IN THE SUPREME COURT OF FLORIDA

CHERRY COMMUNICATIONS, INCORPORATED, Appellant, v. J. TERRY DEASON, ETC., ET AL., Appellees.	)	CASE NO. 83,274

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

RICHARD C. BELLAK
Associate General Counsel
Florida Bar No. 341851

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, Florida 32399-0861
(904) 488-7464

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA PUBLIC SERVICE COMMISSION ORDERS

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA ADMINISTRATIVE RULES

TREATISE

SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, Florida Public Service Commission is referred to in this brief as the "Commission". Appellant, Cherry Communications, Incorporated, is referred to as "Cherry" or the "Company".

Commission Order No. PSC-94-0115-FOF-TI is referred to as the Reconsideration Order. Commission Order Nos. PSC-93-1374-FOF-TI and PSC-93-1374A-FOF-TI are referred to as the Revocation Order and Amended Revocation Order, respectively. Commission Order No. PSC-93-0269-FOF-TI is referred to as the Order to Show Cause.

Citations to the transcript of the June 18, 1993 hearing are referred to as Tr. ___. Citations to the record are referred to as R. ___.

Appellee, Florida Public Service Commission (Commission) includes herein its own Statement of the Case and Facts because the "Statement of the Case" presented by appellant, Initial Brief, p. 1, omits the factual basis for the challenged Commission order, PSC-94-0115-FOF-TI (Order).[1] Moreover, since the Court granted the Commission's Motion to Strike Cherry's Rebuttal testimony by its Order dated May 4, 1994, Cherry's inappropriate reference to its filing of Rebuttal testimony, Initial Brief, p. 5, should be disregarded by the Court.

STATEMENT OF THE CASE AND FACTS

Cherry Communications, Incorporated (Cherry) is a switchless re-seller of long-distance telephone services (R. 478). Cherry received a Certificate to Provide Interexchange Services in Florida on December 4, 1992. (Tr. 93).

By the end of that month, the Commission's Division of Consumer Affairs had received nine complaints by consumers that their preferred interexchange carrier (PIC) had been switched to Cherry without authorization[2] [3] and one complaint solely as to Cherry's sales tactics (Tr. 190-1). The former category of

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[1] Cherry also challenges the underlying orders which were reconsidered therein: PSC 93-1374-FOF-TI and PSC 93-1374A-FOF-TI.

[2] One complaint was received November 3, 1993, a month prior to Cherry's certification. (TR. 191).

[3] Authorization is demonstrated pursuant to four alternatives specified in Florida Administrative Code Rule 25-4.118(2).

consumer complaint is referred to herein as "slamming", the latter is referred to as a "marketing" complaint.

As of the hearing date in this case, June 18, 1993, the Division had received 150 slamming and 24 marketing complaints against Cherry as well as one complaint of delayed refund of excessive charges due to slamming. (Tr. 192). As to complaints against all Florida interexchange companies (IXC's) due to Cherry during the first four months of 1993 (as distinguished from complaints directly against Cherry), 143 of the 361 such slamming complaints were due to activities of Cherry. (Tr. 192).

Complaints about Cherry were received from Florida consumers in 26 counties. Immediately prior to the hearing, 14 slamming complaints were received during the first five working days of May 1993. (Tr. 193). Circumstances surrounding particular complaints included victims of Hurricane Andrew reporting offers of a free month of long-distance service whereupon long-distance service was switched without authorization. (Tr. 194).

Variants of slamming complaints included customers switched to Cherry even though they declined the offer, customers switched who had never been contacted either verbally or in writing and customers who reported that their signatures on Cherry's letter of agency (LOA's)[4] had been forged. (Tr. 196). In addition, consumers complained that Cherry's telemarketers misrepresented

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[4] See, Fla. Admin. Code R. 25-4.118(2)(a).

that Cherry was part of another company such as Centel, Southern Bell, GTE or AT&T. (Tr. 199-200).

Consumers also complained about calls to verify a PIC change where no initial solicitation call was made and calls in which consumers were told that their future bills would reflect a change to Cherry without the consumers being asked or agreeing. Significantly, these complaints continued during the period after January 1993 despite Cherry's assertion that the company had instituted at that time new procedures to provide 100% verification of PIC change requests. (Tr. 200-201).

The Commission's Consumer Complaint Analysts review complaint data not only to investigate individual complaints but also to track problem areas and trends. (Tr. 188). In the areas of slamming and marketing complaints, out-of-state data is useful as an indication of whether a company's problems are pervasive or attributable to a misunderstanding of this Commission's rules. (Tr. 189). In this regard, the Division has received documentation relating to slamming and marketing complaints against Cherry in the states of Tennessee, Louisiana, Arkansas, Illinois and Alabama. (Tr. 201-3).

Complaints received by the Division are logged for investigation only if preliminary screening indicates to the Complaint Analyst that the complaint may be justified and within the Commission's jurisdiction. (Tr. 189). When logged, the company is asked to review the complaint and respond. (Tr. 190). As of April 30, 1993, the Division closed 61 complaints against

Cherry, 32 of which were noted as having been responded to late by the Company. See, Fla. Admin. Code R. 25-4.043. One complaint was never responded to despite repeated requests. (Tr. 198). Cherry's responses are by form letter rather than by means of an assessment of particular facts and circumstances. Cherry has not responded when additional and incident-specific information has been requested. (Tr. 199).

Consistent with the Division's documentation of excessively high levels of slamming and marketing complaints generated by Cherry, Central Telephone-Florida noted unusually high levels of end-user complaints involving Cherry received by Central Telephone's Tallahassee office. These informal complaints were estimated to number 150. (Tr. 335). Following this, 76 WilTel[5] PIC disputes were recorded during the first four months of 1993, a number greater than the total PIC disputes received for any single carrier during the whole of 1992. The WilTel disputes primarily concerned subscribers solicited by Cherry. (Tr. 336). Complaints included unauthorized PIC changes (Tr. 332), misrepresentations that Cherry was an affiliate of Central Telephone and AT&T and sales agents who were extremely rude, were unwilling to accept the customer's decision to decline the offer and used inappropriate language. (Tr. 329). Central Telephone-Florida thereupon found it necessary to take special precautions concerning Cherry, including notices to customer representatives, notations on accounts of

[5] WilTel is a facility-based interexchange company (IXC) whose services Cherry re-sells.

customers contacted by Cherry who did not wish their PIC selection changed and requests to WilTel for reconfirmation of PIC change orders involving Cherry. (Tr. 333-4).

WilTel itself noted more than 5,000 customer complaints regarding Cherry's PIC change requests nationally between January 4, 1993 and the date of its testimony. There were more than 1200 complaints from Florida IXC's in the period between March 1 and April 30, 1993. WilTel also dated its first Florida PIC change request from Cherry at November 20, 1992 a time predating Cherry's Florida certification.[6] (Tr. 306-7). WilTel has stopped accepting PIC change requests from Cherry in Louisiana, based on an order from the Louisiana Public Service Commission, and Oregon, based on an order from the Oregon Attorney General. WilTel has also stopped processing PIC changes in seven additional states and states where Cherry was not registered in January, 1993. (Tr. 317).

In addition to consumer and local exchange carrier slamming complaints, WilTel has received approximately 128 complaints about Cherry from state and federal agencies, including the FCC, state public utility commissions, the Better Business Bureau and state attorneys general. (Tr. 318).

The staff also noted a discrepancy and attendant confusion with respect to Cherry's corporate identity in its application filing (Tr. 272-3) and an omission therein with respect to a felony

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[6] Cherry was not certified in Florida until December 4, 1992.

conviction in 1985 of Cherry's current Chief Executive Officer. (Tr. 271).

On February 22, 1993, the Commission ordered Cherry to show cause,

> why it should not have its certificate cancelled, or pay a fine of $25,000, for submitting unauthorized PIC changes and causing an excessive number of customer complaints to be filed.

Order No. PSC-93-0269-FOF-TI, p. 4.

