louisville d/b/a e.spire v. BellSouth Telecommunications, Inc.*, Order, Kentucky Public Service Commission, Docket No. 98-212 (dated June 16, 1998).
- ²³ Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission (dated September 11, 1997).
- ²⁴ *Complaint of WorldCom Technologies, Inc. Against New England Telephone and Telephone Company d/b/a Bell Atlantic-Massachusetts for Alleged Breach of Interconnection Terms*, Order, Massachusetts Department of Telecommunications and Energy, Docket No. 97-116 (dated October 21, 1998).
- ²⁵ *Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan*, Opinion and Order, Michigan Public Service Commission, Case Nos. U-11178, U-11502, U-11522, U-11553 and U-11554, *aff'd sub nom. TCG v. Michigan Bell Telephone Company d/b/a Ameritech Michigan*, Order of Mandamus (6th Cir. 1998).
- ²⁶ *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCIMetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with U S West Communications, Inc.*, Order Resolving Arbitration Issues, Minnesota Public Utilities Commission, Docket No. P-442, 421/M-96-855 (dated December 2, 1996).
- ²⁷ *Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms and Conditions and Related Arrangements for Interconnection with Southwestern Bell Telephone Company*, Arbitration and Order, Missouri Public Service Commission, Case No. TO-98-278 (dated April 23, 1998).
- ²⁸ *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Order Closing Proceeding, New York Public Service Commission, Case Nos. 97-C-1275, 93-C-0033, 93-C-0103, 97-C-0895, 97-C-0918, 97-C-0979 (dated March 19, 1998).
- ²⁹ *In the Matter of Enforcement of Interconnection Agreement Between Intermedia Communications, Inc. and BellSouth Telecommunications, Inc.*, Order Concerning Reciprocal Compensation for ISP Traffic, North Carolina Utilities Commission, Docket No. P-55, Sub 1096 (Nov. 4, 1998).

1 Washington³⁷ and West Virginia,³⁸ have addressed this issue and have
2 concluded that ISP traffic is properly characterized as “local.” Moreover,
3 these state decisions have been upheld on appeal in each case where a

(...continued)

³⁰ *ICG Telecom Group, Inc. v. Ameritech Ohio Regarding Reciprocal Compensation*, Opinion and Order, Ohio Public Utilities Commission, Case No. 97-1557-TP-CSS (dated August 27, 1998).

³¹ *In the Matter of Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating to Internet Service Providers and Enforcing Compensation Provision of the Interconnection Agreement with Southwestern Bell Telephone Company*, Order No. 423626, Oklahoma Corporation Commission, Cause No. PUD 970000548 (dated June 3, 1998).

³² *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms and Conditions*, Order No. 96-324, Oregon Public Utility Commission, ARB 1 (dated December 9, 1996).

³³ *Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2 of Its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.*, Opinion and Order, Pennsylvania Public Utility Commission, Docket No. P-00971256 (dated May 21, 1998).

³⁴ *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Order Affirming the Initial Order of Hearing Officer, Tennessee Regulatory Authority, docket No. 98-00118 (dated August 17, 1998).

³⁵ *Complaint and Request for Expedited Ruling of Time Warner Communications*, Order, Texas Public Utility Commission, Docket No. 18082, *aff'd sub nom.*, *Southwestern Bell Telephone Company v. Public Utility Commission of Texas*, Order, Docket No. MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938 (W.D. Tex. 1998).

³⁶ *Petition of Cox Virginia Telecom, Inc. for Enforcement of Interconnection Agreement with Bell Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers*, Final Order, Virginia State Corporation Commission, Case No. PUC970069 (dated October 24, 1997).

³⁷ *Petition for Arbitration of an Interconnection Agreement between MFS Communications Company, Inc. and U S West Communications, Inc.*, Arbitrator's Report and Decision, Washington Utilities and Transportation Commission, Docket No. UT-960323 (1996) *aff'd sub nom.*, *U S West Communications, Inc. v. MFS Intelenet, Inc.*, Order on Motions for Summary Judgment, Docket No. C97-222WD (W.D. Wash. 1998).

³⁸ *MCI Telecommunications Corporation Petition for Arbitration of Unresolved Issues for the Interconnection Negotiation between MCI and Bell Atlantic*, Order, West Virginia Public Service Commission, Case No. 97-1210-T-PC (dated January 13, 1998).

1 ruling has been issued. For instance, the U.S. District Court in Texas
2 upheld the Texas Public Utility Commission's decision that ISP traffic is
3 "local" stating:

4 this Court's agreement with the Texas PUC's
5 decision that modem calls to ISPs are "local," and
6 not interstate, does not ignore nor contradict case
7 law finding that Internet transactions may involve
8 interstate commerce or that the "nature" of a
9 communication, not the physical location of
10 telecommunication facilities, is the determinative
11 factor in determining FCC jurisdiction. Indeed,
12 because the PUC is merely regulating the local
13 telecommunications component of Internet access,
14 the FCC and Congress still have interstate
15 jurisdiction over the Internet's information service
16 component and the "transactions" that occur over it.
17 The FCC has recognized that an identifiable
18 technological line divides Internet service into an
19 information and a telecommunications component.
20 It is that same line that also creates jurisdiction for
21 the PUC in this case.³⁹

22 Similarly, the U.S. District Court in Illinois upheld the Illinois Commerce
23 Commission's decision finding that ISP traffic is "local" traffic, observing
24 that "[t]he FCC has repeatedly made it clear that 'telecommunications'
25 and 'information services' are 'mutually exclusive' categories."⁴⁰

26 **Q. DOES THE GTE ADSL TARIFF ORDER HAVE ANY**
27 **APPLICATION TO E.SPIRE'S CASE?**

³⁹ *Southwestern Bell Telephone Company v. Public Utility Comm'n of Texas*,
MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938, p. 23-24 (W.D. Tex.
1998).

⁴⁰ *Illinois Bell Telephone Company d/b/a Ameritech Illinois v. WorldCom
Technologies, Inc.*, No. 98 C 1925, 1998 U.S. Dist. LEXIS 11344, p. 11
(N.D. Ill. 1998).

1 A. No, the *GTE ADSL Tariff Order*⁴¹ is completely inapposite. All of
2 e.spire's traffic for which it claims reciprocal compensation is dial-up
3 traffic, not dedicated traffic.

4 **Q. THEN IS MR. HALPRIN INCORRECT IN ASSERTING THAT**
5 **THE *GTE ADSL TARIFF ORDER* SETTLED THE ISP TRAFFIC**
6 **ISSUE IN FAVOR OF DECLARING IT INTERSTATE AND FREE**
7 **OF RECIPROCAL COMPENSATION OBLIGATIONS (HALPRIN**
8 **DIRECT, pp. 3-6 AND 11-18)?**

9 A. Yes, he is incorrect. The *GTE ADSL Tariff Order* filing has no bearing on
10 the issue of reciprocal compensation for ISP traffic. Relying on that
11 decision, Mr. Halprin asks the Commission to reverse its prior decision in
12 the MFS proceeding determining that ISP traffic is "local" in nature.
13 However, *while the FCC permitted GTE to file interstate tariffs in the*
14 *GTE ADSL Tariff Order, it specifically declined to decide whether dial-up*
15 *calls to ISPs are jurisdictionally interstate or are subject to reciprocal*
16 *compensation. Indeed, the FCC specifically stated that:*

17 [t]his Order does not consider or address issues
18 regarding whether local exchange carriers are
19 entitled to receive reciprocal compensation when
20 they deliver to information service providers,
21 including Internet service providers, circuit-
22 switched dial-up traffic originated by
23 interconnecting LECs. Unlike GTE's ADSL tariff
24 [at issue here], the reciprocal compensation
25 controversy implicates: the applicability of the
26 separate body of Commission rules and precedent

⁴¹ *In the Matter of GTE Telephone Operating Companies*, Memorandum Opinion and Order, CC Docket No. 98-79, 1998 FCC LEXIS 5594 (Oct. 30, 1998) ("*GTE ADSL Tariff Order*").

1 regarding switched access service, the applicability
2 of any rules and policies relating to intercarrier
3 compensation when more than one local exchange
4 carrier transmits a call from an end user to an ISP,
5 and the applicability of interconnection agreements
6 under sections 251 and 252 of the Communications
7 Act, as amended by the Telecommunications Act of
8 1996, entered into by incumbent LECs and
9 competitive LECs that state commissions have
10 found, in arbitration, to include such traffic.
11 Because of these considerations, we find that this
12 Order does not, and cannot, determine whether
13 reciprocal compensation is owed, on either a
14 retrospective or prospective basis, pursuant to
15 existing interconnection agreements, state
16 arbitration decisions, and federal court decisions.⁴²

17 In other words, Mr. Halprin would have the Commission reverse itself on
18 the basis of a decision which the FCC itself states does not address the
19 issue in this case.

20 e. spire expects the FCC eventually to confirm that reciprocal
21 compensation should be paid for dial-up calls placed to ISPs. But, in any
22 event, the FCC's recent *GTE ADSL Tariff Order* provides no basis for the
23 Florida Commission to reverse its prior conclusions since the FCC
24 specifically declined to resolve the reciprocal compensation issue, and the
25 Florida Commission's decision is fully consistent with Congress' decision
26 in the Telecommunications Act to differentiate between the provision of
27 "telecommunications" and "information" services. I also note that

⁴² *GTE ADSL Tariff Order* at ¶ 2. Importantly, although the FCC did indicate that it expected to issue an order "in the next week," that was approximately five weeks ago, and there is no indication as yet that issuance of the FCC's decision is imminent.

1 NARUC and others have asked the FCC to reconsider its *GTE ADSL*
2 *Tariff Order*.

3 **Q. SINCE THE *GTE ADSL TARIFF ORDER* DOES NOT APPLY TO**
4 **THE ISSUE OF RECIPROCAL COMPENSATION FOR ISP**
5 **TRAFFIC, WHAT BEARING SHOULD IT HAVE ON THE**
6 **FLORIDA COMMISSION?**

7 A. The *GTE ADSL Tariff Order* has no bearing on the prior or future
8 decisions of the Florida Commission, or any other state commission, with
9 respect to reciprocal compensation for ISP traffic.

10 **Q. IS MR. HALPRIN'S VIEW CONTRARY TO PRIOR DECISIONS**
11 **OF THE FLORIDA COMMISSION?**

12 A. Yes. As in this case, in the complaints brought by WorldCom
13 Technologies and other CLECs, this Commission evaluated whether calls
14 to ISPs fell within the definition of "local traffic" as set forth in the
15 relevant interconnection agreements. Looking at the contract language
16 itself and other factors, the Commission concluded that the definition of
17 local traffic set forth in the interconnection agreements under dispute was
18 broad enough to include ISP traffic. The language at issue was virtually
19 identical to the language in the e.spire/BellSouth Interconnection
20 Agreement ("Interconnection Agreement") which specifically defines
21 "local traffic" as "telephone calls that originate in one exchange and
22 terminate in either the same exchange, or a corresponding Extended Area

1 Service (“EAS”) exchange.”⁴³ This definition does not differentiate
 2 among types of end users, nor does it exclude calls from end users to other
 3 end users in the same local calling area that happen to be ISPs. The
 4 language of the e.spire/BellSouth Interconnection Agreement is
 5 unambiguous.

