IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellant, vs. MICHAEL MCK. WILSON, et al., Appellees.	)	Case No. 74,915

On Appeal From Order No. 21912 of
The Florida Public Service Commission

ANSWER BRIEF OF APPELLEE
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PRELIMINARY MATTERS

Appellant, Jack Shreve, as Public Counsel, is referred to in this brief as "Public Counsel." Appellee, Southern Bell Telephone & Telegraph Company, is referred to as "Southern Bell." Appellee, Florida Public Service Commission, is referred to as the "Commission."

Order No. **21912** is in the Record at pages 30-37. Reference to Order No. **21912** appears as "[O. at _____]." Pursuant to Florida Rule of Appellate Procedure **9.220**, this answer brief is accompanied by an appendix. References to Southern Bell's appendix appear as "[A. at _____]." Other references to the Record appear as "[R. at _____]."

RESTATEMENT OF THE CASE AND THE FACTS

Public Counsel's Statement of the Case and Facts does not provide adequate factual background for this appeal and mischaracterizes the Commission's rationale for Order No. 21912. Southern Bell will, therefore, restate the case and facts.

On May 12, 1987, Southern Bell filed a tariff to introduce banded rate pricing for Custom Calling Services ("CCS") and Prestige Single Line Service. [A. at 8; O. at 13. CCS include certain discretionary services such as call hold, call forwarding, speed calling, 3-way calling, and call waiting. [O. at 1]. The Commission held a workshop on Southern Bell's proposal. Public Counsel participated. After considering matters presented at the workshop, the Commission approved that tariff, by its Order No. 18326, issued on October 21, 1987, and in so doing adopted the concept of banded rate pricing and tentatively approving rates within the bands. [A. at 8-9; O. at 1]. The order provided that any rate change within the bands would be subject to the normal statutory tariff-approval process except that the statutory notice period for tariff filings would be reduced from 60 days to 30 days. [A. at 9; O. at 2]. The regulatory concept approved by the Commission in Order No. 18326 is generically referred to as "flexible pricing." [R. at 24; O. at 13.

The Commission's objective in approving Southern Bell's request for banded rates was two-fold. [A. at 8-9; O. at 2]. First, the Commission intended to give Southern Bell the flexibility to respond to more competitive market conditions by

altering prices within the bands. [A. at 8-9; O. at 2]. Second, the Commission wanted to give Southern Bell the capability to set rates for CCS at price levels that would maximize contribution from discretionary services and thereby enable Southern Bell to maintain lower rates for basic local service. [O. at 2].

Before filing the tariff that is the subject of the order involved in this proceeding, Southern Bell had made only one request to change CCS rates within the bands: a request to reduce the rate for Speed Calling 30 to the minimum rate within its rate band. [O. at 2]. The Commission approved that request in Order No. 18759, issued January 27, 1988. [O. at 2]. Subsequently, by Order No. 21338, the Commission approved a continuation of the banded rate concept for CCS. [O. at 2].

On August 1, 1989, Southern Bell filed the tariff that is the subject of the Order involved in this proceeding. [R. at 13. In the tariff, it proposed two rate adjustments, both of which were within the tentatively approved rate bands: (a) a 10% increase for residence features, and (b) a 12% increase for business features, except Speed Call 8, which was to be reduced by $.50, and Speed Call 30, which was to remain unchanged. [O. at 3]. The changes were designed to bring the rates in line with the customers' level of demand for CCS as determined in Custom Calling Services (CCS) Residence/Business Demand Study (1988) (Users and Non-Users). [See R. at 4-13]. The rates adjustment was estimated to result in an annual revenue increase of $10,000,000, and thereby reduce upward pressure on local rates. [O. at 3].

The Commission opened Docket No. 891039-TL in order to consider Southern Bell's proposal. [O. at 13. On August 16, 1989, Public Counsel filed a notice of intervention in Docket No. 891039-TL and requested a formal hearing. [R. 14-22]. At its August 29, 1989 agenda conference, the Commission considered the tariff, heard argument from Public Counsel, and decided that it lacked good cause to withhold consent to the tariff. [O. at 5]. On September 1, 1989, because the Commission had failed to withhold its consent to Southern Bell's tariff filing, the rate adjustment went into effect automatically under § 364.05(4), Florida Statutes.

