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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of INTERMEDIA COMMUNICATIONS OF FLORIDA, INC. for expanded interconnection for AAVs within LEC central offices.	)	DOCKET NO. [redacted]
	)	Filed: 12/13/93

INTERMEDIA COMMUNICATIONS OF FLORIDA, INC.'S
SUPPLEMENTAL POST HEARING BRIEF ON ISSUE 5

Intermedia Communications of Florida, Inc. ("Intermedia"), pursuant to Order No. PSC-93-1680-PCO-TP hereby files this its Supplemental Post Hearing Brief in the above docketed matter.

ISSUE 5: Does a physical collocation mandate raise federal and/or state constitutional questions about the taking or confiscation of LEC property?

Position: No. Mandated occupation of used and useful LEC property for the very purpose for which it has been declared used and useful -- i.e. provision of telecommunication service -- is not a taking under a regulatory scheme that provides both due process and fair compensation for the occupation.

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INTRODUCTION

The LECs argue in this proceeding that mandatory physical collocation is an occupation of private property and therefore a per se impermissible "taking" of private property under the fifth amendment and fourteenth amendment to the United States Constitution. Their argument, however, proceeds through misdirection. They would apply to utility regulation a test that is intended for other exercises of the police power. LEC property being "taken" through occupation is property already dedicated pursuant to statute as "used and useful" in utility service. Mandated occupation of used and useful property for the very

purpose for which it has been declared used and useful is not a taking under a regulatory scheme that provides fair compensation for the occupation.

STRUCTURE OF THIS SUPPLEMENTAL BRIEF

Because Issue 5 has its genesis in the challenge to the FCC's order of mandated physical collocation, this supplemental brief will first summarize the FCC's response to that challenge. This summary is provided as background only, because this Commission's actions must stand or fall based on the validity of its own exercise of delegated legislative authority. Next, as more background, this supplemental brief also summarizes Intermedia's argument in its original post hearing brief. Next, a very brief constitutional history of taking clause cases is given. This history explains the true significance of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), upon which the LECs rely heavily. Next is provided an even more condensed history of governmental regulation of private property "clothed with the public interest." This "public utility" history demonstrates that forced occupation of property used and useful in public service is the genesis of utility regulation, and not some extraneous governmental interference that may reasonably be viewed as a taking. Next, the forced occupation of central office space is specifically considered in light of the taking clause and public utility regulation. Finally, this supplemental brief addresses the LEC claim that simply because it is a public utility, it does not forego traditional property rights, and that mandated physical

collocation impairs these traditional rights.

SUMMARY OF FCC RESPONSE TO THE CONSTITUTIONAL CHALLENGE

The arguments made by the LECs in this proceeding are the same that were made to and rejected by the FCC, and that are now being made in the United States Court of Appeals for the District of Columbia Circuit (Bell Atlantic Telephone Companies, et al. v. Federal Communications Comm'n and United States of America, No. 92-1619). In its brief to the Court of Appeals, the FCC treats LEC contentions as a two premise argument. The first LEC premise is that mandatory physical collocation of customer-owned equipment service in telephone company central offices is a "permanent physical occupation" that constitutes a per se taking of property under the fifth amendment; the second LEC premise is that the Communications Act does not authorize the FCC to take.

In response to the first premise, the FCC denies that mandated physical collocation is a taking:

> . . . The Loretto per se rule depends in the first instance on the existence of a 'historically rooted expectation of compensation.' 458 U.S. at 441. No such expectation reasonably exists in this case, where the petitioners are communications common carriers that have dedicated their common carrier property to public use and received corresponding government licenses under terms prescribed by the Communications Act. A number of recent cases have found Loretto to be inapplicable in heavily regulated industries under analogous circumstances.

Brief of the FCC at page 21.

In response to the second premise, the FCC argues that it is empowered to order physical collocation, even if it is a taking:

> Even if the physical collocation requirements the FCC imposed are construed to be a taking, the Commission's action nevertheless is authorized. Section 201(a), by its terms, permits the FCC to order "physical connections" and the agency's action in this case is not conceptually different from most interconnection orders, which require at least some physical occupation of real or personal property. The validity of a statutory authorization to take regulatory action that is ultimately adjudged to be a taking does not depend on a Congressional understanding -- either expressed or implied -- that a taking will occur.

Id. 21-22.

SUMMARY OF INTERMEDIA'S INITIAL ARGUMENT

The Constitution of the State of Florida protects citizens of the state against unjust taking of their property. Article X, Section 6, Fla. Const. This provision does not impair, however, the ability of the Florida Public Service Commission ("Commission") to regulate utility property, including forced occupation of LEC facilities for purposes of interconnection.

