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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Expanded Interconnection)
Phase II and Local Transport)
Restructure)

DOCKET NO. 921074-TP
DOCKET NO. 930955-TL
DOCKET NO. 940014-TL
DOCKET NO. 940020-TL
DOCKET NO. 931196-TL
DOCKET NO. 940190-TL

FILED: 07/15/94

INTERMEDIA COMMUNICATIONS OF FLORIDA, INC.'S
BRIEF TO ADDRESS SUPPLEMENTAL LEGAL AUTHORITY

Intermedia Communications of Florida, Inc. ("Intermedia"), pursuant to Order No. PSC-94-0832-PCO-TP hereby files this Brief to Address Supplemental Legal Authority.

ISSUE 5: Does a physical collocation mandate raise federal and/or state constitutional questions about the taking or confiscation of LEC property?

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APP _____
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EAG _____
LEG Conroy
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SEC _____
WAS _____
OTH _____

Position: No. Mandated occupation of used and useful LEC property for the very purpose for which it has been declared used and useful -- i.e. provision of telecommunication service -- is not a taking under a regulatory scheme that creates a monopoly for the LEC and provides both due process and fair compensation for the occupation.

The LECs continue to rehash in this proceeding their misplaced arguments that this Commission may not mandate physical collocation without impermissibly "taking" private property under the Fifth Amendment and Fourteenth Amendment to the United States Constitution. They now hope to add force to this attack on the Commission's decision to mandate physical collocation by citing as additional authority the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Bell Atlantic v. Federal Communications Comm'n., (slip opinion, Case No. 92-1619, decided June 10, 1994). This case, however, does not support the

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proposition that the Commission should reconsider its decision on Issue 5 in this case.

ICI's Essential Argument

Before addressing the Bell Atlantic case and applying its analytical structure to the instant case, it is worth restating ICI's essential point: Commission mandated physical occupation of central office space cannot be a "taking" within the meaning of the Fifth and Fourteenth Amendments because that space was dedicated to the public use under a comprehensive regulatory scheme where the LEC was granted an exclusive franchise, i.e., a monopoly position, in the local market. The LECs' property rights are protected under this comprehensive regulatory scheme that guarantees the opportunity to earn a fair rate of return on this dedicated property.

As ICI pointed out in its earlier briefs, under the case law a regulated utility may be protected under the Fifth Amendment from forced occupation of its property for a purpose other than that for which its property has been dedicated to use in the public interest. However, there is no taking where the Commission orders physical collocation only for purposes specifically contemplated under Chapter 364 and for the very purpose to which the LEC has declared its property used and useful: the provision of telecommunications services to the public for hire. Thus, under the regulatory scheme of Chapter 364, central office space is subject to Commission jurisdiction and mandatory interconnections can be ordered, even to the extent of requiring physical

collocation.

ICI is not aware of any controlling precedent that directly addresses the instant controversy. More particularly, Bell Atlantic certainly does not address this point because the FCC's regulatory scheme under the Communications Act does not create the statutory monopoly enjoyed by the LECs. Thus this Commission must answer the constitutional questions raised by the LECs by reviewing its decision on physical collocation in the context of the statutory scheme created by Chapter 364. Moreover, this statutory-based approach is perfectly consistent with the approach used by the Court in Bell Atlantic.

The Bell Atlantic Decision

In Bell Atlantic, the federal court found that mandated physical collocation "implicates the Just Compensation Clause of the Fifth Amendment, under which '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 (1982)." Id. at 7. The Court then recognized that the Clause prohibited only uncompensated takings; if the FCC ordered the physical collocation pursuant to a statutory scheme that allowed such an exercise of authority and that just compensation provided, there would be no violation.

The Court concluded, however, that the Communications Act did not authorize the FCC to order physical collocation. To the Court, there was a clear distinction between ordering mere interconnection without physical occupation, and interconnection with physical

occupation. Under the Act, the former might be allowed, but there was no specific grant of Congressional authority to require the occupation. Without this specific grant, the Court ruled that the Act conveyed no such authority and the FCC's order must fall.

