IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-1786

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 060300-TL

GTC, INC., d/b/a GT COM,

Appellant,

v.

LISA POLAK EDGAR, ETC., ET AL.,

Appellees.

ANSWER BRIEF OF APPELLEE THE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATION OF THE PARTIES

Appellee, the Florida Public Service Commission, will be referred to in this brief as "the Commission." Appellant GTC, Inc., d/b/a GT Com, will be referred to as "GT Com." Appellee, the Office of Public Counsel, will be referred to as "Public Counsel."

References to the record on appeal are designated by volume and page number (R. Vol. __ Pg.___). References to the transcript of the June 28, 2006, hearing are identified as (Tr. Vol. __, Pg. __). References to Appellant's initial brief are designated (I.B. at ___). References to the appendix that accompanies Appellant's initial brief are designated (GT Com App. Tab __, Pg. __). References to the appendix that accompanies Public Counsel's answer brief are designated (OPC App. Tab __). The Commission Order that is the subject of this appeal, *In re: Petition for recovery of intrastate costs and expenses relating to repair, restoration and replacement of facilities damaged by Hurricane Dennis, by GTC, Inc. d/b/a GT Com*, 06 FPSC 8:172, 2006 Fla. PUC LEXIS 490,] Order No. PSC-06-0681-FOF-TL, issued August 7, 2006, will be referred to as the "Order."

STATEMENT OF THE CASE AND FACTS

The Commission accepts GT Com's Statement of the Case and Facts to the extent facts are presented, but rejects as improper argument the statements in GT Com's brief at pages 4 and 5 regarding its opinion of the propriety of the Commission's decision. The Commission offers the following additional facts that GT Com omitted from its Statement.

In its Order, the Commission found that section 364.051(4)(b), Florida Statutes, the storm recovery surcharge statute, was meant to enable an incumbent local exchange telecommunications company ("ILEC") such as GT Com to recover tropical storm related costs that are incurred over and above the company's normal operating costs, to assist the company in defraying additional costs caused by the extraordinary circumstance of a named tropical system. (R. Vol. 2, Pg. 261-262) In addition, the statute's direction to determine the costs and expenses that "are reasonable under the circumstances for the named tropical storm" required the Commission to thoroughly analyze the company's request for recovery "so that its customers are not obligated to pay for costs that they already pay for through their monthly bills or that are not directly attributable to the tropical system." (R. Vol. 2, Pg. 261) The Commission further found that a reasonable interpretation of the statute was "to provide for recovery as long as the company was not recovering the costs through other means." (R. Vol. 2, Pg. 261-262)

The Commission found significant the use of the term "recover" in section 364.051(4)(b), Florida Statutes, in addition to the statute's requirement that the Commission determine what costs and expenses were reasonable. (R. Vol. 2, Pg. 261-262) As stated by Commissioner Deason:

> [T]o me another key term in the statute is the term recover. And what that implies to me is that it implies that they may petition the Commission to recover costs which are not otherwise recovered by some means. And that's what recover is. You don't recover twice. Recover means you either recover it through whatever charges you're imposing on customers presently, and if that is not sufficient, then there needs to be a separate recovery mechanism, and that was the focus of this hearing.
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> And absent more precise language indicating differently, I just think it is the most reasonable interpretation of the statute is to provide for recovery as long as there is not recovery by other means. And I think the burden is on the petitioner to demonstrate that there is not recovery by some other means.

(R. Vol. 2, Pg. 242-243; R. Vol. 2, Pg. 261-262, Order at 2-3) The Commission thus denied GT Com recovery through a storm surcharge of amounts it determined were normal operating costs, costs GT Com would have incurred in the absence of a tropical storm, and costs it would recover by other means.

GT Com's statement that as of the date its brief was filed, the Commission had held no other hearings and issued no other orders regarding recovery under section 364.051(4)(b) is correct. Since that date, however, the Commission has

held a hearing and has issued an order granting certain recovery under that statute to BellSouth Telecommunications, Inc. ("BellSouth"). *In re: Petition to recover 2005 tropical system related costs and expenses, by BellSouth Telecommunications, Inc,* Order No. PSC-07-0036-FOF-TL, issued January 10, 2007, in Docket No. 060598-TL, "Order On BellSouth Storm Cost Recovery." A hearing was held on January 4, 2007, on Embarq Florida, Inc.'s ("Embarq") petition, and the Commission is scheduled to make its decision on January 23, 2007. Docket No. 060644-TL -- *In re: Petition to recover 2005 tropical system related costs and expenses, by Embarq Florida, Inc.* Both BellSouth and Embarq sought recovery of only incremental costs. (OPC App. Tabs 5-7)

STANDARD OF REVIEW

This Court has "consistently held that the Commission's orders, and concomitant interpretations of statutes and legislative policies that it is charged with enforcing, are entitled to great deference." *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005). The Court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless it is clearly unauthorized or erroneous. *Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003); *P.W. Ventures, Inc., v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988). So long as the agency's statutory interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and it should be affirmed. *Sullivan v. Florida Department of Environmental Protection*, 890 So. 2d 417 (Fla. 1st DCA 2004).

