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March 25, 1994

Mr. Steve C. Tribble
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 Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Motion for Reconsideration, for Clarification, and for Stay of Order No. PSC-94-0285-FOF-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.

ACK

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AFB _____
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Sincerely yours,
J. Phillip Carver (oj)
J. Phillip Carver

Enclosures

cc: All Parties of Record
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6 Harris R. Anthony
R. Douglas Lackey

WAS _____
OTH _____

A BELLSOUTH Company

DOCUMENT NUMBER-DATE

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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 United States Mail this 25th day of March 1994,
to:

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~~J. Phillip Conner (03)~~

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) Filed: March 25, 1994
FLORIDA, INC.)
_____)

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
MOTION FOR RECONSIDERATION, FOR CLARIFICATION
AND FOR STAY 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 requests, pursuant to Rule 25-22.060, Florida Administrative Code, the entry of an order reconsidering and clarifying the portions of Order No. PSC-94-0285-FOF-TP described below and staying the Order in part, and states as grounds in support thereof the following:

1. Southern Bell requests herein reconsideration and/or clarification of portions of the Order that are contained under four separate headings. Specifically, Southern Bell requests reconsideration of Section VI. Taking, Section XIV. E. Expansion, and of Section XVII B. 1. Extending Expand[ed] Interconnection to the DSO Level. Southern Bell also requests clarification of Section XVII B. 2. Fresh Look.

VI. TAKING

2. The position of Southern Bell on this issue, as set forth previously in its Brief of the Evidence, is that the Florida Public Service Commission ("Commission") lacks the authority to "engage in a taking of LEC property (Southern Bell

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Bell Brief, p. 16). On the basis of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) as well as the other case law cited in this brief, it is clear that physical collocation is the type of permanent physical occupation of property that constitutes a taking. Further, in the absence of the properly delegated authority to take, compensation paid to a LEC by a third party collocater does not render constitutionally proper an otherwise impermissible taking. Put simply, because this Commission lacks the authority to confiscate Southern Bell's property, it is prohibited from doing so, even if there were adequate compensation for the taking.

3. The subject Order concedes virtually every element of the above-described position of Southern Bell. For example, the Order states the conclusion of this Commission "that it is our view that an objective reading of Loretto is that if there is a permanent physical occupation, there is a taking". (Order at p. 7) The Order also agrees with the assertion of GTEFL that "the power to regulate in the public interest does not include the power to take private property". (Order at p. 9) Likewise, the Order acknowledges that "the Commission lacks the power of eminent domain which is required to take property." (Order at p. 7) Finally, the Order also acknowledges that "the constitutional protection against unlawful takings extends to private property dedicated to public use." (Order at p. 9)

4. Thus, the Order acknowledges that a physical occupation is a taking, that this is true even if the property is dedicated to the public use, and that the Commission lacks the power to

effect a taking. Despite these various concessions, however, the Commission reaches the conclusion that a physical occupation that would otherwise be a taking under Loretto is somehow not a taking if the forced occupation results in the property being used for "the public purpose for which the property at issue [is] dedicated." (Order at p. 9) In other words, the Order contains the conclusion that this Commission is free to take the property of a telecommunications provider in a manner that would be generally impermissible under Loretto and that this action is permissible if the property is put to some use that entails the provision of telecommunications service. There is, however, no case authority cited in the Order to support this proposition.

5. At the same time, the Order appears to overlook the general contrary case authority, including those cases cited by Southern Bell. For example, Southern Bell cited Northern Pacific Ry v. North Dakota, 236 US 585, (1915) for the proposition that the power to regulate does not include the power to take. In Northern Pacific, the United States Supreme Court stated specifically that "broad as is the power of regulation, the State does not enjoy the freedom of an owner." Accordingly, neither the State nor the Commission can invoke the "public interest" to deprive the owner of property of its constitutionally protected property rights. (Northern Pacific at p. 593) There is simply no case law to support the conclusion that a Company that is subject to regulation forfeits those property rights to the regulating entity.

