MCI WorldCom Network Services v. Mastec, Inc.

MARSHAL: PLEASE RISE . HEAR YE.HEAR YE.HEAR YE.THE SUPREME COURT OF THEGREAT STATE OF FLORIDA IS NOW IN SESSIO N.ALL WHO HAVE CAUSE TO PLE A, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD . GOD SAVE T HESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.PLEASE BE SEATED.

CHIEF JUSTICE: G OOD MORNING , LADIES ANDGENTLEMEN, AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST C ASE ON TODAY'S DOCKET, IS M CI WorldCom NETWORK SERVICES V E RSUS MASTEC AS YOU CAN SEE, JUSTICE WELLS IS NOT PARTICIPAT IN G.HE IS RECUSED ON THIS CASE. SO YOU MAY PROCEED IF THE PARTIES ARE READY.

MAY IT PLEASE THE COURT. I AM JA ME S PROSZEK , REPRESENTING THE PLAINTIFF AND APPELLANT M C I. THERE ARE TWO CRITICAL ISSUES BEFORE THE COURT IN THIS CASE TODAY. AND OTHERS GET A F REE R IDE UNDER THE TABLE , WHI CH MASTEC AND OTHERS CONCEDE I S UNDER THE T A BLE CU TS .

ARE YOU PROP OSING T H AT WE SHOULD HAVE A DIFFER ENT R ULE OF LAW IN THE TELECOMMUNICATION INDUSTRY, OR SHOULD IT BE THE SAM E WITH REGARD TO ALL CH AT HE WILLS AND IF SO TO ALL CHATTELS AND IF SO, WH Y SO , AND IF NOT, WHY NO T?

WE ARE NOT PROP OSING THAT THERE BE A DIFFERENT RULE FOR TELECOMMUNICATIONS CABLES. IN FA CT , THAT IS OUR PREMISE THAT TELECOMMUNICATIONS CABLES SHOULD BE TREATED NO DIFFERENTLY THAN FLOR IDA LAW HAS T R EATED PROPER TY INCLUDING COMMERCI AL PROPERTY, INCL UDING THE MORTELIERO CASE BACK IN 1966.

BUT YOUR QUESTION AS TO A CHATTEL OR PIECE OF CABLE OR CAPACITY OF A CABLE , THAT IS REALLY WHAT THIS FIGHT COMES DOWN TO AND IS ABOUT , ISN 'T IT?

NO. IT ISN'T THE CAB LE. WE LOST THE USE OF A TELECOMMUNICATIONS CABLE THAT RAN BETW EEN TWO TERMINALS IN MI AMI ICH T THE WAY YOU REPLACE THAT CABLE IS YOU HA VE TO DETERMINE HOW MUCH TRA FFIC THAT CABLE IS CAPABLE OF CARRYING ARE A NO OR IN THIS CASE , NOT HOW MUCH CAPACITY B U T HOW M UCH PRIOR TO THE CUT , CA LLED A DS-3, AND SO WHAT WE HAVE DONE IS GONE OUT AND DETERMINE WHAT IT WOULD C OST TO GET THE SAME T YPE OF PROPERTY TO REPLACE THE CABLE. YOU WOULD N EED SOME THING IN THE VICINITY O F 18 00 DS-3S.

IS THE CABLE SOLE LY DEDICATED FOR REDU NDANT PURPOSES?

THERE ARE ACTU ALLY TWO CABLES, ONE THAT R UNS A NORTH ROUTE THRO UGH MIAMI BETWEEN TWO TERMINALS AND THEN A SE COND RO UTE THAT RUNS THROUGH AN INTERMED IATE TERMINAL IN DOWNTOWN MIAMI ON BISCAYNE BOULEVARD , AND THEN BACK TO THE TER MINAL .

SO AT ONE PO INT, WITH ONE OF THESE CABLES NOT BEING USED, IS THAT HOW YOU WERE ABLE TO REROUTE IT?

IT WAS NOT COMPLETELY EMPTY. HOWEVER, YOU HAVE TWO SEPARATE AND DISTINCT ROUTES ,

EACH ONE CAPABLE OF FUNCTIONING INDEPENDENTLY.

TO DISTINGU ISH TWO QUESTIONS. PURELY EMERGENCY REDUNDANT CAPACITY AS OPPOSED TO EXCESS CAPA CITY, L IKE POWER COMPANIES USE.

RIGHT.

THAT IS ONE QUES TION I HAVE. AND THE SE COND ONE , YOU CAN ANSWER, I THINK, BOTH O F THEM, I F YOU HAVE TO SHUT DOWN A CABLE AND REP AIR I T,THEN, DO YOU HAVE TO GO OUT AND PROVIDE ADDI TIONAL O R PAY FOR WH AT YOU ARE AS KING THE APPELLEES TO DO IN THIS CASE?

THE ANSWER TO THEQUESTION, THE SECOND QUESTION, IS , NO, WE DON'THAVE TO SHUT DOWN IF WE HAVE TO REPAIR A CABLE IN THIS PARTICULAR CIRCUMST ANCE, AND THE REASON IS BECA USE, WH EN WE INSTALLED THE SYSTEM, WE INSTALLED TWO CABLES. WE INSTALLED THE NO RT H ROUTE. WE INST ALLED THE S O UTH ROUTE. NOW, IS ONE COMP LETELY DORMANT W H ILE ALL TRAFFIC TRAVERSES THE OTHER ROUTE? NO. BUT NEITHER CABLE CAN BE FILLED B E YOND 50 PERCENT OF ITS CAPACITY , BECAUSE OF THE NEED FOR THE DE DICATED SPARE. FOR EX AMPLE , I COULD PUT ALL 100 PERCENT OF THE TRAFFICON THE NORTH ROUTE, WHI CH IS THE ROUTE THAT M A STEC SEVER ED AND PUT THE REMAIMING TASK ON THE SOUTH ROUTE OR EXCUSE ME, KE EP THE SOUTH ROUTE COMPLETELY EMPTY. WE DIDN'T DO. THAT WHAT WE HAVE DONE I S SPLIT THE TRAFFIC BETWEENTWO, BUT WE CAN NEVER HAVE MORE TRAFFIC THAN 50 PERCENTOF THE CAPACITY OF EACH CABLE, BECAUSE WE DO HAVE THAT DEDICATED SPARE CAPACITY.

SO IN E ITHER CIRCUMSTANCE , YOU COULD, E VEN IF YOU HAD HAD ALL OF THE TRAFFIC O N ONE, IF SOMETHING H ADHAPPENED TO IT, YOU WOULD STILL BE ABLE, SO IN EITHER CIRCUMSTANCE, YOU ARE ABLE TO REROUTE THE TRAF FIC.

THAT'S CORR ECT.

AND SO I G UESS MY QUESTION HERE , IS , THEN , THE MASTEC DID, IN FACT , OR WERE , IN FACT , ORDE RED TO PAY FOR THE REPAIR OF THAT CABLE .

CORRECT.

IT WAS DOWN FOR 97 HOURSOR SOMETHING TO THAT E FFECT.

THAT'S CORR ECT.

OKAY.

I AM AT A LOSS AS TO WHY THEY SHOULD PAY FOR THAT.

SHOULD MCI AND GET - - .

HAD THEY DONE SO , ANDTHEY DID DO SO , AND SO THEY DID NOT SUFFER ANY KIND O F LOSS BY DOING SO.

I RESPECTFULLY DISA GREE WITH YOUR HONOR.

OKAY. SO WHAT LOSS, IN MONETARY TERMS, DID THEY SUFFER ANY LOSS IN MO NETARY TERMS?