GT Com's assertion that the standard of review is *de novo* is wrong. Unless the Court finds that the Commission "acted outside the scope of its powers and jurisdiction . . . or its decision was 'clearly unauthorized or erroneous,' the PSC's decision will be afforded deference." *Level 3 Communications,* 841 So. 2d at 450.

The party challenging an order of the Commission bears the burden of overcoming the presumption of validity by showing a departure from the essential requirements of law or that the findings of the Commission are not supported by competent, substantial evidence. *Crist v. Jaber*, 908 So. 2d at 430; *Florida*

Interexchange Carriers Association v. Clark, 678 So. 2d 1267, 1268 (Fla. 1996). Absent a clear showing by the appellant that the Commission has acted outside its delegated range of discretion, the Court must affirm the decision. § 120.68(7)(e), Fla. Stat. (2006).

The Commission's findings of fact are entitled to a presumption of correctness. *Crist v. Jaber*, 908 So. 2d at 430. The Court "will not reweigh or re-evaluate the evidence presented to the Commission, but should only examine the record to determine whether the order complained of complies with the essential requirements of law and whether the agency had available competent, substantial evidence to support its findings." *Sprint-Florida, Inc. v. Jaber, 885 So. 2d 286 , 290 (2004).*

SUMMARY OF THE ARGUMENT

The Commission's Order on GT Com's request for storm cost recovery was based on a correct interpretation of section 364.051(4)(b), Florida Statutes, and it is supported by competent substantial evidence. Section 364.051(4)(b), Florida Statutes, requires the Commission to examine a company's request for a surcharge to determine the costs and expenses that are reasonable under the circumstances before a company may recover any costs from its customers. Based on its interpretation of the statute, the Commission denied GT Com recovery through a storm surcharge of amounts it determined that GT Com would have incurred in the absence of a tropical storm, and costs it would recover by other means.

Through a series of straw man arguments, GT Com asserts that the Commission must ignore whether it has already recovered the same costs from its customers through their monthly rates, or whether it will recover the costs through means other than the storm surcharge. Thus, GT Com contends that the plain and obvious meaning of the terms "costs and expenses" as used in the statute is *all* costs and expenses in any way related to a named tropical storm. In GT Com's view, the statute would require its customers to pay certain costs, such as its employees' regular salaries and benefits during a period following a named tropical storm at least twice—once through their normal rates, and again through a storm surcharge tacked on top of the monthly rates. The Commission correctly

determined that the costs representing the normal salaries of GT Com's regular employees that GT Com would have incurred regardless of whether it experienced any damage from Hurricane Dennis were not reasonable.

GT Com's argument regarding improper rate of return regulation is also a straw man argument. Whether companies are rate of return regulated or price regulated is irrelevant. The statutes for both types of companies require the Commission to determine reasonableness before allowing recovery by imposing a surcharge or increased rates on customers.

Similarly, GT Com's argument that the Commission failed to consider the "circumstances for the named tropical system" is meritless. The Commission did look at particular facts and circumstances under which GT Com's hurricane related costs were incurred, and it allowed recovery through the surcharge where it found the costs were incremental and would not have been incurred in the absence of Hurricane Dennis. In this case, however, GT Com simply did not have any capital costs that exceeded normal costs. The Commission's decision with regard to GT Com's capital costs is consistent with its prior and subsequent decisions on storm cost surcharges, in cases involving both price regulated companies and rate of return regulated companies.

The Commission did not use the legislative history of the storm recovery surcharge statute to change the plain meaning of the statute. The Commission on

its own determined that the purpose of statute was not to provide double recovery which would be the result if it allowed costs the company is already recovering from its customers through their regular rates. The Commission merely confirmed its interpretation by referring to a Senate staff report that shows the Commission's interpretation is not just a possible one or a reasonable one, it is the correct one.

The Commission's decision to account for GT Com's reimbursement of storm damage costs through the Universal Service Fund also properly recognized that section 364.051(4)(b), Florida Statutes, was not intended to provide GT Com with double recovery. GT Com's witness testified at hearing to the amount of Universal Service Fund high cost loop support that it should receive based on including its Hurricane Dennis costs in its reports for funding from the Universal Service Fund. There is nothing reasonable about charging customers a storm damage surcharge when other funds will reimburse GT Com for those same storm costs. The Commission's decision was reasonable and is supported by the record.

