

IN THE SUPREME COURT OF FLORIDA

GTC, INC.,)
)
 Appellant,)
)
 v.) Case No. 94,656
)
 JOE GARCIA, ETC., ET AL.,)
)
 Appellee.)
 _____)

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION
TO CROSS-APPEAL OF BELLSOUTH TELECOMMUNICATIONS, INC.

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, will be referred to in this brief as "the Commission." Appellant GTC, Inc. will be referred to as "GTC." Appellee/Cross-Appellant, BellSouth Telecommunications, Inc., will be referred to as "BellSouth."

References to the record on appeal are designated by volume and page (V. __ R.__). References to the hearing transcript are designated (T. __) References to cross-appellant BellSouth's Answer Brief and Cross-Appeal are designated (Cross-Appeal at __). The Commission Order that is the subject of this appeal, Order No. PSC-98-1169-FOF-T.L., will be referred to as the "Final Order."

There are two regulatory terms that the industry commonly refers to by acronyms that are used throughout this brief:

LEC = Local Exchange Company

InterLATA = Telecommunications services that originate in one Local Access and Transport Area and terminate in another.

STATEMENT OF THE CASE AND FACTS

The Commission accepts BellSouth's Statement of the Case and Facts but adds the following relevant facts that BellSouth has omitted.

Between 1988 and 1995, the Commission eliminated the subsidies paid to the LECs other than GTC who were originally net recipients from the pool. (Final Order at 3, 5; Tr. 119; V. I, R. 78) In each case in which a recipient's subsidy was reduced or eliminated, the Commission correspondingly disposed of the revenues of the subsidy contributor in an amount equal to the subsidy payment. (Final Order at 16) That is, the Commission recognized that the contributing company's payments into the subsidy pool would decrease, resulting in an increase in its earnings by an amount equal to the eliminated payment. E.g., In Re: Investigation into authorized return on equity and earning of ALLTEL Florida, Inc., and In Re: Comprehensive review of the revenue requirements of Southern Bell Telephone and Telegraph Company, 94 F.P.S.C. 3:746, 750 (1994).

The Commission historically has taken this action to prevent a windfall to the subsidy contributor when a subsidy payment was reduced or eliminated entirely. In Re: Modified minimum filing requirements report of ALLTEL Florida, Inc., 93 F.P.S.C. 4:355, 383 (1993). (Reducing subsidy payment to ALLTEL "leave[s] GTEFL with a windfall" and directing disposition of revenues in GTEFL's

pending rate case.) Similarly, the Commission in this case determined that termination of the subsidy payment by BellSouth to GTC, absent a rate reduction by BellSouth, would create a windfall to BellSouth. (Final Order at 15)

The Commission did not agree with BellSouth that BellSouth's prior rate reductions would offset the elimination of this subsidy payment to GTC. (Final Order at 16) The Commission found that most of the rate reductions were attributable to action in proceedings not involving the subsidy, and that there was no evidence that those reductions affected BellSouth's participation in the interLATA access subsidy pool at issue here. Id.

The Commission agreed with BellSouth that the original \$2.7 million surplus that it collected in access charges for the subsidy pool had been disposed of in previous proceedings. Final Order at 16. The Commission noted, however, that the amount BellSouth collected and contributed to the pool for subsidy payments to other LECs such as GTC was in addition to the \$2.7 million surplus that BellSouth collected. (Final Order at 16; V. I, R. 70) Even after the disposition of the \$2.7 million surplus revenues, BellSouth continued to collect revenues from its customers for the subsidy pool.

Thus, in conjunction with granting BellSouth's petition to terminate its subsidy payment to GTC, the Commission also ordered BellSouth to make a rate adjustment:

Thus, we find that upon elimination of the subsidy payments to GTC, it is also appropriate to require BellSouth to make adjustments in order to eliminate all aspects, including any windfall, associated with this subsidy, which was implemented when BellSouth and GTC were both under a different regulatory scheme.

