IN 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

INITIAL BRIEF OF APPELLANTS

Jerry M. Johns
Bar No. 0137560
Alan N. Berg
Bar No. 0172112
UNITED TELEPHONE COMPANY
OF FLORIDA
Post Office Box 5000
Altamonte Springs, FL
32716-5000
(407) 889-6018
Attorneys for Appellants

TABLE OF CONTENTS

	Page
Table of Citations	i
Introduction	1
Statement of the Case and Facts	3
Summary of the Argument	12
Argument	
I. WHETHER THE FLORIDA PUBLIC SERVICE COMMISSION'S ACTION IN DETERMINING UNITED TELEPHONE COMPANY OF FLORIDA'S EARNED RATE OF RETURN FOR 1990 WAS AUTHORIZED BY LAW.	14
11. WHETHER THE FLORIDA PUBLIC SERVICE COMMISSION RELIED ON COMPETENT SUBSTANTIAL EVIDENCE TO DETERMINE UNITED TELEPHONE COMPANY OF FLORIDA'S 1990 EARNED RATE OF RETURN.	23
Conclusion	36
Certificate of Service	38

TABLE OF CITATIONS

Cases **Page(s)**

Agrico Chemical Co. v. State of Florida,
365 So.2d 759, 763 (Fla. 1st DCA 1978)
cert. denied 376 So.2d 74 (1979) 32

mocker's Transfer & Storase v. Yarboroush,
277 So.2d 9, 11 (Fla. 1973) 24

Citizens of Florida v. Mavo,
316 So.2d 262, 263-4 (Fla. 1975) 17

Citizens of the State of Florida v.
Public Service Commission,
435 So.2d 784, 786 (Fla. 1983) 21

City of Miami v. Florida Public Service Commission,
208 So.2d 249, 259-60 (Fla. 1968) 30

DeGroot v. Sheffield,
95 So.2d 912, 916 (Fla. 1957) 32

Duval Utility Co. v. Florida Public Service Commission,
380 So.2d 1028, 1031 (Fla. 1980) 32, 34

Florida Gas Co. V. Hawkins,
372 So.2d 1118, 1121 (Fla. 1979) 22

Gulf Power Co. v. Florida Public Service Commission,
453 So.2d 799, 805 (Fla. 1984) 24

Maule Industries v. Mavo,
342 So.2d 63, 65 n.1 (Fla. 1977) 17

Occidental Chemical Co. v. Mayo,
351 So.2d 336, 341 (Fla. 1977) 33

Southern Armored Service, Inc. v. Mason,
167 So.2d 848, 850 (Fla. 1964) 14

State v. Hawkins,
364 So.2d 723 (Fla. 1978) 27, 28, 32

State, Department of Transportation v. Mavo,
354 So.2d 359, 361 (Fla. 1978) 14

United Telephone Company of Florida v. Mann,
403 So.2d 962 (Fla. 1981) 20, 21

Florida Statutes

Chapter 364. Fla. Stat. (1989) 1. 4. 15
Chapter 366. Fla. Stat. (1989) 15
Chapter 367. Fla. Stat. (1989) 15
Section 120.59(2), Fla. Stat. (1989) 33
Section 350.128 (1), Fla. Stat. (1989) 1
Section 364.01(1), Fla. Stat. (1989) 1
Section 364.02(4), Fla. Stat. (1989) 3
Section 364.055, Fla. Stat. (1989) 4. 12
Section 364.055(1), Fla. Stat. (1989) 16
Section 364.055(5)(b)3, Fla. Stat. (1989) 16
Section 364.14, Fla. Stat. (1989) . 3. 4. 12. 14. 15. 17-21
Section 364.381, Fla. Stat. (1989) 1
Section 364.385(2), Fla. Stat. (Supp. 1990) 1

Florida Constitution

Article V. Section 3(b)(2), Fla. Const. 1

Florida Public Service Commission Orders

FPSC Order No. 8378 22
FPSC Order No. 22205 . . . . 3. 4. 14. 15. 21
FPSC Order No. 22377 . . . . 4. 5. 10. 12. 15-19. 24
FPSC Order No. 23539 . . . . 6. 27
FPSC Order No. 24049 1. 8-12. 18. 19. 22. 23. 26. 28. 30. 31
FPSC Order No. 24595 . . . . 1. 8. 11. 19. 22. 33
FPSC Order No. 24942. . . . . 10. 11

Other Authorities

Fla. Admin. Code Rule 25-4.0245 . . . . 9. 28
Fla. Admin. Code Rule 25-4.114(4) 10
Fla. R. App. P. 9.200(a)(2) 1
Fla. R. App. P. 9.220 1

INTRODUCTION

This is an appeal by United Telephone Company of Florida (United or Company) from Order Nos. 24049 and 24595 issued by the Florida Public Service Commission (Commission or FPSC) on January 31, 1991, and May 29, 1991, respectively.

United has invoked jurisdiction conferred upon this Court by Article V, Section 3(b)(2) of the Florida Constitution, and Sections 350.128(1) and 364.381, Florida Statutes (1989). In accordance with Florida Rule of Appellate Procedure 9.200(a)(2), by a Statement of Judicial Acts to Be Reviewed included with its Directions to the Clerk, United limited this appeal to review of the above cited Orders only to the extent that those Orders address and deal with the determination of United's 1990 earnings.

Chapter 364, Florida Statutes, confers on the FPSC the powers over and in relation to telephone companies set forth in the Chapter. See, Section 364.01(1), Fla. Stat. (1989). This Chapter was substantially revised during the 1990 Session of the Florida Legislature. This Case was conducted under the provisions of Chapter 364, Florida Statutes, that existed prior to the revisions by the 1990 Session. See, Section 364.385(2), Fla. Stat. (Supp. 1990).

