IN THE SUPREME COURT OF FLORIDA

UNITED TELEPHONE COMPANY OF FLORIDA, Appellant, V. FLORIDA PUBLIC SERVICE COMMISSION, Appellee.	)	CASE NO. 78,173

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, Florida Public Service Commission, is referred to in this brief as the "Commission." Appellant, United Telephone Company of Florida, is referred to as "United" or the "Company." References to Commission Orders Nos. 22205, 22377, 24049, and 24595 will refer to the Appellant's Appendix and will be shown as [A ___]. References to other portions of the record are shown as [R ___], except references to the transcript of the hearings conducted on October 1, 3-5, 8 and 9, 1990, are shown as [T ___]. References to exhibits are shown by the volume number of the record in which the exhibit appears followed by the exhibit number and page.

STATEMENT OF THE CASE AND FACTS

The Commission generally accepts United Telephone Company of Florida's Statement of the Case and Facts as it relates to the facts and chronology of events in this proceeding. However, the last sentence of the first paragraph on page 10 contains an inaccurate characterization of the Commission's decision in Order No. 22377. The Company states as follows:

> The Commission did not address its earlier decision in Order No. 22377 to allow United to earn up to a 13.3% return on equity.

In fact, the Commission's decision in Order No. 22377 was to reduce the Company's return on equity to 12.8%, with a range of reasonableness of 12.3% to 13.3%, pending the outcome of the full proceeding. This action signified that the Company's revenues in excess of 13.3% were placed subject to refund, not that United would be authorized to earn up to a 13.3% return on equity during the pendency of the full rate proceeding.

SUMMARY OF ARGUMENT

The actions of the Florida Public Service Commission in Orders Nos. 24049 and 24595 determining United Telephone Company of Florida's 1990 earnings and requiring the refund of all earnings in excess of 13.0% comport with the essential requirements of law. United was fully aware that it was the Commission's intention in the limited proceeding to adjust the Company's return on equity to a more reasonable level for the purpose of placing revenues subject to refund and to initiate a full rate proceeding. The Commission clearly indicated that it intended to comply with the provisions of the interim statute in every way possible, but for the one exception that it would not utilize the "last authorized return on equity" from the Company's last rate case. Rather the Commission used the return on equity determined in the limited proceeding.

The Company had no basis on which to expect that its 1990 earnings would not be determined in the full rate proceeding, or that the Commission would not be consistent with its past practices and adjust the Company's interim rates at the conclusion of the full rate proceeding. The Company was given a fair hearing and an opportunity to address the issue of what its 1990 earnings were and what amount, if any, it should be required to refund. The Commission's determination of the Company's 1990 earnings was based on competent substantial evidence from the record of the full proceeding.

United Telephone Company of Florida has no basis on which to complain that the Commission has abused its rights. The

Commission's actions throughout this proceeding have complied with its statutory mandate to protect utility ratepayers while according the Company all of its rights. Therefore, the Commission respectfully requests this Court to affirm Orders Nos. 24049 and 24595, as they comport with all essential requirements of law.

ARGUMENT

I.

THE FLORIDA PUBLIC SERVICE COMMISSION'S DETERMINATION OF UNITED TELEPHONE COMPANY OF FLORIDA'S ACHIEVED RETURN ON EQUITY FOR 1990 AND REQUIREMENT THAT THE COMPANY DISPOSE OF 1990 EARNINGS IN EXCESS OF 13.0% WERE AUTHORIZED BY CHAPTER 364, FLORIDA STATUTES

United Telephone Company of Florida asks this Court to quash the portions of the Florida Public Service Commission's Orders Nos. 24049 and 24595 in which the Commission determined United's earnings for the interim period of calendar year 1990 and ordered it to dispose of all earnings for that period in excess of 13.0%. United asserts that these Orders do not comport with the essential requirements of law. These complaints of United are without any foundation in law or fact.

