BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Resolution of petition(s) to establish nondiscriminatory rates, terms, and conditions for interconnection involving local exchange companies and alternative local exchange companies pursuant to Section 364.162, F.S.	DOCKET NO. 950985-TP ORDER NO. PSC-96-1148-FOF-TP ISSUED: September 12, 1996

The following Commissioners participated in the disposition of this matter:

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

ORDER ON MOTIONS FOR RECONSIDERATION

BY THE COMMISSION:

I. BACKGROUND

This matter came to hearing as a result of petitions for interconnection filed by Continental Cablevision, Inc. (Continental), Time Warner AxS of Florida, L.P., and Digital Media Partners (collectively Time Warner), and Metropolitan Fiber Systems of Florida, Inc. (MFS-FL). Continental and MFS-FL filed petitions against United Telephone Company of Florida (United) and Central Telephone Company of Florida (Centel). MFS-FL also filed a petition for interconnection against GTEFL. Time Warner filed a petition against United.

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-96-0668-FOF-TP (Order), issued May 20, 1996, we decided various issues regarding rates, terms, and conditions for interconnection between the parties. On June 3, 1996, Florida Cable Telecommunications Association (FCTA) filed a motion for reconsideration of portions of the Order. On June 4, GTEFL and United/Centel filed motions for reconsideration of portions of the Order. Several of the other parties filed responses to FCTA's, GTEFL's, and United/Centel's motions for reconsideration.

II. STANDARD OF REVIEW

The appropriate standard for review for a motion for reconsideration is that which is set forth in Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962). The purpose of a motion for reconsideration is to bring to the attention of the Commission some material and relevant point of fact or law which was overlooked, or which it failed to consider when it rendered the order in the first instance. 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.

III. LOCAL RECIPROCAL COMPENSATION THROUGH MUTUAL TRAFFIC EXCHANGE

In their motions filed on June 4, 1996, GTEFL and United/Centel requested that we reconsider our decision in the Order to require GTEFL and MFS-FL, United/Centel and MFS-FL, and Time Warner and Continental to use mutual traffic exchange for the termination of local traffic between each other's networks. GTEFL and United/Centel argued that setting mutual traffic exchange as the mechanism for the exchange of local traffic violates both state and federal law.

A) GTEFL's Assertion that the Commission Misinterprets Florida Law by Failing to Impose an Interconnection Charge

GTEFL asserted that under mutual traffic exchange neither GTEFL nor MFS-FL will pay the other anything for terminating calls originated by the customers of the other carrier. GTEFL contended that no charges for local interconnection are imposed on either interconnecting party, and once again raised the argument that Section 364.162(4), Florida Statutes, mandates that we establish a

charge for local interconnection. GTEFL pointed out that references to "rates" and "prices" are made in this subsection.

GTEFL stated that when a statute is clear and unambiguous, it must be afforded its plain and obvious meaning. Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987). GTEFL also pointed out that, under Florida law, the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary. Green v. State, 604 So.2d 471, 473 (Fla. 1992). GTEFL stated that "charge" means the "price set or asked," as set forth in Webster's II New Riverside University Dictionary, 249 (1984). Also, GTEFL stated that Webster's defines "rate" to be a "cost per unit of a service or commodity" or a "charge or payment calculated by means of a particular ratio, scale or standard." Id at 975. GTEFL argued that by requiring mutual traffic exchange, we have included "in-kind" exchange or bartering as forms of compensation within these definitions, deviating from the plain and common meaning. Thus, GTEFL contended that the Order in this respect does not comply with Florida law.

MCImetro and MFS-FL contended that GTEFL's analysis misses the mark. Section 364.162, Florida Statues, uses three terms interchangeably to refer to the compensation mechanism for local interconnection: price, rate, and charge. We agree with MCImetro and MFS-FL that GTEFL stopped its dictionary analysis too soon. GTEFL's dictionary analysis focuses only on the term "charge," which is defined as "price." The term "price," which is then used in the statute as well as in the dictionary definitions of both "charge" and "rate," is defined as "the quantity of one thing that is demanded in barter or sale for another." Webster's Ninth New Collegiate Dictionary, 933 (9th ed. 1991). 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).

We considered and rejected a similar dictionary definition-based argument raised by United-Centel. Order at 18. We find that, based on the plain language of Section 364.162, Florida Statutes, we are not precluded from establishing mutual traffic exchange as the mechanism for charging for local interconnection. Upon consideration, GTEFL has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order establishing mutual traffic exchange as a mechanism for implementing local interconnection.

B) GTEFL's Assertion that the Evidence Does Not Support the Finding that Mutual Traffic Exchange Will Be Sufficient to Recover Costs of Interconnection

GTEFL contended that by ordering a mutual traffic exchange mechanism, we failed to set a charge that is sufficient to cover the cost of furnishing interconnection as required by Section 364.162(3), Florida Statutes. GTEFL stated that we acknowledged that a mutual traffic exchange approach will not recover one party's costs of interconnection if the relative amount of traffic terminated is so much out of balance as to exceed the transaction costs of billing on a per minute of use basis. However, GTEFL contended that we further acknowledged that the evidence relating to the question of whether traffic will be balanced is lacking. GTEFL stated that the only empirical evidence introduced was simply that traffic would be out of balance. GTEFL argued that even though we recognized it to be highly speculative to predict whether traffic will be balanced, we still ordered mutual traffic exchange. GTEFL contended that there must be substantial evidence proving that traffic will be balanced, and that our decision cannot be based upon speculation or supposition.

