

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC94656

GTC, INC.,

Appellant, Cross-Appellee,

970808-TL

vs.

JOE GARCIA, etc., et al.,

Appellees, Cross-Appellants.

**APPELLEE/CROSS-APPELLANT BELLSOUTH'S
RESPONSE TO APPELLANT GTC'S MOTION FOR REHEARING**

A rehearing is appropriate only if the Court has "overlooked or misapprehended" points of law or fact material to its decision. See Fla. R. App. P. 9.330(a). The motion violates Rule 9.330(a). As shown below, GTC, Inc.'s motion states no point of law or fact that this Court has overlooked or misapprehended. Rather, in violation of Rule 9.330(a), the motion reargues points thoroughly addressed in the parties' briefs, which this Court already has considered. Most notably, GTC's motion alleges that this Court misapprehended certain facts that are ultimately irrelevant to the decision. Therefore, even if GTC were correct, the outcome would not change.

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A. The Court did not fail to consider Order No. 13934

GTC first argues that the Court failed to consider Public Service Commission Order No. 13934 (motion at 2), which created the bill-and-keep system, and therefore misapprehended the history of the subsidy mechanism created under Order No. 14452 (motion at 4). Each of these Orders was fully discussed in GTC's briefs. In fact, GTC's reply brief (at 3-4) quoted extensively from Order No. 13934.

Even a failure to consider Order No. 13934, however, would not undermine this Court's decision. Order No. 13934 simply established the bill-and-keep system. Order No. 14452, which came later, established the subsidy. As this Court emphasized (slip op. at 13), the subsidy was always intended to be temporary. As of the date of the Commission's decision, GTC remained the sole LEC, of the original six, still receiving the subsidy. This Court also noted (slip op. at 12-13) that, notwithstanding GTC's election of price regulation, the Commission retained the power to regulate it, including the power to "[e]liminate any rules and/or regulations which will delay or impair the transition to competition" (slip op. at 13, quoting § 364.01(4)(a), Fla. Stat. (1995)). Therefore, the Court held, "the Legislature did not vitiate the Commission's authority to eliminate rules it set in place while the telecommunication company operated under rate of return regulation" (slip op. at 14). The Court's reasoning is sound even if it completely ignored Order No. 13934, which simply instituted the bill-and-keep access charge plan.

B. The Court's single misstatement of one background fact is irrelevant to the Court's holding

GTC argues (motion at 3) that the Court erred in stating (slip op. at 3) that when bill-and-keep was instituted some LECs were operating below their authorized rate of return and would suffer a loss under the new system. GTC points out that "the Commission did not create the interLATA subsidy mechanism based on any finding that the LECs that were suffering the recurring losses were earning below their authorized rate of return prior to the implementation of bill and keep" (motion at 3).

While GTC is correct, the point is ultimately irrelevant because this Court's statement was intended simply to provide some background facts. The Court's point in stating the background of the subsidy (slip op. at 3) was that some LECs, including GTC's predecessor, would suffer a loss when the Commission implemented the bill-and-keep system. This is fully consistent with Order No. 13934, which created the bill and keep system, and the purpose of Order No. 14452, which created the subsidy pool to keep the suffering LECs whole. In fact, GTC itself educated the Court on this policy: "GTC . . . was one of the seven LECs destined to suffer a shortfall under the Commission's new bill and keep plan. . . . [T]he Commission reaffirmed that entitlement [to the lost revenues] by establishing a temporary mechanism - the intraLATA subsidy - to preserve the revenues" (GTC reply br. at 6).

The confusion arose because Order No. 13934 recognizes that some LECs were already operating at a loss before bill-and-keep, and the Court stated that the switch to bill-and-keep *caused* these LECs to operate at a loss. Order No. 13934 provides that the LECs should only remain whole, and if any LEC was operating at a loss, any changes would only keep their losses at the same pre-bill-and-keep level (reply br. at 3). Despite the misstatement, the Court correctly noted that: “Accordingly, the Commission created a temporary access subsidy pool, the purpose of which was to “keep each company in the same financial position it would have been in prior to implementing bill and keep” (slip op. at 3). The misstatement about the condition of the LECs at the time of the bill-and-keep was trivial. It certainly does not justify changing the decision, or even editing it.

