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December 13, 1993

Mr. Steve C. Tribble, Director
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Florida Public Service Commission
101 E. Gaines Street
Tallahassee, FL 32399-0865

Dear Mr. Tribble:

Re: Docket No. [redacted]
In the Matter of the Petition of Intermedia Communications of Florida, Inc. for Expanded Interconnection for AAVs within LEC Central Offices

Please find enclosed for filing an original and fifteen copies of GTE Florida Incorporated's Response Brief in the above-referenced matter. A copy of the brief is also enclosed on diskette in WordPerfect 5.1.

Service has been made as indicated on the attached Certificate of Service. If you have any questions, please contact the undersigned at 813-228-3094.

Very truly yours,

Kimberly Caswell/dm

Kimberly Caswell

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Intermedia Communications of Florida, Inc. for Expanded Interconnection for Alternate Access Vendors Within Local Exchange Company Central Offices	Docket No. 921074-TP Filed: December 13, 1993

RESPONSE BRIEF OF GTE FLORIDA INCORPORATED

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Intermedia Communications of Florida, Inc. for Expanded Interconnection for Alternate Access Vendors Within Local Exchange Company Central Offices	Docket No. 921074-TP Filed: December 13, 1993

RESPONSE BRIEF OF GTE FLORIDA INCORPORATED

GTE Florida Incorporated (GTEFL) hereby files its Response Brief in this proceeding. In accordance with the Commission's Order number PSC-93-1680-PCO-TP, GTEFL will address only one issue: whether a physical collocation mandate raises federal or state constitutional questions regarding the taking of local exchange company (LEC) property. In its initial Brief, GTEFL explained that a physical collocation mandate would be a taking in violation of both the Florida and United States Constitutions. No party has effectively rebutted this argument.

Most of those opposing GTEFL's position declined to treat the constitutional takings issue in any depth, advancing only conclusory position statements. Intermedia Communications of Florida, Inc. (ICI) and Time Warner AxS of Florida, L.P. (Time Warner) made somewhat lengthier (though no more convincing) arguments. Because of their relatively more detailed statements, this Response will focus on ICI's and Time Warner's contentions.

I. The FCC's Constitutional Analysis Is Irrelevant to Evaluation of this Commission's Actions

At the outset, it is important to clarify the nature of the violations that will occur if this Commission mandates physical collocation. A state physical collocation rule would implicate both state and federal constitutional provisions (including the Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and the Florida Constitution, Article 10, Section 6 and Article 1, Section 9). ICI, however, appears to misunderstand the interplay of the state and federal aspects of the constitutional question.

Under its discussion of the federal constitutional aspect of the takings issue in this proceeding, ICI refers to the FCC's analysis of its own decision mandating physical collocation. (ICI Brief at 11-12.) ICI stresses the FCC's finding that its ruling does not violate the Fifth Amendment. Any consideration of the FCC's reasoning is, however, irrelevant to the debate about constitutionality of a state physical collocation mandate.

Just because the FCC has required physical collocation does not make it constitutionally permissible. As the Commission knows, GTE and a number of other parties have appealed the FCC's physical collocation decision on constitutional grounds. The Bell Atlantic Tel. Companies, et al. v. FCC, et al., No. 92-1619 (D.C. Cir. filed Nov. 25, 1992). A judicial ruling, rather than the FCC's legal conclusions about its own actions, will determine the constitutionality of the FCC's Order.

