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CLERK, SUPREME COURT.
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

GTE FLORIDA INCORPORATED,)
)
 Appellant,)
)
 v.)
)
 J. TERRY DEASON, ETC. ET AL,)
)
 Appellee.)
 _____/

CASE NO. 82,003
FPSC DOCKET NO. 920188-TL
FPSC DOCKET NO. 920939-TL

FILED: SEPTEMBER 23, 1993

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE
CITIZENS OF THE STATE OF FLORIDA
(Intervenors below)

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PRELIMINARY STATEMENT

The Citizens of the State of Florida oppose this appeal: this Court should affirm Florida Public Service Commission Orders numbered PSC-93-0108-FOF-TL, (Initial Order) issued on January 21, 1993, and PSC-93-0818-FOF-TL (Reconsideration Order), issued May 27, 1993. The Citizens agree with and adopt the Preliminary Statement as set forth in GTEFL's Initial Brief, except insofar as that statement implies the Commission orders in any way lack legal foundation, depart from the essential requirements of law, or lack competent and substantial evidentiary support. The Commission's orders fall safely within the range of discretion afforded an administrative agency to do its work, and do not require revision by this Court.

The Citizens adopt all major abbreviations utilized by GTEFL, save the term "Citizens" which shall refer to the office of Public Counsel.

STATEMENT OF THE CASE

The Citizens agree with GTEFL's Statement of the Case except to the extent that GTEFL implies that the time spent on the GTEFL case at the agenda conference is probative of any issue before this Court. In addition, the Citizens note that their motion before the Commission for assignment of this case to the full Commission was successfully opposed by GTEFL. (R. 5253) Finally, the Citizens do not agree with GTEFL's factual assertion that an issue before the Commission was whether the Commission should adopt SFAS 106. This disagreement is set forth in argument later in this brief.

SUMMARY OF ARGUMENT

Both Commission orders under appeal are supported by competent and substantial evidence; both comport with essential requirements of law. Consideration of the Commission's oral decision-making process does not change the standard of review to which Commission orders are subject. The body of evidence which supports a Commission order does not expand or contract with Commission discussion thereupon. Commission orders are not tested for competent and substantial agenda discussion: they are tested for competent and substantial evidence.

Each point of the two orders contested by GTEFL is supported by competent and substantial evidence of record.

ARGUMENT

I. STANDARD OF REVIEW

In Citizens of the State of Florida v. Florida Public Service Commission, 464 So. 2d 1194 (Fla. 1985) the supreme court set forth the standard of review it uses for commission orders:

As we have repeatedly stated, we will not reweigh or reevaluate the evidence presented to the commission, but will examine the record only to determine whether the order complained of meets the essential requirements of law and whether the agency had available to it competent substantial evidence to support its findings. See Polk County v. Florida Public Service Commission, 460 So. 2d 370 (Fla. 1984); General Telephone Co. v. Carter, 115 So. 2d 554 (Fla. 1959).

In the recent case Citizens of the State of Florida v. Wilson, 568 So. 2d 1267, 1271 (Fla. 1990), the supreme court continued:

This court's role in reviewing orders of the PSC is "to determine whether the PSC's action comports with the essential requirements of law and is supported by substantial and competent evidence." Pan Am World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983). (further citations omitted)

This Court has consistently declined to reweigh evidence even where to do so might have provided a different result. In Gulf Power Co. v. Florida Public Service

Commission, 453 So. 2d 799, 803 (Fla. 1984), the supreme court held:

We have repeatedly stated the standard of judicial review by which we are guided when we review PSC orders. We will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not reweigh evidence. Our task is to determine whether competent substantial evidence supports a PSC order. Citizens v. Public Service Commission, 435 So. 2d 784 (Fla.1983); Citizens v. Public Service Commission, 425 So. 2d 534 (Fla. 1982) Shevin v. Yarborough, 274 So. 2d 505 (Fla. 1973)

