IN THE SUPREME COURT OF FLORIDA

CHERRY COMMUNICATIONS, INCORPORATED, Appellant, v. J. TERRY DEASON, ETC., ET AL., Appellees.	Appeal From The Florida Public Service Commission Case No. 83,274

INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FLORIDA CONSTITUTION

FLORIDA ADMINISTRATIVE CODE

STATEMENT OF THE CASE

Cherry Communications, Incorporated ("Cherry" or "the Company")[1] is a switchless re-seller of long distance telephone services whose corporate headquarters is located in Westchester, Illinois. (R. 478)[2] Cherry is a business that is devoted to providing customers nationwide with sophisticated telecommunication services at discounted rates. (Tr. 101) In a short period of time, Cherry has established a permanent niche in the long distance service provider industry. (Tr. 316-17) Cherry is certified or authorized to provide its telecommunication services in numerous states and currently provides services to hundreds of thousands of customers nationwide. (See Tr. 102) Cherry's long range goal is to establish a market presence in all 50 states.

Cherry's entre into the telecommunications arena began in the summer of 1992 as a sales agent for MATRIX Telecom ("MATRIX"),[3] a long distance communications provider. Cherry remained as a sales agent for MATRIX until December 1992.[4] (Tr. 75-76)

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[1] In early 1993, Cherry formally changed its corporate name from Cherry Payment Systems, Inc. to Cherry Communications, Incorporated. (Tr. 72)

[2] The record is referred to as "R. ___"; the transcript of the June 18, 1993 hearing is referred to as "Tr. ___".

[3] MATRIX neither has nor has it ever had a corporate affiliation, either direct or indirect, with Cherry. (Tr. 75)

[4] MATRIX was certified by the State of Florida to provide interexchange telecommunications services.

Acting as sales agents for MATRIX, Cherry's employees solicited members of the public to switch their long distance telephone service from their current provider to MATRIX. (Tr. 75-76) For each switch or "PIC", Cherry's employees obtained a written letter of agency ("LOA") signed by the customer who authorized the PIC of their long distance service. (Tr. 75) Additionally, Cherry relied on MATRIX, which was obligated to confirm the LOAs using existing phone records before submitting the PICs to the local exchange carrier, to switch long distance service to MATRIX. (Tr. 78)

In the course of Cherry's sales activities for MATRIX, Cherry learned that some of its sales representatives may have engaged in improper conduct that was not known, condoned, or encouraged by Cherry management. (Tr. 78) When management learned of the improper conduct, Cherry made a firm corporate commitment to deal expeditiously and directly with all such problems. (Id.)

First, in December 1992, Cherry terminated its relationship with MATRIX. (Tr. 76) Cherry also dismissed the sales representatives who it believed may have engaged in improper conduct.[5/] (Tr. 78, 87) Second, Cherry, through its attorneys, advised the FCC and other regulators in advance that complaints resulting from its employees' conduct could be forthcoming.

[5/] Cherry has since been prosecuting employees who defrauded both the Company and its customers. (Tr. 78)

Finally, in every case where Cherry identified a customer who had been improperly switched, Cherry refunded all service charges and fees incurred as a result of the switch and the return switch.[6/] (Tr. 90, 95-96)

On December 4, 1992, prior to terminating its relationship with MATRIX, Cherry received its Certificate to Provide Interexchange Telecommunications Services in Florida (the "Certificate"). (Tr. 93) One week later, on December 11, 1992, the Florida Public Service Commission ("PSC" or the "Commission") opened docket number 921250-TI to address complaints filed with its Division of Consumer Affairs concerning Cherry. (R. 1) The alleged complaints involved allegations that Cherry violated Florida Administrative Code Rule 25-4.118 ("Interchange Carrier Selection") by submitting "unauthorized PIC changes" -- a practice commonly referred to as "slamming."

On February 22, 1993, the PSC issued Order PSC-93-0269-FOF-TI which initiated show cause proceedings against Cherry (the "Show Cause Order"). (R. 28) The Show Cause Order required Cherry to "show cause why it should not have its Certificate canceled, or pay a fine of $25,000." (Id.) The Order contained allegations of consumer complaints against Cherry for slamming

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[6/] Cherry also implemented new, revised scripts for the third party verifiers, established internal affairs compliance monitors, and required employees and managers to sign employment contracts. (Tr. 81, 84-86) In addition, the Office of Vice President of Security/Regulatory Compliance was created to deal with future potential problems.

and improper marketing practices. (Id.) In addition, the Order alleged that Cherry had failed adequately to respond to Commission inquiries regarding consumer complaints. (Id.)

On March 15, 1993, Cherry timely responded to the Show Cause Order and filed its Formal Response to Order Initiating Show Cause Proceedings. (R. 40) Cherry also filed a Petition for a Formal Proceeding. (R. 35)

By Order dated April 23, 1993, (PSC-93-0640-PCO-TI) the show cause proceedings was set for hearing on June 11, 1993. (R. 326) The Commission later rescheduled the hearing for June 18, 1993. (R. 359)

On May 5, 1993, an Issues Identification Conference was held before the Commission. An Order Establishing Preliminary Issues for Hearing was entered the next day. (R. 336)

On May 17, 1993, Cherry filed a Motion for Reconsideration of the Order Establishing Preliminary Issues for Hearing and to Strike Issue Numbers 1, 4, 6 and 7. (R. 348) On May 25, 1993, the Commission denied Cherry's motion. (R. 373) Subsequently, Cherry filed a Motion for Reconsideration of the Commission's Order Denying Cherry's Motion for Reconsideration before the full panel. Cherry's motion was denied orally during the preliminary stages of the evidentiary hearing. (R. 386; Tr. 10-20)

On May 26, 1993, after multiple settlement conferences with the Commission's Staff, Cherry filed a Motion to Consider and

Accept Offer of Settlement. (R. 377) Cherry's Offer of Settlement provided:

1. Cherry would cease doing business in Florida (i./e. stop making calls soliciting Cherry's services) for a period of four months from the date of the Order Approving the Settlement.

2. During the four month period, Cherry would hire an independent, outside consultant to assist in a thorough evaluation of Cherry's system of telemarketing and to suggest and implement necessary changes to improve the system.

3. Cherry would pay an initial fine of $60,000.00 and an additional fine of $10,000.00, if no significant improvement was demonstrated for a designated period.

4. The present docket would be dismissed. However, the complaints to date could be relied upon by the PSC in any future show cause proceedings.