Essentially, what is challenged here is the Commission's ability to control the use of LEC facilities in the provision of telecommunications services. The entire purpose of Chapter 364, however, is to set up a system under which (a) the LEC is granted a monopoly over certain markets; (b) the Commission may control the use of LEC facilities in the provision of monopoly services; and (c) the LEC is guaranteed the opportunity to earn a fair rate of return on its investments in its facilities. Under this "regulatory bargain," the LEC voluntarily relinquished certain property rights in exchange for certain guarantees and privileges.

In short, the "taking by occupation" alleged to be inherent in mandated physical collocation is occupation by consent.

Moreover, conceptually, the Commission's regulation of LECs in general appears to be the compensated "taking" of the LEC's facilities in the expansive sense of the term. For example, Chapter 364, Florida Statutes, specifically authorizes the Commission to order interconnection between companies. Forced interconnection forces one telephone company to allow its transmission capacity (i.e., spectrum space within its circuits) to be used or occupied by the transmissions of another company. Thus, personal property of the telephone companies is in fact being "taken" in a sense as a fundamental part of the regulatory bargain of Chapter 364. Mandated physical collocation is simply another example of required provision of telecommunication service, involving the forced use (or "occupation") of LEC property.

A CONDENSED THEMATIC HISTORY OF THE TAKING CLAUSE

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. The "taking clause" embraces a simple proposition with which most Americans would agree: the government should not unreasonably interfere with private property. As with most simple constitution propositions, however, the taking clause has engendered a welter of confusing cases. The source of this confusion seems to be a reality recognized by the United States Supreme Court: determining whether there has been an impermissible taking cannot be reduce to a formula; rather each case must be decided ad hoc on its own facts.

E.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

As might be expected, under the case law the meanings of "taken," "property," and "just compensation" are addressed at length, and in differing contexts different constitutional tests are applied. At the risk of distorting constitutional history through oversimplification, the debate over what constitutes a taking has been a debate over where one draws the line between eminent domain (the power of the sovereign to appropriate land) and regulation.

The traditional interpretation of the taking clause required there to be an actual physical invasion of property. If there was not invasion of property, then the regulation was not eminent domain or "taking." See, e.g., Pumpelly v. Green Bay Co., 13 Wall. 166 (1872) (flooding of land due to dam constitutes taking); Mugler v. Kansas, 123 U.S. 623 (1887)(prohibition of sale or manufacture of intoxicating liquors not a taking).

A competing interpretation of the taking clause was advanced by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Justice Holmes viewed traditional takings and regulation through the police power as not fundamentally different, but rather different by degree. In Pennsylvania Coal, a statute prohibited mining that could cause the ground to collapse. This effectively prohibited the mining of coal by the plaintiff.

The Court held that "To make it commercially impracticable to mine certain coal has very nearly the same effect for

constitutional purposes as destroying it." Thus, Justice Holmes' opinion expanded the interpretation of taking to include regulations of land that would substantially lower the value of private property. Justice Holmes observed that not every general law that reduced property values triggered a compensable claim under the fifth amendment. A statute would not require individual compensation, he suggested, if it created "an average reciprocity of advantage."

He did not fully explain this concept, but it has been used most successfully in zoning cases. For example, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court addressed whether restrictive zoning that lowered the economic value of an individual's property amounted to a taking that required compensation. In finding that it did not, the Court applied a reciprocal benefit test (i.e., even the individually injured benefited from the overall zoning scheme) to uphold the exercise of police power.

Under the Pennsylvania Coal approach, when at some point regulation sufficiently diminishes the value of property, the regulation becomes a taking. Until that point is reached, however, government is given wide latitude to regulate private property. Given this approach, it is little wonder the Court admonishes that each case must be viewed on its own merits.[1] In thinking about the contrasting approaches of the traditional test and Pennsylvania

[1]Indeed, in Pennsylvania Coal, Justice Holmes observed that a takings question "the question of degree--and therefore cannot be disposed of by general propositions." 260 U.S. 416.

Coal, at least two law-school type questions occur: first, under the traditional test, how economically draconian can a regulation become without being a taking where there is no invasion of the property?; and second, what happens when the regulation has a minimal effect on the property, but there is in fact a physical invasion? With respect to the second question, if one follows the Pennsylvania Coal approach, no taking would be found. If one follows the traditional approach, there would be a taking per se because of the physical invasion. Which way would the Court go?

This question was answered in Loretto. There the Court reverted to the traditional view that governmental action constituting a "permanent physical occupation" of privately owned real property is, to the extent of the occupation, a taking entitling the owner to just compensation under the fifth amendment. Thus, Loretto can be viewed as a retreat from the Pennsylvania Coal approach, which would have allowed physically invasive use of the police power.

The question that this Commission must address in good faith is what does Loretto, or any of these cases for that matter, have to do with the constitutionality of the proposed mandated physical collocation for a public utility? As will be shown below, the answer is very little.

