BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate increase by GTE Florida Incorporated.	)	DOCKET NO. 920188-TL ORDER NO. PSC-95-0512-FOF-TL ISSUED: April 26, 1995

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER IMPLEMENTING REMAND

BY THE COMMISSION:

On May 1, 1992, GTE Florida Incorporated (GTEFL or the Company) filed rate case MFRs in this proceeding. In its original filings the Company requested an annual revenue increase of $110,997,618. On September 3, 1992, GTEFL submitted revised testimony and exhibits wherein it reduced its request for an increase to $65,994,207. By Order No. PSC-93-FOF-0108-FOF-TL, the Commission determined that the Company's rates should be reduced by $14,475,000. GTEFL filed a Motion for Reconsideration of this order on January 21, 1993, and the Commission subsequently (in Order No. PSC-93-0818-FOF-TL, issued May 27, 1993) modified its original order and decreased the Company's revenue reduction to $13,641,000.

On June 25, 1993, GTEFL gave notice of administrative appeal to the Florida Supreme Court of the above two rate case orders. GTEFL did not ask for a stay of the orders from either the Commission or the Court. The Company's appeal was focused on certain issues, including certain post-retirement benefits, the appropriate capital structure, and costs associated with purchases made by GTEFL from GTE Data Services and GTE Supply. On July 7, 1994, the Supreme Court issued its decision GTE Florida Incorporated v. Deason, 642 So.2d 545 (Fla. 1994), hereinafter referred to as "GTE Florida Incorporated". The Court affirmed in part and reversed in part the Commission's orders, and remanded the case to the Commission for further action consistent with the Court's opinion. Both GTEFL and the Office of Public Counsel (OPC) filed motions for rehearing of the Court's decision, which were denied on September 22, 1994.

I. The Court's Holding

The Court found that the Commission should not have disallowed certain costs associated with transactions between GTEFL and two of its affiliates, GTE Data Services and GTE Supply, and reversed the Commission's determinations concerning these expense items.

In pertinent part the Court's opinion states:

> We do find, however, that the PSC abused its discretion in its decision to reduce in whole or in part certain costs arising from transactions between GTE and its affiliates, GTE Data Services and GTE Supply. The evidence indicates that GTE's costs were no greater than they would have been had GTE purchased services and supplies elsewhere. The mere fact that a utility is doing business with an affiliate does not mean that unfair or excess profits are being generated, without more. Charles F. Phillips, Jr., The Regulation of Public Utilities 254-55 (1988). We believe the standard must be whether the transactions exceed the going market rate or are otherwise inherently unfair. See id. If the answer is "no," then the PSC may not reject the utility's position. The PSC obviously applied a different standard, and we must reverse the PSC's determination of this question. GTE Florida Incorporated at pp. 547-48

The Court directed that the cause be "...remanded to the PSC for further actions consistent with this opinion."

GTEFL believes that the "further actions consistent with this opinion" should be a annual revenue increase of approximately $4.8 million effective as of the date of the rates set by Commission's Order No. PSC-93-FOF-0108-FOF-TL, January 21, 1993. GTEFL believes that the portion of the increase attributable to the period of time before the Commission's vote on this recommendation should be collected via a surcharge.

OPC states at page 8 of its brief:

> the Commission should utilize the discretion provided by the Florida Supreme Court in favor of holding an evidentiary hearing to determine whether GTE's affiliate transactions meet the standard set forth by the Court.

The Commission's rate orders are not often reversed by the appellate courts, but generally, the Commission has not found it necessary to conduct further evidentiary proceedings to implement

remands. See, for example, Order No. PSC-94-0738-FOF-WU, Order Complying with DCA Mandate and Notice of Proposed Agency Action Order Allowing Recovery of Appellate Rate Case Expense issued June 15, 1994, in Docket No. 900384-WU authorized rate adjustments after the remand of Sunshine Utilities of Central Florida, Inc. v. Florida Public Service Commission, 624 So.2d 306, 310 (Fla. 1st DCA 1993) without further evidentiary proceedings.

We note that the Court's decision was to "...reverse the PSC's determination of this question." Given the Commission's general practice of not conducting further evidentiary proceedings on remand unless the record is insufficient or incomplete, we believe no further hearing on the test year level of expenses is appropriate. Thus, we find that GTEFL is entitled to collect the revenue requirement associated with these expenses disallowed by the Commission, $4,750,000 on an annualized basis.

II. Effective Date of the Revenue Increase

At the November 3, 1994 informal meeting with staff and OPC, the Company stated that it was entitled to recover all revenues associated with the disallowance from the date the Commission's original Order was issued, January 21, 1993. In response to a request for authority on the retroactive portion of the affiliated transactions expenses, GTEFL submitted a memorandum on December 9, 1994. GTEFL cites several cases, including Maule Industries, Inc. v. Mayo, 342 So.2d. 63 (Fla. 1977), Village of North Palm Beach v. Mason, 188 So.2d. 778 (Fla. 1966), and Application of Holiday Lake Water System for Authority to Increase its Rates in Pasco County 5 PSC 630 (1979). These same cases were cited in GTEFL's brief. All the cases cited by GTEFL are distinguishable from the instant case.

Maule concerned the double recovery of fuel costs by Florida Power and Light which were included in both an interim rate increase and collected through the fuel and purchased power cost recovery clause. The Court disallowed the double recovery and rejected the notion that because the interim increase was less than the permanent increase, the double recovery did not require a refund.

