IN THE SUPREME COURT OF FLORIDA

GTE FLORIDA INCORPORATED,

Appellant,

vs.

SUSAN F. CLARK, etc., et al.,

Appellees.
_____/

Case No. 85,776

On appeal from an order of the
Florida Public Service Commission
Docket No. 920188-TL

INITIAL BRIEF OF APPELLANT GTE FLORIDA INCORPORATED

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PRELIMINARY STATEMENT

In this brief, appellant GTE Florida Incorporated will be referred to as "GTE." Appellee Florida Public Service Commission will be referred to collectively as "the Commission" or the "PSC." Appellee the Office of the Public Counsel will be referred to as "Public Counsel" or "OPC." The Commission's Order Implementing Remand, Order No. 95-0512-FOF-TL, dated April 26, 1995, (95 FPSC 4:397) will be referred to as "the Order."

References to the record on appeal will be indicated as "R. ___." Unless otherwise indicated, each record citation will be to the first page of the relevant document, followed by citation to the specific page within the document on which the referenced material appears. Various materials referenced in this brief are reproduced in the Appendix and are cited as "A. ___."

Many of the background facts of this case appear in this Court's decision on the first appeal in this case. That decision is reported at GTE Florida Inc. v. Deason, 642 So. 2d 545 (Fla. 1994). It is contained in the Appendix at Tab 1 and will be referred to in this brief as A.1. A copy of the Order, a portion of which is challenged on appeal, is included in the Appendix at Tab 8.

All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This is the second appearance of this case before this Court. On GTE's first appeal, this Court reversed the Commission's rate orders which had erroneously denied GTE the full recovery of certain expenses incurred in purchasing services and supplies from two of its affiliates. [A.1]. On remand, the Commission found that GTE was entitled to recover those expenses, but it refused to allow GTE to recover such expenses to the extent they were incurred during the pendency of GTE's successful appeal to this Court and during the Commission's consideration of this issue on remand. [R. 375, 377-79, 380; A.8]. This resulted in approximately $11 million in lost revenues to GTE. [R. 1, 3; R. 128, 135; A.6].

The circumstances giving rise to this appeal are as follows.

GTE filed a rate case petition with the Commission on May 1, 1992. [A.1]. The cost of services and supplies purchased from two of GTE's affiliates, GTE Data Services and GTE Supply, was included as a component of the rates GTE requested. [A.1]. In October, 1992, the Commission conducted five days of hearings on the petition, after the submission of prefiled testimony by GTE, and after Public Counsel and the Commission Staff had conducted extensive discovery on all issues, including GTE's affiliate costs. In re: Application for rate increase by GTE Florida Inc., 93 FPSC 1:491, 499 (1993).

On January 21, 1993, the Commission issued its initial rate order (id.), ruling, among other things, that GTE could not recover the full amount of expenses incurred by GTE in purchasing services and supplies from its affiliates. [A.1]. The disallowed expenses amounted to approximately $4.8 million each year, on a going-forward basis. [R. 375, 377, 380; A.8].

On February 4, 1993, GTE sought reconsideration of several aspects of the Commission's rate order, including the ruling which denied GTE full recovery of those affiliate expenses. [A.1]. On May 27, 1993, the Commission issued an order (In re: Application for rate increase by GTE Florida Inc., 93 FPSC 5:611 (1993)) partially granting reconsideration, but denying modification of its ruling on affiliate expenses. [A.1].

GTE appealed those orders to this Court, specifically challenging the Commission's refusal to allow it to recover its affiliate expenses in full, along with two other aspects of the orders not relevant to this appeal. On July 7, 1994, this Court reversed the Commission's disallowance of affiliate expenses, declaring that:

> We do find . . . that the PSC abused its discretion in its decision to reduce in whole or in part certain costs arising from transactions between GTE and its affiliates, GTE Data Services and GTE Supply. The evidence indicates that GTE's costs were no greater than they would have been had GTE purchased services and supplies elsewhere. The mere fact that a utility is doing business with an affiliate does not mean that unfair or excess profits are being generated, without more . . . . We believe the standard must be whether the transactions exceed the going market rate or are otherwise inherently unfair. . . . The PSC obviously applied a different standard, and we thus must reverse the PSC's determination of this question

GTE Florida Inc. v. Deason, 642 So. 2d 545, 547-48 (Fla. 1994); A.1. The Court then remanded the case to the Commission for "further actions consistent with [its] opinion." [A.1].