5. Cherry would (through a third party) vigorously investigate and respond to all of the outstanding customer complaints and submit a Report to the Commission within sixty (60) days of the Order Approving the Settlement. For any complaints received by Cherry after the date of the Offer of Settlement, Cherry would conduct the same thorough investigation and response and submit its Report to the Commission within four months from the date of the Order Approving the Settlement.

(R. 377) On June 15, 1993, three days before the scheduled evidentiary hearing, the Commission issued Order PSC-93-0908-FOF-TI rejecting Cherry's settlement offer. (R. 420)

In preparation for the scheduled evidentiary hearing, Cherry filed a Preliminary Statement. (R. 363) In addition, Cherry filed Direct, Rebuttal and Supplemental Testimony and Exhibits of

its President, Mr. David Giangreco. Finally, on June 17, 1993, the day before the scheduled evidentiary hearing, Cherry filed and properly served a Motion in Limine to exclude all hearsay testimony of the Commission's witnesses. (R. 423)

The June 18, 1993 evidentiary hearing lasted the entire day. (Tr. 1-350) During the preliminary stages of the hearing, Cherry's Motion in Limine was denied. (Tr. 20-57) During the hearing, Commissioners Deason, Clark and Johnson heard arguments of counsel and received evidence in the form of previously filed and live testimony and exhibits provided by both parties. (Tr. 60-345) In addition, the Commission set a briefing schedule for the parties to file post-hearing briefs. (Tr. 347)

On July 23, 1993, Cherry filed its post-hearing brief. (R. 442, 468) The Commission Staff did not file a post-hearing brief. Instead, they filed an advisory memorandum to the Commission Panel that recommended and advised the Commission to revoke Cherry's Certificate. (R. 501-A) However, the Commission Staff's advisory memorandum also contained an alternative to revocation subject to certain restrictions.[7] (R. 501-A to 502-A)

The matter was deliberated on the Commission's September 7, 1993 Agenda. On September 20, 1993, the Commission issued Order

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[7] This memorandum, as well as the December 20th memorandum discussed below, are included in the record of this appeal pursuant to a stipulation filed on or about June 30, 1994 with this Court.

PSC-93-1374-FOF-TI, adopting the staff attorney's primary recommendation of revocation and requiring Cherry to notify its customers accordingly (the "Revocation Order"). (R. 478)

On October 5, 1993, Cherry timely filed a Motion for Reconsideration of the Revocation Order and an Emergency Request for Stay Pending Reconsideration and Judicial Review. (R. 517, 550)[8/] On October 25, 1993, the Commission granted Cherry's emergency request for stay pending judicial review.

On December 20, 1993, the Commission staff filed a second advisory memorandum recommending that Cherry's Motion for Reconsideration be denied. (R. 563-A) On January 31, 1994, the Commission issued Order PSC-94-0115-FOF-TI denying Cherry's Motion for Reconsideration (the "Order Upon Reconsideration"). (R. 564)

This appeal followed.

[8/] On October 13, 1993, the Commission issued Amendatory Order PSC-93-1374A-FOF-TI, which is also on appeal, to reflect that Commissioner Clark participated in the decisions set forth in Order PSC-93-1374-FOF-TI and the appearances of counsel. (R. 559)

SUMMARY OF ARGUMENT

The PSC's post-adjudicatory procedure violated Cherry's due process rights because the same staff attorney who prosecuted the case against Cherry also served as the legal advisor to the Commission Panel despite the fact that the Commissioners had their own attorney, Mr. David Smith.

The Commission concedes that its staff attorney represented the Commission in two separate capacities: first as prosecutor, and then as legal advisor to the Commission Panel that decided the case. Staff counsel's dual role as prosecutor and judge, and its submission of two ex parte advisory memoranda (as opposed to post-trial briefs), violated Cherry's rights to a fair and impartial hearing under article I, section 9 of the Florida Constitution.

The PSC also committed reversible error by admitting and relying on hearsay evidence to determine if Cherry's Certificate should be revoked. The Florida Administrative Procedure Act specifically prohibits reliance on hearsay evidence to support adjudicatory findings. The Commission presented no evidence, other than inadmissible hearsay regarding consumer complaints, to prove that Cherry engaged in "slamming."

Finally, the Commission's order revoking Cherry's Certificate is unsupported by substantial competent evidence and, in light of the record, constitutes a Draconian and unwarranted punishment.

A plain reading of the relevant authorities demonstrates that a utility's license can only be revoked if (i) the company willfully violated a lawful rule or order of the Commission, a provision of the Florida statutes, or the terms under which its license was originally granted, or (ii) the company no longer serves Florida's public interest. The Commission failed to meet its burden to adduce any evidence that Cherry committed a willful violation. Moreover, no competent substantial evidence was presented that Cherry does not serve Florida's public interest. Indeed, the record demonstrates that the public interest will be best served if Cherry is permitted to retain its Certificate and remain in business. Cherry provides low cost long distance telephone service to approximately 30,000 Floridians who have experienced no service problems. Cherry thus provides a valuable service and fills a necessary niche in the market.

Cherry admitted making initial mistakes. Revocation of Cherry's Certificate, however, was unwarranted in light of Cherry's immediate and aggressive remedial measures taken in response to the first and only rule to show cause, as well as the disproportionately lesser penalties imposed on larger players in the industry, including MCI and Sprint, which have been subject to show cause hearings resulting in fines, not revocation. The punishment in this case must be corrected to fit the alleged "crime."

ARGUMENT

I. THE PSC'S POST-ADJUDICATORY PROCEDURE VIOLATED CHERRY'S RIGHT TO DUE PROCESS OF LAW UNDER THE FLORIDA CONSTITUTION

Article I, section 9 of the Florida Constitution guarantees that "[n]o person shall be deprived of life, liberty or property without due process of law." This requirement applies to administrative agencies as well as to courts. Art. I, § 9, Fla. Const.; Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322, 323-24 (Fla. 1990); see Gibson v. Berryhill, 411 U.S. 564, 579 (1973).[9/]

The United States Supreme Court in In re Murchison, 349 U.S. 133 (1955), elaborated on the requirements of due process:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But

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9/ See also Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 305 (1937) ("All the more insistent is the need, when power has been bestowed freely, that the "inexorable safeguard" of a fair and open hearing be maintained in its integrity." (citation omitted)).

to perform its high function in the best way "justice must satisfy the appearance of justice."

349 U.S. at 136 (emphasis added).[10] As this Court has noted, "'[a]n impartial decisionmaker is a basic constituent of minimum due process.'" Ridgewood, 562 So. 2d at 323 (quoting Megill v. Board of Regents, 541 F.2d 1073, 1079 (5th Cir. 1976)).