GTEFL acknowledged that we have afforded MFS-FL and GTEFL the opportunity to file a petition to change the mutual traffic exchange mechanism if either believes that the traffic is imbalanced to the point that it is not receiving benefits equivalent to those it is providing through mutual traffic exchange. GTEFL stated that filing a subsequent petition does not cure the legal deficiencies with our decision. GTEFL stated that it would have to measure minutes of local traffic termination and we afford it no opportunity to recover those costs to which it is entitled, since we have not implemented any type of true-up mechanism to permit the recovery of any shortfalls created by the mutual traffic exchange arrangement. Therefore, GTEFL contended that our finding that no evidence exists on whether traffic is balanced compels us to adopt GTEFL's proposed Originating Responsibility Plan (OPR) compensation plan.

MCImetro asserted that the use of mutual traffic exchange enables GTEFL to recover its cost of providing local interconnection. MCImetro stated that the Commission relied on the testimony of witnesses Cornell and Wood that mutual traffic exchange provides compensation "in kind" which is sufficient in economic terms to cover GTEFL's cost of providing interconnection. MCImetro stated that GTEFL's argument ignores the fact that GTEFL is avoiding the payment of cash compensation, and those avoided cash payments remain with GTEFL to cover its costs of providing interconnection. MCImetro asserted that in economic terms, GTEFL

covers its costs of interconnection just as surely through mutual traffic exchange as it would through its preferred alternative of mutual cash exchange.

MCImetro, MFS-FL and AT&T contested GTEFL's argument that the evidence does not support our finding that traffic will be sufficiently balanced for mutual traffic exchange to ensure that each carrier will recover its cost of providing interconnection. However, this is nothing but an argument about the weight of the evidence. Since there is not yet any experience with local interconnection in Florida, it is impossible to say with certainty whether traffic will be balanced. We find that we weighed competing testimony and evidence in concluding that it was indeed 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. GTEFL merely differs with us about the weight of the evidence, and that is not grounds for reconsideration.

Further, as pointed out by MCImetro, we established a "safety valve" which allows any carrier to request that the compensation mechanism be changed upon a showing that traffic in fact is imbalanced to the point that it precludes a carrier from recovering its costs. We find that we have already considered and rejected these arguments of GTEFL. Further, we find that our decision regarding mutual traffic exchange does not violate Section 364.162, Florida Statutes. Upon consideration, we conclude that GTEFL has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order establishing mutual traffic exchange as a mechanism for implementing local interconnection.

C) GTEFL's Assertion that the Evidence Does Not Support the Finding that Costs of Measurement and Billing Are Excessive

GTEFL stated that we concluded that the expense to measure and bill local terminating traffic would be significant and that this expense would be avoided under mutual traffic exchange. GTEFL contended that this conclusion is not supported by competent substantial evidence and that we ignored evidence presented by GTEFL that the costs of measurement will not be avoided under mutual traffic exchange arrangements. Further, GTEFL argued that we failed to address the specific cost numbers GTEFL introduced showing that the cost of measurement and billing would be minuscule.

MCImetro responded that there is ample evidence in the record to support our finding that there is a significant expense to measuring terminating local traffic and that this expense is avoided by the use of mutual traffic exchange. Further, MCImetro stated that while GTEFL presented some evidence to support its claim that the cost of measurement and billing would be minuscule, that evidence went only to the cost of measuring total minutes of terminating traffic, and not to the additional cost of identifying which of those minutes represent local traffic and the cost of billing those local minutes.

Also, we concur with MCImetro that there is other evidence that shows that the LECs, including GTEFL, do not have the capability to separate terminating local usage from terminating toll usage; that the cost to install the capability to separate such traffic is significant; and that the transaction cost of attempting to measure, identify and bill terminating local usage is likely to substantially outweigh the benefits, unless traffic is significantly out of balance.

Accordingly, we find that this is also merely an argument about the weight of the evidence, which is not properly before us on reconsideration. We considered this evidence and this argument at pages 15 through 17 of the Order. Upon consideration, we find that GTEFL has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of our Order regarding the costs of measurement and billing local terminating traffic.

D) GTEFL's Assertion that Mutual Traffic Exchange is Discriminatory

GTEFL stated that in May of this year we approved an interconnection agreement between GTEFL and Intermedia Communications, Inc. of Florida (Intermedia). That decision established a reciprocal compensation mechanism under which the companies will pay each other GTEFL's terminating switched access rates, less the otherwise applicable residual interconnection charge and common carrier line elements, on a minutes of use basis. On an interim basis, Intermedia and GTEFL will not be required to compensate each other for more than 105% of the total minutes of use of the provider with the lower minutes of use in a particular month. We approved this same compensation arrangement for a negotiated agreement between BellSouth and certain ALECs. See Order No. PSC-96-0082-AS-TP, issued January 17, 1996.

GTEFL contended that since the Order establishes mutual traffic exchange under which GTEFL assesses no charges as between

GTEFL and MFS-FL, this means that GTEFL will assess interconnection payments for one co-carrier (and vice versa), while carrying another co-carrier's traffic without payment. GTEFL contended that different rates will apply to carriers taking the same local call termination service. GTEFL stated that this type of discriminatory rate structure would be permissible only if there were some legitimate distinction between the customers to which the different rates apply. GTEFL argued that we must eliminate this impermissible discrimination and find that the initially approved interconnection rates as between Intermedia and GTEFL shall apply to interconnection between MFS-FL and GTEFL as well.