THEY, IN FACT , RENT ED A SPARE CABLE IN AD VANCE AND PAID $9.65 MILL ION TO HAVE A SEPARATE SPARE ROUTE AVAILABLE.THAT WAS PAID BEFORE THE CUT.

THOSE KINDS OF COSTS A REPASSED ON TO THE CUSTOMERSIN THE RATES THAT A RECHARGED ,

CORRECT?

TO SOME EX TENT THEY MAY BE BUT NOT COMPL ETELY .

SO THAT $ 9. 6 MILLION , W HYIS IT THAT YOU ARE ASKING MASTEC TO PAY AL MOST 10 PERCENT OF THAT FOR CUT TING ONE CABLE AT ONE T IME .

WE ARE ASKI NG THAT THAT BE THE MEASURE. WE ARE NOT ASKING THIS C OURTTO SAY THAT MASTEC HAS T O PAY

WHY WOULD THE ME ASURE BE LOST OPPORTUNITY, LOST PROFIT, LOST RENTAL VALUE FOR YOU RENTING THE LINE , NOT WHAT YOU WOULD HAVE T O GO OUT AND PURC HASE AN OTHER LINE FOR?

THAT IS CERTAINLY O NEMEASURE OF DAMAGES OR M ORE MEASURES OF DAMAGE S THAT ARE APPROPRIATE UNDER FLORIDALAW.

WOULD YOU AGRE E OR DISAGREE THAT THE LOSS OF USE DAMAGE DOES NOT DICT ATOR MANDATE LOSS OF THE VALUE THAT IT WOULD COST YOU TO GO OUT AND RENT SOMETHING THAT, IN THIS CASE YOU DIDN'T HAVE TO RENT. THAT THERE ARE VARIOUSMEASURES TO MEASUR E LOSS OF USE.

THERE ARE UNQUESTIONABLY VARIOUS MEASURES.

WHY IS THE BEST MEASURE IN THIS CASE , FOR THE COST , THE PHANTOM COST OF YOU GOING OUT AND HAVING TO RENT ANOTHER CABLE LINE?

WELL, I DISA GREE THAT IT IS A PH ANTOM COST AND I WOULD DIRECT THE COURT 'S ATTENTION TO THE CASE ON WHICH MASTEC RE LIES HEAV ILY THROUGHOUT ITS BRIEF, JUSTICE CARDOZA 'S OP INION FROM THE U.S. SUPREME COURT IN EASTERN BROOKLYN. HE SAYS THAT BY THEIR NATURE , IT REQU IRES SUBSTITUTE O R SPARE CAPACITY AVAI LABLE BEFOREHAND BECAUSE YOU CAN 'T GO OUT AND IN TEN MIN UTES PROCURE A SPARE. SO WHETHER YOU SPEN D THE MONEY BE FORE OR AF TER, THE RESULT IS THE SAME. HERE WE RENTED SPARE CAPACITY. WE RENTED A SPAR E CABLE I N THE FORM OF $9.6 MILL IO N THAT WE INVE STED BEFORE THIS CUT. AS J USTICE CARDOZA SA ID, THE RESULT IS THE SAME, WHET HE R WE WENT AND BOUGHT IT F ROM SOMEBODY ELSE OR WE F UTURE IT IN OUR SELVES.

WHAT WAS THE CH ATTEL A T ISSUE IN THAT CASE?

THE CHATTEL AT ISSUE IN THAT CASE WAS A TUGBOAT.

OKAY.WHICH IS A DEFI NEABLE , ISOLATED IT EM. WE ARE NOT TALKING ABOUT ONE PART OF THAT TUGBOAT BEING DAMAGED.IT WAS COMPLE TELY, THE ENTIRE CHATTEL WAS COMPLETELY U N USABLE . SO ISN'T THE KEY TO THIS CASE HERE, DEFINI NG WHAT THE PROPERTY IS? IS THE CHATTEL , THE FIBER-OPTIC CABLE SYSTEM , OR IS IT A SEG MENT OF THAT SYSTEM? IE COMPARING TO A TUG BOAT. IF WE TRIE D TO COMPARE IT T O A TYP ICAL MO VABLE CHATTEL , PERSONAL PROP ERTY CHATTE L, AS OPPOSED TO ALMOST A FIXTURE TO PROPERTY , BUT IN THIS CASE WHAT IS THE CHATTEL WE ARE TALKING ABOUT? IS IT THE NETWOR K, OR IS IT A SEGMENT OF IT?

IT IS THAT SEGM ENT OF THE CABLE. THAT 11-MILE SEGMENT THAT MASTEC SE VERED IS A S TAND - ALONE CABLE. IT DOESN'T NEED THE SOUTH PART OF THE RING IN ORDER T O FUNCTION. IN FACT , MASTEC CONCEDES IN ITS BRIE F THAT THAT OUGHT TO BE THE RELEVANT PROPERTY,WHEN IT MA KES THE ARGUMEN T THAT, UNDER THE BADILLO CASE THE VALUE OF MCI'S DAMAGES ARE EQUAL TO THE PRE-INJURY VALUE OF THE CABLE.

LET ME GET BACK TO THE CERTIFIED QUESTION HERE, BECAUSE WE ARE BEING ASKED TO ANSWER SOMETHING THAT PRESUMABLY MIGHT BE UN IQUE UNDER FLORIDA LAW, AS OPPOSED TO , I AS SUME THE ELEVENTH CIRCUIT COULD LOOK AT JU STICE CARDOZA'S OPINION AND MAKE SOME ASSUMPTIONS ABOUT GENERALLY -APPLI CABLE PRINCIPLES OF DAMAGE LA W. WHAT IS IT THAT YOU WOULD ARGUE WOULD BE UNIQUE ABOUT FLORIDA LAW OR FL ORIDA STATUTES, THAT , EITHER SAYS THAT, IF THERE IS , EVEN I F THERE ARE NO ACT UAL DAMAGES , THAT YOU ARE ENTI TLED TO DAMAGES ? OR THAT , AG AIN, TO HE LP US ANSWER THIS SPE CIFIC QUESTION, BECAUSE I GUESS , ONCE WE SAY, WELL , YOU COULD OBTAIN LOSS OF USE DAMAGES , THE ISSUE OF THE MEASUR E IS REALLY NOT BEFORE US.

WELL, FIR ST I WOULD TAKE ISSUE WITH THE STATEME NTTHAT THERE WERE NO AC TUAL DAMMINGS. WE LOST THE ABILITY TO USE THE CABLE THAT MASTEC SEVERED.

THE BOTTOM LINE , IF THAT WAS SO EASY , WE WOULDN'T BE HERE. WE ARE HERE ON A CERT IFIED QUESTION FROM THE ELEV ENTH CIRCUIT , AND THIS IS, SOU NDS LIKE WE ARE TALKING ABOUT CONTRACTS 1 01 OR TORT 101 , BUT OBVIOUSLY THERE W ASSOMETHING THAT THE ELE VENTH CIRCUIT FOUND DI FFICULT ABOUT THIS, FOR THEM TO CERTIFY TO US , S O LET 'S GO BACK TO HOW DOES FLORIDA LAW GUIDE US IN THE ANSWER T O THE QU ESTION ? BECAUSE THE QUESTION ASSU MES THAT THERE WERE NO ACT UAL DAMAGES .

RIGHT. AND I THINK THAT IS A MISS ASSUMPTION. FLORIDA HAS RECOGNIZED THAT THERE ARE DAMAGES. AND THAT YOU NEED NOT SHOW LOST PROFITS , IN OR DER TO HAVE DAMAGES , WHEN YOU ARE DEPRIVED OF THE USE OF YOUR PROPERTY.

