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.

The Florida Public Service Commission, Lisa Polak Edgar, in her official capacity as Chairman of the Florida Public Service Commission; and J. Terry Deason, Isilio Arriaga, Matthew M. Carter II, and Katrina J. Tew, in their official capacities as Commissioners of the Florida Public Service Commission,

Appellees

INITIAL BRIEF OF APPELLANT

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PREFACE

GTC, Inc., d/b/a GT Com appeals the Florida Public Service Commission's decision denying recovery of certain costs and expenses it incurred to repair, restore, or replace its lines, plants and facilities damaged by Hurricane Dennis. This Court has appellate jurisdiction pursuant to Fla. Const. Art. V, §3(b)(2) and Fla.R.App.P. 9.030(a)(1)(B)(ii).

Appellant GTC, Inc., d/b/a GT Com will be referred to herein as "GT Com;" appellee Florida Public Service Commission will be referred to as the "PSC" or "Commission" and appellee Office of Public Counsel will be referred to as "OPC." All references to Florida Statutes are to the 2005 version unless otherwise noted.

References to the record below are identified by Volume and Page Number as (R. Vol. ____, Pg.____). References to the transcript of the June 28, 2006 hearing are identified as (Tr. Vol. __, Pg. ___). References to the Appendix to this Initial Brief are identified by Appendix Tab number as (App. Tab ___).

The order on appeal, Order No. PSC-06-0681-FOF-TL (*Order On GT Com Storm Cost Recovery)* will be referred to as the *"Order*." *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).

STATEMENT OF THE CASE AND FACTS

Before 1995, Florida incumbent local exchange telephone companies ("ILECs") were monopolies subject to rate base, rate of return regulation. Under this form of regulation, the PSC set the rates each company could charge its customers based on an exhaustive evidentiary examination of the utility's books and records in order to determine the amount of money reasonably invested in providing utility service, subject to a number of regulatory adjustments. The Commission then set service rates calculated to yield the amount of revenue necessary to recover the company's normal costs of operation plus a Commission-established rate of return on the utility's investment. (Tr. Vol. 1, pgs. 60-61, 64-65) However, 1995 brought a major legislative overhaul of Chapter 364, Florida Statutes, which opened the doors to telecommunications competition and introduced ILECs to price regulation, a greatly reduced level of regulatory oversight.

Pursuant to §364.051(1)(c), Florida Statutes (1995), ILECs that elected price regulation were exempted from rate base, rate of return regulation and from the specific statutes under which the PSC formerly regulated their rates and services:

> Each company subject to this section shall be exempt from rate base, rate of return regulation and the requirements of ss 364.03, 364.035, 364.037, 364.05, 364.055, 365.14, 364.17, and 364.18.

This exemption, however, did not provide ILECs with freedom to set their

own rates. Instead, rates were temporarily frozen, or capped, at 1995 levels, with only three possible avenues for an increase: First, beginning in 2000, price-regulated ILECs could increase basic rates once per year by an amount reflecting inflation minus one percent pursuant to §364.051(4), Florida Statutes (1995). [1] Second, rates for nonbasic services could be increased by a larger amount pursuant to §364.051(6), Florida Statutes (1995).[2] And third, recognizing that local service competition may not develop quickly or smoothly, the Legislature provided a fall-back hardship option, which permitted any price-regulated ILEC to seek a general increase in its basic local rates upon "a compelling showing of changed circumstances" pursuant to §364.051(5), Florida Statutes (1995). That statute has been amended and is now codified as §364.051(4)(a), Florida Statutes.

In 2005, after an extraordinary 2004 hurricane season in which Florida was struck by four damaging storms in quick succession, the Legislature amended §364.051(4), Florida Statutes, to permit ILECs to recover the costs of repairing hurricane damage through a limited customer surcharge. (App. Tab 1) Unlike §§364.051(3), (4)(a) and (6), all of which permit permanent general rate increases, newly-enacted §364.051(4)(b) provides for a direct customer surcharge that is

[1] This provision was later amended and is now codified as §364.051(3), Florida Statutes.

[2] This provision also has been amended, and is now codified as §364.051(5), Florida Statutes.

limited in amount (up to $0.50 per customer) and may be imposed for a limited period of time (up to one year), and which may be imposed solely to assist in the ILEC's recovery of hurricane repair expenses.

Section 364.051(4)(b), Florida Statutes, provides a clear and unambiguous roadmap by which a qualifying ILEC can recover its "intrastate costs and expenses relating to repairing, restoring, or replacing the lines, plants, or facilities" damaged by a hurricane, subject *only* to the following requirements:

(1) The costs and expenses must be verified. §364.051(4)(b)2.

(2) The costs and expenses must be reasonable under the circumstances for the specific storm. §364.051(4)(b)3.

(3) If a company has a storm reserve fund, it may recover only those costs and expenses in excess of the amount available in the fund. §364.051(4)(b)4.

(4) Cost recovery is capped at a maximum charge of $6.00 per customer line per storm season. §§364.051(4)(b)5. and 8.

(5) Finally, the costs and expenses must exceed a minimum amount that ranges from $0 for companies with fewer than 1 million access lines up to $5 million for companies with 3 million or more access lines. §364.051(4)(b)(7).

GT Com petitioned the PSC on March 31, 2006, for authority to recover costs and expenses it had incurred to repair, restore and replace its lines, plants and facilities that were damaged by Hurricane Dennis in 2005. (R. Vol. 1, Pg. 1) The OPC intervened in the proceeding as permitted by §350.0611, Florida Statutes. (R. Vol. 1, Pgs. 14, 17)

The PSC held a hearing on June 28, 2006, during which three witnesses testified. GT Com's witness, R. Mark Ellmer, presented direct and rebuttal testimony. In addition, Hugh Larkin, Jr. provided direct testimony on behalf of OPC and Michael Buckley provided direct testimony on behalf of the PSC Staff.

The PSC issued its *Order* on August 7, 2006. (App. Tab 2) Despite the plain language of §364.051(4)(b), Florida Statutes, the agency denied recovery of the majority of GT Com's costs and expenses relating to repairing, restoring, or replacing the lines, plants or facilities damaged by Hurricane Dennis. GT Com timely filed its Notice of Appeal on September 5, 2006. GT Com was the first company to seek recovery under §364.051(4)(b), Florida Statutes, and to date, the PSC has held no other hearings and issued no other orders regarding recovery under the statute.

SUMMARY OF THE ARGUMENT

The PSC verified that GT incurred interstate costs and expenses of $312,693, exclusive of taxes and carrying costs, related to repairing, restoring or replacing its lines, plants and facilities that were damaged by Hurricane Dennis in 2005. Although it failed to find that the costs were unreasonable in amount or unreasonably incurred, the Commission nevertheless denied recovery of $224,829, or 72% of GT Com's repair costs, erroneously theorizing that §364.051(4)(b), Florida Statutes, permitted it to impose numerous limitations on recovery that are

not identified within the statute itself. Specifically, the PSC erroneously denied recovery of uncontroverted costs and expenses unquestionably incurred to repair, restore and replace its lines, plants and facilities on the grounds that (a) GT Com would have spent some equivalent amount of money performing routine maintenance tasks in the absence of hurricane damage and thus should recover only for in-house labor costs in excess of that amount; (b) the statute does not permit recovery of the cost of replacing lines, plants and facilities that will remain in service for several years; and (c) GT Com should not be reimbursed for replacement costs of some facilities because the company could receive an unknown amount of Universal Service funds from the Federal Communications Commission's High Cost Loop Support program beginning in 2007, which funds should be used to offset GT Com's 2005 hurricane repair costs. [3]

The Commission's interpretation of the statute renders it nearly meaningless, and its *Order* is clearly erroneous because it contravenes the plain language of the statute and constitutes an impermissible attempt to apply rate base, rate of return regulation to GT Com, a price capped ILEC that is statutorily exempt from such regulation. Further, there was no competent substantial evidence to support the agency's decision to impute a speculative amount of future funding against

[3] GT Com has not challenged the PSC's denial of its request for recovery of certain other expenses.

expenses actually incurred by GT Com in 2005 to repair hurricane damage. Accordingly, the *Order* must be reversed.

