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IN THE SUPREME COURT OF FLORIDA

US SPRINT COMMUNICATIONS COMPANY, Appellant, v. KATIE NICHOLS, et al., in the official capacity as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. 70,610

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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DESIGNATIONS

Appellant, US Sprint Communications Company, will be referred to as "US Sprint".

Appellee, The Florida Public Service Commission, will be referred to as "Commission".

Southern Bell Telephone and Telegraph Company will be referred to as "Southern Bell".

Record on Appeal will be indicated as "(R-)".

Appellee's Appendix will be indicated as "(A-)".

STATEMENT OF CASE AND FACTS

Access charges are compensation from long distance carriers, such as US Sprint, to local exchange companies for use of the local network to originate and terminate a call. This Commission, in Order No. 12765 issued on December 9, 1983 (A-1), established the rate and rate structure for intrastate access charges. That order determined the statewide total amount of access charges to be paid to the local exchange companies for such access. It also indicated to what types of service those charges would apply. That order is an essential part of this case and is necessary for an understanding of this appeal. It is, therefore, included in the Appendix as "other authority"[1].

Nine days of hearings were held in the above access charges rate structure proceeding, with 26 parties represented. US Sprint was a party to that proceeding. The Commission's decision on the access charges rate structure, as it affects this case, was that access charges would be imposed on resellers of wide area telephone service (WATS) utilizing trunk side connections (A-18 through 20). Access charges would not be imposed on such services utilizing line side connections. Tariff sheets indicating rates for specific services were filed by the local exchange companies to reflect the Commission's decision. US Sprint would pay access charges to the extent it provided WATS service through trunk side connections.

The language of Order No. 12765 is clear as to this line side,

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[1]Rule 9.220, Rules of Appellate Procedure

trunk side distinction (R-57). Eight parties to that proceeding filed petitions for reconsideration (A-51). US Sprint was not one of them. No appeal was taken from that final order.

The tariff sheets filed by the telephone companies pursuant to Order No. 12765 did not impose access charges on line side or trunk side connections (R-31). As a result of these erroneously filed tariff sheets, US Sprint and others were not paying access charges on their trunk side connections as required by Order No. 12765. US Sprint was receiving the monetary benefit of this error.

This error was not discovered until Southern Bell sought to revise the access charge rates in 1986. Southern Bell's proposed revised tariff, filed June 12, 1986, would have had the effect of imposing access charges on line side connections (R-2). Docket No. 860881-TL was opened to address that filing.

On October 6, 1986, the Commission issued Order No. 16687 (Docket No. 860881-TL, R-29). That order denied Southern Bell's proposed revision of the access charge rates. That order also directed the respective telephone companies to comply with the Commission's decision in Order No. 12765. This decision merely enforced the Commission's previous decision. It did not change that decision. Corrected tariff sheets were filed to remove the error in the original access charges tariff. US Sprint would be required to pay access charges as originally determined by the Commission in Order No. 12765.

US Sprint, at its own request, had been placed on the Commission's notification list for Docket No. 860881-TL on July 14, 1986. As a result of this action, US Sprint was notified of

the proceedings in the docket. On July 24, 1986, the Florida Association of Concerned Telephone Companies, Inc. (FACT) filed to intervene in the docket (R-17). US Sprint did not participate in the proceedings.

On October 22, 1986, sixteen days after the Commission issued Order No. 16687 and after Docket No. 860881-TL had been officially closed, US Sprint filed a Petition for Hearing (R-48). There was no section 120.57(1), Florida Statutes, proceeding in progress at this time. The petition sought a rehearing on the merits of the Commission's original decision on the access charges rate structure (R-50, paragraph 6).

On February 10, 1987, nearly four months after filing its Petition for Hearing, US Sprint filed for oral argument pursuant to Rule 25-22.058(1), Florida Administrative Code (R-45). Contrary to the Rule, the request did not accompany the Petition for Hearing and did not state with particularity why oral argument would aid the Commission. It did state that granting the oral argument would provide an opportunity to clarify prior policies and present timely first hand information (R-47).

