IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellants, v. MICHAEL MCK. WILSON, ETC., ET AL., Appellees.	)	CASE NO. 75,074

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, Tampa Electric Company, is referred to as "TECO." Appellants, the Citizens of the State of Florida, are referred to as Public Counsel, their representative in this case. References to the record on appeal are designated (R.-___). References to the initial brief of Appellants are designated "Appellants' brief at _____." References to Appellee's Appendix to the brief are designated (A.-___.)

STATEMENT OF THE CASE AND FACTS

The Commission generally accepts Public Counsel's statement of the case and the facts insofar as it objectively depicts the events and circumstances leading to the issuance and appeal of Order No. 22093. Such additional facts as the Commission may have relied on in support of its arguments are limited in nature and are incorporated into the body of its brief.

SUMMARY OF ARGUMENT

Order No. 22093, which is the subject of this appeal, is purely procedural in nature. Is does nothing more than grant Public Counsel a hearing. As such, it is non-final administrative action, and this Court is without jurisdiction to hear it. Since the amendments to Article V, Section 3(b)3 of the Florida Constitution in 1980 this Court has had no discretionary jurisdiction to review any type of non-final order. Moreover, even when this Court had jurisdiction to review non-final orders, it consistently declined to review non-final Commission action. This Court reviewed the Commission's cases from the prospective of the final agency action, rather than dealing with intermediate orders in a piecemeal fashion. There is no issue of procedural or substantative law which Public Counsel cannot raise in the complaint hearing which the Commission has scheduled. For these reasons, Public Counsel's appeal should be dismissed.

The Commission approved TECO's supplemental service rider under the procedures of the file and suspend law, section 366.06(4), Florida Statutes. Under this Court's interpretation of the file and suspend law, a complaint proceeding provides an adequate opportunity to contest the implementation of a tariff.

Since this Court decided Citizens of Florida V. Mayo, 333 So.2d 1 (Fla. 1976) under the first file and suspend law, it has been recognized that, in dealing with tariff filings proposing changes in a utility's rates, charges, and regulations, the Commission has a range of options which includes the alternatives

of suspending the rates, actively 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 Company v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976).

The Commission's scheduling of a complaint hearing on TECO's supplemental service rider is consistent with this Court's holding in these cases and others which have followed. To require the Commission to issue a proposed agency action (PAA) order when the file and suspend law allows the utility's proposed tariffs to go into effect within 60 days would defeat the right guaranteed by that law. The APA does not require the issuance of a PAA order nor does it guarantee any right of entry before the tariff changes go into effect. Sections 366.06 and 366.07, Florida Statutes, contemplate a complaint as the basis for a challenge to the prospective applications of rates put into effect under the file and suspend law.

I.

ORDER NO. 22093 GRANTING PUBLIC COUNSEL'S REQUEST FOR A HEARING IS A NON-FINAL ORDER WHICH IS NOT REVIEWABLE BY THIS COURT.

The Commission's Order 22093 was styled "Order Granting Hearing." It was purely procedural in nature. It served only to establish that Public Counsel's belated protest and request for hearing would be treated as a complaint and set for hearing. Consistent with that finding, the Commission also directed TECO to file a response to the complaint within twenty days. R.-33.

The Commission's decision in Order No. 22093 did not address the merits of Public Counsel's complaint against TECO's supplemental service rider. Those questions were left open for determination in the complaint proceeding. In fact, Order No. 22093 did not preclude Public Counsel from litigating any issue, procedural or substantive, with respect to TECO's supplemental service rider. As such, Order No. 22093 constitutes non-final administrative action. Chipola Nurseries, Inc. V. Division of Administration, State Department of Transportation, 335 So.2d 617 (Fla. 1st DCA 1976); Prime Orlando Properties, Tnc. V. Department of Business Regulation, 502 So.2d 456 (Fla. 1st DCA 1986). Such non-final administrative action is no longer reviewable by this Court.

Before 1980, this Court had discretionary jurisdiction to hear appeals of non-final administrative orders by virtue of Article V, Section 3(b)3 of the Florida Constitution. That section provided that the Court could review interlocutory orders of a lower

tribunal, if the final order would otherwise be appealable to the court. However, Section 3(b)3 was eliminated by the 1980 revisions to Article V. This Court no longer has jurisdiction to entertain appeals of non-final orders of any kind. In re Emergency Amendments to Rules of Appellate Procedure, 381 So.2d 1370 (Fla. 1980); See England, Hunter, and Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 149, 191 (1980). Public Counsel thus has no right whatever to appeal Order No. 22093 to this Court.