In response to the Court's decision, the Commission Staff invited all interested parties to meet on November 3, 1994, and discuss what action the Commission should take upon remand. [R. 375, 377; A.8]. OPC was a full and complete participant in the proceedings on remand, and representatives of both OPC and GTE attended that meeting. [Id.]. GTE

maintained that it should be allowed to recover the affiliate expenses it had been wrongfully denied after the Commission's erroneous rate order was entered on January 21, 1993. OPC opposed GTE's request. [Id.]. The Commission Staff requested GTE to provide legal authority for its request that recovery be allowed from the date of the Commission's erroneous rate orders [Id.], and GTE provided both Staff and OPC with a memorandum of law supporting GTE's position on this issue. [R. 4-38; A.2].

The Commission Staff thereafter issued its recommendation to the Commission, concluding that GTE was entitled to recover its affiliate expenses which had been incurred after the effective date of this Court's decision reversing and remanding the Commission's rate orders. [R. 91-107, 94; A.3]. However, the Staff recommended that the Commission reject GTE's request for recovery of the improperly disallowed expenses which had been incurred during GTE's appeal of those orders to this Court. [R. 91, 93-96; A.3]. It did so solely because GTE had not sought a stay of the orders pending that appeal. [R. 91, 94-96; A.3].

The Staff's recommendation was presented to the Commission at its agenda conference, but the Commission declined to vote on the matter at that time. [R. 275, 276; A.7]. Instead, it asked the parties to submit briefs and present oral argument on their proposals for Commission action upon remand. [Id.]. The Commission specifically asked the parties to address the issue of the proper effective date of any rate increases the Commission should order. [Id.]. GTE and OPC submitted briefs [R. 158-187; A.5; R. 188-220; A.4], and oral argument was subsequently held on this issue. [See R. 221-268; A.6].

As to the proper effective date of the rate increases, OPC asserted that GTE should have asked the Commission for a stay of its rate orders.[1/] [R. 158, 170; A.5; R. 221, 246; A.6]. GTE argued in response that it was entitled to full restitution of the affiliate expenses it had incurred after the Commission erroneously denied GTE recovery of those expenses. [R. 188, 204-214; A.4; R. 221, 234; A.6]. In this regard, GTE maintained that the order on remand necessarily had to "reach back to the effective date of the original order that was reversed." [R. 221, 233-34; A.6]. GTE further asserted that it was not barred from recovering those erroneously disallowed expenses simply because it did not seek a stay of the Commission's orders pending appeal. [R. 188, 212-214; A.4; R. 221, 235; A.6].

The Commission Staff again advised the Commission of Staff's conclusion that GTE was entitled to recover the affiliate expenses incurred after this Court's decision had become final. [R. 275-295; A.7]. However, Staff continued to recommend that GTE not be allowed to recover those expenses that were incurred during the appeal itself, since no stay had been obtained pending the appeal. [R. 275, 281-283; A.7].

On April 26, 1995, the Commission determined that GTE was entitled to recover fully its affiliate expenses from May 3, 1995 forward. [R. 375-381, 377, 379; A.8]. However, the Commission denied GTE recovery of its erroneously disallowed expenses incurred during the period of time of the appeal and of the PSC's proceedings on remand.

[1/] OPC also argued that GTE was asking the PSC to engage in retroactive rate-making. [R. 158, 168-175; A.5; R. 221, 246-48; A.6]. Staff disagreed, citing prior orders in which the Commission had recognized that "[r]ate increases or decreases must be prospective, but the allowance or disallowance of expenses need not be." [R. 275, 278; A.7]. The PSC did not accept OPC's contention, and instead based its denial of GTE's request solely on the absence of any stay pending appeal. [R. 375, 378-379; A.8].

[R. 375, 377-379; A.8]. It denied the requested recovery solely because GTE did not seek to stay the Commission's erroneous rate orders pending the outcome of their appeal to this Court. [R. 375, 377-379, 380; A.8].

