

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief.

DOCKET NO. 971478-TP

In re: Complaint of Teleport Communications Group Inc./TCG South Florida against BellSouth Telecommunications, Inc. for breach of terms of interconnection agreement under Section 252 of the Telecommunications Act of 1996, and request for relief.

DOCKET NO. 980184-TP

In re: Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 and request for relief.

DOCKET NO. 980495-TP

In re: Complaint by MCI Metro Access Transmission Services, Inc. against BellSouth Telecommunications, Inc. for breach of approved interconnection agreement by failure to pay compensation for certain local traffic.

DOCKET NO. 980499-TP
ORDER NO. PSC-98-0769-PHO-TP
ISSUED: June 4, 1998

DOCUMENT NUMBER-DATE

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FPSC RECORDS/REPORTING

PREHEARING ORDER

Pursuant to Notice, a Prehearing Conference was held on May 13, 1998, in Tallahassee, Florida, before Commissioner J. Terry Deason, as Prehearing Officer.

APPEARANCES:

Floyd R. Self, Esq., and Norman H. Horton, Jr., Esq.,
Messer, Caparello & Self, P.A., Post Office Box 1876,
Tallahassee, FL 32302-1876.
On behalf of WorldCom Technologies, Inc.

Richard Rindler, Esq., and Michael Shor, Esq., Swidler &
Berlin, Chartered, 3500 K Street, N.W., Suite 300,
Washington, DC 20007.
On behalf of WorldCom Technologies, Inc.

Kenneth A. Hoffman, Esq., and John R. Ellis, Esq.,
Rutledge, Ecenia, Underwood, Purnell & Hoffman, P.A.,
Post Office Box 551, Tallahassee, FL 32302
On behalf of Teleport Communications Group, Inc./TCG
South Florida

Donna L. Canzano, Esq., and Patrick Knight Wiggins, Esq.,
Wiggins & Villacorta, P.A., 2145 Delta Boulevard, Suite
200, Post Office Drawer 1657, Tallahassee, FL 32302
On behalf of Intermedia Communications, Inc.

Richard D. Melson, Esq., 123 South Calhoun Street,
Tallahassee, Florida 32301.
On behalf of MCI Telecommunications, Inc. and MCI Metro
Access Transmission Services, Inc.

Thomas K. Bond, Esq., 780 Johnson Ferry Road, Suite 700,
Atlanta, Georgia 30342.
On behalf of MCI Telecommunications Corporation.

Nancy B. White, Esq., and Robert G. Beatty, Esq., 150
South Monroe Street, Suite 400 Tallahassee, Florida
32301; Bennett Ross, Esquire, 675 West Peachtree Street,
Suite 4300, Atlanta, Georgia 30375.
On behalf of BellSouth Telecommunications, Inc.

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William J. Ellenberg II, Esq., 675 West Peachtree Street,
Suite 4300, Atlanta, GA 30375
On behalf of BellSouth Telecommunications, Inc.

Charles J. Pellegrini, Esq., Florida Public Service
Commission, 2540 Shumard Oak Boulevard, Tallahassee,
Florida 32399-0850.
On behalf of the Commission Staff.

I. CASE BACKGROUND

MFS Communications Company, Inc., (MFS) and BellSouth Telecommunications, Inc., (BellSouth) entered into a Partial Florida Interconnection Agreement (Agreement) pursuant to the Telecommunications Act of 1996 (Act) on August 26, 1996. The Commission approved the Agreement in Order No. PSC-96-1508-FOF-TP, issued December 12, 1996, in Docket No. 961053-TP and an amendment to the Agreement in Order No. PSC-97-0772-FOF-TP, issued July 1, 1997, in Docket No. 970315-TP. On November 12, 1997, WorldCom Technologies, Inc., (WorldCom) filed a Complaint Against BellSouth and Request for Relief, alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by WorldCom's affiliate, MFS, to Internet Service Providers (ISPs). BellSouth filed its Answer and Response on December 22, 1997. In Order No. PSC-98-0454-PCO-TP, issued March 31, 1998, the Commission directed that the matter be set for hearing.

