IN THE SUPREME COURT OF FLORIDA

GTE FLORIDA INCORPORATED Appellant, vs. SUSAN F. CLARK, etc., et al., Appellees.	)	CASE NO. 85,776

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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Appellee, the Florida Public Service Commission, will be referred to in this Brief as "the Commission". Appellee, the Office of Public Counsel, will be referred to as "Public Counsel". Appellant, GTE Florida, Inc., will be referred to as "GTE" or "the Company". Commission Order No. PSC-95-0512-FOF-TL dated April 26, 1995, will be referred to as the "Remand Order". Order No. PSC-93-0108-FOF-TL, dated January 21, 1993, the subject of appeal in GTE Florida, Incorporated v. Deason, 642 So. 2d 545 (Fla. 1994), will be referred to as the Commission's "Rate Order".

References to the record on appeal will be designated "R. __". GTE's Initial Brief will be referenced "Brief at __".

STATEMENT OF THE CASE AND FACTS

The Commission accepts GTE's Statement of the Case and Facts as generally adequate to inform the Court of the nature and course of these proceedings. As is set out in the Argument section of this brief, however, the Commission disputes as argumentative those portions of GTE's statement of facts aimed at advancing its theory that only the failure to request a stay may be considered as grounds for the prospective recovery allowed by the Remand Order.

SUMMARY OF THE ARGUMENT

The rates set by the Commission in GTE's last rate case were permanent rates to be charged on a prospective basis. Those rates were implemented by the Commission's Rate Order and were not automatically stayed by GTE's filing a notice of appeal. To prevent the approved rates from going into effect unconditionally, it was necessary for GTE to seek a stay of the Commission's order and post a sufficient bond or corporate undertaking to guarantee a refund pending the outcome of this appeal. GTE had a right to obtain that stay under the Commission's Rule 25-22.061(1)(a), Florida Administrative Code. GTE's failure to seek a stay and the protection that it afforded was a knowing waiver of its rights. This Court should not entertain an appeal based on a claimed injury of the appellant's own making. Current ratepayers should not be made to bear the result of GTE's choice. Ratepayers are entitled to know what rates they will be charged on a going-forward basis and not be saddled with recovery of past expenses.

GTE cannot invoke the equitable remedy of restitution to overcome the Commission's holding in this case. The Commission has no judicial power to grant the equitable remedy of restitution. Even if restitution were applied, GTE's voluntary waiver of a stay would defeat the claim on its face. Moreover, the facts of the case would not support a claim for restitution, even if the doctrine were applied. GTE has made no plausible case for unjust enrichment nor advanced any other theory which would support a claim for restitution.

The ratemaking principle which requires the imposition of a stay to protect the interest of a party challenging the Commission's rate decrease order is the prohibition against retroactive ratemaking. The Commission only has authority under its ratemaking statutes and this Court's interpretation of those statutes to set rates on a prospective basis. It can only make retrospective adjustments to rates where it has established those rates as conditional. In this case, GTE's permanent rate decrease could have only been made conditional by the imposition of a stay of the Commission's Rate Order.

The application of the principles of restitution to ratemaking would effectively render the process chaotic. Utilities such as GTE would be able to raise such claims any time they found a basis to request a rate increase.

The Commission's remand order allowing recovery of GTE's affiliate expenses on a prospective basis only is a fair result to the Company and entirely consistent with the law. The Commission's remand order should be affirmed.

ARGUMENT

I. THE COMMISSION WAS CORRECT IN ITS DECISION THAT GTE'S FAILURE TO SEEK A STAY OF THE COMMISSION'S ORDER PROHIBITED RETROACTIVE RECOVERY OF AFFILIATE EXPENSES DURING THE PENDENCY OF APPEAL AND REMAND PROCEEDINGS.

