BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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, F.S.	DOCKET NO. 950985-TP ORDER NO. PSC-96-1231-FOF-TP ISSUED: October 1, 1996

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER ON MOTIONS FOR RECONSIDERATION

BY THE COMMISSION:

I. BACKGROUND

This matter came to hearing as a result of petitions filed by Metropolitan Fiber Systems of Florida, Inc. (MFS-FL) and MCI Metro Access Transmission Services, Inc. (MCImetro) for interconnection with BellSouth Telecommunications, Inc. (BellSouth). Section 364.16(3), Florida Statutes, requires each local exchange telecommunications company to provide interconnection with its facilities to any other provider of local exchange telecommunications services requesting such interconnection. Section 364.162, Florida Statutes, provides alternative local exchange companies 60 days to negotiate with a local exchange telecommunications company mutually acceptable prices, terms, and conditions for interconnection. If a negotiated price is not established, either party may petition this Commission to establish non-discriminatory rates, terms, and conditions of interconnection.

By Order No. PSC-96-0445-FOF-TP (Order), issued March 29, 1996, we decided various issues regarding rates, terms, and conditions for interconnection between MFS-FL, MCImetro, and BellSouth. On April 12, 1996, BellSouth filed a motion for

reconsideration of portions of the Order. On April 15, 1996, Time Warner AxS of Florida, L.P. (Time Warner) and Florida Cable Telecommunications Association (FCTA) filed motions for reconsideration of portions of the Order. Several parties filed responses to BellSouth's, Time Warner's, and FCTA's motions for reconsideration.

II. STANDARD OF REVIEW

The appropriate standard for review for a motion for reconsideration is that which is set forth in Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962). The purpose of a motion for reconsideration is to bring to the attention of the Commission some material and relevant point of fact or law which was overlooked, or which it failed to consider when it rendered the order in the first instance. Diamond Cab, 146 So. 2d at 891; Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). It is not an appropriate venue for rehashing matters which were already considered, or for raising immaterial matters which even if adopted would not materially change the outcome of the case.

III. ORAL ARGUMENT

In addition to its motion for reconsideration, BellSouth requested oral argument, stating that its motion for reconsideration represents issues that are very important and that the Order failed to address many of its concerns. On April 24, 1996, MFS-FL filed a motion in opposition to BellSouth's request for oral argument. MFS-FL stated that oral argument is granted in this Commission's sole discretion pursuant to Rule 25-22.060(1)(f), Florida Administrative Code. MFS-FL further stated that the hearing itself attested to the importance of the issues, and that since BellSouth's case failed to persuade us in the first instance, there is no basis upon which to permit BellSouth a second opportunity to rehash the same evidence. MFS-FL contended that BellSouth's motion does not make a threshold showing that we either ignored, misinterpreted or misapplied the law applicable to the evidence in this proceeding, or overlooked and failed to consider the evidence. MFS-FL also stated that neither did BellSouth demonstrate that we overlooked and failed to consider significant evidence in the record.

Rule 25-22.058, Florida Administrative Code, states that a request for oral argument shall state with particularity why oral argument would aid this Commission in comprehending and evaluating the issues before it. It is within our discretion to grant or deny

BellSouth's request for oral argument. We find that BellSouth and the other parties have made their positions clear in their written motions, and that oral argument is not necessary to assist us in our resolution of this matter. Accordingly, we deny BellSouth's request for oral argument.

IV. BELLSOUTH'S MOTION FOR RECONSIDERATION

A. MUTUAL TRAFFIC EXCHANGE

In its motion for reconsideration, BellSouth requested that we reconsider our decision in the Order to require MCImetro, MFS-FL and BellSouth to use mutual traffic exchange for the termination of local traffic between each other's networks. BellSouth argued that setting mutual traffic exchange as the mechanism for the exchange of local traffic violates both state and federal law.

On April 23, 1996, Continental Cablevision, Inc. (Continental), and McCaw Communications of Florida, Inc. (McCaw), filed responses to BellSouth's motion. On April 24, 1996, MCImetro, MFS-FL, and AT&T Communications of the Southern States, Inc. (AT&T), also filed responses to BellSouth's motion. McCaw stated that it believed the petitions filed by MFS-FL, MCImetro, and AT&T adequately respond to BellSouth's motion.

BellSouth raised four arguments against mutual traffic exchange: 1) the Order fails to set a charge for local interconnection, a charge that is required by Florida law; 2) the Order fails to set a local interconnection charge that is sufficient to cover the cost of providing local interconnection, which is also in violation of Florida law; 3) the mandating of mutual traffic exchange constitutes a taking of BellSouth's property without compensation, just or otherwise, in violation of Florida and federal law; and 4) mandatory mutual traffic exchange is forbidden by the Telecommunications Act of 1996.

1) BellSouth's assertion that the order fails to set a charge for local interconnection

BellSouth stated that "mutual traffic exchange" is a misnomer and should be called "free interconnection." It argued that to the extent traffic between the parties is not perfectly in balance it is tantamount to free interconnection. BellSouth further stated that Florida Statutes obligate this Commission to establish an actual "charge" or "rate" for interconnection and, therefore, mutual traffic exchange violates Florida law.

BellSouth contended that, by ordering mutual traffic exchange, we have not set a "rate" or "charge" for local interconnection, and therefore have not fulfilled the requirements of Section 364.162, Florida Statutes. BellSouth stated that the phrase "local interconnection charge" is used throughout Section 364.162, Florida Statutes. As an example, BellSouth referred to Section 364.162(2), Florida Statutes, which states if negotiations are unsuccessful, this Commission is required to set the "rates, terms and conditions for interconnection." BellSouth then stated that in setting the rates for local interconnection, this Commission is instructed three times in Section 364.162, Florida Statutes, that the rates for interconnection are not to be set below cost, and that Section 364.162(3), Florida Statutes, twice says that the rates shall not be below cost. In addition, BellSouth asserted that Section 364.162(4), Florida Statutes, specifically requires that "in setting the local interconnection charge, the Commission shall determine that the charge is sufficient to cover the cost of furnishing interconnection."

