IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellants, V. MICHAEL MCK. WILSON, ETC., ET AL., Appellees.	)	CASE NO. 75,597

ON APPEAL OF ORDER NO. 22467
FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 891303-EI
PETITION OF TAMPA ELECTRIC COMPANY

REPLY BRIEF OF APPELLANTS, CITIZENS OF THE STATE OF FLORIDA

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I.

THE PSC OFFERED A USELESS HEARING IN ORDER NO. 22093, NO HEARING AT ALL IN ORDER NO. 22467, AND REFUSED TO CONSIDER THE MATTER IN THE FUEL COST RECOVERY DOCKET.

Public Counsel's protest and request for hearing on TECO's 1989 service rider tariff was effectively denied in Order No. 22093 which treated the protest as a complaint. The PSC offered a hearing in May 1990 to challenge the "future" applicability of a tariff that was only in effect during 1989:

> [W]e will treat Public Counsel's Protest and Request for Hearing as a complaint attacking the prospective application of the tariff and will afford a hearing on it. Order No. 22093, at 3. [Citizens, at A-51][1]

The PSC's statements that the hearing offered by Order No. 22093 would allow Public Counsel to challenge recovery of the fuel credits "from the date of the approval of the tariff" is clearly erroneous. [PSC, at 9-10] Moreover, this position is contrary to that taken in the appeal of the 1989 service rider where the PSC, in its answer brief, said:

> 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 [Telephone Co. v. Florida Public Service Commission, 342 So.2d 811 (Fla. 1976)] case illustrates. PSC Answer Brief in Case No. 75,074, at 14.

Order No. 22093 was issued on October 25, 1989. [Citizens, at A-49] TECO's petition for a one-year extension was not filed until

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[1]References to the answer briefs of Appellees, the Public Service Commission, Tampa Electric Company, and the Florida Industrial Power Users Group, will be made as [PSC, at __], [TECO, at __], and [FIPUG, at __]. The Citizens' initial brief will be referred to as [Citizens, at __].

November 16, 1989. [Citizens, at A-1] The PSC could not have contemplated that the "hearing" offered in Order No. 22093 would address both the 1989 and the 1990 service riders. Order No. 22467, which approved the 1990 service rider, does not offer a hearing or indicate that the hearing scheduled in Order No. 22093 would be an occasion to challenge the 1990 service rider. Appellees' contentions that Public Counsel was offered a hearing on the 1990 service rider outside the fuel cost recovery docket are incorrect. [PSC, at 8, 9, 14; TECO, at 7, 12] Moreover, they are inconsistent with the PSC's position that it need not offer a hearing because Section 120.72(3), Florida Statutes (1989), exempts permanent rate awards under the file-and-suspend provisions of Section 366.06(4), Florida Statutes (1989), from the APA. [PSC, at 15-16]

Even though TECO never sought approval in the fuel docket, Public Counsel thought the PSC might be willing to address the issue there because, as the PSC notes, the fuel adjustment docket is "an ongoing proceeding in which collection of the fuel charges from prior periods can be challenged." [PSC, at 9] The issue was purely legal in nature: Whether the PSC had ever authorized TECO by order, tariff or otherwise to reduce its reported fuel revenues. Public Counsel's position was that there had been no prior authorization, so TECO should be directed to refund amounts collected in past periods and ordered to cease the practice in the

future.[2]

Witnesses were not called because there was no factual issue to be resolved. The PSC should have conceded that it had never approved TECO's practice of reducing reported fuel revenues. After all, there were no orders or tariffs that authorized the actions TECO had been taking. Instead, the PSC refused to address the issue. The fuel docket panel decided that the appropriate forum was the "hearing" offered by the full Commission in Order No. 22093. [A-1-7] In other words, the PSC refused to consider whether it ever authorized the adjustment TECO had been making for more than a year. Appellees' statements that Public Counsel could have addressed the issue at either the May 1990 hearing offered pursuant to Order No. 22093 or the February 1990 fuel adjustment hearing are