Contrary to GTEFL's assertion, we decided the issues in the instant docket at the agenda conference held on April 16, 1996, after holding an evidentiary proceeding. The final order was issued on May 20, 1996. However, we did not approve the GTEFL/Intermedia agreement until the agenda conference held on May 21, 1996. In fact, that order was issued as a proposed agency action order on June 17, 1996, and was not a final order until July 8, 1996. See Order No. PSC-96-0784-FOF-TP. Accordingly, our first decision to establish interconnection rates with GTEFL was in this docket with MFS-FL.

Further, Section 364.162, Florida Statutes, establishes a two-part procedure for establishing provisions for local interconnection. Specifically, parties may negotiate, or, if negotiations fail, they may petition us to establish nondiscriminatory rates, terms, and conditions of interconnection.

To adopt GTEFL's construction would produce an absurd result. The first time we set rates, terms and conditions of interconnection, either by approval of a negotiated agreement or by arbitration, then those rates, terms, and conditions would per force govern any subsequent agreement or arbitration. However, the plain language of the statute contemplates several sets of negotiations or hearings between parties. Section 364.162, Florida Statutes, does not compel all ALECs to be signatories to an agreement just because a few ALECs were the first to have a Commission-approved rate, nor does the statute prohibit others from negotiating a different nondiscriminatory rate. In fact, Section 364.162, Florida Statutes, grants ALECs, such as MFS-FL, the right to have us set the provisions of interconnection if negotiations fail.

Also, we ordered the implementation of mutual traffic exchange between GTEFL and MFS-FL and required GTEFL to file a tariff regarding its interconnection rate and other arrangements. Thus,

these rates should be available to all, thereby eliminating the possible claim of discrimination.

Upon consideration, we reject GTEFL's argument alleging discrimination. GTEFL does not raise a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order regarding mutual traffic exchange.

E) GTEFL's Assertion that Mutual Traffic Exchange Violates the Takings Clauses of the United States and Florida Constitutions.

GTEFL stated that the Order violated the Fifth and Fourteenth Amendments to the United States Constitution, as well as the Florida Constitution, Article 1, Section 9, that proscribes confiscation of GTEFL's property without just compensation. GTEFL stated that it unquestionably has property rights in the switches, loops, and transmission wire that make up its local telephone infrastructure. According to GTEFL, to the extent that the government requires GTEFL to allow third parties to occupy GTEFL's property through the transmission of competitors' signals, the government significantly impinges upon each of these rights.

GTEFL also argued that mandatory interconnection by definition provides physical access to its tangible property. GTEFL stated that interconnection allows MFS-FL to move its traffic over GTEFL's network, which is a physical invasion by the bits and bytes MFS-FL transmits. Moreover, GTEFL contended that it will be required to make investments in physical property to accommodate such traffic and to devote measurable network capacity to the carriage of this traffic. GTEFL contended that property in GTEFL's switching office and transport network is occupied by MFS-FL or other ALEC-originated traffic, thereby denying it the use of this property to serve its own customers. GTEFL argued that even with this physical intrusion, our mutual traffic exchange requirement provides GTEFL with no compensation.

GTEFL asserted that neither the Commission nor any other governmental agency is permitted to impose confiscatory rates on one line of a company's business simply because the company can theoretically afford those losses by generating additional revenue in other lines of business. Such a notion, GTEFL argued, would permit the government to impose below-cost pricing on any profitable company. GTEFL argued that mandatory below-cost pricing on a particular line of business is unconstitutional even if the company is able to make up those losses from revenues generated

from other businesses, citing Brooks-Scanlon Co. v Railroad Commission, 251 U.S. 396 (1920), in support.

GTEFL relied on Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), for the proposition that the appropriate compensation for this physical taking is to compensate the property owner for the full opportunity cost of the physical invasion. A similar argument was raised by the LECs when we ordered mandatory physical collocation in Phase I of the expanded interconnection docket. Order Nos. PSC-94-0285-FOF-TP, issued March 10, 1994. We stayed that order when the Federal Communications Commission (FCC) ordered mandatory virtual, rather than physical, collocation. Order No. PSC-94-1102, FOF-TP, issued September 7, 1994. In deciding that order, we were persuaded by the argument that property dedicated for the public purpose is subject to a different standard when, pursuant to statutory authorization, a regulatory body mandates certain uses of that property in the furtherance of its dedicated use. We were not persuaded by the LECs' argument that a mandatory physical occupation is a per se taking.

In the instant case, the statutory authorization is provided by Chapter 364, Florida Statutes. We believe that effective interconnection and adequate provision of telecommunications services are statutory purposes that require that we mandate interconnection, and such purposes do not turn statutorily authorized regulation into a compensable taking.