Teleport Communications Group, Inc./TCG South Florida, (TCG) and BellSouth entered into an Interconnection Agreement pursuant to the Act on July 15, 1996. The Commission approved the Agreement in Order No. PSC-96-1313-FOF-TP, issued October 29, 1996, in Docket No. 960862-TP. On February 4, 1998, TCG filed a Complaint for Enforcement of Section IV.C of its Interconnection Agreement with BellSouth, also alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by TCG to ISPs. BellSouth filed its Answer and Response on February 25, 1998.

Intermedia Communications, Inc., (Intermedia) and BellSouth entered into an interconnection agreement pursuant to the Act on July 1, 1996. The Commission approved the agreement in Order No. PSC-96-1236-FOF-TP, issued October 7, 1996, in Docket No. 960769-TP. On February 24, 1997, the companies amended their agreement.

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The Commission approved the amended agreement in Order No. PSC-97-0771-FOF-TP, issued July 1, 1997, in Docket No. 970314-TP. Intermedia's petition to intervene in Docket No. 971478-TP was denied in Order No. PSC-98-0454-PCO-TP, issued March 31, 1998. Subsequently, on April 6, 1998, Intermedia filed a Complaint against BellSouth also alleging that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by Intermedia to ISPs. Accordingly, Docket No. 980495-TP was opened.

MCI Metro Access Transmission Services, Inc., (MCI) and BellSouth entered into an Interconnection Agreement pursuant to the Act on April 4, 1997. The Commission approved the Agreement in Order Nos. PSC-97-0723-FOF-TP, issued June 19, 1997, and PSC-97-0723A-FOF-TP, issued June 26, 1997, in Docket No. 960846-TP. On February 23, 1998, MCI filed a Complaint against BellSouth, which was docketed in Docket No. 980281-TP. Amongst other things, MCI also alleged in Count 13 that BellSouth has failed to pay reciprocal compensation for local telephone exchange service traffic transported and terminated by MCI to ISPs. On April 6, 1998, MCI filed a separate Complaint embodying the complaint set forth in Count 13 of the first Complaint. Accordingly, Docket No. 980499-TP was opened.

In Order No. PSC-98-0561-PCO-TP, issued April 21, 1998, Docket Nos. 971478-TP, 980184-TP, 980495-TP, and 980499-TP were consolidated for purposes of hearing.

Petitions to intervene in Docket No. 971478-TP filed by GTE Florida Incorporated, and Time Warner AxS Florida, L.P., were denied, respectively, in, Order No. PSC-98-0476-PCO-TP, issued April 2, 1998, and Order No. PSC-98-0642-PCO-TP, issued May 7, 1998.

II. 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(2), 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.

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

- 1) 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.
- 2) 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.
- 3) 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.

- 4) 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.
- 5) 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 confidential files.

III. POST-HEARING PROCEDURES

Rule 25-22.056(3), Florida Administrative Code, requires each party to 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. The rule also provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

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 60 pages, and shall be filed at the same time. The prehearing officer may modify the page limit for good cause shown. Please see Rule 25-22.056, Florida Administrative Code, for other requirements pertaining to post-hearing filings.

IV. PREFILED TESTIMONY AND EXHIBITS

Testimony of all witnesses to be sponsored by the parties and Staff 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. 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.

