Case No. 94,656

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IN THE SUPREME COURT OF FLORIDA

GTC, INC.,

Appellant,

v.

JOE GARCIA, ETC., ET AL.

Appellee.

F.P.S.C. Docket No. 970808-TL

REPLY BRIEF OF GTC, INC.

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CERTIFICATE OF FONT TYPE

The undersigned certifies that this brief was drafted using 14 point proportionately spaced Times New Roman font type on Word.

ABBREVIATIONS AND OTHER DESIGNATIONS

This Reply Brief is filed in response to the Answer Brief of Appellee, Florida Public Service Commission (“FPSC”, "Commission"), and to the Answer Brief and Cross-Appeal of BellSouth Telecommunications, Inc. (“BST”, "BellSouth"). References to these and other related documents are abbreviated as follows:

Initial Brief of Appellant GTC, Inc.	-	IB
Answer Brief of Appellee Florida Public Service Commission	-	PSCB
Answer and Cross-Appeal Brief of BellSouth Telecommunications, Inc.	-	BSTB

Unless otherwise indicated, references to “Order” refer to Public Service Commission’s Order No. PSC-98-1169-FOF-TL, the Final Order which is the subject of this appeal.

ARGUMENT

I. THE COMMISSION FUNDAMENTALLY MISAPPREHENDS THE INTERLATA SUBSIDY MECHANISM ESTABLISHED IN 1985: THE MECHANISM WAS NOT CREATED AS A "SINGULAR, UNIQUE BENEFIT OF EARNINGS REGULATION," BUT AS COMPENSATION TO GTC FOR THE LOSS OF ACCESS CHARGE REVENUES, IN LIEU OF A LOCAL RATE INCREASE.

In its Initial Brief, GTC described the revenues at issue in this appeal, a $1.2 million annual payment from an access charge pool created in 1985, as revenues earned by the Company as part of its fair and reasonable rate of return under traditional rate regulation. Thus, the Company could not traditionally be denied these revenues by the Commission without a determination that the elimination of the revenue stream was offset either by overearnings or by some specified additional revenue stream. See, e.g., Keystone Water Company, Inc. v. Bevis, 278 So.2d 606, 609 (Fla. 1973), Gulf Power Company v. Bevis, 289 So.2d 401 (Fla. 1974). And since the new price cap statute (Section 364.051, Florida Statutes) does not require termination of the payment, and does not permit continued earnings analysis and reduction of revenues by the Commission, GTC's election of price cap regulation cannot serve as the basis for termination of the subsidy. IB at 8-12.

The briefs of BellSouth and the Commission reject this view, based on a clearly erroneous characterization of the $1.2 million payment. The heart of this controversy, the error, is best illustrated by two statements in the Commission's brief. First, the Commission describes the payments as "access revenues…earned by BellSouth and paid to GTC as a subsidy…" FPSCB at 1. Next, the Commission declares that it "has simply terminated a singular, unique benefit of earnings regulation to which GTC is no longer entitled." FPSCB at 19. Similarly, Cross-Appellant, BellSouth argues that the $1.2 million paid to GTC is part of earnings to which BellSouth is entitled. BSTB at 14-19. Moreover, BellSouth describes the revenues as temporary, suggesting the revenues would inevitably be eliminated. BSTB at 6. This analysis is flatly inconsistent with the facts of this case, and the Commission's own prior decisions regarding the interLATA subsidy entitlement, and warrants reversal by this Court.

The interLATA subsidy at issue is not a benefit that one day floated GTC's way during the quirky transition to competitive long distance service. On the contrary, the subsidy mechanism was a device crafted by the Commission in 1985 to insure that the Commission did not impose on GTC's predecessor company (St. Joseph Telephone and Telegraph

Company, hereinafter referred to as "GTC") unjust, unreasonable and confiscatory rates. See In re: Intrastate Telephone Access Charges for Toll Use of Local Exchange Services, 84 F.P.S.C. 12:119 (1984) ("Order No. 13934" at 7) and In re: Intrastate access charges for toll use of local access charges, 85 F.P.S.C. 6:69 (1985) ("Order No. 14452").

