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July 15, 1994

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Ms. Blanca Bayo, Director
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Florida Public Service Commission
101 East Gaines Street
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via Hand Delivery

Re: Expanded Interconnection Phase II and Local
Transport Restructure; Docket No. 921074-TP

Dear Ms. Bayo:

Enclosed for filing please find an original and fifteen copies of Time Warner AxS of Florida, L.P.'s and Florida Cable Television Association, Inc.'s Brief Regarding the Legal Impact of Court of Appeals' Decision for the above-referenced docket. You will also find a copy of this letter enclosed. Please date-stamp this copy to indicate that the original was filed and return to me.

ACK _____
AFA _____
APP _____ If you have any questions regarding this matter, please feel
CAF _____ free to contact me. Thank you for your assistance in processing
this filing.

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Respectfully,
PENNINGTON & HABEN, P.A.

Peter M. Dunbar
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SEC / PMD/tmz
WAS Enclosures

OTH cc: All parties of record (w/ enclosures)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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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: July 15, 1994

BRIEF OF TIME WARNER AXS OF FLORIDA, L.P.

AND

THE FLORIDA CABLE TELEVISION ASSOCIATION, INC.

REGARDING

THE LEGAL IMPACT OF COURT OF APPEALS' DECISION

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STATEMENT OF THE CASE AND FACTS

The Federal Communications Commission ("FCC") established by order a policy of mandated physical collocation for the purpose of expanded interconnection of interstate telecommunications facilities. In Phase I of Docket No. 921074-TP, the Florida Public Service Commission ("FPSC") established a mandatory physical collocation policy for interconnection of intrastate special access services. Subsequently, the United States Court of Appeals, District of Columbia Circuit ("Court of Appeals" or "Court") remanded the FCC's Orders as they apply to collocation arrangements for expanded interconnection.

By Order, the Commission has allowed parties to file briefs which address the implications of the FCC remand on the FPSC's determinations in Phase I of this docket.

SUMMARY OF THE ARGUMENT

The remand of the FCC's collocation orders was based on an analysis of federal statutes and does not impact the Commission's Phase I determinations legally.

However, in order to avoid divergent regulatory schemes in the two jurisdictions, much of the FPSC's Phase I intrastate decision was designed to mirror the FCC's interstate determinations. While the FPSC should not allow uncertainties at the interstate level to delay implementation of an intrastate interconnection policy, care must be taken to avoid incompatible regulatory schemes.

ARGUMENT

I. FEDERAL COURT'S DECISION

The LECs argued three points before the Court of Appeals regarding the FCC's orders:

- 1) The FCC lacked statutory authority for the orders;
 - 2) The FCC orders fail to show the reasoned decision making required by the Administrative Procedures Act; and
 - 3) The FCC flouted APA notice-and-comment procedure.
- (*Bell Atlantic Telephone Companies v. FCC*, 1994 WL 247134 (D.C. Cir.), *1)

While the Court of Appeals stated that the FCC Interconnection Orders raise constitutional questions, the Court did not base its remand of the FCC's Orders on a constitutional determination. (Compare *Id.* at *1 with *Id.* at *5-6, FN 1) The Court acknowledged that:

Petitioners' brief, in places, appears to argue that even if the Commission had authority to impose physical collocation we must nonetheless decide whether that imposition inflicted a "taking." In fact we have no power to do so. . . . The only question we consider is whether the orders under review were indeed duly authorized by law. (*Id.* at *5-6, FN 1)

In reaching its decision, the Court accepted the *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) taking standard, presumed a taking which would require a compensation and then determined that the FCC's statutory authority to order physical collocation is insufficient under a heightened standard of statutory review. (*Bell Atlantic*, at *3-5) The Court held that the Communications Act "does not expressly authorize an order of

physical co-location, and thus the Commission may not impose it."
(*Id.* at *5)

II. THE FPSC ORDER

By Order No. PSC-94-0285-FOF-TP, issued in this docket on March 10, 1994, ("Order") the Florida Public Service Commission ("FPSC") determined that a physical collocation mandate was within its authority pursuant to Chapter 364, Florida Statutes.

The FPSC addressed the taking issue head-on and rejected the applicability of *Loretto*, in favor of a line of takings cases involving the regulation of common carriers. After an extensive analysis, which included language from common carrier takings decisions by both the Supreme Court of Florida and the United States Supreme Court, the FPSC determined that a physical collocation mandate, to effectuate statutorily authorized interconnection of telecommunications facilities, does not result in the taking of a common carrier's used and useful property which has been dedicated to the provision of telecommunications services.
(Order at 5-8)

Merely raising constitutional concerns does not require the invalidation of the FPSC's statutory interpretation. (*See Rust v. Sullivan*, 111 S.Ct. 1759, 1771) It is only where a statutory interpretation casts "grave doubts" on the constitutionality of the statute that such an interpretation must be disallowed. (*Id.*) There are no "grave doubts" regarding the FPSC's Phase I decision. The FPSC has broad statutory powers and relied on both Florida And federal caselaw addressing factually similar circumstances for the

proposition that a mandated physical collocation arrangement is permissible regulation of common carriers for the purpose to which the carriers have dedicated their used and useful property.

III. THE IMPACT OF THE FCC REMAND

By stipulation of the parties, the Florida decision was not predetermined by the FCC's decision. (Order at 5) Indeed, the statutory authority for the regulation of intrastate telecommunications in Florida is distinct, both substantively and procedurally, from the FCC's interstate authority. Moreover, in reaching its decision, the Court of Appeals relied on a heightened standard of review necessitated by the federal statutes and the presumption of a taking under *Loretto*.

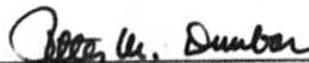
Except for an issue which has been added to Phase II of this proceeding to address how the FPSC should handle its Phase I decision in the absence of a clear interstate collocation policy, the remand of the FCC Orders should have no legal bearing on this case. Uncertainty at the interstate level should not be allowed to impede the development of an intrastate interconnection policy. However, some flexibility must be afforded collocation arrangements in order to prevent totally divergent interstate and intrastate policies. Incompatible collocation arrangements would benefit neither the LECs nor the competitors.

CONCLUSION

The remand of the FCC's interstate collocation mandate has no legal impact on the FPSC's intrastate collocation decision. The FPSC should move ahead to create a fair and flexible policy for

expanded interconnection of intrastate services which will be compatible with eventual interstate interconnection arrangements.

RESPECTFULLY SUBMITTED this 15th day of July, 1994.



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CERTIFICATE OF SERVICE
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