The hearing in this case was held on June 18, 1993. An attorney from the Commission's Legal division represented staff during the hearing and then presented staff's evaluation as to suggested options for Commission action in full accord with applicable rules and statutes. A different attorney from the Commission's Appeals division represented the Commissioners during the hearing and not only was available to give legal advice as to the conduct of the hearing, but did so when appropriate. This separate personnel function was also fully in accord with the requirements of the Commission's rules and policies. Fla. Admin. Code R. 25-21.021(1) and (2).

On September 20, 1993, the Commission issued Order No. PSC-93-1374-FOF-TI revoking Cherry's certificate. On January 31, 1994, the Commission denied Cherry's Motion for Reconsideration in Order No. PSC-94-0115-FOF-TI, the order challenged in this appeal.

SUMMARY OF THE ARGUMENT

There is no inflexible measure of what due process of law requires. Under the balance of interests test, the Commission did not deprive Cherry of its right to due process of law. While Cherry certainly had a right to an unbiased hearing, the Commission also needed access to the expertise of its staff. Cherry did not demonstrate that a combination of functions designed to provide that access deprived Cherry of an unbiased hearing. A process in which the staff attorney both questions the witnesses and participates in the evaluation of evidence was held not to violate due process of law in South Florida Natural Gas v. Florida Public Service Commission, precedent which is on point.

The Commission did not concede any part of Cherry's mischaracterization of the staff attorney's post-hearing role. The staff attorney was permitted by rule, statute and this Court's precedent both to question witnesses and participate in the evaluation of evidence. The staff is not a party in interest, but represents the public interest and is responsible for preparing as complete a record as possible for presentation to the Commission.

Cherry erred factually and legally in its constitutional challenge to the Commission's process. The Commission, unlike agencies in cases cited by Cherry, allowed the staff attorney only to advise in the sense of participating in the evaluation of evidence. Advising the Commissioners in their role as hearing officers was a different task given to a different attorney from a different division within the Commission, in accord with the

requirements of due process. Cherry not only misstated the facts of what occurred, but relied on cases not on point with what the Commission actually did. This was also true as to cases in which a board delegated to a prosecutor the task of writing the board's decision. In the Commission's process, the staff could only submit recommendations. The Commission reviewed those recommendations as part of its review of the whole record. There was no delegation whatsoever to a prosecutor to decide any case. Moreover, as a matter of law, the staff attorney's recommendations were not improper ex parte communications. §350.042(1), Fla. Stat.

Cherry's claim that the Commission's case was solely hearsay and not proved is incorrect and misapprehends the burden of proof. The Commission had sufficient non-hearsay evidence based on an excessively high volume of customer complaints to order Cherry to show cause why its certificate should not be revoked or the Company fined. Though the show-cause proceeding provided an opportunity for Cherry to rebut the reasonable inference of, inter alia, slamming and verification rule violations which the Commission apprehended from the pattern of complaints, Cherry instead gave evidence consistent with its own presumption that the complaints were valid. Moreover, the Commission further utilized the complaints, even if hearsay, to supplement and explain admissions on the record by Cherry that customers were slammed by the willful acts of its salespeople. Cherry admitted that it was responsible for the actions of its salespeople in making sales. Therefore, the

Commission did not err in finding such willful rule violations by Cherry, even assuming the Commission did have the burden of proof.

The Commission not only based its findings of willful rule violations on competent, substantial evidence, but also properly balanced the public detriment resulting from Cherry's causation of excessive numbers of customer complaints as against the benefits derived from competition by Cherry. It is not the Court's role to reweigh that balancing.

The record demonstrates a concern to accord fair treatment to Cherry and to protect the public as well, but is devoid of any purpose to inflict draconian punishment on Cherry. The Commission's consideration was not limited to Cherry, but also toward protecting the public. The Commission could reasonably conclude that revocation of Cherry's certificate was necessary to protect the public under these facts and circumstances.

The Court should reject as contrary to precedent Cherry's request that the evidence be reweighed and the result applied to the issue of revocation. Contrary to Cherry, the record demonstrates a conspicuous lack of good faith in Cherry's treatment of Florida customers and insufficient responses to the Commissioners' attempts at the hearing to elicit signs of greater responsibility and credibility by the Company in the future conduct of its business activities. Accordingly, the Commission's orders should be affirmed.

ARGUMENT

I. THE COMMISSION'S POST-HEARING PROCEDURE DID NOT VIOLATE CHERRY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FLORIDA CONSTITUTION.

While the right to due process of law is guaranteed by both the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution, this Court has held that the manner in which due process applies varies with the character of the interests and the nature of the process involved. Hadley v. Dept. of Administration, 411 So. 2d 184, 187 (Fla. 1991); State v. Johnson, 345 So. 2d 1069 (Fla. 1977) (combining fact-seeking and judicial functions in the same office does not automatically violate due process). There is no single, inflexible test determinative of whether the requirements of due process have been met. Dept. of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), accord Matthews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976). The interests of the parties and nature of the forum are relevant to the evaluation of a claim that due process has been violated.

This Court has recognized the vital importance in the administrative forum of the role of agency staff. South Florida Natural Gas v. Florida Public Service Commission, 534 So. 2d 695 (Fla. 1988). Though the agency decision-maker does not delegate the power to decide, the decision itself combines the views of the decision-maker with the technical knowledge and expertise of the agency staff. One prominent scholar of the administrative process compared it to the model of a medical clinic which, by making use

of the aptitudes of many different specialists, can provide medical services which are superior to what any individual doctor could provide. 3 K. Davis, Administrative Law 277-8 (2d ed. 1980).

Thus, in South Florida Natural Gas, supra, this Court held that

> the Commission is clearly authorized to utilize its staff to test the validity, credibility and competence of the evidence presented . . .

534 So. 2d at 698. In so holding, this Court rejected the utility's contention

> that it was deprived of due process of law because the Commission allowed its staff to make inquiry of utility witnesses and assist in evaluating the evidence. [e.s.]

534 So. 2d at 697.

Though Cherry misdescribed in various ways staff's role in the hearing at issue in this appeal, it is readily apparent that the Court has already considered and rejected the identical due process challenge to staff's combined functions of inquiring of utility witnesses and assisting in evaluating the evidence. South Florida Natural Gas, supra.

The quasi-judicial role of an administrative decision-maker differs from that of a trial or appellate judge. The responsibility is not to adjudge the guilt, innocence or liability of a person or entity, but to reach a decision in the public interest. That process requires the multi-disciplined expertise and analysis of staff in an advisory role. Thus, in determining whether due process has been afforded in an administrative setting,

the guaranteed rights of the individual must be balanced against the welfare of the general public. Hadley, supra. In effect, the administrative context need not match the judicial model or contain all the formalities of a judicial proceeding. Hadley, supra, at 187. The need for agencies to utilize staff to present a complete record for the decision-maker must be weighed in arriving at the appropriate balance. City of Miami v. St. Joe Paper, 364 So. 2d 439 (Fla. 1978). The utilization of staff to develop a record that permits discussion and consideration of a range of reasonable options is not violative of due process principles in the abstract or on the facts of this case. Nor is the impartiality of the Commission panel compromised merely because the same staff attorney both inquires of witnesses and assists in evaluating the evidence.[7] South Florida Natural Gas, supra.

A: THE COMMISSION DOES NOT CONCEDE ANY ASPECT OF CHERRY'S INACCURATE ANALYSIS OF THE STAFF ATTORNEY'S POST-HEARING ROLE.

Cherry's revelation that the Commission "makes no secret of its procedure", Initial Brief, p. 12, is hardly surprising since that procedure is governed by rule and statute. Though Cherry objects that the Commission staff attorney did not file proposed findings of fact and conclusions of law pursuant to Florida Administrative Code Rule 25-22.056(1)(a), a comparison of that rule with Rule 25-22.056(1)(b) demonstrates that the objection is

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[7] Cherry's labeling of these functions as "prosecutor" and "legal advisor" does not vitiate this Court's approval of the actual combination of functions at issue. South Florida Natural Gas, supra.

totally without merit. Rule 25-22.056(1)(b) states that in hearings conducted by a single Commissioner as hearing officer,

> all parties and staff may submit proposed findings of fact, conclusions of law . . . [e.s.]