STANDARD OF REVIEW

The PSC's erroneous interpretation of §364.051(4)(b), Florida Statutes, is purely a legal matter and thus the standard of review is *de novo. Sullivan v. Florida Department of Environmental Protection*, 890 So.2d 417 (Fla. 1st DCA 2004); §120.68(7)(d), Florida Statutes. Although an agency's contemporaneous construction of statutes it is charged with enforcing is entitled to "great weight" and will be upheld unless "clearly unauthorized or erroneous" (*PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988)), an interpretation contrary to the plain meaning of a statute is clearly erroneous and therefore not entitled to great – or indeed any – weight. *Verizon Florida Inc. v. Jacobs,* 810 So.2d 906 (Fla. 2002). *See also Sullivan, id.* (no deference required where agency's view is contrary to plain meaning of statute). Further, the traditional deference granted to the PSC's consideration of evidentiary issues has no application to questions of law. *Tampa Electric Company v. Garcia*, 767 So.2d 428 (Fla. 2000).

While it has sometimes been said that the PSC's orders are "clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and … are reasonable and just….", §364.20, Florida Statutes (1959), the statute that supplied the presumption, was expressly repealed

in 1980 and is no longer applicable. *See, General Tel. Co. v. Carter,* 115 So.2d 554, 556 (Fla. 1959) and cases citing it for reference to the "statutory presumption"; *see also* Ch. 80-36, Sec. 31, Laws of Florida, which repealed the presumption. Instead, the agency's decisions of law must be reviewed under the standard set forth in §120.68(7)(d), Florida Statutes, which provides as follows:

> (7) The Court shall remand a case to the agency for further proceedings consistent with the court's decision to set aside agency action, when it finds that:
>
> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action….

See also Parlato v. Secret Oaks Owners Association, 793 So.2d 1158 (Fla. 1st DCA 2001)(principle that appellate courts generally are not required to defer to lower tribunals on issues of law has been incorporated in §120.68(7)(d), Florida Statutes and thus final order based on conclusion of law is subject to *de novo* review).

Point III of this Brief addresses the PSC's erroneous decision to impute a speculative amount of future funding against expenses actually incurred by GT Com in 2005 to repair hurricane damage. This decision involves both an erroneous interpretation of §364.051(4)(b), Florida Statutes, for which the standard of review is *de novo,* as well as an erroneous factual finding, the standard of review for which is whether it is supported by competent substantial evidence. Section 120.68(7), Florida Statutes.

ARGUMENT

I.
THE FLORIDA PUBLIC SERVICE COMMISSION ERRONEOUSLY INTERPRETED AND APPLIED SECTION 364.051(4)(b), FLORIDA STATUTES TO LIMIT GT COM'S HURRICANE COST RECOVERY TO ONLY THAT PORTION OF ITS COSTS AND EXPENSES IN EXCESS OF A BASELINE AMOUNT THE COMPANY WOULD HAVE EXPENDED IN ITS NORMAL OPERATIONS IN THE ABSENCE OF A HURRICANE, THUS DENYING GT COM RECOVERY OF UNCONTROVERTED IN-HOUSE LABOR COSTS AND EXPENSES ACTUALLY AND REASONABLY INCURRED TO REPAIR, RESTORE OR REPLACE ITS LINES, PLANTS AND FACILITIES DAMAGED BY HURRICANE DENNIS.

Section 364.051(4)(b), Florida Statutes, provides a clear and unambiguous roadmap by which a qualifying ILEC can recover its "costs and expenses relating to" hurricane repairs, subject only to three requirements:

The costs and expenses must relate to hurricane repairs. The statute broadly provides for recovery of "costs and expenses", which need only "relate to" repair, restoration or replacement of damaged facilities, thus implying a broad and expansive reading of the phrase.

The costs and expenses must be verified. The statute requires the PSC to "verify" the costs and expenses. §364.051(4)(b)2. The term "verify" clearly is used in its ordinary sense to indicate that the agency must review the claimed costs and expenses to determine whether they were accurately recorded and truthfully reported.

The costs and expenses must be reasonable under the circumstances

presented by the particular hurricane that caused the damage. The company must show that the costs and expenses are reasonable under the circumstances presented by the particular hurricane event. §364.051(4)(b)3. That is, not only must the company accurately record and report its hurricane repair costs and expenses as required by subparagraph (4)(b)2, but it must also demonstrate that the costs and expenses were reasonable in amount and were reasonably incurred in light of the damage caused by the particular storm.

For example, where post-hurricane damage is so great that the demand for labor outstrips the supply, the Commission should consider whether labor costs that otherwise might be considered excessive actually were reasonable under those particular circumstances. Similarly, the Commission should consider whether severely damaged facilities should be replaced instead of repaired, even though repair was possible and might be less expensive in the short term.

Once the Commission has verified hurricane repair costs and determined that they are reasonable in amount and were reasonably incurred, the company's recovery is subject to three specific and significant limitations:

First, a company may not petition for hurricane cost recovery unless its costs and expenses exceed a minimum amount that ranges from $0 for small companies like GT Com that serve fewer than 1 million access lines, up to $5 million for companies with 3 million or more access lines. §364.051(4)(b)(7).

Second, recovery is limited to costs and expenses in excess of the amount available in its storm reserve fund, if any. §364.051(4)(b)4. GT Com has no storm reserve fund. [4]

Finally, cost recovery is capped at $0.50 per customer line per month for a period of one year, resulting in a maximum charge of $6.00. §§364.051(4)(b)5. and 8. GT Com serves 46,861 lines and the cap therefore results in a maximum recovery of $281,166. (Tr. Vol. 1, Pg. 32)

GT Com sought recovery of intrastate costs and expenses in the amount of $312,693, net of taxes and carrying costs, for labor and materials necessary to repair, restore and replace the lines, plants and facilities damaged by Hurricane Dennis. (Exhibit RME-10, found in Composite Hearing Exhibit No. 5) Much of this expense consisted of labor costs. Some labor was contracted out to third parties due to the magnitude of the work, the need to have it completed as soon as

[4] A "storm reserve" is an optional accounting technique sometimes used by rate of return regulated utilities in order to level out the earnings impact of major storms by crediting a fixed monthly amount to the reserve. The costs of a major storm then would be charged against the balance in the account, thus preventing an abnormally large fluctuation in the company's reported earnings. *See* Rule 25-6.0143, Florida Administrative Code (applicable only to electric utilities). (App. Tab 3) A "storm reserve fund" is an account that the company has actually funded with cash derived from a customer surcharge. *See,* for example, Order No. PSC-06-0772-PAA-EI in which the Commission permitted a rate of return electric utility to extend its previously-approved customer surcharge in order to fund its storm reserve. (App. Tab 4) Storm reserves are unique to such utilities; Generally Accepted Accounting Principles prohibit accruals for uninsured and unquantifiable future losses in most cases.

possible, and the fact that GT Com is a small company with insufficient staff to repair all damage caused by the hurricane. The remaining work was performed in house by company employees. (Tr. Vol. 1, Pgs. 40-47)

The company used a series of hurricane-specific work orders to track the cost of all hurricane-specific repair work, including labor by both contractors and employees. (Tr. Vol. 1, Pgs. 38-39; Exhibits RME-2, 4, and 6-10 in Composite Hearing Exhibit No. 5) Mr. Ellmer, GT Com's Regional Controller, testified that the dollar amounts charged to those work orders related solely to hurricane repairs, that it was necessary to perform the work and incur the charges, and that the costs incurred were reasonable in amount. (Tr. Vol. 1, Pgs. 38-39) There is absolutely no evidence in the record that contradicts Mr. Ellmer's testimony, and in fact, the Commission found that GT Com actually incurred total intrastate costs and expenses of $312,693 to repair, restore or replace the lines, plants or facilities damaged by Hurricane Dennis, exclusive of taxes and carrying charges. *Order*, Pg. 4; 06 FPSC 8:175-176.