6 Notably, the impact of BellSouth’s refusal to compensate CLECs
 7 such as e.spire for terminating ISP traffic was itself critical to the
 8 Commission’s decision finding that ISP traffic is “local” traffic subject to
 9 reciprocal compensation. As the Commission noted in its order, a witness
 10 for TCG summarized the impact that permitting BellSouth to prevail on
 11 this issue would have:

12 As competition grows, the smaller, leaner [CLECs]
 13 may well win other market segments from ILECs.
 14 If each time this occurs, the ILEC, with its greater
 15 resources overall, is able to fabricate a dispute with
 16 [CLECs] out of whole cloth and thus invoke costly
 17 regulatory processes, local competition could be
 18 stymied for many years.⁴⁴

19 **Q. HOW DO YOU RESPOND TO MR. HALPRIN’S CONTENTION**
 20 **THAT RECIPROCAL COMPENSATION PAYMENTS ARE**
 21 **UNFAIR TO BELLSOUTH AND POOR PUBLIC POLICY**
 22 **(HALPRIN DIRECT, pp. 26-28)?**

23 **A.** Mr. Halprin himself answers this question by stating that “the purpose of
 24 reciprocal compensation for local traffic is to ensure that a LEC is able to

⁴³ e.spire/BellSouth Interconnection Agreement, Attachment B.

⁴⁴ *Florida Order* at 18.

1 recover its actual costs of terminating local traffic that originates on
2 another LEC's network . . ." (Halprin Direct, p. 28) That is all we are
3 trying to do. Thus, Mr. Halprin's accusation that e.spire is being
4 compensated unfairly is not only irrelevant but, coming from a BellSouth
5 witness, the height of hypocrisy. As a threshold matter, this is a contracts
6 case. BellSouth has breached its negotiated and agreed commitments to
7 e.spire. To the extent public policy is implicated, the issue in dispute is
8 whether one party to a contract can unilaterally refuse to perform its
9 obligations under the contract without penalty. If the Commission views
10 this case with an eye toward the broader questions involved, it will see that
11 compensating e.spire as per its Interconnection Agreement with BellSouth
12 is eminently fair and appropriate.

13 **Q. MR. HALPRIN REPEATEDLY REFERS TO E.SPIRE**
14 **RECOVERING MORE THAN ITS COSTS, TO "SUBSIDIES"**
15 **BEING GIVEN BY BELL SOUTH TO E.SPIRE, AND EVEN TO**
16 **E.SPIRE PRICING ABOVE ITS COSTS (SEE HALPRIN DIRECT,**
17 **pp. 26-31). ARE THESE COST ISSUES IRRELEVANT TO THIS**
18 **PROCEEDING?**

19 **A.** Yes, these costs are irrelevant to this case because a mechanism was
20 established in the Interconnection Agreement to set rates for reciprocal
21 compensation, regardless of e.spire's or BellSouth's costs. Nonetheless,
22 from a policy perspective, e.spire fully expects that the rates established
23 contractually are, if anything, a conservative estimate of its costs to

1 transport and terminate such traffic. Accordingly, there is no “windfall” to
2 e.spire.

3 Critically, despite Mr. Halprin’s repeated assertions, the record
4 reflects that Mr. Halprin has never worked for an ALEC. Thus, Mr.
5 Halprin does not have a basis for making factual claims about e.spire’s
6 costs, does not have access to the information necessary to establish
7 e.spire’s costs.

8 **Q. WHY DO YOU CALL MR. HALPRIN’S PUBLIC POLICY**
9 **STATEMENTS THE “HEIGHT OF HYPOCRISY”?**

10 A. The focus on reciprocal compensation is always on the terminating end of
11 the call – that is, the fact that e.spire has won over an Internet service
12 provider customer from BellSouth. The greatest market distortion fueling
13 this phenomenon, however, stems from the fact almost every call to an
14 Internet service providers in the BellSouth region is originated by a
15 BellSouth customer. BellSouth controls 99% of the residential market for
16 local telecommunications services, and 90% of the business market. Thus,
17 if the origination of calls were spread more evenly among ALECs and
18 BellSouth, this tremendous imbalance would not exist. Reciprocal
19 compensation, therefore, provides an incentive to BellSouth to open its
20 markets to greater competition.

21 BellSouth turns this argument on its head by arguing that
22 reciprocal compensation will create a disincentive for ALECs to pursue
23 customers because then they too would have to pay reciprocal

1 compensation for terminating traffic. This is absurd, however. e.spire has
2 been working day and night for each customer that it has, and is
3 committed to providing the quality of service and prices that will attract as
4 many more customers as are willing to select e.spire as their local carrier.

5 The limited success that e.spire and other ALECs have had in
6 attracting highly profitable customers, such as Internet service providers,
7 is the first real competition that BellSouth ever has faced. BellSouth
8 would rather deceive the Commission into thinking that compensating
9 ALECs for terminating this traffic is unfair – and thus to starve its
10 competitors to death by depriving them of compensation for services
11 rendered -- than to abide by its contractual commitments and compete for
12 these customers.

13 **Q. WHAT ABOUT MR. HALPRIN'S SUGGESTION THAT E.SPIRE**
14 **SHOULD SEEK REIMBURSEMENT FROM THE END USERS OR**
15 **ISPs INVOLVED?**

16 A. That simply is not a workable solution. The end users involved are
17 customers of BellSouth, and e.spire has no way of billing them. As for the
18 ISPs, BellSouth is prohibited by FCC rules from charging them access
19 charges. If e.spire begins to assess access charges on ISPs, most ISPs will
20 immediately switch-back to BellSouth as their local service provider.
21 Thus, this huge and fast-growing market segment will become the
22 monopoly province of BellSouth. A skeptic could imagine that such an

1 outcome is the true end game underlying BellSouth's aggressive strategy
2 of refusing to pay reciprocal compensation to CLECs for ISP traffic.

3 **Q. DO YOU HAVE ANY FINAL OBSERVATIONS REGARDING MR.**
4 **HALPRIN'S TESTIMONY?**

5 A. Mr. Halprin's position that all ISP traffic is interstate in nature really
6 represents an assertion that all aspects of Internet traffic should be subject
7 to the *exclusive* jurisdiction of the FCC. Given Mr. Halprin's history as a
8 federal regulator, it is not surprising that he believes that the FCC "knows
9 best," and that state regulators should keep their "hands off." However,
10 e.spire believes that state regulators should -- and do -- have extensive
11 jurisdiction over the local access segment of Internet traffic.

12 **Q. HOW DOES E.SPIRE RESPOND TO MR. HENDRIX'S**
13 **TESTIMONY THAT E.SPIRE MAY NOT USE THE MOST**
14 **FAVORED NATIONS PROVISIONS OF ITS**
15 **INTERCONNECTION AGREEMENT WITH BELLSOUTH TO**
16 **ADOPT A RECIPROCAL COMPENSATION RATE FROM**
17 **ANOTHER BELLSOUTH INTERCONNECTION AGREEMENT?**

18 A. The most favored nations provisions of e.spire's Interconnection
19 Agreement with BellSouth (the "Interconnection Agreement") provide as
20 follows:

21 *If as a result of any proceeding before any Court,*
22 *Commission, or the FCC, any voluntary agreement or*
23 *arbitration proceeding pursuant to the Act, or pursuant to*
24 *any applicable federal or state law, BellSouth becomes*
25 *obligated to provide interconnection, number portability,*
26 *unbundled access to network elements or any other services*

1 related to interconnection whether or not presently covered
2 by this Agreement to another telecommunications carrier
3 operating within a state within the BellSouth territory at
4 rates or on terms and conditions more favorable to such
5 carrier than the comparable provisions of this Agreement,
6 then [e.spire] shall be entitled to add such network elements
7 and services, *or substitute such more favorable rates, terms*
8 *or conditions* for the relevant provisions of this Agreement,
9 which shall apply to the same states as such other carrier
10 and such substituted rates, terms or conditions shall be
11 deemed to have been effective under this Agreement as of
12 the effective date thereof to such other carrier.

13
14 Section XXII(A) (emphasis added). e.spire has triggered this most
15 favored nations language to adopt the reciprocal compensation rate stated
16 in the partial interconnection agreement between BellSouth and MFS.
17 The Agreement permits e.spire to adopt “rates, terms, or conditions,” of
18 another CLEC’s agreement.

19 Mr. Hendrix claims that the Eighth Circuit’s decision in *Iowa*
20 *Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) precludes e.spire
21 from adopting a single rate from the MFS interconnection agreement
22 without adopting the entire agreement. But Mr. Hendrix is simply
23 incorrect that *Iowa Utilities Board* controls the application of the most
24 favored nations provision of the Interconnection Agreement. The most
25 favored nations provisions of our Interconnection Agreement were the
26 result of voluntary negotiations – not arbitration – and thus are unaffected
27 by the Eighth Circuit decision.

28 **Q. PLEASE DESCRIBE THE RELEVANT PORTION OF THE**
29 **EIGHTH CIRCUIT DECISION.**

1 A. The Court in *Iowa Utilities Board* interpreted the FCC's so-called "pick
2 and choose" rule. 47 C.F.R. § 51.809. That rule was promulgated by the
3 FCC on August 8, 1996, in its First Report and Order in CC Docket
4 No.96-98. (*Implementation of Local Competition Provisions in the*
5 *Telecommunications Act of 1996*, CC Docket No.96-98, First Report and
6 Order, Rel. August 8, 1996 (the "First Report and Order")). The rule
7 promulgated by the FCC provides:

8 An incumbent LEC shall make available without
9 unreasonable delay to any requesting
10 telecommunications carrier any individual
11 interconnection, service, or network element
12 arrangement contained in any agreement to which it
13 is a party that is approved by a state commission
14 pursuant to section 252 of the Act, upon the same
15 rates, terms, and conditions as those provided in the
16 agreement. An incumbent LEC may not limit the
17 availability of any individual interconnection, service,
18 or network element only to those requesting carriers
19 serving a comparable class of subscribers or
20 providing the same service (i.e., local, access, or
21 interexchange) as the original party to the agreement.

22
23 47 C.F.R. § 51.809(a). The Eighth Circuit found the FCC's rule to be an
24 unreasonable interpretation of 47 U.S.C. § 252(i). (120 F.3d at 800-01).

