

BEFORE THE SUPREME COURT OF FLORIDA

UNITED TELEPHONE COMPANY OF FLORIDA,)
Appellant,)

vs.)

Case No. 78,173

FLORIDA PUBLIC SERVICE COMMISSION,)
Appellee.)

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

CITIZENS' ANSWER BRIEF

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TABLE OF CONTENTS

1

	<u>Page</u>
Table of Citations.....	i
Summary of Argument.....	1
Argument	
I. THE COMMISSION COMPLIED WITH ITS STATUTORY MANDATE TO SET FAIR, JUST AND REASONABLE RATES IN THIS CASE.....	2
II. THE COMMISSION RELIED UPON SUBSTANTIAL COMPETENT EVIDENCE IN ESTABLISHING UNITED'S 1990 EARNED RATE OF RETURN.....	5
Conclusion.....	11
Certificate of Service	

TABLE OF CITATIONS

Page(s)

Cases

Citizens v. Florida Public Service Commission.
383 So.2d 901 (Fla. 1980) 7. 8

Citizens v. Public Service Commission.
425 So.2d 534. 538 (Fla. 1982) 2. 3. 5. 6

Florida Gas Co. v. Hawkins,
372 So.2d 1118 (Fla. 1979) 7

Floridians United for Safe Energy, Inc. v. Public Service Commission.
475 So.2d 241 (Fla. 1985) 3

Occidental Chemical Co. v. Mayo,
351 So.2d 336 (Fla. 1977) 9. 10

South Florida Natural Gas Co. v. Public Service Commission.
534 So.2d 695 (Fla. 1988) 1. 10

United Telephone Co. of Florida v. Manq,
403 So.2d 962. 966 (Fla. 1981) 1. 3

Florida Statutes

Section 120.61, Florida Statutes 8

Section 364.055, Florida Statutes (1989) 3. 9

Section 364.14, Florida Statutes (1989) 1-3, 5

Section 364.14(1), Florida Statutes (1989) 2

Section 366.05(1), Florida Statutes 5

Section 366.06(1), Florida Statutes (1985) 10

Section 366.06(2), Florida Statutes 5

Section 366.06(4), Florida Statutes 6

Section 366.076, Florida Statutes (1983) 3

Florida Public Service Commission Orders

FPSC Order No . 22377 4

FPSC Order No . 23539 6

FPSC Order No . 24049 2. 4. 5. 9. 12

FPSC Order No . 24595 2. 5. 8. 12

FPSC Order No . 22377 4

FPSC Order No . 23539 6

FPSC Order No . 24049 2. 4. 5. 9. 12

FPSC Order No . 24595 2. 5. 8. 12

SUMMARY OF ARGUMENT

Under its power to protect the health, safety and welfare of the Citizens, the Florida Legislature has charged the Public Service Commission with setting fair, just and reasonable rates. § 364.14, Fla. Stat. (1989). This Court has recognized the broad discretion delegated to the Commission in the performance of its lawful duties. United Telephone Co. of Florida v. Mann, 403 So.2d 962, 966 (Fla. 1981). In determining the amount of United's revenues that are to be refunded to the ratepayers, the Commission weighed the evidence of record and determined reasonable amounts to be refunded and to be held subject to further disposition.

In deliberating the appropriate amount to be refunded, the Commission relied upon evidence provided by the Company, which was introduced into the record, and on Staff's evaluation. See South Florida Natural Gas Co. v. Public Service Commission, 534 So.2d 695 (Fla. 1988) (finding that the company WAS not deprived of due process of law by allowing its staff to cross-examine the company's witnesses and assist in evaluating the evidence). In this case, the Commission afforded the Company a full opportunity to address the issue of its earnings during 1990 and relied upon substantial competent evidence in reaching its final decision. United has proven no grounds for relief. Hence, this Court should deny United's request for further hearings.

