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IN THE SUPREME COURT OF FLORIDA

COMMERCIAL VENTURES, INC.

Appellant,

-vs-

CASE NO. 77,665

FLORIDA PUBLIC SERVICE  
COMMISSION,

Docket No. 880240-TC

Appellee.

\_\_\_\_\_ /

AMENDED BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

Commercial Ventures, Inc. is the Respondent in the "Initiation of Show Cause Proceedings" initiated by the Public Service Commission ("PSC") dated April 4, 1988, Docket No. 880240-TC (Order Initiating Show Cause Proceedings). Commercial Ventures, Inc. will be referred to as "Commercial Ventures" or "Respondent" or "Telephone Company" and the Public Service Commission will be referred to as the "PSC".

All references to the record on appeal will be preceded by the symbol "R" followed by the page number. The symbol "A" followed by the page number is used to designate the appendix. The symbol "T" followed by the page number is used to designate the transcript of the evidentiary hearing conducted on November 14, 1988. The symbol "EX" followed by a number or letter is used to designate an exhibit accepted into evidence at the evidentiary hearing. All emphasis is supplied unless otherwise indicated.

This appeal arose from the entry by the PSC of a final order imposing fine issued March 5, 1991 (R-261).

An appeal of the Order Imposing Fine was timely made.

### STATEMENT OF THE FACTS

Commercial Ventures owned ten (10) coin telephones, seven (7) of which were operated in the Everglades Hotel in Miami, Florida,

under the terms of a lease agreement. (T-186) A dispute arose between the owners of the Everglades Hotel ("Everglades Hotel") and Commercial Ventures when the Everglades Hotel installed competing payphones. Commercial Ventures filed a lawsuit against the Everglades Hotel in Dade County. (T-192) The Everglades Hotel filed a series of complaints with the Public Service Commission during the pendency of the litigation. (Ex. 30-A, 30-H, 30-J, 30-L)

Commercial Ventures resolved the initial purported violations to the satisfaction of the PSC (Ex. 31-J). The PSC performed subsequent inspections and evaluations of the coin telephones owned by C.V. without prior notice upon receiving additional complaints from the Everglades Hotel. The subsequent inspections and evaluations resulted in the initiation of the show cause proceedings. (R-1)

Commercial Ventures purchased the coin telephones and the lease to operate the coin telephones in the Everglades Hotel from Continental Pay-Tel Inc. (T-186) who was in the business of selling installed coin telephones with location rights to passive investors and managing and operating the coin telephones. (T-186, 201-202) Commercial Ventures was a passive investor relying upon telephone service companies, including Continental Pay-Tel Inc., to maintain and service the coin telephones. (T-186, 201-202)

The PSC alleged in the Rule to Show Cause (R-1) and found in the Final Order (R-261) violations of the following rules based upon evaluations prepared after inspections by PSC conducted prior to the issuance of the Rule to Show Cause on August 14, 1987,



October 9, 1987 and February 18, 1988 and after issuance of the Rule to Show Cause on May 18, 1988. (T-133, 63)

Rule 25-24.515: (A-5)

(4) Each telephone station shall permit access to local directory assistance and a telephone number for repairs or refunds without charge.

(5) Each telephone station shall display a sign identifying certain required information.

(6) Each telephone station which provides access to any inter-exchange company must provide access to all locally available inter-exchange companies.

(7) Each telephone station must allow incoming calls to be received at no charge.

(10)(a) Each telephone service company shall make reasonable efforts to minimize extent and duration of interruption of service and shall have as their objective the restoration of service on the day interruption is reported to the company.

(10)(b) Each telephone utility shall conduct its operations in a manner to insure that 95% of the telephone service interruptions are cleared and restored within 24 hours after the trouble is reported to the company except for Sundays, holidays and emergencies.

The 10(b) violation although raised in the Rule to Show Cause was not raised by Staff as an issue nor referred to in the Final Order.

Inspections of the telephone stations were performed by the

PSC and the results were reduced to writing by evaluations which occurred on August 14, 1987, October 9, 1987, February 18, 1988, May 18, 1988. (R-63, 133-134; Ex. 30-B, 31-H and 30-F)

#### SUMMARY OF ARGUMENT

##### I. THE PSC EXCEEDED THEIR STATUTORY AUTHORITY UNDER SECTION 364.285, FLORIDA STATUTES

The PSC has authority to impose a penalty of not more than \$5,000 for each offense if the entity under its jurisdiction "refused to comply with or ... have willfully violated any lawful rule or order of the PSC ..." (Sec. 364.285, Fla.Stat., A-2) Commercial Ventures was a passive investor of ten telephones and entered into service contracts with telephone service companies during the entire period that Commercial Ventures owned the coin telephones. (T-186, 201-202) Every service contract with the telephone service companies required that the telephone service company comply with all the rules and requirements of the PSC. (T-201-204, Ex. A, B and C of pre-filed testimony) Every complaint of the PSC was corrected either by the service company under contract with Commercial Ventures or by other telephone service companies which were called from time to time by Commercial Ventures to check on or back up the telephone service companies under contract. (Ex. 30-C, 30-G, 31-G, 31-H; T-195; R-3) The PSC made no attempt to offer any evidence or address the issue that

Commercial Ventures "refused to comply with or willfully violated any rules or orders of the commission". Staff counsel indicated that it is the policy of the PSC to hold the entity with the certificate number responsible for any violations without citing any supporting rule and by ignoring the jurisdictional authority granted by the statute. There is no reference in the Order Initiating Show Cause Proceedings (R-1), nor in the pre-hearing order in which the issues were adopted (R-38), nor in pre-hearing statement of Staff (R-64) that Commercial Ventures refused to comply with or willfully violated PSC rules but it is a finding of fact in the order imposing fine. (R-261) The PSC under Section 364.19, Florida Statutes, has the authority to regulate telephone service companies but made no attempt to do so in this matter nor have they exercised its authority over service companies in any other situation. (T-97-99)

II. NO PRIOR NOTICE BY THE PSC OF INSPECTIONS IN VIOLATION OF SECTION 364.185, FLORIDA STATUTES RENDERS THE ORDER IMPOSING FINE INVALID

All of the purported violations resulted from inspections conducted by the personnel of the PSC. Admittedly, Commercial Ventures received no prior notification of any inspection and had no opportunity to be present during the examinations. (T-70, 103-106, 191, 223) Section 364.185, Florida Statutes, (A-3) mandates:

that the telephone company has 'the right to be notified of and be represented at the making of such investigation, inspections, examinations and tests.'

Section 120.62, Florida Statutes, (A-4) provides that:

no process requirement or a report or inspection or other investigative act or demand shall be issued, made or enforced in any manner or for any purpose except as authorized by law.