In any case, the question for this Commission is not whether the FCC's action was constitutionally permissible; rather, it is whether a state physical collocation mandate would be lawful. It is not true, as ICI states, that "if the FCC's plan for mandatory collocation passes constitutional muster, then there appears to be no state constitutional question triggered by an intrastate physical collocation requirement." (ICI Brief at 12.) Even if the FCC's plan is held to be constitutional, the validity of any state physical collocation mandate would need to be separately evaluated.[1]

As GTEFL explained in its Brief, two questions direct the constitutional assessment at both the state and federal levels: 1) Has a taking occurred?; and 2) Does the agency have the authority to effect such a taking? The FCC has claimed takings authority under the federal Communications Act. As discussed in section II. B. of this Response Brief, this Commission will need to cite a specific Florida statute authorizing it to take property if it wishes to implement a state physical collocation mandate. Any Court of Appeals ruling as to whether the FCC possesses takings power will have no bearing on whether this Commission has been delegated takings authority by the Florida Legislature. If it has

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[1] Time Warner also appears confused about the nature of the constitutional inquiry in this proceeding. Its constitutional analysis concludes that "the expanded interconnection policies of the FCC currently being considered by the FPSC do not give rise to federal or state constitutional questions about taking or confiscation of LEC property." (Time Warner Brief at 11-12.) The issue presented in this proceeding is not the federal or state constitutionality of the FCC's actions, but rather the constitutionality of a physical collocation mandate by this Commission.

not been given this power, a Commission order mandating physical collocation will violate both state and federal constitutional provisions. This is true regardless of whether the FCC's mandatory physical collocation is ruled constitutional. GTEFL thus urges the Commission to reject any suggestions that it can shortcut its own constitutional analysis by reference to the FCC's logic.

II. Mandatory Physical Collocation Is an Unauthorized Taking of Private Property

As GTEFL discussed in its Brief, mandatory physical collocation is a per se physical taking of LEC private property for which this Commission has no statutory or constitutional authority. (GTEFL Brief at 3-7.) The issue is not one of just compensation, as some parties have argued. Rather, it is the fundamental question of whether the government has the right to take the LECs' property at all.

A. Mandatory Physical Collocation Is a Per Se Taking of the LECs' Property

ICI is correct in stating that for the LECs to argue that mandatory physical collocation is unconstitutional, they must establish that forced physical collocation is a taking. (ICI Brief at 12.) As GTEFL demonstrated in its Brief, this point is easily made.

"[A] permanent physical occupation authorized by government is a taking without regard to the public interests it may serve."

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); accord Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). "[R]egulations that compel the property owner to suffer a [permanent] physical invasion of his property" constitute a taking "no matter how minute the intrusion." Lucas at 2893.

Florida courts have explicitly recognized these principles. See e.g., Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associates, Ltd., 493 So. 2d 417 (1986); Beattie et al. v. Shelter Properties, 457 So. 2d 1110 (Fla. 1st DCA 1984). In Storer, for example, the Florida Supreme Court struck down a state statute giving cable television companies the right to place equipment and wiring on apartment complex property over the objections of the property owner. The Court relied on Loretto to find an impermissible, per se taking on both state and federal constitutional grounds. It recognized that permanent physical occupation of another's property "is perhaps the most serious form of invasion of an owner's property interests." Storer, 493 So. 2nd at 1036. It further confirmed that "[a] taking results regardless of the size of the occupied area." Storer, 493 So. 2d at 419. The Court rejected arguments that the physical invasion was only temporary, since the landlord would be required to give the cable television company "exclusive possession and use of a portion of his property" once a tenant requested service. Id. at 419. [2]

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[2] As GTEFL noted in its Brief, a taking will have occurred to the extent that an owner can no longer own and enjoy his property as he (continued...)

The invasion of LEC property involved in mandatory physical collocation is undeniably the type of permanent physical occupation that amounts to a per se taking. As the U.S. Supreme Court has stated, "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." Loretto, 458 U.S. at 437. Under a mandatory collocation regime, uninvited collocators will physically install their transmission equipment within LEC central office buildings, maintain dominion and control over the portion of the building unwillingly dedicated to their exclusive use, and secure easements for ingress and egress through other portions of the building to maintain and repair their equipment. The uninvited physical occupation would be permanent in the relevant sense, since it would continue for indefinite duration, once interconnection was requested.

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[2](...continued)
intended. Vatalaro v. Dep't of Environmental Regulation, 601 So. 2d 1223, 1228-29 (Fla. 5th DCA 1992), citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 2662, 57 L. Ed. 2d 631 (1978). As a significant interference with property rights, a taking is thus distinguished from merely consequential injuries or trivial interferences. See 26 Am. Jur. 2d Eminent Domain § 157.

