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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

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ARGUMENT

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

The Commission's response to Cherry's due process argument completely misses the point. Cherry is not contesting Staff's participation as a party at the trial, but rather, Staff's metamorphosis from "prosecutor" to "advisor" after the trial.[1]

Instead of addressing the substance of Cherry's due process concerns, the Commission summarily concludes that the issue has already been decided in South Florida Natural Gas Co. v. Public Service Commission, 534 So. 2d 695 (Fla. 1988). South Florida, however, is inapposite. South Florida is a rate case, not a license revocation case, in which the utility contested the PSC's procedure that occurred during a rate hearing. This Court's truncated and only discussion of the issue was as follows:

> We reject 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. Section 366.06(1), Florida Statutes (1985) sets forth the standard by which the commission is to act during a rate adjustment case. . . . We find that the commission is clearly authorized to utilize its staff to test the validity, credibility, and competence of the evidence presented in support of an increase. Without its staff, it would be impossible for the commission

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[1] Thus, it makes no difference that "[a] different attorney from the Commission's Appeals division" represented the Commissioners during the hearing." Answer Brief at 6 (emphasis in original). Cherry is not alleging that the procedure during the hearing was improper. The Commission's diatribe regarding the innocuous Mr. Smith is therefore misdirected. Mr. Smith did not participate substantively during the hearing; his participation was limited to advice regarding procedural matters. Moreover, Mr. Smith apparently did not participate substantively after the hearing. Consequently, Mr. Smith never played more than one role. Staff did.

to "investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service."

534 So. 2d at 697-98 (quoting section 366.06(1)).

South Florida thus stands for the proposition that the Commission's Staff is authorized to participate as a party during a rate determination hearing. South Florida does not address the question of Staff's post-hearing role.[2] The Commission is therefore incorrect in its assertion that "the Court has already considered and rejected the identical due process challenge" being made by Cherry. Answer Brief at 11.

The South Florida decision is instructive on the issue of technical expertise. Administrative agencies often rely on the technical expertise of their staff to make informed decisions. There is a world of difference, however, between a rate case and a license revocation case. Rate cases entail the application of technical formulas; Staff's participation -- even at the adjudicatory level -- may therefore be warranted as a matter of necessity. License revocation, on the other hand, does not involve technical expertise; the agency is simply evaluating the alleged misconduct of a company and deciding the appropriate punishment. In this respect, a license revocation proceeding is

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[2] The Court's statement that Staff is permitted to assist "in evaluating the evidence" must be read in the context of the Court's approval of Staff's participation as a litigant during the hearing and its ability to examine witnesses and present argument. Even if the Court was approving Staff's post-hearing participation, it did so in the context of a rate hearing, not a license revocation hearing. Thus, it has no bearing whatsoever on the issue here.

more akin to a criminal prosecution. The company's freedom to do business and its economic well-being are at stake. In such proceedings, agency "expertise" plays virtually no role.

The Commission's argument that the Panel does not decide "guilt or innocence" but rather "attempts to reach a decision in the public interest" is simply not compelling.[3] Answer Brief at 11-12. All judicial bodies serve the public interest. The real issue is whether the procedure that is employed by that judicial body complies with due process.

The PSC has adopted a "judicial model" for trying license revocation cases, but has violated the basic tenet of that model by allowing <u>ex parte</u> and improper communication between one party -- the Staff[4] -- and the ultimate decision-maker, the Commission Panel.[5] This critically flawed judicial model violated Cherry's right to due process because the playing field was not level: only Cherry was required to comply with the technical rules of

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[3] The effect of a Commission ruling that revokes a company's license is equally as devastating as a criminal adjudication of guilt. <u>See</u> <u>Matthews v. Eldridge</u>, 424 U.S. 319, 341 (1976) ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process.").

[4] The Commission admits that Staff was a party to the proceeding. Answer Brief at 21 ("The staff attorney made arguments and . . . participated 'as a party.'").

[5] The statute governing <u>ex parte</u> communications, section 350.042(1), sets legislative limits on such communications. The statute, however, must also comply with constitutional requirements, which in this case it does not.

the judicial model, while the Staff operated under relaxed standards.

Staff's advisory memoranda were not submitted as "proposed orders." They were not served on opposing counsel as a matter of course. They were not filed as part of the lower tribunal record (like Cherry's proposed findings and conclusions). They were one-sided, ex parte communications in which Staff directed the Commission Panel how to rule after the trial was over. Staff thus had two opportunities to make its case, the second of which was made outside the presence of Cherry's counsel.