The Commission issued its Order on remand on April 26, 1995 [R. 375-381; A.8], over nine months after this Court issued its decision reversing the Commission's earlier rate orders. In that Order on remand, the Commission ruled that GTE, "[h]aving failed to protect its right to receive, on an ongoing basis, the revenues associated with its affiliated transactions" by requesting either a stay or a supersedeas, GTE should not be allowed to recover those revenues for the period that they had been erroneously disallowed. [R. 375, 378; A.8]. Declaring that the issue was one of "equity and fairness," the Commission determined that "GTE[]'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. 375, 379; A.8].

Thus, on the sole basis of the absence of a stay of its erroneous rate orders pending appeal, the Commission held that GTE should only be allowed to recover its affiliate expenses from May 3, 1995 forward. [R. 375, 379; A.8]. GTE was expressly denied recovery of the correct level of affiliate expenses it incurred during the two years and three months that had elapsed during GTE's successful appeal of the Commission's original (but erroneous) rate orders and during the Commission's proceedings on remand. [R. 375, 379, 380; A.8]. These expenses amount to approximately $11 million in lost revenue to GTE.

[R. 1, 3; R. 128, 135; A.6]. It is from this ruling that GTE now appeals to this Court.[2/] [R. 382-393].

[2/] GTE does not dispute the rate design devised by the Commission to allow GTE prospective recovery of the appropriate level of affiliate expenses.

ISSUE PRESENTED FOR REVIEW

Whether the Commission erred in refusing to allow GTE to recover the erroneously disallowed expenses that it incurred in purchasing services and supplies from GTE affiliates during the pendency of GTE's appeal to this Court and during the pendency of the Commission's consideration of this matter on remand.

SUMMARY OF ARGUMENT

Although this Court held on the first appeal of this case that the Commission had erroneously disallowed certain of GTE's affiliate expenses, and although the Commission determined on remand that GTE was entitled to recover those expenses, the Commission nevertheless refused to allow GTE to recover such expenses to the extent they had been incurred while the Commission's erroneous rate orders were being appealed to this Court and while the Commission was subsequently considering the matter on remand. That refusal was based solely on the fact that GTE did not seek a stay of those orders pending their review on appeal.

The Commission's Order on remand is directly contrary to the fundamental principle, consistently recognized by this Court and others, that a party against whom an erroneous judgment has been made is entitled, upon reversal, to have his property restored to him by his adversary. Under this authority, the PSC had a duty to restore to GTE the revenues that it lost as a result of the Commission's erroneous rate orders. The Commission's refusal to do so was manifestly inequitable and improper under this Court's controlling precedent.

In particular, it is clear that GTE cannot be denied recovery of its erroneously disallowed affiliate expenses merely because it did not seek a stay of the Commission's rate orders pending its successful appeal of those orders to this Court. It is settled Florida law that a party's failure to supersede a judgment pending appellate review does not bar the party's right to restitution upon the reversal of the judgment. To the contrary, even in the absence of a stay, reversal of a judgment requires restoration of the status quo as between the parties to the suit in order to avoid the unjust enrichment of one party over another.

Thus, the sole ground upon which the Commission denied GTE recovery of its expenses does not, as a matter of law, preclude GTE from receiving restitution of the approximately $11 million in revenues that it lost during the pendency of its successful appeal of the PSC's disallowance of those expenses and during the Commission's proceedings on remand. As Florida courts have uniformly recognized, it would be inequitable to deprive a party of the fruits of its successful result on appeal simply because the erroneous order was not stayed during that appeal. The only loss that GTE should suffer as a result of the lack of a stay is its loss of interest on those erroneously disallowed revenues, which is appropriate since GTE could have had the use of those monies during the appeal had a stay been entered. But the revenues themselves should have been restored to GTE in full once it was determined that disallowance of its affiliate expenses was in error.

While the Florida Statutes and Administrative Rules do provide a permissive procedure that a utility may follow to obtain a stay of the Commission's orders pending appeal, they are not procedural prerequisites that a utility must satisfy in order to recover revenues lost during the appellate process. Nevertheless, by its Order on remand, the Commission has effectively made a request for a stay a mandatory procedure if the appellant is to obtain meaningful relief on appeal from an order erroneously entered by the Commission. That is unwarranted under the provisions of the statute and rule themselves, as well as controlling Florida case law.

