STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CENTRAL CORPORATION, Petitioner, vs. FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	CASE NO. 88-1978RU

FINAL ORDER

Pursuant to notice, an administrative hearing was held before Diane D. Tremor, Hearing Officer with the Division of Administrative Hearings, on May 20, 1988, in Tallahassee, Florida. The issue for determination in this proceeding is whether the statement contained in Section 7 of respondent's Order Number 19095, which requires alternative operator services providers to hold subject to refund all revenues in excess of the local exchange company's most comparable rate, constitutes an invalid exercise of delegated legislative authority.

APPEARANCES

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INTRODUCTION

Pursuant to Section 120.56, Florida Statutes, petitioner Central Corporation (Central) challenges a portion of Order No. 19095 of the Florida Public Service Commission (PSC), contending that the challenged statement constitutes a rule within the meaning of the Administrative Procedure Act and is invalid for failure of the PSC to promulgate it in accordance with the rulemaking procedures required in Section 120.54, Florida Statutes. In support of its position of invalidity of the challenged statement, petitioner presented the testimony of Alan Taylor, PSC's Chief of the Bureau of Service Evaluation, Division of Communications; Jill Hurd, PSC's Chief of the Bureau of Rates and Economics, Division of Communications; James Freeman, accepted as an expert in the area of economics as applied to the regulation of utilities; and Lester Freeman, the president of Central Corporation. Petitioner's Exhibits 1, 3, 5-8, 11, 12, 15-21, 23 and 24 were received into evidence, some to a limited extent.

In support of its position that the challenged statement is not a "rule" within the meaning of the Administrative Procedure Act, the PSC presented the testimony of Alan Taylor, and offered no further exhibits into evidence.

Subsequent to the hearing, both parties submitted proposed findings of fact and proposed conclusions of law. To the extent that the parties' proposed factual findings are not included in this Final Order, they are rejected for the reasons set forth in the Appendix hereto.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, as well as facts stipulated to by the parties, the following relevant facts are found:

1. Central Corporation, formerly known as TFC Teleservices Corporation, is a provider of alternative operator services (AOS). An AOS provider provides operator assisted long distance telecommunications services to various entities including hotels, motels, universities, hospitals and private pay telephone providers. This new AOS telecommunication industry emerged after 1984 when AT&T ceased paying commissions to hotels for toll-traffic from guests and when the Federal Communications Commission authorized privately-owned pay phones. There are currently nine AOS providers in Florida.

2. Central is authorized by Certificate Number 1528, issued by the PSC on November 21, 1986, to operate as an interexchange carrier within the State of Florida. Central currently operates in Florida under an approved tariff on file with the PSC, which tariff became effective on September 15, 1987, and authorizes Central to charge certain amounts for its services. Prior to the challenged action, the PSC never placed any conditions upon Central's approved tariffed rates.

3. Interexchange companies (IXCs) are companies which provide long distance telephone services. They are certificated by the PSC on a statewide basis and engage in competition with each other. Such competition, along with the PSC's fitness screening and approval of tariffed rates, is considered adequate to protect the public. Consequently, the PSC does not regulate the rates of IXCs, at least minor IXCs including AOS providers. The PSC does not set rate levels for minor IXCs and does not set an authorized rate of return on equity for minor IXCs. Indeed, in accordance with Section 364.337, Florida Statutes, which authorizes the PSC to exempt from the requirements of Chapter 364 a telephone company which is in competition with or duplicates the services of another telephone company, the PSC has placed AOS providers under the separate rules and regulations pertaining to IXCs, which are not rate base regulated. The PSC has never established for any minor IXC a rate base or an authorized or required rate of return.

4. Local exchange telephone companies (LECs) serve a franchised monopoly area. The LEC agrees to provide service indiscriminately to the public without competition, and, in return, the PSC guarantees the LEC the opportunity to earn a fair rate of return designed to emulate what might be achieved in a competitive market. The PSC sets rate bases and rate levels for LECs, and authorizes the rate of return on equity. In other words, unlike IXCs, LECs are rate base regulated utilities. LECs and/or the PSC may initiate rate relief or rate decrease proceedings. Interim relief is often necessary and is authorized by statute and case law due to the regulatory lag time pending the conclusion of the proceedings. Such interim rate relief or interim rate decreases are done on

an individual case-by-case basis and are based upon the financial condition of the particular LEC. The PSC has never provided interim rate relief or interim rate decreases on an industry-wide basis. It has set a "generic" rate cap, establishing a 25 cent local call rate for privately-owned pay phones, but that was done on a prospective basis. The PSC has never imposed an industry-wide rate cap, with a requirement to hold subject to refund monies in excess of that cap.

5. At the request of PSC staff, the PSC opened, on December 18, 1987, Docket Number 871394-TP styled "In re: Review of Requirements Appropriate for Alternative Operator Services provided from Public Telephones." This was designated as a "generic" proceeding, and emanated from numerous complaints the PSC had received from end users (i.e., guests of hotels and motels, hospital patients and pay telephone users) who had been charged for alternative operator services. The nature of the complaints included end users being charged for AOS without being aware of using the service, lack of prior knowledge of the rates being charged, inability to use the services of their preferred IXC and inability to access the LEC operator. The most significant complaint, however, was the excessive rate being charged by some AOS providers. The evidence demonstrates that the intrastate long distance rates charged by Central are considerably higher than the rates charged by Southern Bell, an LEC.

