STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GTE FLORIDA, INC., Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	980253-TX Case No. 99-5368RP
BELLSOUTH TELECOMMUNICATIONS, INC., Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 99-5369RP

FINAL ORDER

These consolidated cases came on for final hearing on April 25 and 26, 2000, in Tallahassee, Florida, before Ella Jane P. Davis, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether proposed rules 25-4.300 ("Scope and Definition"); 25-4.301 ("Applicability of Fresh Look"); and 25-4.302, ("Termination of Local Exchange Contracts"), Florida Administrative Code, known as "The Fresh Look Provision," constitute an "invalid exercise of delegated legislative authority".

PRELIMINARY STATEMENT

On or about December 23, 1999, GTE Florida, Inc. (GTE) initiated Division of Administrative Hearings Case No. 99-5368RP and BellSouth Telecommunications, Inc. (BST) initiated Case No. 99-5369RP. Petitioners sought a formal administrative hearing to challenge the validity of the Florida Public Service Commission's (the Commission's) proposed rules 25-4.300, 25-4.301, and 25-4.302 ("the proposed rules" or "Fresh Look rules").

On January 24, 2000, the cases were consolidated.

On January 27, 2000, Time Warner Telecom of Florida, L.P. (Time Warner) moved to intervene on behalf of Respondent Commission, asserting that the proposed rules were a valid exercise of delegated legislative authority. GTE and BST responded in opposition. Intervention was denied on February 18, 2000. On February 22, 2000, Time Warner sought reconsideration

of the denial of intervention and also sought leave to file an amended petition for leave to intervene. GTE and BST responded in opposition to these Motions. The Amended Petition to Intervene was denied on March 21, 2000.

GTE's Motion for Protective Order was granted at the hearing (TR-6-12). However, ultimately, no testimony nor any exhibit was required to be sealed (TR-369-378).

The Commission's and GTE's Motions for Official Recognition were granted at the hearing.

The parties stipulated to the admission in evidence of 70 Joint Exhibits.

The parties entered five stipulations of fact concerning a Joint Administrative Procedures Committee (JAPC) inquiry dated April 28, 1999.

Respondent presented the oral testimony of Sally Simmons, Carolyn Marek, Eric Larsen, Anne Marsh, Kathy Lewis, Craig Hewitt, and Christiana Moore. Respondent's Exhibit 1 was admitted in evidence.

Petitioner GTE presented the oral testimony of Beverly Menard, Patty Tuttle, and Amy Martin. GTE's Exhibit 1 was admitted in evidence.

Petitioner BST presented the oral testimony of Ned Johnston. BST's Exhibits 1-5 were admitted in evidence.

A Transcript was filed on May 10, 2000. The parties' respective proposals were filed on May 24, 2000.

FINDINGS OF FACTS

1. Telecommunications carriers/providers may "wear different hats," dependent upon what function they are performing at a given time. Local exchange carriers are abbreviated "LECs" in the proposed rules. For purposes of this case only, Time Warner is an Alternative Local Exchange Carrier ("ALEC") and GTE and BST are Incumbent Local Exchange Carriers ("ILECs"). Both types of companies provide local telephone service over the public switch network.

2. On February 17, 1998, Time Warner filed a Petition to Initiate Rulemaking. Time Warner's Petition requested that the Commission adopt what it described as a "Fresh Look" rule, under which a customer a/k/a "patron" a/k/a "end user" of an ILEC who had agreed to a long-term, discounted contract would have an opportunity to abrogate that ILEC contract without incurring the liability to the ILEC which the customer had agreed to, so that the customer could then enter a new contract with an ALEC.

3. On at least one prior occasion, the Commission had elected to reach a similar result by a Final Order, rather than by enacting a rule.

4. This time, the Commission granted Time Warner's Petition, and the Commission began the rulemaking process.

5. Other states have adopted "Fresh Look" rules or statutes with varying degrees of success. The legislative, administrative, or litigation histories of these extraterritorial matters are immaterial to the rule validity issues herein, which

are governed by Chapter 120, Florida Statutes. Those histories are likewise non-binding on this forum.

6. The Commission has no way of identifying, let alone notifying, ILEC contract customers as a separate class of the public or as a separate class of potentially interested parties. However, the public, including customers and carriers, received the required statutory notice(s) at each stage of the rulemaking process, and only the following dates and occurrences have significance within the rulemaking process for purposes of the issues herein.

7. A Notice of Rulemaking Development was published in the Florida Administrative Weekly on April 3, 1998. Commission staff held a Rule Development Workshop on April 22, 1998. Based on information received from carriers in response to staff data requests, the rules as proposed April 3, 1998, were revised by staff. On March 4, 1999, staff recommended that the revised rules be adopted by the Commission. At its Agenda Conference on March 19, 1999, the Commission set the rulemaking for hearing. On March 24, 1999, the Commission issued a Notice of Rulemaking, which included further revisions to the proposed rules.

8. The Commission received a letter from JAPC dated April 28, 1999 ("the JAPC letter") which stated, in pertinent part:

> Article 1, Section 10 of the Florida Constitution prohibits the passage of laws impairing the obligation of contracts. Inasmuch as the rules effectively amend the terms of existing contracts, please reconcile the rules with the Constitution.

9. The JAPC letter was not placed into the rulemaking record, responded-to by the Commission, or specifically addressed on its merits by any interested parties. Interested parties did not find out about it until many months later.

10. A rulemaking hearing on the proposed rules was held before the Commission on May 12, 1999. Interested persons submitted written and oral testimony and comments at the hearing.

11. No customer with a contract that would be affected by these rules participated in the rulemaking proceedings, including the hearing, before the Commission.

12. At no time did anyone formally submit a lower cost regulatory alternative, but it was clear throughout the rulemaking process that Petitioners herein opposed the adoption of the proposed rules. Two Statements of Estimated Regulatory Cost ("SERCs") were prepared by Commission staff.