Pursuant to Florida Rule of Appellate Procedure 9.220, this brief is accompanied by an Appendix, which includes copies of the FPSC Orders to be reviewed, as well as other FPSC Orders cited in the brief. References to the Appendix are signified as [A ____]. References to other portions of

the Record are signified as [R ____], except that references to the transcript of the hearings conducted on October 1, 3-5, 8 and 9, 1990, are signified as [T ____]. References to Exhibits are signified by using the volume number of the Record in which the exhibit appears followed by the exhibit number and page. For example, page 5 of Exhibit 63 is referenced as follows: R Vol. XXVI, Ex. 63, p. 005.

STATEMENT OF THE CASE AND FACTS

United is a local telephone company as defined in Section 364.02 (4), Florida Statutes (1989), and is subject to the jurisdiction of the Commission.

On November 21, 1989, the Commission issued Order No. 22205, initiating a limited proceeding to establish a new return on equity for United and initiating an investigation of the Company's earnings. FPSC Order No. 22205 stated that:

> Based on our [the Commission's] general authority to regulate the telecommunications industry as set forth in Section 364.14, Florida Statutes, we hereby schedule a limited proceeding to determine the appropriate return on equity for United and, if appropriate, to place revenues subject to refund. [A 3.]

Commission Order No, 22205 noted that the Commission had previously authorized a range of return on equity for United for 1988 and 1989 of 12.5%-14.5%, and that on January 1, 1990, United's authorized range of return on equity would revert to 14.75%-16.75% authorized in United's last rate case which had been concluded in 1982. [A 1.] Order No. 22205 set a schedule for the limited proceeding in the Docket, and stated that subsequently the Commission would conduct an investigation of United's earnings and rate structure to include the filing of Minimum Filing Requirements and the determination of a test year. [A 3.]

It was also the Commission's intention, although not stated as such, that if the rate of return which was established in the limited proceeding was lower than the rate

of return United was then earning, the difference would be made subject to refund.

Citing as authority Section 364.14, Florida Statutes, and Order No. 22205, the FPSC held a public hearing on December 14, 1989, limited to the issues of the appropriate allowed return on common equity for United, and the calculation of revenues subject to refund, if any. [FPSC Order No. 22377, A 7.] Testimony was received from three witnesses, and the testimony of three other witnesses was accepted by stipulation. The Commission's authority to place revenues subject to refund under Section 364.14, Florida Statutes, was unsuccessfully challenged by United. The Commission stated:

> 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. [FPSC Order No. 22377, A 8.]

The Commission also found:

> Placing a revenue amount subject to refund that will bring the Company's achieved return on equity down to the ceiling of its authorized range of returns [sic] of equity for the Company is in accordance with the provisions of the interim statute. [FPSC Order No. 22377, A 11.]

Order No. 22377 set United's range of return on equity for the purposes of the limited proceeding at 12.3%-13.3%. [FPSC Order No. 22377, A 11.] The Commission also determined that $7,605,000 of United's revenues should be subject to refund with interest effective January 1, 1990. [FPSC Order No. 22377, A 11.]

On January 12, 1990, United wrote to the Chairman of the Commission requesting a prospective test year of calendar year 1991, which request was granted. [R 66 and 70.]

On May 15, 1991, United filed its minimum filing requirements[1] (MFRs) [R Volumes XVIII-XXV] which included a requested increase in rates and charges to produce additional revenues of $25,450,000 based on the 1991 projected test year. United updated its initial MFR filing on August 22, 1990, to incorporate a later budget view. These modifications increased United's request for additional revenues to $26,290,000 for the test year.

Service hearings were held in Altamonte Springs, Florida, on July 30, 1990, and in Ft. Myers, Florida on August 6, 1990.

Voluminous discovery was conducted of United by the Office of Public Counsel including eleven sets of interrogatories, and sixteen requests for production. The Commission Staff submitted eight sets of interrogatories consisting of 614 separate interrogatories. Forty-one persons

---

[1] The MFRs constitute the financial and operational data required by Commission Rules to file a rate case.

associated with United were deposed.[2] Some of these persons were deposed in panels. One witness was deposed over a period of five days. In addition, information was provided by United in response to informal requests, and the Commission Staff conducted an audit of United.

The Prehearing Order, Commission Order No. 23539, was issued on September 28, 1990, less than a week before the hearings began on October 3, 1990. Issue 63 in that Prehearing Order addressed the only issue that is on appeal before this Court. That Issue and the Responses to it, as stated in the Prehearing Order, are:

> 63. ISSUE: What is the amount and appropriate disposition of the revenue held subject to corporate undertaking?
>
> UNITED: The appropriate disposition of the 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. [FPSC Order No, 23539, p. 48 and 49. R 534-5.]

At the time the Prehearing Order was issued, less than a week remained prior to the commencement of the hearing, and at

[2] This figure double counts those persons who were deposed more than once.

that time no discovery on Issue 63 was pending. No subsequent discovery on the issue ever took place.

