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December 13, 1993

Mr. Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
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via Hand Delivery

**Re: Petition for Expanded Interconnection for Alternate
Access Vendors within Local Exchange Company
Central Offices by Intermedia Communications of
Florida, Inc.; Docket No. 93-1000-00**

Dear Mr. Tribble:

Enclosed for filing please find an original and fifteen copies of Time Warner's AxS of Florida, L.P.'s and Florida Cable Television Association, Inc.'s Joint Additional Posthearing Brief 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.

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

Respectfully,

PENNINGTON, HABEN, WILKINSON,
CULPEPPER, DUNLAP, DUNBAR,
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Peter M. Dunbar
Peter M. Dunbar

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Enclosures

cc: All parties of record (w/ enclosures)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Expanded)
Interconnection for Alternate)
Access Vendors within Local)
Exchange Company Central)
Offices by Intermedia)
Communications of Florida, Inc.)

Docket No.: 921074-TP
Filed: December 13, 1993

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JOINT ADDITIONAL POSTHEARING BRIEF OF
TIME WARNER AXS OF FLORIDA, L.P.
AND
FLORIDA CABLE TELEVISION ASSOCIATION, INC.

Time Warner AxS of Florida, L.P. ("Time Warner") and Florida Cable Television Association, Inc. ("FCTA"), pursuant to Florida Administrative Code Rule 25-22.056 and Order No. PSC-93-1680-PCO-TP, jointly submit the following Additional Posthearing Brief in the above-captioned docket to the Florida Public Service Commission ("FPSC" or "Commission"). The discussion infra responds to the Commission's request for Additional Posthearing Briefs on the issue of whether a physical collocation mandate raises federal or state constitutional questions regarding the taking or confiscation of local exchange company property.

I. THE FLORIDA SUPREME COURT HAS DICTATED THAT SUCH TAKINGS CASES SHOULD BE GOVERNED BY THE LEGAL REASONING EXPRESSED BY THE UNITED STATES SUPREME COURT IN LORETTO V. TELEPROMPTER MANHATTAN CITY CORP.

The local exchange companies argue that a physical collocation mandate does raise a constitutional question of taking or confiscation of LEC property. (Beauvais Tr. 333-334; Denton Tr. 418). This argument is without merit and should not be adopted by the Commission. (Canis Tr. 606).

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In evaluating this issue, the LECs have correctly stated that there is no need to perform separate state and federal analyses on this issue. However, the LECs have looked to incorrect precedent and have misconstrued "takings" law in their analyses concerning physical collocation. The Florida Supreme Court has explicitly ruled that such physical takings issues must be governed by the legal reasoning promulgated by the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.ED. 2d 868 (1982). See generally: *Storer Cable T.V. v. Summerwinds Apartments* 493 So.2d 417, 419 (Fla. 1986).

In analyzing whether a physical taking has occurred, the *Loretto* decision has mandated such cases be evaluated through an ad hoc, factual inquiry of:

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.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.ED. 2d 868 (1982). As stated in the initial posthearing brief submitted by Time Warner, physical collocation, as mandated by the FCC and as tentatively proposed by the parties in FPSC Docket 921074-TP, survives these three elements and does not give rise to an unconstitutional physical taking of LEC property. (Canis Tr. 605-606).

A. NO SUBSTANTIAL ECONOMIC HARM RESULTS FROM THE IMPLEMENTATION OF THE EXPANDED INTERCONNECTION POLICY.

First, a mandatory LEC physical collocation arrangement does not cause significant economic impact which gives rise to an unconstitutional physical taking. Physical collocation, as set forth by the FCC and as currently being considered by the FPSC, allows LECs to recover from interconnectors the costs of providing expanded interconnection services plus reasonable overhead loadings. (Kouroupas Tr. 252). In addition, expanded interconnection, as recommended by the FCC, allows increased pricing flexibility for LECs to compete for any customers and/or services which may be served or offered by interconnectors. LECs also enjoy a guaranteed cost recovery and profit margin in their tariffs which have been approved by the FPSC. As a result, no rational argument can be made that expanded interconnection will cause significant economic impact on LECs which would give rise to a total loss of their investment or the value of their property which is used under an expanded interconnection arrangement.