6. Moreover, in a very recent decision, Southern Bell Telephone Company v. Deason (Case Nos. 81,487, 81,716, 81,926 and 82,196, March 10, 1994, the Florida Supreme Court held specifically that "the PSC cannot exercise its regulatory power at the expense of destroying the corporate attorney-client privilege." (Order at p. 8) This conclusion was reached by way of rejecting the contention of the PSC that its role as a regulatory body allowed it to, in effect, restrict the scope of the attorney-client privilege that would otherwise be available to Southern Bell. Although the rights involved in that case and the instant case differ, the principle is the same: the power to regulate cannot be used as a justification to strip a regulated company of fundamental rights or privileges to which it is otherwise clearly legally entitled.

7. Accordingly, the apparent premise of the Order, that an otherwise impermissible taking of a carrier's property is rendered permissible if the property is used to provide telecommunication services, is simply contrary to the controlling law. For this reason, this portion of the Order should be reconsidered, and this Commission should find that physical collocation constitutes an impermissible taking by this Commission of local exchange company property.

XIV. E. EXPANSION

8. Southern Bell requests that this Commission reconsider the portions of its ruling in this section that require that interconnectors be given space in the LEC central offices in a

checkerboard arrangement in order to accommodate future expansion of their facilities. The procedural order entered in this action prior to hearing did not identify any issue that called specifically for testimony regarding the expansion of collocated facilities. (Order No. PSC-93-1274-PHO-TL, August 1, 1993) Consistent with this, no party prefiled either direct or rebuttal testimony on this point. Instead, the only evidence introduced at the hearing regarding expansion was the brief testimony of Intermedia's witness, which was delivered in response to a cross-examination question by counsel for Staff. Specifically, the question was as follows:

Q. In the event that an AAV is located in a central office and finds its necessary to expand - it needs additional space, how should this eventuality be handled?

(TR. 121)

Intermedia's witness responded to this question by proposing allocation of space according to a "checkerboard" method whereby the space allocated to interconnectors would be separated by empty spaces of equal size. The total of this witness' testimony on this issue -- and of all the testimony on this point that was admitted at the hearing -- appears in approximately two pages of the hearing transcript (TR. 121 - 123).

9. Based on this scant testimony, the Order includes the conclusion that the checkerboard arrangement should be utilized "if sufficient space is available". (Order at p. 20) While it is true that there was evidence in the form of the above-referenced testimony to support the checkerboard approach that

was ultimately approved, the evidence was minimal. Further, the issues were not phased in such a way that the various parties had any notice prior to the hearing of the need to address this issue. At the same time, whether the checkerboard approach is appropriate is a question that has a substantial impact on the manner in which collocation will be implemented.

10. Further, the requirement to offer collocation in a checkerboard arrangement would appear to conflict with other portions of the instant Order. For example, the Order contains substantial restrictions on an interconnector's ability to purchase space that it intends to warehouse. (Order, p. 19) Yet requiring the checkerboard approach effectively allows an interconnector to warehouse space for expansion without even paying to reserve the space. This apparent conflict is only one of the issues concerning checkerboarding that should be explored.

11. Accordingly, Southern Bell submits that the checkerboard issue deserves more thorough consideration, and the parties deserve a more complete opportunity to address this issue than they had in the Phase I hearing. For this reason, Southern Bell believes that in the interest of sufficiently considering this issue and reaching a well-informed decision, this Commission should allow the parties to present further testimony as to whether or not the checkerboard approach is workable.

12. Under normal circumstances, this might require the reopening of the hearing and the taking of new testimony. In this particular docket, however, an opportunity to address this

issue readily presents itself in the form of the Phase II hearings that are scheduled to commence in August of this year. Further, switched access collocation will likely generate a substantially greater volume of requests than will special access collocation. Therefore, it is certainly appropriate to consider further this issue in Phase II along with the other issues that will have a direct effect on collocation for switched access.¹

13. Because this issue was scarcely explored and certainly not thoroughly considered in the Phase I hearing. Southern Bell believes that this Commission should reconsider this portion of its Order, withdraw the portion of the Order that mandates the checkerboard arrangement and allow the parties to submit testimony in the Phase II hearing on this issue.