ARGUMENT

I. THE COMMISSION COMPLIED WITH ITS STATUTORY MANDATE TO SET FAIR, JUST AND REASONABLE RATES IN THIS CASE.

The standard on review is whether competent substantial evidence exists to support Orders Nos. 24049 and 24595, Citizens v. Public Service Commission, 425 So.2d 534, 538 (Fla. 1982). United bears the burden of overcoming the presumption of correctness of the Commission's action by showing an error on the face of the order or by clear and satisfactory evidence, Id. at 538-39. United has failed to meet its burden.

The Public Service Commission has a broad range of discretion to protect the citizens of this state from unreasonable rates. § 364.14, Fla. Stat. (1989).¹ In a case involving United, this

¹. Section 364.14(1), Florida Statutes (1989) provides:

Whenever the commission finds, upon its own motion or upon complaint, that the rates, charges, tolls, or rentals demanded, exacted, charged, or collected by any telephone company for the transmission of messages by telephone, or for the rental or use of any telephone line; any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance, or device; or any telephone extension or extension system, or that the rules, regulations, or practices of any telephone company affecting such rates, charges, tolls, rentals, or service are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law, or that such rates, charges, tolls, or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls, or rentals to be thereafter observed and in force and fix the same by order as hereinafter provided. in prescribing rates, the commission shall allow a fair and reasonable return on the telephone

Court recognized the Commission's broad grant of legislative power under Section 364.14, Florida Statutes, to order an interim rate decrease. United Telephone Co., 403 So.2d at 966 (finding that the Commission had not abused its discretion in ordering "interim rate decreases upon finding that a company is earning revenues in excess of its maximum allowable rate of return); see Citizens, 425 So.2d at 540. This broad grant of power has been recognized to predate the statutory mandate of limited proceedings. Floridians United for Safe Energy, Inc. v. Public Service Commission, 475 So.2d 241 (Fla. 1985) (holding that PSC had power to grant subsequent year rate increases which predated its limited proceeding power granted by Section 366.076, Florida Statutes (1983)). See also Citizens, 425 So.2d at 540, citing United for the proposition that "[t]he Court was clearly upholding the Commission's discretion to determine, on a case by case basis, what evidence it will consider in fixing interim rates."

Faced with a company that was clearly earning well in excess of a market rate of return, the Commission acted promptly and reasonably to protect the citizens of this state, as it is statutorily compelled to do. It found that it could not proceed to set an interim rate for United under the interim statute² as this would merely continue United's present unreasonable earnings to the

company's honest and prudent investment in property used an useful in the public service.

². § 364.055, Fla. Stat. (1989).

detriment of the Company's ratepayers. Order No. 24049. [Appellant's Brief, A 50]. Because the interim statute applies a company's rate of return from its most recent rate case, which was in 1982, the Commission found that the interim statute was inadequate to address the "factual particulars" of this case. Order No. 22377 [Appellant's Brief, A 8]. Noting that seven years and many changes in the Company's structure and operations had elapsed since it had last set United's return on equity, the Commission found it appropriate to hold a proceeding limited to determining a return on equity that would reflect United's present earnings. Order No. 24049. [Appellant's Brief, A 16].

In setting the amount subject to refund in the limited proceeding, the Commission

paralleled the requirements of the interim statute by placing the amount of revenue in excess of the newly determined authorized ROE ceiling subject to refund. The procedure which we utilized in that case is the same procedure outlined in the interim statute except for our decision to use a current ROE. Order No. 24049. [Appellant's Brief, A 51].

Having adjusted United's return on equity to reflect current market realities, the Commission further protected the ratepayers by placing \$ 7,605,000 with interest subject to refund. Order No. 24049 [Appellant's Brief, A 17]. This action was not harmful to the Company since the Company would have the opportunity to justify keeping this amount in the full rate hearing. Satisfied that it had protected the interests of the ratepayers, the Commission

proceeded with a full rate case in which United exercised its full due process rights. Order No. 24049. [Appellant's Brief, A 17].

"This Court has consistently recognized the broad legislative grant of authority which these statutes [Sections 366.06(2), 366.05(1), Florida Statutes³] confer and the considerable license the Commission enjoys as a result of this delegation." Citizens, 425 So.2d at 540. The Commission has not exceeded its grant of authority; rather, it has complied with the tenor of its statutory mandate to set fair, just and reasonable rates in order to protect the citizens of this state.