Public hearings, at which the Commission heard testimony and received evidence, were held on October 1, 3-5, 8 and 9, 1990, in Tallahassee, Florida. The following parties participated in the Hearings--United, the Office of Public Counsel, AT&T Communications of the Southern States, the Florida Pay Telephone Association and the Commission Staff. The Communications Workers of America was granted intervention to participate in the hearing on operator services issues, but did not present any testimony or cross-examine any witnesses. United presented six witnesses and the Office of Public Counsel presented two witnesses. The Commission Staff presented two witnesses on service. Testimony of two additional United witnesses, one additional Office of Public Counsel witness and one AT&T witness was admitted by stipulation,

Testimony and evidence relating to United's projected return on equity for 1990 were received during the course of the hearing. Exhibit 6, Schedule C-5, page 2 of 2, a part of the MFRs referred to earlier, reflects a projected return on average common equity for 1990 of 12.75%. [R Vol XVIII, Exhibit 6, Schedule C-5, page 2.] Exhibit 6, Schedule B-5b, page 2, United's 1990 Budget Commitment View dated January 1990, also in the MFRs, reflects a projected intrastate return

on common equity of 12.8% for 1990. [R Vol. XVIII, Exhibit 6, Schedule B-5b, page 2.] These were both filed with the Commission on May 15, 1990. On cross-examination by the Commission's Staff Attorney, United's Witness McRae was asked if based on United's more current October 1990 budget view, the forecasted return on equity for 1990 and 1991 had changed. After some clarifying questions, Mr. McRae testified that for 1990 the budgeted Commitment View showed United at 12.8%, and that in the updated October View, he believed United was projecting 12.9% return on equity for 1990. [T 702-703.] Mr. McRae's belief was confirmed by Exhibit No. 63, submitted by Staff, which shows the projection of 12.9% return on equity for 1990 from the October View Budget dated September 5, 1990.[3] [R Vol. XXVI, Ex. 63, p. 005.] United's June 1990 earnings surveillance report on which the Commission exclusively relied on the issue of United's 1990 earnings in Orders Nos. 24049 and 24595 was also introduced. [R Vol. XXVI, Ex. 61.]

United addressed Issue 63 at length in its posthearing brief filed with the FPSC on November 6, 1990.[4] [See, R Vol. VI.] The Office of the Public Counsel also addressed the

---

[3] Testimony on the accuracy of United's budget projections can be found at T 325-326 and R Vol. XXVI, Ex. 33.

[4] The discussion of this issue, which is Issue 63, begins on page 233 of United's Brief filed with the FPSC on November 6, 1990.

matter in its Brief filed with the FPSC on November 6, 1990.[5] [R Vol. V.] None of the other parties addressed the issue.

The Commission issued its Order No. 24049 on January 31, 1991. Section VIII on pages 37-39 of the Order, entitled "Disposition of United's Revenues Placed Subject to Refund," addresses the issue before the Court. [A 50-52.] This portion of the Order concludes:

> We believe that the Company's June 30, 1990 earnings surveillance report is the most current information available, and this is the most appropriate surrogate for United's earnings for 1990.[6] [FPSC Order 24049, A 51.]

The Order goes on to state that the following adjustments must be made to the June 30, 1990 earning surveillance report:

a. $1,156,248 for deferred taxes

b. $2,556,767 for directory revenues

c. $150,000 for data processing costs

d. $706,337 for general service & license expenses

e. $379,630 for working capital

f. an unidentified amount for taxes. [FPSC Order No. 24049, A 51.1

Finally, the Commission stated that:

---

[5] The Citizen's Brief begins at page 628 of Vol. V.

[6] The Earnings Surveillance Report is a monthly filing required of local telephone companies by Rule 25-4.0245, F.A.C. It shows financial results on a twelve month historical basis. The financial information in the June 30, 1990 earnings surveillance report was based on the last six months of 1989 and the first six months of 1990.

> We have annualized the decline in earnings from December 1989 to June 1990 in order to more closely approximate 1990's earnings. [FPSC Order No. 24049, A 51.]

The Commission concluded from these calculations that United would earn a return on equity in 1990 of 13.84%, which would exceed the midpoint of United's newly authorized rate of return on equity of 13.0% by .84% 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.

The revenue associated with the alleged excess earnings was found to be $6,151,700. The revenue subject to disposition with interest calculated according to Rule 25-4.114(4), Florida Administrative Code, was $6,406,949. The Commission disposed of this amount by ordering United to establish a deferred credit of $6,151,700 plus $255,249 of interest through December 31, 1990 to be applied to United's next depreciation represcription. [FPSC Order No. 24049, A 52.]

An additional amount of $1,453,000 was designated as being subject to refund contingent upon a determination of the lawfulness of the underlying adjustment the Commission wished to make. By Order No. 24942 issued on August 20, 1991, the Commission found that no impediment prevents treating the additional $1,453,000 of 1990 revenues held by United subject to refund, as depreciation. Order No. 24942 will be made a

part of the record on appeal by a supplemental Notice of Appeal. As a consequence of Order No. 24942, the amount at issue herein is the full $7,605,000 held subject to refund plus interest.

On February 15, 1991, United filed a Motion for Reconsideration of FPSC Order No. 24049 asking, in part, that the use of the June 30, 1990 Earnings Surveillance Report as a proxy for 1990 calendar year earnings be reconsidered.

On May 29, 1991, the FPSC issued its Order No. 24595, which among other things, denied United's Motion for Reconsideration. In Order No. 24595, the Commission stated:

> In this proceeding, the June 30, 1990, ESR was the latest and, presumably therefore, the most accurate reflection this Commission had of United's earnings during the interim period. [A 94.]
>
> and
>
> Its June 30, 1990 ESR is the only evidence in the record as to the Company's 1990 earnings for the purposes of interim. [A 95.]

On June 21, 1991, United filed its Notice of Administrative Appeal with this Court and with the FPSC.

SUMMARY OF ARGUMENT

The issue before the Court is whether the Commission's actions in determining that United earned a return on equity of 13.84% in 1990 and ordering United to dispose of all earnings for 1990 above 13.0% comport with the essential requirements of law.

