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May 23, 1994

Ms. Blanca S. Bayo, Director  
Division of Records & Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, FL 32399-0850

Re: Docket No. 921074-TP  
Expanded Interconnection Phase II and Local Transport  
Restructure

Dear Ms. Bayo:

Please find enclosed an original and 15 copies of the Direct  
Testimony of Edward C. Beauvais and R. Kirk Lee on behalf of GTE  
Florida Incorporated for filing in the above matter.

Service has been made on the parties of record as evidenced by  
the Certificate of Service.

Very truly yours,

*Kim Caswell*  
Kimberly Caswell

KC:tas  
Enclosures

- ACK
- AFM \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMR
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG *Campers*
- LIN *orig 46*
- OPS \_\_\_\_\_
- ROH \_\_\_\_\_
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- OTH \_\_\_\_\_

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*Beauvais*  
*Lee*  
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A part of GTE Corporation

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that copies of the Direct Testimony of Edward C. Beauvais and R. Kirk Lee on behalf of GTE Florida Incorporated in Docket No. 921074-TP were sent by U.S. mail on May 23, 1994, to the parties on the attached list.

  
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Expanded Interconnection )  
Phase II and Local Transport )  
Restructure )  

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Docket No. ~~931074-TP~~  
Docket No. 930955-TL  
Docket No. 940014-TL  
Docket No. 940020-TL  
Docket No. 931196-TL  
Docket No. 940190-TL

Filed: May 23, 1994

**DIRECT TESTIMONY**

of

**EDWARD C. BEAUVAIS, Ph.D.**

On Behalf of

**GTE FLORIDA INCORPORATED**

DOCUMENT NUMBER-DATE

**04992 MAY 23 8**

FPSC-RECORDS/REPORTING

1 Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.  
2 A. My name is Edward C. Beauvais; my business address  
3 is 600 Hidden Ridge, Irving, TX 75038. I am em-  
4 ployed by GTE Telephone Operations as Senior Econo-  
5 mist in the Regulatory Planning and Policy Depart-  
6 ment.  
7  
8 Q. WILL YOU PLEASE STATE YOUR EDUCATION AND BUSINESS  
9 EXPERIENCE?  
10 A. My professional resume with a partial listing of my  
11 professional publications and appearances is con-  
12 tained in Beauvais Exhibit No. 1.  
13  
14 Q. HAVE YOU PREVIOUSLY APPEARED BEFORE THIS COMMISSION  
15 OR OTHER REGULATORY BODIES?  
16 A. Yes. I have appeared before this Commission in  
17 Docket numbers 900633-TL, 910757-TP, and 921074-TP,  
18 as well as in numerous workshops held by the Com-  
19 mission. Other state and federal commissions  
20 before which I have appeared are listed in Beauvais  
21 Exhibit No. 1.  
22  
23 Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY TODAY?  
24 A. My testimony today addresses the public policy  
25 issues associated with expanded interconnection

1 with the local exchange network. I will concen-  
2 trate on the public policy issues while Mr. Kirk  
3 Lee will address the issues associated with the  
4 proposed local transport restructure.

5  
6 As I testified in the earlier phase of this docket,  
7 even more so than the case of expanded interconnec-  
8 tion for special access, expanded interconnection  
9 for switched access is likely to place a very  
10 significant strain on the overall support flows in  
11 the local exchange carrier industry, due to the  
12 current pricing mechanisms. Current pricing ar-  
13 rangements rely on the continued flow of contribu-  
14 tion from switched access services and intraLATA  
15 toll services to allow GTEFL and other LECs to  
16 retain a low average basic residential (R1) service  
17 price. As other service providers attempt to  
18 capture a larger share of the transport market for  
19 switched services (perhaps including the provision  
20 of loops), the contribution contained in the prices  
21 will be eroded. Expanded interconnection for  
22 switched access accelerates the competitive ero-  
23 sion.

24  
25 The reason this matter should be considered in this

1 docket is that once a party has obtained floor  
2 space under a physical collocation order for either  
3 switched or special access transport, that party  
4 will no doubt argue (and correctly so) that it is  
5 absolutely inefficient to not be allowed to use  
6 that space for both switched and special transport  
7 services. I would point out, however, that there  
8 may be objectives other than efficiency which the  
9 FPSC may want to pursue. Nevertheless, in estab-  
10 lishing its policy for physical collocation, virtu-  
11 al collocation, or LEC-choice for access transport  
12 facilities, the Commission should bear in mind that  
13 the policy decisions it already reached in Phase I  
14 of this docket have definite implications for the  
15 decisions to be reached in this switched access  
16 transport phase of the process.

17

18 Q. WHAT CIRCUMSTANCES RESULTED IN TODAY'S HEARINGS?

19 A. The petition brought by Intermedia Communications  
20 of Florida, Inc. (ICI) is a direct consequence of  
21 the FCC's Expanded Interconnection Order released  
22 on October 19, 1992. Expanded Interconnection with  
23 Local Telephone Company Facilities, CC Docket No.  
24 91-141, Amendment of the Part 69 Allocation of  
25 General Support Facilities, CC Docket No. 92-222,

1        Report and Order and Notice of Proposed Rulemaking  
2        (FCC Expanded Interconnection Order). That Order  
3        mandates that Tier 1 local exchange companies,  
4        including GTE, permit interested parties to collo-  
5        cate and interconnect their special access trans-  
6        mission facilities within the LEC's central offic-  
7        es. There are only two potential exceptions to  
8        this directive:

9        (1) A formal state regulatory or legislative  
10       policy decision in favor of virtual collocation for  
11       expanded interconnection, or allowing LECs to  
12       choose which form of collocation to use for such  
13       interconnection; or

14       (2) A demonstration by the LEC that a particular  
15       central office lacks sufficient space to permit  
16       physical collocation.

17       FCC Expanded Interconnection Order at para. 41.

18  
19       In its decision in Phase I of this proceeding for  
20       expanded interconnection of special access trans-  
21       port, the Florida Public Service Commission essen-  
22       tially agreed with the decisions of the FCC. The  
23       Commission then set hearings to proceed on the  
24       topic of expanded interconnection for switched  
25       access transport within the state of Florida.



1 Q. HOW DOES THE FCC DEFINE PHYSICAL COLLOCATION AND  
2 WHAT IS THE DIFFERENCE BETWEEN IT AND VIRTUAL  
3 COLLOCATION?

4 A. The term physical collocation is defined by the FCC  
5 as a situation where the "interconnecting party  
6 pays for LEC central office space in which to  
7 locate the equipment necessary to terminate its  
8 transmission links, and has physical access to the  
9 LEC central office to install, maintain, and repair  
10 this equipment." (FCC Expanded Interconnection  
11 Order at para. 39.) Under the FCC's virtual collo-  
12 cation guidelines, interconnectors would designate  
13 the central office equipment dedicated to their use  
14 and monitor and control their circuits terminating  
15 in the LEC's facilities. (FCC Expanded Interconnec-  
16 tion Order at para. 44.) The interconnector's  
17 equipment would thus be located in the LEC's cen-  
18 tral office under either a physical or virtual  
19 collocation scenario. The FCC's virtual colloca-  
20 tion scheme requires technical interconnection  
21 arrangements comparable to those anticipated with  
22 physical collocation. The only real distinction is  
23 that, with virtual collocation, the demarcation  
24 between LEC and interconnector networks is neatly  
25 defined at a demarcation point very close to the



1 central office. In a physical collocation situa-  
2 tion, "the interconnection point would not indicate  
3 a change in ownership of cable facilities." (See  
4 FCC Expanded Interconnection Order at para. 848 n.  
5 201.)

6  
7 Q. WAS THE FCC EXPANDED INTERCONNECTION ORDER SUBJECT  
8 TO ANY DISSENT WITHIN THE FCC?

9 A. Yes. The FCC Expanded Interconnection Order was  
10 issued notwithstanding separate statements from  
11 Chairman Sikes and Commissioner Quello, both indi-  
12 cating serious reservations about mandatory physi-  
13 cal collocation. In his dissent, Chairman Sikes  
14 expressed both legal and policy objections to  
15 mandatory physical collocation. He noted that  
16 mandatory physical collocation raises serious  
17 questions about a "taking" or confiscation of local  
18 exchange carrier property in violation of the Fifth  
19 Amendment and leaves unclear what problems the FCC  
20 is attempting to resolve by forcing LECs to offer  
21 physical collocation, especially when the Order  
22 itself acknowledges that some parties might prefer  
23 virtual interconnection arrangements. Similarly,  
24 Commissioner Quello in his separate statement noted  
25 that "the only real difference between physical

1 collocation and virtual collocation is whether the  
2 local exchange carrier or the interconnector in-  
3 stalls, maintains, and repairs the interconnector's  
4 equipment."

5

6 Q. HOW DOES THE FCC'S ORDER ON EXPANDED INTERCONNEC-  
7 TION AFFECT THE FLORIDA COMMISSION'S ABILITY TO  
8 IMPOSE FORMS AND CONDITIONS OF EXPANDED INTERCON-  
9 NECTION THAT ARE DIFFERENT FROM THOSE IMPOSED BY  
10 THE FCC'S ORDER?

11 A. The FCC's Order did not preempt the states. This  
12 Commission may retain some significant latitude to  
13 develop its own interconnection policies in accor-  
14 dance with state-specific conditions and concerns.  
15 This independent effort is essential since the  
16 implementation of switched access interconnection  
17 greatly accelerates competition for local exchange  
18 services. The FCC has already announced the same  
19 type of rules apply for switched access transport  
20 interconnection as apply for special. The long-run  
21 impacts at the local and state level are likely to  
22 be much larger than the impacts at the federal  
23 level.

24

25 The FCC Expanded Interconnection Order stated the

1 FCC's intention to exempt LECs from its physical  
2 collocation requirements based on a formal state  
3 policy favoring virtual over physical collocation,  
4 or allowing LECs to choose the form of interconnec-  
5 tion to use for intrastate expanded interconnec-  
6 tion. The FCC's subsequent June 8th order in the  
7 expanded interconnection docket, however, shows  
8 that the FCC intends to very narrowly define what  
9 constitutes a state's right in establishing its own  
10 policy for expanded interconnection, even on an  
11 intrastate basis. Absent any further developments,  
12 as a practical matter, I believe that the FCC has  
13 effectively, if not legally, preempted the Florida  
14 PSC.

15

16 Q. DR. BEAUVAIS, IN RESPONSE TO MY PREVIOUS QUESTIONS  
17 YOU INDICATED THAT "ABSENT ANY FURTHER DEVELOP-  
18 MENTS" THE FCC WOULD HAVE ESSENTIALLY DETERMINED  
19 THE INTERCONNECTION POLICY FOR FLORIDA. ARE THERE  
20 ANY OTHER SUCH ACTIONS CURRENTLY BEING TAKEN?

21 A. Yes. GTE and numerous other parties have ap-  
22 pealed the FCC's physical collocation mandate to  
23 the United States Court of Appeals for the District  
24 of Columbia Circuit. (The Bell Atlantic Tel.  
25 Companies et al. v. FCC, et al., No. 92-1619 (D.C.

1 Cir. filed Nov. 25, 1982). Oral arguments in that  
2 appeal occurred on February 22, 1994, and a deci-  
3 sion is pending. I am advised that it appears most  
4 likely that the petitioners' position will be  
5 sustained by the courts and that the mandatory  
6 physical collocation aspects of the FCC's decision  
7 will be found unconstitutional.

