FLORIDA PUBLIC SERVICE COMMISSION
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M E M O R A N D U M

July 18, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CANZANO, EDMONDS)
DIVISION OF COMMUNICATIONS (CHASE, REITH, NORTON)

RE: DOCKET NO. 950985-TL - RESOLUTION OF PETITION(S) TO ESTABLISH NONDISCRIMINATORY RATES, TERMS, AND CONDITIONS FOR INTERCONNECTION INVOLVING LOCAL EXCHANGE COMPANIES AND ALTERNATIVE LOCAL EXCHANGE COMPANIES PURSUANT TO SECTION 364.162, FLORIDA STATUTES

AGENDA: JULY 30, 1996 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF UNLESS ORAL ARGUMENT IS GRANTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950985.RCM

CASE 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 the Commission to establish non-discriminatory rates, terms, and conditions of interconnection.

By Order No. PSC-96-0445-FOF-TP (Order), issued March 29, 1996, the Commission 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 and FCTA filed motions for reconsideration of portions of

the Order. Several of the other parties filed responses to BellSouth's, Time Warner's, and FCTA's motions for reconsideration. This recommendation addresses the relevant motions under each issue as set forth below.

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. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); 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.

SUMMARY OF ISSUES

In Issue 1, staff recommends that the Commission deny BellSouth's request for oral argument. In Issue 2, staff recommends that the Commission deny BellSouth's Motion for Reconsideration regarding the Commission's decision on mutual traffic exchange as a compensation arrangement. In Issue 3, staff recommends that the Commission deny BellSouth's Motion for Reconsideration regarding the Commission's decision that the residual interconnection charge be billed and collected by the carrier terminating the call. In Issue 4, staff recommends that the Commission should reconsider its decision not to set a rate for intermediary handling of local traffic for BST. In Issue 5, staff recommends that the Commission should deny FCTA's and Time Warner's Requests for Reconsideration. In Issue 6, staff recommends that the Commission, on its own motion, should reconsider its decision regarding the toll default mechanism. In Issue 7, staff recommends that the Commission, on its own motion, should reconsider its decision regarding tariffing. In Issue 8, staff recommends that this docket should remain open to address the additional cost and operational information as required by Order No. PSC-96-0445-FOF-TP.

ISSUE 1: Should the Commission grant BellSouth's Request for Oral Argument on its Motion for Reconsideration?

RECOMMENDATION: No.

STAFF ANALYSIS: BellSouth states that its Motion for Reconsideration represents issues that are very important. BellSouth asserts that the Order failed to address many of the concerns expressed by BellSouth. BellSouth also states that to make an informed decision, the Commission should allow agenda conference participation by the parties.

On April 24, 1996, MFS-FL filed a motion in opposition to BellSouth's request for oral argument. MFS-FL states that oral argument is granted in the sole discretion of the Commission by Rule 25-22.060(1)(f), Florida Administrative Code. MFS-FL asserts that the Commission's hearing attests to the importance of the issues, and because BellSouth's presentation failed to persuade the Commission in the first instance there is no basis upon which to permit BellSouth a second opportunity to rehash the same evidence. MFS-FL contends that BellSouth's motion does not make a threshold showing that the Commission 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 asserts that neither did BellSouth demonstrate that the Commission overlooked and failed to consider significant evidence in the record.

Rule 25-22.058, Florida Administrative Code, states that the request for oral argument shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. It is within the Commission's discretion to grant or deny BellSouth's Request for Oral Argument. BellSouth and the other parties have made their positions quite clear in their written motions, and oral argument is not necessary to assist the Commission in its resolution of this matter. Accordingly, staff recommends that BellSouth's Request for Oral Argument be denied.

ISSUE 2: Should the Commission grant BellSouth's Motion for Reconsideration regarding the Commission's decision that for the termination of local traffic, MCImetro, MFS-FL and BellSouth shall compensate each other by mutual traffic exchange.

RECOMMENDATION: No. BellSouth's Motion for Reconsideration regarding the Commission's decision on mutual traffic exchange as a compensation arrangement should be denied. The motion does not raise a material and relevant point of fact or law which was overlooked or which the Commission failed to consider when it rendered the Order in the first instance.

