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

# REPLY BRIEF OF APPELLANT GTE FLORIDA INCORPORATED TO ANSWER BRIEFS OF THE FLORIDA PUBLIC SERVICE COMMISSION AND PUBLIC COUNSEL

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**FLORIDA PUBLIC SERVICE COMMISSION ORDERS**

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## PRELIMINARY STATEMENT

References to the parties, record on appeal, and appendix to GTE's initial brief will follow the same format as that set forth in GTE's initial brief. References to GTE's initial brief will be designated as "GTE Br. ___." References to the PSC's answer brief will be designated as "PSC Br. ___," and references to the Office of Public Counsel's answer brief will be designated as "PC Br. ___."

All emphasis is supplied unless otherwise noted.

## ARGUMENT

### A. GTE Is Entitled To Its Affiliate Expenses From The Date They Were Erroneously Disallowed By The Commission, Even Though GTE Did Not Seek To Stay The Orders Pending Its Successful Appeal To This Court.

This Court has long 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." See authorities cited at GTE Br. 10-14. Indeed, reversal of a judgment "require[s], as between the parties to the suit, restoration of the original status,"[1/] and that is so "even in the absence of a supersedeas bond." Sundie v. Haren, 253 So. 2d 857, 858 (Fla. 1971); see also authorities cited at GTE Br. 15-17. It is therefore clear that "[a]n appellant's election not to take the steps necessary to supersede or stay [a] judgment or decree pending appeal does not as a matter of law bar his entitlement to restitution upon reversal by the appellate court." Mann v. Thompson, 118 So. 2d 112, 114 (Fla. 1st DCA 1960).

These dispositive authorities leave no room for doubt: GTE cannot be denied recovery of the affiliate expenses it lost during the pendency of its successful appeal from the Commission's erroneous rate orders and during the PSC's proceedings on remand simply because it did not seek to stay those orders, pending the outcome of its appeal, by filing a supersedeas bond. Nevertheless, both the PSC and Public Counsel ignore Sundie and its progeny in their briefs. Instead, the PSC argues in a variety of different ways that the Commission's Remand Order should be affirmed because GTE voluntarily "waived" its right to recover the erroneously disallowed expenses.

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[1/] The ratepayers were parties to GTE's appeal through their representation by Public Counsel. Thus, these principles are as fully applicable to them as they are to the PSC.

For example, the PSC argues that "by failing to seek a stay, GTE waived any right to the protection a stay would have afforded." [PSC Br. 6]. It similarly argues that GTE cannot recover its expenses because "GTE voluntarily chose to give up the revenues during appeal just as surely as a defendant voluntarily pays a judgment." [PSC Br. 8]. Finally, it asserts that "GTE willingly forwent collection of the affiliate expenses during pendency of the appeal and remand proceedings," and, therefore, "[w]hatever benefit the ratepayers may have gotten was voluntarily given" and "cannot form the basis for a claim of . . . unjust enrichment." [PSC Br. 9]. None of these arguments withstands scrutiny.

As an initial matter, it is obvious that GTE did not "voluntarily [choose] to give up the revenues." GTE "g[a]ve up the revenues" pursuant to two rate orders of the PSC with which GTE was obligated to comply. Although GTE could have sought to stay the orders by filing a supersedeas bond while they were being appealed to this Court, it by no means follows that GTE's compliance with the orders constituted a "voluntar[y]" relinquishment of its right to be restored to the original status quo upon this Court's reversal of the orders.

Quite to the contrary, the PSC's arguments fly in the face of controlling decisions of this Court that the failure to supersede a judgment pending appeal does not preclude a successful appellant from recovering monies that it thereby lost, once that judgment is subsequently reversed by the appellate court. Obviously, if an appellant's failure to seek a stay of an erroneous judgment constituted a "waiver" of the right to be restored to its original status upon a successful appeal, this Court would not have held as it did in those cases. Rather, under the PSC's view of the law, the only way a successful appellant could ever recover what it lost as the result of an erroneous order would be to supersede or stay that

order, because it would otherwise be deemed to have "waived" its right to be restored to its original position. As the holdings of Sundie and the other cited authorities make clear, that is not the law of Florida.