1. Time Warner Has Misapplied the Relevant Law

In an apparent attempt to preempt arguments based on Loretto and its progeny, Time Warner cites that decision as the sole legal authority for its conclusion that mandatory physical collocation would not effect a taking. (Time Warner Brief at 6.) Time Warner's tortured interpretation of Loretto is plainly misleading. Citing Loretto, Time Warner states that the takings question in this case should be analyzed by means of a three-part balancing test. (Time Warner Brief at 6.) This is an incorrect statement of the Loretto holding.

Time Warner has conveniently ignored the whole point of Loretto: that a multifactor balancing test is not appropriate in cases of physical occupation. As GTEFL has noted, Loretto affirms that a per se taking will be found in all cases where government action requires permanent, physical invasion of private property, regardless of the public interests that may be served. After a physical invasion of property has been found, there is no need to conduct any further analysis. See Patrick R. Scott, State and Local Regulations: Are We Being Taken?, Fla. B. J., Nov. 1993 at 89, 90-91. A balancing test will be used only in cases of "nonpossessory governmental activity." Loretto, 102 S. Ct. at 3179. The element of physical invasion inherent in mandatory physical collocation precludes any credible argument that it is "nonpossessory." In short, Time Warner's analysis deserves no attention, since it misstates the law that applies in cases of permanent physical occupation.

2. ICI Has Ignored the Relevant Law

In contrast to Time Warner, ICI cites no law to support its position that mandatory physical collocation does not effect a taking. Instead, ICI creates its own theory of "occupation by consent." (ICI Brief at 14.) Under this theory, ICI argues, the LECs consented to the compelled occupation of their property by interconnectors because of the regulatory bargain they struck long ago with the state: the LECs would be permitted a monopoly and a fair rate of return on investment, while the Commission could control the use of LEC facilities in the provision of monopoly services. ICI further reasons that because "telecommunications facility" is defined to include real estate, the Commission may compel LECs to permit others to occupy that property. (ICI Brief at 13-14.) This novel legal theory ignores the already existing law that resolves the taking question.

GTEFL does not dispute that its property is affected with the public interest, and that the Commission may regulate the LEC's facilities and operations. But it defies logic--as well as established legal precedent--to suggest that the State's power to regulate the LEC includes authority to appropriate its property. Certainly, the LECs never "consented" to an unconstitutional exercise of regulatory authority.

There is no exception to the Loretto per se rule for property owned by a regulated public utility. In fact, it is a longstanding principle that the constitutional protection against unlawful takings "applies as well to private property devoted to a public

use." Western Union Tel. Co. v. Penn. R.R., 195 U.S. 540, 569 (1904) (cited with approval in Loretto, 458 U.S. at 430-31.) For example, a railroad's real property (including its "grounds, station, platforms, [and] driveways")--though used in its common carrier operations and "subject of regulation in the public interest"--nevertheless "belongs to" the railroad and is entitled to the same constitutional protection as any other private property. Delaware, L. & W. R.R. v. Morristown, 276 U.S. 182, 193 (1928). Despite broad regulatory power, the State cannot rely on "public interest" justifications to undermine an owner's constitutionally protected property rights. Northern Pacific Ry. v. North Dakota, 236 U.S. 585, 595 (1915).

The Supreme Court's application of the Loretto principles in FCC v. Fla. Power Corp., 480 U.S. 245 (1987), is particularly relevant to the instant issue. That decision held that the Pole Attachments Act did not effect a per se taking of public utility company property. It stressed that the Act did not give cable operators "any right to occupy space on utility poles" and did not "prohibit[] utility companies from refusing to enter into attachment agreements with cable operators." Id. at 251. The Court explained, however, that the analysis would differ "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." Id. at 252 n. 6. The key element of compulsion that was absent in the Florida Power case is, of course, the defining characteristic of mandatory physical collocation.