On September 19, 1989, the Commission issued Order No. 21912, approving the tariff proposal. [O. at 1-71. It provided in the order that revenues from the tariff filing would be netted against any losses due to exogenous factors beyond Southern Bell's control, under Order No. 20162 [see A. at 10-60], and that if there should be any revenues in excess after positive and negative revenues are netted out, the entire remaining amount would be subject to refund to ratepayers. [O. at 3-41. The Commission required Southern Bell to file a report with the Commission six months after the rate change so that the Commission could analyze the impact of the changes. [O. at 6]. Finally, it denied Public Counsel's Request for Hearing [see R. at 16-22], which it treated as a complaint, opened a separate docket and set for hearing. [O. at 5]. The Commission reasoned that "[b]ased on [this Court's ruling in] Florida Interconnect Telephone v. Florida Public Service Commission, 342 So.2d 811, a party is not entitled to a hearing

prior to a tariff filing going into effect." [O. at 5]. Rather than seek administrative redress in the complaint proceeding, Public Counsel chose to file this appeal, asking this Court to remand "with directions to afford Public Counsel a formal hearing under section 120.57(1), Florida Statutes, prior to entry of a final order." [Public Counsel's Brief at 20].

SUMMARY OF ARGUMENT

Under Chapter 364, a telephone company has authority to set its own rates subject to review and modification by the Commission. Section 364.05(4) requires a telephone company seeking a change in rates or service to file a 60-day notice with the Commission setting out the change it proposes to make. Section 364.05(3) authorizes the Commission to shorten the notice period. The change automatically becomes effective at the end of the notice period unless after a preliminary examination the Commission notifies the company that good cause requires that the rates be suspended until after a formal hearing can be conducted.

This Court has consistently recognized that (a) § 364.05(4) and its counterpart [§ 366.06(4)] were designed to reduce regulatory lag, and (b) the Legislature did not intend the Administrative Procedure Act to require the Commission to hold a formal hearing before determining whether good cause exists to require it to withhold consent to a company's filing until a formal hearing can be held on the propriety of the new rates. Requiring such a hearing would defeat the legislative purposes expressed in Chapter 364. Under the circumstances, the Commission properly refused to grant Public Counsel's hearing request.

In this case, the Commission did not take affirmative action within the notice period to withhold its consent. Therefore, the tariff became effective at the end of the period by operation of law, not by Commission action. Public Counsel's sole remedy was to file a complaint to set aside the new rates, and the Commission

properly treated his request for hearing as a complaint. Since Public Counsel has failed to pursue the complaint proceeding to a conclusion, he has not exhausted his administrative remedies. Therefore, this appeal must be dismissed.

ARGUMENT

Introduction

This case requires the Court to interpret § 364.05(4) of the Florida Statutes, the "file-and-suspend" law for telephone companies (Chapter 74-195, § 3, Laws of Florida, effective July 1, 1974). Chapter 364, Florida Statutes (1987), gives the Commission broad powers to approve rates charged by telephone companies. As this Court has pointed out, "rate regulation is essentially one of legislative control. The fixing of rates is not a judicial function; hence, our right to review the conclusion of the legislature or of an administrative body acting upon authority delegated by the legislature is limited." United Telephone v. Mayo, 345 So.2d 648, 654 (Fla. 1977).

Public Counsel does not challenge the Commission's power to determine whether to withhold approval of Southern Bell's tariff proposal. That power was delegated by the Legislature to the Commission in 1911 when it took away the common law right of public utilities to set their own rates without prior governmental approval. Chapter 6186, Laws of Florida (1911). Before that act was passed, public utilities had the right to set their own rates without prior approval. See, e.g. Miami Bridge Co. Miami Beach Rv. Co., 12 So.2d 438, 444 (Fla. 1943). The law did not, however, modify the fundamental proposition that a utility has the right to propose rates that are capable of producing a fair return on its investment as long as the rates are just and reasonable.