A brief recap of the relevant regulatory history demonstrates the Commission's clearly erroneous interpretation of its early orders, and is necessary in response to the Commission's presentation of this information in its Statement of Facts, FPSCB at 1-6, and the misapprehensions informing BellSouth's Answer and Cross-Appeal. When the Commission instituted its bill and keep access charge plan, it was fully aware that some LECs would suffer a loss of revenues. The Commission addressed this problem directly in its initial bill and keep order:

> We believe our approach to adjust for the impact of bill and keep is sound and within the authority granted us in Section 364.14, Florida Statutes. The basic policy is to keep the companies whole, that is to keep them in the same financial position they were in prior to bill and keep. Thus, if a company is earning below its authorized rate of return before bill and keep, suffers a shortfall from going to bill and keep which is partially offset by DA and coin charges, local rates would only be increased up to the achieved rate of return prior to implementing bill and keep. We do not intend to use the change to bill and keep as a substitute for a rate case. If the company were earning below its range, it had the option to file a rate case to increase its rates. We will not use this change to bring it up to the bottom of its last authorized rate of return.
>
> If a company is earning within its range before bill and keep and suffers a resulting shortfall which is offset partially by DA and coin charges, any change in local rates will be made to keep it at the level it was earning before bill and keep. If bill and keep does not result in a shortfall, the DA and coin changes would be made because of our decisions for uniformity in these charges, and adjustments would be made to bring the company to the level it was earning within its authorized range before the institution of bill and keep.
>
> If a company is earning above its authorized rate of return, and suffers a shortfall or not, DA and coin charges will be implemented, and adjustments would be made to return the company to the level it was earning before bill and keep. We would then institute an overearnings proceeding.

Order No. 13934 at 7 (emphasis added).

In sum, irrespective of a company's earnings, it would be allowed to raise local rates to bring it back to its earlier achieved rate of return if the access charge changes created a shortfall. If that achieved rate of return was outside the authorized range, then the problem would only be addressed in a rate case. In other words, shortfalls due to access charge changes would not and could not be allowed to change a company's previously achieved rate of return-- the company was entitled to those revenues until a rate case proved otherwise.

To ensure that companies were kept whole, the Commission ordered the LECs to "...file revenue and customer impact data to reflect our decision to implement bill and keep." Order No. 14452 at 11. The Commission then analyzed the data to ensure that the companies neither enjoyed a windfall or suffered a taking as a result of this new system. The Commission summarized this data in charts attached to Order No. 14452. Again, the purpose of this data-driven analysis was to ensure that bill and keep was implemented in a manner that was revenue neutral:

> The charts reflect our intent in implementing bill and keep, which ... was to keep each company in the same financial position it would have been in prior to implementing bill and keep. In other words, implementing bill and keep should result in a "wash" and should not serve as a rate case for a company. When implementing bill and keep, we would also be implementing our previous decisions regarding directory assistance and the $.25 uniform coin-charge statewide. The revenue effects of these two

items would be taken into account in determining any <u>subsidy or increase in local rates</u> that may be needed as a result of implementing bill and keep of access charges.

<u>Id.</u> at 11-12 (emphasis added).

From the outset the Commission recognized the certainty of some revenue shortfall as a result of its plan and signaled that such shortfalls could be made up through an increase in local rates. But in Order No. 14452 the Commission decided that it would not allow any LEC to raise its local rates to recoup the shortfall.

> As discussed in section X, we will not be adjusting basic local rates at this time because all of our access plan can not be implemented presently, for example, bill and keep for LEC toll. . . .We believe the companies <u>can be protected by our method</u> discussed herein for implementing bill and keep of access charges without changing local rates at this time.

<u>Id.</u> at 12 (emphasis added).

The Commission's plan to <u>offset</u> the shortfall was specific. It would first apply against the shortfall additional revenues from the implementation of the $.25 coin charge and its directory assistance plan. <u>Id.</u> But these revenues were inadequate to keep the plan revenue neutral:

> Even after adjusting for these additional revenues, seven LECs will still experience a shortfall. Since our stated intent is to have a "wash" when implementing bill and keep, we find that a temporary subsidy pool is required and is in the public interest. The pool will be funded by each LEC contributing a portion of the access revenue it receives for use of its local network[1]. . . [and] The pool will be administered by the LEC chosen by the subsidy pool participants.