In contrast, Rule 25-22.056(1)(a), the rule applicable to the proceeding below, merely states that in hearings conducted by a panel of two or more Commissioners or the full Commission,

> all parties may submit proposed findings of fact, conclusions of law . . .

The absence of the phrase "and staff" in the just-cited rule excludes the option of staff to submit proposed findings of fact and conclusions of law in hearings governed by that rule. This reflects the fact that although staff may participate "as a party", Fla. Admin. Code, R. 25-22.026(3), staff is not a party in interest as defined in Rule 25-22.026(1).[8] If the rule applicable to hearings conducted by a panel were intended to include staff, it would have included the phrase "and staff", as does the rule applicable to hearings conducted by a single Commissioner as hearing officer where that result was intended.

Moreover, Cherry's mischaracterization of the staff's August 26, 1993 memorandum (staff recommendation) and December 20, 1993 memorandum (staff recommendation on reconsideration) as ex parte

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[8] Staff is not a complainant, applicant, petitioner, protestant, respondent or intervenor in procedures before the Commission. Staff's primary duty is to represent the public interest and to bring all relevant facts and issues before the Commission for its consideration. Fla. Admin. Code, R. 25-22.026(3).

legal memoranda (the former in purported violation of Fla. Admin. Code, R. 25-22.056(1)(b)), Initial Brief, p. 13-14, is incorrect as a matter of law. Under the applicable Commission ex parte statute,[9] §350.042(1),

> [t]he provisions of this subsection [prohibiting such communications] shall not apply to Commission staff. [e.s.]

As a matter of law, therefore, the ex parte strictures imposed on the Commission by the Legislature do not apply to Commission staff. Staff provided these memoranda, not in violation of Rule 25-22.056(1)(b), as contended by Cherry, but in fulfillment of its advisory role as defined by Rule 25-22.026(3), the general principles of staff's role in administrative agencies noted earlier, pursuant to this Court's precedent in South Florida Natural Gas, supra, and as permitted by §350.042(1). Accordingly, Cherry's attempt to redesign these parameters of administrative law should be rejected.

Though Cherry asserts that the Commission copied staff's recommendation that Cherry's certificate be revoked "substantially verbatim", Initial Brief, p. 11, Cherry earlier admitted that staff's advisory memorandum,

> also contained an alternative to revocation subject to certain restrictions. [e.s.]

Initial Brief, p. 6. Obviously, to the extent the Commission rejected staff's suggested alternative, it did not copy the

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[9] Moreover, this Court has held §120.66(1), Fla. Stat., to be inapplicable to Commission proceedings before a Commission panel. Citizens v. Wilson, 569 So. 2d 1268, 1270 (Fla. 1990).

memorandum verbatim. Instead, the Commission selected from a range of options, accepting some and rejecting others, exactly as contemplated by staff's advisory role.

The Commission denies categorically that it "conceded" anything relevant to Cherry's ungrounded theories of "prosecutors", "legal advisors", "dual role as prosecutor and judge" and submission of ex parte memoranda, as claimed in the Initial Brief, p. 13-14. The Commission's explanation cited on p. 13 of the Initial Brief as the source for the supposed "concession" contains not a single word or phrase of what Cherry claims was conceded. Clearly, Cherry's argument is not about any failure of the Commission to "hold the balance nice, clear and true" as appropriate to the administrative forum, Hadley, supra, City of Miami, supra, but about Cherry's desperate attempt to coerce precedents which are not on point into a semblance of support for this appeal. The staff attorney's post-hearing role was precisely that contemplated by Commission rules, the principles of administrative law, this Court's cited precedent and applicable statutes. These are appropriate foundations for the Commission's activities, notwithstanding Cherry's assertions.

B. THE COMMISSION CONDUCTED CHERRY'S HEARING WITHOUT VIOLATING ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

Cherry states that it does not challenge "the combination of investigatory, prosecutorial and adjudicatory functions within the agency of the PSC per se." Initial Brief, p. 14. However, Cherry has cited no authority for its assumption that the Commission, even

in a show cause proceeding to revoke the certificate of a telecommunications company, has a prosecutorial function. The Commission believes that the record of the proceedings below indicates that staff performed its duty to "represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration." Fla. Admin. Code, R. 25-22.026(3).

Moreover, Cherry has admittedly cited "no Florida cases directly on point", Initial Brief, p. 17, and cited no cases from any jurisdiction or administrative agency which are not immediately distinguishable from this case.

Indeed, Cherry's inaccurate analysis is based on inaccurate factual assumptions. On p. 14, n. 14 of the Initial Brief, Cherry erroneously claims that David Smith, who represented the Commissioners at the hearing,

> did not advise the Commission on any substantive matters. All substantive advice was provided by the staff attorney who prosecuted the case, Charles Murphy.

On p. 19, n. 17 of the Initial Brief, Cherry compounds the preceding error by stating,

> There is no indication that Mr. Smith, alleged counsel to the Commissioners, see, supra, note 14, gave any advice to the Commission panel during or after the June 18, 1993 hearing. The sole advice came from Mr. Murphy, the prosecutor. [e.s.]

The record says otherwise.[10] At the outset of the hearing, Cherry's counsel sought to invoke the rule to sequester witnesses and counsel for staff objected (Tr. 5). The Commission Chairman then inquired as to whether invoking the rule was a necessary formality. (Tr. 6). Cherry's Counsel argued that the rule could be invoked in administrative proceedings generally. (Tr. p. 8) Commissioner Johnson concurred with that assertion and then said,

> Whether or not that general [Chapter] 120 rule is applicable here, I would turn to our counsel [i.e., Mr. Smith] and ask.

Tr. p. 8.

Upon the suggestion that the Commission's counsel should be consulted, the Chairman then asked,

> Mr. Smith do you have anything to add?

Mr. Smith then replied,

> I think Mr. Shevin [Cherry's counsel] has the right to invoke the rule in an administrative proceeding before the Commissioners and before the Division of Administrative Hearings.

Chairman Deason then ruled:

> Very well, consider the rule invoked. [e.s.]

Tr. p. 8. As is evident, the Commission's process was not the "one-man show" found to violate due process in the cases cited by Cherry. Here, a contested issue of procedure arose with Cherry's

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[10] The transcript of the hearing, p. 2, notes the appearances of Charles Murphy and Angela Green, PSC Division of Legal Services on behalf of the Commission staff. It separately notes the appearance of David Smith, FPSC General Counsel Office, as Counsel to the Commissioners. The Division of Legal Services is the litigation division and the General Counsel Office is the appellate division within the Commission. See, Fla. Admin. Code R. 25-21.021.

attorneys seeking one result and staff's attorneys seeking another. Though Commissioner Johnson, an attorney, thought she knew the answer generally, she sought legal advice from Mr. Smith, the Commissioners' counsel, as to how to apply it to this hearing. Mr. Smith advised in favor of Cherry, not the Commission staff.[11] The Chairman then ruled in favor of Cherry and invoked the rule.[12]

This example differentiates the Commission's process from the "one-man show" found to violate due process requirements in the cases cited by Cherry. It is astonishing that Cherry would file a 43 page brief on the subject of due process and claim, contrary to the record, that Mr. Smith gave no advice to the Commissioners. The above-cited example reflects the care taken by the Commission to separate the functions of advising the Commission as to staff's views from that of providing legal advice to the Commissioners as to the fair and proper conduct of the hearing. That care extends to appointing different attorneys from different divisions within the Commission to perform those separate functions. A comparison

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[11] Mr. Smith also contributed legal advice sua sponte, where he felt it appropriate (Tr. 57).

[12] This illustrates the fact that the staff attorney and the Commission do not "share hats", since, if that were the case, the Commission would not have invoked the rule. Moreover, if the Commission ultimately adopts a staff recommendation, that indicates a meeting of minds, not a sharing of hats. Unlike the cases cited by Cherry, the Commission does not delegate the task of drafting its decision to a prosecutor. Instead, the Commission weighs staff's views of the record along with the record itself, pleadings, and individual Commissioner's impressions of the hearing to arrive at a decision. Therefore, it is not unusual for staff recommendations to engender lively debate or to be rejected wholly or in part at Commission agenda conferences.

of the Commission's three element process, i.e., attorney for staff, separate attorney for Commission panel, and Commission panel acting as adjudicator, with the "one-man show" cases cited by Cherry, is instructive.