In this case, the PSC's post-adjudicatory procedure violated Cherry's due process rights because the same staff attorney who prosecuted the case against Cherry also served as the legal advisor to the Commission Panel (despite the fact that the Commissioner's had their own attorney). The Commission Panel thus failed to meet the "impartial decisionmaker" requirement because the PSC did not "hold the balance nice, clear, and true" between its prosecutorial and adjudicatory roles.

A. THE PSC CONCEDES ITS STAFF ATTORNEY'S "POST-HEARING ADVISORY ROLE"

Two final orders are at issue in this case. The first is the Revocation Order; the second is the Order Upon Reconsideration. In each instance, the same staff attorney who represented the Commission at trial as the prosecutor also prepared and submitted memoranda advising the Commission Panel how to rule. These memoranda were copied substantially verbatim by the Commission in drafting its final orders.

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[10] Quoting Tumey v. State of Ohio, 273 U.S. 510, 532 (1927) and Offutt v. United States, 348 U.S. 11, 14 (1954).

The first memorandum, dated August 26, 1993 (the "August 26th Memorandum"), was adopted by the Commission in the Revocation Order. The second memorandum, dated December 20, 1993 (the "December 20th Memorandum"), was adopted by the Commission in the Order Upon Reconsideration. These memoranda were not submitted by the prosecuting attorney in his capacity as an advocate for the PSC; rather, they were submitted in his capacity as advisor to the Commission Panel. They were not proposed orders (even though they apparently were treated as such by the Commission Panel which copied them verbatim in drafting the final orders);[11] they were not proposed findings of law and fact; they were not post-trial briefs.

The Commission makes no secret of its procedure.[12] Cherry contested the staff attorney's submission of the August 26th Memorandum in its motion for reconsideration of the Revocation Order. (Tr. 540-44) The basis for Cherry's objection was that the Commission had violated its own procedures because its staff attorney did not file proposed findings of fact and conclusions of law, see Fla. Admin. Code R. 25-22.056(1)(a), and, instead,

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[11] The Commission Staff is not permitted to file proposed recommended orders in hearings before a panel of two or more Commissioners. Fla. Admin. Code R. 25-22.056(1)(a).

[12] The Order Upon Reconsideration states that Cherry "acknowledged" staff counsel's two roles. The statement seems to suggest that Cherry has somehow waived its due process arguments. (Tr. at 600) This characterization of Cherry's position is bizarre. In truth, Cherry has continuously disputed the dual role of the Commission staff; it has not "acknowledged" or accepted it.

filed the August 26th Memorandum which amounted to an ex parte proposed order in violation of Fla. Admin. Code R. 25-22.056(1)(b). (Tr. 540-44) The Commission's unsatisfactory attempt to justify its post-adjudicatory procedure is set forth in the Order Upon Reconsideration.[13/]

> [T]o our knowledge, staff has never filed post hearing Proposed Findings, Conclusions of Law, or Statements of Position, in a proceeding before a Commission Panel. This is because making post hearing filings of this sort would be fundamentally inconsistent with staff's post hearing advisory role.
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> While staff is permitted to participate in proceedings as a "party" its post hearing role is advisory to the Commission. When initialing the staff recommendation to the Commission the "hat" which staff counsel wore (along with numerous other staff members) was that of advisory staff . . . .
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> . . . .
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> Clearly the company is dissatisfied with the varied roles of staff counsel in proceedings before the Commission. However, the role played by staff counsel in the instant proceeding is consistent with that role in every proceeding before a commission Panel.

(R. 600) (latter emphasis added) (footnote omitted).

The Commission has thus conceded that its staff attorney represented the Commission in two separate capacities, first as prosecutor, and then as legal advisor to the Commission Panel who

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[13/] The Commission Panel's justification was copied verbatim from staff counsel's December 20th Memorandum. (Tr. 618-A to 619-A)

made the ultimate findings of fact and conclusions of law.[14/] As argued below, staff counsel's dual role as prosecutor and judge, and its submission of two ex parte legal memoranda, violated Cherry's right to due process of law under article I, section 9 of the Florida Constitution because Cherry was deprived of the right to a fair and impartial hearing.

B. THE COMMISSION IMPROPERLY COMMINGLED ITS PROSECUTORIAL AND ADJUDICATORY FUNCTIONS IN VIOLATION OF ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION

Administrative practice and procedure envisions the combination of investigatory, prosecutorial, and administrative functions within a single administrative agency. See, e.g., Ridgewood, 562 So. 2d at 324. This combination of functions does not, of itself, constitute a due process violation. Id.; see also Withrow v. Larkin, 421 U.S. 35, 58 (1975). However, courts have determined that the combination of functions may create a "risk of unfairness [that] is untolerably high" and thus violate due process. Withrow v. Larkin, 421 U.S. at 58; see also Ridgewood, 562 So. 2d at 324.

In this case, Cherry is not challenging the combination of investigatory, prosecutorial and adjudicatory functions within the agency of the PSC per se. Rather, Cherry is challenging the

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[14/] The Commissioners supposedly were represented by David Smith at the June 18, 1993 hearing. (Tr. 5) Mr. Smith, however, did not advise the Commission on any substantive matters. All substantive advice was provided by the staff attorney who prosecuted the case, Charles Murphy.

PSC's process of adjudication in this matter, wherein an improper commingling of the prosecutorial and adjudicatory functions occurred. As prosecutor, the PSC staff attorney's role is to fashion as strong a case against the accused company as the evidence will allow. This role is manifestly at odds with the impartiality required of an adjudicator.[15] The combination of these two roles permitted the prosecutor in this case, whose goal was to obtain license revocation, to advise the Commission Panel ex parte to revoke Cherry's license. Due process cannot withstand this type of commingling of functions.

The Supreme Court in Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), recited the following timeless observations leading to passage of the federal Administrative Procedure Act:

> Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself. Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management, 36-37 (1937).
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> A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the

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[15] See e.g. In re Bruteyn, 380 A.2d 497, 501 (Pa. Commw. Ct. 1977) ("[W]hen the prosecutor as an individual is permitted in some manner to fulfill the role of the fact finder one of the necessary elements of a fair trial is lacking.").

> strength of the case and of seeking to make it as strong as possible. Nor is complete divorce between investigation and hearing possible so long as the presiding inspector has the duty himself of assembling and presenting the results of the investigation. [Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service, 81-82.]
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> . . . These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor. For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the activity. Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing, provided the proper safeguards are established to assure the insulation. Rep. Atty. Gen. Comm. Ad. Proc. 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941).