B. THE EXPANDED INTERCONNECTION POLICY IS AN EXTENSION OF EXISTING LAW WHICH REASONABLE INDIVIDUALS WOULD INCORPORATE INTO THEIR BUSINESS EXPECTATIONS.

In addition to being unable to meet the requisite economic impact test, LECs are unable to assert that expanded interconnection interferes with their reasonable investment-backed expectations as a common carrier. Section 364.03 (3), Florida Statutes, states that:

Every telecommunications company shall upon reasonable notice, furnish to all persons who may apply therefore and be reasonably entitled thereto suitable and proper telecommunications facilities and connections for telecommunications services and furnish telecommunications service as demanded upon the terms to be approved by the Commission.

Section 364.03, Florida Statutes (1991). As a result of this legislative mandate, LECs and other telecommunications companies within the State of Florida must incorporate into their investment-backed expectations the potential of interconnections and interconnection arrangements which may be ordered by the FPSC.

In addition, Section 364.16, Florida Statutes, states that:

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 or 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 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 enforce in the future and fix the rates and charges by order to be served upon the company or company's affected.

Section 364.16, Florida Statutes (1992). This section further clarifies that the reasonable investment-backed expectations of all telecommunications companies operating within the State of Florida must include the potential of interconnection arrangements which could link the networks of two separate telecommunications companies. This interconnection and linking of networks between telecommunications companies is precisely what is being considered in the expanded interconnection docket. The existence of these laws advise all prudent businessmen of the possibility of

interconnection arrangements. Therefore, within the State of Florida, LECs may not reasonably assert that the interconnection implemented by the FCC and under consideration by the FPSC interferes with reasonable investment-backed expectations as envisioned by the *Loretto* court.

C. THE PROPOSED EXPANDED INTERCONNECTION POLICY IS A LIMITED GOVERNMENTAL INTERFERENCE POSED AT ADJUSTING THE BENEFITS AND BURDENS OF ECONOMIC LIFE TO MAXIMIZE FLORIDA'S TELECOMMUNICATIONS INFRASTRUCTURE FOR THE PUBLIC GOOD.

Finally, LECs in the instant case are unable to assert that the character of the governmental action gives rise to an unconstitutional taking as envisioned by the *Loretto* court. The *Loretto* court agrees that the rapid development and maximum penetration of a communication network which has important educational and community aspects serves legitimate public interests. *Loretto*, 458 U.S. at 426, 102 S.Ct. at 3170. In considering the question of whether a government action rises to the level of an unconstitutional physical taking, the *Loretto* court stated as follows:

The court has often upheld substantial regulation of an owner's use of his property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by a government to be a property restriction of an unusually serious character for the purposes of the takings clause. Our case is further established that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, the character of the government action not only is an important factor in resolving whether the action works a taking, but also is determined.

Loretto, 458 U.S. at 427, 102 S.Ct. at 3171. (Emphasis supplied.)
Despite the Court's harshness, it clarified its statement by
stating that:

A taking may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public benefit adjusting the benefits and burdens of economic life to promote the common good.

Id. (Emphasis supplied), citing to *Penn Central Transportation v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57, L.Ed. 2d 631 (1978).

Within the context of the instant case, expanded interconnection is posed to adjust the benefits and burdens of economic life to promote the common good by removing the monopoly control of local telecommunications. The benefits of competition in the telecommunications marketplace are clearly evident since the divestiture of AT&T. (Kouroupas Tr. 437). The prevalence of affordable customer premises equipment and long-distance service are two of the many benefits stemming from telecommunications competition. The adjusting of benefits and burdens of economic life to promote the common good are also echoed in Chapter 364 of the Florida Statutes, which requires that:

The Commission shall encourage cost-effective technological innovation and competition in the telecommunications industry if doing so will benefit the public by making modern and adequate telecommunications services available at reasonable prices.