<u>Id.</u> at 12-13.

GTC (then St. Joseph) was one of the seven LECs destined to suffer a shortfall under the Commission's new bill and keep plan. As contemplated in Order No. 13934, the Company filed tariffs for a local rate increase. The Commission, however, suspended and then denied the tariffs:

> By Order No. 14280, we suspended the proposed tariff revisions filed by Gulf, St. Joseph and United to increase local rates in response to our decisions contained in Order No. 13934. Those tariffs and those filed by any other companies in response to Order No. 13934 relating to proposed local rate increases are hereby denied since we have found it inappropriate to change local rates at this time.

Order No. 14452 at 16-17.

Thus, the Commission rejected the Company's request for a local rate increase to

[1] This is the overcollection acknowledged by BellSouth in its Answer/Cross-Appeal.

offset the $1.5 million reduction in GTCom's revenues due to the bill and keep access plan. The Commission, however, did not compromise the Company's entitlement to those revenues. On the contrary, the Commission reaffirmed that entitlement by establishing a temporary mechanism - the intraLATA subsidy - to preserve the revenues until the temporary mechanism itself could be either eliminated in a rate case or eliminated dollar-for-dollar by overearnings or some additional data-supported revenue stream. Through Order No. 13934, the Commission explicitly recognized the Company's entitlement to the anticipated shortfall, and in Order No. 14452 the Commission explicitly committed to preserving that entitlement as long as it existed. And as acknowledged in Order No. 13934, that entitlement would exist until a rate case established a new rate base, new rate of return, new authorized rates, new rate structure and new rate levels.[2]

When it issued the original order establishing the interLATA subsidy, the Commission had no confusion about its obligation to fund $1.5 million in revenues each year until the Company came in for a comprehensive rate case. There is no equivocation on this point. What the present Commission and BellSouth misunderstand is that the past Commission was not locked into the <u>mechanism</u> by which the $1.5 million must be

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[2] Because the basic "revenue neutrality" policy articulated in Order No. 13394 is initiated through Order No. 14452, it is useful to identify two additional refinements made by that latter order. First, Order No. 13934 stated that revenue neutrality would be measured by allowing the company to return to its achieved rate of return before implementation of bill and keep. <u>Id.</u> at 7. Order No. 14452 altered the revenue neutrality standard slightly by allowing the company to return to the specifically predicted earnings it would have achieved had bill and keep not been implemented. Order 14452 at 13. Second, Order No. 13394 stated that overearnings of the LEC would be addressed independent of and presumably after the tariffs for a local rate increase were approved; Order No. 14452, however, delayed receipt of the subsidy until pending overearnings investigations were completed. Order 14452 at 14. St. Joseph was not overearning and the Commission determined that St. Joseph was entitled to approximately $1.5 million annually to ensure revenue neutrality.

provided to the Company. In fact, one can infer from Order No. 14452 that the then sitting Commission was betting that seven LECs subjected to the shortfall ultimately would find themselves overearning, so that the subsidy could be eliminated dollar for dollar. In this context, the description of the mechanism as "temporary" makes perfect sense and does no violence to the Company's entitlement to the shortfall.

In large part, the 1985 Commission's implicit prediction proved correct. Over time, almost all of the subsidy recipients in the new access charge scheme experienced overearnings, and rather than lowering local rates, the Commission targeted the overearnings to reduce or eliminate the subsidy amount. Order at 6; Tr. Ex. 1. This very approach confirms the conclusion that the subsidy revenues were revenues to which the companies were entitled. If the companies were not entitled to these revenues, the overearnings could not be used to offset them. Rather, the overearnings would have to be directed toward other entitlements of the company (such as accumulated depreciation reserves) or toward the ratepayers through lower rates.