On April 21, 1987, this Commission issued Order No. 17443 (Docket No. 860881-TL, R-53). That order denied US Sprint's request for hearing. The Commission found, in summary, that Order No. 16687 only enforced its previous decision in Order No. 12765. It directed the respective telephone companies to impose access charges in the manner they were directed to in the access charges rate structure order. A hearing had been held in the original

proceeding which established the tariff. US Sprint had been a party. Since current Commission action only enforced previous action, US Sprint already had its hearing on the access charges rate structure. The request for oral argument was also denied. It failed to comply with Rule 25-22.058(1), Florida Administrative Code.

SUMMARY OF ARGUMENT

US Sprint was a party in the Commission proceeding which established the rate structure for access charges (Order No. 12765). US Sprint did not appeal that decision. Failure to timely file an appeal is an irremediable jurisdictional object.

When an error was discovered in the original access charges tariff filed pursuant to Order No. 12765, the Commission directed the respective telephone companies to correctly refile the erroneous tariff sheets. This action, reflected in Order No. 16687, was merely enforcement of a previous final decision on rate structure for access charges.

The Commission's enforcement of its previous decision did not change the access charges rate structure. It simply required compliance with it. As such, US Sprint is not entitled to a rehearing on the merits of the access charges rate structure.

The Commission provided US Sprint with a point of entry into the administrative process. That is evidenced by US Sprint's participation in the access charges rate structure proceeding. The order at bar, Order No. 17443, does comply with section 120.57(4), Florida Statutes. US Sprint's argument that it does not is clearly without merit. The other procedural arguments raised are not relevant because US Sprint already has had a hearing on the merits. The arguments are also factually unfounded.

The Commission's enforcement of its previous order did not violate the doctrine of administrative finality. The cases relied upon by US Sprint involved subsequent Commission action which

reversed or changed previous decisions. In this case the Commission did neither. It simply enforced its previous decision.

Commission action does not cause US Sprint to monetarily suffer. US Sprint was receiving the benefit of the lower access charge rates as a result of the improperly filed tariff sheets. Commission action merely places US Sprint in the position it would have been had the tariff sheets been correctly filed. Commission action places US Sprint in the same position as similar providers of that service.

PRELIMINARY STATEMENT

The issues raised on appeal by US Sprint are based on a series of events relating back to Commission action in 1983. Although US Sprint's brief identifies three points on appeal there is actually only one overall argument raised: Was US Sprint entitled to a rehearing on the merits of the access charges rate structure adopted in 1983 and enforced in 1986. Appellee's brief, therefore, contains only one point on appeal which responds to this single issue raised by the Appellant throughout the three points of its Brief.

POINT ON APPEAL

COMMISSION ENFORCEMENT OF ITS PREVIOUS DECISION COMPLIED WITH THE ESSENTIAL REQUIREMENTS OF LAW.

The Commission complied with the essential requirements of law when it denied US Sprint's Petition for Hearing and Request for Oral Argument. This is the standard for review. Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353 (Fla. 1980); Kimball v. Hawkins, 364 So.2d 463 (Fla. 1978). The Commission's action was simply an enforcement of its previous decision. As such, US Sprint is not entitled to a rehearing on the merits of the rate structure for access charges.

In Order No. 12765 (A-1), issued on December 9, 1983 this Commission established the rate structure for access charges. That proceeding included nine days of hearings with 26 parties represented. US Sprint participated in that proceeding.[2] That decision determined that access charges would be imposed on certain types of connections, commonly referred to as trunk side connections. They would not be imposed on line side connections. The language of Order No. 12765 is clear and unequivocal with respect to the Commission's decision to impose access charges for trunk side access only (R-57). Eight parties to that proceeding filed petitions for reconsideration (A-51). US Sprint was not one of them. No appeal was taken from that final order.