13. The proposed rules were further revised after the May 12, 1999, hearing. On November 4, 1999, Commission staff issued a recommendation that the Commission adopt the latest rules draft, in part on the basis that the proposed rules will implement the "regulatory mandates" of Section 364.01, Florida Statutes, that the Commission should "promote competition by encouraging new entrants" and "encourage competition through flexible regulatory treatment among providers of telecommunication services."

14. Attached to this recommendation was a revised SERC, dated September 13, 1999. The September 13, 1999, SERC addressed the alternative of not adopting the proposed rules, and found

such an alternative was not viable because it would not foster competition.

15. In preparing both SERCs, Commission staff relied solely on market share data for analyzing competition and did not fully account for revenues to which ILECs were contractually entitled, but which potentially could be unilaterally cancelled by the ILEC customer as a result of the proposed rules. Staff did not ask for such data for estimating cost of the proposed rules to the ILECs.

16. At its November 16, 1999, Agenda Conference, the participation of interested parties was limited to addressing the new SERC. During this Agenda Conference, the Commission revised the rules further, limiting the contracts affected by them to contracts entered into before July 1, 1999, and voted to approve the proposed rules as revised.

17. The exact language of the proposed rules under challenge, as published in the December 3, 1999, Florida Administrative Weekly, pursuant to Section 120.54(3)(d), Florida Statutes, is as follows:

> PART XII - FRESH LOOK: 25-4.300 Scope and Definitions.
>
> (1) Scope. For the purposes of this Part, all contracts that include local telecommunications services offered over the public switched network, between LECs and end users, which were entered into prior to June 30, 1999, that are in effect as of the effective date of this rule, and are scheduled to remain in effect for a least one year after the effective date of this rule will be contracts eligible for Fresh Look. Local telecommunications services offered over the public switched network are defined

as those services which include provision of dial tone and flat-rated or message-rated usage. If an end user exercises an option to renew or a provision for automatic renewal, this constitutes a new contract for purposes of this Part, unless penalties apply if the end user elects not to exercise such option or provision. This Part does not apply to LECs which had fewer than 100,000 access lines as of July 1, 1995, and have not elected price-cap regulation. Eligible contracts include, but are not limited to, Contract Service Arrangements (CSAs) and tariffed term plans in which the rate varies according to the end user's term commitment. The end user may exercise this provision solely for the purpose of obtaining a new contract.

(2) For the purposes of this Part, the definitions to the following terms apply:

(a) "Fresh Look Window" - The period of time during which LEC end users may terminate eligible contracts under the limited liability provision specified in Rule 25-4.302(3).

(b) "Notice of Intent to Terminate" - The written notice by an end user of the end user's intent to terminate an eligible contract pursuant to this rule.

(c) "Notice of Termination" - The written notice by an end user to terminate an eligible contract pursuant to this rule.

(d) "Statement of Termination Liability" - The written statement by a LEC detailing the liability pursuant to 25-4.302(3), if any, for an end user to terminate an eligible contract.

25-4.301 Applicability of Fresh Look.

(1) The Fresh Look Window shall apply to all eligible contracts.

(2) The Fresh Look Window shall begin 60 days after the effective date of this rule.

(3) The Fresh Look Window shall remain open for one year from the starting date of the Fresh Look Window.

(4) An end user may only issue one Notice of Intent to Terminate during the Fresh Look Window for each eligible contract.

25-4.302 Termination of LEC Contracts.

(1) Each LEC shall respond to all Fresh Look inquiries and shall designate a contact within its company to which all Fresh Look inquiries and requests should be directed.

(2) An end user may provide a written Notice of Intent to Terminate an eligible contract to the LEC during the Fresh Look Window.

(3) Within ten business days of receiving the Notice of Intent to Terminate, the LEC shall provide a written Statement of Termination Liability. The termination liability shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract. The termination liability shall be calculated as follows:

(a) For tariffed term plans, the payments shall be recalculated based on the amount that would have been paid under a tariffed term plan that corresponds to the actual time the service has been subscribed to.

(b) For CSAs, the termination liability shall be limited to any unrecovered, contract specific nonrecurring costs, in an amount not to exceed the termination liability specified in the terms of the contract. The termination liability shall be calculated from the information contained in the contract or the workpapers supporting the contract. If a discrepancy arises between the contract and the workpapers, the contract shall be controlling. In the Statement of Termination Liability, the LEC shall specify if and how the termination liability will vary depending on the date services are disconnected pursuant to subsections (4) and (6).

(4) From the date the end user receives the Statement of Termination Liability from the LEC, the end user shall have 30 days to provide a Notice of Termination. If the end user does not provide a Notice of Termination within 30 days, the eligible contract shall remain in effect.

(5) If the end user provides the Notice of Termination, the end user will pay any termination liability in a one-time payment.

(6) The LEC shall have 30 days to terminate the subject services from the date the LEC receives the Notice of Termination. (Emphasis provided only to facilitate the following discussion of "timed" provisions)

18. "Tariff term plans" or "tariffed term plans" are telecommunication service plans in which the rate the customer pays depends on the length of the service commitment. The longer the service commitment the customer makes with the company, the lower the monthly rate will be. Ninety-eight percent of the contracts affected by the proposed rules are tariff term plans filed with the Commission. Contract service arrangements (CSAs) have many functions. By tariff term plans and CSAs, carriers and their customers formalize a negotiation whereby the customer signs-on for service for an extended period, in exchange for lower rates than he would get if he committed to shorter periods or under the regular tariff.

19. Both tariff term plans and CSAs are subject to the Commission's regulatory oversight.

20. No reason was given for use of the "included but not limited to" language added in the rules' current draft.

21. The Commission has published that the "specific authority" for the proposed rules is Sections 350.127(2) and 364.19, Florida Statutes.

22. The Commission has published that the "law implemented" by the proposed rules is Sections 364.19 and 364.01, Florida Statutes.

