BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of BellSouth Telecommunications, Inc. to remove interLATA access subsidy received by St. Joseph Telephone & Telegraph Company.	DOCKET NO. 970808-TL ORDER NO. PSC-98-0465-FOF-TL ISSUED: March 31, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

On July 1, 1997, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition to Remove InterLATA Access Subsidy received by St. Joseph Telephone and Telegraph Company, which is now GTC, Inc. (GTC). On July 22, 1997, BellSouth filed a revised Petition. On August 11, 1997, GTC filed an Answer in opposition to BellSouth's revised Petition. This matter has been set for hearing on May 20, 1998.

On January 30, 1998, our staff conducted an issues identification meeting. The parties and the Office of Public Counsel attended the meeting. At that meeting, a dispute arose regarding the inclusion of certain issues suggested by GTC.

On January 20, 1998, BellSouth served its First Set of Interrogatories and Request for Production of Documents (PODs) on GTC. On January 30, 1998, GTC filed objections to BellSouth's interrogatories and PODs. On February 5, 1998, BellSouth served GTC, Inc. with its Revised First Set of Interrogatories. On that same day, BellSouth also filed a Motion to Compel responses to its Revised Interrogatories. On February 13, 1998, GTC filed its Response to BellSouth's Motion to Compel.

On February 16, 1998, the prehearing officer conducted a pre-prehearing conference at which he heard oral argument on the issues in dispute and the discovery dispute. On February 18, 1998, Order No. PSC-98-0300-PCO-TL was issued setting forth the prehearing officer's rulings on these disputes.

On February 27, 1998, GTC filed a Motion for Reconsideration of Order No. PSC-98-0300-PCO-TL. Therein, GTC asks that we reconsider the prehearing officer's decision to partially grant BellSouth's Motion to Compel. On March 6, 1998, BellSouth filed its Response to GTC's Motion.

On March 16, 1998, GTC filed a Motion for Oral Argument. BellSouth did not file a written response to the Motion prior to our consideration of this matter at our March 24, 1998, Agenda Conference. This matter has not been to hearing, and we determined that it would be beneficial to hear brief statements from the parties regarding this matter. Therefore, we granted GTC's Motion for Oral Argument, but limited discussion to five minutes per side.

GTC

In its Motion, GTC asks that we reconsider the prehearing officer's decision to partially grant BellSouth's Motion to Compel and require GTC to respond to most of the discovery propounded by BellSouth. GTC asserts that all of the discovery requests seek information regarding GTC's earned rate of return, calculated as if GTC were still a rate of return regulated company. GTC notes that BellSouth has indicated that it will use this information to determine if GTC still really "needs" the interLATA subsidy. In requiring GTC to respond to these discovery requests, GTC argues that the prehearing officer's decision departs from the essential requirements of the law.

GTC argues that because it has elected price cap regulation, GTC is no longer obligated to report financial information regarding its rate of return. GTC adds that it is important to bear in mind that its rates are currently capped and cannot be changed unless the company is able to demonstrate changed circumstances in accordance with Section 364.051(5), Florida Statutes.[1] GTC asserts that because its rates are prescribed to be

[1]In accordance with Section 364.051(2), Florida Statutes, when a LEC elects price regulation, its rates for basic local

reasonable for a time certain, we have no justification to review the Company's performance to determine whether it should maintain a certain component of its rates. GTC argues, therefore, that we cannot affect any "component" of GTC's rates while GTC's rates are frozen.

GTC also argues that Section 364.051, Florida Statutes, is clear that price cap regulation exempts a company from rate of return regulation. Thus, once a company has elected to be price regulated, we cannot compel it to produce information regarding its rate of return because we cannot use that information to form the basis of a decision. GTC argues, therefore, that the information sought is irrelevant and that BellSouth's Motion to Compel should have been denied. In support of its arguments, GTC cites Kilgore v. Bird, 6 So. 2d 541 (Fla. 1942); Toyota Motor Corporation v. Green, 483 So. 2d 130 (Fla. 1st DCA 1986); and Krypton Broadcasting v. MGM-Pathe Communications Co., 629 So.2d 852, 854, (Fla. 1st DCA 1994), which states that "[i]t is axiomatic that information sought in discovery must relate to the issues involved in the litigation. . . ."

In addition, GTC argues that the prehearing officer incorrectly applied Section 364.051(1)(c) and 364.052(2), Florida Statutes, by allowing BellSouth's discovery requests. As an example, GTC refers to BellSouth's first interrogatory which asks GTC to compile Surveillance Reports for 1996 and 1997. GTC argues that these reports have been used in the past to determine a company's earnings on a rate base, rate of return regulated basis. GTC notes that only rate of return regulated LECs file Surveillance Reports, in accordance with Rule 25-4.1352, Florida Administrative Code.

