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IN THE SUPREME COURT OF FLORIDA

GTE FLORIDA INCORPORATED,	CASE NO. 82,003
	FPSC DOCKET NO. 920188-TL
Appellant,	FPSC DOCKET NO. 920939-TL
v.	FILED: OCTOBER 18, 1993
J. TERRY DEASON, ETC., ET AL.,	
Appellee.	

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

REPLY BRIEF OF APPELLANT GTE FLORIDA INCORPORATED

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I. PRELIMINARY STATEMENT

This reply brief will be confined to the major defenses raised in the respective answer briefs of the Appellees. The fact that an issue or argument advanced by the Appellees is not specifically addressed herein should not be construed as an acquiescence by GTEFL to that particular point. Rather, it indicates that the point was adequately addressed in the Company's initial brief and no further response is necessary. The abbreviations delineated in the initial brief will be used herein. References to the Commission's and Public Counsel's answer briefs are cited as "FPSC Brief at __" and "PC Brief at __", respectively.

II. SUMMARY OF ARGUMENT

The tactics used in the answer briefs of the Commission and the Public Counsel confirm the merits of GTEFL's arguments on appeal. The Appellees rarely address the specific points raised by GTEFL in its initial brief. There, GTEFL made very specific assertions showing that the Commission's order was not supported by the evidence and that its decision was arbitrary and capricious. These arguments were tied to the record or the lack thereof, as the case may be. The Appellees have declined to respond to these arguments. Rather, the answer briefs merely recite general legal principles without applying those principles to the facts of this case or the actual reasons stated by the Commissioners for making specific decisions. Thus, the answer briefs avoid directly confronting the arguments contained in GTEFL's initial brief.

The briefs of the Appellees do nothing more than state in numerous different ways that the Commission has broad discretion in setting rates. GTEFL never disputed the Commission's discretion in its initial brief. The point is that this discretion must be prudently and lawfully exercised. To avoid being arbitrary and capricious, administrative action must be based on the evidence of record and supported by appropriate rationale. The Commission's orders fail this test; the briefs of the Appellees have done nothing to weaken this conclusion.

III. ARGUMENT

A. THE AGENDA CONFERENCE TRANSCRIPTS ARE DIRECTLY RELEVANT TO ASSESSING THE COMMISSION'S ACTIONS.

The record on appeal includes the transcripts of the Agenda Conferences which contain the oral decision in this case. In an attempt to avoid the Commissioners' statements recorded in the transcripts, the Commission claims that GTEFL is attempting to make that oral decision making process the subject of review. FPSC Brief at 5. The Commission asks the Court to ignore these transcripts in their entirety. It suggests that consideration of the transcripts could produce negative ramifications ranging from a chilling effect on the Commission's decision making process to putting the mental impressions of the Commissioners at issue.[1]

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[1] GTEFL is especially confused as to how the agenda conference transcripts can have a chilling effect when the Commission is required to make its decisions in the Sunshine. Section 286.011 Fla. Stat. (1991). Moreover, mental impressions are not at issue; the record contains only the actual statements made by the Commissioners.

FPSC Brief at 5-6 and PC Brief at 5.

The Commission's argument does not work in any respect. The Commission's "parade of horribles" cannot draw attention from the fundamental principle that the purpose of judicial review is to ascertain whether the decision is appropriately reasoned and based on the evidence. What better test can there be than the actual words spoken by the Commissioners?

GTEFL included transcript quotations in its initial brief to show, among other things, that the Commission's decision on the GTEDS issue was arbitrary and capricious. These quotations demonstrate that the Commission never articulated any reason for the difference in treatment between the GTE Supply adjustment (where an incentive was allowed) and the GTEDS issue (where no incentive was allowed):

> COMMISSIONER CLARK: Explain to me--just explain to me what the difference--the argument between what we did with GTEDS and GTE Supply.
>
> MS. JOHE: The decision the Commission made on GTE's Supply was to split the excess profit, which excess profit is defined as any profit above 11.25 that sets GTE's rates.
>
> . . . . . .
>
> COMMISSIONER CLARK: And what was the rationale for not doing that with GTEDS? I remember these discussions, but I don't remember the particulars of them.
>
> MR. DAVIS: There was extensive discussion on the Supply issue, but <u>there was very little discussion on the Data Services issue. And I don't believe an actual reason was articulated one way or the other.</u>[2]

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[2] (A. 72-73). Emphasis added. A full quotation of the above discussion is set forth at page 22 of the Company's initial brief.

