

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate) DOCKET NO. 920188-TL
increase by GTE Florida) ORDER NO. PSC-96-1021-FOF-TL
Incorporated.) ISSUED: August 7, 1996
_____)

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 DENYING MOTION TO DISMISS, DENYING
PETITION FOR A HEARING UNDER SECTION 120.57(1),
FLORIDA STATUTES, AND SETTING MATTER FOR A
SECTION 120.57(2), FLORIDA STATUTES, PROCEEDING

BY THE COMMISSION:

I. Background

On May 1, 1992, GTE Florida Incorporated (GTEFL) filed an application for increased rates. GTEFL originally requested an annual revenue increase of \$110,997,618. On September 3, 1992, GTEFL submitted revised testimony and exhibits, in which it reduced the requested increase to \$65,994,207.

This Commission held customer hearings on August 17, and September 16, 17, and 24, 1992, in Tampa, St. Petersburg, Sarasota, and Lakeland, respectively, and technical hearings on October 13, 14, 15, 16, and 19, 1992, in Tallahassee. By Order No. PSC-93-FOF-0108-FOF-TL, issued January 21, 1993, we determined that GTEFL's rates should be reduced by \$14,475,000.

On February 4, 1993, GTEFL filed a Motion for Reconsideration of Order No. PSC-93-FOF-0108-FOF-TL. By Order No. PSC-93-0818-FOF-TL, issued May 27, 1993, we modified our decision and ordered that GTEFL's annual revenues be reduced by \$13,641,000.

On June 25, 1993, GTEFL served notice of its appeal of Orders Nos. PSC-93-FOF-0108-FOF-TL and PSC-93-0818-FOF-TL. It did not request a stay of those orders. On July 7, 1994, the Supreme Court affirmed, in part, and reversed, in part, Orders Nos. PSC-93-FOF-

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0108-FOF-TL and PSC-93-0818-FOF-TL, and remanded the case for further action consistent with its opinion. GTE Florida Incorporated v. Deason, 642 So. 2d 545 (Fla. 1994). Among other things, the Court determined that we should not have disallowed certain costs associated with transactions between GTEFL and two of its affiliates, GTE Data Services and GTE Supply.

On remand, by Order No. PSC-95-0512-FOF-TL, issued April 26, 1995, we authorized GTEFL to increase rates prospectively for 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 a uniform \$.18 per month, and to increase rates for local and toll directory assistance. However, we also determined that GTEFL's failure to request a stay pending the disposition of its appeal precluded recovery of these expenses during the pendency of the appeal.

On May 25, 1995, GTEFL served notice of its appeal of Order No. PSC-95-0512-FOF-TL. On February 29, 1996, the Supreme Court ruled that GTEFL should be allowed to recover the previously disallowed expenses, for the period between May 27, 1993, and May 3, 1995, through a surcharge. GTE Florida Incorporated v. Clark, 21 Fla. L. Weekly S101 (Fla. Feb. 29, 1996).

On remand, by Order No. PSC-96-0667-FOF-TL, issued May 17, 1996, we authorized GTEFL to apply a one-time surcharge of \$8.65, in June 1996, to subscribers of 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, who received service during the period May 27, 1993, through May 3, 1995. Subscribers who received service for only a portion of the period were to be assessed a prorated surcharge amount.

On June 7, 1996, the Office of Public Counsel (OPC) filed a protest to Order No. PSC-96-0667-FOF-TL. On June 20, 1996, GTEFL moved to dismiss OPC's protest. On July 2, 1996, OPC responded to GTEFL's motion to dismiss.

II. GTEFL's Motion to Dismiss

The appropriate standard to apply when considering a motion to dismiss is whether, assuming that all allegations in the petition are true and construing all reasonable inferences in favor of the petitioner, the petition nevertheless fails to state a claim for

which relief could be had. Ralph v. City of Daytona Beach, 471 So. 2d 1 (Fla. 1983).

In its motion to dismiss, GTEFL argues three main points:

- A. OPC's Petition is Procedurally and Substantively Deficient;
- B. A Hearing Would Only Harm the Public OPC Purports to Protect; and
- C. The Commission Has the Discretion to Deny OPC's Petition.

A. OPC's Petition is Procedurally and Substantively Deficient

GTEFL claims that OPC's petition is both procedurally and substantively deficient. In support of this argument, GTEFL contends that OPC has cited no statute or rule which would entitle it to relief. GTEFL argues that, instead, OPC relies on an "erroneous" interpretation of GTE Florida Incorporated v. Clark, 21 Fla. L. Weekly S101 (Fla. Feb. 29, 1996); that local rates should not be surcharged, and that even if it was appropriate to surcharge local rates, GTEFL should be required to surcharge both current and former customers.

GTEFL contends that, although the Court mandated that a surcharge be imposed to allow recovery of previously denied expenses and held that no new customers should be charged, it said nothing about the level of such a surcharge. According to GTEFL:

[T]he Court openly acknowledged that 'no procedure can perfectly account for the transient nature of utility customers.' Id. at 5. It is precisely this 'transient nature' of GTEFL's customers that prevents the perfect correlation of charges and customers that OPC seeks. The Court recognized that such perfection is unattainable at this point.

A more complete quote of the Court's opinion in this regard follows:

Finally, we address the structure of the current surcharge. The PSC has acknowledged that it has the ability to closely tailor the implementation of refunds and to accurately monitor refund payments to ensure that the recipients of such refunds truly are those who were overcharged. While no procedure can perfectly account

for the transient nature of utility customers, we envision that the surcharge in this case can be administered with the same standard of care afforded to refunds, and we conclude that no new customers should be required to pay a surcharge.