8  
9 In Phase I of this docket, GTE advanced comprehen-  
10 sive arguments as to why mandatory physical collo-  
11 cation is an unlawful taking of LEC property under  
12 both the federal and Florida Constitutions. I will  
13 not repeat those arguments here, but instead refer  
14 the Commission and the parties to GTEFL's brief on  
15 the constitutional question, attached as Beauvais  
16 Exhibit No. 2. GTEFL's arguments with regard to  
17 mandatory special access collocation apply with  
18 equal force to a switched access collocation deci-  
19 sion.

20  
21 Because of the unsettled status of the FCC's physi-  
22 cal collocation mandate, GTEFL asked this Commis-  
23 sion for a stay of the analogous state mandate in a  
24 petition filed on March 25. The Commission has not  
25 yet ruled on that Petition. If granted, it would

1           ensure consistency between the federal and Florida  
2           regimes, which GTEFL believes was a key Commission  
3           objective in ordering physical collocation in the  
4           first place.

5

6           Q.   WHAT ARE THE POSSIBLE BENEFITS ASSOCIATED WITH  
7           EXPANDED INTERCONNECTION?

8           A.   The costs and benefits associated with expanded  
9           interconnection cannot simply be stated in terms  
10          ascribing the theoretical benefits usually associ-  
11          ated with more competitive marketplaces, for the  
12          type of competition being introduced has atypical  
13          characteristics. Consider for a moment that under  
14          current legislative and regulatory authorizations  
15          in Florida, an AAV can construct facilities to any  
16          location for which right of way can be obtained.  
17          Furthermore, with certain constraints, the AAV can  
18          provide a variety of services over those facilities  
19          to any customer it might secure. AAVs or other  
20          providers of telecommunications services can build,  
21          purchase, lease, or rent real estate assets to  
22          house their terminating network equipment or any  
23          other facilities they might desire, subject only to  
24          zoning restrictions and market conditions. At any  
25          time, the AAV can purchase interconnection to the



1 LEC network on the basis of filed access tariffs of  
2 Florida LECs. Expanded interconnection changes  
3 none of this, save that under the terms of the  
4 FCC's Order, the LEC is now compelled to enter the  
5 real estate business and make space available in  
6 its central offices to any party desiring such  
7 space. This action, of course, requires both a  
8 degree of unbundling and repricing of LEC services.  
9 A more accurate term might simply be "cheaper  
10 interconnection to the LEC network by non-LEC  
11 providers."

12  
13 Aside from the unique circumstances attendant the  
14 FCC decision, however, expanded interconnection  
15 increases the scope of competition in the local ex-  
16 change market. As a professional economist, I  
17 support competition. However, it is important to  
18 examine the distribution of the costs and benefits  
19 of expanding competition. After all, competition  
20 brings with it costs as well as benefits.

- 21  
22 Q. WHO WILL BE THE PRIMARY BENEFICIARIES OF EXPANDED  
23 INTERCONNECTION?
- 24 A. Interconnectors, such as ICI and Metropolitan Fiber  
25 Systems (MFS), will stand to benefit the most from



1           expanded interconnection.     Depending upon the  
2           relative price elasticities in the market for  
3           switched and special access services, firms such as  
4           AAVs taking expanded interconnection may pass a  
5           portion of the savings along to their customers.  
6           Those customers are today typically large business  
7           customers located in the larger metropolitan areas,  
8           such as Tampa.     However, AAVs, as well as other  
9           types of LEC rivals, are increasingly reaching out  
10          to smaller cities.     To be more accurate, such  
11          competitors are targeting areas of traffic concen-  
12          tration, no matter where it is found geographical-  
13          ly.     The impact upon LECs, small business customers  
14          and residential customers will depend on the manner  
15          in which specific interconnection arrangements are  
16          structured and the degree to which LECs are allowed  
17          by this Commission to respond to increasing compe-  
18          tition by interconnectors.     However, interconnec-  
19          tion, especially with the mandate of physical  
20          collocation, may serve to harm LECs and their rural  
21          and residential customers on a relative basis.

22

23         Q.     DR. BEAUVAIS, DO YOU HAVE ANY EVIDENCE THAT THE  
24                 DEMAND FOR EXPANDED INTERCONNECTION WILL MATERIAL-  
25                 IZE PRIMARILY IN THOSE AREAS WHERE CONCENTRATIONS

1 OF TRAFFIC CAN BE LOCATED?

2 A. Yes. There is certainly evidence available in the  
3 form of market plans and actual operations of AAVs,  
4 not only in Florida, but in other states as well.  
5 For example, MFS has recently filed with the Illi-  
6 nois Commission to operate as MFS Intelenet in MSA  
7 1 as a "co-carrier". MSA 1 is the area around and  
8 including the city of Chicago. In their plans,  
9 they announced their intention to target the medi-  
10 um-sized business customers only, leaving the  
11 larger business customer to MFS's other subsidiar-  
12 ies. MFS did not ask for approval to serve other  
13 areas within the state of Illinois. Likewise, in  
14 New York, Teleport operates in New York City serv-  
15 ing business customers, not the mass market of  
16 residential customers.

17  
18 In Florida, GTEFL has received inquiries about  
19 collocation in only five (5) central offices out of  
20 the ninety-one (91) GTEFL operates. These offices  
21 are all located in Hillsborough County, Florida,  
22 and in the City of Tampa. The offices are Beach  
23 Park, Sweetwater, Westside, Tampa East, and Tampa  
24 Main. While these are only 5.5% of GTEFL central  
25 offices, they account for 51.6% of the DS-1s in

1 service provided by GTEFL. That is quite an indi-  
2 cation of the concentrated nature of the market-  
3 place initially being addressed by the new market  
4 entrants.

5  
6 Assuming the company involved in the inquiry would  
7 order the same quantities from GTEFL that it has  
8 done elsewhere when ordering expanded interconnec-  
9 tion and collocation from other GTE telephone  
10 companies, this means that the one (1) intercon-  
11 necting firm would be placing fifty-six DS-1 cir-  
12 cuits into each of the five GTEFL central offices  
13 plus one (1) DS-3 per office. By itself, based on  
14 year-end 1993 measurements, this one firm would  
15 then have the capacity equal to about 7.85% of the  
16 total DS-1 market, excluding the DS-3s. Yet, this  
17 capacity will be concentrated into central offices  
18 accounting for over 50% of the current GTEFL DS-1  
19 demand! This is one reason why market share type  
20 information in the telecommunications industry can  
21 be very misleading as to the relative market power  
22 of firms and the type of regulatory and pricing  
23 treatment which is appropriate for the incumbent  
24 carrier.

25

1 Q. WHAT BENEFITS ARE CREATED FOR CONSUMERS BY THE  
2 MANDATE OF PHYSICAL COLLOCATION?

3 A. Although expanded interconnection may offer some  
4 benefits by encouraging greater competition, there  
5 are no additional benefits created by the physical  
6 collocation mandate. In fact, it is difficult to  
7 construct any rational or logical argument that  
8 physical collocation provides additional benefits  
9 to competition that are not already available under  
10 virtual collocation. On the contrary, given the  
11 highly prescriptive nature of the FCC's Expanded  
12 Interconnection Order as well as the order by this  
13 Commission in Phase I of this docket, any antici-  
14 pated benefits to consumers as a result of expanded  
15 interconnection have been substantially diminished  
16 by restricting parties' ability to negotiate effec-  
17 tively.

18  
19 Indeed, the real economic consumer welfare benefit  
20 of a competitive market for a service is that  
21 mutually advantageous voluntary trades among par-  
22 ties are maximized. By mandating physical colloca-  
23 tion, at least one of the parties may be forced to  
24 enter into a trade it would not elect to enter on a  
25 voluntary basis. Such compulsion violates the very

1 spirit of competition the FCC and this Commission  
2 were attempting to create through expanded inter-  
3 connection. This aspect was recognized by Chairman  
4 Sikes, who stated:

5 The highly regulatory and inflexible  
6 approach the Commission has adopted seems  
7 likely to create more concrete problems  
8 than the illusory ones it seeks to re-  
9 solve.

10 (FCC Expanded Interconnection Order, Sikes Separate  
11 Statement, emphasis added.)

12 This lack of flexibility engendered by a physical  
13 collocation requirement severely thwarts one party,  
14 the LEC, from adequately representing its own  
15 interest, negotiating effectively and fulfilling  
16 its other service obligations.

17

18 Q. Please describe some of the drawbacks of mandatory  
19 physical collocation.

20 A. Mandatory physical collocation will subject LEC  
21 operations to several levels of ongoing disruptions  
22 that will compromise its ability to improve and  
23 expand service in the most efficient way. Space  
24 allocation and exhaustion problems are perhaps an  
25 inevitable consequence of a physical collocation



1 mandate, although that is an empirical issue which  
2 has yet to be borne out by the market. The FCC's  
3 scheme requires the LEC to provide space to inter-  
4 connectors until space is "exhausted." (FCC Ex-  
5 panded Interconnection Order at para. 80 and Appen-  
6 dix B, rule 64.1401(b).) The Order fails to make  
7 any explicit allowance for a LEC to deny physical  
8 collocation when space remains in the central of-  
9 fice. If central office space is allocated to  
10 interconnectors, the LEC may be forced to acquire  
11 additional space for equipment to meet the state's  
12 telecommunications needs. The result may well be  
13 increased rates for the average telephone subscrib-  
14 er.

15  
16 Moreover, the FCC's physical collocation scheme  
17 imposes upon LECs the burden of considering possi-  
18 ble interconnector demands for space when remodel-  
19 ing or building central offices. This expectation  
20 is wholly unfair and inefficient. The LEC's capi-  
21 tal planning process continues to become increas-  
22 ingly more difficult as the critical need for cost-  
23 cutting measures has grown along with competition  
24 in LEC business sectors. The FCC directive to  
25 anticipate physical collocation demands introduces



1 an additional and unreasonable element of uncer-  
2 tainty into its capital planning efforts. Ulti-  
3 mately, ratepayers may be forced to bear the in-  
4 creased expense flowing from this unwarranted  
5 competitive disadvantage for the LEC.

6  
7 Space constraints which may also lead to future  
8 unnecessary conflicts. If, for example, mandatory  
9 physical collocation within the central office is  
10 believed to confer some advantage, and not all  
11 parties can be accommodated, then some will feel  
12 that the LEC conferred an advantage to those par-  
13 ties obtaining physical collocation over those who  
14 did not.

15  
16 Mandatory physical collocation may also lead to  
17 service arrangements which create an inefficient  
18 use of LEC central office space for any given level  
19 of demand. The measures necessary to accommodate  
20 interconnectors will directly affect LEC costs and  
21 productivity. LECs will need to set aside separate  
22 space within the central office and then provide  
23 secure access to that space. Significant new  
24 construction may be required, depending on the  
25 existing central office configurations. LECs will

1           also be required to arrange for interconnectors'  
2           heat, air conditioning, electricity and other such  
3           services. Further, the LEC, who must accommodate  
4           each interconnector with separate transmission  
5           cable, will be unable to promote efficiency by  
6           sharing cables and equipment among customers.

7  
8           In addition to the LEC's direct costs of accommo-  
9           dating interconnectors in its facilities, a physi-  
10          cal collocation rule will force the LEC to bear  
11          increased administrative expenses. Employees will  
12          need to develop charges and file tariffs and main-  
13          tain such tariffs to cover space rental and associ-  
14          ated services (heating, power, etc.). As I noted  
15          earlier, LECs will be required to undertake the  
16          likely futile effort to incorporate potential  
17          future space demands in their long-range expansion  
18          and remodeling plans. Forecasts will thus need to  
19          be revised--and additional costs incurred--as  
20          interconnectors' plans become known.

