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IN THE SUPREME COURT OF FLORIDA

US SPRINT COMMUNICATIONS COMPANY, Appellant, v. KATIE NICHOLS, ET AL., Appellee.	)	Case No. 70,610

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ON APPEAL FROM A FINAL ORDER OF THE FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF US SPRINT COMMUNICATIONS COMPANY

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PREFACE

This is an appeal from a final order of the Florida Public Service Commission (Order No. 17443; issued April 21, 1987 in PSC Docket No. 860881-TL), denying US Sprint Communications Company an opportunity to be heard prior to implementing a change in the then-effective access service tariffs of Southern Bell. US Sprint's substantial interests were thereby adversely affected without affording US Sprint critical procedural due process protections mandated by Florida Statutes chapters 120 and 364.

Jurisdiction vests in this Honorable Court pursuant to Article V, section 3(b)(2) of the Florida Constitution, Florida Statutes sections 120.68(1) and 364.381 (1985), and Rule 9.030(a)-(1)(B)(ii) of the Florida Rules of Appellate Procedure.

For convenient reference, the parties will be referred to as they appeared before the Public Service Commission, and the following symbols and abbreviations may also be used, viz.:

Florida Public Service Commission - Commission or PSC
US Sprint Communications Company - US Sprint
Southern Bell Telephone & Telegraph Company - Southern Bell
Record on Appeal - (R-)
Appellant's Appendix - (A-)

STATEMENT OF CASE AND FACTS

Long distance carriers, such as US Sprint, may only provide service to individual customers by utilizing the facilities of local exchange telephone companies, such as Southern Bell, to originate and terminate a call. On January 1, 1984, the PSC implemented a Southern Bell tariff (hereinafter the "January 1984 tariff") governing the terms and conditions of this access service. One provision of this tariff included discounts (known as prorate credits) in charges paid by those long distance telephone companies that resold wide area telephone service (WATS). Since January 1, 1984, US Sprint relied on and acted in accordance with the relevant provisions of this tariff in ordering and obtaining access services.[1]

On June 11, 1986, Southern Bell filed with the Commission proposed revisions (R-1) (hereinafter the "June 1986 submission") to eliminate completely all prorate credit provisions previously included in the January 1984 tariff.

On July 24, 1986, the Florida Association of Concerned Telephone Companies (FACT) filed a motion opposing Bell's June 1986 submission (R-20). Southern Bell responded in opposition to the FACT motion on August 4, 1986 (R-25). US Sprint took no action at that juncture since, under the applicable statutes,

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[1]The Commission has modified the access tariff at several points between 1984 and 1986. Although the substance of such changes is not relevant to the instant action, it is important to note that each of these tariff changes were made either with the benefit of hearings, as proposed agency actions, or by stipulation of the affected parties.

the Commission could only approve, suspend, or reject the Bell tariff,[2] any of which actions would have been acceptable to US Sprint because such action would have placed all of the long distance companies on an equal footing.

The Commission formally considered the June 1986 submission at its September 16, 1986 Agenda Conference. At that conference, the Commission voted to reject the June 1986 submission and instructed Southern Bell to submit a new tariff to retain the prorate credit for only one type of local access service (Feature Group A).[3] On September 25, 1986, Bell submitted its new tariff to the Commission thereby eliminating the credit previously available to US Sprint as a user of Feature Group B, but retaining the credit for its competitors who use Feature Group A. US Sprint did not move to intervene at this time since the company was entitled to rely upon the Commission's order to provide a clear point of entry into the administrative process.

On October 1, 1986, the Commission Staff "administratively" approved Southern Bell's new tariff, effective that date (A-12). Then, five days later, the Commission issued its order, Order

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[2] § 364.05, Fla. Stat. (1985).

[3] The connections with the local exchange companies are designated as Feature Groups A, B, C, and D. Long distance carriers other than AT&T use feature groups A, B, and D; only AT&T uses C. US Sprint did not object to the across-the-board elimination of the prorate credit for all access feature groups. US Sprint does, however, object to and wish to be heard on the unilateral elimination of the prorate credit for Feature Group B service which unfairly and disproportionally disadvanges US Sprint vis a vis its competitors.