[3]

The present Commission's characterization of the remaining $1.2 million subsidy as a "benefit," with its "windfall" or "bonus" connotation is thus simply inaccurate. If the Commission and BellSouth insist on viewing these subsidy payments from the pool as something other than part of GTC's earned revenues, then the payments are best viewed as "debt service" by BellSouth on the Commission's behalf. When the Commission set

[3] "Generally, public utility rates are established in a full rate case brought before the PSC. In a full rate case, the PSC sets a utility's rates to allow the company to recover a fair and reasonable rate of return on its invested capital. The rate of return is a range fixed by a percentage figure. The range has a floor, a ceiling, and a midpoint. If revenues exceed the permissible range, the utility is to return the excess revenues to its customers. See generally United Tel. Co. v. Mann, 403 So.2d 962 (Fla. 1981)." Citizens of State of Fla. v. Wilson, 568 So.2d 1267, 1267 (Fla. 1990).

average access charges too low for St. Joseph and then denied the Company a local rate increase, the Commission in effect required St. Joseph and now GTC to loan BellSouth and other "winners" a portion of its shareholders' earnings. BellSouth and others were then directed to repay the loan amount from excess access charge revenues into the pool, and BellSouth, as pool administrator, was directed to repay the loan to GTC. This metaphor explains perfectly why overearnings would be used to eliminate the subsidy payments rather than to lower local rates.

The $1.2 million revenues at issue in this proceeding are unique in the sense that this particular Company is the only one still receiving the payment—but they cannot properly be classified as some sort of an outmoded "benefit" to be eliminated in a post-competition housekeeping proceeding. These revenues are a significant component of the fair and reasonable rates locked in by Section 364.051, Florida Statutes, at the time of GTC's price cap election. The Commission's mischaracterization of the revenues forms the basis for its erroneous conclusion that the entitlement to these revenues could be terminated notwithstanding the statute, and is grounds for reversal. See BellSouth Telecommunications, Inc. v. Johnson, 708 So.2d 594, 596-597 (Fla. 1998).

II. THE COMMISSION'S APPLICATION OF A "CHANGED CIRCUMSTANCES" TEST TO TERMINATE GTC'S ENTITLEMENT TO THE SUBSIDY REVENUES WITHOUT AN EARNINGS REVIEW OR AN OFFSET REPRESENTS A DEPARTURE FROM ITS PRIOR ORDERS, AND THE ESSENTIAL REQUIREMENTS OF LAW.

In its Order, the Commission acknowledged that it has previously used overearnings as the criterion to eliminate a recipient's interLATA bill and keep subsidy payments. Order at 12. This is entirely consistent with the discussion above, as to do otherwise would violate the entitlement established by the Commission in the orders discussed above. However, in this case, the Commission has concluded that a new "changed circumstances" test should apply, and that the "changed circumstance" of GTC's price cap election, without more, justifies termination of the Company's entitlement to the revenues.

Nothing in the Commission's prior orders supports application of this standard. All previous orders adjusting or terminating subsidy amounts included analysis of data regarding the recipient's earnings. Yet the Commission's decision to completely eliminate the revenues in the instant case is not based on any analysis of GTC's earnings or need[4] or any offset – only upon GTC's "desire to take on the opportunities of the competitive arena by electing price regulation." Order at 12.

In its brief, BellSouth asserts that "the evidence shows that earnings are not the only basis for eliminating a subsidy" and that the basic criterion for eliminating a subsidy is a change in circumstances. BSTB at 12. Yet BellSouth cites only the Order presently under appeal, (and testimony by a Commission staff member that he did not know of any prior orders specifically stating that the earnings criteria was the only one available, agreeing with BST's counsel that "earnings just happens to be the criteria utilized", Tr. 125) as authority for what is actually a new ratemaking test. In truth, the "changed circumstances" test was never applied by previous Commissions – because to do so without consideration of earnings or an offset of the revenues involved would effect a

[4] With the passage of the price cap regulation statute, and elimination of earnings review, GTC reasonably anticipated that its frozen basic local revenues would continue to include the interLATA subsidy revenues, and believes that the Legislature shares this view. To this end, it declined to provide data necessary to convert the proceeding below into a de facto rate case. Since the amount of the subsidy was undisputed, no additional data were necessary for calculation of an offset.

regulatory taking. [5]

