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

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

The Commission's Order is based on the faulty premise that §364.051(4)(b), Florida Statutes, does not mean what it says. Although the statute clearly permits GT Com to recover up to $6.00 per customer for its reasonable hurricane repair costs and expenses, the Commission argues that it prohibits recovery of such costs and expenses if the company is making a profit; or if the hurricane repair work was performed by company employees; or if those costs were incurred to replace capital facilities; or if the company is a rural telephone company that receives federal assistance in the form of high cost funds. None of these four criteria or conditions for cost recovery are found in the words of the statute. The plain language of the statute belies the Commission's strained interpretation, which reflects the agency's attempt to impose rate base, rate of return concepts upon a competitive company. It is completely irrelevant that BellSouth and Sprint, after reviewing the Commission's order in this case, elected not to seek recovery of certain costs, particularly when the companies' other expenses far exceeded the maximum recovery permitted under the statute.

STANDARD OF REVIEW

GT Com is not required to demonstrate that the Commission departed from the essential requirements of law, as the Commission suggests. That standard was announced in *General Telephone Co. v. Carter,* 115 So.2d 554, 557 (Fla. 1959), where the Court held that "review of the Commission's orders are by certiorari," which is "limited in nature" and requires only an examination of the record "to determine whether the Commission's order is in accord with the essential requirements of law and whether the agency had before it competent substantial evidence to support its findings and conclusions." *Id.* at 557. However, the Commission's orders have not been subject to certiorari review since 1980, when Florida's Constitution was amended. [1] Art. V, §3(b)(2), Fla. Const. *See also* Rule 9.030(a)(i)(B)(ii), Fla. R. App. P. (review of Commission orders is by appeal). The Commission's reliance on case law suggesting that this Court need only conduct a limited certiorari-type review is misplaced because all such decisions rely, directly or indirectly, on *General Telephone*.

[1] Further, the *General Telephone* Court relied upon §366.10, Florida Statutes (1959), which at the time permitted only certiorari review of Commission orders. The statute was amended in 1980 to eliminate this restriction.

ARGUMENT

I.
SECTION §364.051(4)(B) DOES NOT AUTHORIZE THE COMMISSION TO DENY RECOVERY OF HURRICANE REPAIR EXPENSES THAT ARE REASONABLE IN AMOUNT AND WERE REASONABLY INCURRED, BASED ON A STANDARD NOT EXPRESSED IN THE STATUTE.

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

Section 364.051(4)(b)1 and 2, Florida Statutes, clearly requires the Commission to verify costs and determine whether they are reasonable in amount and were reasonably incurred, given the circumstances presented by Hurricane Dennis. The Commission made no finding that GT Com failed to verify its in-house hurricane repair labor costs, that the amount was excessive, that it was unreasonable under the circumstances for the company to use its employees to make hurricane repairs, or that the repairs themselves were unnecessary. Instead, the Commission went beyond the dictates of the statute and disallowed GT Com's in-house hurricane repair costs on the theory that "it is not reasonable to recover these costs through the storm charge recovery mechanism" because "the Company is already recovering this amount through its normal business operations." (Answer Brief, pg. 10)[2] In other words, although the Commission never determined (and does

[2] As explained in Footnote 13 of GT Com's Initial Brief, the testimony upon

not argue in its Answer Brief) that GT Com's in-house labor costs for hurricane repair are *not* "costs and expenses relating to repairing, restoring, or replacing" hurricane-damaged facilities, it denied recovery because the dollar amount of these labor costs did not exceed the amount GT Com would have spent on non-hurricane activities if Hurricane Dennis had not struck GT Com's area.[3] This is a Commission-created standard that is not articulated in the statute. *City of Cape Coral v. G.A.C. Utilities, Inc. of Florida,* 281 So.2d 493 (Fla. 1973).

The Commission's decision is erroneous for two reasons. First, the statute directs the Commission to determine the reasonableness of a particular *expense.* The Commission, however, undertook the additional step of determining whether it believed that GT Com's otherwise-qualified

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which the Commission relies to support this conclusion does not address the company's in-house labor costs and therefore does not support the Commission's conclusion.