6. Central entered an appearance in Docket No. 871394-TP on December 30, 1987. At an Agenda Conference held on February 2, 1988, the PSC voted on various recommendations of its staff. As pertinent to this proceeding, the PSC voted to set an expedited hearing to be held as soon as practicable to determine whether AOS are in the public interest and various other issues concerning the provision of AOS. The PSC also voted to require all AOS providers to place all revenues subject to refund that are generated by charges in excess of the AT&T rate for a comparable call. This vote exceeded the staff's recommendation, which did not include a "hold subject to refund" requirement.

7. At an Agenda Conference held on February 16, 1988, the PSC voted to reconsider the rate cap applicable to AOS providers and to hold the Order reflecting their February 2nd vote pending such reconsideration.

8. At its Agenda Conference held on March 15, 1988, the PSC reconsidered and raised the rate cap amount from the AT&T rate for a comparable call to the LEC rate for a comparable call, thereby decreasing the amount of revenues that AOS providers must hold subject to refund.

9. The action taken on March 15, 1988, was embodied in written Order No. 19095 issued on April 4, 1988. This Order is entitled "Order Setting for Hearing the Issue of Whether Alternative Operator Services are in the Public Interest and Placing Revenues Subject to Refund ..." The remainder of the title relates to "proposed agency action" concerning other requirements for AOS providers, which are not challenged in this proceeding. Order No. 19095 declares that paragraph 7, which requires AOS providers to hold subject to refund all charges collected in excess of the approved rate, is effective February 2, 1988. The Order further recites

> "We are cognizant of the serious impact this action may have on AOS providers and their customers. However, it is our view that we must take immediate and effective action to remedy the abusive

> situation we perceive exists at this time. It is in consideration of these conflicting concerns that we have chosen the least drastic action available. This action does not require AOS providers to immediately stop charging current rates. It does not suspend or revoke any certificates of public convenience and necessity. It does not levy any fines or penalties. It merely places revenues subject to refund to allow for the return of these monies if it is subsequently decided that they were generated from inappropriate charges."

Although not embodied within the terms of Order No. 19095, the parties stipulated that the hearing to determine public interest is scheduled for August 9-12, 1988.

10. Central requested the PSC to hold an evidentiary hearing prior to making the rate cap take effect, but this request was denied. The rate cap requirement and the disposition of the revenues held by AOS providers pursuant to Order No. 19095 are issues to be determined at the hearing to be held August 9- 12, 1988.

11. The rate cap requirement set forth in Order No. 19095 applies to all AOS providers operating in Florida. Central's current tariff authorizes Central to charge more than the rate cap specified in Order No. 19095. Prior to Order No. 19095, there was no rate cap on AOS providers.

12. Regardless of whether the PSC ultimately orders a refund, the "hold subject to refund" requirement which became effective on February 2, 1988, has immediate and significant adverse impacts upon Central. Central is a relatively new company and must use the revenue it generates on a daily basis. Prior to Order No. 19095, Central was able to rely on the unconditional use of revenues it receives under its approved Florida tariff. If Central continues to charge its current tariffed rates, it will have to set aside the difference between what it bills and the rate cap, place it in escrow and will not be able to utilize those funds. It is estimated that the revenues Central might have to refund if it continues to charge its current rates would between $1.2 and $1.7 million. Nonrecoverable commissions and the cost of a actually making the refund would increase the potential cost of the refund. If Central were to reduce its rates to the LEC rate, it would lose a substantial amount of revenue and does not know where it can make up that loss. Even if this option were chosen today, Central would still have to determine to whom it provided services since February 2, 1988, and what the potential refund would be. Additional staffing and/or computer equipment would be necessary to keep track of prior users and charges. A third option is for Central to withdraw from Florida intrastate operations pending the outcome and conclusions of the August PSC proceedings. Central operates in many states. While its Florida business makes up only 8 to 10 percent of its intrastate revenues, some 40 percent of Central's entire business originates at Florida properties. If Central were to cease paying commissions on intrastate revenues, its intrastate business originating from Florida would go to its competitors. While Central has made the decision not to do business in certain states due to those state's methods of rate

regulation, such decisions were made on a prospective basis. Other immediate and adverse impacts upon Central include the administrative costs and burdens associated with separate bookkeeping for its Florida operations, as well as separate books within Florida to segregate the difference between the rate cap and its tariffed rates. Central has already experienced delays in loan financing. Lenders want to wait and see what the PSC does with AOS providers. The valuation of the company is affected due to money taken out of the revenue stream and placed in escrow. Central's financial statement must reflect the contingent liability of potential refunds and full disclosure must be made to the Federal Communication Commission.

CONCLUSIONS OF LAW

13. The position of petitioner Central Corporation is that the provision of Order Number 19095 contained in Section 7, which requires AOS providers to hold subject to refund all revenues in excess of the local exchange company's most comparable rate, constitutes a "rule" within the meaning of the Administrative Procedure Act, and is invalid for failure to follow appropriate procedures for rulemaking. As an AOS provider in Florida subject to the challenged requirement, and having demonstrated an immediate and substantial adverse effect resulting from the challenged requirement, petitioner has standing to seek an administrative determination of its validity pursuant to Section 120.56, Florida Statutes.