The imposition of the fine is predicated solely upon the investigations, inspections, examinations and tests conducted by the PSC and since, as admitted by the PSC, there was no prior notice or opportunity to be present by Commercial Ventures, the imposition of the fine is improper. The position of the Public Service Commission is that Sec. 364.185, Fla.Stat. does not apply for the PSC could not operate under such a limitation (T-174-177). The Order of the Commission ruling that the inspection requirement "has never been applied to the evaluation of public pay telephones" and indicates in its Order that it would be "ludicrous" to apply the requirements of the Statute to the PSC is untenable. (T-174-177; R-261)

III. THE EVIDENCE DOES NOT SUPPORT AND IS INCONSISTENT WITH THE FINDINGS CONTAINED IN THE ORDER IMPOSING A FINE

The PSC cited and found that no more than two of the seven phones inspected were in violation of Rules requiring that the coinphones permit access to local directory assistance, a phone number for the person responsible for repairs or refunds, access to

an inter-exchange company and is to allow incoming calls. These operational deficiencies were based upon evidence that the phones were not in operation due to a coin jam, the electrical power source being removed from the electric outlet or other malfunction. The findings do not support Rule violations for the Rules refer to the capability of the coinphone when in operation. Another violation was an allegation that the Respondent did not use reasonable efforts to minimize interruptions of service with repair programs. This Rule is imposed upon "telephone service companies" and the Respondent is a passive investor who relied upon telephone service companies to maintain the coin telephones and therefore the Rule is inapplicable to Respondent. In addition, there is no evidence to support the contention that interruption of service on any particular phone was not promptly repaired. The last alleged violation pertained to incorrect information on the telephone labels. All of the required information was on the labels affixed to each coinphone however, a change in service companies required a change in some of the information on the labels and an inspection took place shortly after a change in service companies in which the information on the label may not have been changed by the new service company when the inspection took place.

#### IV. PROCEDURAL MISCONDUCT BY THE PSC

The PSC has failed to comply with the essential requirements of law depriving Commercial Ventures by its conduct, ruling, evasion of applicable laws and rules and by failing to provide

"fair play" (an understatement) deprived Commercial Ventures of procedural due process, in violation of Section 9, Article I, of the Florida Constitution, and the Fourteenth Amendment to the U.S. Constitution, and did further violate Article I, Section 17 and 18, of the Florida Constitution.

#### ARGUMENT

##### I. a.

THE FAILURE TO INCLUDE IN THE ORDER INITIATING SHOW CAUSE PROCEEDINGS THE ALLEGATION THAT THE RESPONDENT WILLFULLY REFUSED TO COMPLY WITH OR WILLFULLY VIOLATED A PSC RULE AND ORDER RENDERS THE RULE TO SHOW CAUSE AND PROCEEDINGS INEFFECTIVE.

##### I. b.

THE FAILURE TO INCLUDE AS AN ISSUE IN THE ORDER ON PRE-HEARING PROCEDURE WHETHER OR NOT THE RESPONDENT WILLFULLY REFUSED TO COMPLY WITH OR WILLFULLY VIOLATED A PSC RULE AND ORDER RENDERS THE ORDER IMPOSING THE FINE INVALID.

##### I. c.

THE ABSENCE OF EVIDENCE TO SUPPORT ANY CONTENTION THAT THE RESPONDENT REFUSED TO COMPLY WITH OR WILLFULLY VIOLATED ANY LAWFUL RULE OR ORDER OF THE PSC RENDERS THE ORDER IMPOSING THE FINE INVALID.

##### I. d.

THE CHARGE THAT COMMERCIAL VENTURES REFUSED TO COMPLY WITH OR WILLFULLY VIOLATED A LAWFUL RULE OR ORDER OF THE PSC CANNOT BE SUPPORTED IF THE VIOLATIONS ARE THE RESPONSIBILITY OF A SEPARATE TELEPHONE SERVICE COMPANY.

Section 364.285, Florida Statutes, grants the PSC the power to impose fines upon a finding that the entity subject to its

jurisdiction refused to comply with or willfully violated a lawful rule or order of the Commission. Issues 1 through 6 of the pre-hearing order list the purported rule violations of the Respondent and the penalty but omit any reference to the purported violations having been as a result of the refusal of the Respondent to comply with or its willful violation of the rules described. (R-38) The issues adopted to be heard at the final hearing are predicated upon the Order Initiating Show Cause Proceedings and the response to such Order. (R-1, 5) The Order Initiating Show Cause Proceedings is fatally defective for there is no allegation that the Respondent refused to comply with or willfully violated any lawful rule or order of the Commission. (R-1) Omitting the jurisdictional requirement that the violation is willful from the Rule to Show Cause renders the Order Imposing Fine invalid.

There is no evidence in the Record to support the contention that the Respondent refused to comply with or willfully violated the cited rules. No attempt was made by Staff to present any semblance of evidence on this issue although the materiality of this issue was presented to Staff by the Respondent in its response to the Order Initiating Show Cause Proceedings (R-5) in the proposed issues submitted by Commercial Ventures (R-44, 47), in the pre-hearing statement of the Respondent (R-70), by argument in Respondent's brief (R-209) and in other events which are part of this proceedings. (R-70, 192, 44)

The documents and evidence in the Record conclusively support the contention of the Respondent that there is no refusal to comply

with or any willful violation of a Commission rule. Some of the documents and evidence in support of this position include the following:

A. The Respondent was a passive investor in the purchasing of the coinphones. (T-191, 186, 201-202) The Respondent retained specialists in the maintenance, repair and servicing of coinphones to service the coinphones owned by the respondent from the date the Respondent acquired the coinphones through all dates relevant in this proceedings and all of the service companies had PATS certificates issued by the Commission. (R-5, 70; T-186-191, 201-205) Every service company had a PATS certificate and every service contract was in writing and required the service company to comply with all of the rules and orders of the PSC. (T-186-189, 202-204, Ex. A, B and C) No evidence was submitted by the Staff of the PSC to refute or contest this evidence.

B. The Respondent answered each of the letters of the Commission referring to evaluations reports and ordered the necessary servicing to insure full compliance with the Commission rules by letters dated September 30, 1987, October 29, 1987, March 22, 1988, March 14, 1988, June 14, 1988 and others. (Ex. 30-C, 30-G, 31-G, 31-H; T-195) The irrefuted testimony and documentation offered by the Respondent, including correspondence, indicates an appropriate response by Commercial Ventures of all requests made by the PSC and that corrective action was taken. (Letters dated September 30, 1987, October 29, 1987, March 22, 1988, March 14,



1988, June 14, 1988 and others) (T-195, 197, 212-215)

C. Every inspection conducted by Staff of the PSC known to the Respondent that resulted in unsatisfactory inspection reports was corrected by the service company or independent specialist retained by the Respondent and an appropriate response indicating compliance was submitted to Staff of the PSC. (T-190-191, 195, 212-214). The inspections disclosed to Commercial Ventures prior to the final hearing took place on August 24, 1987 (T-133), October 10, 1987 (T-134), February 18, 1988 and May 18, 1988 (T-63). Communications to the Staff of the PSC by the service companies retained by Commercial Ventures indicated that all items indicated as unsatisfactory in the evaluation reports were corrected within the time limits imposed by the Commission. (Ex. 31-J; T-96, 190) There is no evidence that would support the allegations that Commercial Ventures refused to comply with or willfully violated an order, a rule, a directive or any other request made by Staff of the PSC.