In sum, the advisory memoranda smack of partiality (and thereby violate due process) for the simple reason that they are "memoranda." The Staff's attorneys became the Commission Panel's law clerks. Those law clerks also drafted the rule to show cause, conducted the factual investigation, and tried the case. They then sat down to draft the final decision. Even though the decision here is technically "the Commission's decision," there is no doubt that the law clerks' participation as advocates -- as well as post-hearing advisors -- tainted the judge's impartiality, even if only by virtue of appearance.[6]

The PSC's procedure was a ruse. Cherry rightfully assumed, after participating in a full-blown evidentiary trial, that the

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[6] The partisan nature of the advisory memoranda is reflected by their verbatim conversion into the resulting final orders. Compare R. 477-A to 524-A (August 26th Memorandum) with R. 478 to 516 (Revocation Order) and R. 563-A to 628-A (December 20th Memorandum) with R. 564-607 (Order Upon Reconsideration). The final orders were cribbed, plain and simple.

"judge" would decide the case independent of advice from opposing counsel. Cherry's strategy and course of dealing with Staff was influenced from the start by this assumption. Had Cherry known that the "prosecutor" -- with whom it had negotiated pre-trial -- would also advise the "judge" how to rule post-trial, Cherry may well have decided to alter its negotiation strategy, pursue a different settlement offer, or adopt another trial strategy. A sense of fair play suggests that Cherry has been constitutionally duped and that its due process rights have been violated.

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

The Staff's hearsay evidence, to be admissible, must fall within a recognized exception to the hearsay rule. The Staff's hearsay evidence does not fall within an exception to the hearsay rule and, therefore, must be barred.

A. Hearsay Evidence Presented in "Excessive Numbers" Is Insufficient To Overcome The Presumption Against Its Admission.

Setting aside its previous contention that the inadmissible customer complaints should be admitted to explain and supplement Mr. Giangreco's alleged admissions, the Commission initiates its argument with the unique and otherwise untested proposition that an inference of truth can be obtained by the presentation of a large volume of otherwise defective evidence. Thus, the Commission somehow contends that the receipt of a large number of customer complaints creates an indicia of validity as to each one.

The Commission's only cited authority is Manatee County v. Marx, 504 So. 2d 763 (Fla. 1987). Marx, however, does not stand for the proposition that the presence of a large number of inadmissible complaints can be competent substantial evidence in support of the Commission's findings. The Commission in Marx was evaluating a request by Manatee County to move a boundary line between two telephone service exchange areas. The PSC's evaluation included a finding that no residents in the area had complained about their telephone service. Thus, Marx involved the absence of customer complaints, not their presence.[7] The Commission cites no authority for deriving a corollary to Marx; namely, that the presence of customer complaints is excepted from the hearsay rule.

The Commission quotes itself as authority, however, for the proposition that "it is unrealistic . . . to expect that a customer . . . travel up here to formally on the record be sworn and make a statement [verifying that he] was indeed slammed." Answer Brief at 29. To the contrary, it is not only realistic, but due process requires complaining customers to testify at trial. The Commission is obligated to present customer testimony because otherwise it is hearsay and, as a result, deprives Cherry the right to cross-examine those complaining witnesses. In this case, the Commission did not call even a single witness to

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[7] Manatee County did not even object to this procedure, and the Court's decision does not address any hearsay implications.

testify about alleged slamming nor did they choose to depose any such alleged witnesses.

The Commission also claims that Cherry was required to rebut an inference that the complaints received by the Commission were valid. Answer Brief at 31-32. In support of this proposition, the Commission cites City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). Mann, however, is a rate structure case and is not relevant. There, the Court ruled that the Commission had jurisdiction to consider Tallahassee's rate structure. Upon reconsideration, the Court ruled that Tallahassee had the burden to justify its rate structure. In Cherry's case, the burden of proof rests with the Commission. Unlike Mann, Cherry does not admit to have engaged in the alleged practice. Had Cherry admitted slamming, but denied that the practice was in violation of the Commission's rules, these two cases might have borne some similarity to each other.

B. The Hearsay Evidence In This Record Is Not Being Used To Supplement Or Explain Relevant Evidence.

The Commission retreats to the proposition that admissions allegedly were made by the Company through its witness, David Giangreco, and that the hearsay evidence in question was therefore admissible to supplement those admissions.

In revisiting the statements made by Mr. Giangreco at Tr. 171-172, the Commission omits relevant testimony. In the testimony omitted, Mr. Giangreco was asked to confirm that he was not aware that slamming was taking place. Without qualification, he

responds in the affirmative. Moreoever, the Commission avoids Mr. Giangreco's stern denial that Cherry had slammed customers.

> [I]t'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 training procedures or our sales marketing material that we encourage our salespeople to do this.