In fact, the PSC's argument impermissibly converts the purely permissive stay procedure provided by Section 120.68(3)(a), Fla. Stat. and Rule 25-22.061(1)(a), F.A.C. into a mandatory requirement -- which it clearly is not. Neither the statute nor the rule provides that they are procedural prerequisites a party must satisfy in order to be restored to its original position following the appellate process. Likewise, the PSC can point to none of its own orders (except for the one being challenged here) which has ever held that seeking a stay is the only procedure for a utility to protect its right to recover expenses erroneously denied by the PSC upon a successful appeal from a Commission order. Indeed, if the stay procedure were held to be mandatory, as the PSC would now have it, that would prejudice the right to appeal of parties who cannot afford or do not otherwise wish to incur the cost of a bond. To assert that one has a right to appeal but is denied the full fruits of the success of that appeal if a bond is not or cannot be posted is the assertion of an illusory "right."

In sum, given the permissive nature of the stay procedure, the mere fact that GTE did not seek to supersede the PSC's erroneous rate orders does not constitute a "waiver" of its right to recover its affiliate expenses. As this Court put it in Horn v. Horn, 73 So.2d 905, 906 (Fla. 1954), yet another decision that the PSC and Public Counsel ignore, "[i]f appellant determines to appeal without posting a supersedeas bond, it is his privilege to do so. . . ." GTE cannot be said to have "waived" its rights under Florida law by exercising that "privilege," any more than the appellants "waived" their right to be restored to the original

status quo in Sundie and other cited cases by failing to post a bond and thereby obtain a stay. The whole point of those decisions is that an appellant's failure to obtain a stay does not abrogate that right. This is so even where, as in Sundie, a supersedeas bond "would have prevented sale of the property pending appeal." 253 So. 2d at 858.

Ignoring Sundie and other decisions of this Court, the PSC selectively quotes the statement by the Fifth District in Ronette Communications Corp. v. Lopez, 475 So. 2d 1360, 1361 (Fla. 5th DCA 1985), that an appeal can be risky business if the choice is 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. [PSC Br. 8]. The Court there was merely stating the obvious -- absent a bond, there is a risk that an appellee might, during the pendency of the appeal, become unable to repay money paid under an erroneous judgment. But that is not the case here. There is clearly a way for GTE to recover the revenues it lost during the appeal and remand: the PSC could have "restored the status quo" by allowing a small, temporary surcharge. In fact, this is exactly the mechanism proposed by the Commission's Staff for the recovery of the expenses incurred on remand, after this Court's decision. [R. 275, 283].

Furthermore, the PSC ignores the Court's holding in Ronette 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. 475 So. 2d at 1361. That, of course, is exactly GTE's point. Thus, Ronette does not detract from GTE's position, but rather confirms that GTE did not "waive" its right to reimbursement, any more than the appellant in Ronette did,

and GTE is instead entitled to recover its affiliate expenses from the date they were wrongfully denied by the Commission.

Apart from its erroneous "waiver" argument, the PSC asserts that it lacks the power to follow the equitable principles established in the decisions cited by GTE. In the PSC's words, "[n]otwithstanding the Court's use of the term 'equitable' in the Village of North Palm Beach [v. Mason, 188 So. 2d 778 (Fla. 1966)] and [to its own] reference to 'equity and fairness' in the Remand Order," the Commission has no power to employ principles of equity to authorize GTE to collect "restitution" from its ratepayers. [PSC Br. 7]. This argument also fails.

In the first place, it ill behooves the Commission to suggest it cannot apply fundamental principles of equity in its proceedings when, in the very Order under review, it declared that the issue of whether 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" was one of "equity and fairness." [R. 375, 379; A.8]. Having undertaken to act on remand on the basis of its notion of "equity and fairness," it can scarcely now be heard to say that it has no power to follow this Court's precedent with respect to the equitable principles to be applied under circumstances such as these.

