ORIGINAL

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February 8, 1999

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

**Re: Docket No. 981008-TP**

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Post-Hearing Brief, which we served today. Please file them in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Mary K. Keyer (KR)

Mary K. Keyer

ACK ____
AFA ____
APP ____
CAF ____
CMU ____
CTR ____
EAG ____
LEG 2
LIN 2
OPC ____
RCH ____
SEC 1
WAS ____
OTH ____

Enclosures

cc: All parties of record
M. M. Criser, III
N. B. White
William J. Ellenberg II (w/o enclosures)

DOCUMENT NUMBER-DATE
FEB-8 99
FPSC-RECORDS/REPORTING

**CERTIFICATE OF SERVICE**

**Docket No. 981008-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 8th day of February, 1999 to the following:

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Mary K. Keyer (MKE)
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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

| | | |
|---|---|---|
| COMPLAINT OF e.spire COMMUNICATIONS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING RECIPROCAL COMPENSATION FOR TRAFFIC TERMINATED TO INTERNET SERVICE PROVIDERS | ) | Docket No. 981008-TP<br><br>Dated: February 8, 1999 |

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**BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF OF THE EVIDENCE**

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## STATEMENT OF THE CASE

Section 251(b)(5) of the Telecommunications Act of 1996 ("Act") imposes upon local exchange carriers ("LECs") the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 252(d)(2)(A) provides that for purposes of compliance by an incumbent LEC ("ILEC") with Section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless, *inter alia*, they allow recovery of the costs "associated with the transport and termination on each carrier's network of calls that originate on the network facilities of the other carrier." (emphasis added)

As the FCC made clear in its August 8, 1996 Local Competition Order and applicable rules, the reciprocal compensation obligation imposed on LECs by Section 251(b)(5) only applies to local traffic. *First Report and Order*, CC Docket No. 96-98 (Aug. 8, 1996), ¶¶ 1033-1040. The FCC explicitly held that Section 251(b)(5) reciprocal compensation obligations

> should apply only to traffic that originates and terminates within a local area ... [R]eciprocal compensation for transport and termination is intended for a situation in which two carriers collaborate to complete a local call ... Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. (emphasis supplied)

Id. at ¶¶ 1034-1035. Section 51.703(a) of the FCC rules requires LECs to "establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier."

(emphasis supplied) Section 51.701(e) defines a reciprocal compensation arrangement between two carriers as:

> one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier. (emphasis supplied)

For purposes of reciprocal compensation arrangements between LECs, "local telecommunications traffic" means traffic "that originates and terminates within a local service area established by the state commission." 47 C.F.R. § 51.701(b) (emphasis supplied) The fundamentally local nature of reciprocal compensation is highlighted by Section 252(d)(2)(A) of the Act, which states that reciprocal compensation arrangements must provide for recovery of costs associated with the carriage of calls terminating on the network of the carrier receiving the compensation payments.

On August 12, 1997, BellSouth Telecommunications, Inc.("BellSouth") issued a memorandum to its Alternative Local Exchange Carrier ("ALEC") customers reminding them that BellSouth's interconnection agreement with ALECs applies only to local traffic and that traffic to and from Internet Service Providers remains jurisdictionally interstate. The memorandum further stated that BellSouth will not pay or bill reciprocal compensation for this traffic.[1] (Hendrix, Tr. at 142-143).

[1] The August 12, 1997, letter was sent to e.spire and responded to by e.spire well before e.spire claimed the threshold was met in March 1998. (Hendrix, Tr. at 199-200).

e.spire filed a complaint alleging BellSouth breached its Agreement with e.spire in not paying e.spire reciprocal compensation at the rate of .009 cents for the termination of local traffic, including ISP traffic. The formal hearing on this matter took place on January 20, 1999. BellSouth submitted the direct and rebuttal testimony of Jerry Hendrix and Albert Halprin. The hearing produced a transcript of 275 pages and 9 exhibits.

This Brief of Evidence is submitted in accordance with the post-hearing procedures of Rule 25-22.056, Florida Administrative Code. A summary of BellSouth's position on each of the issues to be resolved in this docket is delineated in the following pages and marked with an asterisk.

## STATEMENT OF BASIC POSITION

BellSouth respectfully requests the Commission deny the relief sought by e.spire Communications, Inc. ("e.spire") in its Complaint. e.spire is not entitled to an award of "damages" for reciprocal compensation or other "damages" allegedly claimed,[2] even assuming the Commission has the authority to award such relief, because the Interconnection Agreement ("Agreement") between e.spire and BellSouth does not require the parties to compensate each other for the termination of local calls. Rather, the Agreement requires that the parties "negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis" once a specified threshold differential in local traffic termination had been met. Thus, at most, even if e.spire established it met the

[2] e.spire claimed damages in the hearing for its tracking system, although e.spire did not include such a claim in its complaint and e.spire had already obtained this tracking system before it began exchanging local traffic in Florida. (Talmage, Tr. at 17, 19)(Hendrix, Tr. at 166).

threshold differential, which BellSouth denies, e.spire is entitled to an order requiring BellSouth to "negotiate the specifics of a traffic exchange agreement," which BellSouth is willing to do.

In a desperate attempt to obtain money from BellSouth to which it is not entitled, e.spire seeks to circumvent the plain language of its Agreement by insisting that it does not have to negotiate anything. Rather, according to e.spire, it can simply "adopt" the reciprocal compensation rate in BellSouth's Interconnection Agreement with MFS and thereby avoid the entire negotiation process set forth in the Agreement. e.spire's argument violates well-established principles of Florida contract law and cannot be accepted by this Commission.

Finally, the obligation on the part of BellSouth and e.spire to "negotiate the specifics of a traffic exchange agreement" is only triggered once "the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis." In determining whether this threshold differential has been met, calls made by an end user to access the Internet or other services offered by an internet service provider ("ISP") must be disregarded, since such traffic is jurisdictionally *interstate* and does not constitute "local traffic."[3] Because there is no evidence that first, this threshold differential has been met, and second, that

[3] The term "ISP" is used in the industry to refer to an Information Service Provider, of which an Internet Service Provider is a subset. The Telecommunications Act of 1996 defines the term "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications* ...." 47 U.S.C. § 153(20). BellSouth uses the term "ISP traffic" herein to mean traffic originated by a residence or business end user to an ISP which provides that end user, via telecommunications, with the information services --- including Internet access service -- defined above.

the threshold differential has been met without taking ISP traffic into account, the existing Agreement remains in effect. Accordingly, the Commission should dismiss e.spire's Complaint in its entirety.

