IN THE SUPREME COURT OF FLORIDA

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

On Appeal From the Florida Public Service Commission

INITIAL BRIEF OF THE CITIZENS
On Behalf of the Citizens of the State of Florida

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PRELIMINARY MATTERS

This is an appeal from order no. 21912 of the Florida Public Service Commission relating to Public Counsel's request for a hearing in proceedings on the rates to be charged by Southern Bell Telephone and Telegraph Company for specified custom calling services.

The Public Counsel is charged by section 350.0611, Florida Statutes (1987) to provide legal representation for the people of the state in proceedings before the Florida Public Service Commission. Jurisdiction is conferred upon this Court by Article V, section 3(b)(2), Florida Constitution, and sections 350.128(1) and 364.381, Florida Statutes (1987).

Pursuant to Florida Rule of Appellate Procedure 9.200, this brief is accompanied by an appendix which includes a copy of the order to be reviewed. References to the appendix are signified as (A___).

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

STATEMENT OF THE CASE AND FACTS

Southern Bell filed a tariff on August 1, 1989, to increase certain custom calling rates by 10% for residential customers and 12% for business customers. (A 8). Custom calling services ("CCS") include such services as call forwarding, call waiting, speed calling, and call hold. Southern Bell's filing concluded that the increase would result in a $10 million revenue increase and would not decrease the market demand for the company's CCS services. Id.

On August 16, 1989 Public Counsel timely filed a notice of intervention and a request for a formal hearing in Docket No. 891039-TL pursuant to section 350.0611 and chapters 120 and 364, Florida Statutes. Asserting that the substantial interests of the company's customers would be affected by a $10 million rate increase, Public Counsel identified five issues of disputed fact, law and policy as the grounds for its request for a formal hearing. (A 21). Public Counsel further contended that Southern Bell had not submitted evidence to show that the $10 million increase in revenues comported with the purposes previously expressed by the Commission of allowing the Company flexibility to adjust to market competition while helping to maintain low rates for local services. Southern Bell also failed to show that its projected earnings without the increase would fall below its approved range of earnings.

On September 19, 1989, the Commission issued a final order approving Southern Bell's proposed rate increases while at the same time denying the citizen's right to an opportunity to be heard prior to issuance of a final order. Order No. 21912; A 1. The Cornmission reclassified Public Counsel's request for a hearing as a complaint proceeding. Id.; A 1 at 5. The Commission reasoned that it was not obligated under statute or case law to grant a hearing request in "interim rate proceedings" before rates go into effect. The Commission buttressed its opinion with the statement that "[s]etting reasonable rates for utilities is a legislative function, not a judicial function." Id.

SUMMARY OF THE ARGUMENT

The Administrative Procedure Act applies to all agency actions determining a party's substantial interests. Section 120.57, Fla. Stat. (1987). There is no general exception for telephone company tariffs filed with the Florida Public Service Commission.

The Commission's final approval of Southern Bell's tariff increasing rates by $10 million per year was not an interim rate proceeding exempted from the Administrative Procedure Act by section 120.72(3), Florida Statutes (1987). Approval of Southern Bell's tariff was a determination of the Company's substantial interests and, under section 120.57, the Commission was required to provide notice and an opportunity for a hearing on the Company's tariff to persons substantially affected by the Commission's action.

THE ADMINISTRATIVE PROCEDURE ACT APPLIES TO THE PUBLIC SERVICE COMMISSION'S APPROVAL OF TELEPHONE COMPANY TARIFFS.

The Administrative Procedure Act applies to all agency actions determining a party's substantial interests. Section 120.57, Fla. Stat. (1987). Exemptions must be explicit within the APA itself or found elsewhere in the statutes. Section 120.72, Fla. Stat. (1987). There is no general exception for telephone company tariffs filed with the Florida Public Service Commission. A limited exemption applies to temporary interim rates, collected before the APA process is concluded, but none exists for permanent rate changes. Therefore, the Commission cannot allow a tariff affecting the substantial interests of Southern Bell's customers to go into effect on a permanent basis without providing a clear point of entry into the decision making process.