Among other costs, GT Com sought recovery of its direct cost for productive in-house employee time, calculated on an hourly basis, exclusive of benefits and overhead. [5] (Tr. Vol. 1, Pgs. 48, 49, 58; Exhibit RME-10) In-house labor was used for a number of hurricane repair functions, including but not limited to replacing

[5] GT Com also sought recovery for benefit and overhead allocations associated with its labor costs, and does not challenge the PSC's denial of this request.

aerial drop wire knocked down by the hurricane, repairing other damaged lines, plants and facilities as necessary to restore service to customers, and repairing and replacing telephone pedestals damaged by the storm. In-house labor also included the direct cost of engineer time necessary to formulate and prepare plans for the contractors to make extensive repairs and replacement of facilities and restoration of plant damaged by Hurricane Dennis on Alligator Point (installation of fiber and copper cable and a cross-connect system) and Indian Pass (installation of fiber cable in Franklin County). (Tr. Vol. 1, Pgs. 41-43)

Significantly, the Commission did not find that GT Com failed to verify its in-house labor costs, that such costs were excessive or that they were not reasonably incurred. Instead, ignoring the plain language of the statute, the PSC imposed an additional limitation on recovery not found in the statute:

> We find that the phrase *"reasonable under the circumstances"* allows us great latitude in determining the methodology and factors that should be taken into consideration when reviewing the petitioner's request. We also find that this statute was enacted to assist the petitioner in defraying additional costs caused by extraordinary circumstances, specifically tropical storms.
>
> One of the main goals of this statute is to assist the petitioner financially. Accordingly, the reasonable clause implicitly ensures that storm related cost recovery should be based on expenditures incurred over and above normal operating expenditures. It is highly unlikely that the Legislature intended, through Section 364.051(4), Florida Statutes, to reimburse companies for costs that they

> would have incurred regardless of whether a storm had occurred or not.

Order, Pg. 6; 06 FPSC 8:177, italics in original, other emphasis added.

Based on this erroneous determination, the Commission denied GT Com recovery of the uncontroverted cost of its in-house labor in the amount of $43,068 for hurricane repairs, arguing that the company was "already recovering" the cost of its in-house labor "through its normal business operations" and therefore the cost "was not incurred as an extraordinary amount related to Hurricane Dennis":

> GT Com's in-house labor costs should be removed for storm cost recovery purposes. *GT Com's in-house labor costs should not be included in the amount to be recovered through a storm charge as the Company is already recovering this amount through its normal business operations.* Witness Ellmer agreed during cross examination that its in-house labor costs that were included in GT Com's storm cost recovery amount, would have been incurred by the Company regardless of whether Hurricane Dennis had occurred. *The cost included for in-house labor, therefore, was not incurred as an extraordinary amount related to Hurricane Dennis*. Since the labor costs would have been incurred by GT Com regardless of whether Hurricane Dennis had occurred, it is not reasonable for the Company to recover these costs through the storm charge recovery mechanism.

Order, Pg. 9; 06 FPSC 8:180-181, emphasis added. In essence, the Commission arbitrarily denied recovery of the cost of in-house necessary to repair hurricane damage on the theory that the company would have paid employees to accomplish other tasks in the absence of a hurricane, and that it was already being reimbursed

by its customers for these expenses. These rulings are patently erroneous because they ignore the clear, straightforward language of the statute and improperly apply rate-base, rate of return regulation to a price-regulated company. [6]

A. The Commission's ruling contravenes the plain and unambiguous language of the statute.

Clear and unambiguous statutory language must be given its plain and obvious meaning. *Holly v. Auld,* 450 So.2d 217 (Fla. 1984); *St. Petersburg Bank & Trust Co. v Hamm,* 414 So.2d 1071 (Fla. 1982). *See also Thayer v. State,* 335 So.2d 815, 817 (Fla. 1976)("the Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute.")

The Legislature expressly chose to permit recovery of "costs" and "expenses," and to use these words without any restrictive or delimiting terms. The terms "costs" and "expenses" are words of common usage, which convey a clear and definite meaning and are not subject to different constructions. They are completely unambiguous, as the term "[a]mbiguity suggests that reasonable persons can find different meanings in the same language." *Forsythe v. Longboat Key Erosion Control Dist.*, 604 So.2d 452, 455 (Fla. 1992). The words "cost" and

[6] The fact that the Commission denied recovery of direct in-house labor costs while permitting recovery of the cost of contracted labor to perform some of the very same tasks illustrates the arbitrary nature of the Commission's decision. (Tr. Vol. 1, Pgs. 40-41; Exhibit RME-2 in Composite Hearing Exhibit 5)

"expense" plainly and obviously mean "amount paid," as does the phrase "costs and expenses." These terms cannot reasonably be construed to mean extraordinary costs, net costs, tax-adjusted costs, depreciated costs, or costs that are in excess of an amount the company would have spent on other activities in the absence of a hurricane. Such concepts require the use of additional limiting words the Legislature chose not to include in the statute. Rather than supply words of limitation, the Legislature stated that costs and expenses need only "relate to" repair, restoration or replacement of damaged facilities, thus implying a broad and expansive reading of the recoverable costs. Accordingly, these unambiguous terms must be construed in their plain and ordinary sense and the statute must be given its plain and obvious meaning. *Holly, supra; Montgomery v. State*, 897 So.2d 1282 (Fla. 2005). *See also Level 3 Communications, LLC v. Jacobs*, 841 So.2d 447, 443 (Fla. 2003), where this Court held that a statute requiring telecommunications companies to pay a fee calculated as a percentage of "gross operating revenues derived from intrastate business" included all of the companies' intrastate business, not just must its intrastate telecommunications business, because "the statute on its face does not limit the assessment based upon the type of service" being provided. Likewise, §364.051(4)(b) does not limit recovery of costs and expenses relating to hurricane repair based upon the type of cost or expense incurred, and therefore clearly requires recovery of all such costs and expenses. *Accord, Verizon Florida*

Inc. Jacobs, 810 So.2d 906, 908 (Fla. 2002).

If necessary, the plain and ordinary meaning of words can be determined by referring to a dictionary. *Montgomery, supra*. It is not necessary to do so in this case because these are words of common, everyday usage that are readily understood. However, the Random House Dictionary of the English Language (2nd Edition, Unabridged) defines the noun "cost" as "the price paid to acquire, produce, accomplish, or maintain anything" and "an outlay or expenditure of money, time, labor, trouble, etc." The noun "expense" is defined as "cost or charge" and "a cause or occasion of spending." The Merriam Webster Collegiate Dictionary (Eleventh Edition) likewise defines "cost" as "the amount or equivalent paid or charged for something" for which the term "price" is a substitutable synonym. [7] "Expense" is defined as "something expended to secure a benefit or bring about a result" and "financial burden or outlay" for which the term "cost" is a substitutable synonym.

These definitions confirm that the statute entitles GT Com to recover the price it paid to complete its hurricane repairs. The Commission's attempt to limit such recovery by reading the statutory term "cost" to mean "extraordinary amount" (*Order*, Pg. 9; 06 FPSC 8:181) and the statutory term "expense" to mean

[7] The Merriam Webster definition of "price" is "the quantity of one thing that is exchanged or demanded in barter or sale for another;" and "the amount of money given or set as consideration for the sale of a specified thing."

"expenditures incurred over and above normal operating expenditures" (*Order,* Pg. 6; 06 FPSC 8:177) improperly introduces terms and concepts that are not found within the statute. The Commission is "not at liberty to add words to statutes that were not placed there by the Legislature." *Hayes v. State,* 750 So.2d 1, 4 (Fla. 1999).