Property interests are not created by the Constitution, but rather are delineated by existing rules or understandings that stem from an independent source such as state law. Ruckelshaus v. Monsanto Co., 467 U. S. 986, 1000 (1984) citing Webb's Fabulous Pharmacies, Inc v. Beckwith, 449 U.S. 155, 161 (1980). Under Sections 364.16 and 364.162, Florida Statutes, a LEC is required to provide interconnection with its telecommunications facilities to any other provider of local exchange telecommunications services requesting such interconnection at nondiscriminatory rates, terms and conditions. If the parties cannot negotiate an agreement, then we must set interconnection rates that are not below cost. We also must ensure that the rates not be set so high as to be a barrier to competition. We find that the mutual traffic exchange arrangement we have established meets the statutory guidelines as discussed previously.

GTEFL relied on Loretto, supra 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.

GTEFL also relied upon that case 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.

We previously found that we may objectively read Loretto to hold that if there is a permanent physical occupation there is a taking. Order No. PSC-94-0285-FOF-TP, issued March 10, 1994. 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.

GTEFL contended that it must be compensated for the full opportunity cost of the physical invasion of its private property. We find 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 critical to any taking analysis, which must begin as follows:

> 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.

We find that while we cannot determine the appropriate compensation for a taking, we certainly have the authority to establish the appropriate rates for the provision of telecommunications service in Florida. Provided that the rates are not confiscatory, we find that we have the statutory authority to establish nondiscriminatory rates, terms, and conditions for interconnection. As we discussed previously, we believe that the mutual traffic exchange we established as a compensation arrangement provides that GTEFL will be compensated for its provision of interconnection services.

Upon consideration, we reject GTEFL's argument that the mutual traffic exchange provision in the Order is a constitutionally impermissible taking. GTEFL has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order regarding the mutual traffic exchange.

F) GTEFL's Assertion that the Commission Failed to Consider GTEFL's Interests

GTEFL contended that we have prejudged GTEFL and United/Centel by assuming that any mechanism other than mutual traffic exchange would be more likely to lead to anti-competitive behavior. Specifically, GTEFL argued that the record was devoid of evidence that either GTEFL or United/Centel would use an ORP to impose barriers to entry and that the costs of interconnection introduced by GTEFL or United/Centel were unnecessary or anti-competitive. We believe that GTEFL merely disagrees with our subsidiary findings, which support our overall decision to require mutual traffic exchange.

GTEFL also claimed that we disregarded our statutory mandate in Section 364.01(4)(g), Florida Statutes, to ensure all providers of telecommunications services are treated fairly. Also, GTEFL stated that it is unfair to force GTEFL to subsidize the market entry of MFS-FL and other ALECs. According to GTEFL, to the extent

that GTEFL does not recover its costs in furnishing interconnection, it must recover them through local rates and other services ordered by GTEFL's customers.

We find that GTEFL's argument that it is subsidizing the market entry of the ALECs is simply another attempt to rehash the argument that mutual traffic exchange does not enable the LEC to cover its costs. Upon consideration, we deny GTEFL's motion for reconsideration regarding market subsidy of ALECs. GTEFL has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order regarding the mutual traffic exchange.

G) United/Centel's Assertion that Mutual Traffic Exchange Violates the Telecommunication Act of 1996

The decision in this proceeding was made after the Federal Telecommunications Act of 1996 (Act) was signed into law on February 8, 1996. We have acted in accordance with its obligations under Section 364.162, Florida Statutes.

United/Centel argued that state commissions are not authorized under Section 252(d)(2) of the Act to impose mutual traffic exchange mechanisms as a permanent resolution of failed negotiations in the absence of competent substantial evidence that it is a reasonable approximation of the parties' costs. United/Centel asserted that if we are to impose any interconnection arrangement where the costs of transport and termination are unknown, we must do so as an interim measure to give us time to consider the additional costs to be incurred by the LEC and the interconnecting ALEC. Also, United/Centel contended that the "safety valve" of requiring the parties to petition the commission for a change when they believe the traffic is imbalanced is insufficient under the Act. Instead, according to United/Centel, we must limit the imposition of mutual traffic exchange to a period necessary to develop a reasonable approximation of the additional cost of terminating local calls.

Section 252(d)(2)(A) provides the general rule that governs state commission approval of reciprocal compensation arrangements. Specifically, this section states:

> (A) IN GENERAL. - For purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless -

> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of reasonable approximation of additional costs of terminating such calls.

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)

We believe 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 we would have less latitude than the parties would have to establish an appropriate compensation policy.

MFS-FL and AT&T stated that Section 252 does not require the Commission to set a time limit on the applicability of mutual traffic exchange and that we are within our authority to order mutual traffic exchange on either a temporary or a permanent basis. We concur.

United/Centel also argued that the ALECs' costs of providing local transport and termination are at least approximate to the LECs' own costs. There is no requirement in the Order that the ALECs submit cost support for local interconnection. United/Centel argued that this is inconsistent with the Act until the Commission finds that the ALECs' costs are presumptively equal to United/Centel's costs. United/Centel requested that the Order be

reconsidered to make it consistent with the requirements of the Act.

MCImetro asserted that United/Centel's contention that the Commission's safety valve is insufficient to ensure that United/Centel is compensated based on a "reasonable approximation of costs" must fail. It noted that we have held that so long as traffic is balanced, mutual traffic exchange enables all parties to recover their costs and that mutual traffic exchange would fail to recover such costs only if traffic was persistently out of balance by more than a de minimis amount. This is precisely the situation in which any party can seek to make the requisite showing to trigger the payment of cash compensation. AT&T added that mutual traffic exchange is itself a reasonable approximation of the cost of terminating calls as contemplated in Section 252(d)(2)(A)(ii) of the Act.

