Marceil Morrell*
Vice President & General Counsel - Florida

Leslie Reicin Stein
Associate General Counsel

Attorneys

Lorin H. Albeck
Kimberly Caswell
Franklin H. Deak
M. Eric Edgington
Joe W. Foster
Ernesto Mayor, Jr.

* Not Admitted in Florida

GTE Telephone Operations

One Tampa City Center
Post Office Box 110, FLTC0007
Tampa, Florida 33601
813-224-4001
813-228-5257 (Facsimile)

ORIGINAL
FILE COPY

March 25, 1994

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

Dear Mr. Tribble:

Re: Docket No. 921074-TP
In the Matter of the Petition of Intermedia Communications of Florida, Inc. for Expanded Interconnection for AAVs within LEC Central Offices

ACK 1
AFA 3
APP
CAF
CMU
CTR
EAG
LEG 1 W/10
LIN 4
OPC
RCH
SEC 1
WAS

Please find enclosed for filing an original and fifteen copies of GTE Florida Incorporated's Petition for Reconsideration and Petition for Stay in the above-referenced matter.

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

KC:tas
Enclosures

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
02840 MAR 25 94
FPSC-RECORDS/REPORTING

BEFORE THE 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: March 25, 1994

GTE FLORIDA INCORPORATED'S PETITION FOR RECONSIDERATION AND PETITION FOR STAY

GTE Florida Incorporated ("GTEFL") files its Petition for Reconsideration of the Commission's Order number PSC-94-0285-FOF-TP ("Order"), issued March 10, 1994, in this Docket. Specifically, GTEFL seeks reconsideration of the Commission's finding that mandatory physical collocation is constitutionally permissible. In addition, GTEFL requests a stay of the Order's physical collocation mandate until the District of Columbia Circuit Court issues its ruling in the lawsuit challenging the FCC's authority to order physical collocation. GTEFL further seeks oral argument, as necessary, on both the Petition for Reconsideration and the Petition for Stay.

Petition for Reconsideration

In its Response Brief in this case, GTEFL observed that for the Commission to accept the argument that mandatory physical collocation is not a taking, it would need to ignore all relevant legal authority. (GTEFL Response Brief at 10.) This is exactly what the Commission ultimately did. Its legal analysis dismisses directly applicable precedent in favor of a novel legal theory with no basis in existing law.

As GTEFL has explained, two questions direct the constitutional takings analysis 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? (GTEFL Response Brief at 3.) With regard to the second question, GTEFL and the Commission do not disagree. The Commission concedes that the Florida Legislature has not granted it the explicit authority necessary to take property. It further agrees that it lacks the power to determine appropriate compensation for a taking. (Order at 7.) Given the concurrence on the issue of the Commission's lack of authority to perform takings, the constitutional inquiry on reconsideration need only focus on the first question--whether or not mandatory physical collocation effects a taking.

This question is settled by reference to the rule established by the U.S. Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982). Loretto states that "[A] permanent physical occupation authorized by government is a taking without regard to the public interests it may serve." Id. at 426. After a physical invasion has been found, there is thus no need to take the constitutional inquiry any further. See Patrick R. Scott, State and Local Regulations: Are We Being Taken?, Fla. B.J., Nov. 1993 at 89, 90-91. Florida courts have explicitly adopted the Loretto 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).

Physical occupation is easily verifiable, since "placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." Loretto at 437. Consistent with this observation, the physical occupation aspect of physical collocation has not been challenged in this proceeding. It is self-evident that a physical collocation rule requires the local exchange company ("LEC") to permit others to physically install their transmission equipment within its central offices.

Having established the fact of physical occupation, the Loretto per se rule must be applied. Indeed, the Commission appears to agree: "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 7. Despite this admission, however, the Commission concludes that Loretto is not the appropriate guide for evaluation of mandatory physical collocation. It instead relies on arguments of Time Warner/FCTA and Intermedia that a regulated common carrier's property is subject to a different standard. Under this new standard, an agency can force a utility to allow others to occupy its property as long as the occupation furthers the public use to which the property is dedicated--in this case, provision of telecommunications services. (Order at 5-6.) This position considers compelled physical occupation of LEC property as simply one point along the continuum of the Commission's regulatory authority over that property.