STAFF ANALYSIS: In its Motion filed April 12, 1996, BellSouth requests that the Commission reconsider its decision in Order No. PSC-96-0445-FOF-TP, issued March 29, 1996, (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 argues 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, MCI Metro Access Transmission Services, Inc. (MCImetro), Metropolitan Fiber Systems of Florida, Inc. (MFS-FL), and AT&T Communications of the Southern States, Inc. (AT&T), also filed responses to BellSouth's motion. McCaw believes that the petitions filed by MFS-FL, MCImetro, and AT&T adequately respond to BellSouth's motion.

In its motion, BellSouth raises 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.

A. BELLSOUTH'S ASSERTION THAT THE ORDER FAILS TO SET A CHARGE FOR LOCAL INTERCONNECTION

BellSouth states that "mutual traffic exchange" is a misnomer and should be called "free interconnection". BellSouth argues that

to the extent traffic between the parties is not perfectly in balance it is tantamount to free interconnection. BellSouth states that Florida Statutes obligate the Commission to establish an actual "charge" or "rate" for interconnection; therefore, mutual traffic exchange violates Florida law.

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

BellSouth asserts 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, the Commission has not fulfilled the explicit requirements of Section 364.162. BellSouth contends 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 asserts that the rules of statutory construction do not permit a different result.

The first rule of statutory construction to which BellSouth cites is that no statutory interpretation is necessary when the statute is facially clear and totally lacking in ambiguity. The tribunal then applies the statute in the manner that is dictated by its plain language. See Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987). BellSouth also points out that under Florida law, plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary. See Green v. State, 604 So.2d 471, 473 (Fla. 1992). BellSouth refers to Webster's New Collegiate Dictionary, 957 (1st Ed. 1973), that defines "rate" to be "a charge, payment or price fixed according to a ratio, scale or standard." Webster's defines the word "charge" to mean "the price demanded for something." BellSouth refers to Black's Law Dictionary, 1134 (5th Ed. 1979), for the definition of "rate" to

mean "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 argues that these definitions do not mention mutual traffic exchange or any other form of barter. Therefore, BellSouth states that the plain language of the statute requires that the Commission set a price for interconnection.

The second rule of statutory construction to which BellSouth looks is that when a statute is susceptible to more than one interpretation, the reviewing tribunal must first seek to give effect to the intent of the legislature in creating the statute. BellSouth states that the 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); and Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., (Fla. 1983).

BellSouth refers 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 Streeter, supra and Florida State Racing Commission v. McLaughlin, 102 so.2d 574 (Fla. 1958). BellSouth asserts that in the transcript of a meeting of the House of Representatives Committee on Utilities and Telecommunications held on April 12, 1995, there was discussion as to the delinking of the universal service fund and interconnection charges. (EXH 1, p. 25). BellSouth contends that the legislators did not discuss the delinking of the universal service fund and mutual traffic exchange.

Further, BellSouth contends that to argue that Section 364.162 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 ignores the fact that the legislature could have drafted legislation making that option available to the Commission.

Finally, BellSouth argues that the Commission 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 contends that the Order is contrary to Florida law and must be overturned.

MCImetro and MFS-FL contend that BellSouth's analysis misses the mark. Section 364.162 uses three terms interchangeably to refer to the compensation mechanism for local interconnection - price, rate, and charge. Staff agrees with MCImetro 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 Law Dictionary, 1188 (7th ed. 1990). "Price" is also defined as "the sum of money or goods asked or given for something. The American Heritage dictionary of the English Language, at 226 (6th Ed., 1976)

MFS-FL explains 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 contends that this is not free interconnection as BellSouth alleges. MFS-FL clarifies 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 notes that the Commission 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. (Order, pp. 13-14)

AT&T asserts that the Commission considered and rejected BellSouth's testimony and argument once. Having pointed to no other matter of fact or law which the Commission did not consider, BellSouth's motion must fail. Staff agrees.

Thus, the Commission has already considered and rejected BellSouth's argument. Staff believes that based on the plain language of Section 364.162, the Commission is not precluded from establishing mutual traffic exchange as the mechanism for charging for local interconnection. Accordingly, BellSouth has not raised a material and relevant point of fact or law that was overlooked or which the Commission failed to consider when it rendered the portion of its order establishing mutual traffic exchange as a mechanism for implementing local interconnection.