14. The PSC contends that the "hold subject to refund" provision of Section 19095 is not a "rule." Various sections within Chapter 364, Florida Statutes, are cited for the proposition that rate changes and interim rates are accomplished by "orders," and it is contended that rates are never set or affected by "rules." The PSC equates the challenged requirement to the establishment of interim rates during the pendency of a full rate-making proceeding. Section 120.72(3), Florida Statutes, is then relied upon by the PSC to demonstrate that the interim rate provisions of Chapter 364 are not subject to the provisions of Chapter 120. The PSC further urges that the challenged requirement is not "final" and is not intended to be determinative of the rights of any given AOS provider. 1/ Instead, future proceedings in August are contemplated to determine whether alternative operator services are in the public interest and whether refunds are appropriate. According to the PSC, the challenged requirement is tentative and effective only until the hearings in August, and it is then that future policy will be developed and implemented. The PSC cites various cases whereby the Courts have allowed it to take action affecting rates in "order" form, as opposed to undergoing the rulemaking requirements of Chapter 120, Florida Statutes.

15. With certain exclusions not here applicable, a "rule" within the meaning of the Administrative Procedure Act is an

> "agency statement of general applicability that implements, interprets, or prescribes law or policy . . . "Section 120.52(16), Florida Statutes.

It has been held that an agency statement is a "rule" if it purports in and of itself to create certain rights and adversely affect others or serves by its own effect to create rights, to require compliance or otherwise to have the direct and consistent effect of law. Balsam v. Department of Health and Rehabilitative Services, 452 So.2d 976 (Fla. 1st DCA, 1984); State, Department of Administration v. Harvey, 356 So.2d 323 (Fla. 1st DCA, 1978).

16. There can be no doubt that the challenged "hold subject to refund" requirement falls within the above definitions of a "rule." The requirement is applicable to all AOS providers in Florida. In and of itself, and by its own effect, it requires AOS providers to either immediately change their previously approved rates or to set monies aside for a potential refund in the future. The fact that the requirement to hold monies may terminate, at some future point in time at least six months subsequent to its imposition, does not lessen or obviate the immediate, indeed retroactive, requirement of compliance. The challenged requirement is directly and consistently applicable to all AOS providers within Florida and its immediate effect is not limited by its somewhat finite duration. Balsam v. Department of Health and Rehabilitative Services, supra. The burdens of the requirement occur regardless of whether a refund is ultimately required. The challenged requirement is easily distinguishable from the case of Department of Commerce v. Matthews Corp., 358 So.2d 256 (Fla. 1st DCA, 1978). There, the court held that a wage rate determination which applied to one party, in one geographic location, for one construction project was not a rule because it was not of general applicability and did not have the consistent effect of law. Here, the "hold subject to refund" requirement applies to every AOS provider operating within Florida on a daily basis for a period of at least six months.

17. With very limited exception, all forms of agency decision-making are subject to the APA. Every requirement or policy relied upon by an agency in reaching a decision must be codified as a rule or expressly stated in an order. A rule has been defined above, and an "order" is defined as a "final agency decision which does not have the effect of a rule . . ." Section 120.52(11), Florida Statutes. As concluded above, the challenged requirement does have the effect of a rule. Nevertheless, it is recognized that when adjudicating individual cases, agencies may find themselves developing policies which may generally be applicable to future cases. This hybrid of a "rule" and an "order" has been characterized as "incipient policy," and even sanctioned, especially where new policies are in the developmental stage and in the process of refinement and further observation. See McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA, 1977). The courts have long recognized that rulemaking may not be forced upon an agency, and that policy may be developed through the adjudication of individual cases. Both rulemaking and the adjudication of individual cases fulfill administrative due process requirements of notice, hearing and judicial review. While the procedure to be used is left to the agency's discretion, there is a "self- enforcing" incentive for rulemaking. When an agency elects to adopt incipient policy in a non-rule proceeding, there must be adequate support and a record foundation for its decision in each proceeding. McDonald v. Department of Banking and Finance, supra. It has been recognized that rulemaking proceedings are preferable where established industry-wide policy is being altered, Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So.2d 1177 (Fla. 1st DCA, 1981), and it is envisioned that resources will not be wasted by repeatedly explicating and defending agency policy. Barker v. Board of Medical Examiners, 428 So.2d 720 (Fla. 1st DCA, 1983).

18. While an agency may thus develop, establish or announce its policy statements through rulemaking or through adjudication on a case-by-case basis, the PSC followed neither path in this instance. There was no rulemaking as envisioned by Section 120.54 of the APA. There was no proceeding as envisioned by Section 120.57 of the APA. Interested and affected persons had no forum in which to challenge the PSC's imposition of a new requirement, and there was no record to review to determine if the basis for the action was supported. 2/

Thus, while the challenged statement appears in an "order," it is not the type of "order" agencies are required to utilize when making decisions affecting substantial interests on a case-by-case basis.

