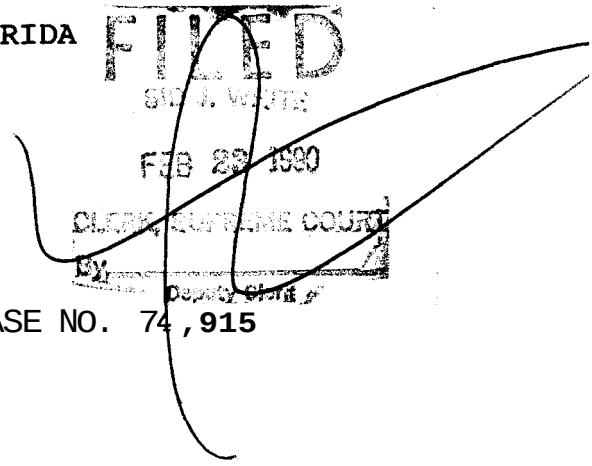
IN THE SUPREME COURT OF FLORIDA



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

On Appeal From the Florida Public Service Commission

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

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THE FILE-AND-SUSPEND LAW, SECTION 364.05(4), FLORIDA STATUTES (1987), DOES NOT APPLY TO THIS CASE

The Commission fundamentally misconstrues the exemptions found in the Administrative Procedures Act for PSC proceedings. Section 120.72(3) states:

> "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 Provisions of chapter 364 or the procedures for interim rates contained in chapter 74-195, Laws of Florida, or as otherwise provided by law." (emphasis added).

The Commission argues that orders under file-and-suspend are exempt from the APA under the "as otherwise provided by law" provision cited above', but they fail to mention that chapter 74-195 cited above is the file-and-suspend statute which is now section 364.05(4), Florida Statutes. Since section 120.73(3), Florida Statutes, specifically mentions the file-and-suspend law by its reference to chapter 74-195, it can not also come under the "as otherwise provided by law" provision of the statute. Section 120.72(3), Florida Statutes (1987), exempts tariffs effective under file-and-suspend from the APA's right to a hearing only for interim purposes.

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[1] PSC Brief at 10-11.

Southern Bell contends that its tariff filing was effective 30 days after filing under the file-and-suspend statute (section 364.05(4), Florida Statutes (1987))[2]. Since the Commission's written order dated September 19, 1989, followed Southern Bell's August 1, 1989 tariff filing by more than 30 days, Southern Bell argues that the tariff went into effect without Commission action under the file-and-suspend statute. However, the Commission approved the tariff at an agenda conference on August 29, 1989, just 28 days after the tariff filing.

PSC orders under the file-and-suspend law are effective on the date the Commission votes rather than on the date of the written order. Section 364.063, Florida Statutes (1987) ("[An] order shall be considered rendered on the date of the official vote for the purposes of ss. 364.05(4)"); Citizens v. Public Service Commission, 425 So.2d 534, 542 (Fla. 1982) ("This provision [section 366.072 similar to section 364.0631 delays the running of the appeal time (or rehearing time) until everyone has a written order, but makes the rate adjustment effective on the date of the Commission's vote."); Gulf Power Co. v. Cresse, 410 So.2d 492, 494 (Fla. 1982) (agreeing with the Commission that the effective date of their action was the date on which their vote was taken). The Commission took affirmative action to approve Southern Bell's tariff within thirty days of the tariff filing, thereby obviating file-and-suspend procedures. The tariff was never suspended, nor

[2] Southern Bell Brief at 6.

did the tariff become effective under file-and-suspend because of inaction. The rates became effective by a final order of the Commission approving the rates and denying Public Counsel's request for a hearing. The exemption from the APA for interim rates under file-and-suspend simply does not apply to the facts here.

Southern Bell characterizes this argument as the same argument rejected by the Supreme Court of Florida in Florida Interconnect Telephone Company V. Florida Public Service Commission, 342 So.2d 811 (Fla. 1977)[3]. The facts in Florida Interconnect are vastly different from the facts here.