23. The proposed rules would allow customers of ILECs, including Petitioners GTE and BST, to terminate their contracts and tariffed term plans for local exchange services without paying the termination liability stated in those contracts and tariffs. Instead, customers would only be required to pay the ILEC "any unrecovered, contract specific nonrecurring costs" associated with the contracts. (Proposed rule 25-4.302(3)(b)). For tariffed term plans (but not contracts), termination liability would be recalculated as the difference, if any, between the amount the customer paid and the amount he would have paid under a plan corresponding to the period during which he actually subscribed to the service. (Proposed rule 25-4.302(3)(a)). The "Fresh Look" rule applies to agreements entered into before June 30, 1999, and that remain in effect for at least one year after the date the rule takes effect. (Proposed rule 25-4.300(1)). The window for contract termination starts 60 days after the rules' effective date and lasts for one year thereafter. (Proposed rule 25-4.301).

24. In the case of ILEC customers who may exercise the "opt-out early" (termination) provisions of the proposed rules, the proposed rules would provide the ILECs with the compensation

they would have received if the contracts had been made for a shorter period than for the period of time for which the parties had actually negotiated.

25. The proposed rules clearly modify existing contracts. Indeed, they retroactively impair existing contracts.

26. It may reasonably be inferred that the retroactive elimination of the respective durations of the existing contracts would work to the detriment of any ILECs which have waived "start up costs" on individual contracts or which planned or invested in any technological upgrades or committed to any other business components (labor, training, material, development, expansion, etc.) in anticipation of fulfilling the contracts and profiting over the longer contract terms legally entered-into prior to the proposed rules.

27. The purpose of the proposed rules, as reflected in the Commission's rulemaking notices, is to "enable ALECs to compete for existing ILEC customer contracts covering local exchange telecommunications services offered over the public switched network, which were entered into prior to switch-based substitutes for local exchange telecommunications services."

28. However, the Commission now concedes that switch-based substitutes for the ILECs' local exchange services were widely available to consumers prior to June 30, 1999, the date provided in the proposed rule.

29. At hearing, the Commission asserted that it is also the purpose of the proposed rules to actively encourage competition, and that by proposing these rules, the Commission deemed

competition to be meaningful or sufficient enough to warrant a "fresh look" at the ILECs' contracts, but not so widespread that the rules would not be necessary. In effect, the Commission made a "judgment call" concerning the existence of "meaningful or sufficient" competition, but has not defined "sufficient" or "meaningful" competition for purposes of the proposed rules.

30. The Commission's selection of June 30, 1999, as the cut-off date for contract eligibility was motivated primarily by a concept that using that date would render approximately 40 percent of existing ILEC contracts eligible for termination.

31. The rulemaking process revealed that the terms of so-called "long-term" agreements range from six months to four years in duration. The Commission selected a one-year term for eligible contracts subject to the proposed rules as a compromise based on this spread of actual contract durations.

32. The one-year window of opportunity in which a customer will be permitted to terminate a contract was selected by the Commission as a compromise among presenters' views expressed during the rulemaking process.

33. The one-year window is to be implemented 60 days after the effective date of the rule to avoid the type of problems incurred when a "fresh look" was previously accomplished by a Commission Order and to allow the ILECs and ALECs time to prepare.

34. Tariffed term plans were developed as a response to competition and have been used at least since 1973.

35. As early as 1984, the Commission had, by Order, given ILECs authority to use CSAs for certain services, upon the condition that there was a competitive alternative available.

36. The Commission has long been aware of the ILECs' use of termination liability provisions in CSAs and tariff term plans, including provisions for customer premises equipment (CPE), and has not affirmatively determined that their use is anticompetitive, discriminatory, or otherwise impermissible.

37. Private branch exchanges (PBXs), which are switches, competed with the ILECs' Centrex systems for medium- to large-size business customers and key telephone systems for smaller businesses, from the early 1980's, as recognized by a Commission Order in 1994.

38. Commission Order No. PSC-94-0285-FOF-TP, dated March 3, 1994, in Docket No. 921074-TP, permitted a "fresh look" for customers of LEC private line and special access services with terms equal to, or greater than, three years. Customers were permitted a limited time to terminate their existing contracts with LECs to take advantage of emerging competitive alternatives, such as alternative access vendors' (AAVs') ability to interconnect with LECs' facilities. Termination liability of the customer to the ILEC was limited to the amount the customer would have paid for the services actually used.

39. Prior to 1996, only ILECs could offer dial tone service, which enables end users to communicate with anyone else who has a telephone. Chapter 364, Florida Statutes, Florida's

telecommunication statute, was amended effective January 1, 1996, to allow ALECs to operate in Florida.

40. ILECs had offered tariffed term plans and CSAs for certain services before the 1996 revision of Chapter 364, Florida Statutes, but effective 1996, substantial amendments allowed the entry of ALECs into ILECs' markets. The new amendments codified and expanded the ILECs' ability to use CSAs and term and volume discount contracts in exchange for ILECs losing their exclusive local franchises and deleted statutory language requiring the Commission to determine that there was effective competition for a particular service before an ILEC could be granted pricing flexibility for that service. Tariff filings before the amendments had required Commission approval.

41. The federal Telecommunications Act of 1996 also opened the ILECs' local exchange markets to full competition and imposed upon the ILECs a number of obligations designed to encourage competitive entry by ALECs into the market, including allowing ALECs to interconnect their networks with those of ILECs; "unbundling" ILEC networks to sell the unbundled elements to competitors; and reselling ILEC telecommunications services to ALECs at a wholesale discount. See 47 U.S.C. Section 51 et seq.

42. "Resale" means taking an existing service provided by a LEC and repackaging or remarketing it.

43. The requirement that ILECs resell their services, including contracts and tariffed term plans, to competitors at a wholesale discount, has been very effective in stimulating resale competition, but to resell or not is purely an internal business

decision of each ALEC. For instance, Time Warner has elected not to be involved in "resales," and is entirely "facility based."