25 **Q. WHY IS MR. HENDRIX'S ARGUMENT INCORRECT?**

26 A. e.spire's adoption of the MFS reciprocal compensation rate under the most
27 favored nations provision of the Interconnection Agreement is not made
28 pursuant to 47 U.S.C. § 252(i) or FCC rule 47 C.F.R. § 51.809. e.spire's
29 Interconnection Agreement with BellSouth was signed on July 25, 1996,
30 two weeks prior to the issuance of the FCC's rules in the August 8, 1996
31 First Report and Order. The most favored nations language in e.spire's

1 Interconnection Agreement is the result of voluntary contractual
2 negotiations between e.spire and BellSouth.

3 The *Iowa Utilities Board* decision does not expressly prohibit
4 application of a voluntarily negotiated most favored nations clause in a
5 CLEC interconnection agreement that allows a CLEC to pick and choose
6 from other interconnection agreements. On the contrary, the Eighth
7 Circuit's decision in *Iowa Utilities* clearly favors voluntary negotiation as
8 the preferred means of obtaining an interconnection agreement pursuant to
9 47 U.S.C. § 252(a). 120 F.3d at 801. Although the Eighth Circuit states
10 that making "pick and choose" available to all CLECs could thwart the
11 negotiation process, nothing in the *Iowa Utilities* decision suggests that
12 such a voluntarily negotiated provision in an individual CLEC's
13 interconnection agreement violates the Telecommunications Act of 1996.

14 Furthermore, in light of the fact that e.spire was one of the earlier
15 CLECs to enter an interconnection agreement with BellSouth, it was
16 reasonable for e.spire to reserve its right to adopt more favorable terms
17 that BellSouth later offered to other CLECs, such as the reciprocal
18 compensation rate included in the MFS interconnection agreement which
19 BellSouth entered on August 26, 1996, after BellSouth signed the
20 Interconnection Agreement with e.spire. If e.spire were to accept less than
21 MFS, it would be at a competitive disadvantage vis-a-vis MFS, or other
22 later entrants.

1 **Q. DID BELLSOUTH INITIALLY INFORM E.SPIRE THAT IT DID**
2 **NOT AGREE WITH E.SPIRE'S MOST FAVORED NATION**
3 **REQUEST?**

4 A. No. The correspondence attached to my Direct Testimony confirms that,
5 until e.spire commenced formal collections actions, BellSouth ignored
6 e.spire's repeated most favored nations request. If there was a legitimate
7 difference in legal interpretation, BellSouth did not make an effort to
8 negotiate this issue in good faith with e.spire. By ignoring e.spire's
9 repeated most favored nations requests, BellSouth forced e.spire to come
10 to the Commission for relief. Although silent on the most favored nations
11 issue in correspondence, BellSouth now raises this legal issue for the first
12 time in these proceedings. If BellSouth had a legitimate difference of
13 interpretation on this issue, it should have raised it months ago.

14 **Q. PLEASE COMMENT ON MR. HENDRIX'S CLAIM THAT**
15 **E.SPIRE IS NOT ADDING OR SUBSTITUTING A RATE.**

16 A. Mr. Hendrix attempts to avoid application of the most favored nations
17 provisions of the Interconnection Agreement through an exercise in
18 semantics in which he concludes that e.spire's attempt to adopt the MFS
19 reciprocal compensation rate does not constitute the addition of a new
20 service or the substitution of more favorable rates, terms and conditions.
21 (Hendrix Direct, p. 7). Mr. Hendrix's strained reading of the most favored
22 nations provision is contrary to the plain meaning of that language.
23 Whether viewed as *adding* a new rate where none existed, or *substituting* a

1 rate of \$0.009 for a rate of \$0.000, the most favored nations language
2 plainly allows e.spire to substitute or add the rate in the MFS
3 interconnection agreement to e.spire's Interconnection Agreement.

4 **Q. HOW DO YOU RESPOND TO MR. HENDRIX'S CONTENTION**
5 **THAT LOCAL TRAFFIC SENT BY BELLSOUTH TO E.SPIRE**
6 **FOR TERMINATION HAS NOT EXCEEDED 2 MILLION**
7 **MINUTES ON A MONTHLY BASIS?**

8 A. Mr. Hendrix has no basis to complain about e.spire's usage reports, which
9 show that the local traffic sent by BellSouth to e.spire for termination
10 exceeds the amount routed by e.spire to BellSouth by far more than
11 2 million minutes monthly. It is critical to remember that BellSouth is
12 expressly obligated under our agreement to track the traffic exchanged and
13 provide regular usage reports to e.spire. Nevertheless, BellSouth failed to
14 track the traffic, and never provided a single usage report to e.spire.
15 Consequently, e.spire was forced to develop its own local traffic
16 measurement system, and perform BellSouth's obligations under the
17 agreement. Thus, BellSouth has unclean hands, and should not be
18 complaining about e.spire's reporting, at least until it produces its own
19 traffic reports.

20 **Q. HAS BELLSOUTH CHALLENGED THE VALIDITY OF**
21 **E.SPIRE'S TRAFFIC MEASUREMENT SYSTEMS?**

22 A. No. As a matter of fact, in proceedings before the Georgia PSC, a
23 BellSouth witness conceded that it does not dispute e.spire's measurement

1 methodology or traffic reports, other than the fact that BellSouth believes
2 that minutes-of-use (“MOU”) attributable to local access calls placed to
3 ISPs should be subtracted from the total.

4 **Q. WHAT ABOUT MR. HENDRIX’S COMPLAINT (HENDRIX**
5 **DIRECT, p. 6) THAT E.SPIRE USED “COMBINED TRUNKS” TO**
6 **RECORD MOU?**

7 A. Mr. Hendrix’s statement is simply untrue. “Combined trunks” are used to
8 simultaneously route local service and exchange access traffic. That is not
9 how e.spire and BellSouth are interconnected. We utilize separate trunk
10 groups for routing local traffic and exchange access traffic. Our MOU
11 count is limited to the traffic routed by each party to the other over the
12 *local traffic* trunk groups. Thus, when counting the MOU sent by
13 BellSouth to e.spire for termination, we limited our counting to MOU
14 routed to us by BellSouth over the trunk groups reserved for local traffic.
15 Indeed, if BellSouth in fact routed ISP access calls to e.spire over these
16 local traffic trunk groups, it is a telling admission that BellSouth itself
17 regards such calling as “local” traffic for most purposes.

18 **Q. HOW DOES E.SPIRE RESPOND TO MR. HENDRIX’S**
19 **TESTIMONY THAT ISP TRAFFIC IS NOT SUBJECT TO**
20 **RECIPROCAL COMPENSATION?**

21 A. Mr. Hendrix provides lengthy legal arguments regarding BellSouth’s
22 position that ISP traffic is not subject to reciprocal compensation.
23 (Hendrix Direct, pp. 7-15). However, these are the same arguments

1 advanced by BellSouth to defend the complaints brought by WorldCom,
2 TCG, Intermedia, and MCI, and which were rejected by the Commission
3 in Order No. PSC-98-1216-FOF-TP on September 15, 1998. This
4 Commission's ruling in that case is consistent with the decisions of at least
5 24 other state Commissions and at least three federal courts.

6 **Q. WHAT IS E.SPIRE'S RESPONSE TO MR. HENDRIX'S**
7 **STATEMENT THAT NO REPRESENTATIVE OF E.SPIRE EVER**
8 **INDICATED THAT E.SPIRE CONSIDERED ISP TRAFFIC TO BE**
9 **SUBJECT TO RECIPROCAL COMPENSATION IN THE**
10 **NEGOTIATION OF THE INTERCONNECTION AGREEMENT**
11 **(HENDRIX DIRECT, p. 8)?**

12 **A.** It was not incumbent upon e.spire to list all types of traffic that would be
13 considered local. The purpose of a general definition, like the definition
14 of local traffic in e.spire's Interconnection Agreement, is to obviate the
15 necessity to provide an exhaustive list of services. Indeed, e.spire did not
16 list ISP traffic as local traffic. Nor did it list as included in the definition
17 of local traffic other types of high volume call recipients, such as calls to
18 airline reservation desks, call-in centers, radio stations, or ticket
19 companies, as local calls. There was no need to provide an exhaustive list
20 of types of local calls because a general definition of local calls was
21 included in the Agreement. ISP-terminated calls fall squarely within that
22 definition, as confirmed by 24 other state commissions and 3 federal
23 courts.

1 **Q. HOW DO YOU RESPOND TO MR. HENDRIX’S STATEMENTS**
2 **(HENDRIX DIRECT, pp. 8 & 19-20) THAT BELLSOUTH DID NOT**
3 **INTEND TO INCLUDE ISP TRAFFIC WITHIN THE SCOPE OF**
4 **“LOCAL” TRAFFIC SUBJECT TO RECIPROCAL**
5 **COMPENSATION OBLIGATIONS?**

6 A. First, let me state that I have discussed this matter with the persons who
7 negotiated the Interconnection Agreement on behalf of e.spire, and they
8 have assured me that e.spire did in fact intend that ISP traffic be included
9 as “local” traffic for purposes of paying reciprocal compensation. Indeed,
10 they have told me that the definition of “local traffic” was intentionally
11 made broad enough to include this and many other types of traffic.

12 However, we do not believe that such statements are relevant. The
13 Interconnection Agreement speaks for itself. And we believe that the
14 obligations of the parties on this point must be gleaned from the language
15 of the Interconnection Agreement itself and not by reference to the some
16 alleged inconsistency between the contract language and the parties’
17 intent.

18 I note with interest that Mr. Hendrix states (Hendrix Direct, pp. 18-
19 19) that BellSouth was aware of FCC rulings espousing a “two-call”
20 theory for ISP traffic during the negotiation of the Interconnection
21 Agreement. If BellSouth believed so strongly that ISP traffic should not
22 be included as “local,” then one must wonder why BellSouth did not insist
23 either that the definition of “local traffic” expressly exclude ISP traffic *or*

1 that the definition of “switched access” expressly include ISP traffic. In
2 our view the answer is simple. This issue was not addressed because both
3 parties accepted the prevailing view that calls placed via tariffed local
4 exchange services to ISPs were to be treated as “local” calls.

5 **Q. DOES THE INTERCONNECTION AGREEMENT BETWEEN**
6 **E.SPIRE AND BELL SOUTH SUPERSEDE ALL PRIOR**
7 **DISCUSSIONS BETWEEN THE PARTIES?**

8 A. Yes. Section XXX of the Interconnection Agreement is an “Entire
9 Agreement” clause that expressly provides that the written agreement will
10 control over the statements or, in this case, the recollections of one of
11 BellSouth’s several negotiators to the Interconnection Agreement.
12 Moreover, there is no question that BellSouth was aware that traffic could
13 become imbalanced. Before I arrived at e.spire in May 1996, I was well
14 aware that there were advantages to a CLEC to having a usage-based rate
15 for reciprocal compensation. I was aware of this through my participation
16 in public proceedings in Pennsylvania, Florida, and elsewhere. As
17 discussed below, BellSouth also was acutely aware of these issues at this
18 time, as evidenced by the record in at least one Florida proceeding. In any
19 event, the language of the Interconnection Agreement concerning the
20 definition of local traffic governs. BellSouth cannot get out of a particular
21 provision of the Interconnection Agreement simply because it finds this
22 particular provision unfavorable. There are certainly other provisions of
23 the Interconnection Agreement that favor BellSouth, such as the

1 unbundled loop rates, which are among the highest in the country. e.spire
2 pays those rates, however, and stands by the bargain it struck with
3 BellSouth. The Commission should ensure that BellSouth does the same.

