IN THE SUPREME COURT OF FLORIDA

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| CITIZENS OF THE STATE OF FLORIDA,<br><br>Appellants,<br><br>v.<br><br>FLORIDA PUBLIC SERVICE COMMISSION,<br><br>Appellee. | ) | CASE NO. 74,915 |

# ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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## SYMBOLS AND DESIGNATIONS OF THE PARTIES

The Public Service Commission is referred to in this brief as the "Commission".

Appellee, Southern Bell Telephone and Telegraph Company, is referred to as "Southern Bell".

Appellants, the Citizens of the State of Florida, are referred to as "Public Counsel", their representative in this case.

References to the record are designated "R-___)".

## STATEMENT OF THE CASE AND FACTS

Public Counsel's Statement of the Case and Facts omits facts the Commission believes are necessary to a complete understanding of this case. Also, Public Counsel mischaracterizes the Commission's rationale as expressed in the order on appeal. Therefore, the Commission presents its own statement.

On August 1, 1989, Southern Bell filed a tariff to adjust the rates for certain discretionary services, including call waiting, call forwarding, three-way calling and speed calling. The rate adjustment was expected to result in an annual revenue increase of $10 million (R-2). The maximum increase for all features and feature packages was $.85 per month. The maximum decrease was $.65 per month. The adjustments proposed were within the rate bands (maximum and minimum prices) approved by the Commission in Order Nos. 18326 and 21338 (R-30, 31). Those orders provided Southern Bell with the flexibility to adjust the prices for these services within the bands upon thirty-day notice to the Commission and affected customers (Appendix at 1, 4). In Order No. 20162, the Commission provided that any increase or decrease in these rates (and others) would be netted against exogenous factors beyond Southern Bell's control, and, if any excess revenues resulted, they would be subject to refund (Appendix at 6).

On August 16, 1989, Public Counsel filed a Notice of Intervention and Request for Hearing, requesting that the rates be suspended and a hearing be held. He contended that the rate adjustments were not consistent with the purposes for which

pricing flexibility was established for these services, and Southern Bell had not shown the need for rate adjustments.

On August 29, 1989, the Commission voted to approve Southern Bell's tariff and to treat Public Counsel's request as a complaint. In its order issued September 19, 1989, the Commission explained that its decision to treat Public Counsel's request as a complaint was based on Florida Interconnect Telephone Co. V. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976). Order No. 21912 (R-34).

Public Counsel filed its appeal of Order No. 21912 on October 19, 1989.

## SUMMARY OF ARGUMENT

The Commission's decision to deny Public Counsel's request for a hearing on Southern Bell's tariff filing and to instead treat his request as a complaint does not deprive Public Counsel of his due process rights.

Under section 364.05(4), Florida Statutes, the "file and suspend" law, and this court's interpretation of that law, the Commission has a range of options to take in response to a tariff filing. The alternatives include: suspending the rates; approving their implementation or taking no action, thereby allowing the rates to go into effect. Under none of these alternatives is the Commission required by the APA to hold an evidentiary hearing prior to its action, even if it means that increased rates may go into effect without hearing. This procedure survived the 1974 amendments to the APA and applies to tariff filings as well as regular rate increases. Florida Interconnect Telephone Co. v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976). To require the Commission to hold a hearing prior to the implementation of the new rates would defeat the purpose of the file and suspend law.

Under section 364.14, Florida Statutes, and the Florida Interconnect case, the complaint process is the appropriate vehicle for Public Counsel to challenge the reasonableness of the rates.

I.

NEITHER TRADITIONAL CONCEPTS OF DUE PROCESS NOR THE PROCEDURES UNDER CHAPTER 120, FLORIDA STATUTES, REQUIRE THE COMMISSION HOLD A HEARING PRIOR TO APPROVING A TARIFF FILED BY A TELEPHONE COMPANY.

There is no requirement at common law, in Chapter 364, Florida Statutes, or in Chapter 120, Florida Statutes, that a hearing be held prior to Commission approval of a tariff which changes rates for telephone service. This is true even when an interested party files a request for a hearing. Due process requirements in the rate-setting context are met when an opportunity for a hearing is provided after the new rates are implemented.

