

3:40 pm

J. Phillip Carver
General Attorney

ORIGINAL
FILE COPY

Southern Bell Telephone
and Telegraph Company
c/o Marshall M. Criser III
Suite 400
150 So. Monroe Street
Tallahassee, Florida 32301
Phone (305) 530-5558

June 29, 1994

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Re: Docket No. 921074-TP, Intermedia's Petition

Dear Mrs. Bayo:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Notice of Supplemental Authority and Motion for Additional Briefing, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

- ACK
- AFA _____
- APP _____
- CAF _____
- CMU Reits _____
- CTR _____
- EAG _____
- LEG Canzan _____
- LIN 4 _____
- OPC _____
- RCH _____
- SEC 1 _____
- WAS _____
- OTH _____

Sincerely yours,
J. Phillip Carver (pw)
J. Phillip Carver

Enclosures

cc: All Parties of Record
A. M. Lombardo
Harris R. Anthony
R. Douglas Lackey

RECEIVED & FILED

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A BELLSOUTH Company

DOCUMENT NUMBER-DATE
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CERTIFICATE OF SERVICE
Dockets No. 921074-TL, 930955-TL,
940014-TL, 940020-TL, 931196-TL, 940190-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by U. S. Mail this *29th* day of *June* 1994, to:

Tracy Hatch
Division of Communications
Fla. Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0866

Charles Murphy
Division of Legal Services
Fla. Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Patrick K. Wiggins
Wiggins & Villacorta, P.A.
Post Office Drawer 1657
Tallahassee, Florida 32302

Intermedia Communications
9280 Bay Plaza Blvd., #270
Tampa, FL 33619-4453

Charles J. Beck
Deputy Public Counsel
Office of the Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Thomas Parker
GTE Florida Incorporated
P.O. Box 110, MC 7
Tampa, FL 33601-0110

C. Dean Kurtz
Central Tel. Co. of Florida
Post Office Box 2214
Tallahassee, FL 32316-2214

Florida Cable Television
Association, Inc.
310 N. Monroe Street
Tallahassee, FL 32301

Interexchange Access Carrier
Coalition (IACC)
Brad E. Mutschelknaus
Rachel J. Rothstein
Ann M. Szemplenski
Wiley, Rein, & Fielding
1776 K Street, NW
Washington, D.C. 20006

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson & Bakas
Suite 716
315 South Calhoun Street
Tallahassee, FL 32301

Joseph P. Gillan
J. P. Gillan and Associates
Post Office Box 541038
Orlando, FL 32854-1038

C. Everett Boyd, Jr.
Ervin, Varn, Jacobs, Odom &
Ervin
305 South Gasdsen Street
Tallahassee, FL 32301

Chanthina R. Bryant
Sprint
3065 Cumberland Circle
Atlanta, GA 30339

Sprint Communications Co.
Ltd. Partnership
c/o Tony Key, Director
3065 Cumberland Circle
Atlanta, GA 30339

Laura L. Wilson, Esq.
c/o Florida Cable Tele-
vision Association, Inc.
Post Office Box 10383
310 North Monroe Street
Tallahassee, FL 32302

Ms. Janis Stahlhut
Vice Pres. of Reg. Affrs.
Time Warner Comm.
Corporate Headquarters
300 First Stamford Place
Stamford, CT 06902-6732

Peter M. Dunbar
Pennington & Haben, P.A.
Post Office Box 10095
Tallahassee, FL 32302

Michael W. Tye
Suite 1410
106 East College Avenue
Tallahassee, FL

Harriet Eudy
ALLTEL Florida, Inc.
Post Office Box 550
Live Oak, FL 32060

Lee L. Willis
J. Jeffry Wahlen
John P. Fons
Macfarlane, Ausley, Ferguson
& McMullen
Post Office Box 391
Tallahassee, FL 32302

Charles Dennis
Indiantown Telephone System
Post Office Box 277
Indiantown, Florida 34956

John A. Carroll, Jr.
Northeast Telephone Company
Post Office Box 485
Macclenny, Florida 32063-0485

Daniel V. Gregory
Quincy Telephone Company
Post Office Box 189
Quincy, Florida 32351

Jeff McGehee
Southland Telephone Company
210 Brookwood Road
Post Office Box 37
Atmore, Alabama 36504

Jodie L. Donovan
Regulatory Counsel
Teleport Communications Group
Inc., Ste. 301
1 Teleport Drive
Staten Island, NY 10311

Kenneth A. Hoffman, Esq.
Rutledge, Ecenia, Underwood,
Purnel & Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302-0551

F. Ben Poag
United Telephone Company of FL
P.O. Box 165000
Altamonte Springs, FL 32716

Michael J. Henry
MCI Telecommunications Corp.
Suite 700
780 Johnson Ferry Road
Atlanta, GA 30342

Richard D. Melson
Hopping Boyd Green & Sams
Post Office Box 6526
Tallahassee, FL 32314

J. Phillip Carver (Handwritten)
J. Phillip Carver

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expanded)
interconnection for alternate)
access vendors within local)
exchange company central offices)
by INTERMEDIA COMMUNICATIONS OF)
FLORIDA, INC.)

