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December 13, 1993

Mr. Steve C. Tribble
Director, Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Re: Docket No. 93-000000- Intermedia's Petition

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Response Brief, 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.

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Enclosures

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

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

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Docket No. 921074-TL

I HEREBY CERTIFY that a copy of the foregoing has been
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Intermedia) Docket No. 921074-TP
Communications of Florida, Inc.)
for Expanded Interconnection for)
AAVs within LEC Central Offices.)
_____) Filed: December 13, 1993

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
RESPONSE BRIEF

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INTRODUCTION

On October 22, 1993, Southern Bell filed its Brief of the Evidence in this action. On November 22, 1993, the Prehearing Officer entered the Order Regarding Post Hearing Briefs (Order No. PSC-93-1680-PCO-TP), which authorized each party to file a response brief by December 13, 1993 to address the arguments raised by other parties on the "taking" issue.¹ Accordingly, Southern Bell files this Brief to respond to certain points raised by Time Warner AxS of Florida ("Time Warner") and Intermedia Communications of Florida, Inc. ("Intermedia").

ARGUMENT

In its initial Brief of the Evidence,² Southern Bell addressed fully the taking issue by relating the legal authority that establishes that an order by the Florida Public Service Commission ("Commission") requiring mandatory physical collocation would constitute an impermissible taking in violation of the Fifth Amendment of the United States Constitution. Specifically, the case law cited by Southern Bell establishes that mandatory physical collocation is a physical taking because

¹ The "taking" issue in its entirety is as follows: Issue No. 5: Does a physical collocation mandate raise federal or state constitutional questions about the taking or confiscation of LEC property?

² Hereinafter, "SBT Brief".

it is a permanent intrusion upon LEC property. (SBT Brief at 13-15) This Commission cannot properly order such a taking -- which would, in effect, condemn the property of each LEC -- because it has not been delegated the congressional authority to do so. (SBT Brief at 18) Further, the fact that compensation may be paid to LECs by third party collocators does not render constitutionally valid an otherwise impermissible taking. (SBT Brief at 18-19)³

In the process of setting out the above-summarized argument, Southern Bell provided this Commission with case support that is more than adequate to disprove each of the arguments made by the parties who contend that mandatory physical collocation is not an unconstitutional taking. For example, Time Warner states in its brief that, even if expanded interconnection does constitute a taking, it is, nevertheless, acceptable as a "legitimate use of police power" by this Commission (Time Warner Brief at 10). This argument simply ignores the fact, which is addressed at length in Southern Bell's Brief, that this Commission does not have the

³ Southern Bell also set forth in its initial Brief authority to rebut the conclusions reached by the FCC that the law relating to taking does not apply to a common carrier under its jurisdiction (SBT brief at 15-16) and that the extent of the physical intrusion entailed in mandatory collocation is insufficient to constitute a taking. (SBT brief at 17)

delegated authority to effect a taking, under the police power or otherwise. (SBT Brief at 18-19).

Likewise, both Time Warner and Intermedia make the argument that, if expanded interconnection is a taking, the taking is still permissible because compensation would be paid by interconnectors. (Time Warner Brief at 10; Intermedia Brief at 13-14). This contention is also rebutted by the case authority set forth in Southern Bell's Brief, which establishes that an impermissible taking cannot be transformed into a constitutionally valid taking by the payment of compensation. Because this Commission lacks the authority to take property, no taking is allowable, even though compensation may be paid. (SBT Brief at 19)

Also, Intermedia makes the argument that all regulation is, in effect, a taking. Therefore, Intermedia concludes that by choosing to function in a regulated industry, a LEC simply acquiesces to any and all takings by this Commission, even though these takings would otherwise be constitutionally impermissible. This rather unique analysis is offered without the benefit of a single citation to supporting case authority. It is also rebutted by the case law Southern Bell cites to refute the conclusion of the FCC that the per se taking rule of Loretto

(discussed below) does not apply to a common carrier subject to FCC jurisdiction.⁴

One point, however, does require further elaboration in this brief even though it was addressed in Southern Bell's initial Brief: the applicability of the Loretto per se taking rule (SBT Brief at 15). The need to clarify this standard arises from the fact that Time Warner has seriously mischaracterized the U.S. Supreme Court's holding in Loretto in its initial brief. Time Warner cites to Loretto in ostensible support for the contention that whether a taking has occurred "should be evaluated through an ad hoc, factual inquiry", which would look to the following factors: (1) "The economic impact of the regulation"; (2) "the extent to which it interferes with investment-backed expectations"; and (3) "the character of the governmental action". (Time Warner Brief at 6)

It is true that in Loretto, the United States Supreme Court cited to this three-prong test as it was expressed in Penn Central Trans. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978). Time Warner failed to disclose in its initial brief,

⁴ See, e.g. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 431, 102 S.Ct. 3164, 3173, (1982) in which the United States Supreme Court specifically noted the distinction between "a permanent physical occupation" (i.e., a taking) and "a regulation that merely restricts the use of property."

however, that immediately after the Supreme Court quoted this rule from Penn Central, it stated expressly the following:

The opinion [in Penn Central] does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.

(Loretto at U.S. 432, S.Ct. 3174)

The Court went on in Loretto to analyze the governmental action at issue in that case and to determine that it amounted to a physical taking. For this reason, the Court did not apply the three-prong test quoted by Time Warner, but, instead, held after lengthy analysis that the subject physical invasion of property was a per se taking.⁵ The Court's rationale was as follows:

...[W]hen the 'character of governmental action', Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

(Loretto at U.S. 434, S.Ct. 3175)

Thus, Time Warner has premised its entire argument on this issue on the application of a three-prong test that, under the express holding of the United States Supreme Court, pertains only

⁵ The specific facts at issue in Loretto are described more fully in Southern Bell's initial Brief at 13-14.

if no physical taking has occurred. For the reasons Southern Bell expressed at length in its initial brief, mandatory physical collocation is a physical taking. Therefore, Time Warner's entire analysis on this point is simply inapplicable.

CONCLUSION

For the reasons set forth in Southern Bell's Brief of the Evidence, mandatory physical collocation constitutes a constitutionally impermissible taking of private property. For this reason, it cannot properly be ordered by this Commission.

Respectfully submitted this 13th day of December, 1993.

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