In Wong Yong Sung v. McGrath, 339 U.S. 33, 43, the same inspector was responsible for, first, assembling the evidence against an alien in deportation hearings, second, advising himself as to what was admitted into the record, and third, acting as judge. It is not surprising that the Court found,

> [t]hese types of commingling of functions of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate division of labor.

That is exactly what the Commission has done, by having staff -- represented by one attorney -- gather and present evidence and having the Commission panel -- counseled by a different attorney from a different division within the agency -- conduct the hearing and rule on evidentiary matters.

Wong is of no help to Cherry in this case where Cherry would instead attack a different combination of functions which is permitted in Florida by Commission rules and this Court's precedent.

McIntyre v. Tucker, 490 So. 2d 1012 (1st DCA 1986) is of no help to Cherry either. There,

> the School Board's attorney acted as both prosecutor, representing the interests of his client the School Board, and legal advisor, advising the Board in its capacity as hearing officer. [e.s.]

As the record demonstrates, Mr. Murphy conducted the presentation of staff's evidence and Mr. Smith gave the Commissioners whatever legal advice they asked for in their capacity as hearing officers or collective agency head. Again, McIntyre involves a combination of functions not present in the Commission process. The combination that is present, i.e., having the staff attorney inquire of witnesses and assist in evaluating the evidence, is contemplated by Commission rules and approved in this Court's precedent.

On p. 17 of the Initial Brief, Cherry again fabricates the specious claim that the Commission "admitted" that the "prosecuting" attorney and the Commission panel shared hats. But the Commission admitted nothing of the kind. What the Commission explained is that the staff attorney has a post-hearing advisory role. (R. 598). Cherry simply misconstrues the word advisory to mean giving legal advice to the Commissioners in their capacity as hearing officers. McIntyre, supra. That was Mr. Smith's job and he performed it. Mr. Murphy's advisory role was to assist in evaluating the evidence so as to present staff's view as to a range of options which the Commissioners could either accept, reject or modify. The two forms of advising are simply different and unrelated. That is why the Second District Court of Appeals rejected the combination of functions in McIntyre and this Court affirmed the combination of functions in South Florida Natural Gas. If anything "stacked the deck" against Cherry, it was not the process, but the record of Cherry's activities.

Forehand v. School Board, 600 So. 2d 1187, 1190 (Fla. 1st DCA 1992), is exactly like McIntyre and therefore equally unhelpful to Cherry. The opinion states that the Board's attorney not only conducted the prosecution, but at other times, the Board Chairman

> asked for and received legal advice from this attorney on procedural matters.

600 So. 2d at 1190. Two out of the three Commissioners on Cherry's panel were lawyers and their need for legal counsel on procedural matters was not great. As the record demonstrates, however, when they needed such counsel, it was obtained from Mr. Smith, not Mr. Murphy. Moreover, Mr. Smith was made available for that purpose, assuring that the requirements of due process were met whether the Commissioners had many questions or none at all.

Ford v. Bay County School Board, 246 So. 2d 119 (1st DCA 1970), is not on point. Ford's due process rights were held not violated because the School Board's retained counsel prosecuted the case but was not present at the meeting where judgement was rendered and did not proffer legal advice during the hearing. At Cherry's hearing, the staff attorney presented staff's case and then assisted in evaluating the evidence toward presenting staff's view of the available options. The staff attorney did not proffer "legal advice" to the Commissioners and was not "retained" for that purpose. Mr. Smith was and did. The staff attorney made arguments and in that sense participated "as a party", but did not function as counsel to the Commissioners. Mr. Smith did.

Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322 (Fla. 1990) is again obviously not on point. The Commissioners did not testify at the hearing and then find their own testimony to be competent, substantial evidence. 562 So. 2d at 322-23. Ridgewood was a "one-man show", while the Cherry hearing was not.

Cherry reiterates its belief that the staff attorney gave legal advice to the Commission panel after the hearing, again finessing the difference between assisting in evaluating the evidence toward presenting staff's view of a range of options on the one hand, and counseling the Commissioners in their position as hearing officers, on the other. The staff attorney performed only the former advisory role, not the latter. In the cases cited by Cherry which violated due process, the same attorney both prosecuted and performed the latter advisory role of counseling the board on procedural matters in their role as hearing officers. Again, that is different from the combination of functions Cherry is attacking here, which is identical to this Court's precedent in South Florida Natural Gas.

Cherry further complains that it was unable to respond or object to staff's recommendation. The Commission rules do not provide for filings in response to the staff's recommendation and there is no right of due process which guarantees the party the right to continue quarreling with the staff ad infinitum. Op. Att'y Gen. 075-190 (1975). (Under Section 120.57(1)(b)5, Fla. Statutes, (1974 Supp.) Public Counsel was found to have no due

process guarantees of cross-examination of staff's recommendations after conclusion of the evidentiary hearings).

Continuing its series of citations which are off point, Cherry offers Allen v. Louisiana State Board of Dentistry, 543 So. 2d 908 (La. 1989), where the prosecuting attorney secretly drafted the Board's findings of fact and conclusions of law. Mr. Murphy drafted primary and alternative recommendations as to a range of options, from certificate revocation to fines, without any foreknowledge as to what, if anything, the Commission would vote to approve. The Commission ultimately approved a recommendation to revoke Cherry's certificate and rejected the alternative recommendations. The Commission could have modified or rejected either recommendation or asked the staff attorney to submit new recommendations, which in turn could be accepted, rejected or modified. Moreover, no Commissioner would know what any of the others thought until the public agenda conference.

In addition, the Allen Court noted the ex parte nature of the communication, which violated Louisiana law, and the fact that the prosecuting attorney secretly drafted the Board's findings of fact and conclusions of law after being told of the Board's decision, for which the attorney was to supply the reasons. In the Commission's process, the staff attorney merely presented staff's view of a reasonable range of alternatives, with draft recommendations supporting that range of alternatives. The individual Commissioners considered these along with the record of the case as a whole, then deciding in public what part, if any, of

the draft they would utilize, modify, discard or replace in their decision. The recommendations could not have been ex parte, given §350.042(1). Cherry's dispute of that issue is with the Florida Legislature, not the Commission.

As to whether the staff attorney's role in presenting staff's case taints his advisory role in presenting staff's options and assisting in the evaluation of the evidence, this Court rejected that view in South Florida Natural Gas. Since neither Allen issue of ex parte communications or a request to the prosecuting attorney for post decision findings of fact and conclusions of law is at issue in the Commission's process, Allen is, once again, not on point. The question is whether Cherry received due process, not whether Allen did, and the facts of Allen are significantly different.

The Commissioners approve staff recommendations which comport with their view of the record and reject those that do not. The staff attorney does not know what the ultimate decision will be when submitting a recommendation. Unlike the Board in Allen, the Commission does not ask the staff attorney to draft the reasons for the decision after it decides, the flaw attacked by the Allen court.

Though Cherry proclaims that the dual roles of the staff attorney of presenting staff's case and then assisting in evaluating the evidence gives the appearance of impropriety, that unsupported view is contrary to this Court's precedent in South Florida Natural Gas. Cherry has merely demonstrated by its case

citations that it is possible to violate a party's due process rights and to do so in an administrative proceeding. However, citation of a succession of cases which are not on point simply does not demonstrate that Cherry's due process rights were violated by the Commission.

Significantly, Cherry has asserted the appearance of impropriety of the process but no statutory impropriety, as in Allen. The Allen decision was explicitly not based on the appearance of impropriety. 543 So. 2d at 915, n. 15.[13]

Rule 25-22.026(3) requires Commission staff to represent the public interest whether or not a show cause proceeding is at issue. The decision faced by the Commission was whether the public interest in allowing Cherry to provide telecommunications services as a competitor was outweighed by the public detriment reflected by

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[13] Similarly, In re Bruteyn, 380 A. 2d 497 (Pa. Commw. Ct. 1977) is not on point. There, the prosecuting attorney was given the task of drafting the final Adjudication and Order, as in Allen, and also, as in the preceding cases cited by Cherry, supplied the board with legal opinions regarding the defendant's evidentiary motions. 380 A. 2d at 502.