D. The unsatisfactory evaluations resulted in the most part from stale information on the coinphone labels on the phones which was the result of a change in the service companies retained by Commercial Ventures. (Ex. 31-H, 30-B) An evaluation was done at a time that Commercial Ventures was changing to the new service company. (T-188-189) All of the coinphones always had a label with the required information from the date of installation. The new service company would have to change the label after being

retained to include the new phone numbers for repairs and refunds. Additional unsatisfactory results were due to one or two coinphones being out of service on the date of evaluation due to a coin jam or removal of the power plug. (T-73, 94-95, 108, 134, 146, 192, 194, 206, 215, 222) The temporary interruption of service prevented certain tests from being done (T-73-75, 150-155) however, contrary to the evaluation results, a coinphone being temporarily out of service is not evidence that the coinphone was not programmed to receive incoming calls or access to the repair service or to inter-exchange carriers and directory assistance as indicated on the evaluation results. The inability to perform the tests on the one or two coinphones that were temporarily out of service on the date of the inspections does not indicate that the phones were incapable of compliance when in operation. Failure to change the phone labels upon changing the service company and the failure of the coinphones to be operational due to a coin jam or removal of the plug from the electrical outlet does not support the charge of a willful violation or a refusal to comply with PSC rules or orders.

E. The failure of Staff of the Commission to incorporate the "willful conduct" provision of Section 364.285, Florida Statutes, in the Order Initiating Show Cause Proceedings, in its proposed issues and the failure of the PSC to present any evidence on the issue.

F. The PSC conceded the absence of evidence to support a "willful" refusal to comply when its inspector was asked whether he or any other personnel made a determination as to whether or not

there was a willful failure or refusal to comply with Public Service Commission rules or orders, testified that:

I didn't determine that they were willful, I determine that they didn't function according to our rule. (T-145, line 11)

The testimony indicates that no determination was made either prior or subsequent to the investigation concerning whether the alleged violations were done willfully or with a refusal to comply with an order of the PSC. (T-71)

The Order imposing the fine is fatally defective because the jurisdictional requirement requiring a willful violation or refusal to comply with a rule or order of the PSC was not raised in the Rule to Show Cause, not raised as an issue, and there is no evidence to support the jurisdictional requirement. On the contrary, the evidence conclusively indicates that the Respondent did not willfully refuse to comply with or willfully violate the applicable rules of the PSC and the conduct of the Respondent cannot be willful because the telephone service companies were by contract responsible to service the coinphones in compliance with all of the rules of the PSC.

II.

THE FAILURE OF THE PSC TO PROVIDE NOTICE OF INVESTIGATIONS, INSPECTIONS, EXAMINATIONS AND TESTS OF THE COIN TELEPHONES OWNED BY COMMERCIAL VENTURES DEPRIVED COMMERCIAL VENTURES OF AN OPPORTUNITY TO BE PRESENT, IS CONTRARY TO SECTION 364.185, FLORIDA STATUTES, AND RENDERS THE ORDER IMPOSING THE FINE VOID PURSUANT TO SECTION 120.62, FLORIDA STATUTES.

The Order Initiating Show Cause Proceedings was issued April 4, 1988. One of the evaluation results upon which the Order Initiating Show cause was performed took place on May 18, 1988 and Respondent was notified on May 27, 1988, of the results of the evaluation that took place on May 18, 1988. (T-65) The Commission admits and its agents testified that no prior notification was issued to the Respondent concerning the May 18, 1988 evaluation, nor for any of the previous three evaluations. (T-70, 103-105, 144) In addition, the PSC admits that the Respondent did not have an opportunity to be present during the inspections and examinations which led to the evaluation reports. (T-70, 144, 191, 103-106, 223; R-64)

The Commission failed to offer credible authority to support the failure of the Commission to comply with Section 364.185, Florida Statutes, which requires prior notice of all inspections and examinations and that the owner be given an opportunity to be present during inspections and examinations.

Section 120.62, Florida Statutes, provides that:

NO PROCESS, REQUIREMENT OF A REPORT, INSPECTION, OR OTHER INVESTIGATIVE ACT OR DEMAND SHALL BE ISSUED, MADE OR ENFORCED IN ANY MANNER OR FOR ANY PURPOSE EXCEPT AS AUTHORIZED BY LAW. (A-4)

The Order Initiating Show Cause Proceedings was issued based upon investigations, inspections, examinations and tests made in violation of Section 364.185, which requires prior notice. The evaluation reports and the testimony of Staff personnel who inspected the equipment of the Respondent cannot be relied upon and cannot be used in support of the purported rule violations. Section 120.62, Florida Statutes, bars the use of this evidence that was obtained in violation of law. Absent the inadmissible and improper evidence there is no evidence to support the allegations of the Commission that any rule violations occurred. The Commission argued that the Standard Operating Procedures of the PSC do not require notice (T-105-106) and the Order Imposing Fine finds that it would be "ludicrous" to apply Section 364.185 to this situation. "Standard Operating Procedures" of the Public Service Commission and inflammatory comments of the Commission do not provide a basis to evade the law.

### III.

THE EVIDENCE DOES NOT SUPPORT AND IS INCONSISTENT WITH THE FINDING THAT THE COINPHONES WERE IN VIOLATION OF PSC RULES.

The Order Initiating Show Cause Proceedings charges and the Order Imposing Fine finds that the Respondent violated the following rules (R-1):

A. Each telephone station shall, without charge, permit access to local directory assistance and the telephone number of any person responsible for repairs or refunds but may provide access by coin return. [Rule 25-24.515(4)]

B. Each telephone station shall be equipped with a legible sign, card or plate or reasonable prominence identifying the described information. [Rule 25-24.515(5)]

C. Each telephone station which provides access to any inter-exchange company must provide access to all locally available inter-exchange companies. [Rule 25-24.515(6)]

D. Each telephone station must allow incoming calls to be received. [Rule 25-24.515(7)]

E. Each pay telephone service company shall make all reasonable efforts to minimize the extent and duration of interruptions of service with service repair programs having as their objective the restoration of service on the same date that the interruption is reported to the company (Sundays and holidays excepted). [Rule 25-24.515(10)(a)]

There is no evidence to support the allegation and rule finding described in paragraphs A, C and D and the rulings of the Tribunal are inconsistent with the evidence.