A. The Commission's Action In Determining United Telephone Company Of Florida's Earned Rate Of Return For 1990 Was Consistent With The Provisions Of The Interim Statute And Did Not Violate The Company's Due Process Rights.

In late 1989, the Commission found itself in the position of having United Telephone Company of Florida's authorized return on equity (ROE) reverting, as of January 1, 1990, to a range of 14.75% to 16.75%, with a midpoint of 15.75%. United had not had a full rate proceeding since 1982, prior to its merger of four separate companies into the current Company. Over the years since United's last full rate proceeding, the cost of money had dropped and the Company no longer required a 15.75% ROE.

The Commission had previously dealt with the problem of United's ROE being too high by issuing proposed agency action Order No. 19726 on July 26, 1988, authorizing an ROE of 13.5%, with a range of 12.5% to 14.5%, for the years 1988 and 1989. This Order became final when neither United nor the Public Counsel protested it. Order No. 19726 resulted in United's experiencing earnings in excess of its authorized ROE of 14.5% which the Commission then ordered the Company to dispose of by recording additional depreciation expense. This requirement that the Company record additional depreciation expense resulted in a lower overall revenue requirement and subsequent rate reductions.

Although there were various factors that might have accounted for some of the Company's excess earnings, such as access line growth, increased toll volumes and some efficiency gains on the part of the Company, the Company's earnings situation clearly required a full examination by the Commission.

The Commission was thus faced with the need to protect the ratepayers from any excess earnings on a going-forward basis. Therefore, the Commission consulted the provisions of the interim statute as it existed at that time, section 364.055, Florida Statutes (1989). Section 364.055(2)(b) (1989), provides:

> (b) In a proceeding for an interim decrease in rates, the commission shall authorize, within 60 days of the filing for such relief, the continued collection of the previously authorized rates; however, revenues collected under those rates sufficient to reduce the achieved rate of return to the maximum of the rate of return calculated in accordance with subparagraph (5)(b)2. shall be placed under

> bond or corporate undertaking subject to refund with interest at a rate ordered by the commission.

Subparagraph (5)(b)2. provides:

> 2. "Required rate of return" shall be calculated as the weighted average cost of capital for the most recent 12-month period, using the company's last authorized rate of return on equity, the current embedded cost of fixed-rate capital, the actual cost of short-term debt, the actual cost of variable-cost debt, and the actual cost of other sources of capital which were used in the company's last rate case.

At this point, the Commission looked to the Company's last rate case in which it had been authorized to earn a 14.75% to 16.75% ROE. By these specific provisions of the interim statute, the Commission could place subject to refund only earnings in excess of the maximum of the last authorized range of return on equity, or earnings in excess of 16.75%. If it followed the specific provisions in section 364.055, the Commission could not protect the ratepayers, on a going-forward basis, from the earnings in excess of a reasonable ROE that prudent judgment indicated United would experience in 1990.

The Commission is, however, required by law to protect United's ratepayers from unjust or unreasonable rates. §364.14, Fla. Stat. (1989). To fulfill the mandate set out in section 364.14, the Commission initiated a limited proceeding by Order No. 22205, issued November 21, 1989 [A 13. In Order No. 22205, the Commission explained the basis for its concerns regarding United's ROE and its statutory authority for a limited proceeding to

investigate the appropriate ROE for the Company. Order No. 22205 [A 3] states:

> On December 14, 1989, we shall hold the limited proceeding hearing and make our decisions regarding the appropriate return on equity for the Company and whether it is appropriate to place revenues subject to refund at a special agenda conference immediately following that hearing.
>
> . . . .
>
> Subsequently, we will proceed with an investigation of United's earnings and rate structure. After the completion of the limited proceeding, we will require the Company to file MFRs by a date certain and on a test year to be determined at that time.