XVII. B. 1. EXTENDING EXPAND[ED] INTERCONNECTION TO THE DSO LEVEL

14. This portion of the Order recites that Teleport advocated interconnection at the DSO level because it contended that this would "extend the benefits of competition to a greater number of end users". (Order at p. 26) The Order also notes that Southern Bell testified that the Commission should "allow the LECs to handle such requests on a case-by-case basis because

¹ Moreover, there is certainly precedent for considering in Phase II certain limited matters that first arose in Phase I, but that remain unresolved. Specifically, the Procedural Order entered into this docket for Phase II on March 10, 1994 (Order No. PSC-94-0277-PCO-TL), identifies as an issue the review of the LEC's proposed intrastate private line and special access expanded interconnection tariffs.

of the potential space and cabling limitations". (Order at p. 27) The Order rejected Southern Bell's request, however, based on the finding "that SBT's approach might create unnecessary delays and frustration to the AAVs. (Id.) (emphasis added)

15. At the outset, Southern Bell notes that its specific testimony was that it would "prefer to handle requests for DSO collocation on a central office by central office basis." (TR. 640) In other words, Southern Bell requested that it be allowed to consider these requests in light of whether allowing DSO collocation in a particular central office would create a space exhaustion problem in that particular location. Nonetheless, the Order's rejection of Southern Bell's request encompassed the broader ruling that no case-by-case consideration of collocation for DSO would be allowed. This leads to the obvious conclusion that all LECs must file tariffs that provide for collocation at the DSO level.

16. Paradoxically, the Order contains repeated references to the desirability of ordering collocation for intrastate purposes in a manner that is consistent with the FCC's ruling on interstate collocation. (e.g., Order at pp. 18 and 23) The FCC, of course, did not require collocation at the DSO level. Thus, this Commission is making a specific exception to its general approach of pursuing consistency with the FCC.

17. Even more problematic, however, is the fact that the stated basis for this exception is simply unsupported by the record in this case. The above-quoted rationale for the prohibition in the Order of handling DSO level collocation

requests on a case-by-case basis is that it "might" result in unnecessary delays. Again, there was no testimony cited in the Order to support this conclusion, and Southern Bell has been unable to find any in the record.

18. Since interconnection has been required for only fiber DSO facilities, Southern Bell believes that there will likely be only a limited demand for this type of DSO interconnection.² Nevertheless, the Order would require the LECs not simply to create a tariff derived from or based upon an FCC tariff, but to create an entirely new tariff for the provision of interconnection at the DSO level.

19. This effort will obviously require the preparation of cost studies and of all other supporting information that must necessarily be filed as part of a proposed tariff. Southern Bell contends that this is an unnecessary burden in light of the fact that the number of collocation requests for DSO fiber-based interconnection will, in all likelihood, be relatively few. There was no evidence presented at the hearing that these requests for collocation cannot be handled to the satisfaction of collocators without the filing of a tariff.

20. Further, even if this were a valid concern, the FCC order proposes a method for adequately dealing with collocation for DSO level services. Specifically, the FCC ordered that for

² Southern Bell believed at the time of the hearing that a requirement to interconnect all DSO facilities (which are primarily copper) would have resulted in a substantial demand on central office space. The Commission ruled in the Order, however, that the interconnection of non-fiber optic technology will not be required. (Order, p. 21)

"special access services other than DS1 and DS3 service" (which would, of course, include DSO service), a LEC shall file a tariff "within 45 days of receipt of a bona fide request to be effective upon 45 days notice." (FCC Order, CC Docket 91-141, p. 120, fn. 603) Thus, the FCC provided a mechanism for timely responding to requests for interconnection at the DSO level, and this mechanism also avoids the unnecessary process of filing in advance tariffs for DSO interconnection on the off chance that this type of interconnection will be requested. Therefore, Southern Bell submits that this Commission should resolve this issue, just as it has a variety of others, in a manner that is consistent with the FCC order for interstate collocation.