For all these reasons, the Commission's Order on remand should be reversed and the Commission should be directed to allow GTE to recover these expenses from the date they were erroneously disallowed by the Commission.

ARGUMENT

THE COMMISSION ERRONEOUSLY DENIED GTE RECOVERY OF THE EXPENSES WHICH WERE INCURRED DURING ITS APPEAL TO THIS COURT AND ON REMAND.

By its July 7, 1994 decision on the first appeal of this case, this Court held that the Commission had erroneously disallowed certain affiliate expenses incurred by GTE. GTE Florida Inc. v. Deason, 642 So. 2d 545, 547-48 (Fla. 1994). On April 26, 1995, some nine months after that decision, the Commission entered its Order determining that GTE was entitled to recover those affiliate expenses. However, the Commission limited GTE's recovery to those expenses that were incurred from May 3, 1995 forward. It specifically refused to allow GTE to recover the erroneously disallowed expenses that GTE had incurred prior to that date, while the issue was on appeal to this Court and during the many months thereafter while the Commission was considering the matter on remand.

In so ruling, the Commission cited no supporting authority, but simply proclaimed that since GTE had failed "to preserve the status quo" through use of a stay or supersedeas, it would not be "fair or equitable to require GTE[]'s ratepayers to bear the responsibility for this failure." In point of fact, GTE is entitled under the controlling Florida precedent discussed below to recover those expenses from the date they were erroneously disallowed by the Commission.

A. GTE Is Entitled To Recover These Expenses From The Date They Were Erroneously Disallowed By The Commission.

This Court has long recognized the fundamental principle that "[a] party against whom an erroneous judgment has been made is entitled upon reversal to have his property

restored to him by his adversary." Sundie v. Haren, 253 So. 2d 857, 858 (Fla. 1971); accord Florida E. Coast Ry. Co. v. State, 82 So. 136, 138 (Fla. 1919). Indeed, a court not only has the power to restore the winning appellant to its prior position, but the duty to exercise that power, and:

> this duty is enforceable by appropriate appellate proceedings taken in the name of the party entitled, when the court denies the power or refuses to exercise it when properly invoked.

Hazen v. Smith, 135 So. 813, 816 (Fla. 1931); accord State ex rel. Hill v. Hearn, 99 So. 2d 231, 233 (Fla. 1957).

These principles were specifically applied by this Court in Florida E. Coast Ry., where it required a railroad to refund the excessive charges it had collected from its customers for freight shipments. In requiring the railroad to make those refunds, the Court noted that the situation was "similar if not identical with the case in which one against whom an erroneous judgments or decree has been made surrenders to his adversary property under such judgment," and "[i]n such case in the event of a reversal of the judgment or decree he is entitled to be restored by his adversary to that which he lost thereby." 82 So. at 138. Thus, the Court squarely held:

> the road is in duty bound to refund the overcharge, it is a definite sum, easily ascertainable from the road's books of account . . . . and the patron of the road by every principle of justice is entitled to restitution. Why should equity not grant the relief?

Id. at 139.

Citing Florida E. Coast Ry. and other precedent of this Court, the First District has declared that, upon reversal of a judgment, the law places an obligation upon the party which

received the benefit of the erroneous judgment to make restitution to the other party. Mann v. Thompson, 118 So. 2d 112, 114 (Fla. 1st DCA 1960). This obligation must be enforced by the courts:

> [O]n the reversal of a judgment or decree the law raises an obligation in the party to the record who has received the benefit of the erroneous judgment or decree to make restitution to the other party for what he has lost, the mode for effecting restitution to be varied according to circumstances. It is held that it is the duty of the court upon proper application by petition or motion to investigate the facts and by proper order to cause the appellants to be restored to all things which they have lost by reason of the decree which has been reversed. (Citations omitted).

Id.