As GTEFL discussed in its Brief, mandatory physical collocation will take away the LECs' right to exclude others from their central offices, the core components of the telecommunications infrastructure. (See GTEFL Brief at 7-14.) This right to exclude others is "the most fundamental property right." Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 604 (11th Cir. 1992), cert. denied, 113 S. Ct. 182, 121 L. Ed. 2d 127 (1992). See also Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Nixon v. United States, 978 F.2d 1269, 1286 (D.C. Cir. 1992). There is a crucial distinction between "regulation affecting one's relationship to those voluntarily admitted to property versus government action compelling an owner to allow continuous access to third parties." Nixon at 1286 (emphasis in original). See also Cable Holdings at 610; Yee v. City of Escondido, 112 S. Ct. 1522, 1528-31 (1992).

To accept ICI's argument that mandatory physical collocation is not a taking, the Commission would need to ignore all the relevant legal authority. The basis for ICI's position is that forced occupation of LEC property by strangers is merely one point on the continuum of the Commission's regulatory authority. In ICI's view, mandated physical collocation is no different from directing the LEC to allow other companies' transmissions to travel over its circuits. This analogy between a transitory use of electromagnetic spectrum and a permanent physical occupation of private property is indefensible. Contrary to ICI's belief, there is, indeed, a firm legal distinction between a per se "taking by

occupation"[3] and other forms of regulation that do not interfere with constitutionally protected property interests.

3. Compensation Will Not Avoid a Taking

Several parties appear to believe that any potential constitutional problems associated with mandatory physical collocation will be remedied if the Commission provides a tariff mechanism under which LECs may receive some payment from collocators for their use of the LECs' property. (Briefs of: AT&T at 7; FCTA at 4; ICI at 11-12; Teleport at 5; Time Warner at 11.) This argument shows a fundamental misunderstanding of basic legal principles. Although the Florida and U.S. Constitutions prohibit the taking of private property without just compensation, the payment of compensation (just or unjust) does not transform a taking into something else. "The fundamental...question of constitutional right to take cannot be evaded by offering 'just compensation.'" Ramirez de Arellano v. Weinberger, 745 F.2d 1500 1524 n.95 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985).

Further, while compensation is not at issue here, it is worth note that this Commission does not have the power to determine what is just compensation.[4] The measure of compensation in takings

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[3] ICI's "taking by occupation" terminology only affirms GTEFL's argument that mandatory physical collocation is a per se taking. Loretto emphasizes throughout that occupation is the key indicator that a taking has occurred.

[4] The FCC has also acknowledged court holdings that the agency "does not have power to determine just compensation." Expanded (continued...)

cases is a matter for the judiciary. "It is well settled that the determination of what is just compensation for the taking of private property for public use 'is a judicial function that cannot be performed by the Legislature either directly or by any method of indirection.'" Daniels v. State Road Dep't, 170 So. 2d 846, 851 (1964), citing Spafford v. Brevard, 110 So. 451, 455 (1926).

It is also significant that the customary standard for compensation in takings cases is fair market value.[5] "The full compensation demanded by our state constitution requires...that the condemning authority compensate the property owner for the full market value of the property taken." Dep't of Transp. v. Fortune Federal Savings and Loan Ass'n, 532 So. 2d 1267, 1270 (1988). Under this standard, a cost-based mechanism for regulating physical collocation rates (such as the FCC has established) would be constitutionally unacceptable.

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[4](...continued)
Interconnection with Local Telephone Company Facilities, Report and Order ("Special Access Expanded Interconnection Order"), FCC 92-440, CC Docket No. 91-141, at para. 240 n.559 (Sept. 17, 1992) (citing Fla. Power Corp. v. FCC, 772 F.2d 1537, 1544-46 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (1987)). The FCC noted (id.) that it has been the rule for at least a century that determination of compensation in takings cases is for the judiciary. Monongahela Navigation Co. v. United States, 148 U.S. 312, 317 (1893).