The Commission's holding, which would give it unfettered ability to control the LEC's property, is plainly contrary to

existing law. Loretto and its progeny are grounded in the very distinction between regulations that are physically intrusive and those that are not. Physical invasion of another's property is "qualitatively more intrusive than perhaps any other category of property regulation." Loretto at 441; see also Storer at 1036. GTEFL has not denied that the Commission may reasonably regulate the Company's facilities and operations. But neither this Commission nor any Court has ever held that the Commission's authority to regulate extends to appropriation of its property. Under the Commission's logic, it could confine the LEC to a ten-foot by ten-foot cage within its own central office in the name of fostering telecommunications competition.

There is no public utility exception to Loretto's per se rule. The private property of a public utility does not lose its constitutional protection just because that property is dedicated to a public purpose. See, e.g., FCC v. Fla. Power Corp., 480 U.S. 245 (1987); Delaware, L. & W. R.R. v. Morristown, 276 U.S. 182, 193 (1928); Western Union Tel. Co. v. Penn. R.R., 195 U.S. 540, 569 (1904). In fact, the Commission explicitly recognizes this longstanding principle. (Order at 9.) Nevertheless, it carves out a flatly inconsistent public utility exception. The only explanation for this action seems to be that none of the cases cited to support a utility's right to protection against unlawful takings "involve a regulatory mandate regarding the public purpose for which the property at issue was dedicated." (Order at 9.)

The absence of a case the facts of which are substantially identical to this one does not excuse the Commission from ignoring the U.S. Supreme Court's unambiguous statements of legal principle. If there is a compelled physical occupation, there is a taking. A utility's property is entitled to protection against unauthorized takings. As noted, the Commission freely accepts these tenets, which allow no room for compromise positions. The Loretto rule is termed a per se rule precisely because it applies in all cases where there is permanent physical occupation. There is no law sanctioning any exceptions to this principle. The only cases cited by proponents of mandatory physical collocation and mentioned in the Order do not involve physical occupation.

GTEFL believes the logical inconsistencies in the Commission's Order may have been driven, at least in part, by its fear that applying the Loretto per se rule in this instance will have unacceptably broad consequences. The following language from the Order is telling:

> In the instant case, the LECs object to the possible mandate of significant central office space to effectuate statutorily authorized interconnection. However, based on Loretto, it appears that even a mandate of virtual collocation, which would require cables and a connection, would be a taking if opposed by the LECs. Such an interpretation would make it impossible for this Commission to regulate telecommunications pursuant to its statutory mandate.

(Order at 7.)

Based on this language, it appears the Commission's constitutional analysis may have been too strongly guided by its desire to preserve its ability to regulate local exchange companies. Aside

from the logical inconsistency this approach has engendered, the Commission's apprehension about this matter is unfounded.

Loretto was decided twelve years ago. In all that time, it has not become a tool to circumscribe the statutory authority of this or other public utilities commissions around the country. There is no reason to expect that the LECs will use Loretto in an attempt to curtail acceptable regulatory practices if this Commission acknowledges that the Loretto principles require a finding that mandatory physical collocation is a taking. As GTEFL explained in its Brief and Response Brief, a taking will be found to the extent that an owner can no longer own and enjoy his property as he 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). A taking, as a significant interference with property rights, is thus distinguished from merely consequential injuries or trivial interferences. See 26 Am. Jur. 2d Eminent Domain § 157.