To force a basis for its arguments, GTE several times in its Brief states that the only reason the Commission disallowed recovery of affiliate expenses during the pendency of the appeal was the Company's failure to seek a stay. In a superficial sense, that is correct. The Remand Order states: "GTEFL's failure to ask for a stay pending its appeal shall preclude any recovery for the expenses not recovered during the pendency of the appeal and implementation of the mandate." R. 380.

GTE would have the Court believe that the Commission's holding is "of no legal import" and provided no basis to deny recovery of the disallowed expenses back to the beginning of the appeal. Thus, GTE would have the Court consider the equitable remedy of restitution and general principles of supersedeas, but not the consequences of the Company's choice not to seek a stay. It would also lead the court away from the fundamental ratemaking law in which those consequences are founded. The Court should decline to accompany GTE on this detour.

A. GTE waived the protection that a stay would have afforded.

The Commission has recognized that its rate orders may be subject to appeal. It has thus adopted a specific rule intended to protect both the interests of the utility and its ratepayers. That rule is Rule 25-22.061, Florida Administrative Code, - Stay Pending

Judicial Review; Vacation of Stay Pending Judicial Review. As is applicable to the Commission's order decreasing GTE's rates in this case, the rule provides in section (1)(a):

> When the order being appealed involves the refund of monies to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

The rule allows a utility to go on charging its old rates, or hold the refund money, pending judicial review. The utility must post a bond to guarantee that the revenues for any required refund will be available at the end of the appeal.

There is no argument that GTE was entitled as a matter of right to obtain a stay of the Commission's order during the pendency of the appeal. All it had to do was ask and post an appropriate bond or corporate undertaking.

If GTE had asked for a stay, there would have then been no need for this appeal of this Commission Remand Order. GTE could have continued to collect the revenues associated with the rate decrease pending the resolution of the appeal. The Company's interests would have been protected, since it would have been entitled to keep the collected revenues if the Commission's order was reversed on appeal. The ratepayers' interests would have similarly been protected, since they would have been assured that the Company had sufficient funds set aside to provide for refunds or credits if the Commission's decrease order were upheld.

Only GTE knows why it did not take advantage of this rule. What is known is that GTE can be presumed to have been aware of this long standing Commission rule and either made a choice not to seek a stay or neglected to do so. In either case, GTE must be responsible for its own actions.

The simple fact is that, by failing to seek a stay, GTE waived any right to the protection a stay would have afforded. At the point it took an appeal of the Commission's rate order, GTE decided which rates it wanted to implement. The Company's ratepayers were entitled to rely on that decision and to consider it as establishing an appropriate level of charges for telephone service. The Commission correctly concluded in its Remand Order that it would be unfair for current ratepayers to retroactively pay for GTE's choice not to protect its financial interest during the pendency of the appeal. Having chosen to waive its right to a stay of the Commission's rate order, GTE should not be heard to complain to this Court. See, Citizens v. Wilson, 571 So. 2d 1300 (Fla. 1991). (Public Counsel waived right to contest recovery of conservation costs from firm customers where he was aware of issues and made no objection to recovery).

B. The equitable remedy of restitution cannot apply in this case.

Through its discussion of the Court's observations in Village of North Palm Beach v. Mason, 188 So. 2d 778 (Fla. 1966) GTE would have this Court make the jump from statutory ratemaking to the equitable remedy of restitution. Mann v. Thompson, 118 So. 2d 112 (Fla. 1st DCA 1960). That is a long and perilous leap.