(Final Order at 16) The Commission further allowed BellSouth to choose the rate to be reduced to assure that the reduction would benefit all of its customers to the extent possible. (Final Order at 17)

SUMMARY OF ARGUMENT

The Commission's Final Order eliminated all parts of a subsidy mechanism that was established as a temporary measure when BellSouth and GTC were under monopoly, rate of return regulation. BellSouth argues that the Commission has the authority to eliminate the part of the mechanism requiring that it pay the subsidy to GTC, but not the authority to order BellSouth to stop collecting the revenue that funds the subsidy. BellSouth attempts to use its election of price regulation to turn a temporary subsidy for the benefit of GTC into a permanent one for itself, and thereby obtain a windfall at its customers' expense.

The Commission concluded that continuation of the price support mechanism is inconsistent with the election of price regulation and a competitive environment, inconsistent with the order originally establishing the subsidy pool mechanism, and not in the public interest. The 1995 changes to the Florida telecommunications law and GTC's and BellSouth's election of price cap regulation in 1996 did not impair the Commission's authority to eliminate the temporary subsidy mechanism and thus prevent an inequitable result.

The Commission exercised its continuing regulatory oversight authority under section 364.01(3), Florida Statutes, "to protect consumers and provide for the development of fair and effective

competition" by eliminating a vestige of rate of return regulation to which neither GTC nor BellSouth are entitled.

The Commission's Final Order is supported by competent substantial evidence. The Commission did not accept BellSouth's bare assertion that it would not receive a windfall from the elimination of its subsidy payment to GTC. The evidence showed that BellSouth's prior rate reductions did not eliminate BellSouth's obligation to pay GTC a subsidy; nor did they eliminate BellSouth's right to collect revenue from its customers for the GTC subsidy. Once BellSouth stops paying the subsidy to GTC, absent a requirement to reduce a rate, it will have revenues that it was entitled to only because of its obligation to pay the temporary subsidy.

The Commission's decision was reasonable and is supported by the record. BellSouth has not met its burden to overcome the presumption of validity that attaches to Commission orders. The Commission's order should be affirmed.

ARGUMENT

THE COMMISSION'S DECISION TO ELIMINATE ALL ASPECTS OF A SUBSIDY MECHANISM IMPLEMENTED UNDER MONOPOLY REGULATION, INCLUDING BELLSOUTH'S COLLECTION OF THE SUBSIDY REVENUE, THEREBY PREVENTING A WINDFALL TO BELLSOUTH, WAS WITHIN ITS AUTHORITY AND WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

A. BELLSOUTH'S ELECTION OF PRICE REGULATION DID NOT ABROGATE THE COMMISSION'S AUTHORITY TO TERMINATE THE SUBSIDY MECHANISM.

In its cross-appeal, BellSouth takes the inconsistent position that although the Commission has authority to terminate the payment of subsidy revenue to GTC, the Commission does not have the authority to take the same action with regard to BellSouth. Both GTC and BellSouth are price regulated companies, however, and the Commission's authority over each company is no different in this regard.

BellSouth agrees that the 1995 changes to the Florida telecommunications law and GTC's election of price cap regulation in 1996 did not impair the Commission's authority to eliminate the temporary subsidy. (Cross-Appeal at 10) BellSouth reasons that "[i]f the PSC has the authority to establish a temporary measure, however, it necessarily has the authority to determine when it will end." (Cross-Appeal at 10) Just as GTC's receipt of the subsidy revenues was a temporary measure, however, so too was BellSouth's collection of the revenues that support the subsidy payment. Once the subsidy payment is terminated, BellSouth does not have a right to continue collecting the revenues to pay the subsidy.

BellSouth asserted that it and its customers should not continue to send money to GTC's owners now that both companies are price regulated. (T. 25) BellSouth further criticized GTC for attempting to use its election of price regulation to turn the temporary subsidy into a permanent one, "thus assuring their owners of a windfall at BellSouth's expense." (T. 25) BellSouth attempts to do exactly what it criticizes GTC for doing. BellSouth wants a windfall at its customers' expense.