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[2]The issue and Public Counsel's position were identified in the prehearing order of the fuel cost recovery docket as follows:

> "ISSUE [7i]: Has TECO been authorized to reduce its reported fuel cost recovery revenues to recognize credits given interruptible customers pursuant to its supplemental service rider tariff? (OPC [i.e., a position identified by the Office of Public Counsel])
>
> * * *
>
> OPC: TECO has been reducing its reported fuel revenues by credits given interruptibles pursuant to the service [rider tariff]. The tariff was approved by Staff and does not contain any provisions allowing for recovery of the credits from all customers through the fuel cost recovery docket. There are no orders in the fuel docket or elsewhere that permit such treatment. TECO should be ordered to refund credits claimed thus far as reductions to fuel revenues for past periods and ordered to cease the practice for future periods." Order No. 22581 at 27-28. [PSC, at A-6-7; FIPUG, at A-10-11].

completely inaccurate. [PSC, at 9; TECO, at 6-7; FIPUG, at 13][3]

While Appellees argue that Public Counsel did not avail himself of hearing opportunities, they do not identify any proceeding in which TECO, as the party seeking affirmative relief, proved its case. TECO has been imposing increased fuel charges since January 1989, yet it never asked for authority to do so at the fuel docket hearings in August 1988, February 1989, August 1989, or February 1990. Order No. 20581 did not authorize such action. [Citizens, at A-34] Neither did Order No. 22093 or Order No. 22467. The tariff "administratively approved" by the PSC staff and the tariff now in effect don't mention how the credits will be recovered from the general body of ratepayers. [Citizens, at A-32, A-6] What does the PSC see as authority for TECO's increased rates?

II.

TECO'S 1990 SERVICE RIDER DID NOT GO INTO EFFECT UPON THE PSC'S FAILURE TO SUSPEND IT. EVEN IF IT HAD, THE PSC HAD TO OFFER A HEARING OPPORTUNITY ON PERMANENT RATE CHANGES.

The PSC argues that this Court has recognized that tariff filings which are not suspended go into effect on a permanent basis by operation of the file-and-suspend law. [PSC, at 15, 20] In the first place, TECO did not implement any rates upon the PSC's

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[3]FIPUG's characterization of the action taken at the February 1990 fuel cost recovery hearing is incorrect. In spite of the fact that the PSC declined to address whether TECO had been authorized to adjust its reported fuel revenues in the fuel docket, FIPUG, at page 13 of its answer brief, says: "The Commission clearly and specifically rejected OPC's position and voted from the bench on February 22, 1990 that TECO was authorized to reduce its reported fuel revenues to recognize the supplemental service rider credits."

failure to suspend. The 1989 service rider was approved by the PSC staff. The 1990 service rider was approved by the full Commission at the January 2, 1990, agenda conference. Secondly, there are no cases in which the Court has upheld the PSC's failure to conduct hearings before rates go into effect on a permanent basis, whether upon a failure to suspend or from taking final agency action at an agenda conference without first conducting a hearing.

In Citizens v. Mayo, 333 So.2d 1 (Fla. 1976), [PSC, at 10] the PSC suspended the initial rates and conducted a full hearing on permanent rates. The case was remanded to the PSC for its failure to conduct appropriate proceedings before awarding interim rates. In Maule Industries, Inc. v. Mayo, 342 So.2d 63 (Fla. 1976), [PSC, at 12] the PSC suspended the filed rates and conducted a full hearing for both interim and permanent rate requests. The PSC was directed to order refunds of that part of the interim award that was not supported by evidence considered in the full proceeding. In Florida Interconnect, supra, 342 So.2d 811, [PSC, at 11] the Court held that the order approving the tariff was not final because hearings had already been scheduled to resolve whether the rate change should remain in effect on a permanent basis.[4] There

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[4]The PSC quotes selectively from Florida Interconnect, supra, 342 So.2d at 813, at page 11 of its answer brief. The passage was followed in the case by a quotation of the telephone file-and-suspend law. The Court then indicated the interim nature of a failure to suspend: "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 schedule's having gone into effect on at least an interim basis." 342 So.2d at 814. The Court noted that the PSC's agenda conference could not be the occasion for final agency action under (continued...)

simply are no opinions out of this or any other court holding that the Florida PSC need not conduct hearings before utility rates go into effect on a permanent basis.