The rules describe in paragraphs A, C and D above, are operational requirements and require that the coin telephones permit access to local directory assistance, provide a telephone number for the person responsible for repairs and refunds without charge, permit access to any inter-exchange company and that each

coin telephone to allow incoming calls to be received. Coin telephones can be programmed or adjusted in a manner that would prohibit any or all of these functions. (T-236-237) These rules pertain to the capability of the coin telephone. The purpose of the Rules is to provide certain services for coinphone users without charge, such as directory assistance, incoming calls, etc. The PSC and its Staff have taken the position that the above mentioned Rules are violated if the coin telephone is not operational or is temporarily out of service. (T-110-112, 146-147, 151-155) The inspector for the PSC testified that he did not get any indication that the violations were because the owner did not want to have incoming calls. (T-153) The testimony of both inspectors was similar and applied to all three of the operational violations. The inspectors testified that the coinphones were to function in a manner that permitted access to directory assistance, repair personnel and an inter-exchange company and allowing incoming calls to be received. (T-152-153) The inspectors rely on the term "function" (the source of which is unknown to this writer) and concluded that if a coinphone did not function as a result of being temporarily out of service, the phone was not in compliance with the Rules. This illogical premise led the inspectors and the PSC to the conclusion that if a coin telephone was out of service for any reason (not functional) then the operational rules were violated. The Respondent operated seven coin telephones in the Everglades Hotel all of which were identical in their manufacture, installation and operations. (T-186, 201-202) The alleged

operational violations apply to the coin telephones that happened to be temporarily out of service on the date of the inspections. (Ex. 31-H; T-146-149, 152-155)

A substantial portion of the guests serviced by the hotel in which the coinphones were installed were from South America. (T-257) The coin slots on a phone jam and the phone becomes inoperable and not functional when the coin slot is jammed. Insertion of a foreign coin will cause a coin jam and five pounds of foreign coins were admitted into evidence. (T-314-316) An example of the testimony of the inspectors includes the testimony that the phone (last four digits 7265) did not operate for it would not return the coins and therefore it did not operate properly and did not do the operational functions required under the rules. (T-146) This position and interpretation of the rules is inconsistent with the rules, lacks logic, and is unreasonable. The only operational violation allegedly found by the inspector in the inspection of May 18, 1988, was as a result of a coin jam. (T-96, Ex. 30-F)

Commercial Ventures was litigating a dispute with the Everglades Hotel. The Hotel filed the only complaint which resulted in the PSC initiating the Rule to Show Cause. (Ex. 31-D, 31-F; T-256) Representatives of Commercial Ventures and service company personnel often found the electrical plugs that provide power to the coin telephones removed from the socket. (T-192, 193, 222-223) The sockets were located above the telephones and required a stoop or ladder for access. (T-222-223) Commercial



Ventures obtained a restraining order from the Dade County Circuit Court restraining agents and employees of the Everglades Hotel from tampering with the coinphones owned by the Respondent (T-192-193) which Temporary Restraining Order had little effect. The PSC inspector cited violations if the inspector was unable to make a call, receive a call, or the coinphone otherwise did not comply with the operational requirements even though there was no power to the telephone. (T-72-73, 193) The evaluations did not mention whether or not the electrical plug was not inserted in the outlet or whether or not the phone had no power during the inspections. (T-73-74, 193) Although coin jams and removal of the electrical plugs were the main causes of the telephones being out of service, other malfunctions, such as damage to the internal electronic system and interference with the interface, which was under the sole control of the Everglades Hotel also disrupted the operation of the coinphones. A coinphone that is out of service cannot support an operational violation pertaining to the capability of the phone.

There is no evidence to support the allegation and rule finding described in paragraph B and the rulings of the Tribunal are inconsistent with the evidence.

This violation pertains to the requirement that each phone must contain a label containing certain required information. The PSC does not deny that the labels were affixed to each telephone but allege that the labels contained erroneous information. (R-5; Ex. A, Ex. 10-X; T-205, 267, 66)

The Order Initiating Show Cause Proceeding dated April 4, 1988, directed Commercial Ventures to bring the pay telephones into compliance with the rules within thirty days. (R-1) Copies of the labels were provided to the PSC (R-5, 15-16). The only inspection report offered into evidence subsequent to the issuance of the Order Initiating Show Cause Proceedings occurred on May 18, 1988 (T-71-72) and disclosed no rule violation as a result of the displayed labels. (T-70, Ex. 30-F) The Order Imposing Fine (R-261) is inconsistent with and contrary to the Order Initiating Show Cause Proceedings and the evidence offered by the inspectors for the PSC.

The PSC, to support the Order Imposing the Fine, must be relying upon one or more inspections that took place prior to the issuance of the Order Initiating Show Cause Proceedings. The Respondent submits that the inspection report taking place prior to the issuance of the Order Initiating Show Cause Proceedings to be irrelevant for the Rule to Show Cause grants the Respondent thirty days to correct any violations. (R-1)

If relevant however, the label violations cannot be supported.

Commercial Ventures was a passive investor and relied upon payphone service company with PATS registration to service and repair the coin telephones in compliance with the rules of the Public Service Commission as previously indicated. Commercial Ventures retained five different coin telephone service companies from September, 1986, when the first coinphones were obtained, to May 11, 1989, when Commercial Ventures terminated the business.

(T-186-191) In October, 1987, Commercial Ventures discharged Peoples Telephone Company as a service company and retained Boca Pay-Tel Inc. (T-189) The inspection evaluation that took place in October, 1987, indicated inadequate notice for refunds and repairs, indicating that the phone number given was for Continental Pay-Tel who disclaimed responsibility for the phones. (T-134, Ex. 31-H) Apparently, the service company that took over the servicing of the telephones in October, 1987, Boca Pay-Tel Inc., had not yet placed the revised labels on the coin telephones by the date of the inspection. However, Continental Pay-Tel Inc., the telephone service and repair company that was displayed on the label, was the company that sold the coin telephones to Commercial Ventures under a one (1) year warranty for repairs which was in effect on the date of the evaluation. (T-187) The investigator made no attempt to determine the responsibility of Continental Pay-Tel under the provisions of the contract in force. Boca Pay Tel Inc. was the telephone company servicing the phones during the evaluation which took place February, 1988. Any reported mislabelling as a result of not updating the labels was immediately corrected upon receipt of notice from the PSC. (T-66-67, 96; Ex. 30-F)

There were no violations disclosed in the inspection of May 18, 1988, which was the inspection that took place subsequent to the issuance of the Order Initiating Show Cause Proceedings. (Ex. 30-F; T-67) Two of the seven coinphones (7245 and 7262) were temporarily out of service, but this fact cannot support the existence of an operational violation and the inspection and

evaluation discloses full compliance with all of the labeling requirements. (Ex. 30-F; T-96) The prior inspections indicating operational violations cannot be supported upon the sole evidence that the phones cited for violations were out of service due to a malfunction such as a coin jam or the mysterious removal of the electrical plug. (T-73, 94-95, 108, 134, 146, 192, 194, 206, 215, 222) Any labeling deficiency cannot support a fine if the label deficiencies were corrected within a reasonable time after notice and a reasonable explanation, such as the changing of a service company which requires changes to the label.

The remaining purported violation described in paragraph E above requires each pay telephone service company to make reasonable efforts to promptly make all needed repairs to coin telephones.

The rule purportedly violated requires each pay telephone service company to make reasonable effort to minimize the extent and duration of interruptions of service. The four other violations are based upon the operation of and the information located on the coin telephones. Rule 25-24.515(10)(a) is a rule imposed upon each pay telephone service company and requires reasonable efforts to minimize the extent and duration of interruptions of service. The Respondent is not a telephone service company as defined under Chapter 364, Fla. Stat. Commercial Ventures was a passive investor relying upon telephone service companies to service the coin telephones during the entire period that Commercial Ventures owned the coin telephones. (T-186-

191, 202-204) Therefore, this rule is not applicable to Commercial Ventures. Commercial Ventures sought to make the telephone service companies under contract with Commercial Ventures a party to the proceedings however, the motion for such relief was either never acted upon by the PSC or was denied. (R-62) In addition, there is an absence of any evidence that would support a contention that reasonable efforts to minimize the extent and duration of interruptions of service was not done. Commercial Ventures responded to every letter and report of the Public Service Commission and had competent and qualified coin telephone service companies repair and correct every matter raised by the PSC (T-204-207), as well as other repairs as required.