4 **Q. DID BELLSOUTH UNDERSTAND THAT TRAFFIC COULD**
5 **BECOME IMBALANCED?**

6 A. Yes. BellSouth undoubtedly was aware that, in one way or another, traffic
7 could become imbalanced. I participated in a proceeding before this
8 Commission in an interconnection docket in late 1995 and early 1996, as
9 an attorney for MFS. The witness for BellSouth in that proceeding was
10 Robert Scheye, to whom Jerry Hendrix reported, and who was one of
11 BellSouth's initial negotiators of the Interconnection Agreement. As a
12 result of this Florida proceeding, BellSouth, as a corporation, was fully
13 aware that traffic could flow heavily in either direction. BellSouth had
14 taken precautions against this very issue in the Stipulation it signed in
15 Florida with Time Warner on December 8, 1995, which stated:

16 under the terms of the Stipulation, the parties pay each
17 other BellSouth's terminating switched access rates,
18 exclusive of the RIC and CCL elements of the
19 switched access rate, on a per-minute-of-use basis of
20 \$0.01052 for terminating local traffic on each other's
21 network. *A local exchange provider is not required to*
22 *compensate another local exchange provider more*
23 *than one hundred five percent (105%) of the total*
24 *minutes-of-use of the local exchange provider with the*
25 *fewer minutes-of-use in the same month.*⁴⁵

⁴⁵ *In Re: Resolution of Petition(s) to Establish Nondiscriminatory Rates, Terms, and Conditions for Interconnection Involving Local Exchange Companies and Alternative Local Exchange Companies Pursuant to Section 364.162, Florida Statutes, Docket No. 950985-TP, Order No. PSC-96-0445-FOF-TP, p. 9 (1996).*

1
2 This proposal was in fact offered to e.spire, but e.spire and BellSouth
3 eventually negotiated the language contained in the Interconnection
4 Agreement. e.spire chose not to negotiate a cap similar to the one
5 accepted by Time Warner. This is one indication that BellSouth was fully
6 apprised of the possibility that traffic could flow heavily in one direction
7 or another, but chose not to negotiate a similar provision with e.spire.

8 **Q. HOW ELSE WAS BELLSOUTH AWARE THAT TRAFFIC**
9 **COULD FLOW HEAVILY TOWARDS CLEC NETWORKS?**

10 A. In the same Florida proceeding the only record evidence on traffic flows
11 was from an MFS witness who stated that "MFS was terminating more
12 traffic than it originated. BellSouth, however, offered no practical
13 experience as to whether traffic would be balanced or not."⁴⁶ The Florida
14 Commission concluded, "[w]e believe that it is highly speculative to
15 predict that traffic will be imbalanced to BellSouth's detriment such that
16 BellSouth terminates far more ALEC traffic than it sends to them."⁴⁷

17 **Q. PLEASE EXPLAIN, IN THIS ENVIRONMENT, THE TERMS TO**
18 **WHICH BELLSOUTH AND E.SPIRE AGREED.**

19 A. The Interconnection Agreement is simple: the parties would negotiate a
20 rate once the traffic flow exceeded 2 million minutes per month in any
21 given state. Once BellSouth agreed to the rate of \$0.009 cents per minute

⁴⁶ *Id.*

⁴⁷ *Id.*

1 with MFS, however, it established the rate that it would have to offer to
2 e.spire through the most favored nations clause in the Interconnection
3 Agreement that was negotiated between e.spire and BellSouth.

4 **Q. WAS JERRY HENDRIX THE SOLE NEGOTIATOR FOR**
5 **BELLSOUTH?**

6 A. No. Initially, Robert Scheye was the chief negotiator. He was supported
7 by a team of subject matter experts and attorneys on issues for which he
8 needed assistance. Mr. Hendrix's understanding of the issues may not be
9 representative of the entire team, or what the BellSouth corporation clearly
10 knew as evidenced by the Florida order. The bottom line is that BellSouth
11 struck a deal, and it must abide by it.

12 **Q. HOW DO YOU RESPOND TO MR. HENDRIX'S ALLEGATION**
13 **THAT BELLSOUTH CONCEIVABLY COULD END UP PAYING**
14 **E.SPIRE MORE IN RECIPROCAL COMPENSATION THAN IT**
15 **RECEIVES FROM ITS OWN END USERS FOR THE**
16 **ASSOCIATED LOCAL EXCHANGE SERVICE (HENDRIX**
17 **DIRECT, pp. 20-22)?**

18 A. I suppose that this is possible, but it is neither relevant nor proven. In any
19 event, given the fact that BellSouth continues to dominate the local
20 market, the huge revenues derived from its embedded customer base
21 would have to be considered.

22 Importantly, the Telecommunications Act requires interconnecting
23 LECs to reimburse each other for the additional *costs* that they incur in

1 terminating traffic routed to one another for completion. Such *cost*
2 reimbursement is a critical safeguard to ensure that neither party is
3 permitted to free-ride the other carrier's network – as BellSouth seeks to
4 do here. The revenue derived by the carrier routing the traffic for
5 completion is immaterial.

6 *I also note that this potential dilemma exists equally for e.spire. If*
7 *an e.spire end user places numerous calls to an ISP served by BellSouth, it*
8 *is equally possible that e.spire's reciprocal compensation obligations to*
9 *BellSouth could exceed the revenue obtained by e.spire from the*
10 *associated end user. The answer to this problem – if it exists at all – is for*
11 *both parties to rationalize their end user pricing, and make sure that high*
12 *volume Internet users are placed on appropriate local exchange pricing*
13 *plans. Certainly the answer is not for BellSouth to reap a windfall by*
14 *retaining all end user revenues and utilizing e.spire's network free-of-*
15 *charge.*

16 **Q. HAS ANY OTHER STATE COMMISSION ADDRESSED THE**
17 **SPECIFIC INTERPRETATION OF THE INTERCONNECTION**
18 **AGREEMENT URGED BY MR. HENDRIX?**

19 **A.** Yes. A complaint identical to the one at issue in this proceeding already
20 has been decided by a Hearing Officer for the Georgia Public Service
21 Commission.⁴⁸ The Hearing Officer decided that: (1) the “entire
22 agreement” clause of the Interconnection Agreement bars Mr. Hendrix's

1 attempted use of parole evidence; (2) local access calls are included in the
2 definition of "local traffic" contained in the Interconnection Agreement;
3 (3) BellSouth violated the terms of the Interconnection Agreement by
4 failing to measure and report local traffic; (4) e.spire's own local traffic
5 measurement system is valid; (5) the most favored nations clause of the
6 Interconnection Agreement was valid and operative; and (6) e.spire
7 properly invoked the most favored nations clause by electing the MFS rate
8 for reciprocal compensation. The Hearing Officer ordered BellSouth to
9 pay all resulting damages plus interest.

10 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

11 **A. Yes it does.**

(...continued)

⁴⁸ See *Georgia Decision, supra*, note 20 (appended to the Direct Testimony of James C. Falvey as Exhibit No. _____ (JCF-8)).

1 BY MR. HORTON:

2 Q Mr. Falvey, did you also cause to be prepared
3 and attached to your direct testimony exhibits which have
4 been identified as JCF-1 through JCF-8?

5 A Yes.

6 Q And do you have any changes or additions to make
7 to those exhibits at this time?

8 A No, I don't.

9 MR. HORTON: Madam Chairman, could we ask that
10 exhibits JCF-1 through JCF-8 be identified for --

11 COMMISSIONER JOHNSON: JCF-1 through 8 will be
12 identified as Composite Exhibit --

13 MR. HORTON: Five.

14 COMMISSIONER JOHNSON: -- Five.

15 (Whereupon, Hearing Composite Exhibit No. 5 was
16 marked for identification.)

17 BY MR. HORTON:

18 Q Do you have a summary of your testimony?

19 A Yes, I do.

20 Q Would you please give that at this time?

21 A Good afternoon, Commissioners.

22 Due to the amount of revenue involved, this
23 proceeding is of critical significance to e.spire. This
24 case is a contract case brought by e.spire to enforce the
25 contract that BellSouth voluntarily signed in July 1996.

1 A deal is a deal, and BellSouth must live up to
2 its contractual obligations.

3 This proceeding stems from BellSouth's failure
4 to compensate e.spire under e.spire's contract for
5 local -- I am sorry, e.spire's contract for local traffic
6 BellSouth terminates on e.spire's network. Under the
7 e.spire BellSouth interconnection agreement, once the
8 differential of local minutes exceeds two million minutes
9 per month in a state, the parties must begin compensating
10 each other for local minutes. Although BellSouth is
11 obligated under the agreement to measure local minutes,
12 it has never produced such reports.

13 Accordingly, e.spire took upon itself the task
14 of measuring local minutes and billing BellSouth.
15 BellSouth agreed by its letter dated January 8, 1998, to
16 use e.spire's reports.

17 This case turns on whether local minutes
18 terminated to Internet service providers, or ISPs, are
19 classified as local minutes under e.spire's contract.

20 The Florida Commission has already determined
21 that minutes terminated to ISPs are local under the
22 essentially identical contract language of intermedia's
23 contract.

24 Given this fact, the two million-minute
25 threshold was exceeded in March 1998, as demonstrated by

1 the testimony of Donna Talmage. e.spire's contractual
2 Most Favored Nations clause permits e.spire to select any
3 rate, term or condition from another party's agreement.

4 When e.spire determined that the two
5 million-minute threshold was triggered, e.spire sent to
6 BellSouth, on November 1998, a so-called Most Favored
7 Nations request for a rate of .9 cents per minute, the
8 rate contained in the BellSouth MFS contract. This
9 request initiated our negotiation with BellSouth.

10 As the correspondence attached to my testimony
11 clearly indicates, these negotiations broke down over two
12 central issues. First, the ISP issue, which the Florida
13 Commission has already decided under similar contracts.
14 Second, the ability of e.spire to rely upon its MFN or
15 Most Favored Nations clause in negotiating the rate to be
16 applied to the traffic. As a result of this breakdown,
17 e.spire was forced to file this complaint.

18 I have three critical points in my testimony
19 that I would like to emphasize. First, negotiations have
20 already taken place on this issue. And, in fact, over
21 eight months of additional negotiations have ensued in
22 negotiating e.spire's second interconnection agreement.
23 But the parties have not resolved this issue.

24 Second, the MFN provision in e.spire's contract
25 is not affected in any way by subsequent decisions by the

1 Eighth Circuit or any other state or federal
2 court, because that is a contract voluntarily signed by
3 BellSouth.

4 Because e.spire was one of the first carriers to
5 sign a telecommunications interconnection agreement in
6 Florida, the MFN provision is an integral part of the
7 fabric of e.spire's contract. Without this provision,
8 e.spire would never have signed the contract.

9 e.spire knew that as the first one in, it was
10 going to be followed by many other carriers, and that
11 those carriers could easily obtain better terms and
12 conditions than e.spire. And that's why it needed to
13 have access to those better terms and conditions.
14 Therefore, BellSouth must not be permitted to
15 unilaterally amend e.spire's MFN provision.

16 Third, in general, it is critical to remember
17 throughout that this is a case about a contract and the
18 enforcement of BellSouth's obligations under that
19 contract.