Approval of Southern Bell's tariff was a determination of the Company's substantial interests and, under section 120.57, the Commission was required to provide notice and an opportunity for a hearing to persons substantially affected by the Commission's action on the Company's tariff. U.S. Sprint Communications Co. v. Nichols, 534 So.2d 698, 699 (Fla. 1988) ("Section 120.57(1), Florida Statutes (1985), requires an agency to provide a party whose 'substantial interests' are affected by the agency's actions with an opportunity to request a hearing."); FFEC-Six, Inc. v. Florida Public Service Commission, 425 So.2d 152, 153 (Fla. 1st DCA

1983) ("The Commission has thereby failed to provide appellant with a clear point of entry into the administrative proceeding, thus rendering the Commission action invalid. See Manasota-88 v. State Department of Environmental Regulation, 417 So.2d 846 (Fla. 1st DCA 1982); Sterman v. Florida State University, 414 So.2d 1102 (Fla. 1st DCA 1982)[emphasis added by the court]). Thus, the Commission's decision to grant final approval of Southern Bell's tariff while concurrently denying Citizens' right to be heard is procedurally flawed under the Administrative Procedure Act.

Furthermore, in an attempt to exclude the Commission's action from the due process requirements of the APA, the Commission errs by characterizing rate setting as a legislative (as opposed to a judicial) function. The 1974 revision of the APA made "possible the abolition of all forms of judicial distinction which [had] been developed relative to agency actions, such as 'quasi-executive,' 'quasi-judicial,' [and] 'quasi-legislative,'" by which the courts had determined whether agency action required compliance with administrative due process procedures. School Bd. of Leon County v. Mitchell, 346 So.2d 562, 566 (Fla. 1st DCA 1977) (quoting Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, (March 9, 1974) reprinted in 3 A. England & L. Levinson, Florida Administrative Practice Manual, App. C at 10 (1979) [hereinafter Reporter's Comments]). The judicial characterizations of agency action in rule-making proceedings as "legislative" in order to exempt an agency's decision from the

"operation of administrative procedure laws, are now brought under the minimum fairness provisions" of the 1974 Act. Id. (quoting Reporter's Comments, supra, App. C at 18). The First District Court of Appeal concluded that the due process requirements of section 120.57, Florida Statutes applied to all agency actions which affected the substantial interests of a party. Id. at 567. The determination of whether a hearing is required under the revised APA rests on whether agency action adversely affects the substantial interests of a party and the presence of disputed facts, not whether a hearing is required by a statute other than chapter 120. See Reporter's Comments, supra App. C at 18.

THE EXEMPTION FROM THE ADMINISTRATIVE PROCEDURE ACT FOUND IN SECTION 120.72(3), FLORIDA STATUTES, APPLIES ONLY TO RATES COLLECTED DURING THE PENDENCY OF PROCEEDINGS CONDUCTED PURSUANT TO SECTION 120.57, FLORIDA STATUTES.

Telephone company tariffs are filed pursuant to sections **364.05** and **364.14,** Florida Statutes **(1987).** Subsection **364.05(4),** provides a mechanism for granting interim rate relief under the file-and-suspend law. That statute was enacted as chapter **74-195,** Laws of Florida, which enacted substantially similar file-and-suspend provisions in sections **366.06** (electric utility rate filings), **367.081** (water & sewer utility rate filings), and **323.08** (motor carrier rate filings). The court has interpreted the file-and-suspend procedures across the various types of rate proceedings in a consistent manner. See e.g., Florida Power Corp. v. Hawkins, **367** So.2d **1011** (Fla. **1979);** Florida Interconnect Telephone Co. v. Florida Public Service Commission, **342** So.2d **811** (Fla. **1977);** Citizens v. Mayo, **333** So.2d **1** (Fla. **1976).** A limited exemption from the **APA** for chapter **74-195** is found at section **120.72(3),** which states:

> *(3)* Notwithstanding any provision of this chapter, all public utilities and companies regulated by the Public Service Commission shall be entitled to proceed under the interim rate provision of chapter **364** or the procedures for interim rates contained in chapter **74-195**, Laws of Florida, or as otherwise provided by law. Section **120.72 (3),** Fla. Stat. (emphasis added).

Since there are no other statutory exemptions, any conclusion that the Commission's tariff approval process is outside the **APA** must be grounded on this provision. Note, however, that it is limited to proceedings for interim rates. Section **120.72 (3),** Fla. Stat. There is no statutory exemption from the **APA** for permanent rate changes under file-and-suspend or any other statute.

