

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration
concerning complaint of TCG
South Florida and Teleport
Communications Group against
BellSouth Telecommunications,
Inc. for breach of terms of
interconnection agreement.

DOCKET NO. 001810-TP
ORDER NO. PSC-01-1336-PHO-TP
ISSUED: June 18, 2001

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on May 30, 2001, in Tallahassee, Florida, before Commissioner Lila A. Jaber, as Prehearing Officer.

APPEARANCES:

James Meza III, Esquire, 150 West Flagler Street, Suite
1910, Miami, Florida 33130
On behalf of BellSouth telecommunications, Inc.

Kenneth Hoffman, Esquire and Martin P. McDonnell,
Esquire, Rutledge Law Firm, Post Office Box 551,
Tallahassee, Florida 32302
On behalf of TCG/Teleport Communications Group

Patricia Christensen, Esquire and Jessica Elliott,
Esquire, Florida Public Service Commission, 2540 Shumard
Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

On December 20, 2000, TCG South Florida and Teleport Communications Group (TCG) filed a complaint against BellSouth

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Telecommunications, Inc. (BellSouth) alleging that BellSouth has failed to pay reciprocal compensation for internet bound traffic originated and terminated by TCG under the terms of the Second BellSouth/TCG Agreement. On January 9, 2001 BellSouth filed its response to TCG's complaint. This matter is scheduled for an administrative hearing on June 22, 2001.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall

notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes

the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Richard A. Guepe	TCG	1, 2, 3, 4(a), 4(b), 5(a) and 5(b)
Fran Mirando	TCG	4(b) and 5(b)
Beth Shiroishi	BellSouth	1, 2, 3, 4(a), 4(b), 5(a), and 5(b)
Clyde Green	BellSouth	4(a)
<u>Rebuttal</u>		
Richard A. Guepe	TCG	1, 2, 3, 4(a), 4(b), 5(a) and 5(b)
Beth Shiroishi	BellSouth	1, 2, 3, 4(a), 4(b), 5(a) and 5(b)

VII. BASIC POSITIONS

TCG:

TCG seeks enforcement of its Interconnection Agreement with BellSouth. TCG and BellSouth entered into the Interconnection Agreement on July 14, 1999 and it was approved by the Commission on September 21, 1999, in Order No. PSC-99-1877-FOF-TP. In the Agreement, BellSouth agreed to pay TCG reciprocal compensation for the transport and termination of "Local Traffic" as defined therein. BellSouth has breached the Agreement by failing to pay TCG reciprocal compensation for the transport and termination of telephone calls originated by BellSouth's end user customers and transported and terminated by TCG to ISPs. Further, BellSouth has breached the Agreement by failing to pay the full amount due for switched access charges for telephone exchange service

provided by TCG to BellSouth. The following facts clearly establish TCG's entitlement to its requested relief.

TCG and BellSouth originally entered into an Interconnection Agreement on July 15, 1996 (the "First BellSouth/TCG Agreement"). The First BellSouth/TCG Agreement was approved by the Commission on October 29, 1996, in Order No. PSC-96-1313-FOF-TP. On February 4, 1998, TCG filed a complaint for enforcement of Section 1.D of the First BellSouth/TCG Agreement, alleging that BellSouth failed to pay reciprocal compensation for telephone exchange service traffic transported and terminated by TCG to ISPs. On September 15, 1998, the Commission issued Order No. PSC-98-1216-FOF-TP ("TCG Order") requiring BellSouth to pay TCG reciprocal compensation for transport and termination of calls to ISPs.

After the expiration of the First BellSouth/TCG Agreement, TCG adopted an existing interconnection agreement between AT&T and BellSouth (the "Second BellSouth/TCG Agreement"). The Commission approved the Second BellSouth/TCG Agreement on September 21, 1999 in Order No. PSC-99-1877-FOF-TP. The Second BellSouth/TCG Agreement is identical to the First BellSouth/TCG Agreement in terms of defining "Local Traffic." Despite the fact that the Commission has already interpreted this definition of "Local Traffic" to include ISP-bound traffic, BellSouth refuses to compensate TCG for terminating its ISP-bound traffic. Based on the TCG Order, the Commission's prior interpretation of the definition of "Local Traffic" in the earlier litigation between TCG and BellSouth governs the disposition of this case and BellSouth is precluded from relitigating that issue in this proceeding under the doctrine of collateral estoppel. The pertinent facts and the applicable law have not changed since the Commission ordered BellSouth to compensate TCG for terminating ISP-bound traffic under the "Local Traffic" provision of the First BellSouth/TCG Agreement. The Commission should follow its own precedent and order BellSouth to compensate TCG for the termination of BellSouth's ISP-bound traffic, in accordance with the plain language of the "Local Traffic" provisions of the Second BellSouth/TCG Agreement.