20 In summary, e.spire has provided its reports in
21 this docket to indicate support for the total local
22 minutes billed. e.spire has never received any report
23 from BellSouth, nor any significant payment on its
24 millions of dollars of reciprocal compensation bills to
25 BellSouth.

1 A Again, subject to check, correct.

2 Q Now, when e.spire signed the interconnection
3 agreement in July of 1996, what type of traffic exchange
4 agreement did the parties agree to?

5 A The parties agreed to the provision in the
6 contract which states that, initially up until the two
7 million-minute mark -- that's two million minutes per
8 state, per month -- no compensation would be required.

9 The thinking was that, if there wasn't going to
10 be a lot of traffic exchange, it wasn't worth the time
11 and effort to bill each other and exchange payments.
12 However, the provision goes on to state that, as soon as
13 you hit that two million-minute mark, we are starting to
14 talk about real money. And at that point, with the first
15 minute after two million minutes, we need to begin
16 exchanging compensation for that traffic.

17 Q Okay. But you would agree that, initially, it
18 was what I have referred to earlier as a bill and keep
19 arrangement?

20 A Up until -- well, up until -- my only concern
21 is, initially, it was what it was, okay? The contract
22 says what it says, and we have to keep going back to the
23 contract in this case.

24 Q Well, Mr. Falvey, I am just asking you --

25 A Okay.

1 Q -- is it -- this is yes or no.

2 A Right.

3 Q Initially, didn't the parties agree to a bill
4 and keep arrangement for that traffic?

5 A Well, no.

6 Q Okay.

7 A The parties agreed to a more substantial
8 provision that says bill and keep up until two million
9 minutes. But on that next minute, then something else
10 happens.

11 Q Okay. And the something else that happens is
12 the parties will negotiate the specifics of a traffic
13 exchange agreement on a going-forward basis; isn't that
14 right?

15 A To apply on a going-forward basis, yes.

16 Q And could you explain what a bill and keep
17 arrangement is?

18 A Bill and keep originated with the independence.
19 And, initially, CLECs wanted bill and keep. That's the
20 irony of this. We didn't think that compensation was the
21 way to go. BellSouth insisted upon it.

22 But bill and keep, the derivation of that term
23 is that each party will bill its end users for local
24 compensation. You will only bill your end users, derive
25 all your compensation there. And then you will keep that

1 money. You don't deliver it over to the other customer,
2 to the other carrier.

3 Q So there is no compensation that goes back and
4 forth between the parties to the agreement?

5 A Not between the two carriers. The compensation
6 is derived from the end user.

7 Q Now, would you agree that the bill and keep
8 arrangement is a type of traffic exchange agreement; is
9 it not?

10 A Yes, in fact, I think I would -- you know, yes.

11 Q Okay. And another type of such an arrangement
12 could be a set rate. That could also be a type of
13 traffic exchange agreement or an arrangement for
14 reciprocal compensation; isn't that right?

15 A Yes. I mean, I think that our agreement --
16 because of the circumstances, because of the language of
17 the agreement -- strongly implies that our bill and keep
18 agreement was going to lead to a compensation
19 arrangement. It specifically says that no compensation
20 shall be exchanged until such and such time.

21 Q And then until that such and such time that you
22 have just referred to, at that point -- under Section
23 6(b) of the interconnection agreement -- the parties will
24 negotiate the specifics of a traffic exchange agreement
25 that will apply on a going-forward basis, correct?

1 A Well, it's -- let's break that down a little
2 bit. We will negotiate a --

3 Q Mr. Falvey, can you answer yes or no, and then
4 you can explain?

5 A Yes. That's what it says.

6 Q Thank you.

7 A But to be clear, what that means is that --
8 first of all, we will negotiate, subject to the other
9 provisions in the contract. Nowhere in that provision
10 does it say, oh, and by the way, we waive our right to
11 the MFN rights that we have firmly and very carefully
12 nailed down in Section 22 of the agreement.

13 But secondly, where it says, on a going-forward
14 basis, I just want to make it clear that that meant going
15 forward from that two million minutes; not going forward
16 from the time when you eventually come around to signing
17 an agreement.

18 Q Mr. Falvey, I think you started out in your
19 summary saying a deal is a deal, and BellSouth has to
20 live up to its obligations. And that would apply to
21 e.spire as well, wouldn't it?

22 A By all means.

23 Q And what e.spire agreed to in that agreement
24 should also be applicable, and they should also be --
25 live up to its obligation. Isn't that right; and live up

1 to what it agreed to?

2 A By all means, yes.

3 Q Now, the -- I believe --

4 COMMISSIONER JACOBS: Can I ask a question real
5 quick?

6 MS. KEYER: Sure.

7 COMMISSIONER JACOBS: I want to be clear about
8 the interaction between Section 6(b) and the most
9 favored clause, okay? The most favored clause says,
10 you are going to engage in traffic up to two million,
11 then you are going to negotiate something.

12 WITNESS FALVEY: That's correct.

13 COMMISSIONER JACOBS: Now -- and then, as I
14 understood it, you sought to invoke the -- Section
15 22. And I forget what subsection.

16 What was it?

17 WITNESS FALVEY: A.

18 COMMISSIONER JACOBS: A, at that point, in
19 addition to negotiating the other docket; is that
20 correct?

21 WITNESS FALVEY: Yes. And if I can elaborate,
22 what the -- what the reciprocal compensation part
23 says is that the parties will thereafter negotiate
24 the specifics of a traffic exchange agreement. So
25 that could include everything from who's going to

1 measure the traffic -- and mind you, up until now the
2 agreement said that they were going to measure it;
3 but, by default, we were measuring it, because they
4 never did.

5 Okay. So who's going to measure it; whether
6 there would be audit rights; certainly, what is the
7 rate. That is one of the things that would have
8 needed to be negotiated. When -- what type of
9 traffic will this apply to. We included the MFN
10 clause to ensure that we would get as good a rate as
11 any other carrier --

12 COMMISSIONER JACOBS: I see.

13 WITNESS FALVEY: -- in the country. The
14 question goes to the crux of the case. You hit the
15 nail on the head. The interaction between these two
16 provisions, as far as I am concerned, that's the
17 whole case.

18 COMMISSIONER JACOBS: Okay. And the .9 cents,
19 was that -- at the time that you invoked this clause,
20 that was the prevailing best rate out there?

21 WITNESS FALVEY: That's correct. The best, to
22 my knowledge. You have to actually sift through the
23 other agreements. But to my knowledge, that was the
24 best rate available. This is -- MFN provision is
25 actually a one-way door. e.spire can invoke it,

1 BellSouth cannot.

2 We are the much smaller carrier. We felt fairly
3 vulnerable signing the contract in July of '96. So
4 we laid out a very detailed MFN clause that's four
5 paragraphs long, to ensure that when we got to that
6 point, that we would get as good a rate as any other
7 carrier.

8 COMMISSIONER JACOBS: Thank you.

9 Side 2 of tape.

10 COMMISSIONER JOHNSON: Green, Section 6(b) -- after
11 you reached the two million minutes of use point,
12 y'all tried to negotiate -- or perhaps it was the
13 witness before that stated that there was some
14 negotiations that did take place. But those
15 negotiations broke down. At that point in time, did
16 you then go to this particular provision?

17 WITNESS FALVEY: At that point in time, no,
18 that's not quite accurate.

19 COMMISSIONER JOHNSON: Okay.

20 WITNESS FALVEY: There was a negotiation that
21 took place, but it was initiated by this provision.
22 We said, okay.

23 COMMISSIONER JOHNSON: Oh, by the Most Favored
24 Nations.

25 WITNESS FALVEY: Yeah. Right off the bat, we

1 said, well, as to the rate, I wouldn't expect to get
2 anything less than I am entitled to, .9 cents a
3 minute under my MFN clause. So take that as a
4 starting point.

5 Their counter to that was .2 cents a minute,
6 which is, I believe, lower than any carrier that I
7 know of gets in this state. And at any rate, under
8 the MFN, it's my choice. It sounds one-sided, but,
9 in fact, the negotiation leading up to this contract
10 is fairly one-sided in the other direction. We are
11 competing with carriers like AT&T and MCI WorldCom,
12 much bigger entities coming down the pike after us.
13 So we insisted on this very detailed MFN clause to
14 bolster our rights under the contract.

15 And by the way, the MFN says it applies to
16 interconnection services, whether or not presently
17 covered under this agreement. So that kind of --
18 that's kind of a wraparound clause.

19 COMMISSIONER JOHNSON: And it also went to -- you
20 described the traffic exchange agreement as to
21 applying to rate, type of traffic and all sorts of
22 things. So with respect to the type of traffic, that
23 was also something that you could go to other
24 agreements and determine -- and say, okay, well, I
25 know it at least applies to these types of traffic,

1 because the other agreements state that they applied.
2 Did you do the same analysis?

3 WITNESS FALVEY: Well, something very similar.
4 We felt that our contract, as it stands, is very --
5 was on very solid ground. It has its' definition of
6 local traffic that would cover all of these -- all of
7 this ISP traffic.

8 COMMISSIONER JOHNSON: I understand that, but --

9 WITNESS FALVEY: Now, to the extent that other
10 parties like Intermedia have come in before this
11 Commission with essentially the exact same language,
12 and you have ruled that ISP traffic is covered by
13 that definition, ISP traffic should also be included
14 under our definition of local traffic, which is
15 identical.

16 But there was no need to go, in other words,
17 reach out and get a rate as to ISP traffic, because I
18 had that in here already.

19 COMMISSIONER JOHNSON: Yeah. But let me make sure I
20 understand what you were saying earlier.

21 WITNESS FALVEY: Sure.

22 COMMISSIONER JOHNSON: After you exceed the two
23 million point, I thought you were suggesting that
24 everything was negotiable. So even if it was in the
25 contract before, that was a negotiable item under the

1 traffic exchange agreement.

2 WITNESS FALVEY: Well, in theory, we could -- we
3 could have accepted less than what was in the
4 contract. But to the extent that I have a right to
5 something under the contract, no.

6 COMMISSIONER JOHNSON: So that wasn't negotiable?

7 WITNESS FALVEY: It would not be negotiable.

8 COMMISSIONER JOHNSON: Okay.

9 COMMISSIONER JACOBS: And in that regard, then,
10 Section 22 is basically a -- is essentially a
11 baseline from which you did measure -- well, you base
12 negotiations from that point forward.

13 WITNESS FALVEY: Exactly. And it's really to
14 protect us. In July of '96, you have to kind of step
15 back, you know -- even our General Counsel's,
16 somewhat tentative about being one of the first
17 carriers to sign this type of an agreement.

18 Mind you, the reason we wanted to, was so we
19 could get into business. A lot of people spent a lot
20 of time around here negotiating and arbitrating. We
21 signed an agreement and got into business. But this
22 was -- this is what we needed in order to do that,
23 this iron-clad, Most Favored Nations provision.

24 And one way of looking at it is that, you know,
25 things might have been negotiable, but we had a

1 bottom line -- as Commissioner Jacobs points out --
2 that with respect to the rate, we would not accept
3 less than .9 cents a minute. And there was, as I
4 mentioned in my opening, a dual breakdown right off
5 the bat that we couldn't agree on what type of
6 traffic was covered, and we couldn't agree on the
7 rate. And those were such core provisions, that it
8 didn't make sense to proceed any further than that.

