

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

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

United Telephone Company of Florida (United) argued in its initial brief that the Florida Public Service Commission (Commission) orders under review do not comport with the essential requirements of the law and are not supported by competent substantial evidence. Answer briefs were filed by the Commission and by Public Counsel.

As to the issue of whether the Commission's decision was authorized by law, United had argued that the Commission transformed what it had clearly issued as a final agency action authorizing United to earn a 13.3% rate of return in 1990 into an interim action for purposes of depriving United of earnings below that rate of return. United also argued that it was unlawful for the Commission to apply only those parts of the interim statute that suit the Commission's purpose while failing to accord United the protections of other parts of the interim statute.

In response to this argument, the Commission's answer brief asserts that the Commission acted in accordance with the interim statute, Section 364.055, Florida Statutes, "... in all respects that it could ..." The Commission all but concedes that it utilized only those parts of the statute that benefited the ratepayer; it afforded none of the protections of the interim statute to United. The answer brief concedes that Order No. 22377 was a final order with respect to the return on equity authorized therein, but offers no response to United's argument that it was then improper to order United to dispose of all earnings over 13.0%.

Upon the issue of whether competent substantial evidence supports the Commission's finding that United would earn 13.84% in 1990, the Commission states that it weighed all the evidence and found that United's projection of its 1990 earnings were entitled to less weight than the evidence the

Commission relied on. The Commission does not identify where in the record it weighed the evidence. Nor does the Commission explain how it could have weighed the alternative evidence when it had found in the orders under review that the evidence it relied on was the "only evidence in the record as to the company's 1990 earnings." The Commission clearly had overlooked the evidence it claims in the answer brief to have weighed. Moreover, before the order on reconsideration was ever issued, the Commission was in possession of information that showed United had earned less than 13% in 1990, yet the Commission took no steps to correct what was by then an obvious error.

The orders under review should be quashed insofar as they direct United to dispose of \$7.6 million for 1990. The case should be remanded to the Commission to receive competent substantial evidence upon the question of whether United's rate of return in 1990 exceeded the 13.3% authorized by Order No. 22377.

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.**

United Telephone Company of Florida (United) argued in its initial brief that the Florida Public Service Commission (Commission) authorized United to earn up to a 13.3% rate of return on equity in 1990 by issuing Order No. 22377 as a final order in a limited proceeding conducted under Section 364.14, Florida Statutes. That order states specifically that the Commission was not acting under Section 364.055, Florida Statutes (the "Interim Rate Statute"). A year later in the same docket the Commission found that its earlier action was an interim proceeding. The Commission's ex post facto transformation of this docket into an interim proceeding resulted in the Commission not allowing United to earn 13.3% in 1990 as its order had authorized. United was entitled to earn up to 13.3% in 1990 and the Commission's action to deprive United of earnings below that level is not in accordance with the essential requirements of the law.

According to the Commission's answer brief, the Commission finds it remarkable that United would argue that Order No. 22377 was not an interim order. The Commission agrees that it was a final order as to authorizing the level of return on equity United could earn, but an interim order as to whether United would have to refund any money at the conclusion of the rate case. (Commission Brief, at p. 9) United is in full agreement with the Commission on this point. In fact, that is the very point United has placed before the court: the Commission authorized United to earn a rate of return of up to 13.3% in 1990 or at least as long as the rate case was pending. Even the Commission agrees that this represents final action by the Commission, United and the Commission also agree that whether United would

have to refund money could not be determined until some time subsequent when it could be shown that United had exceeded its authorized rate of return.

If, as the Commission asserts, however, its authorization in Order No. 22377 for United to earn up to a 13.3% return on equity is a final order, why did it subsequently order United to refund all earnings over 13%? The Commission argues to the court that United was authorized by a final order to earn up to 13.3%, but concedes that it disposed of all United's earnings above 13%. (Commission's Brief, at p. 4) The Commission cites no authority by which it can order a company to refund moneys produced by what the Commission itself has found to be a fair rate of return, or for retroactively adjusting the company's authorized rate of return, yet the Commission surely has done one or the other.

