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Harris R. Anthony
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**ORIGINAL
FILE COPY**

Southern Bell Telephone
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January 2, 1992

Mr. Steve C. Tribble
Director, Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Re: Docket No. 910163-TL - Repair Service Investigation

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Motion for Reconsideration of Order No. 25483, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

- ACK
- AFA _____
- APP _____
- CAF _____
- CMU Enclosures
- CTR _____ cc: All Parties of Record
- EAG _____ A. M. Lombardo
- LEG 1 w/leg R. Douglas Lackey
- LIN b
- OFC _____
- RCH _____
- SEC 1
- WAS _____
- YTH _____

Sincerely yours,

Harris R. Anthony
Harris R. Anthony
(22)

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FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 910163-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this *2nd* day of *Jan.*, 1992,
to:

Charles J. Beck
Assistant Public Counsel
Office of the Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Suzanne Summerlin
Division of Legal Services
Florida Public Svc. Commission
101 East Gaines Street
Tallahassee, FL 32399-0863

Harris R. Anthony
(2)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL
FILE COPY

In re: Investigation into the) Docket No. 910163-TL
Integrity of Southern Bell's)
Repair Service Activities and) Filed: January 2, 1992
Reports)
_____)

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
MOTION FOR RECONSIDERATION OF ORDER NO. 25483**

COMES NOW Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.060, Florida Administrative Code, and files its Motion for Reconsideration of Order No. 25483.

I. BACKGROUND

1. On December 17, 1991, the Commission issued Order No. 25483 (the "Order") in the above-captioned docket, in which it affirmed Order No. 25054 of the Prehearing Officer. The latter order had granted two Motions to Compel filed by Public Counsel. The first Motion to Compel was filed on July 11, 1991, and related to Southern Bell's response and objections to Interrogatory Nos. 1 through 21 of Public Counsel's Third Set of Interrogatories dated June 6, 1991. The second Motion to Compel was filed on July 18, 1991, and related to Southern Bell's responses and objections to Interrogatory Nos. 1 and 2 of Public Counsel's Fifth Set of Interrogatories dated June 11, 1991.

2. Southern Bell objected to responding to the interrogatories on the basis that they called for the provision of information that was privileged as attorney work product. Each of the interrogatories requested that Southern Bell's

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attorneys evaluate certain information that the Company's employees have provided in statements to Southern Bell. These statements themselves are attorney work product and are thus privileged. See, Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla., 1970). The privileged status of the statements themselves has not been disputed by Public Counsel.

II. ARGUMENT

3. The Order first errs in concluding that the "standard of review" to be used by the Commission regarding a discovery order issued by the prehearing officer is the same standard as that which applies to reconsideration by the Commission, pursuant to Rule 25-22.060, Florida Administrative Code, of a final order issued by the Commission itself. Rule 25-22.038(2), Florida Administrative Code, specifies that a party affected by an order of the prehearing officer may file for review of the order by the Commission. The Rule further states that the failure to file within ten (10) days for such review shall constitute a waiver of any objection. If the Commission applies the same standard for review of a prehearing officer's order as it applies to reconsideration of a final order of the Commission itself, a party's opportunity to have the Commission fully consider a matter that was disputed before and initially decided by the prehearing officer is lost.

4. The Order fails to recognize and explain the difference in terminology used by the two different rules. A "review" by

the Commission of a prehearing officer's decision is contemplated by Rule 25-22.038(2), Florida Administrative Code, while the Commission undertakes "reconsideration" of its own orders pursuant to Rule 25-22.060, Florida Administrative Code. This difference in terminology 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. When a decision-making body is asked to reconsider a decision that it has made, it is appropriate to limit such reconsideration only to instances where the decision-making body has made an error of law or fact. Otherwise, there would be no finality with regard to its decision. However, where the decision-making body is reviewing an order by a prehearing officer designated by the decision-making body there should be a different standard of review, one that allows a party to argue its case to the Commission. Otherwise, a party would be deprived of its right under the Commission's rules to have the Commission determine issues.

5. Order No. 25483 finds that application of "de novo" standard of review will somehow impinge on the authority of the prehearing officer in discovery matters. This is not the case. First, most such orders are not the subject of review by the full Commission. Thus, the use of a prehearing officer to decide discovery issues would still provide for administrative economy. Furthermore, the Rule provides for access from the prehearing

officer to the Commission to allow a party to pursue to the full Commission a preliminary matter which may affect its important substantive rights. 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.


6. With regard to the determination that Order No. 25054 of the prehearing officer contains no error of law or fact, Southern Bell also disagrees and respectfully requests that the Commission reconsider its determination. The Order mischaracterizes Southern Bell's willingness to respond to appropriate discovery requests. Southern Bell once again states that if Public Counsel were to propound the interrogatories approved in Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla. 1970), Southern Bell would provide responses without objection. Southern Bell has no objection to responding to interrogatories that request the names and addresses of person with knowledge relevant to this docket. However, Public Counsel's interrogatories go much further. The interrogatories request information with regard to certain activities that fit a given category, e.g., alleged fraudulent activity, and, as a consequence, require counsel for Southern Bell to analyze otherwise privileged information in order to respond. Thus, the


interrogatories go too far, as they ask for Southern Bell Counsel's mental impressions and thus request information which must be attorney work product. The Commission has committed an error of law by failing to recognize that a response to Public Counsel's interrogatories would require Southern Bell to provide information that is attorney work product and is thus privileged.

WHEREFORE, for the foregoing reasons, Southern Bell respectfully requests that the Full Commission reconsider Order No. 25483 and deny Public Counsel's Motion to Compel dated July 11, 1991 and July 18, 1991.

Respectfully submitted,

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY


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