Even when this Court had discretionary jurisdiction to review non-final orders of the Commission, it consistently declined to do so. Interim rate orders provide the most germane examples. In several cases, this Court held that Commission orders establishing interim rates are not final orders appealable to this Court. Citizens of Florida V. Mayo, 316 So.2d 262 (Fla. 1975); Florida Interconnect Telephone Company V. Florida Public Service Commission, 342 So.2d 811 (Fla. 1977).

On its face, it is clear that Order No. 22093 does nothing more tnan grant Public Counsel a hearing. Public Counsel will have the opportunity to raise all procedural or substantive issues arising from the Commission's approval of TECO's supplemental service rider at that hearing. If, after the hearing process is complete, Public Counsel believes that the Commission has decided the case incorrectly, the Commission's final order, and its order setting the matter for hearing, will be reviewable by this Court. The Court should decline jurisdiction and dismiss this appeal.

II.

THE COMMISSION CORRECTLY CONCLUDED THAT PUBLIC COUNSEL'S PROTEST AND REQUEST FOR HEARING FILED FIVE MONTHS AFTER APPROVAL OF TECO'S SUPPLEMENTAL SERVICE RIDER SHOULD TARIFF BE HEARD AS A COMPLAINT CHALLENGING THE PROSPECTIVE APPLICATION OF THE TARIFF.

A. TECO'S SUPPLEMENTAL SERVICE RIDER TARIFF WAS APPROVED UNDER THE FILE AND SUSPEND LAW, SECTION 366.06(4), FLORIDA STATUTES.

Public Counsel has seized upon this appeal of the Commission's procedural order to belabor yet again his views on the nature of the file and suspend law.[1] The Commission is, therefore, compelled to reply, even though Public Counsel's arguments go to the initial approval of TECO's supplement service rider, not the order appealed. An analysis of the law in this area compels rejection of Public Counsel's arguments.

TECO's petition for approval of its supplemental service rider tariff expressly stated that it was being filed under sections 366.06 and 366.075, Florida Statutes.[2] R.-1. Section 366.06(1) forbids utilities to "directly or indirectly, charge or receive any rate not on file with the Commission". It further states that "no change shall be made in any schedule" and

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[1]Public Counsel has made essentially the same arguments in two other cases pending before this Court, Citizens v. Wilson, Case No. 74,471, and Citizens v. Wilson, Case No. 74,915.

[2]Section 366.075 entitled "Experimental and Transitional Rates" allows the Commission to approve rates for particular customer groups or geographic locations to "encourage energy conservation or to encourage efficiency."

specifies that "all applications for changes in rates shall be made to the Commission in writing on rules and regulations prescribed. . . ." Id.

Filings made under section 366.06(1) are subject further to section 366.06(4), the file and suspend law, which provides that

> 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.

The staff's December 8, 1988, recommendation on TECO's petition indicated that the filing was being treated under the file and suspend law. Under the "critical dates" heading of the recommendation, the staff, referring to the requirements of 366.06(4), noted that "sixty days expire January 17, 1989". A-1

The utility, the Commission, and its staff recognized TECO's supplemental service rider tariff as a filing under the file and suspend law. This is consistent with this Court's finding in the Florida Innerconnect case that the Commission's file and suspend laws could apply to any tariff filing, not just a general rate increase. In Florida Interconnect the tariff filing was for a rate decrease for one specific service. 342 So.2d 814.

Consistent with its file and suspend treatment of TECO's petition, the Commission entered its order "denying tariff" on January 10, 1989. R-9. As the order itself indicates, the Commission's denial of TECO's tariff was done on the basis of a

detailed staff analysis and the Commission's own deliberations at agenda. R.-10.

At the same time it denied the specific tariff filing that TECO had submitted, the Commission indicated that it would approve a tariff which would return 20 percent of any fuel savings to the utility's firm rate payers. Order No. 20581 at 3; R.-11.

The Commission staff's administrative approval of TECO'S revised tariff filed in response to order No. 20581 was in accord with the file and suspend law. Since the Commission told TECO in advance what kind of supplemental service rider tariff it would approve, it could hardly have claimed to have a good cause for withholding consent once that tariff was filed. As this Court has recognized, if the Commission does not have good cause to object to a utility's proposed tariff, it has a duty to withhold suspension and allow the rates to go into effect. Maule Industries V. Mayo, 342 So.2d 63 (Fla. 1977).