Finally, the Commission erroneously accorded the language in subparagraph (4)(b) exactly the same meaning it has accorded to very different language in §364.051(4), Florida Statutes (2004). In 2005, the Commission reviewed a request by Sprint for recovery of certain hurricane repair costs incurred before §364.051(4), Florida Statutes (2004) was amended. Prior to its amendment, §364.051(4) provided as follows:

> (4) Notwithstanding the provisions of subsection (2), any local exchange telecommunications company that believes circumstances have changed substantially to justify any increase in the rates for basic local telecommunications services may petition the commission for a rate increase, but the commission shall grant such petition only after an opportunity for a hearing and a compelling showing of changed circumstances. The costs and expenses of any government program or project required in part II shall not be recovered under this subsection unless such costs and expenses are incurred in the absence of a bid and subject to carrier-of-last-resort obligations as provided for in part II. The commission shall act upon any such petition within 120 days of its filing.

Upon amendment, the paragraph was codified as §364.051(4)(a).

Sprint elected to enter into a stipulation with OPC regarding the type and amount of repair expenses for which it would seek recovery. Sprint and OPC disagreed, however, whether hurricane repair costs constituted a substantially changed circumstance that would permit recovery of such expenses. The Commission resolved the dispute, finding that the prior (unamended) statute permitted recovery of only "extraordinary" hurricane costs and did not permit recovery of "normal" operating costs.[8] Order No. PSC-05-0946-FOF-TL; 05 FPSC 10:2. (App. Tab 5) This is exactly the same conclusion the Commission reached when reviewing GT Com's request for recovery under the fundamentally different language of §364.051(4)(b).

Where the Legislature amends a statute, it is presumed that it intends to accord the statute a different meaning. *Seddon v. Harpster,* 403 So.2d 409 (Fla. 1981, superseded by statute on other grounds as stated in *Seton v. Swann,* 650 So.2d 35 (Fla. 1995). In its *Order,* however, the Commission erroneously failed to accord the amendment a different meaning, and instead determined that §364.051(4)(b), like §364.051(4)(a), permitted recovery of only "extraordinary"

[8] Interestingly, the Commission correctly determined in Order No. PSC-05-0946-FOF-TL that the statutory exclusion of one category of costs in §364.051(4) made all other categories of costs eligible for recovery, but failed to draw the same conclusion in the *Order* with regard to the statutory exclusion of one category of costs in §364.051(4)(b), despite GT Com's citation to applicable case law. (R. Vol. 1, pg. 178 at 181-182)

hurricane costs rather than "normal" operating costs. By according these two very different statutory provisions the same meaning, the Commission's decision impermissibly treats the entire phrase "costs and expenses relating to repairing, restoring, or replacing the lines, plants or facilities damaged by a named tropical storm" as meaningless and unnecessary surplusage. *Hechtman v. Nations Title Insurance of New York*, 840 So.2d 993, 996 (Fla. 2003).

B. The Commission's decision was not based on the "circumstances for the named tropical system" as required by §364.051(4)(b)3, Florida Statutes.

The statute requires the Commission to determine whether "costs and expenses are reasonable under the circumstances for the named tropical system." This language plainly calls for an inquiry into the factual circumstances surrounding the particular storm, and requires the Commission to consider the reasonableness of specific costs and expenses in light of the damage caused by Hurricane Dennis. The PSC never attempted this task. Instead, seizing upon a portion of the language in subparagraph (4)(b)3, the Commission declared that "the phrase '*reasonable under the circumstances'* allows us great latitude in determining the methodology and factors that should be taken into consideration when reviewing the petitioner's request" *Order*, Pg. 6; 06 FPSC 8:177, emphasis in original. Based on this theory, the Commission determined, solely as a matter of policy and without regard to any factual circumstances unique to Hurricane Dennis, that five cost categories should *never* be recovered under §364.051(4)(b),

Florida Statutes. [9] The Commission's categorical denial of recovery for these expenses, including the cost of GT Com's in-house labor, clearly constitutes an across-the-board policy choice without regard to the magnitude of damage caused by this particular hurricane. The Commission's decision renders the phrase "under the circumstances for the named tropical system" completely superfluous, in violation of the "elementary principle of statutory construction" that words in a statute should not be treated as mere surplusage. *Hechtman*, *supra.*

C. The Commission's reliance upon a Senate Staff Report was improper and violates elementary principles of statutory construction.

In reaching its decision the PSC improperly relied upon a Senate Staff Report to make findings regarding the supposed legislative intent behind the

[9] *See, e.g., Order,* Pg. 6; 06 FPSC 8:177 ("the reasonable clause implicitly ensures that storm related cost recovery should be based on expenditures incurred over and above normal operating expenditures"); Pgs. 7-8; ; 06 FPSC 8179 ("The costs related to Benefits included in GT Com's storm cost recovery request shall be removed because the costs are part of GT Com's normal business operations …."); Pg. 9; 06 FPSC 8:180 ("GT Com's in-house labor costs should not be included in the amount to be recovered through a storm charge as the Company is already recovering this amount though its normal business operations…. The cost for in-house labor, therefore, was not incurred as an extraordinary amount related to Hurricane Dennis."); Pg. 10; 06 FPSC 8:182 (expense for a cross-connect system "may have been a practical and reasonable business decision, however, *under the circumstances,* the additional costs incurred should not be recoverable under the implicit tenets of Section 364.051(4)(b), Florida Statutes.)(emphasis in original); Pg. 13; 06 FPSC 8:185 ("GT Com should not recover capital assets through the storm cost recovery surcharge because the asset lives and benefits will continue for at least 15 years.")

statute. [10] *Order*, Pg. 2; 06 FPSC 8:174. The Commission's review of and reliance upon the Staff Report is improper for at least three reasons:

First, the Staff Report was not offered into evidence (or even mentioned) at the hearing, no party ever requested the agency to take official notice of the Staff Report, and the Commission never did so on its own motion. Instead, the Staff Report surfaced for the first time in the formal post-hearing recommendation made by the PSC staff to the Commission on July 7, to which parties are not permitted to respond. (R. Vol. 2, Pg. 208, App. Tab 7) The Commission's recognition of and reliance upon the Staff Report therefore violates both §§90.204 and 120.569(1)(i),

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[10] *Order*, Pg. 2; 06 FPSC 8:174:

> The legislative intent of this Statute is to require that a thorough analysis be conducted of the costs and expenses included in a company's request for storm cost recovery so that its customers are not obligated to pay for costs that they already for through their monthly bills or that are not directly attributable to the tropical system. [Footnote 1]
>
> Footnote 1: Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 2232 states: The committee substitute requires that the company show and the commission determine whether costs and expenses are 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 accounts, and are necessary for the restoration process. The proposed language implies a similar type of review. (dated April, 2005, pages 7-8)

Florida Statutes, both of which require notice and an opportunity to respond prior to official recognition.[11]

Second, as shown above, the statute plainly and unambiguously entitles GT Com to recover its "costs and expenses relating to repairing, restoring or replacing the lines, plants or facilities" damaged by Hurricane Dennis. Where the language chosen by the Legislature is clear and unambiguous, the legislative history of a statute is irrelevant; such history may be reviewed only when the "text of the statute is in inescapable conflict." *Aetna Casualty & Surety Company v. Huntington National Bank,* 609 So.2d 1315 (Fla. 1992); *American Home Assurance Company v. Plaza Materials Corporation,* 908 So.2d 360 (Fla. 2005). Further, legislative history may not be used to change the plain meaning of a statute. *State v. Sousa,* 903 So.2d 923 (Fla. 2005). In the instant case, the wording of the statute is entirely clear and the Commission's review of and reliance upon the Staff Report was improper, particularly where the Report was used to introduce an ambiguity where none is present within the statute itself.

Finally, the Staff Report itself notes on its face that it does not, in fact,

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[11] §90.204, Florida Statutes, provides that a court "*shall* afford each party reasonable opportunity to present information relevant to the propriety of taking judicial notice and to the nature of the matter noticed," whether a party requests that such notice be taken or the court does so on its own motion. §120.569(1)(i) similarly states that "[w]hen official recognition is requested, the parties *shall* be notified and given and opportunity to examine and contest the material." (Emphasis added in both cases.)

reflect legislative intent: "This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate." (App. Tab 6, Pg. 11) The Commission thus ascribed importance to the Report that the document itself disclaims.