Neither of these describes the Commission's process. Mr. Murphy's advisory memoranda made staff's evaluation available to each Commissioner to consider along with the complete record and their individual impressions of the hearing. Mr. Murphy could not know what part, if any, of these memoranda would be found usable by the individual Commissioners and whether those individual perceptions would clash or harmonize at the agenda conference. This is reflected in the fact that staff presented alternative recommendations, which were rejected.

Lyness v. Commonwealth, 605 A. 2d 1204 (Pa. 1992) is equally not on point since it concerns a due process claim that Cherry is not even arguing, i.e., whether board members initiating a probable cause finding could preside over the appeal of a hearing officer's order.. It is also not on point because the initiation of the show cause process here was not by the Commission, but by the Legal division, with notice to Cherry and an opportunity to contest it.

the number and nature of the complaints generated by Cherry's activities.

Thus, the Commission's role was not that of determining Cherry's "guilt" or "making the punishment fit the crime" or treating this as a "death case", as argued by Cherry. The Commission's task was to determine to the best of its ability, based on the record, which of a number of possible alternatives best suited the public interest. The burden is on appellant to overcome the presumption of correctness which attaches to orders of the Commission. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1988). The citation of cases which are not on point does not meet that burden. Cherry has not demonstrated that staff's activities in presenting its case or assisting in the evaluation of the evidence violated Cherry's right to due process.

C. THE STAFF RECOMMENDATION MEMORANDA WERE NOT IMPROPER EX PARTE COMMUNICATIONS.

The Commission reiterates that, as a matter of law, §350.042(1), the staff attorney's recommendation memoranda advising the Commissioners of staff's primary and alternative views of the case were not improper ex parte communications. Indeed, the Legislature has seen fit to make such communications per se lawful and proper so that the Commissioners are not precluded from availing themselves of staff's expertise, because the staff is not an interested party and because the staff's primary responsibility

is to represent the public interest. See, also, Citizens v. Wilson, supra.

Though Cherry argues that the staff attorney's recommendation gives the appearance of impropriety[14] to every PSC adjudication, Cherry has been unable to produce a single on point opinion in support. In contrast, the Commission relies on the South Florida Natural Gas opinion, which is on point.

II. THE COMMISSION COMMITTED NO ERROR IN RELYING ON THE EVIDENCE OF RECORD TO SUPPORT ITS FINDING OF SLAMMING.

Cherry argues that

> the PSC failed to prove its case in chief because it presented only hearsay evidence of slamming.

In so arguing, the Commission believes that Cherry is mistaken as to the hearsay issue, since the Commission orders at issue relate any arguably hearsay evidence to explaining and supplementing evidence of record.[15] Order No. PSC-94-1115-FOF-TI, p. 21-25. In addition, even though the Commission did "prove its case in chief", Cherry appears to misread the burden of proof in this case.

In City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981), this Court denied the City's petition for rehearing or

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[14] Appellant literally complained -- truthfully, in the Commission's view, that each PSC adjudication has the "appearance of impartiality". Initial Brief, p. 25.

[15] Section 120.58(1)(a) provides that hearsay evidence may be used for the purpose of supplementing or explaining other evidence.

clarification to place the burden on the Commission to establish that the City's rate structure was unreasonable. The Court stated:

> By issuing an order to show cause, the Commission is affording the City an opportunity to present evidence justifying its rate structure and to prepare a record to rely upon in making a legal challenge to the Commission's final action should the City be dissatisfied with it. Therefore, it is proper for the City to have the burden of going forward with evidence in justification of its present practices. [e.s.]

In this case, the Commission's complaint analysts received a large number of telephone calls at an intense rate which were logged as complaints about Cherry's slamming and marketing practices. Cherry responded to the complaints with refunds and apologies as well as an undertaking to use the complaints to reform its activities, but without denying the validity of the complaints to either the Commission or the complaining customers.[16] Clearly, the validity, vel non, of the complaints, or any individual complaint, was not a practical issue for Cherry, notwithstanding the legal issue now being asserted. For somewhat obvious reasons, the question of the validity, vel non, of any particular one of these complaints was not of more concern to the Commission than it was to Cherry. Under these circumstances, such complaints bear several indicia of reliability such that, for practical purposes, their validity may be presumed.

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[16] See, Exh. 9. Moreover, Cherry's investigation of the complaints was for customer service and public relations reasons, not to test their validity. (Tr. 122-3)

First, a large number of complaints were received from 26 counties in all parts of the state about the same company. Second, though stated in different ways by different complainants with no apparent connection to each other, the subject matter of the complaints was almost identical. Third, the same pattern or trend was replicated nationally. (Tr. 201-3; 317-18).

As Chairman Deason stated at the hearing,

> By statute, [the Commission has] the authority and the responsibility to maintain that persons who enter into this type of enterprise are there to serve the public and to meet certain basic requirements of standards of service. And it seems to me that, in complying with that statutory responsibility and jurisdiction that we have, that it is necessary to be able to communicate with the customers of the utilities and to determine whether there are specific problems-<u>whether there is a trend or pattern</u>.
> And it is unrealistic in my opinion to expect that a customer, for the sake of argument, say that was slammed, to come to Tallahassee, to travel up here and to formally on the record be sworn in and make a statement that that customer was indeed slammed and that to be first-hand evidence that is not hearsay evidence.
> That's why the people of this state have this Public Service Commission here [in] Tallahassee, to look after their interests, to be able to call up on our 800 number and say that "XYZ Company has done something in my opinion which is not appropriate." [e.s.]

Tr. p. 46.

In <u>Manatee County v. Marks</u>, 504 So. 2d 763 (Fla. 1987), this Court noted that

> [t]he Commission found that no residents or property owners in the area had complained about the telephone service,

and listed that finding along with other evidence it found to be competent and substantial. 504 So. 2d at 764-5. Clearly, this Court treated the absence of a number of parallel customer complaints in Manatee to be competent, substantial evidence in support of the Commission's position. It follows logically that the presence of a large number of parallel customer complaints can be competent, substantial evidence in support of the Commission's position even if each complaint is technically hearsay as to the validity of that particular complaint.

In this case, on receipt of an excessively large number of such complaints, the Commission (after preliminary discussions with and assurances from Cherry which did not ameliorate the problem) issued an order to show cause why Cherry should not have its certificate revoked or be fined for submitting unauthorized PIC changes (slamming) and causing an excessive number of customer complaints to be filed.

While hearsay is an out-of-court statement offered to prove the truth of the statement, §90.801(1)(c), the Commission's knowledge of the number of complaints it received, their similarity and their source was not hearsay because the contents of the complaints were not being used to prove the truth of any one complaint. Instead, the Commission reasonably inferred a pattern or trend of slamming and marketing abuses based on the receipt of an excessive number of such complaints bearing the indicia of validity previously noted. Thus, the show cause order was based on submitting unauthorized PIC changes and causing an excessive number

of customer complaints to be filed. The latter led to a reasonable inference of the former even if each complaint was technically hearsay as to the truth of that particular complaint.

That inference was, of course, rebuttable.[17] In accord with City of Tallahassee v. Mann, supra, Cherry was afforded an opportunity to rebut it. Cherry did not attempt such a proof, but, instead, provided ample testimony that the company itself was unconcerned about the validity issue:

> Mr. Giangreco: Well, we have a proactive customer service staff in place of about seven people. We train them to . . . immediately respond by giving a -- the customer is always right. To respond by giving a $12 check back, re-rate the call, to handle it in a quick fashion.

Tr. p. 107.

> Mr. Giangreco: I feel that the purpose of this [response to customer's complaints] is to satisfy the customer's complaint not to determine whether or not the validity of the complaint, that's not the purpose. It's to make this customer satisfied that we are proactively pursuing as you know, proper resolution to whatever problem. The customer is always right. [e.s.]

