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ORIGINAL

December 1, 2000

VIA HAND DELIVERY

970808-TL

Ms. Debbie Causseaux, Clerk
Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1925

Re: Case No. 94,656 - GTC, Inc. v. Joe Garcia, etc., et al.

Dear Ms. Causseaux:

Enclosed for filing in the above referenced case are the original and seven (7) copies of GTC, Inc.'s Motion for Rehearing

Thank you for your assistance in this matter.

Sincerely,

Patrick K. Wiggins

PKW:plk
Enclosures
cc: Parties of Record

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IN THE SUPREME COURT OF FLORIDA

GTC, INC.,

Appellant, CASE NO. SC94656

v.

JOE GARCIA, ETC., ET AL.,

Appellee.
_____/

MOTION FOR REHEARING

Appellant, GTC, INC., files this Motion for Rehearing of this Court's Opinion in *GTC v. Joe Garcia, et al.* No. SC94656 (Fla. Nov. 16, 2000) and states:

GTC respectfully seeks rehearing and remand of this matter to the Commission for further proceedings. The Court's Opinion is in error for at least three reasons. First, this Court has failed to consider Commission Order No. 13934, which is essential to a proper understanding of the Commission's implementation of "bill and keep." Second, the Court has overlooked that purpose of the interLATA subsidy was to maintain revenue-neutrality under bill and keep. Third, the Court erred in failing to recognize that there exists no record support for the Commission's finding that GTC's price cap regulation election indicated that it no longer needed the subsidy. The Court must grant rehearing. If the Commission's order is allowed to stand, it will impair development of competition in the telecommunications

market - the statutory objective of price-cap regulation - by depriving GTC, a small local exchange carrier serving an economically disadvantaged region of Florida, of 1.2 million dollars in annual revenues.

I. The Court Has Failed to Consider Order No. 13934, Which Is Essential To A Proper Understanding of the Commission's Implementation of Bill And Keep

The Opinion's background begins with Order No. 14452, which the Commission issued in 1985. The Court has overlooked Commission Order No. 13934, which was issued in 1984. Order No. 13934 initiated the statewide average bill and keep access charge system. The substance of that order is essential to understanding the basis of this dispute. Order No. 14452 and its progeny must be read *in para materia* with Order No. 13934.

The failure to consider Order No. 13934 has led the Court to fundamental misapprehensions. The Court states as follows:

> Although the Commission believed that the "bill and keep" system would better compensate the [Local Exchange Carriers] for use of their facilities and promote competition, it recognized that immediate implementation of the new policy could not be achieved because some LECs were operating below their authorized rate of return and would suffer a loss under the new system. Accordingly, the Commission created a temporary access subsidy pool, the purpose of which was to "keep each company in the same financial position it would have been in prior to implementing bill and keep." Order No. 14452 at 11. The Commission stressed, however, that the subsidy pool was a temporary mechanism to prevent any LEC from suffering shortfall due to the new system. Opinion at 2-3.

The Court's explanation of the Commission's rationale is both incomplete and incorrect. It is incomplete because the implementation of the bill and keep system did not cause the Local Exchange Carriers to suffer

revenue shortfalls; rather, the concurrent use of statewide average access charges caused the shortfalls, which were shortfalls in respect to the companies' achieved rates of return. When the statewide average access charges were imposed, some companies, such as St. Joseph Telephone Company (GTC's predecessor in interest), were forced to use access charges that were too low. To avoid a resulting unlawful taking of revenues from these "access charge losers under the bill and keep system," the Commission had to offset the recurring losses. In Order No. 14452, the Commission ultimately imposed the interLATA subsidy pool as the mechanism to provide this offset.

The Court's explanation is incorrect because the Commission did not create the interLATA subsidy mechanism based on any finding that the LECs that were suffering the recurring losses were earning below their authorized rate of return prior to the implementation of bill and keep. In Order No. 13934, the Commission explained its "approach" in implementing bill and keep:

> The basic policy is to keep the companies whole, that is, to keep them in the same financial position they were in prior to bill and keep. Thus, if a company is earning below its authorized rate of return before bill and keep, suffers a shortfall from going to bill and keep ... local rates would only be increased up to the achieved rate of return .... Order at 7.

In Order No. 14452, the Commission bolstered its prior explanation with these words:

> [O]ur intent in implementing bill and keep ... was to keep each company in the same financial position it would have been in prior to implementing bill and keep. In other words,

> implementing bill and keep should result in a "wash" and should not serve as a rate case for a company. Order at 11.
>
> * * *
>
> Presently, we have several separate dockets investigating possible overearnings of LECs. We find it appropriate to delay any receipt by those companies involved in overearnings investigations until the investigations are complete. Order at 14.