Docket No. 921074-TP

Filed: June 29, 1994

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
NOTICE OF SUPPLEMENTAL AUTHORITY AND
MOTION FOR ADDITIONAL BRIEFING**

COMES NOW, BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), and hereby respectfully files its Notice of Supplemental Authority and Motion for Additional Briefing, and states as grounds in support thereof the following:

1. On March 10, 1994, The Florida Public Service Commission ("Commission") entered an order (the "Order") in which it found, among other things, that an order of mandatory physical collocation was constitutionally permissible because such an order did not constitute a physical taking. Southern Bell subsequently moved for reconsideration of this aspect, as well as others, of the Order on March 25, 1994 (the "Motion"). In the Motion, Southern Bell argued specifically that under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), mandatory physical collocation necessarily constituted an impermissible taking of property belonging to the local exchange company ("LEC"). This Commission has not yet ruled on the Motion.

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2. On June 10, 1994, The United States Court of Appeals for the District of Columbia issued an order in the appeal of the FCC order on collocation (Bell Atlantic Telephone Companies v. Federal Communications Commission, Case No. 92-1619). In this order, the appellate court overturned the determination of the FCC that mandatory physical collocation did not constitute a taking. In so doing, the Court stated the following:

The Commission's decision to grant CAPs the right to exclusive use of a portion of the petitioners' central offices directly implicates the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve'. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982).

Id. at 7. This conclusion is precisely the same as the legal position advocated by Southern Bell in Phase I and, more recently, in the Motion. Southern Bell hereby gives notice of its reliance upon this decision as supplemental authority in support of its Motion.

3. Southern Bell believes that the effect of the Federal Court's Order is clear. This Commission's determination that physical collocation is permissible is premised solely upon the view that it does not constitute a taking:

GTEFL asserts that the power to regulate in the public interest does not include the right to take private property. We agree,

but note that such analysis presumes that mandatory physical collocation represents a taking. Likewise, GTEFL argues the authority to order connections between carriers does not include the authority to take property. Again we agree, but note that this is not dispositive of whether a taking would occur with a physical collocation mandate.

(Order, at p. 9) Thus, the only real question was whether a taking occurs under an order of mandatory physical collocation, a question that has now been answered affirmatively by the Federal Appellate Court.

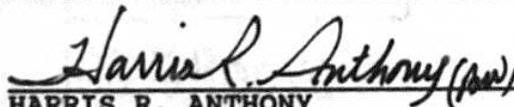
4. Although, again, Southern Bell believes that the impact of the Federal decision is clear, it also believes that this Commission should grant the parties an opportunity to address fully the implications of the Federal Court ruling. Inasmuch as this issue essentially involves a matter of legal interpretation, it cannot be fully and properly addressed by the testimony of witnesses. For this reason, it is not appropriate to address this issue solely through the supplemental testimony that is to be filed later this month. Instead, this issue can only be fully addressed by supplementing the previously filed briefs on this issue to allow each party to state its position as to the legal effect of the Federal Court Order.

5. For this reason, Southern Bell hereby respectfully requests that the Commission allow additional legal argument on this issue in the form of a single supplemental brief to be filed

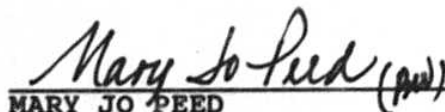
by each party that wishes to do so, which brief should be filed within a reasonable time frame to be set by this Commission.

WHEREFORE, Southern Bell hereby gives notice of its reliance upon the order entered March 10, 1994 in Bell Atlantic Telephone Companies v. Federal Communications Commission, as supplemental authority and respectfully requests the entry of an order allowing supplemental briefing on the legal effect of this order.

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY



HARRIS R. ANTHONY
J. PHILLIP CARVER
c/o Marshall M. Criser III
150 So. Monroe Street, Ste. 400
Tallahassee, FL 32301
(305) 347-5555



MARY JO PEED
c/o Marshall M. Criser III
150 So. Monroe Street, Ste. 400
Tallahassee, FL 32301
(404) 529-7208