## STATEMENT OF POSITION ON THE ISSUES

Issue 1: Is ISP traffic included in the definition of "local traffic" as that term is defined in the Interconnection Agreement between BellSouth and e.spire?

**Position: No. Calls made by an end-user customer to access the Internet or other services offered by an Internet Service Provider ("ISP") do not constitute local traffic. These calls are in the nature of exchange access traffic that is jurisdictionally interstate.

Issue 2: Did the difference in e.spire's minutes of use for terminating local traffic exceed two million minutes in Florida on a monthly basis?

**Position: No. e.spire is including ISP traffic in its alleged minutes of use for terminating local traffic in Florida. E.spire did not prove the difference in minutes of use for terminating local traffic in Florida on a monthly basis exceeded 2,000,000 minutes with or without ISP traffic.

Issue 3: In this instance, how should the reciprocal compensation rate, if any, be determined under the parties' Interconnection Agreement?

**Position: Because e.spire has not proven the two-million-minute differential was met, no reciprocal compensation rate need be determined. Should the Commission find otherwise, the parties should negotiate a traffic exchange agreement, which may include a reciprocal compensation rate, pursuant to Section VI.B. of the Agreement.

Issue 4: What action, if any, should the Commission take?

**Position: The Commission should find ISP traffic is not included in the definition of "local traffic" under the Agreement, that e.spire did not meet the two-million-minute differential, and if it did the parties must negotiate a traffic exchange agreement which may include a reciprocal compensation rate.

### A. BellSouth Is not Obligated to Pay e.spire Reciprocal Compensation for Terminating BellSouth's Local Traffic under the Terms of the Agreement.

This is "what is essentially a black letter contracts case," the merits of which must be determined by the contract. (Falvey, Tr. at 53) Under Florida law, a contract must be interpreted consistent with reason, probability, and the practical aspect of the transaction between the parties. Bay Management, Inc. v. Beau Monde, Inc., 366 So. 2d 788 (Fla. App. Dist. 2, 1978). In other words, to arrive at the intentions of the parties and give effect to the terms of the contract, the contractual terms must be given a reasonable construction. Thompson v. C.H.B. Inc., 454 So. 2d 55 (Fla. App. Dist. 4, 1984). A reasonable interpretation is preferred to one that is unreasonable. Harris Air Systems, Inc. v. Gentran, Inc., 578 So. 2d 879 (Fla. App. Dist. 1, 1991). Importantly, an absurd conclusion must be abandoned for one more consistent with reason and probability. Paddock v. Bay Concrete Indus., Inc., 154 So. 2d 313 (Fla. App. Dist. 2, 1963).

No dispute exists that the Agreement executed by the parties and approved by this Commission does not currently obligate BellSouth to pay e.spire reciprocal compensation for terminating local traffic. Indeed, Mr. Falvey acknowledged that the Agreement currently does not even contain a rate by which reciprocal compensation could be calculated. (Falvey, Tr. at 104). Rather, according to Mr. Falvey, the Agreement provides that up until the two-million-minute differential threshold has been met, the parties will not exchange compensation, but when that occurs, the parties will negotiate the specifics of a

traffic exchange agreement that will apply on a going-forward basis. (Falvey, Tr. at 94-95).[4]

This process is set forth in Section VI.B of the Agreement, which pertains to "Compensation" for "Local Traffic Exchange." It provides in relevant part as follows:

> [T]he Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such an event, the Parties will *thereafter negotiate* the specifics of a traffic exchange agreement which will apply *on a going-forward basis*.

Hendrix, Tr. at 141-142)(emphasis added). In the first instance, the parties agreed that they would not exchange any cash compensation for terminating local traffic. However, if the difference in minutes of use for terminating local traffic exceeded two million minutes per state per month, the parties agreed to "thereafter negotiate the specifics of a traffic exchange agreement" that would apply only "on a going-forward basis."

A plain reading of this provision reflects the parties' intention that, barring the development of a substantial differential in minutes of use for terminating local traffic, the parties would not pay each other reciprocal compensation. Mr.

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[4] e.spire's claim that the Most Favored Nations (MFN) clause automatically entitles e.spire to MFS's reciprocal compensation rate is contrary to the plain language of the Agreement and to Mr. Falvey's testimony that the parties were required to negotiate the specifics of a traffic exchange arrangement once the two-million-minute threshold was met. (Falvey, Tr. at 89, 94-95) If the MFN clause were applicable in this situation, why did e.spire wait until it supposedly met the two-million-minute threshold before invoking it? e.spire's actions are inconsistent with its claims in this case and are telling as to the intent and requirement of the parties to negotiate a traffic exchange arrangement, including whether compensation would be exchanged and what the rate would be.

Falvey admitted the parties agreed to a bill and keep arrangement whereby "no compensation shall be exchanged until such and such time . . . [at which point] the parties will negotiate the specifics of a traffic exchange agreement that will apply on a going-forward basis." (Falvey, Tr. at 94) Mr. Falvey described the negotiations of a "traffic exchange agreement" to "include everything from who's going to measure the traffic . . . ; whether there would be audit rights; certainly, what is the rate. . . . When—what type of traffic will this apply to." (Falvey, Tr. at 96-97)

As Mr. Hendrix explained, e.spire never wanted to exchange cash compensation for traffic termination because it believed the numbers would always favor BellSouth. In fact, according to Mr. Hendrix, e.spire had originally proposed a 100-million-minute threshold because it was critical to e.spire "not to pay any amount for that time period." (Hendrix, Tr. at 198-199).[5] It stands to reason that if e.spire had intended ISP traffic to be included in the definition of "local traffic," it would not have wanted a high threshold.

