IN THE SUPREME COURT OF FLORIDA

COMMERCIAL VENTURES, INC., Appellant,	)	
v.	)	CASE NO. 77,665
FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, is referred to in this brief as the "Commission".

Appellant, Commercial Ventures, Inc., is referred to as "Commercial".

Citations to the record on appeal are designated R. _____.

Citations to the transcript of the hearing are designated Tr. _____.

STATEMENT OF THE CASE AND FACTS

Appellee, Florida Public Service Commission (Commission) supplies its own statement of the Case and Facts due to the inclusion of assertions in Appellant's Statement of the Facts which are irrelevant or inaccurate and the omission of material, relevant facts therein.

From December, 1986 until a date subsequent to July, 1988, Commercial Ventures, Inc. (Commercial) owned seven pay telephones located at The Everglades Hotel, 244 Biscayne Boulevard, Miami, Florida. (Tr. 186; 67). Commercial provided pay telephone services as holder of Certificate of Public Convenience and Necessity No. 1006, pursuant to Rule 25-24.510, F.A.C. (R. 261).

As a result of a complaint received from the hotel about poor pay phone service, Commission staff evaluated the seven pay phones on August 24, 1987, and found them to be in violation of Commission rules.[1] (Tr. 14). Staff notified Commercial of the complaints and requested that corrective action be taken to bring the phones into compliance with those rules. Howard A. Rose, owner and operator of Commercial, responded that all deficiencies had been corrected. (Tr. 143).

In a follow-up evaluation on October 9, 1987, staff found that the pay phones still did not comply with Commission rules and so

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[1] Provisions of Commission Rule 25-24.515, F.A.C., as more particularly set out, infra., p. 9, 13.

notified Commercial. Mr. Rose, on behalf of Commercial, responded by letter dated October 29, 1987, that all deficiencies had been corrected. (Tr. 65).

Relying thereon, staff closed the hotel's complaint but reopened it because the Communications Manager of the hotel advised staff that the problems had not been corrected. (R. 263-4).[2] Because the phones were still not in compliance with Commission rules in the follow-up evaluation by staff on February 18, 1988 (Tr. 65-66), the Commission issued its Order Initiating Show Cause Proceedings, dated April 4, 1988, requiring Commercial to:

> 1) Show cause why it should not be fined $7,000 for failure to correct the legitimate complaints of the hotel as to the pay phones; and
>
> 2) Bring the pay telephones at the hotel into compliance with Commission rules within thirty (30) days.

Commercial was informed as to the deficiencies found in the February 18, 1988 evaluation and responded by letter dated March 14, 1988, that all violations had been corrected. (Tr. 66).

In a subsequent evaluation on May 18, 1988, staff found that

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[2] Appellant misrepresents Ex. 31-J as establishing that "Commercial Ventures resolved the initial purported violations to the satisfaction of the PSC". (Initial Brief at 2). Since there were no Staff evaluations of the payphones between October 9, 1987 and February 18, 1988, (Tr. 65), Ex. 31-J only establishes that, as of November 9, 1987, Staff believed and relied on Commercial's October 29, 1987 representation that all deficiencies had been corrected until informed by the hotel that the deficiencies persisted. (R. 3).

compliance with Commission rules had improved, but that there were still violations. (Tr. 66).

On March 5, 1991, the Commission issued Order No. 24197, Order Imposing Fine. In it are set out the circumstances surrounding Commercial's "numerous and prolonged violations of this Commission's rules". (R. 263). Besides imposing a fine of $7,000 on Commercial for having refused to comply with and willfully violated the Commission's rules (R. 272), the Order determined that violations were not cured within 30 days of the Order Initiating Show Cause Proceedings. (R. 269).

Order No. 24197 is the subject of this appeal.[3]

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[3] Appellant's Initial Brief and appendix were filed with material not included in the record. The Court denied appellant's Motion to Add Documents To The Record on July 15, 1991. Though appellee's Motion to Strike that non-record material is still pending, appellee relies on the Court's July 15, 1991 Order and accordingly will address only citations properly of record.