B. BELLSOUTH'S ASSERTION THAT THE ORDER FAILS TO SET A LOCAL INTERCONNECTION CHARGE SUFFICIENT TO COVER COST

BellSouth asserts 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 disagrees 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 disagrees because the charge is to recover costs, not to insure the equality of benefits.

BellSouth further argues 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 contends that neither MFS-FL, MCImetro, nor AT&T presented competent substantial evidence that traffic would be balanced. BellSouth states 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 states 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. (EXH 6, p.26) BellSouth contends that there is no evidentiary support for the Commission's assumption that traffic will be balanced, and thus the Commission's conclusion is plainly arbitrary.

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

MCImetro asserts that the use of mutual traffic exchange enables BellSouth to recover its cost of providing local interconnection. MCImetro and AT&T state that the Commission 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 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." (Order at 12).

Further, MCImetro contends that BellSouth's argument that the Commission's 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 asserts 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 contest BellSouth's argument that the evidence does not support the Commission's 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 notes that the Order concludes that there was no record evidence to suggest that traffic would be out of balance to the detriment of BellSouth. See Order at pp. 9-10. Also, MFS-FL and AT&T assert that BellSouth neglects 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. Staff believes that the Commission 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 the Commission about the weight of the evidence which is not grounds for reconsideration.

Further, as MCImetro, MFS-FL and AT&T point out, the Commission 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.

The Commission has already considered and rejected BellSouth's argument. Staff believes that the Commission's decision regarding mutual traffic exchange does not violate Section 364.162, Florida Statutes. Accordingly, BellSouth has not raised a material and relevant point of fact or law that was overlooked or which the Commission failed to consider when it rendered the portion of its order establishing mutual traffic exchange as a mechanism for implementing local interconnection.

C. BELLSOUTH'S ASSERTION THAT MUTUAL TRAFFIC EXCHANGE CONSTITUTES A TAKING

BellSouth contends 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 asserts 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 states 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, 1893 (1992).

BellSouth contends that the requirement that it transport and terminate traffic from ALECs constitutes a physical intrusion onto its property. Specifically, BellSouth asserts 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 contends 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 argues 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 denied the ability to use this physical plant for any other purpose, and a taking occurs. BellSouth cites to Bell Atlantic Telephone Companies v. FCC, 24 F. 3d 1441, 1444 (D.C. Cir. 1994) for support.

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 argues that mandating mutual traffic exchange will pass constitutional muster only if BellSouth receives just compensation for deprivation of its property. BellSouth contends that it does not because it will not receive one penny for terminating the 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 respond that BellSouth's basic assertions are incorrect. MCImetro and AT&T note that BellSouth does receive compensation in the form of the ALEC's "in-kind" obligation to terminate BellSouth's traffic, a service which BellSouth requires to continue to provide ubiquitous telephone service to its customers. BellSouth cites to no case which holds that "just compensation" must be in the form of a cash payment rather than payment in kind.

MCImetro further takes issue with BellSouth's takings claim which is predicated on the assertion that the Commission's order involves a physical intrusion onto BellSouth's property. In Loretto, supra, the court was dealing with a state statute which required private landlords to allow a cable television company to place its cable on their property.

MCImetro states 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 suggests substituting the term "business customer" for ALEC in

BellSouth's example of physical intrusion in the third paragraph of this section.

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) and Bluefield Water Works v. Public Service Commission of West Virginia, 262 U.S. 679 (1923). MCImetro asserts that BellSouth has not argued that it will be deprived of the opportunity to earn a fair return on its overall utility operations. Thus, MCImetro concludes 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. Mansanto 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 the Commission to establish nondiscriminatory rates, terms, and conditions of interconnection, except that the rates shall not be below cost. The Commission is also obligated by statute to ensure that the rate must not be set so high that it would serve as a barrier to competition. The Commission has found that mutual traffic exchange meets its requirement to establish rates.

A similar argument was raised by the LECs when this Commission ordered mandatory physical collocation in Phase I of the expanded interconnection docket. See Order No. PSC-94-0285-FOF-TP, issued March 10, 1994. This Commission stayed its order when the FCC ordered mandatory virtual rather than physical collocation. See Order No. PSC-94-1102-FOF-TP, issued September 7, 1994. In that order, this Commission was 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. This Commission was 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 this Commission mandate interconnection and such purposes do not turn statutorily authorized regulation into a taking.

