ORIGINAL

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA
RICHARD M. ELLIS
KENNETH A. HOFFMAN
LORENA A. HOLLEY
MICHAEL G. MAIDA
MARTIN P. McDONNELL
J. STEPHEN MENTON

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

R. DAVID PRESCOTT
HAROLD F. X. PURNELL
MARSHA E. RULE
GARY R. RUTLEDGE
MAGGIE M. SCHULTZ

GOVERNMENTAL CONSULTANTS
PARSONS B. HEATH
MARGARET A. MENDUNI

June 23, 2006

Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

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Re: Docket No. 060300-TL

Dear Ms. Bayo:

Enclosed for filing on behalf of GTC, Inc. d/b/a GT Com are the original and fifteen copies of GT Com's Memorandum of Law.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this filing.

CMP
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Sincerely,

Marsha Rule

Marsha E. Rule

MER/rl
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for recovery of intrastate costs and expenses relating to repair, restoration and replacement of facilities damaged by Hurricane Dennis by GTC, Inc. d/b/a GT Com	)	Docket No. 060300-TL
	)	Filed: June 23, 2006

GT COM'S MEMORANDUM OF LAW

GTC Inc. d/b/a GT Com ("GT Com") by and through its undersigned counsel and pursuant to Order No. PSC-06-0529-PHO-TL, hereby files its Memorandum of Law regarding the meaning and interpretation of §364.051(4)(b), Florida Statutes (2005).

I. HISTORY

Before 1995, Florida incumbent local exchange companies (ILECs) were subject to rate base, rate of return regulation. However, 1995 brought a major legislative overhaul of Chapter 364, Florida Statutes, which opened the doors to competition between local telecommunications service providers and introduced ILECs to price regulation, a greatly reduced mode of regulatory oversight for ILECs that elected to become subject its terms.

Pursuant to §364.051(1)(c), Florida Statutes, ILECs that elected price regulation were exempted from rate base, rate of return regulation and from the specific statutes that formerly regulated their rates and services. That exemption, however, did not provide ILECs with freedom to set their own rates. Instead, rates were temporarily frozen, or capped, at 1995 levels, with only three possible avenues by which such rates could be increased: First, beginning in 2000, price-regulated ILECs could increase basic rates once per year by an amount reflecting

inflation minus one percent pursuant to §364.051(4), Florida Statutes (1995). [1] Second, nonbasic rates could be increased by a larger amount pursuant to §364.051(6), Florida Statutes (1995).[2] And third, recognizing that the local service competition may not develop quickly or smoothly, the Legislature provided a fall-back hardship option, which permitted any price-regulated ILEC to seek a general increase in its basic local rates upon "a compelling showing of changed circumstances" pursuant to §364.051(5), Florida Statutes (1995). That statute has been amended and is now codified as §364.051(4)(a), Florida Statutes (2005). To date, Sprint-Florida, Incorporated is the only Florida ILEC that has sought a rate increase pursuant to this hardship option. *See* Docket No. 050374-TL.

In 2005, after an extraordinary 2004 hurricane season in which Florida was struck by four damaging storms in quick succession, the Legislature amended §364.051 to add a hurricane cost recovery clause. Unlike §§364.051(3), (4)(a) and (6), all of which permit permanent general rate increases, §364.051(4)(b) provides for direct reimbursement of a specified expenses through a surcharge that is limited in both time and amount. A copy of §364.051(4)(b) is attached hereto as Attachment "A."

Section 364.051(4)(b), Florida Statutes, provides a clear and unambiguous roadmap by which a carrier of last resort like GT Com can recover its "intrastate costs and expenses relating to repairing, restoring, or replacing the lines, plants, or facilities" damaged by Hurricane Dennis, subject to only to the following requirements:

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[1] 364.051(4), Florida Statutes (1995) was later been amended and is now codified as §364.051(3), Florida Statutes (2005). The statute originally referenced an adjustment in "prices" but was amended in 2003 to specify an adjustment in "revenues," thus permitting "greater flexibility to increase or decrease individual rates, provided that the total revenue increase for basic service is no greater than the allowable percentage." Order No. PSC-03-0983-PAA-TL, In re: Request for approval of adjustment to basic service revenues pursuant to Section 264.051, Florida Statutes, by Verizon Florida, Inc.

(1) The costs and expenses must be verified. §364.051(4)(b)2.

(2) The costs and expenses must be reasonable under the circumstances for the specific storm. §364.051(4)(b)3.

(3) If a company has a storm reserve fund, it may recover only those costs and expenses in excess of the amount available in the fund. §364.051(4)(b)4.

(4) Cost recovery is capped at a maximum charge of $6.00 per customer line per storm season. §§364.051(4)(b)5. and 8.