339 U.S. at 42-44 (emphasis added).[16/]

The quoted passages stand for the proposition that the prosecutor and the judge cannot wear the same hat. See, e.g. McIntyre v. Tucker, 490 So. 2d 1012 (Fla. 1st DCA 1986) ("In practice, impartiality and zealous representation are inherently incompatible in the same person at the same time."). In this

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[16/] The federal APA now permits "[a]n employee or agent engaged in the performance of . . . prosecuting functions for an agency in a case . . . [to] participate or advise in the decision, recommended decision, or agency review." 5 U.S.C. § 554(d). The Florida Administrative Procedure Act does not contain a similar provision. See § 120.57, Fla. Stat.

case, as the Commission has admitted, the prosecuting attorney and the Commission Panel that decided Cherry's case shared hats. As a consequence, the deck was stacked -- both psychologically and constitutionally -- against Cherry.

Although there are no Florida cases directly on point, there are analogous Florida cases in the context of other administrative agencies, as well as analogous cases from other jurisdictions. A brief review of the significant authorities is instructive.

The First District Court of Appeal in McIntyre v. Tucker, 490 So. 2d 1012 (Fla. 1st DCA 1986), a teacher termination case, put into practice Judge Pearson's admonition in Metropolitan Dade County v. Florida Processing Company:

> It is sufficient for us to point out that it would be in closer accord with traditional notions of justice and fair play for a quasi-judicial administrative board to designate one person to act as its legal advisor and a different person to act as its prosecutor.

McIntyre, 490 So. 2d at 1013 (quoting Metropolitan Dade County v. Florida Processing Company, 218 So. 2d 495, 497 (Fla. 3d DCA 1969)). The court held that McIntyre was denied a fair hearing because the school board's attorney "acted as both prosecutor, representing the interest of his client the School Board, and legal advisor, advising the Board in its capacity as hearing officer." 490 So. 2d at 1013; see also Forehand v. School Board, 600 So. 2d 1187, 1190 (Fla. 1st DCA 1992) (holding that dual

roles played by school board's attorney as legal advisor and prosecutor denied Forehand the right to a fair hearing).

The McIntyre court distinguished Ford v. Bay County School Board, 246 So. 2d 119 (1st DCA 1970), cert. denied, 257 So. 2d 259 (1972), where the court held that Ford's due process rights were not violated. "In Ford . . . the School Board's attorney did not proffer legal advice during the hearing and was not present at the separate hearing wherein the final judgment was rendered. In contrast, the School Board attorney in the instant case was present at the final meeting of the Board and he did proffer legal advice." 490 So. 2d at 1013-14.

More recently, in Ridgewood, this Court held that a party's due process rights under the federal and state constitutions were violated when the same department head appeared as an expert witness and also entered the final order in the case. The Court recited the following facts:

> It is clear, however, that Secretary Pelham was heavily involved in this case. Pelham signed the notice of violation. Pelham was in charge of the attorneys prosecuting the alleged violation. Pelham was the Department's only witness in its case in chief. Pelham reviewed the hearing officer's findings. Pelham issued the final order. Thus, Pelham was the prosecutor, witness, and ultimate judge of the facts.
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> Most significantly, in this final role Secretary Pelham necessarily passed upon his own evidence. To approve the hearing officer's findings of fact and conclusions of law, he had to conclude that his own testimony was competent and substantial. Even with the best of intentions,

> this can hardly be characterized as an unbiased, critical review.

Ridgewood, 562 So. 2d at 322-23.

The facts here are equally egregious as those in McIntyre and Ridgewood. Here, PSC's staff attorney actually prosecuted the revocation hearing on behalf of his client, the PSC, and then advised the same client, the PSC (by virtue of the August 26th Memorandum) to rule in his favor. Although the staff attorney did not give legal advice to the Commission Panel during the revocation hearing (as in McIntyre), and was not a "one man show" (as in Ridgewood), those holdings should not rise or fall on such subtle factual distinctions. The mere fact that the prosecuting attorney in this case served as the legal advisor to the Commission Panel is sufficient to have jeopardized "traditional notions of justice and fair play." Indeed, the fact that the staff attorney advised the panel after the hearing, instead of during the hearing, only exacerbates the violation because Cherry's attorneys were unable to respond or object to the advice.[17] No system of justice can maintain public confidence in its fairness if, after trial, the prosecutors can advise judges how to rule. See Wong Yang Sung.

Other jurisdictions have struck down administrative processes that allowed for commingling similar to that which

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[17] 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.

occurred in this case. In Lyness v. State Board of Medicine, 605 A.2d 1204 (Pa. 1992), the Pennsylvania Supreme Court held that a physician's due process rights under the Pennsylvania Constitution were violated by the commingling of prosecutorial and adjudicatory functions within a single multi-administrative board. The court wrote:

> In determining what process is due Pennsylvania citizens, this Court has established a clear path when it comes to commingling prosecutorial and adjudicatory functions. There is a strong notion under Pennsylvania law that even an appearance of bias and partiality must be viewed with deep skepticism, in a system which guarantees due process to each citizen.

605 A.2d at 1207 (emphasis added).

The Court rejected the board's argument that a due process violation occurs only when the adjudicatory and prosecutorial functions are commingled in the same individual as opposed to within a multi-member board. "Due process is not swept under the carpet simply because it is transgressed by a group of people rather than a single individual . . . . Whether it is one person or eight who merge the prosecutorial and adjudicatory roles, the danger is equally serious." 605 A.2d at 1207.

Likewise, the Supreme Court of Louisiana held that a physician's due process rights were violated when the Board of Dentistry's findings were drafted ex parte by the board's prosecutor. Allen v. Louisiana State Board of Dentistry, 543 So. 2d 908, 916 (La. 1989). The record in Allen indicated that the

board's prosecutor, Wootan, drafted the formal findings of fact and conclusions without notice to Allen. The Court held:

> Wootan was not merely a scribe; he became the main fact finder. The detailed findings and credibility judgment which were offered in support of the committee's final decision and which play such a crucial role in meaningful judicial review were simply not those of the neutral hearing committee. They were the secret product of an advocate. This infirmity is not cured by the fact Wootan's draft was adopted verbatim by the committee members after minimal review.

543 So. 2d at 913.

The PSC followed essentially the same procedure in this case. The staff attorney drafted and submitted advisory memoranda that were converted, almost verbatim, for use as the Commission Panel's final orders. Even though Cherry eventually received copies of the advisory memoranda (after repeated requests), the effect on Cherry was the same as in Allen because Cherry was not permitted to file objections or responses.

The Allen court correctly equated this procedure to a commingling of adjudicatory and prosecutorial functions: "[B]y drafting the committee's findings and conclusions, Wootan put himself in the position of adjudicator." 543 So. 2d at 913. Thus, the court found that Allen was deprived of the right to a hearing that is "both fair and that has the appearance of fairness" because Wootan served as "investigator, general counsel, prosecutor and fact finder." Id. at 915.