BellSouth stated that Section 364.162, Florida Statutes, does not mention "bill and keep," mutual traffic exchange, trade, or barter as a basis for local interconnection; thus, we have not fulfilled the explicit requirements of Section 364.162, Florida Statutes. BellSouth contended that it is clear the Legislature expected a monetary amount to be set as payment for the termination of calls between local telecommunications companies.

BellSouth asserted that the rules of statutory construction do not permit a different result. The first rule of statutory construction that BellSouth cited is that no statutory interpretation is necessary when the statute is facially clear and totally lacking in ambiguity. In that case, the tribunal applies the statute in the manner dictated by its plain language. See, e.g., Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987). BellSouth also pointed out that under Florida law, the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary. See, e.g., Green v. State, 604 So.2d 471, 473 (Fla. 1992). BellSouth referred to Webster's New Collegiate Dictionary, 957 (1st Ed. 1973), which defines "rate" to be "a charge, payment or price fixed according to a ratio, scale or standard," and the word "charge" to mean "the price demanded for something." BellSouth referred to Black's Law Dictionary, 1134 (5th Ed. 1979), for the definition of "rate" as "the price stated or fixed for some commodity or service of general need or utility supplied to the public measured by specific unit or standard." BellSouth argued that these definitions do not mention mutual traffic exchange or any other form of barter; therefore, the plain language of the statute requires that we set a price for interconnection.

The second rule of statutory construction to which BellSouth looked is that when a statute is susceptible of more than one interpretation, the reviewing tribunal must first seek to give effect to the intent of the legislature in creating the statute. BellSouth stated that the Florida Supreme Court has repeatedly held that the legislative intent must be determined whenever possible by looking to the way in which it is reflected in the language of the statute. See, S.R.G. Corp. v. Dept. of Revenue, 365 So. 2d 687 (Fla. 1978); Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983).

BellSouth referred to another rule of statutory construction that it is only appropriate to attempt to discover the legislative intent by looking outside a statute when the language itself is not sufficiently clear to reveal its intent. In this uncommon circumstance, the typical source of guidance is the legislative history of the particular statute. See, e.g., Streeter, supra; Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958). BellSouth asserted that the Florida House of Representatives Committee on Utilities and Telecommunications, on April 12, 1995, discussed the delinking of the universal service fund and interconnection charges, but that the legislators did not discuss the delinking of the universal service fund and mutual traffic exchange.

Further, BellSouth contended that to argue that Section 364.162, Florida Statutes, can or must be interpreted to allow "in-kind" compensation would violate the prohibition against reading words into a statute. To argue that the Legislature intended a mutual traffic exchange mechanism, BellSouth argued, ignores the fact that the Legislature could have drafted legislation making that option available to this Commission.

Finally, BellSouth argued that we did not provide any rationale supporting the notion that mutual traffic exchange constituted a legitimate "charge" or "rate" for local interconnection because there is simply no basis for such a conclusion. BellSouth contended, in conclusion, that the Order in this respect is contrary to Florida law and must be overturned.

MCImetro and MFS-FL contended that BellSouth's analysis misses the mark, noting that Section 364.162, Florida Statutes, uses three terms interchangeably to refer to the compensation mechanism for local interconnection - price, rate, and charge. We agree with MCImetro's and MFS-FL's analysis that BellSouth stopped its dictionary analysis too soon. Although Webster's defines "rate" to be "a charge, payment or price fixed according to a ratio, scale or standard," and "charge" to mean "the price demanded for something,"

BellSouth neglects to refer to Webster's for the definition of "price":

> price . . . **1** *archaic*: VALUE, WORTH **2 a:** the quantity of one thing that is exchanged or demanded in barter or sale for another . . . .

Webster's at 933. While the "thing" demanded in "barter" may be money, it does not have to be. Similarly, Black's defines price to be "[t]he consideration given for the purchase of a thing." Black's at 1188. "Price" is also defined as "the sum of money or goods asked or given for something." The American Heritage Dictionary of the English Language, 226 (6th Ed., 1976).

MFS-FL explained that the charge in this case is that BellSouth must accept all of MFS-FL's traffic for termination in return for having all of its MFS-FL-customer bound traffic terminated on MFS-FL's network. In other words, the price (or charge or rate) MFS-FL pays to interconnect with BellSouth is that it must terminate all traffic BellSouth sends to it. MFS-FL contended that this is not free interconnection, as BellSouth alleged. MFS-FL further explained that free interconnection would occur if MFS-FL were permitted to terminate traffic on BellSouth's network but did not have to do anything in return.

AT&T noted that in the Order, on pages 13 and 14, we concluded:

> We disagree with BellSouth's arguments that mutual traffic exchange violates Section 364.162(4), Florida Statutes ... We agree with BellSouth that the statute must be construed as a whole so that absurd results are avoided ... To construe the statutory language so narrowly to say that mutual traffic exchange would not be an adequate form of compensation would, in our opinion, yield an absurd result.

AT&T asserted that we considered and rejected BellSouth's testimony and argument once, and since BellSouth pointed to no other matter of fact or law that we did not consider, BellSouth's motion must fail.

We conclude that we have already considered and rejected BellSouth's argument. Based on the plain language of Section 364.162, Florida Statutes, we are not precluded from establishing mutual traffic exchange as the mechanism for charging for local interconnection. Accordingly, we find that BellSouth has not in its first assertion raised a material and relevant point of fact or

law that was overlooked or which we failed to consider when we rendered the portion of the Order establishing mutual traffic exchange as a mechanism for implementing local interconnection.