44. Since 1996, competing carriers could and do sell additional (other) services to customers already committed to long-term ILEC contracts. They may also purchase ILEC CSAs wholesale at discount and resell such agreements to customers.

45. Market share data demonstrates that there has been greater ALEC competition in Florida since the 1996 amendments, but typically, ALECs target big cities with denser populations and denser business concentrations.

46. There is no persuasive evidence that any of the affected ILEC contracts (those post-June 30, 1999) were entered into by customers who did not have competing alternatives from which to choose. In fact, testimony by Commission staff supports a finding that since LECs' CSAs are subject to Commission review and their service tariffs are filed with the Commission, the Commission has not authorized CSAs unless there was an "uneconomic bypass" or competition. "Uneconomic bypass" occurs where a competitor can offer service at a price below the LEC's tariffed rate but above the LEC's cost.

47. The Commission presented an ILEC customer, Mr. Eric Larsen of Tallahassee, who testified that he had had the benefit of competition, not necessarily from an ALEC, when he had entertained a bid from a carrier different from his then-current ILEC in 1999. However, at that time, he renegotiated an expiring contract with his then-current ILEC instead of with the

competitor. This renewal contract with an ILEC would not be affected by the proposed rules.

48. Business customers, such as Mr. Larsen, may reasonably perceive business trends. They could reasonably be expected to have factored into their negotiations with competing carriers at the time the contracts were formed that a potential for greater choices would occur in the future, even within the life of their long-term contracts with an ILEC.

49. As of 1999, 80 ALECs were serving Florida customers, 100 more had expressed their intention of serving Florida before the end of the year 2000, and ALECs had obtained some share of the business lines in many exchanges. While this does not mean that every area of Florida has every service, it is indicative of a spread of competition.

50. Petitioner GTE is anchored in the Tampa Bay area. By June 30, 1999, the date expressed in the proposed rules, nine facilities-based competitors were in the same geographic area. One ALEC (MCI) was serving 10,000 lines. Competitors operated 20 switches and 83 percent of the buildings in GTE's franchise area were within 18,000 feet of a competitor's switch. However, in most cases, GTE's CSA or tariff term agreements had been successful against specific competing bids for the respective services.

51. Market share data showed that by June 30, 1999, Petitioner GTE had executed 101 agreements allowing ALECs to provide service by inter-connecting their networks with GTE's

networks, reselling GTE's services, and/or taking "unbundled" parts of GTE's network.

52. While market share data is not conclusive, in the absence of any better economic analysis by the Commission or other evidence of existing ALEC presence or of a different prognosis for ALEC penetration, market share is at least one indicator of the state of competition when the contracts addressed by the proposed rules were entered into.

53. The Commission has no data about how many customers currently opt-out of their ILEC contracts prior to natural expiration and pay the termination liability to which those ILEC agreements bind them in order to accept a competing offer from another carrier, but clearly, some do. This evidences current competition.

54. Competing carriers can and do sell to ILEC customers at the natural expiration of their long-term agreements. This evidences current competition.

55. The Commission has no data predicting how many more customers would opt-out if the proposed rules are validated. Therefore, the presumption that "if we publish a rule they will come" is speculative.

56. Likewise the Commission's presumption that customers regard termination liability provisions in ILEC contracts as a barrier to their choices and a bar to competition was not proven. Some of the factors that went into that presumption were speculative because the Commission has not reviewed the termination liability provisions of Petitioners' contracts and

has offered no evidence of formal complaints to the Commission by customers who want to opt-out of ILEC contracts. "Informal communication" with Commission staff by customers was undocumented and unquantified.

57. The Commission did present the testimony of Mr. Larsen who explained that because he needs to keep the same business telephone number, he feels that it is not economically feasible for him to opt-out of his several overlapping ILEC contracts unless he can synchronize all his existing contract termination dates and that the proposed "fresh look" rules would permit him to do that. However, his testimony provided no valid predictor that even if the termination of all his existing ILEC contracts were enabled by the proposed rules he would, in fact, be able to find a competitor in his area whose contract(s) were more to his liking.

58. The proposed rules, with their arbitrary date of June 30, 1999, would not allow Mr. Larsen to terminate, without liability, the one ILEC contract he entered into after that date. (See Finding of Fact No. 47). Based on his sincere but unfocused testimony, it remains speculation to presume that Mr. Larsen would be willing to incur contractual liability by early termination of his single non-qualifying ILEC contract just because the proposed rules would let him "opt-out" of the several qualifying ILEC contracts.

59. It is indicative of the proposed rules' possible effect on future competition that Mr. Larsen speculated that if he could terminate all his qualifying ILEC contracts simultaneously under

the proposed rules, he might be able to persuade a competitor, perhaps an ALEC, to pay his termination costs on his single non-qualifying ILEC contract if he renegotiated all his business away from his ILEC and to that competitor.

60. The introduction of the proposed rules into the market place could create a "competitive edge" not anticipated by the Commission.

61. Other carriers, including ALECs competing with ILECs, can and do enter into contracts with their customers which, like the contracts which would be affected by the proposed rules, are long-term contracts subject to termination liability, but the long-term contracts of carriers other than ILECs would not be affected by the proposed rules.

62. The proposed rules pertain only to ILECs and their business customers.

63. In effect, the proposed rules apply predominantly to ILECs' large business customers.

64. Under the proposed rules, competitors which had originally bid against the ILECs for an affected contract at the time it was entered-into could get "a second bite at the apple" occasioned solely by the application of the proposed rules.

CONCLUSIONS OF LAW

65. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause, pursuant to Sections 120.52 and 120.56, Florida Statutes.

66. Petitioners, as ILECs, would be substantially affected by the proposed rules. Therefore, they have standing to pursue this rule challenge.