In this case the Commission has assured Public Counsel of his due process rights by treating his request for a hearing as a complaint, thus affording him an opportunity to be heard.

As is explained more fully below, this Court's interpretations of the so-called "file and suspend" provisions of section 364.05, Florida Statutes, compels affirmance of the Commission's action. The facts in this case are substantially similar to those in Florida Interconnect Telephone Co. v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976), where this Court upheld the Commission's authority to approve rates pending disposition of a complaint. Before considering that argument, however, it is helpful to have in mind the genesis of the "file and suspend" provisions.

Telephone companies are public utilities. They provide services of a public nature. State v. Southern Telephone & Construction Co., 65 Fla. 270, 61 So. 506 (1913). At common law a public utility had the right to set its own rates and to adopt and put into effect such rate schedules or tariffs as it believed to be just and reasonable. Miami Bridge Co. v. Miami Beach Ry. Co., 12 So.2d 438, 445 (Fla. 1943); Mountain States Telephone and Telegraph Company v. New Mexico State Corporation Commission, 337 P2d 43 (N. M. 1959). The remedy at common law for the utility's customers was to attack the utility's rates as arbitrary or discriminatory in the courts. Cooper v. Tampa Electric Co., 17 So.2d 785, 786 (Fla. 1944).

The common law process for the fixing of rates for telephone service was abridged in Florida in the early 1900's when the Legislature exercised its prerogative to delegate the rate-review and rate-setting authority to the Commission. See, Chapter 6186, Acts of 1911. The delegation did not, however, modify the fundamental common law proposition that a telephone company has the right to propose rates that are capable of producing a fair return on its investment so long as those rates are just and reasonable. Id. For telephone companies, that process is currently described in section 364.05, Florida Statutes (1987).

Section 364.05 describes the procedure for changing rates and incorporates the so-called "file and suspend" provision. The file and suspend provision was born out of the tension between the common law concept of a utility's right to prescribe its rates, so

long as they are just and reasonable, and the delegation of ratemaking authority to a commission. A telephone company no longer has the prerogative of changing its rates solely at its own discretion. It must submit them to review by the regulatory commission; but the regulators cannot arbitrarily or indefinitely withhold consent to the operation of those rates.

The file and suspend law represents a compromise between the company's right to immediate rate relief and the duty of the Commission to protect the interest of the public in just and reasonable rates. Viewed another way, this Court has recognized that the purpose of the file and suspend law was "expressly designed to reduce so-called "regulatory lag" inherent in full rate proceedings. Citizens of Florida V. Mayo, 333 So.2d 1, 4 (Fla. 1976).

A. This Court's Interpretation of the File and Suspend Law Compels Affirmance of the Commission's Decision.

The Florida Interconnect case, and other cases construing the file and suspend law, compel affirmance of the Commission's decision in this case. This Court has repeatedly held that under the file and suspend law there is no right to a hearing prior to the implementation of the rates, either where the Commission fails to act, or where it approves the tariff in the absence of good cause to suspend it.

In the Florida Interconnect case, a competitor of Southern Bell in the private branch exchange (PBX) business, Florida

Interconnect Telephone Company (Florida Interconnect), contested a tariff filing by which Southern Bell lowered its rates for PBX equipment and services. The tariff filing was processed under the file and suspend law, section 364.05(4), Florida Statutes (1975). The statute required the Commission to act within thirty days to suspend the tariff if it found good cause to do so.

Before the Commission acted on the proposed tariff, but more than thirty days after the tariff was filed, Florida Interconnect filed a complaint and request for hearing on the proposed rate changes alleging that its substantial interests would be affected by approval of the tariff. The Commission approved the tariff at its agenda conference, but notified Florida Interconnect that its complaint would be set for hearing. Florida Interconnect did not pursue the immediate opportunity for a hearing on its complaint. Instead, Florida Interconnect took an appeal claiming that Chapter 120, Florida Statutes, required that it be given an opportunity for hearing prior to implementation of the proposed tariff changes.