(Tr. 171)

The PSC relies on Mr. Giangreco's discussion that nine complaints had been received, and that some of these complaints involved allegations that salespeople had signed letters of agency. (Tr. 160) Contrary to the Commission's assertion, Mr. Giangreco's testimony was not an admission of slamming by Cherry, and certainly not while Cherry was a certified IXC. Rather, Mr. Giangreco's testimony refers to a time when Cherry was acting as a sales agent for Matrix, and thus is irrelevant to these show cause proceedings -- which only pertains to Cherry's operation as a licensed IXC, not to Matrix's operation as an IXC .[8]

Although the Commission did not recognize Mr. Giangreco's comment regarding these nine complaints as admissions in its Order Upon Reconsideration (R. 574), the PSC appellate staff references these comments as if they were recognized as

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[8] This conclusion is supported by the Commission's admission that these nine complaints were received less than 25 days after Cherry received its certificate. Answer Brief at 1. Because there is lag time in receiving complaints (Revocation Order, R. 488), it is most likely that all of these nine instances occurred while Cherry was acting as a sales agent for Matrix. The Commission had the burden, which it did not carry, to show that these nine complaints involved allegations of slamming that occurred after Cherry received its certificate.

admissions. If the Commission believed this reference to be salient as an admission, they would have cited it in their Order.

Finally, Mr. Giangreco's testimony must be viewed in context of his entire discussion regarding Cherry's early receipt of complaints and the immediate remedial measures taken in response to those complaints, regardless of whether the complaints were valid. Even if Mr. Giangreco's testimony is somehow construed as a relevant admission, the customer complaints do not "supplement" Mr. Giangreco's testimony because the vast majority of those complaints involved telemarketing activities, not LOAs. Thus, while Mr. Giangreco may have broached the issue of some early LOA complaints, his testimony should not be considered a license for the PSC to admit the flood of inadmissible hearsay regarding alleged telemarketing complaints. In short, apples cannot supplement oranges.

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

A. There Is No Competent Substantial Evidence That Cherry Willfully Violated Any Florida Statutes Or Commission Rules Or Regulations.

The PSC concedes that Cherry's Certificate can only be revoked if Cherry willfully violates a lawful rule or order of the Commission, a provision of the Florida Statutes, or the terms or conditions of Cherry's license. Answer Brief at 36. In support of its contention that Cherry's alleged misconduct justifies revocation, the Commission draws this Court's attention to five pieces of "evidence" which include: isolated testimony; inad-

vertent harmless error in Cherry's application; and introductory remarks by counsel. The referenced "evidence" is not competent to support a revocation of Cherry's Certificate, nor is it substantial.

These isolated parcels are cited to draw this Court's attention from the full evidentiary record and do not support the Commission's argument that Cherry's conduct was "willful." With respect to Roberta Ferguson, the PSC ignores her other testimony that Cherry would serve a "niche" in the Florida market place. Tr. 316-17. As discussed above, Mr. Giangreco's testimony only revealed that slamming complaints were received by Cherry and not that slamming by Cherry occurred. The PSC's reliance upon counsel's opening statement (for the proposition that Cherry allegedly admitted slamming customers) is totally absurd; such statements are not evidence. Cherry's alleged failure to respond to some complaints within the fifteen day deadline -- even though all complaints were responded to prior to trial -- does not evidence a willful disregard of the PSC's rules. Finally, the PSC fails to draw this Court's attention to three separate findings made by the Commission that (i) Cherry's correct corporate number appeared on all pages of the application with the exception of one (R. 501; Tr. 148-150, 252); (ii) that the principal's conviction had been fully disclosed in Dunn & Bradstreet prior to the filing of the application (R. 501; Tr. 12); and (iii) that when the inaccuracy in Cherry's application was brought to Cherry's attention, Cherry immediately submitted a

letter to the Commission disclosing all relevant information regarding the inadvertent omission. (R. 501; Tr. 99)

That the Commission's five parcels of "evidence" prove "willful" misconduct by the Company, especially in light of Mr. Giangreco's extensive and unrebutted testimony to the contrary, is ludicrous. These five isolated parcels -- totaling less than a minute of verbal testimony, two pieces of paper and a five second inadmissible argument of counsel -- reflect that the Commission's Revocation Order is unsupported and that Cherry has received an unwarranted punishment.

B. The Record Is Devoid Of Competent Substantial Evidence That Cherry Does Not Serve Florida's Public Interest.

The PSC fails to identify any evidence that Cherry violated the terms and conditions under which its authority to operate was originally granted. The PSC merely states in conclusory fashion that "[o]n consideration of the record," the Commission found that Cherry's injury to the public interest outweighed the general public interest standard which had initially supported granting Cherry its Certificate. Answer Brief at 41. However, the PSC fails to draw this Court's attention to any portion of the Revocation Order or Order Upon Reconsideration where the Commission balanced the five mandatory public interest factors found in section 364.337(2). The Commission did not balance these public interest factors because the PSC did not proffer any competent or reliable evidence with respect thereto.