The Bell Atlantic Rationale Applied to Reconsideration

From ICI's perspective, the Bell Atlantic case has no affect on the Commission's decision that it has statutory authority to order physical collocation, and that the monopoly creating regulatory scheme for providing just and reasonable rates for the use of its facilities satisfies constitutional requirements. For example, as already noted Bell Atlantic does not even address the taking issue within the context of a statutory scheme creating a monopoly franchise. Nevertheless, Bell Atlantic does bring into focus the different premises of ICI and the LECs, and how these different premises shape their respective arguments.

Statutory Interpretation

From ICI's perspective, under a mechanical application of the Bell Atlantic rationale there would be two pivotal questions to be addressed on reconsideration. First, as a matter of statutory interpretation, does Chapter 364 really grant the Commission the authority to order physical collocation? The LECs state unequivocally that Chapter 364 grants no such authority. ICI urges the Commission to be clear that this first question is one of statutory interpretation, not constitutional scrutiny. Certainly, the LECs attempt to use constitutional perspectives to support their statutory interpretation; nevertheless, the scope of

authority intended to be granted under Chapter 364 remains a matter of statutory interpretation. ICI has argued and the Commission has found that Chapter 364 does give it the authority to order physical collocation. Although the LECs disagree with this decision, it is the decision of the case, and the LECs advance no argument on reconsideration not already made.

Constitutional Scrutiny

The next pivotal question is this: Does the Commission's decision that Chapter 364 allows it to order physical collocation, with compensation, pass constitutional scrutiny? In other words, does the fact that the forced physical collocation would be labeled a "taking" under a blind application of the Loretto rule render the statute and the Commission's order unconstitutional?

ICI's Answer: The Decision is Constitutional

ICI believes that the Commission's order and the statute would be found constitutional. As explained earlier, ICI believes that there is no prohibited taking where the Commission order collocation only for purposes specifically contemplated under Chapter 364 and for the very purpose to which the LEC has declared its property used and useful, i.e., for the very purpose which the LEC was granted a monopoly.

The LECs' Position: The Decision is Unconstitutional

How would the LECs respond to the second pivotal question? ICI suspects that the first response would be to challenge the question's premise by arguing that the statute is not so clear, and that the lack of clarity requires a finding of no such authority to

compel physical collocation. Next, the LECs might argue that "a taking is a taking" and any taking, if allowed, requires compensation at market value set by the judiciary. They would further argue that since the Commission cannot exercise such judicial powers under the Florida Constitution two conclusions must be drawn: first, Chapter 364 does not allow forced physical collocation; and second, if it does, the statute is unconstitutional.

The LECs' Premise

ICI has attempted to be fair in providing a sample of what the LECs might argue because it wishes to draw the Commission's attention to what ICI believes is the LECs' fundamental premise. In a nutshell, the LECs believe that ordered "physical collocation" amounts to an appropriation of its private property in the same way that taking land from a citizen for a highway is an appropriation of his or her private property. In fairness to the LECs, from this perspective, all of their arguments make sense; indeed, if this is the premise from which the legal analysis must flow, the LECs are correct: the Commission may not order physical collocation.

What the LECs' Premise Overlooks

As anticipated earlier, however, the LECs' premise ignores a few fundamental facts: they have been granted a monopoly; the private property they seek to protect, i.e., the central office, has been dedicated to and declared used and useful for telecommunication purposes; and the physical collocation has been ordered for the very purposes for which the property was declared used and useful. The LECs are receiving a just and fair return on their investment in this property. Yet, the LECs want to treat the property just as if it were your land or my land being confiscated by the highway department. ICI counters with the modest observation that the central office is not just like your land or my land, and that correct legal analysis must evaluate the constitutionality of the mandated physical collocation within the overall context of the monopoly creating regulatory scheme administered by the Commission under Chapter 364, Florida Statutes.

Conclusion

For the reasons stated, nothing in the Bell Atlantic case impels the Commission it to reconsider its decision on legal grounds. The Commission's decision to require physical collocation was an appropriate policy decision that does not violate the LECs' property rights as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and does not violate Article X, Section 6 of the Florida Constitution.

Respectfully submitted this 15th day of July, 1994.

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Docket No. 921074-TP

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