2) BellSouth's assertion that the order fails to set a local interconnection charge sufficient to cover cost

BellSouth asserted that adopting mutual traffic exchange violates Section 364.162(4), Florida Statutes, which requires that the charge for local interconnection cover the costs of interconnection, and that one of the fundamental problems with mutual traffic exchange is that it contains no recovery for the costs associated with the termination of local calls. BellSouth disagreed with the Order, which states that mutual traffic exchange allows companies to cover the costs of interconnection because each company "receives the benefits equal to the benefits it provides." BellSouth disagreed because, it said, the charge must recover costs, not insure the equality of benefits.

BellSouth further argued that for such an argument to have a glimmer of logic, it must be based on the premise that the traffic will be balanced and that each party's costs will be equal. BellSouth contended that neither MFS-FL, MCImetro, nor AT&T presented competent substantial evidence that traffic would be balanced. BellSouth stated that AT&T's witness had no evidence concerning traffic balances and that MCImetro's witness speculated that traffic would be balanced within a year or two but did not provide empirical evidence. BellSouth stated that the only empirical evidence in the case concerning traffic balance was presented by MFS-FL and it clearly showed that traffic was not in balance. BellSouth contended that there is no evidentiary support for our assumption that traffic will be balanced, and, thus, our conclusion is plainly arbitrary.

Further, BellSouth asserted that even if traffic were balanced, neither BellSouth nor the ALEC may be covering its costs. The evidence given by MCImetro and MFS-FL, BellSouth stated, demonstrated that the costs of interconnection for BellSouth and the costs of interconnection for an ALEC would not necessarily be identical. Thus, BellSouth argued that mutual traffic exchange does not provide a mechanism for the parties to recover their costs.

MCImetro asserted that the use of mutual traffic exchange enables BellSouth to recover its cost of providing local interconnection. MCImetro and AT&T stated that we relied on witness Cornell's testimony that mutual traffic exchange provides compensation "in kind" which is sufficient in economic terms to

cover BellSouth's cost of providing interconnection. Specifically, the Order, on page 12, provides that "by mutual traffic exchange, each company avoids the cost of the rates it pays to the other company, and therefore receives the benefits equal to the benefits it provides."

Further, MCImetro contended that BellSouth's argument that our analysis is in error because the statute requires a charge to recover costs, not to insure the equality of benefits, ignores the fact the BellSouth avoids the payment of cash compensation, and those avoided cash payments remain with BellSouth to cover its costs of providing interconnection. MCImetro asserted that in economic terms BellSouth covers its costs of interconnection just as surely through mutual traffic exchange as it would through its preferred alternative of mutual cash exchange.

MCImetro, MFS-FL and AT&T contested BellSouth's argument that the evidence does not support our finding that traffic will be sufficiently balanced for mutual traffic exchange to ensure that each carrier recover its cost of providing interconnection. This is nothing but an argument about the weight of the evidence. MFS-FL noted that the Order concludes that there was no record evidence to suggest that traffic would be out of balance to the detriment of BellSouth. Also, MFS-FL and AT&T asserted that BellSouth neglected the record evidence of several expert witnesses who testified that in the long run traffic would be balanced. Since there is not yet any experience with local interconnection in Florida, it is impossible to say with certainty whether traffic will be balanced. We weighed competing testimony and evidence and concluded that it was likely that traffic would be sufficiently balanced to justify using mutual traffic exchange, especially when other advantages were factored into the consideration, such as additional measurement and billing costs if another method were used. BellSouth merely differs with us about the weight of the evidence.

Further, as MCImetro, MFS-FL and AT&T pointed out, we established a "safety valve" which allows any carrier to request that the compensation mechanism be changed upon a showing that traffic in fact is imbalanced to the point that it precludes a carrier from recovering its costs.

Again, we conclude that we have already considered and rejected BellSouth's argument. Our decision regarding mutual traffic exchange does not violate Section 364.162, Florida Statutes. Accordingly, we find that BellSouth in its second assertion has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we

rendered the portion of the Order establishing mutual traffic exchange as a mechanism for implementing local interconnection.

3) BellSouth's assertion that mutual traffic exchange constitutes a taking

BellSouth contended that mandatory mutual traffic exchange amounts to a taking under the Fifth and Fourteenth Amendments to the United States Constitution, as well as the Florida Constitution, Article 1, Section 9. Under the Order, BellSouth asserted that it is obligated to use its facilities to provide transport and termination of calls without receiving any compensation for allowing these calls to transit its network.

BellSouth stated that government action that requires a property owner to allow a utility to dedicate a portion of its property to use and transit by others constitutes a taking for Fifth Amendment purposes. Thus, even a small government-mandated physical intrusion into one's property for the purpose of carrying public utility traffic is a taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The degree of intrusion is immaterial; regulations that compel the property owner to suffer a physical invasion of his property constitute a per se taking no matter how minute the intrusion. Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893 (1992).

BellSouth contended that the requirement that it transport and terminate traffic from ALECs constitutes a physical intrusion onto its property. Specifically, BellSouth asserted that it must engineer its telephone exchange plant to accommodate the busy-hour traffic originated by all users, including ALECs, and that would require BellSouth to make investments in physical property to accommodate such traffic to avoid degrading service generally. Also, when traffic is offered by the ALECs for termination on BellSouth's network, BellSouth is obligated to devote measurable network capacity to the carriage of this traffic. Thus, BellSouth contended that property in its switching offices and transport network is measurably occupied by the ALEC-originated traffic, and BellSouth is denied the use of this property to serve others for the duration of the ALEC-originated calls. BellSouth argued that because it has and will invest in physical plant to terminate ALEC-originating traffic as well as other types of traffic, this plant is measurably occupied when traffic occurs, and, therefore, BellSouth is then denied the ability to use this physical plant for any other purpose, and a taking will occur. BellSouth cites Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1444 (D.C. Cir. 1994) for support of this argument.

A principle of the Takings Clause with respect to public utility regulation is set forth in Duquesne Light Co. v. Barash, 488 U.S. 299, 307-308 (1989):

> [T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory . . . if the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth . . . Amendment[].