[5] See, e.g., United States v. 564.54 Acres of Land, 99 S.Ct. 1854, 1859-60, 441 U.S. 506, 515-517 (1979); Dade County v. General Waterworks Corp., 267 So. 2d 633, 640 (1972). A market-based standard factors in all elements that would be considered in negotiations between a willing buyer and a willing seller. Board of Comm'rs of State Institutions v. Tallahassee Bank and Trust Co., 100 So. 2d 67, 69 (Fla. 1st DCA 1958). As the Commission knows, GTEFL has advocated a market approach to determining floor space prices for physical collocation. (GTEFL Brief at 31.)

B. The Commission Has No Authority to Take the LECs' Private Property

The taking of private property is "one of the most harsh proceedings known to the law." Baycol, Inc. v. Downtown Development Authority of the City of Fort Lauderdale, 315 So. 2d 451 (1975). As such, the Supreme Court has long held that statutes shall not be read to delegate the power to take property unless they do so "in express terms or by necessary implication." Western Union Tel. Co. V. Penn. R.R., 195 U.S. at 569. See also Regional Rail Reorganization Act Cases, 419 U.S. 102, at 127 n.16, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974). Florida courts have repeatedly confirmed that no state agency or private entity may take property in the absence of a specific statutory delegation of authority. District Board of Trustees of the Daytona Beach Community College v. Allen, 428 So. 2d 704 (Fla. 5th DCA 1983); see also 21 Fla. Jur. 2d Eminent Domain § 4 and cases cited therein. An agency may exercise takings authority "only in compliance with the statute giving it such power." Tosohatchee Game Preserve, Inc. v. Central and Southern Fla. Flood Control District, 265 So. 2d 681, 683 (1972). Any such statute will be strictly construed against the agency asserting the takings power. Nye v. City of Ocala, 608 So. 2d 15, 17 (1992); Tosohatchee, 265 So. 2d at 682; Brest v. Jacksonville Expressway Authority, 194 So. 2d 658, 660 (Fla. 1st DCA 1967), aff'd per curiam, 202 So. 2d 749 (1967).

Parties supporting a physical collocation rule believe that even if this requirement works a taking, the taking is within the Commission's statutory authority. To this end, Teleport contends

that "[e]ven if [mandatory physical collocation] were determined by a court to be a taking, the Florida Commission has the same authority as the FCC to order collocation for a public purpose." (Teleport Brief at 5.) Time Warner states that if "takings claims prove meritorious," it is nevertheless "unquestionable that the FPSC through Chapter 364 may require interconnections or even require physical occupation to implement the public good." (Time Warner Brief at 10.) As noted, ICI believes that the "taking" of the LEC's property is "a fundamental part of the regulatory bargain of Chapter 364." (ICI Brief at 15.)

Despite their conviction that the Commission has the legal authority to compel physical occupation of the LEC's property, no party cites any provision expressly conferring takings power on the Commission. Vague, general references to Chapter 364 do not satisfy the legal imperative of specific delegation of authority. As GTEFL pointed out in its Brief, the Legislature has conferred takings power on numerous state agencies and other entities.[6] In all of these cases, the delegation is explicit and unambiguous. The power is carefully circumscribed to allow taking of private

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[6] See, e.g., the following sections of the Florida Statutes (1993): 361.05 (authorizing natural gas companies to take property for pipelines and works); 373.1961(7) (granting takings power to governing boards of water management districts); 235.05 (giving school boards the right to take property for school purposes); 155.15 (permitting counties to take property for hospital purposes); 421.12 (granting housing authority the right to take property for slum clearance); 361.07 (giving entities operating sewer systems the authority to take property); 333.12 (giving political subdivisions the power to take property for airport purposes); 337.27 (allowing Department of Transportation to use eminent domain to establish and maintain highway systems); 250.40(9) (permitting the Armory Board to take property for military installations).

property only for the public purpose specified in the statute. Basic principles of statutory construction compel the conclusion that the absence of any statute expressly granting the Commission the power to take property means that no such authority exists. If the Legislature had intended to confer takings power upon the Commission, it could easily have done so, as it has in so many other instances.[7]