A physical collocation mandate forces the LEC to turn over significant portions of its central offices--the core of its network--to its competitors. This interference with the LEC's property is undeniably severe and historically unprecedented. Even though LEC property is dedicated to public use, government appropriation of that property cannot be reasonably understood to be a condition of regulation. But, as noted earlier, LECs expect the trivial interferences that have customarily been associated

with reasonable regulation of their property and facilities. LECs have not protested, and courts are not likely to entertain, sudden protests to these kinds of incidental intrusions. It is thus improbable that Loretto will be used to curtail historically acceptable regulatory practices.

GTEFL urges the Commission to reconsider the constitionality of its physical collocation mandate in light of the Company's comments here. The public utility exception the Commission fashions is not a reasonable interpretation of existing law; rather, it is a wholly new concept that ignores the law that directly applies to this situation. This constrained analysis cannot withstand judicial review. A more careful reading of the relevant precedent upon reconsideration will reveal the internal inconsistencies in the Commission's analysis and prompt a sounder and more objective evaluation.

A decision that mandatory physical collocation is constitutionally impermissible will not undermine the Commission's objectives in ordering expanded interconnection. To the contrary, GTEFL believes these goals will be better met through a flexible policy of allowing LECs and collocators to determine together whether interconnection will be furnished through physical or virtual collocation in a particular instance. GTEFL's initial Brief discussed at length the reasons why this approach is superior to a physical collocation requirement. (GTEFL Brief at 7-22.) Leaving the collocation option to private negotiations will also minimize potential disruption if the federal Court rules that the

FCC's physical collocation mandate is unconstitutional. Voluntary collocation configurations will remain in place, while compelled physical collocation arrangements will be subject to dismantling after the physical collocation mandate is struck down.

Petition for Stay

Whether or not the Commission undertakes reconsideration of its physical collocation mandate, GTEFL seeks a stay of that mandate for a period at least sufficient to allow the federal appeal of the FCC's physical collocation mandate to conclude.

As the Commission knows, GTEFL and a number of other parties have appealed the FCC's physical collocation decision on the grounds that it is an unlawful taking in violation of the U.S. Constitution. The Bell Atlantic Tel. Companies, et al. v. FCC, et al., No. 92-1619 (D.C. Cir. filed Nov. 25, 1992). The oral argument in that case took place on February 22 and the decision is pending. While there is no timetable established for decision, the Court's past practice indicates that a ruling will occur about two to four months from the date of the argument.

The unsettled nature of the federal physical collocation mandate strongly recommends a stay of the Florida mandate. The constitutional status of this Commission's physical collocation rule is inextricably linked to the fate of the analogous FCC requirement. The threshold evaluation of whether a taking has occurred is the same at both the state and federal levels. As GTEFL explained in its initial Brief, there is no need to perform

separate state and federal analyses of the takings issue because the constitutional guarantees protecting private property are the same under both Florida and U.S. constitutional law. See Florida Canners Ass'n v. State of Florida, Dep't of Citrus, 371 So. 2d 503, 513 (Fla. 2d DCA 1979); Fla. High School Activities Ass'n v. Bradshaw, 369 So. 2d 398, 402 (Fla. 2d DCA 1979). Consistent with this principle, the parties in this proceeding have used both federal and Florida sources to develop their constitutional arguments.

Since this Commission has already admitted it lacks the requisite statutory authority necessary to perform a taking (Order at 7), the federal Court's determination as to whether physical collocation effects a taking will control the resolution of the constitutional issue before this Commission. If the Court deems the FCC's physical collocation mandate constitutes a taking, there is no separate body of law that would justify a contrary result on the State level. And if it is a taking, this Commission (by its own admission) has no authority--either from the Florida Legislature or the U.S. Congress--to perform a taking. Therefore, a state physical collocation mandate would violate both the Florida and U.S. constitutions.