We find that our decision regarding mutual traffic exchange does not violate the Act. Our decision was based on Chapter 364, Florida Statutes, and is consistent with the provisions of the Act. Upon consideration, we find that United/Centel has not raised a material and relevant point of fact or law that was overlooked or which we failed to consider when we rendered the portion of the Order establishing mutual traffic exchange as a mechanism for implementing local interconnection.

In summary, we reject GTEFL's and United/Centel's motions for reconsideration of the provision of the Order establishing mutual traffic exchange as a reciprocal compensation arrangement for the termination of local traffic.

IV. TRAFFIC IMBALANCE CRITERIA

FCTA, Time Warner, and Continental filed motions for reconsideration of our decision with respect to establishing information requirements should a party request that the compensation mechanism be changed to a specified rate. In support of its motion, FCTA argued: 1) that we need not establish now the criteria by which we will judge any future petitions to change the terms of interconnection; 2) that the "standards" in the order are inconsistent with our findings and the record evidence; 3) that by requiring ALECs to provide traffic data, we have overlooked or failed to consider that ALECs would have to develop the tracking and billing systems that mutual traffic exchange is designed to obviate; 4) that standard 2 in the order is ambiguous and could create competitive disincentives by requiring that parties quantify the "financial impact" due to any traffic imbalance; and 5) that

the order appears to set up standards independent of Section 364.162(7), Florida Statutes, the provision that governs future petitions. FCTA stated that the "standards" are too restrictive in that they do not provide for "changed circumstances" in the future, and they should, at minimum, be revised. FCTA also requested a clarification that we do not intend to make any determination as to whether the Intermedia 105% cap on traffic imbalance, or any other cap, is appropriate if and when a usage-based local interconnection rate is established.

Time Warner also argued that the potential requirement that a new entrant would be required to respond to a LEC complaint and provide such data, would mean that the new entrant must track the three elements of data from the beginning of the exchange of local traffic. This would inflate the costs for new entrants. Time Warner stated that this cannot be our intention and requested reconsideration.

Continental argued that our action violates the Administrative Procedures Act (APA), Chapter 120, Florida Statutes, by establishing a procedure that is not based on record evidence. Continental proposed that we hold another "discrete" hearing where parties may assert "any right under federal or state law" to further adjudicate this issue. Continental asked that we delete the portion of the order that establishes a procedure for requesting a change in the mutual traffic exchange compensation arrangement.

United/Centel filed a response to the motions of Time Warner and FCTA, stating that the record "amply supports" imposition of measurement requirements.

We agree with the ALECs that our decision to implement mutual traffic exchange was based in part on the efficiencies inherent in not having to record, measure and bill local usage. The Order, as worded, however, would seem to require that each ALEC nevertheless do exactly that, even if some other party petitions us to change the pricing mechanism. We find that the petitioning party shall be required to make the initial showing of traffic imbalance and we hereby clarify the Order to that end.

We presume that a local carrier will not petition us for a change in the compensation mechanism unless it has good reason to believe that it is being harmed and it is unable to come to terms with the other carrier(s). We shall expect a verifiable demonstration of the extent of any imbalance and the degree of harm. Thus, the information list in the Order is to be viewed as a set of guidelines, rather than "standards." A potential

petitioning party who plans to argue that traffic is imbalanced to the point that it is not receiving benefits commensurate with those which it is providing, will be able to use the guidelines listed to determine what information we will consider relevant in making a determination.

Parties may not presume that we will consider ourselves either limited to or by the information identified in the Order. FCTA argued that the language in Section 364.162,(7) Florida Statutes, already sets forth "a full statutory scheme" for changing interconnection rates and terms. We note that the same provision requires us to make, within 120 days, a specific set of post-hearing findings, one of which is that there has been a "compelling showing of changed circumstances." Knowing ahead of time at least some of the information that we may deem relevant to a "showing of changed circumstances" should be welcome to the parties. We do not agree with the ALECs that including relevant information needs in the Order violates either of Chapters 364 and 120, Florida Statutes.

We clarify the Order by replacing the language beginning with the second sentence of the first paragraph of Section (g) with the following:

> In the event that one or the other party determines that traffic is unbalanced to the point that the benefits of Mutual Traffic Exchange are not comparable for both parties, and if they are unable to agree on a mechanism for compensation among themselves, one or the other may seek resolution by the Commission. The Commission will wish to verify assertions of traffic imbalance by the petitioning party as quickly as possible, given the 120 day statutory limit upon which to make a ruling. The following criteria should serve as guidelines in helping that party to develop information to support its petition to the Commission. The Commission will wish to review, among other things,
>
> * terminating local traffic data which reflects the trends in the flow of traffic for a reasonable period of time;
>
> * reasonable evidence showing the negative impact, financial or otherwise, that the traffic imbalance has caused and will likely continue to cause; and

* reasonable estimates of the costs which would be incurred due to the additional processing and software required to measure, record and bill local usage.

Finally, FCTA requested clarification that we do not intend the Order to require any determination with respect to whether the Intermedia 105% cap on traffic imbalance, or any other cap, is appropriate, if and when a usage-sensitive local interconnection rate is ordered. We find that it is unnecessary to do this. It is clear in the Order that we make no prejudgment, but simply demonstrate the inconsistency of the LECs' positions in respect to their Intermedia agreements and this proceeding concerning potential cost recovery.