By Order No. 22377, the Commission authorized United to earn up to a 13.3% return on equity in 1990. Order No. 22377 was a final order issued in a limited proceeding authorized, according to the Commission, by Section 364.14, Florida Statutes. The Order states that the interim statute (Section 364.055, Florida Statutes), did not apply to this proceeding. One year later, the Commission issued Order No. 24049, in the same docket, stating that the earlier proceeding was in the nature of an interim proceeding. By this ex parte transformation of a final order into an interim order, United has been stripped of all protections of the interim statute and unlawfully deprived of a hearing upon whether its 1990 rate of return exceeded that which it had been authorized to earn.

In finding that United would earn a return on equity of 13.84% in 1990, the Commission ignored the only competent substantial evidence of what United would earn in favor of a calculation that the Commission Staff developed in part during the agenda conference at which United's rate case was decided.

The rate case, which was based on a projected test year of 1991, necessarily employed forecast data for United's investment, revenue and expense. The source of this data was sophisticated budgeting models developed by United and relied upon by the Commission in determining the rate increase allowed United. Unrebutted and unchallenged evidence of record indicated that United would earn a 12.9% return on equity in 1990, a level that would not result in any earning above the authorized return of 13.3%. The Commission ignored this evidence in favor of evidence of what United earned in the last six months of 1989 and the first six months of 1990, with adjustments that purportedly made that data more representative of 1990. No evidence of record demonstrates, or even infers, that United would earn in 1990 what it earned in an earlier period. Almost all of the so-called adjustments were developed at the Commission agenda conference and are not based on evidence in the record. United had no opportunity to verify or challenge these calculations. The resulting conclusion that United earned 13.84% on equity in 1990 is not based on competent substantial evidence.

The orders under review do not comport with the essential requirements of law and should be quashed.

ARGUMENT

I. WHETHER THE FLORIDA PUBLIC SERVICE COMMISSION'S ACTION IN DETERMINING UNITED TELEPHONE COMPANY OF FLORIDA'S EARNED RATE OF RETURN FOR 1990 WAS AUTHORIZED BY LAW.

The orders under review do not comport with the essential requirements of the law in that no statutory authority exists to authorize the action taken therein.

It is well settled that the Commission has only such authority as is expressly or by clear implication given to it by statute. Any reasonable doubt as to the existence of a power must be resolved against the Commission. Southern Armored Service, Inc. v. Mason, 167 So.2d 848, 850 (Fla. 1964) and State, Desartment of Transportation v. Mavo, 354 So.2d 359, 361 (Fla. 1978).

The orders the Commission issued in this proceeding demonstrate on their face that the Commission was unable to conform its actions to the statutes from which it is required to draw its powers.

The initial order in this proceeding is Order No. 22205. [A 1.] In that Order, the Commission stated that based on its "general authority" as set forth in Section 364.14, Florida Statutes, it was initiating a "limited proceeding to determine the appropriate return on equity for United. . . ." [A 3. Emphasis added.]

The Order then sets forth a schedule for accomplishing this purpose, following which it states:

> Subsequently, we will proceed with an investigation of United's earnings and rate structure. <u>After the completion of the limited proceeding</u>, we will require the Company to file MFRs by a date certain and on a test year to be determined at that time. [FPSC Order No. 22205, A 3. Emphasis added.]

Throughout Order No. 22205, the Commission makes it abundantly clear that it would conduct a "limited proceeding" as opposed to an interim proceeding.

The Commission proceeded upon the schedule it had established and on January 8, 1990, issued Order No. 22377 containing its findings and conclusions with respect to the limited proceeding. This order is styled Final Order Setting United Telephone Company of Florida's Return on Equity for Purposes of this Limited <u>Proceeding</u> and Placing Revenues Subject To Refund. [Emphasis added].

Because United had objected that the Commission had no authority to hold a limited proceeding[7], the Commission went to some length in asserting that its authority for this limited proceeding would be found in Section 364.14, Florida Statutes. The Commission in defending its reliance upon this

[7] Chapter 364, Florida Statutes, prior to its 1990 revision which is not applicable in this docket, did not contain a provision for a limited proceeding, unlike Chapters 366 and 367 which cover all regulated utilities other than telephone companies.

provision specifically dismissed any applicability of the interim rate statute:

> If the provisions of the interim statute adequately addressed the factual particulars of this telephone company's situation we would be using 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 use at this time. [FPSC Order No. 22377, A 8.]

The "provisions" of the statute to which the Commission had reference were to that section of the interim statute which provides that the rate of return on common equity to be used to calculate the interim amount is

> . . . the maximum of the range of the last authorized rate of return on equity established in the company's most recent rate case. [Section 364.055(5)(b)3, Fla. Stat. (1989).]

The maximum return on equity from United's most recent rate case was 16.75%. The Commission would have had to use that rate of return for interim rate purposes. Since United's earnings were substantially below that level, no excess earnings would have been available for refund if the interim statute were used.

As a matter of expediency, the Commission rejected the interim statute because it did not produce the result the Commission desired. Notwithstanding that the interim statute is designed to operate in ". . . <u>any</u> proceeding for a change of rates . . .," [Section 364.055(1), Fla. Stat. (1989), emphasis added] the Commission cast about for other authority

and settled upon Section 364.14, Florida Statutes. Whether that section of the law does provide for limited proceedings is subject to question; what is not subject to question is the fact that the Commission used this provision to issue a final order, not an interim order, establishing United's return on equity from and after January 8, 1990, the date the Order was issued.

The sum and substance of Order No. 22377 is that it is a final order establishing United's authorized return on equity within a range of 12.3-13.3%. The Commission had plainly provided that going forward United could earn up to 13.3% and if achieved earnings were higher than that level, the Company would have to dispose of the excess through refunds, depreciation, or other means.