Having established a threshold level below which there would be no payment of reciprocal compensation, the parties agreed, as reflected by the Agreement, to defer the negotiation of a specific traffic exchange plan, the

[5] Unlike Mr. Falvey, Mr. Hendrix was directly involved in negotiating the Agreement. (Hendrix, Tr. at 191; Falvey, Tr. at 106). In interpreting the Agreement, the Commission can properly consider Mr. Hendrix's testimony concerning the negotiations and the circumstances surrounding execution of the Agreement, notwithstanding the fact that the Agreement contains a "merger clause." *See* Clark v. Clark, 79 So. 2d 426 (Fla., 1955)(in construing contract, court's concern is the determination of intention of parties, objects to be accomplished, consideration of surrounding circumstances, the other provisions in the agreement, and occasions and circumstances under which it was entered into.)

necessity of which was contingent upon an event that might or might not materialize. The second clause of Section VI.B of the Agreement memorializes the parties' intention to defer negotiations of a traffic exchange plan until the two-million-minute threshold was met. Specifically, the parties agreed to *"thereafter negotiate* the specifics of a traffic exchange agreement" to govern the exchange of local traffic. The parties further agreed that any plan that the parties negotiated would apply only "on a going-forward basis." (Hendrix, Tr. at 141-142).

Accordingly, based upon a plain reading of the Agreement, two requirements must be met before the payment of reciprocal compensation is due. First, there must be the requisite differential in traffic terminations for local traffic; and second, the parties must negotiate a traffic exchange plan pursuant to which reciprocal compensation, if any, will be calculated thereafter. Neither of these requirements has been met in this case.

First, there is no evidence in the record, other than Mr. Falvey's conclusory testimony, that e.spire has met the two-million-minute differential threshold. In fact, the reports and documentation provided by e.spire "showed traffic terminating from BellSouth to e.spire." (Hendrix, Tr. at 208). There is no evidence that the difference in minutes of use exceeded two million minutes as required by the Agreement to begin negotiations of a traffic exchange arrangement. (Hendrix, Tr. at 141-142, 201). While BellSouth has agreed to use e.spire's usage reports, it has requested an audit to determine the means by which e.spire jurisdictionally tracks its traffic. (Hendrix, Tr. at 202). e.spire had

previously indicated to BellSouth that its trunks carried both local and toll traffic. (Hendrix, Tr. at 207, 213). Because no dispute exists that only local traffic should be counted toward the two-million-minute differential, BellSouth should be entitled to conduct an audit to assure itself and the Commission that e.spire's two- million-minute threshold calculation includes only local minutes of use. (Hendrix, Tr. at 207). Obviously, there also is a disagreement about whether ISP traffic should be considered in the two-million-minute calculation, which is addressed below.

Secondly, and perhaps more importantly, even assuming that the two-million-minute threshold has been met, BellSouth still is not obligated to pay reciprocal compensation until after the parties negotiate the specifics of a traffic exchange arrangement. However, e.spire has not expressed any interest in conducting meaningful negotiations with BellSouth on terms of a traffic exchange agreement, other than to make a "take it or leave it" offer demanding the reciprocal compensation rate in MFS's interconnection agreement with BellSouth to which e.spire is not entitled, as explained in greater detail below. (Falvey, Tr. at 89, 99, 101)

In fact, Mr. Falvey's testimony demonstrates that e.spire is attempting to use this complaint proceeding to bypass entirely the negotiation process agreed to by the parties. For example, Mr. Falvey initially took the position that once the two-million-minute differential threshold was met, reciprocal compensation was immediately due and payable, yet acknowledged that, in fact, the Agreement required the parties to negotiate. (Falvey, Tr. at 98-99, 113-114; *see also*

Talmage, Tr. at 27). Mr. Falvey claims reciprocal compensation "would apply ... retroactively" although the clear and unambiguous language of the Agreement states whatever arrangement the parties negotiate will apply on a "going-forward basis." (Falvey, Tr. at 93-94, 113). It is Mr. Falvey's position that "going forward" and "retroactively" mean the same thing! (Falvey, Tr. at 113).

The only evidence proffered by e.spire concerning negotiations with BellSouth on the terms of a traffic exchange agreement was e.spire's demand for the reciprocal compensation rate in the MFS interconnection agreement. While apparently conceding that negotiations are required, Mr. Falvey testified that e.spire "would never negotiate below .9 cents. . . . that was our bottom line." (Falvey, Tr. at 109). Thus, it is clear from Mr. Falvey's own testimony that, once the two-million-minute differential has been met, he expected negotiations with BellSouth, not the payment of reciprocal compensation by BellSouth, but then did not want to really negotiate.

Furthermore, negotiating the terms of a traffic exchange agreement requires more than simply agreeing to a reciprocal compensation rate, as testified to by Mr. Falvey. In a moment of candor, Mr. Falvey admitted that once the two-million-minute differential threshold was met, the parties were to negotiate the specifics of a traffic exchange agreement, including among other things "what type of traffic will this apply to." (Falvey, Tr. at 96-97) Mr. Falvey also admitted there were various types of traffic exchange arrangements that could be negotiated between the parties, including a bill and keep arrangement,[6]

[6] A recent decision from a federal court in North Dakota affirmed a decision by the North Dakota Commission to exempt ISP traffic from the payment

a reciprocal compensation arrangement incorporating a usage-based rate, or a reciprocal compensation arrangement based on a form of elemental billing. (Falvey, Tr. at 94). e.spire recognized the Agreement contemplated more than simply agreeing to a rate, since Mr. Falvey sent BellSouth a two-page proposed amendment to the Agreement that purported to set out the terms of a traffic exchange agreement acceptable to e.spire. (Falvey, Tr. at 108; e.spire Complaint, Exhibit B).

As evidenced by the plain language of Section VI.B of the Agreement and as confirmed by the actions and testimony of Mr. Falvey, BellSouth is not obligated to pay reciprocal compensation to e.spire, even assuming the Commission finds that the two-million-minute differential has been met. Rather, the parties would be required to negotiate the terms of a traffic exchange agreement that would apply on a going-forward basis. Those negotiations have not yet taken place, and e.spire should not be permitted to circumvent the negotiation process by the filing of this complaint.