No. 16687 (R-29; A-8), embodying the action taken at the September 16, 1986 Agenda Conference. Consistent with the Agenda vote, the order simply rejected the June 1986 submission and instructed Southern Bell to submit a new tariff. However, the belated order did not specify when the new tariff was to be filed or become effective, did not authorize the Staff to approve or make effective the new tariff, and did not contain the statements required by the statute to give adversely affected parties notice of hearing or appellate rights.[4]

When US Sprint discovered that a new tariff was not only filed but approved and implemented prior to the issuance of the order, US Sprint timely filed an alternative petition for hearing or reconsideration on October 22, 1986 (R-33). By this petition US Sprint suggested two methods under which the Commission could have cured the plain procedural deficiencies of its action: (1) the Commission could treat the October 6, 1986 order as a proposed agency action (PAA), which under Commission rules provides a substantially affected party an opportunity for a hearing, or; (2) the Commission could reconsider the order, immediately suspend the new tariff, and set the matter for hearing under the requisite statutory procedures for implementing tariff changes. Either of these methods would have afforded US Sprint its notice and opportunity for hearing.

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[4] § 120.59(4) Fla. Stat. (1985).

Although a request for hearing is required to be "granted or denied within 15 days of receipt,"[5] the Commission took no action on US Sprint's request for over five months. In the interim, US Sprint filed a request for oral argument in an attempt to bring the procedural posture of the matter squarely before the Commission (R-45).

At the March 31, 1987 Agenda Conference, the Commission voted to deny US Sprint's Alternative Petition for Hearing or Reconsideration, along with Sprint's oral argument request, without providing US Sprint an opportunity to speak at the Agenda Conference. On April 21, 1987, the Commission issued Order No. 17443 memorializing its action (R-53; A-1). This appeal followed.

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[5] § 120.57(1)(b)(1), Fla. Stat. (1985).

SUMMARY OF ARGUMENT

The Commission has materially revised the rates paid by US Sprint under the January 1984 access tariff thereby placing US Sprint at a serious and costly economic competitive disadvantage. The January 1984, Commission-approved tariff had been relied on for over two-and-one-half years. A change in this tariff cannot be legally implemented by PSC fiat, where affected parties, who by PSC rule must purchase these access services under that tariff, are denied meaningful notice and an opportunity to be heard prior to altering the tariff. Such failure to abide by basic statutory and judicial directives constitutes a material departure from the essential requirements of the law and justifies reversal.[6]

The factual context within which this case arises is crucial to an understanding of the deficiencies complained of which form the basis of this appeal: in December 1983 the Commission issued an order which US Sprint and Southern Bell interpreted as providing prorate credits for all inferior access connections used in conjunction with resold WATS; in January 1984 the Commission approved a tariff which did exactly that; from 1984 until October 1986, US Sprint and the other long distance carriers were compelled to abide by and did rely on such tariff provisions for obtaining access in Florida; in June 1986 Southern Bell proposed a new

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[6]For the standard of review for PSC orders, see, for example, Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679, 681 (Fla. 1979), and Florida Gas Co. v. Hawkins, 372 So.2d 1118, 1121 (Fla. 1979).

tariff provision to eliminate all such prorate credits; US Sprint had notice of that proposed revision and did not object to its approval, rejection, or suspension; on September 16, 1986 the Commission voted to reject Southern Bell's proposed tariff and ordered that a new tariff be filed to eliminate some of the prorate credits and not others; this new tariff was filed on September 25, 1986 and administratively approved by the PSC Staff on October 1, 1986, five days before issuance of the written order requiring the tariff filing; and, US Sprint's attempt to obtain a hearing on the partial deletion of some of the credits was summarily denied over five months later.

Up to the point where it rejected the June 1986 submission, the Commission acted appropriately. When, however, it permitted the new tariff to become effective without giving a substantially affected party an opportunity to object, the Commission violated the due process protections embodied in chapters 120 and 364 of the Florida Statutes. The Commission could easily have complied with these essential requirements by: (a) simply directing the filing of a new tariff and allowing the statutory notice period to operate normally; (b) properly waiving the statutory period; or, (c) noticing its intent as a proposed agency action. All of these alternative procedures are well established in the statutes or the PSC's rules. Yet there was no attempt to cure the defective procedure, even when advised of at least two of these methods by US Sprint in its Petition for Hearing or Reconsideration.