It was incumbent on the PSC to establish an evidentiary record showing that the factors listed in section 364.337(2) were

considered. However, these factors were <u>not</u> expressly considered <u>in the record</u>. Consequently, there is no competent, substantial evidence to support the Commission's decision to revoke Cherry's Certificate on the basis that Cherry does not serve Florida's public interest.

C. **Revocation Is Not Warranted.**

The Commission has never revoked a certificate for issues relating to "slamming." (R. 511; Tr. 255) In its fifty page Answer Brief, the PSC refuses to acknowledge or address this statistic in the context of whether cancellation of Cherry's Certificate after a single rule to show cause is a warranted penalty. Rather, as justification for the Commission's first such cancellation of a certificate, the PSC directs this Court to the Commissioners' questioning of Mr. Giangreco. Answer Brief at 43-46. The Commissioner's questions and mindset are <u>not evidence</u>. The PSC points to no record evidence to support why no penalty short of revocation would secure obedience to the Commission's orders and protect the public. Answer Brief at 46.

This crystal ball-like analysis must be rejected because the findings within the record -- not the PSC's rendition of the Commissioners' mindset -- render revocation of Cherry's Certificate inappropriate. Specifically, the rule to show cause at issue here was the first and only Rule to Show Cause ever issued by the Commission to Cherry. (R. 512; Tr. 25) In addition, the record evidence shows that MCI and Sprint have been subject to show cause hearings that have resulted in penalties

short of revocation, namely a $25,000 fine for one, and a $40,000 fine for the other. (Composite Exhibit Nos. 7 and 8; Tr. 104-5, 183) Finally, the record shows that MCI and Sprint continue to be named as respondents in complaints received by the Commission. (R. 510; Tr. 97)

In sum, the punishment received by Cherry -- revocation of its Certificate -- does not fit the alleged crime. Revocation is an unwarranted and unreasonable sanction for a first-time violation, especially in light of the lesser penalties imposed on Cherry's more competitors. Revocation is even more outrageous in light of the record absence of testimony from any individual who was allegedly slammed.

D. Cherry is Not Requesting This Court To Re-Weigh The Evidence, But Rather To Evaluate The Entire Record.

This Court has mandated that it cannot affirm a Commission decision which is "arbitrary or unsupported by the evidence." Citizens v. Public Service Commission, 435 So. 2d 784, 787 (Fla. 1983). In this case, the record reveals that the Commission was presented uncontradicted evidence concerning remedial measures instituted by Cherry both before and after the initiation of show cause proceedings. This Court cannot affirm a decision of the Commission to revoke Cherry's Certificate in light of this extensive remedial evidence.

Specifically, the uncontradicted evidence received by the Commission indicates that Cherry took immediate action as soon as it became aware that customer complaints were received: Cherry consolidated its offices to better control its marketing

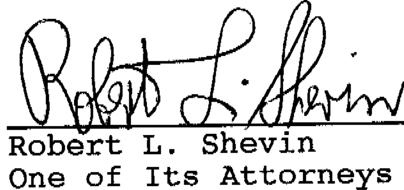
procedures; reimbursed any complaining Florida customers for switching charges and inconvenience; retained the services of an independent law firm to thoroughly investigate the complaints and draft responses to these complaints for the Commission; retained outside consultants to assist it in correcting any marketing difficulties; stopped telemarketing -- the cause of the vast majority of the complaints received by the Commission prior to March 15, 1993; employed compliance monitors to monitor solicitations between Cherry's staff and prospective customers; required sales people to sign an employees' agreement; and required sales managers to sign a management agreement. (R. 500-07; Tr. 71, 85-86; 90) The uncontradicted result of these remedial measures illustrates that the vast majority of complaints received by the Commission stemmed from solicitations occurring prior to March 16, 1993. (R. 507; Tr. 90) Moreover, from April to June 17, 1993 -- the day before the evidentiary hearing -- the Commission received only one marketing complaint concerning Cherry Communications. (R. 507; Tr. 208)

What is important in this case is that the record shows that Cherry has adopted permanent safeguards to eliminate customer complaints and, as a result Cherry's continued operation in Florida is clearly in the public interest.

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,

By: 
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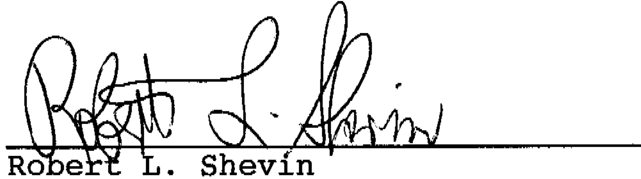
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 12th day of September, 1994 on Richard C. Bellak, Florida Public Service Commission, Fletcher Building, 101 East Gaines Street, Tallahassee, Florida 32399-0380.



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