V. ORDER OF WITNESSES

| <u>WITNESS</u> | <u>APPEARING FOR</u> | <u>ISSUE NO.</u> |
|------------------------------|----------------------|------------------|
| <u>DIRECT & REBUTTAL</u> | | |
| Gary Ball | WorldCom | 1 |
| Paul Kouroupas | TCG | 2 |
| Julia Strow ¹ | Intermedia | 4 |
| Ron Martinez | MCIm | 3 |
| Jerry Hendrix | BellSouth | 1-4 |

VI. BASIC POSITIONS

WORLDCOM:

The WorldCom-BellSouth Interconnection Agreement ("Agreement") is clear and unambiguous -- each party is required to compensate the other for all ISP traffic. Even if the Commission finds the Agreement ambiguous, reciprocal compensation is still required under the Agreement due to the express language of the Telecommunications Act of 1996, prior orders of this Commission, prior FCC rulings, rulings of other state commissions, and custom and usage in the industry.

¹Ms. Strow will adopt the prefiled direct testimony of Michael A. Viren.

TCG:

BellSouth and TCG entered into an Interconnection Agreement in July, 1996. Pursuant to the Federal Telecommunications Act of 1996, the Agreement was filed with and approved by the Florida Public Service Commission in October, 1996. Pursuant to terms of the Agreement, BellSouth and TCG paid each other reciprocal compensation for local calls terminated to ISPs.

On August 12, 1997, BellSouth reversed its position and prior conduct by forwarding a letter to TCG declaring that BellSouth would not pay reciprocal compensation for calls terminated to ISPs. BellSouth's unlawful unilateral action constitutes a breach of the BellSouth-TCG Interconnection Agreement which requires the payment of reciprocal compensation for the termination of local traffic. Calls originated by BellSouth end users and terminated by TCG to ISPs clearly fall within the definition of "local traffic" under the Agreement. Further confirmation and support that calls terminated to ISPs constitute local traffic can be found in the testimony of a BellSouth witness in a 1989 FPSC proceeding, FPSC Order No. 21815 issued September 5, 1989 and more recent decisions of other state regulatory commissions.

BellSouth misapprehends the Federal Communications Commission ("FCC") orders addressing access charge issues. In fact, a careful reading of the FCC orders supports TCG's position. For purposes of rendering a decision in this proceeding, however, the consideration of the FCC orders is unnecessary. BellSouth's failure to pay reciprocal compensation on calls terminated by TCG to ISPs constitutes a breach of the BellSouth-TCG Interconnection Agreement. The Commission should order BellSouth to immediately remit to TCG all funds unlawfully withheld by BellSouth and payable to TCG for calls originated by BellSouth customers and terminated by TCG to ISPs, together with accrued interest.

INTERMEDIA:

This is a dispute over the legal meaning of a contractual provision in the Interconnection Agreement and should be resolved as a matter of law. It does not involve disputed issues of material fact or policy and does not require an evidentiary hearing to be resolved.

This dispute arises because BellSouth refuses to honor its contractual obligation under the interconnection Agreement to provide reciprocal compensation for local ISP traffic originated by its end-users that terminates on Intermedia's network. BellSouth's refusal also violates Section 251(b)(5) of the Act which sets forth the obligation of all local exchange companies (LECs) to provide reciprocal compensation.

Under Section 1(D) of the Agreement, all calls that terminate within a local calling area, regardless of the identity of the end-user, are local calls for which reciprocal compensation is due. Nothing in the Agreement creates a distinction pertaining to call placed to telephone exchange end-users that happen to be ISPs.

BellSouth attempts to circumvent its contractual obligation by declaring that local call to ISPs are actually interstate calls passing through the ALEC which merely serves as a "conduit." BellSouth ignores the reality that locally generated Internet Communication consists of two segments: (1) a local telephone call from an end-user to an ISP; and (2) an enhanced transmission from the ISP over the Internet. Thus, in this context, the ISP does not serve as a telecommunications carrier and the local telephone call to the ISP terminates at the ISP.

It is only by ignoring the clear meaning of the Agreement and the clear distinction between telecommunications and enhanced service that BellSouth can attempt to avoid its contractual obligation.