YOU ARE TALKING ABOUT THE AUTOMOBILE ANALOGY ? AUTOMOBILE CASES? WHAT PARTICULAR

I THIN K IT IS NOT ONLY AUTOMOBILES.IT IS COMMERCIAL PROPERTY AS WELL. I THINK PART OF THE PROBLE M THAT THE FEDERAL COURTS HAD , BOTH THE OTHER DIST RICT COURTS WHO ARE REPRESENTED HERE BY THE AMI CUS AND THE ELEVENTH CIRCUIT , IS THE WAY THEY CHARACTERIZE THE PROPERTY. IT SAYS MCI INS ISTS THAT FLORIDA COMMON LAW DOES NOT DISTINGUISH BETWEEN PLE ASURE PROPERTY, SUCH AS THE PERSONAL AUTOMOBILE S AT ISSUE IN THE LINE OF ME CAN MORTELIRO ,. THE ELEVENTH CIRCUIT MISUNDERSTOOD THAT PRE MISE . MORTELERO, THE PROPERTY AT ISSUE WAS A. CARMEN:IER THAT WAS USED WAS A CAR CARRIER THAT WAS USED IN BUSINESS. THE PLAINTIFF IN THAT CASE SOUGHT DAMAGES FOR LOST BUSINESS. $2.

FOR LOST BUS INESS. THE DIST RICT COURT STRUC K THAT PART OF THE CLAIM. ON APPEAL , THE FLORIDASUPREME COURT SAID THE DISTRICT COURT WAS CO RRECT IN STRIKING THE LOST PROFIT CLAIM. HOWEVER , HAD THE PLAINTIFF SOUGHT DAMAGES FOR THE RENTAL COST OF THE SUBSTITUTE, THAT WOULD HAVE BEEN A PROPER MEASURE OF DAMAGES. THAT CASE HAS BEEN C ITEDSINCE THEN , IN THE AT &T VERSUS ALONZO CASE, WHICH WE SUBMIT WAS THE DISTRICT COURT IN FLORIDA, MIAMI, THAT DID GET THE QUESTION RIGHT. IN ME EK AND IN MECHAN , MASTEC HAS SA ID IN ITS BRIEF THAT THE RATION ALE FOR MECHAN WAS A PL EASURE AVAILABLE AND THE PLAINTIFF COULDN'T RENT AN OTHER VEHICLE. THE RA TIONALE IN MECHA N SAIDTHAT THE PLAINTIFF COULD RENT ANOTHER VE HICLE THAT SHE COULD AFFORD.

IS THIS CASE CITED BY THE SUPREME COURT AND MCI VE RSUS OSP , WHERE THEY SAY CLE ARLYTHAT YOU ARE NOT EN TITLE ED TO THESE LOSS OF USE DAMAGES , BECAUSE YOU DID NOT HAVE ANY RENTAL VALUE , DIDN'T HAVE ANY RENTAL DAMAGES , T HOSEKINDS OF THIN GS. HOW IS THIS CASE DIFF ERENT FROM THAT CASE OR THE LI ENED CASE THAT CAME OUT OF THE OR THE LYNN CASE THAT CAME OUTFIT SOUTHERN DISTRICT O F FLORIDA?

THIS IS A DIFF ERENT CASE THAN THE CASES IN T HESOUTHERN DISTRICT O F FLORIDA. IN THE OSP

CASE , VIRGINIA COURTS SAID THAT YOU HAD TO SHOW THAT YOU HAD THE USE O F THE PROPERTY AND YOU WOULD HAVE USED THE PROPERTY, B UTFOR THE LOSS OF USE AND THA T WAS THE CASE THAT MCI PUT O N AT TR IAL. I TRIED THE CASE, SO I KNOW WHAT THE EVID ENCE WAS. IN THAT CASE, MCI DID NOT OFFER EVIDENCE THAT THE CAPACITY TO WHIC H IT WAS ABLE TO REROUTE TRAFFIC, WAS, IN FACT , SPARE CAPACI TY THAT WAS DEDI CATED FOR THAT PURPOSE. IN THIS CASE , MCI AT THE TRIAL COURT LEVEL, DID OF FER THAT TESTIMONY, THAT THE REASON FOR THE SECO ND CABLE , IS REDUNDANCE I. IT WOULDN'T BE THERE, BUT FOR THE NEED OF REDUNDANCY . WE HAVE B U ILT TWIC E THE CAPACITY THAT WE WOULD NEED TO SE RVE MIAMI , SO THAT IS A CRITICAL FACTOR DIFFE RENCE , WHEN YOU LOOK AT HOW THE VIRGSUPREME COURT DECIDEDTHAT CASE.

THAT MAK ES A DIFFER ENCE BECAUSE OF WHAT? IT SEEMS TO ME, WHEN Y OUBUILD A CABLE SYSTEM LIKE THAT, THAT EV EN IF YOU ARE THE ACTUAL ONES WHO , IF IT HAD BEEN SOMEONE ASSOCIATED WITH MCI WHO HAD DAMAGED T HECABLE , YOU WOULD ST ILL E NDUP IN THE SAME POSITION. I MEAN, YOU CA N HAVE THAT THERE, FOR YOUR PURP OSES , ASWELL AS TO SERVE YOUR CUSTOMERS IF SOMEONE E LSE DOES THAT, SO I AM NOT SURE HOW THIS, RE ALLY , MA KES A DIFFERENCE.

WELL , THE VIRGSUPREME COURT LOOKED AT THE WELL , THE VIRGINIA SUPREME COURT LOOKED AT THE DICHOT OMY BETWEEN THE SPARE BOAT CASES AND THE BROOKLYN EASTER N YOU W ORK YOUR PROPERTY O VER TIME. IN THE KYOTO CASE , THE DAMAGED FERRY WAS REPLACED BY A SUBS TITUTE FE HR N ATURE PLAINTIFF KEPT SOLE LY FOR THAT PURPOSE, IN THE EVE NT THAT ONE OF THEIR MAIN FERRY WOULD BE DAMAGE D, THEY HAD A SPARE THAT THEY KE PT TO USE. IN THE BROOKLYN EAST ERN CASE, THEY HAD TH REE TUGBOATS. WHEN ONE WAS DAMA GED , RATHER THAN PULLING A SPARE THAT THEY KEPT OR RENT ING A SPARE, THEY SIMPLY WOR KED THE OTHER TUGBOATS OVER T IME, AND THE SUPREME COURT SAID, IN THAT CIRCUMSTANCE WHERE YOU DON'T KEEP A SPARE BOAT , WE ARE GOING TO DENY LOSS OF USE DAMAGES, BASED ON A RENTA L. AND THAT WAS WHAT THE VIRGSUPREME COURT LOOKED AT. IT FOUND THAT , BECAUSE M CIHAD NOT AT THE TRIAL LEVEL , PUT ON EVIDENCE THAT IT KEPT SPARE CAPACITY , A SUBSTITUTE BOAT, A SUBS TITUTE CABLE, THAT THE CASE WAS M ORE LIKE BROOKLYN EASTERN , AND THEREFORE IT WAS GO ING TO DENY LOSS OF USE.

BUT IN THIS CASE YOU ADMIT THAT IT WASN'T REALLY A SPARE. THEY WERE USED 50-50. IT WASN'T 100 PERCENT ON ONE AND WE ARE GOING TO USE THIS AS A QUOTE/UNQUOTE SPARE CABLE.

YES AND NO. IT WAS

J UST

IT WAS 5 0-50 , BUT WE COULD NEVER FILL EITHER ONE OF THOSE TO MORE THAN H ALF THE CAPACITY , BECAUSE WE HAVE TO KEEP THAT AM OUNT OF CAPACITY RESERV ED.