1. The Power to Regulate in the Public Interest Does Not Include the Right to Take Private Property

The Commission should reject any contentions that Commission authority to order expanded interconnection necessarily implies the power to compel occupation of the LEC's property. For instance, FCTA states: "[E]xpanded interconnection is in the public interest, and requiring it is within the Commission's statutory authority. Mandating physical collocation, therefore, constitutes

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[7] It is, moreover, "a fundamental canon of statutory construction" that "courts must avoid any statutory interpretation which creates substantial constitutional difficulties." Cable Holdings, 953 F.2d at 602. See also, e.g., Frisby v. Schultz, 487 U.S. 474, 483, 108 S. Ct. 2495, 2501, 101 L. Ed. 2d 420 (1988); United States v. Brown, 731 F.2d 1491, 1494 (11th cir. 1984). In Cable Holdings, the Court was asked to rule on cable companies' authority, under the 1984 Cable Act, to compel access to the interiors of apartment buildings. The Court rejected a construction of the Act that would have permitted such access, relying heavily on the fact that such an interpretation would raise serious constitutional problems under the Fifth Amendment Takings Clause, in accordance with Loretto. Because the ambiguous language at issue could be construed without raising constitutional problems, the Court was bound to do so. This rule directly applies in the instant case. The Commission is obliged to reject contentions that any provision of Chapter 364 implies takings authority, because such as interpretation would raise constitutional concerns.

lawful governmental regulation." (FCTA Brief at 4.) This logical leap is legally untenable.

GTEFL has not disputed the Commission's authority to devise special access interconnection rules. (GTEFL Brief at 3.) To this end, GTEFL recognizes the Commission's power to take actions to maintain and enhance this State's telecommunications infrastructure and to foster competition and innovation. (See Brief of ICI at 9-10, citing §§ 364.01, 364.03, & 364.15.) But the power to regulate in the public interest simply does not imply the power to take private property. If it did, every regulatory agency would have authority to confiscate the property of the businesses it regulates. Commission reliance on its general regulatory powers--rather than specific statutory authority--to ground takings power would be an exceptionally broad and unprecedented exercise of discretion.

2. Authority to Order Connections Between Carriers Does Not Include Authority to Take Property

In their Briefs, Time Warner and ICI mention Florida Statutes section 364.16. (Time Warner Brief at 7-8; ICI Brief at 10.) Because GTEFL expects some parties' Response Briefs to focus more closely on this section in an attempt to support a mandatory physical collocation rule, some discussion of the provision is warranted here.

Section 364.16 states:

> Whenever the commission finds that connections between any two or more telecommunications companies,

> whose lines form a continuous line of communication or could be made to do so by the construction and maintenance of suitable connections at common points, can reasonably be made and efficient service obtained, and that such connections are necessary, the commission may require such connections to be made, may require that telecommunications services be transferred, and may prescribe through lines and joint rates and charges to be made, used, observed, and in force in the future and fix the rates and charges by order to be served upon the company or companies affected.

This provision enables the Commission to order carriers to provide electronic transmission links with other carriers. Since its initial adoption in 1913, neither this Commission nor any other entity has suggested that it encompasses the compelled physical occupation of one carrier's property by another.

Nor can it be argued that section 364.16 (or any other Florida Code provision) necessarily implies Commission authority to order mandatory physical collocation. Even if the Commission is authorized to require connections between carriers, there is no basis for the further inference that it may freely implement interconnections by ordering the permanent physical occupation of LEC property. Mandatory physical collocation is not necessary to achieve the asserted pro-competitive goals of expanded interconnection. Indeed, two of the five FCC Commissioners expressed doubt that mandatory physical collocation was even <u>useful</u>, much less necessary.[8] As GTEFL discussed in its Brief, expanded interconnec-

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[8] In addition to raising the serious constitutional concerns associated with a physical collocation mandate, Chairman Sikes noted that the FCC's expanded interconnection Order failed to explain "what problems the Commission is attempting to resolve" by requiring physical collocation. <u>Special Access Expanded Interconnection Order</u>, Sikes Statement. Commissioner Quello likewise (continued...)

tion is best accomplished through negotiated arrangements, rather than an inflexible requirement of either physical or virtual collocation. (GTEFL Brief at 7-22.)