9 COMMISSIONER JOHNSON: And I guess -- you have
10 answered my question as to how you believe the
11 contract should be interpreted. But as I read the
12 language, in such an event -- and this is taking the
13 Most Favored Nations clause off the table, because I
14 understand the rights under that.

15 WITNESS FALVEY: Okay.

16 COMMISSIONER JOHNSON: But taking one step at a
17 time, that sentence that says, in such an event the
18 parties shall thereafter negotiate the specifics of a
19 traffic exchange agreement, which will apply on a
20 going-forward basis, it strikes me that in reading
21 that, that, even if the contract before said what
22 kind of traffic would be subject to it, that that was
23 a negotiable item; and that, because y'all were
24 almost starting the negotiation process over after --
25 that's how I was -- that's how I was reading this.

1 So it's fine for you to react, that you're almost
2 starting over to determine what the traffic should
3 be, what the rate should be; but that you always had
4 the option to go to the Most Favored Nations to find
5 those.

6 WITNESS FALVEY: Yeah, that's right. I mean, I
7 guess there would be a suggestion there that
8 BellSouth could avail itself of my Most Favored
9 Nations clause. And that's just not the way it's
10 written.

11 In other words, I can select better provisions
12 from another agreement. But if I -- if I -- but the
13 rest of this agreement, that only affects certain --
14 that would only affect the rate, okay? I am -- I am
15 taking a rate from the MFS agreement. I am not
16 taking anything else from that agreement.

17 That's what this actually says. It says that --
18 it says that -- we can substitute such more favorable
19 rates, terms or conditions for the relevant
20 provisions of this agreement. So it actually comes
21 out and says that you can just take the rates, you
22 can just take the terms, you can just take
23 conditions.

24 BellSouth voluntarily signed this, and that's
25 what we are enforcing.

1 BY MS. KEYER:

2 Q Mr. Falvey, what I am hearing you say is that
3 e.spire can basically pick and choose whatever it wants?

4 A That's correct. I think we -- we have been
5 very, you know, judicious in the extent to which we have
6 exercised this clause.

7 Q Now, isn't it true that there is not -- I think
8 we have already established this. But in the
9 interconnection agreement, there is not a set rate for
10 reciprocal compensation; isn't that true?

11 A There is an explicit rate. There is what I
12 would say is a process for arriving at a rate.

13 Q There is a process, but there is not a set rate
14 set forth in that interconnection agreement, is there?

15 A No. We -- you know, initially, the CLECs wanted
16 to keep it that way. The CLECs didn't want to have any
17 rates. I was an attorney in some of the earlier
18 proceedings where BellSouth said, no, we have to have a
19 rate, we have to have four-and-a-half cents a minute
20 switched access. But, no. But there is no rate in
21 this -- in this docket.

22 Q And, in fact, e.spire wanted even a higher
23 threshold, right? I mean, e.spire wanted 100 million
24 minute threshold.

25 A I don't know the answer to that, but that may be

1 true.

2 I will say that we did not want to put in place
3 the mechanisms for measuring. And the response to that
4 was that, well, BellSouth will measure. As it turns out,
5 BellSouth breached that provision, and we ended up
6 measuring anyway.

7 Q Wouldn't you agree, Mr. Falvey, that if it were
8 intended -- if the parties intended to include ISP
9 traffic and local traffic, that e.spire would have wanted
10 a lower threshold and not a higher threshold on the
11 minutes of use?

12 A Well, first of all, I didn't say that I knew
13 that we wanted a higher threshold. Second of all, there
14 were proceedings before this Commission that made it very
15 clear back in the -- in the fall and winter of 1995, that
16 the traffic was going to be terminating to the CLECs.
17 Everybody knew that.

18 There is a docket in the MFS docket where MFS
19 put on the only record evidence. And that only record
20 evidence said, in New York, the majority of the minutes
21 are terminating to us. So BellSouth was on notice. Bob
22 Scheye was the witness in that proceeding. Bob Scheye,
23 as we all know, was Jerry Hendrix's boss at the time.

24 Q Okay.

25 A Everyone knew.

1 Q Excuse me?

2 A Everyone knew which way the traffic was going to
3 flow.

4 Q You were not involved in the negotiations, is
5 that what you just said, of this agreement?

6 A I was not a party to the negotiations. My boss,
7 Riley Murphy, was, and --

8 Q And Jerry Hendrix --

9 A If I could finish -- to the extent that I was
10 responsible for the BellSouth region, I had minute by
11 minute, you know, updates as to what was going on in
12 those negotiations. And I have had extensive
13 conversations since that time, as to what went on in
14 those negotiations.

15 Q And if Jerry Hendrix was directly involved in
16 those negotiations and testifies that e.spire wanted a
17 100 million-minute threshold or a higher threshold, you
18 would not disagree with that; or you would have no reason
19 to, or no basis?

20 A I would not have -- let me say the answer is
21 that I would not be the one to object. My attorney would
22 object. But we couldn't object to the fact -- but we
23 could certainly object to the relevance of that, because
24 what I would guide the Commission to do is to read this
25 contract. We aren't going to talk -- there is no reason

1 to look at the conversations that went on leading up to
2 this contract, unless there is an ambiguity in this
3 contract. And that's critical to this case, like any
4 contracts case. So I would object on relevance, if I
5 were the attorney.

6 Q Are you an attorney now, Mr. Falvey, or are you
7 a witness?

8 A Well, you asked me if I would object, so I
9 became one.

10 Q No, I didn't ask you if you would object. I
11 asked you, if you had a basis for disagreeing with his
12 testimony, if he testified that during the negotiations
13 -- of which he was intimately and personally involved --
14 if he testified that e.spire wanted a 100 million-minute
15 threshold, do you have any basis to disagree with that?

16 A At this instant, I don't. I could certainly
17 find out whether we can put that on the table. There is
18 a record of that negotiation.

19 Q Would you recognize Mr. Robertson's signature or
20 writing, handwriting?

21 A No.

22 Q You would not? He was your boss, and you
23 wouldn't recognize his handwriting?

24 A Richard Robertson was never my boss.

25 Q Now, Mr. Falvey, isn't it true that what

1 e.spire is trying to do in this case is get the
2 Commission to add a rate and add a term to this
3 agreement?

4 A I think you can look at it as adding a rate
5 where there was none, or you could look at it as
6 substituting a rate of .9 for a rate of zero.

7 Q Okay. Substituting a rate where there was no
8 rate?

9 A Essentially, yes.

10 Q In fact, I think it's been marked as JCF-2, your
11 letter of November 14th, 1997. e.spire was actually
12 seeking to amend the agreement, wasn't it?

13 A I think that that's one way we could have done
14 it. If we had reached a traffic exchange arrangement, we
15 certainly could have done it by amendment.

16 Q And your definition of negotiate, Mr. Falvey,
17 would that be a party saying, this is it, and this is all
18 I will take; do you consider that to be negotiation?

19 A Yes. I mean, there is a book on negotiating
20 called, getting to yes. And there is a thing called the
21 BNTM. That is an acronym that essentially stands for
22 your bottom line position. It is a very well-known book.

23

24 Our bottom line position was not -- we were
25 never going to go below .9 cents.

1 Q So you had no intention of negotiating, did you?

2 A We would never negotiate below .9 cents. I
3 don't think there would be any -- I mean, barring some
4 other strange provision, that was our bottom line.

5 Q And I don't remember what your exact words were
6 regarding BellSouth's counter offer, if you will, but
7 BellSouth did offer the .2 cents per minute; did they
8 not?

9 A Yes.

10 Q And are you aware that this Commission, the
11 Florida Public Service Commission, approved in the
12 MCI-AT&T arbitration cases, a composite reciprocal
13 compensation rate of .00325?

14 A I would take that, subject to check. Again, you
15 don't have the right to exercise the most favorable
16 provisions clause of Section 22, and I do.

17 Q Okay. The amendment that you were seeking in
18 your November 14th, 1997, letter that's been identified
19 as JCF-2, that was not adopted or accepted by BellSouth,
20 was it?

21 A No. That's why we are here today.

22 Q And the Florida agreement is the same as the
23 Georgia agreement; is that right?

24 A It's a one region-wide agreement, yes, in terms
25 of the interconnection agreement.

1 Q Your testimony on page -- your direct testimony
2 on page 13 refers to the Georgia Public Service
3 Commission and a hearing that was held in Georgia
4 regarding the same agreement. Specifically, lines 21 and
5 22 on page 13, and then page 14, lines one and two?

6 A Yes.

7 Q You refer to the hearing officer's
8 recommendation or finding that e.spire is contractually
9 entitled under the Most Favored Nation clause in its
10 agreement, and you refer to the Section 22(a) to
11 collect -- I guess in Georgia it's the .0087 per minute
12 rate adopted from the interconnection agreement between
13 BellSouth and another carrier?

14 A That's correct.

15 Q Okay. Isn't it true that the Georgia Public
16 Service Commission did not accept that, just yesterday,
17 and, in fact, voted to -- or basically voted and held
18 that e.spire must negotiate a traffic exchange agreement
19 with BellSouth?

20 A No. Let me clarify that. The Commission -- it
21 is my understanding they postponed a vote on all of these
22 issues. They could come back two weeks from now and rule
23 entirely in my favor. They said that during that
24 two-week period, that they would encourage the parties to
25 negotiate.

1 They did not rule that the MFN does not prevail
2 in the negotiation provision. In fact, Commissioner
3 Baker, I think, by the report that I got, basically said
4 that he was inclined to rule in our favor on virtually
5 every point; that he wasn't ready, yet, to rule in our
6 favor as to the rate.

7 But I think that -- I am glad you raised this,
8 because I think you have completely mischaracterized what
9 happened yesterday at the Georgia Commission. I don't
10 really think that this is an appropriate way to rehash
11 what happened orally before that Commission.

12 To my understanding, there was no vote at all,
13 other than to postpone the vote for two weeks.

14 Q Were you there, Mr. Falvey?

15 A No, I was not. But I have a direct report by
16 phone from someone who was.

17 Q Okay. When did you join e.spire?

18 A May of 1996.

19 Q Didn't the Georgia Commission yesterday
20 eliminate any damage payments recommended by the initial
21 hearing officer, or did they, according to your
22 understanding, also not rule on that?

23 A To my knowledge -- I think -- let's be clear.
24 There is a whole series of damages that we need in this
25 contract case, okay?

1 Q Okay. I am talking about compensatory damages
2 for the Traffic Master, specifically.

3 A For the Traffic Master system, we have asked for
4 that here, we have asked for that in Georgia. And it was
5 my understanding -- and I may be wrong, because this just
6 happened yesterday. I don't really think this is
7 appropriate to be discussing it at length. But it was my
8 understanding that they didn't have a definitive vote on
9 anything. Some of the Commissioners mused as to how they
10 thought this would come out, but they said they would
11 vote on the whole thing two weeks from now. We will know
12 a lot more in two weeks.