BUT YOU WERE USING BOTH INSTEAD OF USING ONE , 100 PERCENT AND THE OTHER ZERO PERCENT AS A SPARE , YOU WERE USING BOTH.

WE CAN NEVER USE THE CAPACITY MORE THAN 50 PERCENT, BECAUSE WE KEEP , WHILE SOME OF IT

WERE YOU USING BO TH?

YES. WE WERE USING BOTH , BUT WE COULD NEVER FUL LY USE IT, BECAUSE WE HAD TO KEEP HA LF THE CAPACITY ON A DED ICATED , AND I THINK BROFER BROWNSTEIN PO INTS OUT IN I THINK PROFES SOR BROWNS TEIN POINTS OUT IN HIS ARTICLETHAT IT HAS CHA NGED SINCE THE KYOTO WAS DECIDED ANDTODAY.

CAN YOU EXPLAIN HOW Y OUREACHED THE $800,000 FIGU RE.

YES. THE $800 ,000 FIGURE WAS BASED ON THE COST TO RENT COMPABLE CARRYING CAPACITY FROM ANOTHER CARRIER. THIS CABLE HAS A CAPACITY OF 816 DS-3 S THAT WERE WORKINGAT THE TIME THE CABLE W ASCUT. A DS-3 IS 672 UNITS OR TELEPHONE CA LLS AT ONE TIME. AND THE F CC HAS SAID THIS IS THE COMMON DENOMINATOR I N THE INDUSTRY. WHAT WE DID WAS, WE WENT AND WE GOT A PRICE FROM ANOTHER CARRIER. WHAT WOULD IT COST , TO HAVE 816 DS- 3S. THE PRICE COMES ON A MO NTHLY BASIS. WE REDUCED TO AN HO URLY BASIS. MULTIPLIED IT BY 9 7 AND THAT IS WHERE YOU COME UP WITH THE 800, 000.

THE 100 PE RCENT USE OF THE CABLE OR 50 PERCENT O R WHAT?

816 DS-3S IS JUST CAPACITY OF THE TRUNK. WHAT WE ARE SE EKING IS JUST CAPACITY THERE NOT THE 100 PERCENT OF CAPACITY THAT W ASTHERE, SO WE ARE NOT ASKING FOR THAT.

LET ME SEE IF I CAN H EL P YOU MAKE ME UNDER STAND THIS A B IT. IF WE ARE USING THE C ABLEAND NOT USING THE CAPACITY OF THE CABLE , BUT WE HAVE GOT A HUGE MOTOR VEHICLE AND ITS CAPACITY IS A CERTAIN AMOUNT. IF THAT TRUC K CAN CARRY $100,000 ON A PARTICULAR DAY IN DELI VERS , IT SEEMS TO ME THAT THIS ARGU MENT , REA LLY , IS ON THE MEASURE OF DAM AGESNOT THE ELEMENT. BECAUSE YOU CAN GO OUT A NDRENT A TRUCK FOR $ 100 A DAY, BUT IF YOU HAVE TO HAVE THE CAPACITY OF WHAT IS IN I T AND I WANT TO RENT THAT , THEN THAT MAY B E $100,000, SO IT IS MORE OF A DEBATE A S TO THE MEASURE, RATHER T HAN THE ELE MENT.

I DON'T THINK SO. I WOULD HAVE TO GO OUT AND RENT, TO REPL ACE THE TRUCK THAT WAS CAPABLE OF CARRYING 10 ON,000 WORTH OF CARGO, I HAVE TO GO OUT AND RENT THE SAME SI ZED TRUCK AND THAT IS WHAT WE ARE DO ING HERE , GOING OUT AND RENTING THE SAME SIZED CABLE IF YOU WILL , TO REPLACE WHAT WAS DAMAGED, AND THAT IS WHAT IT WOULD COMES TO THE REPLACE THAT . BREAK IT DOWN EVEN FURT HER.

SEE, THE PROBLE M WE G ET INTEREST IS THAT THE P IECE OF CABLE IT SELF , IS CERTAINLY NOT THAT 800,000. IT IS THE CAPACITY FOR WHAT IT CAN DO WITHIN THAT PER IOD OF TIME, IS IT NOT?

I HAVE TO RENT THE BOX , TO PU T THE CARGO IN. I HAVE TO RENT THE CABLE OR THE CAPACITY TO PUT THE TELEPHONE TRAFFIC IN. IT IS THE SAME THING .

CHIEF JUST ICE: YOUR TIME , YOU ARE IN YOUR REBUTT AL, SO YOU MAY WA NT TO S A VE THE REST.

ALL RIGHT. I WILL , YOUR HONOR, T HANKYOU.

CHIEF JUSTICE: THANK YOU.

CHIEF JUSTICE , MAY IT PLEASE THE COURT. MY NAME IS ALAN KLUGER AND I REPRESENT MASTEC. THE KEY TO ANALYSIS IS WHAT IS THE RELEVANT PROPERTY.THE RELEVANT PROPERTY HERE IS THE SYSTEM. WE KNOW THAT, BECAUSE IT HAS BEEN CONCEDED AT THE LOWER COURT AND, AG AIN, IN THE BRIEF, AND THIS IS FROM THE BRIEF OF MCI. THEY SAID, IN ADDITION TO THE VI TAL PUBLIC IN TEREST IN UNINTERRUPTED TELECOMMUNICATION SERVICES, MCI PROVIDES SERVICE GUARANTEES TO MANY OF ITS CUSTOMERS , IN WHICH MCI GUARANTEES IF THERE IS A BACKUP ROUTE, IMMEDI ATELY AVAILABLE TO CARRY THEIRTRAFFIC, IF THE PRI MARY CABLE BECOMES INOPERABLE . DUE T O THE COMPETIT IVE NATURE OF THE INDUSTRY , EVEN CUSTOMERS WITHOUT SERVICE DPARN TEASE, WOULD LE AVE WITHOUT SH FS GUARANTEES , WOULD LEAVE MCI IF MCI DID NOT HAVE CAPACITY DUE TO A CUT. WE HAVE ALSO CITED THE COURT RECORD WHERE REDUNDANCE I IS CAUSED REDUNDANCY IS CAUSED EVEN BY THEIR

OWNCHOICE. FOR INSTANCE IF THEY DECIDED TO TAKE THE 50 PERCENT T HAT JUSTICE CANTERO SP OKE ABOUT AS ARGUED IN THEIR ARGUMENT AND DECIDED TO USE ONLY 5 0 PERCENT CAPACITY AND S HUT DOWN THE REST OF THE S YSTEM BECAUSE THEY WANT TO SERVICE IT, THE Y HAVE THE REST O F THE REDIDN'T AND THE SYSTEM, AND THAT IS THE WAY THEY ARE BUILT. SO THE COURT DIDN'T UNDERSTAND

IS THAT WHAT IS NO RM IN THE INDUSTR Y?

AS CONCEDED IN THEIR BRIEF THIS IS THE NORM , A NDTHEY ARE REQU IRED TO DO I T BECAUSE BIG CUSTOMERS WOULDN'T GO TO MCI. THEY WOULD GO T O AT &T OR SOMEONE ELSE WH O HAS A REDUNDANT SYSTEM .

IS THAT REQUIRED?

NO. BY COMPETITION AND IN THE MARKETPLACE.

THAT WAS MY QUE STION .

CHIEF JUSTICE: JUSTICE ANSTEAD.