Chapter 364 represents a compromise between the policy considerations underlying the common law right of a public utility to set its own rates and the delegation of complete ratemaking authority to a public agency. Under § 364.05(4), while a utility no longer has the prerogative of changing its rates without first submitting them for approval, the Commission cannot arbitrarily withhold consent to rates the utility has proposed. This principle, as applied to telephone companies [§366.06(4) contains a nearly identical provision for other utilities] is embodied in § 364.05(4), Florida Statutes (1987):

> Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than eight months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, . . .

This Court has recognized that the file-and-suspend proceeding 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); see Florida Power Corp. v. Hawkins, 367 So.2d 1011, 1013 (Fla. 1979).

To further reduce regulatory lag in an area where Southern Bell is subject to competition from others who provide similar services, the Commission entered Order No. 18326, which approved the concept of "flexible pricing", thus giving Southern Bell additional flexibility in responding to market conditions by

shortening the notice period [as the Commission was authorized to do by the Legislature. Section 364.05(3)] and tentatively approving rate changes within the bands.

Although 364.05(4) clearly reveals a legislative decision not to require a proceeding of any sort to justify inaction by the Commission during the notice period, Public Counsel contends that 120.57 gives him a right to formal hearing on whether the Commission should take affirmative action to withhold its consent and thus prevent tariffs from becoming effective at the end of the notice period. For the following reasons, Public Counsel's position is not supported by either existing law or policy concerns.

A. Public Counsel's Interpretation of File-and-Suspend as it Applies to Southern Bell's Tariff is Contrary to Existing Law and Would Render Meaningless Both 364.05(4) and Commission Order No. 18326

In his brief, Public Counsel concedes that due process does not require a hearing before implementation of interim rates under 364.055, but he argues that before it permits a change to become "final," the Commission is required by 120.57 to provide notice and an opportunity for a hearing to all persons substantially affected. [Public Counsel's Brief at 5, 11]. Public Counsel claims not only that he has a right to a hearing, but that the hearing must be held on the same docket in which the tariff is filed and that it must be completed before the rates become effective. He claims this right under the 1974 amendments to the Administrative Procedure Act ("APA") (Chapter 74-310 Laws of

Florida, effective January 1, 1975), by negative inference under § 120.72(3), Florida Statutes, which provides that, in granting interim rates under § 364.055, the Commission is exempt from Chapter 120. It does not follow, however, that Public Counsel is entitled to a formal hearing during the notice period on whether the Commission should act to prevent the rates a telephone company has filed from becoming effective automatically.

When a telephone company or other utility requests a general rate increase, a formal full rate proceeding is required. Such a proceeding is long and complicated. But, the Legislature created §§ 364.05(4) and 366.06(4) to enable telephone companies and other utilities to quickly make minor changes in rates and service. Under § 364.05(4), a telephone company may file a tariff requesting a change in some rate or other aspect of its service. The Commission immediately opens a docket in which to consider the request. The Commission has 60 days from the date of filing (30 days in this case because of Order No. 18326) within which to notify the utility that for "good cause" it is "withholding consent". Otherwise, the tariff automatically takes effect.

If the Commission gives notice within the period finding good cause to suspend the effectiveness of the change, the change is suspended until the Commission has conducted a formal hearing which it must complete within eight months from the date the company filed the tariff. The Commission may also withhold consent but nevertheless authorize the telephone company to collect interim

rates under bond until the Commission can complete a rate hearing and enter a final order.

If the Commission fails to take affirmative action within the 60 (or 30) day notice period by withholding its consent, the proposed rates automatically go into effect on a permanent basis, unless a substantially affected party files a complaint. As this Court stated in Interconnect [also discussed in detail later in this brief], when a complaint is filed, the change is not final because its continued effectiveness is subject to the outcome of the complaint proceeding. Interconnect at 813.