SUMMARY OF THE ARGUMENT

The Commission had regulatory jurisdiction over Commercial's pay telephone services at the Everglades Hotel pursuant to § 364.01; 364.02(4). § 364.285, F.S., provided for penalties not exceeding $5,000 per day against regulated entities, such as Commercial, which violated Commission's rules.

There is no authority for appellant's claim that the failure to recite the phrase "refused to comply or willfully violated" nullified the Commission's penalty process. Reading § 364.285, F.S., as a whole, rather than in fragmentary phrases, the Commission's Order Initiating Show Cause Proceedings clearly referred to conduct within the meaning of the statute:

> Commercial Ventures ... repeatedly failed to comply with the above-identified rules. [Emphasis supplied].

The testimony of Commission service standard evaluators provided competent and substantial evidence of Commercial's repeated and protracted violations of Commission rules. The request by Commercial that this Court reweigh the evidence on appeal is improper. The further claim that the responsibility to adhere to Commission rules is inapplicable to Commercial as a self-described "passive investor", is unsupported and contrary to § 364.285. That statute specifically refers to "entities subject to the jurisdiction of this Commission", like Commercial.

§ 364.185, F.S., requires that notice of inspection be

provided to "enter upon premises occupied by any telephone company". Commercial ignored this statutory language which, by its terms, did not apply to public pay phones placed on a premises occupied by a hotel.

Commercial's misreading of § 364.185 would render unannounced pay phone evaluations useless since, with notice, the phones could be reprogrammed to comply with Commission rules and then deprogrammed after the test.

Commercial's invitation to the Court to reweigh the evidence is improper. There was ample competent and substantial evidence of record as to Commercial's repeated non-compliance with Commission service standards rules for pay phones. Unlike others Commercial would blame for its non-compliance, Commercial, as the holder of a certificate of convenience and necessity to provide the pay phone services at issue, was subject to Commission jurisdiction and, therefore, the penalty provisions of § 364.285 for non-compliance with Commission rules.

Though Commercial claims the Commission impaired Commercial's rights by denying many of its motions below, Commercial does not identify a single instance of legal insufficiency or error in the Commission's Orders disposing of those motions. Commercial even admits that, individually, the Commission's acts did not deprive Commercial of due process or fail to comply with the essential requirements of law.

Given the burden on appellant to clearly identify error, the

mere recital of its denied motions and objections (denied and granted) is insufficient.

The substitution of a Commissioner for another Commissioner on the panel who became unavailable cannot be error where appellant concurs that § 350.01(5) governs and the Commission followed the statute.

ARGUMENT

I. THE COMMISSION CORRECTLY APPLIED § 364.285, F.S., TO THE FACTS OF THIS CASE.

§ 364.285, F.S., (1989) stated, in pertinent part, that

> The Commission shall have the power to impose on any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission or any provision of this chapter a penalty for each offense of not more than $5,000, which penalty shall be fixed, imposed, and collected by the Commission. ... Each day that such refusal continues constitutes a separate offense.

Appellant first argues that the Commission omitted the "jurisdictional requirement" that Commercial's violations were willful because the statutory words "refused to comply with or willfully violated" are not present in the Order Initiating Show Cause Proceedings (R. 1) or Issues 1-6 of the Prehearing Order (R. 38).

Appellant cites no authority for its assertion that an incantation of specific parts of a statute creates jurisdiction while citation of the statute together with facts comprehended by the meaning of the statutory language as a whole is insufficient.

As stated in Weitzel v. State, 306 So.2d 188, 192 (Fla. App. 1974),

> It is fundamental that words, phrases, clauses, sentences and paragraphs of a statute may not be

> construed in isolation, but that on the contrary a statute must be construed in its entirety.

Thus, the Order Initiating Show Cause Proceedings referred to Commercial's "repeated violations of Rule 25-24.515(4), (5), (6), (7) and (10)". Whether such reported non-compliance is described as a "refusal to comply" with those rules, a "willful violation" of those rules or a "cavalier disregard" of those rules, penalties for that conduct are provided by § 364.285, F.S.