Moreover, the PSC concedes that this Court specifically held in Village of North Palm Beach that equity required the PSC to look to the status and timing of its original order in fixing the rights of the public. 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. The PSC is unable to distinguish Village of North Palm Beach on this

dispositive issue, and makes no attempt to do so. Rather, the PSC states weakly that "notwithstanding" this decision and its own Order ruling as a matter of "equity and fairness" in favor of the ratepayers, the PSC lacks authority to employ equitable principles. This Court made it plain in Village of North Palm Beach that this is not the case at all.

Furthermore, the PSC's argument to the contrary is founded on its faulty premise that the PSC is not a "judicial tribunal." [PSC Br. 7]. In support of this assertion, the PSC cites to Myers v. Hawkins, 362 So. 2d 926 (Fla. 1978). However, this Court made no such broad holding there at all. Instead, this Court merely held that the term "judicial tribunals" as used in Article II, Section 8(e) of the Florida Constitution -- the "Sunshine Amendment" prohibiting legislators from representing another person during the term of office before any state agency other than "judicial tribunals" -- did not include the PSC. Id. The Court so held, however, precisely because "the statutory range of the Commission's responsibilities is so vast that the agency in fact exercises judicial-like powers in performing only a fraction (albeit a . . . significant fraction) of its duties." Id. at 932.

The point is, then, in Myers -- as in Village of North Palm Beach -- this Court expressly recognized that the PSC does, in fact, possess "judicial-like powers." The mere fact that it is not a "judicial tribunal" within the meaning of the "Sunshine Amendment" does not mean it cannot apply equitable principles as part of the exercise of its "judicial-like powers." To the contrary, as Village of North Palm Beach and Sundie make clear, it is required to do so under the circumstances of this case.[2/]

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[2/] The other cases cited by the PSC in purported support of its lack of power to grant equitable relief are similarly inapposite. In those cases, the agencies lacked statutory power (continued...)

Indeed, the PSC has applied equitable principles, including restitution, in a variety of other circumstances. For example, in In re: Petition for resolution of settlements dispute between General Telephone Co. of Florida and Southern Bell Telephone & Telegraph Co., 81 FPSC 169 (1981), the Commission resolved disputes among telephone companies by granting "Motions for Immediate Restitution" filed by several of the companies, thereby directing Southern Bell "to remit" certain revenues to those companies. And, in In re: Application of Jupiter Island Beach Water Co., Inc., for a certificate to operate a water utility in Martin County, 82 FPSC 43 (1982), the Commission decided not to require a utility "to provide any form of restitution or penalty" for instituting unapproved rates in light of the circumstances presented, including the fact that the unauthorized rates did not cause the utility to overearn. However, it is clear that the Commission believed it had full authority to order "restitution" had it found that to be appropriate.[3/]

The PSC and Public Counsel assert that equity does not, in any event, require that GTE be restored to the same status it would have enjoyed had the Commission not

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[2/](...continued)
to grant the relief sought. Here, however, the PSC indisputably has statutory power over the rates GTE charges its customers and, hence, the power to apply equitable principles in exercising that power.

[3/] In many other cases, the Commission has relied upon equitable principles as the basis for its decision. See, e.g., In re: Petition of Gulf Power Co. to revise its treatment of franchise fees for ratemaking purposes, 1977 Fla. PUC LEXIS 223, Docket No. 770001-EU (CR), Order No. 8022 (1977) (finding that "equity and fairness dictate that the fees be borne by customers residing within franchise areas"); In re: Petition of Peoples Gas System, Inc. for authority to increase its rate and charges, 1977 Fla. PUC LEXIS 350, Docket No. 760922-GU, Order No. 7897 (1977) (concluding that "the provisions and percentage increases prescribed herein will distribute the authorized increase in revenues in a fair, reasonable and equitable manner").