In the Second BellSouth/TCG Agreement, the parties agreed to the rates applicable to reciprocal compensation for the exchange of local traffic. Pursuant to the terms of that Agreement, TCG is entitled to compensation for its termination of BellSouth's ISP-bound traffic at the tandem interconnection rate of \$.00325. TCG is entitled to be compensated at the tandem interconnection rate because TCG's switches serve a "comparable geographic area" to BellSouth's switches. Pursuant to FCC rules, because TCG meets the "comparable geographic area" test, it is entitled to reciprocal compensation at the tandem interconnection rate for the termination of BellSouth's ISP-bound traffic.

BellSouth has also breached the Second BellSouth/TCG Agreement by failing to pay TCG the full switched access charges due for telephone exchange service provided by TCG to BellSouth. Pursuant to BellSouth's filed tariffs, TCG is entitled to switched access charges for telephone exchange service provided by TCG to BellSouth at the rate of \$.02733 per minute of use. Despite TCG's entitlement to switched access charges at that rate, BellSouth has remitted its payments at a lower rate in violation of the Commission approved tariffs.

BELLSOUTH:

BellSouth did not breach the Second Teleport Communications Group ("TCG") Agreement by refusing to pay TCG reciprocal compensation for traffic bound to Internet Service Providers ("ISPs") for three primary reasons. First, ISP-bound traffic is, and always has been, interstate traffic. Second, the parties did not agree to pay reciprocal compensation for ISP-bound traffic in the Second TCG Agreement. Third, this Commission's Order in Order No. PSC-98-1216-TP has no bearing on the issues in this proceeding because it only applied to the First TCG Agreement.

Additionally, BellSouth has also not breached the Second TCG by failing to pay TCG switched access charges for telephone exchange service because BellSouth has paid TCG all switched access charges owed.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE 1: What is the Commission's jurisdiction in this matter?

POSITIONS

TCG:

This Commission has jurisdiction to enforce the terms of the Second BellSouth/TCG Agreement that BellSouth has breached. The United States Court of Appeals for the Eighth Circuit confirmed that, pursuant to Section 252 of the Act, State Commissions like this one, "are vested with the power to enforce the provisions of the agreements.... (they) have approved." Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8th Cir. 1997). The Commission also has jurisdiction to consider and resolve this complaint pursuant to Section 364.01, Florida Statutes, and Order No. PSC-99-1877-FOF-TP. Moreover, Section 16 of the Second BellSouth/TCG Agreement requires the parties to petition this Commission for a resolution of any disputes that arise as to the interpretation of the Agreement.

BELLSOUTH:

The Commission has jurisdiction in this matter because state commissions have the authority to hear disputes concerning the enforcement of agreements they approve pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act"). See. Iowa Util. Bd. v. FCC, 120 F. 3d 753, 804 (8th Cir. 1997). The FCC, however, in its Order on Remand and Report and Order (FCC Order No. 01-131, released April 27 2001) ("Remand Order") confirmed that ISP traffic is interstate traffic and

within the exclusive jurisdiction of the FCC. Therefore, any interpretation and decision by this Commission must be consistent with the FCC's findings and analysis in the Remand Order.

STAFF:

Part II of the Federal Telecommunications Act of 1996 (Act) sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act regards interconnection with the incumbent local exchange carrier and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

State Commissions retain primary authority to enforce the substantive terms of agreements they have approved pursuant to Sections 251 and 252 of the Act. Iowa Utilities Board v. Federal Communications Commission, 120 F. 3d 753,804 (8th) Cir. 1997). A petition has been filed requesting the Commission's review of an agreement it previously approved to determine if the parties are in compliance with that agreement. Based on Iowa Utilities Board and Section 252 (c) (1), the Commission has the authority to review the complaint.

ISSUE 2: Under the BellSouth/TCG Agreement, are the parties required to compensate each other for delivery of traffic to ISP's?

POSITIONS

TCG:

Yes. Attachment 11 of the Second BellSouth/TCG Agreement defines "Local Traffic" as:

Any telephone call that originates and terminates in the same LATA and is billed by the originating party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a local

interconnection arrangement with an independent LEC with which [TCG] is not directly interconnected. [emphasis added].

