970808-TL

IN THE SUPREME COURT OF FLORIDA

ORIGINAL

CASE NO. 94,656

GTC, Inc.,

Appellant,

vs.

JOE GARCIA, etc., et al.,

Appellees.

_____/

ON APPEAL FROM A FINAL DECISION OF THE
FLORIDA PUBLIC SERVICE COMMISSION

APPELLEE/CROSS-APPELLANT BELLSOUTH TELECOMMUNICATIONS, INC.'S ANSWER BRIEF ON APPEAL AND INITIAL BRIEF ON CROSS-APPEAL

September 2, 1999

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INTRODUCTION

This is an appeal from a decision of the Florida Public Service Commission ("PSC"). This Court has jurisdiction. Art. V, § 3(b)(2), Fla. Const. (1980); § 364.381, Fla. Stat. (1997); Fla. R. App. P. 9.030(a)(1)(B)(ii). GTC, Inc. appeals the PSC's decision to eliminate a temporary subsidy that BellSouth Telecommunications, Inc. had been paying GTC for a number of years. The issue on appeal is whether the Florida Telecommunications Act of 1995 guaranteed certain revenues to local telephone companies who opted for a new pro-competitive regulatory system featuring diminished governmental oversight. On cross-appeal, the issue is whether the PSC had the authority to require BellSouth to reduce its rates by the amount of the eliminated subsidy.

CERTIFICATE OF FONT TYPE

The undersigned certifies that this brief was drafted using the Times New Roman 14 point font type on WordPerfect.

STATEMENT OF THE CASE AND FACTS

GTC's statement of the facts contains no citations to the record on appeal, and some of the facts asserted do not appear to be supported in the record. Therefore, BellSouth presents its own statement. Many of the facts stated are taken from the

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PSC's findings (included in the appendix). GTC does not contest these findings on appeal.

History of the interLATA access subsidy

In 1982, in a modified final judgment, a federal district court ordered the divestiture of AT&T into separate Bell Operating Companies. The Bell companies would continue to provide local telephone service, while AT&T would provide long-distance service. *See United States v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982). The following year, the PSC established the access charges that long-distance telephone companies (called interexchange carriers, or "IXCs") were required to pay local telephone companies (called local exchange carriers, or "LECs") for use of their local networks to originate and terminate long-distance calls within Florida (A. 6; R. 1:12, 20).[1] The order established pools for exchange access and intraterritory toll revenues, recognizing that it was a short-term measure until the PSC could implement a "bill and keep" system, whereby each LEC would keep the revenues it received for the use of its local facilities (R. 1:20).

[1] "A. #" refers to the appendix attached to this brief, which contains the PSC's final order (R. 3:438-56). "T" refers to the transcript of the evidentiary hearing in the PSC. "Ex." refers to the exhibits introduced at that hearing.

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Two years later, the PSC established what it called the interLATA[2] access subsidy to ensure that all LECs would be compensated for the use of their facilities without increases in local rates (A. 6-7; R. 1:21) (the "temporary subsidies").[3] The temporary subsidies were funded by requiring each LEC to contribute a portion of the access revenue it received from IXCs for use of its local network (R. 1:21; T. 123). BellSouth was the largest contributor (R. 1:50). The temporary subsidies were designed to aid in the transition from the pooling system for access revenues to the bill and keep system (A. 2, 5; T. 119).

The temporary subsidies were never intended to be permanent (A. 3, 6; T. 119). In creating them, the PSC noted that "a temporary subsidy pool is required and is in the public interest" (R. 1:21; T. 14). They were to last only until the PSC had the opportunity to address each company's particular circumstances through a rate case or other proceeding (A. 4, 6; T. 21-22). The PSC also indicated it would remove an LEC from the temporary subsidy pool when the LEC no longer required the subsidy (A. 4).

Originally, six companies received a temporary subsidy (A. 3; T. 16). GTC's subsidy (the "GTC Subsidy") was the second-largest (Ex. 2). In 1988, the PSC began

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[2] "LATAs" are local access and transport areas, which mark the boundaries beyond which the Bell Operating Companies, formed at the divestiture of AT&T, are prohibited from carrying telephone calls. *See U.S. Sprint Communications Co. v. Marks*, 508 So. 2d 1107, 1108 (Fla. 1987).

[3] This order, #14452, was attached to BellSouth's petition in the PSC.

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reducing or eliminating the temporary subsidies on a case-by-case basis as circumstances changed and the companies no longer needed them (A. 3; T. 19, 21; Ex. 2). In 1989, the PSC reduced the GTC Subsidy by $300,000 to $1,223,000 (A. 3; T. 19, 77, Ex. 2). By 1995, the PSC had eliminated all temporary subsidies except the GTC Subsidy (A. 3, 6; T. 16; Ex. 2).

The Florida Telecommunications Act of 1995

In 1995, the Florida Legislature enacted the Florida Telecommunications Act of 1995. *See* Ch. 95-403, Laws of Fla. (the "Act"). The Act granted LECs the option of converting from traditional rate-of-return regulation -- whereby LECs were both guaranteed and limited to a stated rate of return -- to price regulation, whereby rates were capped but LECs were not limited to a specific rate of return. *See* § 364.051(1)(a), Fla. Stat. (1995). When a LEC elects price regulation, its rates for basic local telecommunications service are capped at the rates in effect on the date of election. *See* § 364.051(2)(b), Fla. Stat. (1995). In exchange for these price caps, the LECs are exempted from several statutory requirements. *See* § 364.051(1)(c), Fla. Stat. (1995). In June 1996, GTC elected price regulation (R. 1:9). The PSC approved GTC's election (R. 1:9).

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Proceedings below

In 1997, BellSouth filed a petition in the PSC (R. 1:1-4), later revised (R. 1:7-93), for removal of the GTC Subsidy. St. Joseph Telephone and Telegraph Co. (now GTC, Inc., d/b/a GT Com (A. 2)) opposed the petition (R. 1:95). AT&T intervened (R. 2:296, 2:303).

The PSC held a hearing on BellSouth's petition, in which it accepted pre-filed direct and rebuttal testimony and exhibits, and considered live cross-examination and questioning from PSC members (T. 1-136). The only witnesses at the hearing were one representative each from BellSouth (T. 7-85), AT&T (T. 86-116), and the PSC (T. 116-34). GTC presented no witnesses.

After the hearing, the PSC issued a 19-page decision (A. 1-19). The PSC first found that it had authority to eliminate the GTC Subsidy because of its original authority to establish it (A. 8). The PSC found that eliminating the GTC Subsidy did not conflict with the Act. The PSC found that "[t]he evidence does not suggest that the [Act] impaired our authority to implement and enforce our prior, lawfully enacted orders regarding the subsidy" (A. 8). The PSC noted that it was undisputed that the subsidy was intended to be temporary (A. 8-9).

The PSC held that terminating the GTC Subsidy was appropriate because GTC's election of price regulation constituted a substantial change in its circumstances (A. 12-13). It found that "GTC has demonstrated a desire to take on the opportunities of the

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competitive arena by electing price regulation" (A. 12). The PSC emphasized that section 364.051(5) allowed GTC to apply for a rate increase if it believed that elimination of the GTC Subsidy constituted a substantial change in circumstances (A. 12, 13). Although the PSC terminated the GTC Subsidy, it also required BellSouth to reduce its rates in an amount equal to the GTC Subsidy (A. 16-17).