LET ME ASK YOU , A LS O , WHETHER THE SITUATION W OULDBE THE SAME , IF THEY HAD MADE ARRANGEMENTS TO LEASE THIS CAPACITY , IN THE EVENT OF ACCIDENTS LIKE THIS . AND THEREFORE , AND THE LEASE ARRANGEMENT WAS SUCH THAT IT WAS BASED ON THE AM OUNT OF VOLUME OR CAPACITY THAT THEY ACTUALLY USED , TH AT THEY WOULD LEASE FROM SOMEBODY ELSE. THAT IS THAT THEY HAD IT , AND SO YOU COULD MEASURE , ACTUALLY, WHAT THE LEASE OR , AND A LEASE IS A RENTAL , WHAT THE RENTAL COST WAS , SO IF THEY TOOK CARE OF THIS ISSUE IN THAT WAY , WHY WOULDN'T THEY BE ENTITLED,THEN, TO THAT LEASE C OST THAT WOULD BE PUT INTO EFFECT, OK AY , ON LY IN THE EVENT THAT THIS CABLE WAS DAMAGED OR CUT OR INCOMPARABLE. WHY WOULDN'T THEY, IN THAT EVENT, BE ENTITLED, THEN , TO RECOVER TH OSE LEASE COSTS , YOU KNOW, THAT WENT INTO EFFECT , THAT WERE AVAILABLETO THEM?

LET ME SEE IF I UNDERSTAND. IN YOUR HYPOTH, YOUR H ONOR , YOU ARE ASKING ME IF THEY ACTUALLY EXPENDED MO NE Y , AND YOU COULD TIE IT INTO A PAYMENT , AND THAT WAS THERE FOR THE PURPOSE OF THE EMERGENCY, WOULD THAT BE COMPENSABLE, AND THE ANSWER IS IT MIGHT BE , BUT I WA NT TO ROLL BACK SOMETHING THAT JUSTICE PARIENTE SAID , WHICH IS LET'S LOOK AT WHAT THEY CERTIFIED AND WHAT THE RECORD IS. THE QUESTION THAT THEY ASKED IS , IT IS ASSUME D IN T HEQUESTION, THAT THE TELECOMMUNICATIONS TRAFFIC CARRIED BY THE DAMAGED CABLE AND THE CARRIER , PRES ENTED NO EVID ENCE THAT IT SUF FERED LOSS OF RE VENUE OR OTHER DAMAGES D URING THE TIME THE CABLE WAS UNAVAI LABLE . AND SO WHAT WE ARE TALKING ABOUT, WE DON 'T QUARREL.

THE HYPOTHETICAL THAT I AM POSING TO YOU , I GU ESS , IS THAT , AS OP POSED TO A CAPITAL INVE STMENT THAT THEY HAVE OBVIOUSLY MADE HERE , THAT THEY HAVE AN ARRANGEMENT WITH ANOTHER COMPANY THAT HAS EX CESS CAPACITY , THAT IN THE EVENT THEY NEED IT, THEY HAVE A CERTAIN LEASE ARRANG EMENT , AND IT IS GOING TO BE BASED ON HOW M UCH THEY USE. OF COUR SE THEY HAVE SOME KIND OF CHARGES THEY HAVE TO PAY TO THAT OTHER COMP ANY, JUST BECAUSE THE COMPANY I S MAKING IT AV AILABLE TO THEM , AND THAT IF YOU HAD T HAT KIND OF COMMER CIAL ARRANGEMENT , INSTEAD OF THE CAPITAL INVESTMENT THAT HAD BEEN MADE HERE, THAT THAT IS THE WAY THAT THEY DEALT WITH THIS . I GUESS WHAT I AM SUGGES TING IS THAT THAT APPEARS TO BE , AT LEAST , A MORE AP PEAL ING CLAIM , BECAUSE THE N YOU ARE ACTUALLY IDENTIFY IN G SOMETHING THAT IS MUCH CLOSER TO AN ACTUAL RENTAL SITUATION, AS OP POSED TO SORT OF A MITIGATION OF DAMAGES KIND OF T HING HERE, WHERE THEY HAVE THE EX TRA CAPACITY ALRE ADY AVA ILABLE TO THEM .

AND THE ANSWER IS IT DOESN'T MAKE A DIFFERENCE , AND LET ME NAT URAL SIZE . AND LET ME ANALOGIZE .

SO THEY WOULDN 'T BE ENTITLED.

THEY WOULDN'T.

IF THEY TURNED TO COMPANY XYZ AND SAID IT HAPPENED AND NOW IN ADDITION TO THE BASE CHARGE THAT WE PA Y YOU FOR HAVING THIS AVAILABLE , WE WILL PAY YOU $10 ON ,000 A DAY $100,0 00 A DAY NOW , BECAUSE WE HAVE TO SW ITCH , WHY WOULDN'T THEY BE ENTITLED TO THAT?

I AM GOING TO TELL Y OUAND THE REASON IT WOULDN'T MAKE A DIFFERENCE IS , IT WOULDN'T MATTER WHETHER IT IS AN OUTLAY OF CAPITAL OR RENT, BECAUSE THE REASON THEY HAVE THESE REDUNDANT SYSTEMS IF I CAN EXPLAIN, IF THEY T AKE THE PLAIN CASE SUWATE, BEC AUSE IT GHOST OTHER WAY , AND ANALOGIZE IT , THE ANSWER IS WHY ISN'T THE EXTRA CAPACITY COST TIED IN WITH THE PLAIN COST , BECAUSE YOU DID IT WITH YOUR HYPOTHETICAL, AND I SAY THAT , SEEKING A RENTAL OF A CABLE , WHEN YOU LOO K AT THE ENTIRE SYSTEM OF REDUNDANCY , PROVIDES NO PROTECTION AGAINST THE DAMAGE TO THECABLE , BECAUSE THE SYSTEM I S A REDUNDANT SYSTEM , SO IT DOESN'T MAT TER IF YOU LEASE IT. THE OUTSIDE LOOP. OR IF YOU OWN IT. THAT DO ESN'T REALLY MATTER , BECAUSE GO BACK TO THE BEGINNING.

JUSTICE ANSTEAD 'S QUESTION, LET ME PUT IT THIS WAY , LESS SAY THAT YOU LEASE WITH AT &T , YOU HAVE ONE LOOP. YOU DON' T HAVE A CONTRACT SYSTEM. YOU HAVE ONE LOOP. WHEN YOU LEASE AT AND D'S LOOP AND THEN AT&T BRE AKS DOWN AND SAYS WE ARE GOIN G TO CHARGE YOU X DOLLARS PER HOUR FOR YOUR LOOP WH ILE YOURS BROKE DOWN. YOU PAY THEM FOR X DOLLARSPER HOUR FOR 97 HOU RS AND THEN YOU ARE BACK U P A GAIN. JUSTICE ANST EAD 'S QUESTION IS SHOULDN'T MCI BE ABLE T O RECOVER FOR THAT PAYMENT TO AT&T?

IF WHAT YOU ARE SAYING , THAT THERE IS NO BACK UP CABLE, AND ESS ENTIALLY LEASING,I A, I THINK THAT THERE MIGHT BE AN ELEMENT OF DAMAGE THERE, AND THEY MIGHT HAVE TO PAY IT THE. I MEAN, I NE ED TO F ULLY THINK IT OUT, BUT I THINK THAT, UN DER THOSE SCENARIO , THEY

THEY COULD CLAIM A CONCRETE COST OF REVENUE AND A CONC RETE COST THAT THEY INCURRED IN OB TAIN ING THAT LOOP.