The traffic at issue fits the definition of "Local Traffic". BellSouth's end users customers place calls to TCG's end user ISP customers; the traffic originates and terminates in the same LATA; and BellSouth, the originating party, treats these calls as local when billing its end users. In fact, BellSouth bills its originating end user customers local rates when they dial any ISP, whether the ISP is served by BellSouth, TCG or another provider. Clearly, calls to ISPs fall within the agreed upon definition of "Local Traffic" and because the traffic at issue is "Local Traffic" as defined in the Second BellSouth/TCG Agreement, reciprocal compensation is due from BellSouth to TCG.

BELLSOUTH:

No. Under the terms of the Second TCG Agreement, the parties were only required to pay reciprocal compensation for local traffic. As recently made clear by the FCC in the Remand Order, traffic to ISPs is interstate and not local. Additionally, the parties did not agree to include ISP-bound traffic in the definition of "Local Traffic" under the Second TCG Agreement.

STAFF:

Staff has no position at this time.

ISSUE 3: What is the effect, if any, of Order No. PSC-98-1216-FOF-TP, issued December 15, 1998, in Docket No. 980184-TP, (TCG Order), interpreting the First Bell South/TCG Agreement requiring BellSouth to pay TCG for transport and termination of calls to ISPs, on the interpretation and application of the Second BellSouth/TCG Agreement?

POSITIONS

TCG:

BellSouth and TCG crafted a contractual definition of "Local Traffic" in the First BellSouth/TCG Agreement and agreed upon the exact same language in the Second BellSouth/TCG agreement. The parties expressly delineated what is and what is not "Local Traffic" in order to eliminate uncertainty over what type of traffic might be encompassed by the definition. If BellSouth had intended at the time of the agreement to exclude calls terminated to ISP customers of TCG from the definition of "Local Traffic," it could have, and should have, sought to modify the contractual definitions. BellSouth did not.

The definition of "Local Traffic" in the Second BellSouth/TCG Agreement is exactly the same as the definition of "Local Traffic" in the First BellSouth/TCG Agreement. The definition of "Local Traffic" in the First BellSouth/TCG agreement was interpreted and applied by this Commission in the TCG Order to require BellSouth to pay reciprocal compensation to TCG for the transportation and termination of calls to ISPs.

The Commission has determined that the definition of "Local Traffic" in the First BellSouth/TCG Agreement includes ISP-bound traffic. The Commission's prior determination of this issue governs the disposition of the same issue in this case and BellSouth is precluded from relitigating this issue. BellSouth is obligated to pay reciprocal compensation for ISP-bound traffic pursuant to the same definition of "Local Traffic" in the Second BellSouth/TCG agreement.

BELLSOUTH:

Order No. PSC-98-1216-FOF-TP has no effect whatsoever on the interpretation and application of the Second TCG Agreement because that Order interpreted only the First TCG Agreement, which is not at issue in this docket.

STAFF:

Staff has no position at this time.

ISSUE 4(a):

Has BellSouth breached the Second BellSouth/TCG Agreement by failing to pay TCG reciprocal compensation for transport and termination of Local Traffic as defined in the Second BellSouth/TCG Agreement for calls originated by BellSouth's end-user customers and transported and terminated by TCG to ISPs?

POSITIONS

TCG:

Yes.

BELLSOUTH:

For the reasons previously stated, BellSouth did not breach the Second TCG Agreement by failing to pay reciprocal compensation for the calls originated by BellSouth's end-user and transported and terminated by TCG. BellSouth has paid TCG reciprocal compensation for the transport and termination of "Local Traffic," which does not include ISP-bound traffic.

STAFF:

Staff has no position at this time.

ISSUE 4(b):

If so, what rates under the Second BellSouth/TCG Agreement should apply for the purpose of reciprocal compensation?

POSITIONS

TCG:

Pursuant to the terms of the Second BellSouth/TCG Agreement, TCG is entitled to reciprocal compensation at the tandem interconnection rate of \$.00325 for the termination of all BellSouth's local traffic, including ISP bound traffic. Under

FCC Rule 57.711(a)(3) and the FCC's recent confirmation of the application of that rule,¹ TCG is entitled to the above reciprocal compensation rate because TCG's switches serve a "comparable geographic area" to BellSouth's switches.

TCG is able to connect virtually any customer in a LATA to the TCG switch serving that LATA either through TCG's own facilities built to the customer premises, UNE loops provisioned through collocation in BellSouth end offices, or using dedicated high-capacity facilities (in special access services or combinations of UNEs purchased from BellSouth).