Tr. p. 122-3

In sum, Cherry's asserted concern that the Commission inappropriately relied on hearsay lacks any basis. The Commission had non-hearsay evidence as to the excessive number of complaints under circumstances in which a reasonable, though rebuttable, inference of validity would apply. Under City of Tallahassee,

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[17] An irrebuttable inference would indeed have violated Cherry's due process rights.

supra, Cherry had the burden of rebutting that inference and did not do so. Indeed, based on Cherry's actions, as opposed to its arguments, the company itself is content to presume the validity of the slamming and marketing complaints it responds to and invests no effort in disproving their validity.

Moreover, even under Cherry's incorrect view of this case, the Commission has not committed error in its reliance on the evidence. Cherry's view, briefly stated, is that this is a "death penalty" case, Initial Brief, p. 38, and therefore the Commission has the burden to prove its case-in-chief, as in a criminal prosecution. According to Cherry, the Commission has failed to do so because its case is solely based on hearsay. Cherry claims that the company never admitted slamming customers and, therefore, the customer complaints to that effect constitute hearsay which does not explain or supplement any admission of slamming pursuant to §120.58(1)(a) and cannot by itself support a finding of fact as to slamming. To illustrate, Cherry cites some testimony of its witness.

However, the record does not support Cherry's argument. Indeed, Mr. Giangreco testified that,

> We also had complaints from individuals who had been switched from their carrier either without their knowledge or consent.

Tr. p. 88.

Cherry argues that even if this statement is construed as "an admission that Mr. Giangreco had actual knowledge that customers had been switched, it could as easily have been a reference to Cherry's past relationship with MATRIX. MATRIX is specifically

mentioned in the context of the language cited by the Commission." Initial Brief, p. 28.

The problem with this argument is the cited passage itself.

> Mr. Giangreco: As discussed previously, early in our venture into telecommunications services, we experienced some difficulties with unethical employees, and separate problems with MATRIX Telecom System.

Tr. p. 88.

Mr. Giangreco did not specify that the individuals who were switched without their knowledge or consent were switched only because of MATRIX, as opposed to Cherry's "difficulties with unethical employees" or, given the relatively short period of time in which these events took place, how early a time period in Cherry's venture into telecommunications his comment was limited to. Therefore, the complaints are admissible to supplement and explain both aspects of the testimony.

Moreover, the record has other testimony as to Mr. Giangreco's knowledge of such switches. For example, one way for a customer to authorize a PIC change is for the customer to sign a letter of agency (LOA's). Complaints have been received to the effect that customer signatures on Cherry's LOA's had been forged. Mr. Giangreco admitted that form of slamming had occurred:

> And we only verified one in five (LOA's), thinking that, okay,here we have a good group of salespeople who were in our employ, by the way, that we thought were good outstanding citizens and wonderful people. And they went out and signed LOAs, and then we had problems initially . . .. [e.s.]

Tr. 160. Again, this admission of slamming is explained and supplemented by the complaints as to the extent the forgery of LOA signatures actually occurred and for how long a time period the word "initially" refers to.

Moreover, the Commission contests Cherry's claim, Initial Brief, p. 29, that the Commission's questioning "elicited a flat out denial that slamming occurred."[18]

> Chairman Deason: Has Cherry slammed customers?
> Witness Giangreco: No. Not, not--well, I never encourage anybody to slam a customer. I never--it's not a corporate policy, it's not a direction from this company or the officers of this company.
>
> . . .
>
> Chairman Deason: And you don't even know if slamming did take place.
> Witness Giangreco: I don't know that to be the case,

Tr. 171-2.

The Commission contends that Mr. Giangreco explained his response of "No" as applying, not to Chairman Deason's question, but to a much narrower question as to whether he or other officers encouraged anybody to slam a customer. Since Cherry admitted it is responsible for the actions of its sales staff when making sales, Exh. 3, Mr. Giangreco's answer that he and other officers did not encourage anybody to slam customers left Chairman Deason's question

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[18] See, also, acknowledgement of Cherry's counsel that "[t]his Company has acknowledged it's made mistakes. We acknowledge that there have been incidents where people have been slammed." Tr. p. 24. Such a denial, therefore, would not have been truthful.

unanswered. Other testimony also indicates the narrow and technical import of Mr. Giangreco's denial of any knowledge that slamming occurred:

> Mr. Murphy: . . . you were asked if Cherry engaged in unethical marketing practices in Florida. Is your answer yes or no?
>
> Mr. Giangreco: Well, unethical behavior, have we had complaints, yes. As I mentioned a short time ago, unethical behavior, the only way that I can tell you that yes, in fact, it definitely occurred, <u>if I was at the point of sale</u>. [e.s.]

Tr. 147. Therefore, despite the previous admissions that customers were slammed, Mr. Giangreco testified that he had no actual knowledge of slamming because he was not present at the point of sale. When his theory that he could only have actual knowledge that slamming occurred if he was at the point of sale is added to the fact that Cherry only investigates complaints for customer service and public relations reasons and not to determine if the complaint is valid, Mr. Giangreco had established willful blindness, not a credible denial of slamming or his knowledge of it.

The Commission did not err in identifying admissions of slamming on the record which the customer complaints explained and supplemented. Even if hearsay, therefore, they were admissible to explain and supplement competent, substantial evidence. Given the competent, substantial evidence of the excessive numbers of complaints previously discussed and the proper burden of proof, the

Commission actually proved more than it needed to and, a fortiori, did not err in so doing.

III. THE COMMISSION'S ORDER REVOKING CHERRY'S CERTIFICATE IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND IS WARRANTED TO PROTECT THE PUBLIC.

A. THE COMMISSION'S FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The Commission does not disagree with Cherry's lengthy statutory analysis of the Commission's power to revoke Cherry's certificate, Initial Brief, p. 30-34, ¶1. The Commission does disagree with Cherry's conclusions as to the results of applying those statutory criteria to this case. Initial Brief, p. 34, ¶2-36. In addition, the Commission notes Cherry's citation of Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (Fla. 1983), which states that,

> [t]he burden is upon appellants to overcome the presumption of correctness attached to orders of the PSC.

427 So. 2d at 717.

Cherry restates in a conclusory fashion that the Commission failed to demonstrate based on competent, substantial evidence that Cherry violated, willfully or otherwise, any Florida statutes or Commission rules.

The evidence relied on by the Commission as to Cherry's rule violations is presented in the Revocation Order, PSC-93-1374-FOF-TI, at p. 12-16 under the heading "IV. Violations". Challenges to the evidence relied on by the Commission as to Cherry's rule violations are discussed in the Reconsideration Order, PSC-94-0115-

FOF-TI, at p. 19-25. The Commission discusses its interpretation of the word "willful" at p. 11-12 of the Revocation Order.

Florida Administrative Code Rule 25-24.070(1) provides in pertinent part:

> No person shall provide interstate interexchange telephone service without first obtaining a certificate of public convenience and necessity from the Commission. Services may not be provided, nor may deposits or payment be collected, until the effective date of a certificate, if granted.

In the Revocation Order, p. 13, the Commission noted as follows:

> Initially we observe that Company witness Giangreco testified "[i]f we had solicited prior to certification, it would be easier to prove that fact. A party would merely have to show that a Cherry agent had submitted a PIC change on behalf of Cherry Communications, Inc. prior to December 4, 1992." In this regard, WilTel regulatory analyst, Roberta M. Ferguson testified that "WilTel has been processing Cherry PIC change requests for Florida since November 20, 1992 (Tr. p. 306)."

The Revocation Order contains further evidence of this nature.

Florida Administrative Code Rule 25-4.118(1), provides in pertinent part:

> (1) The primary interexchange company (PIC) of a customer shall not be changed without the customer's authorization.
> (Violation of this rule is referred to as "slamming").

In the Revocation Order, p. 14, the Commission noted, inter alia, that,

> . . . the Company witness acknowledged complaints from individuals "who had been

switched from their carrier either without their knowledge or consent." (Tr. p. 88).