MCI

BellSouth and MCI must pay each other reciprocal compensation for the termination of ISP traffic. MCI and BellSouth agreed to the definition of Local Traffic contained in Attachment IV, subsection 2.2.1, of the Agreement. In fact, it was BellSouth which proposed the definition. MCI and BellSouth further agreed to pay reciprocal compensation for telephone calls which meet that definition of local traffic. Telephone calls to an ISP meet that definition. Had an exception been intended for ISP traffic (or for any other subset of local traffic), it would have been expressly included by the parties. No such exception is contained in the Agreement and no such exception was ever suggested by BellSouth.

BELLSOUTH:

Calls made by an end user customer to access the Internet or other services offered by an Internet Services Provider ("ISP") do not constitute local traffic. These calls are in the nature of exchange access traffic that is jurisdictionally interstate.

The interconnection agreements negotiated between BellSouth and the parties in this proceeding require the termination of calls on either BellSouth's network or the other party's network for reciprocal compensation payments to occur. Call termination does not occur when an ALEC, serving as a conduit, places itself between BellSouth and an ISP. The agreements between BellSouth and the parties to those proceeding also require that for reciprocal compensation to occur, traffic must be jurisdictionally local as defined by the agreements. ISP traffic is not jurisdictionally local because the Federal Communications Commission ("FCC") has concluded that enhanced service providers, of which ISPs are a subset, use the local network to provide interstate services. The FCC has long held that the jurisdictional nature of traffic is determined by the end-to-end nature of a call.

The FCC has initiated a proceeding to determine whether calls to an ISP made from within a local calling area should be treated jurisdictionally. The Commission should not act until the FCC acts in that proceeding. The status quo should be maintained.

STAFF:

Staff has no position at this time.

Staff's positions are preliminary and based on materials filed by the parties and on discovery. 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.

VII. ISSUES AND POSITIONS

ISSUE 1: Under their Florida Partial Interconnection Agreement, are WorldCom Technologies, Inc./MFS Communications

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Company, Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

POSITIONS:

WORLD COM: Yes. The Interconnection Agreement is clear and unambiguous. The Commission should enforce the Agreement as written, direct the release of escrow funds to WorldCom and direct BellSouth to compensate for all ISP traffic.

TCG: No position.

INTERMEDIA:

Intermedia is not a party to this portion of the proceeding.

MCI: No position.

BELLSOUTH:

No. BellSouth is only required to compensate WorldCom for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

STAFF: No position.

ISSUE 2: Under their Interconnection Agreement, are Teleport Communications Group, Inc./TCG South Florida and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

POSITIONS:

WORLD COM: Not at issue for WorldCom.

TCG: Yes. Under the BellSouth-TCG Interconnection Agreement, TCG and BellSouth are required to compensate each other for transport and termination of traffic to ISPs. The

Commission should order BellSouth to immediately remit to TCG all funds unlawfully withheld by BellSouth, with interest.

INTERMEDIA:

Intermedia is not a party to this portion of the proceeding.

MCI: No position.

BELLSOUTH:

No. BellSouth is only required to compensate Teleport for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

STAFF: No position.

ISSUE 3: Under their Interconnection Agreement, are MCI Metro Access Transmission Services, Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

POSITIONS:

WORLDCOM: Not at issue for WorldCom.

TCG: No position.

INTERMEDIA:

Intermedia is not a party to this portion of the proceeding.

MCI: Yes. BellSouth and MCI must pay each other reciprocal compensation for the termination of telephone calls to ISPs. The definition of Local Traffic in Attachment IV, Subsection 2.2.1, which was included at BellSouth's request, makes no exception for telephone calls terminated to ISPs. Had such an exception been intended, it would have been expressly included by the parties.

BellSouth should be ordered to pay to MCIm all outstanding charges for reciprocal compensation, with interest. Further, on a going forward basis, BellSouth should be ordered to continue to compensate MCIm for such traffic in accordance with the Agreement.