II. THE COMMISSION RELIED UPON SUBSTANTIAL
COMPETENT EVIDENCE IN ESTABLISHING UNITED'S
1990 EARNED RATE OF RETURN.

United has the burden of showing that the Commission did not rely upon substantial competent evidence in rendering Orders Nos. 24049 and 24595. Citizens v. Public Service Commission, 425 So.2d 534 (Fla. 1982). "It is clear that the evidentiary basis for an interim increase need not be subject to the same intense scrutiny, cross-examination, and adversarial contest as is required in the

³. Section 366.06(2), Florida Statutes, grants the Commission the same authority as Section 364.14, Florida Statutes, but applies to electric utilities. Section 366.05(1), Florida Statutes, is the legislative delegation of power to the Commission to set fair and reasonable rates.

final public hearings."⁴ Id. at 540. United claims that the Commission had insufficient evidence to support its decision and ignored the only evidence offered by United's witness. It further claims that the lack of notice on this issue [63] stems from the purported failure of the staff to introduce a position on the issue of calculation of revenues subject to refund so that it was precluded from addressing the issue. [Appellant's Brief, A 27].

United had notice before August 15, 1990, that the amount and disposition of revenue held subject to refund would be at issue in the rate case. [R-193, 234, 395]. Between the early identification of the issue and the hearing date of October 1, 1990, United had adequate notice and opportunity to present evidence on the issue and to inquire as to Staff's position on the issue. Furthermore, in Order No. 23539, issued on September 28, 1990, Staff identified Exhibit RDM-6 (the June 30, 1990 earnings surveillance report) as an exhibit to be introduced at the hearing. [R-Vol. IV at 487]. Not only was United on notice that the surveillance report would be introduced at the hearing, United did not object to the inclusion of the report into the hearing record. [T-651, 704-06; Appellant's Brief, 29].

⁴. The interim proceedings alluded to are file and suspend procedures in Section 366.06(4), Florida Statutes, in the electric statutes. The same standard applies to all interim rate proceedings conducted by the Commission as the public policy supporting interim rates (avoidance of regulatory lag and protection of the ratepayers) is the same.

In the only cases addressing the issue United raises, the Supreme Court indicated objections to Commission decisions based on the information received outside of the record. In Florida Gas Co. v. Hawkins, 372 So.2d 1118 (Fla. 1979), this Court found that the denial of a petition for a rate increase based on the use of surveillance reports not in the record constituted a denial of due process. Unlike the instant case, Florida Gas involved use of surveillance reports which were not a part of the record. This Court suggested that resort to matters outside the record must be accompanied by notice and an opportunity to explain or rebut the matters so recognized. Id. at 1121. Though on notice both as to the issue and the use of the exhibit prior to hearing, United neither availed itself of the opportunity to meet its burden nor made inquiry on the issue. The Company should not be heard to complain now.

In Citizens v. Florida Public Service Commission, 383 So.2d 901 (Fla. 1980), three dissenting justices noted that the Supreme Court of Florida had previously quashed the Commission's efforts to base regulatory action upon official notice of surveillance reports because parties were not afforded the opportunity to contest the data. The Commission terminated a rate case and converted an interim award to a permanent award on the basis of its review of the company's surveillance reports. While the parties conceded that the surveillance reports were not part of the official record in the proceeding, the Commission stated that, pursuant to Section

120.61, Florida Statutes, it had taken "official notice" of the surveillance report at a post-hearing agenda conference where parties could not participate. Id. at 903. The dissent would have found the Commission's use of the surveillance report to constitute a denial of administrative due process because the reports were not included in the record and did not comply with the requirements of Section 120.61, Florida Statutes. Id. at 904.

In this case, United was not so disadvantaged and was afforded the basic rudiments of procedural due process of notice that the reports would be used, that the calculations of 1990 earnings would be at issue, and that they would have an opportunity to be heard. Additionally, unlike the cases cited, United's surveillance reports were introduced into the record of this case and United's witness, Mr. Richard McRae, was given an opportunity to respond to questions about the reports. [Appellant's Brief, 29; T-651, 704-06].