In Florida Interconnect the Supreme Court reviewed a decision by the PSC to approve a tariff filed by Southern Bell Telephone & Telegraph Company on May 24, 1975. On June 25, 1975 (more than 30 days after the tariff was filed) Interconnect filed a complaint and request for hearing. On July 7, 1975, the PSC voted at agenda conference to approve the tariff effective July 10, 1975. Interconnect then filed in this Court a petition for writ of certiorari and motion to stay the order.

This Court denied the petition on the "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 [Administrative Procedure] Act." 342 So.2d at 813. (emphasis

[3] Southern Bell Brief at 18-21.

added).

Compare the facts in Interconnect to the Commission's order here boldly entitled "Final Order Approving Tariff Filing" (A 1). In the present appeal, the PSC (1) ordered Southern Bell's tariff approved as a final order, (2) denied Public Counsel's request for hearing (filed fifteen days after Southern Bell filed the tariff)[4], and (3) closed the docket approving Southern Bell's tariff filing[5].

Other cases cited by Southern Bell have no more bearing on this case than does Florida Interconnect. The fact that Citizens v. Mavo, 333 So.2d 1, 6 (Fla. 1976), says "the Commission can obviate any hearing requirement simply by failing to act for 30 days" is irrelevant. Order No. 21912, at 14-15. That case cannot be read to hold that the Commission can obviate a requirement for a hearing by taking final action before the suspension period runs,

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[4] The Commission chose instead to treat the request for hearing as a complaint in a separate docket. Although the Commission decided on August 29, 1989 to treat the request for hearing as a complaint, it delayed opening a docket for the complaint until January 11, 1990. (Supp. App. 1). The Public Counsel promptly served a discovery request on Southern Bell five days later. The Commission intends to hold the hearing in late November, 1990, and decide the case on March 6, 1991 -- more than a year and a half after Southern Bell filed the tariff. (Supp. App. 3).

[5] The Public Counsel served Southern Bell with requests for production of documents on August 16, 1989, and September 1, 1989. After Southern Bell objected in part to producing the documents, the Public Counsel filed motions to compel on October 10 and 11, 1989. The Commission never ruled on these motions, presumably because of its September 19, 1989 order (A 1) closing the docket.

as the Commission purports to do here.[6]

Similarly, Maule Industries v. Mavo, 342 So.2d 63 (Fla. 1977), is inapplicable. Southern Bell's Brief at page 17 quotes language from Maule Industries, 342 So.2d at 67 n.7, that the PSC should withhold suspension and allow rates to go into effect if it has no reason to suspend them. Nothing in that opinion, however, suggests that the PSC need not hold hearings to resolve whether rates should remain in effect on a permanent basis. See supra nn. 6 & 7. In Maule Industries, this Court reversed the PSC for its failure to base interim rates, granted after suspension of the filed rates, on adequate evidence.

The legislature created section 364.055, Florida Statutes, to permit the Commission to authorize the collection of "interim rates" pursuant to "a tariff filing of a telephone company" until the effective date of the Commission's final order. Section 364.055(1), Fla. Stat. This section amplifies the file-and-suspend procedures by setting guidelines for determining a reasonable increase in rates to be collected by a telephone company awaiting a final order in lengthy rate proceedings. Telephone companies are thereby protected from potential economic harm that

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[6]Southern Bell's citation is taken out of context. In Citizens v. Mayo, 333 So.2d at 4, the Court said that the rates not suspended went into effect, but only as "interim charges" pending the outcome of "the full rate proceeding." The citation in the Company's initial Brief is irrelevant regardless of the interpretation, though, because the tariff here was not allowed to go into effect automatically.

may result from protracted rate setting proceedings, whether the delay is caused by an investigation by the PSC or by compliance with APA due process requirements. Thus, the legislature struck a balance between protecting the company's economic interests and the consumer's right to be heard. **See** infra n. 7. Southern Bell did not seek to use section 364.055, Florida Statutes, in this case.