### B. e.spire Is not Entitled to the Reciprocal Compensation Rate from the MFS Agreement.

Relying upon Section XXII.A of the Agreement, referred to as "the Most Favored Nations" clause, e.spire contends that it is entitled to "adopt" the reciprocal compensation rate of $.009 from the MFS interconnection agreement without negotiating with BellSouth and without adopting any other of the terms and conditions contained in the MFS agreement. (Falvey, Tr. at 75-76). This

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of reciprocal compensation. U.S. West Communications, Inc. vs. AT&T Corp., No. A1-97-085, Slip op., (D.N.D. January 8, 1999).

contention is without merit, and e.spire's reliance upon Section XXII.A is seriously misplaced.

Section XXII.A of the Agreement provides as follows:

> If as a result of any proceeding before any Court, Commission, or the FCC, any voluntary agreement or arbitration proceeding pursuant to the Act, or pursuant to any applicable federal or state law, BellSouth becomes obligated to provide interconnection, number portability, unbundled access to network elements or any other services related to interconnection, whether or not presently covered by this Agreement, to another telecommunications carrier operating within a state within the BellSouth territory at rates or on terms and conditions more favorable to such carrier than the comparable provisions of this Agreement, *the [e.spire] shall be entitled to add such network elements and services, or substitute such more favorable rates, terms or conditions for the relevant provisions of this Agreement*, which shall apply to the same states as such other carrier and such substituted rates, terms or conditions shall be deemed to have been effective under this Agreement as of the effective date thereof to such other carrier.

Section XXII.A (emphasis added). By its plain terms, Section XXII.A permits e.spire to do two things: (1) to "add" new network elements or services from other agreements if those network elements or services were not addressed in the parties' original agreement; and (2) to "substitute" more favorable rates, terms and conditions from another agreement for rates, terms and conditions that are specified in e.spire's agreement. (Hendrix, Tr. at 144, 197). It does not permit e.spire to avoid negotiating the terms of a traffic exchange agreement with BellSouth, thereby negating Section VI.B of the parties Agreement, as e.spire is attempting to do. (Hendrix, Tr. at 144).

Neither of the two clauses in Article XXII.A has any bearing on this case. The first clause pertains to "adding" network elements or services and permits e.spire to add such elements and services from other agreements not addressed

in e.spire's original agreement. (Hendrix, Tr. at 197). This language was designed to ensure that e.spire would have an opportunity to purchase all new network offerings as they were developed without having to renegotiate its entire Agreement to add such items. Here, e.spire is not seeking to "add" network elements or services, and e.spire does not contend otherwise. The existing Agreement already obligates the parties to exchange local traffic; the only issue is the compensation arrangement that will apply when they do so.

The second clause of Article XXII.A pertains to "rates, terms and conditions" and permits e.spire to "*substitute*" a more favorable rate from another agreement for one that is already delineated in its existing Agreement. However, by using the words "substitute" and "more favorable," the parties obviously intended that there be an existing rate, such as a loop rate, in the Agreement before e.spire could exercise its rights under the second clause. (Hendrix, Tr. at 197). If rates could be inserted into the Agreement where no rate previously existed, as e.spire seeks to do here, the language requiring the "substitution" of a "more favorable" rate would be rendered meaningless. Thus, notwithstanding e.spire's claims to the contrary, the second clause of Article XXII.A creates a scenario under which rates could be substituted, but not inserted whole cloth.

The phrase "whether or not presently covered by this agreement" does not allow e.spire to insert a rate into the Agreement where one currently does not exist. The clause applies to the "adding" of network services or elements. (Hendrix, Tr. at 197). As explained by Mr. Hendrix, this provision allows a party

to "add ... things that were not currently in their agreement." (Hendrix, Tr. at 197). In other words, services may be added, but rates may not.

The best evidence that e.spire is not seeking to "substitute" a rate for reciprocal compensation comes from Mr. Falvey's own words. First, Mr. Falvey admitted that the existing Agreement does not have a rate for reciprocal compensation. (Falvey, Tr. at 41, 104). It is difficult to conceive how the reciprocal compensation rate from the MFS agreement can be "substituted" for a rate that does not exist. Second, in another remarkable display of candor, Mr. Falvey insisted in his prefiled rebuttal testimony that e.spire was entitled to "adopt" the reciprocal compensation rate from the MFS agreement. (Falvey, Tr. at 75-76). Mr. Falvey's use of the word "adopt" instead of the verbs actually in Section XXII.A of the Agreement is telling, as is e.spire's attempt to amend the Agreement and try to add a term for reciprocal compensation without negotiating the traffic exchange agreement as required under Section VI.B.

Even assuming Section XXII.A were applicable, which BellSouth submits is not the case, it cannot be read in the fashion urged by e.spire. Reading this provision to allow e.spire to adopt the reciprocal compensation rate in the MFS agreement without negotiating with BellSouth the terms of a traffic exchange agreement would render superfluous the language in Section VI.B. Such a construction is unreasonable and cannot be accepted by the Commission. *See* Bay Management, Inc. v. Beau Monde, Inc., 366 S. 2d 788 (a contract must receive reasonable construction); Reinhardt v. Reinhardt, 131 So. 2d 509 (Fla. App. Dist. 3, 1961)(a reasonable interpretation is preferred to one which is

unreasonable); White v. Harmon Glass Service, Inc., 316 So. 2d 599 (Fla. App. Dist. 4, 1975)(reconciliation of two clauses in a contract will be made on a reasonable, rather than an unreasonable, basis).

Furthermore, it is a basic principle of contract interpretation under Florida law that a limited or specific provision will prevail over one that is more broadly inclusive. Raines v. Palm Beach Leisureville Community Assoc., 317 So. 2d 814 (Fla. App. Dist. 4, 1975)(specific clause in contract takes precedence over general clause.) Mr. Falvey admitted at the hearing that Sec. VI.B. is a specific provision that applies to the traffic exchange agreement. (Falvey, Tr. at 121).

In this case, the subject of compensation for the exchange of local traffic is specifically described in Article VI.B. Consistent with Florida contract law, this specific provision cannot be diminished, limited, or totally rendered superfluous, as e.spire attempts to do, by relying upon the general language in Article XXII.A. Thus, e.spire's reliance upon Article XXII.A is misplaced, and nothing in Article VI.B entitles e.spire to the relief it seeks here.