The Commission's brief does refer to In re: Modified Minimum Filing Requirements Report of Northeast Florida Telephone Company, Inc., 93 F.P.S.C. 2:419 (1993) ("Northeast MFRR Order"), apparently to support the proposition that the Commission did not look at only overearnings in the dollar for dollar elimination of the interLATA subsidy received by a company ("Commission also considered anticipated stimulation of earnings when a $.25 extended area service calling plan was implemented", FPSCB at 3.). However, if the Commission believes that the Northeast MFRR Order supports its vague argument that "changed circumstances" can allow it to ignore a company's entitlement to the subsidy revenues, it again misapprehends its own orders. In that case the Commission approved a settlement agreement between Northeast and the Office of the Public Counsel resolving treatment of the company's overearnings for 1991 and 1992 and its going forward rates.

> As part of the Agreement the Commission approved a stipulation which required further reductions in Northeast's bill and keep subsidies to the extent that Northeast's earnings exceed a 13.2% return on equity. Based on Northeast's level of earnings and the stimulation which is occurring with the $.25 calling plan . . . Northeast's remaining interLATA subsidy shall be eliminated and Northeast shall be removed from the interLATA subsidy pool effective January 1, 1993.

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[5] In its brief, the Commission suggests that because the subsidy was intended to be temporary, GTC had no reasonable expectation that the revenues would continue either before or after price cap regulation, and no regulatory taking can occur. FPSCB at 20-21. Yet nothing in the price cap statute, caselaw or the Commission's review of GTC's operations prior to this order suggests that GTC's entitlement to these revenues would be automatically terminated as a result of the Company's price cap election. And through its previous orders, including reduction of GTC's subsidy by $300,000 in 1989 to offset overearnings, the Commission signaled that the revenues would continue until overearnings or another offset of the revenue amount occurred. See In re Investigation Into St. Joseph Telephone & Telegraph Co.'s Authorized Return on Equity & Earnings, 89 F.P.S.C. 12:97 (1989). While the mechanism was intended to be temporary, the revenue amount was explicitly guaranteed to GTC by Order Nos. 13934 and 14452.

Id. at 2.

Northeast agreed in the context of resolving a rate case that for the purposes of eliminating the subsidy – i.e., recognizing its entitlement to the original shortfall – earnings exceeding 13.2% return on equity would be considered overearnings. As in any rate case, the Commission had to project future earnings based on current data. Taking into account the then existing level of earnings and the likely earnings from the calling plan stimulation, the Commission determined that the subsidy could be eliminated without subjecting Northeast to confiscatory rates. Because the order was issued as a proposed agency action and not protested, Northeast presumably agreed to or acquiesced in the Commission's determination.

The two original orders establishing the subsidy effectively guaranteed that it would not be eliminated unless (1) the recipient experienced overearnings or other specifically identified additional revenues to offset the current subsidy requirement; or (2) if a rate case reestablished fair, just and reasonable rates without the subsidy. The Northeast MFRR Order is consistent with this two-prong guarantee: first, the subsidy was eliminated based on company-specific data reflected in the stipulated overearnings; next, the elimination occurred within the context of a (settled) rate case. Id.

Therefore, insofar as the Commission is relying upon a continuation of its pre-Act authority to justify termination of the subsidy, that approach is not supported by the record, represents a deviation from previous ratemaking policy, and at the very least, requires a remand. See Florida Cities Water Co. v. State, Pub. Serv. Comm'n, 705 So.2d 620 (Fla. 1st DCA 1998) (shift in ratemaking policy must be supported by expert testimony, documentary evidence or other evidence appropriate to the nature of the issue involved); reaffirmed in Southern States Utilities v. Florida Pub. Serv. Comm'n., 714 So.2d 1046, 1057 (Fla. 1st DCA 1998); quoted in Palm Coast Utility Corp. v. State, ____ So.2d ____, 1999 WL 761169 (Fla. 1st DCA 1999). To be clear: GTC continues to believe that the Commission's action in this case is precluded by the 1995 price cap regulation statute. However, to the extent that the Commission suggests that its authority to end GTC's entitlement to these revenues is not affected by that statute, its decision must also be rejected as inconsistent with previous ratemaking orders, and a departure from the essential requirements of law.