This action also violated two basic legal doctrines designed to ensure due process. First, the Commission determined the substantial interests of US Sprint without providing a clear point of entry into the administrative process before taking final action. Second, the Commission acted in direct violation of the doctrine of administrative finality by unilaterally changing a tariff previously effective for almost three years without providing a hearing opportunity.

The effect of the Commission's failure to abide by these precepts is dramatically demonstrated by the economic impact on US Sprint, which was suddenly placed at a serious competitive disadvantage vis-a-vis those carriers able to retain the credit under the new tariff. The Commission's failure to acknowledge or employ important and applicable due process protections, as evidenced by the PSC's flat denial of US Sprint's requests to be heard, constitutes a clear and unacceptable departure from the essential requirements of law, warranting reversal and voiding of the tariff ab initio.

ARGUMENT

POINT I

THE COMMISSION ILLEGALLY CHANGED TARIFF RATES IN DEROGATION OF THE NOTICE REQUIREMENTS MANDATED BY FLORIDA STATUTES SECTION 364.05.

The Commission's action below failed to comply with the clear statutory mandate that "no change shall be made in any rate" filed with the Commission "except after 60 days' notice" unless the notice period is expressly waived by Commission order.[6] Specifically, the PSC rejected a June 1986 Southern Bell tariff submission and then approved a new, later tariff submission only six days after filing, before issuance of an order, and without an express waiver of the statutory notice period. These serious transgressions render the new Commission implemented tariff illegal ab initio under existing statutory and decisional law. The Commission's orders approving these actions should be reversed and the status quo ante reinstated.

The Florida Legislature has established as a fundamental rule that a telephone company "shall file with the Commission and shall print and keep open to public inspection" schedules (i.e., tariffs) setting forth all rates to be charged for the utility's services.[7] Once filed with the Commission, all initial rates or changes to existing rates require a 60 day public notice

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[6] § 364.05(1), Fla. Stat. (1985).

[7] § 364.04(1), Fla. Stat. (1985).

period before the rates may go into effect.[8] This period enables the Commission to review the tariff submission to ensure that it is "fair, just, reasonable, and sufficient."[9] Moreover, this notice period allows affected persons the opportunity to review a tariff submission and, in conjunction with chapter 120, to be given an opportunity to be heard on the proposed tariff prior to implementation.

When a tariff is submitted, the Commission has three options under this statute:[10] It may either abstain from action, in which case the tariff takes effect automatically after the 60 days absent a protest; it may reject the tariff; or the Commission "may withhold its consent" to all or part of the tariff, in which case the statute provides an elaborate process leading to the ultimate approval or withdrawal of the suspended tariff within a set time from filing.[11]

In applying this statutory scheme to the present case, it is clear that the October 1986 tariff was legally a new tariff. First, by its own order the Commission flatly rejected Southern

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[8] § 364.05(1), Fla. Stat. (1985).

[9] § 364.03(1), Fla. Stat. (1985).

[10] The Commission's other alternatives are discussed at Points II and III below.

[11] § 364.05, Fla. Stat. (1985). "This package survives the adoption of the new Administrative Procedures Act. See section 120.72(3), Florida Statutes." Florida Interconnect Tel. Co. v. Florida Public Service Comm'n, 342 So.2d 811, 814 (Fla. 1976).

Bell's June 1986 tariff submission.[12] Second, Southern Bell did not submit substitute pages to the Commission, but rather an entirely new tariff package.[13] Third, the Commission processed this submission as a new tariff, assigning it a new tariff number.[14] Consequently, when the Commission directed Southern Bell to "file a revision" to the January 1984 effective tariff,[15] a new statutory notice period attached and must be complied with.

The courts have consistently treated the statutory notice period as an inviolable command. In the Boyd case,[16] which is directly on point with the instant issue, the First District Court reversed a new tariff rate implemented by an order of the Commission rendered only three days after the tariff was filed. The dispositive fact in the case was that there had never been a hearing on the new tariff and the Commission allowed the rate increase to take effect before the running of the statutory notice period.[17]

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[12]Order No. 16687, at 3 (R-31; A-10).

[13]Tariff T-86-346 (A-12).

[14]Id.

[15]Order No. 16687, at 3 (R-31; A-).