This Court held that Florida Interconnect's appeal was not well-founded. First, the order approving the tariff did not constitute final agency action within the meaning of section 120.52(9), Florida Statutes (1975). Since the complaint proceeding was still pending, the Court concluded that the decision was not "final" and, therefore, not reviewable.

Additionally, the Court stated that the order of the Commission, issued more than thirty days after the tariff was filed, was in "a very real sense surplusage." The Court reached

its conclusion by virtue of the 'file and suspend" law enacted in 1974. Under file and suspend, "[i]f the Commission does not object to the proposed tariff changes within 30 days, the proposed rates automatically go into effect." Florida Interconnect at 813 (emphasis added).

The Court also stated that the automatic implementation provision of the file and suspend law survived the adoption of the APA, specifically referencing section 120.72(3), Florida Statutes (1975), which grants an exemption to the APA for file and suspend procedures.

Finally, the Court concluded that the Commission was without authority to suspend the new rates. Having failed to deliver "a reason or written statement of good cause for withholding its consent" within thirty days of the tariff, the Commission was unable to do so in response to a complaint filed after the thirtieth day had run.

The facts in this case parallel Florida Interconnect in all material aspects. As in Florida Interconnect, the Commission found no good cause to suspend Southern Bell's tariff. In the absence of that finding, the Commission approved the tariff, even though the Commission's order approving it was in a "very real sense surplusage." The Commission could simply have taken no action and the rates would have gone into effect automatically. Furthermore, the order approving these rates preserved Public Counsel's objections by treating his request for hearing as a

complaint. As in Florida Interconnect, the rates were "'approved' pending disposition of the complaint."

Public Counsel has characterized the Commission's action in this case as being final and its action in Florida Interconnect as being interim. However, there is no substantive difference between the two. In both, the new rates were approved subject to subsequent hearings on complaints raised about the new rates. In this case, if the Commission finds, after hearing Public Counsel's objections, that the rates previously approved are unjust or unreasonable, it can order Southern Bell to change them.

Public Counsel also attempts to distinguish this case from Florida Interconnect based upon the fact that he filed a request for hearing, not a complaint, and he filed his request prior to the expiration of the thirty-day notice period. The Commission is without authority to withhold consent and suspend the rate changes based only upon a request for hearing. Section 364.05(4) requires a reason or written statement of good cause and this Court has specifically rejected any other basis for suspending rates. In Maule Industries, Inc. V. Mayo, 342 So.2d 63 (1976), it was argued that rates could be suspended where there was doubt as to the reasonableness of the rates. The Court flatly rejected that argument:

> We cannot accept this view of the Commission's role. The file and suspend statute requires "a reason or written statement of good cause" for initially withholding consent.

Id. at 67, n. 7.

Public Counsel concedes that under the file and suspend law due process does not require a hearing before interim rates become effective. He contends, however, that the same does not apply to permanent rates, and the that Commission's action in this case involved approval of permanent rates.[1] He bases his argument on the enactment of the 1974 amendments to the APA (Chapter 74-310, Laws of Florida), specifically the provisions of section 120.72(3), Florida Statutes. He maintains that under the 1974 amendments, a hearing is required prior to the approval of any rate change, except for interim rates. Public Counsel's arguments are not substantiated by the provisions of section 120.72(3), Florida Statutes, or by Court cases construing the file and suspend law. See, Citizens of Florida v. Mayo (Mayo case), 333 So.2d 1 (Fla. 1976) and Maule Industries, Inc. v. Mayo, 342 So.2d 63 (Fla. 1976).