Moreover, Appellant confuses statutory construction with jurisdiction. This Commission's jurisdiction over Commercial is based on § 364.01 and § 364.02, F.S., as well as specific statutory authority to grant certificates in the public interest to telephone companies offering pay telephone service. § 364.335(4), F.S. Appellant has cited no authority for its argument that the form of the Order Initiating Show Cause Proceedings (Order No. 19085) or Prehearing Order (Order No. 19885) acted to divest the Commission of its jurisdiction over Commercial's rule violations or the assessment of penalties for those violations. For § 364.285, F.S. purposes, the issue could not have been stated more clearly than in the Order Initiating Show Cause Proceedings:

> Commercial Ventures, Inc. a certificated PATS (telephone company providing pay telephone services) subject to the jurisdiction of this Commission, repeatedly failed to comply with the above-identified rules. [Rule 25-24.515(4)(5)(7)(10), F.A.C.].

(R. 2).

Appellant next offers evidence referencing documents designed to demonstrate that Commercial did not refuse to comply with or willfully violate the aforementioned subsections of Rule 25-24.515, F.S. Given the abundant evidence of record in the form of testimony by Commission service evaluators and evidence supported thereby, Tr. 63-69; 133-4, 139-143, this is a thinly veiled invitation to the Court to reweigh this evidence contrary to case authority and statute:

> It is not this Court's function on review of a decision of the Public Service Commission to re-evaluate the evidence or substitute our judgement on questions of fact.

City Gas Company of Florida v. Public Service Commission, 501 So.2d 580, 583 (Fla. 1985).

> If the agency's action depends on any fact found by the agency in a proceeding meeting the requirement of § 120.57, the Court shall not substitute its judgement for that of the agency as to the weight of the evidence on any disputed finding of fact.

§ 120.68(10), F.S.

Appellant claims, however, that all of the evidence that the violations were substantial and protracted despite repeated communications from Commission staff to Commercial amounted to no evidence at all if unattended by the statutory phrase "refusal to comply or willfully violated".

Again, however, Appellant errs against the authority of

Weitzel v. State supra. The job of the service evaluators was not to determine whether, as a matter of law, Commercial's violations were willful, but to determine whether, as a matter of fact, Commission service standard rules were violated and, if so, the factual circumstances surrounding those violations. Thus, once staff determined the severity and duration of those violations as a matter of fact, that formed the competent and substantial evidence that Commercial had refused to comply with and willfully violated Commission rules as a matter of law, so as to subject itself to the penalty provided by § 364.285. In this connection and, again, reading the statutory provision as a whole, Weitzel, supra, the type of evidence relied on by the Commission is consistent with the further provision of § 364.285 that

> Each day that such refusal or violation continues constitutes a separate offense.

See DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957).

While Commercial reoffers evidence that it was a "passive investor", that it contracted with various companies to service the pay phones, that if the phones didn't work or were mislabeled others were at fault rather than Commercial, this misses the legal and regulatory point of the Commission's enforcement activities on behalf of the public.

Commercial operated these phones under a Certificate of Public Convenience and Necessity. To evaluate whether public convenience and necessity were served thereby, the service evaluators

> Try to act like customers in our tests and try to experience the same problems [the public] would have (Tr. 96).

Commercial differed from repair companies, hotel customers allegedly tampering with or damaging pay phones and mere "passive" investors in that Commercial owned and operated these seven pay phones as "a certificated PATS subject to the jurisdiction of this Commission (R. 2)". Therefore, Commercial was responsible for knowledge of and compliance with the relevant provisions of Rule 25-24.515 and subject to penalties for failure to comply. § 364. 285.

In so arguing, the Commission makes no judgment as to the merits of complaints Commercial may have against the array of actors cited as exculpatory participants in Commercial's pay phone activities. However, Commercial's legal responsibility under Commission jurisdiction is not lessened thereby:

> While there is uncertainty as to Commercial Ventures contractual agreements with maintenance companies, this does not negate Commercial Ventures' responsibility, as the Certified PATS subscriber of record, to comply with Commission Rules. Order Imposing Fine (R. 269).