III. THE 1995 PRICE CAP STATUTE DOES NOT CREATE AUTHORITY FOR THE APPLICATION OF THE "CHANGED CIRCUMSTANCES" TEST, BUT INSTEAD PRECLUDES THE COMMISSION'S TERMINATION OF GTC'S ENTITLEMENT TO THE REVENUES._

It is undisputed that the price cap statute, Section 364.051, does not mention termination of the interLATA or any similar subsidies as a cost of price cap regulation. In the Commission's view, this means that it continues to enjoy the same power over the subsidy that it exercised under the old rate regulation scheme. However, as discussed in detail in its Initial Brief, GTC believes that by establishing fixed starting point revenues for price cap companies, and by prohibiting earnings analysis after that point, the Legislature clearly signaled its intent to create a new regulatory bargain in which price cap regulated companies bear the risk of changing market conditions, but not of the standardless removal of the Company's starting line revenues without an offset. IB at 8-12. This interpretation is consistent with the Legislature's stated expectation that the new law would permit the prices and rates for services to be regulated by market forces rather than the Commission. See Fla. H.R. Comm. on Commerce, CS for SB 1554 (1995) Staff Analysis, p. 1 (final May 8, 1995), attached to FPSCB at App. 6.

Nevertheless, the Commission has inserted itself into this proceeding between two price-regulated companies, ostensibly as a housekeeping matter, ordering a local rate reduction by one company and a standardless rate review of the other. This is not an "alternative" view of the statute worthy of great deference by the Court—the Commission's interpretation contravenes the clear intent of the Legislature in crafting the price regulation statute. Even BellSouth interprets the price cap statute as providing that once a LEC has elected price regulation, the PSC lacks the statutory authority to order adjustment of the LEC's rates. BSTB at 15.

The Commission asserts that its authority to eliminate these revenues as a changed circumstance is consistent with its continuing regulatory oversight authority under the 1995 statute. FPSCB at 16. GTC agrees that the Commission's authority to require regulated companies to comply with its previous orders survives the Act—in fact, this is the basis for GTC's position that the Commission can continue to require BellSouth to remit the subsidy created by Order No. 14452. However, not only is the termination of GTC's entitlement to these revenues inconsistent with the Commission's previous orders and standard of review, but nothing in the Act authorizes the Commission to craft a new standard for doing so. The Commission's statement that GTC "voluntarily gave up the regulatory status quo when it elected price cap regulation and with it went the grant of a subsidy" (FPSCB at 19), simply is not supported by the statute.

In its brief, the Commission cites the general language of Section 364.01(3), Florida Statutes, in which the Florida Legislature stated that "the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight <u>"to protect consumers and provide for the development of fair and effective competition…"</u> FPSCB at 13, 21 (emphasis added). As further support for its action below, the Commission offers two previous court decisions affirming its continued "regulatory oversight authority" under the statute. <u>See</u> <u>Teleco Communications Co. v. Clark</u>, 695 So.2d 304 (Fla. 1997) (allowing Commission to exercise jurisdiction over inside wire providers) and <u>AT&T Communications v. Marks</u>, 515 So.2d 741 (Fla. 1987) (permitting Commission to create an interim solution to harmonize old and new telecom statutes); FPSCB at 15-16. Finally, it asserts that the price cap election itself constitutes a change in circumstances which justifies termination of the subsidy.

None of these authorities warrants the Commission's decision to reach beyond the statute and convert the price cap election into a new automatic standard for reduction of revenues under the facts of this case. In Teleco v. Clark, this Court authorized the Commission[6] to exercise authority over the ownership of title to inside wire for the provision of telecommunications service, because to do otherwise would jeopardize the continued availability of uninterrupted telecommunications service to Florida customers. Teleco v. Clark, at 309. No similar concern exists in this proceeding.

In AT&T v. Marks, the Court approved the Commission's temporary extension of restrictions on how competitive, non-rate base regulated long distance telecommunication companies could connect to their large customers. The purpose of the bypass restriction was to promote universal service by protecting LECs from access competition. 515 So.2d at 744. In essence, the Commission was preserving the monopoly status of the LECs in the provision of access services while competitive long distance telecommunications evolved. Id. Thus the continuation of that status might deny temporarily long distance companies new competitive opportunities, but the bypass policy did not deprive any company of specific earnings to which it was entitled. The instant case is inapposite. Here the Commission would permanently deprive GTC of specific revenues to which the Company is entitled under previous Commission orders.