D. The Commission's decision improperly applied rate base, rate of return regulation to GT Com.

As noted above, the Commission's decision to deny GT Com recovery of its in-house labor costs was based not only on an erroneous statutory interpretation, but also upon its theory that the company "is already recovering this amount through its normal business operations." *Order* at 9; 06 FPSC 8:180. This theory is unsupported by the record and results from an improper application of rate-base, rate of return regulation to GT Com, a price-regulated telecommunications company that is statutorily exempt from rate base, rate of return regulation pursuant to 364.051(1) (c), Florida Statutes, which provides as follows:

> Each company subject to this section shall be exempt from rate base, rate of return regulation and the requirements of ss 364.03, 364.035, 364.037, 364.05, 364.055, 365.14, 364.17, and 364.18.

Under rate base, rate of return regulation, the Commission examines a utility's books and records in order to determine the amount of money reasonably invested in providing utility service, minus depreciation, and then sets service rates

calculated to yield the amount of revenue necessary to recover the company's normal costs of operation plus a Commission-established rate of return on the investment included in rate base. (Tr. Vol. 1, pgs. 60-61, 64-65)

GT Com has been under price regulation since 1996 and its last rate case was approximately 30 years ago. [12] (Tr. Vol. 1, Pg. 61; Vol. 2, Pgs. 141-142) Accordingly, GT Com's current revenue and rates were not established by the Commission to allow GT Com the opportunity to recover its prudently incurred costs plus a Commission-established return. Unlike electric utilities, GT Com's prices for various services are limited by both statute and competitive market forces. It has been many years since the Commission examined GT Com's expenses, set a revenue requirement, authorized a rate of return, and established rates that would permit the company to recover the specific costs upon which those rates were based. Accordingly, GT Com's current rates do not have any particular costs or expenses "built in" and clearly do not (and were never intended to) "recover" its current costs, let alone the repair costs necessitated by the spate of increased hurricane activity experienced in Florida in recent years.

GT Com may or may not "recover" its costs through its local rates in any given year, particularly since GT Com, unlike electric utilities, is not a monopoly

[12] In that case, the Commission set rates for the St. Joseph Telephone Company, which served the area damaged by Hurricane Dennis, and which now has been consolidated into GT Com.

service provider and its customers may elect to take service from a different company. (Tr. Vol. 1, Pg. 61) The Commission did not conduct a review of GT Com's rates and indeed, had no authority to do so. In the absence of a rate review to match GT Com's rates to its current expenses and apply a newly-established rate of return (which of course it is not authorized to do), the Commission simply presumed that GT Com "is already recovering this amount [its in-house labor costs] through its normal business operations." [13] In so doing, the Commission inappropriately imposed the same requirements on GT Com that it imposes on

[13] There is no competent substantial evidence in the record to support this determination. In support of its finding the PSC referenced Mr. Ellmer's "agreement" that the company's in-house labor costs "would have been incurred by GT Com regardless of whether Hurricane Dennis had occurred." However, as noted in the Commission Staff's post-hearing Memorandum, in which the Staff made its formal recommendation to the Commission regarding the resolution of GT Com's petition, the "agreement" upon which the Commission relies is found in Mr. Ellmer's testimony at pages 98 through 106 of the Hearing Transcript, *none of which addresses direct labor costs.* (R. Vol. 2, Pg. 208; App. Tab 7, Pgs. 10-11) Rather, this testimony clearly and specifically addresses only the company's allocations of indirect costs, including vacation and holiday time (Tr. Vol. 1, Pg. 98); vehicle expense such as lease payments, maintenance and fuel (Tr. Vol. 1, Pg. 103); tools and other work equipment (Tr. Vol. 1, Pg. 103); provisioning expense, such as the cost of warehouse employees who manage and distribute inventory (Tr. Vol. 1, Pg. 103-104); nondirect engineering expense such as draftsmen, clerical staff and supplies allocated as a percentage of direct engineer time (Tr. Vol. 1, Pg. 104); plant operation, including time allocated for supervisors based on how their direct report employees' time is charged (Tr. Vol. 1, Pg. 105); and allocation of other overhead costs such as employee benefits and payroll taxes (Tr. Vol. 1, Pg. 105, 106). Mr. Ellmer's "agreement" therefore is limited to allocations of indirect expenses; he never "agreed" to the patently incorrect conclusion that GT Com would have incurred direct hurricane repair labor costs in the absence of a hurricane or that GT Com was already recovering any such costs.

electric utilities under Chapter 366, Florida Statutes.

Unlike §364.051(4)(b), Chapter 366 does not require or authorize the Commission to permit recovery of "costs and expenses relating to repairing, restoring, or replacing the lines, plants, or facilities" damaged by a hurricane. Instead, regardless of whether it is reviewing a petition for storm cost recovery or a request for a general rate increase, the Commission must apply its broad plenary ratemaking authority (and regulatory theories associated therewith) under Chapter 366, Florida Statutes, including but not limited to the authority set forth in §§366.04, 366.05, and 366.06, Florida Statutes. These statutes authorize the Commission (among other things) to regulate rates and services, prescribe a system of accounting, prescribe a rate structure, establish rates, and require installation of facilities. The Commission has no such authority over price-regulated telecommunications companies such as GT Com.

Consistent with rate-base, rate of return regulation, the Commission permits electric utilities to recover "only extraordinary costs" because the agency sets base rates on the basis of the utility's "projected expenses and the expectation of the utility realizing certain revenues." *See*, *e.g*, Order No. PSC-05-0937-FOF-EI, in which the Commission limited Florida Power & Light's storm cost recovery to that amount of employee labor expense that was over and above the amount that had been budgeted and included in rate base within the past three years (App. Tab 8,

Pg. 8) and Order No. PSC-05-0748-FOF-EI, in which the agency applied the same limitation to Progress Energy Florida Inc. (App. Tab 9, Pg. 19)

The Commission's application of these same ratemaking theories to GT Com is unlawful. In essence, the Commission erroneously interpreted §364.051(4)(b), Florida Statutes, to give it exactly the same authority the agency wields over rate base, rate of return electric utilities.

In 2005, the Legislature enacted §366.8260, Florida Statutes, (the "Electric Storm Cost Statute"), under which the Commission may permit an electric utility to issue long-term bonds to finance the costs of certain storm recovery costs. The bond costs are then recovered through traditional rate base, rate of return regulatory processes. Unlike §364.051(4)(b), Florida Statutes, which broadly permits recovery of unadjusted "costs and expenses relating to" hurricane repairs but caps the amount that may be recovered, the Electric Storm Cost Statute mandates a number of limitations on recoverable costs and specifically requires the Commission to apply traditional ratemaking adjustments to adjust recovery for normal levels of operating expenses, while setting *no cap* on the amount recoverable:

> (n) "Storm-recovery costs" means, at the option and request of the electric utility, and as approved by the commission pursuant to sub-subparagraph (2)(b)1.b., costs incurred or to be incurred by an electric utility in undertaking a storm-recovery activity. Such costs shall be net of applicable insurance proceeds and, where

> determined appropriate by the commission, **shall include adjustments for normal capital replacement and operating costs, lost revenues, or other potential offsetting adjustments.** Storm-recovery costs shall include the costs to finance any deficiency or deficiencies in storm-recovery reserves until such time as storm-recovery bonds are issued, and costs of retiring any existing indebtedness relating to storm-recovery activities.

§366.8260(1)(n), Florida Statutes (2005), emphasis added.[14]

The Legislature considered and enacted both §364.051(4)(b), Florida Statutes, and the Electric Storm Cost Statute during its 2005 session. Both statutes became effective on June 1, 2005. The Legislature's decision to permit price-regulated telecommunications companies to recover up to $6 per access line per year of "costs and expenses relating to repairing, restoring or replacing the lines, plants or facilities" damaged by a hurricane, without reference to offsetting adjustments for normal operating costs, while simultaneously mandating a radically different and complex hurricane cost recovery scheme for electric utilities that specifically requires such adjustments, constitutes an intentional rejection of the electric utility approach adopted by the PSC in its *Order*.