[3] GT Com's witness, Mr. Mark Ellmer, testified that employees could not perform hurricane repairs and continue their normal work activities at the same time due to the magnitude of the hurricane damage; that the company tracked the number of employee hours spent doing hurricane repair work and sought recovery of only those costs; and that the company's request for recovery of its in-house labor costs did not include any time spent on normal work activities. However, the company's normal, non-hurricane work did not vanish simply because it was forced to divert its employees to hurricane repairs; rather, the work had to be performed later and the company still had to pay for it. (Tr. Vol. 1, pgs. 38-48)

expenses were "reasonable for recovery." This is a fundamentally different task than that assigned by the Legislature in §364.051(4)(b)1 and 2.

Second, the reason cited by the Commission for denying recovery – that the company "is already recovering" the expense "through its normal business operations" – is insupportable. The company is exempt from rate base, rate of return regulation of its rates, the Commission has not set rates for the company in 30 years, and there is absolutely no evidence that those long-ago rates were calculated to "recover" hurricane repair expenses that might be incurred decades later. What the Commission really means when it insists that GT Com is "recovering" its in-house hurricane repair costs "through its normal business operations" is that GT Com is not experiencing a net operating loss. Nothing in §364.051(4)(b), Florida Statutes, authorizes the Commission to deny recovery of valid in-house hurricane repair expenses simply because the company isn't losing money.

The Legislature did not authorize the Commission to inquire into the company's earnings levels or to limit recovery of valid hurricane repair expenses on that basis. Rather than revert to a rate base, rate of return type of review to determine whether the company was "recovering" previously-approved costs through current rates, the Legislature allowed carrier of last resort telephone companies such as GT Com the *opportunity* to impose a

hurricane cost recovery charge of up to 50¢ that is both simple and straightforward.[4] Section 364.051(4)(b) says nothing that even implies that traditional ratemaking principles are to be imported into GT Com's competitive environment. However, unlike the monopoly regulated electric utilities, which have no dollar cap on their hurricane cost recovery, only a limited amount of recovery – 50¢ per line – is available to carriers of last resort. The opportunity to impose this surcharge is available but must be considered judiciously by a company like GT Com, whose customer base has diminished due to competition from wireline phone companies, wireless phone companies, and cable TV providers. (Tr. Vol. 1, pgs. 61, 63; Hearing Exhibit 2, page 23, Interrogatory No. 33) Imposing even a 50¢ surcharge may not be worth it if it will tend to cause a loss in customer base. In fact, the record reflects that competition has prevented GT Com from increasing its rates in the past as permitted by law. (Tr. Vol. 1, pg. 63; Hearing Exhibit 3, pages 81-84) But if the company decides to impose the charge, the Legislature provided a process that was supposed to be "quick and dirty" –

[4] Importantly, recovery under §364.051(4)(b) is available only to companies like GT Com upon which the Legislature has imposed "carrier of last resort" obligations under §364.025(1), Florida Statutes. While Competitive Local Exchange Companies ("CLECs") may choose to serve only those customers they find profitable, carriers of last resort may not; they must provide service upon request to any person in their territory. Further, CLECs may raise their rates at any time but GT Com cannot.

not a pseudo-rate review of earnings and rate base.

Finally, in an apparent attempt to establish a predicate for deference to its interpretation of the statute, the Commission argues that it is perfectly appropriate to interpret the phrase "costs and expenses" to mean "extraordinary amount" because the term "cost" is "virtually meaningless." Not only does this argument ignore the actual language of the statute, which permits recovery of "costs and expenses relating to repairing, restoring, or replacing" hurricane-damaged facilities, but it also impermissibly adds terms to the statute "that were not placed there by the Legislature." *Hayes v. State*, 750 So.2d 1, 4 (Fla. 1999). The statute speaks for itself and this Court should reverse the Commission's attempt to turn it into something it is not. As noted in GT Com's Initial Brief, the Legislature fully understands how to incorporate cost recovery methodologies and ratemaking principles into a hurricane cost recovery statute and is well equipped to do so – after all, they did it in §366.8260, Florida Statutes. They did *not* do it here.