GT Com has failed to overcome the presumption of validity that attaches to orders of the Commission. It has not shown that the Commission's Order was unsupported by competent substantial evidence or that the Commission abused its discretion. The Commission's order should be affirmed.

ARGUMENT

I. THE COMMISSION CORRECTLY INTERPRETED AND APPLIED SECTION 364.051(4)(b), FLORIDA STATUTES, TO ALLOW GT COM TO COLLECT A STORM COST SURCHARGE FOR ONLY THOSE COSTS THAT EXCEEDED ITS NORMAL OPERATING COSTS.

Section 364.051(4)(b), Florida Statutes, authorizes an incumbent local exchange telecommunications company to petition the Commission for recovery of its intrastate costs and expenses for repairing, restoring, or replacing the lines, plants, or facilities damaged by a named tropical system. The statute provides that the Commission "shall verify the intrastate costs and expenses submitted by the company," and that the Commission "shall determine whether the intrastate costs and expenses are reasonable under the circumstances for the named tropical system." § 364.051(4)(b) 2, 3, Fla. Stat. (2005).

GT Com asserts that the Commission may only determine whether its costs are reasonable in amount and reasonably incurred in light of the damage caused by the particular storm, in this case Hurricane Dennis. (I.B. at 10) GT Com would have the Commission and this Court ignore whether it has already recovered the same costs from its customers through their monthly rates, or whether it will recover the costs through means other than the storm surcharge. Thus, in GT Com's view, it is perfectly permissible for its customers to pay certain costs, such as its employees' regular salaries and benefits during a period following a named

tropical storm at least twice—once through their normal rates, and again through a storm surcharge tacked on top of the monthly rates. The Commission disagreed.

GT Com initially sought to recover $463,710 through the storm surcharge, an amount that was reduced to $312,693 when the Commission removed intrastate taxes and carrying charges of $151,017, finding that these costs were not direct costs associated with the storm. (R. Vol. 2, Pg. 263, Order Pg. 4) GT Com does not assert the Commission erred in making this adjustment. The Commission agreed that the remaining $312,693 were costs and expenses that GT Com attributed through its work orders to repairing, restoring, or replacing the lines, plants, or facilities damaged by Hurricane Dennis. Contrary to GT Com's implication at page 12 of its initial brief, however, the Commission did not agree that $312,693 were costs and expenses that were properly verified or reasonable, and that they should be recovered through a customer surcharge. (R. Vol. 2, Pg. 263, Order Pg. 4)

GT Com focuses in Point I of its argument on the Commission's disallowance of its in-house labor costs in the amount of $43,068. In addition to this amount, the Commission disallowed GT Com's claim for $19,767 in overhead and $38,952 in benefits allocated to in-house labor, which GT Com does not challenge. GT Com also contracted for labor with third parties for storm damage work. The cost of this outside labor was reasonable for recovery through the

surcharge to the extent it was an incremental cost; that is, to the extent it was not budgeted for by GT Com and therefore not covered by its normal rates. The amount the Commission did not allow, $43,068, represented the normal salaries of GT Com's regular employees that it would have incurred regardless of whether it experienced any damage from Hurricane Dennis. (R. Vol. 2, Pg. 268, 277)

A. The Commission's Decision To Disallow Double Recovery Is Consistent With The Statute's Direction To Determine "Reasonable" Costs To Be Recovered From Customers.

The Commission is given the authority and responsibility by section 364.051.(4)(b), Florida Statutes, to determine what costs and expenses are reasonable under the circumstances for recovery through a storm surcharge. The Commission determined that for GT Com's in-house labor costs and expenses to be reasonable for recovery under the statutory scheme, they must be incremental costs—that is, costs in excess of GT Com's normal costs that are already being recovered from its customers through their monthly rates.

GT Com contends that the terms "costs and expenses" have a plain and obvious meaning that is completely unambiguous. In GT Com's view, this means all costs and expenses including the regular salaries of its employees plus allocated shares of overhead and benefits. Although the Commission did not premise its decision on the meaning of "costs and expenses" standing alone, the meaning of the terms are not as plain as GT Com would have the Court believe. The term

"cost" or the terms "costs and expenses" may be words of common, everyday usage as GT Com asserts, but they are susceptible to multiple interpretations depending on context. Justice Souter, delivering the opinion of the United States Supreme Court, has written the following in the context of his analysis of the Federal Communications Commission telecommunications pricing rules:

> [a]t the most basic level of common usage, "cost" has no such clear implication. A merchant who is asked about "the cost of providing the goods" he sells may reasonably quote their current wholesale market price, not the cost of the particular items he happens to have on his shelves, which may have been bought at higher or lower prices.
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> The fact is that without any better indication of meaning than the unadorned term, the word "cost" in §252(d)(1), as in accounting generally, is "a chameleon," *Strickland v. Commissioner, Maine Dept. of Human Services*, 96 F.3d 542, 546 (CA1 1996), a "virtually meaningless" term, R. Estes, Dictionary of Accounting 32 (2d ed. 1985).