Aside from the legal problems prompting a stay, there are practical considerations. Throughout its Order, the Commission emphasizes the need for consistency with the FCC. It repeatedly acknowledges the role of the FCC's interconnection decision in its own deliberations. (See, e.g., Order at 3, 4, 11.) "[W]e find

that it is important to be consistent with the FCC. As acknowledged by the LECs, a unified plan will limit administrative costs, help prevent tariff shopping, and remove some incentives for misreporting the jurisdictional nature of the traffic." (Order at 12.) If the FCC's physical collocation mandate is overturned, and this Commission attempts to maintain such a mandate, these advantages will be lost. A stay is necessary to ensure the consistency that was a key feature of the Commission's reasoning in ordering a collocation scheme similar to that of the FCC.

There is ample justification for a stay. While it is impossible to determine the outcome of the federal appeal, it has been widely reported in the trade press that the judges' questions during the hearing seemed to indicate a predisposition to rule against the FCC. In any event, because the status of the Commission's physical collocation mandate will necessarily remain unsettled until conclusion of the appeal, a stay is necessary to prevent potentially irreparable harm to the LECs and, in turn, their ratepayers.

In the absence of a stay, the LECs will need to comply with collocators' requests for physical collocation in accordance with the tariff terms specified by this Commission. LECs will be required to arrange for collocators' electricity, heat, air conditioning, security, and other such services. Depending on the configuration of a particular central office, significant new construction might be required to allow physical collocation of other entities' equipment. For security purposes, interconnectors'

space would need to be physically segregated within the LEC's central office facility. In most cases, this would require the LEC to build new walls and to create new building accesses. Where multiple collocation requests are received for an office, their spaces would also need to be physically separated from one another. Coded locks or magnetic card readers will need to be installed on all doors, stairwells, and elevators in facilities where interconnectors will be located. Other necessary projects might involve addition and/or relocation of cable conduit and risers and power lines; reconfiguration of heat and colling distribution systems; and augmentation of systems such as primary and back-up power, heat and cooling, and fire detection and suppression.

If the LEC undertakes any or all of these tasks and physical collocation mandate is held to be an impermissible taking, the Company will have wasted time and money that would have been better directed elsewhere. Personnel and other resources will have been shifted from projects of long-term benefit to collocation-related tasks that may ultimately prove futile if physical collocation arrangements must later be dismantled. There is no guarantee that the LEC will recover expenditures associated with an aborted collocation project. Moreover, there is no way it can ever be compensated for the inefficiencies and disruptions to its operations occasioned by a mandatory physical collocation mandate that is later struck down.

A stay will cause no substantial harm or be contrary to the public interest. The Commission has ordered tariffs associated

with physical collocation to be filed on April 10. (Order at 37.) It is expected that the tariffs will be subject to a detailed review for some time (probably at least two months) before they are approved. Although, as stated earlier, there is no date established for the Court's decision, a ruling in the June timeframe is likely. It is possible that a decision may be rendered before the Commission even approves the intrastate tariffs. In any case, the period from tariff approval to the date of the Court decision will probably be minimal.

GTEFL believes a stay until conclusion of the ongoing switched access phase (Phase II) of this docket is warranted. Expanded interconnection for switched access raises the same constitutional issues with regard to collocation that switched access interconnection did. Any collocation requirements for switched access will likely track those ordered for special access. For the sake of conceptual neatness, a stay is appropriate until the end of Phase II. In addition, this period should prove sufficient to determine if any further appeals will be filed as a result of the pending Circuit Court decision.

In the alternative, the Commission could order a shorter period of stay, just until a decision is rendered in the pending federal appeal. This option would likely produce little or even no delay in the implementation of physical collocation if and when the Circuit Court decision assures this Commission that mandatory physical collocation is constitutionally sound.

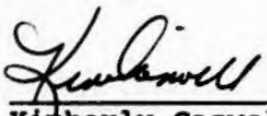
Whatever period the Commission deems appropriate for a stay, the LECs could still file tariffs as scheduled on April 10, as long as the Commission orders these tariffs to be suspended until the end of the stay period. Since the tariffs would go into effect immediately upon termination of the stay period, any public interest benefits associated with expanded interconnection would be secured without undue delay.