### C. ISP Traffic Should Be Disregarded in Determining whether the Two-Million-Minute Threshold Requirement Has Been Satisfied.

#### 1. ISP traffic is not local traffic.

In determining whether the two-million-minute threshold has been satisfied, the Commission is required to consider only "local traffic." "Local traffic" is defined in the Agreement as:

> telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS

exchanges are defined and specified in Section A.3 of BellSouth's General Subscriber Service Tariff.

Attachment B, paragraph 48 on page 7.

The definition of "local traffic" does not include, nor was it intended to include, ISP traffic. The crucial point in the ISP analysis is that a communication from an end user to an ISP *does not* terminate at the ISP's premise; rather, it passes through the ISP and terminates at one of a myriad of host computers. (Hendrix, Tr. at 147). It is undisputed that one Internet call can access computer databases in the same state, in other states, and in different countries not merely at different times during the transmission, but simultaneously. The fact that a single Internet call may concurrently be interstate, international and intrastate makes it inseverable for jurisdictional purposes. (Hendrix, Tr. at 147) Thus, a call to an ISP, because it does not terminate with the ISP, but flows through the ISP to interstate and international termination points, is not local traffic but interstate traffic and should not be considered in determining whether the two-million-minute threshold has been met.

Mr. Hendrix's brief discussion of the call process illustrates that a call to an ISP does not terminate with the ISP. (Hendrix, Tr. at 146-147). ISPs use local exchange services to collect traffic from end users. In this example, the end users access the ISP by dialing a local telephone number via their computers and modems. The traffic is then routed to the ISP location, generally referred to as the ISP Point of Presence (POP), which represents the edge of the Internet. Once the ISP collects the traffic, the ISP converts the signals of the incoming calls to digital signals and routes the calls over its own network to a backbone

network provider (i.e. AT&T or MCI), where the calls are ultimately routed to an Internet-connected host computer. Therefore, as Mr. Hendrix explained, an ISP takes a call from its subscriber and transmits the call to and from the communications networks of other telecommunications carriers. (Hendrix, Tr. at 146-147). The call from the end user to the ISP "only transits through the ISP's local point of presence; it does not terminate there." (*Id.*) There is no interruption of the continuous transmission of signals between the end user and the host computers.

### 2. The FCC treats ISP traffic as jurisdictionally interstate.

The Commission must decide whether the interpretation of the Agreement urged by e.spire is reasonable, given the practical effect of such interpretation. As the party with the burden of proof, e.spire must show that, at the time BellSouth negotiated these Agreements, BellSouth considered extant FCC precedent (discussed below) to require ISP traffic to be included within the definition of "local traffic" for purposes of reciprocal compensation. e.spire has not met, and cannot meet, this burden of proof for all the reasons stated below. As Mr. Hendrix repeatedly testified, BellSouth cannot be presumed to have intended for ISP traffic to meet the "local traffic" definitions when it negotiated the Agreement, because 1) the FCC had expressly found services provided by ISPs to be interstate in nature, 2) the FCC had traditionally determined the jurisdictional nature of a call by examining its end-to-end nature, and 3) it was economically irrational for BellSouth to have agreed to subject ISP traffic to payment of reciprocal compensation. (Hendrix, Tr. at 149-155, 158).

The FCC has jurisdiction over all interstate and foreign communication by wire or radio. 47 U.S.C. S 152(a). "Communication by wire" is defined as follows:

> [T]he transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including the instrumentalities, facilities, apparatus, and services (*among other things, the receipt, forwarding, and delivery of communications*) to such transmission.

47 U.S.C. S 153(51)(emphasis added).

The FCC determines the jurisdiction of a call by the nature of the traffic that flows through the facilities, and not by the physical location of the facilities or the type of facilities used. (Hendrix, Tr. at 149). What is dispositive, therefore, in the jurisdictional analysis, is the relationship between where the call begins and where it ends.

For example, in Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rec. 1619 (1992), *aff'd,* Georgia Public Service Commission v. FCC, 5 F.3d 1499 (11th Cir. 1993) ("Memory Call Order"), the FCC employed an end-to-end analysis to determine the jurisdictional nature of the call at issue. Even though an out-of-state caller retrieved messages from a voice messaging processor (an information service) by using an intrastate call forwarding service, the FCC found that there was a "continuous two-way transmission path from the [out-of-state] caller to the voice mail service" and that consequently the entire call constituted "an interstate communication." *Id.* at 1620-21. In so finding, the FCC stated that:

> [t]he language of the Act contradicts the narrow reading of our jurisdiction urged by the states that would artificially terminate our jurisdiction at the local switch and ignore the 'forwarding and delivery of [the] communications' to the 'instrumentalities, facilities, apparatus and services' that comprise BellSouth's voice mail service. Indeed, the communications from the out-of-state caller to the local telephone number and switch, its forwarding to the voice mail service by the local switch and its receipt and interaction with BellSouth's voice mail service, fall within the explicit subject matter jurisdiction of this Commission under the Act.

*Id.* The FCC concluded:

> Our jurisdiction does not end at the local switch but *continues to the ultimate termination of the call. The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.* Jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination. The fact that the facilities and apparatus used to provide BellSouth's voice mail service may be located within a single state ... does not affect our jurisdiction or expand the Georgia PSC's jurisdiction. This Commission has jurisdiction over, and regulates charges for, the *local network when it is used in conjunction with the origination and termination of interstate calls.*

*Id.* (emphasis added).

In its Memory Call Order, the FCC rejected the Georgia Commission's argument that the second part of the call from an out-of-state caller seeking to reach his or her voice mailbox should be classified as part of an intrastate enhanced service. To the contrary, the FCC viewed the entire communication as *interstate* even though the "second call" (the actual accessing of the customer's voice mailbox) occurred within a piece of equipment that was purely in the state of Georgia and that was an enhanced service.