Verizon Communication Inc., et al. v. Federal Communications Commission, et al., 535 U.S. 467, 498, 500 (2002).

GT Com's plain meaning argument also ignores the requirement that the costs and expenses must be reasonable, and it ignores the history of the statute. Prior to the 2005 legislation, section 364.051(4), Florida Statutes, provided that a price cap regulated telecommunications company could petition for a rate increase if it made a showing of substantially changed circumstances to justify an increase.

In 2005, this part of the statute was made paragraph (4)(a), and paragraph (4)(b) was added to establish that damage from a named tropical storm constitutes a compelling showing of changed circumstances. Chapter 2005-132, § 28 at 27, Laws of Fla.

The addition to the statute is not fundamentally different in any way that supports GT Com's claim that all costs must be allowed regardless of whether they are incremental or extraordinary costs. The prior statute, now section (4)(a), did not address any particular allowable costs at all, except to provide that the costs and expenses of a specified governmental program were not recoverable and thus were not to be considered a changed circumstance. Under either version of the statute, the Legislature did not intend the Commission to allow recovery of anything other than extraordinary costs; that is, costs that are incremental and that would not have been incurred in the absence of substantially changed circumstances.

B. The Commission Properly Considered the "Circumstances for the Named Tropical System."

GT Com contends that the Commission disregarded any factual circumstances unique to Hurricane Dennis, and disregarded the magnitude of damage that was caused by it. (I.B. at 21) That is not true. The Commission considered the evidence of damage that GT Com offered and its Order describes the circumstances of the hurricane. (R. Vol. 2, Pg. 262, Order Pg. 3) The

Commission also allowed recovery through the surcharge of outside contractor costs that were not budgeted and that were required specifically because GT Com asserted that the Hurricane damage work exceeded the capabilities of its in-house labor. Thus, the Commission did look at particular facts and circumstances under which GT Com's hurricane related costs were incurred. GT Com identifies no verified incremental labor costs attributable to Hurricane Dennis damage that the Commission did not allow.

C. The Commission Did Not Err in Confirming Its Interpretation of Section 364.051(4)(B) by Reference to Legislative History Materials.

Just as courts often do, the Commission reviewed a legislative staff report to confirm its understanding and interpretation of section 364.051(4)(b), Florida Statutes. Such reports on legislation directly affecting an agency are commonly within the knowledge of an agency even as the legislation wends its way through the Legislature.

The Commission did not use the legislative history of the storm recovery surcharge statute to change the plain meaning of the statute. The Commission on its own determined that the purpose of statute was not to provide double recovery which would be the result if it allowed costs the company is already recovering from its customers through their regular rates. The Commission merely confirmed its interpretation by referring to the Senate staff report quoted in a footnote on page

two of its Order, and contained in GT Com's Appendix to its initial brief at Tab 6. The House of Representatives staff report, as well as a second Senate committee staff report, explained the language of (4)(b) in essentially the same terms:

> Effective upon becoming law, the bill amends s. 364.051(4), F.S. by finding that evidence of damage to the "lines, plant, and facilities" of a LEC with a carrier-of-last resort obligations due to named tropical systems occurring after June 1, 2005, constitutes a compelling showing of a changed circumstance. In the event of a named tropical system, the LEC would be permitted to seek recovery of its intrastate costs and expenses related to "repairing, restoring, and replacing" damaged equipment. The PSC would be responsible for verifying the intrastate costs and expenses submitted by the company to determine that they were reasonable under the circumstances. Traditionally, for rate-base regulated industries, the Commission would apply a "prudent and reasonable" test to ensure, for example, that costs are not double recovered, are booked to the appropriate costs (sic) accounts, and are necessary for the restoration process. The proposed language proposes a similar type review.

Fla. H.R. Utilities and Telecommunications Comm. and Commerce Council, CS for HB 1649 Staff Analysis at 6-7 (4/26/2005) available at http://www.myfloridahouse.gov/; Fla. Senate Comm. on Commerce and Consumer Services and Comm. on Communications and Public Utilities, CS for SB 2232 Staff Analysis at 7-8 (4/15/2005) & Fla. Senate Government Efficiency Approp. Comm. CS/CS/CS/SB 2068 at 6-7 (4/26/2005) available at http://www.flsenate.gov/session/ (The Senate bill that was enacted as Chapter

2005-132, Laws of Fla, CS/CS/SB 1322, in its final version incorporated the amendment to section 364.051(4) that was contained in these bills.)