Loretto is relied upon as authority for the 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 is also 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. In Loretto, the Court stated:

> 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

This Commission previously found that an objective reading of Loretto is that if there is a permanent physical occupation there is a taking. 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.

In the instant case, BellSouth objects to the mandate of a mutual traffic exchange arrangement to effectuate statutorily authorized interconnection. Based on BellSouth's interpretation of Loretto, it appears that such interconnection would be a taking if opposed by BellSouth. Such an interpretation would make it impossible for this Commission to regulate telecommunications pursuant to its statutory mandate.

BellSouth contends 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. Staff believes that Loretto is not the appropriate standard to employ regarding the 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 case is present here.

Upon consideration, staff believes that the Commission has the authority to establish the appropriate rates for the provision of telecommunications service in Florida. Provided that the rates are not confiscatory, the Commission has the statutory authority to establish nondiscriminatory rates, terms, and conditions for interconnection. BellSouth's motion regarding this issue does not raise a material and relevant point of fact or law which was overlooked or the Commission failed to consider when it rendered the Order in the first instance. Thus, BellSouth's motion for reconsideration regarding this issue should be denied.

D. BELLSOUTH'S ASSERTION THAT MANDATORY MUTUAL TRAFFIC EXCHANGE VIOLATES TELECOMMUNICATIONS ACT OF 1996

Although BellSouth acknowledges 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 was reached after the date the Act became law. MFS-FL and AT&T

state that the Commission has acted in accordance with its obligations under Section 364.162, Florida Statutes. BellSouth states that to the extent this proceeding and Order are construed to be a matter within the scope of the Act, the action ordered by the Commission 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 enactment if such regulations are not inconsistent with the provisions of this part of the Act. MFS-FL contends that the Commission is merely enforcing its statutory mandate to order interconnection arrangements in a situation in which the parties have not reached agreement. Further, MFS-FL and AT&T assert that the Commission's action is consistent with the provisions of the Act. Staff agrees.

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 of 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 argues that the applicable pricing standard for judging the reasonableness of the terms and conditions for reciprocal compensation clearly contemplate 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 responds 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 contends that this section contemplates that recovery of costs and bill-and-keep are mutually exclusive. Also, BellSouth argues that by using the term "waive", the Act allows the negotiating parties to relinquish the mutual recovery of costs voluntarily. However, BellSouth contends that it does not authorize mandatory mutual traffic exchange as the method of cost recovery.

MCImetro and MFS-FL respond 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, and that the Commission would have less latitude than the parties would have to establish an appropriate compensation policy.

Staff believes that the Commission's decision regarding mutual traffic exchange does not violate the Federal Telecommunications Act of 1996. Its decision was based on Chapter 364, Florida Statutes, and is consistent with the provisions of the Act. Accordingly, BellSouth has not raised a material and relevant point of fact or law that was overlooked or which the Commission failed to consider when it rendered the portion of its order establishing mutual traffic exchange as a mechanism for implementing local interconnection.

Staff notes that in a footnote, BellSouth requests that the Commission include in its 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 states that it will not seek a stay of the Order if an appeal is necessary. Staff believes that this issue 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.

ISSUE 3: Should the Commission grant BellSouth's Motion for Reconsideration regarding the Commission's decision that the residual interconnection charge be billed and collected by the carrier terminating the call.

RECOMMENDATION: No. BellSouth's Motion for Reconsideration regarding the Commission's decision that the residual interconnection charge be billed and collected by the carrier terminating the call should be denied. The motion does not raise a material and relevant point of fact or law which was overlooked or which the Commission failed to consider when it rendered the Order in the first instance.

STAFF ANALYSIS: In its Motion for Reconsideration, filed on April 12, 1996, BellSouth requests the Commission to reconsider its decision requiring that the residual interconnection charge be billed and collected by the carrier terminating the call. The Commission 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. (Order, p.19) BellSouth states that the decision violates both federal and state laws and contains provisions not supported by competent and substantial evidence.