In addition to the Memory Call Order, the FCC -- well before the parties executed their Agreement -- also firmly delineated its jurisdictional authority over local calls used to provide an interstate service in an interstate Foreign Exchange

(FX) decision. *See* New York Telephone Co.--Exchange System Access Line Terminal Charge for FX and CCSA Service, Memorandum Opinion and Order, 76 F.C.C. 2d 349 (1980). In that case, petitioners challenged an intrastate New York Telephone tariff imposing a charge on the local exchange service used by out-of-state customers of FX and Common Control Switching Arrangement (CCSA) services. The services allowed an end user in New York to call an out-of-state customer by dialing a local number and paying local rates. For example, an FX service purchased by a Washington, D.C. business would allow a New York City resident to call that business's out-of-state premises by dialing the local New York City number associated with the local exchange portion of service. *Id.* at 351. See Late-Filed Exhibit No. 1 of Albert Halprin for a discussion of seven-digit dialing for interstate use.

Notwithstanding the fact that the originating caller could access the service by dialing a local number and paying local charges, and despite the fact that the FX customer had to purchase local exchange service from New York Telephone, the FCC concluded that the *service as a whole was interstate* and thus subject to FCC jurisdiction. 76 F.C.C. at 352. Moreover, the FCC concluded that the Communications Act did not "reserve to the state jurisdiction over the local exchange portion of interstate services." *Id.*

e.spire's contention that the call to an ISP terminates at the ISP falls apart under this end-to-end analysis. In these FCC cases, an interstate call is completed in part through the use of intrastate local exchange services, and in both cases the originating end user makes the call by dialing a local number and

paying local service charges. In such a situation, the FCC explicitly declined to treat the call as the sum of jurisdictionally separable components, and instead ruled that *the service as a whole was interstate*. Further, the FCC held that it had jurisdiction over all the call's components, including the originating local exchange component, subject to the FCC's discretion to defer to state jurisdiction where appropriate. A call from an end user to one or more Internet websites through an ISP is a "communication by wire" subject to the FCC's jurisdiction. As demonstrated by FCC rulings, even if the ISP "forwards" the call (via telecommunications) from the end user to the websites, the communication does not terminate at the ISP. The ISP is a step in a continuous call from the end user to the Internet - it is not a termination point. As summarized by Mr. Hendrix, "calls to an ISP constitute exchange access traffic, not telephone exchange service (local service) subject to reciprocal compensation. Calls that merely *transit* a CLEC's network, cannot be eligible for reciprocal compensation." (Hendrix, Tr. at 150).

The FCC has also addressed the jurisdictional characteristics of the Internet specifically. In its Non-Accounting Safeguards Order, the FCC described Internet service as follows:

> The Internet is an interconnected global network of thousands of interoperable packet-switched networks that use a standard protocol ... to enable information exchange. An end user may obtain access to the Internet from an Internet service provider, by using a dial-up or dedicated access to connect to the Internet service provider's processor. The Internet service provider, in turn, connects the end user to an Internet backbone provider that carries traffic to and from other Internet host sites.

*Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking,* CC Docket No. 96-149 (released December 24, 1996), note 291. The FCC described the call from the end user to the ISP as only transiting through the ISP's local point of presence - the FCC does not view the call as terminating with the ISP. There is no interruption of the continuous transmission of signals that would justify treating the ISP as anything other than another link in the chain of transmission between the end user and the host computer.

Section XXVII of the Agreement states that the Agreement shall be governed by, construed and enforced in accordance with applicable federal law. Under clear FCC and other federal precedent in existence at the time the parties negotiated their Agreement, and thereafter, calls bound for the Internet through an ISP's switch could only have been considered as interstate exchange access traffic -- not local traffic -- because they "terminate" not at the ISP's equipment, but rather at the Internet host computer containing the data that the originating end user seeks to access. Accordingly, e.spire's conclusion that such calls are "local" in nature is erroneous.

### 3. The FCC has never held ISP traffic is local traffic for reciprocal compensation purposes.

Although e.spire treats the ISP traffic issue as a forgone conclusion based upon this Commission's Order in Docket Nos. 980184-TP, 980495-TP, and 980499-TP (Sept. 15, 1998)("WorldCom case"), such is not the case. That order

was rendered before the FCC issued its October 30, 1998, order holding that ISP traffic in the GTE ADSL docket is interstate traffic. See GTE Telephone Operating Companies, GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket 98-79 (rel. October 10, 1998)("GTE ADSL Tariff Order.") It also applied only to those who were parties to that proceeding, addressed different agreements than the one involved herein. Thus, it has no precedential effect here. Furthermore, the Commission's previous decision noted that the FCC had not yet ruled on the jurisdictional nature of ISP traffic. It has now done so.

By allowing GTE to file its ADSL tariff at the federal level and treating it as part of an end-to-end interstate communication, the FCC also determined that ISP internet traffic has always been interstate traffic. Furthermore, the two-part call theory relied on by e.spire was explicitly rejected by the FCC in the GTE ADSL Tariff Order. The "current law weighs in favor" of, and requires a finding that, ISP traffic is not local but is interstate and within the jurisdiction of the FCC. As such, the Florida Public Service Commission may not require BellSouth to include it as local traffic for reciprocal compensation purposes. (Halprin, Tr. at 228).

While the FCC stated its findings applied solely to GTE's ADSL service, the jurisdictional analysis and conclusions in the GTE ADSL Tariff Order necessarily apply equally to the ISP Internet traffic at issue in this proceeding. There is no difference in the jurisdictional nature of ISP Internet traffic depending on whether such traffic is switched or dedicated, and no basis exists to

distinguish the two types of traffic for purposes of jurisdictional analysis. Indeed, the precedents the FCC cited in concluding that it should "analyze ISP traffic as a continuous transmission from the end user to a distant Internet site" concerned circuit-switched, dial-up services.[7] Because ISP Internet communications that originate on the local network facilities of one LEC and traverse the local network facilities of another LEC are interstate communications and do not terminate on the network of the second LEC, such communications are not, as a matter of law, subject to reciprocal compensation under Section 251 of the Communications Act. Nor are such communications subject to the reciprocal compensation provisions of the BellSouth Telecommunications, Inc. -e.spire interconnection agreement.[8] The crucial distinction is not that the communication from the end user to the ISP involves both telecommunication and information services, but that a communication (no matter how it is classified) from an end user to the ISP *does not end* at the ISP's premise. (Hendrix, Tr. at 154-155, Halprin, Tr. at 240-241).