When the Legislature desires to limit recovery to extraordinary costs, or to invite the Commission to adjust costs and expenses, it knows how to do so. *Clark*

[14] Among myriad other differences, the Electric Storm Cost Statute does not limit the amount of recovery, while §364.051(4)(b) caps recovery at $6 per access line per year.

v. Sumner, 72 So.2d 375 (Fla. 1954). The Legislature clearly expressed that intent in the Electric Storm Cost Statute but chose not to adopt the same limitations in §364.051(4)(b), Florida Statutes. Pursuant to the clear and unambiguous terms of §364.051(4)(b), Florida Statutes, GT Com is entitled to recover its unadjusted costs and expenses relating to repairing, restoring or replacing the lines, plants and facilities damaged by Hurricane Dennis, regardless of whether the cost is considered "extraordinary" or "incremental" to its normal operations, and regardless of how a traditional rate base, rate of return regulated utility would recover such costs pursuant to other inapplicable statutory authority.

II.
THE FLORIDA PUBLIC SERVICE COMMISSION ERRONEOUSLY INTERPRETED AND APPLIED SECTION 364.051(4)(b), FLORIDA STATUTES TO DENY GT COM RECOVERY OF CAPITAL COSTS ACTUALLY AND REASONABLY INCURRED TO REPLACE ITS LINES, PLANTS AND FACILITIES DAMAGED BY HURRICANE DENNIS.

The Commission found that GT Com expended intrastate costs of $141,552 for capital assets and that such capital expenses were reasonably and prudently incurred:

> Clearly, Hurricane Dennis impacted GT Com's network infrastructure, causing the Company to incur costs for repairing, replacing, and restoring its lines, plants, and facilities. Further, GT Com made an informed and thoughtful decision before incurring costs to procure the capital assets required to restore service to its customers. GT Com's decision for choosing the replacement assets was based on engineering and economic principles.

Order, Pg. 11-12; 06 FPSC 8:183. The costs in question include (among other things) the cost to replace telephone pedestals, fiber and copper cable on Alligator Point, and fiber cable at Indian Pass, all of which were damaged or destroyed by Hurricane Dennis. (Tr. Vol. 1, Pgs. 41-43).

Although the Commission verified these capital expenses, found that they were reasonably incurred, and made no finding that the amount was unreasonable, it nevertheless denied recovery because it "question[ed] whether it is reasonable to allow the entire capital asset cost to be recovered over a one-year period." Noting that GT Com depreciates capital assets over a 15-year period for tax accounting purposes, the Commission found that "[a]llowing recovery of the replacement plant in a one-year period, when GT Com's current depreciation policy is to use a fifteen year life, is not reasonable." *Order,* Pg. 12; 06 FPSC 8:184.

The Commission's interpretation and application of the statute to deny recovery of capital costs is erroneous for at least four reasons:

A. The Commission's ruling contravenes the plain and unambiguous language of the statute.

Section 364.051(4)(b), Florida Statutes, clearly and unambiguously permits GT Com to recover the cost of *replacing* lines, plants and facilities. Replacement costs are, by definition, capital costs. (Tr. Vol. 1, Pg. 64) While the Legislature certainly could have excluded or limited recovery of replacement costs, it chose not to do so. The Commission's decision simply ignores the clear legislative

directive to permit recovery of reasonable costs of replacing facilities that were destroyed by a hurricane.

B. The Commission's decision was not based on the "circumstances for the named tropical system" as required by §364.051(4)(b)3, Florida Statutes.

The agency's determination that "GT Com should not recover capital assets through the storm cost recovery surcharge because the asset lives and benefits will continue for at least 15 years" clearly reveals the agency's belief that recovery of capital replacement costs is unreasonable *per se*, regardless of the "circumstances for the named tropical system." Nothing in the statute authorizes the Commission to deny recovery of replacement costs that were reasonable in amount and reasonably incurred simply because the specific item being replaced will remain in service for several years. Once more, the Commission's decision was made without any consideration of the damage caused by this particular hurricane, thus improperly treating this language as mere surplusage. *Hechtman*, *supra.*

C. The Commission's decision improperly applied rate base, rate of return regulation to GT Com.

As noted above, GT Com is exempt from rate base, rate of return regulation pursuant to §364.051(1)(c), Florida Statutes. Under rate base, rate of return regulation, the Commission examines a utility's books and records in order to determine the amount of money reasonably invested in providing utility service, minus depreciation of capital expenses, and then sets service rates calculated to

yield the amount of revenue necessary to recover the company's normal costs of operation plus a Commission-established rate of return on invested capital. (Tr. Vol. 1, pgs. 60-61, 64-65) The requirement that certain expenses be capitalized rather than recovered directly is a bedrock tenet of rate base, rate of return regulation, under which the utility is permitted to recover its reasonable operating costs, but may earn the Commission-established return only on the depreciated balance of its capital assets. *See, e.g.,* §366.06, Florida Statutes, which mandates rate base, rate of return regulation of monopoly electric utility companies under which the Commission must set rates based on "net investment" including the cost of property "less accrued depreciation"; and §367.081, Florida Statutes which mandates rate base, rate of return regulation of water and wastewater utility companies under which the Commission must set rates based on the depreciated value of capital costs.

In stark contrast, §364.051(1)(c), Florida Statutes, exempts price-regulated telephone companies from this regulatory regime, while §364.051(4)(b), Florida Statutes, mandates full "recovery" of "costs and expenses relating to . . . replacing [its] lines, plants or facilities" that were damaged by a hurricane. Had the Legislature wished the Commission to apply rate base, rate of return regulatory theories to limit GT Com's hurricane cost recovery to net expenses, depreciated expenses or non-capital expenses, it most certainly would have expressed that

intention explicitly. Its failure to do so was intentional, as shown by its enactment Electric Storm Cost Statute, which specifically authorizes the Commission to adjust for capital expenditures.

As noted above, the Legislature enacted both §364.051(4)(b), Florida Statutes, and the Electric Storm Cost Statute during its 2005 session and both statutes became effective on June 1, 2005, yet they mandate radically different cost recovery schemes. Obviously, the Legislature simply did not authorize the Commission to make the same adjustments for capital replacement costs incurred by price-regulated telephone companies that it required for rate base, rate of return monopoly electric utilities.

The Commission attempted to justify its decision to deny recovery of GT Com's capital costs on the grounds that (a) it had applied the principle "consistently" in the past and (b) most businesses capitalize assets:

> We have consistently applied the principle that when an asset exceeds a minimum threshold level and has a long term life, that asset should be capitalized. With respect to petitions for storm cost recovery, we have consistently applied this capitalization methodology. Capitalization of assets is not limited to regulated utilities – it is used by most businesses.

Order, Pg. 12; 06 FPSC 8:184, footnote omitted. These arguments are disingenuous at best. The cases cited by the Commission reveal that it has "consistently applied the principle" only as part of its rate base, rate of return

regulation of monopoly electric utility companies, except for a single instance in which it approved a *stipulation* offered by Sprint and OPC for recovery under a different statute, of a portion of hurricane repair costs which were incurred before §364.051(4)(b) was enacted. (App. Tab 5) Moreover, it is irrelevant that, for purposes of tax reporting, businesses capitalize costs that have a long useful life. In the absence of rate base, rate of return regulation, it simply does not matter whether a particular cost is capitalized or expensed. (Tr. Vol. 1, Pg. 65) [15] The accounting treatment of an expense is important only in connection with the Commission's ratemaking proceedings for monopoly rate base, rate of return utilities because the accounting treatment determines whether and to what extent the expense will be included in the company's rate base, and thus, in the revenue requirements and rates set by the Commission to permit the company to earn a specified rate of return. [16] In the world of price-regulated telephone companies, the

[15] There is no evidence that GT Com did not, in fact, capitalize any particular asset on its books and records. In this respect, the Commission's apparent concern that an asset be capitalized is simply a shorthand reference to the fact that capital costs are not directly recoverable under rate base, rate of return regulation.

