

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,656

GTC, Inc.,

Appellant,

vs.

JOE GARCIA, etc., et al.,

Appellees.

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

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

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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

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).<sup>1</sup> 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).

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<sup>1</sup> "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.

Two years later, the PSC established what it called the interLATA<sup>2</sup> 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”).<sup>3</sup> 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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<sup>2</sup> “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).

<sup>3</sup> This order, #14452, was attached to BellSouth’s petition in the PSC.

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).

**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

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

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.

## **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**

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GTC first argues (br. at 8-12)<sup>4</sup> 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

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<sup>4</sup> Citations are to GTC's amended initial brief.

eliminate the PSC's authority to re-assess its previous determinations when 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 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**

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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.

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 telephone 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.

**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 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.<sup>5</sup>

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.<sup>6</sup>

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

<sup>6</sup> 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,

**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.

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those arguments belong in an appeal from *that* order. *See, e.g., Persoff v. Persoff*, 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).

**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, 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 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.

**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 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 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.

Respectfully submitted,

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