GTC suggests that this irrelevant misstatement of one background fact somehow renders the entire decision wrong because “the implementation of the interLATA subsidy was not related to the level of earnings, but was based upon revenue neutrality.” GTC fails to show, however, how this simple misstatement even remotely affected the Court’s ruling.

Whether the LECs were operating at a loss before bill-and-keep is ultimately irrelevant. The issue here, which GTC’s motion ignores, is whether the Commission had the authority to remove a subsidy it instituted, which was always intended to be temporary, and which it had removed for every other LEC that had been receiving it,

because GTC had elected price regulation. This Court, affirming the Commission, correctly held that the Commission had such authority.

C. The Court did not overlook the Commission's intent to maintain revenue neutrality

GTC also argues (motion at 4-5) that the Court erred by failing to recognize that the Commission committed to LECs that they would be kept whole under bill-and-keep, and that the Commission removed subsidies only upon a showing of excess earnings. GTC's argument that excess earnings was the only criterion by which the Commission could remove the subsidy was fully briefed. In its opinion, this Court recognized that the Commission intended the LECs to be kept whole, but also that the Commission intended the subsidy to be temporary (slip op. at 13). As BellSouth argued in its answer brief:

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 over earning, 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 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.

(BellSouth answer brief at 12). This Court considered these arguments, as well as GTC's. The Court held that substantial competent evidence showed that GTC's election of price regulation constituted a sufficient change in circumstances to justify elimination of the subsidy (slip op. at 16-17).

D. The record supports the Commission's finding that GTC no longer needed the subsidy

Finally, GTC argues (motion at 6) that this Court erred in concluding that GTC's election of price-cap regulation indicated that it no longer needed the subsidy. GTC argues that the record does not support the Commission's finding that GTC is now revenue neutral (motion at 7).

GTC made this identical argument in its briefs. In its amended initial brief, GTC argued that the Commission "made no finding that GTC was overearning." GTC asserted that the only criterion the Commission may use to eliminate the subsidy

is whether GTC is overearning -- i.e., no longer merely revenue neutral -- but that the 1995 Act prohibits the Commission from considering earnings because GTC elected price-cap regulation. GTC's argument -- in its briefs and now -- leads to an absurd result. Because under price cap regulation overearnings are no longer relevant, the Commission could never consider whether GTC was overearning; and since, according to GTC, overearnings is the *only* basis for eliminating the subsidy, the temporary subsidy can never be eliminated. It would essentially become permanent. Thus, GTC would be the only LEC in Florida to receive a \$1.2 million subsidy forever. The Commission never intended this result when it instituted the subsidy, and the Legislature never intended this result when it allowed LECs to elect price regulation.

This Court fully considered GTC's argument, and flatly rejected it: "GTC maintains, therefore, that by incorrectly applying language from the new act (i.e., concluding that GTC's price-cap election constituted a "changed circumstance") to justify the elimination of the revenues derived from the subsidy, the Commission blurred the distinction between the two schemes. *We disagree*" (slip op. at 15, emphasis added). This Court recognized that the Commission used earnings criteria to eliminate the subsidy in the past (slip op. at 16), but also recognized that the Commission never said that earnings would be the sole criterion for eliminating the subsidy (slip op. at 17). The Court found that the record supported the Commis-

sion's and BellSouth's position that GTC's election of price-cap regulation equated to a substantial change in circumstances, and that GTC elected to seek the benefits of a competitive market (slip op. at 17). GTC does not challenge this finding.

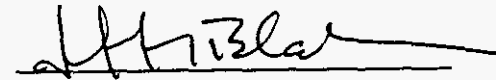
CONCLUSION

Originally, six LECs received a subsidy. GTC's was the last remaining one. The Commission eliminated the subsidy because GTC elected price regulation, thus stating its desire to join the free market. A continued subsidy of \$1.2 million is inconsistent with that desire. Therefore, as this Court found, the Commission was well within its discretion in eliminating the subsidy. If, as GTC claims, elimination of the subsidy results in losses to GTC, then the elimination of the subsidy may constitute a substantial change in circumstances to justify a rate increase under section 364.051(5), Florida Statutes.

For the reasons set forth above and in BellSouth's Answer Brief, the motion for rehearing should be denied.

Respectfully submitted,

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I CERTIFY that a copy of the foregoing was mailed on December 15, 2000

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