[16] Further, any expense that an electric utility, for example, does not recover through a storm reserve surcharge is booked to rate base, where it will be used to determine if the company is earning within its permitted range of return (and therefore, whether it is "recovering" the cost), and upon which the Commission will set rates in the future. None of these concepts are applicable to competitive businesses such as price capped ILECs or relevant to recovery under §364.051(4)(b).

accounting treatment of a particular hurricane repair or replacement expense is irrelevant to recovery under §364.051(4)(b), Florida Statutes.

D. The Commission's decision violates elementary principles of statutory construction.

Although it is not necessary to resort to rules of statutory construction and interpretation because the statute is clear and unambiguous (*Rollins v. Pizzarelli*, 761 So.2d 294 (Fla. 2001)), such rules would defeat rather than support the Commission's action.

The meaning of particular statutory terms may be ascertained by reference to associated terms. The Commission justified its denial of capital costs on the grounds that the statute does not define the term "costs", noting that the term "can logically mean the dollars expended to repair, restore or replace; or, costs can be defined as the incremental increase in total costs. Many other definitions exist for the term "costs." *Order*, Pg. 12; 06 FPSC 8:184. The Commission thus not only ignored the plain and unambiguous meaning of the term "costs" and disregarded the dictionary meaning thereof, but it additionally failed to consider the phrase in which the Legislature used that term, as required by the doctrine of statutory construction known as *noscitur a sociis* (a word is known by the company it keeps). *Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 863 So.2d 201 (Fla. 2003): *Carraway v. Armour & Co.*, 156 So.2d 494 (Fla. 1963). The statute provides for recovery of "costs and expenses." The term "expenses"

thus expands the category of expenditures eligible for recovery. The statute further provides that the costs and expenses need only "relate to" repair, restoration or replacement of damaged facilities, also implying a broad and expansive reading of the phrase that is completely inconsistent with that applied by the Commission.

Mention of one thing implies the exclusion of another. The statute imposes a single limitation on recovery of reasonably incurred hurricane repair costs: if the company has a storm reserve fund, it may recover only those costs and expenses that exceed the funds available therein. The Legislature's specific enumeration of a single offset or limitation to reasonable repair and replacement costs therefore must be construed as excluding all other possible offsets and limitations that the Legislature could have applied, but did not. *Dobbs v. Sea Isle Hotel*, 56 So.2d 341, 341 (Fla. 1952)(where statute includes single exception to statutory provision, the court "cannot write into the law any other exception" but must instead apply the rule of *expressio unius est exclusio alterius); Thayer v. State*, 335 So.2d 815 (Fla. 1976).

The statute may not be construed in such a way as to extend, modify or limit its express terms. The Commission's interpretation of the term "costs" to exclude capital costs improperly limits the express terms of the statute and supplies words that that were not placed there by the Legislature. *Holly; Hayes*, *supra*. The Commission is not free to do so even if it believes the Legislature "really meant

and intended something not expressed in the phraseology of the act." *St. Petersburg Bank & Trust Co.* at 1073.

The statute must be read as a whole. All parts of a statute must be read together in order to achieve a consistent whole. *Forsythe, supra*. When §364.051(4)(b) is considered in its entirety, it is clear that the Legislature provided a plan for recovery of reasonable hurricane repair costs, subject only to a ceiling of $6 per customer, a floor or threshold amount of damages that varies depending on the company, and the offset of storm reserve funds, if any. Unlike this cost recovery mechanism, however, the Commission's rate base, rate of return regulation requires numerous offsets and adjustments, but imposes neither a ceiling nor a floor on recovery. The Legislature thus provided a regulatory review process that effectively substitutes a severe limitation on the amount of recovery for the Commission's traditional rate base, rate of return regulation. The Commission's denial of reasonable hurricane repair costs based on traditional regulatory principles is incompatible with the unified and distinct cost recovery mechanism found in §364.051(4)(b), and reveals that agency failed to read all parts of the statute together in order to achieve a consistent whole.

III.

THE FLORIDA PUBLIC SERVICE COMMISSION ERRONEOUSLY INTERPRETED AND APPLIED SECTION 364.051(4)(b), FLORIDA STATUTES, TO REDUCE GT COM'S RECOVERY BY OFFSETTING POSSIBLE FUTURE RECEIPT OF UNIVERSAL SERVICE FUNDS AGAINST THE COSTS ACTUALLY AND REASONABLY INCURRED BY GT COM TO REPLACE ITS LINES, PLANTS AND FACILITIES DAMAGED BY HURRICANE DENNIS.

GT Com serves rural areas, where customers typically are not clustered closely together. Rural companies' "cost per loop"[17] therefore tends to be high when compared with companies serving urban areas. As a rural company, GT Com is eligible to receive a "High Cost Loop Support" subsidy from the federal Universal Service Fund ("USF") to the extent that its overall cost per loop exceeds 150% of the national average cost per loop. (Tr. Vol. 1, Pgs. 69, 84) Both GT Com's average costs per loop and the national average cost per loop are calculated on an after-the-fact basis; on June 30th of each year, telecommunications companies report their costs for the prior calendar year to the Universal Service Administrative Company, which audits the data and reports the calculated national average cost per loop to the Federal Communications Commission ("FCC") approximately October or November. The FCC may approve, reject or adjust the calculation. The calculated national average cost per loop may be further adjusted in light of the actual funds available for distribution. Ultimately, high cost loop

[17] A "loop" is the telephone line from a telephone company's central office to an end user customer location.

subsidies for 2005 would paid over a period of time, beginning in 2007. (Tr. Vol. 1, Pgs. 84-85)

The Commission erroneously offset possible future high cost loop subsidy payments against GT Com's hurricane 2005 repair costs, in contravention of the plain language of the statute. Further, the amount by which the Commission reduced GT Com's costs and expenses is arbitrary and the Commission's decision lacks competent substantial evidence.

A. The Commission's ruling contravenes the plain and unambiguous language of the statute.

The Commission erroneously determined that it was "appropriate to offset the requested hurricane costs with any [high cost loop subsidy] funds received from the USF," arguing that the subsidy was "similar to an insurance recovery":

> Similar to an insurance recovery that would serve to offset storm costs, any recovery from the Universal Service Fund (USF) that can be attributed to additional expenses related to Hurricane Dennis, should reduce GT Com's storm cost recovery, thus, reducing its proposed customer surcharge.

Order, Pg. 17, 06 FPSC 8:188-189.

This ruling flies in the face of the plain and unambiguous language of §364.051(4)(b), Florida Statutes, which clearly and unambiguously permits GT Com to recover its "costs and expenses relating to repairing, restoring, or replacing" damaged lines, plants and facilities. As explained above, the term

"costs and expenses" must be given its plain and ordinary meaning, and it simply is not susceptible of any interpretation that requires additional words to express, such as net costs, incremental costs, or unsubsidized costs. Nothing in the statute permits the Commission to reduce GT Com's 2005 hurricane expenses on the basis of any subsidy – let alone one that may be received several years in the future. [18]

The statute permits but a single offset to GT Com's recovery of its costs and expenses:

> A company having a storm-reserve fund may recover tropical-system-related costs and expenses from its customers only in excess of any amount available in the storm-reserve fund.