The PSC denied the parties' motions for reconsideration, but granted GTC a stay of the order pending appellate review (R. 3:482-91). This appeal follows.

SUMMARY OF ARGUMENT

The Act does not prohibit the PSC from eliminating the GTC Subsidy. The order creating the temporary subsidies, as well as several subsequent orders, specifically noted that the subsidy was temporary. Therefore, if GTC relied on the GTC Subsidy in setting its rates before electing price regulation, it did so without justification because it knew that the subsidy was not permanent. All the other temporary subsidies had been eliminated, and GTC had to know that someday its own subsidy would be eliminated as well.

The Act does not abrogate the PSC's authority to eliminate the GTC Subsidy based on changed circumstances. The Act does not exempt LECs who choose price regulation from all regulation; only from selected statutory requirements. They remain

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under PSC oversight. The Act nowhere guarantees LECs that the revenues they received before they elected price regulation will indefinitely continue.

Although the other temporary subsidies were eliminated because those LECs were overearning, earnings are not the only basis for eliminating a subsidy. The basic criterion is a change in circumstances. In the other subsidy cases, the LECs' overearnings constituted that change. In this case, GTC's election of price regulation constituted a sufficient change in circumstances to justify eliminating the GTC Subsidy.

BellSouth cross-appeals that part of the PSC's order requiring BellSouth to reduce its rates in an amount corresponding to the GTC Subsidy. The PSC had no statutory authority to impose such a requirement because BellSouth is now price-regulated, and therefore is exempted from those statutes allowing the PSC to change BellSouth's rates. Moreover, even if the PSC has the authority to require BellSouth to reduce its rates, its determination was not based on substantial competent evidence because the undisputed evidence showed that BellSouth already had reduced its rates by over $200 million, substantially more than its original $2.7 million access charge surplus. To maintain the revenue neutrality the PSC intended to achieve, BellSouth should not have to further reduce its rates. No windfall to BellSouth results because it is merely returned to its revenue-neutral position.

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ARGUMENT ON APPEAL

BellSouth presents the following argument in response to the issues raised in GTC's initial brief. In considering these issues, this Court should note that PSC orders "come to this Court 'clothed with a presumption of validity.'" *Florida Interexchange Carriers Ass'n v. Clark*, 678 So. 2d 1267, 1270 (Fla. 1996) (quoting *City of Tallahassee v. Mann*, 411 So. 2d 162, 164 (Fla. 1981)). Moreover, "an agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous." *Florida Interexchange Carriers*, 678 So. 2d at 1270. The burden of overcoming these presumptions is on the party challenging the PSC's order, and it must be shown that there has been a departure from the essential requirements of law. *Id. See also BellSouth Telecomm., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998) (explaining the same standards of review, citing *Florida Interexchange Carriers*).

I. THE ACT DOES NOT PROHIBIT THE PSC FROM ELIMINATING THE GTC SUBSIDY

GTC first argues (br. at 8-12)[4] that the Act somehow prohibits the PSC from eliminating the GTC Subsidy. GTC nowhere quotes any statutory prohibition, and the statute contains none. Moreover, nothing in the Act suggests that it intended to eliminate the PSC's authority to re-assess its previous determinations when

[4] Citations are to GTC's amended initial brief.

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circumstances change. As explained below, (A) the PSC emphasized when it created the subsidy that it was intended to be temporary; and (B) the Act does not abrogate the PSC's authority to revisit its prior orders based on changed circumstances.

A. The PSC emphasized when it created the subsidy, and in several orders since, that it was intended to be temporary

The order creating the subsidy specifically noted that it was temporary (R. 1:21). Moreover, several orders the PSC issued thereafter also recognized that the subsidy was temporary (T. 15; R. 1:54-55, 64-65). As the PSC itself found (A. 4, 6), the subsidy was to last only until the PSC had the opportunity to address each company's particular circumstances through a rate case or other proceeding.

GTC emphasizes (br. at 11) that it relied on the GTC Subsidy in setting its rates before electing price regulation. GTC had no justification, however, for relying on the GTC Subsidy. When it elected price regulation, GTC knew that the subsidy was only temporary. All the other temporary subsidies had been eliminated, and GTC had to know that someday its own subsidy would be eliminated as well. It therefore had no right to rely on the continued subsidy in estimating its future revenues. GTC could not, on the one hand, seek the competitive atmosphere of price regulation while, on the other, continue receiving a subsidy in the amount of $1.2 million from a potential competitor. Accepting this argument would allow a LEC to convert a temporary subsidy into a permanent one simply by electing price regulation. At least one other

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LEC has recognized that its election of price regulation was inconsistent with its continued reliance on a similar temporary subsidy (T. 21).

B. The Act did not abrogate the PSC's jurisdiction to end these temporary subsidies

GTC does not argue that the PSC lacked authority to institute the temporary subsidies in 1985. GTC apparently concedes that the PSC had such authority -- as it must, because GTC benefitted from the GTC Subsidy for over ten years. Instead, GTC argues (br. at 8) that the PSC could not *eliminate* the GTC Subsidy. If the PSC has the authority to establish a temporary measure, however, it necessarily has the authority to determine when it will end.

The only basis GTC asserts for its argument that the PSC lacked authority to eliminate the GTC Subsidy is the intervening passage of the Act in 1995. Nothing in the Act, however, demonstrates any intention to restrict the PSC's jurisdiction to review the GTC Subsidy.

GTC attributes many requirements and prohibitions to the Act that the statute simply does not contain. For example, GTC argues (br. at 11) that the Act guarantees "statutory entitlement to the revenue the utility was receiving at the time it elected price regulation." The statute, however, says no such thing. The Act also does not address whether the PSC can eliminate temporary subsidies that existed before it was passed, or the grounds on which it can do so.

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The Florida legislature has given the PSC exclusive jurisdiction to regulate telecommunications. *See Florida Interexchange Carriers Ass'n v. Beard*, 624 So. 2d 248, 251 (Fla. 1993); § 364.01(2), Fla. Stat. (1997). The Act did not eliminate this authority. Among other things, the Act allows LECs to elect price regulation instead of the traditional rate-of-return regulation. *See* § 364.051, Fla. Stat. (1995). When a LEC elects price regulation, it must cap its basic local telepone rates at the rates then in effect, and in exchange it is exempted from some statutory requirements. The Act does not, however, exempt LECs electing price regulation from all regulation, and such companies remain under PSC oversight. GTC does not argue that the PSC's order was rendered pursuant to any of the statutes from which LECs electing price regulation are exempted.

GTC argues (br. at 11) that the Act grants it an entitlement to the revenues it was receiving when it elected price regulation. GTC fails to cite any provision in the Act, however, that guarantees such revenues. While the Act freed price-regulated LECs from rate-of-return regulation, the Act nowhere guarantees LECs that the revenues they received before they elected price regulation will indefinitely continue.

