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IN THE SUPREME COURT OF FLORIDA

US SPRINT COMMUNICATIONS)
COMPANY,)
) Appellant,)
) vs.)
) KATIE NICHOLS, ET AL.,)
) Appellee.)
_____)

CASE NO. 70,610

Submitted for Filing:
September 18, 1987

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

**REPLY BRIEF OF APPELLANT
US SPRINT COMMUNICATIONS COMPANY**

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PREFACE

The record and briefs presented in this case confirm that the Commission failed to comply with essential requirements of law when changing legally effective tariff rates absent adequate notice, a clear point of entry, or an adequate hearing opportunity. The Commission's characterization of its action as "enforcement" does not cure this fundamental noncompliance with applicable statutory provisions governing changes in lawfully approved tariff rates.

Even if this were an attempt to "enforce" an earlier order, the FPSC is not authorized to disregard the procedures set forth in Florida Statutes chapters 120 and 364 when changing existing tariff rates. The Commission's final order purporting to change legally approved tariff provisions without proper notice or a hearing is void ab initio and should be reversed by this Court.

* * * * *

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

Florida Public Service Commission - Commission or FPSC

US Sprint Communications Company - US Sprint

Southern Bell Telephone and Telegraph Company - Southern Bell

Record on Appeal - (R-)

ARGUMENT

I. THE COMMISSION'S SELF-STYLED "ENFORCEMENT" ACTION FAILED TO COMPLY WITH THE ESSENTIAL REQUIREMENTS OF LAW

The Commission's assertion that its actions were in the nature of "enforcement" is wholly without legal merit or factual substance. The Commission cannot unilaterally change a legally effective tariff then deny a proper petition for hearing that raises a dispute of material fact, and still have complied with the essential requirements of law.

First, the Commission has ignored the fact that the January 1984 tariff¹ has an independent legal existence apart from any order. As pointed out in US Sprint's Initial Brief, approved tariffs have the force and effect of law and the rates charged therein must be charged regardless of the consequences.² The Commission's earlier, December 1983 order is not somehow superior to the January 1984 tariff, nor would an apparent inconsistency between the two authorize the Commission to deny the legal status

¹For this brief, as in its Initial Brief, US Sprint shall refer to the industry-wide tariff effective on January 1, 1984 as the "January 1984 tariff." The earlier Commission Order, No. 12765 (issued December 9, 1983), which the Commission claims it was "enforcing" will be referred to as the "December 1983 Order." The new tariff changing the January 1984 tariff will be designated the "October 1986 tariff."

²Maddalena v. Southern Bell Tel. & Tel. Co., 382 So.2d 1246, 1248 (Fla. 4th DCA 1980); In re Pennichuck Water Works, 419 A.2d 1080, 1083 (N.H. 1980). See also Florida Rate Conf. v. Florida RR & Public Utilities Comm'n, 108 So.2d 601 (Fla. 1959); Landrum v. Florida Power & Light Co., 505 So.2d 552, 554 (Fla. 3d DCA 1987); Corporation De Gestion Ste-Foy, Inc. v. Florida Power & Light Co., 385 So.2d 124 (Fla. 3d DCA 1980).

of the tariff and disregard normal ratemaking and administrative procedure protections of Florida Statutes chapters 120 and 364.

It is incredible for the Commission to suggest that a material revision to this lawfully approved tariff, after over two-and-one-half years, is in the nature of a technical "enforcement" of the December 1983 order. The Commission's position assumes that all local exchange companies, all long distance carriers, the Staff, and the Commission misinterpreted the December 1983 Order or failed to discover the "error" during a lengthy investigation and review process and an almost three year implementation period. Such assumptions are unfounded and incorrect.

The January 1984 tariff was not the product of an isolated event, but rather the final embodiment of one of the most extensive proceedings in Commission history. For over one-and-one-half years the Commission conducted workshops and adjudicatory hearings and evaluated numerous tariffs and policies that ultimately culminated in the January 1984 tariff. The 1984 tariff document was subjected to further scrutiny after the Commission formally suspended the tariff on the basis that "it must be reviewed in detail to ensure consistency and compliance with Order No. 12765 [the December 1983 Order]" and to enable "analysis" by the Commission.³ In March 1984, the Commission disposed of the last of eight petitions for reconsideration of the December 1983 Order

³Order No. 12805, 1 (December 22, 1983). By this Order, the tariff's provisions were allowed to become effective on January 1, 1984 subject to refund if during the suspension period the Commission found the tariff to be illegal.

and the January 1984 tariff and lifted the suspension of the tariff.⁴ Since the suspension was lifted and the final approved tariff rates became effective, the January 1984 provisions here under review had been relied upon and unchallenged by either the telephone companies or the Commission.