19. The PSC argues that the action taken -- the "hold subject to refund" requirement, is simply in the nature of an interim rate requirement which the PSC has the authority to impose without compliance with APA requirements. 3/ This argument must fail for several reasons. As noted in the findings of fact, AOS providers are not rate base regulated by the PSC, and the interim rate provisions in Chapter 364 are inapplicable, at the present time, to AOS providers. In addition, the interim rate procedures of Chapter 364 have never been applied on an industry wide basis. Of necessity, the considerations are specific to a particular utility or company and its particular financial condition. To apply a measure characterized as an interim rate provision to all AOS providers implements a new policy which deviates from the PSC existing policy and manner of regulating AOS providers. Thus, whether the abrupt discontinuance of prior policy is deemed either a new policy or an interim rate provision, it must be done in compliance with either rulemaking requirements or individual case-by-case adjudication, where there is opportunity for notice, hearing and judicial review. There was none here.

20. Certainly, the PSC has the authority (indeed, the duty) to continually evaluate its policies and procedures with regard to the regulation of utilities in Florida. However, when it determines to take action in the form of an industry-wide requirement which purports to have the present effect and force of law, it must do so in the manner authorized by statute. The "hold subject to refund" requirement constitutes a "rule," yet it was not the product of a rulemaking proceeding. It was not the product of an individual adjudication envisioned by Chapter 364 for interim rate relief. It was not notice of proposed agency action. Unlike the factual situation in the case of Florida Public Service Commission v. Indiantown Telephone System, Inc. et al, 435 So.2d 892 (Fla. 1st DCA, 1983), the challenged statement is much more than defining a controversy or a notice designed to focus on disputed issues, with the subsequent opportunity for challenges and adjudicatory hearings. If the PSC felt the need for immediate action in order to protect the public welfare, it could have utilized the emergency rule provisions contained in Section 120.54(9), Florida Statutes. This mechanism, of course, would have been effective for only ninety days.

21. The cases cited by the PSC are readily distinguishable from the instant case. In Indiantown, supra, the Court recognized that adjudicatory proceedings affecting several parties could be accomplished in a single docket resulting in a single order. There, the PSC issued a "Notice of Proposed Agency Action" to each telephone company in the state notifying of its intent to disapprove certain existing agreements. Contained in that notice was a statement of the facts and a statement of the policy. A procedure was then set forth for affected parties to file petitions for hearings on the proposed agency action, said hearings to be held in accordance with Section 120.57, Florida Statutes. Noting that the agency action involved in the Indiantown proceeding was "proposed," rather than final, and that opportunities for challenges and adjudicatory hearings were afforded, the Court held that the Notice of Proposed Agency Action was not a rule, and permitted the PSC to proceed to develop its policy through adjudication on a case-by-case basis. As indicated above, the "hold subject to refund" requirement was not set forth as proposed agency action. It became effective on February 2, 1988, over two months before the Order was even reduced to writing. It is true that at the August, 1988 hearing to be held on the issue of whether AOS are in the public interest, interested

parties will have the opportunity to present evidence and argument on whether refunds should be ordered. However, the challenged statement constitutes a present requirement to either place monies in escrow or change rates NOW, or actually from February 2, 1988, through the conclusions of the August hearings. This is not proposed agency action. By its own effect, it immediately and retroactively requires compliance with no opportunity for input, challenge or hearing.

22. The PSC cites the case of United Telephone Company v. Mann, 403 So.2d 962 (Fla. 1981) as authority for establishing an interim "subject to refund" condition pending a full scale rate-making proceeding. That case involved a single, noncompetitive rate base regulated utility, and individual action was taken with due regard to the particular financial condition of that single company. The PSC has cited no judicial case law approving PSC interim rate action taken with regard to an entire industry or a previously non-rate base regulated entity.

23. In summary, the challenged "hold subject to refund" requirement, as contained in Section 7 of Order Number 19095, constitutes a "rule" within the meaning of the Administrative Procedure Act. The PSC having failed to follow the rulemaking procedure set forth in Section 120.54, Florida Statutes, the statement constitutes an invalid exercise of delegated legislative authority within the meaning of Section 120.52(8), Florida Statutes, and is invalid.

FINAL ORDER

Based upon the findings of fact and conclusions of law recited herein, it is ORDERED that the requirement that alternative operator services providers hold subject to refund all revenues in excess of the local exchange company's most comparable rate, as contained in Section 7 of Order Number 19095, constitutes an invalid exercise of delegated legislative authority.

Ordered and entered this 24th day of June, 1988, in Tallahassee, Florida.

_____

DIANE D. TREMOR
Hearing Officer
Division of Administrative
Hearings
The Oakland Building
2009 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of June, 1988.

ENDNOTES

1/ This argument is interesting in light of the fact that the Order itself, in Section 7, recites that "it is our view that we must take 'immediate and effective' action to remedy the abusive situation we perceive exists at this time." Although the Order itself was reduced to written form on April 4, 1988, the "hold subject to refund" requirement was made effective as of February 2,

1988. In addition, the notice attached to the Order provides that while certain of its provisions are preliminary in nature and will become effective or final on a future date only if a petition for hearing is not timely filed, the provisions of Section 7 are reviewable only by a motion for reconsideration or judicial review.

2/ Indeed, the PSC successfully objected to the receipt into evidence of a transcript of the Agenda Conference, urging that the transcripts of Agenda Conferences, which are simply discussions between the Commission and its advisory staff, are not part of the official records of the Commission.