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II. THE STANDARD FOR ELIMINATING A TEMPORARY SUBSIDY IS WHETHER THE LEC HAS EXPERIENCED A CHANGE IN CIRCUMSTANCES, AND GTC'S ELECTION OF PRICE REGULATION CONSTITUTED SUCH A CHANGE

GTC also argues (br. at 13-22) that the PSC eliminated the GTC Subsidy based on a different standard than it had previously used. As shown below, however, ever since the original order establishing the temporary subsidies, the PSC had warned that they would be eliminated on a case-by-case basis as the circumstances changed (A. 6).

In creating the temporary subsidies, the PSC noted that "a *temporary* subsidy pool is required and is in the public interest" (R. 1:21; T. 14) (emphasis added). The temporary subsidies were designed to last only until the PSC had the opportunity to address each company's particular circumstances through a rate case or other proceeding (A. 4, 6; T. 21-22). The PSC also indicated it would remove an LEC from the subsidy pool when the LEC appeared not to require a subsidy (A. 4). At the time of BellSouth's petition in this case, five of the six temporary subsidies had been eliminated.

While it is true, as GTC argues, that the temporary subsidies of the other LECs were eliminated because they were overearning, the evidence showed that earnings are not the only basis for eliminating a subsidy (T. 125). The basic criterion is a change in circumstances (A. 6). In the other subsidy cases, the LECs' overearnings constituted that change. The PSC has never stated or implied, however, that overearnings were

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the *only* change in circumstances that would justify eliminating a temporary subsidy. In this case, the PSC decided that GTC's election of price regulation constituted a sufficient change in circumstances to justify eliminating the GTC Subsidy (A. 12-13). GTC has failed to prove that the PSC's decision departed from the essential requirements of law.[5]

Although GTC complains that its revenues will be reduced as a result of the order, it is not without a remedy. The Act contains an escape clause, which allows a LEC to petition for a rate increase if circumstances have substantially changed. It provides that "[n]otwithstanding the provisions of subsection (2), any [LEC] that believes circumstances have changed substantially to justify any increase in the rates for basic local telecommunications services may petition the [PSC] for a rate increase, but the [PSC] shall grant such petition only after an opportunity for a hearing and a 'compelling showing of changed circumstances." § 364.051(5), Fla. Stat. (1997). If GTC genuinely -- if mistakenly -- relied on the GTC Subsidy in setting its now-capped rates, it can petition for a rate increase.[6]

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[5] At least one other LEC has recognized that its election of price regulation would result in elimination of a similar temporary subsidy (T. 21).

[6] GTC's complaint that the statutory procedure is too cumbersome and establishes too strict of a standard (br. at 18-21) is properly directed at the legislature. Moreover, some of GTC's arguments on this issue (br. at 19-21) address a separate PSC order requiring an evidentiary hearing to determine whether the circumstances justify a rate increase. Because that order is not under review here, those arguments belong in an appeal from *that* order. *See, e.g., Persoff v. Persoff,*

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ARGUMENT ON CROSS-APPEAL

BellSouth presents the following argument in support of its cross-appeal.

THE PSC'S DECISION REQUIRING BELLSOUTH TO REDUCE ITS RATES LACKED STATUTORY AUTHORITY AND WAS NOT BASED ON SUBSTANTIAL COMPETENT EVIDENCE

When the PSC eliminated the GTC Subsidy, it also required BellSouth to reduce its own rates by a corresponding amount "in order to eliminate a windfall" (A. 17). As further explained below, this Court should reverse that part of the PSC's order because (A) once BellSouth chose price regulation, the PSC lacked the statutory authority to require BellSouth to reduce its rates; and (B) substantial competent evidence does not support the PSC's conclusion that BellSouth otherwise will enjoy a financial windfall from elimination of the GTC subsidy.

A. The PSC lacked the statutory authority to require BellSouth, a price-regulated LEC, to reduce its rates

BellSouth has opted for price regulation (T. 37). Therefore, it is now exempt from many statutes regulating other LECs under rate-of-return regulation. For example, section 364.14, Florida Statutes (1997), grants the PSC the power to determine and fix rates whenever it determines that the rates are unjust, unreasonable,

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589 So. 2d 1007, 1009 (Fla. 4th DCA 1991) (refusing to consider argument directed to order from which appellant had not appealed in an appeal from an order finding a violation of the non-appealed order).

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unjustly discriminatory, unduly preferential or otherwise in violation of law. Before BellSouth chose price regulation, this statute authorized the PSC to require BellSouth to reduce its rates when one of the temporary subsidies was eliminated. This statute, however, now applies only to rate-of-return regulated LECs. The Act exempts LECs that have elected price regulation from rate-of-return regulation, and specifically exempts them from section 364.14. *See* § 364.051(1)(c), Fla. Stat. (1997). BellSouth has elected price regulation. Therefore, the PSC lacks the statutory authority to order BellSouth to adjust its rates.

BellSouth's witness testified that he did not believe the PSC has the authority to order BellSouth, which has elected price regulation, to reduce access rates (T. 37). The PSC failed to identify any statute under which it has the authority to order BellSouth to adjust its access rates even though it is now price regulated. The most the PSC could say about its authority was that its staff witness "*suggested* that it *appears* that [the PSC] *may* have the authority to require BellSouth to implement rate reduction if the subsidy payment is terminated" (A. 15) (emphasis added). The PSC identified no statute, however, granting it such authority.

The PSC's staff witness testified that he believes the PSC has the authority to increase GTC's access charges as long as it also decreases BellSouth's access charges, but might not have the authority to require only one (T. 127). The PSC expressly ruled, however, that it did *not* have the statutory authority to increase GTC's rates at

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this time (A. 12-13). Therefore, according to the PSC staff's own testimony the PSC did not have the authority to order BellSouth to reduce its rates.

The PSC's staff witness also testified that in the past, the PSC has made decisions concerning access charges that "may not have been strictly in compliance with the law" but were nonetheless "a reasonable solution" (T. 129-30). *All* of the PSC's actions, however, must comply with the law. The PSC cannot act outside its statutory authority. *See Radio Tel. Communications, Inc. v. Southeastern Tel. Co.* 170 So. 2d 577, 581 (Fla. 1964) (the legislature has not granted the PSC the general authority to regulate utilities, but has only given it specific powers). The fact that the PSC has issued reasonable but *ultra vires* orders in the past does not justify its action here.

AT&T argued at the hearing that even though section 364.163, Florida Statutes, prevents the PSC from increasing GTC's rates, the PSC could reduce BellSouth's rates because of the PSC's past policy of precluding BellSouth from receiving a windfall when it terminated a LEC's temporary subsidy (A. 15, T. 113, 114). When in the past the PSC had required BellSouth to reduce charges or make some other type of reduction, however, BellSouth had been operating under a rate-of-return sharing obligation, whereby it was limited to a specified rate of return. Since then, BellSouth has elected price regulation (T. 78), and the PSC no longer has the authority to require BellSouth to reduce its rates.

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B. The decision to require BellSouth to reduce its rates was not based on substantial competent evidence

The PSC found that discontinuance of the GTC Subsidy, absent a corresponding rate reduction, will create a windfall for BellSouth (A. 15). The PSC's findings are not supported by competent substantial evidence. *See Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997) (the PSC's findings and conclusions should be approved if they are based on competent substantial evidence and if they are not clearly erroneous).