The failure to timely file an appeal is an irremediable jurisdictional defect. Williams v. State, 324 So.2d 74 (Fla.

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[2]US Sprint's corporate entity at that time was GTE Sprint Communications Corporation.

1975). The Commission's decision on the access charges rate structure is no longer an appealable issue. This Court is without jurisdiction to consider that order.

The initial tariff sheets filed by the telephone companies pursuant to Order No. 12765 did not impose access charges on either line or trunk side connections. As a result, US Sprint was not paying access charges on its trunk side access as required by that order. That error was not discovered until Southern Bell sought to revise its access charge rates in 1986. To correct the error the Commission, in Order No. 16687 (R-29), directed the respective telephone companies to comply with the decision in Order No. 12765. Corrected tariff sheets were filed to remove the error in the original access charges tariff. The Commission did not change the access charges rate structure from what it had originally voted it to be. The Commission simply required new tariff sheets that correctly reflected the services to which the access charges applied. The Commission was enforcing its previous decision.

This Court has stated that the Commission has a variety of lawful sanctions for noncompliance. Aloha Utilities Inc. v. Florida Public Service Commission, 376 So.2d 850 (Fla. 1979). Such compliance methods can include show cause orders.[3] Statutory provisions provide penalties of up to $5,000 per day for violation of any statute, order, or rule.[4] The

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[3]See City of Tallahassee v. Florida Public Service Commission, 433 So.2d 505 (Fla. 1983).

[4]Sections 350.127, 364.285, 366.095, and 367.171, Florida Statutes.

Administrative Procedures Act also provides an enforcement procedure through the circuit courts.[5]

The Commission had all of these alternatives available to it to enforce its approved rate structure for access charges. Directing the respective companies, as part of the Southern Bell revision proceeding, to correctly refile the erroneous tariff sheets was the most efficient method to enforce the Commission's previous decision. Any of the other alternatives would have been too harsh, too costly, or too lengthy to correct a technical error no one knew had occurred or intended to occur.

Commission action in denying the request for hearing and oral argument did comply with the essential requirements of law. The Commission does have the power to enforce its actions. The enforcement action reflected in Order No. 16687 was identical to the Commission's original decision. It resulted in no actual change in what the Commission had voted to do in Order No. 12765. The Commission was merely enforcing that decision.

The fact that the Commission's action was consistent with its previous order is admitted by US Sprint's in its Petition for Hearing:

> This illustrates the fact that the Commission, in trying to be consistent with the letter of its previous order, has failed to examine clearly the implications of the order (R-33, 36).

This statement also reflects US Sprint's concern with the policy established in Order No. 12765, as opposed to the procedural

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[5]Section 120.69, Florida Statutes.

aspects of Order No. 16687. US Sprint's Petition for Hearing does not question the Commission's authority to enforce its previous decision. It alleges that the Commission's policy is improper.

Since the Commission's action in Order No. 16687 merely enforced its previous decision, US Sprint's argument applying section 364.05, Florida Statutes, is misplaced. The cases cited by US Sprint regarding the "inviolable command"[6] of a statutory notice period and the "importance"[7] of a notice period are also not relevant given the facts of this case.

US Sprint participated in the original proceeding which established the rate structure for access charges. The very action of this Commission has been to enforce the rate structure as originally adopted. US Sprint had the hearing it now seeks. By attempting to reach back and address the Commission's decision on the access charges rate structure at this time, US Sprint seeks to relitigate issues it previously chose not to appeal. No timely appeal of Order No. 12765 was filed. US Sprint should not be allowed to use Order No. 17443 to breathe new life into a closed, final decision. This Court is without jurisdiction to consider that order. Williams v. State, 324 So.2d 74 (Fla. 1975).