[16]Boyd v. Southeastern Tel. Co., 105 So.2d 889 (Fla. 1st DCA 1958) (A-27), cert. discharged, 114 So.2d 1 (Fla. 1959) (A-34).

[17]Id. at 893 (A-31). At that time, section 364.05 provided a 30 days notice period.

The importance of the notice period was also acknowledged by this Court in Florida Interconnect.[18] In that case the Florida Interconnect Telephone Company claimed the Commission had approved a Southern Bell tariff without notice, an opportunity for hearing, or the other incidents of due process required by the statutes. This Court ultimately denied Florida Interconnect's claim because, unlike here, the petition for hearing was filed outside the statutory notice period.[19] The clear import of the decision is that if Florida Interconnect had timely filed its request for hearing, the Commission's action would have been void and a reversal or remand required. Here, US Sprint did exactly what this Court admonished Florida Interconnect to do by filing within the notice period, and thus is entitled to relief.

It is equally clear that there was no waiver of the 60 day notice period in the order here on review. A proper waiver would have provided US Sprint with an opening to the administrative process. The Commission may waive the 60 day notice period "for good cause shown . . . by an order specifying the change so to be made, the time when it shall take effect, and the manner in which the same shall be filed and published."[20] But, as the court in the Boyd case pointed out, an order of the Commission

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[18]Florida Interconnect Tel. Co. v. Florida Public Service Comm'n, 342 So.2d 811 (Fla. 1976).

[19]At the time of the Florida Interconnect case, section 364.05 still provided for a 30 day notice period.

[20]§ 364.05(2), Fla. Stat. (1985) (emphasis added).

that does not fulfill all of these requirements does not constitute a valid waiver of the statutory notice period.[21] The need to comply with each of the statutory elements is grounded in both the plain language of the statute and fundamental principles of due process, since it is the public's essential right to notice and hearing that may be jeopardized or compromised.

The implementation of the September 25, 1986 tariff submission fails to comply with the waiver statute in two vital respects. First, the Staff approved the September 25th tariff prior to the issuance of an order. Under the statute, before there can be a waiver the Commission must issue an order. In addition, the Commission's eventual October 6th order made no attempt to authorize the Staff to approve the tariff. Even if the order had expressed an intent to authorize the Staff to act, such a delegation would fly in the face of the legislative mandate that: "No change shall be made in any rate, toll, rental, contract, or charge prescribed by the commission without its consent."[22] Thus, the Staff was powerless to approve and implement this tariff under these circumstances.

Second, the order finally issued on October 6th failed to comply with three of the four waiver requirements enumerated in the statute. The entire statement by the Commission in its order is that "Southern Bell should file a revision to Section

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[21] Boyd, 105 So.2d at 893 (A-31).

[22] § 364.05(3), Fla. Stat. (1985).

E3 of the Tariff in order to delete only the CCL charge credits for trunk-side access associated with the resale of [dedicated access line] DAL Service."[23] A search of the rest of the order reveals no finding of good cause justifying waiver of the notice period, no statement when the new tariff should take effect, and no description of the manner in which the new tariff would be filed and published. Under these facts, it is inconceivable that a valid waiver occurred.

US Sprint does not dispute the Commission's ability to reject and/or direct the filing of a new tariff; this is frequently done within the parameters of due process. Rather, the objection expressed herein is the Commission's gross departure from those essential procedural requirements of the law. Absent proper notice and the attendant opportunity for hearing contemplated under the statutes, previously approved tariffs simply may not be changed by the PSC in the manner employed here. US Sprint respectfully submits that the PSC order denying US Sprint's petition for hearing and purporting to alter tariffed rates in noncompliance with relevant statutory requirements be reversed, and the status quo ante be reinstated.

POINT II

THE COMMISSION FAILED TO PROVIDE A CLEAR POINT OF ENTRY INTO THE ADMINISTRATIVE PROCESS AS REQUIRED BY FLORIDA STATUTES SECTION 120.59(4).

It is well established that, when the Commission desires to take final agency action absent a hearing, the Commission's

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[23]Order No. 16687, at 3 (R-31; A-10).

action will not stand unless the PSC has provided a clear point of entry into the administrative process for substantially affected parties. Whether judged by case law, the governing statute, or the PSC's own rules, the procedure employed in the instant case failed to comply with this essential due process requirement.