13 Q Okay. Mr. Falvey, will you refer to Section
14 6(b) of the agreement?

15 A Yes.

16 Q Now, you would agree, would you not, that that
17 last sentence -- that it says, in such an event -- that
18 the event referred to there is when the difference in
19 minutes for terminating local traffic exceeds two million
20 minutes per state on a monthly basis?

21 A That's correct.

22 Q Then reading further, it says, the parties will
23 thereafter negotiate specifics of a traffic exchange
24 agreement.

25 We can agree that that would occur once the,

1 what I refer to as the, two million-minute threshold is
2 reached?

3 A That's correct. And then we would apply the
4 rate retroactively to that two million and first minute.
5 We have a lot of retroactive arrangements like that
6 between our companies, as you know.

7 Q Okay. And you -- you say it applies
8 retroactively. Do you interpret going forward and
9 retroactively to mean the same thing?

10 A Yes.

11 Q Okay.

12 A And I would put it this way, that what this
13 sentence means is that, going forward from the two
14 million minute; however, that would be retroactively from
15 the end of a negotiation. Particularly, you know, to the
16 extent that you have managed to drag the negotiation out
17 into litigation and no doubt into a series of appeals
18 that won't end for some time, and are costing my company
19 an awful lot of time and money.

20 Q Okay. Let me ask you another question about
21 that. That language that we just addressed, that last
22 sentence of Section 6(b), that doesn't state that the
23 parties must negotiate a specific rate, does it?

24 A As I said before, it certainly implies that cash
25 compensation would be exchanged from that point forward.

1 Q But it doesn't say that, now, does it, Mr.
2 Falvey? Please answer with a yes or a no.

3 A No. Explicitly, it does not say that.

4 Q Thank you.

5 A If I can explain my answer why I say,
6 explicitly; because, implicitly, we still have a right to
7 a rate, because you have to read a contract in its
8 entirety as a whole. And you can't read this provision
9 without also reading Section 21, which is my critical
10 core Most Favored Nations clause.

11 Q I want to ask you one last question about that
12 section. Assuming that the two million-minute threshold
13 has been met, which BellSouth denies -- but you are not
14 saying that negotiations are not required; isn't that
15 right?

16 A I never said that, just that they foundered,
17 because we couldn't agree on some very basic things.

18 COMMISSIONER JACOBS: Did I see -- on that last
19 point, did I see some reference of and maybe even
20 some testimony that you had presented your statement
21 of the minutes of use to BellSouth, and they have
22 been agreed upon or at least had not been refuted?

23 WITNESS FALVEY: Yes, that's correct. And
24 that's in the correspondence from Pat Finland that
25 was attached to my complaint. And that

1 correspondence states that we will -- to the -- that
2 they basically admitted that they had breached the
3 requirement in the agreement, that they should be
4 measuring this traffic. And then went on to say
5 that, given that we have not measured the traffic
6 ourselves, we will accept your reports.

7 COMMISSIONER JACOBS: And did those reports show
8 -- well, let me ask you, what did those reports show?

9 WITNESS FALVEY: Those reports show that they
10 owe us \$1.45 million.

11 COMMISSIONER JACOBS: Based on -- and can you
12 tell me, based on your exceeding two million minutes
13 of use, for what period of time?

14 WITNESS FALVEY: That's correct. From March
15 1997, that was the first month we went over two
16 million minutes; and the agreement expires September
17 1, 1998. Okay. So it's already expired. And so
18 this case is really about a discrete, finite amount
19 of money. It's not, you know, some never-ending
20 hemorrhaging of money. It's a very discrete, finite
21 sum of money.

22 And the reciprocal compensation after September
23 1, 1998, will be governed by the new agreement, which
24 is coming before you shortly in arbitration.

25 COMMISSIONER JACOBS: Now, when you entered

1 negotiations, that was -- that was in March, as soon
2 as the first time you exceeded; or was it some period
3 after that?

4 WITNESS FALVEY: It was a region wide
5 agreement. So the first letter that I sent was in
6 November of 1997, and that was based on a realization
7 by our company that, back in August of '97, we had
8 gone over the two million minutes.

9 Now, why were we a little bit behind in that
10 regard? Well, because the onus was on BellSouth to
11 measure the minutes each month and report them to us,
12 from the minute we turned up our very first switch
13 back in Columbus, Georgia, in November of '96. So
14 what happened was that sometime after August of '97,
15 we said, hey, we should be getting reports; and we
16 should be billing them for reciprocal compensation.

17 At that point, we put into place measurement
18 systems, and we initiated this negotiation. When we
19 initiated it, okay, in November of '97, we did it
20 region wide, and we put in rates for a whole series
21 of states where we anticipated having traffic. We
22 didn't go over -- we didn't turn up the switch in
23 Jacksonville, which is what this is all about, until
24 December of '97, and we didn't go over the two
25 million-minute mark until March of 1998.

1 COMMISSIONER JACOBS: Oh, I see. So --

2 WITNESS FALVEY: Okay. But we had already
3 initiated the process of negotiation prior to that,
4 because of earlier switches. The August '97 was for
5 Columbus, Georgia.

6 COMMISSIONER JACOBS: Okay. I understand now.

7 WITNESS FALVEY: Does that help?

8 COMMISSIONER JACOBS: Yes, it helps.

9 WITNESS FALVEY: That's a lot of dates.

10 COMMISSIONER JACOBS: That helps.

11 Now -- so -- and the only other point I wanted
12 to see, when you were in the midst of these
13 negotiations for the switch that we are talking about
14 here -- which is Jacksonville -- that is when you
15 took the snapshot, if you will, for which you would
16 invoke the Most Favored Nations clause; is that
17 correct? Not back when you first began the process,
18 or would it have made a difference?

19 WITNESS FALVEY: It doesn't matter, only to the
20 extent that the MFS agreement was available
21 throughout that period.

22 COMMISSIONER JACOBS: Okay. It wouldn't have
23 made a difference which rate. Would it have been the
24 same had you invoked it earlier or later?

25 WITNESS FALVEY: Yes.

1 COMMISSIONER JACOBS: Okay.

2 WITNESS FALVEY: We would have still turned to
3 that MFS agreement.

4 COMMISSIONER JACOBS: Okay.

5 BY MS. KEYER:

6 Q Mr. Falvey, at the time that you sent the
7 letters identified as JCF-2 and JCF-4 -- I believe those
8 were in November and December of 1997 -- Florida had not
9 reached the two million-minute threshold, had it? And I
10 believe that's -- that has just come out in your
11 discussion with Commissioner Jacobs?

12 A That's correct. We anticipated it. And if I
13 can finish my answer.

14 Q Excuse me, I am sorry, I thought you were
15 through.

16 A For once, we wanted to try to get ahead of the
17 game. Here we were kind of behind the eight ball,
18 because we had to put in place measurement systems for
19 the first three months, August, September, October. We
20 were just doing estimates, that's the best we could do.
21 We put them before the Georgia Commission, and I think
22 they are going to accept those, under the circumstances.
23 BellSouth wasn't doing any measurement themselves.

24 But we were kind of trying to play catch-up, to
25 the extent that you had never delivered us any reports.

1 So for once, we were starting to say, okay, we have got a
2 switch turned up in Jacksonville in December; and we are
3 going to be billing that soon, so let's get that rate
4 established, also.

5 Q Okay. But under your own records, Mr. Falvey,
6 Florida did not exceed the two million-minute threshold
7 until March 1998; isn't that right?

8 A That's correct.

9 Q Okay.

10 A That was the first time you have ever raised
11 this issue. This is typical that there is a series of
12 issues that come up sort of at the 11th hour, here. But
13 I see where you're going.

14 Q Mr. Falvey, that's not responsive to my
15 question.

16 MS. KEYER: And I am going to move to strike
17 that portion.

18 WITNESS FALVEY: I see where you're going. I am
19 trying to respond to the implication.

20 BY MS. KEYER:

21 Q I just asked a question.

22 A Okay.

23 Q And you answered it, I believe.

24 A Okay.

25 Q Now, if e.spire wanted to add a rate in the

1 reciprocal compensation provision or under the local
2 traffic exchange portion, they could have said so,
3 couldn't they?

4 A We sure did. I wrote that into my letters,
5 explicitly.

6 Q Well, I am talking about when you entered into
7 the interconnection agreement, and you entered into
8 Section 6(b), and you agreed to negotiate. Once the two
9 million-minute threshold had been met, you agreed to
10 negotiate the specifics of a traffic exchange agreement.

11 If e.spire intended, or the parties agreed to
12 allow you to add a rate rather than to negotiate,
13 couldn't the parties have done that and agreed to do
14 that?

15 A No. And let me explain why. Because at the
16 time, or in July of '96, I don't know what the best rate
17 is going to be when I reached the two million-minute
18 mark, okay? I -- that's when we are going to start
19 exchanging compensation. And I didn't know, as one of
20 the first carriers to make the effort to come into this
21 market, what the best rate was going to be available at
22 that time.

23 Q Well, Mr. Falvey --

24 A Let me finish.

25 Q Okay.

1 A If I agree to .5 cents, only to find out that
2 AT&T and MCI -- with superior bargaining power -- are
3 able to get .9 or a penny a minute, then I am at a
4 disadvantage, vis-a-vis those other carriers.

5 So we didn't feel that it was advisable to put
6 in a rate. We rested upon our Most Favored Nations
7 clause, a very good -- one of the best in the country, I
8 might add.

9 Q Well, Section 6(b) is a specific provision that
10 applies to the traffic service. I mean, traffic exchange
11 agreement; does it not?

12 A Is it? I guess the answer to that is yes. I
13 mean it is --

14 Q Okay.

15 A It is one provision of the contract.

16 Q And if you had concerns about a specific rate,
17 and you wanted the best rate, you could have negotiated
18 that. And you could have said, as BellSouth has done in
19 other agreements, that e.spire may elect the terms of any
20 compensation arrangement for local interconnection then
21 in effect between BellSouth and any other
22 telecommunications carrier. Or in the absence of such
23 election, the parties will negotiate the specifics of a
24 traffic exchange agreement, which will apply on a going
25 forward basis; isn't that true?

1 A No. I wouldn't say we could have negotiated
2 such a provision. I would say we did negotiate such a
3 provision. We negotiated a provision that would allow us
4 to access our MFN at any time, whether or not a provision
5 is included in this agreement.

6 So I don't know whether you are trying to tell
7 me that reciprocal compensation is not in the agreement,
8 or is in the agreement. But either way, I get to use my
9 MFN.

10 Q Mr. Falvey, will you look at -- I am going to
11 have to withdraw that.

12 I will come back to that point.

13 If ISP traffic is held not to be local, would
14 e.spire meet the two million-minute threshold? It
15 wouldn't, would it, in Florida?

16 A I honestly don't know the answer to that. But I
17 suspect that the answer is no.

18 I mean, there is call centers. There is a lot
19 of different types of customers that can generate a very
20 similar pattern of traffic. So I am just not familiar
21 enough with our Jacksonville customer base to answer that
22 definitively.