Although the Commission spends 10 pages positing after-the-fact justifications for the disparate treatment of GTEDS and GTE Supply, it never addresses this language revealing the Commissioners' own thinking on this matter. The Appellees avoid addressing these statements because there is no way to explain them away.

The purpose of this appeal is to determine if the order is based on the evidence of record and whether the order is arbitrary and capricious. The purpose of the appeal is not to see how creative the Commission's attorneys can be in developing various theories as to why the Commission may have made a particular decision. The best proof of this fact is the Commission's own words reflected in the agenda transcripts. Many of the theories cited in the answer brief were never considered by the Commission. The Commission's suggestion that judicial review be had without examining the statements that grounded the decision is improper.

B. GTE DATA SERVICES

1. THE ADJUSTMENT IS NOT SUPPORTED BY COMPETENT EVIDENCE.

At pages 8 through 10 of its answer brief, the Commission purports to explain why its order is supported by the evidence. GTEFL submits the Commission's own arguments demonstrate that the order is not supported by the record. In its search for some scintilla of evidence to support its adjustment, the Commission offers three items: that market-based pricing can be the source of abuse; that Public Counsel witness DeWard believed that GTEDS' return was too high; and that Mr. DeWard suggested that GTEFL's

affiliate relationships be investigated by the Commission. FPSC Brief at 8. None of these arguments can sustain the GTEDS' adjustment.

In regard to the last point, the Commission rejected the request for an affiliate investigation. Order No. PSC-93-0108-FOF-TL at 73, A. at 163. In regard to the other points raised, the record demonstrates that Mr. DeWard did absolutely no analysis. He merely testified as to his own personalized view of the situation without any support for his views. This unsubstantiated opinion of an expert does not rise to the level of competent and substantial evidence necessary to support a decision on appeal. Arkin Construction Co. v. Simpkins, 99 So.2d 557, 561 (Fla. 1957) and Le Fevre v. Bear, 113 So.2d 390, 393 (2d DCA 1959). In short, the Commission's response to the Company's extensive recitation of evidence is to present only theoretical dangers associated with affiliated relationships without showing that they exist in this case.

The Commission states at page 9 of its answer that its GTEDS decision is consistent with the rules of the Federal Communications Commission (FCC) regarding when market-based pricing of affiliates' services can be used. The Commission remarks that the FCC requires affiliate transactions to be priced at cost where "substantially all" of a firm's services are provided to affiliates. The Commission's attempt to justify its actions on the basis of the FCC rule fails for two reasons. First, the same FCC rule states that the provision of service to unaffiliated companies makes market-based pricing acceptable for regulatory purposes. Second, GTE pays

market-based prices to affiliates which are included in rates that are subject to the jurisdiction of the FCC. (Tr. 862-863). Thus, the FCC rule does not support the ultimate conclusion drawn by the Commission.

The Commission then argues that because GTEDS has a return of 24% and affiliated sales of 90%, the Commission was justified in making its adjustment. This argument ignores the comparable GTE Supply statistics showing the same 24% return and nonaffiliated sales of 85%. (Tr. 1891). The Commission made no attempt to distinguish between these very similar set of facts. In the absence of any such effort or any other logic to support the GTEDS' adjustment, it must be deemed arbitrary and capricious.

Finally, it is significant that all the "evidence" offered at page 10 of the Commission's answer brief to support the GTEDS adjustment does not even pertain to GTEDS. Instead, it relates solely to GTE Supply, the affiliate that received the incentive. This further underscores the weakness of the Commission's position on this matter.

2. THE CITED AUTHORITIES DO NOT SUPPORT THE COMMISSION'S POSITION.

The Commission attempts to contest GTEFL's assertion that the Commission did not cite appropriate authority in support of the GTEDS adjustment at page 10 of its answer. This attempt includes such statements as: "It is true that in these cases the Commission did not specifically apply an interstate rate return [sic] on investment to reduce GTEFL's and United's affiliate transactions to

cost" and the admission that the citations in the order were not to similar GTEDS-type adjustments but to the fact that GTEFL was put on notice as to the higher degree of scrutiny that would apply to affiliate transactions. FPSC Brief at 11, 14. GTEFL respectfully directs the Court to pages 12 through 16 and 23 through 27 of its initial brief, where it shows in detail how it has satisfied the established higher burden of proof associated with affiliate transactions. Those portions of the Company's initial brief are especially probative since the Commission has now agreed in its answer that the standard of scrutiny set forth in its 1981 order for GTEFL is the applicable standard to use in this case. FPSC Brief at 11, 14. GTEFL's point on appeal is that the Commission ignored the evidence the Company submitted to satisfy this 1981 standard and instead created a new standard without notice.