In a recent decision involving the same legal issue as that presently before this Court, the First District Court of Appeal reversed an order of the Commission that failed to provide a party with a clear point of entry.[24] In FFEC-Six, the Commission attempted to take final action when it issued an order establishing a utility's rate of return. In reversing, the court found:

> the Commission order did not indicate that further information was necessary, nor did the order articulate appellant's right to request a § 120.57, Florida Statutes, hearing, or the applicable time limit for such a request, or the applicable procedural rules. The Commission has thereby failed to provide appellant with a clear point of entry into the administrative proceeding, thus rendering the Commission action invalid.[25]

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[24] FFEC-Six, Inc. v. Florida Public Service Comm'n, 425 So.2d 152 (Fla. 1st DCA 1983) (A-36). The clear point of entry rule was first enunciated in Capeletti Bros., Inc. v. State Dep't of Transp., 362 So.2d 346 (Fla. 1st DCA 1978), cert. den., 368 So.2d 1374 (Fla. 1979), has been affirmed in numerous cases since then. See e.g., City of St. Cloud v. Department of Envtl. Reg., 490 So.2d 1356 (Fla. 5th DCA 1986); L.R. v. Department of State, 488 So.2d 122 (Fla. 3d DCA 1986).

[25] FFEC-Six, 425 So.2d at 153 (citations omitted) (A-37).

Since the FFEC-Six decision, the Florida Legislature has codified and somewhat embellished the clear point of entry requirement at Florida Statutes section 120.59(4).[26] This statute provides that whenever an agency issues an order contemplating final action, the order must contain a notice that "shall inform the recipient of any administrative hearing . . . which may be available to him, shall indicate the procedure which must be followed to obtain the hearing . . . , and shall state the time limits which apply."[27] Yet, the Commission order here at bar contains none of these important recitations.

In order to expedite Commission action without sacrificing due process rights, the Commission's own rules offer an alternative means of notice which could have been used in this case. The rules provide that in advance of taking action, the Commission may notice its "proposed agency action" (PAA) by an order describing the hearing rights, judicial review options, and procedural requirements available to potentially affected parties.[28] The Commission has frequently utilized and relied on this PAA procedure in approving tariffs.[29] The key component of this procedure

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[26]Ch. 84-203, § 5, Laws of Fla. This Court has previously determined that the PSC is subject to chapter 120. ASI v. Public Service Comm'n, 334 So.2d 594 (Fla. 1976).

[27]§ 120.59(4), Fla. Stat. (1985).

[28]Fla. Admin. Code Rule 25-22.029.

[29]See, e.g., Order No. 17373 (Apr. 7, 1987) (Notice of Proposed Agency Action, Order Approving Tariff Filing and Requiring All Other Local Exchange Companies to File Conforming Tariff Revisions) (A-44).

is the ability of a substantially affected party to petition for hearing prior to the PAA order becoming effective. When such a petition is filed, the action is automatically suspended pending the outcome of the hearing. Sub judice, despite prior Commission precedent for handling similar tariff matters as PAAs, and despite US Sprint's express requests, the October 6th order was not issued as or deemed by the Commission to be a PAA.

In light of the Commission's refusal to provide a clear point of entry, the additional failure to comply with the 15 day mandate of Florida Statutes section 120.57(1)(b)(1) in processing US Sprint's attempt to legitimately gain entry to the administrative process only compounds the Commission's errors. This statute speaks in absolute and unequivocal language that is unmistakable in its intent: "A request for a hearing shall be granted or denied within 15 days of receipt."[30]

The Commission's failure to act upon US Sprint's alternative petition of October 22, 1986 for over five months, and the Commission's flat denial of US Sprint's requests for oral argument or an opportunity to speak at Agenda, violate the clear language

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[30] § 120.57(1)(b)(1), Fla. Stat. (1985).

of the statute and constitute a departure from the essential requirements of law.[31]

POINT III

THE COMMISSION'S MODIFICATION OF A TWO-AND-ONE-HALF YEAR OLD TARIFF, ABSENT PROPER NOTICE AND OPPORTUNITY FOR HEARING, VIOLATES THE DOCTRINE OF ADMINISTRATIVE FINALITY AND DENIES FUNDAMENTAL PROCEDURAL DUE PROCESS.