And the statutory directive "to protect consumers and provide for the development

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[6] Although the Commission cites the Teleco case as supporting its claimed authority in the instant case, the Commission would do well to read that case as cautionary, as the Commission's expansive claim of authority under its general ratemaking power was rejected by the Court. Id. at 308-309.

of fair and effective competition…"? Nothing in the record below suggests that the termination of the subsidy resolves a consumer problem; in fact, the subsidy has actually served to keep GTC's local rates lower. Nor is there any finding by the Commission that BellSouth is somehow unable to compete with GTCom as a result of the $1.2 million payment. To the contrary, the Commission actually concluded in this same proceeding that BellSouth was not entitled to keep the $1.2 million at issue, and ordered the rate reduction which is the subject of BellSouth's Cross-Appeal. Order at 16-17. Nevertheless, the Commission's reduction of GTC's revenues is characterized in its brief as part of its duty "to provide for the development of fair and effective competition." FPSCB at 16. In reality, the Commission's re-direction of pooled access charge revenues from GTC to BellSouth's customers is a solution in search of a problem.

If the Commission believes that the subsidy mechanism is no longer appropriate within the context of price cap regulation, then it may go to the Legislature to request a solution. In fact, GTC agrees that a system which effectively requires it to loan money to Florida's largest ILEC (and its future competitor) each year, only to have BellSouth pay it back, is less than ideal. And had GTC been permitted to raise its local rates as requested in 1985, or had the Commission approved a local rate increase or other offset in this proceeding, this awkward system would not be necessary. However, in the absence of either action, the $1.2 million "loan" must continue to be repaid. The mechanism may change – in fact, the Commission's own staff suggested an offsetting increase in access charges in the proceeding below (Tr. 126) — but the Commission's obligation to treat the underlying revenues as part of GTC's "starting line" rate of return cannot be avoided on the pretext that the dollars are simply a vestige of the old rate regulation.

The Commission asserts that no return to the Legislature is necessary, since the statute anticipates an evidentiary hearing, under Section 364.051(5) for price cap regulated companies who need to change their rates. FPSC Brief at 20. Further, the Commission argues that because GTC has not "taken advantage of the compensatory mechanism offered by section 364.051(5)", GTC cannot demonstrate that a taking has occurred.
[7] Id. However, shifting the burden to GTC in a new hearing does not cure the Commission's ultra vires act. In fact, the hearing the Commission proposes is clear evidence of its disregard of the Legislature's intention to let market forces control.

Despite the price cap statute, the Commission apparently believes that it has authority to specifically target GTC's frozen earnings for reduction and to direct BellSouth to reduce its local rates, and to conduct what is potentially a de facto rate case to determine whether those revenues should be restored. IB at 19-21. Following the Commission's interpretation, the Section 364.051(5) hearing would be an adequate remedy in any case where the Commission decides to reduce the earnings of a price cap LEC, or orders the LEC to reduce local rates, so long as the LEC can demonstrate a "compelling showing of changed circumstances." This approach would permit the Commission to initiate review and adjustment of price cap regulated companies' revenues on an ongoing basis, without the formal restrictions of a traditional rate case. This

[7] BellSouth agrees, suggesting that GTC's remedy is through the statute's "escape clause, which allows a LEC to petition for a rate increase if circumstances have substantially changed." BSTB at 13. This position is glaringly inconsistent with BellSouth's Cross-Appeal, in which it argues that the Commission's ratemaking in this case constitutes an ultra vires act. It is difficult to imagine that BellSouth would agree to a standardless rate case as a remedy for the rate reduction underlying its Cross-Appeal.

interpretation of a statute actually intended to reduce the Commission's authority to engage in ratemaking is clearly erroneous, contravenes the Legislature's intent, and should be reversed.

Respectfully submitted this 15th day of October, 1999.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by hand or overnight delivery to the following this 15th day of October, 1999.

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