67. Under Section 120.56(2)(c), Florida Statutes, proposed rules are not presumed valid or invalid. Once challenged, the burden shifts to the agency to prove that the proposed rule "is not an invalid exercise of delegated legislative authority as to the objections raised," (see Section 120.56(2)(a), Florida Statutes), but first, the challengers must present evidence necessary to establish a factual basis for their objections. Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So. 2d 317 (Fla. 1st DCA 1998); St. Johns River Water Management District v. Consolidated Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998).

68. A rule may be declared "wholly or partly invalid." Section 120.56(2)(b), Florida Statutes.

69. A proposed rule may be ruled invalid on constitutional grounds. Dept. of Business and Professional Regulation v. Calder Race Course, Inc., et al., 724 So. 2d 100 (Fla. 1st DCA 1998); Dept. of Environmental Regulation v. Leon County, 344 So. 2d 297 (Fla. 1st DCA 1977).

70. Petitioners allege that the proposed rules constitute an invalid exercise of delegated legislative authority, pursuant to Section 120.52(8), Florida Statutes, because:

> (1) the commission materially failed to follow applicable rulemaking procedures, Section 120.52(8)(a);
>
> (2) the proposed rules exceed the commission's grant of rulemaking authority

and would be unconstitutional, Section 120.52(8)(b);

(3) the proposed rules would enlarge, modify or contravene the specific provisions of law they purport to implement, Section 120.52(8)(c);

(4) the proposed rules are arbitrary and capricious, Section 120.52(8)(e);

(5) the proposed rules are not supported by competent substantial evidence, Section 120.52(8)(f); and

(6) the proposed rules impose costs on ILECs which could be avoided by the adoption of a less costly alternative - no rule - that would substantially accomplish the same purported objective, Section 120.52(8)(g).

71. Petitioners' concern over the April 28, 1999 JAPC letter is a "red herring" in terms of Florida's post-1996 rulemaking procedures. In the course of this process, there may be several JAPC inquiries as to sequential drafts of proposed rules. Provided the Commission responds to JAPC's letter in the time frame established pursuant to Subsections 120.54(3)(e)4 and (8), Florida Statutes, i.e. before the Commission files the proposed rules for adoption with Florida's Secretary of State, the Commission has fulfilled its obligations related to the JAPC letter. Therefore, I cannot conclude that there has been a material failure to follow statutory rulemaking procedures due to the Commission staff's handling of the JAPC letter. See Section 120.52(8)(a), Florida Statutes.

72. Also, the Commission prepared and revised its SERCs without any obligation to do so in the absence of the filing of a formal alternative. See Section 120.541, Florida Statutes. Therefore, the SERC herein does not constitute a material failure

of rulemaking procedures. See Section 120.52(8)(a), Florida Statutes. While the SERC may present concerns as to its adequacy due to its analysis of loss to the ILECs because the rules' objective (material and substantial competition) is so lacking in clarity, those concerns are better addressed in the context of Petitioners' other grounds for challenge, all of which hinge upon the ultimate assertion that competition would best be served by allowing the market to operate as it is. Accordingly, I conclude there has been no failure under Section 120.52(8)(g), Florida Statutes, as regards the revised SERC.

73. However, the proposed rules are fatally flawed in other respects.

74. Chapter 120, Florida Statutes, Florida's Administrative Procedure Act (1999), limits an agency's ability to adopt rules without sufficient statutory authority. Rules may not be based only on a general grant of rulemaking authority. They must also implement a specific statute. An agency's rules are required to implement, interpret, or make specific "the particular powers and duties granted by the enabling statute." See Section 120.52(8), Florida Statutes.

75. Moreover, a statutory grant of rulemaking authority is "necessary but not sufficient" to allow an agency to adopt a rule. See Section 120.52(8), Florida Statutes.

76. An agency has no authority to adopt a rule only because it is reasonably related to the authority of the enabling statute and is not arbitrary or capricious. See Sections 120.52(8) and 120.536(1), Florida Statutes.

77. A proposed rule may be held invalid because the agency lacks the statutory authority to adopt it. Dept. of Health & Rehabilitative Services v. Delray Hospital Corp., 373 So. 2d 75 (Fla. 1st DCA 1979); Dept of Environmental Regulation v. Leon County, supra.

78. The Commission's stated "specific authority" is Sections 350.127(2) and 364.19, Florida Statutes, and its "law implemented" is Sections 364.01 and 364.19, Florida Statutes.

79. Those statutes provide as follows:

> 350.127 Penalties; rules; execution of contracts. -
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> * * *
>
> (2) The commission is authorized to adopt, by affirmative vote of a majority of the commission, rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.
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> 364.19 Telecommunications service contracts; regulation by commission. -
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> The commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.
>
> 364.01 Powers of Commission, legislative intent. -
>
> (1) The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter.
>
> (2) It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies, and such preemption shall supersede any local or special act or municipal charter where any conflict of authority may exist. However, the provisions of this chapter shall not

affect the authority and powers granted in s. 166.231(9) or s. 337.401.

(3) The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure. The Legislature further finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition, but nothing in this chapter shall limit the availability to any party of any remedy under state or federal antitrust laws. The Legislature further finds that changes in regulations following increased competition in telecommunications services could provide the occasion for increases in the telecommunications workforce; therefore, it is in the public interest that competition in telecommunications services lead to a situation that enhances the high-technological skills and the economic status of the telecommunications workforce.

(4) The commission shall exercise its exclusive jurisdiction in order to:

(a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.

(b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.

(c) Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation.

(d) Promote competition by encouraging new entrants into telecommunications markets and by allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than local exchange telecommunications companies.

(e) Encourage all providers of telecommunications services to introduce new or experimental telecommunications services free of unnecessary regulatory restraints.

(f) Eliminate any rules and/or regulations which will delay or impair the transition to competition.

(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

(h) Recognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services, where appropriate, if doing so does not reduce the availability of adequate basic local telecommunications service to all citizens of the state at reasonable and affordable prices, if competitive telecommunications services are not subsidized by monopoly telecommunications services, and if all monopoly services are available to all competitors on a nondiscriminatory basis.