BellSouth argues 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 filed its opposition to BellSouth's Motion on April 24, 1996. MFS-FL states that the Commission has already considered and rejected BellSouth's argument that it should receive the RIC. In addition, MFS-FL states that BellSouth adds no new legal argument or factual point in its Motion, and therefore cannot meet the standard for a motion to reconsider.

MCImetro filed its response to BellSouth's Motion on April 24, 1996. MCImetro states that the Commission's Order regarding the collection of the RIC is supported by competent and substantial evidence. MCImetro states that BellSouth chooses 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 asserts that BellSouth ignores the evidence which 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 asserts that this is sufficient evidence to support the Commission's 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 asserts that BellSouth's Motion does not analyze the evidence on this issue, but simply renews the arguments made in its post-hearing filings that the RIC should be regarded purely as a revenue requirement issue. MCImetro states that this argument ignores the fact that BellSouth has elected to be governed by price regulation, and is therefore in total contrast to what the Commission ordered.

AT&T filed a response to BellSouth's Motion on April 24, 1996. AT&T states that BellSouth ignores the testimony of several petitioning and intervening witnesses. AT&T also points out that BellSouth erroneously attributes certain positions regarding the RIC to AT&T. AT&T states that according to BellSouth's transcript references, the positions were taken by MFS-FL witness Devine and not AT&T. AT&T asserts that this evidence and that presented by BellSouth was weighed and evaluated by the Commission and the Order noted, "We disagree with BellSouth's arguments." (Order, p.19) AT&T therefore asserts that BellSouth cannot now resuscitate a failed position under the guise of a Motion to Reconsider.

McCaw Communications of Florida, Inc. filed a reply to BellSouth's Motion for Reconsideration on April 23, 1996. McCaw states that it supports MFS-FL's, MCImetro's, and AT&T's responses to BellSouth's Motion.

Staff believes that BellSouth is simply restating the same arguments that it made in its post hearing brief. The Commission has not failed to consider evidence that would warrant reconsideration of its Order. The motion does not raise a material and relevant point of fact or law which was overlooked or which the Commission failed to consider when it rendered the Order in the first instance. Therefore, staff recommends that BellSouth's Motion for Reconsideration regarding the Commission's decision that the residual interconnection charge be billed and collected by the carrier terminating the call should be denied.

ISSUE 4: Should the Commission reconsider its decision not to set a charge for intermediary handling of local traffic for BST?

RECOMMENDATION: Yes, The Commission should reconsider its decision not to set a rate for intermediary handling of local traffic for BST. The rate should be set at the same level as the tandem switching element in BST's Switched Access Switched Transport tariff, which is $.00050 per access minute, and should be assessed only where ALECs involved in the call are not collocated in the same wire center.

STAFF ANALYSIS: This issue addresses the appropriate way to compensate an intermediary carrier for switching calls between originating and terminating carriers, where such carriers are interconnected with BST but not with each other. BST has requested that the Commission reconsider its decision on this issue in so far as it did not elect to set a rate for intermediary handling of local traffic. In its request, BST stated that, in its order, the Commission appeared to require BST to provide the intermediary function. The Company also stated that it was willing to provide it, that it had agreed to a rate in its Stipulation, and that parties agreed that a price for the intermediary function was appropriate. Since the Commission failed to actually set a rate, BST requests that it do so.

BST has proposed that the rate be set at the sum of its tandem switching and transport switched access rate elements, plus $.002 per access minute of use (MOU). Some, but not all of the parties who responded to BST's Request for Reconsideration, took a position on this issue. Those who took a position 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 note that the rate proposed by BST is substantially in excess of the Company's cost to provide the service.

Staff agrees that a specific rate should be set. We therefore recommend that the Commission reconsider its decision, and set a rate for intermediary handling of local traffic by the LEC. This rate should 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.

Staff recommends that the rates proposed by BST for intermediary handling of local traffic should not be approved. We believe that a rate more closely related to cost is appropriate. BST did not provide a TSLRIC estimate for tandem switching in this proceeding. Instead, BST supplied the LRIC estimate for tandem switching that was submitted in DN 921074 as part of the Local Transport restructure. In that docket, LECs were ordered to design the new components of Local Transport to be 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 GTEFL and United/Centel. The parties eventually agreed on a revised set of rates. Those rates, including tandem switching, were ultimately approved by the Commission and are currently in effect. (See Order No. PSC-96-0099-FOF-TP) Current local transport rates are therefore based closely on LRIC costs.