Significantly, the Allen court rejected the board's arguments that Allen's due process rights were not violated (i)

because the committee had decided the ultimate question of guilt prior to asking Wootan to draft the Committee's findings, and (ii) because the committee members subsequently signed the draft opinion.

> The first fails because the committee's conclusions on the ultimate issue are only as strong as their factual basis. Wootan cannot be considered a neutral party; his role was that of advocate, one who has developed the "will to win." . . . The ex parte nature of Wootan's involvement distinguishes the procedure followed here from the practice of some trial courts of allowing counsel to prepare draft "reasons for judgment" for the court. We conclude that since Wootan's "involvement" in the decision process began before the adjudicatory task was done, i.e., before the committee had arrived at findings of fact and reasons for judgment, Allen's right to a neutral adjudicator was violated.
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> . . . Moreover, th[e] after-the-fact adoption of an ex parte draft is no substitute for the committee's own reasons as to why it ruled as it did. To so hold would be to mistake rationalization for the rational. The committee members' adoption of Wootan's findings does not avoid this problem.

543 So. 2d at 914.[18/]

Like those of McIntyre, Ridgewood Properties, Lyness, and Allen, Cherry's due process rights have been violated as a result

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[18/] The court further found that Wootan's commingling deprived Allen of his right to meaningful judicial review. "Here, the findings to which we are asked to defer are not the findings of the committee but those of the prosecutor." 543 So. 2d at 915. The same holds true here as a result of the Commission Panel's wholesale adoption of the staff attorney's advisory memoranda. See supra note 13.

of the commingling of prosecutorial and adjudicatory functions. Accordingly, the Revocation Order should be vacated.

C. THE ADVISORY MEMORANDA WERE IMPROPER EX PARTE COMMUNICATIONS

This Court has condemned the practice of ex parte communications between a judge and a single litigant:

> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992); see Jennings v. Dade County, 589 So. 2d 1337, 1341 (Fla. 3d DCA 1991) ("Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings."), review denied, 598 So. 2d 75 (Fla. 1992; see also Allen.

Furthermore, the Court has held that a party is not required to establish that an ex parte communication was actually prejudicial. As this Court held in Rose:

> The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

601 So. 2d at 1183.

In this case, staff counsel did not submit proposed findings of fact and conclusions of law; they did not file a post-trial brief; they did not file responses in opposition to Cherry's proposed findings of fact or motion for reconsideration. Instead, the Commission's staff attorney "switched sides" and submitted advisory memoranda in his role as legal advisor to the Commission Panel.

This type of communication with the ultimate fact-finder far exceeds the violation condemned by this Court in Rose, where the prosecutor submitted a proposed order to the court without copying opposing counsel. See also Allen, 543 So. 2d at 913-14 (discussed supra Point IB). Indeed, in this case, the PSC in effect treated the advisory memoranda as proposed orders, and adopted their recommendations verbatim. See supra note 13. Nevertheless, although the prosecutor eventually copied opposing counsel, Cherry was not permitted to respond to Staff's ex parte communications or to submit its own proposed orders. This would not have been the case if the revocation hearing had been conducted by a Commissioner sitting as a hearing officer, and not by a Commission Panel. Compare Fla. Admin. Code R. 25-22.056(1)(a) with Fla. Admin. Code R. 25-22.056(1)(b).

The Court in Rose admonished that "a judge should not engage in any conversation about a pending case with only one of the parties participating in the conversation." 601 So. 2d at 1183 (emphasis in original). The Commission admits that this type of

communication occurred in this case and, moreover, that this is the standard operating procedure in every case heard before Commission panels. Order Upon Reconsideration (R. 600).

Thi s "standard" ex parte communication procedure is unconstitutional, unfair, and lessens public confidence in the impartiality of the PSC's adjudicatory procedure. Revocation of a certificate of public convenience is a significant and economically devastating event. To allow the prosecutor to advise the judges how to rule cannot possibly yield fair results and lends the appearance of impartiality to every PSC adjudication. Accordingly, if for no other reason, the Revocation Order should be vacated.

II. THE PSC COMMITTED REVERSIBLE ERROR BY ADMITTING AND RELYING ON HEARSAY EVIDENCE TO SUPPORT ITS FINDING OF SLAMMING

It was improper for the Commission to rely on hearsay evidence to determine whether Cherry's Certificate should be revoked.

The Florida Administrative Procedure Act (Chapter 120 of the Florida Statutes) governs proceedings before the PSC. Section 120.58(1)(a), Florida Statutes, provides that hearsay evidence "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (emphasis added); see also State Dept. of Admin. v. Porter, 591 So. 2d 1108, 1109 (Fla. 2d DCA 1992); Juste v. Department of Health & Rehabilitative Servs., 520 So. 2d 69, 71 (Fla. 1st DCA 1988).

Findings of the Commission based solely on hearsay evidence must be set aside. See Harris v. Game and Fresh Water Fish Comm'n, 495 So. 2d 806, 808 (Fla. 1st DCA 1986). As demonstrated below, the Commission relied solely on hearsay evidence to support their conclusion that Cherry engaged in slamming.

The direct pre-filed testimony of the Staff's witnesses concerning alleged customer complaints against Cherry, and Exhibit NP-15 (which recorded all of the alleged customer complaints against Cherry), do not prove that Cherry engaged in slamming. The Staff's sole evidence consists of hearsay in the form of pre-filed direct testimony summarizing telephone conversations between unidentified Staff members and an exhibit containing a telephone log of customers who allegedly complained about Cherry.

This hearsay evidence is particularly problematic considering the manner in which it was obtained: via telephone. Ms. Pruitt, the Staff's witness, testified that an unidentified staff operator receives telephone calls from complaining customers. (Tr. 232) The operator types out a report based on each alleged conversation (as the operator may remember it) and the report is logged into a computer. (Tr. 233) A computer printout of the alleged customer complaint is then forwarded to the telephone company in question. Id. Ms. Pruitt testified that there are numerous operators who take notes of their respective conversations with the allegedly complaining

customers. (Tr. 235) Exhibit NP-15 is a compilation of these notes. (R. 235) With the exception of the unspecified number of calls Ms. Pruitt personally received, her knowledge of the conversations between the operators and alleged complaining customers is based entirely on her reading of Exhibit NP-15. (Tr. 235-36)

Thus, Ms. Pruitt's testimony is at best only sufficient to prove that phone calls were received by the Commission; it does not prove that slamming occurred or that complaints were received. Moreover, Ms. Pruitt's testimony regarding complaints received by the unidentified operators is "double hearsay" and thus was doubly inadmissible. Cherry had no opportunity to assess whether (1) the complaining party had personal knowledge or was merely passing on information; (2) the complaining party truthfully provided information to the operators;[19] and (3) whether the operators properly recorded this information and included all relevant information which might be helpful to Cherry. The admission of the hearsay was improper, prejudicial and constitutes reversible error.

