



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: MAY 20, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (B...)

FROM: DIVISION OF APPEALS (MOORE) *ATM DESUO*
DIVISION OF COMMUNICATIONS (AUDG, DOWDS)
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (WRIGHT) *DM*

RE: DOCKET NO. 990316-TL - PETITION FOR DECLARATORY STATEMENT BY GTC, INC. D/B/A GT COM REGARDING SECTION 364.051, F.S.

AGENDA: JUNE 1, 1999 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTICIPATION SHOULD BE LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: JUNE 9, 1999 - BY STATUTE, AN ORDER MUST BE ISSUED BY THIS DATE

SPECIAL INSTRUCTIONS: SHOULD NOT BE DEFERRED

FILE NAME AND LOCATION: S:\PSC\APP\WP\990316.RCM

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CASE BACKGROUND

GTC, Inc., is an incumbent local exchange company that has elected price regulation under section 364.051, Florida Statutes. On August 28, 1998, the Commission issued a final order terminating the interLATA access subsidy to GTC, Inc., f/k/a St. Joseph Telephone and Telegraph Company ("GTC"). In re Petition of BellSouth Telecommunications, Inc. to remove interLATA access subsidy received by St. Joseph Telephone & Telegraph Company, Order No. PSC-98-1169-FOF-TL, Docket No. 970808-TL ("Final Order"). GTC appealed that order to the Florida Supreme Court. The Court has granted GTC an extension of time until July 14, 1999, to file its initial brief to allow GTC to seek this declaratory statement.

On March 11, 1999, GTC filed a Petition for Declaratory Statement pursuant to section 120.565(1), Florida Statutes, and Rule 28-105.001, Florida Administrative Code. A notice of the

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petition's filing was published in the Florida Administrative Weekly on March 26, 1999. The Office of Public Counsel (OPC) filed a Notice of Intervention and a response to the petition on April 2, 1999. OPC is entitled to appear in this proceeding pursuant to section 350.0611(2), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant GTC, Inc.'s petition for a declaratory statement?

RECOMMENDATION: No, the Commission should decline to issue the declaratory statement that GTC, Inc. requests.

STAFF ANALYSIS: Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

GTC seeks a declaration concerning section 364.051(5), Florida Statutes, which provides:

364.051 Price Regulation.--

(5) 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

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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.

In support of its petition, GTC cites to the order terminating the subsidy and the statement therein that "GTC may seek relief as provided in Section 364.051(5), Florida Statutes, if necessary." Final Order, *Id.* at page 13. GTC asserts that when enforced, the Final Order will subject it to changed circumstances by virtue of an immediate loss of revenue. It further asserts that because such an application for relief under section 364.051 would be a case of first impression for the Commission, there are ambiguities that GTC needs to have resolved before determining how to proceed.

GTC seeks a declaration that:

(a) the removal of the interLATA subsidy effected by the Final Order constitutes grounds under section 364.051(5), Florida Statutes, for the Commission to grant GTC authority to raise rates for basic local service;

(b) in determining whether to grant authority to raise rates for basic local service the Commission may not inquire beyond the narrow issues of (1) the amount of subsidy eliminated and (2) the adjustments to basic local rates necessary to generate the subsidy amount; and

(c) in determining whether to grant authority to raise rates for basic local service, no party to the proceeding may seek discovery from GTC beyond (1) the amount of subsidy eliminated and (2) the adjustments to basic local rates necessary to generate the subsidy amount.

OPC asserts in its response opposing the declaratory statement that the use of the words "compelling" and "substantially" in section 364.051(5), Florida Statutes, shows that companies such as GTC face a heavy burden before they can increase their local rates under price regulation. OPC further asserts that all of the circumstances affecting a company, including evidence that may offset the circumstances presented by the company, should be considered. OPC suggests that other matters might offset the elimination of the subsidy to GTC, such as greater support from interstate high cost support mechanisms or lower expenses due to work force reductions. Any proceeding under the statute would be very fact dependent in order to determine if the circumstances were as compelling or as substantial as alleged by the company.

GTC essentially seeks a declaration that the termination of the subsidy--a single adverse event--establishes, on its face, a right to an increase in basic local rates. All that would be left for the Commission to determine in the proceeding under section 364.051(5), Florida Statutes, would be the amount of subsidy eliminated and the amount of the rate increase. The statute, however, requires a "compelling showing of changed circumstances." Staff does not believe that a declaratory statement proceeding is the right kind of proceeding in which to determine whether a compelling showing has been made. Declaring that the Commission may not inquire beyond the narrow issues that GTC requests would be tantamount to finding that a compelling showing has been made without the opportunity for any party to challenge whether there is a change in circumstances.

Although an agency may hold a hearing to consider a petition for declaratory statement, it must be conducted in accordance with sections 120.569 and 120.57(2), Florida Statutes. Rule 28-105.003, Florida Administrative Code. Thus, only an informal hearing in which the material facts are agreed upon is contemplated. In addition, section 364.051(5) requires the Commission to provide the opportunity for a hearing before a petition for a rate increase is granted under that statute. Staff believes that a section 120.57(1) hearing held under section 364.051(5) is the proper proceeding in which to determine whether circumstances have changed substantially to justify a rate increase.

GTC further asks the Commission to limit the scope of discovery through the vehicle of a declaratory statement. OPC asserts that granting GTC's request would violate the purpose of section 364.051(5) because it would effectively forbid parties from discovering facts that would show the company's changed circumstances are not as compelling or substantial as alleged. OPC argues that this would require a ruling of general applicability, more appropriate for rulemaking and inappropriate in a declaratory statement. If the Commission agrees with staff on the first part of GTC's request, it will be unnecessary to answer the third question posed. Nevertheless, staff believes that the scope of discovery must be determined within the context of the evidentiary proceeding, with the particular facts and issues before the Commission. Thus, the Commission should decline to grant the third part of GTC's request.

Staff recommends that the Commission should not issue a declaratory statement where its interpretation of the statute in question will substantially affect the interests of customers and where the statute contemplates an evidentiary hearing. The

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questions posed should be answered in the proceeding initiated by filing a petition under section 364.051(5), Florida Statutes.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, this docket should be closed if the Commission accepts staff's recommendation in Issue 1.

STAFF ANALYSIS: If the Commission accepts staff's recommendation in Issue 1, a final order can be issued disposing of the petition and the docket can be closed.