Thus, under § 364.05(4), the Commission can take one of three alternative courses of action after a telephone company has filed a tariff. The Commission may:

1. Do nothing, in which event the rates take effect at the end of the applicable period;

2. Give the telephone company a notice that it is withholding consent for good cause, in which event the telephone company may not change its service until the Commission gives its consent or until 8 months have elapsed; or

3. Withhold its consent but nevertheless authorize the telephone company to collect interim rates under bond until it can complete a rate hearing and enter a final order.

Here, the Commission choose the first alternative which it was required to do unless it found as a preliminary matter that good cause existed to stop the rates from taking effect. As this Court cautioned in Maule Industries v. Mayo, 342 So.2d 63, 67 n.

7 (Fla. 1976) [which is discussed in greater detail later in this brief], the Commission must have good reason to initially withhold consent or it is improper to do so.

Public Counsel apparently contends that because he requested a hearing, the Commission was required either (a) to give Southern Bell a notice before the end of the 30-day period that it was withholding consent to the new rates, or (b) to initiate an immediate formal hearing and decide before the expiration of the 30-day period whether it should give Southern Bell a suspension notice. Public Counsel asserts that, by failing to do either and by treating his request for hearing as a complaint, the Commission violated his due process rights guaranteed by Chapter 120. The real issue before the Court is, therefore, whether under Chapter 120, the Commission could, after Public Counsel had requested a hearing, allow the 30-day statutory notice period to run and thereby permit the rates to become effective automatically. Stated another way, it is whether the Commission was required to give Public Counsel a formal § 120.57 hearing in the docket on whether the Commission should take affirmative action to suspend the proposed tariff. Thus, Public Counsel claims two formal hearings must be held -- one on whether good cause exists and the other in a complaint proceeding if initiated by an affected party. Merely to state the question is to reveal the absurdity of Public Counsel's position.

The text of § 364.05(4) makes it clear that the Commission must make a quick preliminary determination of whether good cause

exists to require a formal hearing. If the Commission finds good cause, the change is suspended and a formal hearing must be conducted. If it fails to find good cause, the rates take effect. But the rates may still be challenged by any substantially affected party by initiating a complaint proceeding.

Citizens of Florida v. Mayo, 333 So.2d 1 (Fla. 1976) (hereinafter referred to as "Mayo"), illustrates that the Legislature did not intend, under the pre-1975 APA, to require a formal hearing on whether the Commission should act during the notice period. In Mavo, Public Counsel argued that due process gave him the right to a full evidentiary hearing before implementation of an interim rate increase. Id. at 4. This Court ultimately rejected that proposition, stating:

> We agree with public counsel that the Legislature's placement of subsection 366.06(4) [essentially the same provision as § 364.05(4) except it relates to non-telephone utilities] 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 (emphasis added).

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[1] From 1974 until the enactment of Chapter 80-36, § 5, Laws of Florida, in 1980, § 364.05(4) provided for a 30-day notice requirement. Chapter 80-36, § 5 changed that notice requirement to its present 60-day length. Order No. 18326 changed the 60-day notice requirement to 30 days for tariffs in connection with Southern Bell's CCS only.

This Court made several other findings relative to the operation of the statute. Court observed that "[i]f the Commission does not affirmatively act within 30 days to suspend the proposed new rate schedule . . . the new rates go into effect automatically on the 31st day . . .". Mavo at 4. Moreover, the Court stated that "[w]here 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." Mavo at 5. As the Court stated on page 5, "[t]he Legislature did not intend a full rate hearing before all new rate schedules become effective. Had it intended that the result, there would have been no need to enact subsection 366.06(4) at all." Finally, footnotes 9 and 10 make it even clearer that the Commission makes its decision without a hearing. Footnote 9 states: "Obviously, the question of due process [i.e., the right to a hearing] does not arise if the Commission does not suspend the new rates within 30 days," and footnote 10: "This alternative [i.e., allowing the rates to become effective automatically] will generally be impolitic for elected Public Service Commissioners."