Subsequent to the limited proceeding, the Commission issued Order No. 22377 on January 8, 1990 [A 6], in which United's ROE was established as 12.8%, with a range of 12.3% to 13.3%. Based on the Company's August 31, 1989, surveillance report, which reflected an achieved ROE of 13.66%, and four adjustments, two proposed by United and two by the Commission Staff, the Commission determined United's achieved ROE to be 14.53%. After calculating the amount of earnings necessary to reduce United's achieved ROE of 14.53% to the maximum of the range authorized in the limited proceeding of 13.3%, the Commission then placed $7,605,000 annually of United's revenues subject to refund with interest effective January 1, 1990. Order No. 22377, in Section III [A 8-91, specifically states:

> The Company takes the position that Chapter 364, Florida Statutes, does not authorize this Commission to place revenues subject to refund during the pendency of this

> docket. We find our authority to initiate this limited proceeding within the general authority granted this Commission to regulate the telecommunications industry as set forth in Section 364.14, Florida Statutes. That Section predates the specific provisions of Section 364.05 (sic), Florida Statutes, commonly called the "interim statute". In this limited proceeding, we are resetting the authorized return on common equity for this telephone company. If the provisions of the interim statute adequately addressed the factual particulars of this telephone company's situation we would be utilizing its specific provisions. However, the last authorized return on common equity set for this Company was set so long ago and in such a different financial climate, that it would be inappropriate to utilize it at this time. It is imperative that this Commission protect the Company's ratepayers by placing the appropriate amount of revenues subject to refund at this point, the outset of a full rate proceeding that will require many months to complete. We can calculate the correct revenue amount only if we first adjust the Company's allowed return on common equity to a more appropriate level.

Later in Order No. 22377 [A 113, the Commission stated:

> Placing a revenue amount subject to refund that will bring the Company's achieved return on equity down to the ceiling of the authorized range of returns on equity for the Company is in accordance with the provisions of the interim statute.

As Order No. 22377 makes abundantly clear, United had every indication that the Commission intended to utilize the interim statute in all respects that it could, except for the compelling need to reestablish United's ROE at a more appropriate level. United was aware that the Commission was adjusting its ROE so that the appropriate amount of revenues could be placed subject to

refund at the outset of a rate proceeding in which it would file minimum filing requirements (MFRs). United had no basis on which to believe that it would be involved in anything different than a rate case conducted consistent with the requirements of the interim statute.

United has argued that Order No. 22377 could not be considered an "interim order" because its title reflected that it was a final order and because the "Notice of Further Proceedings or Judicial Review" appearing at the end of the order stated the basis for further review of the Commission's "final action" in the matter. It is remarkable that United would attempt to make a serious argument that Order No. 22377 was not an interim order based on such indicia.

United has stated that interim orders have never been subject to judicial review, therefore, because this was a final order and subject to judicial review, it could not be an "interim order". Order No. 22377 was styled a final order because it followed a full hearing in which the Company's authorized ROE was adjusted to a more appropriate level. On that issue, the level of ROE, the Order was final and the Company would have been entitled to judicial review. However, as is already clear, the substantive portion of the order placing revenues subject to refund undeniably demonstrated that it was in the nature of an interim order.

This Court has indicated that it will look to the substance of an order for its effect, not to the styling of the title or other

less substantive indications. As this Court declared in Citizens v. Mayo, 316 So.2d 262 (Fla. 1975):

> Petitioners contend that the order of the Commission is final and therefore reviewable since it was styled by the Commission in a separate docket. We hold that the order of the Commission is an interim order and not final. Under the provisions of Section 366.06, Florida Statutes, the legislature prescribed the method a utility must use to obtain a rate increase. An "interim rate increase" is a part of the main proceeding and is authorized only "pending a final order by the commission." The statute must be read as a whole. When read in this manner, an interim order is clearly not a separate proceeding whatever its docket number.
>
> . . . . This is not, as asserted by petitioners, an unrestricted discretionary grant of power. The Commission, under the statute, must act reasonably, given the circumstances of each request, ... The Commission's action is restricted to ensure the protection of the public through an appropriate bond . . . .
>
> . . . . We hold the legislature had the power to grant this authority, and adequate due process protections are provided in the act. . . .