BellSouth argued that mandating mutual traffic exchange will pass constitutional muster only if BellSouth receives just compensation for deprivation of its property. It will not receive just compensation for deprivation of its property, BellSouth contended, because it will not receive one penny for terminating ALEC's originated traffic, without regard to the volume of traffic offered or the investment in physical plant needed to accommodate it.

MCImetro and AT&T responded that BellSouth's basic assertions are incorrect. MCImetro and AT&T noted that BellSouth does receive compensation in the form of the ALECs' "in-kind" obligation to terminate BellSouth's traffic, a service which BellSouth requires to continue to provide ubiquitous telephone service to its customers. We note that BellSouth cited no case that holds "just compensation" must be in the form of a cash payment rather than payment in kind.

MCImetro further took issue with BellSouth's takings claim as predicated on the assertion that the Order requires a physical intrusion onto BellSouth's property. We observe that Loretto involved a state statute that required private landlords to allow a cable television company to place its cable on their property. MCImetro stated that BellSouth's position belies the fact that any physical intrusion is present in this case. Instead, the Order involves only the use of BellSouth's network, like all of BellSouth's other customers, to terminate traffic originated from the ALEC. To see the absurdity of BellSouth's position, MCImetro suggested substituting the term "business customer" for ALEC in BellSouth's example of physical intrusion above.

Where an alleged taking results from the price established by a regulatory body for a public utility service, rather than by a physical invasion of property, a public utility's property is not taken by regulation so long as the rates established by the regulatory authority allow the utility to earn a reasonable return on its investment. See Federal Power Commission v. Hope, 320 U.S. 591 (1944); Bluefield Water Works v. Public Service Commission of

West Virginia, 262 U.S. 679 (1923). MCImetro asserted that BellSouth had not argued that it will be deprived of the opportunity to earn a fair return on its overall utility operations. Thus, MCImetro concluded that the establishment for one service of "in-kind" rates that cover BellSouth's TSLRIC cost of providing the service is perfectly valid under the state and federal constitutions.

Property interests are not created by the Constitution, but rather are delineated by existing rules or understandings that stem from an independent source such as state law. Ruckelshaus v. Monsanto Co., 467 U. S. 986, 1000 (1984), citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980). Sections 364.16 and 364.162, Florida Statutes, permit a LEC and a requesting ALEC to negotiate mutually acceptable prices, terms and conditions for interconnection. If a negotiated price is not established, either party may petition this Commission to establish nondiscriminatory rates, terms, and conditions of interconnection, except that the rates shall not be below cost. We are also obligated by statute to ensure that the rate must not be set so high that it would serve as a barrier to competition. We have found that mutual traffic exchange meets our obligation to establish rates.

An argument similar to BellSouth's was raised by the LECs when we ordered mandatory physical collocation in Phase I of the expanded interconnection docket. See Order No. PSC-94-0285-FOF-TP, issued March 10, 1994. We stayed our order when the Federal Communications Commission ordered mandatory virtual, rather than physical, collocation. See Order No. PSC-94-1102-FOF-TP, issued September 7, 1994. In Order No. PSC-94-0285-FOF-TP, we were persuaded by the argument that property dedicated for the public purpose is subject to a different standard when, pursuant to statutory authorization, a regulatory body mandates certain uses of that property in the furtherance of its dedicated use. We were not persuaded by the LECs' argument that a mandatory physical occupation is a per se taking.

In this case, the statutory authorization is provided by Chapter 364, Florida Statutes. Effective interconnection and unbundling and the adequate provision of telecommunications service require that we mandate interconnection, and such purposes as these do not turn statutorily authorized regulation into a taking.

Loretto may be relied upon as authority for a taking analysis based upon an ad hoc factual inquiry of:

1) The economic impact of the regulation;

2) The extent to which it interferes with investment-backed expectations; and
3) The character of the governmental action.

Loretto may also be relied upon for the proposition that a permanent physical occupation represents a per se taking and that an ad hoc inquiry is only reached in the absence of such a permanent physical occupation. The Loretto court stated that:

> We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. Id. at 441.

We previously found that an objective reading of Loretto is that if there is a permanent physical occupation there is a taking. See Order No. PSC-94-0285-FOF-TP. This is the case regardless of the size of the occupation. In Loretto, the permanent occupation was the attachment of wires and a box to the exterior of a building.

Here, BellSouth objects to the mandate of a mutual traffic exchange arrangement to effectuate statutorily authorized interconnection. Based on BellSouth's interpretation of Loretto, interconnection would be a taking if opposed by BellSouth. Such an interpretation would make it impossible for us to regulate telecommunications pursuant to our statutory mandate.

BellSouth contended that mutual traffic exchange amounts to a taking because it is obligated to use its facilities to provide transport and termination of calls without receiving any compensation for allowing these calls to terminate its network. We find that Loretto is not the appropriate standard to employ regarding this Commission's statutorily authorized regulation of the LEC's property. Loretto involved neither the taking of a common carrier's property nor government regulation of a common carrier. This distinction is central to any taking analysis:

> A lawful governmental regulation of the service of common carriers, though it may be a burden, is not a violation of constitutional rights to acquire, possess, and protect property, to due process of law, and to equal protection of the laws, since those who devote their property to the uses of a common carrier do so subject to the right of governmental regulation in the interest of the common welfare . . . Even where a particular regulation causes a pecuniary loss to the carrier, if it is reasonable with

> reference to the just demands of the public to be affected by it, and it does not arbitrarily impose an unreasonable burden upon the carrier, the regulation will not be a taking of property, in violation of the Constitution. State ex rel. Railroad Com'rs v. Florida East Coast Ry. Co., 49 So. 43-44 (Fla. 1909). (emphasis added)

It has long been established that property which has been dedicated to a public purpose can be regulated and even permanently physically occupied as long as the regulation involves the dedicated public purpose. See, Munn v. Illinois, 94 U.S. 113, 126 (1876). Under this analysis, the taking issue is not reached except to the extent that there is inadequate compensation for the use of the property or a mandate to use the property in a manner to which it has not been dedicated. Neither condition is present here.