V. LEC HANDLING OF INTERMEDIARY TRAFFIC

GTEFL contended that our decision to set the rate for handling of intermediary traffic was not based upon substantial evidence. GTEFL argued that it had proposed a rate of $.002 per minute of use, but that we elected instead to set a rate of $.00075 per minute of use. GTEFL stated that the evidence presented at hearing did not support the conclusion that this rate was sufficient to recover the TSLRIC, and that witness Menard had in fact testified that she did not believe that the rate was sufficient to recover the TSLRIC.

However, GTEFL's proposed rate for the intermediary traffic handling element was the tandem switching rate of $.00075 plus $.002 per minute of use. Order at 23. Further, as we noted in the Order, GTEFL did not provide TSLRIC data for handling of intermediary traffic. It did, however, provide LRIC data upon which the original tandem switching rate was based. We determined that the difference between the LRIC and the approved rate, in the absence of any other data, could reasonably be used to cover any increment of TSLRIC over LRIC. Moreover, contrary to GTEFL's present argument, witness Menard did not state that the rate was not adequate to cover costs. We find that Ms. Menard simply testified that if the TSLRIC for tandem switching were to turn out to be similar to the LRIC estimates shown for end office switching in her exhibit, then TSLRIC costs would not be covered. From that, we presume that the LRIC end office switching costs are higher than the LRIC tandem switching costs, but this says nothing about TSLRIC estimates.

MCImetro and MFS responded to GTEFL's motion on this point. Both stated that we acted properly with the evidence before us. Upon consideration, we find that GTEFL has stated nothing that

was local or toll. AT&T further stated that to the extent ALECs do not have adequate NXX codes, we may want to re-visit the toll default aspect of the Order.

MFS-FL disagreed with United/Centel that the word "terminating" should be substituted for "originating" in that section of the Order. MFS-FL asserted that the originating, not the terminating, carrier has the call record and therefore knows both the originating and terminating number called. MFS-FL stated that absent SS7 capability, the originating carrier is the only carrier who can reconcile whether a call is local or toll. Therefore, MFS-FL argued that the Order is accurate as written.

United/Centel argued that the company terminating the call should have the burden to prove if the call is local or toll, while MFS-FL argued that the company originating the call is the one that knows if the call is local or toll. We agree with MFS-FL that the originating company should have the burden of determining if the call is local or toll, because it must be able to bill its end user appropriately. Therefore, we find that United/Centel's motion does not raise a material or relevant point of fact or law which was overlooked or which we failed to consider when we rendered the Order in the first instance.

The record on this point is not strong one way or the other, and we recognize that it is important to be able to determine if a call is local or toll. The LECs' local calling areas are well known because they are published in the telephone directory. However, an ALEC's local calling area may or may not be the same as the LEC's local calling area. In addition, the ALEC has statewide authority, so a call that is local to the ALEC customer may be a toll call for a LEC customer. Also, the ALEC does not have control over the assignment of NXX codes. Therefore, we find it appropriate to order the companies to work out how they will define their local calling areas and how they will use the NXXs, so that the local-toll distinction will not be a problem. In addition, we find it appropriate to order that the ALECs identify their local calling areas and provide that information to the LECs.

We do not believe that the concern regarding the toll default mechanism should be who can determine if the call is local, but who pays what charges when the toll default mechanism applies. We find that the Order needs to be to clarified to reflect our intent. The relevant section of the Order states:

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

> the local exchange provider originating the call can provide evidence that the call is actually a local call.

Order at 21. We are concerned that the language in the Order requiring originating switched access to be assessed is inconsistent with Florida Statutes. Section 364.16(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 terminating a toll call and would thus not comply with the statute. Thus, we find that the Order shall be modified as follows 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:

> 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.

While we deny United/Centel's motion for reconsideration regarding toll default, on our own motion, we have reconsidered our decision as to whether originating or terminating access charges shall apply for the toll default. Upon consideration, we find that the company terminating the call shall receive terminating switched access charges from the originating company unless the originating company can prove that the call is local.

VII. EXPANDED INTERCONNECTION RATES

United/Centel requested reconsideration of that part of the Order that provides that, where ALECs are collocated at the same LEC tandem, they should be allowed to cross-connect with each other rather than transit the LEC switch, and that the LECs should be allowed to charge the applicable special access cross-connect rate to the ALEC ordering the cross-connect. United/Centel argued that the appropriate charges for this function should be on the basis of the existing expanded interconnection tariff considering whatever facilities are needed to accomplish that interconnection.

The only party to respond to United/Centel's motion was MCImetro, who agreed with United/Centel that a LEC should be allowed to charge for a function to the extent that it provides more than a single cross-connect. However, MCImetro stated that the appropriate charge should be at TSLRIC, not at a currently tariffed rate.

We find it appropriate to clarify the Order to emphasize that LECs may charge for the facilities used when ALECs are collocated, and that it was not our intention to limit the services provided. Rather, the issue before us was whether cross connection was allowed, and, hence, our decision addressed that activity only. Further, we find that the rates in the expanded interconnection tariff shall apply where applicable.

VIII. EMERGENCY INFORMATION AND E911 BACKUP ROUTING CAPABILITIES

United/Centel requested that we reconsider the following portion of the Order:

> United/Centel shall provide the respective ALECs with a list consisting of each municipality in Florida that subscribes to Basic 911 service, the E911 conversion date and ten-digit directory number representing the appropriate emergency answering position for each municipality subscribing to 911 services.

