

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC94656

01 MAR 29 1997 3 37

RECEIVED-TPSC  
MARCH 29 11:10:19  
REGISTRATION AND REPORTING

GTC, INC.,

Appellant, Cross-Appellee,

vs.

JOE GARCIA, etc., et al.,

Appellees, Cross-Appellants.

970808-TL

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

Appellee/Cross-Appellant, BellSouth Telecommunications, Inc., pursuant to Florida Rule of Appellate Procedure 9.330(b) and this Court's order, responds to Appellant GTC, Inc.'s second motion for rehearing. This Court should deny the motion for the reasons that follow.

**BACKGROUND**

This is an appeal from a decision of the Florida Public Service Commission ("PSC"). GTC, Inc. appealed 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 was whether GTC was entitled to continue to receive the subsidy after it had selected price regulation under the Florida Telecommunications Act of 1995, a

APP  
CAF  
CMP  
COM  
CTR  
ECR  
LEG  
OPC  
PAI  
RGO  
SEC  
SER  
OTH

DOCUMENT NUMBER-DATE

03901 MAR 29 6

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC94656

GTC, INC.,

Appellant, Cross-Appellee,

vs.

JOE GARCIA, etc., et al.,

Appellees, Cross-Appellants.

---

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

Appellee/Cross-Appellant, BellSouth Telecommunications, Inc., pursuant to Florida Rule of Appellate Procedure 9.330(b) and this Court's order, responds to Appellant GTC, Inc.'s second motion for rehearing. This Court should deny the motion for the reasons that follow.

**BACKGROUND**

This is an appeal from a decision of the Florida Public Service Commission ("PSC"). GTC, Inc. appealed 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 was whether GTC was entitled to continue to receive the subsidy after it had selected price regulation under the Florida Telecommunications Act of 1995, a

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC94656

GTC, INC.,

Appellant, Cross-Appellee,

vs.

JOE GARCIA, etc., et al.,

Appellees, Cross-Appellants.

---

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

Appellee/Cross-Appellant, BellSouth Telecommunications, Inc., pursuant to Florida Rule of Appellate Procedure 9.330(b) and this Court's order, responds to Appellant GTC, Inc.'s second motion for rehearing. This Court should deny the motion for the reasons that follow.

**BACKGROUND**

This is an appeal from a decision of the Florida Public Service Commission ("PSC"). GTC, Inc. appealed 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 was whether GTC was entitled to continue to receive the subsidy after it had selected price regulation under the Florida Telecommunications Act of 1995, a

new pro-competitive regulatory system featuring diminished governmental oversight. On cross-appeal, BellSouth appealed the PSC's decision to require BellSouth to reduce its rates by the amount of the eliminated subsidy.

This Court issued its original opinion on November 16, 2000, in which it affirmed the PSC's elimination of the subsidy to GTC and reversed the requirement that BellSouth reduce its rates in the same proportion. GTC then filed a motion for rehearing, arguing several points: (1) that this Court failed to consider certain Public Service Commission orders that created the bill-and-keep system; (2) that this 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; (3) that this Court failed 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; and (4) that this Court erred in concluding that GTC's election of price-cap regulation indicated that it no longer needed the subsidy. As BellSouth argued in its response to the motion for rehearing, GTC made most of these argument in its briefs, and in its original opinion, this Court fully considered GTC's arguments and flatly rejected them.

On February 22, 2001 this Court issued a revised opinion. That opinion was identical to the original, except that it eliminated the following underlined words in two

sections of the opinion: (1) in a clause of the “Background” section, stating that the PSC “. . . recognized that immediate implementation of the new policy could not be achieved because some of the LECS were operating below their authorized rate of return and would suffer a loss under the new system” (slip op. at 3); and (2) on page 17, stating that “the LECs’ earnings circumstances had changed to the effect that they no longer relied on the subsidy in order to remain competitive.” The Court made no other changes to the opinion, and it remains dated November 16, 2000. In conjunction with the revised opinion, this Court denied GTC’s motion for rehearing.

GTC then promptly filed a *second* motion for rehearing. This second motion does not address any new aspects of the revised opinion. Indeed, it could not do so because the revised opinion does not contain any new aspects; it only deletes two phrases. Instead, the second motion makes many of the same arguments contained in the first motion. BellSouth has filed a motion to strike this second motion because it is unauthorized, *see* Fla. R. App. P. 9.330(b) (limiting each party to *one* motion for rehearing) and because the second motion only addresses the portions of the revised opinion that remained unchanged, and not the minor word deletions in the revised opinion. This Court has yet to rule on the motion to strike, but in the meantime has ordered BellSouth to respond to the second motion for rehearing.