IN THIS CASE IT WOULD BE CONCRETE AND THEY WOULD GET DAMAGES AND THE REC ORD BEFORE THE LOWER COURT, THE JUDGE IN THE LOWER COURT SAID, VERY CLEARLY, T HAT THEY CAN GET RENTAL V ALUE FOR LOSS OF USE , BUT THE RECORD BEFORE THE COURT SHOWED ABSOLU TELY NO LOSS OF USE WITHIN THE DEF INED SYSTEM. I AM SO RRY , JUSTICE ANSTEAD, THAT IS THE ANSWER. THAT IS MY ANS WER TO YOUR QUESTION.

GO AHEAD.

SO THE ANSWER IS , IF , SO NOW THE QUESTION GOES AND I WAS GOING TO ASK YOU ABOUT THE AT&T V ERSUS LAN ZOCASE, WHERE THEY DID APPEAR TO REROUTE THE TELECOMMUNICATIONS TRAFFICAND THEY CITE ED TO ME CHAN AND THE STATEMENT FOUND THAT AT&T WAS ENTI TLED TO LOSS OF USE DAMAGES. IS THAT A WRO NGLY DECIDEDCASE?

TWO GROUNDS. FIRST OF ALL, THERE IS NOTHING IN THE REC ORD IN L.A. NZO THAT F ULLYINDICATES , LIKE THIS IN LANZO THAT, FULLY INDICATES LIKE THIS CASE DID , THAT AT&T HAD IN THE SYSTEM, AND SECONDLY MCI HAD THE CAPACITY AS TO THE REDUNDANT SYSTEM. SECONDLY.

BUT IN THIS CASE THEY WERE ABLE TO REROUTE THE TRAFFIC IN THEIR OWN SYSTEM.

JUSTICE ANSTEA D'S HYPOTHETICAL, I DON'T KNOW, IT IS REALLY NOT IN THE RECORD, BUT THE SE COND P OINTIS TO THE EXTENT THAT YOUREAD IT THAT WAY, IT IS WRONGLY DECIDED. IT IS REALLY AN ERR ANT DEC ISION.WE BELIEVE THAT THE DECI SION INS THE OTHER FOUR CASES IN THE SOUTHERN DISTRI CT, T HECASE FROM THE VIRGSUPREME COURT AND OTHER COURTS THAT HAVE LOOKED AT IT, ARE FAR MORE CORRECT.

WHY, IF YOU HAVE A GENERAL PRINCIPLE OF LAW , THAT YOU ARE EN TITLED TO LOSE OF USE DAMAGES , THAT IS DEMONSTRATED APPARE NTLY , BY THE EX AMPLE THAT I G AVE OR THAT, THE EX AMPLE THAT JUSTICE CANTERO GAVE , WHY , IF WE HAVE , THEN , IF THAT IS THE GENE RAL PRINC IPLE O F FLORIDA LAW , THEN , WHY AREN'T , UNDER ANALOGOUS CASES WHERE WE HAVE HAD CASES WHERE THEY DIDN'T ACTUALLY GO OUT AND RENT SOMETHING, BUT WE SAID T HEY ARE STILL ENTITLED TO THAT RENTAL VA LUE , YOU KNOW , TO THAT LOSS , THEN , IF YOU ARE GOING TO AG REE , THAT THE GENERAL PROPOS ITION O F FLORIDA LAW IS THAT THEYWOULD BE ENTI TLED TO LOSE OF USE DAMAGES, WHICH , IF I UNDERSTAND YOUR RESPO NSE TO THE HYPOTHET ICAL THAT JUSTICE CANTERO PO SE D TO YOU , THEN WHY WOULDN'T WE EXTEND THE OTHER SIDE O F THAT. THAT IS THAT JUST BECAUSE THEY HAVE PROV IDED FOR THIS BY A CAP ITAL EXPENDITURE , WHY SHOULD THAT DEPR IVE THEM, THEN, OF THIS LOSS OF USE DAMAGE THAT THEY ARE GENERALLY ENTITLED TO UNDER FLORIDA LAW? ANOTHER GENERAL RULE IN THE AUTOMOBILE CASES , THE GENERAL RULE IN THE AIRCRAFT CASES, THE BOAT CASES , DON'T APPLY TO THIS CASE, AND HERE IS WHY. THE CONCE PT , THERE ARE S OME LANGUAGE THAT I BELIEVE I S ERRANT. THERE IS THE CONCEPT IN THE AUTOMOBILE CASES , THAT PLEASURABLE USE IS A USE THAT NEEDS TO BE COMPENSA TED , BECAUSE OTHERWISE YOU WOULD HAVE A DIFFERENT RULE FOR THE WEALTHY AND A DIFFERENT RULE FOR PEOPLE THAT COULDN'T AFFORD TO RENT A CAR, AND AS A MATTER OF PUBLIC POLICY , THE CASES STARTED TO SAY THAT YOU WOULD GET THE VALUE OF THAT PLEASURE. IN THIS CASE , THERE IS NOTHING IN THE RECORD THAT PUTS MCI IN THAT CATEGORY. MCI HAS MADE A BUSI NESS DECISION. THEY HAVE STIPUL ATED HERE I N OPEN COURT. THAT IS.

PERCENT. THEY HAVE STIP ULATED IN THEIR BRIEF. THE REA SON THE REDUNDANCY CABLE IS PUT IN THE SYSTEM IS IN ORDER TO COMPETE IN THE MARKETPL ACE FOR A WH OLE HOST OF REASONS. A BLAC KOUT NOT CAUSED BY ANYBODY.AN ACT OF GOD NOT CAUSED B Y ANYBODY.THEY WANT TO SERVICE THE OTHER 50 PERCENT OF THE CABLE. NOT ANYBODY'S NEGLIGENCE.

BUT DOES THAT MAKE IT MORE A QUESTION OF FACT AS TO THE VALUE OF YOUR DAMAGES?IF THE REDUNDANCY CAPACITY IS PLACED FOR A MULTIFACTORIAL REASON, FOR THEIR OWN REP AIR , A CTS O F GOD , COMPETITIVENESS IN THE MARKETPLACE, AND FOR WHAT HAPPENED IN THIS CASE , THIRD PARTIES WHO DAMAGE OUR CABLE, SO FOR A VARI ETY OF REASONS , MCI WANTS TO AR GU E TO THE JURY, WE PAID "X" NUMBER O F DOLLARS TO DO THIS SYSTEM FOR A VARIETY OF REASONS. ISN'T AT LEAST IT IS ARGUABLY SOME PORTION OF THAT EXPENSE LOSS OF USE?

AS A N ARG UMENT IN OPPOSITION TO THE SUMMARY JUDGMENT IN THE LOWER COURT, THAT WOULD BE AN ARGUMENT, JUSTICE BELL. THAT IS NOT THE CERTIFICATION THAT WAS N OTWHAT THE ELEVENTH CIRCUIT WAS CONCERNED ABOUT. THE ELEVENTH CIRC UIT WAS WITH A FINDING THAT THERE WAS NO DAMAGE AND FIND N INGTLOWER COURT THAT THE SYSTEM WAS AND A FINDIN G IN THE LOWER COURT THAT THE SYSTEM WAS THE RELE VANT PROPERTY AND NOT THE CABLE, ITSE LF.

BUT ISN'T , LET ME GO BACK TO YOU ARE WANTING TO DISTINGUISH BETWEEN YOU CABLE BETWEEN A CABLE SYSTEM AND OTHER TYPES OF, LIKE, B OATS AND PLANES AND AUTOMOBILES , AND HAVEN'T THE CASES GONE WAY BE YOND THE PLEASURE VEHICLE? IN OTHER WO RDS LET 'S GO A NDSAY, IF A TRU CKING COMPANY AND ONE OF THEIR VEHICLES ARE DAMAGED , DOES F

LORIDA LAW ALLOW FOR LOSS OF USE , EVEN THOUGH THEY HAVE OTHER VEHICLES, OR NOT?