Notwithstanding the enactment of Chapter 120, utilities and companies retained the right to pursue certain courses of actions which affect the substantial interests of parties without the requirement for a prior hearing. Section 120.72(3) defines two instances in which this may occur: 1) utilities or companies may "proceed under the interim rate provisions of chapter 364 or (under) the procedures for interim rates contained in chapter 74-195, Laws of Florida;" or 2) utilities or companies may "proceed . . . as otherwise provided by law." The prepositional

[1] Rates are never really permanent. Rates are always subject to change by the telephone company and by the Commission on its own motion or upon complaint.

phrase "under the interim rate provisions . . ." and the clause "as otherwise provided by law" serve the function of adverbs which define "how" companies or utilities may "proceed". Each retains its grammatical and logical independence and each provides a distinct exception to the APA. A utility or company may seek an interim rate increase without the necessity of a hearing prior to putting the rates into effect. It may proceed in a like manner under the file and suspend law where the Commission takes no action within sixty days (in this case, thirty days), or where the Commission approves the proposed tariff. Section 364.05 is a provision of law which otherwise creates an exception to the APA.

The Mayo case was the first case decided under the newly-enacted file and suspend law. It involved considerations of due process under that law. The procedural rights guaranteed by the pre-1974 APA were essentially the same as those in the current version of the statute. In Mayo, Public Counsel had argued that due process required the right to a full evidentiary hearing before implementation of an interim rate increase. This Court rejected that proposition:

> We agree with public counsel that the Legislature's placement of subsection 366.06(4) suggests no reason to alter the public policy of this state in favor of traditional due process rights in rate "hearings", permanent or interim. On the other hand, we agree with Gulf Power that an inflexible hearing requirement was not intended inasmuch as the Commission can obviate any hearing requirement simply by failing to act for 30 days. We must conclude, therefore, that the Legislature intended to provide elected Public Service Commissioners

> with a range of alternatives suitable to the factual variations which might arise from case to case.

Id. at 6.

The Court found no inconsistency between "procedure for due process" contained in section 120.26, Florida Statutes (1973), and the implementation of interim rates without hearing under the file and suspend law. Section 120.26 provided:

> The agency shall afford each party authorized by law to participate in an agency proceeding the right to:
> (1) Present his case or defense by oral and documentary evidence,
> (2) Submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

Id. at 7, n. 16.

Admittedly, the Mayo case did not require the Court to specifically address the question of a due process hearing before implementation of final rates under the file and suspend law, since it was only concerned with an interim request. However, the opinion makes clear that the same considerations of due process for the interim increase would be applicable to permanent rates under the file and suspend law. Among other things, the Court concluded that:

> (3) [t]he Legislature did not intend a full rate hearing before all new rate schedules become effective. Had it intended that result, there would have been no need to enact subsection 366.06(4) at all.

> (4) [t]he Legislature obviously intended to allow public utilities the benefit of proposed rate increases from the date they could satisfy the Commission on the basis of an uncontested preliminary showing that the needs of the company were such as to necessitate immediate financial aid. Where the Commission is *so* satisfied after a preliminary analysis extending over a period not longer than thirty days, the rates become effective without further action by the Commission.
>
> . . .

Id. at 5. (Footnote omitted)

In an effort to balance the rights of the utility against the power of the regulators to protect the public interest, the Court concluded that the Commission could "obviate any hearing requirement simply by failing to act for 30 days." Id. at 6. The Court further emphasized that conclusion in footnote 9 of the Mayo opinion where it stated:

> Obviously, the question of due process does not arise if the Commission does not suspend the new rates within 30 days. In those cases, the Legislature has directed that proposed rates become effective on the 31st day.

Id. at 5, n. 9.

The Court's conclusion that no hearing at all would be required if the proposed rates went into effect by operation of law on the thirty-first day is emphasized in the opinion at footnote 10 which states that this alternative (of not holding a hearing) will:

> [G]enerally be impolitic for elected Public Service Commissioners. The Commissioners would have to justify their analysis of the company's needs, generally based on staff recommendations, without the benefit of a publicly developed record and without any publicly expressed reasons to support the new increase.

Id. at 5.

It may be no less "impolitic" for the current, appointed commissioners to allow a rate increase to go into effect without a hearing, but it, nevertheless, is an option under the file and suspend law.

