

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the proper)	DOCKET NO. 890216-TL
application of Rule 25-14,003, F.A.C.,)	
relating to tax savings refund for)	ORDER NO. 24306
1988 and 1989 for GTE FLORIDA, INC.)	
_____)	ISSUED: 4/1/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 J. TERRY DEASON
 BETTY EASLEY
 GERALD R. GUNTER
 MICHAEL MCK. WILSON

ORDER TO SHOW CAUSE

BY THE COMMISSION:

I. BACKGROUND

By Order No. 22352, issued December 29, 1989, GTE Florida Incorporated (GTEFL or the Company) and the Office of the Public Counsel (OPC) were directed to submit briefs on the legal question of whether the Commission is now precluded from making an adjustment based on GTEFL's sale of the Quad Block property by any legal impediment arising from the Company's accounting practices or the property's treatment in prior proceedings.

In Order No. 22352 we directed our Staff to prepare a recommendation as to the appropriate action, if any, regarding the gain on the sale of the land. The Order also stated judgement would be reserved on the adjustments proposed by OPC in its brief. By Order No. 23143, we determined that no further adjustment should be made for the sale of the land.

In the course of Staff's investigation an audit was performed on GTEFL's records. As part of the Staff's audit of the sale of the Quad Block property, it became apparent that certain records of GTEFL no longer exist. These records were destroyed by GTEFL in conjunction with the Company's records retention and disposal procedures. These procedures were premised on the FCC's Part 42 of the Code of Federal Regulations governing record retention, as amended in 1986.

The Commission's rule on record retention, 25-4.020(3), Florida Administrative Code, was adopted in 1976; it incorporated by reference the then current version of the FCC's Part 42. Prior

DOCUMENT NUMBER-DATE

03114 APR -1 1991

PSC-RECORDS/REPORTING

ORDER NO. 24306
DOCKET NO. 890216-TL
PAGE 2

of accounts had to be retained permanently. In addition, cash vouchers had to be retained for a period of time ranging from three to forty years, depending upon which accounts the cash vouchers supported. On August 22, 1986, the FCC changed Part 42 to leave the retention period for any particular record (with the exception of toll records) to the discretion of the individual carriers. Despite the restrictive provisions of Section 120.54(8), Florida Statutes, that a..."rule may incorporate material by reference but only as such material exists on the date the rule is adopted..." and the fact that the relevant FPSC rule was last adopted March 31, 1976, GTEFL updated its record retention procedures to comply with the 1986 version of Part 42 and to reduce the amount of material being maintained.

At the June 19, 1990, Agenda Conference, during our initial consideration of the appropriate action to pursue regarding GTEFL's destruction of records, GTEFL questioned the validity of Rule 25-4.020(3). According to GTEFL, a copy of the FCC Part 42 Rule that was incorporated by reference into Rule 25-4.020(3) was not on file with the Secretary of State as required by Rule 1S-1, Florida Administrative Code. GTEFL further argued that its destruction of records was not a violation of Rule 25-4.020(3) since that Rule incorporates the "current" Part 42 of the FCC's Rules. This argument is premised on the FCC's revision to Part 42 in 1986 that shortened the duration for retention of interstate records.

We deferred consideration of the destruction of records issue in order to investigate GTEFL's allegations regarding Rule 25-4.020(3).

II. VALIDITY OF RULE 25-4.020(3)

Rule 25-4.020(3), Florida Administrative Code, states that:

All records shall be preserved for the period of time specified in the current edition of Part 42 of the Rules and Regulations of the Federal Communications Commission entitled "Preservation of Records of Communication Common Carriers."

The Rule was last amended on March, 31, 1976. The Rule must be read in conjunction with Section 120.54, Florida Statutes, entitled "Rulemaking: adoption procedures." This statute states, in pertinent part:

ORDER NO. 24306
DOCKET NO. 890216-TL
PAGE 3

Pursuant to rule of the Department of State, a rule may incorporate material by reference but only as such material exists on the date the rule is adopted. For purposes of such rule, changes in such material shall have no effect with respect to the rule unless the rule is amended to incorporate such material as changed. No rule shall be amended by reference only.

Section 120.54(8). Under the Secretary of State's Rules, Rule 1S-1, Florida Administrative Code, a document that is incorporated by reference must be filed along with the Rule which incorporates the document. This provision has been substantially the same since 1976.

From our review of the Rule and its history, two things appear to be reasonably certain. First, a copy of the FCC Part 42 Rule that is incorporated by reference in Rule 25-4.020(3) is not currently in the Secretary of State's files. It should be noted, however, that the Secretary of State's Office does not appear to have had a document tracking system in place at the time the Rule was filed that fully recorded what was actually filed. Second, Rule 25-4.020(3) was properly filed with the Secretary of State and published in the Florida Administrative Code.