Id. at 263-264.

The purpose of the restrictions on the Commission's interim authority is the protection of the public. The Commission has amply demonstrated that its paramount intention in this proceeding has been to protect United's ratepayers.

United subsequently filed its MFRs on May 15, 1990. On July 23, 1990, the parties attended an issue identification meeting at which the issues to be resolved in the rate proceeding were

identified by the parties. As early as that date, United was aware that there would be an issue in the proceeding to deal with the appropriate amount and disposition of the revenues held subject to refund.

As late as the prehearing conference, which was held August 27, 1990, the parties had the opportunity to argue for the addition, deletion, or alteration of issues. Order No. 23539 [R 487], the Prehearing Order, subsequently issued on September 28, 1990, reflected the agreed-upon wording of Issue 63 as follows:

> 63. ISSUE: What is the amount and appropriate disposition of the revenue held subject to corporate undertaking?
>
> UNITED: The appropriate disposition of revenue held subject to corporate undertaking cannot be determined until 1990 results are known. (Mr. McRae)
>
> FPTA: No position.
>
> AT&T: No position at this time.
>
> CITIZENS: No position.
>
> STAFF: No position at this time pending further discovery.

United makes much of the fact that the Company was the only party that took a position on this issue in the Prehearing Order. However, the very fact that the issue was identified in the Prehearing Order as an issue that would be dealt with in the hearing demonstrates that United's claimed lack of notice or belief that this issue would or should be resolved at the conclusion of the rate case is disingenuous. Indeed, as this Court noted in

Citizens v. Public Service Commission, 435 So.2d 784, 787 (Fla. 1983):

> The Commission unquestionably has the discretionary authority under the Administrative Procedure Act, chapter 120, Florida Statutes (1981), to determine issues which will be litigated in a rate proceeding, both to put parties on notice and to ensure an adequate musterins of evidence. The Commission's prehearing conference was held to provide counsel an opportunity to raise issues of concern and its prehearing order then formalized the decisions there agreed upon. (emphasis added)

The Commission's prehearing order in this matter put United on notice that its 1990 earnings and the appropriate disposition of its revenues placed subject to refund were at issue.

United Telephone Company of Florida had every reason to know and believe that the Florida Public Service Commission's action in placing its revenues subject to refund by Order No. 22377 was an interim measure to protect ratepayers consistent with the procedures set out in section 364.055, Florida Statutes (1989). The Commission made it absolutely clear that this was its intent in Orders Nos. 22205 and 22377.

The Commission reiterated this intent in its final rate case Order No. 24049, issued January 31, 1991 [A 14], and again on reconsideration, in Order No. 24595, issued May 29, 1991 [A 90]. The Commission gave United more than ample opportunity to be heard at every juncture of this proceeding. United had every reason to know that this was an action patterned on the interim statute in every particular except the adjustment of the Company's ROE during

the limited proceeding. In all other respects, this proceeding was consistent with the Commission's past practice in applying the provisions of the interim statute. United was given every due process right to which it was entitled.

During the limited proceeding to adjust United's ROE to a reasonable level, United was given a full hearing, with the opportunity to present witnesses and testimony and to cross-examine opposing witnesses. United fully exercised its due process rights during that limited proceeding. Order No. 22377 fully set out the basis for the Commission's decision to reduce United's authorized ROE to 12.8%, with a range of reasonableness of 12.3% to 13.3%. Based on the adjusted ROE, Order No. 22377 placed a portion of United's revenues subject to refund to protect the ratepayers.

United had, throughout the proceeding, the full knowledge that some disposition was to be made of those revenues at the conclusion of the rate proceeding. The Company may complain now that the outcome it desired did not result, but it cannot complain that the Commission abused its rights.

United did not request reconsideration nor did it file an appeal of Order No. 22377. United treated Order No. 22377 as what it recognized it to be, an order establishing an interim rate subject to adjustment at the end of the full rate proceeding.