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[19] As the Commission admits in the Order Upon Reconsideration:

> We also agree that the testimony by the Company that it was inundated with complaints does not attest to the accuracy of such complaints.

R. 585.

In its Order Upon Reconsideration, the Commission argues (incorrectly) that Cherry admitted slamming.

> Cherry is concerned that we did not provide citations to the record authority upon which our determination was based. The decision was based on the admission of slams by the Company's witness which is found at Tr. p.88 l. 14-16.

R. 585. The Commission is wrong. Cherry admitted that complaints were received, not that slamming occurred.[20] The Commission relies on the testimony of Mr. Giangreco, in which he discusses initial problems Cherry had in handling customer service issues. Mr. Giangreco's so-called "admission" is as follows:[21]

> As discussed previously, early in our venture into telecommunications services, we experienced some difficulties with unethical employees, and separate problems with MATRIX Telecom system. Consequently, we were initially inundated with individuals who were less than satisfied with the manner they had

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[20] Cherry responded to every complaint for customer service and public relations purposes only.

[21] In the Order Upon Reconsideration, the Commission reversed a previous determination which was made in its Revocation Order. "Regarding the Company's statement in its Response to the Show Cause Order, we agree that the admission applies to Matrix and thus, is not dispositive of Cherry's own slamming violations." (R. 585) Thus, even if one were to construe that the statement at page 88 was 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. No follow up question by Staff Counsel at the hearing clarified this allegation. In fact, the questions by Staff that immediately followed ignore this purported revelation.

been contacted or their treatment once they had been switched. We also have complaints from individuals who had been switched from their carrier either without their knowledge or consent.

Tr. 88 (emphasis added).

The Commission clings to this single underlined sentence as the gravamen of its entire decision. However, the Commission ignored its own subsequent questioning of Mr. Giangreco, which elicited a flat out denial that slamming occurred. Chairman Deason crossed the witness, and the following exchange occurred:

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. Nowhere do you see in any of our memos or our training procedures or our sales marketing material that we encourage our salespeople to do this.

Chairman Deason: So your response is that management did not intentionally condone or encourage or was even aware that slamming was taking place?

Witness Giangreco: That's correct. And if I ever --

Chairman Deason: And you don't even know if slamming did take place?

Witness Giangreco: I don't know that to be the case.

Chairman Deason: But you know there have been a number of customer complaints filed?

Witness Giangreco: Right.

Tr. 171-172.

No further cross examination was solicited on this issue, and no other witness was called to rebut this testimony.[22] This testimony was specifically referenced by Cherry in its Motion for Reconsideration (at p. 29) but was not addressed by the Commission in its subsequent order. Like Mr. Giangreco's testimony, all the other evidence presented merely supported the contention that complaints existed, not that slamming occurred. In sum, the PSC failed to prove its case in chief because it presented only hearsay evidence of slamming. Hearsay does not constitute "competent" or "substantial" evidence. See infra Point IIIA. Accordingly, any determination which relied on this hearsay, including the PSC's slamming finding, must be vacated.[23]

III. THE COMMISSION'S ORDER REVOKING CHERRY'S CERTIFICATE IS UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND IS AN UNWARRANTED AND DRACONIAN PENALTY

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

The general standard of review for PSC orders in the Florida Supreme Court is set forth in the recent case of International Telecharge, Inc. v. Wilson, 573 So. 2d 816, 819 (Fla. 1991):

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[22] Although the Staff had every opportunity to obtain competent evidence, including depositions of complaining customers and live testimony, the Staff declined to do so. Instead, the Staff merely advised complaining customers in a letter of their right to attend the hearing. (R. 262-63) No complaining customer witnesses were called to testify.

[23] There is no suggestion that any of the exceptions to the rule against hearsay are applicable, and thus no argument on that issue is presented in this initial brief.

> In reviewing orders of the PSC, this Court must determine "whether the PSC's action comports with the essential requirements of law and is supported by substantial competent evidence."

(quoting Pan Am. World Airways, Inc. v. Florida Pub. Serv. Comm'n, 427 So. 2d 716, 717 (Fla. 1983)); see also Manatee County v. Marks, 504 So. 2d 763, 765 (Fla. 1987).

The applicable standard for the PSC to revoke the certification of a public utility is set forth in Florida Administrative Code Rule 25-24.474, which provides in relevant part:

> **25-24.474 Cancellation of Certificate.**
> (1) The Commission may on its own motion cancel a company's certificate for any of the following reasons:
> (a) Violation of the terms and conditions under which the authority was originally granted;
> (b) Violation of Commission Rules or orders;
> (c) Violation of Florida Statutes; or
> (d) Failure to provide service for a period of six (6) months.

There are three separate statutory bases for Rule 25-24.474. The first is section 364.285, Florida Statutes, which provides in relevant part:

> **364.285 Penalties.**
> The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than $25,000, which penalty shall be fixed, imposed, and collected by the commission; or the commission may, for any such violations, amend, suspend, or revoke any certificate issued by it.

§ 664.285, Fla. Stat. (emphasis added).

The second statutory basis for Rule 25-24.474 is section 350.127, Florida Statutes, which provides in relevant part:

> **350.127 Penalties; rules; execution of contract.** The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than $5,000, which penalty shall be fixed, imposed, and collected by the commission; or the commission may, for any such violations, amend, suspend, or revoke any certificate issued by it.

§ 350.127, Fla. Stat. The language in section 350.127 relating to revocation of certificates is the same as that found in section 364.285, with the exception that section 350.127's maximum fine is set at $5,000 per offense and section 364.285's maximum fine is $25,000.[24]

Finally, the Commission also has statutory authority to revoke a certificate under subsection (4) of section 364.335 of the Florida Statutes, which provides:

> Revocation, suspension, transfer, or amendment of a certificate shall be subject to the provisions of this section; except that, when the commission initiates the action, the commission shall furnish

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[24] There is no indication in the record as to which fine amount would control in this case. However, the Show Cause Order referenced a $25,000 fine. (R. 28)

> notice to the appropriate local government and to the Public Counsel.[25]

§ 364.335, Fla. Stat. The "provisions of this section" language underlined above refers to subsections (1) through (3) of section 364.335, which govern the granting of certificates. The standard for granting a certificate is "whether the granting of such certificate is in the public interest." § 364.335(2), Fla. Stat.; see also Fla. Admin. Code R. 25-24.471(3) ("A certificate will be granted if the Commission determines that such approval is in the public interest.")