AN EVEN MORE CONDENSED HISTORY OF REGULATION OF PROPERTY CLOTHED WITH THE PUBLIC INTEREST

As the Commission is aware, from the time of King James I the public was viewed to have certain rights in certain types of private property (ferries and port facilities, for example) that

were employed or dedicated in public use. Thus, a ferry could be forced to carry passengers or freight, an early example of mandated occupation.

In Munn v. Illinois, 94 U.S. 113 (1876), the Supreme Court summarized the historical justification for this impairment of private property rights:

> Property does become clothed with a public interest when used in a manner to make it a public consequence, and affects the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control.

94 U.S. at 126.

Thus, under Munn, property clothed with the public interest could be subjected by the government to economic regulation, such as forced occupation, without the regulation being viewed as eminent domain or a taking. Whether economic regulation was allowable, of course, turned on whether it was reasonably related to the public use to which the owner had committed his or her property. Moreover, such economic regulation could not be confiscatory. By analogy to eminent domain, the law developed that property affected with the public interest, such as public utilities, were entitled to just and reasonable compensation.[2]

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[2] See, e.g., Smyth v. Ames, 169 U.S. 466 (1898); Nebbia v. New York, 291 U.S. 502 (1934); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

THE TAKING CLAUSE AND "USED AND USEFUL" PROPERTY

The property of the LECs, of course, is "clothed with the public interest" under the common law. But more than this, it is property dedicated to public use under a comprehensive statutory regulatory scheme. This scheme guarantees the LEC both due process and an opportunity to achieve a fair rate of return on its investments used in public service. Thus, it is beyond reasonable argument that the property of the LECs can be subject to all manner of regulation, including forced occupation, without triggering the taking clause. For government to do this, only two conditions must be met: first, the property of the LEC must in fact be dedicated to public use; and second, the LEC must be fairly compensated for the public use of its property.

The central office is, of course, dedicated to public use. The very purpose of the central office is to provide the switching functions at the heart of the LEC's local exchange telecommunications service to the public. Indeed, the LECs have declared their central offices "used and useful" in providing public utility service. And finally, as noted in Intermedia's Post Hearing Brief, under Section 364.02(7) and (8), Florida Statutes, it is clear that all facilities used by a telephone company in the provision of telephone service are in fact statutorily "clothed with the public interest."

BUT DON'T PUBLIC UTILITIES HAVE RIGHTS, TOO?

Southern Bell in its initial brief suggests ". . . the constitutional protection against takings 'applies as well to

private property devoted to public use.' Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540, 569 (1904) (cited with approval in Loretto, 458 U.S. at 430-31)." In this context, Southern Bell also cites FCC v. Florida Power Corp., 480 U.S. 245 (1987), suggesting under the court's ruling the FCC could not have order FPC to make pole attachments without violating the taking clause.

In response, first of all, the Court declined to "decide . . . what the application of [Loretto] would be if the FCC in a future case required utilities over objection to enter into, renew, or refrain from terminating pole attachments." 480 U.S. at 251-52 & n.6. Moreover, as in the Loretto case, the Court emphasized that its ruling was narrow. Thus, what one can reasonably infer from these cases is that a regulated utility may be protected under the fifth amendment from forced occupation of its property for a purpose other than that for which its property has been dedicated to use in the public interest. For example, if this Commission attempted to order the LEC to allow a water and wastewater utility to lease the LEC's offices, then there may very well be a constitutional taking.

In the instant case, however, the Commission would only order collocation for purposes specifically contemplated under Chapter 364 and for the very purpose to which the LEC has declared its property used and useful: the provision of telecommunications services to the public for hire. Thus, under the regulatory scheme of Chapter 364, central office space is subject to Commission jurisdiction and mandatory interconnections can be ordered, even to

the extent of requiring physical collocation.

CONCLUSION

In sum, the LECs have attempted to use Loretto and other taking cases to suggest that mandatory physical collocation - i.e., forced physical occupation in furtherance of the essential enterprise of the utility - differs from traditional economic regulation of public utilities as property clothed with the public interest. But as has been shown, regulation of public enterprises began with physical occupation, and was allowed because of the initiatory behavior of the owner in employing the property in public use. Loretto in no way undermines a state public utility commission's to fully regulate the public utility; rather, it simply returned the Court to the traditional "invasion" test for determining whether regulation of private property--i.e., property not clothed with the public interest--was a taking requiring individual compensation.

For the reasons stated here, as well as the reasons provided in Intermedia's post hearing brief, this Commission may order physical collocation without violating the Fifth and Fourteenth Amendments to the U.S. Constitution and without violation Article X, Section 6 of the Florida Constitution.

Respectfully submitted this 13th day of December 1993.

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CERTIFICATE OF SERVICE

Docket No. 921074-TP

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