21  
22          All of the costs flowing from a physical colloca-  
23          tion mandate can never be recovered. Many of the  
24          most substantial, ongoing costs will remain unquan-  
25          tifiable because they derive from injection of

1 inefficiencies into the day-to-day operations of  
2 the LEC. Among other things, LEC employees must  
3 suffer construction intrusions every time the  
4 office needs to be reconfigured to accommodate  
5 interconnectors. LEC personnel will lose immediate  
6 unrestricted access to all parts of their facili-  
7 ties, as well as the ability to freely exchange  
8 information about LEC plans and operations.

9  
10 Although the interconnectors may argue that in-  
11 creased inefficiencies on the part of the LEC is a  
12 price to be paid for competition, the number of  
13 disruptions and degree of inefficiency can be  
14 decreased with virtual collocation arrangements  
15 without an appreciable negative impact upon inter-  
16 connectors.

17  
18 Additionally, mandatory physical collocation will  
19 remove the LEC's ability to insure network security  
20 and reliability, as Chairman Sikes recognized in  
21 his dissent from the FCC's physical collocation  
22 rule. Today, one of the LEC's chief means of  
23 guarding against harm to the network is its com-  
24 plete discretion to control entry to its central  
25 offices. Without this authority, the potential for

1 both inadvertent and intentional interference with  
2 LEC operations increases dramatically.

3  
4 Finally, safety hazards in collocators' spaces  
5 could affect the entire central office. The LEC  
6 will have little authority over the intercon-  
7 nectors' activities, equipment and installation  
8 methods. Because interconnectors' areas will be  
9 locked, the ability of LEC employees to quickly and  
10 effectively respond to emergencies will be substan-  
11 tially diminished.

12  
13 Q. GIVEN THE COSTS ASSOCIATED WITH MANDATORY PHYSICAL  
14 COLLOCATION, DOES GTEFL SEEK TO HAVE THE FLORIDA  
15 COMMISSION ORDER EXPANDED COLLOCATION IMPLEMENTED  
16 ON A VIRTUAL BASIS INSTEAD?

17 A. No. Although some parties may contend that virtual  
18 collocation arrangements are the most efficient,  
19 GTEFL is not advocating a virtual collocation man-  
20 date any more than it is advocating one for physi-  
21 cal collocation. Rather, GTEFL is only asking for  
22 an equal right to negotiate an expanded intercon-  
23 nection arrangement with its customers/competitors.  
24 GTEFL desires to maintain its property rights in  
25 its structural assets as well as to manage its

1 businesses and fulfill its obligations to customers  
2 and stockholders, without being compelled by regu-  
3 latory authority to accommodate architectural and  
4 rate design imperatives which impose inefficiencies  
5 in network design, provisioning and administration.  
6 With a physical collocation mandate, the LEC has no  
7 choice; it must provide physical collocation re-  
8 gardless of the inefficiencies or disruptions  
9 created.

10

11 As I noted earlier, it is far from clear that any  
12 benefits will accrue to consumers on the whole  
13 because of physical collocation. Any benefits  
14 ascribed to expanded interconnection will accrue  
15 directly to requesting interconnectors who, unlike  
16 LECs, can customize service offerings and price  
17 beneath the LECs' tariffed rate umbrella. And any  
18 benefits realized by large customers will be at the  
19 expense of the smaller ones, the rural and residen-  
20 tial customers, under the current form of rate of  
21 return/rate base regulation to which GTEFL is  
22 subject. If the large urban business customers  
23 discontinue LEC tariffed services and substitute  
24 interconnectors' services, inherent contribu-  
25 tions/subsidies which benefit rural and residential



1 customers will be lost. These subsidies are inher-  
2 ent in the requirement that the LECs charge state-  
3 wide averaged tariffed rates for their services  
4 despite the fact that service costs vary as a  
5 function of terrain, traffic and household density.  
6 These contributions generally support residential  
7 and rural customers, who are charged prices for  
8 service provisioning that are lower than related  
9 costs, using revenues obtained from business and  
10 urban customers, who are charged prices higher than  
11 their causally related costs.

12

13 Any potential benefit to the rural customer is  
14 likely to be deferred to the indefinite future, due  
15 to the alternative provider's complete discretion  
16 regarding its customer selection. By contrast, the  
17 loss of the contribution and the resulting increase  
18 in rates is a very real possibility. Any proceed-  
19 ing which fails to fully consider the impact upon  
20 all contribution and support mechanisms could  
21 seriously deteriorate the quality and availability  
22 of service presently enjoyed by the more rural  
23 citizens of Florida.

24

25



1 Q. DR. BEAUVAIS, CAN YOU QUANTIFY THE IMPACTS OF THIS  
2 LOSS OF CONTRIBUTION ARISING FROM EXPANDED INTER-  
3 CONNECTION?

4 A. Certainly I can make a relatively crude approxima-  
5 tion at such a quantification. Just as in the case  
6 of special access transport expanded interconnec-  
7 tion, it is not the expanded interconnection of  
8 switched access transport facilities per se which  
9 leads to a potential loss of contribution. Rather,  
10 it is the competitive rivalry subsequent to and  
11 flowing from expanded interconnection which gener-  
12 ates the loss of contribution from many services,  
13 especially toll, business services and switched  
14 access.

15  
16 The GTE network is characterized by economies of  
17 scale and scope. This is reflected in the fact  
18 that the incremental costs of operation are quite  
19 low, especially at quantities demanded and supplied  
20 around the designed capacity of the network. GTEFL  
21 estimates that the weighted incremental cost of a  
22 minute of use of transport facilities is approxi-  
23 mately \$0.002 per minute. That is, given the  
24 facilities are in place, the ongoing cost of pro-  
25 viding an additional minute of use over the

1 switched transport facilities is approximately  
2 \$0.002 per minute of use. The price in the current  
3 GTEFL tariff is \$0.0073 per minute of use for each  
4 termination of intrastate traffic. This provides  
5 for a gross margin of \$0.0053 per minute of use.  
6 Thus for each minute of use that is removed from  
7 GTEFL's transport facilities and placed over a  
8 competing system, GTEFL loses \$0.0073 of revenue  
9 and \$0.0053 of contribution, ceteris paribus. This  
10 may not sound like a great financial impact, but  
11 when the per minute impact is expanded to literally  
12 millions of minutes, the numbers can become quite  
13 large.

14  
15 Consider the case for each of the five (5) central  
16 offices where GTEFL has received an inquiry rela-  
17 tive to expanded interconnection. In this example,  
18 the one (1) interconnecting firm would be placing  
19 fifty-six DS-1 circuits into each of the five GTEFL  
20 central offices plus one (1) DS-3 per office. This  
21 provides a theoretical capacity of 2,016 voice  
22 grade channels into/out of each of the five central  
23 offices provided earlier. Each of these 2,016  
24 lines could, in principle, carry 43,200 minutes of  
25 use per month, or a total capacity of 87,091,200

1 minutes of use per month per office. If such  
2 facilities were used solely for transport of  
3 switched access at their capacity limit, GTEFL  
4 would see its contribution flows decrease by  
5 \$5,539,000 per year per office or \$27,695,000.

6

7 Q. DO YOU MEAN THAT GTEFL ACTUALLY EXPECTS TO SEE ITS  
8 CONTRIBUTIONS DECREASE BY OVER \$27 MILLION PER  
9 YEAR?

10 A. Not at all. Keep in mind that the numbers I just  
11 developed were based on theoretical capacity lim-  
12 its. It would be very unlikely that any company  
13 could load its transport facilities to anything  
14 approaching what would be a 100% load factor.  
15 Indeed, that would be a quantity greater than the  
16 total transport traffic today originating and  
17 terminating from the three major interexchange  
18 carriers from those five offices. So in that  
19 sense, the \$27 million figure is very unrealistic.  
20 However, offsetting that is the fact that I have  
21 only assumed one company collocating and intercon-  
22 necting in only five GTEFL central offices. Judg-  
23 ing from the interest evidenced in this proceeding  
24 by the many parties, that will prove to be a very  
25 conservative number of interconnection arrange-

1           ments.

2  
3           My point in making the foregoing calculations is  
4           simply to illustrate to the Commission that even  
5           relatively small amounts of contributions on a per-  
6           minute basis translate to multimillion dollar flows  
7           when the financial leverage of the network is  
8           considered. I further want to point out that the  
9           entrance of these competitors is not trivial. That  
10          is, if that new entrant were to place such facili-  
11          ties in such quantities as it has done in other GTE  
12          operating areas, the supply potential is more than  
13          enough to serve the entire demand associated with  
14          that office. The market share numbers are even  
15          more meaningless than I indicated above.

16  
17        Q.    COULD YOU PLEASE ADJUST YOUR QUANTIFICATION OF THE  
18              IMPACTS OF ADOPTING EXPANDED INTERCONNECTION FOR  
19              SWITCHED ACCESS TRANSPORT IN LIGHT OF THE QUALI-  
20              FICATIONS YOU NOTED?

21        A.    Certainly. The most questionable assumption made  
22              in the foregoing is that of a 100% load factor on  
23              the transport facilities. Clearly this is not the  
24              case in practice. A much more reasonable assump-  
25              tion would be a load factor of between 20% and 40%

1 or between 8,640 minutes per voice grade circuit  
2 per month and 17,280 minutes per month. The former  
3 would be more or less equivalent to a loading over  
4 a Feature Group A type transport arrangement; the  
5 latter for a more densely populated center. To be  
6 very conservative, however, I will utilize only a  
7 10% load factor of each voice grade equivalent  
8 circuit, even though this is a very inefficient  
9 loading of the facilities. With a 10% load factor,  
10 the annual loss of contribution, assuming that the  
11 traffic would otherwise have been carried by GTEFL,  
12 amounts to \$553,900 per office per year. With five  
13 (5) central offices in my calculation, the total  
14 loss of contribution amounts to \$2,769,500 per  
15 year, again on a ceteris paribus assumption.

16

17 Q. THAT APPEARS TO STILL BE A RELATIVELY LARGE POTEN-  
18 TIAL LOSS OF CONTRIBUTION. IS IT REALLY POSSIBLE  
19 TO LOSE ALMOST \$3 MILLION IN THE WAY OF CONTRIBU-  
20 TION FLOWS FROM ONLY FIVE CENTRAL OFFICES BY ONLY  
21 ONE COMPANY INTERCONNECTING?

22 A. Yes, indeed it is possible. And keep in mind that  
23 I am only basing these calculations on the trans-  
24 port function narrowly defined. I am not incorpo-  
25 rating toll and the switching function associated



1 with switched access. Such calculations would make  
2 the loss of contribution increase significantly.  
3 The total number of minutes of use flowing through  
4 a large LEC's network is staggering. Consider for  
5 a moment that in the five offices cited above, even  
6 excluding local and EAS minutes of use, that just  
7 among the three major carriers, GTE is originating  
8 and terminating over 656,000,000 minutes as of year  
9 end 1993 and passing them over GTEFL transport  
10 facilities. If the single company under consider-  
11 ation were to provision the facilities I have  
12 assumed above, it would have more than enough  
13 capacity to serve the entire switched access trans-  
14 port demand from those offices. So the answer is,  
15 the loss of such levels of contribution is indeed  
16 possible, ceteris paribus. However, in the short  
17 run, the transport restructure effort means that  
18 the sources of contribution are moved from the  
19 transport function to the switching function and  
20 that such a rate design is revenue neutral.