Section 364.337(2) of the Florida Statutes lists the criteria that "shall" be considered by the PSC in determining whether the granting of a certificate is in the "public interest." Those are: (1) the number of firms providing the service; (2) the geographic availability of the service from other firms; (3) the quality of service available from alternative suppliers; (4) the effect on telecommunications service rates charged to customers of other companies; and (5) any other factors that the PSC considers relevant to the public interest.

There are no relevant cases (other than International Telecharge) interpreting any of the aforementioned, relevant statutory sections or the administrative code provision.

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[25] In International Telecharge, Inc. v. Wilson, 573 So. 2d 816, 817 (Fla. 1991), this Court cited section 364.335 as authority for the PSC's power to revoke a certificate.

However, a plain reading of the statutes and rule suggests that Cherry's Certificate can only be revoked by the Commission if the Company is found to have willfully violated a lawful rule or order of the Commission, a provision of the Florida statutes or the terms and conditions under which Cherry's authority was originally granted, or if the service Cherry provides no longer serves Florida's public interest.

The Commission has failed to show through any competent or reliable evidence that Cherry violated, willfully or otherwise, any of the Florida Statutes or PSC rules and regulations. In addition, the Commission did not proffer any evidence that Cherry violated the terms and conditions under which its authority to operate was originally granted.[28] Thus, the Revocation Order, which summarily finds that Cherry willfully violated all of the

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[28] Cherry's Florida IXC application unintentionally misstated a corporate identification number and also misstated that Cherry's principal had no prior conviction. Over Cherry's vehement objection that its application was not at issue in the Show Cause proceedings (R. 348, 386; Tr. 10-20), these inaccuracies were inquired into at the hearing. However, the PSC made three separate findings which mitigate the relevance of Cherry's application to the ultimate question of revocation. First, the Commission found that Cherry's correct corporate number appeared on all pages with the exception of one. (R. 501, Tr. 148-150, 252.) Second, the Commission found that the principal's conviction had been fully disclosed in Dun & Bradstreet prior to the filing of Cherry's application. (R. 501; Tr. 12) Third, once the inaccuracy in Cherry's application was brought to Cherry's attention, Cherry immediately submitted a letter to the PSC disclosing all relevant information regarding the omission. (R. 501; Tr. 99)

rules at issue (R. 491-494) is unsupported by substantial competent evidence.

Moreover, the Commission did not proffer any competent or reliable evidence with respect to the mandatory public interest factors identified in section 364.337(2). Clearly, it was incumbent on the Commission's Staff to establish an evidentiary record showing that the factors listed in section 364.337(2) were considered. These factors were not expressly considered on the record. Consequently, there is no "competent substantial" evidence to support the PSC's decision to revoke Cherry's Certificate on the basis that Cherry does not serve Florida's public interest.

The record supports that the public interest will be best served if Cherry is permitted to retain its Certificate and remain in business. Cherry provides low cost long distance telephone service to approximately 30,000 Floridians who have experienced no service problems with Cherry. (Tr. 102) Moreover, even the evidence tendered by the Commission demonstrates that Cherry has a valuable service to provide and fills a niche in the market place. (Tr. 322)

The standard of review of the order revoking Cherry's Certificate is whether there is "competent substantial" evidence to support the PSC's finding that (1) the Company "willfully violated" a rule or order of the PSC or (2) the Company no longer serves the "public interest." Because the Commission failed to

sustain its burden in this regard, the orders on appeal should be reversed.

B. CANCELLATION OF CHERRY'S CERTIFICATE SUBSEQUENT TO RECEIVING ITS FIRST RULE TO SHOW CAUSE IS AN UNWARRANTED AND UNREASONABLE PENALTY

In Deltona Corporation v. Florida Public Service Commission, 220 So. 2d 905 (Fla. 1969), the Florida Supreme Court set forth general guidelines regarding the imposition of penalties by the PSC:

> The Commission, of course, has the power to impose penalties sufficiently heavy to secure obedience to its orders, after all parties have an ample opportunity to test the validity of such orders. The questions raised by petitioner in these proceedings were not frivolous and the failure of petitioner to secure the certificate of public convenience and necessity was not malicious. Under the circumstances of this case, the penalty, if any, which may be imposed upon petitioner should be moderate.

Id. at 908. Although Deltona is not directly on all fours with this case, it does suggest that, when the PSC penalizes a company such as Cherry for alleged wrongful conduct, the "punishment should fit the crime." Deltona also indicates that this Court will not hesitate to review the nature and/or severity of a particular penalty.

Prior to Cherry's revocation, the PSC had never revoked a certificate of public convenience and necessity for issues relating to "slamming." (R. 511; Tr. 255) This was evident at the Agenda Conference held September 7, 1993, in which confusion surfaced among the Commissioners concerning the mechanics,

finality and appealability of a revocation Order. (September 7, 1993 Hearing, Transcript at 10-19) Moreover, the Rule to Show Cause at issue here was the first and only Rule to Show Cause ever issued by the PSC against Cherry. (R. 512; Tr. 25) These facts illustrate that the PSC was not seeking individualized justice, but rather, was determined to make an example of Cherry as a warning to other utilities.

The record evidence shows that several other providers of long distance telecommunication services have had multiple show cause proceedings which have resulted in penalties short of revocation. (Composite Exhibit Nos. 7 & 8, Tr. 104-5, 183) Specifically, larger players in the industry, including MCI and Sprint, have been subject to show cause hearings for similar complaints which have resulted in fines, not revocation. (Id.) More importantly, even after extraordinary measures have been taken to correct their "slamming" difficulties, MCI and Sprint have yet to curtail their problems and have not had their certificates revoked. (R. 510; Tr. 97)

The Show Cause Order here required Cherry to show cause why it should not have its certificate canceled, or pay a fine of $25,000. (R. 28) Cherry, prior to the hearing on the merits in this case, had numerous settlement discussions with the Commission's Staff. Three days prior to the hearing, the Commission formally rejected a final settlement offer by Cherry which included payment of $60,000.00 to the Commission and

substantial restrictions to the Company's operations in Florida. (R. 420) Subsequent to the hearing, the Commission Staff's primary recommendation was revocation. Alternatively, the Staff recommended a fine of $250,000 to $500,000 and to restrict Cherry's marketing operations in the state. (R. 501-A to 502-A) The Commission followed the directive of the prosecutor and chose the first recommendation: revocation. The PSC Commissioners and Staff were, from the outset, only interested in revocation.