In the Maule Industries case, the Court further emphasized that the file and suspend law required the immediate implementation of rates upon expiration of the suspension period. The case was an appeal of the Commission's order lifting the suspension of Florida Power and Light Company's proposed rates. The effect of the order was to allow an interim rate increase to go into effect. The order was challenged by Public Counsel, who claimed that the Commission had not made the requisite findings to warrant lifting the suspension. The Commission sought to justify its action upon the grounds, among others, that the suspension for "good cause" requirement of the file and suspend law only necessitated a finding that the rates "may" be unjust and unreasonable. On this theory, the Commission claimed it did not need to develop the "additional or corroborative data" required by the Court's decision in the Mayo case, supra. This Court rejected the Commission's argument as a light-handed treatment of its

obligation under the suspension provisions of the law. The Court noted:

> If the Commission does not have a reasoned basis to believe that the rates as filed are unreasonable or discriminatory it would appear to have a statutory obligation to withhold suspension and allow them to become effective.

342 So.2d 67, n. 7.

This Court thus concluded that the file and suspend law requires the Commission to allow the proposed rates to go into effect unless the Commission can demonstrate some substantial basis on which to contest their reasonableness.

B. The Complaint Proceeding Affords Public Counsel Adequate Due Process.

The Commission's decision to treat Public Counsel's request for a hearing as a complaint is consistent with the Court's decision in Florida Interconnect, and it affords adequate due process protection.

A complaint proceeding is the historical vehicle to challenge the reasonableness of rates which are legitimately in effect. The opportunity to initiate a complaint proceeding exists at any time during the effectiveness of any rate schedule. Because of this opportunity and the provisions of the file and suspend laws, Commission practice has been to approve or suspend a tariff without a hearing. See, e.g., In re: AT&T Communications of the Southern States, Inc.'s Proposal to Increase Amount Charged for

InterLATA Intrastate Directory Assistance Calls From $.25 to $.30, 87 FPSC 4:162; In re: southern Bell Telephone and Telegraph Company's Filing to Pass the Cost of a Local Ordinance on to Local Subscribers, 83 FPSC 3:63; In re: Tariff Filing by United Telephone System of Florida to Establish Charges for Non-published and Non-listed Telephone Numbers in Certain Exchanges, 81 FPSC 6:86.

Lest there be any doubt that a complaint is the proper vehicle for initiating a challenge to existing rates, one need only refer to section 364.14(1), Florida Statutes, relating to adjustments in utilities' rates. That section states:

> (1) Whenever the commission finds, upon its own motion or upon complaint, that the rates, charges, tolls, or rentals demanded, exacted, charged, or collected by any telephone company for the transmission of messages by telephone, or for the rental or use of any telephone line; any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance, or device; or any telephone extension or extension system, or that the rules, regulations, or practices of any telephone company affecting such rates, charges, tolls, rentals, or service are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law, or that such rates· charges, tolls, or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order as hereinafter provided.

This section of the statute contemplates that virtually any challenge to the tariffed rates of a telephone company can be brought in the form of a complaint.

Public Counsel's lament that a complaint proceeding would be inadequate to protect its interests is not well-founded. A complaint balances the due process rights of the utility to put rates into effect under file and suspend with those of the ratepayers to challenge the rates' prospective application. Moreover, Public Counsel's contention that the complaint proceeding would place him at an unfair disadvantage, so far as burden of proof is concerned, does not comport with the Commission's practice in proceedings where rates and other terms and conditions of the utility's services are at issue. As this Court recognized in Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799 (Fla. 1984) and South Florida Natural Gas Company v. Public Service Commission, 534 So.2d 695 (Fla. 1988), the Commission is required to investigate and test rates which it, or a challenging party, believes may be unreasonable. Accordingly, the utility bears the ultimate burden of persuasion in such proceedings. Id.

## CONCLUSION

Public Counsel's request that this case be remanded to the Commission should be denied. The Commission has assured Public Counsel of his due process tights by treating his request for a hearing as a complaint. The procedures followed by the Commission in this case are consistent with the legislative mandate of the file and suspend law and this Court's interpretations of that law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Florida Public Service Commission, has been furnished by U.S. Mail this 29th day of January, 1990 to the following:

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