As a matter of public policy, all of the Commission's regulations relevant to this case are aimed at a clear goal: that members of the public using a pay phone get their coins returned when appropriate, can report repairs when needed [Rule 25-

24.515(4)], have legible, accurate information about the pay phone provider [Rule 25-24.515(5)], can receive incoming calls [Rule 25-24.515(7)], can reach any desired interexchange company [Rule 25-24.515(6)] and can use a working pay phone [Rule 25-24.515(10)(a)].

This Court should reject as a matter of public policy Commercial's arguments that evidence of contractual relations with repair companies, letters stating complete compliance and references to business conflicts are the equivalent of actually demonstrating compliance by having pay phones that work correctly when evaluated.

II. § 364.185, F.S., DID NOT REQUIRE THAT THE COMMISSION PROVIDE NOTICE TO COMMERCIAL OF TESTS OF COMMERCIAL'S COIN TELEPHONES.

The statute, by its terms, did not apply to Commercial's or other public pay phones, and has never been applied to such phones. The text of § 364.185 (1989) itself specified its applicability:

> The Commission or its duly authorized representatives may during all reasonable hours enter upon the premises occupied by any telephone company. ... for the purpose of making investigations, examinations, and tests ... the telephone company shall have the right to be notified of and be present at the making of such investigations, inspections, examinations and tests. [Emphasis supplied].

In the case of public pay telephones, such as those in this case, testing of the pay phones did not require entry upon the premises occupied by a telephone company, i.e., Commercial, it required entry on the premises occupied by the Everglades Hotel. Commercial's pay phones did not occupy the premises, they were merely allowed to be placed there. The Everglades Hotel is not a "premises occupied by [a] telephone company".

Appellant has once again read parts of the statute in isolation with no authority for doing so. As stated in Terroni v. Westwood Ho!, 418 So.2d 1143,

> Statutory language is not to be assumed superfluous; a statute must be construed so as to give meaning to all words and phrases contained within that statute.

There was ample competent, substantial evidence to support the reasonableness of the Commission's interpretation of this statute. (Tr. 167-9). (See, also Tr. 105-7, Ex. 30-0).

> Mr. Harrold: Mr. Williamson, you testified that these inspections of these pay phones are not noticed to the owner or whoever. Is there a practical reason for that?
>
> Mr. Williamson: We've always inspected them from the standpoint that the public never ...when they go to use it, there's no notice given ...
>
> Mr. Harrold: Is there an easy way to change how a pay phone operates on short notice?
>
> Mr. Williamson: You can dial and use a proper coding at that number and you can change the function of the phone without even going on site.
>
> Mr. Harrold: And what changes could you make to the phones operation...
>
> Mr. Williamson: You could restrict certain types of calls, you could restrict refunds of certain coins.

As this Court stated in P.W. Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988),

> At the outset, we note the well-established principle that the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight.... The courts will not depart from such a construction unless it is clearly unauthorized or erroneous.

Appellant has cited no authority or reason to depart from that principle here. The Commission's Standard Operating Procedures

(SOP's) (Tr. 105-7; Ex. 30-0), and the above-cited testimony of staff are consistent with the Commission's interpretation of § 364. 185 as stated in the Order Imposing Fine:

> The statute applies to Commission entry upon any premises occupied by any telephone company. Pay telephones are, by their nature, available to the general public. For this Commission, which is charged with regulating pay telephone service, to be afforded less access to such telephones than the public at large would be ludicrous. Section 364.185 applies to circumstances where the Commission needs access to telephone facilities which are not open and available to the general public, and where due process might prohibit an unmitigated right to entry. (R. 271).

The Commission's interpretation is entitled to great weight. P. W. Ventures, supra.

III. THE COMMISSION'S FINDINGS THAT COMMERCIAL'S PAY PHONES VIOLATED COMMISSION RULES ARE SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE OF RECORD.

Section III of Appellant's Initial Brief again invites this Court to reweigh the evidence contrary to case authority and statute. City Gas Company of Florida, supra; § 120.68(10), F.S.