The Commission, as a creature of statute, can only act consistent with its grant of legislative authority. Deltona Corporation v. Mayo, 342 So. 2d 510 (Fla. 1977). Notwithstanding the Court's use of the term "equitable" in the Village of North Palm Beach and the reference to "equity and fairness" in the Remand Order, the Commission has no inherent equity powers to authorize GTE to collect "restitution" from its ratepayers. See, Federal Power Commission v. Hope Natural Gas, 320 U. S. 591, 64 S. Ct. 281, 88 L. Ed 333 (1944) (Federal Power Commission, as agency governed by Natural Gas Act, had no power to make reparation orders addressing past rates, but could only set rates prospectively). The power to do equity resides fundamentally in the courts and is not within the province of administrative agencies to exercise. Biltmore Construction Co. v. Florida Department of General Services, 363 So. 2d 851 (Fla. 1st DCA 1978); See also, Canney v. Board of Public Instruction of Alachua County, 278 So. 2d 260 (Fla. 1973) (As a rule administrative agencies have no general judicial powers notwithstanding that they may perform some quasi-judicial duties, and the Legislature may not authorize officers or bodies to exercise powers which are essentially judicial in their nature). (Citation omitted). The Public Service Commission is not a "judicial tribunal". Myers v. Hawkins, 362 So. 2d 926 (Fla. 1978).

Even if it were otherwise applicable, the law of restitution which GTE attempts to invoke in support of its cause would not allow recovery in these circumstances. As this Court noted in

Ronette Communications Corp. v. Lopez, 475 So. 2d 1360 (Fla. 5th DCA 1985):

> The majority rule is that if a defendant who has suffered the entry of an adverse money judgment against him voluntarily pays the judgment, the case is moot, but if the payment is involuntary, it does not result in a waiver of the right to appeal. (Citations omitted).

GTE effectively stands in the shoes of a defendant who has voluntarily paid an adverse judgment and seeks to appeal. GTE voluntarily chose to give up the revenues during appeal just as surely as a defendant voluntarily pays a judgment. In either case, retention of the money is foregone and there is no basis for complaint on appeal. The Commission did not force GTE to make the decision it did; the Company did so voluntarily.

The Commission agrees with the conclusion that failure to seek a stay or supersedeas does not necessarily preclude a party from seeking an appeal. However, what may be challenged on appeal and the remedy that may be sought is another matter. As this Court noted in Ronette, even where a judgment is paid involuntarily, an appeal is risky business where the choice was made not to post a bond. If the appellant is successful, there is no guarantee that the money can be obtained from the appellee in the future. Id. at 1361.

GTE bases its theory of restitution on principles of unjust enrichment. Brief at 18. That is a recognized basis for invocation of the equitable remedy, even a prerequisite. 66 Am. Jur. 2d, Restitution and Implied Contracts, Sec. 6, p. 946 (1973). However, it is difficult, to say the least, to see how GTE can

unequivocally say its ratepayers have been unjustly enriched in this case. In the first place, GTE willingly forwent collection of the affiliate expenses during pendency of the appeal and remand proceedings. Whatever benefit the ratepayers may have gotten was voluntarily given. Benefits voluntarily bestowed, however, cannot form the basis for a claim of restitution based on unjust enrichment. Id. at Sec. 5, Necessity of request; benefits voluntarily or officiously conferred. Challenge Air Transport, Inc. v. Transportes Aereos Nacionales, S.A., 520 So. 2d 323 (Fla. 3rd DCA 1988). Equity would not require GTE's ratepayers to pay for a voluntarily provided benefit they were unaware was being bestowed.

Moreover, it must certainly be the case that not all of GTE's current customers were recipients of the "benefit" of the foregone affiliate expenses. Those who have been added since the effective date of the new rates on remand could not have gotten any benefit; yet GTE would surcharge them for past affiliate expenses.

If GTE would have the Court do equity in this case, then it ought to compare the burden of overcharges previously imposed by GTE on its ratepayers. In its Rate Order, the Commission found that GTE had been overcharging its customers by approximately $13.5 Million, based on a 1991 test year. Even with the affiliate expenses added back, the Court might well determine that the net effect of this is that GTE was unjustly enriched, not its customers.

GTE's arguments do not establish a right to recover from its ratepayers. "Equity and good conscience" will hardly be offended if the ratepayers are allowed to retain the voluntarily bestowed benefit, if there is any, of disallowed affiliate expenses. 118 So. 2d 115.