The Commission is well aware that legislative staff reports are aids that are written by staff to explain legislation. Nevertheless, the reports bolster the Commission's interpretation and support a determination that its interpretation of section 364.051(4)(b), Florida Statutes, is not only a reasonable and possible interpretation, but that it is the correct interpretation. Notably, GT Com has not presented any legislative history to support a different interpretation of the statute. GT Com's interpretation is contrary to the legislative analyses and to the Commission's interpretation. The Commission's interpretation is not just a possible one or a reasonable one, it is the correct one. This Court should defer to the Commission's interpretation. *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005).

D. The Commission Properly Analyzed GT Com's Costs and Expenses to Determine Whether They Should be Paid for by Customers Through a Surcharge.

The Commission acted well within the terms of the statute and its discretion to interpret and apply section 364.051(4)(b), Florida Statutes, to authorize GT Com to collect a storm cost surcharge for only those costs attributable to Hurricane Dennis that exceeded the costs already being paid for by its customers. Contrary to GT Com's assertion, the Commission did not improperly apply rate base, rate of return regulation to GT Com to conclude that the company is already recovering its

in-house labor costs through "its normal business operations." (R. Vol. 2, Pg. 268, Order Pg. 9)

GT Com asserts that it has been under price regulation since 1996 and its last rate case was approximately 30 years ago; that its current revenue and rates were not established by the Commission to recover its costs and a return. (I.B. at 25) Though technically correct, this assertion is misleading and it does not support a conclusion that GT Com's current rates do not cover its expenses plus a profit.

First, GT Com's (formerly St. Joseph Telephone Company) earnings were regularly reviewed by the Commission following its last "full-blown" rate case in 1976. The Commission adjusted the company's rates several times as a result of those reviews. (Tr. Vol. 2, Pg. 134) *See, e.g., In Re: Investigation into the authorized return on equity and earnings of St. Joseph Telephone & Telegraph Company*, 94 FPSC 5:61, Order No. PSC-94-0547-FOF-TL, Docket No. 940200-TL; 1994 Fla. PUC LEXIS 418 (May 11, 1994); *In Re: Modified Minimum Filing Requirements Report of St. Joseph Telephone and Telegraph Company*, 93 FPSC 3:48, Order No. PSC-93-0328-FOF-TL, Docket No. 910927-TL, 1993 Fla. PUC LEXIS 331 (March 4, 1993).

Second, GT Com elected price regulation, choosing to forego rate of return regulation, in 1996. It would be a huge stretch for such a company that chose price cap regulation to claim that the rates it was collecting at the time it made the choice

were not covering all of its costs plus a profit. Such a claim would not be credible in any case. If GT Com had not been covering all of its costs and earning a profit, it likely would have asked the Commission for a rate increase prior to electing price cap regulation.

In addition, since January 1, 2001, GT Com has been permitted under section 364.051, Florida Statutes, to increase its rates for basic local service by the change in inflation less one percent once per 12-month period. The statutory scheme enables a company to cover its costs and expenses plus earn a profit during the transition to full competition. (Tr. Vol. 2, Pg. 152) Thus, GT Com's claim that its current rates were never intended to recover its current costs plus afford it a profit is not credible.

Moreover, there is ample evidence that GT Com recovered its costs and expenses plus a profit during 2005, even taking into consideration the hurricane damage costs. GT Com's Regional Controller, Mr. Ellmer, specifically testified to that fact. (Tr. Vol. 1, Pg. 97) Although GT Com quibbles about which costs Mr. Ellmer specifically agreed "would have been incurred by GT Com regardless of whether Hurricane Dennis occurred," there is no doubt that he agreed GT Com did not exclude the wages and benefits associated with regular time and budgeted overtime labor from its request for a surcharge. (Tr. Vol. 1, Pg. 80) He also specifically agreed that the employee benefits and overhead costs associated with

the in-house labor would have been incurred absent the hurricane. (Tr. Vol. 1, Pg. 105-106) Clearly GT was already recovering its normal expenses.

GT Com further reasons that because the Commission limited the storm cost recovery for rate of return regulated electric companies to incremental or extraordinary costs, that somehow it is impermissible to impose the same limitation on a price cap regulated company. Whether companies are rate of return regulated or price regulated, however, is irrelevant. The statutes for both types of companies require the Commission to determine reasonableness before allowing recovery by imposing a surcharge or increased rates on customers.

