

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of) DOCKET NO. 910163-TL
Citizens of the State of) ORDER NO. PSC-92-0339-FOF-TL
Florida to initiate investi-) ISSUED: 05/13/92
gation into integrity of)
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY's repair)
service activities and reports.)
_____)

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY

ORDER DISPOSING OF MOTION FOR
RECONSIDERATION OF ORDER NO. 25483

BY THE COMMISSION:

I. Background

This proceeding was initiated to investigate the integrity of Southern Bell Telephone and Telegraph Company, Inc.'s (Southern Bell's) repair service activities and reports. This Order involves a discovery dispute between Southern Bell and the Office of Public Counsel (Public Counsel). By Order No. 25054, issued September 12, 1991, the Prehearing Officer granted Public Counsel's Motions to Compel Southern Bell to respond to Items Nos. 1 - 21 of Public Counsel's Third Set of Interrogatories dated June 6, 1991, and Items Nos. 1 and 2 of Public Counsel's Fifth Set of Interrogatories.

On September 23, 1991, Southern Bell filed a motion for reconsideration of Order 25054 by the full Commission. Public Counsel responded in opposition to Southern Bell's motion on September 30, 1991. By Order No. 25483, issued December 17, 1991, the Commission, inter alia, denied Southern Bell's motion for reconsideration and affirmed the Prehearing Officer's decisions in Order 25054. In addition, the Commission also adopted the policy that the appropriate standard for review of a Prehearing Officer's order is the same as that applied for a motion for reconsideration. Under this standard, the proponent of reconsideration must establish that an error of law or fact was made in the reaching the decision under review.

On January 2, 1992, Southern Bell filed a Motion for Reconsideration of Order No. 25483. Public Counsel filed a Motion to Strike Southern Bell's Motion for Reconsideration on January 8,

DOCUMENT NUMBER-DATE

04807 MAY 13 1992

=PSC-RECORDS/REPORTING

1992. Southern Bell responded in opposition to Public Counsel's Motion to Strike on January 20, 1992.

II. Discussion

A. Use of "Reconsideration" Standard for Review of Prehearing Officer's Orders

Southern Bell argues in its Motion for Reconsideration of Order No. 25483 that the Commission errs in adopting a "reconsideration" standard for review of a Prehearing Officer's orders. In support of this notion, the Company states that Rule 25-22.038(2), Florida Administrative Code, "specifies that a party affected by an order may file for review of the order by the Commission." (emphasis in original) Southern Bell contrasts this with the provisions of Rule 25-22.060, Florida Administrative Code, which expressly addresses a party's opportunity to seek "reconsideration" of a full Commission decision. Southern Bell argues that the difference in terminology between these two sections "clearly anticipates that the full Commission will consider an order of the prehearing officer on a basis different from the standard it uses when it is asked to reconsider its own orders." The Company further argues that a reconsideration standard deprives a party of its right under the Commission's rules to have the Commission determine issues. The Company concludes by arguing that:

The Commission is not an appellate panel sitting in review of decisions of a lower tribunal. Rather, under its own rules, it is the ultimate "trial court." The Commission has not and should not delegate away its decision-making authority in those limited instances when it is asked to review a prehearing officer's decision.

With respect to the issue of the appropriate standard of review, Public Counsel argues in its motion to strike that, pursuant to Rule 25-22.060, Southern Bell is not entitled to reconsideration of an order disposing of a motion for reconsideration. Public Counsel further argues that, even under Rule 25-22.038(2), the Commission may review the prehearing officer's order under a standard of whether the prehearing officer made an error of fact or law.

Southern Bell's response to the motion to strike states that a "review" of a prehearing officer's order is not the same as a motion for reconsideration by the Commission of its own order and that, therefore, the Company's motion for reconsideration is appropriate. Southern Bell also argues that the Commission's

adoption of a reconsideration standard for review was raised for the first time in Order No. 25483 and that reconsideration is appropriate.

Rule 25-22.038 generally establishes the Commission's designation of the Prehearing Officer as well as the Commission's delegation of procedural matters to the Prehearing Officer. The provision for review of a Prehearing Officer's order by the Commission is found in Rule 25-22.038(2). That Section provides as follows:

(2) Orders of the Prehearing Officer. A party who is adversely affected by any such order or notice may seek reconsideration by the Prehearing Officer, or review by the Commission panel assigned to the proceeding, by filing a motion in support thereof within ten (10) days of service of the notice or order. Unless raised within this time, any error claimed with reference to discovery, scheduling, prehearing requirements, or the prehearing order will be waived, absent good cause shown.

Southern Bell's argument, reduced to its essentials, is that if a party fails to persuade a Prehearing Officer of the merits of its position, that party is guaranteed an opportunity to reargue its full case again before the full Commission to hopefully persuade at least three of the remaining four Commissioners to agree with its previously unpersuasive arguments or in some cases to try out entirely new arguments. Rule 25-22.038(2) does not compel such a second full bite at the apple. The notion that Rule 25-22.038(2) grants an entitlement to a de novo review of a Prehearing Officer's order is incorrect. The Rule provides only that a party make seek review of an order. It does not compel a specific standard by which the Commission will conduct such review. The Commission's designation of and the delegation of authority over procedural matters to the Prehearing Officer are unquestionably within the Commission's discretion. It is equally within the Commission's discretion to establish the standard by which it will review a Prehearing Officer's decisions.

Southern Bell has raised no error of law or fact inherent in our decision to limit the scope of Commission review of a Prehearing Officer's order. Southern Bell simply wishes that we had reached a different result. Accordingly, we find it appropriate to deny Southern Bell's Motion for Reconsideration of that portion of Order No. 25483 which reflects our decision that the appropriate standard for review of a Prehearing Officer's order is the same as that applied for a motion for reconsideration.

B. Reconsideration of Order to Compel

Southern Bell argues that Order No. 25483 mischaracterizes Southern Bell's willingness to respond to appropriate discovery requests. The Company reiterates its previous argument that Public Counsel's discovery requests go beyond those allowed by Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla. 1970) because they require counsel for Southern Bell to analyze otherwise privileged information in order to respond.

Public Counsel responded by arguing that the Prehearing Officer's and the Commission's determination that the discovery propounded by Public Counsel was within the scope of the Surf Drugs holding is correct.

The arguments raised by Southern Bell in its second motion for reconsideration on this issue have been raised and rejected twice before, once by us and once by the Prehearing Officer. Southern Bell has failed to raise any matter that the Commission failed to consider or overlooked. Accordingly, we find it appropriate to deny the Company's Motion for reconsideration on this issue. Southern Bell is hereby ordered to provide the requested discovery within 10 days from the date of issuance of this Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Southern Bell Telephone and Telegraph Company's Motion for Reconsideration of Order No. 25483 is denied in its entirety as set forth in the body of this Order. It is further

ORDERED that this docket remain open.

By ORDER of the Florida Public Service Commission, this 13th day of May, 1992.


STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

TH

ORDER NO. PSC-92-0339-FOF-TL
DOCKET NO. 910163-TL
PAGE 5

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.