

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of CITIZENS OF THE STATE OF FLORIDA for a limited proceeding to reduce GENERAL TELEPHONE COMPANY OF FLORIDA's authorized return on equity)))))	DOCKET NO. 870171-TL
In re: Investigation into the proper application of Rule 25-14.003, F.A.C., relating to tax savings refunds for 1988 and 1989 for GTE FLORIDA, INC.)))))	DOCKET NO. 890216-TL ORDER NO. 21208 ISSUED: 5-9-89

The following Commissioners participated in the disposition of this matter:

MICHAEL MCK. WILSON, Chairman
THOMAS M. BEARD
BETTY EASLEY
GERALD L. GUNTER
JOHN T. HERNDON

ORDER DENYING ORAL ARGUMENT,
REVIEW OF ORDER NO. 20799 AND REVIEW
AND RECONSIDERATION OF ORDER NO. 20800

BY THE COMMISSION:

BACKGROUND

By Order No. 18661, issued January 7, 1988, we accepted the written offer of GTE Florida Incorporated (GTEFL) not to contest a January 1, 1988 effective date for any resolution of Docket No. 871206-PU. This action was taken in lieu of our requiring that a specific level of 1988 revenues be collected subject to refund.

Our Staff, GTEFL, Public Counsel (PC) and the Florida Consumers for Responsible Utilities (FCRU) attended an issue identification meeting on January 13, 1989. PC argued there that we may legally set a new return on equity (ROE) midpoint for GTEFL and use it in applying Rule 25-14.003, Florida Administrative Code (the Tax Rule), back to earnings collected from January 1, 1988, onward. This would be lawful, in PC's opinion, because of the company's acquiescence to retroactive action accepted by Order No. 18661. GTEFL disagreed with this position, asserting that it had agreed only to a retroactive resolution of Docket No. 871206-PU and not to the retroactive application of the Tax Rule.

By Order No. 20799, issued February 23, 1989, the Prehearing Officer compelled GTEFL to produce documents for inspection by PC. By Order No. 20800, issued February 23, 1989, the Prehearing Officer denied motions to strike and rejected a proposed procedural process filed by GTEFL. On March 6, 1989, GTEFL filed separate Motions for Review of Orders Nos. 20799 and 20800 by the full Commission.

GTEFL argues in its Motion for Review that Order No. 20800 should be modified to remove certain issues from consideration in this proceeding and to resolve a legal question prior to considering the balance of the issues. GTEFL believes that the issues proposed in this proceeding by PC and FCRU dealing with its ROE, its capital structure and its 1988 and 1989 earnings are irrelevant and should have been stricken by Order No.

DOCUMENT NUMBER-DATE

04639 MAY-9 1989

FPSC-RECORDS/REPORTING

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20800. In GTEFL's opinion, the only relevant issue to be addressed here is whether it has disposed of its 1988 tax savings generated by the Tax Reform Act of 1986. Prior to deciding the factual issues, the company urges us to resolve the legal question of whether GTEFL can be compelled to return its tax savings twice to its customers.

GTEFL charges in its Motion for Review that Order No. 20799 should be reversed, contending that the company's production of certain documents should not be compelled. This motion asserts that two of PC's requests seek production of documents which are irrelevant. The documents being sought by these requests are those which indicate GTEFL's current cost of equity and which relate to the projection or evaluation of earnings for 1988 and 1989.

Additionally, GTEFL filed a Request for Oral Argument, accompanying its Motions for Review. GTEFL alleges that the issues and pleadings in this proceeding are numerous and complex and requests that oral argument be granted in order to aid us in comprehending and evaluating them. Also, GTEFL claims that oral argument will offer us an opportunity to question the parties on their diverse positions.

On March 6, 1989, PC filed a Motion for Reconsideration of Order No. 20800, stating that this order wrongly excluded from consideration those issues involving the Commission's Proposed Agency Action in Order No. 20269, issued November 7, 1988. PC asks that this order be reconsidered for the purpose of removing its limitation on the scope of the proceeding.

On March 8, 1989, PC filed a Response to GTEFL's Motions for Review. PC's Response maintains that its earlier pleadings furnish sufficient rationale to justify our denial of these motions. On March 13, 1989, GTEFL filed a Response to PC's Motion for Reconsideration. GTEFL's Response states that reconsideration should be denied because Order No. 20800 correctly held that the protests of the Proposed Agency Action commences a de novo proceeding which is not intended to review the proposed action.