Beyond being improper argument on appeal for that reason, the arguments, if heeded, would be contrary to the policy of regulation in the public interest. There is no authority, for example, that a phone capable by design of operating correctly complies with Commission rules even if non-operational. Under the appellant's suggested reading of the rules, these seven pay phones would have been in compliance even if they were always non-operational. This argument is itself facially at odds with Rule 25-24.515(10)(a), and with the apparent purpose of these rules to provide for the public's convenience and necessity. Those rules govern the conduct of holders of Certificates of Public Convenience and Necessity, like Commercial.

Appellant's further argument in this section reiterates and restates at length Commercial's attempts to identify others as exculpatory of Commercial's violations. Thus, Commercial suggests, certain patrons may have jammed the phones with foreign coins (Initial Brief, 18) the hotel may have had litigation-related conflicts with Commercial and disrupted phone operations (Initial Brief, 18-19) and Commercial's repair contractors may have

mislabeled the phones, (Initial Brief, 20-21).

None of this is relevant because none of the entities, groups or individuals were certificated PATS providers subject to Commission jurisdiction. Commercial alone was, and as such, responsible for compliance with Commission rules as a matter of law, § 364.285, without prejudice, of course, to Commercial's rights as against those whom Commercial would blame for its non-compliance.

The remainder of Section III restates arguments already addressed. Commercial met the statutory definition of a telephone service provider regardless of its self-characterization as a "passive investor in a new business opportunity which reflected a nice return". (Tr. 251); § 364.01; 364.02(4) F.S. Commercial was in the business of "affording telephone communications service for hire within the state". § 364.02(4), F.S.

Commercial concludes this section of argument with the assertion that:

> Commercial Ventures, more than the PSC, had the most interest in insuring that all repairs were done promptly. [Emphasis supplied]. Initial Brief 2, 3.

However, Commercial's assertion is unsupported as a matter of law and fact. As long as the legislature required the Commission to regulate pay phones, Chapter 364, F.S., the Commission did not have the option of waiting until market forces affected repairs by Commercial, as a matter of law. Therefore, Commercial would more

properly present that argument to the legislature in support of deregulation, if it so chooses. Further, as a matter of fact, Mr. Rose, Commercial's owner and operator, testified that,

> Commercial Ventures advised in writing the attorney for the Everglades Hotel that three of [Commercial's] telephones were going to be put on temporary suspension because of competition...[The] phones were ordered back up ... because of the insistence of Mr. Taylor with the Public Service Commission. [Emphasis supplied]. (Tr. 195-7).

IV. THE CONDUCT OF THE COMMISSION IN THIS MATTER COMPORTED WITH THE ESSENTIAL REQUIREMENTS OF LAW, AFFORDED PROCEDURAL DUE PROCESS AND WERE WITHIN THE COMMISSION'S STATUTORY AUTHORITY.

Appellant prefaces its lengthy list of complaints concerning the Commission's conduct of proceedings below (listed as letters A through Z) in Section IV of the Initial Brief with a telling admission:

> Taken individually, the procedures and omissions of the PSC may not constitute a deprivation of due process or a failure to comply with the essential requirements of law;

Appellee would state that, taken as a whole, the record demonstrates that the Commission proceedings at issue afforded appellant due process, complied with the essential requirements of law and were within the Commission's statutory authority.

In demonstration thereof, the Commission would answer letters A through Z of Section IV of the Initial Brief as follows:

A. This issue is addressed in Section I of the Answer Brief, supra.

B. This issue is addressed in Section II of the Answer Brief, supra.

C. This issue is addressed in Section III of the Answer Brief, supra.

D. The Order Initiating Show Cause Proceedings (R. 1), referred to Commercial as having

> repeatedly failed to comply with the above-identified rules. [Emphasis supplied].