The Court has erred by failing to recognize that the Commission's implementation of the interLATA subsidy mechanism had nothing to do with the level of earnings of the companies, but was grounded entirely in a policy of revenue neutrality.

II. The Court Overlooked The Commission's Intent To Maintain Revenue-Neutrality In Creating The InterLATA Subsidy

The Court's failure to consider Order No. 13934, has also caused it to overlook the fact that the subsidy mechanism was the second method proposed by the Commission to offset the recurring losses. In Order No. 13934, the Commission invited St. Joseph and other companies to file tariffs necessary to increase their local rates to offset the losses imposed by the use of statewide average access charges. St. Joseph did file the invited tariffs. The Commission, however, blocked the local rate increase and created as a surrogate the interLATA subsidy pool in which all LECs were required to participate. Order No. 14452 at 12.

This history must not be overlooked or misapprehended. If St. Joseph had been allowed to use company specific access charges when the bill and keep system was initiated or if the Commission had allowed St. Joseph to raise its local rates as it suggested it would do in Order No. 13934, there would have been no deprivation of revenues, no need for the interLATA

subsidy mechanism, and no annual loss of $1.2 million when it elected price cap regulation.

The Court thus has erred as well in failing to recognize that, in both Order No. 13934 and Order No. 14452, the Commission committed to the companies that they would be kept "whole" under bill and keep. Thereafter, the Commission removed the subsidies only upon a showing that the companies' earnings exceeded their authorized rates of return.

III. The Court Erred In Failing To Recognize That The Commission's Finding That GTC's Price Cap Regulation Election Indicated That It No Longer Needed The Subsidy Was Entirely Unsupported By The Record

Moreover, the Court has failed to recognize that none of the Commission's prior decisions eliminating the subsidy had anything to do with maintaining the competitiveness of the LECs. The Court states as follows:

> While admittedly none of the commission's prior decisions eliminating the interLATA subsidy expressly relied on "changed circumstances" as the criterion for eliminating the subsidy, it is apparent from the face of the Commission's prior orders eliminating the subsidy to other LECs that the elimination was based on the fact that the LECs no longer required the subsidy. In other words, the LECs earnings circumstances had changed to the effect that they no longer relied on the subsidy in order to remain competitive. Considered in this light, GTC's switch to price-cap regulation is an indication that it no longer needs to be subsidized in order to remain competitive... Opinion at 17.

On the contrary, at the time of each of the prior decisions, the LECs enjoyed a legal monopoly in their service territories. The LECs' competitiveness was not only irrelevant to the Commission's prior decisions,

the Commission could not have lawfully considered it as a criterion for eliminating the subsidy. This part of the case is simple. For all but GTC, the interLATA subsidy was eliminated only when data demonstrated overearnings. Thus, any attempt to harmonize the order on appeal with regulatory precedent is incorrect.

The Court misconstrues the word "required" in Order No. 14452. The Commission did not declare that the recipient LECs "required" the subsidy; rather the Commission declared that the subsidy pool itself was required:

> Even after adjusting for these additional revenues, seven LECs will still experience a shortfall. Since our stated intent is to have a "wash" when implementing bill and keep, we find that temporary subsidy pool is required and is in the public interest. Order at 12.

The Court also overlooks the Commission's stated intention to offset the recurring losses until data showed that the offset was not needed to maintain revenue neutrality. The Commission explained in Order No. 14452 that:

> As previously stated, our intent in implementing bill and keep was to keep the companies in the same position they were in before bill and keep so that the implementation results in a wash unless subsequent data warrants a different treatment. (emphasis added) Order at 13.

The Commission followed this approach perfectly for 13 years, that is, until GTC elected price-cap regulation. Notwithstanding, the Court wrongly concluded that GTC's election of price-cap regulation was an indication by proxy that "it no longer needs the subsidy to be competitive." The Commission did not rely on the price-cap election as an indication of "no

such need." Rather, the Commission treated the price-cap election as an admission of "no such need." There is nothing in the record to support this finding.

If the Commission's order is allowed to stand, the effect will be to impair competition in the telecommunications market to the detriment of the public interest, while depriving GTC, a small local exchange carrier serving an economically disadvantaged region of Florida, of annual revenues in the amount of 1.2 million dollars.

WHEREFORE GTC, INC. respectfully requests that this Honorable Court grant its Motion to Rehear this matter, and to remand the order on appeal to the Commission for further proceedings.

Dated this 1st day of December, 2000.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed on December 1, 2000 to:

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