

IN THE SUPREME COURT OF FLORIDA **ORIGINAL**

CASE NO. 94,656

GTC, Inc.,

970808-TL

Appellant,

vs.

JOE GARCIA, etc., et al.,

Appellees.

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

**APPELLEE/CROSS-APPELLANT BELLSOUTH  
TELECOMMUNICATIONS, INC.'S REPLY BRIEF ON CROSS-APPEAL**

November 29, 1999

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APP \_\_\_\_\_  
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SEC   /   \_\_\_\_\_  
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DOCUMENT NUMBER-DATE

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

CERTIFICATE OF FONT TYPE ..... 1

REPLY ARGUMENT ON CROSS-APPEAL ..... 1

THE PSC’S DECISION REQUIRING BELL SOUTH TO REDUCE ITS  
RATES LACKS STATUTORY AUTHORITY AND WAS NOT  
BASED ON SUBSTANTIAL COMPETENT EVIDENCE ..... 1

    A. The PSC lacks the statutory authority to require BellSouth, a price-  
regulated LEC, to reduce its rates ..... 2

    B. The decision to require BellSouth to reduce its rates was not based  
on substantial competent evidence ..... 7

CONCLUSION ..... 10

CERTIFICATE OF SERVICE ..... 11

**TABLE OF AUTHORITIES**

**Cases**

*Ameristeel Corp. v. Clark*,  
691 So. 2d 473 (Fla. 1997) ..... 8

*C.S. v. S.H.*,  
671 So. 2d 260 (Fla. 4th DCA 1996) ..... 6

*J.M. v. State*,  
677 So. 2d 890 (Fla. 3d DCA 1996) ..... 6

*McKendry v. State*,  
641 So. 2d 45 (Fla. 1994) ..... 6

**Statutes**

§ 364.01, Fla. Stat. (1997) ..... 2, 5, 6

§ 364.051, Fla. Stat. (1997) ..... 1-3, 5, 6

§ 364.14, Fla. Stat. (1997) ..... 2, 6

§ 364.163, Fla. Stat. (1997) ..... 4

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**REPLY ARGUMENT ON CROSS-APPEAL**

BellSouth presents the following argument in reply to the PSC's answer brief on cross-appeal.

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

On cross-appeal, BellSouth presented two issues directed to the PSC's requirement that BellSouth reduce its rates by the amount of the GTC Subsidy. BellSouth argued that (A) because BellSouth is subject to price regulation under section 364.051, Florida Statutes, the PSC lacks authority to require BellSouth to reduce its rates; and (B) substantial competent evidence does not support the PSC's conclusion that BellSouth would enjoy a financial windfall from elimination of the GTC subsidy. BellSouth replies to the PSC's responses to these arguments in turn.

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

BellSouth first argued that the PSC lacks the authority to require BellSouth to reduce its rates because, as a price-regulated LEC, BellSouth is exempt from the statute granting the PSC the power to adjust rates that are unjust or unreasonable (BellSouth br. at 14-16). BellSouth noted that it is subject to price regulation under section 364.051, Florida Statutes (1997). By statute, BellSouth is specifically exempted from earnings regulation under section 364.14, which is the source of the PSC's authority to regulate the rates of telecommunications companies.

In its answer brief on cross-appeal, the PSC does not directly respond to BellSouth's argument that the PSC lacks the authority to order BellSouth to reduce its rates. The PSC does not argue -- nor could it -- that it may order BellSouth, pursuant to section 364.14, to reduce its rates as unjust or unreasonable. By its failure even to address these statutory provisions, the PSC tacitly admits that it lacks authority to reduce BellSouth's rates.

Instead, the PSC argues that the vague authority granted in section 364.01(3) "to protect consumers and provide for the development of fair and effective competition" provides the authority to order BellSouth to change its rates. The PSC does not explain why this general provision should be read, in effect, to negate the specific exemption from rate regulation provided in section 364.051. Moreover, the PSC never shows

how “consumers” or competition would be harmed if the PSC were unable to order BellSouth to reduce its rates.<sup>1</sup>

Although the PSC purports to justify its extra-statutory order as necessary to protect consumers or competition, it is apparent that the PSC’s goal in ordering the rate reduction is simply to regulate BellSouth’s earnings. The PSC even argues that “if BellSouth does not reduce one of its rates, then its net revenues will increase” (br. at 8-9). Under the price regulation the Florida legislature adopted in 1995, however, the PSC lacks the authority to regulate BellSouth’s earnings. *See* § 364.051(3), Fla. Stat. (1997).