The PSC found that in the past, when one of the Temporary subsidies was terminated, the payor was required to either reduce some rate, or set aside the monies pending further action (A. 6). The PSC determined that this policy was designed to keep all the subsidy participants revenue-neutral (A. 6). In this case, however, BellSouth already had reduced access rates in excess of the amounts it was contributing to the subsidy pool. Therefore, BellSouth would not receive a windfall upon the elimination of the GTC Subsidy, and no basis existed for requiring BellSouth to further reduce its rates.

At the inception of the subsidy pool, BellSouth had a surplus, meaning that the access charges BellSouth received amounted to more than it had previously received under the pooling arrangement. This revenue surplus funded the subsidy pool (A. 14). BellSouth effectively eliminated the original surplus amount of $2.7 million, however, by reducing access charges by well over that amount since 1985 (A. 13; T. 28, 35). In

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fact, as the PSC's staff witness acknowledged, due to PSC actions since 1987, BellSouth has reduced access rates by over $200 million (T. 38, 128). Therefore, BellSouth already has reduced its access rates by much more than the original $2.7 million surplus and the $1.2 million GTC Subsidy combined (T. 50). As BellSouth's witness testified, no windfall would exist because BellSouth already has reduced its access rates by over $200 million (T. 44). Because a revenue surplus no longer exists, BellSouth should not have to reduce its rates when the PSC eliminates the GTC Subsidy.

In previous dockets, when the PSC eliminated one of the temporary subsidies, the PSC did not, in each case, order a simultaneous rate reduction (T. 78). If the payor had other rate reductions or increased expenses authorized or ordered, it was allowed to use those reductions to offset the elimination of one of the temporary subsidies (T. 79). As shown above, BellSouth had other rate reductions that eliminated any potential gain that could have resulted from the elimination of the GTC Subsidy. The PSC acknowledged that BellSouth has substantially reduced its access charges through various settlement agreements "to a greater extent than these agreements required" (A. 17). The PSC's witness also conceded that other PSC actions may be used to eliminate any potential windfall from the elimination of one of the temporary subsidies (T. 128). Nevertheless, in contradiction to its own findings, the PSC concluded that BellSouth should make yet another rate reduction to avoid a windfall (A. 17). Therefore, even

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if the PSC had the statutory authority to require BellSouth to reduce its rates, its determination that BellSouth would receive a windfall when the GTC Subsidy was eliminated cannot be based upon competent substantial evidence, and is clearly erroneous.

Although AT&T's witness testified that even after recognizing previous reductions, BellSouth would still enjoy a financial windfall, it failed to present any facts or documents supporting its bald statement (T. 100, 105). Therefore, this statement also cannot constitute substantial competent evidence that BellSouth would enjoy a windfall.

CONCLUSION

For the reasons stated, the PSC's decision to terminate the GTC Subsidy should be affirmed. Its decision to require BellSouth to reduce its rates commensurate with the elimination of the GTC Subsidy, however, should be reversed.

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Respectfully submitted,

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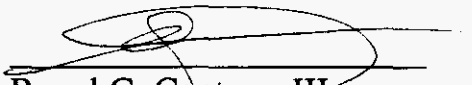

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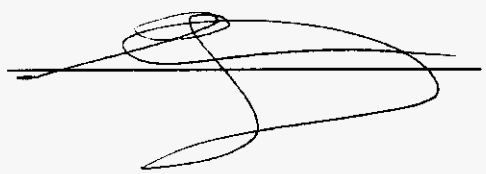

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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-98-1169-FOF-TL ISSUED: August 28, 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.

APPEARANCES:

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On behalf of Commission Staff.

**FINAL ORDER ON PETITION
TO REMOVE INTERLATA ACCESS SUBSIDY**

BY THE COMMISSION:

BACKGROUND

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. d/b/a GT Com (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. By Order No. PSC-98-0639-PHO-TL, issued May 7, 1998, AT&T's petition to intervene was granted. We conducted a hearing in this Docket on May 20, 1998. Our determinations on the issues presented at hearing are set forth herein.

In Section I, we address the origination, policy, and history behind the interLATA access subsidy. In that Section, we also consider whether the subsidy was intended to be implemented on a permanent basis. In Section II, we address our authority to terminate the subsidy. In Section III, we consider whether the subsidy payment to GTC should be terminated and, if so, whether it should be phased out, or completely terminated at one time. In Section IV, we consider termination of the subsidy mechanism and action that BellSouth must take to offset termination of the subsidy payments to GTC. In Section V, we address the appropriate date by which the subsidy payment should be terminated.

I. ORIGINATION, HISTORY, POLICY, TERM, AND CRITERIA FOR TERMINATION OF THE SUBSIDY

The interLATA access subsidy was established by us in Order No. 14452, issued on June 10, 1985, in Docket No. 820537-TP, to aid in the transition from a system of pooling of access revenues to a more appropriate means of addressing access revenue, whereby each company would keep the revenue it received for the use of its local facilities. In Order No. 14452, we recognized that our access plans, such as bill and keep of local exchange companies' (LEC) toll, could not be implemented at that time. We found that establishing a temporary subsidy pool was in the public interest. BellSouth witness Lohman asserted that the interLATA access subsidy plan was established so that there would be a "wash" on companies'

earnings. He also asserted that the access subsidy was never envisioned as a permanent payment.

BellSouth's witness Lohman also explained that under the original subsidy pool, six companies received subsidy payments: ALLTEL, Gulf, Indiantown, Northeast, GTC, and United. Witness Lohman outlined the history of the reduction or elimination of the subsidy receipts for the six original companies in an exhibit. Therein, he showed that we eliminated the subsidy for Gulf in 1988. See Order No. 19692, issued July 19, 1988, in Docket No. 820537-TP. In that Order we noted that at the same time Gulf was overearning, it was also receiving a subsidy from the interLATA subsidy pool. We found it inappropriate, therefore, for Gulf to continue to receive the subsidy payment. We therefore ordered termination of the subsidy payment to Gulf.

According to witness Lohman the next company to have the subsidy removed was Indiantown. The witness stated that by Order No. 21954, issued September 27, 1989, we terminated the subsidy payments to Indiantown and United because of the companies' current and anticipated earnings. We terminated the subsidy payment to Northeast based upon earnings and stimulation occurring with the $.25 ECS calling plan from MacClenny to Jacksonville by Order No. PSC-93-0228-FOF-TL, issued February 10, 1993.

Witness Lohman explained that ALLTEL's subsidy was reduced several times in disposing of several years of overearnings, and then eliminated totally in 1995. ALLTEL's 1991 overearnings were disposed through a subsidy reduction, effective April 1, 1992, in Order No. PSC-92-0028-FOF-TL. In Orders No. PSC-93-0562-FOF-TL, issued April 13, 1993; PSC-93-1176-FOF-TL, issued August 10, 1993; and PSC-94-0383-FOF-TL, issued March 31, 1994, we further reduced ALLTEL's subsidy in view of its earnings. By Order No. PSC-95-0486-FOF-TL, issued April 13, 1995, we eliminated the subsidy payment to ALLTEL based upon ALLTEL's earnings.