The Commission then describes the nature and excessive volumes of slamming complaints received by the Commission, by Cherry pursuant to its customer complaint protocol, by WilTel, Cherry's underlying carrier, and by Centel, along with precautions taken by Centel as a result of the volume and nature of the complaints. Moreover, earlier in this Brief, the Company witness's admission was noted to the effect that company employees "signed LOA's", i.e., letters of agency authorizing PIC changes supposedly signed and furnished by customers. (Tr. p. 160). Indeed, Cherry's counsel also stated at the hearing that Cherry admitted it had slammed customers. (Tr. p. 24).

Florida Administrative Code Rule 25-4.118(2) contains requirements for PIC change authorization by customers, such as the LOA's just referred to and verification by independent firms. In the Revocation Order, p. 15, the Commission noted that the Company's admission that customers "had been switched from their carrier either without their knowledge or consent" is an implicit admission that the required verification procedures did not take place.. The Commission also cited other such evidence, including customer complaints summarized by the Company to the effect that Cherry had not provided an explanation of how their long-distance service came to be switched or documentation that had been promised by the Company. Exh. 9.

Florida Administrative Code Rule 25-4.043 provides:

> The necessary replies to inquiries propounded by the Commission's staff concerning service or other complaints received by the Commission shall be furnished in writing within fifteen (15) days from the date of the Commission inquiry.

In the Revocation Order, p. 15, the Commission referred to testimony by the Commission witness to the effect that "[a]s of April 30, 1993, 61 complaints against Cherry Communications had been closed by the Division of Consumer Affairs. Of those cases, 32 were noted as having late responses from Cherry Communications." (Tr. p. 198).

In the parallel discussions of rule violations in the Reconsideration Order, p. 19-25, the Commission supplies specific citations to the record.[19]

The Commission addressed the concept of willful acts in the Revocation Order, p. 11-12. Citing Commission Order No. 24306, the Commission noted that willful implies intent to do an act, as distinct from intent to violate a rule. In addition, the Commission applied the concept to this case:

> The Company has admitted that its sales staff are agents for the Company, that it can control its sales staff, and that it is responsible for the actions of the sales staff when making sales. [Exh. 3] We find that sales agent violations flourished under Cherry's management and that it is not plausible that the Company's sales agents did not intend or "will" the acts of repeatedly submitting unauthorized PIC change requests.

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[19] The discussion in the Revocation Order was excerpted here for clarity, since that order provides the initial evidentiary support, rather than discussion of the arguments on reconsideration as to that evidence.

> Indeed, the record evinces a pattern of such acts dating from a time prior to certification. Likewise, the Company's routine failure to meet Commission staff inquiry reply deadlines which are established by Rule, evince a willful disregard of that Rule.

Based on the above, the Commission had ample competent and substantial evidence that Cherry willfully violated Commission rules.

Moreover, the Commission properly found that Cherry's Florida IXC application failed to disclose the felony conviction of James R. Elliott, the Company's CEO, and contained a misstated corporate number, making it unclear which of two corporations was the responsible party in the event of problems. (Tr. 271-3). It was within the Commission's discretion to evaluate the relevance of inaccuracies on Cherry's application to the question of revocation and to weigh the effect of other assertedly mitigating factors. Cherry is, in effect, asking this Court to reweigh those factors, which is not the Court's role. Citizens of Florida v. Public Service Commission, 435 So. 2d 784 (Fla. 1983).

Cherry also argues that the public interest factors in Section 364.337(2) were not expressly considered and that there was, therefore, no competent, substantial evidence to revoke Cherry's certificate on the basis that Cherry does not serve Florida's public interest.

Cherry misconceives the application of those provisions in this case. The factors in Section 364.337(2) relevant to different regulatory treatment for firms in competitive markets were found to

be favorable to Cherry at the time it was granted a certificate. The deluge of complaints that ensued thereafter did not re-raise the question of whether §364.337(2) had been properly applied. Instead, those problems presented the question of whether the benefit of having an additional competitor in the market for telecommunications services resellers was outweighed by the serious public detriment of an excessive volume and severity of complaints generated by Cherry's conduct of its business activities. In statutory terms, the record of Cherry's injury to the public interest supporting revocation, §364.335(4), had to be balanced against the general public interest standard which had initially supported granting the certificate, §364.335(3). See, also, §364.337(2)(e). On consideration of the record, the Commission found that the balance favored revocation. Again, it is not the Court's role to reweigh those factors. Citizens of Florida, supra.

The Commission does not contest the benefits of competition, only Cherry's incorrect assumption that those benefits are absolute. In International Telecharge, Inc. v. Wilson, 573 So. 2d 816, 819 (Fla. 1991), this Court stated,

> Competition in the telephone industry is intended to benefit the public, and is not intended to benefit a corporation in derogation of the public interest.

More recently, in Florida Cable Television Ass'n. v. Deason, 635 So. 2d 14, 16 (1994), this Court considered an appellant's assertion that the legislative purpose of Chapter 364 is "to foster

competition in the public interest." The Court rejected that assertion:

> [Appellant's] narrow reading of legislative intent fails to see the forest for the trees. Although fostering telecommunications competition in the public interest is one purpose of Chapter 364, the Commission has a broader, overall duty to regulate. See §364.01(3)(a)-(f), Fla. Stat. (1991).

The record supported Commission findings that Cherry:

1) filed an inaccurate application for certification which omitted the felony conviction for wire fraud of its CEO;

2) filed misleading corporate documents;

3) had ethical/marketing problems when it solicited customers in person;

4) had ethical/marketing problems when it solicited customers via telemarketing;

5) slammed an unprecedented number of Florida customers;

6) repeatedly failed to timely reply to Commission staff inquiries;

7) operated as a reseller prior to certification;

8) despite implementation of new procedures, demonstrated no improvement in its slamming complaint record during the pendency of this proceeding.

Order No. PSC-93-1374-FOF-TI, p. 19-20.

Accordingly, the Commission's broader duty to regulate required the Commission to consider carefully the balance of public benefit and public detriment occasioned by Cherry's participation in the market. The Commission did not err in doing so. The Commission's decision that Cherry willfully violated Commission rules, as well as the terms and conditions of its operating authority, and no longer served the public interest was based on competent substantial evidence.

B. CANCELLATION OF CHERRY'S CERTIFICATE IN THIS CASE IS WARRANTED AS NECESSARY TO PROTECT THE PUBLIC.

Cherry suggests several interpretations of Deltona Corporation v. Florida Public Service Commission, 220 So. 2d 905 (Fla. 1969), but misses the import of what the case actually says:

> The Commission, of course, has the power to impose penalties sufficiently heavy to secure obedience to its orders . . .

A review of the record indicates that the Commissioners participated actively during the hearing in this case. They asked questions of the witnesses generally and, in particular, all three Commissioners individually questioned Cherry's witness. Though Cherry speaks of the Commission's need to fit the "punishment" to the "crime" and decries a "PSC determined to make an example of Cherry as a warning to other utilities," Cherry's concern is exclusively about Cherry, a luxury the Commission does not have. The Commission was concerned with treating the Company fairly, but also had to take into account the public interest. A review of the record reflects both of these concerns but, in contrast, is utterly

devoid of anything relevant to punishing Cherry with draconian measures or using Cherry as an example to warn other utilities.

The thrust of Commissioner Clark's questions to Cherry's witness, for example, ran to whether the Company had the expertise to conduct the affairs of a telecommunications company properly and responsibly:

> Commissioner Clark: One other thing. List for me who you have employed, either at the law firm or consultants or in-house, who you feel has the expertise to carry on a viable long-distance company?
> Witness Giangreco: To help us?
> Commissioner Clark: Uh-huh.
> Witness Giangreco: Swidler and Berlin in the application process to replace Network Solutions. I don't know, you're going to have to forgive me if I make the wrong name, I think his name is David Swayword?
> Mr. Cushing: Mr. Swafford has been assisting us in our Florida problem.
> Commissioner Clark: Oh, all right. We know who David is.
> Witness Giangreco: He is not assisting us. He's directing us to the people that can assist us.
> Commissioner Clark: I see.
> Witness Giangreco: Well, we've recruited, well, Bevilacqua is experienced. I can't -- really couldn't tell you.
> Commissioner Clark: Well, I tell you why I'm interested. You know your company has had problems --
> Witness Giangreco: Yeah.
> Commissioner Clark: -- and what is important to me is what caused those problems, how you've addressed it, and what the likelihood is that you can remedy them such that your company can provide service that's in the public interest. That's why I'm asking. [e.s.]