The PSC suggests (br. at 6) that because the subsidy scheme was temporary, so too was BellSouth’s authority to collect the revenues with which it paid the subsidies. The PSC, however, erroneously assumes, without citing any record facts, that BellSouth collects revenues specifically earmarked to support the subsidy payment to GTC, and improperly questions what would happen to BellSouth’s earnings if BellSouth no longer were required to pass along these allegedly-earmarked revenues as subsidies.

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<sup>1</sup> The PSC’s order, requiring BellSouth to lower rates to reduce revenues, but allowing BellSouth to choose *which* rate to reduce, essentially admits there is no group of “consumers” that is being harmed by any particular rate BellSouth charges, nor any service for which competition is hampered.

The same analysis applies to the PSC's position (br. at 7) that equity demands that the PSC order BellSouth to reduce its rates simply because it is removing the GTC Subsidy, to prevent BellSouth's customers from paying for a non-existent subsidy. The PSC ignores testimony that BellSouth has already reduced its access revenues far beyond the amount it would save from the removal of the GTC Subsidy.

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). AT&T agreed that section 364.163, Florida Statutes, barred the PSC from granting GTC a rate increase (A. 15).<sup>2</sup> The PSC expressly ruled that it did *not* have the statutory authority to increase GTC's rates at this time (A. 12-13). Therefore, the PSC did not have the authority to order BellSouth to reduce its rates.

AT&T argued at the hearing that even though section 364.163 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 rate-of-return regulation, whereby it was

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<sup>2</sup> "A. #" refers to the appendix to BellSouth's initial brief on cross-appeal, which contains the PSC's final order (R. 3:438-56).

limited to a specified rate of return. BellSouth has since elected price regulation (T. 78), and the PSC no longer has authority to require BellSouth to reduce its rates.

The PSC argues (br. at 8) that the rate reduction is permissible because it will have no net effect on BellSouth's revenues. This argument again ignores the testimony and the PSC's own findings. AT&T testified that BellSouth can reduce rates for a service other than switched access in order to eliminate windfall profits (A. 14). The PSC testified that it has historically allowed other reductions to offset potential surplus from the subsidy (T. 128). The PSC found that BellSouth had substantially reduced its access charges through various settlement agreements to a greater extent than those agreements required (A. 17).

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 fails to identify any statute giving it such authority. The PSC's order says lamely 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). Yet it brashly concluded: "we are confident in our authority to require BellSouth to make a reduction . . ." (A. 16-17). On appeal, the PSC again identifies no specific provision granting it such authority. It relies solely on some legislative intent contained in section 364.01. Section 364.051, however, governs telecommunications companies electing price regulation, and specifically



removes the PSC's statutory authority to alter revenues under section 364.14. A specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. *See McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994). *See also J.M. v. State*, 677 So. 2d 890, 892 (Fla. 3d DCA 1996) (it is a firmly-established principle of statutory construction that a specific statutory provision is to govern any conflicting general statutory provision); *C.S. v. S.H.*, 671 So. 2d 260, 268 (Fla. 4th DCA 1996) (the more specific statute is considered an exception to the terms of the more general one). Therefore, the specific provisions of section 364.051 control over the general legislative intent in section 364.01 to "protect consumers and provide for the development of fair and effective competition."

Other than citing this legislative intent (br. at 9), the PSC simply repeats the bald findings contained in the order (br. at 8). The PSC states that "the Commission concluded that it had the authority to terminate the subsidy mechanism in its entirety, including requiring BellSouth to reduce a rate so that its customers would no longer fund the eliminated subsidy" (br. at 8). This statement conspicuously lacks any statutory support.

Finally, the PSC's concern with BellSouth eliminating excess revenues generated from collecting access charges from its IXC customers does not make sense given that the PSC does not purport to require BellSouth to reduce these rates, but gives BellSouth the option to eliminate rates where it chooses. The PSC noted in its

ruling that AT&T conceded that BellSouth can eliminate any possible windfall profits. Allowing BellSouth an option contradicts the PSC's findings that these revenues would support the subsidy.