We find that we have the authority to establish the appropriate rates for the provision of telecommunications service in Florida. Further, provided that the rates are not confiscatory, we have the statutory authority to establish nondiscriminatory rates, terms, and conditions for interconnection. We find that BellSouth's third assertion does not raise a material and relevant point of fact or law that we overlooked or that we failed to consider when we rendered the Order in the first instance. Thus, on this assertion, we deny BellSouth's motion for reconsideration.

4) BellSouth's assertion that mandatory mutual traffic exchange violates Telecommunications Act of 1996

Although BellSouth acknowledged that this proceeding was heard and briefed prior to the date the Federal Telecommunications Act of 1996 (Act) was signed into law on February 8, 1996, the decision we reached was reached after the date the Act became law. MFS-FL and AT&T stated that this Commission has acted in accordance with its obligations under Section 364.162, Florida Statutes. BellSouth stated that to the extent this proceeding and Order are construed to be a matter within the scope of the Act, the action we ordered is not lawful.

Section 261(b) of the Act provides that nothing in the Act shall be construed to prohibit any state commission from enforcing regulations prescribed prior to the date of enactment of the Act or from prescribing regulations after the date of enactment if such regulations are not inconsistent with the provisions of the Act. MFS-FL contended that we are merely enforcing our statutory mandate to order interconnection arrangements where the parties have not

reached agreement. Further, MFS-FL and AT&T asserted that our action is consistent with the provisions of the Act. We agree.

Section 251(b)(5) of the Act obligates all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 252(d)(2)(A) provides the general rule that governs state commission approval of reciprocal compensation arrangements. Specifically, this section states:

> (A) IN GENERAL. - For purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless -
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of reasonable approximation of additional costs of terminating such calls.

BellSouth argued that the applicable pricing standard for judging the reasonableness of the terms and conditions for reciprocal compensation clearly contemplates the recovery by each carrier of the costs associated with the termination of calls on its network and that mutual traffic exchange does not do this. MCImetro responded that the general rule in Section 252(d)(2)(A) applies regardless of whether the arrangements have been established by the parties through a voluntary agreement under Section 252(a) or through action by a state commission under Section 252(b).

Section 252(d)(2)(B) provides:

> (B) RULES OF CONSTRUCTION. - This paragraph shall not be construed -
>
> (i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements) . . . .

BellSouth contended that this section contemplates that recovery of costs and bill-and-keep are mutually exclusive. Also, BellSouth argued that by using the term "waive" the Act allows the negotiating parties to relinquish the mutual recovery of costs voluntarily. However, BellSouth contended that the Act does not authorize mandatory mutual traffic exchange as the method of cost recovery.

MCImetro and MFS-FL responded that while Section 252(d)(2)(B)(i) does not require a state commission to adopt mutual traffic exchange, it clearly authorizes it to do so. The Act expressly recognizes that the offsetting of reciprocal obligations, whether through bill-and-keep or mutual traffic exchange, is a permissible method of cost recovery. Nothing in the Act states that the rules of construction apply only to voluntarily negotiated compensation mechanisms, or that this Commission would have less latitude than the parties would have to establish an appropriate compensation policy.

Our decision regarding mutual traffic exchange as a compensation mechanism does not violate the Federal Telecommunications Act of 1996. That decision was based on Chapter 364, Florida Statutes, and is consistent with the provisions of the Act. Accordingly, BellSouth, in its fourth assertion, has not raised a material and relevant point of fact or law that we overlooked or that we failed to consider when we rendered the portion of the Order establishing mutual traffic exchange as a mechanism for implementing local interconnection. Having fully considered BellSouth's arguments concerning mutual traffic exchange, to that extent we deny its motion for reconsideration.

We note that in a footnote, BellSouth requested that we include in the final order a provision that if judicial review is sought by any party, any carrier interconnecting on a mutual traffic exchange basis during the pendency of appeal will be required to keep adequate records to allow the proper billing, starting on the original date of interconnection, in the event of a reversal or remand of the Order. BellSouth stated that it will not seek a stay of the Order if an appeal is necessary. This is not an issue for reconsideration. If BellSouth seeks appellate review, then BellSouth may ask for a stay of the Order if it so chooses.

B. RESIDUAL INTERCONNECTION CHARGE

In its motion for reconsideration, BellSouth also requested that we reconsider our decision requiring that the residual interconnection charge be billed and collected by the carrier

terminating the call. We ordered that in a situation where calls were terminated or originated from companies not directly connected with each other or to the ALEC's network, but connected to BellSouth, the residual interconnection charge (RIC) should be collected by the company providing terminating access. BellSouth stated that that decision violates both federal and state law and contains provisions not supported by competent and substantial evidence. It argued that allowing the ALECs to collect the RIC, particularly where they have no costs of transport, nor revenue requirement normally associated with the RIC, will simply provide them with a windfall and will prevent the LECs from collecting the money the RIC was expressly created to facilitate.

MFS-FL responded that we have already considered and rejected BellSouth's argument that it should receive the RIC. In addition, MFS-FL stated that BellSouth adds no new legal argument or factual point, and therefore cannot meet the standard for a motion for reconsideration.

MCImetro responded that the portion of the Order regarding the collection of the RIC is supported by competent and substantial evidence. MCImetro stated that BellSouth chose to ignore the evidence that an ALEC should compensate BellSouth for performing the intermediary function for toll traffic on the same basis that other LECs compensate BellSouth for this function today. In addition, MCImetro asserted that BellSouth ignored the evidence that shows that when a toll call today is handled jointly by two local exchange companies, the RIC is charged by the company that terminates the call. MCImetro asserted that this is sufficient evidence to support our ruling that access charges shall be split fairly according to the function that each carrier performs, and that the carrier performing the terminating function is entitled to the RIC.