TECO's tariff filing made after issuance of Order No. 20581 was, in fact, consented to by the Commission. The Commission staff's administrative approval of the tariff was nothing more than the execution of that consent given by the Commission.[3] The tariff was approved under the provisions of the file and suspend law.

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[3]Public Counsel's claim in Point V of his brief that staff approval of this tariff was an impermissible delegation of authority is baseless. The Commission decided what kind of tariff

TECO's supplemental service rider tariff was approved for implementation January 1, 1989. Public Counsel did not file his protest and request for hearing until May 5, 1989. By any measure of the file and suspend law's operation, TECO's tariff was long since effective by that time. Even if the Commission had not given its consent, TECO's tariff filing would have become effective within 60 days, at least two months before Public Counsel filed his protest.

B. THE COMMISSION PROVIDED PUBLIC COUNSEL THE REQUIRED POINT OF ENTRY UNDER THE FILE AND SUSPEND LAW IN SETTING HIS PROTEST FOR HEARING AS A COMPLAINT.

As the Commission noted in its Order No. 22093, Public Counsel's argument for a right of a prior hearing is essentially the same argument that this Court rejected in the Florida Innerconnect case, supra. R.-31.

Florida Interconnect Telephone Company (Florida Interconnect), a competitor of Southern Bell Telephone and Telegraph Company (Southern Bell) in the private branch exchange (PBX) business, contested a tariff filing by which Southern Bell lowered its rates for PBX equipment and services.

(footnote 3 continued)
would be approved. The staff's review and "approval" was a purely ministerial act. Such actions do not exceed the bounds of permissible delegation. Cf. Barrow v. Holland, 125 So.2d 769 (Fla. 1960) (Game and Freshwater Fish Commission could not delegate unbridled discretion to its director to issue permits to exhibit wildlife). The Commission has further defined the tariff approval process by adotping Chapter 25-9, Florida Administrative Code. That chapter sets out in detail the form and required content of the utility tariff filings.

The tariff filing was processed under the telephone file and suspend law (section 364.05(4), Florida Statutes (1975)), which is the same in all relevant respects as the electric file and suspend law. As with the electric file and suspend law of the same vintage, (section 366.06(4), Florida Statutes (1975)), the telephone 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 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 affected 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 the immediate opportunity for a hearing on its complaint. Instead, it took an appeal claiming that the APA, specifically section 120.57(1)(b), Florida Statutes, required that it be given an opportunity for hearing prior to the implementation of the proposed tariff changes.

This Court found that Florida Interconnect's appeal was not well-founded for three basic reasons. First, the Court concluded that the Commission's order approving the tariff did not constitute final agency action within the contemplation of the APA, specifically section 120.52(9), Florida Statutes (1975), which defines order as a "final agency decision." Because the complaint proceeding was still pending, the Court concluded that the decision was not "final" and, therefore, not reviewable. 314 So.2d 813.

Second, this Court found that the order of the Commission, issued more than 30 days after the tariff was filed, was in "a very real sense surplusage." Id. This Court explained its conclusion as follows:

> 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 30 days, the proposed rates automatically go into effect . . . Id.

Concerning this point, the court further concluded 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 exception to the APA for file and suspend procedures. Id. at 814.

Finally, the court concluded that "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.

The Court's reasoning in the Florida Interconnect case is applicable to this appeal. In this case, as in Florida Interconnect, the Commission consented to the utility's tariff filing. The Commission's approval of TECO'S tariff, even though given within 60 days after the revised filing, was of no more substantive effect than the redundant "approval" of the tariff in Florida Interconnect. There is no real distinction between the Commission's consent given in an order and its consent given by failure to act with the time limit set by the file and suspend

law. As in the Florida Interconnect case, TECO's tariff filing was made outside of a full rate proceeding and did not involve a request for interim rates. As this Court recognized, the Commission's decision was "interim" only in the sense that it was subject to challenge in complaint proceedings. As in the Florida Interconnect case, a belated challenge to the tariff under the due process and hearing requirements of section 120.57, Florida Statutes, was rejected as an inappropriate challenge to the approved tariff. As in Florida Interconnect, the opportunity to challenge the reasonableness of the changes made effective by the file and suspend law was held out in the form of a complaint proceeding. Finally, in this case, as in Florida Interconnect, adequacy of notice is not a decisive issue; under the file and suspend procedure the tariff could have gone into effect by operation of law, whether or not the Commission specifically voted to approve it. Id.