The rate for BST for intermediary handling of local traffic should therefore be set at $.00050 per minute of use, which matches its tandem switching rate approved in DN 921074. Staff believes the recommended rate is sufficiently greater than the LRIC estimate provided in both DN 921074 and this docket, that it is reasonable to believe that it also covers TSLRIC.

ISSUE 5: Should the Commission grant FCTA's and Time Warner's Request for Reconsideration of Order No. PSC-96-0445-FOF-TP?

RECOMMENDATION: No. FCTA's and Time Warner's Requests for Reconsideration should be denied. The motions do not raise a material and relevant point of fact or law which was overlooked or which the Commission failed to consider when it rendered the Order in the first instance.

STAFF ANALYSIS: On April 15, 1996 Time Warner and FCTA filed Requests for Reconsideration of Order No. PSC-96-0445-FOF-TP which establishes local interconnection rates, terms, and conditions between MFS-FL/MCImetro and BellSouth. MCImetro, MFS-FL, AT&T, and Continental filed responses to those requests.

The Commission approved a stipulation between BellSouth and several ALECs, including Time Warner and FCTA. See Order No. PSC-96-0082-AS-TP, issued January 17, 1996 (Stipulation). The Commission subsequently set the rates terms and conditions for MFS-FL and MCImetro in Order No. PSC-96-0445-FOF-TP, issued March 29, 1996. (Order)

Time Warner and FCTA argue the Order departs from essential requirements of law by ignoring or overlooking the 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 challenge 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 notes that Section 364.08, 364.09, and 364.10, Florida Statutes, have been interpreted to prohibit undue or unreasonable discrimination. Neither Time Warner nor FCTA challenges the Commission's statutory authority to authorize bill and keep.

Further, Time Warner and FCTA argue 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.

FCTA and Time Warner argue that the Order overlooks the requirement that whatever compensation arrangements are adopted must foster competition. FCTA contends 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 argues that the Commission must avoid setting rates,

terms, and conditions that make it more 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 the Commission to establish such nondiscriminatory rates, terms, and conditions of interconnection.

AT&T asserts that adopting FCTA's and Time Warner's construction of Section 364.162 would render an absurd result. The first time rates, terms, and conditions of interconnection are set by the 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.

Staff finds the arguments raised by 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, negotiated an agreement with BellSouth, as they are allowed to do by law. But Section 364.162 does not compel MFS-FL and MCImetro to be signatories to an agreement negotiated by Time Warner and FCTA just because they were the first to have a Commission approved rate. In fact, Section 364.162 grants ALECs, such as MFS-FL and MCImetro, the right to have the 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 note that the Commission 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. (Stipulation Order, pp. 4-5). Neither FCTA nor Time Warner appealed that order. MCImetro asserts 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, the Commission also ordered BellSouth to file a tariff for its interconnection rates and other arrangements. Continental's interpretation of the tariffing requirements is that the 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 states 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 asserts that if FCTA or Time Warner needs relief from their 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. Staff agrees with this analysis. Interestingly, MFS-FL points 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 argues that the Order rejects the rates approved in the Stipulation. FCTA asserts that the reasons for doing so are based upon supposition and faulty reasoning and that there is no competent substantial evidence supporting this action. Staff believes that FCTA merely disagrees with the Commission's conclusions.

FCTA takes issue with the reasons the Order rejects applying the terms of the Stipulation to the requests in this case. The Order states that the terms of the Stipulation do not ensure that each company will be fairly compensated if traffic is significantly imbalanced. Order at 10. FCTA contends that there is no evidence of record that traffic will be significantly imbalanced. FCTA states that "if traffic is out of balance by more than 105%, parties will obviously be compensated under the Stipulation by mutual traffic exchange." FCTA argues 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.

Staff points out that the Commission 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, p. 40)

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

FCTA states 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. Staff notes that as the Order clearly states, "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." (Order, p. 10). The Commission 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 it approved the Stipulation.