The burden to show the lack of competent and substantial evidence is one which GTEFL concedes it must overcome. GTEFL cites Citizens of the State of Florida v. Beard, 613 So. 2d 403 (Fla. 1993) as authority for the notion that this court can look to the Commission's "oral decision-making process" as part of the appellate record. The Citizens agree. However, nothing in Citizens v. Beard says that the evidence in a case varies with the quality of Commission discussion thereupon. If a Commission order is supported by competent and substantial evidence, Citizens v. Beard does not suggest that this Court must look also to Commission discussions for any measure of adequacy. Even if the Commissioners' discussions showed misunderstanding or mistake, it is the Commission *order* which is under challenge here, not the Commissioner's discussions of it. Citizens v. Beard, in summary, did nothing to change the burden faced by GTEFL: GTEFL must show that the two Commission orders are unsupported by competent and substantial evidence in the record.

As GTEFL notes, this Court has on numerous occasions set forth a definition

of what evidence it regards as competent and substantial. In the Gulf case, supra, the supreme court found significance in the Commission's being presented with conflicting evidence:

The PSC was presented with conflicting evidence. It understood Gulf's proposal, identified its concerns, and gave Gulf every opportunity to explain.... Gulf did not provide an answer that was satisfactory to the PSC.

Gulf Power, 453 So. 2d at 803.

Conflicting evidence was also significant to the supreme court in its test for competent and substantial evidence in Citizens of Florida v. Public Service Commission, 435 So. 2d 784, 787-88 (Fla. 1983):

The record reveals that the Commission was presented with competing testimony on the proper treatment for attrition.

. . . .

The Commission obviously weighed the evidence presented on this issue. We find their decision supported by competent substantial evidence.

In summary, this Court has held "time and again"¹, and has "repeatedly stated"² that it will look to the record to find whether the order of the Commission is

¹ Citizens, 435 So. 2d at 787.

² Citizens, 464 So. 2d at 1194.

supported by competent substantial evidence. It has never held that the oral deliberations of the Commission must measure up to any standard: it is the order of the Commission and its supporting evidence that must be tested, not Commission discussion. Finally, the supreme court has noted that conflicting evidence is to be weighed by the Commission and not by this court, even where this court might disagree with the Commission's result.

II. DISALLOWANCE OF CERTAIN GTEFL DATA SERVICE EXPENSES IS SUPPORTED BY THE RECORD

GTEFL purchases a number of goods and services, including data processing services from affiliated companies. Some of the goods and services are furnished to GTEFL at the actual costs incurred by the affiliate and some are furnished at prices which GTEFL says are market driven. (Tr. 1326) GTEFL obtains data processing services from GTE Data Services (GTEDS). GTEDS is a wholly owned subsidiary of GTE Corporation. (Tr. 860) GTEFL and GTEDS are answerable to the same authority, namely the GTE corporation. (Tr. 1900) The Citizens' witness DeWard and GTEFL witnesses testified on this issue. Mr. DeWard's evidence shows that GTEFL should not be allowed to pass along prices for data processing services to its customers where those prices resulted in excessive profits³ to an affiliate of GTEFL. (Tr. 1327) Mr. DeWard's testimony is that of an expert with years in the field. (Tr. 1305-1308) Mr. DeWard's testimony results from

³ Mr. DeWard's calculation of 24% return on affiliate's stockholder investment is unchallenged.

his concern that common management of GTEFL and of GTEDS can drain off profits to reduce the level of net income to GTEFL. (Tr. 1348).

GTEFL's brief concedes that there was conflicting evidence on the GTEDS issue:

In contrast to the Company's evidence, the Public Counsel presented the testimony of Thomas C. DeWard, a paid consultant employed by Larkin and Associates.

GTEFL's Initial Brief at 14.

After noting the existence of contrasting evidence, GTEFL immediately invites this court to weigh Mr. DeWard's evidence. As is discussed under *Standard of Review* above, this court need not, and has repeatedly said that it will not, reweigh evidence. Evaluating Mr. DeWard's competence, the thoroughness of his analysis, and the adequacy of his recommendations are matters this Court has historically left to the Commission. Both Commission orders are supported by competent and substantial evidence.