Order at 30. United/Centel stated that it should not be required to provide this information to the ALECs. However, United/Centel's argument merely reargues that this information should be acquired from the 911/E911 coordinators or the emergency agencies themselves. It added that only the ALECs can identify the geographic location of the ALEC customer and the appropriate requirements for 911/E911 service.

We find that United/Centel has not shown material and relevant facts or points of law we failed to consider when we issued the Order. Upon consideration, we deny United/Centel's motion on this point.

United/Centel also requested clarification or reconsideration of the following portion of the Order:

> If the primary tandem trunks are not available, the respective ALEC shall alternate route the call to the designated secondary E911 tandem. If the secondary tandem trunks are not available, the respective ALEC

> shall alternate route the call to the appropriate Traffic Operator Position System (TOPS) tandem.

Order at 33. United/Centel asserted that it does not have secondary tandems nor does it alternate route traffic to a TOPS tandem. Although this requirement is included in an agreement between United/Centel and Intermedia, United/Centel stated that it was in error in stating that it could perform this task in the Intermedia agreement. United/Centel explained that it alternate routes traffic via specialized equipment located in United central offices, but that this equipment is not utilized in Centel central offices. The company was silent as to how E911 traffic is routed for Centel.

We stated in the Order that "the ALECs' backup systems for E911 should be consistent with United/Centel's and that this is an operational concern that should be a priority to all parties." Order at 32. We believe that E911 emergency service should be transparent to the end user.

We find it appropriate to grant United/Centel's motion for reconsideration in respect to backup routing capabilities of E911 calls, even though we find that it is unclear from the record that United/Centel does not have the capability to comply with the backup E911 routing methods we required in the Order. It appears to us that United/Centel has presented a point of fact that we failed to consider or overlooked at the time we rendered our decision. In addition, we find it appropriate to order United/Centel and MFS-FL to work together and to file with us within 30 days from the date of issuance of this order a comprehensive proposal on how 911/E911 traffic will be routed. The proposal shall include a provision for backup systems, cost and price support, and a list of operational procedures for furnishing 911/E911 service.

IX. WHITE AND YELLOW PAGE DIRECTORIES

United/Centel requested reconsideration of our decision concerning white and yellow page directories. In the Order, we required United/Centel to provide directory listings for ALEC residential and business customers in its white and yellow page directories at no charge. In addition, we ordered that United/Centel publish and distribute the directories at no charge.

United/Centel asserted that our reason for the decision to require that United/Centel assume these obligations at no charge is that the company will be gaining revenues from the ALECs' directory

listings. However, it stated that it does not receive revenues for publishing and distributing directories. It claimed the directories are published by separate entities under contract to United/Centel. United/Centel asserted that even if the company is receiving some financial benefit from directory publishing and distribution, there is no competent evidence in the record to show that United/Centel will be gaining revenues from ALECs' directory listings.

United/Centel argued that both Section 364.161(1), Florida Statutes, and the Act preclude us from requiring United/Centel to provide directory listings and publish and distribute directories at no charge. According to United/Centel, these are network elements that must be cost-based priced and may include a reasonable profit. United/Centel stated that we do not have authority to require that it provide directory listings and publish and distribute directories at no charge.

AT&T, MCImetro and MFS-FL supported our decision. They pointed out that the directory publishing companies are affiliates of United/Centel, not just separate entities. MCImetro and MFS-FL stated that United/Centel does not pay its affiliates for residential and business listings. In addition, according to witness Poag, its affiliates compensate United/Centel for customer information for business listings included in the yellow pages. MCImetro argued that United/Centel will be gaining revenues from ALEC listings.

We concur with AT&T, MCImetro, and MFS-FL. Moreover, United/Centel has not shown material and relevant facts or points of law we failed to consider in this respect when we issued the Order. Upon consideration, we deny United/Centel's request for reconsideration of the portion of the Order concerning white and yellow page directories.

X. TARIFF FILINGS

On June 17, 1996, MCImetro filed a cross-motion for reconsideration. In that motion, MCImetro urged us to reconsider the portion of the Order which gives GTEFL and United/Centel 60 days from the order on reconsideration in which to file tariffs. MCImetro stated that there was no testimony addressing the appropriate tariff filing interval, and that the 60-day requirement was based only on a verbal recommendation by our staff.

MCImetro contended that if the tariff filings are delayed until 60 days from the reconsideration order, the ability of ALECs to commence business under the terms and conditions we have ordered

may be adversely affected. MCImetro stated that such a time frame would be inconsistent with the thrust of the amendments to Chapter 364, which put interconnection proceedings on a tight timetable in order to ensure that the conditions for local competition would be in place as quickly as possible.

MCImetro suggested that a more reasonable time frame would be 30 days from the Commission's vote on reconsideration. MCImetro asserted that the LECs have known, since May 20th of this year, the parameters of our decision. According to MCImetro, even with slight changes that could come about as a result of reconsideration, there is no impediment to prompt tariff filings to implement that decision.

On June 26, 1996, GTEFL filed a Response to MCImetro's Cross-Motion for Reconsideration. GTEFL recommended a compromise between the Order and MCImetro's suggestion. GTEFL stated that it does not object to a 30-day time frame for filing tariffs. However, GTEFL suggested that the 30 days should run from the date of the our order on reconsideration, rather than from the date of our vote.

