

SUPREME COURT OF FLORIDA

THE CITIZENS OF FLORIDA,

Appellant,

v.

Case No. 73,623

KATIE NICHOLS, etc., et al.,

Appellees.

On Appeal From The Florida Public Service Commission

INITIAL BRIEF OF THE FLORIDA RETAIL FEDERATION

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ATTORNEYS FOR THE FLORIDA RETAIL
FEDERATION

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TRODU TION

For purposes of this appeal, the Florida Retail Federation shall be known as the "Federation." The Citizens of the State of Florida, as represented by the Public Counsel, shall be referred to as "Citizens." Southern Bell Telephone and Telegraph Company shall be referred to as "Southern Bell," and the Florida Public Service Commission shall be referred to by the acronym "PSC."

References to the record on appeal shall be made by the following designation:
"[R: 3."

Although the Federation is technically an appellee in these proceedings, its position is aligned with that of the Citizens. Accordingly, this brief is being submitted as an initial brief in support of the position taken by the Citizens. Henceforth, unless otherwise directed by the Court, the Federation shall act as a party appellant in these proceedings.

STATEMENT OF THE CASE AND FACTS

The Federation accepts the Statement of the Case and Facts set forth by the Citizens in their Initial Brief served March 22, 1989, with the following additions thereto:

The Federation is a trade association of Florida's retailing industry. Its primary purpose and reason for existence is to represent Florida's retailing industry before state and national legislative bodies and to work with governmental agencies on behalf of the retailing industry. [R: 3561

A substantial number of the Federation's members obtain regulated telecommunications services from Southern Bell. Thus, a substantial number of the Federation's members, especially those located in areas served by Southern Bell, have a significant interest in paying reasonable rates for telecommunication services provided to them by Southern Bell. [R: 356] Accordingly, as users of such services, the individual members of the Federation are adversely affected by any such rate restructuring, as approved in these proceedings, and thus have a significant interest in the outcome of these proceedings. [R: 3571

The Federation petitioned to intervene in the proceedings below by pleading filed March 3, 1988. [R: 356] It was subsequently accorded party status by PSC order rendered March 9, 1988. [R: 4021

SUMMARY OF THE ARGUMENT

The argument presented by the Citizens and the Federation is simplicity itself: There is no competent, substantial evidence in this record to support the PSC's conclusion, expressed in both its original order and in its order on the motion for reconsideration, that there will be no quantifiable stimulation of Southern Bell's business **as** a result of the rate reductions mandated in the proceedings below. Since the Court cannot uphold an order of the PSC absent competent, substantial evidence of record, §120.68(10), Fla. Stat. (1987); General Development Utilities, Inc. v. Hawkins, 357 So.2d 408 (Fla. 1978), those portions of the PSC's orders concerning stimulation, projection of revenues and rates must be reversed and remanded to the PSC for further proceedings.

ARGUMENT

THERE IS NO COMPETENT, SUBSTANTIAL EVIDENCE IN THIS RECORD TO SUPPORT THE COMMISSION'S FINDING OF ZERO STIMULATION

All too often parties try to disguise a case otherwise without merit by arguing that an administrative agency's order is not supported by competent, substantial evidence. That is not the case here. Not only is there no competent, substantial evidence in this record to support the PSC's conclusions regarding the effects of stimulation, all of the available evidence points to the opposite conclusion.' Therefore, this Court has no choice but to reverse the PSC's order, at least insofar as it relates to the effects of stimulation, projections of revenues and rates, and remand this cause to the PSC for further proceedings.

The Federation concedes, as it must, that every reasonable doubt will be resolved in favor of the PSC's order. See, e.g., State ex rel Railroad Commissioners v. Florida East Coast Railway Company, 69 Fla. 165, 67 So. 906 (1915). However, while this Court should ordinarily defer to the PSC's policy-making decisions, that deference is not without limitations, and the most important limitation upon the PSC's decision-making is that its orders be supported by competent, substantial evidence appropriate to the issue