North Palm Beach concerned an infirmity in the Commission's Final Order (the failure to make explicit factual findings, although those findings were supported by record evidence). On remand the Commission made the appropriate findings. The Court rejected the argument that the failure to make the findings rendered the awarded rate increase void ab initio. Thus, a refund

was not required for the increased rates authorized during the pendency of the appeal.

Holiday Lake decided by the Court as Citizens v. Hawkins, 364 So.2d 723 (Fla. 1978), concerned the Commission's practice of adding back the accrued depreciation on CIAC to rate base, which allowed the utility to earn a return on CIAC. The Court held that this practice violated Section 367.081 (2) Florida Statutes (1977). The Court held that the Commission's Order departed from the essential requirements of law and quashed the Commission's Order. On remand, the Commission ordered the utility to refund $3.39 per customer, based on the amount of revenue collected in violation of the statute.

No case cited by GTEFL involves the reversal of a disallowed expense and the failure of the utility to request a stay of the Commission's final Order. As such, all are readily distinguishable. There does not appear to be any controlling case with the same fact pattern.

Section 120.68(3)(a), Florida Statutes provides in pertinent part that:

> The filing of the petition (for judicial review) does not itself stay enforcement of the agency decision... The agency may ... grant a stay upon appropriate terms, but... a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event, the order shall specify the conditions, if any, upon which the stay or supersedeas is granted.

Rule 25-22.061 (1)(a), Florida Administrative Code provides that:

> When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

GTEFL did not request either a stay before the Commission or a writ of supersedeas before the Supreme Court. Having failed to protect its right to receive, on an ongoing basis, the revenues associated with its affiliated transactions, the Company should not be permitted to collect these monies retroactively.

The issue here is one of equity and fairness. In the event that OPC (or any other party) appeals an increase granted to a utility, it has the right to seek a stay of the Order. See Rules 25-22.061(2) and (3), Florida Administrative Code. That stay can be vacated upon "a motion by the utility and the posting of good and sufficient bond or corporate undertaking." Rule 25-22.061(3)(a), Florida Administrative Code. Thus, any party seeking to appeal a Commission Order has the opportunity to preserve the status quo (and its right to the associated revenues), pending the decision on appeal. GTEFL having failed to do so in this instance, it is not fair or equitable to require GTEFL's ratepayers to bear the responsibility for this failure.

The Court's opinion does not direct the Commission to allow recovery of the revenues associated with the disallowed expenses retroactively from the date of Order No. PSC-93-FOF-0108-FOF-TL. Absent a specific directive from the Court to allow recovery, we believe the failure to ask for a stay of the Commission's Orders is dispositive of this issue.

Therefore, we find that GTEFL shall be authorized to increase rates permanently to recover the expenses previously disallowed by the Commission prospectively, to be effective thirty days from this vote, or May 3, 1995. GTEFL's failure to ask for a stay pending its appeal shall preclude any recovery for the expenses not recovered during the pendency of the appeal and implementation of the mandate.

III. Allocation of Revenue Increase

On November 30, 1994, GTEFL filed a proposal to increase certain rates to recover the expenses previously disallowed by the Commission. GTEFL proposed to increase local and toll directory assistance charges by five cents, flat residential (R1) by twenty cents per month, and measured R1 rates by fifteen cents per month. The Company stated "...recovery of at least part of the increased expense through local rates is the only appropriate approach, given the service cost-to-price relationships in the existing competitive environment."

While we agree that GTEFL's proposed increases to directory assistance are appropriate, we do not believe that it is appropriate to saddle only residential ratepayers with the remaining revenue increase. Rates for various business exchange services were restructured and/or reduced in the rate case. Had we known then that we were dealing with less of a revenue decrease, it is likely that the reductions in business exchange rates would have been somewhat smaller.

We believe that a more equitable approach would be to increase access line rates for all local exchange access services, including flat and measured residential and business, network access registers, semipublic coin, PATS, and shared tenant services by a uniform dollar amount. This method has the least impact on the revised rate relationships adopted by the Commission, while ensuring that all exchange access customers contribute equally. Therefore, we find that GTEFL shall be authorized to increase local exchange access services (including flat and measured residential and business access lines, network access registers, semipublic coin lines, PATS lines, and shared tenant service trunks) by $.18 per month. The Company shall file tariffs to implement these rates to be effective 30 days after the Commission vote.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that GTEFL is entitled to collect the revenue requirement associated with these expenses disallowed by the Commission, $4,750,000 on an annualized basis. It is further

ORDERED that GTEFL's failure to ask for a stay pending its appeal shall preclude any recovery for the expenses not recovered during the pendency of the appeal and implementation of the mandate. It is further

ORDERED that GTEFL is authorized to increase local exchange access services, including flat and measured residential and business access lines, network access registers, semipublic coin lines, PATS lines, and shared tenant service trunks by $.18 per month. It is further

ORDERED that GTEFL is authorized to increase local and toll directory assistance charges by five cents. It is further

ORDERED that GTEFL shall file revised tariffs to implement these increased rates to be effective 30 days after the Commission vote, or May 3, 1995. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 26th day of April, 1995.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

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Commissioner Deason and Commissioner Johnson dissent from the Commission's decision concerning the appropriate rate increases.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.