The rationale for the interim exemption is unmistakable. Were it otherwise, setting interim rates would itself be a decision affecting substantial interests subject to notice and hearing requirements. The temporary nature of interim rates mitigates harm to both the company and its customers. Moreover, the overall process contemplates compliance with the APA's procedural requirements. Subsection **364.05(4)** applies only "pending a final order." Section **364.05(4)** Fla. Stat. Refund and record-keeping requirements go into effect eight months after suspension of the tariff if a final order has not yet been issued. Id. Also, the Commission is required "upon completion of hearing and final decision" to order refunds of "such portion of the increased rate or charge as by its decision shall be found not justified." Id.

The file-and-suspend statute must be read with the other provisions of Chapter 364. See Maule Industries, Inc. v. Mayo, 342 So.2d 63, 66 n.5 (Fla. 1976) ("It follows, of course, and we so held in the Gulf Power case, that the interim rate procedures enacted in 1974 are an integral part of the general and more elaborate process for obtaining rate increases." Id.). Section 364.05(1), Florida Statutes, requires telephone companies which are requesting changes in rates to file those changes with the Commission and publish notice of the proposed changes at least sixty days prior to their proposed effective date. Further, the notice must be "kept open to public inspection." Section 364.05(1), Fla. Stat. Subsection 364.05(3) clearly states that no change becomes effective without the Commission's "consent." The file-and suspend law in subsection 364.05(4) gives the Commission certain latitude to craft expedited rate relief, but only "pending a final order" after giving its "consent" as expressed in subsection 364.05(3), Florida Statutes.

The Commission may consent to proposed rates by failing to suspend them within thirty days. Even so, this consent allows the rates to only become temporarily effective pending the outcome of proceedings culminating in a final order. Florida Interconnect Telephone Co. v. Florida Public Service Commission, 342 So.2d 811, 814 (Fla. 1977) ("This procedure [file-and-suspend] survives the adoption of the new Administrative Procedure Act. See Section

120.72(3), Florida Statutes (1975). . . . Thus, the Commission was without authority to suspend [Southern Bell's] new rate tariffs had it chosen to do so, and consequently Interconnect is in no position to complain about the new schedules having gone into effect on at least an interim basis." [emphasis added]). Public Counsel concedes that the Commission is not required to hold a hearing before new rates become temporarily effective under the interim rate provision; however, a full hearing is required before the Commission renders a final order granting a permanent rate increase.

The due process protection afforded by the Legislature requiring notice and consent are to ensure that the public has an opportunity to contest proposed changes before the Commission enters a final order granting a permanent rate increase. See Citizens v. Mayo (Florida Power Corp.), 316 So.2d 262, 264 (Fla. 1975) ("An interim rate increase is a part of the main proceeding and is authorized only 'pending a final order by the commission."') [emphasis added by the court; footnote omitted]. Enactment of the file-and-suspend provision did not decrease the level of due process afforded affected persons. Florida Power Corp. v. Hawkins, 367 So.2d 1011, 1013 (Fla. 1979) ("It is clear the [file-and-suspend] statute was designed to provide accelerated rate relief without sacrificing the protection inherent in the overall regulatory scheme."); Florida Gas Co. v. Hawkins, 372 So.2d 1118,

1121 (Fla. 1979) ("[T]he public policy of this state favor[s] traditional due process rights in utility rate hearings.")

The APA requires a full hearing when an agency renders a decision which affects the "substantial interests of a party." Section 120.57, Fla. Stat. The Commission's consent, given actively or passively, is a decision. See Citizens of Florida v. Mayo, 333 So.2d 1, 4 (Fla. 1976) (characterizing Commission inaction as equivalent to consent). As such, that decision triggers the hearing requirements of the APA. Hence, approving permanent rate changes without affording due process cannot be read consistently with the statutory requirements placed on the Commission by sections 364.05 and 120.57, Florida Statutes.