3/ Though not determinative of the issues here since it is concluded that this is not an interim rate proceeding, the exception from APA requirements contained within Section 120.72(3) does not appear to be applicable when the PSC itself initiates proceedings "in the nature of interim rate" changes. That exception appears to allow individual public utilities and regulated companies, not the PSC itself, to proceed under the interim rate provisions of Chapter 364. It is a mechanism designed to solve the problem of regulatory lag, and not a device to allow the PSC to ignore Chapter 120 when imposing industry-wide requirements.

APPENDIX TO FINAL ORDER, CASE NO. 88-1978RU

The parties' proposed findings of fact have been fully considered and are accepted and/or incorporated in this Final Order, with the following exceptions:

Central Corporation

5 - 7.	Rejected as irrelevant to the issues in dispute.
67.	Rejected as an improper factual finding.
71.	Rejected as argumentative.

PSC

10, last sentence	Rejected as irrelevant to the issues in dispute.
11.	Rejected as argumentative.
13 - 15.	Rejected as argumentative and/or legal argument, as opposed to factual findings.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED, TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

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DISTRICT COURT OPINION

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FLORIDA PUBLIC SERVICE COMMISSION,

Appellant,

vs.

CENTRAL CORPORATION,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 88-1889
DOAH CASE NO. 88-1978RU

Opinion filed October 19, 1989.

An Appeal from a Final Administrative Order.

Diane Tremor, Hearing Officer.

David E. Smith, Public Service Commission, Tallahassee, for Appellant.

Wings S. Benton and Patrick K. Wiggins of Ransom & Wiggins, Tallahassee, for Appellee.

JOANOS, J.

The Florida Public Service Commission has appealed from a final administrative order declaring Paragraph 7 of Public Service Commission Order 19095 to be an invalidly promulgated rule pursuant to Chapter 120, Florida Statutes. Under the facts of this case, we affirm.

An alternative operator service (AOS) provides operator-assisted long distance telecommunications services. Appellee Central Corporation is a type of AOS denominated an interexchange carrier (IXC). In December 1987, after receiving numerous general complaints from AOS users of excessive rates, the Commission opened Docket No. 871394-TP for the purpose of reviewing the regulatory requirements appropriate for an emerging telecommunications industry providing long distance telephone services.

The initial action in this docket was taken when the Commission voted in February 1988 to set an expedited hearing to determine whether the provision of AOS service was in the public interest. In March 1988, the Commission voted that AOS providers would be required to hold subject to refund all revenues collected by those providers which exceeded the most comparable local exchange rate. This decision was embodied in Paragraph 7 of Order 19095, issued April 4, 1988. The Commission explained that the revenues were being placed subject to

refund pending the results of the hearing on whether AOS was in the public interest, in order that the excess monies could be returned if it was decided that they were generated from inappropriate charges.

After the Commission denied its request to hold an evidentiary hearing prior to effectuating Paragraph 7, Central petitioned for an administrative determination that Paragraph 7 was an invalidly promulgated rule. The gravamen of the Commission's argument in support of Paragraph 7 was that it constituted an "interim rate order" pursuant to Section 364.055, Florida Statutes, and thus was not subject to the requirements of the Administrative Procedures Act, Chapter 120, Florida Statutes.

The rates which may be charged by most telephone companies regulated by the Commission are set with reference to a "rate base," in order that a reasonable rate of return on equity may be calculated. The Commission acknowledges that rates which may be charged by an IXC are not set in consideration of such a base, but are set forth by the IXC as part of the "tariff" which it is required to maintain on file with the Commission. See Rule 25-24.485, Florida Administrative Code.

During any proceeding for a change of rates, the Commission may authorize the collection of "interim rates" until the entry of a final order with regard to the change. Section 364.055(1), Fla. Stat. The difference between the interim rate and the previously authorized rates must be collected subject to refund in the event the final order does not authorize the rate change. Section 364.055(2)(a), Fla. Stat.

However, the specifically prescribed method for calculation of interim rates as set forth in Section 364.055(4) and (5)(a-b), makes this section impracticable of application to telephone companies such as Central, "those rates are not established with regard to a rate base. Further, the instant "hold subject to refund" provision was not entered in a "proceeding for a change of rates," as authorized by Section 364.055(1), but rather in anticipation of a proceeding to determine whether AOS services were in the public interest. Therefore, we agree with the ruling of the hearing officer that Paragraph 7 cannot be classified as an interim rate order pursuant to Section 364.055(1) so as to be exempt from the requirements of the APA. See Section 120.72(3), Florida Statutes (1987)(notwithstanding any provision of this chapter, all public utilities and companies regulated by the Commission shall be entitled to proceed under the interim rate provisions of chapter 364).

However, the Commission does have the statutory authority to take action upon receipt of consumer complaints of excessive rates. Section 364.14(1), Florida Statutes (1987), provides that

> [w]henever the Commission finds, ... upon complaint, that the rates, charges, tolls, or rentals demanded, exacted, charged, or collected by any telephone company . are unjust, unreasonable, unjustly discriminatory, unduly preferential, or in anywise in violation of law ... the Commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force and fix the same by order.