The Commission cites no statutory or case law authority for the proposition that the Commission has an inherent power to modify legally effective tariff rates based on "corrective" action to "enforce" an earlier order. This is understandable since none exists. As recognized in the Commission's Answer, the only enforcement mechanisms available to the Commission are: (1) imposition of penalties, (2) revocation of a certificate, and (3) an enforcement action before the Circuit Court.⁵

None of these mechanisms is applicable in the instant case, and the Commission cannot legislate a new power to "enforce" simply because it desires to revisit an earlier order. While the FPSC does have available certain lawful procedures to enforce valid Commission orders, these actions must be taken "in the

⁴Order Nos. 12938 (Jan. 27, 1984) and 13091 (Mar. 16, 1984).

⁵Commission Answer Brief at 9-10. It should be noted that each of these mechanisms is specifically authorized by the Legislature. See §§ 364.285, 120.69, Fla. Stat. (1985).

manner prescribed by law for that purpose."⁶ Such "lawful forms"⁷ do not include unilaterally changing an existing, approved tariff rate outside the standard notice and hearing requirements provided in Florida Statutes sections 364.05, 120.57(1), and 120.59(4). The blatant attempt presented here to proceed in an ultra vires manner and to suggest that these statutory requisites simply do not apply should be rebuked and the attempted illegal tariff change voided.

II. EFFECTIVE TARIFF RATES HAVE INDEPENDENT LEGAL VALIDITY AND MAY ONLY BE CHANGED BY THE COMMISSION PURSUANT TO FLORIDA STATUTES SECTION 364.05

As this Court stated twenty years ago:

"We find from the statutory context of other provisions of Chapter 364 that the procedure outlined in Section 364.05 is designed to apply to any rate change."⁸

Indeed, the language of section 364.05 provides that "no change shall be made in any rate" except pursuant to the process therein described.⁹ Here, however, the Commission has clearly acted outside this process. The January 1984 tariff had been

⁶State v. Atlantic Coast Line R.R., 54 So. 900, 903 (Fla. 1911). See also Art. I, § 18, Fla. Const., which prohibits administrative penalties in the absence of specific legislative authorization. Continental Construction Co. v. Board of Trustees of the Internal Improvement Trust Fund, 464 So.2d 204, 207 (Fla. 1st DCA 1985), pet. for rev. den., 472 So.2d 1180 (Fla 1985).

⁷Aloha Utilities, Inc. v. Florida Public Service Comm'n, 376 So.2d 850, 851 (Fla. 1979).

⁸Florida Interconnect Tel. Co. v. Florida Public Service Comm'n, 342 So.2d 811, 814 (Fla. 1976) (emphasis added).

⁹§ 364.05(1) Fla. Stat. (1985) (emphasis added).

subjected to extensive review by the Commission and the industry, and has been actually in effect and utilized for over two-and-one-half years. Both the local and long distance carriers relied on the accuracy of the initial tariff. Thus, when the Commission decided to alter the January 1984 tariff it was duty bound to comply with the provisions of section 364.05 in effectuating the change.

Indeed, whenever this Court examines Commission action, it "must establish the grant of legislative authority to act since the Commission derives its power solely from the Legislature."¹⁰ As this Court has also acknowledged, the jurisdiction of the Commission "must be invoked in the manner provided by statute and it is not authorized to proceed except in conformity with the statutes."¹¹ There is no escape provision which relieves the Commission of its statutory obligation to follow section 364.05 simply because the Commission believes it is "correcting" the tariff to conform with a post hoc interpretation of a prior order.

Where the legislature has spelled out a clear procedure for changing tariff rates, the Commission must abide by this procedure.¹² No legal basis exists to allow or warrant a derogation of this process, and the Court should not override well-estab-

¹⁰United Tel. Co. of Florida v. Florida Public Service Comm'n, 496 So.2d 116, 118 (Fla. 1986).

¹¹Florida Motor Lines Corp. v. Douglass, 7 So.2d 843, 847 (Fla. 1941).

¹²Thayer v. State, 335 So.2d 815, 817 (Fla. 1976).

lished precedents by endorsing a Commission-created "enforcement" scheme that would allow the FPSC to disregard the statutes at will. The Commission's self-styled "enforcement" of its earlier order undeniably changed lawfully tariffed rates, and, simply put, should have been in compliance with Florida Statutes section 364.05 to be valid and enforceable.