21

22 Q. SINCE THE PROPOSED RATE DESIGN IS REVENUE NEUTRAL  
23 FOR THE SWITCHED TRANSPORT FUNCTION, DOESN'T THIS  
24 ASSURE THE COMMISSION THAT THE PUBLIC WILL BE  
25 PROTECTED AND THAT NO ADVERSE IMPACTS CAN BE EX-

1           PECTED IF THE COMMISSION WERE TO ADOPT EXPANDED  
2           INTERCONNECTION FOR SWITCHED ACCESS TRANSPORT?  
3       A.   That is at best a static view of the market dynam-  
4           ics. As I have tried to make clear in the above  
5           examples and in other cases before this Commission,  
6           it is the contribution margins which attract com-  
7           petitive entry in a particular market segment. The  
8           restructure of transport prices described by Mr.  
9           Lee including the adoption of a Residual Intercon-  
10          nection Charge is not a stable long term solution;  
11          it is a step in the right direction, however. The  
12          placing of the responsibility of the contribution  
13          generation onto the switching function from the  
14          transport function simply means it is that much  
15          more desirable for rivals to enter the switched  
16          access business on a broader scale than just trans-  
17          port, or at least to bypass the LEC's switch. And  
18          it is here that the real effects from the adoption  
19          of expanded interconnection and transport competi-  
20          tion begin to show up. As rivals enter the switch-  
21          ing market, not only can they avoid GTE's prices  
22          which contain the contribution formally generated  
23          from switched transport, but such rivals are now  
24          positioned to avoid the contribution once generated  
25          by the LEC from toll services, switched access

1 services, vertical services such as Call Waiting,  
2 and business services. I believe it is beyond the  
3 scope of my testimony today to calculate and show  
4 what those contribution flows are, especially since  
5 it becomes very sensitive proprietary information,  
6 but they are far larger than that which I have  
7 shown for switched transport based on the current  
8 prices. As this erosion of contribution to both  
9 GTEFL's profits and to holding down the price of  
10 basic residential service continues, certainly  
11 GTEFL will need to rebalance rates. As I testified  
12 in the cross-subsidy docket, I would recommend a  
13 non-linear multipart tariff which takes into ac-  
14 count not only the cost conditions, but also recog-  
15 nizes market demand as well. In determining the  
16 prices for all services, the common costs would be  
17 recovered from the array of services roughly in  
18 inverse proportion to the elasticity of demand for  
19 each service. That is, all services would make a  
20 contribution to the shared and common costs of  
21 production; the degree of contribution would be  
22 determined by the demand characteristics of consum-  
23 ers for each service. This, of course, has some  
24 elements of a "Catch-22" dilemma. Those services  
25 in which customers exhibit the least price respon-

1 siveness would generally be those where the fewest  
2 options are available. For those "competitive  
3 services," by definition, customers have more  
4 choices and, thus, an increased price elasticity of  
5 demand. Therefore, while all services would be  
6 making a contribution toward the common costs of  
7 the firm, those services with the least elastic  
8 demand would be making more of a contribution.

9

10 Q. WOULD YOU PLEASE EXPLAIN THE "CATCH-22" ASPECT OF  
11 THIS PROBLEM?

12 A. The "Catch-22" aspect is that if the Commission  
13 attempts to limit the price increases on the lesser  
14 elastic services, it limits the market forces which  
15 would tend to increase the elasticity over time.  
16 Since entry into an industry or market is deter-  
17 mined in large part by the profitability of the  
18 market, by holding down the price for those servic-  
19 es, the Commission is limiting the incentive of new  
20 firms to enter the market. Further, since one of  
21 the principle determinants of the price elasticity  
22 of demand is the number of firms offering similar  
23 products, this restriction on entry places downward  
24 pressure on the elasticities. One is led to the  
25 conclusion, therefore, that following the precepts

1 of optimal departures from marginal cost pricing,  
2 will lead to (1) a case of increasing competition  
3 in those services where demand is currently more  
4 inelastic as the price rises and (2) that the level  
5 of contribution obtained from the mix of "competi-  
6 tive" and "monopoly" services will tend to equality  
7 at the margin over time. In working through the  
8 dynamics, it would be expected that the percentage  
9 of contribution coming from "monopoly services"  
10 would decrease over time while the percentage of  
11 contribution from "competitive services" would  
12 increase. In any event, in virtually no case would  
13 "monopoly services" be assigned the burden of all  
14 shared costs or vice versa.

15

16 Q. DR. BEAUVAIS, YOU JUST STATED THAT IN VIRTUALLY NO  
17 CASE WOULD MONOPOLY SERVICES BE ASSIGNED THE BURDEN  
18 OF ALL COMMON COSTS. ARE THERE ANY CASES WHERE  
19 THIS WOULD OCCUR?

20 A. The only case where this would happen is that if  
21 all "competitive services" were characterized by  
22 completely elastic demands--a most unlikely situa-  
23 tion. Yet even in the case of completely elastic  
24 demand, it cannot be argued that cross-subsidiza-  
25 tion is taking place so long as all services are



1           priced to at least recover their respective margin-  
2           al cost.

3

4       Q.   DO YOU RECOMMEND THAT THE PRICES BE BASED ON THESE  
5           INVERSE ELASTICITY RULES AS WELL AS USING THESE  
6           RULES TO AVOID CROSS SUBSIDIZATION?

7       A.   No, I don't. While it is true that the use of the  
8           inverse elasticity rules can be gainfully employed  
9           to avoid cross-subsidization among products and  
10          groups of products, I would recommend that non-  
11          linear multipart price structures be employed as  
12          the primary pricing mechanisms, rather than strict  
13          reliance on the inverse elasticity approach. In  
14          such a rate structure, the price of the marginal  
15          unit would be set at or very close to the incremen-  
16          tal operating costs while the inframarginal prices  
17          would be priced higher to cover the other costs of  
18          the service. Such a price structure improves the  
19          economic welfare gains derivable from uniform  
20          inverse-elasticity (Ramsey) pricing, since the  
21          marginal price is set much closer to the marginal  
22          cost of a service. Even in the non-linear multi-  
23          part rate structure, however, the price elasticiti-  
24          ties of demand must be taken into account when  
25          pricing a service subject to economies of scope or

1 scale. The important fact in this proceeding,  
2 however, is that both approaches avoid internal  
3 cross-subsidization and lead to much more stable  
4 rate structures and price levels.

5

6 Q. WHAT LECs IN FLORIDA SHOULD BE REQUIRED TO PROVIDE  
7 EXPANDED INTERCONNECTION?

8 A. In principle, if expanded interconnection provides  
9 such significant benefits as are claimed by its  
10 proponents, then all LECs should be required to  
11 provide the service, no matter what their size or  
12 where they are located. However, the FCC's order  
13 limits tariffing requirements to expanded intercon-  
14 necton for access services of Tier 1 LECs only.  
15 GTEFL believes that this limitation is a reflection  
16 of the facts I described above--that the benefits  
17 of expanded interconnection are quite concentrated  
18 and the costs are diffused over a wide base.  
19 Further, in many non-urban areas, the costs associ-  
20 ated with expanded interconnection will not be  
21 recoverable due to insufficient demand for such a  
22 service by potential interconnectors. Thus GTEFL  
23 supports a limitation to Tier 1 LECs in Florida as  
24 well. Many small LECs concur in tariffs developed  
25 and maintained by the National Exchange Carrier

1 Association (NECA), which has not been required to  
2 file expanded interconnection tariffs on behalf of  
3 its member companies.

4  
5 Even though expanded interconnection requirements  
6 apply only to larger LECs, the impact of such  
7 interconnection is not, however, limited to such  
8 LECs. Expanded interconnection for intraLATA  
9 services will affect smaller LECs through the  
10 compensation arrangements that exist between large  
11 and small LECs. These arrangements specify how  
12 LECs involved in jointly providing services will be  
13 compensated for the portion of the service they  
14 have provided. Expanded interconnection allows for  
15 non-LEC interconnectors to provide portions of  
16 these services. Current arrangements do not re-  
17 flect this possibility or its impact. The conse-  
18 quences of expanded interconnection to smaller LECs  
19 cannot be limited or controlled by applying the  
20 interconnection requirement to only the larger  
21 LECs.

22  
23 Q. UNDER WHAT CIRCUMSTANCES SHOULD THE COMMISSION  
24 IMPOSE THE SAME OR DIFFERENT FORMS AND CONDITIONS  
25 OF EXPANDED INTERCONNECTION THAN THE FCC?

1       A.    As I have already testified, the FCC's Order does  
2           not compel this Commission to adopt the same re-  
3           quirements for intrastate interconnection as those  
4           at the interstate level. After all, today we treat  
5           interstate and intrastate services as different for  
6           pricing purposes. This could be continued for the  
7           case of expanded interconnection as well. As a  
8           practical matter, however, separate intrastate and  
9           interstate interconnection regimes would prove  
10          unworkable. For the most part, GTEFL believes that  
11          interconnection for intrastate access services  
12          should follow interconnection for interstate access  
13          services. Having a unified plan would certainly  
14          limit the administrative costs of the expanded  
15          interconnection service and remove some of the  
16          incentive for misreporting the jurisdictional  
17          nature of the traffic.

18  
19       Q.    DOES THIS UNIFIED TREATMENT EXTEND TO ALL ASPECTS  
20           OF THE ISSUES ASSOCIATED WITH EXPANDED INTERCONNEC-  
21           TION?

22       A.    No. With regard to collocation, GTEFL strongly  
23           believes that the Commission should decide for  
24           itself whether it is in the public interest of all  
25           Florida consumers to force physical collocation on

1           LECs. As I noted earlier, a decision is expected  
2           soon in the federal appeal of the FCC's physical  
3           collocation rule. Given the uncertain status of  
4           this requirement, GTEFL urges the Commission to  
5           develop and be prepared to implement its own collo-  
6           cation policy. Only in this way can the Commission  
7           actively ensure protection of state-specific inter-  
8           ests. Obviously GTEFL disagrees with the Commis-  
9           sion decision in Phase I of this docket with re-  
10          spect to interconnection and would certainly urge  
11          the Commission to rethink that policy in light of  
12          the potential impacts flowing from the mandate of  
13          physical collocation for switched access transport.

14

15        Q.    SHOULD THE COMMISSION MANDATE EXPANDED INTERCONNEC-  
16           TION FOR NON-FIBER OPTIC TECHNOLOGY?

17        A.    No. In principle, the technology involved in  
18           expanded interconnection should be irrelevant.  
19           However, practical considerations with regard to  
20           space constraints, particularly in vault space and  
21           entrance facilities to LEC central offices, imply  
22           strongly that expanded interconnection should be  
23           limited to only fiber optic technology. Tradition-  
24           al cable facilities are far larger than those  
25           associated with fiber and therefore could lead to



1 far greater demands on limited space. However, if  
2 the Commission were to allow the parties seeking  
3 interconnection to negotiate their own agreement as  
4 to virtual or physical collocation, there is no  
5 inherent reason why an acceptable agreement as to  
6 the technology to be employed in expanded intercon-  
7 nection could not be agreed upon. But the final  
8 decision would have to be deferred to the owner of  
9 the property rights--the LEC. Otherwise, a party  
10 seeking interconnection via non-fiber technology  
11 could result in an immediate exhaustion and excess  
12 demand for LEC structural space. Under such condi-  
13 tions, the LEC must have the right to refuse ex-  
14 panded interconnection.

15

16 Q. IF THE COMMISSION REQUIRES LECS TO OFFER EXPANDED  
17 INTERCONNECTION, SHOULD THE COMMISSION ALLOW LECS  
18 AND OTHER PARTIES TO INTERCONNECT WITH THE COLLO-  
19 CATING PARTY?

20 A. Yes. First, it is consistent with the symmetrical  
21 treatment of all parties in the marketplace.  
22 Second, if the AAVs truly have a "better mousetrap"  
23 to offer the marketplace than do the LECs in terms  
24 of transport facilities, then there is no reason it  
25 should be denied to any entity in the marketplace.