This equitable requirement is aptly illustrated by American Bankers Life Assurance Co. of Fla. v. Williams, Salomon, Kanner & Damian, 399 So. 2d 365, 366 (Fla. 3d DCA 1981). There, the trial court entered a final judgment determining the first and third mortgages of the appellant together constituted a first lien upon the subject property. The Third District reversed that judgment, holding that the third mortgage could not be elevated to the same priority as the first mortgage and, accordingly, the second mortgage of the appellee remained second in priority. Subsequent to the judgment of foreclosure, but prior to the Third District's decision, the property was sold to appellant at a foreclosure sale.

On remand, the trial court entered a revised final judgment of foreclosure, declaring the sale to appellant invalid, redetermining the priority of the three mortgages, and ordering a resale of the property. Appellant appealed, contending, among other things, that the Third District had not directed a resale of the property on remand and that resale was not the

proper mode of restitution where the property had been conveyed to a non-party before reversal of the foreclosure sale.

The Third District rejected these contentions and affirmed the trial court's order. Id. at 367. In so doing, the Court held that "[a] party against whom an erroneous judgment has been made is entitled upon reversal to have his property restored to him by his adversary. . . ." Id. at 366-67. Because a redetermination of the priority of mortgages, without more, would not have restored appellee to all his rights as holder of a second mortgage, "[r]estitution of [appellee's] rights was properly achieved by ordering resale of the property upon reversal of the foreclosure sale by the reviewing court." Id. at 367.

These equitable principles are fully controlling in this Court's review of the PSC's order.[3/] Indeed, in Village of North Palm Beach v. Mason, 188 So. 2d 778 (Fla. 1966), this Court specifically recognized that equity and fairness required the PSC to look to the status and timing of its original order in fixing the rights of the public, and the Court took pains to note that this was an equitable principle that worked both ways, whether the utility or the ratepayers benefited in any particular instance. In that case, the Court had remanded a Commission order because the Commission had failed to include sufficient findings of fact in that order. On remand, the Commission corrected this omission by adding the necessary findings into the previously entered order.

[3/] It goes without saying that where an administrative agency is acting in a quasi-judicial capacity, as the PSC did here, the agency must act within the constraints of case law precedent. See, e.g., Edgerton v. International Co., Inc., 89 So. 2d 488, 489 (Fla. 1956) ("[s]tatutory authority given to administrative officers must be exercised in accordance with the requirements of controlling provisions and principles of law"); accord Atlantic Coast Line R. Co. v. State, 143 So. 255, 260 (Fla. 1932).

The Village of North Palm Beach appealed, arguing that the Commission could not leave the original order in place since this Court had found the findings of fact to be lacking. Under this theory, the utility would have had to refund the increase in rates collected for almost two years since the original order took effect. The Court rejected this argument, explaining that it had only found the Commission "had not written into its order the necessary findings of fact to support its conclusion. Id. at 781. This deficiency, the Court noted, could be easily corrected by entry of a supplemental order on remand. Id.

Because the Commission's original order in Village of North Palm Beach -- unlike the Commission's original rate order here -- was reasonable and supported by the law, the Supreme Court determined that the order's continuation would be most consistent with fixing the parties' rights "as of the time they ought to be determined," and that "[i]t would be inequitable to defer the utility's right to the increase rates for approximately two years because of what we found to be a defect in the order entered by the commission." Id. The Court emphasized that this is an equitable notion that works both ways:

> The soundness of what we do here is demonstrated by the fact that if the instant case had involved an order decreasing rates it would be equally inequitable to allow the utility to collect the old and greater rates for the period between the first and second orders.

Id.

Under these controlling principles, the PSC had a duty to restore to GTE the revenues that it lost as a result of the Commission's erroneous rate orders. That loss consisted of the approximately $11 million in completely proper expenses which GTE incurred during the pendency of its appeal and the Commission's subsequent proceedings upon remand. The

Commission's refusal to restore GTE to the position it would have been in but for the Commission's erroneous disallowance of these expenses was manifestly inequitable and violated the controlling equitable principles laid down by this Court for application under circumstances such as these. Moreover, as we now show, the stated basis for the Commission's refusal to do so was itself contrary to settled Florida law.

B. GTE Cannot Be Denied Recovery Of These Erroneously Disallowed Expenses Simply Because It Did Not Seek To Stay The Orders Successfully Appealed To This Court.