¹ In its final order the PSC pegged Southern Bell's authorized rate of return on its telecommunications services at 13.2% on equity. In doing so, as the Citizens have already pointed out, the PSC thus accepted the accuracy of every estimate of revenue made by Southern Bell for 1988, 1989, and 1990, except for the stimulative effects of the rate reductions otherwise ordered by the PSC. Accordingly, even if the PSC uses the evidence of record most favorable to Southern Bell's position, additional rate reductions of approximately \$42,000,000 per year, at a minimum, would be required in order to set rates that would produce a projected return on equity of 13.2%. [R: 2667-26711]

in the record. See, e.g., §120.68(10), Fla. Stat. (1987); General Development Utilities, Inc. v. Hawkins, 357 So.2d 408 (Fla. 1978). Here, there is no such evidence to support the PSC's conclusions insofar as they relate to the effects of stimulation upon Southern Bell's revenues.

Since the PSC's action in this regard is not based upon any express rule provision, it conceivably may attempt to justify its erroneous decision by arguing that its conclusion in this regard is actually nothing more than "incipient policy." See McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). That it cannot do. While the case-by-case emergence of incipient policy through adjudication is certainly permissible, see, e.g., Florida Cities Water Company v. Florida Public Service Commission, 384 So.2d 1280, 1281 (Fla. 1980), there must still be an adequate support for that incipient policy in the record of the proceeding. Id.; McDonald at 583-584; State Department of Administration v. Harvey, 356 So.2d 323, 326 (Fla. 1977). Here there is none.

The PSC likewise cannot claim that its conclusion is justified by its specialized expertise over the subject matter. Both the PSC's factual premise in this regard and its reasoning are quite capable of being demonstrated by expert testimony, documentary opinion or other evidence "appropriate in form [to the] nature of the issues involved." Anheuser Busch, Inc. v. Department of Business Regulation, 393 So.2d 1177, 1183 (Fla. 1st DCA 1981). In fact, such evidence **was** presented by Southern Bell itself but nevertheless ignored by the PSC. Therefore, the real issue, indeed the only issue, is whether these orders **as** framed are supported by competent, substantial evidence in the record. See Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983). Since there is no such evidence in this record (indeed, even the

PSC in its order on the motion for reconsideration was unable to point to any), the PSC's conclusion in this regard is without record foundation and must therefore be reversed.

Of course, this is not the first time that this Court would be called upon to reverse an order of the PSC for such reasons. In General Development Utilities, Inc. v. Hawkins, *supra*, the Court reversed an order of the PSC because of the use of evidence found outside of the record. There, the Court found that the PSC's use of evidence dehors the record breached section 120.59(2), Florida Statutes, which directs an explanation of findings of fact by facts of record, section 120.57(1)(b)7, which states that findings of fact are to be based exclusively on evidence of record and on matters officially recognized, and section 120.61, which contemplates notice of matters to be officially recognized and the opportunity to contest them. *Id.*

Here, the PSC tried to overcome this dearth of record evidence by citing to an order in another docket. This it cannot do, absent complying with the procedures set forth in section 120.61, Florida Statutes:

When official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material.

See Peoples Bank of Indian River County v. Department of Banking and Finance, 395 So.2d 521, 525 (Fla. 1981):

[A]ny material or information which may have been properly noticed must nonetheless have been available to the parties for rebuttal at some stage of the agency proceedings.


~~Also see~~ §§90.202(5) and 90.203, Fla. Stat. (1987), which authorize a court to take judicial notice of an administrative order upon the requesting party's giving notice to each adverse party and furnishing the court with sufficient information to enable it to

take judicial notice of the matter. The PSC obviously did not comply with these procedures; indeed, no mention was made its intent to rely upon a prior order until it denied the Citizen's motion for reconsideration. Therefore, the mere recitation of this prior order, without more, cannot cure the PSC's failure to predicate its decision upon evidence found in this record.

It will serve no useful purpose to further belabor the issue. Suffice it to say, this cause must be reversed and remanded to the PSC for the very simple reason that there is absolutely no competent, substantial evidence whatsoever in this record to justify the PSC's conclusions regarding the effects of stimulation on Southern Bell's revenues.

REQUEST FOR RELIEF

Since no competent, substantial evidence supports the PSC's findings regarding the stimulative effects of rate reductions on Southern Bell's revenues, those portions of the PSC's orders No. **20162** and **20503** dealing with such matters should be quashed and remanded for further proceedings.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by

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