United complains that there is no evidence that the June 30, 1990, surveillance report represents the earnings level that would have been achieved by United in the full 1990 calendar year. The Citizens disagree and believe the record supports the Commission's decision. As the Commission stated when it denied United's request for reconsideration: "The Company failed to submit any evidence into the record on which the Commission could determine the appropriate disposition of its revenues held subject to corporate undertaking." Order No. 24595. [Appellant's Brief, A 94]. Thus,

the Commission "annualized the decline in earnings from December 1989 to June 1990 in order to more closely approximate 1990's earnings." Order No. 24049 [Appellant's Brief, A 51]. This represented the most recent actual data about United's earnings during 1991, in contrast with the wholly projected earnings data United would have preferred the Commission to use.

The Commission used the most current actual earnings data provided by United and contained in the record. Logic supports the use of the June 30, 1990, surveillance report. Its use is also consistent with the Commission's longstanding interim ratemaking authority, which has recently been codified as the interim statute. See § 364.055, Fla. Stat. (1989). In setting interim rates or revenues subject to refund, the statute does not require "up to the minute" information, but instead permits the Commission to use the most recent twelve month period. See Id. This has always been construed to mean the most recent twelve month period available. Use of the most current information available at the time of hearing -- the June 30, 1990, surveillance reports -- is consistent with the Commission's interim authority.

Under the substantial competent evidence standard, this Court has determined that the Commission need only identify the record source for facts they have found, and need only include the ultimate facts upon which it relied in the final order. Occidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla. 1977). In Occidental,

the only evidence in the record as to "rate design came as staff counsel concluded an oral recitation of recommendations:

Finally, the overall increase 19.9 percent. This compares with about 15 and a half to 15.9 percent granted on an interim basis. These increases we are recommending be spread in a proportional manner to that proposed by the company originally." *Id.* at 339 (emphasis in original).

Not only did United's witness, Mr. McRae have an opportunity to respond to staff's questions regarding the company's 1990 earnings, United's 1990 surveillance report was made a part of the record.

In South Florida Natural Gas, Co., the company also claimed that the Staff failed to take any position at all on the issue, that its evidence was unchallenged, that the proceeding was nonadversarial, that it did not have an opportunity to rebut Staff's evaluation, and that the Commission ignored the Company's evidence. 534 So.2d at 697. This Court rejected the company's contention that it had been denied due process of law. *Id.* This Court found

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.' *Id.* at 698 (quoting § 366.06(1), Fla. Stat. (1985).

The Commission relied upon its staff's evaluation and the

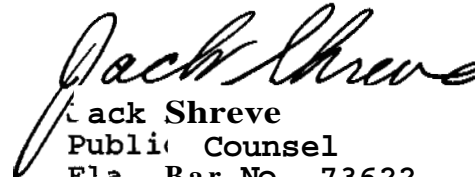
record evidence in reaching its final determination of United's 1990 earnings. Additionally, the final order clearly sets out the ultimate facts, supported by the record of testimony and exhibits, which were used to determine the amount to be refunded. This meets the test set by this Court.

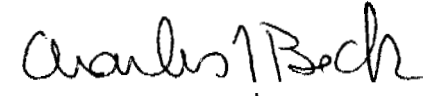
CONCLUBION

The Commission's decision was based upon the most recent actual earnings data for 1990 available in the record. While United would have preferred that the Commission use wholly projected data to determine the amount of excessive earnings during the interim period, the Commission chose instead to use the most recent actual data available at the time of the hearing showing what United was actually earning during 1990. Not only was the data competent, substantial evidence; it was actually the best data available at the hearing to determine what United was actually earning during 1990.

The Citizens respectfully request this Court to deny Appellant's request for a further hearing and to affirm Order Nos. 24049 and 24595.

Respectfully submitted,


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CERTIFICATE OR SERVICE
CASE NO. 78,173

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties this 18th day of September, 1991.

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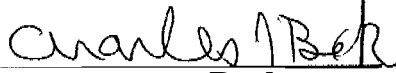
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