Therefore, the Commission may act by order to fix "just and reasonable rates" upon complaints that existing rates are unjust and unreasonable. The crux of this appeal therefore becomes whether Paragraph 7 as enacted and implemented in this case was an "order," that is, a final agency decision which does not have the effect of a rule, Section 120.52(11), Florida Statutes, or a "rule," an agency statement of general applicability which prescribes law or policy, including any form which imposes any requirement not specifically required by statute or an existing rule. Section 120.52(16), Fla. Stat.

The hearing officer determined that Paragraph 7 had the effect of a rule in that: 1) it was of general applicability, i.e., it affected all Florida AOS providers, and 2) it imposed an immediate requirement not otherwise required by statute or existing rule, that is, in light of the "hold subject to refund" language, AOS providers either had to change previously approved rates to match those charged by local exchange companies, or set monies aside to cover the potential refund obligation. We agree.

The Commission argued below, and before this court, that the temporary nature of Paragraph 7, that is, its applicability only until the August 1988 proceeding, precluded its classification as a rule. However, a temporally limited agency action is properly denominated a rule if it has the consistent effect of law, that is, is consistently applicable throughout its existence to an entire group rather than to one member of that group. Balsam v. Department of Health and Rehabilitative Services, 452 So.2d 976 (Fla. 1st DCA 1984). Paragraph 7 is by its terms applicable to every AOS provider in Florida, regardless of the actual rates being charged by individual providers, for the entire duration of its applicability.

The Commission further argues that Paragraph 7 does not explicitly require AOS providers to take any previously unrequired action. It merely notifies them that they might be required to meet a contingent liability in the future, leaving it to their sole discretion how to meet that contingency. We find that this contention ignores reality, in that some action, of whatever nature, must be taken by these companies to meet the liability for these rate differentials in the event it is imposed.

We are not unmindful of the principle that rulemaking cannot be forced upon an agency and that policy may be developed through the adjudication of individual cases. See McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977)(while the Florida Administrative Procedures Act requires rulemaking for policy statements of general applicability, it also recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual cases).

However, both rulemaking and the adjudication of individual cases fulfill administrative due process requirements of notice, hearing and judicial review. Here, the PSC followed neither path. There was no rulemaking as envisioned by Section 120.54, Florida Statutes, nor was there a proceeding as envisioned by Section 120.57, Florida Statutes. Interested and affected persons had no forum in which to challenge the PSC's imposition of a new requirement, and there was no record to review to determine if the basis for the action was supported. Thus, the instant agency action is not the type of order agencies are required to utilize when making decisions affecting substantial interests on a case-by-case basis.

Therefore, because Paragraph 7 of PSC Order 19095 is consistently applicable throughout its existence to every Florida AOS provider, and because

its effect is to impose requirements on these companies previously unimposed by statute or preexisting rule, we find that the hearing officer was correct in her classification of this provision as a rule subject to the requirements of Section 120.54, Florida Statutes. Because those requirements were admittedly not followed by the Commission in this case, the provisions of Paragraph 7 cannot be enforced.

We do not by this opinion hold that the Commission cannot, by order, fix reasonable rates for a telephone company against whom complaints of excessive rates have been filed, pursuant to the authority granted by Section 364.14, Florida Statutes. It simply cannot do so in the form of a rule without following the statutory procedures for the promulgation of such rules.

The order of the hearing officer is affirmed.

SHIVERS, C.J., CONCURS. ERVIN, J., DISSENTS WITH OPINION.

ERVIN, J., dissents.

I had assumed that following this court's seminal decision in McDonald v. Department of Banking & Fin., 346 So.2d 569 (Fla. 1st DCA 1977), we had moved away from the sterile exercise of attempting to classify agency action as either a rule or an order, as exemplified in such pre-McDonald opinions as Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977), and State of Fla., Dep't of Admin. v. Stevens, 344 So.2d 290 (Fla. 1st DCA 1977). The majority's opinion unfortunately furnishes a bright signal to litigants that this type of review mechanism remains not only alive but exceedingly well--despite the absence of any explicit authority in our Administrative Procedure Act (APA) for invalidating agency action having the characteristics of a rule, as defined in Section 120.52(16), Florida Statutes (1987), but not formally adopted as such.

I conclude that Public Service Commission Order No. 19095 is just what it purports to be: an order rather than a rule. As such, it does not fall within the definition of a rule as provided in section 120.52(16):

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

(Emphasis added.)

Order No. 10995 requires alternate operator services (AOS) providers to hold, subject to refund, all revenues in excess of an amount certain, until the disposition of the revenues is determined by the hearing set in the order. The appellee argues that this order is a rule, chiefly because it is generally applicable to all AOS providers, and because it is immediately enforceable; thus it is argued, the order prescribes law or policy without being subject to the stricture of rulemaking. To the contrary, the Public Service Commission (Commission) argues that although orders may also prescribe law, the order on review cannot possibly be a rule, because its only effect is to ensure certain

monies be set aside until policy can be developed and enunciated--"prescribed," within the meaning of section 120.52(16).