Tr. 158-9.

Far from Cherry's characterization of the Commission as concerned with punishing Cherry, Commissioner Clark's questions represented a search for some indication that the Company could conduct its business responsibly and in accord with the public interest. Her further questioning explored possible solutions to the conflict posed by the Company's abuses and the need to protect the public.

Chairman Deason's questions were also directed toward the issue of whether Cherry's compliance would or would not improve:

> Chairman Deason: Are you aware that -- first of all, do you know if there was a representation made at that time (February, 1993) that the problems that Cherry had encountered had caught the attention of management and that <u>appropriate controls either had been or would be put in place to minimize complaints in the future</u>? [e.s.]
> Witness Giangreco: I'm sure, I'm sure, as I said, it's been an evolutionary process. What date are you talking, February?
> Chairman Deason: I believe it was February the 2nd.[20]

Tr. 166.

Commissioner Johnson's questions focused on the credibility of Cherry's verification controls:

> Commissioner Johnson: Who developed those plans, or what consulting grouping or --
> Witness Grangreco: No. The monitor was Jim Elliott's idea. The third-party verification, tightening up the script, was kind of an agreement between Bob Bevilacqua and Rochelle Fishman, who runs TRC, which is the third-party verification company that we use.

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[20] The hearing was held June 18, 1993.

Tr. 174. Though Cherry characterizes the Commissioners as "from the outset, only interested in revocation," Initial Brief, p. 38, the record demonstrates, overwhelmingly, the importance to the Commissioners of, in Commissioner Clark's words,

> what caused these problems, how you've addressed it, and what the likelihood is that you can remedy them such that your Company can provide service that's in the public interest. [e.s.]

The staff, which Cherry also characterizes as only interested in revocation, recommended either revocation, or in the alternative, a fine of $250,000 to $500,000, as well as restrictions on Cherry's marketing operations in the state.[21] The Commission could reasonably conclude, based on the record, that nothing short of revocation -- not even the fines recommended alternatively by staff -- would secure obedience to the Commission's orders, Deltona, supra, and protect the public from further abuses.

Finally, the fact that the Commission so concluded on Cherry's first order to show cause does not violate Article I Section 9 of the Florida Constitution. Competition in the telephone industry is intended to benefit the public and is not intended to benefit a corporation in derogation of the public interest. International Telecharge, Inc. v. Wilson, supra (Court held that PSC has the

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[21] §364.285 provides that each day the violation continues consitutes a separate offense. See, e.g., Order No. PSC-92-1063-AS-TI ($250,000 fine).

authority to ban alternative operator services providers completely if it determines that they are not in the public interest).

C. THE COURT SHOULD REJECT CHERRY'S ATTEMPT TO HAVE THE EVIDENCE IN THIS CASE REWEIGHED.

In Manatee County v. Marks, 504 So. 2d 763 (Fla. 1987), this Court stated,

> On review of action of the Public Service Commission this Court does not re-evaluate or reweigh the evidence, but only determines whether the Commission's decision is supported by competent, substantial evidence.

504 So. 2d at 764-5.

To give credence to Cherry's claims that its remedies were effective, that its violations were not willful, that its service was less expensive than that of other companies,[22] that other companies had comparable problems, or its other assertions would require this Court to reweigh the evidence, contrary to Manatee County and a long line of appellate precedent. The Court should reject Cherry's inappropriate request to do so.

The Commission found that no Cherry sales procedure had been effective in deterring slams, citing, inter alia, a continued high rate of 108 slamming complaints received by the Commission in April and May 1993 (Tr. p. 206 line 23 through p. 207, line 1) and no improvement in complaint volume (Tr. pp. 209-227).

Moreover, the Commission made 13 findings, with citations to the record, as to Cherry's unethical marketing practices.

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[22] The Commission denied proposed finding 35 to that effect in the Revocation Order, p. 33, and in the Rehearing Order, p. 15.

Reconsideration Order, p. 27. They include findings that Cherry's slamming complaints far exceed those of other IXC's. (Tr. 190-192); Exhibit 12, NP-1, NP-2) and that Cherry accounts for 89% of WilTel's complaint volume (Tr. 308, lines 13-21).

Although Cherry states that its remedies to address complaints were successful, contrary to the Commission's findings, it also states, incongruously, that it then voluntarily stopped its method of telemarketing which had caused those complaints. Initial Brief, p. 40.

Commissioner Deason pursued the telemarketing issue further at the hearing:

> Commissioner Deason: Your telemarketing efforts have ceased at this point?
> Witness Giangreco: Yes, they have.[23]
> Chairman Deason: And it is not your intention to revitalize those efforts?
> Witness Giangreco: I don't want to preclude us from ever being able to do telemarketing in the future . . .

Tr. 168-9.

In response to Commissioner Clark's questions, Cherry's witness stated,

> Witness Giangreco: I believe I can eliminate all problems down to zero, I believe I can do that.

Tr. 159. As previously noted, however, Cherry had already advised the Commission in January 1993 that it had instituted new

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[23] Though Cherry agreed to supply a late-filed exhibit specifying the date telemarketing ceased in Florida, Cherry did not do so. (Tr. 179, 181).

procedures to prevent slamming and to provide 100% verification of PIC change requests. Tr. 200-201.

As to the Company's "thorough" investigation of complaints by its law firm, Cherry's witness admitted,

> Witness Giangreco . . . what the law firm does with that information, I'm not really quite sure.

Tr. 112. As to the purpose of responding to those complaints and reporting to the Commission, Cherry's witness stated,

> Witness Giangreco: I feel that the purpose of this is to satisfy the customer's complaint not to determine whether or not the validity of this complaint, that's not the purpose.

Tr. 122-3.

Viewing this case as almost exclusively concerning Cherry, the Company improperly invites the Court to reweigh the evidence, contrary to the cited precedent, and to apply the result to the issue of revocation. To that end, the Company asserts its "good faith" in its attempts to remedy its problems and further asserts that it has "learned much".

However, this case concerns not only Cherry, but the public interest as well. At the interface between Cherry's employees and the public, the Commission found no evidence of the Company's good faith or that it has strengthened its ability to function in the public interest as a reseller of long-distance telephone service. Accordingly, the Commission's order revoking Cherry's certificate to provide long-distance telecommunications reseller service in

Florida and the order on reconsideration to that effect should be affirmed.

CONCLUSION

Cherry has failed to establish that the Commission deprived Cherry of its right to due process of law or relied solely on hearsay evidence. In addition, Cherry's inappropriate request that the Court reweigh the evidence and apply the result to the issue of revocation is contrary to the Court's proper role and applicable precedent.

Accordingly, Commission Order PSC-94-0115-FOF-TI (and underlying Orders PSC-93-1374-FOF-TI and PSC-93-1374A-FOF-TI) should be affirmed by this Court.

Respectfully submitted,

ROBERT D. VANDIVER
General Counsel
Florida Bar No. 344052

Richard C. Bellak

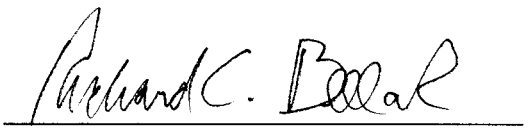
RICHARD C. BELLAK
Associate General Counsel
Florida Bar No. 341851

FLORIDA PUBLIC SERVICE COMMISSION
101 East Gaines Street
Tallahassee, FL 32399-0850
(904) 488-7464

Dated: August 5, 1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 5th day of August, 1994 to the following:



RICHARD C. BELLAK

Robert L. Shevin
Richard B. Simring
Stroock & Stroock & Lavan
3300 First Union Financial Center
200 South Biscayne Boulevard
Miami, FL 33131

Michael J. Hayes
Robert W. Cushing
Kenneth M. Sullivan
Gardner, Carton & Douglas
321 N. Clark Street, Suite 3400
Chicago, IL 60610

B83274.MRD