improperly disallowed GTE's affiliate expenses. They contend that, because some of GTE's customers have changed since entry of the PSC's erroneous rate orders, it would be inequitable for GTE to now collect those expenses erroneously denied. [See PSC Br. 9; PC Br. 2, 8]. However, such a change in customers is not uncommon for utilities, and this fact has not prevented relief such as GTE seeks in other circumstances. Indeed, there undoubtedly was the same change in customers present in Village of North Palm Beach. That is the very nature of a utility's continuing service to the public.

Recognizing this truth, the Commission has expressly required semi-annual "true-ups" in fuel adjustment proceedings, even though there has been a change in customers during that period. See, e.g., In re: Investigation of fuel adjustment clauses of electric utilities, 83 FPSC 299 (1983); see also In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell Telephone & Telegraph Co., 95 FPSC 5:101 (1995) (ordering Southern Bell to refund $30.45 million to its subscribers as part of "true-up" proceedings); 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 revenue deficiency associated with accruing a decommission expense).

The PSC's only response is that this Court has expressly approved that procedure. [PSC Br. 16]. But that is GTE's exact point: in sustaining this type of "true-up" procedure, this Court implicitly recognized that the mere fact that there will necessarily be some mismatch of customers who did not receive the service for which the fuel charge is imposed does not render it an impermissible procedure. The same is equally true here.

In fact, the Commission has not hesitated to require a utility to give a credit on its current customers' bills, regardless of whether they were customers at the time of the event giving rise to the credit. See, e.g., In re: Request by Occidental Chemical Corp. for reduction of retail electric service rates charged by Florida Power Corp., 1988 Fla. PUC LEXIS 209, Docket No. 870220-EI, Order No. 18627 (1988) (approving $18.5 million credit to ratepayers for 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) (Commission on remand ordered sewer company to credit each customer's bill to fully remove the overcharge resulting from an erroneous determination of gross revenues).[4/]

The PSC cannot have it both ways. That is, of course, the very point this Court made in Village of North Palm Beach: the Court determined that the continuation of the Commission's original order would be most consistent with fixing the parties' rights "as of the time they ought to be determined," and that "[t]he soundness of what we do here is demonstrated by the fact that if the instant case had involved an order decreasing rates it

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[4/] The PSC attempts to distinguish Occidental Chemical Corp. by asserting that the adjustment made there "was based on a stipulated rate reduction." However, that misses the point that the Commission approved the stipulation by which the utility had to refund $18.5 million to its ratepayers, although some had necessarily changed during the resolution of that dispute. The PSC likewise attempts to distinguish Holiday Lakes by arguing that the Court there remanded the case to determine the revenue requirements in light of the Court's decision. But that is exactly what happened here. This Court remanded the case to the PSC to determine the correct revenue requirements with respect to GTE's affiliate expenses in light of the Court's decision. Moreover, the PSC ignores the fact that in Holiday Lakes the Commission corrected its order precisely by ordering the utility company to credit each customer's bill for the prior overcharge, even though there was not an exact identity between the customers who paid the overcharge in the first instance and those who received the credit. Since it has the power to benefit the ratepayers by such a credit, it equally has the power to benefit the utility by the same procedure. See Village of North Palm Beach.

would be equally inequitable to allow the utility to continue to collect the old and greater rates for the period between the entry of first and second orders." 188 So. 2d at 781.

Finally, and continuing to ignore Village of North Palm Beach, the PSC asserts that application of these principles in a ratemaking context "would result in chaos." [PSC Br. 10]. It proclaims that "[r]atepayers 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." [PSC Br. 10].