By Order No. 20857, issued March 6, 1989, the issues involved in this proceeding were removed from the generic investigation involving all utilities, Docket No. 871206-PU, and lodged in Docket No. 890216-TL, which was opened to deal with GTEFL specifically. Additionally, this order consolidated with the latter docket those issues raised in Docket No. 870171-TL concerning PC's petition for a limited proceeding to reduce GTEFL's authorized ROE. We held that consolidation was the most efficient way to resolve all these apparently overlapping issues.

ORAL ARGUMENT

GTEFL's arguments concerning oral argument relate strictly to the procedural posture of this proceeding, and we find that oral argument is unnecessary at this stage of the proceeding. PC's petition to reduce GTEFL's authorized return on equity was recently consolidated into this proceeding, and we believe that this action has rendered moot some of GTEFL's arguments

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concerning the issues involving its earnings and equity. For the reasons stated below, we find that the Prehearing Officer's action is correct in both including issues relating to these topics and rejecting those dealing with the Proposed Agency Action. Upon consideration, we deny GTEFL's Request for Oral Argument because the arguments raised in its Motion for Review are procedural in nature and were adequately addressed by the parties at our Agenda Conference on April 4, 1989.

ORDER NO. 20800

GTEFL complains that Order No. 20800 is defective because the list of issues approved by the Prehearing Officer is inconsistent with the scope limitations he imposed on this proceeding. Under the company's theory, all issues advanced by PC and FCRU should have been stricken in Order No. 20800. At page 5 of this order, the Prehearing Officer describes this proceeding's scope as being "to determine whether GTEFL has carried out its obligations for 1988 under the tax rule, and if not, what steps need to be taken." While agreeing with this decision, GTEFL disagrees with the Prehearing Officer's ruling that the 11 issues proposed by PC and FCRU fall within this scope.

GTEFL alleges that a change to its ROE can have no effect on the Commission's application of the Tax Rule. Similarly, its projected 1988 and 1989 earnings have no effect on the Tax Rule's operation in 1988, particularly since 1988 actual data is now available. According to the company, the Tax Rule cannot legally be applied in the manner urged by PC. To foreclose such an "illegal, unjust, inequitable" procedure, GTEFL asserts that, before taking any further action in this proceeding, the Commission must resolve the company's argument that the company cannot be forced to return tax savings twice. Finally, the company argues that it has "detrimentally relied" upon other Commission actions regarding the disposition of tax savings which have not followed the Tax Rule. Applying the Tax Rule to GTEFL now may subject the company to liability in excess of its steps taken to return its tax savings, in GTEFL's opinion, particularly if the procedure advocated by PC is implemented.

PC concludes that we have sufficient authority to change GTEFL's ROE in a limited proceeding, citing the Southern Bell Telephone and Telegraph Company rate stabilization proceeding in Docket No. 880069-TL. The issues involving ROE and earnings projections are relevant, according to PC, because a new ROE midpoint should be set for GTEFL in order to apply the Tax Rule and determine how much of the company's 1988 earnings should be returned to its ratepayers. Moreover, PC claims that GTEFL's assertion that its tax savings were disposed of, e.g., through an access charge reduction and by recording additional depreciation expense, misses the point of the Tax Rule which specifies that refunds must be made.

After considering the arguments, we deny GTEFL's Motion for Review of Order No. 20800 because the Prehearing Officer correctly decided the issues addressed in that order. The issues approved in Order No. 20800 should be considered in this proceeding. These issues are appropriate in applying the Tax Rule because PC should have the opportunity to show that GTEFL

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is not in compliance with the Tax Rule just as the company should be given the chance to demonstrate that it is in compliance with this rule or, at least, with its spirit. The 13 issues adopted by the Prehearing Officer appear germane to our consideration of the positions advocated by the parties. Our review of the Tax Rule has caused us to conclude that ROE and earnings are of paramount importance to its application. Order No. 20800 makes clear at pages 6 and 7 that no position is taken by the Prehearing Officer on PC's argument that a newly-set ROE midpoint for GTEFL may lawfully be used in applying the Tax Rule retroactively to earnings from January 1, 1988, forward. In addition, our recent consolidation of essentially-identical issues raised in Docket No. 870171-TL recognizes that these overlapping issues should be considered together. For these reasons, we find that GTEFL's Motion for Review of Order No. 20800 should be denied.

ORDER NO. 20799

1. MOTION FOR REVIEW:

PC sent GTEFL the following document requests:

* * *

(2) Please provide each document in your possession, custody, or control discussing, evaluating, or otherwise indicating your current cost of equity. The phrase "current cost of equity" refers to your market cost of equity, not your return on equity authorized by the Florida Public Service Commission.

* * *

(4) Please provide each document in your possession, custody, or control projecting or evaluating your earnings, return on equity, or return on rate base during 1988 and 1989.