BELLSOUTH:

No. BellSouth is only required to compensate MCIm for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

STAFF: No position.

ISSUE 4: Under their Interconnection Agreement, are Intermedia Communications, Inc., and BellSouth Telecommunications, Inc., required to compensate each other for transport and termination of traffic to Internet Service Providers? If so, what action, if any, should be taken?

POSITIONS:

WORLD.COM: Not at issue for WorldCom.

TCG: No position.

INTERMEDIA:

Yes. Under Section 1(D) of the Agreement, all calls that terminate within a local calling area, regardless of the identity of the end-user, are local calls for which reciprocal compensation is due. Nothing in the Agreement creates a distinction pertaining to calls placed to telephone exchange end-users that happen to be ISPs.

BellSouth attempts to circumvent its contractual obligation by declaring that local call to ISPs are actually interstate calls passing through the ALEC which merely serves as a "conduit." BellSouth ignores the reality that locally generated Internet Communication consists of two segments: (1) a local telephone call from an end-user to an ISP; and (2) an enhanced transmission from the ISP over the Internet. Thus, in this context, the ISP does not serve as a telecommunications carrier

and the local telephone call to the ISP terminates at the ISP.

It is only by ignoring the clear meaning of the Agreement and the clear distinction between telecommunications and enhanced service that BellSouth can attempt to avoid its contractual obligation.

The Commission should enforce the Interconnection Agreement by ordering BellSouth to pay Intermedia for terminating such local traffic under the reciprocal compensation provisions of the Agreement and by granting such other relief as the Commission deems appropriate.

MCIm: No position.

BELLSOUTH:

No. BellSouth is only required to compensate Intermedia for transport and termination of local traffic. ISP traffic is interstate traffic. No action need be taken by the Commission.

STAFF: No position.

VIII. EXHIBIT LIST

| <u>WITNESS</u> | <u>PROFFERED BY</u> | <u>I.D. NUMBER</u> | <u>DESCRIPTION</u> |
|----------------|---------------------|-----------------------------|--|
| Paul Kouroupas | TCG | <u> </u> (PK-1) | BellSouth-TCG Interconnection Agreement approved by FPSC in Docket No. 960862-TP |
| | | <u> </u> (PK-2) | August 12, 1997 letter from Ernest Bush of BellSouth to TCG |

| <u>WITNESS</u> | <u>PROFFERED BY</u> | <u>I.D. NUMBER</u> | <u>DESCRIPTION</u> |
|----------------|---------------------|------------------------------|---|
| Julia Strow | Intermedia | <u> </u> (MAV-A) | Excerpts, Intermedia-BellSouth Interconnection Agreement approved October 7, 1996, Order No. PSC-96-1236-FOF-TP |
| Julia Strow | Intermedia | <u> </u> (MAV-B) | August 12, 1997, letter E.L. Bush to All Competitive Local Exchange Carriers |
| | | <u> </u> (MAV-C) | September 2, 1997, letter Jonathan E. Canis to Jere A. Drummond |
| | | <u> </u> (MAV-D) | September 11, 1997, letter from Harris B. Anthony to Jonathan E. Canis |
| Ron Martinez | MCIm | <u> </u> (RM-1) | Excerpts from the MCIm/BellSouth Interconnection Agreement |
| Jerry Hendrix | BellSouth | <u> </u> (JDH-1) | Diagram |
| | | <u> </u> (JDH-2) | Diagram |

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

IX. PROPOSED STIPULATIONS

There are no stipulations at this time.

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X. PENDING MOTIONS

1. GTE Florida Incorporated's Petition for Permission to Submit a Brief, filed May 6, 1998.

It is therefore,

ORDERED by Commissioner J. Terry Deason, 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 J. Terry Deason, as Prehearing Officer, this 4th day of June, 1998.

A handwritten signature in black ink, appearing to read "J. Terry Deason", is written over a horizontal line.

J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

CJP

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), 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.