Contrary to the erroneous conclusion of the Commission, GTE cannot be denied full recovery of its affiliate expenses simply because it did not seek a stay of the Commission's rate orders pending its successful appeal of those orders to this Court. Under Florida law, a party's failure to supersede a judgment pending appellate review does not bar the party's right to restitution upon the reversal of the judgment. As this Court declared in Sundie, "even in the absence of a supersedeas bond, reversal of the [judgment] . . . required, as between the parties to the suit, restoration of the original status."[4/] 253 So. 2d at 858; accord American Bankers Life Assurance Co. of Fla., 399 So. 2d at 367. This is so even

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[4/] Indeed, to hold otherwise would fly in the face of the uniformly recognized tenet of Florida law that a party who desires to appeal is not obliged to seek a stay of the judgment or obtain a supersedeas bond pending appeal. See Horn v. Horn, 73 So. 2d 905, 906 (Fla. 1954) ("[i]f appellant determines to appeal without posting a supersedeas bond, it is his privilege to do so"); accord Alexander v. Adams, 501 So. 2d 15 (Fla. 4th DCA 1986); Fitzgerald v. Addison, 287 So. 2d 151, 152 (Fla. 2d DCA 1973); Green v. Green, 254 So. 2d 802, 804 (Fla. 3d DCA 1971), writ discharged, 264 So. 2d 838 (Fla. 1972); Lowman v. Young, 212 So. 2d 88, 91 (Fla. 1st DCA 1968). This fundamental right to appeal in the absence of a stay would be an empty right if the failure to do so would act as a later bar to the successful appellant recovering all that it had lost during the pendency of the appeal of the erroneous order.

where, as in Sundie, a supersedeas bond "would have prevented sale of the property pending appeal." 253 So. 2d at 858.

As this Court has made clear, then, the failure of an appellant to seek a stay pending appeal does not, in itself, prevent the appellant from recovering what it lost as a result of the erroneous order. Florida courts have repeatedly made this point.

For example, in Ronette Communications Corp. v. Lopez, 475 So. 2d 1360, 1361 (Fla. 5th DCA 1985), the Fifth District declared in words directly applicable here:

> The fact that appellant could have obtained a stay of execution pending appeal by posting the bond described in appellate rule 9.310(b)(1) but did not is of no legal import here. Appellant's right to appeal is not conditioned upon the posting of a supersedeas bond.

The court accordingly went on to hold that the "appellant shall be entitled to reimbursement from appellees in the event the final judgment is reversed on appeal," even in the absence of a stay. Id. Thus, although the court acknowledged that the "appellant's choice of paying the judgment rather than posting a bond pending appeal is a risky one" since the appellees might become judgment proof, the right to restitution is not altered by the appellant's failure to obtain a stay. Id.

The First District squarely held to the same effect in Mann, 118 So. 2d at 114:

> Appeals from final judgments and decrees are a matter of right under the Constitution and laws of this state, and if an appellant determines to appeal without posting a supersedeas bond, it is his privilege to do so. An appellant's election not to take the steps necessary to supersede or stay the judgment or decree pending appeal does not as a matter of law bar his entitlement to restitution upon reversal by the appellate court.

These authorities leave no room for doubt: the bare fact that GTE did not seek a stay of the Commission's erroneous rate orders pending their appeal to this Court is of no legal import. Hence, the only ground upon which the Commission denied GTE the recovery of its expenses does not preclude GTE from receiving restitution of the approximately $11 million in revenues that it lost during the pendency of its successful appeal of the PSC's disallowance of those expenses and during the pendency of the Commission's proceedings on remand. Furthermore, and contrary to the Commission's notion of equity, Florida courts have long held that principles of equity in fact require that a party not be deprived of the fruits of its successful result on appeal simply because the erroneous order was not stayed during that appeal.

This very point was made by the First District in Lonergran v. Lippman, 406 So. 2d 1124, 1125 (Fla. 1st DCA 1981), review denied, 418 So. 2d 1279 (Fla. 1982). There, the hotel the appellant had leased was razed while the appeal was pending, thereby destroying the appellant's leasehold interest. The appellees urged that since no stay had been entered pending the appeal, they were not responsible for any damages to the appellant/lessee. The First District disagreed, holding that:

> It would be unconscionable to allow a prevailing party in the trial court to destroy or dispose of the underlying property in a dispute while the case was on appeal and then have no liability or responsibility to the other party when that final judgment was reversed and the loser was unable to restore the status quo.