Section 364.01(3)(c), Florida Statutes (1991).

The expanded interconnection docket is merely an implementation of the legislative mandates to promote competition and facilitate inexpensive and advanced telecommunications services to citizens of the State of Florida. These legislative directives combined with the *Loretto* court's interpretation of the physical takings issue equate that expanded interconnection does not give rise to an unconstitutional taking or confiscation of LEC property.

II. THE PROPOSED EXPANDED INTERCONNECTION POLICY IS A LAWFUL GOVERNMENTAL REGULATION OF COMMON CARRIERS PROTECTING THE COMMON WELFARE.

The LECs point to the outcome of *Loretto* and *Storer Cable T.V.* as a testament to the constitutional infirmities of the proposed expanded interconnection policy. These cases, however, do not involve common carriers or governmental regulation of common carriers. This difference must be the crux of evaluating this issue. The Florida Supreme Court has stated that:

A lawful governmental regulation of the service of common carriers, though it may be a burden, is not a violation of constitutional rights to acquire, possess, and protect property, to due process of law, and to equal protection of the laws, since those who devote their property to the uses of a common carrier do so subject to the right of governmental regulation in the interest of the common welfare. ... Even where a particular regulation causes a pecuniary loss to the carrier, if it is reasonable with reference to the just demands of the public to be affected by it, and it does not arbitrarily impose an unreasonable burden upon the carrier, the regulation will not be a taking of property, in violation of the Constitution.

State ex rel. Railroad Com'rs v. Florida East Coast Ry. Co., 49 So.2d 43 (Fla. 1909). It is unquestionable that the expanded

interconnection policy proposed by this commission is in the interest of the common welfare. As such, the Florida Supreme Court has clearly dictated this regulation is not a taking of property in violation of either the federal or state constitutions.

III. THE PROPOSED EXPANDED INTERCONNECTION POLICY DOES NOT VIOLATE THE TAKINGS PROHIBITIONS OF THE CONSTITUTION IN THAT THE LECs WILL RECEIVE JUST COMPENSATION FOR THE LIMITED USE OF THEIR PROPERTY.

While the *Loretto* analysis points out that no taking occurs in the instant case, if such takings claims prove meritorious, they must still fail as expanded interconnection is a legitimate use of police power to which the LECs are receiving just compensation. It is unquestionable that the FPSC through Chapter 364 may require interconnections or even require physical occupation to implement the public good. (*Kouroupas Tr. 250*). The FCC has determined that giving interconnectors a right to physical collocation is necessary to ensure prompt achievement of the full benefits of expanded interconnection for special access. *In re expanded interconnection with LEC facilities*, 7 FCC 7482 (1992). The FCC has further stated that the purpose of physical collocation is to bring the overall benefits of enhanced competition in the interstate special access market to the United States economy.

This intent is carried into Florida with the FPSC implementation of an expanded interconnection policy. The policy is posed to provide the overall benefits of enhanced competition to the intrastate special access market for the benefit of the telecommunications consumers in this State. In addition, the FPSC

has and presumably will continue to structure an expanded interconnection policy which will ensure recovery by the LECs for the use of their property. This compensation meets the Fifth Amendment requirement of just compensation following a governmental taking.

As a result of the public interest which is served by expanded interconnection as well as the cost recovery guarantee to LECs, physical collocation does not give rise to the unconstitutional physical taking of property as protected by the state and federal constitutions. The expanded interconnection arrangement proposed by the FCC and the FPSC provides for substantial control and compensation for the use of LEC property. In addition, expanded interconnection does not give rise to the economic impact or investment interference which facilitate a claim of an unconstitutional physical taking. Finally, expanded interconnection is not the aggregation of governmental power which courts have equated with an unconstitutional physical taking. For these reasons, 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. (Canis Tr. 605-606; Kouroupas Tr. 252).

RESPECTFULLY SUBMITTED this 13th day of December, 1993.

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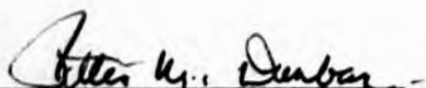
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