The PSC has not "interpreted section 366.06(4) consistently since its inception to allow the type of tariff approval granted TECO's SSI tariff." [PSC, at 20]. In the past, TECO's petitions for rate changes, whether accompanied by a tariff or not, were decided only after a hearing was either held or offered. See, e.g., In re: Petition of Tampa Electric Company for Modification of GSDT On-Peak Demand Charges, 84 F.P.S.C. 2:100 (1984); In re: Petition of Tampa Electric Company for Approval of GSD and GSDT Tariffs, 84 F.P.S.C. 4:129 (1984). See also In re: Petition of Florida Power & Light Company for Approval of a Permanent Commercial/Industrial Load Control Program Eligible for Energy Conservation Cost Recovery, 90 F.P.S.C. 3:405 (1990) (notice of proposed agency action order with tariffs appended to order.)

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[4](...continued)
the APA because it was not properly noticed as a hearing under Section 120.57. Adequacy of notice was not a factor in the Court's opinion because the "intermediate" consideration of the new rates would have occurred anyway. 342 So.2d at 814. It was not because a hearing was not required on the permanent rates. [PSC, at 17]. Dicta in Florida Interconnect would indicate that the PSC's final action on TECO's 1990 service rider at the January 2, 1990, agenda conference was invalid.

III.

THE STATUTORY SCHEME IN FLORIDA WILL NOT SUPPORT THE CHANGES IN ELECTRIC UTILITY REGULATION THE PSC IS TRYING TO IMPLEMENT.

A. FLORIDA'S ELECTRIC UTILITY STATUTES AND ITS ADMINISTRATIVE PROCEDURE ACT DIFFER FROM THOSE IN JURISDICTIONS IN WHICH UTILITIES CAN INITIATE RATES ON A PERMANENT BASIS IF THE AGENCY FAILS TO SUSPEND.

Apparently, the PSC would like to regulate electric utilities in Florida in the manner employed by certain federal agencies and other states, but without considering significant differences in relevant statutes. [PSC, at 18] Most other state utility regulatory statutes are patterned after the Federal Power Act. 16 U.S.C.S. §§ 791a et seq. (1978). Utilities are authorized to initiate their own rate changes. It is discretionary with the agency whether to hold a hearing.[5] File-and-suspend provisions allow the agency to suspend rates -- if the agency chooses to hold a hearing. Without file-and-suspend provisions, the agency would be powerless to prevent rates from taking effect. The

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[5]The discretion granted to other agencies to decide whether to conduct hearings is evident in the cases cited in the PSC's answer brief at 19-20. In United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153 (1958), the Court quoted from Section 4(e) of the Natural Gas Act which provided that the Federal Power Commission "shall have the authority . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service . . .." 358 U.S. at 106 n.3, 79 S.Ct. at 196 n.3, 3 L.Ed.2d at 157 n.3. Virtually identical language is found in Georgia Code Annotated § 93-07.1(b), which is quoted in Georgia Power Project v. Georgia Power Co., 409 F.Supp. 332, 335 n.2 (N.D.Ga. 1975). Mississippi Code Annotated § 77-3-39, quoted in Mississippi Power Co. v. Goudy, 459 So.2d 257, 260 (Miss. 1984), states that the Mississippi PSC "may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates."

Administrative Procedure Acts in such jurisdictions only specify the manner in which a hearing must be conducted if the agency elects to have one, without specifying when a hearing must be held.