Witness Lohman stated that by Order No. 22284, issued December 11, 1989, we accepted GTC's proposal to reduce its interLATA subsidy by $300,000. The witness explained that the company had proposed this reduction in the subsidy because lowering its authorized range of return on equity would have otherwise resulted in overearnings. We determined that GTC's earnings appeared sufficient to absorb the reduction in its subsidy, and GTC would still earn within its newly-authorized range of return on equity.

Witness Lohman testified that, in the past, when the subsidy was reduced or terminated, we required BellSouth to reduce charges in some area or to make some other type of reduction.

Regarding the criteria to be used to terminate the subsidy, BellSouth witness Lohman stated that he believes that earnings or other changes in circumstances should be the basis for terminating the subsidy. According to witness Lohman, in Order No. PSC-92-0028-FOF-TL the Commission explained that it intended the access subsidy to last only until it was presented with an opportunity to address each company's particular circumstances through a rate case or other proceeding. According to the witness, in Order No. PSC-95-0486-FOF-TL, the Commission also indicated that it intended to remove a LEC from the interLATA subsidy pool when the LEC appeared to no longer require the subsidy. Witness Lohman also explained that under Section 364.051(5), Florida Statutes, if a price regulated company still receives a subsidy, the company may use changed circumstances as the reason to restructure its rates to cover the subsidy elimination and petition us for a rate increase.

In its brief, AT&T argued that the interLATA access subsidy mechanism is a transitional system of subsidy payments to those LECs that would have experienced a shortfall in access revenues if bill and keep had been implemented on a "flashcut" basis. AT&T witness Guedel added that the payment was not intended to be permanent. In its brief, AT&T also stated that, beginning with Order No. 14452, nearly every order that we have issued regarding the access subsidy mechanism indicated that we would reduce or eliminate the subsidy as the earnings of the recipient LECs would allow. AT&T's witness Guedel also asserted that, when we removed a subsidy, we also reduced the rates of the payor to prevent a windfall profit.

As for the proper basis for terminating a subsidy payment, in its brief AT&T argued that any continuation of the access subsidy should be contingent on a clear showing of need by the LEC. AT&T argued that this would be consistent with our prior policies.

GTC stated in its brief that the interLATA access subsidy was created to end access charge pooling, maintain access charges, and move to a bill and keep system, while maintaining each company's pre-bill and keep financial position. In its brief, GTC also agreed that prior to price regulation, we considered rate base, rate of return overearnings as the criterion for subsidy termination. GTC further indicated that there is little argument among the parties about the history of the subsidy, or what the

criterion was for individual company subsidy termination before the passage of price cap regulation. GTC agreed that the subsidy pool was not intended to be permanent.

Regarding subsidy termination criteria, GTC argued that earnings would not be a lawful criterion to use for a price cap company under the current law. GTC further argued that the subsidy pool should end only in a manner that furthers our original intent to create a "wash" through the implementation of bill and keep. The company suggested that one criterion we could use would be whether a company could legally raise its rates to offset the loss of its subsidy revenue. GTC believes this is an important consideration, because the subsidy is one of the components of the revenue stream that has been frozen by price regulation.

The Commission staff's witness Mailhot agreed with the parties assessments regarding the origin, history, policy and term of the subsidy. He also noted that GTC has been the only company receiving an interLATA subsidy since the beginning of price cap regulation. Witness Mailhot further emphasized that in prior cases when we eliminated the payment of the subsidy to a company, we also ordered the payor of the subsidy to reduce some rate by an amount equal to the subsidy payment. Witness Mailhot explained that this was to keep the payor of the subsidy whole, but preclude a windfall.

Regarding the criteria that we should consider in terminating the subsidy, witness Mailhot testified that we could, in addition to earnings, examine whether the subsidy payments still help maintain uniform statewide access charges. He stated that maintenance of uniform charges was one of the primary reasons for establishing the subsidy payments when the interLATA access charge pooling arrangement ended. He asserted that uniform statewide access charges were believed to be necessary in order to prevent IXCs from only serving those parts of the state that had low access charges.

Determination

Based upon the evidence and the arguments presented, and in view of the general agreement between our staff and the parties, we find that the subsidy was established to make the transition from a pooling environment for interLATA access charges to a bill and keep environment easier for the LECs.

We also find that the history demonstrates that the main criterion we used in the past to reduce or eliminate the subsidy of a rate-base regulated company was earnings. We agree that Order No. 14552 is clear on this point. The evidence presented also clearly demonstrates that in all previous reductions or eliminations of the interLATA subsidy, the company involved was overearning. Thus, we determined that the LEC no longer needed the subsidy.

While the record clearly demonstrates that we used the earnings status of a company as the criterion when reducing or eliminating the subsidy, the five companies that have already had the subsidy eliminated were rate of return companies at the time we eliminated the subsidy. GTC, the only company still receiving the interLATA subsidy, had its subsidy amount reduced based upon its earnings when it was also still under rate of return regulation. GTC is now price regulated.

In addition, we find that the evidence is clear that when the subsidy payment was terminated to a LEC, the payor(s) of the subsidy were required to reduce some rate or the monies were set aside pending further action. The record shows that this policy was designed to keep all the subsidy participants revenue neutral.

The record also is clear that the interLATA subsidy pool that we established in Order No. 14452 was to be a temporary mechanism. The parties and Commission staff witness agree on this point. There is disagreement regarding the criteria that should be used to end the interLATA subsidy pool. The evidence does demonstrate, however, that the access subsidy was to last only until a company experienced some change in circumstances that we found justified terminating the subsidy. We believe that it is appropriate for changed circumstances to continue to be the criterion for determining if the subsidy should be eliminated.

II. AUTHORITY TO TERMINATE THE SUBSIDY

BellSouth argued that our authority to terminate the subsidy is clear. As BellSouth explained in its brief, by Order No. 12765, issued December 9, 1983, in Docket No. 820537-TP, we established the access charges that interexchange telecommunications companies pay local telecommunications companies for the use of the local network. BellSouth stated that we took this action in accordance with the Modified Final Judgment, U.S. v. ATT, 552 F.Supp. 131 (D.D.C. 1982) and action in FCC Docket 78-72. See BellSouth's Brief at p. 5. See also Order 12765, p. 4. Thereafter, by Order

No. 14452, we established the interLATA access subsidy to ensure that all LECs would be compensated for the use of their facilities without increases in local rates. Because we had the authority to implement the interLATA access subsidy, BellSouth argued, that we have the same authority to terminate it.

BellSouth claimed that we clearly recognized from the beginning that the subsidy was temporary and that we could terminate the subsidy. BellSouth asserted that GTC is attempting to use its election of price regulation as a shield to protect it from elimination of the subsidy payment. BellSouth argued that GTC should not be protected from elimination of the subsidy simply because GTC voluntarily elected to be price regulated. BellSouth further argued that GTC's election of price regulation is, in fact, a basis that we could consider for eliminating the subsidy for GTC. BellSouth added that if we determine that we do not have the authority to terminate the subsidy to GTC, then we must also determine that we have no authority to require BellSouth to continue the payment.