Further, the Commission's reliance upon *Verizon Communications, Inc., et al v. Federal Communications Commission, et al.*, 435 U.S. 467 (2002) is misplaced. In that case, the Court examined radically different statutory language that required the Federal Communications Commission ("FCC") to set just and reasonable rates for competitors to pay incumbent

telephone companies for the lease of their network elements, based on the cost of providing such network elements. "Network elements", as defined in 47 U.S.C.A. §153(29), are a combination of existing physical equipment, information, and ongoing maintenance and service functions. The statute thus required the FCC to determine the cost (on a per-use basis) of providing combinations of facilities and services such as electronically switching a telephone call from one segment of the telephone network to another segment, or terminating a long distance telephone call on a local telephone network. The Court determined that the term "cost" did not have a particularly plain meaning within that statutory context, especially since "the Act uses 'cost' as an intermediate term in the calculation of "just and reasonable rates…." *Verizon* at 500.

In stark contrast, §364.051(4)(b), Florida Statutes, does not require the Commission to apply a series of technical telecommunications network functions to calculate and determine a cost of a particular piece of telecommunications equipment or of a telecommunications service. The statute takes the costs of the petitioning company – they are what they are – and requires the Commission only to determine if those costs are "reasonable under the circumstances for the named tropical system." Unlike the cost of providing network elements, the "costs and expenses" of

hurricane repairs can be determined by reviewing GT Com's invoices and receipts for hurricane repair costs and expenses paid to third parties, and its data demonstrating the exact number of hours and corresponding dollars of its in-house labor expense for hurricane repairs.

B. GT Com's in-house hurricane repair costs were reasonable under the circumstances.

The Commission argues that it complied with the dictates of §364.051(4)(b)3 because it "considered the evidence of damage that GT Com offered and its Order describes the circumstances of the hurricane." (Answer Brief, 13) However, the Commission did not deny recovery of GT Com's in-house labor costs and expenses for hurricane repairs because they were unreasonable in amount or unreasonably incurred in light of the damage caused by Hurricane Dennis. Instead, the Commission did a "clean sweep," denying recovery on a categorical basis without regard to the specific damage caused by Hurricane Dennis, because "it is not reasonable for the Company to recover these costs through the storm charge recovery mechanism." Order, pg. 9. As set forth above, §364.051(4)(b)3 requires the Commission to consider whether *specific costs* are reasonable under the circumstances; it does not authorize the Commission's wholesale denial of entire categories of qualifying hurricane repair costs.

C. The Commission's reliance upon a Senate Staff Report was improper.

The Commission's review of the Senate Staff Report was improper because it failed to comply with §§90.204 and 120.569(1)(i), Florida Statutes, and because the text of §364.051(4)(b) was not "in inescapable conflict" such that the Commission was required to review the statute's legislative history. *Aetna Casualty & Surety Company v. Huntington National Bank*, 609 So.2d 1315, 1317 (Fla. 1992). *See also Comerica Band & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So.2d 163 (Fla. 4th DCA 1996)(courts may not consult legislative history in the form of legislative staff reports to support a meaning of a statute that is not reflected in the text of the statute passed by the Legislature).

D. The Commission improperly applied rate base, rate of return regulatory concepts to limit GT Com's recovery.

The Commission's Answer Brief confirms that when it denied recovery of GT Com's in-house hurricane repair labor costs on the grounds that the company "is already recovering" the expense "through its normal business operations," it meant that the company is not experiencing a net operating loss. Setting and reviewing a company's earnings based on the concept of cost recovery is the primary component of rate base, rate of return regulation, and that concept is not embodied in §364.051(4)(b), Florida Statutes. Nothing in §364.051(4)(b), Florida Statutes, authorizes the

Commission to deny recovery of valid in-house hurricane repair expenses simply because the company isn't losing money.

II.
THE COMMISSION ERRED IN DENYING GT COM RECOVERY OF ITS REASONABLE CAPITAL COSTS OF REPLACING FACILITIES THAT WERE DAMAGED BY HURRICANE DENNIS.

