BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: PETITION ON BEHALF OF CITIZENS OF THE STATE OF FLORIDA TO INITIATE INVESTIGATION INTO THE INTEGRITY OF SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S REPAIR SERVICE ACTIVITIES AND REPORTS	DOCKET NO. 910163-TL
In Re: COMPREHENSIVE REVIEW OF THE REVENUE REQUIREMENTS AND RATE STABILIZATION PLAN OF SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY	DOCKET NO. 920260-TL ORDER NO. PSC-94-1291-FOF-TL ISSUED: October 17, 1994

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S MOTION FOR RECONSIDERATION

BY THE COMMISSION:

CASE BACKGROUND

On June 3, 1994, the Prehearing Officer's Order No. PSC-94-0672-PCO-TL, Order Resolving Discovery Issues Re: In Camera Documents (Order) was issued. On June 13, 1994, Southern Bell filed a Motion for Reconsideration of that Order (Motion). On June 24, 1994, the Attorney General filed a Response to Southern Bell's Motion for Reconsideration (Response).

As the Attorney General's Response points out, p. 1-2, the standard of appropriate reconsideration in Diamond Cab Company of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962), involves bringing the agency's attention to a point which was overlooked or which the agency failed to consider when it rendered the order. "It is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment or the order." Diamond Cab, at 891.

With respect to discovery of the remaining in camera documents for which reconsideration is sought, including employee statements, Human Resource worknotes, panel recommendations and audits, Southern Bell has combined large amounts of reargument with some additional points. This is especially true of its argument about the employee statements, which not only reargues its previous motion, but even reargues the Florida Supreme Court's holdings in Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994), the opinion which the Order applied. This is obviously inappropriate under Diamond Cab, supra. Therefore, it is appropriate to consider the new points Southern Bell has raised and only as much of the reargument as is necessary to address those points in context.

DISCUSSION

We first address whether the determination that the employee statements are discoverable should be reconsidered. In Case No. 81,716, the Court stated as follows, 632 So. 2d at 1386:

> ...we find that the employees' statements which were made directly to counsel are privileged. Statements made to security personnel, like the statements made to security that were included in the panel recommendations, are not protected by the privilege. Counsel's summaries of the employees' statements, whether the statements were communicated to counsel, to security, or to any other personnel, are protected as work-product. [e.s.].

The Order applied these directives to the employee statements. Though the contents of the statements cannot be revealed while this litigation continues, what is on the face of the documents is consistent with the disposition of this question in the Order.

Southern Bell argues, p. 5 of its Motion, that the employee statements are privileged

> whether or not the statement was transcribed by a security person assisting Mr. Carver, or whether or not the security person asked an occasional question.

Having thus invited us to ignore the Court's holding on this issue, as stated above, Southern Bell then noted, p. 6, n. 6, that

> Southern Bell's Counsel directed and controlled, and in most cases [i.e. during the actual interviews of the employees listed on the schedules] were present during, the interviews with employees.

Southern Bell made this point even though the Florida Supreme Court has already held, 632 So. 2d at 1385, n. 14, that

> Southern Bell's claim that counsel directed, controlled, and was sometimes present at the employee interviews does not invoke the privilege [e.s.].

In our view, these arguments, which relitigate the Florida Supreme Court's opinion, do not provide grounds for reconsideration of the Order.

Similarly, Southern Bell has not presented grounds for reconsideration of its claim of work-product immunity for the employee statements.

The Court's discussion of the status of employee statements is found in Case No. 81,716, as cited above. 632 So. 2d at 1386. Though Southern Bell cites the Court's discussion in Case No. 81,487, that discussion concerns panel recommendations containing

> thoughts and impressions of personnel managers based on counsel's communications to them. [e.s.].

Clearly, the Court was referring to counsel's summaries as the basis for the panel recommendations, which is why Southern Bell was authorized to redact counsel's notes, thoughts and impressions, but not the information recited to the managers by counsel. 632 So. 2d 1386 and n. 15.

We have already returned counsel's summaries to Southern Bell in accord with the Court's holding in Case No. 81,716 that they are, in fact, work-product. What is lacking in the opinions of either Case No. 81,487 or 81,716, where it logically would have been found if the Court so intended, was any holding by the Court that employee statements taken by security personnel were protected

work-product.[1] Southern Bell's "self-help" solution, whereby it applies the law itself and creates such a holding, is not equivalent to a holding by the Court and does not create a basis for reconsideration of the Order, which applied the Court's holding.[2]

We next address whether the determination that the human resource worknotes are discoverable, except for counsel's notes, thoughts and impressions, be reconsidered. As to these documents, Southern Bell claims that the Order "directly defies the Court." Motion, p. 10. However, Southern Bell neglects the Court's holding that:

> Statements made to security personnel...are not protected by the privilege.