The PSC misconstrues the case of Florida Interconnect Telephone v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1977). Florida Interconnect sold telephone equipment known as automatic private branch exchanges (PBXs). It was not a regulated telephone company, although it competed with companies that were. Southern Bell Telephone and Telegraph Company filed a tariff on May 24, 1975, a portion of which "constituted a rate reduction, accompanying the introduction of a new line (trademarked Dimension) of Private Branch Exchange Service." Id. at 812. Florida Interconnect filed a complaint with the PSC on June 27, 1975, alleging that approval of the tariff would affect its substantial interests. Id. On July 7, 1975, the PSC approved the tariff at an

agenda conference "without individual notice to, or knowledge of, petitioner." Id. The director of the PSC's rate department notified Southern Bell and Florida Interconnect by letter dated July 10, 1975 that the complaint would be set for hearing. "The letter noted that Southern Bell's tariff had been 'approved' pending disposition of the complaint." Id. at 813. On July 14, 1975, the PSC's chief hearing examiner also wrote to both parties "requesting certain information in order to expedite the hearing." Id. Instead of participating in the hearing, Florida Interconnect appealed the Commission's interim decision which the company maintained failed to comport with the APA's requirements for notice and hearing. Id.

The court conceded that Florida Interconnect's argument appeared "plausible at first blush" but concluded that the order being appealed did "not constitute final agency action within the contemplation" of the APA. Id. Correspondence sent by the PSC's rate department director and chief hearing examiner to Florida Interconnect indicated the interim nature of the Commission's decision:

> Rather than cooperate with this effort to expedite its complaint, petitioner chose to seek review of the Commission's tentative approval in court. But the actions of Messrs. Swafford and Smithers indicate that the agency decision was not "final" and hence not reviewable by this Court. Cf. Citizens of Florida v. Mayo (Southern Bell Tel. & Tel. Co.), 322 So.2d 911 (Fla. 1975); Citizens of Florida v. Mayo (Florida Power Corp.), 316 So.2d 262 (Fla. 1975); Citizens of Florida v. Mayo (Florida Power & Light Co.), 314 So.2d 781 (Fla. 1975).

Id. (emphasis added).

The cases cited in the quote above all involved appeals of PSC orders granting interim rates. They were all decided based on the decision in Citizens v. Mayo (Florida Power Corp.), 316 So.2d 262 (Fla. 1975). In that case, the Court said, even if the interim award is granted in a separate docket, it is nonfinal as an integral part of the full rate case. Id. at 263 (stating that "an interim order is clearly not a separate proceeding whatever its docket number." Id. at 264.[1] The Court's primary reason for denying Florida Interconnect's petition was therefore because the Commission order was not final agency action. The petition for

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'In Citizens v. Mayo, the Court held that adequate due process protections were encompassed within the file-and-suspend law because the Commission had to act "in the main proceeding" within eight months and had to account for "increased funds in order to provide refunds." 316 So. 2d at 264. In a later appeal that referred to both Florida Interconnect and Citizens v. Mayo, the Court said: "Indeed, the File and Suspend Law itself restricts the Commission's action and imposes time and bond requirements to protect the public. Citizens of Florida v. Mayo, 316 So. 2d 262, 264 (Fla. 1975)." Florida Power Corp. v. Hawkins, supra, 367 So. 2d at 1014.

writ of certiorari was dismissed without prejudice to Florida Interconnect's right "to seek relief in this Court from a duly-entered final order." 342 So. 2d at 815.

The Court in Florida Interconnect also found that "[a]nother reason" for denying the appeal was because the order from the July 7, 1975 agenda conference was "in a very real sense surplusage." Id. at 813. Under the file-and-suspend statute, the tariff went into effect automatically thirty days after the filing on May 24, 1985:

> By the time Interconnect filed its complaint with the Commission on June 27, 1975, more than thirty days had elapsed from Southern Bell's May 24, 1975 filing of its proposed tariff rates. Thus, the Commission was without authority to suspend intervenor's new rate tariffs had it chosen to do so, and consequently Interconnect is in no position to complain about the new schedule's having gone into effect on at least an interim basis.

Id. at 814 (emphasis added). The court then noted that "[i]n any event," the notice in the Florida Administrative Weekly, was inadequate for the agenda conference to have been the occasion to take final agency action.