The Florida Interconnect case and the predecessor cases decided by this Court on the file and suspend law compel affirmance of the Commission's order in this case. This Court has repeatedly held that under the operation of the file and suspend law, there is no right under the APA for a hearing prior to the implementation of the rates, either where the Commission fails to act or approves the tariff filing in the absence of good cause to suspend.

C. A COMPLAINT PROCEEDING IS THE PROPER VEHICLE TO CHALLENGE TARIFF CHANGES PUT IN EFFECT UNDER THE FILE AND SUSPEND LAW.

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. No procedural error can be ascribed to the Commission for setting the matter for hearing as a complaint, when Public Counsel challenged the tariff months after it became effective .

There is no doubt that a complaint is the proper vehicle for initiating a challenge to existing rates. One need only refer to section 366.07, Florida Statutes, relating to adjustments in utility's rates. That section states:

> Whenever the Commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged, or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory, or preferential, or anywise in violation of law, or any service is inadequate or cannot be obtained, the Commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts, or service, to be imposed, observed, furnished, or followed in the future. (Emphasis supplied).

By the terms of this section, virtually any challenge to the tariffed rates, rules, and regulations of an electric utility can be brought in the form of a complaint.

Public Counsel's lament that a complaint proceeding would be inadequate to protect his interests is not well founded. The 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.

In this regard, Public Counsel's argument that his due process right are violated because his challenge is limited to the prospective application of TECO'S supplemental service rider tariff is baseless. The fact that TECO'S supplemental service rider is in effect pending hearing on Public Counsel's complaint does not mean that firm ratepayers' due process right are violated. Due process under the file and suspend law does not require that the complaint challenge be retroactive in application. A prospective challenge is adequate, as the Florida Interconnect case illustrates. Public Counsel has misinterpreted this case and others to support his challenge to the adequacy of a complaint proceeding. (See Appellants' Brief at 12).

The Commission has granted Public Counsel a clear point of entry through a complaint proceeding. Because he has been offered that hearing, Public Counsel has been forced to argue that his interests will not be protected if TECO is allowed to put its supplemental service rider into effect without the guarantee of a retroactive challenge. This position is inconsistent with Florida law.

Public Counsel further contends that the complaint proceeding would place him at a disadvantage, so far as burden of proof is

concerned. This 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. The situation here is analogous to the Commission's treatment of interim rates in a full rate proceeding. The reasonableness of the interim rates is not taken as "proven" for purposes of the full proceeding. There is no presumption that the utility is entitled to rates at least equal to the interim. The utility bears the burden to show that it is entitled to any increase. The reasonableness of the interim award will be measured by the permanent rates ultimately approved. Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982). Ultimately, 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. South Florida Natural Gas Company v. Florida Public Service Commission, 534 So.2d 695 (Fla. 1988); Gulf Power Co. v. Public Service Commission, 453 So.2d 799 (Fla. 1984).

III.

NEITHER TRADITIONAL CONCEPTS OF DUE PROCESS NOR THE PROCEDURES UNDER CHAPTER 120, FLORIDA STATUTES, REQUIRE THE COMMISSION TO HOLD A HEARING PRIOR TO APPROVING A TARIFF FILING BY AN ELECTRIC UTILITY.

Public Counsel's claims of due process in tariff approval proceedings are based on a misinterpretation of the essential basis of the file and suspend law. He has likewise misinterpreted this Court's decisions and the requirements of the APA.

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. Mountain States Telephone and Telegrapn Company v. New Mexico State Corporation Commission, 337 P.2d 43 (N. M. 1959); Miami Bridge Co. v. Miami Beach Ry. Co., 12 So.2d 438, 445 (Fla. 1943). 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 Company, 17 So.2d 785, 786 (Fla. 1944).

The common law process for the promulgation of utility rates was abridged in Florida in 1951 when the Legislature exercised its prerogative to delegate the review and rate-setting authority to the Commission. That delegation 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 so long as those rates are just and reasonable when measured by "correct standards that bear a proper relation to the factors involved in the production." Id. For electric utilities,

that process is currently described in section **366.06**, Florida Statutes -- Rates: Procedure for Fixing and Changing -- which states in relevant part.