Furthermore, GTC argues that while the prehearing officer conceded in Order No. PSC-98-0300-PCO-TL that GTC is not a rate of return regulated company, the prehearing officer noted that we have always reviewed earnings to determine the propriety of removing the subsidy. GTC argues that if we intend to review earnings as part of the case, then we would be incorrectly assuming that we can review earnings, and, subsequently, remove the subsidy, based on rate of return earnings calculations.

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telecommunications service are capped.

Finally, GTC argues that as a matter of law and of public policy we should not alter a component of its price capped rates. GTC asserts that the Legislature crafted Section 364.051, Florida Statutes, as a balance between rate of return regulation and no regulation. While GTC is now free from rate of return regulation, it is price capped for at least three years. GTC argues that in establishing the price caps, the Legislature did not contemplate that we would continue to make regulatory adjustments to a company's earnings. GTC notes that while Sections 364.051 and 364.052, Florida Statutes, are very specific on some points, neither of these provisions address the interLATA subsidy. GTC adds that when it elected price regulation, the subsidy was an integral part of its rates. At the time it elected price cap regulation, GTC asserts that there was no mention of any impact on the subsidy. Since GTC is now price capped, it argues that it is entitled to maintain the rates it had at the time of its election of price regulation. GTC further points out that under Section 364.052, Florida Statutes, only the rates of a small LEC that elects price cap regulation after July 1, 1996, are subject to our review.[2] GTC states that it elected price cap regulation before July 1, 1996. Therefore, GTC argues that any decision to review GTC's earnings under a rate base/rate of return method is contrary to the law; thus, we should reconsider the prehearing officer's Order No. PSC-98-0300-PCO-TL.

BellSouth

In its Response, BellSouth states that it agrees with GTC that GTC, as a price regulated company, is no longer obliged to provide us with financial information in order for us to set GTC's rates and rate of return. BellSouth argues, however, that BellSouth is not the Florida Public Service Commission, therefore, the arguments that GTC raises are inapplicable. BellSouth adds that it is only seeking information that we have used in the past to determine whether the subsidy should be removed.

BellSouth also argues that GTC's obligation to comply with discovery requests is not abated simply because GTC's basic rates are currently frozen. BellSouth adds that the prehearing officer

[2] We note that under Section 364.052(2), Florida Statutes, any prior period overearnings of a company electing price regulation after July 1, 1996, become subject to refund or other disposition by this Commission.

specifically included issues in this proceeding relating to the effects of GTC's frozen rates and the effect of removal of the subsidy.

Finally, BellSouth argues that GTC has not presented any new arguments that would merit overturning the prehearing officer's order. BellSouth asserts that GTC is merely restating its prior arguments. Furthermore, BellSouth argues that GTC simply wants the best of both worlds -- to be able to be price regulated, but to continue to be subsidized by BellSouth. BellSouth argues that this is improper. BellSouth argues, therefore, that GTC has not presented any mistake of fact or law that would warrant granting GTC's motion for reconsideration. Thus, BellSouth states, the motion should be denied. In addition, BellSouth notes that it pared down its discovery requests as directed by the prehearing officer. BellSouth attached its revised, reduced discovery requests to its Response.

Determination

We have reviewed GTC's Motion for Reconsideration in order to determine whether it identifies a point of fact or law which was overlooked or which the prehearing officer failed to consider in rendering Order No. PSC-98-0300-PCO-TL. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). We note that it is not appropriate to reargue matters that have already been considered through a motion for reconsideration. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. V. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Upon review, we find that the arguments that GTC raises in its Motion for Reconsideration are the same arguments presented by GTC at the February 16, 1998, pre-prehearing conference and addressed in the prehearing officer's Order on Disputed Issues and Discovery Dispute. See Order No. PSC-98-0300-PCO-TL at p. 4. GTC's only new argument is that the prehearing officer misinterpreted the statutory provisions regarding price cap regulation and rate of return regulation for small LECs, Sections 364.051 and 364.052,

Florida Statutes, and, as a result, improperly allowed BellSouth to obtain information that is irrelevant to the matter at issue in this docket.

Section 364.051(1)(c), Florida Statutes, states:

> 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, 364.14, 364.17, and 364.18.

Section 364.052(2) states, in pertinent part:

> . . . After July 1, 1996, a company subject to this section, electing to be regulated pursuant to s. 364.051, will have any overearnings attributable to a period prior to the date on which the company makes the election subject to refund or other disposition by the commission. Small local exchange telecommunications companies not electing the price regulation provided for under s. 364.051 shall also be regulated pursuant to ss. 364.03, 364.035(1) and (2), 364.05, and 364.055 and other provisions necessary for rate base, rate of return regulation. . . .