The flaw in the Commission's reasoning is that by issuing a final order rather than suspending the tariff, the question of a hearing is precluded. Under Florida Interconnect, the Commission's order is final agency action only in regard to the interim

effectiveness of the tariff filed, not to its final effectiveness as a permanent increase. Therefore, a timely request for a hearing under the APA must be granted. The Commission also errs in its interpretation of Florida Interconnect as support for the proposition that affording a complaint proceeding against Southern Bell's tariff will satisfy its obligations under the APA. It is true that a complaint had been filed against Southern Bell's tariff in Florida Interconnect, but that case does not stand for the proposition that, in the absence of a complaint, the initial approval of Southern Bell's tariff would have been final. Since Florida Interconnect had filed a complaint and a hearing was to be held to decide whether Southern Bell's tariff should stay in force, the Court was not faced with the question whether, in the absence of a complaint, the Commission would have had to conduct a hearing if one was timely requested.

THE OPPORTUNITY TO FILE A COMPLAINT AGAINST SOUTHERN BELL'S RECOVERY METHODOLOGY CANNOT BE SUBSTITUTED FOR THE PSC'S FAILURE TO COMPLY WITH THE APA IN THE FIRST PLACE.

Hearings under the APA are intended to formulate agency action based on record. The due process requirements of the APA provide for evidence and argument on all issues involved, cross-examination, submission of rebuttal evidence and the right to be represented by counsel. Section 120.57(1)(b)r, Fla. Stat (1987). There is an assigned burden of proof that must be met by the party seeking affirmative relief. Florida Power Corporation v. Cresse, 413 So.2d 1187, 1191 (Fla. 1982) ("'Burden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates. Welch, Cases and Text on Public Utility Regulation, 638 (Revised Ed. 1960)."). The PSC is required to evaluate evidence and render its decisions within this framework.

The PSC, however, seeks to circumvent this process at page 5 of Order No. 21912 by holding out the opportunity for Public Counsel to file a complaint challenging the grounds on which Southern Bell seeks to increase its custom calling charges. Order No. 21912; A 1 at 5 ("Based on the foregoing, we find it appropriate to deny OPC's request for a hearing prior to this tariff filing going into effect. However, we will accept OPC's

filing as a complaint and, as such, we will set it for hearing in a separate docket."). Presumably, the company's customers would accept the burden of proof to establish that the increase in rates Southern Bell requested should be changed.

This places the cart before the horse. The party seeking affirmative relief in Docket No. 891039-TL is Southern Bell. It wants to realize a $10 million revenue increase charging higher rates for custom calling services. Only after Southern Bell has proven on the record of a proceeding conducted pursuant to the APA (1) that offsetting rate reductions to other services should not be ordered, (2) that the company's current earnings are not within its authorized range of earnings, (3) that the company's projected earnings for 1989 and for 1990 would not be within its authorized range of earnings without a $10 million rate increase, and (4) that the $10 million increase in revenues comported with the purposes expressed by the Commission of allowing the company flexibility to adjust to market competition while helping to maintain low rates for local services, would the new charges become the "established" rate. Only then will others seeking to overcome the new rates have to prove that they should be changed.

The change in Southern Bell's custom calling services rates is adverse to its customers, and they are "ineffective until an order has properly been entered pursuant to Section 120.59, after proceedings under Section 120.57." See Capelleti Brothers, Inc.

v. Department of Transportation, 362 So.2d 346, 348 (Fla. 1st DCA 1978). Moreover, the PSC cannot use any subsequent proceedings as a basis to review the efficacy of allowing Southern Bell to collect the charges in the first place. The purpose of section 120.57 proceedings is to formulate agency action, not to review earlier, tentative decisions. McDonald v. Department of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977).

CONCLUSION

The Public Service Commission committed a material error when it approved Southern Bell's request to increase its custom calling services rates. Customers were not afforded a clear point of entry into the decision-making process despite the adverse nature of the change, the presence of unaddressed issues of fact, law and policy, and a timely request for a hearing. The opportunity to initiate a proceeding challenging the Commission's action is inadequate to protect the customers' interests where the PSC has not afforded the opportunity for a hearing required in the first instance.

The Court should order that the PSC cannot affirmatively approve or otherwise permit telephone companies to change rates or services on a permanent basis without first complying with the notice and hearing requirements of section 120.57, Florida Statutes (1987). Since, in this case, the PSC's Order No. 21912 was based on an improper interpretation of case law and sections 120.72(3) and 364.05(4), Florida Statutes (1987), this case should be remanded with directions to afford Public Counsel a formal hearing under section 120.57(1), Florida Statutes prior to entry of a final order.

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CERTIFICATE OF SERVICE
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Case No. 74,915

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties this 28th day of December, 1989.

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