In order to decide whether the subject order is a rule, it is necessary for us to examine some of the primary objective behind rulemaking and determine whether those considerations are applicable to the action on review. Perhaps the most important goal of the rule adoption is fair notice to the public of the agency's intended action, described by this court as "clos[ing] the gap between what the agency and its staff know about the agency's law and policy and what an outsider can know." McDonald, 346 So.2d at 580 (quoting K. Davis, Discretionary Justice 102 (1969)(hereinafter Davis)). Rulemaking is also designed to assure "'mature consideration of rules of general application,'" 1/ as well as to impel "agencies to 'confine their own discretion' by 'moving from vague standards to definite standards to broad principles to rules.'" Id. (quoting Davis, at 55).

Applying the above considerations to the case at hand, it is obvious that the Commission's order is not impressed with any of the benchmarks of policy for which the provisions of Section 120.54, Florida Statutes (1987), relating to rulemaking, are required. The Commission itself identifies the order as an interim measure designed to ensure consumer protection during the time that the Commission examines the issues presented by the complaints it has received. As such, the order under review can neither be impressed with the "mature consideration" intended for a rule, nor can it be viewed as the initial step in a progression from vague standards to definite standards and finally to broad principles, given the agency's confession of a lack of adequate information on the merits presented by the complaints of excessive charges by AOS. Due to the agency's lack of formulation of any policy at the time of the entry of the order on review, we are not confronted with any gap between what the agency knows and what the public is unaware of. Indeed, at the time of the order's entry, it appears that the agency itself knew little more than would an interested outsider, in that the purpose of the public hearing, as provided in the order, was to obtain information from which the Commission hoped to develop an intelligent policy judgment that it was then unable to state. In my judgment, none of the considerations that are relevant to rule adoption is present here.

As observed in McDonald, the framers of the APA "had no intention of building an impenetrable wall between policymaking and adjudication." McDonald, 346 So.2d at 581. "The folly of imposing rulemaking procedures on all statements of incipient policy is evident[,]" because to do so will hardly encourage agencies to "structure their discretion progressively by vague standards, then definite standards, then broad principles, then rules." Id. at 580 (emphasis added). Although the definition of a rule "obviously could be read literally to encompass virtually any utterance by an agency," 2/ nevertheless, to do so makes it impossible for an agency to "wisely sharpen its purposes through adjudication before casting rules." Id. at 581 (citing Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 927 (1965)).

In a number of cases this court has recognized that it is unwise to force agencies to pigeonhole their activities into "rule" versus "order" categories. For example, in Florida Pub. Serv. Comm'n v. Indiantown Tel. Sys. Inc., 435 So.2d 892 (Fla. 1st DCA 1983), holding that the Commission could proceed to develop policy through adjudication rather than rulemaking, this court said that "there is no authority to compel the agency to choose rulemaking over adjudication." Id. at 895-96. Furthermore, in Department of Revenue v. U.S. Sugar Corp., 388 So.2d 596, 598 (Fla. 1st DCA 1980)(Ervin, J., concurring), it was noted that the classification of agency action as a rule or order is not

important; rather the relevant inquiry is whether the agency has adequately explained its action, and, if it has, whether its action is within the discretion delegated to it. If an agency has explained itself and has acted within its delegated authority, then the court should sustain the action even though the agency's statement "may have all the characteristics of section 120.52[16]'s definition of rule." Id. As was observed in White Advertising Int'l v. State of Fla. Dept. of Transp., 368 So.2d 411, 413 n.5 (Fla. 1st DCA 1979)(Ervin, J., concurring and dissenting)(citing 1 K. Davis, Administrative Law Treatise 286 (1958)), "Professor Davis' solution to deciding whether such borderline activities [i.e., categorizing as rule or order] should be validated is 'to avoid classifying them--to skip the labeling and to proceed directly to the problem at hand.'"

More than six years ago this court rejected an argument that the Board of Medical Examiners' interpretation of Section 458.311(1)(b), Florida Statutes (1979), which resulted in the applicant being barred for licensure as a medical practitioner because he had not graduated from an approved medical school, was invalid for the reason that the interpretation had not been adopted as a rule. Barker v. Board of Medical Examiners, 428 So.2d 720 (Fla. 1st DCA 1983). In upholding the Board's nonrule policy decision, we made the following observations:

> The fact, however, that no rule was extant at the time Barker applied for licensure does not necessarily mean the Board's action was void. The time has long since passed (if ever it existed) that agency action was mechanically invalidated simply because no rule was in effect. Certain opinions from this court during our early experience with Florida's 1974 Administrative Procedure Act may have so indicated. Our academic endeavors in attempting to label the action either rule or nonrule to determine whether or not it fell within section 120.52(14)'s [now renumbered as 120.52(16)] definition of a rule have now been largely discarded. There are, however, costs exacted upon an agency which avoids the rulemaking procedure provided by section 120.54, chief among those being that the agency may be required repeatedly to defend its nonrule policy decisions in each case.

Id. at 722 (citations omitted).

The above approach appears to have been approved by the Florida Supreme Court, insofar as it relates to an agency's formation of policy. In City of Tallahassee v. Florida Pub. Serv. Comm'n, 433 So.2d 505 (Fla. 1983), the supreme court, while denying the city's petition to force the Commission to initiate rulemaking, made the following observations:

> The statutes outlining the PSC's jurisdiction and duties are necessarily general in nature, providing for flexibility in the exercise of its power.