The cited rule would apply to the various telephone service companies that serviced the coinphones owned by Commercial Ventures. The rule would not apply to Commercial Ventures who was a passive investor relying upon telephone service companies for the servicing and repairing of the coinphones. In addition, there is a lack of evidence indicating that required repairs were not timely performed. Commercial Ventures, more than the PSC, had the most interest in insuring that all repairs were done promptly.

#### IV a.

THE CONDUCT OF THE PSC IN THIS MATTER FAILED TO COMPLY WITH THE ESSENTIAL REQUIREMENTS OF LAW AND VIOLATED AND DISREGARDED PROCEDURAL DUE PROCESS REQUIREMENTS OF SECTION 9, ARTICLE I, OF THE FLORIDA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

IV b.

THE PROCEEDINGS CONDUCTED BY THE PUBLIC SERVICE COMMISSION WERE NOT CONDUCTED IN A FAIR AND IMPARTIAL MANNER; THE PSC EXCEEDED THEIR STATUTORY AUTHORITY AND VIOLATED OR DISREGARDED LAW AND APPLICABLE RULES, ALL OF WHICH CONSTITUTES A FAILURE TO COMPLY WITH ESSENTIAL ELEMENTS OF LAW AND DEPRIVED THE APPELLANT OF DUE PROCESS OF LAW

The proceedings of the Public Service Commission must conform to the Statute imposing their statutory authority. McRae v. Robbins, 9 So.2d 284 (Fla. 1942). Rudiments of fair play and due process require that the Appellant be afforded a fair and impartial hearing, meeting all requirements of the law. Moore v. Florida Estate Commission, 121 So.2d 196 (Fla. 3rd DCA 1960); Drew v. Insurance Commissioner, 330 So.2d 794 (Fla. 1st DCA 1976). 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; however, taken as a whole, the procedures of the PSC evidences a disregard of fair play, a lack of impartiality and an abuse of the authority by the Public Service Commission.

The record shows the following:

A. The Order initiating show cause proceedings which is the subject matter of the hearing seeks to impose a financial penalty in compliance with its statutory authority under Section 364.285, Florida Statutes, but fails to recite that the purported violations of the rules were "willful" as required by the jurisdictional statute (R-1).

B. All of the purported violations resulted from

investigations, inspections, examinations and tests conducted by the Public Service Commission without prior notice to the telephone company and without an opportunity to be present in disregard of Section 364.185, Florida Statutes (R-1, 64; T-70, 144, 191, 103-106, 223).

C. The rule to show cause proceedings were instituted and processed against the Respondent, Commercial Ventures, a passive investor, even though the investigation by the PSC disclosed that telephone service companies other than the Respondent was contractually obligated to service the phones in a manner that complied with the Public Service Commission rules (R-1, pg. 2, 4th PP; R-5, 62; T-201-205)

D. The Order Initiating Show Cause proceedings dated April 4, 1988 ordered Commercial Ventures to correct any and all rule violations within thirty days. (R-1) The PSC modified the operational issues at the recommendation of the Staff on August 26, 1988, and received by Respondent on September 1, 1988, by changing the operational issues from "do the Commercial Ventures Inc. pay telephones" violate the cited rules to "is or has Commercial Ventures Inc. ever been in violation" of the cited rules. (R-38, Order on Pre-Hearing Procedure) On the last business day prior to the final hearing

Commercial Ventures received the pre-hearing order which again modified the operational issues by reverting back to the initial issues of "do the Commercial Ventures Inc. pay telephones" violate the applicable rules. (R-155)<sup>1</sup> The PSC disregarded the last minute revision of the operational issues accepting and considering evidence of evaluations pre-dating the Order Initiating Show Cause Proceedings (T-63, 133-134). The findings in the Order Imposing Fine relied upon all four inspections of which one took place subsequent to the Order Initiating the Rule to Show Cause Proceedings. (R-261) Litigating the issue whether the Respondent has ever been in violation of the Rule is unreasonable, unjust and unfair. The substantial modification of the issues on the eve of the Final Hearing is unreasonable, unjust and unfair. The disregard of the final operational issues that confined the purported violations to a date subsequent to the issuance of the Rule to Show Cause Order; considering evidence of purported violations pre-dating the Order to Show Cause; and finding such violations to support the Order Imposing the Fine is unreasonable, unjust and unfair.

E. The receipt of the pre-hearing order by the Respondent on the last business day prior to the final hearing is unreasonable,

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<sup>1</sup> The pre-hearing order dated November 9, 1988 was received November 10, 1988, the last business day prior to Veteran's Day weekend. The final hearing was November 14, 1988, the next business day.



unjust and unfair.<sup>2</sup>

F. The Order Initiating the Show Cause Proceedings dated April 4, 1988, directed Commercial Ventures to bring the coinphones in compliance with the PSC rules within thirty days. (R-1) The next evaluation report took place on May 18, 1988, and indicated no violations other than operational violations applicable to two coinphones on the basis that the coinphones were temporarily out of service in need of a repair and three phones violated accessibility to the physically handicapped. (Ex. 30-F) The phones were installed prior to the effective date of the applicable rule and the rule specifically exempted these telephones from the physically handicapped provision as known or should have been known to the inspector. [Rule 25-24.515(13), (A-5)] Irrespective of the exemption, Commercial Ventures caused the coinphones to be lowered. (T-221)

G. Rule 25-24.515(13) requires that each telephone station installed after January 5, 1987 comply with certain height standards for making the coin telephone usable by physically handicapped people. (A-5) The Order Initiating the Show Cause Proceedings, the issues proposed and adopted by the Commission and the Final Order Imposing Fine made no reference to the purported violation, yet evidence was presented on the issue at the final hearing (T-84-88, 91-92). Staff knew that the coinphones of the

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<sup>2</sup> The pre-hearing order dated November 9, 1988 was received November 10, 1988, the last business day prior to Veteran's Day weekend. The final hearing was November 14, 1988, the next business day.