All of the discussion in the answer briefs by the Commission and Public Counsel regarding the Commission's obligation to protect the ratepayer is laudable. United has not argued that the ratepayer should not be protected or that the Commission is in any way neglectful of its duties. When challenged to explain the lawful basis for its action, however, such platitudes by the Commission are not helpful. The Commission cannot, and presumably would not, commit an unlawful act in the name of protecting the ratepayer, so little benefit is derived from discussing the Commission's motivation. United concedes that the Commission is well-intentioned.

The Commission's attention and efforts in the answer brief would have better been directed to responding to United's argument that the Commission at the outset disclaimed any reliance on the interim statute because it entailed use of United's previously authorized 16.75% rate of return and then at the conclusion of the proceeding claimed to be acting under the interim statute in order to avoid giving United a hearing on what it had

earned in 1990. The Commission freely concedes it used only those parts of the interim statute that suited its purposes. The Commission seems not to be aware that there is anything wrong with using one part of the statute that is perceived to offer a benefit to the ratepayer while ignoring other provisions of the same statute which offer protections to the utility. It is these "factual particulars" that the Commission finds so troublesome which offer a measure of protection to United when the interim statute is applied ~~in toto~~. Had all provisions of the interim statute been applied evenhandedly, the Commission would have used United's authorized return on equity ceiling of 16.75% to determine whether to place money subject to refund. This would have resulted in no overearnings and the Commission would not have been able to place any monies subject to refund, to be sure, but sometimes that is what happens when the law is applied as written. The Commission seems to believe that the statutes are for its convenience, to be used expediently to achieve results the Commission considers to be desirable. It has not occurred to the Commission that statutory provisions it finds troublesome may be in place to protect parties' legitimate interests. United has not argued that the interim statute should have been or should not have been utilized in this proceeding. The company's only arguments are that the Commission cannot use only that part of the statute which serves to benefit one party while ignoring other provisions in the same statute that offer protections to the other party; and the Commission cannot initiate a proceeding under one statutory provision and conclude it under another when the obvious effect is to avoid due process.

The Commission argues that United had due process and a hearing because this matter was an issue in the rate case. (Commission Brief, at p. 14)

The issue in question, Issue No. 63 in the rate case, was how much

money was there to dispose of and how should it be disposed of. The first part of the issue is a factual determination which United addresses in Point II of its initial and reply briefs. The second part of the issue is a policy question which the Commission has decided by determining that the disposition should take the form of additional depreciation. United agrees that that is a good way to dispose of excess earnings. Upon analysis then, Issue No. 63 has no bearing on the question before the court; that is, whether the Commission's action is authorized by law. Issue No. 63 is a question of fact and policy, not a question of law. The implication of the Commission's reference to Issue No. 63 is that United was thereby placed on notice that the Commission might allow United to earn less than the 13.3% authorized by the Commission and that the proceeding would be subsequently transformed into an interim proceeding. Such an implication clearly cannot be read into that issue nor in any other issue in the proceeding.

Given the Commission's reluctance to afford United the protections of the interim statute, United is also concerned that if the case is remanded to the Commission without very specific instructions, the Commission will attempt to justify its earlier conclusions by introducing a number of adjustments to inflate United's 1990 earnings. This possibility can be avoided if the remand is accompanied by instructions that United's 1990 return on equity be calculated in the same manner as the Commission used in establishing the amount subject to refund.

The Commission has not acted in accordance with the requirements of Chapter 364, Florida Statutes, and has failed to demonstrate any lawful foundation for its action. The orders under review should be quashed insofar as they dispose of United's earnings for 1990 and the Commission should be directed to hold a hearing to determine whether United did

actually exceed its authorized rate of return of 13.3% in 1990. The Commission should be instructed to calculate United's 1990 return on equity in the same manner as it determined the amount to be held subject to refund in Order No. 22377.

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.**

United argued in its initial brief that the Commission did not rely on competent substantial evidence when it determined that United would earn a rate of return on equity of 13.84% in 1990. The argument was made in two parts: 1) the Commission ignored United's evidence of what it would earn in 1990, and 2) the Commission's reliance upon other information, substantial portions of which were outside the record, was unfounded.