In summary, this Court made it clear in Mavo that the legislature did not intend to create a right to a formal hearing on the issue of whether the Commission should act within the notice

period to suspend rates filed by a utility. The Court made this decision after considering the pre-1975 APA.[2]

In two cases decided by this Court on December 22, 1976, under the post-1975 APA, the Court further emphasized that § 364.05(4) is a vehicle requiring the immediate implementation of rates upon expiration of the notice period and confirmed that the due process considerations remained essentially the same under the new APA.

The first case, Maule Industries v. Mayo, 342 So.2d 63 (Fla. 1976) (hereinafter referred to as "Maule"), was an appeal from the Commission's order lifting a suspension of Florida Power and Light Company's proposed rates, thereby allowing an interim rate increase

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[2] The Court in its Mayo opinion examined file-and-suspend in light of the pre-1975 APA and found no inconsistency between the "procedure for due process" contained in § 120.26, Florida Statutes (1973), and the implementation of interim rates without hearing under the file-and-suspend law. Section 120.26, since repealed, 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.

Mayo at 7, n. 16.

Importantly, the pre-1974 Act contained the following provision which the Court did not construe to require a hearing each time a matter was decided by the Commission:

> Section 120.22 Hearing Guaranteed -- Any party's legal rights, duties, privileges or immunities shall be determined only upon public hearing by an agency unless the right to public hearing is waived by the affected party, or unless otherwise provided by law. (Emphasis added).

to go into effect. The order was challenged by Public Counsel, who claimed that the Commission had not made the findings required 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 § **364.05** (4) only necessitated a finding that the rates "may" be unjust and unreasonable. Maule at 67, n.7. The Commission claimed it did not need to develop the "additional or corroborative data" required by the Court's decision in Mayo, supra. This Court rejected the Commission's argument, explaining as follows:

> If the Commission does not have a reasonable 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.

Maule at **67**, n. **7**.

The Court thus concluded that the law reauires the Cornmission to allow the proposed rates to go into effect unless the Commission can demonstrate some substantial basis to contest their reasonableness.[3] Id.

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[3] Although only relevant to the complaint proceeding, Southern Bell notes that the issues raised by Public Counsel in his Request for Hearing fail to demonstrate a substantial basis to contest the reasonableness of Southern Bell's tariff filing. Public Counsel contended in his Request for Hearing that the Commission did not intend to permit an increase in rates while incentive regulation (under Commission Order No. 20162, included in the Appendix to this brief) is being implemented. However, Southern Bell's tariff filing is entirely consistent with Order No. 20162, in which the Commission expressly contemplated that rate increases, as well as decreases, could occur during the pendency of incentive regulation: "We will allow any rate increases to be netted against rate decreases and significant governmental actions." [A. at 17]. The Commission further provided that "if (footnote continued)

In the second case, Florida Interconnect Telephone Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976), this Court expressly rejected the notion that the new APA requires a hearing before the expiration of the notice period. The Interconnect case involved a request by Florida Interconnect Telephone Company ("Florida Interconnect"), then a competitor of Southern Bell in the private branch exchange ("PBX") business, to quash a Commission order which approved Southern Bell's lowering of its rates for PBX equipment and services.

The tariff filing was processed under the pre-1980 version of the file-and-suspend law, which required that the Commission act within thirty days to suspend the tariff, if it found good cause to do so, otherwise, the tariff would automatically go into effect.

Before the Commission acted on the proposed tariff, but more than 30 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 effected by approval of the tariff. Thereafter, the Commission proceeded to approve the tariff at its agenda conference, but notified Florida Interconnect that its complaint would be set for hearing. Florida Interconnect did not pursue its opportunity to have a hearing on its complaint, in much the same way as Public Counsel, at least until the past two weeks, has ignored the complaint proceeding

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the result is an overall increase in earnings as a result of the netting process, the net amount will be refunded to the rate payer and/or permanent disposition will be made as appropriate." Id.

initiated by the Commission in this case. Instead, Florida Interconnect, like Public Counsel in this case, took an appeal claiming that under the APA, specifically § 120.57(1)(b), Florida Statutes, it was entitled to an opportunity for hearing before implementation of the proposed tariff changes.