## ARGUMENT

As BellSouth noted in reply to the original 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)*. GTC second motion, like the first, states no point of law or fact that this Court has overlooked or misapprehended. Rather, it reargues points thoroughly addressed in the parties’ briefs, which this Court has now twice considered and twice rejected.

The second motion (at 1-2) takes issue with statements on page 17-18 of the Court’s revised opinion. The second motion quotes the very same passage quoted in the first motion (*compare* first motion at 5 *with* second motion at 1-2). Although GTC calls the quoted passage “amended text in the Revised Opinion,” apparently to imply that this Court said something new that could justify another motion for rehearing, the only differences between the two quotes are: (1) GTC quotes more of the passage in the second motion; and (2) the revised opinion eliminated a phrase, as noted above. The second motion therefore raises nothing new.

GTC’s second motion argues (at 2-3), as did the first (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 made this identical argument in its briefs. In its amended initial brief (at 15), GTC argued that the Commission “made no finding that

GTC was overearning.” GTC asserted that the only criterion the PSC 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 PSC from considering earnings because GTC elected price-cap regulation. As BellSouth noted before -- in its briefs and in its opposition to GTC’s first motion for rehearing -- GTC’s argument leads to an absurd result. GTC argues that the PSC could never consider whether GTC was overearning because overearnings are no longer relevant under price-cap regulation. Thus, GTC argues that because overearnings is the *only* basis for eliminating the subsidy, the temporary subsidy can never be eliminated, and thus becomes permanent. Under this erroneous argument, GTC would be the only LEC in Florida to receive a \$1.2 million annual subsidy forever. As BellSouth has argued and this Court has held, the PSC 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 PSC used earnings criteria to

eliminate the subsidy in the past (slip op. at 16), but also recognized that the PSC 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 Appellees' position that GTC's election of price 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 also complains (motion at 3-4), as it did before (first motion at 4-5) that this Court failed to recognize that the PSC removed subsidies only upon a showing of excess earnings. GTC's argument that excess earnings was the only criterion by which the PSC could remove the subsidy was fully briefed. In its opinion, this Court recognized that the PSC intended the LECs to be kept whole, but also that the PSC intended the subsidy to be temporary (slip op. at 13).

As BellSouth argued in its answer brief (at 12), 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 could 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 one (A. 4). At the time of BellSouth's petition in this case, five of the six temporary subsidies had been eliminated.



While, as the PSC acknowledged (slip op. at 16), 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 the *only* change in circumstances that would justify eliminating a temporary subsidy. In this case, the PSC decided that GTC's election of price-cap regulation constituted a sufficient change in circumstances to justify eliminating GTC's subsidy (A. 12-13). This 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).


### CONCLUSION

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

For the reasons stated above, in response to GTC's first motion for rehearing, and in BellSouth's answer brief, the motion for rehearing should be denied.

Respectfully submitted,

ADORNO & ZEDER, P.A.

  
Raoul G. Cantero, III

Fla. Bar No. 552356

2601 South Bayshore Drive

Suite 1600

Miami, Florida 33133

Tel. (305) 858-5555

Fax. (305) 858-4777

Attorneys for BellSouth

**CERTIFICATE OF SERVICE**

I CERTIFY that a copy of this response was mailed on March 26, 2001 to:

Blanca S. Bayo, Clerk  
Division of Records & Reporting  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399

Christiana Moore  
Division of Appeals  
Fla. Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399

Beth Keating  
Division of Legal Services  
Fla. Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399

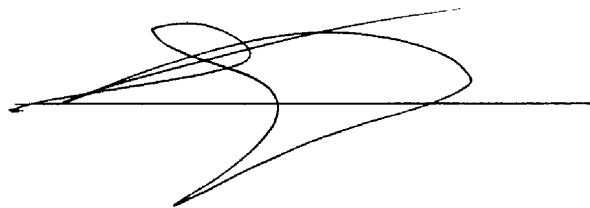
Mark R. Ellmer  
GTC, Inc.  
502 5th St., Suite 400  
Port St. Joe, FL 32456

Charles J. Beck  
Deputy Public Counsel  
c/o The Florida Legislature  
111 W. Madison St., Ste. 812  
Tallahassee, FL 32399

John H. Vaughan  
GTCOM  
502 5th St.  
Port St. Joe, FL 32456

Tracy Hatch  
AT&T Communications of the  
Southern States, Inc.  
Suite 700  
101 N. Monroe St.  
Tallahassee, FL 32301

Patrick K. Wiggins  
Katz, Kutter, Haigler, Alderman,  
Bryant & Yon, P.A.  
12th Floor  
106 East College Avenue  
Tallahassee, FL 32301  
Counsel for GTC, Inc.

A handwritten signature in black ink, appearing to be 'P. Wiggins', written over a horizontal line.

08037.052/#351065