The Commission's answer brief asserts that the Commission "weigh[ed] all the evidence and its staff's recommendation" and "found" that United's evidence "simply did not warrant as much weight" as the evidence the Commission relied upon. (Commission's Brief, pp. 18 and 22). These statements go to the very heart of United's argument that competent substantial evidence does not support the Commission's findings of what United would earn in 1990.

The Commission's answer brief attempts to dismiss a direct challenge to the competence and substantiality of the evidence it used to make a \$7.6 million error with no more than a conclusory statement that it did too weigh the evidence and make findings. The Commission mistakes the court's deference to Commission findings of fact for blindness. In one of the orders under review, the Commission found that the June 30 earnings surveillance report (ESR) which the Commission used as the basis to determine that United earned 13.84% in 1990 was the "only evidence" in the record as to the Company's 1990 earnings. (A 95) Where then did the Commission weigh United's evidence? Where are the findings that United's projection of its 1990 earnings are entitled to less weight than the

evidence the Commission used? The Commission will not or can not **say**. Faced with **a** direct challenge to the factual basis of its findings, the Commission has refused to identify when, where or how it evaluated the evidence, but only offers lamely that it weighed all the evidence, thereby flatly contradicting its finding in the order that there was no alternative evidence to weigh. It is not a proper response to such a direct challenge **to** provide mere conclusory statements without citing to the record to show where and when this weighing took place, especially when the order under review states that there is no alternative evidence. Obviously, the Commission **was** not even aware that other evidence existed in the record until United's brief pointed it out.

In its initial brief, United cited Occidental Chemical Co. v. Mayo, 351 So.2d **336** (Fla 1977) and Duval Utility Co. v. Florida Public Service Commission, **380** So.2d 1028 (Fla 1980) **for** the proposition that mere conclusory statements fall short of the Commission's obligation to provide an explicit statement **of** the underlying facts supporting a finding or a sufficient statement of the ultimate facts upon which the Commission relied. Such statements should have been in the orders under review, but are not. The Commission's answer brief was the Commission's opportunity to identify in the record where such findings might be supported, but the Commission chose not to do **so**. If, upon a challenge such as has been made in this proceeding, the Court permits the Commission to prevail in such **a** stance, the obligation that Commission orders must be based on competent substantial evidence is illusory. Certainly, if the Commission had considered all the evidence at any stage of this proceeding, the Commission should have identified it, **if** not in the Order, then surely in the answer brief.

Certainly, no indication exists in the Commission's orders in this

proceeding that it weighed all the evidence. To the contrary, in Order No. 24595, the Commission said the Company's June 30 earnings surveillance report (ESR) "... is the only evidence in the record as to the Company's 1990 earnings for purposes of interim." (A 95, emphasis added). As United argued at length in its initial brief, the orders are silent as to consideration of any evidence presented by the only witness who testified on what United would earn in 1990.

Referring to this testimony dismissively as "predictions", ^{1/} the Commission asserts that United is only complaining because the Commission did not rely on United's evidence. The Commission staff itself elicited the testimony in question; it was not controverted by any other witness or by subsequent cross-examination of United's witness. United's argument is partly based upon the Commission's failure to rely on United's evidence, but also upon the Commission's complete failure to even consider that evidence. In plain terms: 1) United argued in its initial brief that the Commission ignored United's evidence; 2) the Commission denied that in its answer brief and said it weighed all the evidence. To what part of the record does the Commission refer the court? Nowhere. The Commission is relying on the court's deference to Commission findings of fact by simply refusing to respond substantively to the issues before the court.

The same can be said of the Commission's defense of the evidence it claims to have relied upon, United's June 30, 1990, ESR. United argued in its initial brief that the Commission had no evidence before it that the

^{1/} "Predictions" is used in a pejorative sense by the Commission in its brief. The Commission authorized United to utilize a projected test period and substantially relied on those projections to resolve United's rate case; the testimony in question is part and parcel of those projections.

June 30 ESR was representative of earnings for the full year 1990. The Commission's answer brief totally ignores this argument. The Commission obviously does not expect to be held accountable for its findings of fact, and thus will not respond to the most direct challenges that its findings are not based on competent substantial evidence.