The Commission's citation of General Tel. Co. of Upstate New York, Inc. v. Lundy, 218 N.E.2d 274, 64 PUR 3d 302, 306 (N.Y. 1966), is inappropriate. There the issue was whether the New York Commission even had authority to investigate affiliate pricing in the first instance. No such question was presented in the matter at bar. Another key difference is that the New York Commission -- unlike the Florida Commission in this case -- did an investigation to support its finding. Again, general statements of law without any attempt to tie them to the facts of the instant case are insufficient to save the Commission's orders from being reversed on appeal.

3. THE GTEDS AND GTE SUPPLY ADJUSTMENTS ARE UNACCEPTABLY INCONSISTENT IN THE ABSENCE OF ANY RATIONALE TO SUPPORT DISPARATE TREATMENT.

At pages 13 through 15 of its answer the Commission attempts to explain why it did not make the same adjustment for GTEDS as it did for GTE Supply. That discussion, however, totally ignores the key fact that the Commissioners and their Staff indicated on the record that they did not consider whether there was a difference between GTEDS and GTE Supply when the adjustment was made.[3] These statements constitute a prima facie admission that the GTEDS adjustment is arbitrary and capricious. The Commission's decision must be supported by some articulated logic to avoid a holding that it is arbitrary and capricious. The Commission has not and cannot make this showing. For example, the Commission never explained why GTE Supply got an incentive when it had outside sales of 15% and GTEDS did not when it had 10% in outside sales coupled with significant ongoing growth. The Commission attorneys creative arguments about what "might have been" cannot justify this illogical result. The Commission completely failed to respond to the Company's argument on this point.

4. THE COMMISSION'S DECISION CREATES A NEW AFFILIATE POLICY.

The Commission's explanation at pages 15 through 16 of its answer as to why it has not created a new affiliate policy is empty rhetoric. The Commission has agreed that the appropriate standard

[3] GTEFL fully explained the Commission's action on this point in Section III A, supra.

to use is that set forth in the 1981 GTEFL rate order. FPSC Brief at 14. GTEFL made the showing required under the 1981 order but it was ignored by the Commission in lieu of an unreasonable percentage approach. The Commission failed to consider the evidence and studies that the Company produced pursuant to the standard stated for affiliate adjustments in the 1981 order. The result is the implementation of a new policy.

5. THE GTE SUPPLY ADJUSTMENT IS NOT SUPPORTED BY COMPETENT EVIDENCE.

GTEFL stands on the argument presented in its initial brief from pages 29 through 31. However, the Company is compelled to specifically respond to the Commission's statement that GTEFL is seeking the Court to substitute its opinion for that of the Commission. FPSC Brief at 19. The Company is not asking the Court to substitute its judgment for that of the Commission. The Commission appears to believe that any attempt to ascertain whether there is evidence to support a decision is synonymous with reweighing the evidence. It is not.

C. STATEMENT OF FINANCIAL ACCOUNTING STANDARD 106

1. THE ADJUSTMENT IS NOT BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE.

GTEFL stands by the arguments contained in its initial brief on this issue. Initial Brief at 31-40. In this section of its reply, GTEFL will draw attention only to the most significant factual errors made by the Commission.

On page 21 of its answer brief, the Commission repeatedly states that "It will no longer have to pay the costs associated with the phase-out of SPF and DEM." The Commission goes on to insinuate that this situation will give GTEFL an additional $19.7 million per year. This statement is incorrect. The correct statement is that the SPF and DEM costs will not increase in amount after 1993. (Tr. 902, 926). The full amount of the $19.7 million already transferred will still be experienced by the Company.

The fundamental flaw in the Commission's argument is that it ignores the state of the evidentiary record. The record is so deficient that at page 21 of its answer the Commission is forced to rely on Mr. DeWard having "assumed" revenues in 1993 and 1994 would be the same. There is no evidence in the record to support the assumption. The Commission further states at page 21 that the evidence showed that there would not be any significant changes during 1994. When GTEFL witness Johnson stated that he was not aware of any other changes that would occur in 1994, it was the declining earnings position established by the attrition study that he was referring to. He was not aware of anything that would cause earnings to improve. As demonstrated in the Company's initial brief there is no evidence in the record to show what GTEFL's financial condition would be in 1994 except the GTEFL attrition study showing declining earnings. Initial Brief at 33-34.