It is clear that the text of Rule 25-4.020(3) was properly adopted, filed and published. While a copy of the FCC's Rule is not currently on file with the Secretary of State, it is certainly not clear that it was not filed with Rule 25-4.020(3). Moreover, if it was not filed with Rule 25-4.020(3), it can reasonably be presumed that the Secretary of State would have rejected the Rule at that time as improperly filed. Conversely, since the Rule was accepted as filed and published in the Florida Administrative Code it can be presumed that FCC Part 42 was filed when the Rule was adopted. The document's subsequent disappearance cannot be attributed as a failure to comply with the Secretary of State's rules. Such disappearance cannot invalidate a properly adopted Rule. Accordingly, we believe that Rule 25-4.020(3) is valid.

III. COMPLIANCE WITH RULE 25-4.020(3)

In conjunction with a Commission audit of Quad Block property transactions directed by order of the Commission, Staff auditors requested in part "all accounting entries, original source documents that support entries, tax returns and supporting

ORDER NO. 24306
DOCKET NO. 890216-TL
PAGE 4

workpapers for the period of acquisition and sale of the property by GTEFL, General and Subsidiary Financial Ledgers, deeds and Property Appraisals." The Company responded, in part, "All other documentation and supporting transaction, correspondence, original accounting entries retained by the company are available on microfilm at the company retention center for inspection today, October 9." When the field auditor visited the Company's record retention center on October 12, 1989, he found that the Company had failed to retain various records and documents which include, but are not limited to, cash vouchers for the years 1952 through 1979 and certain cash receipt vouchers and general ledgers. Retention personnel reviewed the status of the vouchers requested by the auditor and determined that they had been destroyed on October 11, 1989.

The Company argues that it is in compliance with our Rule because its record retention policy is in compliance with the current edition of the FCC Part 42 as revised on August 22, 1986. The Company further argues that:

Prior to this date, FCC Part 42 required carriers to retain cash vouchers for forty (40) years. A driving factor behind the Commission's revision of Part 42 was to reduce the existing record retention and reporting burdens being experienced by the carriers. Basically, the FCC, with the exception of toll records, left the retention period of any particular record to the business practices of the individual carrier.

The Company has not denied that under the previous FCC Part 42 the records should have been maintained. The thrust of the Company's argument is that the Company is in compliance with the new FCC Part 42.

In investigating the destruction-of-records matter, our Staff pursued two issues: (1) whether the destruction of some documents as a result of a change in the corporate policy governing record retention violated the Commission's Rule; and (2) whether the destruction on October 11, 1989, of particular records that had been requested by our Staff auditor on October 2, 1989, was an attempt to circumvent the Commission's audit of the Quad Block property transactions. On November 9 and 17, 1989, depositions were taken of five GTEFL officials and employees; those transcripts consist of nearly 600 pages and are supported by a volume of

ORDER NO. 24306
DOCKET NO. 890216-TL
PAGE 5

exhibits. On March 2, 1990, we inspected GTEFL's record center and conducted interviews with three employees.

A. DESTRUCTION OF RECORDS

In investigating the Destruction Issue, depositions were taken of four Company employees. These employees either had direct knowledge of the events surrounding the October 11, 1989, destruction of records or responsibility for either implementing the newly-adopted records retention policy or gaining access to the records for our auditor. A deposition was taken of the supervisor of GTEFL's records retention center. This person has had this responsibility since 1982 and has first-hand knowledge of the former and current retention policies, as well as the destruction of the particular records in question. Depositions were also taken of the manager responsible for administering the records retention function and the two individuals responsible for obtaining access to records for our auditor in connection with this audit.

Additionally, our Staff inspected the records center and interviewed the person responsible for both locating the records sought by Staff auditors, as well as for implementing the Company's records destruction policy. This individual participated in the October 11th destruction of records that included some of those being sought by our auditor.

After reviewing the evidence gathered on the Destruction Issue, it does not appear that the October 11th destruction of records was devised to circumvent the Commission's audit of the Quad Block property transactions. Our auditor's request for records was specific and comprehensive and, as such, was adequate to inform Company personnel of the particular records he was seeking. It appears that a breakdown in GTEFL's interdepartmental communications caused this failure to stop the destruction of the particular records sought by our auditor.

B. CHANGE IN RECORDS RETENTION POLICY

In investigating the Policy Issue, GTEFL's General Counsel was deposed because he was the official who had responsibility for records retention at the time the Company's policy governing this matter was changed following the FCC's relaxation of its requirements. In addition, the attorney in the General Counsel's office who determined that the proposed records retention policy

ORDER NO. 24306
DOCKET NO. 890216-TL
PAGE 6

change would be in compliance with our requirements was also interviewed.

Based on our review of this information, it appears that the Company violated the Commission's record retention rule by implementing a policy of destroying records which were required to be retained. While none of the evidence tends to show that GTEFL intended to violate the Rule through implementing such a policy, we find that the Company's action was "willful" in the sense intended by Section 364.285, Florida Statutes. We believe that in authorizing the Commission to fine regulated utilities for "willful" acts, the Legislature was not limiting this authority only to circumstances in which the Commission finds that the utility set out on a course of action with the intended purpose of violating one of its rules.