Further, FCTA states 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. FCTA contends that there is nothing in the record to support this conclusion and states that the plain language of the Stipulation states that the 105% cap is intended as a competitive safeguard. FCTA adds that another plausible interpretation is to provide a convenience to the parties if traffic is far out of balance. The Commission stated that it foresees 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, page 10)

Staff notes that the Commission considered and rejected the terms of the Stipulation as an interconnection arrangement for the requests for interconnection by MCImetro and MFS-FL. That does not mean that the terms of the Stipulation are not reasonable and should not have been approved when the negotiated agreement came before the Commission. However, based on the evidence in the record, the Commission 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.

Staff believes that the Commission has not failed to consider evidence that would warrant reconsideration of its Order. The motions do not raise a material and relevant point of fact or law which was overlooked or which the Commission failed to consider when it rendered the Order in the first instance. Therefore, staff recommends that Time Warner's and FCTA's Motions for Reconsideration regarding the Commission's decision in Order No. PSC-96-0445-FOF-TP should be denied.

ISSUE 6: Should the Commission, on its own motion, reconsider the portion of Order No. PSC-96-0445-FOF-TP regarding the toll default mechanism?

RECOMMENDATION: Yes. Staff recommends that the Commission, on its own motion, reconsider its decision as to whether originating or terminating access charges should apply for the toll default. Staff recommends 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. Staff recommends that the portion of the order be modified 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.

In addition, staff recommends that BellSouth and the respective ALECs 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, staff recommends that the ALECs should identify and provide their local calling areas to the LECs.

STAFF ANALYSIS: The diagrams below should help to describe the toll default mechanism. The following diagrams represent three situations where a call is sent from a LEC customer to an ALEC customer.

A. LEC Customer ========LOCAL==========> ALEC Customer

B. LEC Customer ========TOLL===========> ALEC Customer

C. LEC Customer ========????===========> ALEC Customer

In diagram A, both parties know that the call is local, so mutual traffic exchange would apply. In diagram B, both parties know that the call is toll, so the LEC would pay the ALEC terminating access charges. Diagram C deals with the situation where the LEC does not know if the call that it is sending to the ALEC is local or toll. This is where the toll default mechanism ordered by the Commission is applied. It would be the same for all three diagrams if the call was in the other direction from the ALEC to the LEC. Therefore, except for mutual traffic exchange, the company who terminates the call receives the payment.

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, then BellSouth will charge that ALEC for that call in the same manner that it charges an IXC: 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.

The Commission took this evidence into consideration when it rendered its 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, p.16)

Staff believes that the Order needs to be changed to clarify its intent. BellSouth's proposal discussed above 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 the proceeding, but also staff has concerns that the language in the Order requiring originating switched access to be assessed is inconsistent with the Florida Statutes. Section 364.160(3)(a) 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. Staff recommends that the order be modified 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. To do so, staff recommends that the portion of the order be modified 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.

Staff recommends that the Commission, on its own motion, reconsider its decision as to whether originating or terminating access charges should apply for the toll default. Staff recommends that company terminating the call should receive terminating switched access from the originating company unless the originating company can prove that the call is local.

Staff recognizes 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, staff recommends that the companies 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, staff recommends that the ALECs should identify and provide their local calling areas to the LECs.

ISSUE 7: Should the Commission, on its own motion, reconsider the portion of Order No. PSC-96-0445-FOF-TP regarding filing tariffs?

RECOMMENDATION: Yes. Staff recommends that the following sentence be added to the body of the Order in Section III, and to the ordering paragraphs:

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

STAFF ANALYSIS: The Commission ordered BellSouth to tariff it 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 the Commission, interconnection prices, rates, terms, and conditions shall be filed with the Commission before their effective date. However, the order did not discuss a time frame for BellSouth to file the tariffs.

Staff believes that there needs to be some time frame that BellSouth has to file its interconnection tariff. This was not discussed by any of the parties in the proceeding. Due to the number of complex issues in this case, it appears that the time frame for filing tariffs went by unnoticed. Staff recommends that the Commission, on its own motion, reconsider the portion of the Order regarding tariffing. Staff recommends that the following sentence be added to the body of the Order in Section III, and to the ordering paragraphs:

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

ISSUE 8: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open to address the additional cost and operational information as required by Order No. PSC-96-0445-FOF-TP.