The Court should also consider that the application of the law of restitution to ratemaking would result in chaos. Ratepayers would be able to demand restitution for past overcharges, even if rates were lawfully in effect; utilities could demand to recoup past losses to make them whole. Ratemaking would become an unmanageable contest among whichever parties felt they were wronged under past charges. There would be little certainty and order in the process. Prospective ratemaking is a logical and fair doctrine which is not weakened by the arguments GTE brings to this Court now.

C. The relief sought by GTE would constitute prohibited retroactive ratemaking.[1]

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[1] Since GTE has taken the tack that the only reason that the Commission denied recovery of expenses during pendency of the appeal, it will doubtless argue that arguments about retroactive ratemaking are unsupported by the Commission's order. It is true that the order does not expressly discuss the applicability of that doctrine. However, it is not true that it played no part in the Commissioners' decision. Commissioners Kiesling and Clark especially felt that the issue of the effective date of the rate adjustment was controlled by the prohibition against retroactive ratemaking. Commissioner Kiesling stated:

> Well, I guess my feeling on it is that when I look at what is a long-running, you know, history of cases involving retroactive ratemaking, it seems -- and, you know, what we have done traditionally, that we ought to follow that until the court tells us differently. And it seems like going back to any other date than now runs afoul of that retroactive ratemaking. R. 355-356.

GTE's focus on the effect of its failure to request a stay and the availability of restitution leads the Court away from a confrontation with the unavoidable legal issue of retroactive ratemaking. This case involves the setting of rates by an administrative agency, not the award of a judgment by a court. As this Court and others have enunciated countless times, ratemaking is prospective in nature, not retroactive. Westwood Lake, Inc. v. Dade County, 264 So. 2d 7 (Fla. 1972). That simple fact has broad implications for this case. Even if GTE may be heard to complain on appeal about a situation of its own making, it cannot so easily sidestep the legal issues underlying the Commission's decision.

In its Remand Order, the Commission noted that

> [h]aving failed to protect its right to receive, on an ongoing basis, the revenues associated with its affiliate transactions, the Company should not be permitted to collect these monies retroactively. R. 378.

The significance of GTE's failure to request a stay is that without it the Commission was unable to capture and preserve jurisdiction over the disposition of the disallowed affiliate

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Chairman Clark echoed that view, stating that " . . . to me, allowing the recovery of a previous expense in future rates is clearly retroactive ratemaking in some circumstances." R. 356. Presumably, that included the issue at hand.

Notwithstanding exactly how the Commission expressed its conclusions on why the affiliate expenses were allowed only on a prospective basis from the date of the remand decision, the law is what it is. The Commission cannot waive the law prohibiting retroactive ratemaking. Even if the Court found that the Commission had relied on the wrong authority for its Remand Order, the Court would be correct in upholding the Commission's decision based on retroactive ratemaking. Saunders v. Saunders, 346 So. 2d 1057 (Fla. 1st DCA 1977) (Trial court's order upheld where result was correct, even though court relied on wrong rule).

expenses. Unless the Commission takes some action to capture funds associated with rate increases or decreases on a going-forward basis, it loses control of the final disposition of these funds. It cannot arbitrarily go back and adjust rates to the beginning of the rate case, or to any other point in the past. See, United Telephone Company v. Mann, 403 So. 2d 962 (Fla. 1981) (Commission had discretion to determine amount of interim rate refund so long as amount did not exceed amount ordered subject to refund at the interim hearing). This is a reflection of the fundamental principle that ratemaking is prospective in nature. The Commission cannot simply set rates at a level which it thinks ought to have been charged in the past. Rates must be set on a going-forward basis to be charged in the future. As this Court noted in City of Miami v. Florida Public Service Commission, 208 So. 2d 249, 260 (Fla. 1968), "the new rates are prospective as of the date they are fixed". In a normal rate setting proceeding such as GTE's rate case, the only way that the Commission can adjust rates retrospectively is to have established the rates as conditional from some point in the past. This is accomplished by making the affected revenues subject to refund guaranteed by bond or corporate undertaking.[2]

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[2]As an example, this procedure is embodied in the telephone interim rate statute, section 364.055, Florida Statutes which requires that interim rate increases or decreases be implemented subject to refund guaranteed by bond or corporate undertaking. The same applies for rates implemented after the expiration of eight months pursuant to section 364.05, Florida Statutes, where the Commission has not established new rates by that time.