III. DISALLOWANCE OF CERTAIN GTEFL SUPPLY EXPENSES IS SUPPORTED BY THE RECORD

As with GTEDS, GTEFL obtains services from its sister affiliate. (TR. 863) In this instance, GTE Supply procures supplies on behalf of GTEFL as its agent, as well as actually selling certain material and supplies to GTEFL. The Citizens' witness DeWard supported the same treatment for this expense as with GTEDS, namely, to allow GTEFL to recover GTE Supply costs as if they were billed at GTE Supply's costs. This would have

resulted in a reduction to expense of \$148,437. (Tr. 1329) The Commission disallowed \$73,982 instead of the \$148,437 recommended by Mr. DeWard. (Initial order, at 160) It is important to note that the evidence of Mr. DeWard was not accepted entirely by the Commission. The Commission was persuaded that an incentive was appropriate in GTEFL's dealing with GTE Supply, even in the face of the potential abuse occasioned by affiliated transactions. (Tr. 1327) Commission action on the issue shows a balancing of the positions taken by GTEFL and of that taken by the Citizens. The Commission properly weighed the competent and substantial evidence before it and resolved the matter to its satisfaction. The supreme court need not revisit the evidence presented by either side.

IV. COMMISSION TREATMENT OF THE SFAS 106 ISSUE IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE OF RECORD

The Citizens disagree with the Statement of Facts offered by GTEFL in its brief. The issue in this case was not whether the Commission should *adopt* Statement of Financial Accounting Standards 106. (SFAS 106) The Commission was asked by GTE to allow as operating expenses those which SFAS 106 requires it to report for external financial reporting purposes. Whether costs *were* incurred is the business of SFAS 106. Whether they *ought to have been* incurred is a matter for the judgement of the Commission. (Tr. 1636, 1640)

Although the initial Commission order purports to utilize SFAS 106 for ratemaking purposes, (Order at 77, app. 0167) the Commission enters a specific finding

relevant here:

As noted above, we have reviewed GTEFL's calculations of FAS 106 costs and the assumptions behind such calculations. Other than our adjustments to the discount rate *and the deferral of a portion of the FAS 106 costs until 1994*, the latter of which is discussed infra, we find that the FAS 106 costs are properly included for ratemaking purposes. (italics added)

Initial order at 80.

Thus it is not true that the Commission found \$21,000,000 properly included for ratemaking purposes: it found the requested amount, less the deferred amount proper.

GTEFL's filing supported full application of SFAS 106 to ratemaking. To the contrary, Citizens' witness favored a continuation of booking such expenses when they occurred. Had the Commission followed the recommendation of the Citizens' witness, the entire \$21,000,000 would have been disallowed. (Tr. 1633) The Citizens' evidence on the SFAS 106 expense is expressed in Witness Montanaro, whose testimony is to be found in the record beginning on page 1632. Witness Montanaro stressed the uncertainty of the expense and the opportunity of GTEFL to control and perhaps reduce the expense after the test year. (Tr. 1637-1639)

The record, and particularly the evidence furnished by Witness Montanaro, would support a disallowance of the entire \$21,000,000. Although the Citizens still believe their evidence more persuasive than that offered by GTEFL, they concede that the

record supports the decision the Commission reached.

GTEFL's criticism of the disposition of the \$10,000,000 deferred by the Commission must be considered in this light: there is competent and substantial evidence in the record which would have supported its total disallowance. That the Commission chose to allow the Company to amortize this deferred sum is supported by the same evidence which would have supported its disallowance.

There was conflicting, competent and substantial evidence with respect to the proper treatment of SFAS 106 expenses. The Commission weighed the evidence and considered competing interests. It fashioned an appropriate balance between GTEFL and the customers' interests. In so doing, the Commission was well within its discretion.