Utilities are charged with knowledge of our rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds, that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the scheduled destruction of documents, would meet the standard for a "willful violation."

In our view, "willful" implies intent to do an act, and this is distinct from intent to violate a rule. In order to measure the intent of GTEFL, it is appropriate to examine its actions regarding: (1) the safeguards established to insure compliance with Commission rules; (2) the steps taken, or not taken, to halt destruction of documents sought by the Commission; (3) the systematic destruction of documents in violation of our Rule; and (4) the failure to seek an interpretation of the Rule in question prior to destroying documents. It is uncontroverted that GTEFL adopted a policy of destroying records and willfully implemented it. GTEFL's behavior in this instance appears to rise to the level of a "willful violation" of the Commission's Rule. Accordingly, such conduct warrants the imposition of a penalty.

Procedures are in place for a utility to use in seeking clarification of our requirements. If GTEFL was uncertain of its record retention obligations, there was adequate opportunity for the Company to seek clarification under these procedures. Such clarification should have been obtained prior to the permanent destruction of documents.

ORDER NO. 24306
DOCKET NO. 890216-TL
PAGE 7

C. THE APPROPRIATE PENALTY

In quantifying the appropriate fine for this violation, we are guided by two principal concerns: (1) the harm to the ratepayers from the potential damage to the Commission's ability to audit the Company's records; and (2) the duration of this destruction's effect on future audit procedures.

By Order No. 23143, we determined that no adjustment should be made for the Quad Block property because the costs associated were never recovered from GTEFL's ratepayers. Therefore, it does not appear that the ratepayers have been directly harmed by the violation. In addition, as discussed above, there does not appear to be any attempt to destroy the specific documents requested. However, the apparent general violation of the Commission's record retention rules cannot be ignored. In view of this apparent violation, pursuant to Section 364.285, Florida Statutes, we find it appropriate to require GTEFL to show cause why it should not be fined \$5,000 for violation of Rule 25-4.020(3), Florida Administrative Code.

IV. AUDIT PROCEDURES REPORT

Notwithstanding any of the above, it also appears from the investigation that the GTEFL employees responsible for locating the records requested by our auditor and delivering them to him failed to act with due diligence in satisfying our auditor's request for inspection of records. The individual in charge of locating the accounting records being sought called an employee of the records center and discussed the records being sought. She did not read the request to the records center employee. Instead she asked him to search for records referring to "Quad Block" and "Tampa City Center." In addition, the records center employee was asked to look for general ledger "level run" records for 1972 through 1980. Rather than securing all the documents requested by our auditor, the individual responsible for locating records further concluded that our auditor could request the specific portions of the records when he arrived at the records retention center and thereby locate the particular documents sought. These actions cause two concerns. First, perhaps too much interpretation of audit record requests is required because communication between employees appears to be inadequate. Additionally, in order to minimize the amount of records being inspected, the Company may be forcing auditors to narrow their record requests.

ORDER NO. 24306
DOCKET NO. 890216-TL
PAGE 8

Accordingly, we find it appropriate to require GTEFL to implement new policies to govern its employees' response to audit record requests. GTEFL employees should furnish all possible records that an auditor seeks to inspect. Moreover, the Company's current procedures should be changed in order to rely less on interpretation and communication between various employees and less on forcing the auditor to seek fewer records. Therefore, GTEFL shall submit a report detailing the procedures that the Company intends to implement in order to accomplish these objectives. This report shall be filed within 60 days of the issuance of this Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that GTE Florida Incorporated shall show cause in writing why it should not be fined \$5,000 for violation of Rule 25-4.020(3), Florida Administrative Code. It is further

ORDERED that any response filed by GTE Florida Incorporated shall contain specific statements of fact and law. It is further

ORDERED that any response to this Order shall be filed within 20 days of the date of this Order. It is further

ORDERED that upon receipt of a response as outlined above, and upon GTE Florida Incorporated's request for a hearing, further proceedings will be scheduled by the Commission, at which time the Company will have an opportunity to contest the violations alleged above. It is further

ORDERED that GTE Florida Incorporated's failure to respond in the form and within the prescribed time frame will constitute admission of the violations alleged above and a waiver of the right to a hearing.

ORDER NO. 24306
DOCKET NO. 890216-TL
PAGE 9

By ORDER of the Florida Public Service Commission, this 1st
day of APRIL, 1991.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

TH

Commissioner Gerald R. Gunter dissented from the Commission's decision in Section III of this Order.

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.

This order is preliminary, procedural or intermediate in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.037(1), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, at his office at 101 East Gaines Street, Tallahassee, Florida 32399-0870, by the close of business on April 21, 1991.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to