GT Com also contends that the contrast between the detailed language used to define "storm-recovery costs" in section 366.8260(1)(n), Florida Statutes, and the language of section 364.051(4)(b) supports its conclusion that section 364.051(4)(b) "broadly permits recovery of unadjusted 'costs and expenses relating to' hurricane repairs". GT Com is wrong. Section 366.8260, Florida Statutes, is a very detailed statute applicable to investor-owned electric utilities, providing a complex recovery scheme involving financing of storm costs through the issuance of bonds. Section 364.051(4)(b) permits recovery of costs and expenses only if they are verified by the Commission and determined to be reasonable under the circumstances. Unlike section 364.051(4)(b), section 366.8260(1) defines "storm-recovery costs" and 18 other terms. If anything, the

Commission is granted more discretion under 364.051(4)(b), which does not define costs or expenses, than it is accorded under section 366.8260, Florida Statutes.

GT Com would have its customers paying its employee's salaries and benefits for the three-month period following the storm damage, once through their regular monthly rates and again through a surcharge. There is no justification for customers to pay twice for a company's costs, whether it is a price regulated company or a rate of return regulated company. Whether a company is rate of return or price regulated is irrelevant in this regard. There is nothing in the language of section 364.051(4)(b) that requires such a result.

GT Com's contention that the Commission improperly applied rate base, rate of return regulation to GT Com is simply wrong. The Commission did only what the statute required it to do; that is, determine what costs and expenses were reasonable under the circumstances and to analyze the costs GT Com—a price cap regulated company—presented in light of that standard.

II. THE COMMISSION DID NOT ERR IN INTERPRETING AND APPLYING SECTION 364.051(4)(b), FLORIDA STATUTES, TO DENY GT COM RECOVERY OF CERTAIN CAPITAL COSTS THROUGH A SURCHARGE.

A. The Commission's Decision Complies With the Statute's Direction to Allow Recovery of Costs That Are Reasonable Under the Circumstances.

Contrary to GT Com's assertion, section 364.051(4)(b), Florida Statutes, does not clearly and unambiguously permit it to recover the cost of replacing lines,

plants and facilities. The statute permits the company to file a petition to recover the cost of replacing facilities damaged by a named tropical system. It does not permit it to recover any costs that the Commission does not find reasonable under the circumstances. With regard to the costs for capital assets, the Commission found that it would not be reasonable for GT Com to recover capital assets through the storm cost recovery surcharge over a one-year period. GT Com depreciates the assets over a 15-year period, allocating the cost to the periods in which services are received from the asset. (R. Vol. 2, Pg. 271-272; Order at 12-13)

The Commission's decision with regard to GT Com's capital costs is consistent with its prior and subsequent decisions on storm cost surcharges, in cases involving both price regulated companies and rate of return regulated companies. (R. Vol. 2, Pg. 271, Order at 12; Tr. Vol. 2, Pg. 153, 155-158)

B. The Commission Did Not Disregard the "Circumstances for the Named Tropical System" in Disallowing Certain Capital Costs.

The Commission considered all of the evidence of damage occurring to GT Com's plant from Hurricane Dennis and it recognized that the company incurred costs as a result. (R. Vol. 2, Pg. 270, Order at 11) In a similar case, with regard to approving Sprint-Florida, Incorporated's ("Sprint") petition for a storm cost surcharge under the former version of section 364.051(4), the Commission approved a storm cost surcharge to recover capital costs to the extent the cost of reconstruction exceeded the normal material and labor costs of construction. (TR.

Vol. 2, Pg. 156 – 157; R. Vol. 2, Pg. 270, Order at 11) The Commission in that case recognized that circumstances during tropical system recovery can result in cost premiums for outside labor and materials. In this case, however, GT Com simply did not have any costs that exceeded normal costs.

C. The Commission Did Not Improperly Apply Rate Base, Rate of Return Regulation to GT Com.

The Commission's decision to disallow $141,552 in capital costs was based on the fact that capital assets are depreciated over a 15-year period and therefore should not be recovered in one year. (R. Vol. 2, Pg. 271, Order at 12) This is not a concept that is unique to the regulation of rate of return regulated companies. As the Commission stated in its Order, "[c]apitalization of assets is not limited to regulated utilities—it is used by most businesses." (Tr. Vol. 2, Pg. 271, Order at 12) GT Com's witness, Mr. Ellmer, agreed that it depreciates its assets like other companies do. (Tr. Vol. 1, Pg. 96.) The fact that capitalization of assets is also a tenet of rate base, rate of return regulation does not make its use inappropriate in this case.

