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July 15, 1994

URGENT
FILE

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 Supplemental Brief Regarding its Motion for Reconsideration of Order No. PSC-94-0285-POF-TP, 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.

Sincerely yours,

J. Phillip Carver (BW)
J. Phillip Carver

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cc: All Parties of Record

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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 *15th* day of *July* 1994, to:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expanded) Docket No. 921074-TP
interconnection for alternate)
access vendors within local)
exchange company central offices)
by INTERMEDIA COMMUNICATIONS OF)
FLORIDA, INC.)
_____)
) Filed: July 15, 1994

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
SUPPLEMENTAL BRIEF REGARDING ITS MOTION FOR RECONSIDERATION
OF ORDER NO. PSC-94-0285-FOF-TP**

COMES NOW, BellSouth Telecommunications, Inc., d/b/a
Southern Bell Telephone and Telegraph Company ("Southern Bell or
"Company"), and hereby respectfully submits, pursuant to Order
No. PSC-94-0832-PCO-TP, its Supplemental Brief Regarding its
Motion for Reconsideration of Order No. PSC-94-0285-FOF-TP.

Southern Bell argued in its initial brief in this matter
that mandatory physical collocation is constitutionally
impermissible because it constitutes a physical taking of the
property of a local exchange company ("LEC"), and that the
Florida Public Service Commission ("Commission") does not have
the authority to effect such a taking. Southern Bell premised
its argument that mandatory physical collocation is a taking on
the decision of the United States Supreme Court in Loretto v.
Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

On March 10, 1994, this Commission entered an order in which
it found, among other things, that the requirement of mandatory
physical collocation is constitutionally permissible because such

a requirement does not constitute a taking. (Order No. PSC-94-0285-FOF-TP) At the same time, the order acknowledged specifically that "the power to regulate in the public interest does not include the power to take private property", and that "the constitutional protection against unlawful takings extends to private property dedicated to the public use". (Order, at p. 9). The order also agreed with the assertion of GTEFL that "the authority to order connections between carriers does not include the authority to take property". (Order, at p. 9)

Thus, the order acknowledged expressly that this Commission lacks the power to take private property. The only remaining question for the Commission was whether mandatory physical collocation constitutes a taking. In this regard, the Commission observed that "it is our view that an objective reading of Loretto is that if there is permanent physical occupation there is a taking. This is the case regardless of the size of the occupation". (Order, at p. 7). Therefore, assuming that, Loretto applies, the involuntary physical occupation of a LEC's central office space by collocators would have to be viewed as constituting a taking.

The Commission, however, ruled that mandatory physical collocation is permissible. In so doing, the Commission opined that Loretto did not set forth the applicable standard. The FCC

had, of course, previously made the same ruling, a fact that was expressly noted by this Commission as support for its view on this issue:

... [I]t appears that Loretto is not the appropriate standard to employ regarding the Commission's statutorily authorized regulation of a LEC's "used and useful" property. This is consistent with the determination made by the FCC. In addressing this matter at the Federal level, the FCC found that '[a]ny per se rule, including the Loretto per se rule, is not reasonably applicable to a regulation covering public utility property owned by an interstate common carrier subject to the specific jurisdiction of this agency'.

(Order, at p. 7)

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 does not constitute a taking. The Court specifically 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, 426 (1982).

(Federal Court Order, at p. 7) Thus, the Federal Appeals Court specifically found that Loretto applies when a regulatory agency orders mandatory physical collocation, a conclusion that applies equally to the rationale used by the FCC and this Commission.

The Federal Court considered whether the FCC had statutory authority to take property. The FCC had previously stated that, under 47 U.S.C. §201(a), it had the authority to order carriers "to establish physical connections with other carriers" (Fed. Court Order, at 6) Based upon the previously stated determination that an order of physical collocation is a taking, the Federal Court held that "the order of physical collocation, therefore, must fall unless any fair reading of § 201(a) would discern the requisite authority ..." to order this connection in a way that entails a taking. (Federal Court Order, at 9) The Federal Appellate Court further stated that, although this power to order connections is undoubtedly broad, it "does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LEC's central offices." (Federal Court Order, at 9) The Court also noted that physical connection can be accomplished by either virtual or physical collocation. Accordingly, "the Commission's decision to mandate physical co-location ... simply amounts to an allocation of property rights quite unrelated to the issue of 'physical

connection'." (Fed. Court Order, at 9) Thus, it was determined that the FCC had no authority to effect this taking of LEC property.

The foregoing illustrates that the Federal Court resolved rather easily that the Loretto per se taking rule applies in the regulatory context. The Federal Appellate Court decision, accordingly, primarily focused upon the issue of whether the FCC had the statutory authority to effect such a taking. Our case is much simpler. This Commission has already acknowledged that it does not have the delegated authority to take private property. Instead, its decision to order mandatory physical collocation was based solely upon the related conclusions that Loretto did not apply to this regulatory matter, and that, therefore, mandatory physical collocation is not a taking. On the basis of the Federal Appeals Court decision, however, it is now clear that Loretto does apply, and that under Loretto, mandatory physical collocation is, in fact, a taking. It is equally clear that this Commission cannot order physical collocation because, as acknowledged in the Phase I Order, it lacks the authority to take (as opposed to regulate) LEC property.

Accordingly, this Commission should grant Southern Bell's Motion for Reconsideration, and amend Order No. PSC-94-0285-FOF-TP, to remove the portions ordering mandatory physical

collocation. This order should also be modified ultimately to provide that the LECs shall have the option to provide either physical or virtual collocation¹.

Wherefore, Southern Bell respectfully requests the entry of an order reconsidering, and vacating upon reconsideration, the portions of Order No. PSC-94-285-FOF-TP that order the LECs to provide mandatory physical collocation.

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¹ This is the obvious result that follows from the legal conclusion that mandatory physical collocation is impermissible. However, whether (and in what manner) the Commission should modify the Phase I Order on this point has been identified as an issue for Phase II. (See, Order Adding Additional Issue, Order No. PSC-94-0830-PCO-TP, July 7, 1994). Therefore, Southern Bell has restricted its request for relief to simply vacating the portions of the Order that require mandatory physical collocation. Presumably, the parties will present testimony in Phase II as to an appropriate modification to the Phase I Order, and any such modification will occur after the Phase II hearings are concluded.