Respondent were exempt under the Rule and that the phones were lowered at the insistence of the Staff. (T-91-92, 220-221)

H. The pre-hearing order received on the eve of the final hearing required the Respondent to present their evidence at the final hearing first which is contrary to the rules and acceptable procedures and places a burden of proof upon the Respondent when the burden of proof is on the PSC as initiator of the proceedings. (R-155) (Fla. Prac. and Proc. Sec. 9-7; Turner v. Turner, 576 S.W.2d 452) Considerable burdens, consternation and frustration were imposed upon the undersigned over the Veteran's Day weekend and thereafter. The Order was disregarded at the final hearing and Staff presented its case first. (T-1-170)

I. The pre-hearing order received on the eve of the trial barred Howard Rose, the undersigned, from participating as attorney for Commercial Ventures on the grounds that he was a witness for Commercial Ventures. (R-155, pg. 14, 4th PP, PP 8) The undersigned is a licensed and practicing attorney and is also the sole officer and managing agent of Commercial Ventures. The ruling and prohibition is directly contrary to the law which holds that self-representation by a corporation is permissible in administrative proceedings and the only inquiry is whether the individual's appearance is authorized on behalf of the corporation. The Magnolia's Nursing & Convalescent Center v. Department of Health and Rehabilitative Services, 428 So.2d 256 (Fla. 1st DCA 1982). The ruling also violated Rule 221-6.008 of the Rules of Department of Administration (A-10) which specifically authorized

the undersigned to represent Commercial Ventures. On the eve of the trial the undersigned had the impossible burden of retaining other counsel to prepare to try the dispute for Commercial Ventures. The undersigned appeared with an attorney, Mr. Burt Ginsberg, (T-3-4) who was in no way prepared to try the matter. Although the prohibition was removed at the hearing and the undersigned permitted to proceed as attorney for Commercial Ventures (T-18-24), irreparable harm was suffered and the last minute order was unfair, unreasonable, unsupportable and directly contrary to law and applicable rules.

J. Howard Rose, as attorney for Commercial Ventures, was also barred from taking the deposition of the complaining witness, Zabdy Daniels, employee of Everglades Hotel, on the grounds that the attorney was also a witness for Commercial Ventures which, as indicated in paragraph I above, is contrary to law, (R-155)<sup>3</sup>

K. Commercial Ventures in response to a settlement offer from the Staff submitted a response dated November 1, 1988 which was made a part of the pre-hearing order without the consent, approval or knowledge of Commercial Ventures (R-155, 172-173) and without submitting the offer of the Staff.

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<sup>3</sup>Commercial Ventures subpoenaed Zabdy Daniels twice, the PSC issued a protective order immediately preceding the taking of the deposition precluding the undersigned from taking the deposition which required that the undersigned retain other counsel. (R-58, 82, 83, 90, 105, 108, 124) Despite producing a pile of papers and over eleven hours of time, the undersigned was wrongfully prevented from taking the deposition of the complaining witness.

L. The pre-hearing conference took place on October 20, 1988 (Fifth revision to CASR, Ex. 10-T). Commercial Ventures had three business days to object or respond to Staff Recommendations. The short notice is unreasonable, unfair and contrary to 25-22.060 of the rules of the Public Service Commission which states that exceptions may be filed within fourteen days of service of Staff Recommendations. Commercial Ventures had three business days to respond.

M. The unfair, untenable, illogical and abusive position of Staff was adopted by the PSC to support the position of the PSC that Commercial Ventures violated rules is as follows:

(1) A payphone is in violation of Rule 25-24.515(4) which requires access to local directory assistance without charge if the phone is temporarily out of service.

(2) A payphone is in violation of Rule 25-24.515(6) which requires access to all locally available inter-exchange companies without charge, if the phone is temporarily out of service.

(3) A payphone is in violation of Rule 25-24.515(7) which requires that the phone allow incoming calls to be received if the phone is temporarily out of service.

One or two of the seven of the coinphones were out of service during some of the inspections by Staff as a result of coin

jams, electrical plugs being removed from the sockets<sup>4</sup> or other temporary malfunctions. Obviously, this would not constitute evidence that the coinphones were programmed to prohibit free local directory assistance, to prevent access to inter-exchange companies and not permit incoming calls, all of which will decrease the productivity of the phones. No such violations were charged to the coinphones owned by Commercial Ventures that were in operation during the inspections and never more than two of the seven telephones were inoperable during any one inspection by Staff. The basing of the violations on a finding that the phones were out of service is contrary to reason and is a gross misapplication of the applicable rules.

(4) The payphones were cited in an evaluation report for violation of Rule 25-24.515(13) (A-5) which requires that the coin slot on each telephone station be no higher than 54" (Ex. 30-F, line 5, T-84-88). This rule grandfathered in coinphones installed prior to January 5, 1987. (T-91-92, 86-66; Rule 25-25.515(13); Ex. 10-Q; A-5) The unrefuted evidence established that all of the payphones were installed prior to this date, yet the PSC disregarded the evidence and applicable rule in finding the existence of this violation. (Ex. 30-F; T-84-92, 214) Moreover, Commercial Ventures incurred substantial expense and lowered the

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<sup>4</sup>Respondent had been litigating a dispute with the Everglades Hotel, the owner of the property where the seven coinphones were installed. The plugs providing power to the phones were often found unplugged. (T-215) The Respondent obtained a restraining order prohibiting tampering with the plugs which could not be effectively enforced. (T-215-216)

phones to comply with and placate the dictates of Staff (T-221), but this act of compliance was disregarded by the PSC.

N. The PSC disregarded copies of the label attached to each coinphone (R-5; Ex. A; T-191-192; Ex. 10-X) and supported by the testimony of Commercial Ventures (T-205) and accepted testimony that the labels were not accurate. Any inaccuracy was temporary and resulted from a change of service companies when Commercial Ventures was in transition from one service company to another.

O. The Order on pre-hearing procedure dated August 26, 1988 was received by Commercial Ventures September 1, 1988 (R-38) and the proposed order was received by fax transmission on August 25, 1988. The Order required Commercial Ventures to prepare and file its direct testimony within four business days (September 3 through September 5, 1988 was the Labor Day weekend). Commercial Ventures' motion for an extension of time was not only ignored but Staff indicated in a telephone conversation that the pleadings of Commercial Ventures would be stricken and no defense would be permitted if the direct testimony was not timely filed. The undersigned had to cancel a scheduled vacation which was to begin August 26, 1988, lost a deposit and worked over the Labor Day weekend in order to prepare the direct testimony. This imposed severe and substantial time burdens, economic burdens and was unfair, unreasonable and arbitrary.<sup>5</sup>

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<sup>5</sup> The Hearing Officer, Commissioner Beard, indicated at the final hearing that he thought he granted the continuance which is contrary to any order and contrary to the comments of Staff attorney. (T-43-47)

P. Commercial Ventures moved to prohibit the testimony of the witnesses for not timely complying with the pre-trial order. (R-61) Although the rule pertaining to timeliness of the filing was strictly enforced against Commercial Ventures (R-61), compliance was not required of Staff and Commercial Ventures was denied relief. (R-69; T-5, 48)

Q. Commercial Ventures invoked the rule excluding witnesses from the final hearing. (T-48, line 23) The complaining witness, Zabdy Daniels, employed by the Everglades Hotel, was excluded from the hearing, however, her attorney, Moises Grayson, was permitted to stay. (T-50-55) During the testimony of the complaining witness, Grayson, her attorney as well as the attorney for the Everglades Hotel, was permitted to question his client, Daniels, at the final hearing (T-350-362) and to otherwise participate in the proceedings (T-363, 366, 368-370) which defeated the purpose of invoking the rule.

R. The Public Service Commission required Commercial Ventures to file fifteen copies of all documents in its Order on pre-hearing procedure (R-38). Thereafter, Commercial Ventures learned that one of the copies was for the attorney for the complaining witness (T-6-9). The attorney also received copies of Staff filings as indicated on the Certificate of Service dated September 15, 1988 of Staff's pre-filed testimony. (T-6-9)<sup>6</sup>

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<sup>6</sup>Correspondence was going back and forth between Billy J. Yates of the PSC and Everglades Hotel without the knowledge of Commercial Ventures.