Although the Commission has the power to revoke Cherry's Certificate, this power must be used judiciously. See Deltona. The revocation of Cherry's Certificate is an unwarranted and unreasonable sanction for a first time violation, especially in light of the lesser penalties imposed on Cherry's more powerful and more experienced competitors. Revocation is even more surprising in light of the record, which contains no testimony of any individual with personal, first-hand knowledge, or other competent substantial evidence that slamming occurred. See Argument II.

The penalty of revocation of Cherry's Certificate -- the equivalent of the death penalty -- does not fit the alleged crime and, in addition, is not justified based on the absence of anything but hearsay testimony. Even if the Commission had proved its case, a fine in the suggested statutory range of $25,000 would have been appropriate to reprimand Cherry.

The Florida constitution guarantees that "no person shall be deprived the right of life, liberty or property without due process of law." Fla. Const. Art. 1 § 9. The Commission's revocation of Cherry's Certificate without first attempting a less Draconian punishment, such as a fine, deprived Cherry of its due process rights under the Florida Constitution.

C. CHERRY'S ON-GOING GOOD FAITH EFFORTS TO REMEDY ITS PREVIOUS MARKETING DIFFICULTIES RENDER REVOCATION INAPPROPRIATE

Cherry provides long distance telephone service to approximately 30,000 Floridians. (Tr. 102) Indeed, since December 4, 1992, Cherry has provided Floridians with the option of obtaining low cost, long distance service, appreciably less expensive than the basic packages offered by the market's principal players, AT&T, Sprint and MCI. (Tr. 101)

Although Cherry has provided a valuable service to a significant number of Floridians, Cherry acknowledged and understood the Commission's initial concern regarding the number of consumer complaints the Staff may have received. In return, Cherry requested the Commission to examine the number of complaints being received at the time of hearing and to acknowledge Cherry's immediate efforts to remedy or correct its previous marketing difficulties which may have caused these complaints. (R. 363) Despite David Giangreco's unrebutted, competent, substantial testimony that remedial procedures in place in Florida had

succeeded in curtailing complaints in Florida and elsewhere, the Commission revoked Cherry's Certificate.

Cherry's good faith successful efforts to remedy any marketing difficulties it may have had are inconsistent with the penalty of revocation. The record indicates that the vast majority of complaints received by the Commission stemmed from solicitations occurring prior to March 16, 1993. (Tr. 90; R. 507) The immediate remedies which were adopted to address those complaints were successful, and should have been considered in rendering an appropriate punishment.

Specifically, Cherry consolidated its offices in order to better control its marketing procedures. (R. 507) Further, in each instance when a Floridian complained of an unauthorized switch -- regardless of its legitimacy -- Cherry responded with an explanatory letter and a $12.00 check to reimburse the customer for any switching charges and inconvenience incurred. (R. 503; Tr. 90) In addition, Cherry retained the services of an independent law firm to thoroughly investigate the complaints, draft responses to these complaints for the Commission, and solicit customer input. (R. 500; Tr. 90) Cherry also retained outside consultants to assist it in correcting any marketing difficulties. As a result, Cherry voluntarily stopped its method of telemarketing which had caused the vast majority of the complaints received by the Commission prior to March 15, 1993. (R. 503-4; Tr. 71)

Moreover, Cherry employed compliance monitors to monitor solicitations between Cherry's staff and prospective customers. (R. 84) Cherry also required all of its sales people to sign an Employee's Agreement which provides, inter alia, that Cherry will terminate the employee if he/she engages in any unethical behavior in connection with his/her marketing activities. (R. 501; Tr. 85-86) Further, Cherry required each of its sales managers to sign a Management Agreement which provides, inter alia, that Cherry will terminate the sales manager if he/she engages in any unethical behavior in connection with his duties at Cherry. (R. 507)[27]

As illustrated above, the record supports the contention that aggressive corporate policies have been undertaken by Cherry to minimize any sales problems. The record also supports the fact that other long distance telecommunications providers in this State have been unable to eliminate their slamming complaints despite the fact that they have also gone through show cause hearings without suffering revocation. (See infra Argument IIIB)

Although the Commission is likely to argue that the aforementioned facts are tangential at best to the issues before this Court, the Commission's serious allegations against the Company render these remedial measures relevant. The PSC's primary

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[27] Cherry has since terminated and prosecuted employees who it believes violated its sales procedures. (R. 504)

function is to insure compliance with its order -- not to mete out Draconian punishment. See Deltona. The record demonstrates that consideration of these mitigating factors is essential because the Commission has failed to account for them in determining the appropriate punishment.

These remedial measures which were instituted by Cherry after initiation of show cause proceedings in February 1993, illustrate Cherry's good faith efforts to correct its problems and thus allow a significant number of Floridians to retain the benefits presently being provided by Cherry. The Commission's decision to revoke Cherry's Certificate is an inappropriate and Draconian penalty given the de minimis number of complaints which have been received by the Commission since Cherry's institution of remedial measures.

It must be reiterated that any type of wrongful actions taken by the Company or its employees were not willful in nature. Furthermore, the PSC received 23 marketing complaints concerning Cherry from December 4, 1992 through April of 1993. (R. 507, Tr. 208) The PSC admitted that from April to June 17, 1993 it received only one additional marketing complaint. (R. 507, Tr. 208)

Cherry has learned much from its explosive entry into the long distance marketplace. These lessons have strengthened Cherry's ability to function efficiently and ethically as a long distance service provider. Cherry's on-going, expensive, and

good faith efforts to minimize its marketing difficulties mitigate any purpose which might have been served by the revocation of Cherry's Certificate.

CONCLUSION

WHEREFORE, for the foregoing reasons, Cherry Communications, Incorporated respectfully requests this Honorable Court to vacate Orders PSC-93-1374-FOF-TI, PSC-93-1374A-FOF-TI and PSC-94-0115-FOF-TI of the Florida Public Service Commission.

Respectfully submitted,

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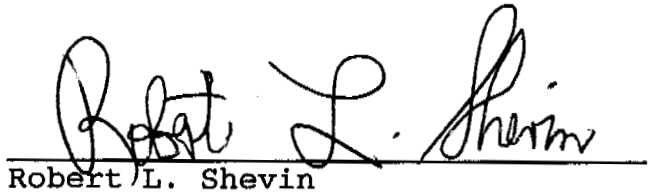
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by overnight mail this 11th day of July, 1994 on Richard C. Bellak, Florida Public Service Commission, Fletcher Building, 101 East Gaines Street, Tallahassee, Florida 32399-0380.



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