Public Counsel argues that the Commission used the most current information available at the time of the hearing. That statement is in error. As United stated in its initial brief, the projection by United's witness of a 12.9% rate of return for 1990 was based on more recent data than the June ESR. Even if one disregards that fact, however, both Public Counsel and the Commission are in possession of United's year end ESR for 1990 which is based on actual results. That information was available to the Commission before it ever issued its order on reconsideration. The Commission ignored information in its possession which plainly showed that it had erred. Failing to acknowledge and correct such an error is in clear contravention of the case of Reedy Creek Utilities v. Florida Public Service Commission, 418 So.2d 249 (Fla 1982). In that case, the Commission had ordered Reedy Creek to make a refund to its customers of certain tax savings. Before the refund was made, the Commission discovered an error in the calculation of the amount to be refunded and, two and one-half months after the initial order, issued an amendatory order which increased the amount to be refunded. Reedy Creek appealed to this Court, arguing among other things, that the doctrine of administrative finality precluded the Commission from amending its order after the passage of two and one-half months. The court found:

When the Commission determined that it had erred to the detriment of the using public, it had the inherent power and the statutory duty to amend its order to protect the customer. Id, at 253

The Court held that since Reedy Creek had not relied to its detriment on the earlier order, the company would not be prejudiced by its correction. Here we are faced with the obverse face of that set of facts. Based upon the affidavit United filed with its Motion for Reconsideration and upon the actual 1990 ESR, the Commission had reason to know it had erred in its inaccurate estimate of United's earnings. The decision was still within the Commission's control because United's Motion for Reconsideration had not even been ruled upon. Just as in Reedy Creek where the Commission had the inherent power and statutory duty to protect the public by requiring a recalculation of the refund, in this case the Commission had the same power and duty to correct its error to protect United from having to refund earnings which are the product of an inaccurate calculation. United asserted in its initial brief that the Commission knows and has known since before it issued its order on reconsideration that United did not earn a 13.84% rate of return in 1990. See Initial Brief at p. 26. The Commission and Public Counsel do not controvert that, nor can they since they both know it to be true.

Why is United not subject to the protections delineated in Reedy Creek?

While the Commission would not amend its order on reconsideration in May, 1991, to correct what was by then an obvious and substantial error, one month later in June, 1991, the Commission did amend its order further to reduce United's rate increase because United advised the Commission that one of the company's anticipated costs would not be incurred. In Order No. 24049, the Commission had given United a rate increase based in part on the anticipated cost of a change in the way United provides operator services. When United notified the Commission that it would not implement the change,

the Commission reduced the rate award. Citing the Reedy Creek case, the Commission found that ". . . the Commission has the authority to correct a ratemaking order if new evidence or a mistake is discovered." (R. 1785) Within this one rate proceeding it is possible to see that the Commission does not exercise its authority to amend orders evenhandedly. It corrects only those errors that have adversely affected the public. The Commission's obligation under the law is to act in an even-handed, objective manner.

Because the Commission is unable to meet its lawful obligation to support its findings, and is unwilling to correct its error in accordance with the Reedy Creek decision, United asks the Court to direct the Commission to hold a hearing to receive evidence upon the issue of what United actually earned in 1990, and to allow United to keep all earnings up to the ceiling of its authorized return on equity of 13.3%.

CONCLUSION

The answer briefs of the Commission and Public Counsel do not sustain a finding that the Commission's action is authorized by law or that its findings are supported by competent substantial evidence.

Orders No. 24049 and 24595 should be quashed insofar as they provide for the disposition of United's earnings for 1990. The case should be remanded to the Commission to receive evidence upon the question of whether United's rate of return in 1990 exceeded the 13.3% return on equity authorized to United in Order No. 22377. The Commission should be directed to calculate United's 1990 earnings using the same measures and adjustments it utilized to establish the amount that was made subject to refund.

Respectfully submitted,



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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a copy of the Reply Brief of United Telephone Company of Florida has been furnished by U.S. Mail or hand-delivery to the following parties this 8th day of October, 1991:

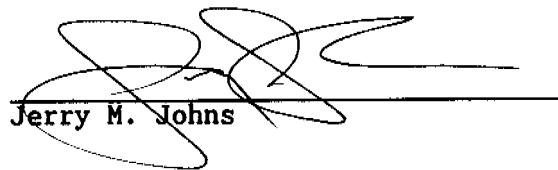
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