That this decision was a final one, subject to no further action in this docket or any other docket, was emphasized by a notice at the end of the order advising that any party who was adversely affected by the decision must ask for reconsideration or file for judicial review by the Supreme Court within 30 days after the order was issued. This Court has consistently held that interim rate orders are not subject to judicial review. Citizens of Florida v. Mayo, 316 So.2d 262, 263-4 (Fla. 1975) and Maule Industries v. Mayo, 342 So.2d 63, 65 n.1 (Fla. 1977).

It was not until Order No. 24049 was issued one year later that the Commission began to call this an interim proceeding. What was called a final order in Order No. 22377 was characterized as an "interim award" in Order No. 24049. [A 51.1 In response to United's assertion that the earlier decision was a final order, the Commission declared:

> This Commission does not conduct full reviews of interim periods to determine if interim awards were exactly correct. [A 51, emphasis added.]

While that may be true for interim awards, it is certainly irrelevant to this proceeding. Having specifically disclaimed any application of the interim statute in Order No. 22377, the Commission is surely precluded from subsequently treating it as an interim award.

The Commission avoided use of the interim statute in Order No. 22377, so that it did not have to recognize the maximum return on equity from United's last rate case. Only by ignoring the interim statute in favor of the questionable existence of authority in Section 364.14, Florida Statutes, to conduct a limited proceeding was the Commission able to make \$7.6 million subject to refund. One year later, the Commission was characterizing that as an interim award so that it could use the rate of return authorized in the new rate proceeding as the benchmark by which the refund could be

measured.[8] More importantly, the Commission believes that it is not required to hold a hearing to determine the actual amount of overearnings if it characterizes this case as an interim proceeding and the $7.6 million as an interim award. [FPSC Order No. 24049, A 51, and FPSC Order No. 24595, A 94.] The time for determining the nature of the proceeding was when the Commission initiated it, not one year later. It was expedient for the Commission to find authority to hold limited proceedings in Section 364.14, Florida Statutes, to avoid worrisome "factual particulars" associated with the interim statute. The term expediency, however, does not do justice to the Commission's abrupt abandonment of everything it said in Order No. 22377 to avoid giving United a hearing on whether it had excess earnings in 1990.

In Order No. 24049, the Commission asserts that it

> . . . paralleled the requirements of the interim statute . . . except for our decision not to use a current [Return on Equity]. [FPSC Order No. 24049, A 51.]

While intended to convey a sense of faithful adherence to the law, this use of the term parallel is a bald admission that the Commission's action is unauthorized as a matter of law. Since the Commission claims to be acting under Section

---

[8] If the rate of return authorized in the limited proceeding was used for refund purposes, United would be able to earn up to a 13.3% return on equity. If an interim procedure is used the Commission would assert that United must refund everything over a 13% return on equity.

364.14, Florida Statutes, it would seem appropriate to parallel, and perhaps even intersect, that section of the law rather than try to assert some vague relationship with statutory provisions the Commission had already concluded were inapplicable.

On reconsideration, the Commission reiterated its position that the limited proceeding had in fact been an interim proceeding. The Commission finds support for its position in United Telephone Comsanv of Florida v. Mann, 403 So.2d 962 (Fla. 1981), which dealt with interim rates. The Commission quoted with approbation that portion of the decision which begins:

> That does not mean that the amount to be refunded must necessarily be calculated by the previously authorized rate of return. [A 51.]

By quoting this language from that case, the Commission is apparently arguing that in an interim proceeding, disposition of monies held subject to refund can be determined upon the basis of the record in the full proceeding. That may well be true, but it does not offer support for the notion that the Commission can transform a final order into an interim order on an ex parte basis.

It is interesting that the Commission's citation of the United Telephone Comsany of Florida v. Mann case begins where it does because the preceding sentence of the decision states:

> Since changes in cost of common equity are not easily calculable, they are not proper subjects for interim hearings. Id. at p. 967,

Of course, changing the cost of common equity was the principle objective of the limited proceeding. [FPSC Order No. *22205,* A 2.]

The Commission's reliance upon United Telephone Company of Florida v. Mann is misplaced. That decision involves a proceeding in which current cost of common equity was not at issue in the initial hearing. Conversely, in the case at bar, the cost of common equity was the core issue.

The Commission cannot have properly applied any of the principles of the interim statute because

> The statute removes most of the Commission's discretion in such areas as cost-of-equity capital. Interim relief is prescribed by a formula that locks the authorized rate of return to the previously authorized rate of return . . . Citizens of the State of Florida v. Public Service Commission, 435 So.2d 784, 786 (Fla. 1983).

Taken as a whole, the Commission's successive conclusions as to its legal authority are a morass through which no one could find their way. What the Commission calls a final order is also an interim order. What it calls a limited proceeding is also an interim proceeding. It is acting under Section 364.14, Florida Statutes, and is "paralleling" another statute--but only those sections of the other statute that present it with no unacceptable "factual particulars".

The Commission's facile evasion of its statutory duty to hold a hearing to determine whether United's 1990 earnings exceeded its authorized rate of return should not be countenanced by the Court.

Parties to Commission proceedings are entitled to the due process protections of the United States and Florida Constitutions. In Order No. 8378 entered by the Commission in 1978, the Commission dismissed without hearing a petition of Florida Gas Company for a rate increase. In a subsequent review of the Order, this Court held that due process required a fair hearing and the opportunity to address those matters at issue. The Court stated:

> There can be no compromise on the footing of convenience or expediency, or because of a natural desire to avoid delay, when the minimal requirement of a fair hearing has been neglected or ignored.

Florida Gas Co. v. Hawkins, 372 So.2d 1118, 1121 (Fla. 1979).

United has been denied a fair hearing on the issue of its 1990 earnings and rate of return. Order Nos. 24049 and 24595 should be quashed, and the case remanded to the Commission with directions to hold a hearing on the issue of United's 1990 earnings. Consistent with the Commission's final order in the limited proceeding, United is entitled to earn up to 13.3% on equity in 1990.