US Sprint is dissatisfied with the access charges rate structure. But there is an avenue available to US Sprint. As the Commission stated in Order No. 17443, denying US Sprint's request

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[6]Boyd v. Southeastern Telephone Company, 105 So.2d. 889 (Florida 1st DCA 1958), cert. discharged, 114 So.2d 1 (Fla. 1959)

[7]Florida Interconnection Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976)

for hearing and oral argument, "...Sprint remains free to file an appropriately-styled petition requesting a change in the Commission's established policy." (R-57)

A. THE COMMISSION PROVIDED A POINT OF ENTRY INTO THE ADMINISTRATIVE PROCESS, AND INFORMED US SPRINT OF THE ADMINISTRATIVE OR JUDICIAL REVIEW OF ORDER NO. 17443 AS REQUIRED BY SECTION 120.59(4), FLORIDA STATUTES.

US Sprint was a party in the proceeding in which the rate structure for access charges was adopted (Order No. 12765). A point of entry into the administrative process was provided at that time, and US Sprint participated. The Commission has complied with the law.

US Sprint alleges that this Commission has failed to comply with section 120.59(4), Florida Statutes, in providing notice of the procedure which must be followed to obtain an administrative hearing or judicial review of final Commission action. US Sprint states, "Yet, the Commission order at bar contains none of the important recitations [of section 120.59(4), Florida Statutes]." (US Sprint's Brief at 16, emphasis original). The Commission disagrees.

A review of the order at bar, Order No. 17443, contains the very recitations which US Sprint states the Commission has failed to provide (R-59). The Commission has complied with that section. Sprint's argument is without merit.

US Sprint also alleges that other action contributes to a departure by the Commission from the essential requirements of law. This is not the case. The Commission has provided the necessary point of entry and has complied with the law. These

arguments, therefore, are not relevant to the resolved point of entry issue. In addition to not being relevant, the facts, if reviewed, show such arguments to be unfounded.

US Sprint had every valid opportunity to participate in Docket No. 860881-TL. Southern Bell filed its revised proposal to its access charges tariff on June 12, 1986. US Sprint, at its own request, was placed on the Commission's notification list for this docket on July 14, 1986. As a result of that action, US Sprint was notified of the staff recommendation concerning the erroneous tariff sheets. It was also notified as to the time and location when the Commission would consider that recommendation. Resulting Commission action[8] adopted that recommendation, directing Southern Bell to comply with the previous tariff order.

Despite notice of these proceedings, US Sprint chose not to intervene during the four month period the docket was open. Other parties did take advantage of the opportunity to intervene and participate in the proceedings.[9] This Commission cannot force a party to participate if it chooses not to.

US Sprint's assertion that Order No. 16687 should have been issued as a proposed agency action (PAA) order is without merit. PAA proceedings are not applicable to this situation. The issue of rate structure had already been decided. Nine days of hearings, with US Sprint participating, have already been held on this issue. Further, very rarely does the Commission use the PAA

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[8]Order No. 16687

[9]The Florida Association of Concerned Telephonics Companies, Inc., intervened on July 24, 1986 (R-17).

proceeding to approve a tariff. US Sprint's cite to one Commission order does not prove otherwise.

US Sprint alleges that this Commission violated section 120.57(1)(b)(1), Florida Statutes, by not making a decision to grant or deny its hearing request within 15 days of receipt. That is not the case. US Sprint filed its request for hearing on October 22, 1986. The docket in which US Sprint sought a hearing was officially closed on October 6, 1986. There was no administrative proceeding pursuant to 120.57(1), Florida Statutes, in existence at that time. The hearing request was filed after final agency action was taken and after the docket was closed. As such, the statutory provisions did not apply.

US Sprint substantively and procedurally failed to satisfy the Florida Administrative Code requirements for requesting oral argument.[10] The request was filed four months after its Petition for Hearing, the document it must accompany. By provisions of the rule, failure to file a timely request constitutes a waiver of that request. The request also did not state with particularity why oral argument would aid the Commission. Sprint's statements that oral argument would provide an opportunity to clarify prior policies and present timely first hand information (R-47) were actually attempts to rehabilitate its Petition for Hearing. They were not an aid to the Commission. The Commission, therefore, acted properly in denying the request for oral argument.