1           Likewise, if AAV costs are lower than those of the  
2           LEC, there is no reason that LECs should be pre-  
3           cluded from purchasing inputs from the AAVs in  
4           order to provide the services to its remaining  
5           customers. Clearly, the AAVs are no longer simply  
6           interested in providing just a "redundant" or  
7           "network reliability" type of offering to their  
8           established customer base. After all, once they  
9           are interconnected with the LEC, the end-to-end  
10          service is no more reliable than the weakest link.  
11          Part of the AAV service would be an input provided  
12          by a LEC. If LEC service is unreliable, then a  
13          more efficient market solution would be to allow  
14          the LEC to purchase services from the AAV and  
15          utilize them in providing its own output. One of  
16          those inputs which might be utilized by a LEC, or  
17          another party, is AAV floor space.

18  
19          Q.    A CLOSELY RELATED ISSUE, THEN, IS WHO SHOULD BE  
20                ALLOWED TO INTERCONNECT?

21          A.    In its Order, the FCC proposes that expanded inter-  
22                connection for switched access transport be made  
23                available to all parties, regardless of their  
24                possible regulatory classification as Interexchange  
25                Carrier (IXC), end user, Competitive Access Provid-

1 er (CAP), Enhanced Service Provider (ESP), or any  
2 other label. GTE supports this line of reasoning  
3 and believes that limiting this service to a given  
4 classification of customers is unworkable.

5  
6 Any attempt to enforce some arbitrary classifica-  
7 tion scheme is simply a waste of LEC resources.  
8 This points out the problems associated with many  
9 existing tariff applications in an increasingly  
10 competitive marketplace. Since this policy confu-  
11 sion crosses both special and switched access  
12 services in the Florida jurisdiction and also  
13 clearly exists at the federal level, a comprehen-  
14 sive reexamination of FCC as well as Florida rules  
15 will be required if the potential benefits of  
16 expanded interconnection are truly to be realized.

17  
18 Q. DOES THE COURSE OF ACTION WHICH YOU JUST DESCRIBED  
19 WITH RESPECT TO RECIPROCAL COLLOCATION REQUIREMENTS  
20 AND WHO IS ALLOWED TO INTERCONNECT HAVE ANY OTHER  
21 REGULATORY IMPLICATIONS?

22 A. Yes, some rather serious ones. Essentially, what  
23 is being suggested for expanded interconnection is  
24 the elimination of resale and use and user restric-  
25 tions. As currently filed, interstate access

1 tariffs do not contain resale or sharing restric-  
2 tions and therefore, these matters need not be  
3 addressed solely with respect to these tariffs.  
4 However, local tariffs do contain resale and shar-  
5 ing prohibitions. These restrictions exist because  
6 the local tariffs contain rate structures and rate  
7 levels which are, to a large degree, dependent on  
8 customer identity, rather than the volume of ser-  
9 vice purchased by customers. The use of resale  
10 and sharing restrictions has allowed social and  
11 public policy goals to be introduced into the rate  
12 design for LEC services. The elimination of these  
13 restrictions, while desirable as a long term policy  
14 goal, must be preceded by a comprehensive review  
15 and potential restructure of all affected services.

16

17 Q. IF THE LONG TERM EFFECTS INCLUDE A POTENTIAL RE-  
18 STRUCTURE OF ALL AFFECTED SERVICES, THEN DOES  
19 EXPANDED INTERCONNECTION HAVE POTENTIALLY SIGNIFI-  
20 CANT EFFECTS ON THE JURISDICTIONAL SEPARATION OF  
21 LEC COSTS?

22 A. Yes, expanded interconnection could have potential-  
23 ly significant effects on the jurisdictional sepa-  
24 ration of LEC costs. More accurately, it is the  
25 increased competition induced by technological

1 changes and enhanced by expanded interconnection  
2 which will affect the jurisdictional separations.  
3 Switching equipment at LEC end offices and tandem  
4 offices is used jointly for local, extended area  
5 service (EAS), intraLATA toll, and interLATA  
6 switched access services. The total cost (or  
7 revenue requirement) of this equipment is allocated  
8 to the various services, based upon their relative  
9 minutes of use.

10

11 LEC costs associated with interoffice trunking  
12 facilities are likewise allocated to the above  
13 services, plus private line and special access,  
14 based upon relative use, expressed in terms of  
15 trunks, circuits, and miles. The costs allocated  
16 to each service drive the jurisdictional allocation  
17 of LEC costs.

18

19 As interexchange carriers begin to interconnect at  
20 the LECs' central offices and abandon existing LEC  
21 access connection facilities, the total LEC invest-  
22 ment in these joint facilities will not disappear;  
23 rather, this investment will be reallocated among  
24 the services and jurisdictions which remain, based  
25 on the usage that remains on these facilities. As



1 the interLATA access usage declines, more of the  
2 interoffice transport facility costs will be allo-  
3 cated to the remaining EAS and intraLATA toll  
4 services.

5  
6 When switched interconnection is adopted, jointly  
7 used facilities will see a decrease in switched  
8 access minutes, both state and interstate, and a  
9 corresponding increase in costs allocated to all  
10 other services, including EAS and local. The  
11 jurisdictional impact of switched interconnection  
12 will be much greater than the impact of special  
13 interconnection, both because of the sheer volume,  
14 and because switched interconnection will likely  
15 result in carriers interconnecting at each end  
16 office, bypassing the tandem altogether. As the  
17 interLATA switched access minutes decline because  
18 IXCs bypass LEC tandem switches, more of the joint-  
19 ly used switching and exchange trunking facility  
20 costs will be allocated to intraLATA toll, EAS, and  
21 local services.

22

23 Q. SHOULD ALL SWITCHED ACCESS TRANSPORT PROVIDERS BE  
24 REQUIRED TO FILE TARIFFS?

25 A. I believe that all participants in the market

1           should be allowed the same freedom to compete,  
2           under the same terms and conditions. Therefore, if  
3           the Commission finds it appropriate that the LECs  
4           should operate subject to tariffs, then all parties  
5           providing switched access transport should be  
6           subject to the same condition. If the competitive  
7           rivals are not required to file tariffs, then the  
8           LECs should be afforded the same degree of regula-  
9           tory latitude. A strong case can be made that the  
10          unilateral requirement imposed on LECs to file  
11          tariffs actually weakens the price competition  
12          between the LEC and other parties, lessening the  
13          benefits to the ultimate consumers.

14

15        Q.    IF THE COMMISSION PERMITS COLLOCATION, WHAT RATES,  
16            TERMS, AND CONDITIONS SHOULD BE TARIFFED BY THE  
17            LEC?

18        A.    As I have just testified, the answer to this ques-  
19            tion depends upon whether or not the Commission  
20            requires LECs to file tariffs in the first place.  
21            If firms such as ICI are not required to file  
22            tariffs, then GTEFL and other LECs should also not  
23            have to meet such requirements. If the latter is  
24            the case, then it is not necessary to tariff any  
25            rates, terms and conditions for expanded intercon-

1           nection, as they would be reached by negotiation.  
2           If tariffs are required, however, in terms of  
3           collocation, a legitimate argument can be made by  
4           LEC rivals that GTEFL and other LECs have market  
5           power in the provision of loops, including special  
6           access lines to end users, but not monopoly power;  
7           there are very legitimate and cost-effective loop  
8           substitutes available today and even more will be  
9           available in the future. However, whatever degree  
10          of market power that a LEC has in the provision of  
11          loops, it certainly does not have any market power  
12          in the provision of real estate or commer-  
13          cial/industrial floor space for collocation. Ac-  
14          cordingly, the market can be allowed to work very  
15          efficiently in the pricing of floor space, should  
16          the Commission be interested in pursuing such a  
17          policy.

18  
19          To the extent that a LEC has space available in its  
20          central offices and wishes to make that space  
21          available to third parties, rental rates can be  
22          established based on market conditions in the area  
23          for equivalent kinds of space. To the extent that  
24          central office space is differentiated from other  
25          floor space, some premium can potentially be ex-

1           tracted. Consider the consequences if the Commis-  
2           sion pursues this course of action. First, the LEC  
3           would be effectively replacing the Cost Allocation  
4           Manual (CAM) with a market-based transaction price.  
5           If there is no effective demand for the rental  
6           space made available, then the price will be quite  
7           low, approximating the marginal cost of the floor  
8           space. If the demand exists, then the price which  
9           would be charged, both to the LEC itself and to any  
10          other party seeking to rent the space is the same  
11          market-based price.

12  
13          Suppose a market price is established, even for the  
14          sake of argument including pure economic rent, and  
15          the demand for the space exceeds the quantity of  
16          space available. The first market action in re-  
17          sponse to this excess demand is to raise the price  
18          of the floor space until the quantity demanded is  
19          in balance with the quantity available. Of course,  
20          competitors will utilize the regulatory process to  
21          complain that the price is too high. If a firm  
22          making the allegation of "price gouging" is not  
23          happy with the LEC price for floor space, the firm  
24          can simply locate elsewhere and face no competitive  
25          harm in the terms of collocation pricing, since

1 GTEFL is maintaining its pricing policy of virtual  
2 collocation. Any appeals to the regulatory process  
3 for relief from the pricing of floor space should  
4 immediately be dismissed by the Commission as an  
5 arbitrary attempt to use the process to force delay  
6 on the LEC. Thus, in principle, the price of floor  
7 space should not be a tariffed service.

8

9 Q. HAVEN'T THE FCC AND THIS COMMISSION ALREADY RE-  
10 QUIRED THE TARIFFING OF FLOOR SPACE PRICING FOR  
11 SPECIAL ACCESS EXPANDED INTERCONNECTION?

12 A. Indeed, they have; that is why my answer to the  
13 previous question was that in principle the price  
14 of floor space should not be subject to tariffing  
15 requirements. As I also stated earlier, a number  
16 of issues have been taken out of this Commission's  
17 hands by the FCC's actions. Likewise, the Commis-  
18 sion has already answered a number of these ques-  
19 tions in Phase I of this proceeding. Since a price  
20 already exists for floor space, power, etc. in the  
21 interstate tariffs, GTEFL suggests that as a prac-  
22 tical matter, the prices, terms and conditions in  
23 the federal tariffs should be mirrored in the state  
24 tariffs. Further GTEFL recommends that no distinc-  
25 tion between the price of floor space for special



1 access transport and switched access transport be  
2 attempted.

3

4 Q. WHAT STANDARDS SHOULD BE ESTABLISHED FOR THE LECs  
5 TO ALLOCATE FLOOR SPACE FOR COLLOCATORS?

6 A. As I testified above, the market, if allowed to  
7 operate, will take care of this matter without any  
8 standards being established. The FCC and this  
9 Commission have already established a first-  
10 come/first-served policy for the allocation of  
11 floor space in a LEC central office. Again, as a  
12 practical matter, the standards already established  
13 for obtaining space in the LEC central offices for  
14 interstate expanded collocation should be mirrored  
15 in the Florida intrastate arrangements. Again no  
16 distinction should be made between switched and  
17 special access space.

18

19 No federal or Florida requirement for reciprocity  
20 has been placed on those parties seeking collocation  
21 from the LECs. As GTEFL has stated, we believe  
22 that reciprocal agreements are desirable, so  
23 that those parties seeking collocation with LECs  
24 should have the same standards imposed on them to  
25 allocate floor space as are imposed on the LECs.

1           This may call for an increased level of regulation  
2           to be imposed on the AAVs in Florida than has been  
3           exercised in the past.

4  
5       Q.    BASED ON YOUR TESTIMONY, WOULD YOU SAY THAT EXPAND-  
6           ED INTERCONNECTION FOR SWITCHED ACCESS TRANSPORT IS  
7           IN THE PUBLIC INTEREST?