II. WHETHER THE FLORIDA PUBLIC SERVICE COMMISSION RELIED ON COMPETENT SUBSTANTIAL EVIDENCE TO DETERMINE UNITED TELEPHONE COMPANY OF FLORIDA'S 1990 EARNED RATE OF RETURN.

The orders under review do not comport with the essential requirements of the law in that they are not based on competent substantial evidence.

In Order No. 24049 the Commission concluded that United earned too much money in 1990 and disposed of the purported excess by treating it as depreciation expense. In effect, the Commission took this money from United's investors and gave it to the company's customers. In the order, the Commission found that United had earned a 13.84% return on equity in 1990. No evidence in the record supports that finding: to the cantrary, the only evidence in the record of United's 1990 earnings is that they would result in less than a 13.0% return on equity. Even under the Commission's theory of how overearnings should be calculated, the Company's investors would be entitled to all earnings up to 13.0%.

In its Motion for Reconsideration United pointed out the lack of evidence to support the Commission's conclusion. The Company requested that the Commission hold a hearing to receive the necessary evidence. The Commission refused to do so. United is prepared to dispose of any true overearnings, but such action can only be taken based on competent

substantial evidence. United was the only party to develop evidence on this point.

The orders under review should be quashed insofar as they provide for any disposition of United's 1990 earnings because the orders are not based on competent substantial evidence, and this matter should be remanded for further hearings to establish whether United earned in excess of the 13.3% return on equity in 1990 authorized in Order No. 22377. [A 9.]

THE EVIDENCE

A. What Evidence Did United Offer?

The only testimony of record concerning United's 1990 earnings came from Mr. Richard McRae, United's chief financial officer, who on cross-examination by the Commission stated that United would earn 12.9% in 1990. [T 703.1 Mr. McRae's statement is unchallenged in the record. No other witness testified upon this point. Mr. McRae's qualifications to testify upon the Company's financial matters were not questioned. This Court has ruled in the past that the Commission may weigh the evidence of competing experts, and that the Court will not re-evaluate the probative weight to be given to the evidence, Blocker's Transfer & Storage v. Yarborough, 277 So.2d 9, 11 (Fla. 1973) and Gulf Power Co. v. Florida Public Service Commission, 453 So.2d 799, 805 (Fla. 1984) but here there is no countervailing testimony or evidence to be weighed.

Mr. McRae's rate case testimony was based upon United's 1990 budget, which utilized the same budgeting process upon which the entire rate case was based. Since United's rate case used a projected test period, forecasted amounts were used for rate base, revenues and expenses. Without making any specific finding to this effect, the Commission accepted United's budgeting process without exception and indeed based its decisions in the rate proceeding on United's budget.[9] Consequently, there is no basis upon which the Commission could reject Mr. McRae's projection of 1990 earnings on the basis of reliability. In fact, rather than reject Mr. McRae's testimony on this point, the Commission chose to ignore it.

Other evidence developed by United supports Mr. McRae's testimony. As stated earlier, United's rate case involved a projected test period. Several budgetary iterations were included in the evidence of record. These show that United projected earnings of 12.75-12.9% [See, R Vol. XVIII, Exhibit 6, Schedules B-5b, page 2 and C-5, page 2 and R Vol. XXVI, Exhibit 63, page 005. for 1990.] No evidence of records supports a return on equity for 1990 higher than 12.9%.

Mr. McRae's projection that the Company would earn 12.9% in 1990 was buttressed in United's Motion for Reconsideration

---

[9] Testimony and an Exhibit on the accuracy of United's budget projections can be found at T 314-316 and R Vol. XXVI, Ex. 33.

of Order No. 24049. This Motion was filed on February 18, 1991, and was accompanied by an affidavit by Mr. McRae which averred that United would earn less than 13.0% in 1990. [R 1649.1 United noted in filing the Motion that it was not attempting by the affidavit to prove what United would earn, but rather only ". . . to sustain United's request that the Commission take evidence upon this point rather than rely on unsubstantiated estimates." [R 1638.1

The Commission did not rule upon United's Motion for Reconsideration until April 16, 1991, more than four weeks after United filed its year-end earnings surveillance report for 1990, which showed what the Company had actually earned in 1990. That earnings report is not in the record and thus as a matter of fact does not establish what the Company earned, but it was available to the Commission when it rejected United's request for a hearing. The Commission, then, had five separate reasons for knowing its conclusion in Order No. 24049 that United would earn 13.84% in 1990 was wrong. The only relief the Company had requested was for the Commission to hold a hearing to receive evidence as to United's 1990 earnings. The Commission knew based on evidence and information available to it that United did not earn 13.84% in 1990. The Commission also knew that United's 1990 earnings did not exceed 13.0%.

B. **What Evidence Did** the Commission Act Upon?

The Commission, at the prehearing stage of United's rate case, designated that the following would be an issue:

> ISSUE NO. 63: What is the amount and appropriate disposition of the revenue held subject to corporate undertaking? [FPSC Order No. 23539, at 48. R 534.]

The revenue referred to in the issue is the $7.6 million United collected in 1990.

United took the position that until 1990 earnings could be calculated, this issue could not be determined. The Commission Staff took no position "pending further discovery". [R 535.1 The Staff never undertook further discovery on this point, nor did it ever state a position on the issue. Neither the Staff nor any other party to the proceeding, except United, generated any evidence as to United's 1990 earnings. The Commission had ample opportunity to test the reliability of this data through discovery and on cross-examination, but chose not to do so.