BELLSOUTH:

If the Commission finds that BellSouth has breached the TCG Agreement by failing to pay reciprocal compensation for ISP-bound traffic, the rate of compensation under the Agreement that BellSouth should pay TCG is the "Direct End Office Interconnection" rate of \$.002 per minute of use.

STAFF:

Staff has no position at this time.

ISSUE 5(a):

Has BellSouth breached the Second BellSouth/TCG Agreement by failing to pay TCG switched access charges for telephone exchange service provided by TCG to BellSouth?

POSITIONS

TCG:

Yes.

¹In the Matter of Developing a Unified Intercarrier Compensation Regime, FCC Docket No. 01-92, FCC Order No. 01-132.

ORDER NO. PSC-01-1336-PHO-TP
DOCKET NO. 001810-TP
PAGE 14

BELLSOUTH:

BellSouth has not breached the Second TCG Agreement by failing to pay switched access charges because BellSouth has paid all switched access charges owed.

STAFF:

Staff has no position at this time.

ISSUE 5(b):

If so, what rates under the Second BellSouth/TCG Agreement should apply for purposes of originating and terminating switched access charges for intraLATA toll traffic?

POSITIONS

TCG:

Based on the rate elements in BellSouth's intrastate switched access tariffs, TCG has billed BellSouth \$.02733 per minute of use for terminating switched access charges for intraLATA toll traffic. BellSouth remits payments at a lower rate in violation of the Commission-approved tariffs.

BELLSOUTH:

As stated above, BellSouth has not breached the Second TCG Agreement. If the Commission, however, does find a breach, the rate for switched access charges under the agreement is the rate that BellSouth is currently paying, \$.02643 per minute of use.

STAFF:

Staff has no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Richard A. Guepe	TCG	_____	BellSouth/AT&T
		(RTG-1)	Interconnec- tion Agreement
		_____	Citations to
		(RTG-2)	Florida PSC Orders
		_____	BellSouth/TCG
		(RTG-3)	A d o p t i o n Agreement
Fran Mirando	TCG	_____	TCG billings
		(FM-1)	to BellSouth a n d BellSouth's payments, u n p a i d balances, and late charges
Beth Shiroishi	BellSouth	_____	Comments of
		(ERAS-1)	AT&T Corp.
		_____	Access Service
		(ERAS-2)	Tariff E3- Carrier Common Line Access
		_____	Access Service
		(ERAS-3)	Tariff E6- BellSouth SWA Service
		_____	Access Service
		(ERAS-4)	Tariff E6- BellSouth SWA Access Service

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Rebuttal</u>			
Richard A. Guepe	TCG	_____ (RTG-4)	AT&T and BellSouth LATA maps

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

XI. PENDING MOTIONS

- 1) TCG's Motion for Partial Summary Final Order filed on May 25, 2001.
- 2) TCG's Motion to Compel and Request for Expedited Order on filed May 25, 2001.
- 3) TCG's ore tenus Motion for Continuance made at the May 30, 2001, Prehearing Conference.

XII. PENDING CONFIDENTIALITY MATTERS

There are no pending requests for confidential treatment at this time.

XIII. RULINGS

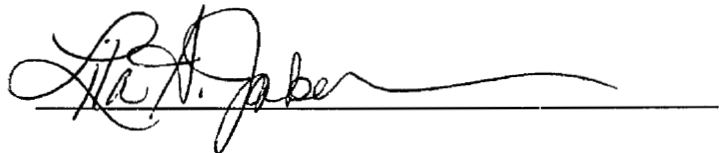
- 1) Opening statements, if any, shall not exceed 10 minutes per party.
- 2) TCG South Florida and Teleport Communications Group's Motion for Continuance and Rescheduling of Controlling Dates for Prehearing Statements, Prehearing Conference and Final Hearing, filed May 18, 2001, is hereby denied.

3) TCG shall file a written Motion for Continuance incorporating the grounds set forth in its ore tenus Motion for Continuance made at the Prehearing Conference. BellSouth's response to TCG's ore tenus Motion for Continuance shall be incorporated as its response to the written Motion for Continuance to be filed by TCG. Staff shall file a recommendation for the June 12, 2001, Agenda Conference, addressing the Motion for Partial Summary Final Order and the ore tenus Motion for Continuance.

It is therefore,

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer, this 18th day of June, 2001.

A handwritten signature in black ink, appearing to read "Lila A. Jaber", is written over a horizontal line.

LILA A. JABER
Commissioner and Prehearing Officer

(S E A L)

PAC/JAE

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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

ORDER NO. PSC-01-1336-PHO-TP
DOCKET NO. 001810-TP
PAGE 18

hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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.