Furthermore, contrary to Mr. Falvey's representations, the FCC has never stated that ISP traffic is "local traffic." The two FCC dockets most frequently cited by those who contend that the issue of ISP traffic has been resolved by the FCC are distinguishable. (Hendrix, Tr. at 153-154, 173-174). The discussion in the two dockets, namely the Non-Accounting Safeguard Docket (CC Docket No. 96-149) and the Universal Service Docket (CC Docket No. 96-45), has been taken

[7] See GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket 98-79 (rel. Oct. 30, 1998)("GTE ADSL Tariff Order"), ¶¶ 17-20.

completely out of context. The purpose of the Non-Accounting Safeguard docket was to address the issue of separate subsidiary requirements for interLATA information service. The Universal Service docket was opened pursuant to statutory requirements to establish a universal support system that would be operable in a competitive marketplace. Neither of these dockets contradicted the FCC's position that enhanced service providers services included jurisdictionally interstate traffic.

The FCC, in its April 10, 1988 Report to Congress in Docket No. 96-45 opined that whether ALECs are entitled to reciprocal compensation for terminating Internet traffic in which the FCC noted that "*does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider.*" (Emphasis added). In its most recent decision regarding ISP traffic, the FCC specifically rejected the two-call theory and upheld that the internet traffic at issue is interstate traffic and does not terminate at the ISP's local server, but continues to its ultimate destination. (Hendrix, Tr. at 162)(See also GTE ADSL Tariff Order.)

The FCC has not held that ISP traffic is local traffic for purposes of the instant dispute before the Commission. Rather, through a series of orders, the FCC has exempted ISPs from paying switched access charges to the local exchange carriers for originating traffic to them. Instead, ISPs are permitted to receive calls over local exchange service lines purchased from the LEC, rather than over switched access facilities. In support of its decision, the FCC explicitly

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[8] See BellSouth Telecommunications, Inc. –e.spire Communications, Inc. Interconnection Agreement (July 25, 1996).

stated its policy concern that the nascent ISP industry would be harmed if ISPs were required -- like IXCs -- to pay for originating traffic to them.

It is simply incorrect to characterize the FCC's access charge exemption, pursuant to which ISPs are treated as end users -- as opposed to IXCs -- for access charge purposes, as a ruling that somehow classifies calls made to ISPs over local facilities as "local traffic" for reciprocal compensation purposes. (Hendrix, Tr. at 172-173.) Such an argument amounts to nothing more than an attempt to bootstrap a holding that was narrowly tailored to accomplish a specific policy goal of the FCC into a conclusion that calls to ISPs are local calls subject to reciprocal compensation.

However, the FCC has never held that ISPs are end users for *all* purposes, and certainly not for purposes of the reciprocal compensation rules; rather, it has held only that ISPs are to be treated as end users "for purposes of the access charge system." *See, e.g., Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 91-213, and 95-72, FCC 97-158, released May 16, 1997 ("Access Reform Order), ¶ 348. The fact that, for policy and political reasons, the FCC has exempted ISPs from paying access charges in no way alters the fact that the traffic they collect is access-type traffic, not local traffic.

The FCC has always recognized that the true nature of ISP traffic was access traffic. For example, in the 1983 order in which it initially established the ISP access charge exemption, the FCC stated: "Among the variety of users of

access service are ... enhanced service providers." MTS and WATS Market Structure, 97 FCC 2d. 682, 711 (1983). Likewise, in its 1987 Notice of Proposed Rulemaking in which it proposed to lift the ISP access charge exemption, the FCC stated:

> We are concerned that the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public. As we have frequently emphasized in our various access charge orders, our ultimate objective is to establish a set of rules that provide for recovery of the costs of exchange access used in interstate service in a fair, reasonable, and efficient manner from all users of access service, regardless of their designation as carriers, enhanced service providers, or private customers. *Enhanced service providers, like facilities-based interexchange carriers and resellers, use the local network to provide interstate services.* To the extent that they are exempt from access charges, the other users of exchange access pay a disproportionate share of the costs of the local exchange that access charges are designed to cover.

*Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking,* 2 FCC Rcd 4305, 4306 (1987) (emphasis added); (Hendrix, Tr. at 175-176). In both these dockets, the FCC decided not to impose access charges on ISPs. In each case, however, the FCC -- after referring to the interstate nature of the calls -- cited only policy reasons for its decision, in particular, its concern that imposing access charges at that time upon enhanced service providers could jeopardize the viability of what was still a fledgling industry. (Hendrix, Tr. at 151-152).

More recently, in the Access Reform Order, the FCC again declined to impose access charges upon ISPs. The FCC found that "[t]he access charge system contains non-cost-based rates and inefficient rate structures" that were not wholly addressed by access reform. *Access Reform Order*, at ¶¶ 344-348.

The FCC also found that existing access charges may not reflect certain differences between circuit switching and packet switching. The FCC held that it was not convinced that exempting ISPs from access charges imposed uncompensated costs on local exchange carriers or contributed to network congestion. Thus, while extending the ISP access charge exemption, the FCC issued a Notice of Inquiry to "consider the implications of information services more broadly, and to craft proposals for a subsequent Notice of Proposed Rulemaking that are sensitive to the complex economic, technical and legal questions raised in this area."

Notably absent from any of these decisions is a determination by the FCC, or even a question raised by it, that traffic to ISPs is local traffic, rather than access traffic used to originate interstate calls. Instead, in each case, the FCC granted or perpetuated an *exemption* from the access charge regime, based solely on pragmatic (and political) considerations regarding the impact of existing access charges on the ISP industry. (Hendrix, Tr. at 151-152). Moreover, in each instance, the FCC specifically noted the possibility that access charges, either as currently structured or modified, might be applied at some point in the future to ISPs. (*Id.*)

Obviously, if the FCC had concluded that traffic received by ISPs was local, there would have been no need for it to exempt that traffic from the access charge regime; access charges would not have applied in the first place. Moreover, the FCC could not have held out the possibility that it might, in the future, assess some sort of access charge on such traffic. If the ISP traffic at

issue is truly local traffic, it could never be subjected to any form of interstate access charges. (*Id.*).