The Commission also noted in its Order that it had consistently applied the capitalization methodology with respect to petitions for storm cost recovery, both for rate of return regulated electric companies and for a price cap regulated company when it approved Sprint's petition and its stipulation with Public Counsel. (R. Vol. 2, Pg. 271, Order at 12) The Commission recently approved the same

methodology with regard to BellSouth Telecommunications Inc.'s petition for storm cost recovery under section 364.051(4)(b), Florida Statutes. *In re: Petition to recover 2005 tropical system related costs and expenses, by BellSouth Telecommunications, Inc.*, Order No. PSC-07-0036-FOF-TL, issued January 10, 2007, in Docket No. 060598-TL, Order on BellSouth Storm Cost Recovery. (OPC App. Tab 7) Both Sprint and BellSouth were price regulated companies and in each of these cases the company agreed that it is reasonable to exclude costs that are capitalized from the surcharge. Thus, the storm cost surcharge properly recovered only those capital costs to the extent they were extraordinary costs. (R. Vol. 2, Pg. 270, Order at 11)

D. The Commission Decision is Consistent With the Principles of Statutory Construction.

The Commission did not conclude that the meaning of section 364.051(4)(b) was ambiguous, and it therefore did not resort to rules of statutory construction. Although it stated that the term "costs" can have many different meanings, the capital costs were disallowed because the Commission found that they were not reasonable under the circumstances, as it was required to do. (R. Vol. 2, Pg. 270, Order at 11) The basis for the Commission's disallowance of certain capital costs was not the particular meaning it ascribed to "costs" or "costs and expenses."

Contrary to GT Com's assertions, section 364.051(4)(b), Florida Statutes, does not provide for the recovery of all costs with a clear and finite list of

exceptions or even one exception. Nowhere in this statute is the term "except" used, unlike the statute the Court construed in *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 341 (Fla. 1952), the case GT Com relies upon for the principle *expressio unius est exclusion alterius.* The provision in section 364.051(4)(b)4 that limits a company's recovery to amounts in excess of a storm reserve fund only confirms that the Legislature did not intend a company to "double recover" its storm costs. It does not preclude the Commission from considering other ways in which GT Com will recover its costs.

Moreover, just as the statute limits recovery to "intrastate costs," and therefore excepts interstate costs, it also limits recovery to "reasonable" costs and "verified" costs, thus excepting unreasonable or unverified costs. The application of the rule *expressio unius est exclusion alterius* urged by GT Com does not require the Commission to allow a surcharge for costs or expenses that it does not find reasonable or that are being recovered through other means.

The limitations on the amount of recovery imposed by section 364.051(4)(b) is not a substitution by the Legislature for a Commission examination and determination of reasonableness, contrary to the argument GT Com makes on page 38 of its initial brief. As explained by the Commission in its Sprint order, the Legislature imposed limits on the amount and duration of a surcharge for ILECs so as not to "significantly skew the competitive market, since in most instances a

competitive business would be unable to request or impose such a surcharge, except to the extent that the market would bear." *In re: Petition for approval of storm cost recovery surcharge, and stipulation with Office of Public Counsel, by Sprint-Florida, Incorporated,* 05 FPSC 10:2, Order No. PSC-05-0946-FOF-TL; "Order Approving Storm Cost Recovery Surcharge" (GT Com App. Tab 5, Pg. 3)

Allowing GT Com to recover through a surcharge all of its costs, regardless of whether they are incremental to its normal costs and regardless of whether the costs are recovered through other means, would render the direction for the Commission to determine what costs are reasonable virtually meaningless—a result that should be avoided. *Hechtman v. Nations Title Insurance,* 840 So. 2d 993, 996 (Fla. 2003).

III. THE COMMISSION'S DECISION TO ACCOUNT FOR GT COM'S REIMBURSEMENT THROUGH UNIVERSAL SERVICE FUNDS FOR STORM DAMAGE COSTS WAS BASED ON COMPETENT SUBSTANTIAL EVIDENCE AND WAS WITHIN THE COMMISSION'S DISCRETION TO DETERMINE WHETHER COSTS TO BE RECOVERED BY A SURCHARGE WERE REASONABLE.

Based on the evidence of record, the Commission found that GT Com will begin receiving Universal Service Fund disbursements for its 2005 storm costs in January 2007, and that recovery of any costs from the fund because of additional expenses related to Hurricane Dennis should reduce the amount GT Com can recover through a special storm surcharge. (R. Vol. 2, Pg. 276-277, Order at 17-

18) The Commission's decision properly recognized that section 364.051(4)(b), Florida Statutes, was not intended to provide GT Com with double recovery. Its decision is reasonable and is supported by the record.

A. The Commission's Decision Did Not Contravene the Language of Section 364.051(4)(b), Florida Statutes.

In its Point III. A., GT Com repeats its arguments that the statute requires the Commission to allow it to collect through a surcharge all of its costs and expenses related in any way to its storm damage, regardless of whether those costs are reasonable. The Commission believes it has addressed GT' Com's arguments about the construction of the statute in its preceding arguments.