B. The Commission Has Granted United Its Full Due Process Rights By Affording It A Fair Hearing And An Opportunity To Present Evidence And Testimony On Its 1990 Earnings In The Context Of The Full Rate Proceeding.

United clearly knew that the Commission would act on Issue 63 at the conclusion of the rate proceeding. United, therefore, has in actuality already had its hearing on its 1990, or interim period, earnings. The simple fact is that United now believes that its actual 1990 data would show that it earned less than its June 30, 1990, earnings surveillance report reflected. Therefore, United asserts that it has been denied its right to a full hearing.

It is well established that the Commission is not required to hold a full separate evidentiary proceeding focused only on the interim period's earnings. The Court stated in Southern Bell Telephone and Telegraph Company v. Bevis, 279 So.2d 285 (Fla. 1973):

> In City of Miami v. Florida Public Service Commission, 208 So.2d 249 (Fla. 1968), we determined that the Commission could not make a retroactive utility rate reduction, but we have never held the Commission powerless to make interim increases contingent on the outcome of a full hearing, and thus refundable if the full hearing discloses that the interim increase was improvidently granted. Thus, the company can be allowed to enjoy the rate of return authorized by the Florida Public Service Commission while full rate hearings progress without endangering the consumers of the utility's services.

Id. at 286-287.

It is clear that the Commission has the authority to make adjustments to the interim award at the conclusion of the hearing

on the request for permanent rate relief. As this Court stated in Citizens v. Public Service Commission, 435 So.2d 784 (Fla. 1983):

> In addition, interim rates are granted upon an expedited basis with the possibility of additional hearings to follow. At the subsequent hearing elements of the award of interim relief may be addressed and further adjustments may be made at the conclusion of the hearing.
>
> . . . .
>
> It is clear from a reading of the entire statute that the granting of interim relief should be done so that earnings are increased to the minimum of the previously authorized range. To accomplish this level of earnings the statute authorizes several accounting alternatives. The Commission may use a test period different from the test period used for permanent relief.

Id. at 786.

United concedes in its Brief, at page 20, that no separate hearing is required to determine an interim award.

In fact, there was no transformation of a final order into an interim order, on an ex parte or any other basis. Indeed, as this Court has pointed out in many cases, the Commission has very broad discretion in fixing fair, just and reasonable interim rates. Citizens v. Public Service Commission, 425 So.2d 534 (Fla. 1982). The Commission has exercised its discretion carefully and thoughtfully in this proceeding to protect United's ratepayers without abusing United's rights.

II.

THE COMMISSION'S ACTIONS IN ORDERS NOS. 24049 AND 24595 ARE BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE FROM THE FULL RATE PROCEEDING.

In general, there are three basic approaches the Commission can take to determine a utility's interim period earnings. One method the Commission can utilize is the test year data from the twelve months proceeding immediately preceding the interim period, which is also the data most often used to determine the interim award at the outset. A second method the Commission can utilize is the utility's permanent test year data filed to support its permanent rate increase application. Finally, the third method is to utilize the actual data from the interim period.

In this specific case, the Commission was faced with using the historical test year which was the twelve months period of **1989**, the totally projected test year of **1991**, or the actual data available from the interim period of **1990** to approximate United's 1990 earnings. The Commission does not often have the benefit of actual interim results on which to determine a utility's interim earnings. Quite regularly, the Commission has chosen either the historical or the projected test year data on which to approximate a utility's interim earnings. It is evident, however, that actual data from the interim period is likely to be the most accurate data available regarding a utility's interim earnings, and this is what the Commission chose to use.

United argues that the Commission did not act on the basis of competent and substantial evidence, because it did not rely on United's evidence. Specifically, the Company sets out in its Brief the various locations at which its chief financial officer, Mr. McRae, testified as to his predictions of what United would earn in 1990. If the Commission had chosen to act on Mr. McRae's predictions that United would earn less than 13.0% in 1990, it is likely United would not have taken this appeal. Of course, if that had been the case, United would not have been ordered to refund any of its revenues held subject to refund. United is only complaining because its evidence was not relied upon by the Commission, not because there was no competent substantial evidence in the record to support the Commission's decision.