YES , YOUR H O NOR , THE

SO WHAT , THERE THE POLICY CAN'T BE THAT WE ARE WOR RIED ABOUT R ICH OR POOR OR PLEASURE USE. WHAT IS THE POLICY IN THOSE CASES?

IT IS RICH AND POO R. THE CASES THAT DEAL WITH BUSINESSES, LIKE MARY LAND CASUALTY AND THE MORTELEROCASE, THEY ARE DEA LING WITH SMALL BUSINESSES , AND WHILE THEY DIDN 'T DO IT IN THERICH AND POOR, THEY WE REN'T DISCUSSING THE CONCEPT OF A SYSTEM. AGAIN, WE GO TO T HIS. THIS IS RELEV ANT PROPER TY, AND LET ME CONCEDE THIS. I BELIEVE THAT, IF YOU BELIEVE THE RELEVANT PROPERTY IS THE CABLE , IF YOU BELIEVE THAT THE RELEVANT PROPERTY WAS THE CABLE, ITSELF , THEN THE ANALYSIS IS , WHAT ARE THE DAMAGES ATTRIBUT ABLE TO THE CABLE? AND THE LOWER COURT , W HILERULING THAT THE RELEVANT PROPERTY WAS THE SYSTEM SAID , BUT IF IT WAS THE CABLE, THIS IS WHAT THE EVIDENCE IS , WITH REGA RD TO THE CABLE , YOU CAN'T HAVE IT BOTH WAYS. I BELIEVE THAT THE SUPREME COURT OF VIRG, AND I MIGHT SAY, COUNSEL SAID THAT VIRGDIDN'T RECOGNIZE THAT THE FAIR VALUE MIGH T BE AN ELEMENT OF DAMAGE , EVEN IF A SUBSTITUTE WASN'T PROCURED. THAT IS NOT TRUE. THIS IS WHAT I T SAY S IN THE OPINION. IN SUCH CIRCUMSTAN CES , THE FAILED VALUE OF THE H IGHER MAY BE AN ELEMENT OF DAM AGE AND THIS WHE THER THE SUBSTITUTE IS AC TUALLY PROCURED OR NOT. THAT IS THE VIRGSUPREME COURT AND HERE IS WHAT THEY CONCLUDED THE VIRGINIA SUPREME COURT , AND HERE IS WHAT THEY IN CLUDED. WHAT THEY CONC LUDED. WE BELIEVE IT IS ANALOGOUS AND IN THE OTHER CASES THAT WE HAVE CITED. IT SAYS MCI CONTENDED THAT THE EXTRA CAPACITY THAT IT BUILT, ESSENTIALLY JUSTICE ANSTEAD'S POINT, IS THAT FIBER OPT TIC NETW ORK AND THAT ALLO WED IT TO CA RRY TRAFFIC IS FUNC TIONALLY EQUIVALENT TO THE S PARE BOAT OR THE CUYUGA IN YOUR HYPOTHETICAL. MCI SIMPLY MADE ADDI TIONAL USE OF ITS OWN CAPACITY ON ITS OWN NET WORK , EXTRA CAPACITY THAT WAS RE QUIRED TO MAINTAIN THE GENERAL USEFUL THE BUSINESS , EXACTLY THE STIP ULATION THAT THEY MADE IN COURT , GENERAL USE OF THEIR BUSINESS AND THE POINT THEY MADE IN THEIR BRIEF AND THE POINT T HEY MADE AT LOWER COURT AT PAGE 99 OF THE THIRD VO LUME OF THE LOWER RECORD. YES , YOUR HONOR.

IF IN FACT WE DETERM INE THAT THERE IS SOME LOSS OF USE HERE, BECAUSE CLEA RLY WHEN THE CABLE WAS CUT , IT WAS NO LO NGER FUNCT IONING , THAT PORTION OF IT W AS NO LONGER FUNCTION ING IN THE MANNER THAT IT HAD BEEN PREVIOUSLY. SO IF WE AG REE THAT , UNDER THOSE CIRCUMSTANCES, THERE IS SOME KIND OF LOSS OF USE , WHAT DO YOU PROPOSE WOULD B E THE MEASURE OF DAMAGES FOR THAT?

THE REQUEST TO REPAIR A NDTHAT IS WHAT WE P AID.THAT IS THE AMOUNT .

COST OF REPA IR IS NOT LOSS OF USE.

EVEN FLORIDA CASES S AYTHAT, YOUR HONOR. HERE IS WHAT THE FLORIDA CASES SAY. THEY SAY THAT REASONABLE RENTAL VALUE IS , A MEASUREOF LOSS OF USE AND EVEN THE RECENT COMMENT THAT WE S AID IN OUR BRIEF SAYS "A" , NOT THE ONLY . AND IN FACT THIS COURT

WE DON'T BUY THAT, BECAUSE I THIN K YOU HAVE ALREADY CONCEDED THE COST OF REPAIR, THAT YOU ARE PA YING COST OF REPAIR. THAT IS NOT AN ISSU E IN THIS CASE.

REASON IT IS BECAUSE THAT IS THE APPROP RIATE MEASURE OF DAMAGES.

JUSTICE QUIN CE IS ASKING YOU, LET'S ASSU ME WE GET BY THE FIRST QUESTION AND WE ANALOGIZE IT MORE TO THE OTHER CASES ABOUT BOATS AND AIRPLANES , AND WHAT SHE IS ASKING YOU IS WHAT, THEN, WOULD BE YOUR TAKE ON WHAT THE MEASURE OF DAMAGES WOULDBE.

IT IS WHAT?

BEYOND THE REPAIR. YES. BEYOND THE REPAIR COST THAT IS REALLY NOT AN ISSUE HERE , BUT IF WE SAY THAT THERE IS SOME LOSS OF USE BEYOND THE REPAIR AMOUNT, WHAT WOULD YOU POSIT AS THE MEASURE OF DAMAGES FOR THAT LOSS OF USE?

I BELIEVE THAT THE PROPER MEASURE OF DAMAGES IS WHAT THEY CAN DEMONSTR ATE, WHICH WOULD BE LOST PROFIT COULD BE USED, AND THERE WAS NO NONE, SO IT WAS ZE RO, OR REPAIR, OR AS THIS COURT SAID, I N THE MORTELERO CASE IN 19 26 , IT SAID , U PO N PROPER PROOF OF DAMAGE AS TOWHAT THE DAMAGES WERE, CAUSED BY THE ACT, IT LOGICALLY FOLLOW S YOU WOULD GET THAT AWARD, AND ALL I AM SAYING HERE .

DID YOU ARGUE AT SOME POINT, I TH OUGHT THAT YOU HAD ARGUED AT SOME POINT THAT, ASS UMING THERE IS SOME LOSS OF USE , THAT THERE WOULD ONLY BE THE DIFFERENCE BETWEEN THE VALUE OF THE CABLE PR IOR TO THE INJURY AND THE VALUE YOUTHFUL THE CABLE AFTER INJ URY. YOU DID NOT MAKE THAT ARGUMENT ONCE BEFORE?

I DID MAKE THAT ARGUMENT.

HO W DO YOU, ASSU MING THAT IS THE CASE, HOW DO YOU DETERMINE THE VALUE OF T HECABLE, PRIOR TO AND THE VALUE YOUT HFUL THE CABLE AFTER?