MCImetro further asserted that BellSouth's motion did not analyze the evidence on this issue, but simply renewed the arguments made in its post-hearing filings that the RIC should be regarded purely as a revenue requirement issue. MCImetro stated that this argument ignores the fact that BellSouth has elected to be governed by price regulation, and is therefore in contrast to the Order.

AT&T responded that BellSouth ignored the testimony of several petitioning and intervening witnesses. AT&T also pointed out that BellSouth erroneously attributed certain positions regarding the RIC to AT&T, positions actually taken by MFS-FL witness Devine. AT&T asserted that we weighed and evaluated this evidence and that presented by BellSouth as reflected in the Order,

on page 19. AT&T, therefore, asserted that BellSouth cannot now resuscitate a failed position under the guise of a motion for reconsideration.

McCaw stated that it supports MFS-FL's, MCImetro's, and AT&T's responses to BellSouth's motion.

We find that BellSouth has simply restated the same arguments that it made in its post hearing brief. Moreover, we find that we did not fail to consider evidence that would warrant reconsideration of the portion of the Order concerning residual interconnection charges. BellSouth does not raise a material and relevant point of fact or law which we overlooked or which we failed to consider when we rendered the Order in the first instance. Therefore, we deny BellSouth's motion for reconsideration regarding our decision that the residual interconnection charge be billed and collected by the carrier terminating the call.

C. INTERMEDIARY HANDLING OF LOCAL TRAFFIC

In its motion, BellSouth also requested that we reconsider that portion of the Order regarding compensating an intermediary carrier for switching calls between originating and terminating carriers, where such carriers are interconnected with BellSouth but not with each other, insofar as we elected not to set a rate for intermediary handling of local traffic. BellSouth stated that we appeared to require it to provide the intermediary function. It further stated that it was willing to provide that function, that it had stipulated to a rate in Order No. PSC-96-0082-AS-TP (Stipulation), issued January 17, 1996, and that parties agreed that a price for the intermediary function was appropriate. Since we did not set a rate for the intermediary function, BellSouth requested that we now do so.

BellSouth proposed that the rate be set as the sum of its tandem switching and transport switched access rate elements, plus $.002 per access minute of use. Those of the responding parties who took a position on this issue advocated the adoption of a specific rate. AT&T, MFS-FL and MCImetro testified during the proceedings that the appropriate rate should be set at the Total Service Long Run Incremental Cost (TSLRIC) of that function. These parties also noted that the rate proposed by BellSouth is substantially in excess of its cost to provide the service.

We find it appropriate to set a specific rate for LEC intermediary handling of local traffic. Accordingly, we reconsider the Order in this respect. This rate shall be applied only where

the ALECs involved in the call are not collocated in the same wire center. The difference between direct local interconnection and the intermediary function at issue here is that there is a direct cross benefit to each carrier when each terminates the other's traffic. For the intermediary carrier, however, there is no cross benefit, and therefore a specific rate must be established to compensate for performance of the intermediary (or hand off) function.

However, we do not find the rates proposed by BellSouth for intermediary handling of local traffic to be appropriate. Rather, we find that a rate more closely related to cost is appropriate. BellSouth did not provide a TSLRIC estimate for tandem switching in this proceeding. Instead, it supplied the LRIC estimate for tandem switching that was submitted in Docket No. 921074-TP as part of the local transport restructure. In that docket, we ordered LECs to design the new components of local transport based on costs, and to provide the underlying cost support. See Order No. PSC-95-0034-FOF-TP. This cost support was analyzed by the interested parties, who then negotiated with the LECs, including GTE Florida, United Telephone Company of Florida and Central Telephone Company of Florida. The parties eventually agreed on a revised set of rates, including tandem switching, that we ultimately approved and that are currently in effect. See Order No. PSC-96-0099-FOF-TP. Current local transport rates are, therefore, based closely on LRIC costs.

We find it appropriate to set the rate for BellSouth for intermediary handling of local traffic as $.00050 per minute of use, which matches its tandem switching rate approved in Docket No. 921074-TP. That rate is sufficiently greater than the LRIC estimate provided in both that docket and in this docket and it is reasonable to believe that it also covers TSLRIC.

V. FCTA'S AND TIME WARNER'S MOTIONS FOR RECONSIDERATION

Time Warner and FCTA also requested reconsideration of the Order. MCImetro, MFS-FL, AT&T, and Continental filed responses to those requests. We approved a stipulation between BellSouth and several ALECs, including Time Warner and FCTA. See Order No. PSC-96-0082-AS-TP. Subsequently, we set interconnection rates, terms and conditions for MFS-FL and MCImetro in Order No. PSC-96-0445-FOF-TP, issued March 29, 1996.

Time Warner and FCTA argued that the Order departs from the essential requirements of law by ignoring or overlooking this Commission's duty under Sections 364.16 and 364.162, Florida Statutes, to establish non-discriminatory rates, terms, and

conditions and to promote competition among the largest possible array of companies. They also challenged the approval of a rate structure negotiated by several ALECs and BellSouth and a subsequent approval of different rates, terms, and conditions for MCImetro and MFS-FL without any supporting rationale for the disparate treatment. FCTA noted that Sections 364.08, 364.09, and 364.10, Florida Statutes, have been interpreted to prohibit undue or unreasonable discrimination. Neither Time Warner nor FCTA challenged the Commission's statutory authority to authorize bill and keep.

Further, Time Warner and FCTA argued that subsequent approval of different rates results in the signatories being denied due process, being placed at a competitive disadvantage, and being discouraged from entering negotiated settlements in the future. Moreover, FCTA and Time Warner argued that the Order overlooks the requirement that whatever compensation arrangements are adopted must foster competition. FCTA contended that the subsequent approval of a different rate for the same service when provided to MCImetro and MFS-FL overlooks or fails to consider that the ALEC parties to this proceeding are going to compete against each other. Thus, FCTA argued that we must avoid setting rates, terms, and conditions that make it likely that one ALEC will compete more effectively than another.