GTEFL argues that its production of the above-described documents should not be compelled because they are irrelevant to any issue in this proceeding. GTEFL maintains that the subject matter here is "tax savings" and that issues involving projected earnings and a new ROE are not applicable to this subject matter. With regard to both requests quoted above, the company alleges that the Tax Rule operates on an actual earnings basis and is unrelated to either current cost or equity or projected earnings beyond the reporting period. GTEFL believes that it has already returned its "tax savings" for 1988 and is committed to do so for 1989, and thus earnings, midpoint ROE and current cost of capital are neither appropriate nor relevant issues in this proceeding. Additionally, the motion alleges that the second request quoted above is "overbroad, burdensome, oppressive, vague, ambiguous, and imprecise." For these reasons, GTEFL requests that Order No. 20799 be reversed.

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PC's Response states that GTEFL's Motion for Review of this order should be denied because the company's ROE and current and projected earnings are at issue in this proceeding. PC complains that the Commission's Proposed Agency Action affected the Tax Rule when it "did away with the existence of a midpoint return on equity and set a new test of using only a 'ceiling' rate of return." Had an ROE midpoint been set, PC charges that it likely would have been 13.25%. In that event, PC argues that GTEFL will likely have to refund to its ratepayers because PC projects that the company's 1988 earnings will fall between 13.25% and 14.25%.

We have discussed above our reasons for concluding that the appropriate issues have been approved by the Prehearing Officer in this case. We believe that the documents sought by PC relate to those issues. Further, we find that PC has shown that these documents are discoverable and that, notwithstanding the filing of copious objections, GTEFL has failed to demonstrate adequate grounds for denying PC the opportunity to discover them. Upon consideration, GTEFL's Motion for Review of Order No. 20799 is denied because the Prehearing Officer correctly decided the issues addressed in that order. Further, the company shall comply with Order No. 20799 no later than April 10, 1989.

2. MOTION FOR RECONSIDERATION:

PC quarrels with the Prehearing Officer's determination that the offer made by GTEFL in resolution of its participation in Docket No. 871206-PU is no longer before the Commission. Order No. 20800 holds further that consideration of this offer and the events leading to our acceptance of a modification of it will unnecessarily waste the efforts of the parties and the Commission. PC claims that all matters dealt with as Proposed Agency Action (PAA) in Order No. 20269 are proper issues for consideration here. PC seeks to have this scope limitation removed from this proceeding, charging that matters covered in the PAA are "much broader than the obligations of GTEFL under the tax rule for 1988."

GTEFL correctly points to a line of legal precedents establishing that a protest to a PAA order deprives that proposal of any continuing legal effect. Citing both General Development Corp. v. Division of State Planning, 353 So.2d 119 (Fla. 1st DCA 1977), and McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), the company properly characterizes the hearing which follows the protest of a PAA order as a de novo proceeding not intended to review preliminary action. Additionally, GTEFL believes that its offer has been rejected by the protests, thereby withdrawing its terms. GTEFL agrees with the finding of the Prehearing Officer that these matters should not be issues in this case.

PC's Motion for Reconsideration of Order No. 20800 is denied because the Prehearing Officer correctly decided the issues addressed in that order and PC has shown no grounds supporting modification by the full Commission. In our opinion, the protests of the PAA order have effectively removed the proposal made there from further consideration. While all of the issues that led us to issue that proposed resolution

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remain, the offer made by the company and our proposed acceptance of a modification of it are currently without legal force and effect. Therefore, no good purpose can be found for further inquiry into the matters that led up to and are contained within the PAA order.

Therefore, it is

ORDERED by the Florida Public Service Commission that GTE Florida Incorporated's Request for Oral Argument filed March 6, 1989, is hereby denied. It is further

ORDERED that GTE Florida Incorporated's Motion for Review of Order No. 20799 filed March 6, 1989, is hereby denied. It is further

ORDERED that GTE Florida Incorporated's Motion for Review of Order No. 20800 filed March 6, 1989, is hereby denied. It is further

ORDERED that Public Counsel's Motion for Reconsideration of Order No. 20800 filed March 6, 1989, is hereby denied. It is further

ORDERED that Orders Nos. 20799 and 20800, issued February 23, 1989, are hereby affirmed. It is further

ORDERED that GTE Florida Incorporated shall comply with the requirements of Order No. 20799, issued February 23, 1989, no later than April 10, 1989. It is further

ORDERED that these dockets shall remain open for further proceedings.

By ORDER of the Florida Public Service Commission,
this 9th day of May, 1989.


STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

DLC

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

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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 or sewer 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.