BellSouth asserts that its election of price regulation preempts the Commission's authority to eliminate all aspects of the subsidy pool mechanism. BellSouth argues that the Commission can only eliminate the part that benefits GTC, but not the part that benefits BellSouth. But the part that benefits BellSouth--collection of \$1.2 million in revenues from its customers--is in place only by virtue of the requirement that BellSouth pay the \$1.2 million subsidy to GTC. The two go hand-in-hand. It would be inequitable for the Commission to eliminate one without the other, and it would be inequitable for Bell's customers to continue to fund a non-existent subsidy contribution. GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996)(The Court concluded that it would be inequitable for either utilities or ratepayers to benefit, thereby receiving a windfall from an erroneous order.)

The Commission concluded that just as it was appropriate to end BellSouth's payment to GTC of the subsidy instituted when BellSouth and GTC were under rate of return regulation, it was

appropriate to end BellSouth's collection of the revenues to pay the subsidy when the subsidy terminates. BellSouth is not entitled to have its earnings supplemented by collecting revenues that are in its rate structure solely in consideration for paying the subsidy to GTC. The Commission properly concluded that BellSouth cannot use its election of price regulation to secure a windfall profit at the expense of its customers.

The Commission reached the same conclusion with regard to its authority over BellSouth's collection of the revenues to pay the subsidy as it reached with regard to GTC's continued receipt of the subsidy. (Final Order at 16-17) That is, the Commission concluded that continuation of the price support mechanism is inconsistent with the election of price regulation and a competitive environment, inconsistent with the order originally establishing the subsidy pool mechanism, and not in the public interest. (Final Order at 8-9, 12-13) 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.

BellSouth's reduction of a rate when it stops paying the subsidy to GTC will have no net effect on its revenues and no effect on its rate of return. Because it will no longer have to pay the subsidy to GTC, its net revenues will remain the same. On the other hand, if BellSouth does not reduce one of its rates, then its net revenues will increase. If BellSouth needs that additional

revenue, it has the same remedy that GTC has, and may seek a rate increase pursuant to section 364.051(5), Florida Statutes.

Contrary to BellSouth's claim at page 15 of its brief, the Commission did not rely on a staff witness opinion for its authority. (Final Order at 8-9, 17) As it did with regard to GTC's receipt of the subsidy, by directing BellSouth to reduce a rate to offset the subsidy, the Commission exercised its continuing regulatory oversight authority over the transition from monopoly, rate of return regulation to competition in the provision of local exchange services. §364.01(3), Fla. Stat. (1997). The Commission carried out its duty under this statute to "to protect consumers and provide for the development of fair and effective competition"; and to enforce its prior decision that the subsidy be a temporary mechanism that was not intended to result in windfalls to either the recipient or the payor of the subsidy. In re: Intrastate access charges for toll use of local exchange services, 85 F.P.S.C. 6:70, 80-82. (Appendix 2 to Commission's Answer Brief at 12-14); AT&T Communications v. Marks, 515 So. 2d 741 (Fla. 1987)(The Commission had authority to take interim measures in the public interest during the transition to long distance competition).

The Commission's decision eliminates a vestige of rate of return regulation to which neither GTC nor BellSouth are entitled now that they have chosen price regulation. The Commission's order gives effect to its prior orders and is consistent with the law.

B. COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S DECISION.

In prior proceedings involving BellSouth or another contributing LEC's subsidy payment, in which the Commission has reduced or eliminated the subsidy contribution, the Commission has required the company to recognize the subsidy reduction in some manner so as to prevent a windfall. (Final Order at 16) In the case of BellSouth, because there were separate ongoing proceedings addressing its revenue requirements and rates, the Commission typically accounted for the excess revenues and directed their disposition in those proceedings. E.g., In Re: Petitions of Southern Bell Telephone and Telegraph Company for rate stabilization, 92 F.P.S.C. 12:77, 81-82 (1992). (Final Order at 16)

BellSouth asserts that with regard to the elimination of the requirement for it to pay a subsidy to GTC, the Commission should recognize that BellSouth had already reduced its access charges in excess of the amounts it was contributing to the subsidy pool. Thus, BellSouth argues, it will not receive a windfall. BellSouth conceded, however, that most of the reductions were the result of settlement of other Commission proceedings such as the earnings review in Docket No. 920260-T.L., In Re: Petitions of Southern Bell Telephone and Telegraph Company for rate stabilization. (T. 66-69) Moreover, BellSouth offered no evidence that these rate reductions took into account the revenues from elimination of this subsidy

payment to GTC. The Commission found that there was no evidence that BellSouth's prior reductions affected its participation in this subsidy pool and the collection of the revenue for the subsidy to GTC. (Final Order at 16)

BellSouth also asserts that its original \$2.7 million revenue surplus that funded the subsidy pool no longer exists, therefore it should not be required to reduce its rates when the subsidy payment to GTC is eliminated. (Cross-Appeal at 17) The Commission agrees that this surplus was disposed of through previous rate reductions and has acknowledged that fact in its prior orders, as well as the Final Order here. E.g., In Re: Intrastate access charges, 89 F.P.S.C. 9:586, 591 (1989). (Final Order at 16)

What BellSouth fails to tell the court is that this \$2.7 million subsidy surplus was net of the amount BellSouth was required to contribute to the subsidy pool. (Final Order at 16) That is, BellSouth originally had a surplus of \$2.7 million in addition to the revenues it collected and was required to contribute to the subsidy pool. In re: Intrastate access charges, 89 F.P.S.C. 9:586, 591 (1989)(Schedule shows BellSouth having a surplus of \$2.657 million plus a required contribution amount of 2.267 million, for a total of \$4.924 million). Therefore, the prior disposal of that surplus is of no import in this case. In addition, the above order was issued in 1989. Numerous orders issued since that time demonstrate that the Commission continued to direct disposition of BellSouth's revenue that was no longer

required for subsidy contributions in each case where a subsidy was reduced or eliminated after the \$2.7 million surplus was disposed of. See In Re: Investigation into interLATA bill and keep subsidy of ALLTEL Florida, Inc., 95 F.P.S.C. 4:274, 276 (1995).

Contrary to BellSouth's claim, the Commission's conclusion that BellSouth should reduce a rate to avoid a windfall did not contradict its own findings. Rather, as shown above, BellSouth has misstated the Commission's findings.

The Commission was not required to accept BellSouth's testimony that a windfall would not result without evaluation. Sunshine Utilities v. Florida Public Service Commission, 577 So. 2d 663, 666 (Fla. 1st DCA 1991)(An administrative tribunal is not required to accept the unconfirmed assertions of a utility's witness without evaluation.) BellSouth offered no evidence that showed that its prior rate reductions resulted from a change in its contribution to the subsidy pool for GTC. The fact remained that after the rate reductions, BellSouth continued to collect revenues that included an amount to pay the subsidy to GTC. Once it stops making the payment to GTC, absent a requirement to reduce a rate, it will have revenues that it was entitled to only because of its obligation to pay a subsidy.

The Commission's decision was reasonable and is supported by the record. BellSouth has not shown that it was either arbitrary or unsupported by the evidence, as it is required to do. Citizens v. Florida Public Service Commission, 425 So. 2d 534 (Fla. 1984).

CONCLUSION

BellSouth has not met its burden to overcome the presumption of validity that attaches to Commission orders. Florida Interexchange Carriers Ass'n v. Clark, 678 So. 2d 1267 (Fla. 1996). It has not shown that the Commission's decision is clearly erroneous or that it is unsupported by competent substantial evidence. The Commission's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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