Florida's statutes are different. Florida is one of only a few states whose statutes are not based on the Federal Power Act. Florida's electric utilities have never been authorized to initiate rate changes without explicit PSC approval since jurisdiction was established in the PSC in 1951.[6]

Before the file-and-suspend law was enacted by Chapter 74-195, Section 4, Laws of Florida, electric utilities could not implement any rate changes without explicit PSC approval. Section 366.06(2), Florida Statutes (1973) [now Section 366.06(1), Florida Statutes (1989)], provided that "no change shall be made in any [electric utility] schedule." Applications for rate changes had to be made to the PSC in writing. The PSC, not the utility, had "the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged or collected by any public utility for its service." Section 366.06(3), Florida Statutes

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[6]See 1974 Op. Att'y Gen. Fla. 074-309 (Oct. 9, 1974). After surveying other state statutes, Florida was found to be one of only four states in which a hearing was required by law. 1974 Fla. Att'y Gen. Ann. Rep. at 501. The Attorney General's conclusion that rate changes could not be implemented by tariff filings led the PSC to adopt a hearing procedure for changes in fuel adjustment charges. Under the PSC's interpretation of its authority to this Court, however, the PSC could again allow electric utilities to change fuel charges by tariff filings and offer no hearings at all. See Louisville & Nashville R. Co. v. Speed-Parker, Inc., 103 Fla. 439, 137 So. 724, 730 (Fla. 1931), for a discussion of how Florida statutes differed from those administered by the Interstate Commerce Commission and resulted in "Commission" rates as opposed to "railroad" rates.

(1973) [now Section 366.06(2), Florida Statutes (1989)], required that a hearing be held whenever the PSC found that rates should be changed:

> [T]he commission shall order and hold a public hearing, giving notice to the public and to the utility company, and shall thereafter determine just and reasonable rates to be thereafter charged . . ..

The enactment of file-and-suspend procedures in Section 366.06(4), Florida Statutes (Supp. 1974), did not limit a utility's rights as it did in other jurisdictions. To the contrary, it granted a new right to institute rates, if the PSC failed to suspend, pending the outcome of the full rate case. This right was not created directly, but by implication from the fact that the PSC could withhold consent to the new rates by acting within the suspension period. Presumably, if the PSC failed to act, a utility could collect the new rates until statutory due process was satisfied. This was recognized in Citizens v. Mayo, supra, 333 So.2d at 4, where the court observed that rates not suspended could go into effect as "interim charges" pending the "full rate proceeding."[7]

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[7]This is consistent with State ex rel. Utilities Commission v. Edmisten, 230 S.E.2d 651, 665 (N.C. 1976), which the PSC mischaracterizes in its answer brief at 19-20. The three ways in which rates might go into effect in that case under file-and-suspend referred only to interim rates pending full hearings on the permanent award: "General Statutes 62-134 and 62-135 clearly authorize the Commission to permit rate schedule changes applied for by a utility to be placed into effect on an interim basis before hearing and final determination. There are three ways by which this may occur."

The same year file-and-suspend was enacted, the Legislature rewrote the APA. Ch. 74-310, Laws of Fla.; Ch. 120, Fla. Stat. (1974). Unlike the APA's in other jurisdictions, the Florida APA specifies when a hearing must be held as well as the manner in which it must be conducted.[8] Accordingly, electric utilities in Florida can only implement rates on their own initiative on an interim basis pending the outcome of hearings required by Section 366.06(2) and Section 120.57, Florida Statutes (1989).