Section 364.162, Florida Statutes, establishes a two part procedure for establishing provisions for local interconnection. Specifically, parties may negotiate or, if negotiations fail, may petition this Commission to establish such nondiscriminatory rates, terms, and conditions of interconnection. AT&T asserted that adopting FCTA's and Time Warner's construction of Section 364.162, Florida Statutes, would render an absurd result. The first time rates, terms, and conditions of interconnection are set by this Commission, either by approval of a negotiated agreement or by arbitration, then those rates, terms and conditions would govern any subsequent agreement or arbitration. However, the plain language of the statute contemplates several sets of negotiations or hearings between parties. MCImetro and MFS-FL raised similar arguments.

We find the arguments of AT&T, MCImetro, and MFS-FL to be compelling. In fact, FCTA and Time Warner were parties to the hearing but, as the hearing approached, they negotiated an agreement with BellSouth, as they are allowed to do by law. But Section 364.162, Florida Statutes, does not compel MFS-FL and MCImetro to be signatories to an agreement negotiated by Time Warner and FCTA just because the latter were the first to have a Commission-approved rate. In fact, Section 364.162, Florida

Statutes, grants ALECs, such as MFS-FL and MCImetro, the right to have this Commission set the provisions of interconnection if negotiations fail. Nor does the law prohibit others from negotiating a different nondiscriminatory interconnection arrangement.

Further, MCImetro and MFS-FL noted that we acknowledged that a negotiation might produce a different regime than litigation and reserved for a subsequent complaint proceeding any claim that the differences were unduly discriminatory. See Stipulation. Neither FCTA nor Time Warner appealed that order. MCImetro asserted that FCTA and Time Warner as parties to that proceeding are bound by the Commission's determination, absent a showing of changed circumstances. Since the proceeding in which mutual traffic exchange was adopted was pending at the time and was expressly referred to in the order, the existence of that proceeding is not a changed circumstance.

Under the Order, we also ordered BellSouth to file a tariff for its interconnection rates and other arrangements. Continental's interpretation of the tariffing requirements is that this Commission intends for all ALECs, regardless of whether they entered into an agreement, to have the right to order interconnection arrangements under those in the tariff. MCImetro stated that under ordinary principles of tariff interpretation, these rates, terms, and conditions should be available to all, including FCTA and Time Warner, to the extent they are willing to take the entire package and they have not, by contract, relinquished their right to take under the terms of the tariff. MCImetro asserted that if FCTA or Time Warner needs relief from the Stipulation to take under the tariff, then that should be the subject of a separate complaint proceeding rather than a motion for reconsideration in this docket. We agree with this analysis. MFS-FL pointed out that the stipulated terms are considered transitional with new negotiations to begin no later than June 1, 1997, with the expiration of their negotiated agreement on December 31, 1997.

FCTA argued that the Order rejects the rates approved in the Stipulation, asserting that the reasons for doing so are based upon supposition and faulty reasoning and that there is no competent substantial evidence supporting this action. However, we find that FCTA merely disagrees with our conclusions.

FCTA took issue with the reasons the Order rejects applying the terms of the Stipulation to the requests in this case. On page 10, the Order states that the stipulated terms do not ensure that each company will be fairly compensated if traffic is significantly

imbalanced. FCTA contended that there is no evidence of record that traffic will be significantly imbalanced, stating that "if traffic is out of balance by more than 105%, parties will obviously be compensated under Stipulation by mutual traffic exchange." FCTA argued that the Order supplies no supporting facts or rationale for the conclusion that mutual traffic exchange above the 105% cap will not ensure cost recovery while mutual traffic exchange pursuant to the terms of the Order will ensure cost recovery.

We required implementation of mutual traffic exchange as discussed on pages 10-14 of the Order and specifically

> ORDERED that if MCImetro, MFS-FL or BellSouth believes that traffic is imbalanced to the point that it is not receiving benefits equivalent to those it is providing through mutual traffic exchange, it may request the compensation mechanism be changed as discussed in the body of the Order. (Order at 40).

Thus, the Order provides that if traffic is imbalanced, the parties may request the compensation mechanism be changed.

FCTA stated that it is unclear how the Order concludes that the rate in the Stipulation does not ensure cost recovery on the one hand but may be too high on the other hand. However, the Order, on page 10, clearly states that, "based on the cost information in the record, it appears that the local interconnection rate of $0.01052/minute contained in the Stipulation may be too high." We merely rejected establishing the terms of the Stipulation for the parties requesting interconnection based on evidence in the record, which was not available at the time we approved the Stipulation.

Further, FCTA stated that the Order erroneously concludes that the Stipulation foresees a movement to mutual traffic exchange in the future and anticipates a nearly balanced exchange of traffic, contending that there is nothing in the record to support this conclusion and that the plain language of the stipulation states that the 105% cap is intended as a competitive safeguard. FCTA added that another plausible interpretation is to provide a convenience to the parties if traffic is far out of balance. We stated that we foresee this based on the language of the Stipulation itself:

> If it is mutually agreed that the administrative costs associated with the exchange of local traffic are greater than the net monies exchanged, the parties will exchange

> local traffic on an in-kind basis; foregoing compensation in the form of cash or cash equivalent. (Order at 10)

We considered and rejected the Stipulation as an interconnection arrangement for the requests for interconnection by MCImetro and MFS-FL. That does not mean that those terms are not reasonable and should not have been approved when the negotiated agreement came before us. However, based on the evidence in the record, we determined that mutual traffic exchange, as provided in the Order, was the appropriate arrangement to be established for MCImetro and MFS-FL's requests for interconnection with BellSouth.

We find that we have not failed to consider evidence that would warrant reconsideration of the Order. Time Warner's and FCTA's motions do not raise a material and relevant point of fact or law that we overlooked or which we failed to consider when we rendered the Order in the first instance. Therefore, we deny Time Warner's and FCTA's motions for reconsideration of Order No. PSC-96-0445-FOF-TP.