The Commission had projections of United's earnings for 1990 in the record in the form of data filed with the Company's MFRs, as well as the testimony of the Company's chief financial officer as to what he believed United would earn in 1990. The Commission also had six months of actual 1990 data in the record in the form of United's June 30, 1990, earnings surveillance report, filed by United with the Commission. The earnings surveillance report was submitted as an exhibit during the Commission staff's cross-examination of the Company's chief financial officer.

It is important to point out here that the Company's June 30, 1990, earnings surveillance report was pre-identified as a staff exhibit for the Company's chief financial officer in the Prehearing Order No. 23539, issued a few days before the hearing began.

United was, therefore, on notice that this exhibit would be introduced into the record.

After weighing all the evidence and its staff's recommendation, the Commission decided to rely on the Company's June 30, 1990, earnings surveillance report with its six months of actual 1990 data as the most current and reliable information available. The Commission then trended this data to reflect the very gradual decline in earnings reflected for the first six months of 1990.

United complains arduously that the Commission has denied its due process by calculating its interim earnings on the basis of only the first six months of actual 1990 data projected over the second half of 1990. The Company asserts that this actual data, submitted by the Company, is not a proper surrogate for its 1990 earnings. However, United does not appear to have any problem with the Commission's setting its rates for 1991 on totally projected data.

United also argues that the adjustments the Commission made were not based on evidence in the record. In fact, however, the Commission made five adjustments to this data to reflect the adjustments made in the Company's last rate case, to as closely approximate the interim period's earnings as possible. Even if the Commission had accepted Company witness McRae's projected figure for United's 1990 earnings, each of these adjustments, consistent with the last rate case, would have had to be made. This would

have resulted in making the Company's achieved ROE substantially greater than McRae's estimate of United's 1990 ROE.

The Commission's first adjustment was to the Company's net operating income to reflect the reversal of the General Services & Licenses (GS&L) Credit for deferred taxes on intercompany profits. This adjustment was to make the June 30, 1990, earnings surveillance report data consistent with the Company's last rate case in 1982. United acknowledges in its Brief at page 30 that this adjustment appears on its June 30, 1990, earnings surveillance report.

The Commission's second adjustment was to include unlisted/nonpublished revenues in regulated revenues. This adjustment made the calculation of the Company's directory revenues consistent with the regulatory treatment of these revenues in the Company's last rate case in 1982. The specific dollar amount of this adjustment appears in the record of this proceeding. [T 702]. The Company's chief financial officer stated upon cross-examination by the staff counsel that this was the correct dollar amount to reflect this adjustment for the Company's earnings for the twelve-month period ended June 30, 1990.

The Commission's third adjustment was to reduce the Company's data processing expenses associated with directory operations to assure that the Company's expenses were consistent with the Commission's decisions in the Company's 1982 rate case. Upon cross-examination of the Company's chief financial officer by staff counsel, he testified that the dollar amount of this adjustment was

based on an estimate provided by the Company to the Public Counsel's witness DeWard. [R Vol. XXVI, Ex. 67] He further testified that it was merely an estimate and that he was unable to provide a better figure. The Commission had no other figure on which to base this adjustment that was required as having been made in the Company's last rate case.

The Commission's fourth adjustment was to exclude a portion of GS&L expenses consistent with the Commission's decisions in the Company's last rate case in 1982. This adjustment is not only consistent with the Company's 1982 rate case, but reflect the identical amounts in that rate case (Order No. 11029). [T 651-6521 The nature of this adjustment was the subject of staff cross-examination of the Company's chief financial officer. He testified that the Company simply did not include this adjustment on its June 30, 1990, earnings surveillance report. [T 688]

The Commission's fifth adjustment was to reduce the Company's working capital calculation to reflect the effect of the Commission's first adjustment, which was to reverse the GS&L credit. This adjustment was necessary to assure that the Company's calculation of working capital was consistent with that calculation approved in its last rate case in 1982.