However, by this argument the PSC is doing nothing more than setting up a strawman. All of the purported concerns expressed by the PSC could only be possible if GTE had not taken an appeal or was asking the PSC to go back in time beyond the entry of the erroneous rate orders that were overturned on appeal. That is not the case. GTE timely appealed from the PSC's erroneous rate orders which this Court then overturned, and it is only seeking relief for the period of the appeal and remand proceedings. Thus, the issue before this Court relates solely to the relief available on remand in light of this Court's reversal of the erroneous Commission orders. All that is sought is restoration of the status quo upon remand, and that is as proper in a ratemaking context as in other contexts. This Court's decision in Village of North Palm Beach leaves no doubt about that.

As the foregoing makes clear, the Commission's Order on remand runs afoul of the controlling principle espoused by this Court and others that reversal of a judgment requires

restoration of the original status, even in the absence of a supersedeas bond. Accordingly, the Commission's Remand Order cannot stand.[5/]

### B. A Surcharge By GTE To Collect Those Erroneously Denied Expenses For The Period Of The Appeal And Remand Would Not Constitute Retroactive Ratemaking.

The PSC and Public Counsel argue that to allow GTE to recover the affiliate expenses it lost during the appellate and remand process would amount to retroactive ratemaking. The PSC makes this argument despite the fact that it did not base its Order on any such finding, and its own Staff attorney concluded that such relief on remand would not involve retroactive ratemaking.[6/] [R. 337, 356]. As we now show, the rule prohibiting retroactive ratemaking has no application to the Commission's Remand Order.

First and foremost, GTE's application for these rates was made, in the first instance, on a prospective -- not a retrospective -- basis. Simply because the resolution of GTE's application involved an appeal and remand does not change that fundamental fact. The

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[5/] At a minimum, GTE should have been allowed to recover its expenses from the effective date of this Court's order reversing the erroneous rate orders. Even had GTE sought a stay of those orders, the stay would have expired, and any supersedeas bond would have been dissolved, upon reversal of the orders by this Court. Thus, even if the statute and rule constituted the exclusive procedure which GTE should have followed to recoup expenses lost during the appeal of an erroneous PSC order -- which they do not -- they still would not preclude GTE from recovering those expenses incurred after this Court reversed the Commission orders, because the stay procedures they set forth do not apply to the proceedings on remand. On remand, GTE lost close to $3 million in revenues during the more than seven months that the Commission considered how to implement this Court's decision.

[6/] While the PSC cites to certain comments by two members of the Commission on the issue of retroactive ratemaking, [PSC Br. 10 n.1], there was no finding by the Commission that the requested relief should be denied as retroactive ratemaking. [R. 375, 375-381; A.8; see also R. 337, 341-356].

proceedings on remand from this Court's decision were nothing more than the culmination of the proceeding initiated by GTE to establish new rates prospectively from the date of the Commission's order. GTE merely sought on remand to have those previously requested rates established effective as of that date, just as it had originally requested. Since there was no first-time request for a new rate, no issue of retroactive ratemaking arises.[7/] See, e.g., Citizens v. Public Service Comm'n, 448 So. 2d 1024, 1027 (Fla. 1984).

The PSC argues, however, that "[t]he 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 expenses." [PSC Br. 11-12]. This argument is based on the premise -- assumed by the PSC without citation of any authority to support it -- that "[u]nless 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." [PSC Br. 12]. In the PSC's view, "the only way that the Commission can adjust rates retrospectively is to have established the rates as conditional from some point in the past," which the PSC asserts can only be accomplished "by making the affected revenues subject to refund guaranteed by bond or corporate undertaking." [PSC Br. 12].

This argument ignores the fundamental fact that the Commission always loses jurisdiction over the disposition of its rate orders once they are timely appealed. This is true

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[7/] The PSC's reliance on In re: Application for a rate increase in Marion County by Sunshine Utilities of Central Florida, Inc., 94 FPSC 6:227 (1994) in purported support of its argument that disallowed expenses can only be recovered from the date of the PSC's decision on remand, actually illustrates the exact opposite. There, the PSC allowed recovery of "appellate rate case expenses." By definition, those expenses could only have been incurred during the appeal and not from the date of the Commission's remand order.

whether or not those orders are stayed pending the outcome of the appeal. Once the appellate court remands an order to the Commission for further proceedings, as this Court did here, the Commission then regains jurisdiction over the matter and has full power to implement the remand order. Thus, the presence or absence of a stay during appeal has no effect on the Commission's jurisdiction on remand to implement this Court's decision.