As set forth on page 6 of Order No. PSC-98-0300-PCO-TL, the prehearing officer addressed GTC's argument that earnings is not a factor that we can review to determine the propriety of removing the interLATA subsidy. The prehearing officer stated:

> The Commission is not prohibited from reviewing evidence that may indicate what impact removal of the subsidy will have on GTC simply because GTC has elected to become price regulated.

Order No. PSC-98-0300-PCO-TL at p. 6. The prehearing officer further noted that GTC itself had brought up the issue of the impact that removing the subsidy would have on the Company. Reviewing earnings is one means of investigating that impact. The prehearing officer then found that the discovery sought by BellSouth was likely to lead to the discovery of admissible evidence. GTC has not identified any mistake of fact or law in that finding. GTC simply disagrees with the prehearing officer's interpretation of the statutory provisions in question and the

discovery rules. While reasonable minds may differ, a difference of opinion does not amount to a mistake of law.

Essentially, GTC asserts that, once a company has elected price cap regulation, not only can we not regulate the Company's rates, we also cannot review any information relating to the company's rates or revenues for any purpose. GTC argues that since we cannot review the information, the information is not discoverable, at least for any of our purposes. Furthermore, since the company's rates cannot be altered under price regulation, GTC argues that all components of those rates are also protected from regulatory meddling.

We find that the Rules of Civil Procedure on discovery contradict GTC's argument. Under those Rules, which we have adopted by Rule 25-22.034, Florida Administrative Code, the scope of discovery is broad. This is clearly indicated by Rule 1.280(b)(1), Florida Rules of Civil Procedure, which provides:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

We have broad discretion in resolving discovery disputes. When discovery disputes arise, however, we try to balance the competing interests to be served. See Dade County Medical Association v. Hlis, 372 So.2d 117, 121 (Fla. 3rd DCA 1979). We note that in Eyster v. Eyster, 503 So.2d 340, 343 (Fla. 1st DCA 1987), rev. den. 513 So.2d 1061 (Fla. 1987), the court stated:

> [T]he trial court possesses broad discretion in granting or refusing discovery motions and also in protecting the parties against possible abuse of discovery procedures, and only an abuse of this discretion will constitute fatal error. Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967).

Furthermore, in the case of Cazares v. Calderbank, 435 So.2d 377 (Fla. 5th DCA 1983), the court found that if a logical connection between the information sought and the issues is not readily apparent, the questioner should point out to the court how the information sought is reasonably calculated to lead to the discovery of admissible evidence.

As set forth in Order No. PSC-98-0300-PCO-TL, the prehearing officer considered the arguments of both parties. The prehearing officer's decision balanced the competing interests of both parties by requiring GTC to provide the earnings information requested by BellSouth, but limiting the scope of particular interrogatories. In addition, the prehearing officer encouraged the companies to work together to further reduce the amount of information sought to that which is necessary to proceed with the case. Nevertheless, the prehearing officer found that the earnings information was reasonably likely to lead to the discovery of admissible evidence based upon BellSouth's arguments that we have used such information in similar cases and that BellSouth was not proposing to alter GTC's rates in any way.

In allowing BellSouth to discover GTC's earnings information, the prehearing officer did not make any determination as to whether or not we could or should grant BellSouth's Petition to remove the interLATA subsidy. That is an issue to be addressed at hearing, not within the context of a discovery dispute or a motion for reconsideration of the resolution of that discovery dispute.

Regarding GTC's particular reference to BellSouth's request for Surveillance Reports for 1996 and 1997, we note that we agree with GTC that it is no longer required to provide such reports to the Commission in accordance with Rule 25-4.1352, Florida Administrative Code, for ratemaking purposes. The earnings information within a Surveillance Report is, however, the type of information that we have relied upon in the past in determining whether or not to remove the interLATA subsidy. The information requested is, therefore, likely to lead to the discovery of admissible evidence.

We believe that the legal and factual arguments presented by GTC are arguments that will be fully explored at hearing. As indicated by the approved issues, GTC will have ample opportunity to argue the purpose and intent of the subsidy, the application of Sections 364.051 and 364.052, Florida Statutes, and the propriety of removing the subsidy. As stated before, the prehearing officer made no determination on these issues in ruling upon the discovery dispute. The prehearing officer simply applied the appropriate legal test to determine whether the discovery was proper. GTC has not shown any mistake in the application of that test.

Based on the foregoing, we hereby deny GTC's Motion for Reconsideration of Order No. PSC-98-0300-PCO-TL. GTC has not identified a point of fact that the prehearing officer overlooked or a mistake in the prehearing officer's application of the law.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that GTC, Inc.'s Motion for Reconsideration of Order No. PSC-98-0300-PCO-TL is denied. It is further

ORDERED that this Docket shall remain open pending the outcome of the hearing.

By ORDER of the Florida Public Service Commission this 31st day of March, 1998.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the

First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.