**III. THE COMMISSION INITIATED RATE CHANGE IGNORED
CHAPTER 120 HEARING AND FUNDAMENTAL PROCEDURAL DUE
PROCESS REQUIREMENTS**

This Court has expressed the principle that "the general statutory scheme for making and adjusting rates embraces the traditional requirements of procedural due process, *i.e.*, notice and a hearing."¹³ Additionally, Florida Statutes section 120.57(1), establishes a party's notice and hearing rights when one's substantial interests are being affected by a proposed change in tariff rates.¹⁴ The Commission may not simply obviate these fundamental due process protections by characterizing its action as "corrective" of a lawfully approved and long-standing tariff so as to allegedly bring about "compliance" with the Commission's current interpretation of a prior order.

Indeed, section 364.14, which authorizes the Commission to order changes in rates that are "unjust, unreasonable, unjustly

¹³Florida Power Corp. v. Hawkins, 367 So.2d 1011, 1013 (Fla. 1979). See also Florida Gas Co. v. Hawkins, 372 So.2d 1118, 1121 (Fla. 1979).

¹⁴ASI, Inc. v. Florida Public Service Comm'n, 334 So.2d 594 (Fla. 1976). See also Florida Retail Fed., Inc. v. Mayo, 331 So.2d 308, 310 (Fla. 1976).

discriminatory, unduly preferential, or anywise in violation of law," specifically "contemplates the holding of a hearing by the Commissioners upon their own motion or upon complaint."¹⁵ In the instant case, however, the Commission did not act pursuant to this legislative mandate. Moreover, when US Sprint petitioned for a hearing to point out these omissions and to dispute the Commission's post hoc construction of the December 1983 order, the Commission took five months to deny US Sprint's petition, and then did so without providing US Sprint any opportunity to express formally its concerns to the Commission. This result obtains even though the US Sprint hearing petition was filed well within the statutory file and suspend period that legally attached to the October 1986 tariff submission.¹⁶

To explain the denial of these essential procedural due process rights, the Commission suggests that US Sprint had an opportunity to pursue its rights during the 1982-1984 access proceedings. The Commission argues further that US Sprint should not be permitted to raise an objection now to the Commission's original policy. This argument mischaracterizes US Sprint's position. US Sprint did in fact pursue its rights in the original proceeding, and if the January 1984 tariff had included the rates now imposed, US Sprint would have objected. That US Sprint,

¹⁵Boyd v. Southeastern Tel. Co., 105 So.2d 889, 893 (Fla. 1958) (emphasis added).

¹⁶R-33. US Sprint's petition was filed 16 days after the Commission issued its order directing the tariff filing (R-29) and 21 days after Southern Bell filed its new tariff (see p. 12 of the Appendix to US Sprint's Initial Brief).

and the other parties, did not object thus confirms that no problem existed in the approved 1984 tariff.

In any case, the October 1986 tariff modification triggered the chapter 120 procedural due process rights outlined above, and the resulting hearing opportunity should have been afforded. Contrary to Commission assertions, this Court is not faced with deciding the merits of the dispute. The factual issues should have been addressed in a Commission hearing at the time the tariff change was proposed in 1986. The presence of material disputed facts on the proper interpretation and application of the December 1983 order is precisely the reason a hearing was necessary.

The Commission stated in its answer brief that:

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.¹⁷

These bases for failing to follow normal notice and hearing procedures under Florida Statutes sections 364.05 and 120.57 run squarely afoul of the procedural due process procedures

¹⁷Commission Answer Brief, p. 10.

found essential by this Court for utility rate changes. As stated in Florida Gas Company v. Hawkins:¹⁸

When factual matters affecting the fairness of utility rates are being considered by a regulatory commission the rudiments of fair play and due process require that the company must be afforded a fair hearing and an opportunity to explain or rebut those matters. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to avoid delay, when the minimal requirement of a fair hearing has been neglected or ignored.¹⁹

In the current case, the Commission's desire to effect an expeditious rate change, which the Commission unilaterally deemed to be consistent with its intent in a prior order, was the occasion for a plain failure to abide by the appropriate procedural and statutory requirements cited by the Court. Notwithstanding the Commission's assertions, a change in the tariff rate did raise factual and legal questions upon which US Sprint was entitled to have its views heard by the Commission. The denial of this fundamental opportunity on grounds of expediency or cost savings should be squarely rejected by the Court.

Finally, as shown in the record, US Sprint filed a petition for hearing on October 22, 1986²⁰ which was not acted on by the FPSC until April 21, 1987.²¹ The Commission has failed

¹⁸372 So.2d 1118 (Fla. 1979).

¹⁹Id. at 1121.