S. Neither the Order Initiating Show Cause Proceedings (R-1), the issues adopted by the PSC for the final hearing (R-38), the pre-hearing statement of Staff (R-64), nor any other document submitted by the PSC provided notice to Commercial Ventures of the dates of the purported violations to be relied upon by the PSC until testimony was offered at the final hearing. The Respondent learned at the final hearing that at least five inspections took place by three different inspectors. Evidence of three of the inspections were offered at the final hearing. The flip-flop on the issue of whether Commercial Ventures was in violation of a rule or whether they ever were in violation of a rule and failure to specify the dates of the violations or the evaluation reports to be relied on by the PSC placed unreasonable, unconscionable and oppressive burdens upon the Respondent.

T. The Respondent sought to disqualify the Commissioner, Thomas M. Beard, as one of the two hearing officers for bias and prejudice. (R-231, 244, 251) The Respondent relied upon the following events in its attempts to disqualify one of the hearing officers (R-231, 244, 251): preventing the undersigned from taking the deposition of the complaining witness by entering a protective order; frustrating two subpoenas (brief, pg. 29, PP J, Note 2); attempting to bar the undersigned from conducting the defense on behalf of the Respondent (See brief, PP. I, pg. 28-29); threatening to play "hard ball" prior to the final hearing; threatening a new show cause order against the certificate of Commercial Ventures; accusing Commercial Ventures of "playing games" by the filing of



motions seeking relief; making derogatory remarks and expressing an inference of wrongful conduct; accusing the principal of Commercial Ventures of being contemptuous which comments were not justified; indicating a disbelief of representations made by Commercial Ventures; questions the veracity of the principal of Commercial Ventures; failing to timely consider pending motions; adopting or permitting the scheduling of events that placed unconscionable, intolerable and unreasonable burdens upon the Appellant such as one day for issue identification, five business days to file and serve pre-file direct testimony, causing the pre-hearing order to be served the last business day prior to the final hearing (Brief, pg. 26-27, subpp. E and Note 2); failed or refused to permit review of orders by Commission panel contrary to Rule 25-22.060, F.P.S.C.; refused to allow Appellant to seek declaratory statements in violation of Sec. 120.565, Fla.Stat., and Rule 25-22.020-022, F.P.S.C. (R-231). Additional grounds include prohibiting the undersigned at the pre-hearing conference from acting as attorney for the Respondent which is directly inconsistent with the law and applicable rules as cited previously (pre-hearing conference transcript, page 25-28); indicating a pre-disposition prior to the final hearing that Commercial Ventures was in violation of the Commission Order and Rule (pre-hearing conference transcript, page 53); imposing the burden of proof on the issues raised in the Rule to Show Cause upon the Respondent (pre-hearing conference transcript, page 53); and adopting the position of Staff requiring the Respondent to present its evidence first (pre-hearing

conference, page 51) which is contrary to the purpose and effect of an Order to Show Cause which places the burden on the accuser, the PSC; ruling prior to final hearing that the multiple violations after notification infers a willful refusal to comply with the Commission Rule and places the burden on the Respondent to prove that the conduct wasn't willful (pre-hearing conference transcript, page 60)<sup>7</sup>; misinterpreting the significance of an Order to Show Cause as being conclusive evidence of its contents as found by the PSC without a hearing and contrary to its legal effect of being a motion, as indicated by hostile and emotional comments at the final hearing (T-137); by adopting indefensible issues covering a period of over one and a half years without specifying dates of purported violations (brief pg. 25-26, sub-PP. D); entering an order on pre-hearing procedure delivered to Respondent on September 1, 1988, requiring the filing of direct testimony by September 9, 1988 (four business days, excluding the Labor Day weekend) and refusing to act on a motion for continuance, causing the undersigned to cancel a vacation, lose a deposit and incur an oppressive and substantial burden (R-38; T-43); adopting all issues proposed by Staff and rejecting all issues proposed by Respondent; and denying or failing to act on various relief sought by the Respondent as more specifically described in the following paragraph.

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<sup>7</sup>There is no evidence of multiple violations. Inspections disclosed that no more than two coinphones were not operational at any one time due to a coin jam or disruption of electricity. (See brief, Argument III, pgs. 16-18)

U. The hearing officer either denied or failed to act on the following relief sought by the Respondent:

1. 8-30-88 Objections to proposed issues. (R-47) The objections were substantially overruled and the issues proposed by Staff were adopted.

2. 7-15-88 Motion for reconsideration of the issuance of order initiating show cause proceedings and adoption of the agenda (R-23) on the grounds that Commercial Ventures never received notice of the agenda conference, had no opportunity to contest the issuance of the order initiating show cause and did not receive the proposed issues and other relevant documents until July 12, 1988, and not by notice, but from a friend not employed by the PSC.

3. 7-20-88 Motion to dismiss or strike order initiating show cause proceedings on the grounds that the order was entered without prior notice, without an opportunity to be heard and was not supported by statutory authority. (R-33)

4. Motion for continuance of time to pre-file direct testimony and to continue or extend the schedule of events indicating that Commercial Ventures received no notice of the initial events of the above captioned proceedings prior to a chance telephone conversation with a friend on July 12, 1988, except for the request to establish docket dated February 16, 1988 and the Order Initiating Show Cause Proceedings dated April 7, 1988. (R-25)

5. Motion for continuation of activities dated August 29, 1988 (R-42) responding to unsigned proposed Order on pre-hearing

procedure attempting to obtain a continuance on the filing of the Respondent's direct testimony. The refusal to act of which resulted in the loss of a deposit and the cancellation of a vacation.

6. Motions to revise Case Assignment and Scheduling Record dated August 30, 1988, in which the Respondent objected to the receipt of the notice of issue identification after the time for responding expired and otherwise giving notice to Respondent after the time for a response to an event has expired. (R-50)

7. Motion for contempt or other relief dated September 6, 1988 (R-52) seeking appropriate relief for the failure of the complaining witness to submit to the taking of her deposition.

8. Motion to dismiss dated September 27, 1988 (R-60).

9. 9-27-88 Motion to prohibit testimony of witnesses for Staff for failing to timely file pre-file testimony contrary to the order of the PSC. (R-61; T-48)

10. Motion to add additional parties dated September 29, 1988 (R-62) seeking to add as parties the telephone service companies that service the coinphones owned by the Respondent.

11. 12-2-88 Petition for declaratory statement (R-177) and second petition for declaratory statement (12-2-88) (R-182) pursuant to Rule 25-22.020-21 (R-189) which denied Respondent of its right for a determination of the applicability of Sec. 364.285, 364.185 and 120.62, Florida Statutes. (A-2-4)

12. Motion for reconsideration of Order on petition for declaratory statement dated December 28, 1988 (R-205) attempting to

seek a declaratory statement as permitted under Rule 25-22.020-021, which was never acted upon. (A-8)

13. Motion to bar admission of exhibits and testimony dated October 7, 1988 (R-69) on the grounds that the direct testimony required of Staff was not timely filed and served.