(5) Finally, the costs and expenses must exceed a minimum amount that ranges from $0 for companies with fewer than 1 million access lines up to $5 million for companies with 3 million or more access lines.

This is the first case presented to the Commission under Section 364.051(4)(b), Florida Statutes (2005).

II. SECTION 364.051(4)(B) IS CLEAR AND UNAMBIGUOUS AND THE STATUTORY LANGUAGE MUST BE GIVEN ITS PLAIN AND ORDINARY MEANING

Clear and unambiguous statutory language must be given its plain and obvious meaning. *Holly v. Auld,* 450 So.2d 217 (Fla. 1984); *St. Petersburg Bank & Trust Co. v Hamm,* 414 So.2d 1071 (Fla. 1982). *See also Thayer v. State,* 335 So.2d 815, 817 (Fla. 1976)("the Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute.")

The Legislature expressly chose to permit recovery of "costs" and "expenses," and to use these words without qualifying terms. These are words of common usage, which convey a clear and definite meaning and are not subject to different constructions. Accordingly, these unambiguous terms must be construed in their plain and ordinary sense and the statute must be given its plain and obvious meaning. *Holly, supra; Montgomery v. State,* 897 So.2d 1282 (Fla.

[2] §364.051(6), Florida Statutes (1995) has been amended and is now codified as §364.051(5), Florida Statutes (2005).

2005). [3] GT Com is entitled to recover its *costs and expenses* – not its net costs, tax-adjusted costs, depreciated costs, or costs that are considered "incremental" to some level of expenditure that is not even mentioned within the statute. All of these concepts require the use of additional words the Legislature did not include in the statute.

Despite the straightforward and unambiguous terms of §364.051(4)(b), Public Counsel proposes "an incremental cost approach, including an adjustment to remove normal capital costs" which Public Counsel asserts is "the appropriate methodology for storm cost recovery." In support of this theory, Public Counsel cites to several Commission decisions, most of which involve rate base, rate of return regulated electric utilities and all of which involve different statutes. This interpretation is contrary to the unambiguous statutory language chosen by the Legislature, which simply is not susceptible of the interpretation urged by Public Counsel. The only limitation the Legislature imposed on the costs and expenses eligible for recovery is found in §364.051(4)(b)4., which states as follows:

> A company having a storm-reserve fund may recover tropical-system-related costs and expenses from its customers only in excess of any amount available in the storm-reserve fund.

The Legislature certainly could have imposed other similar limitations on costs and expenses eligible for recovery. It could have, for example, permitted companies to recover only costs and expenses in excess of or incremental to some specified level of expenditure; only those costs that are typically expensed for accounting purposes; or only net costs and expenses after adjustment for items such as depreciation, taxes or future Universal Service High Cost Loop Support. It did

[3] Although not necessary in this case, the plain and ordinary meaning of words can be determined by referring to a dictionary. *Montgomery, supra.* The Random House Dictionary of the English Language (2nd Edition, Unabridged) defines the noun "cost" as "1. the price paid to acquire, produce, accomplish, or maintain anything; 2. an outlay or expenditure of money, time, labor, trouble, etc." The noun "*expense*" is defined as "1. cost or charge; 2. a cause or occasion of spending."

not do so, and the Legislature's specific enumeration of a single offset to recoverable "costs and expenses" must necessarily be construed as excluding all other possible offsets that the Legislature could have applied, but did not. *Dobbs v. Sea Isle Hotel,* 56 So. 2d 341, 342 (Fla. 1952)(where statute includes single exception to a statutory provision, the court "cannot write into the law any other exception" but must instead apply the rule of "expressio unius est exclusio alterius" (express mention of one thing is the exclusion of another)); *Thayer, supra* (the mention of one thing in a statute implies the exclusion of other such things). The Commission may not add words to §364.051(4)(b) that were not placed there by the Legislature, [4] (*Forsythe v. Longboat Key Beach Erosion Control District,* 604 So.2d 452, 454 (Fla. 1992)), even if it believes the Legislature "really meant and intended something not expressed in the phraseology of the act." *St. Petersburg Bank & Trust Co.* at 1073.