406 So. 2d at 1125. The court went on to emphasize that:

> A person is not required to take supersedeas or to secure a stay in order to appeal a judgment; and just as the issues raised in the appeal are not mooted by the trial court's enforcement of the final judgment, his rights are not abolished when the opposing

> party suffers the underlying property on which a property right is based to be destroyed.

Id.

The inequity to GTE here is even more glaring since the "property" at issue -- money -- was not destroyed and the PSC plainly could have "restored the status quo" by allowing a small, temporary surcharge.[5/] In fact, the result of the Commission's refusal to allow GTE a recovery of the improperly disallowed expenses is that the using and consuming public served by GTE in its franchise area -- who received the full benefit of the services and supplies purchased by GTE during this period of time -- have been granted a windfall. That is neither fair nor equitable. It is, instead, unjust enrichment by order of the PSC.

This is made especially manifest when one considers what practical difference it would have made had the Commission's orders been stayed pending appeal, as the PSC says was required in order for GTE to preserve its rights upon a reversal of those orders. In that event, GTE would have been paid during the appeal and remand proceedings all of the

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[5/] This is, of course, exactly the mechanism proposed by the Commission's Staff for the recovery of the expenses incurred after this Court's decision. [R. 275, 283]. It was a means fully available to the PSC to allow GTE a complete and equitable recovery of all erroneously disallowed expenses. In fact, the Commission has used this mechanism in prior cases. See In re: Investigation of the appropriate accounting and ratemaking treatment of decommissioning and depreciation costs of nuclear powered generators, 83 FPSC 182 (1983) (allowing electric utilities to include a surcharge on its bills designed to recover the revenue deficiency associated with accruing a decommission expense). Moreover, this is simply the reverse of providing a credit on its bills when there is an overcharge, a mechanism which the Commission has also used. See In re: Request by Occidental Chemical Corp. for reduction of retail electric service rates charged by Florida Power Corp., Docket No. 870220-EI, Order No. 18627 (Jan. 4, 1988) (approving $18.5 million credit reflecting a flowthrough to the utility's ratepayers of the utility's excess deferred income taxes); In re: Application of Holiday Lake Water System for authority to increase its rates in Pasco County, Florida, 5 FPSC 620 (1979), discussed infra at 20.

expenses that it now seeks to have paid. Thus, all that the stay would have meant was that GTE would have had the use of those monies for that period of time. By the same token, the only thing that GTE should be held to have lost by its failure to seek such a stay is the loss of use of those monies that it would have been able to collect earlier had it obtained a stay. Under the equitable principle of restitution long adhered to by this Court, the monies themselves -- constituting expenses that GTE properly incurred in providing its service to the public -- should have been reimbursed upon this Court's decision that those expenses had been improperly disallowed.

The Commission, however, turned the notion of equity on its head by finding that it would not be "fair or equitable" to allow GTE to be restored to the same position as it would have been in absent the Commission's erroneous disallowance of GTE's affiliate expenses. That is not the case at all. To the contrary, it is clear from this Court's reversal of the PSC's disallowance of those expenses and the Commission's own findings on remand that those expenses should have been allowed in the first place. Hence, GTE should not now be penalized and required to absorb those erroneously disallowed expenses which were incurred to provide service during the appeal process and the remand proceedings.

In short, the members of the using and consuming public within GTE's service area would be no worse off now than they would have been with a stay, if they were required to pay those expenses which were incurred for their benefit. To the contrary, they have actually benefitted from the lack of a stay order, since they have had the use of this money for over two years while the Commission's error was being corrected. And, GTE has in turn been penalized by the lack of a stay by losing the use of these monies during that period

of time. That loss of interest is the only penalty that GTE should suffer as a result of the lack of a stay, and GTE must be allowed to recover the monies themselves that were lost as a result of the PSC's erroneous rate orders. The teachings of this Court and others, discussed supra at 10-14 and 15-18, make that clear.