23 MS. KEYER: I don't have anything further.

24 COMMISSIONER JOHNSON: Staff.

25

CROSS EXAMINATION

1 BY MS. KEATING:

2 Q Good afternoon, Mr. Falvey.

3 A Good afternoon.

4 Q I have just got a few questions, and most of
5 them are for clarification.

6 A Sure.

7 Q I believe you had indicated earlier that you
8 were not personally involved in the negotiation of this
9 agreement; is that correct?

10 A That's correct. I mean, you know, I would, like
11 I said, tend to get very immediate reports. I don't know
12 if you have negotiated an interconnection agreement. But
13 it is very time-intensive, hours upon hours. I have
14 spent a lot of time doing it this second time around. So
15 we didn't put two of us in the room.

16 But as I said, I would get up-to-the-minute
17 reports at every step of the way.

18 Q Well, to the best of your knowledge, was ISP
19 traffic ever specifically discussed?

20 A I don't think we -- I think, no. I really don't
21 think it was. I think -- we never saw a need to
22 distinguish between different types of local traffic.

23 Q Okay. Now, is it e.spire's position that the
24 term, local traffic, as defined in the interconnection
25 agreement, does not discriminate among types of end users

1 and does not exclude calls from end users to ISPs in the
2 same local calling area?

3 A That's essentially correct. It covers all local
4 calling.

5 Q Now, when did e.spire first become aware of
6 BellSouth's position regarding ISP traffic?

7 A I would have to say that it was actually the
8 summer. I have -- it gets hard to remember the years,
9 especially as we step over into 1999. But it was
10 actually, I would say, the summer of '97. There were
11 some letters that Bell Atlantic and BellSouth sent to the
12 FCC, sort of suggesting that they -- what their position
13 was on this issue.

14 Q And what was e.spire's response?

15 A I guess -- I mean -- I am not sure that we
16 responded specifically to those letters. But our
17 industry -- in the -- in DC, the FCC matters, we tend to
18 work through ALTS, our trade association. And ALTS, I
19 believe, wrote a fairly firm response.

20 This is kind of a life blood issue for our
21 industry. And so we -- as a member of ALTS, and through
22 a series of meetings at the FCC over the course of the
23 last year-and-a-half or so, we have been very vocal in
24 protesting the exclusion of that traffic from the
25 definition of local calls.

1 Q And did you address any of your concerns, or
2 e.spire's concerns to BellSouth directly?

3 A You know, I think the first time that we brought
4 it to them directly, was when we realized that they
5 hadn't been reporting, and that we hadn't been billing
6 them because we hadn't been -- they hadn't been
7 reporting.

8 I mean, putting the Traffic Master in place was
9 no small endeavor. We started probably, you know, in the
10 late summer; but getting -- finding out which software to
11 use and getting that system installed in the appropriate
12 switches was a lengthy endeavor.

13 Q Just one more question. At what point is a
14 call considered terminated?

15 A I think you look at the definition in our
16 interconnection agreement, and it addresses exactly that
17 issue. I think we also answered an interrogatory on that
18 question. If you would just give me a minute to find the
19 definitions.

20 Actually, let me take a look. To the extent
21 that we essentially answered this in the interrogatory, I
22 just want to make sure my answer is consistent with the
23 answer to the interrogatory.

24 Q That's fine.

25 A Call termination occurs when a call is delivered

1 to the exchange bearing the call number.

2 MS. KEATING: Thank you, Mr. Falvey. Those are
3 all the questions staff has.

4 COMMISSIONER JOHNSON: Commissioner Jacobs.

5 COMMISSIONER JACOBS: Mr. Falvey, you had some
6 discussion in your testimony -- basically, it was an
7 unjust enrichment argument, where you said that for
8 BellSouth not to have to pay reciprocal compensation
9 amounts to them, having an unjust enrichment. Could
10 you explain that to me?

11 WITNESS FALVEY: Well, essentially, the
12 BellSouth position is not really an affirmative
13 regime in any sense. It's really, well, we are not
14 going to pay you for this type of traffic, but it
15 doesn't really say how they are going to pay.

16 You know, they say, well, they are not local
17 calls. Well, if they are not local calls, then they
18 are something else. And the fact of the matter is,
19 if they are not going to pay me anything at all, I am
20 certainly incurring costs to carry this traffic.
21 And, in fact, the Telecom Act even says, you shall --
22 we have a right to the additional cost of
23 transporting and terminating traffic.

24 But, I mean, there is a lot more than that.
25 There's -- just enrichment. But there is also just a

1 fundamental, which is kind of an equitable principal.
2 But there is the legal issue, is that there is --
3 they are in breach of a contract, and that they are
4 taking away a contract right, which is that my
5 contractual right to recover under the
6 interconnection agreement.

7 COMMISSIONER JACOBS: In that -- in those
8 circumstances, the CLEC -- you are saying the CLEC
9 should have been compensated -- let's say we go to
10 the interpretation that the BellSouth -- the ILEC has
11 here, that this is not local traffic. Then what you
12 are saying is that CLEC should have gotten some other
13 type of compensation, if that were the case?

14 WITNESS FALVEY: Yeah. And I think -- you know,
15 it's my understanding here in Florida that that issue
16 has been fairly settled, that it is local traffic.
17 But I think that's absolutely right that -- if it's
18 not, then, you're sort of in limbo in terms of how
19 you're getting compensated for carrying that traffic.

20 COMMISSIONER JACOBS: Okay.

21 WITNESS FALVEY: And to the extent that, you
22 know, we signed up customers relying upon our
23 contract -- which was signed before the FCC rules
24 were issued, you know, long before the Eighth Circuit
25 decision ever came out -- we feel we have a right to

1 rely on that contract.

2 COMMISSIONER JACOBS: Thank you.

3 COMMISSIONER JOHNSON: Redirect?

4 MR. HORTON: No redirect.

5 COMMISSIONER JOHNSON: Mr. Falvey, let me ask you
6 one question. I think it's something you said very
7 early on in your testimony. You said that
8 originally, I think, that your company wanted bill
9 and keep? You were talking just in general.

10 WITNESS FALVEY: Right, right.

11 COMMISSIONER JOHNSON: It's history. And you said,
12 in fact, we wanted bill and keep.

13 WITNESS FALVEY: Yeah. What I was referring to
14 was the earlier positions of the CLEC industry.

15 COMMISSIONER JOHNSON: Uh-huh.

16 WITNESS FALVEY: There is some suggestion that
17 us charging them is not fair somehow, it's not
18 equitable. And it's in that context that our
19 industry notes that this was all their idea in the
20 first place. I mean, Joe Cresse put testimony in in
21 1995 that said, if we have compensation rates between
22 the carriers, there is a potential for carriers to
23 select customers that have large amounts of
24 terminating traffic.

25 At the same time, BellSouth went into those

1 hearings. And I have been reading the orders lately,
2 because I was an attorney in those proceedings.
3 BellSouth said, not only should there be
4 compensation, it should be at the switched access
5 rates. It should be four-and-a-half cents a minute,
6 four-and-a-half cents a minute.

7 And at the time, I think they thought that they
8 were going to be -- since they had all the customers,
9 that they were going to be on the receiving end of
10 this traffic. And our industry was saying, no, bill
11 and keep, we don't really know how this is going to
12 turn out.

13 By the time we signed these agreements, everyone
14 knew exactly what was going on, exactly which way the
15 traffic was going to flow. And, in fact, MFS put
16 evidence on in the December '95 docket to say, here
17 is what our records show in New York City today. We
18 are receiving the traffic, okay?

19 So at that point, you know, everyone gravitated
20 towards a permanent rate. And just -- it is very
21 ironic that now that they got some form of
22 compensation, they are complaining that it's way too
23 high; that they have come all the way from
24 four-and-a-half cents a minute, down to .2 cents a
25 minute.

1 COMMISSIONER JOHNSON: Okay. Yeah. I just wanted
2 that perspective. I do remember, at least in the
3 cases here, we were dealing with the issue. And I
4 believe I probably voted for bill and keep. I think
5 I was a minority on that one.

6 WITNESS FALVEY: Right.

7 COMMISSIONER JOHNSON: And I was trying to remember
8 the rationale as to why the CLECs were supportive.
9 And my recollection, I think, was the same as yours.

10 WITNESS FALVEY: One of them was the
11 administrative burden. I remember Nina Kornell was
12 one of the witnesses.

13 COMMISSIONER JOHNSON: Yeah.

14 WITNESS FALVEY: And there is an administrative
15 burden in terms of putting in the measurement and
16 billing systems. And to that extent, our contract
17 took that into account. We said, hey, we had ACSIs-7
18 to put into place, E991, billing; literally starting
19 with nothing, the same systems that, you know, an
20 insurance company would have.

21 All of a sudden -- a small insurance agent. All
22 of a sudden, we are trying to become a local exchange
23 carrier like BellSouth. So the purpose of our
24 contract was, until there was some money at stake, we
25 will do bill and keep for the same reason, the

1 administrative ease and efficiency.

2 COMMISSIONER JOHNSON: But by the time you said
3 y'all started actually negotiating these particular
4 agreements, you were kind of more aware of what was
5 happening out there.

6 WITNESS FALVEY: Yes. I think everyone --

7 COMMISSIONER JOHNSON: How the traffic flowed?

8 WITNESS FALVEY: Right. I mean, Bob Scheye was
9 here in Florida. He was the witness for BellSouth in
10 those same hearings. And I was the attorney, and we
11 put on the traffic study. I think it was somewhat
12 confidential, but it was the only -- it was cited in
13 that order as the only evidence. And that evidence
14 showed that the CLECs were going to be on the
15 receiving end.

16 COMMISSIONER JOHNSON: Got you.

17 WITNESS FALVEY: So if Bob was paying attention
18 -- and I think he usually does -- then, yeah,
19 everyone knew exactly what was going on. A part of
20 the conundrum for the R box is that, for 10 years
21 they were saying that it costs four-and-a-half cents
22 a minute or three-and-a-half cents a minute, whatever
23 it is, to terminate local calls. This is very
24 expensive. We need to be compensated for it.

25 All of a sudden, someone else is performing that

1 termination, and they are on the paying end. They
2 are essentially paying access charges.

3 Well now, all of a sudden, access doesn't cost
4 much at all. It's only -- you know, comes out to be,
5 oh, only .2 cents a minute. So I think they have
6 kind of been on the horns of a dilemma. And one way
7 they are trying to work it out is to create this
8 separate category for ISP traffic.

9 COMMISSIONER JOHNSON: Okay. Thank you.

10 Any follow-up? No?

11 Thank you.

12 MR. HORTON: May Mr. Falvey be excused?

13 COMMISSIONER JOHNSON: Yes. We will admit the
14 exhibit. I don't think I did that.

15 MR. HORTON: Sorry.

16 COMMISSIONER JOHNSON: Show Exhibit 5 admitted
17 without objection.

18 And you are excused.

19 WITNESS FALVEY: Thank you.

20 (Witness excused.)

21 (Whereupon, Hearing Composite Exhibit No. 5 was
22 received into evidence.)

23 COMMISSIONER JOHNSON: Let's take a short break,
24 about 10 minutes.

25 (Thereupon, a recess was taken.)
 (Transcript continues in sequence in Volume 2.)