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[10]Rule 25-22.058(1), Florida Administrative Code.

B. COMMISSION ENFORCEMENT OF ITS PREVIOUS DECISION DID NOT VIOLATE THE DOCTRINE OF ADMINISTRATIVE FINALITY.

Commission action reflected in Order No. 16687 was merely the enforcement of its earlier decision, Order No. 12765, which established the rate structure for access charges. The Commission's recent efforts have been directed only towards enforcing that original decision.

In the cases cited by US Sprint, the subsequent Commission action which violated the doctrine of administrative finality either amended or reversed previous Commission action. In this case the Commission did neither. It simply enforced its previous decision.

Peoples Gas System v. Mason[11] is referred to by US Sprint as virtually identical to the instant case. That case involved a subsequent decision by the Commission that it did not have the authority to approve a territory agreement when it did so. In response, this Court stated:

> Then, more than four years later, the Commission sought to change its mind that it did not have the authority to approve the agreement...This kind of second guessing cannot be sustained. (emphasis supplied)[12]

The distinction with the instant case is that the Commission did not change its mind. It was being consistent in enforcing its previous order.

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[11] 187 So.2d 335 (Fla. 1966)

[12] Id. at 340

This Court in Reedy Creek Utilities Company v. Florida Public Service Commission[13] found that the Commission did have the ability to clarify an order without notice or opportunity for hearing. That ability is subject to the doctrine of administrative finality. The two and one-half month period between orders was not contrary to that doctrine. In discussing the Commission's power to modify a previous order this Court stated:

> ...[the Commission] had the inherent power and statutory duty to amend its order to protect the customer. (emphasis supplied)[14]

The Commission action in Order No. 16687 did not amend its previous order. It directed compliance with it.

The final case US Sprint relies upon is Revell v. Florida Department of Labor and Employment Security[15]. That case is cited as requiring the potentially affected person to be provided notice and hearing if that person would suffer as a result of corrective action.

The corrective action in Revell, however, is entirely different from the action taken by the Commission in Order No.

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[13] 418 So.2d 249 (Fla. 1982)

[14] Id. at 253.

[15] 371 So.2d 227 (Fla. 1st DCA 1979)

16687. The First District Court of Appeal in Revell stated:

> [B]efore the final decision in favor of appellant on the merits was reversed appellant was entitled to notice of the proposed action and the opportunity to object and request a hearing if necessary (emphasis supplied)[16]

The Commission action in the instant case did not reverse previous action. Nor did The Commission reconsider, on the merits, its previous action. It was merely enforcing an earlier decision.

Based on the facts of this case, the doctrine of administrative finality is not applicable. The Commission's decision in Order No. 16687 was, in fact, the same as its decision in Order No. 12765. The legal conclusions upon which US Sprint relies, therefore, are not persuasive in showing that the Commission's denial of US Sprint's request for hearing and oral argument departed from the essential requirements of law.

US Sprint also alleges that it would, in fact, suffer if the Commission would enforce its previous decision and properly impose charges on its trunk side access. That is not the case. US Sprint was receiving the monetary benefit of the lower access charge rates as the result of the improperly filed tariff sheets. Commission action which it now challenges merely places US Sprint in the position it would have been had the tariffs sheets been correctly filed. Commission action places it in the same position as all other providers of that service. Having received the benefit of that error, US Sprint cannot now object to it. See Corporation De Gestion Ste-Foy v. Florida Power and Light, 385 So.2d 124 (Fla. 3d DCA 1980).

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[16] Id. at 230.

CONCLUSION

The Commission's enforcement of its previous decision complied with the essential requirements of law. US Sprint has been provided with the appropriate opportunities to participate in the administrative process before this Commission. The Commission, therefore, properly denied US Sprint's request for hearing and oral argument. The Commission respectfully requests that this Court affirm Order No. 17443.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 24th day of August, 1987 to the following:

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