There can certainly be no doubt that, had the tables been turned and it had been GTE which was found to have erroneously collected such expenses, the Commission would have required GTE to refund such overcharges from the date they were erroneously collected and would not have merely ordered GTE to stop collecting those rates from that date forward. For example, in In re: Application of Holiday Lake Water System for authority to increase its rates in Pasco County, Florida, 5 FPSC 620 (1979), the Commission on remand ordered the sewer company to credit each customer's bill to fully remove the overcharge resulting from an erroneous determination of gross revenues that had allowed the utility to earn a rate of return based on a statutorily prohibited component.

Thus, had GTE collected excessive rates under an erroneous Commission order, equity would have required a full refund by GTE from the date of the erroneous order. The same must be equally true where GTE was deprived of full recovery of these expenses due to the Commission's erroneous rate orders. To hold otherwise would contravene the general principle espoused by this Court in Sundie and by other Florida courts that, notwithstanding the absence of a stay, reversal of a judgment on appeal requires restoration of the status quo. It also would unnecessarily penalize GTE for the passage of time necessitated by appellate review of those orders and, in addition, by the more than nine months that passed after this

Court's decision was issued and before the Commission finally allowed GTE to begin to collect the erroneously denied expenses.

Accordingly, the Commission could not, as a matter of law, refuse to allow GTE recovery of its affiliate expenses during the pendency of its appeal merely because it did not seek a stay of the erroneous orders being appealed. Yet this is the only ground asserted for the Commission's order.

Significantly, the Commission was unable to point to any authority holding that an appellant's failure to seek a stay or post a supersedeas bond justifies a refusal on remand to restore the appellant to the position it would have been in but for the entry of the erroneous and subsequently reversed order. Instead, it merely noted that Section 120.68(3)(a), Florida Statutes, and Rule 25-22.061(1)(a), Florida Administrative Code, permitted GTE to seek a stay of the Commission's erroneous rate orders pending appeal. However, neither the statute nor the rule provide that a stay is mandatory if the appellant is to be granted full relief from an erroneous order.

Section 120.68(3)(a), Florida Statutes, simply provides, in relevant part, that "[t]he agency may . . . grant a stay upon appropriate terms, but . . . a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas." Rule 25-22.061(1)(a), Florida Administrative Code, provides that:

> When the order being appealed involves the refund of money 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.

Consequently, if GTE had wanted to collect these monies during the appeal process and thereby protect its right to the use of those monies during that period of time, it could have sought a stay of the Commission's orders. But, while the statute and administrative rule provide a permissive procedure that an appellant may follow to obtain a stay of the Commission's orders pending appeal, it by no means follows that if a stay is not sought, and an order is ultimately reversed, the successful appellant is then barred from recovering the monies which were lost while the erroneous order was under review. Neither the statute nor the administrative rule provide that they are procedural prerequisites that a utility must satisfy before it can recover revenues lost during the appellate process. Nevertheless, by its Order on remand, the Commission has effectively made a request for a stay a mandatory procedure if the appellant is to obtain complete relief on appeal when an order erroneously entered by the Commission is reversed.

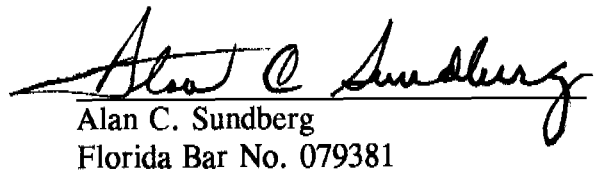
Not only is that result unwarranted under the provisions of the statute and rules themselves, it is contrary to the authorities discussed supra at 15-18, which make clear that full recovery after a successful appeal does not depend on securing a stay of the judgment pending appeal. Because the Commission's Order on remand runs afoul of these controlling principles, it cannot stand.

CONCLUSION

For all the foregoing reasons, that portion of the Commission's Order on remand precluding GTE from recovering affiliate expenses incurred during the pendency of its appeal from the Commission's rate orders to this Court and during the Commission's subsequent proceedings on remand should be reversed and remanded to the Commission with

instructions to establish a temporary surcharge in such an amount and for such period of time as will allow GTE to fully recover those expenses.

Respectfully submitted,



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