Even assuming that GTE's rates had to be "conditional" to preserve the PSC's jurisdiction over them on remand, there can be no question that this was the case here. Contrary to the PSC's suggestion, it is not the act of posting a supersedeas bond that makes the rate order "conditional." Rather, it is the filing of the appeal itself which renders the rate order conditional. It is hornbook law that "a judgment becomes final only when the appellate process, once started, has been completed." Cicero v. Paradis, 184 So. 2d 212, 214 (Fla. 2d DCA 1966); accord Geico Financial Services, Inc. v. Kramer, 575 So. 2d 1345, 1347 (Fla. 4th DCA) (same), review denied, 589 So. 2d 291 (Fla. 1991); Wilson v. Clark, 414 So. 2d 526, 530 (Fla. 1st DCA 1982) ("an action continues to have life until there is a final determination on an appeal").

Because GTE took a timely appeal from the PSC's rate orders, they did not become "final" until entry of this Court's decision on appeal. That is the case whether a supersedeas bond was filed or not. Accordingly, under the PSC's own analysis, since the rates were conditional from the date of GTE's appeal, the PSC had full power on remand to authorize

GTE to recover the erroneously denied expenses, without running afoul of the prohibition against retroactive ratemaking.[8/]

The PSC further asserts that "a utility's customers are entitled to be charged only those rates which are lawfully approved and in effect at any given time." [PSC Br. 14]. It contends that allowing GTE to recover the erroneously denied expenses on remand would violate the right of GTE's customers to know what rate they will be charged and to adjust their consumption accordingly. [PSC Br. 14]. The inescapable fact, however, is that GTE's customers were fully represented by Public Counsel in GTE's appeal of the PSC's rate orders, and, as such, were on notice of GTE's challenge to those rate orders and the possibility that this Court might reverse them.

The PSC's argument further presumes that the original rate orders entered by the PSC in this case were lawful, which they were not. This Court specifically determined that they were unlawful to the extent they denied GTE the recovery of certain of its affiliate expenses. GTE's customers certainly do not have a vested right to the promulgation of unlawful rates by the PSC, nor do the PSC or Public Counsel contend otherwise.

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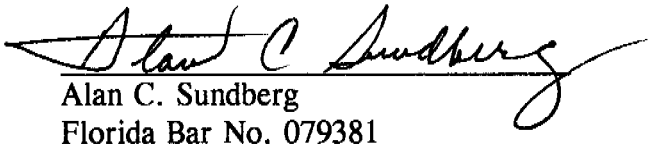
[8/] In an effort to avoid this Court's decision in Village of North Palm Beach, allowing the Commission to grant a rate increase from the date of the Commission's original order, the PSC asserts that the Court there did not intend to "quash" the Commission's order, but only to fix certain deficiencies in it, allowing the order to stand from the time it was rendered. But that is precisely what happened here as well. This Court did not "quash" the PSC's rate orders. Rather, it simply reversed that portion of the orders which had denied GTE its affiliate expenses to correct the PSC's application of the wrong standard in determining their recoverability. It affirmed the remainder of the PSC's orders. Village of North Palm Beach is therefore perfectly applicable here, and illustrates that the relief sought by GTE is appropriate and does not run afoul of the prohibition against retroactive ratemaking.

Here, the correction on remand of the Commission's erroneous rate orders would not constitute retroactive ratemaking. To hold otherwise would preclude the Commission from ever correcting the effect or erroneous disallowance (or allowance) of expenses after its order is reversed on appeal. That clearly is not the law.

## CONCLUSION

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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