V. REMOVAL OF A NON-UTILITY SUBSIDIARY ENTIRELY FROM EQUITY INVESTMENT IS REASONABLE, WITHIN COMMISSION DISCRETION, AND CONSISTENT WITH PAST COMMISSION PRACTICE

GTECC is a wholly owned subsidiary of GTEFL; GTECC offers a variety of services which are not regulated by the Commission⁴. (Initial brief at 40) The Commission orders remove the GTECC investment from the equity portion of GTEFL's capital structure. (Initial order at 34; Reconsideration order at 18) This accounting treatment was recommended by Citizens' witness DeWard. (Tr. 1313) The reasons for

⁴ Generally speaking, GTECC is in the business of installing, and maintaining, inside wiring and customer premises equipment.

the adjustment were elicited by Commission staff counsel from Citizens' witness Cicchetti:

By Mr. Hatch:

Q If a regulated local exchange company makes an investment in an unregulated inside wire or CPE business, is it your opinion that their business risk has been increased?

Witness Cicchetti

A Generally speaking, yes, if that line of business has higher business risks.

Q Would it be your opinion that ratepayers should only pay for the cost of regulated local exchange services, not for the unregulated operations?

A Yes.

(Tr. 658)

In urging error on this point, GTEFL does not offer evidence in this record which refutes Mr. DeWard or Mr. Cicchetti's testimony. Mr. Hanley, GTEFL's cost of capital and capital structure witness, (Tr. 499) was given ample opportunity to address this area, but said nothing inconsistent with the evidence provided by Witnesses DeWard and Cicchetti. (Tr. 562-571)

GTEFL also suggests that the Commission's decision with respect to this issue is inconsistent with its treatment of parent debt rule. However, no evidence in the record suggests that similar treatment is required because no evidence suggests that the issues are similar.

GTEFL also suggests that treatment of the issue in the instant case is inconsistent with the Commission decision in In re: Application of United Telephone Company of Florida, 92 F.P.S.C. 7:555 (1992). Were this court to so find, it should first look to the record for some suggestion that the evidentiary basis upon which the decisions were based are similar if not identical. GTEFL had opportunity to provide record basis for such a similarity, but did not do so.

Confronted with this suggestion of inconsistency, the Commission pointed out the difference between the two cases:

In the instant case, we did not make an equity ratio adjustment for the purpose of reducing the equity ration to 54.9% as proposed by OPC witness Cicchetti. We did, however, remove non-regulated investments 100% from equity. In the UTF proceeding, because the equity ratio adjustment was in excess of the amount of the nonregulated investment which could have been removed from equity, the nonregulated investments from equity adjustment was unnecessary.

Reconsideration order at 17.

GTEFL's reliance on Southern Bell Telephone and Telephone Company v. Florida Public Service Commission, 443 So. 2d 92 (Fla. 1983) is misplaced. While the case does reject arbitrary or haphazard application of Commission discretion (Bell at 96) it also found the Commission's disallowance of charitable contributions to be supported by the record under review. In short, the decision which gave rise to apparent inconsistency was approved by the supreme court in the Bell case because it was

supported by evidence of record.

Finally, GTEFL erroneously declares the Commission decision inconsistent with established precedent. Only the United order (discussed above) is offered by GTEFL to show "Established Commission precedent"⁵. Other Commission orders show that the Commission has consistently removed investment in nonutility enterprises 100% from equity. See In re: Application of Gulf Power Co., 90 F.P.S.C. 10:195, 215 (1990); In re: Application of City Gas Co., 91 F.P.S.C. 1:395, 414 (1991).

The Commission's treatment of GTEFL's nonregulated subsidiary is supported by competent and substantial evidence of record and is consistent with its own established precedent.

⁵ GTEFL's Initial Brief at 44.

CONCLUSION

This court should affirm the Commission orders under challenge because they are supported by competent and substantial evidence of record and comport with the essential requirements of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery (denoted with an asterisk) to the following parties on this 23rd day of September, 1993.

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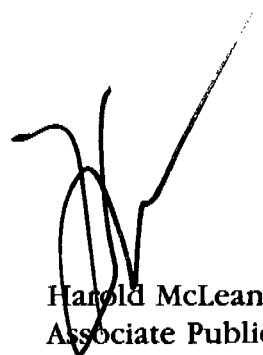
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