²⁰(R-33).

²¹(R-53).

to support its refusal to either grant or deny US Sprint's petition for hearing for a significant period beyond the statutorily prescribed 15 day limit.²² The Commission's sole response to this statutory violation is that the Commission's unilateral closure of its docket on this matter somehow tolled the normal 15 day disposition period. The Commission, however, cites no statute or case law precedent for the proposition that an agency's declaration that its proceeding is "closed" somehow avoids the requirement to dispose of a petition for hearing within the statutorily mandated 15 day period.

For this Court to allow an agency to suspend normal section 120.57 hearing rights on the basis of whether or not a "docket" was deemed open by the agency, would be to undo fundamental chapter 120 protections against unilateral agency action affecting the substantial interests of parties.²³

No valid basis exists for the FPSC to have simply held the petition in abeyance for 5 months while US Sprint's substantial interests were being adversely impacted by the Commission's action to illegally change rates. US Sprint's attempts in the face of this delay to address the Commission through oral argument, and ultimately at Agenda Conference, were rebuffed by the Commis-

²²§ 120.57(1)(b)(1), Fla. Stat. (1985).

²³Moreover, if there was no "docket" open at the time US Sprint's petition for hearing was filed, this would have been a ministerial matter easily remedied by simply opening a new docket on the petition, and then proceeding to either grant or deny the petition within the described 15 day time limit.

sion. As a result, there could not have been a more complete denial of US Sprint's due process rights.

IV. THE COMMISSION-ORDERED CHANGE IN A TWO-AND-ONE-HALF YEAR OLD APPROVED TARIFF RATE HAD A SERIOUS NEGATIVE IMPACT UPON US SPRINT'S SUBSTANTIAL INTERESTS

The Commission suggests throughout its Answer Brief that the change made to the January 1984 tariff was trivial, ministerial, or otherwise de minimis in nature. In response, US Sprint strongly conveys to the Court that US Sprint's substantial interests continue to be severely and adversely affected unless the Commission implemented rate change is voided ab initio and the status quo ante reinstated.

First and most basically, the Commission's action increased the amount US Sprint must pay for access in Florida. Second, US Sprint is suddenly paying a significantly higher rate for these access connections relative to other competitors.

Based upon the existence of the prorated credit in the January 1984 tariff, US Sprint ordered and presently utilizes a significant amount of Feature Group B access in Florida. This reliance on Feature Group B access recognized that Feature Group B would, under the January 1984 tariff, be rated at the same level as Feature Group A access (since both are "unequal" or "inferior" forms of access made available to the competitors of AT&T such as US Sprint).

The significant networking and operational decisions resulting from the decision to commit to Feature Group B access involve long-term obligations in plant and facilities that impact critical

aspects of US Sprint's business. To now penalize US Sprint for this Feature Group B access networking strategy without notice after almost three years of evolution is neither fair nor reasonable. US Sprint might well not have decided to rely on Feature Group B access in its overall networking strategy in Florida if the January 1984 tariff had not applied the prorate credit to Feature Group B access. The January 1984 tariff is thus precisely the type of administrative matter that the Court has previously said should be "final and dispositive of the rights and issues involved therein" and upon which a party may safely rely.²⁴

The negative impact on US Sprint resulting from the improper rate change was alleged and properly plead in US Sprint's original petition to the Commission for hearing.²⁵ If granted, such hearing would have provided an opportunity to present to the Commission the position of US Sprint that the original 1984 tariff provision was lawful, proper, and should therefore continue in effect. Absent such an opportunity, the unlawful alteration of the long-standing tariff rate here on review affected US Sprint's substantial interests in a material and negative way without honoring basic procedural due process rights prior to the rate change.

²⁴Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679, 681 (Fla. 1979); Peoples Gas System, Inc. v. Mason 187 So.2d 335, 339 (Fla. 1966).

²⁵R-33.

CONCLUSION


This Court is not charged to review whether the January 1984 tariff was consistent with the December 1983 Order. Rather, the limited question now before this honorable body is whether the Florida Public Service Commission complied with the applicable statutory procedures of Florida Statutes chapters 120 and 364 when in October 1986 it issued a final order changing important provisions of the lawfully approved January 1984 access tariff. Upon the record of this case, there has been no valid indication of such lawful compliance. US Sprint respectfully requests that this Court reverse the Order on appeal and void ab initio the October 1986 tariff change with instructions that any further FPSC attempt to alter these access tariff provisions must comply with the essential requirements of the law.

Respectfully submitted,

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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 18th day of September, 1987.

By: Bruce Renard
BRUCE W. RENARD