BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Southern Bell's Capital Recovery Position	)	DOCKET NO. 890256-TL
	)	ORDER NO. 22636
	)	ISSUED: 3-5-90

ORDER DENYING MOTION TO COMPEL

Southern Bell Telephone and Telegraph Company (Bell) served its First Set of Interrogatories (the First Set) on the Florida Cable Television Association (FCTA) on August 18, 1989. Interrogatories 25, 26, 27, and 28 concern services currently provided, or anticipated, by the members of FCTA. On September 18, 1989, FCTA responded to the First Set, objecting to these four questions. FCTA argued that the contested questions are irrelevant to Bell's depreciation represcription, not reasonably calculated to lead to the discovery of admissible evidence, and beyond the permissible scope of discovery.

Bell served its Seventh Set of Interrogatories (the Seventh Set) on FCTA on January 26, 1990. Interrogatories 1(a), 1(b), 2, 3, 5, 6, 8, 9, 11, and 14 concern studies made, nomenclature used, equipment used or depreciation practices employed by the members of FCTA. On February 8, 1990, FCTA responded to the Seventh Set, objecting to these ten questions. Again, FCTA argued that the questions are irrelevant to this proceeding and not calculated to lead to the discovery of admissible evidence. These questions were also characterized by FCTA as being unduly burdensome, oppressive, and intended to harass.

Bell filed a Motion to Compel, on February 9, 1990, arguing that it and the cable industry use similar facilities. In support of its motion, Bell cites magazine articles about the cable industry's use of fiber optics and the possibility of using cable facilities to provide telephone service. Bell also supplies testimony from an out-of-state proceeding alleging that cable systems use fiber optic facilities in those portions of their networks that are comparable to Bell's interoffice trunking and feeder routes. Bell also cites a cable industry representative's statement that fiber optic facilities are appropriate for use in the "trunking" and "feeder" portions of a cable network. Bell refers to a magazine article which asserts that two-thirds of all cable managers expect that fiber optic facilities to eventually replace coaxial cable throughout their distribution networks. Bell contends that similarities between the industries are undeniable and that, accordingly, the cable companies are in position to compete with Bell for both business and residential telephone customers.

On February 21, 1990, FCTA filed its Reply to the Motion to Compel and Alternative Motion for Protective Order. FCTA argues that questions about its members' current and contemplated services and their depreciation practices are outside the limits of permissible discovery in this pending proceeding. In FCTA's view, this proceeding is only about Bell's telephone network, the company's depreciation study, and our regulation of its depreciation rates. FCTA cites authority which places the burden of establishing relevancy on the questioner, Calderbank v. Cazares, 435 So.2d 377, 379 (Fla. 5th DCA, 1983). FCTA further points out that discovery cannot be used to put "one party in a more strategic position than he otherwise would be by acquiring information that has nothing to do with the merits of the action," Brooks v. Owens, 97 So.2d 693, 699 (Fla. 1957). Finally, FCTA alleges that we have disallowed "retaliatory discovery" through attempted turn-the-tables discovery of an intervenor in Order No. 19288, issued May 5, 1988, in Docket No. 860001-EI-G.

Upon review of the arguments, I find that Bell has not met its burden of establishing the relevancy of the contested interrogatories. Rule 1.280(b)(1) of the Florida Rules of Civil Procedure states that "[p]arties may obtain discovery regarding any matter . . . that is relevant to the subject matter of the pending action. . . . It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (emphasis added)

The purpose of this proceeding is to represcribe Bell's depreciation rates. Since it furnishes telephone service, Bell is regulated by the Commission under authority granted by Chapter 364, Florida Statutes. No such authority has been granted to the Commission over the members of the FCTA who are involved in the cable television business. Further, the cable industry is precluded from competing with Bell's local exchange operations by virtue of Section 364.335. The answers which Bell seeks to compel are neither "relevant to the subject matter of the pending action" nor "reasonably calculated to lead to the discovery of admissible evidence" as required by Rule 1.280(b)(1). Accordingly, the contested interrogatories are beyond the scope of the eleven issues involved in this proceeding.

Based on the foregoing, it is

ORDERED by Commissioner John T. Herndon, as Prehearing Officer, that Southern Bell Telephone and Telegraph Company's Motion to Compel, filed on February 9, 1990, is denied. It is further

ORDERED that the Reply filed by the Florida Cable Television Association on February 21, 1990, is granted to the extent provided in the body of this Order and is dismissed as moot in all other respects.

By ORDER of Commissioner John T. Herndon, as Prehearing Officer, this 5th day of March, 1990.

John T. Herndon
JOHN T. HERNDON, Commissioner
and Prehearing Officer

(S E A L)

CWM/DLC

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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by

the Commission; or 3) 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. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.