XVII. B. 2. FRESH LOOK

21. Southern Bell requests clarification as to one aspect of the Order's provisions regarding the "fresh look" policy. At the conclusion of the subject order, the following is stated specifically:

ORDERED that the tariffs shall contain a fresh look provision consistent with the fresh look policy adopted by the FCC. Specifically, customers with LEC special access services with terms equal to, or greater than, three years, entered into on, or before, February 1, 1994, shall be permitted to switch to competitive alternatives during the 90 day period after expanded interconnection arrangements are available in a given CO.

(Order at p. 37) In the body of the Order, however, there is a discussion regarding fresh look that refers to both special access service and private line service. Southern Bell assumes

that it is the intention of this Commission to apply the fresh look provision only to special access service, and, accordingly, requests a clarification to this effect.

22. As was cited in the Order, the principal testimony that addressed the fresh look provision was that of the witness for Teleport. As the Order notes, "Teleport argu[ed] that the Commission should adopt a 'fresh look' provision designed to allow consumers in the special access market to choose a carrier without incurring substantial penalties." (Order at p. 27) (emphasis added) In point of fact, Teleport's witness' testimony on this point dealt exclusively with the reasons that he believed a fresh look should be allowed for special access. There was no mention in his testimony of extending the fresh look provisions to private line services. Neither has Southern Bell been able to find in its review of the record any evidence to support extending the fresh look policy to private line service.³

23. Accordingly, Southern Bell submits that the action that is consistent with both the testimony in this case and the prior action by the FCC is to order that the "fresh look" policy apply only to special access services. Again, this is the mandate set out in the ordering clause of this order, and Southern Bell believes that this clause accurately reflects the Commission's intent. Southern Bell, therefore, respectfully requests that

³ Moreover, as stated previously, the Order recites in numerous places the intention of this Commission to order expanded interconnection in a manner consistent with the FCC. The FCC's fresh look provisions also apply only to interstate special access service. (See Second Memorandum Opinion and Order on Reconsideration, September 2, 1993)

this Commission clarify its order by stating expressly that any language to the contrary that it contained in the body of the order is a nullity.

24. Under the subject Order, the LECs are directed to allow expanded interconnection for special access on the terms set forth in the Order. On the basis of the authority set forth above, however, Southern Bell contends that this Order on collocation is unconstitutional. For this reason, Southern Bell hereby requests that this Commission stay the provisions of the Order requiring expanded interconnection until such time that it has considered and ruled upon the instant Motion for Reconsideration.⁴

25. Further, the subject Order requires that the LECs file certain tariffs as required by specific provisions of the Order. While Southern Bell intends to file these tariffs at the times required by the Order, Southern Bell hereby requests that it be allowed to exclude from these tariffs those portions that are the subject of this Motion for Reconsideration. Specifically, Southern Bell hereby requests a stay of the requirements in the Order to include in the tariffs provisions for checkerboarding, a "fresh look" policy to be applied to private line service, and the offering of interconnection at the DSO level. Southern Bell will, of course, subsequently file modifications to the tariff in


⁴ The FCC's decision on this point has been appealed. The issues have been fully briefed and argued and the matter is ripe for a decision by the federal appellate court. Thus, the granting of the requested stay will also allow time for the federal court to rule on this issue.

any manner that is required to render them consistent with this Commission's Order on Southern Bell's Motion for Reconsideration.


WHEREFORE, Southern Bell respectfully requests the entry of an order reconsidering, clarifying and staying the subject order in the manner set forth above on the basis of the forgoing argument.

Respectfully submitted this 25th day of March, 1994

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