§364.051(4)(b)4, Florida Statutes. The statute authorizes no other offsetting factor and (except for the cap of $6.00 per customer) supplies no other exception to recovery of "costs and expenses." Accordingly, the principle of *expressio unius*

[18] There is no competent substantial evidence to sustain the Commission's finding that the subsidy is "similar to an insurance recovery." Mr. Ellmer testified that GT Com received no insurance proceeds for hurricane damages but would not have requested recovery of insured losses because the company would not have experienced a loss to the extent it contracts for insurance to cover specific risks. Mr. Ellmer testified that insurance is "a specific contract arrangement that we make with the insurance company to cover extraordinary items" (Tr. Vol. 1, Pg. 83); and that insurance proceeds, unlike high cost loop subsidy payments, are "directly assignable and identified and related to the hurricane cost" (Hearing Exhibit 3, Pg. 73 (Deposition Transcript of Mark Ellmer)). High cost loop subsidy payments demonstrably are not similar to insurance proceeds because, as shown below, they are not specifically attributable to GT Com's hurricane costs, are not intended to reimburse the company for any specific expense, are not guaranteed, and the amount is not only speculative, but is determined based on costs incurred by other companies across the nation.

est exclusio alterius precludes the Commission from offsetting recovery by any other funds. *See Dobbs v. Sea Isle Hotel*, 56 So.2d 341,341 (Fla. 1952), where this Court found that the Legislature's inclusion of a single exception to a statute of limitations precluded imposition of other exceptions not found in the statute:

> It is very clear that the legislature intended there should be but one exception to the provision . . . . We have oft-times held that the rule 'Expressio unius est exclusio alterius' is applicable in connection with statutory construction. This maxim, which translated from the Latin means: express mention of one thing is the exclusion of another, is definitely controlling in this case. The legislature made one exception to the precise language of the statute. . . We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally. We must assume that it thoroughly considered and purposely preempted the filed of exceptions to, and possible reasons for tolling, the statute. We cannot write into the law any other exception. . . .

This maxim applies equally to §364.051(4)(b), Florida Statutes. The statute supplies a simple, straightforward and cohesive process for recovery of costs and expenses relating to hurricane repairs: A company must first demonstrate that it incurred at least the amount of costs and expenses set forth in subsection (4)(b) 7; must verify that it actually incurred such costs and expenses as set forth in subsection (4)(b)2; must demonstrate that the costs and expenses were reasonable in amount and reasonably incurred in light of the damaged caused by the specific hurricane in question as required by subsection (4)(b)3; and must offset against its

costs and expenses the amount available in its storm-reserve fund, if any, pursuant to subsection (4)(b)4; after which it may recover the remaining amount of its costs and expenses, subject to the $6 cap found in subsection (4)(b)5. When the Legislature's comprehensive scheme for recovery of hurricane repair costs and expenses is considered as a whole, as it must be, it is perfectly apparent that the Legislature expressly included a single offset to recovery, thus precluding the Commission from creating and applying additional offsets. *Forsythe, supra.*

Had the Legislature intended to include a second offsetting factor in the statute, such as that proposed by the Commission, "it would have done so clearly and unequivocally." *Dobbs* at 341. The Commission's attempt to engraft additional offsets into the statute must be rejected.

B. The Commission's decision was not supported by competent substantial evidence.

Even assuming, *arguendo,* that it was appropriate to offset Universal Service funds against GT Com's hurricane repair costs, the Commission's determination that GT Com would receive "approximately $141,449 in additional High-Cost Loop Support payments as a result of the 2005 expenses and capital projects related to Hurricane Dennis" is not supported by competent, substantial evidence and must be reversed. *Order,* Pg. 18; 06 FPSC 8:189.

Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred (or)

. . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla. 1957). Conclusory statements by witnesses do not provide factual support for Commission's decision and therefore do not constitute competent substantial evidence. *GTC, Inc. v. Garcia*, 791 So.2d 452 (Fla. 2001). Instead, testimony must be "adequately predicated on pertinent factual data". *Gulf Power Company v. Florida Public Service Commission*, 487 So.2d 1036, 1037 (Fla. 1986).

As noted in the Staff's post-hearing Memorandum to the Commission, in which the Staff made its formal recommendation regarding the resolution of GT Com's petition, the Commission's finding was specifically based on Hearing Exhibit No. 3, page 53 and Hearing Exhibit No. 6, page 6 - Interrogatory 9. (R. Vol. 2, Pg. 208, App. Tab 7) Neither of these two items provide competent substantial evidence to support the Commission's finding that GT Com will receive additional high cost loop subsidy payments of $141,449 as a result of its 2005 hurricane repair expenses, and the Commission's reliance thereon, to the exclusion of factual data and testimony provided by GT Com, was arbitrary.

The first item of "evidence" upon which the Commission based its decision consists of a single page of Mr. Ellmer's deposition, during which counsel for GT Com stipulated that the company responded to Interrogatory No. 9 of Commission Staff's first set of interrogatories. (Hearing Exhibit No. 3, page 53; App., Tab 10)

The stipulation by itself is not competent substantial evidence; obviously it can provide no more evidence than does the underlying interrogatory response.

The second item of evidence consists of the company's response to Staff's Interrogatory No. 9 (Hearing Exhibit No. 2, page 6 – Interrogatory 9; App. Tab 11), in which Staff queried whether future high cost loop support subsidy payments should be offset against GT Com's hurricane repair costs. The company replied in the negative, explaining that it would receive the subsidy "only to the extent that its average loop cost *exceeds* the NACPL [national average cost per loop] for 2005 based on actual costs reported retroactively for companies throughout the country" (emphasis in original); that subsidy payments for 2005 (which would be received beginning in 2007) could not be calculated on the basis of past subsidies because the 2005 average will be greater than the 2004 average; and that for every $1 increase in the average, GT Com's subsidy will *decrease* by 90 cents. GT Com supplied factual data to support these statements. Based on the data available to GT Com prior to the hearing when it responded to the interrogatory, the company stated that it could receive approximately $121,317 in increased subsidy payments.

Importantly, GT Com explained that calculating the impact of hurricane costs on the eventual receipt of subsidy payments "considers only the impact of hurricane costs, and assumes that all other factors affecting High Cost Loop Support remain exactly the same. *This is not a viable assumption* because there are

many additional factors that will affect such support and the amount of money GT Com may eventually receive." *Id.*, emphasis added.

There is no testimony or other evidence in the record that contradicts or casts doubt upon GT Com's sworn interrogatory response. No party provided data that conflicts with that provided by GT Com, and the Commission's finding that GT Com would receive $141,449 arbitrarily ignores this evidence. However, the record is replete with testimony which demonstrates that high cost loop subsidy payments are speculative (Tr. Vol. 1, Pgs. 69, 90); that the subsidy amount is based on figures that are not yet available, including national average loop costs and the amount of money in the Universal Service Fund that may be available for distribution in the future (Tr. Vol. 1, Pgs. 69, 84-85); that based on currently-available data, national average loop costs for 2005 will show an increase over the 2004 national average, thereby decreasing the amount of GT Com's subsidy (Hearing Exhibit 3, Interrogatory No. 9 (Pgs. 006 – 007); Tr. Vol. 1, Pgs. 85-86); and that the subsidy does not reimburse GT Com for specific costs (Tr. Vol. 2, Pgs. 136-137). Finally, Mr. Ellmer testified at the hearing and provided up to date factual data demonstrating that even if one assumes that national average loop

costs do not increase, *GT Com's subsidy will actually decrease by approximately $200,000 for 2005.* (Hearing Exhibit 8; Tr. Vol. 2, Pgs. 136-137). [19]

No party contested this testimony. No party provided data that contradicted or cast doubt upon that provided by GT Com. The Commission's decision therefore was arbitrary and lacked competent substantial evidence. *MCI Telecommunications Corp. v. Florida Public Service Commission*, 491 So.2d 539 (Fla. 1986).

CONCLUSION

Appellant GT Com respectfully requests that this Court reverse the Florida Public Service Commission's *Order* for the reasons set forth herein.

Respectfully submitted this 28th day of November, 2006.

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[19] However, given the uncontroverted evidence that the national average loop cost will increase and will not remain the same, the evidence establishes that GT Com's subsidy will decrease by more than this amount.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on this 28th day of November, 2006, on the following:

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CERTIFICATE OF COMPLIANCE

In compliance with 9.210(a), Fla. R. App. P., the font size used in this Brief is Times New Roman, size 14.

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ATTORNEY