The factual situation before the court is similar to that considered in State v. Hawkins, 364 So.2d 723 (Fla. 1978). State v. Hawkins involved a water utility rate case in which a witness for the Office of Public Counsel testified on an accounting matter that was at issue, much as Mr. McRae testified upon United's anticipated 1990 rate of return. The Commission rejected the witness's testimony. The Court held:

> Petitioner's expert witness, Mr. Ben Johnson, gave convincing testimony explaining why the Commission's accounting practice was improper and inequitable. Respondents did not cross-examine Mr. Johnson, nor did they offer rebuttal testimony. Id. at 727.

The Court in State v. Hawkins concluded that no competent substantial evidence existed to reject the unrefuted testimony and that, consequently, the Commission had departed from the essential requirements of the law. Mr. McRae's testimony was similarly unchallenged and unrebutted by other witnesses' testimony.

In Order No. 24049, the Commission claims to have relied on United's June 30, 1990 earnings surveillance report (ESR) as an "appropriate surrogate" for what United would earn in 1990.[10] The June 30 ESR shows *six* months of earnings for 1989 and six months for 1990. [R Vol. XXVI, Exhibit 61]. No one has ever represented that the June 30 ESR contains an estimate of or can be used for a "surrogate" for any purpose. Under Rule 25-4.0245, Florida Administrative Code, the June 30 ESR is simply a rate of return report for the twelve months ending June 30, 1990. The Commission's characterization of it

---

[10] In Order No. 24049, the FPSC states:

> We believe that the Company's June 30, 1990 earnings surveillance report is the most current information available, and this is the most appropriate surrogate for United's earnings for 1990. [A 51.]

as a "surrogate" for some other period is nonsense. The Commission had before it no evidence that one period could be substituted for the other. The Commission Staff precluded any testimony on this point by the cryptic means by which it had the June 30, 1990 ESR admitted as evidence. United's witness, Mr. McRae, was asked whether the June 30 ESR was "true and correct" to which he responded affirmatively as of "the time they were prepared." [T 651.] He was asked whether it was United's ". . . latest filed surveillance report" [at the time of the hearing] to which he responded affirmatively. [T 704.] Finally, he was asked how gains on sale of land, parent company contributions and certain directory revenues were treated. [T 704-6.] That is the sum total of discussion of the June 30 ESR. Not one word was said about whether the report could or would be used as a "surrogate" for a different period of time, nor were any comparisons suggested between the twelve months ending June 30, 1990 and December 31, 1990.

Not only did the June 30 ESR have no probative value as to United's 1990 earnings, the Commission's belief that it was "the most current information available" was just plain wrong. The testimony and exhibits of Mr. McRae establish projections by United of a 12.9% return on equity for 1990, which are based on later information than the June 1990 ESR relied upon by the Commission in making its projections. Even the Commission apparently did not believe that the June 30 ESR was

a surrogate for 1990 because after stating in Order No. 24049, that it was a surrogate, the Commission made extensive and substantial adjustments to it "to more closely approximate 1990's earnings." [A 51.1

The Commission noted that United's net operating income as of June 30 was $86,567,784. The Commission then made the following adjustments:

1. $1,156,248 for deferred taxes
2. $2,556,767 for directory revenues
3. $ 150,000 for estimated data processing costs
4. $ 706,000 for general service and license expenses
5. $ 379,630 for working capital (rate base adjustment)
6. an unidentified amount for taxes. [FPSC Order No. 24049, A. 51]

Adjustment number 1 above can be found in the June 30 ESR. No evidence is in the record as to how any of the amounts in adjustment numbers 2 - 6 above were calculated. United had no opportunity to challenge these calculations or to question whether they should even be made. Setting aside any other deficiencies in the numbers, several of the adjustments (numbers 2, 3 and 5 above) are for findings made in the rate order in this case, and which should have prospective effect only. Imputing these findings to an earlier period is retroactive ratemaking in contravention of City of Miami v. Florida Public Service Commission, 208 So.2d

249, 259-60 (Fla. 1968). Adjustment number 3 is admitted by the Commission to be simply an estimate while adjustment number 4 is itself described as a "surrogate"; that is, the surrogate is built upon a surrogate.

Having made those adjustments, the Commission then ". . . annualized the decline in earnings from December 1989 to June 1990 in order to more closely approximate 1990's earnings." [FPSC Order No. 24049, A 51.] No evidence is in the record as to how this was done, nor does the Order explain it.

Some indication of what might have been done to "annualize" the earnings is found in the transcript of the January 7, 1990, Agenda Conference[11], where the following was stated by a Staff member:

> But I believe based on what is in the record if you wanted to take the first six months of 1990 and the average change in earnings over that period, and if you extrapolate the entire year so that you in effect have a forecast of 1990 only that you would end up in the neighborhood of 14.26 percent based on the staff's adjustments and the trend in the earnings, and that would hopefully incorporate both the phase dawn of SPF, and the growth in customers and theoretically everything that is going on. [R Vol. XVIII, Vol. 11, p. 151.]

Unfortunately, what exactly was done to "annualize" the earnings does not appear anywhere in the Record in this case. United cannot even check to see if the math was done

[11] Parties other than the Commission Staff were not allowed to participate in the Agenda Conferences in this case.

correctly, because nowhere is it disclosed exactly what was done[12], or what was relied upon to do it. The sophisticated budgeting models employed by United to derive its budget projections of 1990 earnings[13] contrast starkly with the seat-of-the-pants off the record methodology relied on by the Commission.

It is well settled that findings of the Commission which are not based on competent substantial evidence must be reversed. Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla. 1980) and State v. Hawkins, supra.

None of the foregoing adjustments was made on the basis of ". . . such evidence as will establish a substantial basis in fact from which the fact at issue can be inferred . . ." and ". . . such evidence as a reasonable mind would accept as adequate to support a conclusion." DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957), and Agrico Chemical Co. v. State of Florida, 365 So.2d 759, 763 (Fla. 1st DCA 1978) cert. denied 376 So.2d 74 (1979).