In contrast, GTC asserted that there is no specific statutory authority that permits us to terminate the interLATA subsidy payment to GTC. GTC stated that the subsidy and its history has only been addressed in our orders. GTC argued that we cannot rely on our prior orders terminating the subsidy for other LECs as authority to terminate the subsidy here, because those orders were issued prior to the Florida Telecommunications Act of 1995, which established price regulation. GTC further contended that we must not rely on rate of return regulation considerations in addressing BellSouth's petition, but must consider new approaches more appropriate for the current regulatory scheme.

Essentially, GTC argued that because it is now price regulated, and we have never eliminated the subsidy for a price-regulated LEC, we cannot now eliminate the subsidy for GTC, at least not based upon the criteria we have used in past cases. GTC asserted that in previous cases we have used earnings as the criteria for termination of the subsidy for rate of return regulated LECs. According to GTC, earnings is a meaningless criteria when applied to a price regulated LEC, which is exempt from rate base, rate of return regulation pursuant to Section 364.051(1)(c), Florida Statutes.

In addition, GTC mentioned staff witness Mailhot's suggestion that we could allow GTC to increase its access charges and require BellSouth to decrease its access charges in an amount equal to the

subsidy as an alternative to simply eliminating the subsidy. GTC asserted that witness Mailhot's proposal is a "workable solution" that would balance the interests of all parties.

AT&T argued in its brief that we have the authority to "oversee the continuing implementation of [our] orders." See AT&T's Brief at p. 8. AT&T also argued that our prior lawful actions were not repealed by the enactment of the Florida Telecommunications Act of 1995; therefore, our authority and oversight with regard to our prior orders is still in effect.

AT&T also argued in its brief and through the testimony of witness Guedel that Section 364.01(4)(g), Florida Statutes, requires us to ensure that all providers of telecommunications services are treated fairly. According to AT&T, it is unfair for IXCs to subsidize GTC's revenues through the payment of switched access charges to BellSouth. AT&T stated that receipt of the subsidy constitutes anticompetitive behavior. Thus, AT&T argued, the subsidy can and should be eliminated.

Determination

Based upon the evidence and the arguments presented, we find that we have the authority to eliminate the subsidy payment to GTC by virtue of our original authority to establish the subsidy. (See Order 14452 at p. 12 ("[W]e find that a temporary subsidy pool is required and is in the public interest.")). Elimination of the subsidy payment to GTC does not conflict in any way with Section 364.051, Florida Statutes. The evidence does not suggest that the enactment of the Florida Telecommunications Act of 1995 impaired our authority to implement and enforce our prior, lawfully enacted orders regarding the subsidy.

We agree with AT&T and BellSouth that we have continuing authority over our prior orders in this matter. The parties and the Commission staff agree that we lawfully implemented this subsidy. The fact that GTC is now price regulated does not alter our authority with regard to this subsidy, which was implemented prior to GTC's election of price regulation. In fact, we agree with BellSouth's witness Lohman that it seems quite appropriate that we should remove a revenue support instituted when a company was under rate of return regulation once a company has become price regulated.

Again, we emphasize that each of the parties has agreed that the interLATA subsidy was clearly intended to be temporary. See

Order No. 14452; BellSouth's Brief at p. 4; AT&T's Brief at p. 7; and GTC's Brief at p. 5. We have, in fact, eliminated the subsidy for each of the other original participants in the pool, except GTC. We have not eliminated a subsidy payment for a LEC after it has elected price regulation, nor have we been asked to do so, until now.

We also note that while we have in the past used earnings to determine whether a subsidy payment should be removed, earnings have never been identified as the sole criteria for terminating the subsidy. Based upon the evidence and the arguments presented, it appears that we could eliminate the subsidy if we were to find that the subsidy has fulfilled its stated purpose "to have a 'wash' when implementing bill and keep. . ." and if we determined that elimination of the subsidy is in the public interest. Order No. 14452 at 12. The record does not demonstrate that traditional, rate of return earnings information is the only evidence that may indicate a "wash" or public interest.

Finally, we note that while we do not agree with AT&T that receipt of the subsidy amounts to an "anticompetitive behavior" under 364.01(4)(g), Florida Statutes, we do agree that the continued subsidization of GTC's revenues is contrary to our statements in Order No. 14452 that:

> Doing away with pooling of access revenues is in the public interest in that the inequities inherent in pooling are being replaced with the more appropriate approach of each company keeping the revenue it receives for use of its local facilities. We recognize that discontinuance of the access pool is not complete because we have established a temporary subsidy pool. However, our implementation plan is an important first step in this complex process.

Order No. 14452 at p. 13.

For all of these reasons, we find that our authority to terminate the interLATA subsidy payment to GTC remains intact.

III. TERMINATION OF THE SUBSIDY PAYMENT TO GTC

BellSouth argued in its brief that we may terminate the subsidy payment to GTC even though GTC's basic rates are frozen,

because Section 364.051(5), Florida Statutes, provides that GTC may petition us for a basic local service rate increase if it believes that circumstances have changed substantially to justify such an increase. Similarly, AT&T asserted that we can terminate the subsidy payment, because Section 364.051(5), Florida Statutes, allows GTC to petition for rate relief upon a showing of changed circumstances.

In his testimony, BellSouth's witness Lohman argued that we have generally reduced or eliminated the interLATA access subsidy either because companies asked to be relieved from participating in the pool or companies experienced changed circumstances, such as overearnings. Witness Lohman further argued that these criteria are appropriate reasons for discontinuing the subsidy, and should be the criteria used in this proceeding. Witness Lohman asserted that our acknowledgment of GTC's election of price regulation is an action that provides the impetus to eliminate this temporary payment to GTC. Witness Lohman contended that GTC's election of price regulation is a significant change in circumstances that justifies the elimination of the subsidy payment to GTC. The BellSouth witness also asserted that the subsidy payment was intended to be a temporary relief measure and was to be removed as each company's circumstances changed. Witness Lohman argued, therefore, that GTC's election of price regulation is a substantial change from rate base, rate of return regulation and warrants elimination of the subsidy from the point at which GTC elected price regulation. Witness Lohman also stated that the subsidy should be eliminated entirely at one time, as it was with both Gulf and Indiantown.

AT&T's witness Guedel argued that GTC should not be allowed to use its election of price regulation to protect and prolong the continuation of the subsidy. Witness Guedel argued that the subsidy was intended to render support only during a transitional phase to bill and keep. In addition, AT&T stated in its brief that the subsidy should be eliminated immediately, because GTC has received an access subsidy for over a decade.

Staff's witness Mailhot argued that the interLATA toll bill and keep subsidy should be removed if we find that it is appropriate to rely upon GTC's earnings as a criterion, and GTC's earnings support the elimination of the subsidy. Witness Mailhot asserted that using GTC's earnings as a criterion for removal of the subsidy is consistent with our prior decisions. He also suggested that an alternative may be to terminate the subsidy, allow GTC to increase its access charges, and require BellSouth to

reduce its access charges by the amount of the subsidy. As witness Mailhot stated, when the subsidy pool was established, the payments made into the pool by each company, including BellSouth, came from its access charges. The witness asserted that, in effect, BellSouth collects access charges for GTC and then passes this revenue on to GTC in the form of subsidy payments. The witness stated that we could have adjusted each company's access charges to eliminate the subsidy system in a generic proceeding, once access charges became nonuniform, but did not. Witness Mailhot recommended, therefore, that we terminate the subsidy to GTC, and allow GTC to increase its access charges, and require BellSouth to reduce its access charges.