IT HAS BEEN OUR POSITI ONTHAT THIS IS OFF THE SP OOL CABLE.IT IS NOT WHAT RUNS THROUG H THE CABLE. THERE IS NOTHING IN THE RECORD THAT WOULD INDI CATE THAT ANY, AS FANC IFUL AS THEY SAID IN THE SU PREME COURT CASE, IT IS P IE IN THE SKY AND THE T YP E O F DAMAGES THAT TRADITIONALLY JU RIES , COURTS DON'T G RANT WIND FALL DAMAGES.WHAT HAPPEN ED HERE IS SIMPLE. THE CABLE HAD TO BE REPAIRED AT $23,000. THAT IS WHAT THE EVIDENCE IS OR THE CABLE CA N BE REPLACED . IT IS AN OTHER NUM BER. THEY CH OSE NOT TO PUT THAT IN.

WAIT. THAT IS NOT LOSS OF USE , EITHER. IF SOMEBODY HAS , AND LET'S GO BACK TO A COMMER CIAL VEHICLE. COMMERCIAL VEHICLE IS YOU GET, YOU CAN GET DAMAGES . YOU GET COST OF REPAIR , YOU GET THE VALUE OF THE , WHAT THE , IF YOU CAN ESTABLISH IT , WHAT THE PROPERTY WAS WORTH BEFORE AND AF TER. THIS IS A DECREASE BECAUSE OF REPAIR. NOW, AND THEN YOU GET LOSS OF USE. THAT IS ANOTHER ELEMENT OF DAMAGES. IT I S NOT , SO YOU ARE GOINGBACK, TO IF WE BUY THEARGUMENT THAT, BECAUSE THEREIS, IN FACT, NO NEED TO GO OUT AND RENT A SUBSTITUTE CABLE SYSTEM , THAT THERE IS THERE FOR NO , THERE WAS NO LAST OF USE , AND IT IS PHANTOM DAMAGE, THEN , BUT IF WE DON'T AND WE GO AND SAY , YOU KNOW WHAT? THIS SHOULD BE TR EATED LIKE THE OTHER CASES. DO YOU HAVE ANY ARGUMENT ABOUT THEIR $800,000 , ANOTHER WAY TO CALCULATE THAT TYPE OF DAMAGE?

I HAVE BEEN ADVISED MY TIME HAS EXPIRED. MAY I ANSWER YOUR QUESTION ? THERE , THE BE DILLO CASE THAT WE CITE, THE SE COND PA RT OF THE CERTIFICATION , LI MITS THEIR DAMAGES TO THE PRE-INJURY VALUE OF THE DAMAGED CABLE , AND WE KNOW THAT THE DAMAGED CABLE HA S A CERTAIN VALUE , SO THEY ARE LIMITED BY THE BED ILLO CASE AND BY FLO RIDA LAW TO THE PRE-INJURY VALUE. BY CONCEPT, WHY WOULD SOMEBODY GET MORE IN A C LAIM FOR DAMAGE THAN THE ENTIRE VALUE OF THE CHATTEL? THE ONLY WAY THEY WIN , IS IF THIS COURT OR THE L OWERCOURT OR RE MAND BACK TO THE ELEVENTH, SAYS THAT, NO , NO , IT IS NOT THE CABLE. NO, NO, IT IS NOT THE SYSTEM. IT IS THE MIN UTES THAT COULD FLOW THROUGH THERE ON A N ARBITRARY AND VALUABLE BASIS BUT THEY DON'T HAVE TO, BECAUSE THE SYSTEM IS BUI LT TO HANDLE THE EX CESS CAPACITY. I BELIEVE THAT THE U.S.SUPREME COURT 'S DEC ISION IN BROOKLYN TERMINAL , WHERE JUSTICE CARDOZA TAL KS ABO UT THIS IS DAMAGES. IT IS NOT FANCIFUL , NOT MADE UP, NOT SOME THING PI E IN THE SKY, THAT THAT IS REALL Y THE BUSINESS ANALYSIS HERE , AND I BELIEVE THAT ALL OF THE OTHER CASES, TAL KING ABOUT PERSONAL VALUE AND ALL OF THE REST, ARE POLI CY DECISIONS MADE IN E ARLY

DAYS OF THE AUTOMO BILE THAT MAKE SENSE.

SO YOUR ARGUMENT IN T HAT SITUATION, IF A VEHICLE WAS TOTALED OUT IN , YOU WOULD NOT GET LOSS OF USE DAMAGES. YOU CAN ONLY GET THE VALUE OF THE MAX IMUM O F WHAT THE PROPERTY WAS VALUED AT.

THAT IS THE BEDILLO CASE AND WHAT HAPPENED IN THAT CASE IS THEY WERE REVERSED BECAUSE THE MUSTANG W ASWORTH LESS THAN THE A WARDTHAT WAS GIVEN, AND THEY SAID FLORIDA LAW IS CL EAR , YOU CAN'T GET MORE THAN THE PRE-INJURY VALUE OF THE CHATTEL.

CHIEF JUSTICE: THANK YOU.

THANK YOU VERY MUCH.

YOUR HONOR , WITH RESPECT TO THE QUESTION YOU JUST POSED , WAY -J BA KERY IS A CASE DIRE CTLY ON POINT N THAT CASE, THERE WAS A LOSS OF BAKERY EQUIPMENT , AND COURT FOUND THAT YOU ARE ENTITLED TO LOSE OF USE DAMAGES EVEN THOUGH THERE IS A TO TAL LOSS OF PRO PERTY. THE DEAL WAS A BEDIL LO WAS A TOTAL DECISION. IT WOULD HAVE GIVEN THE VALUE OF THE CAR, EVEN THOUGH IT EXCE EDED , W OULD HAVE GIVEN THE FU LL LOSS O F USE DAMAGES EVEN THOUGH IT EXCEEDED THE VALUE YOUTHFUL THE CAR. IT IS CONTRARY TO MECHAN. MECHAN SAYS UNDER THE RESTATEMENT , YOU ARE ENTITLED TO AT LE AST THE RENTAL VALUE. FLORIDA HAS FOLLOWED THE RESTATEMENT VALUE FOR FOUR DECADES THERE. IS NOTHING THAT RECA PS IT IN THE DEAL. EVEN IF IT WERE, WE PUT ON EVIDENCE BEFORE THE TRIAL COURT THAT THE CABLE WAS WORTH $8 .2 MI LLION , W ELL I N EXCESS OF WHAT WE ASKED FOR.

IS THAT THE ENTIRE CABLE SYSTEM THAT YOU HAVE THERE?

NO. THAT WAS JUST COST TO HAVE THE ELEVENTH -THE ELEVEN-MILE CABLE THAT WAS SEVERED , IN P LACE.

AND YET THE LOSS OF IT FOR 72 HO URS I S WORTH $800,000-SOMETHING DOLLARS?

THAT IS A QU ESTION F ORTHE JURY TO DECIDE, WHETHER WHAT WE ASK IS REASONABLE.WHAT WE ARE ASKING AND WHAT THE COURT DENIED , IS THAT WEGET TO PUT THAT MEASURE BEFORE THE JURY , A RECOGNIZED MEASURE O F DAMAGES THAT GOES BACK T O MORTELERO IN 19 26 BE FORE THE FLORIDA SUPREME COURT. THAT IS ALL WE ARE ASKING AND I AM OUT OF T IME.

CHIEF JUSTICE: THANK YOU VERY MUCH AND TH ANKS TO COUNSEL ON BOTH SIDES , FOR AN IN TEREST ING AND INFORMATIVE ORAL ARGUMENT MUCH ORAL ARGUMENT.