Since only one service evaluation (5-18-91) post-dated the Order Initiating Show Cause Proceedings (4-4-91), the repeated violations upon which a fine was to be imposed had to refer to the multiple (3) service evaluations held prior to the Order Initiating Show Cause Proceedings; i.e., August 24, 1987, October 9, 1987, February 18, 1988. Therefore, there was no unfairness in the fact that the Prehearing Order (R. 38) setting the issues presented by the Order Initiating Show Cause Proceedings for hearing would list those prior failures to comply as an issue. Moreover, when stated as a legal, rather than purely factual matter, the phrase "Do the Commercial Ventures Inc. pay phones violate the applicable rule?" would encompass prior, as well as current, violations.

E. No allegation having been made as to intentional delay by the agency in sending out the document to appellant, delay in receipt in and of itself would not be a basis for establishing failure to provide due process.

F. Besides requiring Commercial to show cause as to why it should not be fined for past violations, as described therein, the Order Initiating Show Cause directed Commercial to

> bring the pay telephones at the Everglades Hotel into compliance with our rules within thirty (30) days of the issuance date of this Order.

> This docket will remain open for six (6) months to provide staff with an opportunity to review Commercial Ventures, Inc.'s operations and at the conclusion of this period, to recommend whether an additional fine amount is warranted. [Emphasis supplied]. (R. 3).

Though staff found that violations were not cured within 30 days of the Order Initiating Show Cause Proceedings (Tr. 66), no additional fine amount was imposed. Appellant cannot claim lack of due process where no sanctions have been imposed. The issue is, therefore, either premature or moot.

G. This issue is addressed in F. supra.

H. This issue is moot as cured because the appellant's objection as to the order of presentation of evidence at the hearing was granted. Moreover, there is case authority contrary to appellant's claim that the Commission had the burden of proof. See, City of Tallahassee v. Mann, 411 So.2d 162 (Fla. 1981), where it was held that, in PSC show cause proceedings against City to show why rate differential was not discriminatory, City had the burden of going forward with evidence in justification of its practices. There is no showing by appellant that the burdens, consternation and frustration alleged here rise to the level of constitutional deprivation.

I. This issue is moot as cured because the appellant's objection to being barred from representing Commercial at hearing was granted. Howard A. Rose is both the owner and operator of

Commercial and its attorney. The record establishes that the Commission dealt with the complications presented by Howard A. Rose's multiple roles as attorney, corporate principle, party and witness in good faith.

J. This issue is a sub-issue of that addressed in I., supra. Since co-counsel for Commercial took the deposition and Mr. Rose was present to assist, the error, if any, was de minimus. No showing that it rose to the level of constitutional deprivation is made. The record discloses the good faith attempt of the Commission to deal with the complications presented by Mr. Rose's multiple roles in the proceeding and to protect the rights of the deponent, a non-party and non-attorney.

K. This issue is moot as cured since Commercial's Motion to Strike the settlement offer was granted. (Tr. 60). See also, discussion, Tr. 58-61, wherein Commissioners explained that the settlement offer would have to be accepted or rejected by the Commission, rather than a matter for negotiation confined to Commission staff.

L. This issue is addressed in E., supra. Moreover, appellant's citation of Rule 25-22.060 is inapposite, as that is a post-hearing provision. Finally, the issue is moot as cured by Commercial's participation in the pre-hearing conference.

M. Parts (1)-(3) of this section are addressed in Section III of this Answer Brief, supra. Part (4) is either premature or

moot, as discussed in F., supra.

N. This issue is discussed in Section III of the Answer Brief, supra.

O. This issue is addressed as in E., supra, and P., infra.

P. The Commission extended the time for appellant's rebuttal to afford appellant sufficient time to respond.

Q. This decision resides within the Commission's discretion; agency procedures also reflect the fact of the Commission's status as a public agency.

R. Given the Commission's status as a public agency, no wrongful conduct is alleged by appellant.

S. This issue is addressed in D., supra.

T. This section recapitulates moot, cured or de minimus issues raised in other sections of Section IV of the Initial Brief and already addressed therein.