The complaint process the PSC portrays as an alternative procedure under the APA is completely inadequate. [PSC, at 12-15] PSC rules only recognize a complaint as a vehicle to attack a utility's violation of a rule, order or statute. Rule 25-22.036(5), Florida Administrative Code. [Citizens, at A-84]. Approval of TECO's 1990 service rider remains invalid and ineffective until the PSC issues an order pursuant to Section 120.59 after proceedings conducted pursuant to Section 120.57. Capeletti Brothers, Inc. v. Department of Transportation, 362 So.2d 346, 348 (Fla. 1st DCA 1978), cert den., 368 So.2d 1374 (Fla. 1979). The PSC cannot use proceedings subsequent to the January 2, 1990, agenda conference to review the efficacy of allowing TECO to collect charges pursuant to the service rider. The purpose of Section 120.57 proceedings is to formulate agency action, not to review an earlier, tentative decision. McDonald v. Department of

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[8]Contrast, for example, the Federal APA. 5 U.S.C.S. §§ 550 et seq. (1989). See K. Davis, Administrative Law Treatise, § 12:10, 447 (2ed. 1978) ("The [Federal] Administrative Procedure Act never requires a trial-type hearing." [Emphasis in original.]

Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977).

B. THE INTERPLAY OF FLORIDA'S ELECTRIC UTILITY STATUTES, THE ADMINISTRATIVE PROCEDURE ACT, AND THE OFFICE OF PUBLIC COUNSEL PREVENTS THE PSC FROM ALLOWING RATES TO TAKE EFFECT ON A PERMANENT BASIS WITHOUT PROVIDING A CLEAR POINT OF ENTRY.

In 1974, the Florida Legislature, "in an attempt to control what it termed the 'shadow government,' drafted and passed into law a major revision of the Administrative Procedure Act." Roberson v. Florida Parole and Probation Commission, 444 So.2d 917, 919 (Fla. 1983). Justice Ehrlich, speaking for a majority of the court, stated:

> Among other things, this legislation was designed to cure the alleged ills of this 'shadow government' by making the rulemaking and adjudicative procedures uniform from agency to agency, by bringing the process out into the open so that citizens would be aware of how rules were made, and by allowing citizen participation in the promulgation thereof. The APA was intended to apply to all agencies unless specifically exempted under the Act. Graham Contracting Inc. v. Department of General Services, 363 So.2d 810 (Fla. 1st DCA 1978), cert. denied, 373 So.2d 457 (Fla. 1979). Additionally, it presented a more streamlined means whereby individuals who felt that their substantial interests were being affected by agency action could challenge the agency action in administrative proceedings. This encouraged consistency and fairness in agency action, insured by a clarified and comprehensive scheme for judicial review. Thus the light was beginning to shine on the "shadow government."

In addition to these major revisions to the APA, the Legislature in 1974 also enacted two significant changes to the statutory scheme by which utilities are regulated. Chapter 74-195, Sections 1 and 4, Laws of Florida, created the Public Counsel, Sections 350.061-.0614, Florida Statutes (1989), and established file-and-suspend procedures which, for electric utilities, appear

in Section 366.06(4), Florida Statutes (1989). Citizens v. Mayo, supra, 333 So.2d at 3 n.4. Creation of a consumer advocate authorized to "appear, in the name of the state or its citizens, in any proceeding or action before the commission" assured that proceedings before the PSC would be more frequent and more involved. In an apparent trade-off, file-and-suspend procedures were enacted to enable utilities to obtain expedited rate relief to reduce "regulatory lag" during the pendency of these proceedings when necessary to preserve financial integrity. Id. at 4. The Legislature balanced the utility's need for prompt action with the overriding imperative of meaningful public access to administrative proceedings. Contrary to the PSC's contentions, file-and-suspend procedures were enacted in Florida, not to obviate the need for hearings, but because more hearings would have to be held.

In 1976, the Legislature took another significant step to alter utility regulation in Florida. Section 350.12(2)(m), Florida Statutes (1975), granted the PSC a statutory presumption of correctness in all its actions.[9] State courts had to presume

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[9]Section 350.12(2)(m), Florida Statutes (1975), provided, in pertinent part: "All rules and regulations made and prescribed by the commissioners shall be made prima facie evidence. . .. Every rule regulation, schedule or order heretofore or hereafter made by the commissioners shall be deemed and held to be within their jurisdiction and their powers, and to be reasonable and just and such as ought to have been made in the premises and to have been properly made and arrived at in due form of procedure and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. All presumptions shall be in favor of every action of the commissioners and all doubts as to their jurisdiction and powers shall be resolved in their favor . . ..

