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SID J. WHITE
AUG 23 1995
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

GTE FLORIDA INCORPORATED,
Appellant,
vs.
SUSAN F. CLARK, etc., et al.
Appellee

Case No. 85,776

On Appeal from an Order of the Florida Public Service Commission

Docket No. 920188-TL

CITIZENS' ANSWER BRIEF

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SUMMARY OF ARGUMENT

GTE Florida, Inc. ("GTE") would have this Court sanction and require the use of retroactive ratemaking for the first time. Retroactive ratemaking would require the Florida Public Service Commission ("Commission") to charge current customers for services rendered in the past whether or not these customers previously received any services from GTE. Prior decisions by this Court prohibit retroactive ratemaking.

GTE's request for relief would have this Court require the Commission to order such an action. GTE seeks to impose a surcharge on current customers to pay for services provided by the company earlier.

The Commission carefully crafted a rule governing stays of Commission orders that protects all parties during an appeal while avoiding the imposition of retroactive rates. GTE failed to seek a stay available under the Commission's rules during GTE's initial appeal to this Court. On remand, the Commission refused to engage in retroactive ratemaking to rectify GTE's failure to seek a stay.

The Commission properly exercised its broad discretion in handling this case on remand from this Court.

ARGUMENT

GTE ignores the fundamental problem that they seek to have this Court sanction retroactive ratemaking for the first time.

GTE asked the Florida Public Service Commission, and now asks this Court, to require a surcharge for up to one year on current customers' bills to pay for services rendered in the past. Under this proposal, a new customer moving into GTE's service territory would be forced to pay for services the customer never received. Case law prohibiting retroactive ratemaking prevents this unjust result.

In instances of both rate increase orders and rate decrease orders issued by the Commission, procedures exist to protect companies and ratepayers during an appeal. These procedures, embodied in rules adopted by the Florida Public Service Commission, protect all parties without engaging in retroactive ratemaking.

In the case of a rate increase order, increased rates subject to refund may be put in place while an appeal is taken. A previous GTE rate case provides an example of this procedure.

In 1976 GTE filed a rate case seeking approximately 71 million dollars per year in higher rates. Ultimately the Commission authorized the Company to increase its rates by about 41 million

dollars per year. FPSC Order No. 7669 issued March 7, 1977. The Public Counsel appealed that order to this Court and prevailed on two issues: (1) the use of a year end rate base instead of an average rate base, and (2) the computation of income tax expense.

On remand, the Commission made changes consistent with the Court's opinion. FPSC Order No. 8331 issued June 2, 1978. These changes reduced GTE's revenues by approximately 8 million dollars per year. The Commission decided that since (1) GTE had been charging higher rates during the pendency of the appeal, and (2) all increases had been collected subject to refund by virtue of a stipulation between GTE and the Public Counsel[1], the Commission ordered a refund of past overcharges and reduced rates on a prospective basis.

In the case of the Commission ordering a rate reduction, the rules to protect all parties and avoid retroactive ratemaking are equally clear. Section 120.68(3)(a), Florida Statutes (1993), states that an agency may grant a stay of its order upon appropriate terms. The Commission implemented this statute in Commission Rule 25-22.061(1)(a), which states:

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[1]An appeal by a public officer such as the Public Counsel acts as an automatic stay until modified by the Commission. Rule 9.310(b)(2), Rules of Appellate Procedure. The agreement between GTE and the Public Counsel allowed the rate increase to go into effect subject to refund during the appeal.

> "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" (underlining added).

GTE should have asked the Commission for a stay of its rate reduction order, in which case the rate reductions would not have been put into effect immediately. Instead, rates would have remained in effect subject to refund pending the final action on appeal. The purpose of a stay is to preserve the status quo and delay execution of a judgment or order. Hirsch v. Hirsch, 309 So.2d 47 (3d D.C.A. 1975).

Had GTE followed this procedure, the Commission would have been in a very different position on remand in this case. The Commission could have ordered a refund for the interim period and determined the appropriate amount of rate reduction to put in place on a prospective basis. All parties, including GTE, would have been protected without the Commission engaging in retroactive ratemaking.

There are several Florida Supreme Court cases setting forth the rule against retroactive ratemaking. In City of Miami vs. Florida Public Service Commission, 208 So.2d 249 (Florida 1968),

the Commission heard rate cases involving Southern Bell and Florida Power and Light Company. In each case the hearing ultimately resulted in a rate reduction. On appeal, the City of Miami contended that the rate reductions should have been made retroactive to the beginning of the case with appropriate refunds to ratepayers.