8       A.    GTEFL agrees that expanded interconnection can be a  
9           desirable offering and can promote expanded choices  
10          to customers. Despite this conditional endorsement  
11          of the concept of expanded interconnection, GTEFL  
12          remains firmly convinced that the current policies  
13          associated with tariff rules and applications  
14          hinder the ability of the LEC to compete with its  
15          non-regulated or lightly regulated competitors.  
16          GTEFL strongly believes that access rules and rate  
17          structure changes are necessary either concurrently  
18          or preferably prior to the availability of expanded  
19          interconnection. Such pricing and regulatory  
20          reforms must include:

- 21           a)   geographic deaveraging of access services  
22               pricing;  
23           b)   increased flexibility in the timing of making  
24               price adjustments;  
25           c)   the ability to put together service packages

1 as end-to-end offers to customers, including  
2 the resale of AAV facilities, with the ability  
3 to go "off-tariff" to satisfy unique customer  
4 demands and service arrangements.

5 d) increased flexibility in the range of allow-  
6 able prices to LECs;

7 e) consistent treatment for all competitors in  
8 the marketplace by regulatory bodies with  
9 recognition that AAVs, ESPs, IXCs, cellular  
10 carriers, etc. are potential and actual LEC  
11 competitors as well as valued customers;

12 f) recognition that a firm can simultaneously be  
13 an ESP and an AAV, or an AAV and an IXC. Any  
14 rules established by the Commission should be  
15 blind to the identity of the party. The LEC  
16 does not have the ability, nor does it want  
17 to, perform the duties of the telephone po-  
18 lice.

19

20 Q. DOES CHAPTER 364, FLORIDA STATUTES, ALLOW THE  
21 COMMISSION TO REQUIRE EXPANDED INTERCONNECTION FOR  
22 SWITCHED ACCESS?

23 A. Having gone through all the rationale as to why and  
24 how switched access transport should be implemented  
25 if the Commission decides to do so, I must say that

1           it is not at all clear to me that current Florida  
2           law allows the Commission to proceed. I am not a  
3           lawyer and as an economist, I prefer to see compe-  
4           tition prevail in the marketplace for the benefit  
5           of consumers. However, under Chapter 364 of the  
6           Florida Statutes and this Commission's rulings in  
7           its AAV investigation (Docket No. 890183-TL), it is  
8           clear that AAVs in Florida can only provide private  
9           line services between affiliated entities and  
10          dedicated service between an end user and an inter-  
11          exchange carrier. The provision of switched access  
12          transport violates both of these allowances;  
13          switched transport is not a private line service by  
14          historical definition and it is certainly not being  
15          provided between affiliated entities. Neither is  
16          switched access transport a dedicated service  
17          between an end user and an IXC. Rather, it is, by  
18          definition, a switched service provided between a  
19          local exchange company and an IXC.

20  
21          As a general rule, current Florida law does not  
22          allow for AAVs to take advantage of expanded inter-  
23          connection for switched access. This certainly  
24          gives rise to inefficiencies in the marketplace so  
25          far as AAVs are concerned, but is similar in nature

1 to the prohibition placed on both GTEFL and on  
2 Southern Bell against competing in the interLATA  
3 business.

4

5 Q. DOES THIS COMPLETE YOUR TESTIMONY?

6 A. Yes, it does.

7

8

9

10

11

12

13

14

15

16



**RESUME**

February, 1994

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**CURRENT RESEARCH:**

Pricing and costing of evolving telecommunication networks and evaluation of welfare, allocative, and distributive effects of alternative pricing systems; Evaluation of alternative regulatory regimes for public utility services; Demand and cost analysis of telecommunications services; Experimental design of peak load pricing experiments; Evaluation of competition in telecommunications markets.

**CONSULTING & TESTIMONY PREPARATION:**

Virginia State Corporation Commission: design and development of forecasting methodologies for use by Commission in evaluating capital budgets of electric utilities in Virginia; (August, 1975 - June, 1976)

**Testimony/Exhibits/Comments Prepared and Filed before:**

Federal Power Commission (now FERC)  
Federal Communications Commission  
Virginia State Corporation Commission  
North Carolina Utilities Commission  
West Virginia Public Service Commission  
Public Service Commission of Wisconsin  
Public Utility Commission of Ohio  
Hawaii Public Utilities Commission  
California Public Utilities Commission  
Illinois Commerce Commission  
Kentucky Public Service Commission  
South Carolina Public Service Commission  
Georgia Public Service Commission  
Florida Public Service Commission  
Corporation Commission of Oklahoma

**Other Regulatory Appearances:**

NARUC Technical Education Conference for Commissioners  
New England Council of Public Utility Commissioners  
Instructor - NARUC Annual Regulatory Studies Program; Michigan State University  
Alabama Public Service Commission Telecommunications Conference

## **CONSULTING & TESTIMONY PREPARATION (continued):**

### **Other Regulatory Appearances (continued):**

Virginia State Corporation Commission Annual Conference  
South Carolina Public Service Commission Annual Conference

### **Legislative Testimony:**

Before the Indiana House Commerce Committee  
Before the Illinois Public Utilities Committee  
Before the Florida House of Representatives

## **PRESENTATIONS and PUBLICATIONS:**

"Econometric Estimation of Peak Electricity Demands", Journal of Econometrics, January, 1979 (with R.M. Spann);

"An Interventionist Theory of Public Utility Regulation", Paper presented to the Virginia Economic Association, March, 1976, Richmond, VA;

"Alternative Bidding Arrangements: A Study of Risk and Uncertainty in the Domestic Oil Industry", Paper presented to the Western Economic Association, June, 1976, San Francisco, CA. (with S. Millsaps);

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"The Financial Effects of Local Measured Service on the Operating Telephone Company", Paper presented to the Telecommunication Industry Workshop, March, 1979, Kansas City, MO;

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**PRESENTATIONS and PUBLICATIONS (continued):**

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"Local Loops as Barriers to Entry?", in Challenges for Public Utility Regulation in the 1980s; Michigan State University: December, 1980; also appearing in Proceedings of Workshop on Telecommunication Issues; Bureau of Utility Research, University of Connecticut: January, 1984; (with J. Alleman);

Universal Measured Service Policy Statement, GTE Service Corporation, March, 1980.

"No Main Is An Island", Paper presented to the Western Economic Association, July, 1981, San Francisco, CA. (with J. Alleman);

"Review of Peak Load Pricing: European Lessons for US Energy Policy", The Southern Economic Journal, July, 1981.

"Predicting Local Telephone Usage Under Measured Service", Public Utilities Fortnightly, August 5, 1982; (with G. Cohen and L. Garfinkel);

"The Economic Impact of Access Charges: Does Anyone's Ox Need to be Gored?", in Adjusting to Regulatory, Pricing, and Marketing Realities; Michigan State University, December, 1983, (with L. Cole);



**PRESENTATIONS and PUBLICATIONS (continued):**

"Metering Costs and Measured Service: An Evaluation of Efficiency Gains from Usage Sensitive Pricing of Telephone Service", Paper presented to the Institute of Public Utilities, December, 1983, Williamsburg, VA. Also in Changing Patterns in Regulation, Markets, and Technology: The Impact on Public Utility Pricing: Michigan State University, December, 1984.

"A Cost-Benefit Analysis of Alternative Local Service Pricing: Estimates From a US Telephone Company", in Local Telephone Pricing: Is There a Better Way?: Canadian Radio-Television & Telecommunications Commission and The Centre for the Study of Regulated Industries, McGill University, Third Quarter, 1984.

"An Overview of the Economic Impacts of Local Measured Service", Paper presented to the Kentucky Telephone Association, May, 1985, Lexington, KY;

"Exchange and Interexchange Rate Design", Presented to the NARUC Annual Regulatory Studies Program; Michigan State University, June, 1985.

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"Regulatory Reform: A Vision of the Future From the Perspective of a Local Exchange Company," Presented to the Tennessee Telephone Association Annual Conference, September 9, 1988; Chattanooga, TN.

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"Local Transport Competition: Interconnection and Price Reform - Expanding the Scope," paper presented to the Center for Public Utilities, College of Business Administration and Economics, New Mexico State University, March 11, 1992, Santa Fe, New Mexico.

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**"Regulation and Competition: Sweet Siblings or Evil Twins?,"** paper presented to the University of Kansas 1992 Fall Stakeholders Symposium on Telecommunications, November 17, 1992, Lawrence, Kansas.

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**"Regulation and Competition: Bet You Can't Have Just One,"** paper presented to the University of Kansas 1993 Fall Stakeholders Symposium on Telecommunications, November 18, 1993, Lawrence, Kansas.

**"Competition and Rivalry in Telecommunications Markets: Definitional Issues,"** invited paper presented to NARUC Winter Meetings, February 24, 1994; Washington, D.C.

## **COURSES TAUGHT**

Principles of Economics  
Introduction to Econometrics  
Public Policies Toward Business  
Introduction to Public Choice Theory

Industrial Organization  
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition of Intermedia )  
Communications of Florida, Inc. ) Docket No. 921074-TP  
for Expanded Interconnection for ) Filed: December 13, 1993  
Alternate Access Vendors Within )  
Local Exchange Company Central )  
Offices )  

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**RESPONSE BRIEF OF GTE FLORIDA INCORPORATED**

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Petition of Intermedia )  
Communications of Florida, Inc. ) Docket No. 921074-TP  
for Expanded Interconnection for ) Filed: December 13, 1993  
Alternate Access Vendors Within )  
Local Exchange Company Central )  
Offices )  
\_\_\_\_\_ )

**RESPONSE BRIEF OF GTE FLORIDA INCORPORATED**

GTE Florida Incorporated (GTEFL) hereby files its Response Brief in this proceeding. In accordance with the Commission's Order number PSC-93-1680-PCO-TP, GTEFL will address only one issue: whether a physical collocation mandate raises federal or state constitutional questions regarding the taking of local exchange company (LEC) property. In its initial Brief, GTEFL explained that a physical collocation mandate would be a taking in violation of both the Florida and United States Constitutions. No party has effectively rebutted this argument.

Most of those opposing GTEFL's position declined to treat the constitutional takings issue in any depth, advancing only conclusory position statements. Intermedia Communications of Florida, Inc. (ICI) and Time Warner AXS of Florida, L.P. (Time Warner) made somewhat lengthier (though no more convincing) arguments. Because of their relatively more detailed statements, this Response will focus on ICI's and Time Warner's contentions.

I. The FCC's Constitutional Analysis Is Irrelevant to Evaluation of this Commission's Actions

At the outset, it is important to clarify the nature of the violations that will occur if this Commission mandates physical collocation. A state physical collocation rule would implicate both state and federal constitutional provisions (including the Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, and the Florida Constitution, Article 10, Section 6 and Article 1, Section 9). ICI, however, appears to misunderstand the interplay of the state and federal aspects of the constitutional question.

Under its discussion of the federal constitutional aspect of the takings issue in this proceeding, ICI refers to the FCC's analysis of its own decision mandating physical collocation. (ICI Brief at 11-12.) ICI stresses the FCC's finding that its ruling does not violate the Fifth Amendment. Any consideration of the FCC's reasoning is, however, irrelevant to the debate about constitutionality of a state physical collocation mandate.

Just because the FCC has required physical collocation does not make it constitutionally permissible. As the Commission knows, GTE and a number of other parties have appealed the FCC's physical collocation decision on constitutional grounds. The Bell Atlantic Tel. Companies, et al. v. FCC, et al., No. 92-1619 (D.C. Cir. filed Nov. 25, 1992). A judicial ruling, rather than the FCC's legal conclusions about its own actions, will determine the constitutionality of the FCC's Order.