GTC argued, however, that Section 364.051, Florida Statutes, creates a balance between rate of return regulation and no regulation by freezing rates for a certain time, and then allowing rates to increase a limited amount over time. GTC asserted in its brief that termination of the subsidy payment would significantly alter the approach set forth in Section 364.051, Florida Statutes, because it would eliminate a component of GTC's revenues during a period when the company's rates are frozen. GTC claimed that it would be unable to recover the lost revenue and would be forced into a "lose-lose" situation. GTC contended that if the subsidy payment is terminated, it will be the only LEC to have its access charges reduced simply because it elected price regulation. GTC argued that termination of the subsidy would be ". . . an adjustment which is either an unlawful rate of return calculation or an arbitrary determination based upon nothing put forth in evidence in this docket." See GTC's Brief at p. 9.

In its brief, GTC also argued for the same alternative approach that staff's witness Mailhot suggested. GTC further argued that requiring GTC to collect access charges directly from the IXCs will create a "wash," and, thus, further our original intent in creating the bill and keep subsidy mechanism. GTC further argued that implementation of this alternative will maintain GTC in the same position as the other LECs that have chosen price regulation. In addition, GTC state that if staff witness Mailhot's alternative approach is adopted, then the subsidy could be eliminated at once, in conjunction with redirection of IXC access charge revenue directly to GTC. If the subsidy is simply terminated, however, GTC stated that the subsidy payments should be gradually decreased over the period of time that it would take GTC to offset the loss of the subsidy.

Determination

Upon consideration of the arguments presented, we agree with the assessments of BellSouth and AT&T that the fact that GTC's basic rates are currently frozen does not alter our ability to terminate the subsidy payment as explained in Section II of this Order. Section 364.051(5), Florida Statutes, states, in pertinent part:

> 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.

If GTC believes that termination of the subsidy payment to GTC amounts to a changed circumstance that justifies a rate increase, GTC may seek relief pursuant to Section 364.051(5), Florida Statutes.

While we agree with the parties that we have previously used overearnings as the criterion to eliminate a recipient's interLATA bill and keep subsidy payments, we also agree with BellSouth and AT&T that GTC's election of price regulation is a substantial change in GTC's circumstances. We agree with AT&T's assessment in its brief that GTC has demonstrated a desire to take on the opportunities of the competitive arena by electing price regulation.

As for the alternative approach suggested by staff's witness Mailhot and advocated by GTC, there is not sufficient record evidence to find that the alternative approach is necessary or proper. There is also no evidence regarding the effects that implementation of the suggested alternative might have on the parties or any other companies. Furthermore, we are concerned that the access charge "adjustment" suggested by GTC and the Commission staff's witness appears to be contrary to Section 364.163, Florida Statutes, which caps each LEC's intrastate access rates.

Based on the record and the arguments presented, we find that GTC has experienced a changed circumstance, its election of price regulation. We find that this changed circumstance warrants termination of the subsidy to GTC. Furthermore, we find no support in the record for increasing GTC's access charges. Again, we emphasize that GTC may seek relief as provided in Section 364.051(5), Florida Statutes, if necessary.

Upon consideration, we also find that the subsidy shall be terminated entirely at one time. There is not sufficient evidence to support a gradual reduction in the subsidy payments, nor is there evidence to support leaving the subsidy in place until GTC's basic rates are no longer capped.

IV. THE INTERLATA SUBSIDY MECHANISM

In his testimony, BellSouth witness Lohman argued that his company has effectively eliminated collection of the original subsidy amount of $2.7 million by reducing access charges by well over that amount since 1985. Witness Lohman further argued that the original revenue surplus enabled BellSouth to make subsidy payments that were passed on to other companies based on the uniform access rates. Witness Lohman also argued that the $2.7 million surplus has not existed for many years; thus, there is no surplus for disposal. BellSouth's witness further contended that "collecting and passing on" the access revenues ceased when we stopped requiring uniform statewide access rates. Witness Lohman argued that BellSouth is no longer collecting access revenues for GTC; therefore, "the payment is just a subsidy from BellSouth to GTC." See Transcript at pgs. 28 and 36. In addition, witness Lohman asserted that terminating subsidy payments to GTC will not create a windfall that will benefit BellSouth; thus, BellSouth should be allowed to keep the full amount that it has been paying to GTC.

BellSouth witness Lohman also contended that the IXCs were not funding the subsidy pool; instead, the IXCs were paying for their access to the local network at the same level at which they made payments prior to the implementation of bill and keep. The BellSouth witness argued that this revenue neutrality was, however, eliminated in 1988 as uniform access rates were replaced by LEC-specific rates. Witness Lohman asserted that the various access reductions made by BellSouth have changed the revenue neutrality of the access revenues established in the original bill and keep order.

As for whether BellSouth should be required to make a rate reduction upon the elimination of the subsidy payment to GTC, BellSouth witness Lohman conceded that in prior cases in which the subsidy payments to a LEC have been eliminated, we have either ordered BellSouth to reduce some rate or set aside the monies pending further action. Nevertheless, witness Lohman contended that BellSouth has reduced rates tremendously since the finalization of the bill and keep pool in 1987. The witness also noted that these reductions occurred while BellSouth was still under rate of return regulation, and that BellSouth is now price regulated.

AT&T's witness Guedel argued that BellSouth will enjoy a windfall profit if the subsidy payments to GTC are discontinued without accompanying rate reductions. Witness Guedel further argued that this reduction should be targeted at BellSouth's switched access charges, because switched access charges have historically supported the interLATA toll bill and keep access subsidy pool. Witness Guedel contended that switched access provides BellSouth a contribution in excess of cost of over one thousand percent. Thus, at their current levels, switched access charges deter competition by setting a price squeeze in favor of the incumbent LECs. Witness Guedel did, however, concede that it is possible for BellSouth to reduce a different service in order to eliminate any possible windfall profits resulting from the termination of the subsidy payments to GTC.

In addition, AT&T's witness Guedel argued that the bill and keep subsidy pool has been funded by a portion of BellSouth's access revenue, and that interexchange carriers were the parties paying those access charges. Witness Guedel contended that at the inception of the subsidy pool, BellSouth had a revenue surplus, which meant that access charges amounted to more than fair compensation for the use of BellSouth's local access service. Witness Guedel contended that it was this revenue surplus that funded the subsidy pool. Witness Guedel argued that we have the authority to eliminate the subsidy payments and channel the resulting windfall profits to reduce rates for the payor companies. Witness Guedel further asserted that,

> [i]n in carrying out the elimination of the subsidy pool, the Commission would be doing exactly what it has done in the past with implementing that Order by removing part of the subsidy, and using that windfall profit to reduce rates for the payor company.

Transcript at p. 114.

Furthermore, AT&T argued in its brief that we cannot increase GTC's access charge rates, because we are barred from doing so by Section 364.163, Florida Statutes. AT&T does, however, believe that we can decrease BellSouth's access charges because of our past policy of precluding BellSouth from receiving a windfall when the subsidy payment to a LEC is terminated.