THE COMMISSION EXERCISES NO SPECIAL EXPERTISE INTERPRETING THE ADMINISTRATIVE PROCEDURES ACT

Southern Bell completes its citation of cases by referring to this Court's decision in Pan American World Airways V. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983), which stated "agencies are afforded wide discretion in the interpretation of the statutes they administer." 427 So.2d at 719. This general rule of law applies to the PSC's interpretation of chapter 364 as well as Commission rules. It does not apply to the Commission's interpretation of the APA.

Southern Bell quotes United Telephone Co. V. Mayo, 345 So.2d 648 (Fla. 1977) out of context for the proposition that the court's review of this issue is limited. Southern Bell Brief at 8. In that case United petitioned the Commission for general rate relief.

United Telephone, supra at 650. After holding extensive hearings and compiling a lengthy record, the PSC approved United's request with modifications. Id. On appeal, the supreme court stated that their review of PSC rate-making was limited to an examination of "the record to determine whether competent substantial evidence which supports the Commission's findings and conclusions exists." Id. at 654. United Telephone does not apply to the case here because the PSC denied Public Counsel an opportunity for a hearing that would have developed a record for court review. The Public Counsel asks the court to review PSC action for compliance with APA due process safeguards. Section 120.68(9), Florida Statutes, provides the standard of review. See infra p. 8. This Court -- not the agency -- is the final arbiter of the due process requirements contained in the APA.

Certainly, the PSC may consent to rate relief any time after filing, but consent requires a decision determining the substantial interests of the utility and its customers. That triggers the notice and hearing requirements of Section 120.57.[7] The case of

[7] The issue in Florida Power Corp. v. Hawkins, 367 So.2d 1011 (Fla. 1979) was whether the PSC could revoke an interim rate increase without notice or hearing. The Court said it could not: "The general statutory scheme for making and adjusting rates embraces the traditional requirements of procedural due process, i.e., notice and a hearing. Sections 366.06(3); 366.07, Florida Statutes (1975). Within this framework is the so-called 'File and Suspend Law,' Section 366.06(4), Florida Statutes (1975) [now Section 366.06(3), Florida Statutes (1987)]. . . . It is clear the statute was designed to provide accelerated rate relief without sacrificing the protection inherent in the overall regulatory scheme." 367 So.2d at 1013 (emphasis added).

U.S. Sprint Communications Co. v. Nichols, 534 So.2d 698, 699 (Fla. 1988) states "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." U.S. Sprint involved a tariff filing, just as this case does. This Court decided that U.S. Sprint had already had a hearing on its issues and that the PSC need not grant another hearing. None of the Court's analysis in U.S. Sprint would have been necessary were U.S. Sprint not entitled to a hearing on the tariff filing in the first place under the APA. That is what the Public Counsel asks the Court to decide in this case.

Reversal and remand for appropriate proceedings is required by section 120.68(9), Florida Statutes (1987), which provides:

> (9) If the court finds that the agency has erroneously interpreted a provision of law and that a correct interpretation compels a particular action, it shall:
>
> (a) Set aside or modify the agency action, or
>
> (b) Remand the case to the agency for further action under a correct interpretation of the provision of law.

This court, not the PSC, determines the statutory requirements and legislative intent of chapter 120.

THERE ARE NO FURTHER ADMINISTRATIVE PROCEDURES TO PURSUE ON THE COMMISSION'S FINAL ORDER

Southern Bell incorrectly alleges that Public Counsel failed to exhaust its administrative remedies because the PSC held out an opportunity to Citizens to challenge the prospective application of higher rates in an after-the-fact complaint proceeding. The Florida Rules of Appellate Procedure apply to supreme court review of final orders of the PSC in telephone rate cases. Fla. R. App. P. 9.110(a)(2); see r. 9.030(1)(A)(ii); r. 9.020 (administrative action includes an "order" of "any agency, department, board or commission."). In this case, the PSC issued a final order reflecting their final approval of Southern Bell's tariff and denial of a request for hearing on behalf of the company's customers (Al,5). Public Counsel initiated this appeal within thirty days of that duly entered final order. Hence, Southern Bell's allegation that Public Counsel did not exhaust its administrative remedies does not apply in this case.

