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April 2, 1999

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 990316-TL

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizen's Response in Opposition to GTC's Petition for Declaratory Statement. A diskette in WordPerfect 6.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Charles J. Beck
Deputy Public Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

Petition of GTC Inc. for a Declaratory)
Statement regarding Section 364.051,)
Florida Statutes)
_____)

Docket 990316-TL

Filed April 2, 1999

**CITIZENS' RESPONSE IN OPPOSITION TO GTC'S PETITION
FOR DECLARATORY STATEMENT**

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this response in opposition to the petition for declaratory statement filed by GTC Inc. ("GTC") on March 11, 1999.

BACKGROUND

The Florida Public Service Commission ("PSC") set up a subsidy mechanism in 1985 to prevent companies from being harmed during a change from a system of pooling interLATA revenues to a system of billing and keeping interLATA revenues. GTC and five other companies received a subsidy as a result of the PSC's decision. Over the years the PSC eliminated the subsidies for every company except GTC as the financial conditions of the companies allowed. Local rates were never increased as the PSC eliminated these subsidies.

The subsidy payments were never intended to be permanent, as can be seen by

the successful elimination of the subsidies for every company other than GTC. See *a/so* order no. PSC-98-1169-FOF-TL at 5. Moreover, the subsidies were eliminated even though each of the five companies was governed by strict rate of return regulation when the PSC eliminated the subsidy payments.

Traditionally, rates charged by all telephone companies in Florida were determined by rate base, rate of return regulation. An application for an increase in rates entailed a comprehensive review of a company's operations, including the company's financial performance. A company could increase its rates only after this thorough review and a demonstration of financial need. Parties are provided wide latitude in discovery during such a proceeding.

In 1995 the legislature provided an alternative to this process. Section 364.051, Florida Statutes, allowed smaller local exchange companies to elect price regulation in lieu of rate base, rate of return regulation.

Price regulation should provide assurance to customers that their basic telephone rates will remain stable, while at the same time providing additional flexibility to companies. It also provides companies with the opportunity to earn more profit than they would be allowed to earn under traditional regulation. Price regulation, the industry argued, better reflected the emerging competitive environment for telecommunications services than did traditional rate base, rate of return regulation.

GTC elected price regulation with its attendant benefits for the company.

After GTC elected price regulation, BellSouth Telecommunications, Inc. ("BellSouth") petitioned the Commission for authority to end the subsidy payments it had been making to GTC. BellSouth argued that the election of price cap regulation by GTC warranted removal of the subsidy mechanism that was never intended to be permanent. GTC demonstrated a desire to take on the opportunities of the competitive arena by electing price regulation, and continuation of the subsidy would no longer be appropriate. See order no. PSC-98-1169-FOF-TL at 14. The subsidy had already been eliminated for all other companies without any increase in local rates, and those companies were governed by more stringent traditional regulation when the subsidies were eliminated. The PSC decided to eliminate the subsidy payments to GTC, the last company that had been receiving the subsidy.

The statute governing price regulation allows a company electing price caps to increase its prices for basic local telecommunications services only under very special circumstances. Section 364.051(5), Fla. Stat. (1998) provides:

"...any local exchange telecommunications company that believes circumstances have changed substantially to justify any increase in the rates for basic local telecommunications services may petition the commission for a rate increase, but the commission shall grant such petition only after an opportunity for a hearing and a compelling showing of changed circumstances..." (Emphasis added).

ARGUMENT

GTC seeks an unprecedented decision by the PSC. Despite the fact that every other company under more stringent, rate-of-return regulation was able to eliminate its subsidy payments without increasing local rates, GTC seeks a declaratory statement paving the way for it to be the first to do so. At the same time, it seeks a declaratory statement from the PSC that would prohibit any party from engaging in discovery about any matter other than the amount of the subsidy eliminated. The PSC must reject GTC's petition.

Once a company elects price cap regulation with its benefits to the company of greater regulatory flexibility and the opportunity to earn greater profits, it must make a compelling showing of changed circumstances and show that circumstances have changed substantially before it can break its price commitments. The use of the words "compelling" and "substantially" in section 364.051(5), Fla. Stat. (1998) was no mistake. These words show that the companies face a heavy burden before they can increase their local rates under price regulation. After all, local rate price stability is supposed to be the *quid pro quo* for customers in consideration of the many benefits to the company under price cap regulation.

A compelling showing of changed circumstances cannot be made in a vacuum. No company should be allowed to present its side of a story while preventing all other

parties from showing other relevant circumstances. A company might be able to present some evidence supporting its position, but other evidence brought to the case by other parties may easily offset those circumstances. The PSC should not make an unprecedented decision to raise the local rates of a price cap company without considering all of the circumstances affecting a company.

In any proceeding by a price cap company seeking to increase its local rates, the PSC must allow parties wide latitude in discovery. For example, would the PSC allow a company to increase its local rates if the company were already earning a fair or more than fair rate of return? Would the PSC increase local rates when the increase would allow a company to earn an unreasonably high return on equity? What if the elimination of the subsidy payments to GTC were offset by other matters, such as greater support from interstate high cost support mechanisms or lower expenses achieved through downsizing its workforce? The company's request for a rate increase would not be "compelling" or "substantial," as required by the statute, under these circumstances.

Any proceeding under section 364.051(5), Fla. Stat. (1998) would be very fact-dependent in order to determine whether the circumstances were as compelling or substantial as alleged by the company. GTC's request to prohibit most discovery would violate the purpose of the statute because it would effectively forbid parties from discovering facts that would show the company's changed circumstances are not as

compelling or substantial as alleged by the company.

Issuance of a declaratory statement at this time is also premature. GTC's petition essentially asks the PSC to issue a protective order against virtually all discovery before a proceeding even begins. Now is not the time to decide such a matter. Instead, the issue would be ripe for adjudication only after service of discovery and a request for a protective order. A better decision would be made with specific requests rather than a blanket prohibition of all discovery on matters other than those matters the company wishes to present to the PSC.

Finally, GTC's request is inappropriate because it seeks a ruling of general applicability about limiting the scope of proceedings under section 364.051(5), Fla. Stat. (1998). Such a request is more appropriate for rulemaking. *Agency for Health Care Administration v. Wingo*, 697 So. 2d 1231 (Fla. 1st DCA 1997) ("when an agency is called upon to issue a declaratory statement "which would require a response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement or comply with the provisions of Section 120.54 governing rulemaking"")(quoting in part *Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry*, 567 So. 2d 928 (Fla. 1st DCA 1990)); *Investment Corp. of Palm Beach v. Division of Pari-Mutual Wagering, Department of Business and Professional Regulation* (Fla. 3d DCA 1998) ("Once the Division reached the conclusion that the questions asked of it in the petitions had

general applicability to the pari-mutual industry, thus requiring rulemaking, the Division overstepped administrative bounds when it issued the declaratory statement").

WHEREFORE, the PSC should not issue the declaratory statement requested by GTC because (1) a proceeding reviewing a company's claims that circumstances have changed substantially should not be limited only to those facts the company chooses to show in favor of its petition; (2) the request is premature and not ripe for adjudication because there are no specific discovery requests in dispute; and (3) GTC's request deals with a matter of general applicability about limiting the scope of proceedings under section 364.051(5), Fla. Stat. (1998) and therefore requires a rulemaking proceeding.

Respectfully submitted,

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**DOCKET NO. 990316-TL
CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S.

Mail or hand-delivery to the following parties on this 2nd day of April, 1999.



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