The Court found that Florida Interconnect's appeal was without merit for several reasons. First, it concluded that the Commission's order approving the tariff did not constitute final agency action as that term is defined in § 120.52(9), Florida Statutes, reasoning that "[c]entral to this determination is our specific finding that the Commission's Order No. T-75-74, which we review today, does not constitute final agency action within the contemplation of the Act [the APA]." Id. at 813. Because the complaint proceeding was still pending, the Court concluded that the decision was not "final" and, therefore, not reviewable. Id.

Second, the Court went on to discuss the procedure under § 364.05(4), and stated that the Commission's order, issued more than 30 days after the tariff was filed, was in "a very real sense surplusage." Id. It explained the reason for this conclusion:

> This is so because of the provisions of the "file-and-suspend" law, enacted as Chapter 74-195, Laws of Florida. If the Commission does not object to the proposed tariff changes within thirty days, the proposed rates automatically go into effect. . .

Id.

This Court concluded that "the Commission was without authority to suspend intervenor's new rate tariffs had it chosen to do so. . . ." Id. at 814.

Finally, the Court specifically found that § 364.05(4) survived the adoption of the APA, specifically referring to § 120.72(3), Florida Statutes (1975). Id.[4]

In his brief, Public Counsel makes much of the fact that Florida Interconnect's request for hearing came after the notice period. [Public Counsel's brief at 12-14]. However, that fact made little or no difference in the Court's ruling. The reasons the Court gave, cited above, clearly had nothing to do with the belated nature of the request for hearing. The only implication of the late request was that by the time Florida Interconnect asked for a hearing, the Commission was without authority to suspend the rates even if it had chosen to do so. That result merely re-enforces the Commission's interpretation of § 364.05(4). Once the notice period passes, the rates automatically go into effect. The expiration of the notice period did not affect Florida Interconnect's right to file a complaint, however. Neither did it effect this Court's determination that the order was not final agency action. The finding that the order was not final, which was "central" to the Court's ruling, was discussed before the Court made any mention of "lateness."

Public Counsel also misapprehends the Court's statement that "Interconnect is in no position to complain about the new schedule's having gone into effect on at least an interim basis."

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[4] It is worth noting that the APA went into effect only six months after file-and-suspend. See Chapter 74-195, § 3, Laws of Florida and Chapter 74-310, Laws of Florida.

Interconnect at 814 (emphasis added). The Court was merely recognizing its earlier holding that because a complaint is pending, the order was not "final agency action" and thus the order was not ripe for appeal.

The facts in this case are very similar to those in Interconnect. In both cases, the Commission failed to find good cause to suspend Southern Bell's tariff filing. In the absence of such a finding, the Commission approved both tariff filings, even though the Commission's orders approving the tariffs were in a "very real sense surplusage." Interconnect at 813. Like the filing in the Interconnect case, Southern Bell's tariff filing here was made outside of a full rate proceeding and did not involve a request for interim rates. Here, as in the Interconnect case, the Commission refused to hold a hearing under § 120.57, Florida Statutes. In both cases, the complaining party was given an opportunity to challenge the reasonableness of the changes in a complaint proceeding. Finally, in this case, as in Interconnect, the question of whether the complainant had adequate notice of the agenda conference at which the Commission decided not to act is not decisive. Under the file-and-suspend procedure, the tariff went into effect whether or not the Commission voted to approve it at the agenda conference. Id.

The Interconnect case and the predecessor cases decided by this Court compel affirmance of the Commission's order. This Court has repeatedly held that, since the tariff takes effect by operation of law and not by Commission order, the APA confers no

right to a hearing during the notice period on whether there is good cause to suspend.[5]

The result Public Counsel seeks is contrary to the statute, to this Court's rulings and to policy concerns. The statute, and the decisions we have cited, make it clear (a) that the file-and-suspend process does not contemplate a hearing and (b) that this result is unaffected by the enactment and amendment of Chapter 120. Interconnect at **814**. In accordance with the Court's decisions, the Commission has traditionally declined to conduct formal hearings during the notice period.[6] See Pan American World Airways v.