In addition, however, GT Com's claim that the statute has just one exception to its recovery of all costs, even if that means a double recovery, is inconsistent with its recognition that any insurance proceeds it receives for storm damage should be offset against a surcharge. The statute does not mention insurance proceeds, but GT Com's witness stated that if the company had received insurance proceeds on account of the hurricane, then it would be appropriate to offset the amount of the surcharge by the amount of the insurance proceeds. (Ex. 3, Pg. 73) GT Com attempts to make a distinction between offsetting universal service funds and offsetting insurance proceeds against a surcharge based on its opinion that receipt of universal service funds is speculative. The Commission did not see a meaningful difference. (R. Vol. 2, Pg. 276, Order at 17)

There is nothing reasonable about charging customers a storm damage surcharge when universal service funds will reimburse GT Com for those same storm costs. Such a result is made even more unreasonable when one considers that it is the customers of telecommunications providers, including GT Com's, that are typically assessed by their providers through a line item charge on their monthly bills in order to fund the Universal Service Fund.

B. Competent Substantial Evidence Supports the Commission's Finding That GT Com Will Receive Reimbursement for Storm Costs.

The Commission's decision to reduce GT Com's storm damage surcharge by $40,209 to take into account universal service fund reimbursement was based on its calculation from the evidence that GT Com will receive approximately $141,449 in Universal Service Fund reimbursements for its 2005 storm damage. GT Com's witness testified at hearing that $141,451 was the estimated difference in Universal Service Fund high cost loop support that it should receive based on including its Hurricane Dennis costs in its reports for funding from the Universal Service Fund. (Tr. Vol. 2, Pg. 118; Ex. 2, Pg. 6) The Commission did not, however, reduce GT Com's claim by the full $141,451 GT Com stated or the $141,449 that it calculated GT Com would receive. Rather, it offset that amount by some of the adjustments it had already made to GT Com's request. Thus, although GT Com itself projected that it would receive $141,451 in Universal

Service Fund reimbursement, the Commission only deducted $40,209 from the amount GT Com may recover through a surcharge. (R. Vol. 2, Pg. 277, Order p. 18)

GT Com complains that it does not know the precise amount of Universal Service funds it will receive based on its 2005 costs. In addition to GT Com's own reports, however, GT Com's witness testified, that it has received such funds since at least 1986. (Tr. Vol. 1, Pg. 133) Public Counsel's witness Mr. Larkin testified that "because of the increased cost resulting from these items being capitalized and items being expensed as a result of the storm, the company will receive additional high-cost loop support payments" and that these payments should be taken into consideration. (Tr. Vol. 2, Pg. 173)

GT Com's claim that its projected subsidy will decrease by $200,000 (from $4.4 million in 2006 to $4.2 million high cost support in 2007), if one makes certain assumptions about national average costs, overlooks that it will still receive approximately $141,449 more because of its additional hurricane costs than it would receive if it did not report its hurricane costs. (Tr. Vol. 2, Pg. 136-137) GT Com's witness testified that the subsidy or support that it receives is based on total company costs. (Tr. Vol. 2, Pg. 137) Thus, regardless of the level of its total company costs, if it has higher costs due to hurricane expenses than it otherwise

would have, then it will receive a larger subsidy than it would without the hurricane costs.

Competent substantial evidence supports the Commission's decision to reduce GT Com's storm surcharge by the amount of universal service funds it is projected to receive. It was within the Commission's discretion to give more weight to the evidence that demonstrated a long record of increasing subsidy payments, the documentary evidence showing projected receipts, and the testimony of Public Counsel's witness. The Commission was not compelled to ignore its own regulatory experience or abandon common sense. *Gulf Power Company v. Florida Public Service Commission*, 453 So. 2d 799 (Fla. 1984). The Commission properly applied its expertise to the evidence before it. *Citizens v. Public Service Comm'n*, 435 So. 2d 784, 787-788 (Fla. 1983). Competent substantial evidence supports the Commission's decision.

GT Com further complains that it will not receive the Univeral Service Fund subsidy until several years in the future. (I.B. at 41) The record establishes, however, that GT Com will begin receiving USF funds based on its 2005 costs, including storm costs, in January 2007. (Tr. Vol. 1, Pg. 85) The Commission took this delay into account and approved carrying costs at the commercial paper rate for the period from when the costs were incurred until GT Com receives its

reimbursement through the Universal Service Fund. (R. Vol. 2, Pg. 277, Order at 18)

CONCLUSION

The Commission's orders come to this Court clothed with a presumption of validity. *Crist v. Jaber*, 908 So. 2d at 430. GT Com has failed to overcome this presumption. It has not shown that the Commission's Order was unsupported by competent substantial evidence or that the Commission abused its discretion. The Commission's construction of the statute it is charged with enforcing is a reasonable one and is neither clearly unauthorized or erroneous. *Level 3 Communications, LLC v. Jacobs*, 841 So. 2d at 450.

The Commission's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 12th day of January, 2007, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman 14-point type face, a font that is proportionally spaced.

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