> (1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any utility for its service. The commission shall investigate and determine the actual legitimate cost of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, ...

It is out of that 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 that ratemaking authority to a commission that review under the so-called "file and suspend" laws is born. A utility no longer has the prerogative of changing its rates solely at its discretion. It must submit them to review by the regulatory commission, but the regulators cannot arbitrarily or indefinitely withhold consent to their operation. That principle is embodied in section **366.06(4)**, Florida Statutes, which states:

> 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, ...

Clearly, the Florida file and suspend law represents a compromise between the utility's right to immediate rate relief and the duty of the Commission to protect the interests of the public by a review to establish that the rates are just and reasonable. In other terms, 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 (Fla. 1976).

A. PUBLIC COUNSEL'S INTERPRETATION OF THE FILE AND SUSPEND PROCEDURE AS IT APPLIES TO TECO'S TARIFF IS CONTRARY TO THE HOLDINGS OF THIS COURT AND WOULD RENDER THE OPERATION OF THE FILE AND SUSPEND LAW MEANINGLESS.

In his brief, Public Counsel concedes that due process does not require a hearing before implementation of interim rates under the file and suspend law, but argues that the same should not apply to the implementation of TECO's supplemental service rider, notwithstanding the Commission's consent to the operation of the tariff change. Presumably, this is the result of the enactment of the 1974 amendments to the APA (Chapter 74-310 Laws of Florida), specifically the operation of section 120.72(3), Florida Statutes. Yet, the considerations of due process under the file and suspend law and the procedural rights guaranteed by the pre-1975 APA are essentially the same as those contained in the current versions of these statutes. The Mayo case, supra, which

was the first case decided under the newly-enacted file and suspend law in 1974, illustrates this proposition. In that case, Public Counsel had argued that due process required the right to a full evidentiary hearing before implementation of an interim rate increase. This Court ultimately 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.

333 So.2d at 6.

The Court found no inconsistency between "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. That statute 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 were applicable to permanent rates under the file and suspend law. This is clearly stated among the conclusions reached by the court on the file and suspend law's operation. 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 the 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 30 days, the rates become effective without further action by the commission.
>
> . . .

Id. at 5. (Footnote omitted)

It was in contemplation of the rights of the utility vis-a-vis the power of the regulators to protect the public interest that the Court could conclude 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 31st day is emphasized in the opinion at footnote 10 which states that this alternative (of not holding a hearing) will

> generally 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 hearing, but the Court clearly concluded that that was an option under the file and suspend law. This Court has continued to recognize that option as a viable one in the Florida Interconnect case, supra, and in other cases decided since Mayo. For example, 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 Florida 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. Id. at 1014. In this context, the Court further expressly rejected Public Counsel's argument that

the utility had no constitutional right of due process flowing from the file and suspend statute. Id.

Finally, it must be noted that this Court's decisions on the file and suspend law are consistent with the current APA. In Florida Interconnect, this Court recognized that the file and suspend law survived the enactment of the 1975 APA, and that the APA itself contained an exception for file and suspend proceedings in section 120.72(3). The Commission's application of file and suspend procedures in this case comport with the plain meaning of that exemption.

Section 120.72(3) recognizes that, 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 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, or where the Commission approves the proposed tariff. Section 366.06(4) is a provision of law which otherwise creates an exception to the APA.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction to review the Commission's non-final order. If the Court entertains the appeal, it should find that the Commission has not violated Public Counsel's due process rights by scheduling a complaint hearing. Order No. 22093 should be affirmed, so that the Commission can complete the hearing Public Counsel has requested.

Respectfully submitted,

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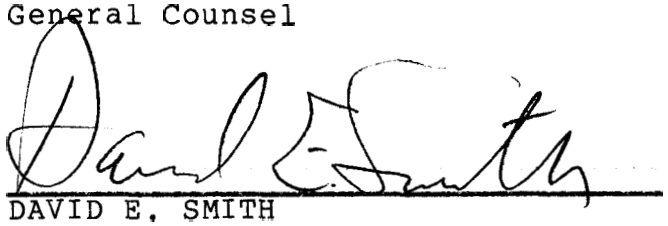

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Florida Public Service Commission and Appendix have been furnished by U.S. Mail to the following parties on this 26th day of February, 1990.

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