The minimal drawbacks in ordering a stay must be measured against the potential waste of substantial effort and expense in implementing a collocation scheme that is likely to held constitutionally impermissible. Granting the requested stay is the only reasonable outcome to this balancing process.

* * *

For all the reasons discussed in this filing, GTEFL asks the Commission to take the following actions: 1) grant its Petition for Reconsideration and replace mandatory physical collocation for intrastate special access interconnection with a policy of negotiated collocation arrangements; if the Commission believes that further discussion of the constitutional question is necessary, GTEFL requests oral argument before the Commission rules on the Petition; and 2) grant the Company's Petition for Stay. If the Commission is not prepared to grant the Stay without further discussion, GTEFL seeks oral argument before the Commission makes its decision.

Respectfully submitted on March 25, 1994.

By: 

Kimberly Caswell

Post Office Box 110, MC 7
Tampa, Florida 33601
Telephone: 813-228-3094

Attorney for
GTE Florida Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of GTE Florida Incorporated's Petition for Reconsideration and Petition for Stay in Docket No. 921074-TP was sent by U. S. mail on March 25, 1994, to the parties on the attached list.

Kimberly Caswell

Tracy Hatch
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0865

Harris R. Anthony
J. Phillip Carver
c/o Marshall Criser III
150 S. Monroe Street
Suite 400
Tallahassee, FL 32301

Patrick K. Wiggins
Kathleen Villacorta
Wiggins & Villacorta
P. O. Drawer 1657
Tallahassee, FL 32302

David B. Erwin
Young VanAssenderp
225 S. Adams St.
Suite 200
Tallahassee, FL 32302

Michael W. Tye
AT&T Communications Inc.
106 East College Avenue
Suite 1410
Tallahassee, FL 32301

Peter M. Dunbar
Haben Culpepper Dunbar & French
P. O. Box 10095
Tallahassee, FL 32302

Office of Pub. Counsel
Claude Pepper Building
111 W. Madison Street
Room 812
Tallahassee,FL 32399-1400

Harriet Eudy
ALLTEL Florida, Inc.
P. O. Box 550
Live Oak, FL 32060

Jeff McGehee
Southland Tel. Co.
210 Brookwood Road
P. O. Box 37
Atmore, AL 36504

Lee L. Willis
Ausley McMullen McGehee Carothers & Proctor
P.O. Box 391
Tallahassee, FL 32302

Joseph McGlothlin
Vicki Gordon Kaufman
McWhirter Grandoff and Reeves
315 S. Calhoun St.
Tallahassee, FL 32301

Daniel V. Gregory
Quincy Tel. Co.
P. O. Box 189
Quincy, FL 32351

John A. Carroll, Jr.
Northeast Fla.Tel.Co.
P. O. Box 485
Macclenny, FL 32063-0485

Charles L. Dennis
Indiantown Tel.Sys.Inc.
P.O. Box 277
Indiantown, FL 34956

Joseph P. Gillan
Gillan and Assoc.
P.O. Box 541038
Orlando, FL 32854-1038

Brad Mutschelknaus
Danny E. Adams
Rachel Rothstein
Wiley Rein Fielding
1776 K Street N.W.
Washington, DC 20006

F. B. Poag
Dir.-Tariffs & Reg.
Sprint/United-Florida
P.O. Box 165000
Mail Code #5326
Altamonte Springs, FL 32716-5000

C. Everett Boyd Jr.
Ervin Varn Jacobs Odom & Ervin
305 S. Gadsden St.
Tallahassee, FL 32301

Chanthina R. Bryant
Sprint
3065 Cumberland Circle
Atlanta, GA 30339

Paul Jones
Time Warner Cable
Corporate Hdqtrs.
300 First Stamford Pl.
Stamford, CT 06902-6732

Jodie L. Donovan
Regulatory Counsel
Teleport Comm. Group
1 Teleport Drive
Suite 301
Staten Island, NY 10311

Mickey Henry
MCI Telecomm. Corp.
780 Johnson Ferry Rd
Suite 700
Atlanta, GA 30342