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

B. GT Com's replacement costs were reasonable under the circumstances.

The statute unambiguously permits recovery of costs and expenses of *replacing* lines, plants and facilities. Replacement costs of facilities are, by definition, capital costs. The Commission's Answer Brief confirms that it denied recovery of GT Com's cost of replacing 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, simply because the Commission doesn't consider it a good idea to permit recovery of capital replacement costs through a surcharge under §364.051(4)(b). The Commission's categorical denial of recovery for such facilities flies in the face of the statute's unambiguous language and renders it meaningless.

Further, as explained above, §364.051(4)(b)3 requires the Commission to consider whether *specific costs* are reasonable under the circumstances; it does not justify the Commission's across-the-board policy

decision to deny recovery of replacement costs because it generally believes such recovery to be unreasonable.

C. The Commission improperly applied rate base, rate of return regulatory concepts to limit GT Com's recovery.

In the absence of rate base, rate of return regulation, it simply does not matter whether a particular cost is capitalized or expensed. The fact that the Sprint *settled* its case in 2005 by agreeing not to seek recovery of the costs of replacing certain assets says nothing about how §364.051(4)(b) is properly interpreted. Nor is it relevant that in 2006, BellSouth and Sprint, after reviewing the Commission's order in this case, elected not to seek recovery of capital hurricane replacement costs, particularly when the companies' other expenses far exceeded the maximum recovery permitted under the statute.

D. The Commission improperly denied recovery of capital replacement costs on grounds not expressed in the statute.

Once more, the Commission attempts to justify its denial of capital replacement costs on the grounds that it believes recovery of such costs through a surcharge to be poor regulatory policy. However, this regulatory policy is not expressed anywhere in §364.051(4)(b)3, which clearly and unambiguously permits GT Com to recover the cost of *replacing* its lines, plants and facilities, so long as those costs and expenses are reasonable

under the circumstances. The language of the statute does not justify the Commission's across-the-board policy decision to deny recovery of replacement costs because it generally believes such *recovery* to be unreasonable.

III.
SECTION 364.051(4)(B), FLORIDA STATUES, DOES NOT AUTHORIZE THE COMMISSION TO LIMIT RURAL TELEPHONE COMPANIES' RECOVERY OF HURRICANE REPAIR COSTS.

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

The Commission erroneously limited GT Com's recovery because it is a rural telephone company that receives federal assistance in the form of high cost loop support. These funds are just another potential revenue source for the company, and like other revenue sources, are outside the scope of the statute. Had the Legislature intended to treat rural telephone companies differently from others for cost recovery purposes, or to offset loop subsidy payments against hurricane repair costs, it certainly could have done so. However, the statute makes no distinction between rural companies that receive high cost loop support and companies that do not, does not mention support payments, and does not limit recovery on that basis.

B. The finding that GT Com will receive $141,449 in high cost loop support payments is not supported by competent substantial evidence.

Not only did the Commission apply the statute incorrectly by applying a speculative amount of high cost loop support to reduce reasonably incurred hurricane costs, the amount applied also was wrong. GT Com's witness did not state that the company expected to receive approximately $141,449 more in high cost loop support payments than it would have received in the absence of a hurricane. Rather, Mr. Ellmer simply responded to a question about the meaning of an interrogatory response. (Tr. Vol. 2, pg. 117-118) In fact, his unrebutted testimony and exhibits established that the figure was approximately $121,000. (Tr. Vol. 1, pgs. 85 – 86, 89) [5]

[5] As explained in GT Com's Initial Brief, the company will receive high cost loop subsidy payments only to the extent that its average loop cost exceeds the *2005* national average cost per loop. However, the $141,449 figure was derived using the *2004* national average cost per loop. (Hearing Exhibit 2, page 6, Interrogatory No. 9) GT Com demonstrated that the national average cost per loop has increased every year in the past (Hearing Exhibit 2, page 6, Interrogatory No. 9) and that the *2005* average had actually increased from $318.74 to at least $323.90, causing the company's total loop support payments to decrease by over $200,000, which reduces the amount the Commission erroneously considers attributable to Hurricane Dennis to approximately $121,000. (Tr. Vol. 1, pgs. 85 – 86, 89; Hearing Exhibit No. 8, pg. 1) The Commission simply ignored this uncontroverted evidence and calculated its amount based on the *2004* average cost per loop.

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 16th day of February, 2007.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on this 16th day of February, 2007, on the following:

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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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