(i) Continue its historical role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies.

80. Section 350.127(2), Florida Statutes, constitutes the blanket grant of rulemaking authority that is "necessary" for the Commission to promulgate any rules, but it is so general that it gives the Commission no comfort with regard to rulemaking authority. See Section 120.52(8), Florida Statutes.

81. Likewise, Section 364.19, Florida Statutes, is insufficient to allow an agency to adopt just any "reasonable" rule regulating service contracts between telecommunication companies/carriers/providers and their customers/patrons/end users.

82. Assuming arguendo, but not holding, that Section 364.19, Florida Statutes, could be construed as sufficient authority to adopt a rule regulating the internal "terms" (conditions) of service contracts, that authority would fall short of authorizing the Commission to, in effect, terminate an existing private contract, because a statute may not offend constitutional boundaries against contract impairment. See Article 1, Section 10 of the Florida Constitution.

83. The effect of the proposed rules is also impermissibly retroactive. The Commission's assertion that the rules are not retroactive because customer opt-outs cannot begin until 60 days after rule adoption, which of necessity is in the future, is a distinction without a difference. Contracts valid when signed before July 1, 1999, would be retroactively voidable if the proposed rules are adopted. The rules, if acted upon by customers, have the potential of rewriting termination liability provisions, with the specific intent of allowing customers to terminate their valid contracts, abrogating them, and rendering them meaningless.

84. Assertions that because the Commission previously provided more limited "fresh looks" by Orders rather than by rule

and that, therefore, there is precedent for these proposed rules does not merit discussion.

85. Under Florida law, almost no degree of contract impairment is permissible.

86. In the case of Pomponio et al. v. The Claridge of Pompano Condominium, Inc., etc., et al., 378 So. 2d 774 (Fla. 1980), at page 780, citing Yamaha Parts Distributors Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975), the court stated, "Any realistic analysis of the impairment [of contract] issue in Florida must logically begin with the well-accepted principle that virtually no degree of contract impairment is tolerable in this state." The Pomponio case was distinguished and limited in the subsequent case of Cenvill Investors, Inc., v. Condominium Owners Organization of Century Village East, Inc., 556 So. 2d 1197 (Fla. 4th DCA 1990), but there, the court specifically opined that it is the retroactive application of new legislative statutes to contracts already in existence which is the pivotal point upon which a constitutional bar is to be determined. The same reasoning should apply to rules promulgated by the executive branch of government.

87. Florida courts have emphasized their constitutional repugnance to state action adjusting contract rights. See State Farm Mutual Auto Ins. Co. v. Hassen, 650 So. 2d 128 (Fla. 2nd DCA 1995) stating, "[E]ssentially no degree of impairment will be tolerated, no matter how laudable the underlying public policy consideration of the statute may be." Cf. Hassen v. State Farm Mutual Insurance Co., 674 So. 2d 106 (Fla. 1996). See also

Sarasota County v. Andrews, 573 So. 2d 113 (Fla. 2d DCA 1991) which stated, "Although . . . Pomponio suggests that some [contract] impairment is tolerable, it specifies that the bedrock of its analysis is the principle that virtually no degree of impairment will be allowed and indicates that the amount of impairment that might be tolerated will probably not be as much as would be acceptable under a traditional federal analysis." See also Gans v. Miller Brewing Co., 560 So. 2d 281 (Fla. 4th DCA 1990), rev. denied, Gans v. Miller Brewing Co., 574 So. 2d 140 (Fla. 1990), holding that, "Virtually no degree of contract impairment has been tolerated in this state," and State Farm Mutual Insurance Co., v. Gant, 478 So. 2d 25 (Fla. 1985), holding, "The statutory amendment . . . may be constitutionally applied to preexisting contracts no more than the original . . . statute could be applied retroactively." Park Benziger & Co., Inc. v. Southern Wines & Spirits, Inc., 391 So. 2d 681 (Fla. 1980), stated, "Exceptions have been made to the strict application of [the federal and Florida constitutional contract clauses] when there was an overriding necessity for the state to exercise its police powers, but virtually no degree of contract impairment has been tolerated in this state." State of Florida, Dept. of Transportation v. Chadbourne, Inc., 382 So. 2d 293 (Fla. 1980), held, "This Court has generally prohibited all forms of contract impairment." Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978), stated, "It is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our constitution." United Gas Pipe Line Co. v. Bevis, 336 So.

2d 560, at pg. 564 n. 18 (Fla. 1976), opined that, "We have generally prohibited all forms of contract impairment."

88. In each of the foregoing cases, Florida courts have declined to apply a statute retroactively where to do so would substantially impair an existing contract.

89. Indeed, the Florida Supreme Court, in addressing the right to contract and the concept of an impairment of contract in perhaps the most highly regulated of all industries, the legal profession, initially declined to permit the prohibition of a form of contract. The opinion In the matter of The Florida Bar, 349 So. 2d 630 (Fla. 1977), declined to forbid or regulate attorneys' contingent fee contracts due to lack of competent substantial evidence of fraud or other abuses. While The Florida Bar is not regulated by Chapter 120, Florida Statutes, and is not an "agency" pursuant to Chapter 20, Florida Statutes, that opinion is at least peripherally instructive. It cited many time-honored constitutional premises:

> The right to make contracts of any kind, so long as no fraud or deception is practiced and the contracts are legal in all respects is an element of civil liberty possessed by all persons who are sui juris. . . . It is both a liberty and property right and is within the protection of the guaranties against the taking of liberty or property without due process of law. . . . It follows, therefore, that neither the federal nor state governments may impose any arbitrary or unreasonable restraint on the freedom of contract. . . . That freedom, however, is not an absolute, but a qualified right and is therefore, subject to a reasonable restraint in the interest of the public welfare. . . . Freedom of contract is the federal rule; restraint is the exception, and when it is exercised to place limitation upon the right to contract, the power, when exercised, must

not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances. (Internal citations omitted).