In its Brief, United asserts that the Commission made a sixth adjustment. United may be referring to a sentence in Order No. 24049 that alludes to an overall income tax effect of the above adjustments. The 1990 income tax effect of the five adjustments made consistent with the Company's last rate case is merely a fall-

out calculation based on the Company's effective tax rate which was filed by the Company in its MFRs.

All of the above adjustments are completely consistent with section 364.055, Florida Statutes (1989), that specifically requires that adjustments consistent with the Company's most recent rate case be made in determining the appropriate interim award. §364.055(5)(b), Fla. Stat.

United further argues that it did not know what the purpose of the staff was in placing its June 30, 1990, earnings surveillance report in the record. In light of the Company's extensive experience with the Commission, the use of the Company's August 31, 1989, earnings surveillance report to determine the appropriate amount of revenues to place subject to refund, and the identification of Issue 63 in the proceeding, this assertion of United's is hard to swallow.

Perhaps more troubling is United's contention that since the Commission staff did not take a position on Issue 63 in the Prehearing Order No. 23539, the Commission had no option but to accept United's position. This is clearly not the law.

United had the burden of establishing the level of its interim earnings. In South Florida Natural Gas v. Florida Public Service Commission, 534 So.2d 695 (Fla. 1988), this Court stated:

> More specifically, the company argues that the commission failed to take a position on all of the issues and, because the commission failed to present testimony or tangible evidence, it cannot reevaluate the fiscal evidence presented. Further, because no evidence was presented by the commission,

> no material issues exist, thus precluding the commission from a formal proceeding under section 120.57(1), Florida Statutes (1985). We reject this contention. The act of filing creates issues of material fact for all factors comprising the justification for the increase. We find that, under the commission's rate-setting authority, a utility seeking a change must demonstrate that the present rates are unreasonable, **see** section 366.06(1), Florida Statutes (1985), and show by a preponderance of the evidence that the rates fail to compensate the utility for its prudently incurred expenses and fail to produce a reasonable return on its investment.
>
> We reject the utility's contention that it was deprived of due process of law because the commission allowed its staff to make inquiry of utility witnesses and assist in evaluating the evidence. . . . . We find that the commission is clearly authorized to utilize its staff to test the validity, credibility, and competence of the evidence presented in support of an increase. Without its staff, it would be impossible for the commission to "investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service."

In this case, the Commission used its staff to test the credibility of United's fiscal evidence. The Commission correctly found the testimony of the Company's witness McRae, that United would not earn in excess of 13.0% in 1990, simply did not warrant as much weight as the Company's June 30, 1990, earnings surveillance report, with its six months of actual 1990 data.

United does not like the result of the Commission's weighing of the evidence in this proceeding. Therefore, United asserts that the Commission did not base its decision on competent, substantial evidence. The Company asks the Court to substitute its judgment

for the Commission's, which is not appropriate under the law. The basis for the Court's review of Commission orders is set out in Citizens v. Public Service Commission, 425 So.2d 534 (Fla. 1982), as follows:

> The standard on review is whether competent, substantial evidence supports a Commission order. Citizens v. Hawkins, 356 So.2d 254, 259 (Fla. 1978); De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957). Orders of the Commission come before this Court clothed with the presumption of validity. On review this presumption of validity can only be overcome where the Commission's error either appears plainly on the face of the order or is shown by clear and satisfactory evidence. General Telephone Co. v. Carter, 115 So.2d 554, 556-57 (Fla. 1959).

The Commission's actions in Order Nos. 24049 and 24595 meet the essential requirements of law as set forth above.

CONCLUSION

The Commission's actions in Orders Nos. 24049 and 24595 comport with of the essential requirements of law and represent the Commission's exercise of its statutory mandate to set fair, just and reasonable interim rates for this Company. Therefore, the Commission requests that this Court affirm Orders Nos. 24049 and 24595.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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