This Court did not agree. The Court stated that an examination of the pertinent statutes led it to conclude that the Commission would not have authority to make retroactive ratemaking orders. The Court specifically cited section 364.14, Florida Statutes, which states in part that the Commission shall determine the just and reasonable rates to be thereafter observed and enforced. It found that this statute prohibited retroactive rates by the Commission, as requested by the City of Miami.

This Court applied this same rule in the later case of Southern Bell Telephone & Telegraph Company vs. Florida Public Service Commission, 453 So.2d 780 (Florida 1984). This case involved a dispute between GTE and Southern Bell concerning the appropriately representative time period for studying their respective toll traffic. The representative period was used as a basis for withdrawing revenues from a toll settlement pool. A five day study period had been in use, but on January 1, 1981, GTE began to use a seven day study period to determine its share of revenues from the pool. On July 1, 1982, the Commission issued an order

finding the seven day method appropriate and ordered the change of method be made retroactive to January 1, 1981, the date GTE first unilaterally announced its intention to use the seven day study period.

On appeal, this Court found that the Commission's adjudication must be given prospective effect only. To hold otherwise, according to the Court, would violate the principle against retroactive ratemaking. Id. at 784. The Court held that the Commission properly had the power to adjudicate the dispute, but it may not retroactively adjust the distribution of revenues made pursuant to the telephone companies' arrangement prior to the Commission's order.

Other Commission cases show careful adherence to the rule prohibiting retroactive ratemaking. In Gulf Power vs. Cresse, 410 So.2d 492 (Florida 1982), the Commission ordered a rate increase on November 3, 1980, exactly eight months after Gulf Power filed its petition for a rate increase. It initially directed Gulf to file revised rate schedules applicable to bills rendered for meter readings taken on or after November 10, 1980. Later, at its own initiative, the Commission reconsidered its order concerning the effective date for the rate increase. It held that the approved rate increase was to apply to bills based on meter readings taken on or after December 3, 1980 (thirty days after the effective date of the new rates) and ordered Gulf Power to refund approximately

2.2 million dollars resulting from the application of the new rates to bills based on meter readings taken from November 10, through December 3. Gulf Power appealed the decision concerning the refund to the Florida Supreme Court.

The Commission contended that it was following the law regarding prospective ratemaking when it ordered Gulf to bill at the new rates for meter readings taken on or after December 3, 1980. It further told this Court that to permit Gulf to bill at the new rates on the day following the suspension period would result in the billing for energy consumed before the end of the suspension period and before the effective date of the Commission action. The Court agreed with the Commission and upheld both the refund and the new effective date for meter readings.

In another case the Commission was careful to change rates on remand only on a prospective basis. In the Fall of 1984 the Commission recognized that access charges should be reduced to reflect the elimination of gross receipts tax embedded in access charges. Effective January 1, 1985, the Florida legislature repealed that portion of the gross receipts tax assessed on the access charges billed by local exchange companies. Instead, it directed interexchange carriers to collect gross receipts tax on the full amount of their charges to customers. When the Commission reduced access charges by the amount of embedded gross receipts tax, it did that by reducing charges for billing and collection

service -- a service used only by AT&T. MCI appealed that decision, arguing that the Commission acted arbitrarily by reducing rates for a service used only by AT&T. The court agreed with MCI and remanded the decision for further proceedings by the Commission.

On remand, MCI filed a petition asking the Commission to increase the charges for billing and collection service and to reduce the charges for busy hour minutes of capacity. Although MCI parenthetically claimed a right to recoup overpayments previously made as a result of the Commission's original decision, MCI actually asked the Commission to make its changes only on a prospective basis. The Commission's order found it appropriate to make the adjustments effective from the date of the issuance of its order on remand. Commission Order No. 16887 issued November 23, 1986, at page 3. The Commission carefully ensured that its rate adjustment order did not affect rates retroactively.

The Commission's action on remand here avoided the imposition of retroactive rates. This Court should not reverse that action. Upon remand, the lower tribunal has broad discretion. Lucom vs. Potter, 131 So.2d 724 (Florida 1961); Tampa Electric vs. Crosby, 168 So.2d 70 (Florida 1964). The Commission's actions complied with the prohibition against retroactive ratemaking and avoided the inequity of charging present customers for services they may or may not have received in the past.

For these reasons, this Court should affirm the Commission's decision below.

Respectfully submitted,

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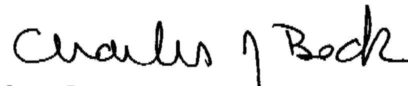

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CERTIFICATE OF SERVICE
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