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

BellSouth also argues on cross-appeal that the PSC's finding that discontinuing the GTC Subsidy without a corresponding rate reduction would create a windfall for BellSouth was not supported by competent substantial evidence (BellSouth br. at 17-19). The PSC argues (br. at 11) that no evidence existed that BellSouth's prior rate reductions affected its participation in the subsidy pool. Based on this argument, the PSC disagrees that "BellSouth has already reduced its access charges in excess of the amounts it was contributing to the subsidy pool" (br. at 10). This does not make sense, since the PSC ruled that BellSouth could reduce rates in areas other than those used to contribute to the subsidy pool.

The PSC's continuing claims that BellSouth would gain a "windfall" if it were not required to reduce its rates is unsupported and unsupportable. The PSC appears to assert, without any basis in the record, that BellSouth collects some revenues solely for the purpose of passing them on to GTC as a subsidy (br. at 12). Accordingly, the PSC argues, if BellSouth is not ordered to cease collecting this earmarked revenue, and its obligation to pay GTC is eliminated, BellSouth will realize a windfall (br. at 12).

This argument is contradicted by the terms of the PSC's order. There was no evidence that BellSouth collects any revenue solely to pass on a subsidy to GTC, or for any purpose other than in exchange for services BellSouth provides to its customers. If the PSC were able to identify any revenues BellSouth received from its customers, other than for services provided, that amounted to a windfall, surely the PSC would have ordered BellSouth specifically to reduce rates charged to those customers from whom BellSouth had collected the purported windfall. The PSC did not order BellSouth to reduce access charges, however, or any other specific charge, but simply ordered BellSouth to reduce *any* charges that would result in a reduction in its revenues corresponding to the amount of the GTC Subsidy (A. 17). This demonstrates the PSC's inability to identify any "windfall" BellSouth would gain.

The PSC argues (br. at 12) that it is not required to accept BellSouth's testimony without evaluation. This does not eliminate the requirement, however, that the PSC's ultimate ruling be based upon substantial competent 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 then contends (br. at 12) that BellSouth offered no evidence to show that prior rate reductions resulted from a change in its contribution to the subsidy pool. To the contrary, BellSouth's witness provided unrebutted testimony that "BellSouth

has completely eliminated any 'surplus' by reducing access charges by well over [\$2.7 million] since 1985. Since August of 1985, BellSouth has reduced switched access rates by over \$130 million" (T. 28). This argument further contradicts the PSC's contention that the reduction is needed to keep BellSouth revenue neutral. There is no support for the PSC's position (br. at 12) that the rate reduction must result from a change in contributions to the subsidy pool. Thus, the PSC's findings are not supported by competent substantial evidence.


The PSC suggests (br. at 11) that BellSouth was duplicitous by failing to inform the Court that the \$2.7 million surplus amount was net of the amount BellSouth was required to contribute to the pool. However the PSC calculates the revenue reduction, the PSC's staff witness acknowledged that, due to PSC actions since 1987, BellSouth has reduced access rates by over \$200 million (T. 35, 38, 44, 128). The PSC argues (br. at 10) that most of the reductions resulted from settlements or other Commission proceedings. BellSouth demonstrated, however, that it had unilaterally reduced toll rates by \$31 million unrelated to any docket whatsoever (T. 67). Therefore, BellSouth already has reduced its access rates by substantially more than the original \$2.7 million surplus and the \$1.2 million GTC Subsidy combined (T. 50). BellSouth also committed to refunding to its customers any refund it receives from GTC for any year subject to the sharing requirement (T. 28).

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). For example, the PSC has allowed companies to place the subsidies on additional depreciation, implementing intraLATA bill and keep, and reducing local service rates, among other things (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). Even if, as the PSC argues, it could discount BellSouth's testimony, its findings are not based on substantial, competent evidence.

**CONCLUSION**

For the reasons stated above and in BellSouth's initial brief on cross-appeal, the PSC's decision requiring BellSouth to reduce its rates commensurate with the elimination of the GTC Subsidy should be reversed.

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