Id. at 5 - 6.

Based upon the above-quoted language, the Court's directive does not appear as clear as GTEFL claims. Further, assuming that all allegations in its petition are true, and construing all reasonable inferences in favor of OPC, it cannot be said that OPC has failed to state a claim for which relief could be had.

GTEFL also argues that OPC has failed to make any claim for relief. Although GTEFL is technically correct, OPC argues that: "[t]he Commission should not require current customers to pay millions of dollars attributable to services provided to others -- something neither contemplated nor sanctioned by the Florida Supreme Court." OPC's request for relief, therefore, though not explicit, is certainly implied. Moreover, applying the correct standard, as set forth above, it still cannot be said that OPC's petition fails to state a cause of action for which relief could be had.

B. A Hearing Would Only Harm the Public OPC Purports to Protect

GTEFL next argues that a hearing would only harm the public which OPC seeks to protect. In its response to GTEFL's motion, OPC argues that this argument has no legal significance with regard to whether OPC's petition should be dismissed. We agree. Whether the public may, in fact, be harmed by the delay in implementing a surcharge, engendered by OPC's petition for a hearing, is dependent upon the final outcome of any such hearing. GTEFL's claim is irrelevant to the question of whether OPC has stated a claim for which relief could be had.

C. The Commission Has the Discretion to Deny OPC's Petition

Finally, GTEFL argues that we have the discretion to deny OPC's petition. In support thereof, GTEFL cites In re: Resolution by the City of Plant City for Extended Area Service Between Plant City and Tampa, 89 F.P.S.C. 3:365 (1989), in which we dismissed Plant City's protest of a proposed agency action order to implement an optional extended area service (OEAS) plan. Specifically, GTEFL cites to our statement that "while the OEAS plan is not a perfect panacea for each customer's specific desires, implementation of the

plan does not affect a subscriber's substantial interests simply because a customer does not get his heart's desire."

According to GTEFL, the logic applied in Plant City "applies with particular force to this case, because the Commission does not have untrammelled discretion on remand." GTEFL further argues that "a surcharge mechanism that cannot be reasonably expected to give GTEFL full recovery would violate the Court's order."

We do not agree with GTEFL's characterization of Plant City. The issue of whether a customer is substantially affected by the implementation of one versus another form of toll relief is entirely dissimilar from the issue of whether the Court intended that current customers should pay former customers' "shares" of previously disallowed expenses.

D. Conclusion

Based upon the discussion above, GTEFL has not demonstrated that OPC's petition fails to state a claim for which relief could be had. Its motion to dismiss OPC's petition for a hearing is, therefore, denied.

III. OPC's Petition For a Section 120.57(1) Hearing

In its petition, OPC raised the following issues of fact, law, and policy:

- a. Which rates should be surcharged to comply with the decision of the Florida Supreme Court in GTE Florida Inc., vs. Clark, 21 F.L.W. S101, 1996 Fla. SCT 3945 (February 29, 1996)?
- b. What is the appropriate dollar amount to be charged?
- c. Should the Commission require customers of GTE who had service during the period May 27, 1993, through May 3, 1995, but who are no longer customers of GTE, to pay a portion of the charge?
- d. What portion of the charge is attributable to customers of GTE who received service during the period May 27, 1993, through May 3, 1995, but who are no longer customers of GTE?
- e. How should the Commission calculate the amount of the charge per customer?

Upon consideration, Issues a, c, and e appear to be mixed issues of policy and law. Issues b and d, while issues of fact, do not appear to be in dispute. The appropriate dollar amount to be collected through a surcharge is readily ascertainable, by determining the annual amounts of the previously disallowed expenses, and bringing those accounts forward. Likewise, the portion of these expenses that are attributable to customers who are no longer customers of GTEFL is also capable of being determined by relatively simple computations. In fact, in its motion to dismiss, GTEFL asserts that it has "given OPC documents that reflect how many customers left its system during the relevant period, and the impact of these customers' departure on the surcharge is relatively easy to calculate. There is no disputed factual issue that is necessary to air and resolve through a hearing."

Since there do not appear to be any disputed issues of material fact, OPC's request for a hearing under Section 120.57(1), Florida Statutes, is denied. However, since there do appear to be disputed issues of law, especially with regard to the appropriate interpretation of the Court's decision, we find it appropriate to set this matter for a proceeding under Section 120.57(2), Florida Statutes. GTEFL and OPC may present briefs regarding the appropriate interpretation of GTE Florida Inc., vs. Clark, 21 F.L.W. S101, 1996 Fla. SCT 3945 (February 29, 1996). GTEFL and OPC have agreed that they can file their briefs by August 9, 1996.

It is, therefore,

ORDERED by the Florida Public Service Commission that GTE Florida Incorporated's motion to dismiss the Office of Public Counsel's petition for a Section 120.57(1), Florida Statutes, hearing is denied. It is further

ORDERED that the Office of Public Counsel's petition for a Section 120.57(1), hearing is denied. It is further

ORDERED that this matter is set for a Section 120.57(2), Florida Statutes, proceeding, in which the Office of Public Counsel and GTE Florida Incorporated may brief what they believe to be the appropriate interpretation of GTE Florida Inc., vs. Clark, 21 F.L.W. S101, 1996 Fla. SCT 3945 (February 29, 1996). It is further

ORDERED that the parties shall file their briefs by August 9, 1996.

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By ORDER of the Florida Public Service Commission, this 7th
day of August, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(S E A L)

RJP

Commissioner Julia L. Johnson dissented.

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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 this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.