Staff's witness Mailhot argued that the access revenues that the LECs contributed into the subsidy pool were derived from revenues that the IXCs paid as access charges. Thus, if the subsidy payments to GTC are eliminated, the witness argued that it is consistent with our prior decisions to require BellSouth to implement a rate reduction by an amount equal to the subsidy BellSouth was paying to GTC. Witness Mailhot further argued that we have generally required the payor to reduce some rates whenever a subsidy was eliminated in order to avoid any windfall. Witness Mailhot did, however, concede that there may have been instances in which we set aside monies and applied those monies to depreciation pending a decision on a permanent rate reduction. Staff witness Mailhot suggested that it appears that we may have the authority to require BellSouth to implement a rate reduction if these subsidy payments are terminated.

In its brief, GTC argued that it has not been the recipient of BellSouth's "largesse;" instead, BellSouth has collected access revenues on behalf of GTC. GTC further argued that absent some rate reduction by BellSouth, termination of the subsidy to GTC will result in a windfall for BellSouth. GTC asserted that if we terminate the subsidy payment, allow GTC to increase its access charges, and require BellSouth to decrease its access charges, as suggested by staff witness Mailhot, then "the Commission will be carrying out the effect of its earlier decisions previously made in a lawful manner." See GTC's Brief at p. 13.

Determination

We do not agree with BellSouth's assertion that it has merely been subsidizing GTC by way of the access subsidy payments. We are persuaded by the arguments presented by AT&T, GTC, and the staff witness, that discontinuance of the access revenue streams to GTC, absent any rate reduction on the part of BellSouth, will create a windfall for BellSouth.

In our past Orders pertaining to termination of the subsidy, we have required BellSouth to recognize the subsidy reduction in some manner. For example, in Order No. PSC-92-0028-FOF-TL, issued in Docket No. 911108, on March 10, 1992, BellSouth's subsidy payment to ALLTEL was reduced by $334,000. The subsidy payment reduction was treated as an additional extended area service (EAS) set-aside amount for BellSouth. Order No. PSC-92-0368-FOF-TL, issued May 14, 1992, included a reduction in the amount of interLATA subsidies paid to Northeast Florida Telephone Company by Southern Bell (now BellSouth) and GTE Florida. By that Order, we required Southern Bell to set aside any reduction in the subsidy payments for EAS implementation in Docket 880069-TL. GTE Florida's portion of Northeast's interLATA subsidy reduction was placed into an unclassified depreciation reserve account until such time as rates were changed. By Order No. PSC-93-0228-FOF-TL, issued February 10, 1993, we required the reduced subsidy payment for BellSouth to be included as an additional set-aside amount to be disposed of in Docket No. 920260-TL. In Order No. PSC-93-1176-FOF-TL, issued August 10, 1993, we also required BellSouth to add the reduction in subsidy payments to their set-aside amount to be disposed in Docket No. 920260-TL. By Order No. PSC-94-0383-FOF-TL and Order No. PSC-95-0486-FOF-TL, we took similar action.

We agree with witness Lohman that BellSouth's original $2.7 million subsidy was disposed in previous dockets. The original subsidy amount of $2.7 million was, however, net of contributions. As previously discussed, we found it necessary to dispose of the additional amounts as BellSouth's contribution to the subsidy fund was reduced. Likewise, BellSouth shall be required to recognize the subsidy reduction.

While we acknowledge that BellSouth has made substantial reductions in its switched access charges since the finalization of the bill and keep mechanism, BellSouth's witness Lohman did concede that most of BellSouth's switched access charge reductions were the result of settlement or sharing agreements. There is no evidence that these agreements affected BellSouth's participation in the interLATA access subsidy pool. Rather, as argued by AT&T and staff's witness Mailhot, the evidence indicates that the IXCs funded the subsidy pool by their use of the local network, even though BellSouth's access charges were reduced. Thus, we find that upon elimination of the subsidy payments to GTC, it is also appropriate to require BellSouth to make adjustments in order to eliminate all aspects, including any windfall, associated with this subsidy, which was implemented when BellSouth and GTC were both under a different regulatory scheme. Furthermore, we are confident

in our authority to require BellSouth to make a reduction to negate any windfall for the same reasons set forth in Section II of this Order.

Based on the arguments and the evidence presented, we find that the subsidy mechanism shall be terminated. Thus, we shall require BellSouth to make a reduction in order to eliminate a windfall. BellSouth has, however, substantially reduced its access charges through various settlement agreements and to a greater extent than these agreements required. Thus, we shall allow BellSouth to make the reduction in a specific rate, at BellSouth's discretion, that will benefit all of BellSouth's ratepayers to the extent possible. BellSouth shall file tariffs with us within sixty (60) days of the issuance of this Order to reflect this rate reduction.

V. SUBSIDY PAYMENT TERMINATION DATE

BellSouth's witness Lohman testified that GTC should refund to BellSouth all subsidies received from the date GTC first had overearnings or June 25, 1996, when GTC became price regulated, whichever is earlier. Witness Lohman noted that Order No. 14452 states that all subsidy pool contributions and receipts are subject to refund. AT&T argued that the effective date of the subsidy removal and the matching access reduction for BellSouth should be October 1, 1998, because the amount of the access reduction would not be a large amount. AT&T suggested that BellSouth's access charge reduction could be combined with access reductions scheduled to be made pursuant to the new legislation.

We do not agree with BellSouth that the subsidy payments should be eliminated effective from the date that GTC elected price regulation. BellSouth did not petition us to terminate the subsidy payments when GTC elected price regulation. Because the subsidy was implemented by us, it is appropriate for GTC to continue to receive the subsidy payment until we make a decision to terminate the subsidy. See Order No. 14452. Although we did indicate in Order No. 14452 that the subsidy payments were subject to refund, the Order is clear that we would require a LEC receiving the subsidy to make a refund if we determined that the LEC was overearning. Order No. 14452 at p. 14. There is, however, no earnings information in the record for this case to allow us to determine if GTC has been overearning. Furthermore, it would be unduly burdensome to GTC to require it to refund the subsidy payments it has received since it elected price regulation. The payments shall, therefore, be terminated upon the filing of

BellSouth's tariff reflecting its reduction as set forth in Section IV of this Order.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the interLATA access subsidy to GTC, Inc. d/b/a GT Com shall be terminated. It is further

ORDERED that BellSouth Telecommunications, Inc. shall file tariffs reflecting a reduction in a specific rate, at BellSouth Telecommunications, Inc.'s discretion, that will offset the terminated access subsidy payments to GTC, Inc. d/b/a GT Com, and will benefit all of BellSouth's ratepayers, to the extent possible. It is further

ORDERED that BellSouth Telecommunications, Inc. shall file its tariffs reflecting the reduction within sixty (60) days of the issuance of this Order. It is further

ORDERED that the termination of the interLATA access subsidy to GTC, Inc. d/b/a GT Com shall be effective upon the filing of BellSouth Telecommunications, Inc.'s tariffs reflecting the reduction required by this Order. It is further

ORDERED that upon the filing of BellSouth Telecommunications, Inc.'s tariffs reflecting the reduction required by this Order, and the conclusion of the time for appeal set forth in the Notice of Further Proceedings or Judicial Review, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 28th Day of August, 1998.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR 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: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting 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.