GTEFL gave several reasons in support of its suggestion. First, GTEFL argued that tariff filings based on oral votes have the potential to cause confusion because the final order might be different than our staff's recommendation or that we might make oral modifications to our staff's recommendation. The tariffs filed might not be accurate and changes might have to be made to the tariffs after the final order is issued. According to GTEFL, this would waste Commission and company resources, and confuse customers. Second, GTEFL argued that marking time from the date of our vote, rather than our order, is at odds with parties' appellate rights. Third, GTEFL noted that MCImetro's suggestion is inconsistent with our action in the unbundling docket in which tariff filings are due 30 days from our order, and not our vote. GTEFL added that the shorter 30-day filing deadline will allow MCImetro and other ALECs to start operating under the terms we set a month earlier than they would otherwise.

MCImetro is correct in stating that there was no discussion in the record regarding the time frame for filing tariffs. However, we typically set time frames for parties to make filings when we issue orders. We concur with MCImetro that Chapter 364.162, Florida Statutes, put interconnection proceedings on a tight time frame in order to ensure that conditions for local competition would be in place as quickly as possible. Therefore, we believe that ALECs should not be delayed in taking the terms and conditions set forth in United/Centel's and GTEFL's tariffs. At the same time, we concur with GTEFL that the potential of having to make

tariff revisions because the tariffs as filed are not accurate should be avoided. Therefore, we deny MCImetro's cross motion for reconsideration to change the tariff filing deadline to 30 days from our vote on reconsideration. However, upon consideration, we find it appropriate to set the filing deadline 30 days from the issuance of our order on reconsideration.

XI. DIRECTORY INFORMATIONAL PAGES

United/Centel requested that we reconsider our decision regarding the informational pages of the directory. In the Order, we required that:

> United/Centel shall work with the respective ALECs to ensure that the appropriate ALEC data, such as calling areas, service installation, repair, and customer service, is included in the informational pages of United/Centel's directory.

Order at 46. United/Centel stated that its white pages directory is published by a separate, unregulated entity and the informational pages are partially provided without charge to United/Centel. United/Centel argued that these informational pages are supplied in compliance with Rule 25-4.040(3) and (4), Florida Administrative Code, and that these rules do not apply to ALECs. United/Centel asserted that the Commission is attempting to do indirectly what it cannot do directly. According to United/Centel, it would be more appropriate for us to require the ALECs to deal directly with the white pages directory publisher rather than to potentially saddle United/Centel with an additional expense not borne by its competitors.

MFS-FL filed a response to United/Centel's motion, in which it stated that United/Centel should have no objection to passing through the benefits of its special relationship with its publishing affiliates to work with ALECs to ensure that their informational pages are included in the directory. MFS-FL contended that any assertion that such coordination "saddles" United/Centel with costs is fanciful.

We find that United/Centel has not raised a material or relevant point of fact or law which was overlooked or which we failed to consider when we rendered our order in this respect in the first instance. Upon consideration, we deny United/Centel's motion for reconsideration of our decision concerning the informational pages of the directory.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that GTEFL's and United/Centel's motions for reconsideration of Order No. PSC-96-0668-FOF-TP with respect to compensation for termination of local traffic through mutual traffic exchange is denied. It is further

ORDERED that Order No. PSC-96-0668-FOF-TP shall be clarified, as discussed in the body of this Order, with respect to the establishment of criteria by which it will be determined whether traffic is imbalanced and when a party petitions for establishment of a rate for local interconnection. It is further

ORDERED that GTEFL's motion for reconsideration of Order No. PSC-96-0668-FOF-TP with respect to the rate established for local exchange company handling of intermediary traffic is denied. It is further

ORDERED that United/Centel's motion for reconsideration of Order No. PSC-96-0668-FOF-TP with respect to the toll default mechanism is denied. It is further

ORDERED that Order No. PSC-96-0668-FOF-TP shall be modified as herein described with respect to whether originating or terminating access charges apply for the toll default mechanism. It is further

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

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

ORDERED that Order No. PSC-96-0668-FOF-TP with respect to expanded interconnection rates where there are collocated ALECs shall be clarified as herein described. It is further

ORDERED that the portion of United/Centel's motion for reconsideration of Order No. PSC-96-0668-FOF-TP with respect to the provision of certain emergency information to ALECs is denied. It is further

ORDERED that the portion of United/Centel's motion for reconsideration of Order No. PSC-96-0668-FOF-TP in respect to E911 backup routing capabilities is granted. It is further

ORDERED that United/Centel and MFS-FL file within 30 days of the issuance of this Order a joint comprehensive proposal regarding the routing of 911/E911 traffic as herein described. It is further

ORDERED that United/Centel's motion for reconsideration of Order No. PSC-96-0668-FOF-TP with respect to white and yellow page directories is denied. It is further

ORDERED that MCImetro's cross-motion for reconsideration regarding tariff filings is denied. It is further

ORDERED that GTEFL and United/Centel shall file tariffs 30 days from the issuance of this Order. It is further

ORDERED that United/Centel's motion for reconsideration of Order No. PSC-96-0668-FOF-TP with respect to the informational pages of the directory is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 12th day of September, 1996.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

DLC/CJP

NOTICE OF 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 the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.