The Commission's attempt to ignore the attrition study is without merit. This evidence was placed into the record by the Company as a part of its direct filing and was never disputed by any party of record. An attrition study shows what a company's

earnings will be in future periods. As noted, this study shows declining earnings in 1994 for GTEFL. Moreover, contrary to the Commission's statement at page 22 of its brief, GTEFL did rely on its attrition study to verify the revenue requirement in the case. (Tr. 775). Mr. Johnson, GTEFL's accounting witness, even went so far as to directly reference the attrition study in his summary of his direct testimony when he took the stand. (Tr. 799-800).

Finally, the Commission's attempted distinction between this case and the United case is without merit. Application for a Rate Increase by United Tel. Co. of Fla., 92 F.P.S.C. 7:555 (1992). The Commission states that the SFAS 106 adjustment for GTEFL was the same as the one made in the United case. GTEFL agrees that the mechanics of the adjustment are the same. However, as in other areas of its brief, the Commission is only espousing general principles without trying to apply them to the facts of this appeal. In United, the Commission had complete financial information to support its decision regarding United's 1994 earnings, including the Company's budget. Based on an analysis of that data an adjustment was made. In stark contrast, the Commission merely "assumed" that GTEFL's revenues, expenses and rate base would be the same to reach its conclusion regarding 1994 earnings in the GTEFL case. The Commission's reliance on the United case is thus inappropriate.

2. THE COMMISSION DECISION IS NOT CONSISTENT WITH THE CASE LAW.

Contrary to the Commission assertion on page 24 of its answer brief, the Company is not alleging that the test year concept is

sacrosanct. Rather, GTEFL has pointed out that any modification to the test year must be done in a rational manner. Furthermore, the Commission's reliance on the cases cited in its brief is misguided. The Commission relies on Florida Bridge Company v. Bevis, 363 So.2d 799, 801 (Fla. 1978), for the proposition that the Commission could amortize legal fees over 5 years when the test year expense was extraordinarily high. But in GTEFL's case, the issue before the Court is not whether the SFAS 106 costs are too high. The issue is whether there was any evidence in the record to support what 1994 earnings would be to offset these costs. The Commission's statement that "there is no essential difference in this type of deferral [Florida Bridge] and the deferral of FAS 106 cost in GTE's rate case" is incorrect. Florida Bridge did not involve any determination of what the company's earnings would be in a period beyond the test year. It only looked at normalizing an extraordinarily high expense incurred during the test year.

Likewise, the Commission attempted distinction of Broward County Traffic Assoc. v. Mayo, 340 So.2d 1152 (Fla. 1977) is also unsuccessful. The Commission has committed the same violation prohibited by the Broward County. Specifically, the Commission has made an adjustment based on general economic conditions and undocumented conclusions.

The remainder of the Commission's citations fall within the category of citing general propositions of law without tying them to the facts of this case. FPSC Brief at 26. Thus, they do not merit a further response.

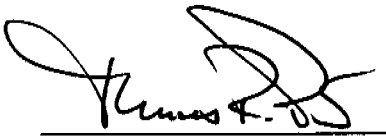
D. THE COMMISSION'S REMOVAL OF GTECC ENTIRELY FROM EQUITY IS ARBITRARY AND CAPRICIOUS.

The Commission's argument in this section of its brief misses the point GTEFL made in its initial brief. GTEFL's point was that the Commission had engaged in arbitrary and capricious conduct because it was not treating matters pertaining to the capital structure in a consistent manner. Cash flows within a capital structure are the same regardless of whether they represent nonregulated investment or tax deductions. As such, if there is going to be a different treatment the Commission must state a rational basis for that difference in treatment. No such reason was given in the order. As such, this adjustment is arbitrary and capricious.

VI. CONCLUSION

The answer briefs of the Appellees fail to address the arguments advanced by GTEFL in its initial brief. The Commission's orders ignore the competent and substantial evidence of record and are arbitrary and capricious, in departure from essential requirements of law.

GTEFL renews its request that this Court reverse and remand the orders of the Public Service Commission as they pertain to the issues on appeal, with instructions to enter amendatory orders authorizing an additional $18,600,000 in expenses for ratemaking purposes and rate recovery.



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Dated: October 18, 1993

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of GTE Florida Incorporated's Reply Brief in Case No. 82,003 (FPSC Docket Nos. 920188-TL and 920939-TL) has been hand-delivered this the 18th day of October, 1993, to the following:

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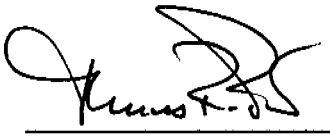

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