III. THE COMMISSION'S PRIOR DECISIONS REGARDING RATE BASE, RATE OF RETURN REGULATED ELECTRIC UTILITIES AND OTHER STATUTES THAT PRE-DATE §364.051(4)(B), FLORIDA STATUTES, ARE INAPPLICABLE HEREIN

GT Com is a price-regulated small local exchange telecommunications company. Its rates for basic local service are not based on traditional rate base, rate of return regulation. The "incremental cost approach" urged by Public Counsel is nothing more than an inappropriate attempt to subject GT Com to a form of regulation from which it has been specifically exempted

[4] The Legislature is presumed to know existing law, including the extent of the Commission's jurisdiction over electric utilities pursuant to §§366.04 and 366.05, Florida Statutes, and is further presumed to be aware of how the Commission has construed and applied these existing statutes. *Crescent Miami Center, LLC v. Florida Dept. of Revenue,* 903 So.2d 913 (Fla. 2005); *Joshua v. City of Gainesville,* 768 So.2d 432 (Fla. 2000). Had the Legislature, when enacting §364.051(4)(b), wished to achieve a result similar to reached by the Commission under §§366.04 and 366.05, Florida Statutes, it simply could have imposed a similar regulatory scheme. As a matter of law, its failure to do so was both knowing and deliberate.

pursuant to §364.051(1)(c), Florida Statutes.

Public Counsel notes that the Commission has limited storm cost recovery to "incremental costs" in several cases initiated by electric utilities. However, these cases are completely irrelevant to the Commission's consideration of §364.051(4)(b), Florida Statutes, for at least two reasons.

First, the Commission retains and exercises broad rate base, rate of return regulatory authority over electric utilities, in connection with which it determines revenue requirements and sets rates that permit each utility to recover specific categories and amounts of prudently incurred costs and a reasonable rate of return on its investment. The utility's normal operating and maintenance costs are already reflected in the company's base rates, and the company is said to "recover" those costs by charging the rates set by the Commission. Those same principles cannot be applied to GT Com, which, like all price-regulated telecommunications companies, has been specifically exempted from such regulation.

GT Com's revenue and rates are not established by the Commission to allow GT Com the opportunity to recover its prudently incurred costs and a Commission-established return. Unlike electric utilities, GT Com's prices for various services are limited by both statute and competitive market forces. As such, under price regulation, there is no revenue requirement established by the Commission which includes recovery of in-house labor or other costs. These costs may or may not be "recovered" by GT Com through its local rates in any given year, particularly since GT Com, unlike electric utilities, is not a monopoly service provider and its customers may elect to take service from a different company. Further, GT Com has been under price regulation since 1996 and the last rate case for the former St. Joseph Telephone Company, which served the area damaged by Hurricane Dennis, was well over 20 years ago. Accordingly,

GT Com's current rates do not have any particular costs or expenses "built in" and clearly do not (and were never intended to) "recover" any part of the repair costs necessitated by the spate of increased hurricane activity experienced in Florida in recent years.

Further, the statutes that govern recovery of electric utilities' storm costs are radically different from §364.051(4)(b), Florida Statutes. Three of the dockets referenced by Public Counsel involved the Commission's exercise of its plenary authority to regulate the rates and services of electric utilities pursuant to §§366.04 and 366.05, Florida Statutes.[5] As noted above, the Commission has no such jurisdiction over price-regulated telecommunications companies.

Two additional cases referenced by Public Counsel were brought pursuant to §366.8260, Florida Statutes (2005), (the "Electric Storm Cost Statute"). [6] Unlike §364.051(4)(b), Florida Statutes, the Electric Storm Cost Statute places a number of limitations on recoverable costs and specifically adopts the incremental cost methodology urged by Public Counsel:

> (n) "Storm-recovery costs" means, at the option and request of the electric utility, and as approved by the commission pursuant to sub-subparagraph (2)(b)1.b., costs incurred or to be incurred by an electric utility in undertaking a storm-recovery activity. **Such costs shall be net of applicable insurance proceeds and, where determined appropriate by the commission, shall include adjustments for normal capital replacement and operating**

[5] *See* Docket No. 041291-EI (Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance by Florida Power & Light Company); Docket No. 041272-EI (Petition for approval of storm cost recovery clause for recovery of extraordinary expenditures related to Hurricanes Charley, Frances, Jeanne, and Ivan, by Progress Energy Florida, Inc.); Docket No. 050093-EI (Petition for approval of stipulation and settlement for special accounting treatment and recovery of costs associated with Hurricane Ivan's impact on Gulf Power Company).

[6] *See* Docket No. 060038-EI (Petition for issuance of a storm recovery financing order, by Florida Power & Light Company); and Docket No. 060154-EI (Petition for issuance of storm recovery financing order pursuant to Section 366.8260, F.S. (2005), by Gulf Power Company). Public Counsel also cites to Docket No. 050374-TL (Petition for approval of storm cost recovery surcharge and stipulation with Office of Public Counsel by Sprint-Florida, Incorporated) in support of its incremental cost theory. However, not only was that case brought under a different statute, but because Sprint elected to stipulate with Public Counsel to limit its request to incremental costs, neither Sprint's request nor the Commission's approval of that requests establishes any precedent.

> **costs, lost revenues, or other potential offsetting adjustments.** Storm-recovery costs shall include the costs to finance any deficiency or deficiencies in storm-recovery reserves until such time as storm-recovery bonds are issued, and costs of retiring any existing indebtedness relating to storm-recovery activities.