---

[12] United can only guess that the extrapolation described above was the method used.

[13] Testimony and an Exhibit on the budget process and the accuracy of United's budget projections can be found at T 314-316 and R Vol. XXVI, Ex. 33.

United's Motion for Reconsideration argued that the Commission's decision to use the June 30 ESR was not supported by competent substantial evidence. The Company asserted:

> There is not one word in the transcript, in any exhibit or in any other document of record that the June 30 ESR accurately depicts earnings for any period other than the 12 months ending June 30, 1990. It does not even seem intuitively correct that six months of operations in 1989 should be considered pertinent to a calculation of 1990 earnings. [R. 1638.]

Just as the Commission completely ignored the need for evidence on this issue, it completely ignored United's assertions in the Motion for Reconsideration. The sum total of the Commission's consideration of this issue in the order on reconsideration consists of:

> In this proceeding, the June 30, 1990, ESR was the latest and, presumably therefore, the most accurate reflection this Commission had of United's earnings during the interim period. [FPSC Order No. 24595, A 94.]
>
> and
>
> [United's] June 30, 1990 ESR is the only evidence in the record as to the Company's 1990 earnings for purposes of interim. [FPSC Order No. 24595, A 95.]

These conclusory statements fall far short of the Commission's obligation to provide an explicit statement of the underlying facts supporting that finding or a succinct and sufficient statement of the ultimate facts upon which the Commission relied. Section 120.59(2), Florida Statutes, and Occidental Chemical Co. v. Mayo, 351 So.2d 336, 341 (Fla.

1977) and Duval Utility Co. v. Florida Public Service Commission, supra at 1031.

United is not asking this Court to reweigh the evidence. The Commission ignored, or simply was not aware of, what evidence was available on 1990 earnings, and erred to the extent of selecting one piece of evidence and declaring it the most current and only evidence in the record on the subject of United's 1990 return on equity, while other, later evidence was in the record.

The Commission steadfastly refused to substantively address allegations that it has acted without competent substantial evidence. Despite clear evidence of record that its ex parte calculation of United's 1990 earnings was wrong, the Commission refused to receive evidence on the point, ostensibly for the reason that it does not want to hold a hearing.

The only relief United has ever requested from the Commission upon this issue is to hold a hearing to take evidence upon United's 1990 earnings. United has no objection to disposing of any earnings in excess of its authorized rate of return for 1990, but the Commission must be held to the standard of competent substantial evidence in making that determination.

It is futile to extend the protections of due process to administrative proceedings if the Commission is allowed to

ignore evidence of record in favor of evidence created outside the hearing process on an ex parte basis.

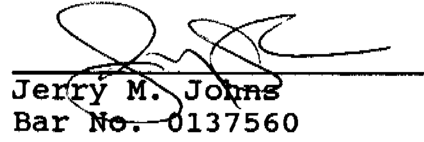
The Commission's failure to base its decision on competent substantial evidence and refusal to identify the factual basis upon which it has acted require that the Orders be quashed.

CONCLUSION

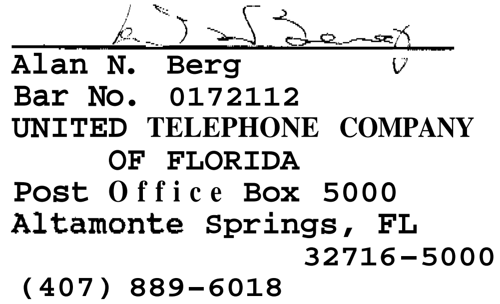
The foregoing analysis confirms that actions taken by the Commission in order Nos. 24049 and 24595 in regard to United's 1990 earnings were not consistent with either statute cited as authority for its actions. The Commission also declared one piece of evidence as the only and latest evidence in the record on the issue of United's 1990 earnings, and made off the record adjustments to that evidence. Other, later, reliable evidence is in the record on the issue, but was either ignored or mistakenly overlooked by the Commission. The result is that the action of the Commission in determining United's 1990 return on equity is not based on competent substantial evidence, but on evidence mischaracterized as the only evidence in the record which was adjusted with off the record figures, and annualized by an unexplained methodology.

Order Nos. 24049 and 24595 should be quashed, and this matter should be remanded to the Commission far hearing to determine United's 1990 earnings. Only if United's 1990 earnings are determined to be more than the 13.3% maximum allowed by Order 22377, should any of the money held subject to corporate undertaking be subject to refund.

Respectfully submitted,



Jerry M. Johns
Bar No. 0137560



Alan N. Berg
Bar No. 0172112
UNITED TELEPHONE COMPANY
OF FLORIDA
Post Office Box 5000
Altamonte Springs, FL
32716-5000
(407) 889-6018

Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the Initial Brief of Appellants and the related Appendix has been furnished by U.S. Mail or hand-delivery on this 29th day of August 1991, to:

*Suzanne Summerlin
Division of Legal Service
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32399-0850

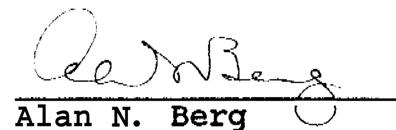
*Charles J. Beck
Assistant Public Counsel
Office of the Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400

*Michael W. Tye
AT&T Communications
106 East College Avenue
Suite 1410
Tallahassee, Florida 32301

*Floyd R. Self
Messer, Vickers, Caparello, Madsen & Lewis
Suite 701, First Florida Bank Building
215 South Monroe Street
Tallahassee, Florida 32302

Rod Smith, Esquire
Communications Workers of America
Post Office Box 628
Alachua, Florida 32615

* Hand-delivery



Alan N. Berg