In any case, the question for this Commission is not whether the FCC's action was constitutionally permissible; rather, it is whether a state physical collocation mandate would be lawful. It is not true, as ICI states, that "if the FCC's plan for mandatory collocation passes constitutional muster, then there appears to be no state constitutional question triggered by an intrastate physical collocation requirement." (ICI Brief at 12.) Even if the FCC's plan is held to be constitutional, the validity of any state physical collocation mandate would need to be separately evaluated.<sup>1</sup>

As GTEFL explained in its Brief, two questions direct the constitutional assessment 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? The FCC has claimed takings authority under the federal Communications Act. As discussed in section II. B. of this Response Brief, this Commission will need to cite a specific Florida statute authorizing it to take property if it wishes to implement a state physical collocation mandate. Any Court of Appeals ruling as to whether the FCC possesses takings power will have no bearing on whether this Commission has been delegated takings authority by the Florida Legislature. If it has

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<sup>1</sup> Time Warner also appears confused about the nature of the constitutional inquiry in this proceeding. Its constitutional analysis concludes that "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." (Time Warner Brief at 11-12.) The issue presented in this proceeding is not the federal or state constitutionality of the FCC's actions, but rather the constitutionality of a physical collocation mandate by this Commission.

not been given this power, a Commission order mandating physical collocation will violate both state and federal constitutional provisions. This is true regardless of whether the FCC's mandatory physical collocation is ruled constitutional. GTEFL thus urges the Commission to reject any suggestions that it can shortcut its own constitutional analysis by reference to the FCC's logic.

## II. Mandatory Physical Collocation Is an Unauthorized Taking of Private Property

As GTEFL discussed in its Brief, mandatory physical collocation is a per se physical taking of LEC private property for which this Commission has no statutory or constitutional authority. (GTEFL Brief at 3-7.) The issue is not one of just compensation, as some parties have argued. Rather, it is the fundamental question of whether the government has the right to take the LECs' property at all.

### A. Mandatory Physical Collocation Is a Per Se Taking of the LECs' Property

ICI is correct in stating that for the LECs to argue that mandatory physical collocation is unconstitutional, they must establish that forced physical collocation is a taking. (ICI Brief at 12.) As GTEFL demonstrated in its Brief, this point is easily made.

"[A] permanent physical occupation authorized by government is a taking without regard to the public interests it may serve."

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); accord Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). "[R]egulations that compel the property owner to suffer a [permanent] physical invasion of his property" constitute a taking "no matter how minute the intrusion." Lucas at 2893.

Florida courts have explicitly recognized these principles. See e.g., Storer Cable T.V. of Florida, Inc. v. Sunnervinds Apartments Associates, Ltd., 493 So. 2d 417 (1986); Beattie et al. v. Shelter Properties, 457 So. 2d 1110 (Fla. 1st DCA 1984). In Storer, for example, the Florida Supreme Court struck down a state statute giving cable television companies the right to place equipment and wiring on apartment complex property over the objections of the property owner. The Court relied on Loretto to find an impermissible, per se taking on both state and federal constitutional grounds. It recognized that permanent physical occupation of another's property "is perhaps the most serious form of invasion of an owner's property interests." Storer, 493 So. 2d at 1036. It further confirmed that "[a] taking results regardless of the size of the occupied area." Storer, 493 So. 2d at 419. The Court rejected arguments that the physical invasion was only temporary, since the landlord would be required to give the cable television company "exclusive possession and use of a portion of his property" once a tenant requested service. Id. at 419.<sup>2</sup>

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<sup>2</sup> As GTEFL noted in its Brief, a taking will have occurred to the extent that an owner can no longer own and enjoy his property as he  
(continued...)

The invasion of LEC property involved in mandatory physical collocation is undeniably the type of permanent physical occupation that amounts to a per se taking. As the U.S. Supreme Court has stated, "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." Loretto, 458 U.S. at 437. Under a mandatory collocation regime, uninvited collocators will physically install their transmission equipment within LEC central office buildings, maintain dominion and control over the portion of the building unwillingly dedicated to their exclusive use, and secure easements for ingress and egress through other portions of the building to maintain and repair their equipment. The uninvited physical occupation would be permanent in the relevant sense, since it would continue for indefinite duration, once interconnection was requested.

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<sup>2</sup>(...continued)

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). As a significant interference with property rights, a taking is thus distinguished from merely consequential injuries or trivial interferences. See 26 Am. Jur. 2d Eminent Domain § 157.



1. Time Warner Has Misapplied the Relevant Law

In an apparent attempt to preempt arguments based on Loretto and its progeny, Time Warner cites that decision as the sole legal authority for its conclusion that mandatory physical collocation would not effect a taking. (Time Warner Brief at 6.) Time Warner's tortured interpretation of Loretto is plainly misleading. Citing Loretto, Time Warner states that the takings question in this case should be analyzed by means of a three-part balancing test. (Time Warner Brief at 6.) This is an incorrect statement of the Loretto holding.

Time Warner has conveniently ignored the whole point of Loretto: that a multifactor balancing test is not appropriate in cases of physical occupation. As GTEFL has noted, Loretto affirms that a per se taking will be found in all cases where government action requires permanent, physical invasion of private property, regardless of the public interests that may be served. After a physical invasion of property has been found, there is no need to conduct any further analysis. See Patrick R. Scott, State and Local Regulations: Are We Being Taken?, Fla. B. J., Nov. 1993 at 89, 90-91. A balancing test will be used only in cases of "nonpossessory governmental activity." Loretto, 102 S. Ct. at 3179. The element of physical invasion inherent in mandatory physical collocation precludes any credible argument that it is "nonpossessory." In short, Time Warner's analysis deserves no attention, since it misstates the law that applies in cases of permanent physical occupation.



## 2. ICI Has Ignored the Relevant Law

In contrast to Time Warner, ICI cites no law to support its position that mandatory physical collocation does not effect a taking. Instead, ICI creates its own theory of "occupation by consent." (ICI Brief at 14.) Under this theory, ICI argues, the LECs consented to the compelled occupation of their property by interconnectors because of the regulatory bargain they struck long ago with the state: the LECs would be permitted a monopoly and a fair rate of return on investment, while the Commission could control the use of LEC facilities in the provision of monopoly services. ICI further reasons that because "telecommunications facility" is defined to include real estate, the Commission may compel LECs to permit others to occupy that property. (ICI Brief at 13-14.) This novel legal theory ignores the already existing law that resolves the taking question.

GTEFL does not dispute that its property is affected with the public interest, and that the Commission may regulate the LEC's facilities and operations. But it defies logic--as well as established legal precedent--to suggest that the State's power to regulate the LEC includes authority to appropriate its property. Certainly, the LECs never "consented" to an unconstitutional exercise of regulatory authority.

There is no exception to the Loretto per se rule for property owned by a regulated public utility. In fact, it is a longstanding principle that the constitutional protection against unlawful takings "applies as well to private property devoted to a public

use." Western Union Tel. Co. v. Penn. R.R., 195 U.S. 540, 569 (1904) (cited with approval in Loretto, 458 U.S. at 430-31.) For example, a railroad's real property (including its "grounds, station, platforms, [and] driveways")--though used in its common carrier operations and "subject of regulation in the public interest"--nevertheless "belongs to" the railroad and is entitled to the same constitutional protection as any other private property. Delaware, L. & W. R.R. v. Morristown, 276 U.S. 182, 193 (1928). Despite broad regulatory power, the State cannot rely on "public interest" justifications to undermine an owner's constitutionally protected property rights. Northern Pacific Ry. v. North Dakota, 236 U.S. 585, 595 (1915).

The Supreme Court's application of the Loretto principles in FCC v. Fla. Power Corp., 480 U.S. 245 (1987), is particularly relevant to the instant issue. That decision held that the Pole Attachments Act did not effect a per se taking of public utility company property. It stressed that the Act did not give cable operators "any right to occupy space on utility poles" and did not "prohibit[] utility companies from refusing to enter into attachment agreements with cable operators." Id. at 251. The Court explained, however, that the analysis would differ "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." Id. at 252 n. 6. The key element of compulsion that was absent in the Florida Power case is, of course, the defining characteristic of mandatory physical collocation.

As GTEFL discussed in its Brief, mandatory physical collocation will take away the LECs' right to exclude others from their central offices, the core components of the telecommunications infrastructure. (See GTEFL Brief at 7-14.) This right to exclude others is "the most fundamental property right." Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 604 (11th Cir. 1992), cert. denied, 113 S. Ct. 182, 121 L. Ed. 2d 127 (1992). See also Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Nixon v. United States, 978 F.2d 1269, 1286 (D.C. Cir. 1992). There is a crucial distinction between "regulation affecting one's relationship to those voluntarily admitted to property versus government action compelling an owner to allow continuous access to third parties." Nixon at 1286 (emphasis in original). See also Cable Holdings at 610; Yee v. City of Escondido, 112 S. Ct. 1522, 1528-31 (1992).

To accept ICI's argument that mandatory physical collocation is not a taking, the Commission would need to ignore all the relevant legal authority. The basis for ICI's position is that forced occupation of LEC property by strangers is merely one point on the continuum of the Commission's regulatory authority. In ICI's view, mandated physical collocation is no different from directing the LEC to allow other companies' transmissions to travel over its circuits. This analogy between a transitory use of electromagnetic spectrum and a permanent physical occupation of private property is indefensible. Contrary to ICI's belief, there is, indeed, a firm legal distinction between a per se "taking by

occupation"<sup>3</sup> and other forms of regulation that do not interfere with constitutionally protected property interests.

### 3. Compensation Will Not Avoid a Taking

Several parties appear to believe that any potential constitutional problems associated with mandatory physical collocation will be remedied if the Commission provides a tariff mechanism under which LECs may receive some payment from collocators for their use of the LECs' property. (Briefs of: AT&T at 7; FCTA at 4; ICI at 11-12; Teleport at 5; Time Warner at 11.) This argument shows a fundamental misunderstanding of basic legal principles. Although the Florida and U.S. Constitutions prohibit the taking of private property without just compensation, the payment of compensation (just or unjust) does not transform a taking into something else. "The fundamental...question of constitutional right to take cannot be evaded by offering 'just compensation.'" Ramirez de Arellano v. Weinberger, 745 F.2d 1500 1524 n.95 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985).

Further, while compensation is not at issue here, it is worth note that this Commission does not have the power to determine what is just compensation.<sup>4</sup> The measure of compensation in takings

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<sup>3</sup> ICI's "taking by occupation" terminology only affirms GTEFL's argument that mandatory physical collocation is a par se taking. Loretto emphasizes throughout that occupation is the key indicator that a taking has occurred.

<sup>4</sup> The FCC has also acknowledged court holdings that the agency "does not have power to determine just compensation." Expanded  
(continued...)



cases is a matter for the judiciary. "It is well settled that the determination of what is just compensation for the taking of private property for public use 'is a judicial function that cannot be performed by the Legislature either directly or by any method of indirection.'" Daniels v. State Road Dep't, 170 So. 2d 846, 851 (1964), citing Spafford v. Brevard, 110 So. 451, 455 (1926).

It is also significant that the customary standard for compensation in takings cases is fair market value.<sup>5</sup> "The full compensation demanded by our state constitution requires...that the condemning authority compensate the property owner for the full market value of the property taken." Dep't of Transp. v. Fortune Federal Savings and Loan Ass'n, 532 So. 2d 1267, 1270 (1988). Under this standard, a cost-based mechanism for regulating physical collocation rates (such as the FCC has established) would be constitutionally unacceptable.

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<sup>4</sup>(...continued)

Interconnection with Local Telephone Company Facilities, Report and Order ("Special Access Expanded Interconnection Order"), FCC 92-440, CC Docket No. 91-141, at para. 240 n.559 (Sept. 17, 1992) (citing Fla. Power Corp. v. FCC, 772 F.2d 1537, 1544-46 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (1987)). The FCC noted (id.) that it has been the rule for at least a century that determination of compensation in takings cases is for the judiciary. Monongahela Navigation Co. v. United States, 148 U.S. 312, 317 (1893).