Section 364.16 cannot support a mandatory physical collocation order for another reason. The Commission has accepted a stipulation among all the parties in this proceeding that any entity should be allowed to interconnect. (Stipulation on Issue 9.) As diverse interests have pointed out, it would be undesirable and probably infeasible to try to draw functional distinctions among potential interconnectors. However, section 364.16, by its terms, empowers the Commission to order connections only between "telecommunications companies." If the Commission purports to order physical collocation on the basis of section 364.16, it would therefore have no choice but to institutionalize these artificial distinctions in its expanded interconnection rules. Thus, for example, end users, cable television companies, and firms serving only other telecommunications companies would be denied the right to interconnect, because they are not considered to be telecommunications companies under the statute. See § 364.02(7), Fla. Stat. (1993). No amount of creative statutory construction can avoid the explicit limitation of section 364.16.

Finally, any interpretation of Chapter 364 to find takings authority would produce absurd results never contemplated by the State Legislature. For example, if this Commission authorizes

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[8](...continued)
stated that physical collocation "could well be a solution in search of a problem." Id., Quello Statement.

permanent physical occupation of LEC central offices, it will presumably order the LECs to file tariffs resembling a commercial real estate lease. These tariffs would include charges for such non-communications services as floor space rental, labor and materials employed in building out partitioned space to the collocator's specifications, heating, ventilation, cooling, and electric power. To describe this result as odd is an understatement. It converts telecommunications companies into real estate landlords, forcing them to tariff items that cannot be characterized as communications services under any common-sense meaning of that term. This result cannot have been what the Legislature envisioned when it enacted Chapter 364. Certainly, there is nothing in the legislative history to support the strained analysis that would be necessary to sanction mandatory physical collocation.

III. Negotiated Interconnection Is the Only Way to Avoid Constitutional Violations

Because this Commission lacks the requisite specific authority to take the LEC's private property, a mandatory physical collocation cannot survive a constitutional challenge. The only way to avoid constitutional problems and a costly and protracted appeal is to permit LECs and interconnectors to determine together whether expanded interconnection will be furnished through physical or virtual collocation in a particular instance. This approach circumvents any constitutional concerns because collocation terms

will be voluntarily negotiated, rather than forced upon the parties. As GTEFL pointed out in its Brief, a policy of negotiated arrangements will minimize the potential disruption if the FCC's mandatory collocation ruling is struck down on appeal, as the Company believes it will be. Negotiated collocation configurations would remain in place, while compelled physical collocation arrangements would be subject to dismantling after the physical collocation mandate is overturned. (GTEFL Brief at 7.)

As GTEFL discussed at length in its Brief, negotiated collocation is superior on policy, as well as legal, grounds. (GTEFL Brief at 7-22.) The fact that physical collocation arrangements exist today in Florida, in the absence of any mandate, disproves any argument that a physical collocation rule is necessary to ensure fair negotiations.

IV. Conclusion

GTEFL's constitutional arguments are sound and based on firmly established legal precedent. In contrast, parties which favor mandatory physical collocation have been compelled to invent novel legal theories and mischaracterize applicable law in an effort to support their positions. Their constrained analyses cannot conceal the fact that mandatory physical collocation is a taking of private property for which the Commission has no authority. If this Commission determines that expanded interconnection is warranted, the only acceptable course for both legal and policy reasons is to permit LECs and interconnectors to negotiate their own collocation arrangements.

Respectfully submitted on December 13, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of GTE Florida Incorporated's Response Brief in Docket No. 921074-TP was sent by U. S. mail on December 13, 1993, to the parties on the attached list.

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