The fundamental legal principle embodied in this process is the prohibition against retroactive ratemaking. There have been many formulations of that concept based on specific circumstances. However, retroactive ratemaking basically involves an attempt to set rates on a going-forward basis to recoup past losses or to refund past over-earnings. City of Miami, supra; Citizens v. Florida Public Service Commission, 448 So. 2d 1024 (Fla. 1984); Gulf Power Co. v. Cresse, 410 So. 2d 492 (Fla. 1982). As an illustration, it would be retroactive ratemaking if the Commission failed to establish interim rates subject to refund but nevertheless attempted to make its final rate decision effective during the interim period. See, Friends of the Earth v. Wisconsin Public Service Commission, 254 N.W. 2d 299 (Wisc. 1977) (To retain jurisdiction to make a refund and not violate retroactive ratemaking the commission's interim order must contain a refund condition).

The principle of prospective ratemaking and the prohibition against retroactive ratemaking has other applications. For example, if the Commission determines, based on a utility's surveillance reports, that it is overearning, the Commission must initially take some action to capture those overearnings on a going-forward basis. See, Order No. 22377, 90 F.P.S.C. 1:60, 61 (1990) (Reversed on other, procedural grounds in United Telephone Company v. Beard, 611 So. 2d 1240 (Fla. 1993). This is normally done by requiring the utility to hold money subject to refund pending the outcome of an earnings review. At the end of the

proceeding, the Commission is then able to adjust rates to cover the duration of the overearnings review.

The same prohibition against retroactive ratemaking applies as a result of GTE's failure to request a stay of the Commission's rate decrease order pending appeal. At the point the Commission issued its final order decreasing GTE's rates, those were the lawful permanent rates to be charged thereafter. The effect of GTE's failure to seek a stay of the Commission's order was to leave the Commission without any mechanism to control the future disposition of revenues associated with the rate decrease during the pendency of the appeal and remand proceedings. The Commission could not go back after the appeal was over and retroactively adjust rates back to the beginning of the appeal. To do so would violate the prohibition against retroactive ratemaking. The Commission was put in the position of making an adjustment to existing permanent rates after the remand. That adjustment had to be prospective to be consistent with the Commission's statutory authority[3] and the prohibition against retroactive ratemaking.

The Court should note that the prohibition against retroactive ratemaking is not simply a doctrine of convenience. Regulated utilities have the right to earn a fair rate of return collected through their rates. However, a utility's customers are entitled to be charged only those rates which are lawfully approved and in effect at any given time. Customers have the right to know what rate they will be charged and to adjust their consumption

[3] Sections 364.035; .05; .055 and .14, Florida Statutes.

accordingly. Similarly, a utility has the right to collect its lawfully approved rates until such time as the rates are changed. Surely, GTE would not contend to this Court that the Commission should go back and require the Company to refund overearnings it may have had prior to the initiation of its last rate case.

There is nothing inconsistent with the basic ratemaking principles described above and the Court's holding in Village of North Palm Beach v. Mason relied on by GTE. In that case, this Court found that its decision quashing the Commission's rate order did not render the order void ab initio. As a result, the rate increase granted by the Commission was allowed to stand from the time it was entered through the proceedings on remand. Ordinarily, if the order had been voided through the Court's quashal as the Village argued, the Court could not have allowed the rate increase to be effective back to the time when it was approved. As the Court apparently recognized, this would have been retroactive ratemaking. However, it was not the Court's intention to render the order void by the use of the term "quashed". Instead, the Court meant only that the Commission's findings were deficient in its order even though

> this deficiency was easily corrected by entry of an amendatory or supplemental order upon the same record on which the original order was entered.