the validity of Commission actions, and the PSC came to rely upon this deference in making its decisions. [PSC, at 20 (citing Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983)); FIPUG, at 15 (citing Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982))]. Chapter 76-168, Section 3(2)(j), Laws of Florida, the Regulatory Reform Act of 1976, as amended by Chapter 77-457, Section 1, Laws of Florida, identified Section 350.12 as one of the regulatory statutes to be repealed on July 1, 1980, pursuant to "sunset" review, unless it was subsequently re-enacted. It was, instead, repealed by Chapter 81-170, Section 6, Laws of Florida.

The repeal of Section 350.12(2)(m) removed a "shadow" unique to the PSC and applied the "clarified and comprehensive scheme for judicial review" noted in Roberson. Judicial statements of deference since 1980 relied on earlier cases without considering: (1) the repeal of Section 350.12(2)(m); (2) standards of judicial review enunciated in Section 120.68 of the APA; or (3) the fact that, since 1980, the Court reviews PSC orders pursuant to its mandatory appellate jurisdiction pursuant to Article V, Section 3(b)(2), of the Florida Constitution, instead of by petition for writ of certiorari.[10]

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[10]For example, Pan American World Airways, supra, 427 So.2d at 717-718, cites Surf Coast Tours, Inc. v. Florida Public Service Commission, 385 So.2d 1353, 1354 (Fla. 1980), to support a presumption of correctness. Surf Coast Tours cites Florida East Coast Ry. v. King, 158 So.2d 523, 525 (Fla. 1963), which in turn cites Florida Rate Conference v. Florida Railroad and Public Utilities Commission, 108 So.2d 601, 605 (Fla. 1959), which traces the presumption of correctness directly to Section 350.12(2)(m).

The Legislature clearly intended to make administrative agencies responsive to the citizens of this state, and to afford them reasonable notice and a meaningful opportunity to be heard before taking final action which adversely affects their interests. By repealing the statutory presumption of correctness, the Legislature recognized that PSC Commissioners might also have their decisions tested in an open forum and be faced with "the sobering realization their policies lack convincing wisdom." McDonald, supra, 346 So.2d at 583. Public Counsel independently serves the public interest by providing an advocate "to expose, inform and challenge agency policy and discretion." Id. (citing State ex rel. Department of General Services v. Willis, 344 So.2d 580, 591 (Fla. 1st DCA 1977)). The PSC is now probably entitled to even less judicial deference than other agencies because it must consider the argument of an advocate authorized "to urge . . . any position which he deems to be in the public interest, whether consistent or inconsistent with positions previously adopted by the commission." § 350.0611(1), Fla. Stat. (1989).

If the Court were to accept the PSC's interpretation of statutes enacted in 1974, it would thwart the clear intention of the Legislature. The PSC's interpretation of the file-and-suspend statute returns PSC procedures to the shadows. Customers, finding higher utility bills in their mailboxes, could only respond with complaints. This after-the-fact opportunity is not only too little, too late, but it also presents the virtually insurmountable

burden of proving that Commission "approved" rates are unjust and unreasonable.

On the other hand, if the Court rejects the PSC's arguments, disharmony between the file-and-suspend statute, the APA, and the role of the public advocate disappears. Granting a right to be heard before the PSC takes final action on utility rates affirms the Legislature's policy of open access to agency proceedings. Permitting electric utilities to implement rates only on an interim basis, pending the outcome of proceedings that must conform to the APA, assures the utilities' financial integrity and balances competing private and public interests.

Respectfully submitted,

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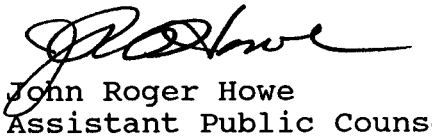

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CERTIFICATE OF SERVICE

CASE NO. 75,597

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