§366.8260(1)(n), Florida Statutes (2005), emphasis added.[7] The Commission's exercise of its specific and detailed statutory authority under the Electric Storm Cost Statute provides no precedent for this docket.

The Legislature considered and enacted both §364.051(4)(b), Florida Statutes, and the Electric Financing Statute during its 2005 session. Both statutes became effective on June 1, 2005. The Legislature's decision to permit price-regulated telecommunications companies to recover up to $6 per access line per year of "costs and expenses relating to repairing, restoring or replacing the lines, plants or facilities" damaged by a hurricane, adjusted *solely* for storm reserve funds, while simultaneously mandating a radically different and complex hurricane cost recovery scheme for electric utilities, constitutes an intentional rejection of the incremental cost approach urged by Public Counsel in this docket.

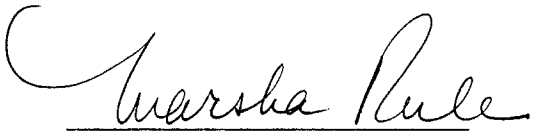
IV. CONCLUSION

When the Legislature wants to limit recovery to incremental costs, or to invite the Commission's adjustment of or offsets to recoverable costs, it knows exactly how to do so. It clearly expressed that intent in §366.8260, Florida Statutes but chose not to do so in §364.051(4)(b), Florida Statutes. Pursuant to the clear and unambiguous terms of §364.051(4)(b), Florida Statutes (2005), GT Com is entitled to recover its unadjusted costs and

[7] Among myriad other differences, the Electric Storm Recovery Statute does not limit the amount of recovery, while §364.051(4)(b) caps recovery at $6 per access line per year.

expenses relating to repairing, restoring or replacing the lines, plants and facilities damaged by Hurricane Dennis, regardless of whether the cost is considered "incremental" to its normal operations, regardless of how any particular expense is treated for accounting purposes, and regardless of how a traditional rate base, rate of return regulated utility would recover such costs pursuant to other statutory authority.

Respectfully submitted this 23rd day of June, 2006.



Kenneth A. Hoffman, Esq.
Marsha E. Rule, Esq.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, Florida 32302
Telephone: 850-681-6788

Attorneys for GTC Inc. d/b/a GT Com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. and electronic mail this 23rd day of June, 2006, to the following:

Florida Public Service Commission
Adam Teitzman, Esq.
2450 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ateitzman@psc.state.fl.us

Office of Public Counsel
Charles J. Beck, Esq.
111 West Madison St., #812
Tallahassee, FL 32399-1400
beck.charles@leg.state.fl.us

Attorney

Section 364.051(4)(b), Florida Statutes (2005)

(b) For purposes of this section, evidence of damage occurring to the lines, plants, or facilities of a local exchange telecommunications company that is subject to the carrier-of-last-resort obligations, which damage is the result of a tropical system occurring after June 1, 2005, and named by the National Hurricane Center, constitutes a compelling showing of changed circumstances.

1. A company may file a petition to recover its intrastate costs and expenses relating to repairing, restoring, or replacing the lines, plants, or facilities damaged by a named tropical system.

2. The commission shall verify the intrastate costs and expenses submitted by the company in support of its petition.

3. The company must show and the commission shall determine whether the intrastate costs and expenses are reasonable under the circumstances for the named tropical system.

4. A company having a storm-reserve fund may recover tropical-system-related costs and expenses from its customers only in excess of any amount available in the storm-reserve fund.

5. The commission may determine the amount of any increase that the company may charge its customers, but the charge per line item may not exceed 50 cents per month per customer line for a period of not more than 12 months.

6. The commission may order the company to add an equal line-item charge per access line to the billing statement of the company's retail basic local telecommunications service customers, its retail nonbasic telecommunications service customers, and, to the extent the commission determines appropriate, its wholesale loop unbundled network element customers. At the end of the collection period, the commission shall verify that the collected amount does not exceed the amount authorized by the order. If collections exceed the ordered amount, the commission shall order the company to refund the excess.

7. In order to qualify for filing a petition under this paragraph, a company with 1 million or more access lines, but fewer than 3 million access lines, must have tropical-system-related costs and expenses exceeding $1.5 million, and a company with 3 million or more access lines must have tropical-system-related costs and expenses of $5 million or more. A company with fewer than 1 million access lines is not required to meet a minimum damage threshold in order to qualify to file a petition under this paragraph.

8. A company may file only one petition for storm recovery in any 12-month period for the previous storm season, but the application may cover damages from more than one named tropical system.

This paragraph is not intended to adversely affect the commission's consideration of any petition for an increase in basic rates to recover costs related to storm damage which was filed before the effective date of this act.