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[5] The cases decided by this Court after the Interconnect decision likewise support a utility's right to propose and implement rates via the file-and-suspend procedure. In Florida Power Corporation v. Hawkins, **367** So.2d 1011 (Fla. 1979), this Court found that the Commission was without authority to unilaterally, without notice and hearing, revoke Florida Power Corporation's interim rate award put in effect pursuant to the file-and-suspend law. As it did in the Mayo and Interconnect cases, this Court found that the power to unilaterally undo rates put into effect by consent or operation of law would render the utility's right to put rates into effect after **30** days meaningless. Florida Power at **1014**. In this context, the Court further expressly rejected Public Counsel's argument that the utility had no constitutional right of due process in the benefits flowing from the file-and-suspend statute. Id. See also, Citizens v. Mayo, **335** So.2d **809** (Fla. **1976)**.

[6] Because any affected party has the opportunity to initiate a complaint proceeding at any time during the effectiveness of any rate and because of the express provisions of the file-and-suspend laws (§§ **364.05(4)** and **366.06(4))**, the Commission, following this Court's directives, has traditionally not held hearings prior to taking action or failing to take action on a tariff filing. See,e.g. 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; In re: Southern Bell Telephone & Telegraph Company's Filing to Pass the Cost of a Local Ordinance on to Local Subscribers, **83** FPSC 3:63.

Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983) ("agencies are afforded wide discretion in the interpretation of the statutes they administer").

If Public Counsel's argument is correct that the Commission must hold a formal hearing before it allows rates to take effect automatically, then the Commission must withhold its consent (or "suspend") the proposed tariff every time a substantially affected party requests a hearing. Otherwise, the tariff would automatically go into effect before the formal hearing process could be completed. Such a result, in essence giving all affected parties a "de facto suspension" power, is absurd and contrary to the Legislature's intent when it created file-and-suspend. Public Counsel's request for a hearing in the same docket in which Southern Bell filed its tariff must be denied.

B. A Complaint Proceeding is the Proper Procedure for Public Counsel to Challenge Tariff Changes Under § 364.05(4) and Public Counsel is Prevented from Pursuing this Appeal until he Exhausts his Administrative Remedy

Public Counsel is entitled to a clear point of entry into the rate-making process, and the Commission has given it to him by treating his Request for Hearing as a complaint and allowing him to pursue it in another docket. A complaint proceeding is the historical vehicle to challenge the reasonableness of rates which have taken effect. The opportunity for initiating a complaint proceeding exists at any time during the effectiveness of any rate schedule.

Section 364.14(1), Florida Statutes, relating to adjustments in a telephone company's rates, clearly states that a complaint is the proper vehicle for initiating a challenge to existing rates. That section reads as follows:

> **Readjustment of rates, charges, tolls, or rentals: hearing; order compelling facilities to be installed, etc.--**
>
> **(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. In prescribing rates, the commission shall allow a fair and reasonable return on the telephone company's honest and prudent investment in property used and useful in the public service. (Emphasis added).

Public Counsel's assertion that a complaint proceeding would be inadequate to protect his interests is not well founded. Section 364.14(1) contemplates that virtually any challenge to the tariffed rates, rules, and regulations of a telephone company can be brought in the form of a complaint. The complaint process balances the due process rights of the telephone company to put rates into effect under § 364.05(4) with those of the ratepayers to challenge the rates' prospective application. The complaint procedure clearly comports with the obvious objective of the

statute, which is to reduce regulatory lag and allow new rates to take effect at the end of the notice period unless the Commission, after its own preliminary analysis, decides that the telephone company has not made an adequate showing.