Even so, the First District Court of Appeal has determined that an agency's order that denies a section 120.57, Florida Statutes, hearing begins the thirty day period for appellate review. Gadsden State Bank v. Lewis, 348 So.2d 343, 347 (Fla. 1st DCA 1977) (finding that in certain circumstances the court had jurisdiction to review a department's denial of a request for

hearing and that a substantially affected party is not required to await department's final order before obtaining appellate review). The district court specifically addressed the doctrine of exhaustion of administrative remedies in the subsequent case of Communities Financial Corp. V. Florida Dept. of Environmental Regulation, 416 So.2d 813, 816 (Fla. 1st DCA 1982). The district court found that an exception to the doctrine occurs "where agency actions are so egregious or devastating that the promised administrative remedies are too little or too late." Id. Of the five criteria enumerated by the court for finding an exception, one is an agency's refusal to afford a hearing. The promised complaint proceeding here is both "too little" and "too late."[8]

PSC COMPLAINT PROCEDURES DO NOT ALLOW THE COMMISSION TO APPROVE FINAL RATE INCREASES WITHOUT A HEARING

Section 364.14, Florida Statutes, allows persons to file complaints against the rates and charges of telephone companies. The Commission has also passed rules governing complaints.

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[8] The Commission intends to hold the hearing in late November, 1990, and decide the case on March 6, 1991 -- more than a year and a half after Southern Bell filed the tariff (Supp. App. 3). This effectively guarantees Southern Bell a $10 million per year rate increase for a year and a half at the expense of Southern Bell's customers. There is no mechanism to refund this money later if the Commission finds the rate increase unwarranted.

Fla. Admin. Code Rule 25-22.036(5) states:

> (5) Complaints. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order." (Supp. App. 4 (underlining added).

The separate right to file a complaint alleging a violation of statute, rule, or order does not eliminate the obligation under section 120.57, Florida Statutes, to conduct a requested hearing before taking final agency action. The PSC's complaint procedure is designed to challenge final action already taken and is not a substitute for a hearing before an agency takes final action, as guaranteed by the APA. It is like saying a person falsely imprisoned without a hearing has no right to complain because he can always file a writ of habeas corpus. Under the timetable adopted by the Commission here, a hearing on the writ would be conducted about fifteen months after imprisonment, and a decision reached more than three months after that.

PRIOR COMMISSION ORDERS DID NOT PRE-APPROVE THE RATE INCREASE HERE

In **1987** the Commission approved "banded rates" and a shortened notice period for Southern Bell's custom calling services. Rates within the bands were not "tentatively approved," as claimed by Southern Bell[9]. Instead the Commission specifically stated:

> **"By** our action taken herein, we are <u>not</u> preapproving tariffs reflecting the individual rates within the Company's proposed band. Each tariff filing altering rates for CCS or PSLS shall be subject to the normal tariff-approval process." (Southern Bell appendix at **9)** (emphasis added).

On its face, the **1987** order had no effect on the tariff approval process in this case other than to shorten the notice period for changes in the tariff from sixty days to thirty days.

Also, Commission order **20162** issued October **13, 1988**[10] determined Southern Bell's allowed range of earnings for the three years **1988** through **1990.** During this time period only, the Commission decided that Southern Bell's increased revenues from allowed rate increases would offset a number of identified

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[9] Southern Bell brief at **2, 3.**

[10] Southern Bell appendix at **10-60.**

increased expenses. This order, like the 1987 order, did not "preapprove" any rate increases at all.

CONCLUSION

The Commission and Southern Bell argue that customers had no right to a hearing before the Commission issued its final order approving a $10 million per year rate increase. Interestingly, their analysis is the same whether the tariff filing increased rates $10 million per year, $100 million per year, or even $500 million per year.

The Commission's failure to offer the opportunity for a hearing freed Southern Bell from the responsibility of proving a need for the rate increase; proving the accuracy of its factual representations; and proving that its tariff will not harm its customers. The Court should reverse and remand for appropriate proceedings pursuant to the provisions of Section 120.68 (8) and (9), Florida Statutes (1987).

Respectfully submitted,

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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 23rd day of February, 1990.

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