In the seminal case of Peoples Gas System v. Mason,[32] this Court said that the PSC has the power, on its own motion or request of a party, to modify an order still under its control. This Court went on to note, however, that at some point in time the decision necessarily passes out of the agency's control, and the action becomes final and dispositive of the rights and issues involved.[33] Once administrative finality attaches, the power of the agency to modify its earlier action "may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification . . . is necessary in the public interest because of changed conditions

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[31]Indeed, one Florida appellate court has suggested that any agency action taken prior to disposing of a request for a hearing could be voidable on this basis alone. Florida Convalescent Centers, Inc. v. State Dep't of Health & Rehab. Services, 445 So.2d 631 (Fla. 1st DCA 1984). The adoption of such a rule by this Court here would be entirely consistent with the legislative intent underlying chapter 120.

[32]187 So.2d 335 (Fla. 1966) (A-38).

[33]Id. at 339 (A-42).

or other circumstances not present in the proceedings which led to the order being modified."[34]

The instant tariff modification procedure employed by the Commission flagrantly disregards both the rule and its rationale as established by this Court in Peoples Gas:

> [The] orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts.[35]

The need for such finality is even more compelling where there has been a longstanding, uncontested period of reliance by the parties. Here, the nearly three-year-old,[36] Commission approved, mandatory tariff fully meets this test and is beyond the Commission's authority to simply change by way of unilateral "clarification" or "correction."

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[34] Id.; see also Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979).

[35] Peoples Gas, 187 So.2d at 339 (A-42).

[36] The relevant portions of the January 1984 tariff had been in effect for 2 years, 5 months, and 11 days when Southern Bell made its June 11, 1986 tariff submission to the PSC (R-1). When the Commission Staff approved and implemented the September 25, 1986 tariff submission, the January 1984 tariff had governed service for 2 years and 10 months (A-12).

In Peoples Gas, this Court found that the Commission had changed a policy previously in effect for some four-and-one-half years. In quashing the Commission's later action, this Court found dispositive the fact that the original policy had been acted upon, and the Commission altered that policy on its own motion, without a record demonstrating the circumstances justifying the change. The Court concluded: "We experience no qualms in holding that in entering the order under review the commission went far beyond any power it has to modify an order previously entered."[37]

The parameters of the instant case are virtually identical and should support the same conclusion. Here, pursuant to Commission order, the parties followed and relied on the prorate credit provisions of the January 1984 access tariff for two years and ten months. During this period, the Commission had many opportunities to "correct" the January 1984 tariff: first, the Commission suspended the tariff and placed it in effect on an interim basis "pending its analysis by the Commission."[38] And, second, the Commission considered and disposed of numerous petitions for reconsideration.[39] However, at no time during these proceedings did the Commission or any of the parties object to or question

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[37]Peoples Gas, 187 So.2d at 339 (A-42).

[38]Order No. 12805, at 1 (Dec. 22, 1983) (Order Suspending Tariff in Part and Denying Tariff in Part).

[39]Order Nos. 12938 (Jan. 27, 1984) (Order on Southern Bell's Petition for Reconsideration) and 13091 (Mar. 16, 1984) (Order Disposing of Petitions for Reconsideration).

the formulation of the prorate credits as expressed in the January 1984 tariff. Moreover, since January 1984 the Commission has been engaged in a continuous investigation of access charges and services provided under the tariff without the Commission once suggesting that the prorate credits embodied in the tariff were improper, illegal, or otherwise inconsistent with Commission policy.[40]

This set of facts is clearly distinguished from those confronted in the Reedy Creek case, wherein this Court approved a "clarification" order of a PSC issued without notice or an opportunity for hearing.[41] In Reedy Creek, such "clarification" was permitted solely because of the short period of time between the original order and the clarification (less than three months) and because the parties had not relied upon the earlier order or changed position in response thereto.[42] This is directly contrary to the instant case where there was substantial reliance for nearly three years, and the opportunity to take corrective action had long since passed.

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[40]Indeed, the issue arose in June 1986 only because Southern Bell was attempting to respond to actions taken by the Federal Communications Commission with respect to the interstate access tariffs.