14. 10-24-88 Motion for review by Commission panel seeking the review of the denial of previous order pursuant to Rule 25-22.060. (A-6; R-116)

15. 10-20-88 Motion in limine to exclude evidence obtained as a result of unannounced inspections or tests in violation of Section 364.185, Florida Statutes. (R-102)

16. 10-24-88 Motion for video tape deposition which was not permitted by Staff and the attorney for the deponent. (R-115)

17. 11-17-88 Objections to pre-hearing order on the grounds that the Respondent did not have timely notice of the pre-hearing order or an opportunity to file objections prior to the final hearing for it was received the last business day prior to the final hearing. (R-173)

18. 11-28-88 Request for oral argument (R-188).

19. 12-23-88 Proposed findings of facts, conclusions of law and recommended order was disregarded. (R-192)

20. 12-1-89 Motion to be heard at agenda conference by telephone (R-256).

21. 10-7-88 Second motion for contempt against the complaining witness for not honoring a second subpoena (R-82).

22. 10-18-88 Motion to quash subpoena and motion for

protective order seeking to prevent Staff from taking the deposition of the complaining witness after the PSC prohibited the Respondent from taking the deposition. (R-108)

23. 12-28-88 Motion to extend time for filing Respondent's brief. (R-186)

24. 6-1-89 Notice and Motion to produce for production of the seventh and eighth revisions of the Case Assignment and Scheduling Record (CASR) - (never received by the Respondent prior to the motion). (R-246) Unknown if the CASR granted the relief requested in paragraph 23 above.

V. The final hearing took place on November 14, 1988. (T-1) The final order imposing fine is dated March 5, 1991, over two years and three months from the date of the final hearing. (R-261) Rule 25-22.059 requires that the final order be entered "within ninety days after the hearing or receipt of the hearing transcript, whichever is later." (A-7) The hearing transcript is dated November 30, 1988. (T-394)

W. The two Commissioners that participated in and attended the final hearings were the hearing officer, Thomas M. Beard and John D. Herndon. Prior to the issuance of the Order Imposing Fine, Commissioner Herndon resigned from the Public Service Commission. The Order Imposing Fine indicates that the Commissioner, Gerald L. Gunter, participated in the disposition of the matter although he did not participate in or attend the final hearing. The delay in the issuance of the Order Imposing Fine deprived the Respondent of a determination by the Commissioner participating in and attending

the final hearing and substantially left the decision to the Commissioner which Respondent sought unsuccessfully to disqualify. (R-231, 257)

X. The PSC in at least one evaluation report (May 27, 1988) indicated a rule violation as a result of the coinphones not being accessible to the physically handicapped as required by Rule 25-24.515(13). (Ex. 30-F) The inspectors knew, or should have known, or upon reasonable inquiry would have known, that the coinphones were installed prior to January 5, 1987 and the Rule requiring access to the physically handicapped did not apply to coinphones installed prior to January 5, 1987. (Rule 25-24.515(13) Commercial Ventures in an attempt to appease and placate the PSC incurred the expense of lowering the coin telephones, not knowing at the time that the expensive gesture was without meaning.

Y. The attorney for Commercial Ventures was verbally advised that if the hearing which took place in Miami was not concluded on November 14, 1988, any continuation would take place in Tallahassee, Florida.

Z. The Order Imposing Fine, which is the subject matter of this appeal, was entered March 5, 1991 (R-261), without prior receipt of a recommended Order depriving the Respondent of an opportunity to file exceptions in violation of Rule 25-22.059. (A-7)

The conduct of the Public Service Commission, the hearing officer and Staff as described above deprived the Respondent of a fair and unbiased final hearing, failed to provide essential

requirements of law and deprived the Respondent of procedural due process guaranteed by the law.

V.

THE ORDER IMPOSING FINE IS VOID AND INEFFECTIVE FOR TWO COMMISSIONERS ARE REQUIRED TO PARTICIPATE IN THE HEARINGS AND FINAL DECISION AND ONLY ONE COMMISSIONER THAT PARTICIPATED IN THE HEARING PARTICIPATED IN THE FINAL ORDER IMPOSING FINE

The final hearing on the Order Initiating Show Cause Proceedings must be heard before a panel of not less than two Commissioners. [Sec. 350.01(5), Fla. Stat.; Rule 25-22.0355(1)] (A-9) The two Commissioners assigned to the proceedings were Thomas M. Beard, Chairman, and John T. Herndon. Both of the assigned Commissioners participated in the final hearing. John T. Herndon resigned as a Commissioner prior to the entry of the Order Imposing Fine. The Order Imposing Fine indicates that the Commissioner, Gerald L. Gunter, participated in the disposition of the matter. (R-261)

Section 350.01(5) which governs this issues recites as follows:

Only those Commissioners assigned to a proceeding requiring hearings are entitled to participate in the final decision of the Commission as to that proceedings. If a Commissioner becomes unavailable after assignment to a particular proceedings, the Chairman shall assign a substitute Commissioner. In those proceedings assigned to a hearing examiner, following the conclusion of the hearings, the designated hearing examiner is responsible for preparing the recommendations for final disposition by a majority vote of the Commission.

The Respondent received no notice and is unaware of any



recommendation made for final disposition of the matter. The Respondent is unaware of a hearing being held before the full Commission in which any recommendations for final disposition was voted upon by the Commission. The Respondent received no notice, nor an opportunity to object to or participate in any recommendations made for the final disposition of the matter.

The disposition of the matter by the Chairman who indicated prejudice in a pre-judgment of the matter and contempt for the undersigned together with a Commissioner that did not participate in the pre-trial procedures nor attend the final hearing deprives the Respondent of a fair hearing, violates due process of law and fails to comply with essential requirements of law.

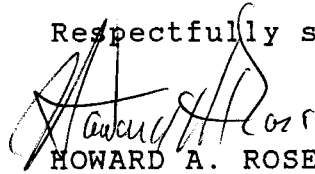
#### CONCLUSION

The Respondent seeks an Order reversing the findings of the Public Service Commission declaring the Order Imposing Fine invalid and the discharge of the Order Initiating the Show Cause Proceedings based upon each of the arguments submitted.

The Respondent also requests this Court to consider utilizing its jurisdiction or status as the highest judicial officers of the State to cause an investigation of the conduct of the Public Service Commission in the handling of administrative proceedings. The Record discloses a disregard of applicable statutory law, of applicable rules governing procedures and procedural conduct that is abusive, unreasonable and unfair. Government officials should

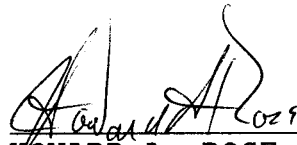
be accountable for their misdeeds and violations of their fiduciary obligations.

Respectfully submitted,



HOWARD A. ROSE  
Attorney for Appellant

I HEREBY CERTIFY that a true and correct copy of has been furnished by mail to Charles W. Murphy, Staff Counsel, Attorney for Appellee, 101 East Gaines Street, Tallahassee, FL 32399-0850, this <sup>29</sup> 28th day of August, 1991.



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