90. Ultimately, in The Florida Bar Re Amendment to the Code of Professional Responsibility, 494 So. 2d 950 (Fla. 1986), the court did amend The Florida Bar Disciplinary Rules to limit and regulate future contingent fee contracts, but only upon the presentation of what the majority opinion tacitly found to be competent substantial evidence in the form of public opinion that abuses actually existed, and only after legislation had already begun to regulate attorney fees. While one might dispute, as did Justice Barkett's opinion concurring in part and dissenting in part, whether those elements truly constitute "competent substantial evidence," one cannot avoid the fact that in the instant rules cases, there is no persuasive evidence that telecommunications customers perceive any abuse by the contracts at issue, and there is no clear legislative mandate that these proposed rules be promulgated to prevent abuse through the use of such contracts.

91. Due to the foregoing constitutional considerations, I disagree with the Commission's application to the instant cases of the able opinion in Osheyack v. Public Service Commission, DOAH Case No. 97-1628RX (Final Order of Administrative Law Judge J. Lawrence Johnston, entered August 11, 1997), aff'd per curiam in Osheyack v. State, Division of Administrative Hearings (Public Service Commission), 718 So. 2d 1244 (Fla. 2d DCA 1998).

92. Upon authority of Osheyack, the Commission asserts that in light of the highly regulated nature of the targeted contracts

and the highly regulated nature of the telecommunications industry as a whole, the constitutional prohibition against impairment of contract cannot prohibit the proposed rules. The Commission also cites Miami Bridge Co. v. Railroad Commission of Florida, 20 So. 2d 356 (Fla. 1944), cert. denied, 325 U.S. 867, 65 S.Ct 1405 (1945); H. Miller & Sons v. Hawkins, 373 So. 2d 913 (Fla. 1979); Energy Reserves Group, Inc., v. Kansas Power & Light Co., 459 U.S. 400, 103 S.Ct. 697 (1983); U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 97 S.Ct 1505 (1977); and Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 31 S.Ct 259 (1911).

93. I have considered these cases and others, and do not find any of them controlling or particularly helpful in a rule challenge context.

94. U.S. Trust Co. of New York v. New Jersey, and Chicago, Burlington & Quincy R.R. Co., v. McGuire, supra, are so limited by their facts and procedural history that they are not useful here, although I do note that the U.S. Trust Co. case states, "[The] contract clause limits the power of the states to modify their own contracts as well as regulate those between private parties," while simultaneously permitting retroactive legislation only under restricted circumstances.

95. In a non-rule context, the Florida cases of Miami Bridge Co. v. Railroad Commission of Florida, supra and City of Plantation v. Utilities Operating Co., 156 So. 2d 842 (Fla. 1963), cert. dismissed, City of Plantation v. Utilities Operating Co, 379 U.S. 2, 85 S.Ct. 32 (1964), permitted initial state

preemptions of existing community utility contracts and rates by a legislatively-created state regulatory agency pursuant to the state's police power to create superceding agencies and uniform rates. Hudson Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529 (1908), prevented private riparian rights contracts from acting extraterritorially to divert water from one state to another, upon the basis of a superceding state police power in the first state's water regulatory agency.

96. In a non-rule context, a Florida court has explicitly affirmed a utility's "constitutional right to be protected against the impairment of contracts to any degree greater than necessary to achieve a county ordinance's stated purpose." Brevard County Florida v. Florida Power & Light Co., 693 So. 2d 77 (Fla. 5th DCA 1997), rev. denied, Brevard County, Florida v. Florida Power & Light Co., 699 So. 2d 1371 (Fla. 1997). Yet, courts also have repeatedly ruled against state action that constitutes *unconstitutional* impairment of contracts even where the industry at issue was heavily regulated. Geary Distributing Co. Inc. v. All Brand Importers, Inc., 931 F.2d 1431 (11th Cir. 1991), cert. denied, Geary Distributing Co. v. All Brand Importers, Inc., 502 U.S. 1074, 112 S.Ct. 971 (1992); Miller Brewing Co., infra; and Park Benziger & Co., Chadbourne Inc., and Dewberry, all supra.

97. Usually, courts have permitted impairment of regulated companies' contracts only where there has been an attempt to circumvent, by that contract, a power (typically, the ratemaking power) which was expressly vested in the regulatory agency. For

instance, see H. Miller and Sons, Inc. v. Hawkins, supra, which approved a Public Service Commission Order escalating connection fee charges on contracts between a developer and a local utility upon which all payments under the contracts had been paid by the developer prior to a rate increase. The increase, however, was only applied to the houses under the contracts which had not yet been connected when the increase was authorized. The fees were not applied retroactively to houses both already connected and paid pursuant to the contracts. The case further considered a contract escalation clause incorporated by reference. Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra, held there had been no impairment of contract in a situation in which all three elements existed: emergency use of the police power over rates; clear evidence of a significant and legitimate public purpose was demonstrated; and no total destruction of the contract occurred. The case also defers to the Kansas Supreme Court's interpretation of its state law. (It should be noted that the court would also have weighed a substantial impairment of a contract and a significant and legitimate public purpose in a non-emergency situation but did not have to do so in this case).

98. None of the foregoing cases concerning the supremacy of the police power of regulatory agencies is persuasive here, because the contracts targeted by the instant proposed rules are authorized by statute and because the Legislature has specifically given the ILECs contract and discounting authority. Therefore, these ILEC contracts do not attempt to circumvent the

regulatory statute and should not be nullified by a retroactive administrative rule.

99. In the rule challenges at bar, the ILECs, like the pari-mutuel facilities in Calder Race Course, Inc. et al., supra, operate in a regulated environment, but as that case made clear, statutorily sanctioned intensive regulation alone is insufficient reason for rules to disregard the Florida Constitution.

100. At the very least, on the basis of the Court's analysis in Calder Race Course, Inc. et al., supra, the constitutional implications of the Commission's proposed rules assist in evaluating whether the claimed delegation of legislative authority is sufficient to support the proposed rules.