[41]Reedy Creek Utilities Co. v. Florida Public Service Comm'n, 418 So.2d 249 (Fla. 1982).

[42]It is also instructive to note that when Reedy Creek learned of the "corrective" order and filed a petition for reconsideration, the Commission conducted a full evidentiary hearing before denying the reconsideration request. Reedy Creek, 418 So.2d at 252.

The Commission's duties under the statutes, and the legal status the statutes afford tariffs, further support the applicability of the administrative finality doctrine to tariffs and substantiate the finality to be afforded the January 1984 tariff. The Legislature has charged the Commission with ensuring that every tariff put into effect is "fair, just, reasonable, and sufficient."[43] Once approved, telephone companies must charge only those rates shown in the scheduled tariffs.[44]

Pursuant to these legislative pronouncements, the courts have afforded approved tariffs the full force and effect of law.[45] This is construed to mean that a tariffed rate is the only basis by which a utility can charge its customers, and the tariffed rate must be charged regardless of the consequences.[46] In explaining the impact of this rule under the analogous federal statutes,[47] one federal court in Florida has specifically declared

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[43] § 364.03(1), Fla. Stat. (1985).

[44] § 364.08(1), Fla. Stat. (1985).

[45] Maddalena v. Southern Bell Tel. & Tel. Co., 382 So.2d 1246, 1248 (Fla. 4th DCA 1980). See also Landrum v. Florida Power & Light Co. 505 So.2d 552, 554 (Fla. 3d DCA 1987).

[46] Corporation De Gestion Ste-Foy, Inc. v. Florida Power & Light Co., 385 So.2d 124 (Fla. 3d DCA 1980).

[47] The Court has looked to, and received support from, federal judicial decisions involving the construction of analogous federal tariffs and statutes. United Tel. Co. v. Public Service Comm'n, 496 So.2d 116, 119 (Fla. 1986).

that a tariffed rate is to be charged even if the tariff may arguably violate the governing statutes.[48]

It is thus entirely disingenuous for the Commission to suggest that it need not have provided notice or an opportunity for a hearing below because its action in changing the tariff was merely "corrective."[49] This issue of "corrective" action was addressed by the First District Court of Appeal in Revell v. Florida Department of Labor & Employment Security.[50] In that case the court held an agency may not simply correct an action if a party would suffer as a result of the second, corrective action. The court concluded that the potentially affected party "was entitled to notice of the proposed action and the opportunity to object and request a hearing."[51]

In the instant case, the January 1984 tariff had become final within the clear purview of the doctrine of administrative finality. The Commission should not be permitted to avoid the requisite procedural due process protections by characterizing the September 1986 revision to that tariff as "corrective," or "ministerial" when in fact the rates paid by US Sprint increased over the rates paid under the previously effective tariffs as a result of the Commission's action.

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[48]Louisville & Nashville R.R. v. St. Regis Paper Co., 102 F. Supp. 713 (N.D. Fla. 1952), aff'd, 201 F.2d 371 (5th Cir. 1953).

[49]Order No. 17443, at 3-4 (R-55 to 56; A-3 to 4).

[50]371 So.2d 227 (Fla. 1st DCA 1979).

[51]Id. at 230.

Approval of the Commission's actions below would vest unbridled authority in that body to materially and unilaterally manipulate a key element of the regulatory process, i.e., tariffed rates, absent the chapter 120 and 364 notice and hearing protections. The Court must, therefore reverse the Commission's action as violative of fundamental notions of administrative finality and a departure from the essential requirements of law.

CONCLUSION

The Commission's actions sub judice constitute a clear departure from the essential requirements of statutory and decisional law designed to ensure the provision of basic procedural due process protections to substantially affected parties such as US Sprint.

In recognition of these material deficiencies and based on the foregoing, US Sprint respectfully requests this Honorable Court to reverse the PSC order on appeal, void the tariffs sought to be implemented by such order ab initio, and order that the prior tariff provisions be reinstated as effective until properly modified by the Commission in compliance with the law.

Respectfully submitted,

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LAUCHLIN T. WALDOCH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by U.S. Mail to William E. Bilenky and Gregory J. Krasovsky, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0850, this 30th day of July, 1987.

By: Bruce Renard
BRUCE W. RENARD