632 So. 2d 1386. If the Prehearing Officer had found that the worknotes were based on privileged statements, the worknotes would have been treated as privileged, as was noted in the Order, p. 7, n. 6. That having not been found, p. 2-4 supra, we follow the Court's directives for the most closely analogous documents, the panel recommendations. There, the Court itself already rejected Southern Bell's current argument, Motion, p. 10, n. 8, to the effect that such derivative materials contain counsel's thoughts and impressions:

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[1] The Court explicitly found such statements not privileged and noted that the legal issues associated with privilege and work product "overlap in the instant case". 632 So. 2d at 1384.

[2] Southern Bell merely adds in brackets the words "employee statements" to its citation of what the Court has written. Motion, p. 9. Our analysis of the same cited passage, however, has the advantage of being consistent with the rest of the Court's opinion:

> The fact that the panel recommendations were based on work-product [i.e., counsel's summaries] does not convert them [the panel recommendations] into work product.

632 So. 2d at 1386. As previously noted, this reading is consistent with note 15 of the Southern Bell opinion:

> We reiterate that the information recited to the managers by Southern Bell's counsel is not to be redacted. [e.s.]

Southern Bell's theory that the statements themselves are non-discoverable is inconsistent with note 15.

> The [panel] recommendations contain the thoughts and impressions of the personnel managers based on counsel's communications to them.

632 So. 2d at 1386.

Therefore, we believe that conferring privileged status on worknotes based on counsel's summaries of statements given to security personnel would not be in accord with the Court's analysis in Southern Bell.

We next address whether the redaction process concerning the panel recommendations should be reconsidered. Southern Bell argues that the Prehearing Officer's decision to retain unredacted copies of the panel recommendations "defeats the purpose of the Court's order." Motion, p. 10. Southern Bell misstates both the Order and its purpose.

The Order stated, p. 7, that copies would be retained "during the redaction process." In other words, if Southern Bell carries out the Florida Supreme Court's Order and appropriately redacts counsel's "notes thoughts and impressions", but not "the information recited to the managers", 632 So. 2d 1386, n. 15, the intent is to destroy the unredacted copies at the conclusion of that process. Therefore, the unredacted copies were only to be temporarily retained to protect the documents for appeal purposes in case Southern Bell took an extreme position and "redacted" the entire document.

We could not have anticipated the extent to which Southern Bell would validate this cautious approach. In its Motion, p. 10, n. 8, Southern Bell adopts precisely that extreme position with respect to the worknotes:

> Even accepting the Order's flawed conclusion that only counsel's impressions are protected, this would encompass the entirety of the worknotes. [e.s.]

The Order did not err in precluding the destruction of the document pending resolution of this matter.[3]

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[3] Though Southern Bell, Motion, p. 11, n. 9, also argues that the Court expressed "concern" about the in camera process at oral argument, that argument pre-dated consideration of the briefs in Case No. 82,399. Therein, the Commission advised the Court that

We next address whether the determination not to return the audits, panel recommendations and all other in camera documents to Southern Bell should be reconsidered. Southern Bell's final points are to the effect that all of these documents must be returned because "[t]he proceeding in which discovery was sought, and the privilege claims were raised, is concluded." Motion, p. 12. This is reargument of points that were rejected in the Order. Order, p. 2-3. The proceeding as to which the documents are relevant is investigative Docket No. 930163-TL, which remains open. Order No. PSC-94-0172-FOF-TL, p. 8-9.

Since the premise of Southern Bell's argument (i.e., that the "proceeding" is concluded) is incorrect, the arguments based on that premise are without merit. Thus, for example, Rule 25-22.006(5)(d) F.A.C. is inapplicable because the process for determining privilege issues is incomplete and, therefore, none of these documents have been subjected to discovery, whether for 60 days, or for one day. Moreover, Order No. PSC-94-0172-FOF-TL does not say that Docket No. 910163-TL is "technically pending solely because of the pendency of the appeals." The Order notes that appeals are pending in that docket, but also notes that the Commission intends

> to continue working with Southern Bell and interested parties to address concerns raised in our investigative dockets. [e.s.]

Order No. PSC-94-0172-FOF-TL, p. 8.

Finally, if the Legal division had sought this discovery for "tactical reasons", as Southern Bell speculates, the requests would have been rescinded. No grounds requiring reconsideration of the Order having been put forward by Southern Bell, the Motion is denied.

In view of the above, it is

ORDERED that Southern Bell Telephone and Telegraph Company's Motion for Reconsideration of Order No. PSC-94-0672-PCO-TL is denied. It is further

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staff with access to in-camera documents were "walled off" from the Legal division staff conducting the rate case and investigation. That obviously responded to the Court's concern because no reference to any such concern appears in the Southern Bell opinion.

ORDERED that Dockets Nos. 910163-TL and 920260-TL are to remain open. It is further

ORDERED that the effect of this Order is stayed pending appeal, if an appeal is taken.

BY ORDER of the Florida Public Service Commission, this 17th day of October, 1994.

BLANCA BAYÓ, Director
Division of Records and Reporting

by: _____
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR 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: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

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