VI. TOLL DEFAULT MECHANISM

BellSouth proposed that, to distinguish local from toll traffic, it would provide ALECs with NXX codes to the extent that the ALECs require them for use in the calling areas the ALECs want to establish. BellSouth also proposed a toll default mechanism whereby a BellSouth customer is calling an ALEC customer and the NXX code used by the ALEC is such that BellSouth cannot determine whether the call is local or toll. In that case, BellSouth would charge that ALEC for that call in the same manner that it charges an IXC, for example, BellSouth would charge originating switched access for that call. To avoid paying BellSouth originating intrastate network access charges, the ALEC would have to provide sufficient information to determine whether the traffic is local or toll. However, if BellSouth does not provide an ALEC with access to a sufficient number of numbering resources so that BellSouth can tell whether or not a call is local or toll, the call will be deemed local.

We considered this evidence in our decision regarding the toll default mechanism. The relevant section of the Order states:

> When it cannot be determined whether a call is local or toll, the local exchange provider shall be assessed originating switched access charges for that call unless the local exchange provider originating the call can provide evidence that the call is actually a local call. (Order at 16)

We find that we must revise the Order to clarify our intent. BellSouth's proposal does not make sense for two local exchange providers who are exchanging toll traffic. Today, if BellSouth exchanges traffic with an adjacent LEC, BellSouth would not charge the adjacent LEC originating switched access. BellSouth bills and keeps the revenue it receives from its end user and then pays the adjacent LEC terminating switched access. This should be the same in the competitive environment.

Not only does the payment of terminating switched access make more sense in the context of this proceeding, but we are also concerned that the language in the Order requiring originating switched access to be assessed is inconsistent with the Florida Statutes. Section 364.160(3)(a), Florida Statutes, states:

> No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

The Order, as written, requires the payment of originating switched access for a toll call and would thus not comply with the statute. Thus, we revise the Order to require the payment of terminating switched access charges by the local exchange provider who delivers traffic to another provider and cannot prove that it is local, as follows:

> When it cannot be determined whether a call is local or toll, the local exchange provider originating the call shall be assessed terminating switched access charges for that call unless the local exchange provider originating the call can provide evidence that the call is actually a local call.

Therefore, on our own motion, we reconsider our decision as to whether originating or terminating access charges should apply for the toll default. We find, accordingly, that the company terminating the call should receive terminating switched access from the originating company unless the originating company can prove that the call is local.

We recognize that it is important to be able to determine if a call is local or toll. The LEC's local calling areas are well known because they are published in the telephone directory. However, the ALEC's local calling area may or may not be the same as the LEC's local calling area. In addition, the ALEC has statewide authority, so a call that is local to the ALEC customer may be a toll call for a LEC customer. Also, the ALEC does not have control over the assignment of NXX codes. Therefore, we

direct the companies to work out how they will define their local calling areas and how they will use the NXXs, so that the local-toll distinction will not be a problem. In addition, we direct that the ALECs identify and provide their local calling areas to the LECs.

VII. TARIFF FILINGS

We ordered BellSouth to tariff its interconnection rates and other arrangements. Such arrangements are available to all similarly situated ALECs on a non-discriminatory basis. The Order also cites Section 364.162(2), Florida Statutes, which states that whether set by negotiation or by this Commission, interconnection prices, rates, terms, and conditions shall be filed with this Commission before their effective date. However, the Order did not provide a time frame for BellSouth to file the tariffs.

There needs to be some time frame for BellSouth to file its interconnection tariffs, but this was not discussed by any of the parties in this proceeding. Because of the number of complex issues in this case, it appears to us that the time frame for filing tariffs went unnoticed. Therefore, on our own motion, we reconsider the portion of the Order regarding tariffing, and add the following sentence to the body of the Order in Section III:

> BellSouth shall file its tariff for its interconnection rates, terms, and conditions within 30 days from the date of the issuance of the order on reconsideration.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth's Request for Oral Argument is denied. It is further

ORDERED that BellSouth's Motion for Reconsideration of Order No. PSC-96-0445-FOF-TP is denied in part and granted in part. It is further

ORDERED that BellSouth's Motion for Reconsideration of Order No. PSC-96-0445-FOF-TP is denied regarding our decision on mutual traffic exchange as a compensation arrangement for the termination of local traffic as discussed in the body of this Order. It is further

ORDERED that BellSouth's Motion for Reconsideration of Order No. PSC-96-0445-FOF-TP is denied regarding our decision that the residual interconnection charge be billed and collected by the carrier terminating the call. It is further

ORDERED that the rate for BellSouth for intermediary handing of local traffic shall be set at the same level as the tandem switching element in BellSouth's Switched Access Switched Transport tariff, which is $0.00050 per access minute, and shall only be assessed where ALECs involved in the call are not collocated in the same wire center. It is further

ORDERED that FCTA's Motion for Reconsideration of Order No. PSC-96-0445-FOF-TP is denied. It is further

ORDERED that Time Warner's Motion for Reconsideration of Order No. PSC-96-0445-FOF-TP is denied. It is further

ORDERED that Order No. PSC-96-0445-FOF-TP shall be revised with respect to whether originating or terminating access charges apply for the toll default mechanism. The company terminating the call shall receive terminating switched access charges unless the originating company can prove that the call is local. Order No. PSC-96-0445-FOF-TP is modified as herein described. It is further

ORDERED that BellSouth and the respective ALECs shall work out how they will define their local calling areas and how they will use NXX codes. It is further

ORDERED that the respective ALECs shall identify their local calling areas and provide that information to BellSouth. It is further

ORDERED that BellSouth shall file its tariff for its interconnection rates, terms, and conditions within 30 days from the date of this Order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 1st day of October, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: _____
Chief, Bureau of Records

(S E A L)

DLC/CJP

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.