#### 4. ISP traffic was not considered "local" when the parties negotiated the Agreement.

At the time the Agreement was negotiated, the federal law treated ISP traffic as jurisdictionally interstate.[9] The Agreement provides it will be governed by federal law. (Hendrix, Tr. at 143). Thus, based upon the agency decisions that have been rendered to date, it was entirely unreasonable for the parties to believe that there was any factual or legal basis for considering ISP traffic as "local." First, parties to a contract are presumed to enter into their agreement with full knowledge of the state of existing law, which in turn is incorporated into and sheds light on the meaning of the parties' agreement. *See, e.g., Wilcox v. Atkins,* 213 So. 2d 879 (Fla. App. Dist. 2, 1968); *General Development Corp. v. Catkin,* 139 So. 2d 901 (Fla. App. Dist. 3, 1962)[10]

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[9] While BellSouth realizes the Commission issued an order in 1989 (Docket No. 880423-TP) addressing the issue of end user access to information service providers, BellSouth's consistent, regionwide position on the interstate nature of ISP traffic has been based on subsequent FCC rulings, discussed above, that clearly show ISP traffic to be interstate and, therefore, not subject to reciprocal compensation.

[10] This same common sense rule has been frequently stated and applied by federal courts. See, e.g., Florida East Coast Railway Co. v. CSX Transportation, Inc., 42 F.3d 1125, 1129 (7th Cir. 1994) ("[T]he legal framework that existed at the time of a contract's execution must bear on its construction. Contracts are presumed written in contemplation of the existing applicable law. Specifically, parties are assumed to have contracted with reference to those statutory provisions that relate to the subject matter of their contract.") The existing "law" that contacting parties are presumed to have in mind includes court orders, judicial decisions, and administrative regulations. See, Green v. Lehman, 544 F. Supp. 260, 263 (D. Md. 1982) ("[I]t is a fundamental principle of contract law, which should be well known to the parties, that implied into every contract,

Mr. Hendrix, who was intimately involved with the negotiation of the Agreement, stated unequivocally that it was not BellSouth's intent to have ISP traffic be considered local traffic. (Hendrix, Tr. at 145). Moreover, e.spire never stated that it considered ISP traffic to be local traffic, and e.spire did not seek to include ISP traffic in the definition of local traffic. (Hendrix, Tr. at 194-195; Falvey, Tr. at 123). Mr. Hendrix negotiated the e.spire Agreement with Richard Robertson, who was a former BellSouth employee who 'knew very well what [BellSouth's] policies were." (Hendrix, Tr. at 194) Mutual or reciprocal assent to a certain or definite proposition is an essential element to the creation of a contract. *Goff v. Indian Lake Estates, Inc.,* 178 So. 2d 910 (Fla. App. Dist. 2, 1965). It is, therefore, necessary that there be a meeting of the minds as to all the essential terms of the contract. *Flagler Co. v. Amerifirst Bank,* 559 So. 2d. 1210 (Fla. App. Dist. 4, 1990).

It is undisputed that the Agreements in question do not specifically address the treatment of ISP traffic for reciprocal compensation purposes. Each witness testified that the subject of ISP traffic never arose during negotiations. (Hendrix, Tr. at 195, Falvey, Tr. at 123). While the parties did settle on a definition of "local traffic" in each Agreement, they did not specify whether ISP traffic was subject to this definition. BellSouth witness Jerry Hendrix testified that, because of the FCC's treatment of ISP traffic over the years, particularly the FCC's explicit finding that ISPs provided interstate services, there was no need

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as a term thereof, is the law as it exists at the time and place of contracting. Further, this principle extends to valid regulations having the force and effect of general application.")

for BellSouth to presume that ISP traffic would be subject to the reciprocal compensation obligations attendant to local traffic. (Hendrix, Tr. at 194). He believed that since Mr. Robertson was also familiar with BellSouth's position on this issue, it was not necessary for e.spire to bring it up. (Hendrix, Tr. at 194, 206).

An actual assent of the parties upon exactly the same matter is indispensable to the formation of a contract. General Finance Corp. v. Stratton, 156 So. 2d 664 (Fla. App. Dist. 1, 1963). Clearly, the record in this proceeding reflects that the parties never mutually agreed that ISP traffic would be subject to the reciprocal compensation obligations of the respective Agreements. The language used by the parties to define their reciprocal compensation obligations simply does not express a mutual intention to subject ISP traffic to payment of reciprocal compensation. The evidence is undisputed that there was no meeting of the minds on the issue of including ISP traffic in the definition of local traffic, therefore, no such extension of that definition can be made to include ISP traffic under the terms of the contract.

Moreover, as Mr. Hendrix explained, it would not have made economic sense for BellSouth to have included ISP traffic in the definition of local traffic. (Hendrix, Tr. at 157-158). Because ISP traffic is always one-way, as opposed to two-way, reciprocal compensation will be one-way compensation to those ALECs specifically targeting large ISPs. If ISP traffic were subject to reciprocal compensation, "the originating carrier in most instances would be forced to pay the interconnecting carrier *more* than the originating carrier receives from an end

user to provide local telephone service." (Hendrix, Tr. at 157). The ludicrousness of such a result only underscores that ISP traffic should not be considered local traffic in determining whether the two-million-minute threshold has been met.

## CONCLUSION

For the foregoing reasons, the Commission should deny e.spire the relief sought in its Complaint. Even if the Commission finds that the two-million-minute threshold has been satisfied, the parties are obligated to negotiate a traffic exchange agreement, the terms of which would apply on a going-forward basis. e.spire has no contractual right to an award of money damages (even assuming the Commission has the authority to issue such an award) or to an order reforming the Interconnection Agreement. If the threshold has been met without including ISP traffic in the calculation, the parties should be required to complete negotiations and implement the traffic exchange agreement. If the threshold is not met without including ISP traffic, then the Commission should defer ruling on whether e.spire has met the threshold until the FCC decides whether ALECs are entitled to reciprocal compensation for terminating ISP traffic. Should the Commission not wish to defer its ruling, the Commission should hold that ISP traffic is interstate traffic and thus should not be included in the calculation of local minutes.

Respectfully submitted this 8th day of February, 1999.

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