101. Clearly, the power to abrogate contracts has not been made "in clear and unambiguous terms," within Chapter 364, Florida Statutes.

102. Because the Commission lacks the authority to make a prior determination of just and reasonable rates for these types of contracts but is restricted to review complaints under them, the authority to obliterate them where no formal complaints from customers have been received is even more questionable. See Sections 364.051(1)(c), 364.051(6)(a), and 364.14, Florida Statutes (1999).

103. Section 364.01, Florida Statutes, also cited by the Commission as part of its "law implemented" is not helpful in its assertion of rule validity. Section 364.01, Florida Statutes, is entitled, "Powers of Commission, legislative intent." As its

title indicates, that Section sets forth legislative intent and generally describes the Commission's authority to oversee telecommunications companies. It cannot serve as an independent basis to justify the proposed rules.

104. Section 364.01, Florida Statutes, is not a specific grant of authority, but rather is the kind of "general legislative intent or policy" statement that is expressly deficient to support a rule under the new standard of Sections 120.52(8) and 120.536(1), Florida Statutes, (1999). "Statutory language" generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute. Department of Business and Professional Regulation v. Calder Race Course, Inc., supra.

105. The proposed rules do not "regulate" contract "terms" at all. They do not contemplate regulation of specific internal contract terms, or even modification of existing contracts through a change in rates which is clearly contemplated by the authority conferred upon the Commission in several parts of Chapter 364, Florida Statutes. Rather, the proposed rules would authorize unilateral termination of entire existing contracts, regardless of those contracts' internal terms and conditions. A contract cannot be "regulated" if it ceases to exist, and regulation of specific contract terms or conditions necessarily requires consideration of the contract terms themselves. Here, however, the Commission did not review any of the ILEC contracts' termination provisions to determine whether they were reasonable.

The proposed rules mean that all contracts before June 30, 1999, will be available for "fresh look," regardless of their terms, and conceivably even if they don't specify any termination liability.

106. Section 364.051(6)(a)2, Florida Statutes, provides as follows:

> Nothing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.

107. Pursuant to Section 364.051(6)(a) 2, if the ILEC's actions in meeting competition are not unreasonably discriminatory or anticompetitive, they are permissible. The Legislature has authorized ILECs to use term and volume discount contracts, and the Commission's proposed rules attempt to retroactively deauthorize such contracts during an arbitrary period of time.

108. Therefore, the proposed rules are an invalid exercise of delegated legislative authority in that they exceed the grant of rulemaking authority (See Section 120.52(8)(b), Florida Statutes), and would enlarge, modify, or contravene the specific provisions of law they purport to implement. See Section 120.52(8)(c), Florida Statutes.

109. For the reasons set out below, the proposed rules also are arbitrary and capricious and not supported by competent, substantial evidence. See Subsections 120.52(8)(e) and (f), Florida Statutes.

110. The proposed rules purport to allow customers/patrons to take advantage of competitive options which were unavailable when they signed contracts with the ILECs, but the Commission admits that such options were, in fact, available, just not as widely available as the Commission would have liked them to be. It is not reasonable for the Commission to provide, in the absence of any proof of fraud or illegal contract, a blanket "fresh look" opportunity which ignores the fact that customers already had competitive alternatives when they signed their ILEC contracts.

111. Likewise, because the Commission admittedly is unable to identify customers with long-term ILEC contracts for purposes of notifying them directly of rulemaking activity, it follows that there can be no hard data as to how many customers would be affected by the proposed rules.

112. Not knowing how many customers would be affected starts the Commission's speculative spiral which continues through a speculation that all or some customers feel trapped by ILEC contracts, culminating in the most speculative component of all: that all or some customers will opt-out of contracts they freely negotiated during a period of competition.

113. It is unclear exactly what the Commission's theory is, as to why allowing ILECs to use contracts before fostered

competition and abrogating existing ILEC contracts now also supposedly fosters competition. There is evidence that ALEC market penetration has not been uniform throughout the state, possibly due to internal business decisions of individual ALECs, and that ALEC market competition has been concentrated in denser-populated geographic areas which also tend to be where ILECs operate. However, there is no evidence that ALECs are not gaining a greater market share today than they were in June 1999, which is the Commission's selected contract identifier date. Conceding that the evidence shows that market penetration by ALECs has not been consistent timewise or uniform throughout the state, there still is insufficient evidence herein by which to draw the Commission's conclusion that the targeted long-term ILEC contracts are anti-competitive.

114. Likewise, there was no demonstration that the ILECs' long-term contracts present any greater, or even different, obstacles to competing carriers trying to win a customer subject to such an agreement, than would an ALEC's long-term contract. Therefore, the fact that the rules capture contracts of ILECs, but not contracts of ALECs renders the rules discriminatory, arbitrary, and capricious. Indeed, this discriminatory component may, contrary to the Commission's intended goal, produce less, rather than more, competition.

115. To the degree that any ALECs which originally bid unsuccessfully for an affected contract at the time it was entered-into would, through the proposed rules, have an

additional opportunity to rebid to provide the same services, the proposed rules discriminate in favor of ALECs over ILECs.

116. Indeed, the proposed rules could work in opposition to Subsection 364.01(4)(g), Florida Statutes, which expresses the Legislature's intent that "all providers of telecommunications services are [to be] treated fairly" and that the Commission shall "eliminat[e] unnecessary regulatory restraint."

117. The proposed rules' only real effect on competition, if, in fact, any ILEC customer takes advantage of them, will be to promote a one-time impairment of ILEC contracts so that competitors of ILECs (predominately ALECs) can "woo away" ILEC customers and commit such customers to extended contracts of their own.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ordered that the Florida Public Service Commissions' proposed Rules 25-4.300, 25-4.301, and 25-4.302, the "Fresh Look" Rules, constitute an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 13th day of July, 2000, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of the notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.