188 So. 2d 781. Because the Court did not intend to quash the Commission's order but only point out what amounted to a technical deficiency, it allowed the order to stand from the time it was rendered.

GTE cannot rely on Village of North Palm Beach to support its claimed right to collect revenues during the pendency of appeal and remand. The Court in that case never found that the rates were improper and it did not breathe life into past charges retroactively. No event occurred in Village of North Palm Beach which required the rates to be adjusted as a result of an appeal. Thus, the Court and the Commission were never faced with the question of whether rates could be adjusted retroactively without any provision for retaining control of the associated revenues.

The Commission proceedings cited in footnote 5 of GTE's Brief at page 18 do nothing to lend support to its claims. The Commission's proceedings on nuclear decommission costs involved an adjustment to fund the decommissioning reserves on a going-forward basis though the fuel adjustment mechanism. 83 F.P.S.C. 8: 182 (1983). Decommissioning costs are accrued like depreciation expense which may be adjusted in any case without violating retroactive ratemaking principles. Southern Bell Telephone and Telegraph Co. v. Florida Public Service Commission, 415 So. 2d 1268 (Fla. 1982). This Court has also recognized that periodic review and true up of fluctuating expenses through the fuel adjustment proceedings is permissible. Citizens, supra, 448 So. 2d 1024. The Commission's action in the decommissioning proceedings was certainly not to "authorize a surcharge" equivalent to allowing recovery of previously disallowed expenses, as GTE would have it.

The adjustment in Docket No. 870220-EI, Order No. 18627, 88 F.P.S.C. 1:89, was based on a stipulated rate reduction. Part of

the rate reduction took into account the flow back of $18.5 Million in excess deferred taxes which Florida Power Corporation had collected based on a higher corporate tax rate previously in effect. It was not a matter of past overearnings, but a stipulated adjustment to bring deferred taxes down to a level in line with current income tax rates.

The Commission based its adjustment in Holiday Lakes on its interpretation of the Court's holding in Village of North Palm Beach, specifically, that the Court had not meant to render the order void ab initio. Rather, the Commission concluded that the Court had simply remanded the case back to redetermine the revenue requirement. Thus, the Commission had the authority to correct a finding in its order over which it never truly lost control.

The Commission's allowance of prospective recovery in GTE's case is consistent with its action in similar cases. See, for example, Order No. PSC-94-0738-FOF-WU, 94 F.P.S.C. 6:227 (Disallowed expenses recovered only on a prospective basis from date of Commission's decision on court's remand in Sunshine Utilities of Central Florida v. Florida Public Service Commission, 624 So. 2d 306 (Fla. 1st DCA 1993).

CONCLUSION

The Commission's orders come to this Court clothed with a presumption of correctness. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983). GTE has done nothing to overcome that presumption. It has not shown that the Commission's decision departs from the essential requirements of law or is not supported by competent substantial evidence. Citizens v. Florida Public Service Commission, 464 So. 2d 1194 (Fla. 1985). The Commission's Remand Order should be affirmed.

Respectfully submitted,

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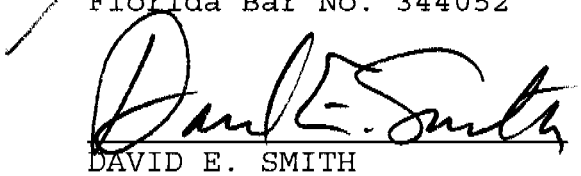

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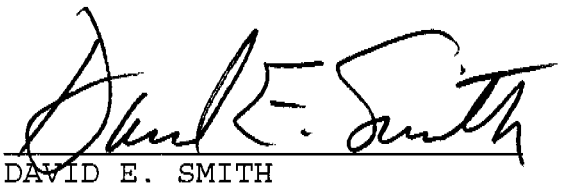
Dated: August 23, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 23rd day of August, 1995 to the following:



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