<sup>5</sup> See, e.g., United States v. 564.54 Acres of Land, 99 S.Ct. 1854, 1859-60, 441 U.S. 506, 515-517 (1979); Dade County v. General Waterworks Corp., 267 So. 2d 633, 640 (1972). A market-based standard factors in all elements that would be considered in negotiations between a willing buyer and a willing seller. Board of Comm'rs of State Institutions v. Tallahassee Bank and Trust Co., 100 So. 2d 67, 69 (Fla. 1st DCA 1958). As the Commission knows, GTEFL has advocated a market approach to determining floor space prices for physical collocation. (GTEFL Brief at 31.)



B. The Commission Has No Authority to  
Take the LECs' Private Property

The taking of private property is "one of the most harsh proceedings known to the law." Baycol, Inc. v. Downtown Development Authority of the City of Fort Lauderdale, 315 So. 2d 451 (1975). As such, the Supreme Court has long held that statutes shall not be read to delegate the power to take property unless they do so "in express terms or by necessary implication." Western Union Tel. Co. v. Penn. R.R., 195 U.S. at 569. See also Regional Rail Reorganization Act Cases, 419 U.S. 102, at 127 n.16, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974). Florida courts have repeatedly confirmed that no state agency or private entity may take property in the absence of a specific statutory delegation of authority. District Board of Trustees of the Daytona Beach Community College v. Allen, 428 So. 2d 704 (Fla. 5th DCA 1983); see also 21 Fla. Jur. 2d Eminent Domain § 4 and cases cited therein. An agency may exercise takings authority "only in compliance with the statute giving it such power." Tosohatchee Game Preserve, Inc. v. Central and Southern Fla. Flood Control District, 265 So. 2d 681, 683 (1972). Any such statute will be strictly construed against the agency asserting the takings power. Nye v. City of Ocala, 608 So. 2d 15, 17 (1992); Tosohatchee, 265 So. 2d at 682; Brest v. Jacksonville Expressway Authority, 194 So. 2d 658, 660 (Fla. 1st DCA 1967), aff'd per curiam, 202 So. 2d 749 (1967).

Parties supporting a physical collocation rule believe that even if this requirement works a taking, the taking is within the Commission's statutory authority. To this end, Teleport contends

that "[e]ven if [mandatory physical collocation] were determined by a court to be a taking, the Florida Commission has the same authority as the FCC to order collocation for a public purpose." (Teleport Brief at 5.) Time Warner states that if "takings claims prove meritorious," it is nevertheless "unquestionable that the FPSC through Chapter 364 may require interconnections or even require physical occupation to implement the public good." (Time Warner Brief at 10.) As noted, ICI believes that the "taking" of the LEC's property is "a fundamental part of the regulatory bargain of Chapter 364." (ICI Brief at 15.)

Despite their conviction that the Commission has the legal authority to compel physical occupation of the LEC's property, no party cites any provision expressly conferring takings power on the Commission. Vague, general references to Chapter 364 do not satisfy the legal imperative of specific delegation of authority. As GTEFL pointed out in its Brief, the Legislature has conferred takings power on numerous state agencies and other entities.<sup>6</sup> In all of these cases, the delegation is explicit and unambiguous. The power is carefully circumscribed to allow taking of private

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<sup>6</sup> See, e.g., the following sections of the Florida Statutes (1993): 361.05 (authorizing natural gas companies to take property for pipelines and works); 373.1961(7) (granting takings power to governing boards of water management districts); 235.05 (giving school boards the right to take property for school purposes); 155.15 (permitting counties to take property for hospital purposes); 421.12 (granting housing authority the right to take property for slum clearance); 361.07 (giving entities operating sewer systems the authority to take property); 333.12 (giving political subdivisions the power to take property for airport purposes); 337.27 (allowing Department of Transportation to use eminent domain to establish and maintain highway systems); 250.40(9) (permitting the Armory Board to take property for military installations).

property only for the public purpose specified in the statute. Basic principles of statutory construction compel the conclusion that the absence of any statute expressly granting the Commission the power to take property means that no such authority exists. If the Legislature had intended to confer takings power upon the Commission, it could easily have done so, as it has in so many other instances.<sup>7</sup>

**1. The Power to Regulate in the Public Interest  
Does Not Include the Right to Take Private Property**

The Commission should reject any contentions that Commission authority to order expanded interconnection necessarily implies the power to compel occupation of the LEC's property. For instance, FCTA states: "[E]xanded interconnection is in the public interest, and requiring it is within the Commission's statutory authority. Mandating physical collocation, therefore, constitutes

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<sup>7</sup> It is, moreover, "a fundamental canon of statutory construction" that "courts must avoid any statutory interpretation which creates substantial constitutional difficulties." Cable Holdings, 953 F.2d at 602. See also, e.g., Frisby v. Schultz, 487 U.S. 474, 483, 108 S. Ct. 2495, 2501, 101 L. Ed. 2d 420 (1988); United States v. Brown, 731 F.2d 1491, 1494 (11th cir. 1984). In Cable Holdings, the Court was asked to rule on cable companies' authority, under the 1984 Cable Act, to compel access to the interiors of apartment buildings. The Court rejected a construction of the Act that would have permitted such access, relying heavily on the fact that such an interpretation would raise serious constitutional problems under the Fifth Amendment Takings Clause, in accordance with Loretto. Because the ambiguous language at issue could be construed without raising constitutional problems, the Court was bound to do so. This rule directly applies in the instant case. The Commission is obliged to reject contentions that any provision of Chapter 364 implies takings authority, because such an interpretation would raise constitutional concerns.

lawful governmental regulation." (FCTA Brief at 4.) This logical leap is legally untenable.

GTEFL has not disputed the Commission's authority to devise special access interconnection rules. (GTEFL Brief at 3.) To this end, GTEFL recognizes the Commission's power to take actions to maintain and enhance this State's telecommunications infrastructure and to foster competition and innovation. (See Brief of ICI at 9-10, citing §§ 364.01, 364.03, & 364.15.) But the power to regulate in the public interest simply does not imply the power to take private property. If it did, every regulatory agency would have authority to confiscate the property of the businesses it regulates. Commission reliance on its general regulatory powers--rather than specific statutory authority--to ground takings power would be an exceptionally broad and unprecedented exercise of discretion.

2. Authority to Order Connections Between Carriers Does Not Include Authority to Take Property

In their Briefs, Time Warner and ICI mention Florida Statutes section 364.16. (Time Warner Brief at 7-8; ICI Brief at 10.) Because GTEFL expects some parties' Response Briefs to focus more closely on this section in an attempt to support a mandatory physical collocation rule, some discussion of the provision is warranted here.

Section 364.16 states:

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 and 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 to 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 in force in the future and fix the rates and charges by order to be served upon the company or companies affected.

This provision enables the Commission to order carriers to provide electronic transmission links with other carriers. Since its initial adoption in 1913, neither this Commission nor any other entity has suggested that it encompasses the compelled physical occupation of one carrier's property by another.

Nor can it be argued that section 364.16 (or any other Florida Code provision) necessarily implies Commission authority to order mandatory physical collocation. Even if the Commission is authorized to require connections between carriers, there is no basis for the further inference that it may freely implement interconnections by ordering the permanent physical occupation of LEC property. Mandatory physical collocation is not necessary to achieve the asserted pro-competitive goals of expanded interconnection. Indeed, two of the five FCC Commissioners expressed doubt that mandatory physical collocation was even useful, much less necessary.<sup>8</sup> As GTEFL discussed in its Brief, expanded interconnec-

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<sup>8</sup> In addition to raising the serious constitutional concerns associated with a physical collocation mandate, Chairman Sikes noted that the FCC's expanded interconnection Order failed to explain "what problems the Commission is attempting to resolve" by requiring physical collocation. Special Access Expanded Interconnection Order, Sikes Statement. Commissioner Quello likewise  
(continued...)



tion is best accomplished through negotiated arrangements, rather than an inflexible requirement of either physical or virtual collocation. (GTEFL Brief at 7-22.)

Section 364.16 cannot support a mandatory physical collocation order for another reason. The Commission has accepted a stipulation among all the parties in this proceeding that any entity should be allowed to interconnect. (Stipulation on Issue 9.) As diverse interests have pointed out, it would be undesirable and probably infeasible to try to draw functional distinctions among potential interconnectors. However, section 364.16, by its terms, empowers the Commission to order connections only between "telecommunications companies." If the Commission purports to order physical collocation on the basis of section 364.16, it would therefore have no choice but to institutionalize these artificial distinctions in its expanded interconnection rules. Thus, for example, end users, cable television companies, and firms serving only other telecommunications companies would be denied the right to interconnect, because they are not considered to be telecommunications companies under the statute. See § 364.02(7), Fla. Stat. (1993). No amount of creative statutory construction can avoid the explicit limitation of section 364.16.

Finally, any interpretation of Chapter 364 to find takings authority would produce absurd results never contemplated by the State Legislature. For example, if this Commission authorizes

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<sup>8</sup>(...continued)  
stated that physical collocation "could well be a solution in search of a problem." *Id.*, Quello Statement.

permanent physical occupation of LEC central offices, it will presumably order the LECs to file tariffs resembling a commercial real estate lease. These tariffs would include charges for such non-communications services as floor space rental, labor and materials employed in building out partitioned space to the collocator's specifications, heating, ventilation, cooling, and electric power. To describe this result as odd is an understatement. It converts telecommunications companies into real estate landlords, forcing them to tariff items that cannot be characterized as communications services under any common-sense meaning of that term. This result cannot have been what the Legislature envisioned when it enacted Chapter 364. Certainly, there is nothing in the legislative history to support the strained analysis that would be necessary to sanction mandatory physical collocation.

### III. Negotiated Interconnection Is the Only Way to Avoid Constitutional Violations

Because this Commission lacks the requisite specific authority to take the LEC's private property, a mandatory physical collocation cannot survive a constitutional challenge. The only way to avoid constitutional problems and a costly and protracted appeal is to permit LECs and interconnectors to determine together whether expanded interconnection will be furnished through physical or virtual collocation in a particular instance. This approach circumvents any constitutional concerns because collocation terms

will be voluntarily negotiated, rather than forced upon the parties. As GTEFL pointed out in its Brief, a policy of negotiated arrangements will minimize the potential disruption if the FCC's mandatory collocation ruling is struck down on appeal, as the Company believes it will be. Negotiated collocation configurations would remain in place, while compelled physical collocation arrangements would be subject to dismantling after the physical collocation mandate is overturned. (GTEFL Brief at 7.)

As GTEFL discussed at length in its Brief, negotiated collocation is superior on policy, as well as legal, grounds. (GTEFL Brief at 7-22.) The fact that physical collocation arrangements exist today in Florida, in the absence of any mandate, disproves any argument that a physical collocation rule is necessary to ensure fair negotiations.

#### IV. Conclusion

GTEFL's constitutional arguments are sound and based on firmly established legal precedent. In contrast, parties which favor mandatory physical collocation have been compelled to invent novel legal theories and mischaracterize applicable law in an effort to support their positions. Their constrained analyses cannot conceal the fact that mandatory physical collocation is a taking of private property for which the Commission has no authority. If this Commission determines that expanded interconnection is warranted, the only acceptable course for both legal and policy reasons is to permit LECs and interconnectors to negotiate their own collocation arrangements.

Respectfully submitted on December 13, 1993.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of GTE Florida Incorporated's Response Brief in Docket No. 921074-TP was sent by U. S. mail on December 13, 1993, to the parties on the attached list.

  
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