U. Here, appellant describes twenty-four of its motions, noting that they were denied. Reasons for denial were set out in Order 20288 Denying Motions, issued November 8, 1988 (R. 145); Order 20462 on Petition for Declaratory Statement, Second Petition for Declaratory Statement and Motion to Extend Time For Filing Respondent's Brief, issued December 15, 1988 (R. 189); Order 21891, Denying Motion, issued September 13, 1989 (R. 248) and Order 22331, Denying Motion for Reconsideration, issued December 21, 1989 (R. 57).

None of those reasons are challenged by appellant.

Therefore, the mere listing, at most, implies incorrectly that the denial of many (but not all) of appellant's motions created constitutional deprivation. If the reasons for denial were sound, denial was proper, however many motions were denied. Given appellant's burden to clearly identify error, those reasons should be presumed correct since they have not been challenged by appellant.

V. Case authority establishes that mandamus is available to bring about entry of an order when the time allotted by statute has run. Fla. Society of Newspaper Editors v. Florida Public Service Commission, 543 So.2d, 1262, 1265 (Fla. 1st D.C.A. 1989).

W. This issue is addressed in V., supra, and Section V of the Answer Brief.

X. This issue is addressed in F., supra.

Y. Appellant does not explain why this incentive to at least minimal efficiency was in error in litigation which consumed proportionately so excessive an amount of agency time and effort.

Z. Appellant relies here on an inapplicable procedural rule. A recommended order or filing of exceptions thereto was not required.

Appellant's claim that its objections and allegations establish constitutional deprivation are unsupported in the record

individually, as admitted by the appellant, or when taken as a whole. The record establishes that due process was afforded, the essential requirements of law were compiled with and the Commission acted within its statutory authority. Moreover, by listing on appeal the lengthy catalogue of its motions and objections below without clearly identifying error in the Commission's disposition of any of them, appellant has totally failed to meet its burden. American Motor Inns of Florida, Inc. v. Bell Electric Company, 260 So.2d 276, 278 (4th D.C.A. 1972).

V. THE FINE IS NOT RENDERED VOID AND INEFFECTUAL BECAUSE OF A SUBSTITUTION ON THE PANEL.

Appellant correctly cites § 350.01(5) as governing, but then confuses relevant with irrelevant provisions. When Commissioner Herndon became unavailable, Commissioner Gunter was substituted, exactly as the statute provides:

> If a Commissioner become unavailable after assignment to a particular proceeding, the Chairman shall assign a substitute Commissioner.

The Commission's action in compliance with the statute which Appellant agrees is controlling is unexceptionable. The further argument by Appellant apparently relates to other language in § 350.01(5) not relevant to the substitution of Commissioner Gunter for Commissioner Herndon, since this was not a case in which a hearing examiner was appointed.

Finally, Appellant's claim of prejudice on the part of one Commissioner or unfairness to Appellant because of the substitution of another Commissioner pursuant to the statute admittedly controlling is unsupported.

CONCLUSION

While appellant restates here its argument below, in effect asking this Court to retry the case, appellant has not challenged the reasoning cited by the Commission for its decision, let alone clearly demonstrated error in it. American Motor Inns of Florida, supra.

In Deltona Corporation v. Florida Public Service Commission, 220 So.2d 904 (Fla. 1969), this Court held that

> The Commission, of course, has the power to impose penalties sufficiently heavy to secure obedience to its orders...

220 So.2d at 908. Moreover, the Court stated that the proceedings in Deltona

> were not frivolous.... Under the circumstances of this case, the penalty, if any, which may be imposed upon petitioner should be moderate. [Emphasis supplied].

220 So.2d at 908.

It follows that, if this Court views appellant's mere reoffering of arguments made below as a frivolous effort to have its case retried, there should be less concern about the imposition of a relatively larger penalty.

In view of the above, the Florida Public Service Commission respectfully requests that this Court affirm the Commission's Order Imposing Fine based on the Commission's jurisdiction to regulate pay phone service in the public interest.

Respectfully submitted,

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Dated: July 29, 1991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 29th day of July, 1991, to:

Howard A. Rose, Esquire
Attorney for Commercial
Ventures, Inc.
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North Miami Beach, FL 33180

RICHARD C. BELLAK

DATED: July 29, 1991