Public Counsel's request for hearing must fail because he has failed to exhaust his administrative remedy by not pursuing the complaint proceeding. Public Counsel asks this Court to compel the Commission to hold a formal hearing pursuant to § **120.57,** but he has failed to exhaust the administrative remedies available to him under the Florida Administrative Code. If the Legislature has given an agency primary jurisdiction to resolve an issue, courts will not ordinarily intervene until all administrative remedies have been exhausted. Key Haven v. Board of Trustees of the Internal Improvement Trust Fund, **427** So.2d **153, 157** (Fla. **1982);** Communities Financial Corp. v. Florida Department of Environmental Regulation, **416** So.2d **813, 816** (Fla. 1st DCA **1982);** State ex rel. Dept. of General Services v. Willis, **344** So.2d **580** (Fla. 1st DCA **1977).** Until Public Counsel exhausts his administrative remedy in the complaint proceeding, this Court should not intervene because, as stated in Interconnect, there has not been "final agency action." Interconnect, **342** So.2d at **813.**

Public Counsel admits in his brief that he has not tried to avail himself of his right to pursue his contention in the complaint proceeding initiated by the Commission. Still, he claims

that this remedy is inadequate.[7] In Communities Financial Corp. v. Florida Department of Environmental Regulation, 416 So.2d 813 (Fla. 1st DCA 1982), the plaintiff/appellants also failed to seek administrative redress and yet they too claimed they did not have an adequate remedy. The court held in Communities Financial that "since such avenues of relief were not pursued, we cannot conclude that the remedies of the administrative process were inadequate.'' Id. at 816.

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. Florida 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. Moreover, the Commission has not yet faced the question of who has the burden of proof in the complaint proceeding which Public Counsel had, until only recently,

[7] It should be noted that Public Counsel did serve Southern Bell with a document request in the complaint proceeding on January 16, 1990. A copy of the document request is included in Southern Bell's appendix. [A. at 61-67]. Perhaps Public Counsel is now utilizing the complaint proceeding because he now recognizes the adequacy of that method of challenging the reasonableness of the tariff and obtaining a hearing.

disdained. Thus, it is premature for Public Counsel to argue that issue before this Court.

Public Counsel has lost nothing by the Commission's decision to allow the notice period under the file-and-suspend statute to expire and, thus, to deny him an opportunity for hearing in the same docket that was opened in response to Southern Bell's tariff filing. He still can get his hearing in the complaint proceeding.

The irony of Public Counsel's contention is that if he had properly pursued his administrative remedy in the complaint proceeding without taking this appeal, he would have saved himself, the Commission and Southern Bell much time and effort. Public Counsel's arguments are simply without legal basis and are contrary to the policy concerns underlying § 364.05(4). As clearly stated by this Court in Interconnect, and already discussed in this brief, because the complaint proceeding is still pending, the Commission decision is not "final" and, therefore, not reviewable by this Court.

CONCLUSION

Southern Bell respectfully submits that the Commission properly denied Public Counsel's request that it hold a formal hearing during the 30-day notice period on the issue of whether it had good cause to withhold consent and thus prevent Southern Bell's tariff from becoming effective by operation of law. When the 30-day notice period expired, the tariff took effect without Commission action. The Commission's order, entered after the

period had expired, was surplusage; therefore, it cannot provide a jurisdictional basis for this appeal. The only proper way for Public Counsel to challenge it was by filing a complaint to set aside the new rates. The Commission properly treated Public Counsel's request for hearing as a complaint. Public Counsel has failed to pursue the complaint proceeding to a conclusion; therefore, he has not exhausted his administrative remedies. Southern Bell respectfully submits that this appeal must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: WALTER D'HAESELEER, Division of Communications, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32301; TOM McCABE, Division of Communications, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32301; SUSAN CLARK, Division of Legal Services, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32301; TRACY HATCH, Division of Legal Services, Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, Florida 32301; JACK SHREVE, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 801, Tallahassee, Florida 32399-1400; and CHARLES J. BECK, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 801, Tallahassee, Florida 32399-1400, by United States Mail this 29th day of January, 1990.

ATTORNEY

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