> To the extent the PSC solidifies its position on policy in a particular area, we believe such established policy should be codified by rule. However, as in the instant case, if the PSC seeks to exercise its authority on a case-by-case basis until it has focused on a common scheme of inquiry derived through experience gained from adsversary proceedings, then we hold that there should be erected no impediment to the PSC's election of such course.
>
> * * *
>
> Currently, by its own actions and admissions, the PSC has shown that ... it is in a formulative stage regarding policy. As such, no greater restraints should be imposed on the exercise of the PSC's authority other than those already found in section 366.06(1) as well as those factors it has, and subsequently will, expressly raise either in its orders or through adversary proceedings in this Court.
>
> * * *
>
> We have held in the past and continue to hold in this case, that administrative agencies may develop policies by adjudication and that formal rulemaking is not initially necessary in all cases.

Id. at 507-08 (emphasis added).

In the instant case, despite the contrary admonition of a number of scholars and judges, appellee asks this court to approve the hearing officer's order that places the agency's action into the rulemaking category--an exercise which appears to me to be one of mere labeling--rather than permit the agency to proceed with incipient policymaking by interim order, and then to final action. If the latter course were approved, this court would be in a position of reviewing whether the action taken was correct, rather than being restricted to the limited question, at this truncated juncture, of whether the action should be invalidated, because not adopted as a rule.

Appellee also argues, relying upon Balsam v. Department of Health & Rehabilitative Servs., 452 So.2d 976 (Fla. 1st DCA 1984), that action which has industry-wide effect is necessarily a rule, regardless of the duration of the agency action. I do not regard Balsam as standing for such a broad proposition. The court's holding in Balsam, which invalidated a moratorium imposed by the agency on receipt of certificate of need (CON) applications, appears largely motivated by the court's recognition that if appellant, a party substantially affected by the agency's imposition of the moratorium, had not been afforded the review mechanism provided by the rulemaking procedures of Chapter 120, the appellant would have had no review until the next "batching cycle" of CON applications. Id. at 977. By that time, appellant would have been deprived of a competitive advantage. Id. In fact, the result of our decision in Balsam was to order HRS to make a determination on appellants' application for a CON "as soon as possible." Id. at 978. 3/ In the present case, Central Corporation,

however, has been provided a point of entry into the administrative proceeding, and indeed has now had a full section 120.57(1) hearing, pursuant to the very order it challenges. Thus, in my judgment, the policy underpinning our decision in Balsam is inapplicable to the instant case.

The very fact that Central has been afforded dual entries into the administrative arena via both the rule challenge and adversary adjudicatory avenues is perhaps an even more fundamental reason why the order on review should not be invalidated as a nonadopted rule, or why the rule challenge proceeding should not be entertained. The practice of allowing simultaneous, dual administrative proceedings was condemned in Fox v. State Bd. of Osteopathic Medical Examiners, 395 So.2d 192 (Fla. 1st DCA 1981), in which we held that declaratory statement proceedings brought pursuant to section 120.565 of the APA could not be pursued on issues simultaneously litigated in a section 120.57 adjudicatory proceeding. See also Couch v. State of Fla. Dep't. of Health & Rehabilitative Servs., 377 So.2d 32 (Fla. 1st DCA 1979). Similarly, in the case at hand, issues were simultaneously litigated under Sections 120.57 and 120.56, Florida Statutes (1987). In my judgment, it is questionable whether the party affected by the agency's action has the legal right to proceed under both statutes, in that the order which it is challenging as a nonadopted rule itself provides the party with a formal hearing, which was sought, and which has now been concluded. One has to question whether permitting such dual reviews, under the circumstances at bar, results in an undesirable manipulation of the procedural protections provided in the APA.

For the above reasons I would reverse the hearing officer's order of invalidation.

ENDNOTES

1/ McDonald, 346 So.2d at 580 n.6 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709, 714 (1969)).

2/ McDonald, 346 So.2d at 581 (quoting Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 37 (D.C. Cir. 1974)).

3/ Another pertinent reason for invalidating the agency's action in Balsam was that there was no statutory authority for the imposition of a moratorium, in that Section 381.494(5), Florida Statutes (1981), required the agency, by rule, to provide for the submission of CON applications on a "timetable or cycle basis." Balsam, 452 So.2d at 977. Consequently a moratorium on such applications would clearly have been in contravention of the authority delegated to the agency by the legislature. In contrast, the agency here is specifically given the authority by Section 364.14(1), Florida Statutes (1987), to determine by order whether the rates demanded are "just and reasonable."

M A N D A T E
From
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Judges of the Diane D. Tremor
Hearing Officer

WHEREAS, in that certain cause filed in this Court styled:

FLORIDA MANUFACTURED HOUSING ASSOCIATION, INC., A Florida incorporated association not for profit

Case No. 88-1889
vs. Your Case No. 88-1978-R

DEPARTMENT OF BUSINESS REGULATION, DIVISION OF FLORIDA LAND CONDOMINIUMS AND MOBILE HOMES

vs.

FEDERATION OF MOBILE HOME OWNERS OF FLORIDA, INC.

The attached opinion was rendered on October 19, 1989.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinions, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable Douglass B. Shivers

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 21st day of November, 1989.

_____
Clerk, District Court of Appeal of Florida,
First District