

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building  
101 East Gaines Street  
Tallahassee, Florida 32399-0850

M E M O R A N D U M

February 15, 1993

*degr*

TO : DIRECTOR OF RECORDS AND REPORTING (TRIBBLE)

FROM : DIVISION OF APPEALS (BELLAK) *RCB*

RE: : DOCKET NOS. 910163-TL - 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; 920260-TL - COMPREHENSIVE REVIEW OF THE REVENUE REQUIREMENTS AND RATE STABILIZATION PLAN OF SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY; 900960-TL - SHOW CAUSE PROCEEDING AGAINST SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY FOR MISBILLING CUSTOMERS; AND 910727-TL - INVESTIGATION INTO SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S COMPLIANCE WITH RULE 25-4.110(2), F.A.C., REBATES

AGENDA : FEBRUARY 16, 1993 - CONTROVERSIAL - PARTIES MAY PARTICIPATE

PANEL : FULL COMMISSION

FILE NAME: I:\PSC\APP\WP\910163.RCM

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CASE BACKGROUND

Order No. PSC-93-0151-CFO-TC, issued by the prehearing officer on January 28, 1993, in the above consolidated docket, granted Public Counsel's Motions To Compel production of two categories of documents comprising respectively certain internal audits and panel recommendations concerning employee discipline. Southern Bell, in its request for review of that order, asserts that "numerous mistakes of both law and fact" therein require that this Commission review and reverse that decision.

DISCUSSION OF ISSUES

ISSUE I: Should Southern Bell's Motion For Review be granted?

STAFF RECOMMENDATION: No. With one exception as to a factual error involving a misidentified audit, the motion should be denied.

DOCUMENT NUMBER-DATE

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STAFF ANALYSIS: Though error of fact or law would meet the appropriate standard for reconsideration if so found, Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 399 So. 2d 161 (Fla. 1st DCA 1981); Order No. PSC-92-0339-FOF-TL (5/13/92), staff recommends that, no error therein of law or fact be found, with the exception of a single factual error involving a misidentified internal audit. With that exception, as further explained below, the motion should be denied.

I. Internal Audits

A. Attorney-Client Privilege

Southern Bell's motion re-argues its point that, unless the attorney-client privilege is viewed as an absolute, it does not exist at all. Any attempt to accommodate it to other regulation-based concerns in Southern Bell's view, destroys the privilege and is, therefore, incorrect. This analysis should be rejected. The Prehearing Officer's Order cited the Consolidated case<sup>1</sup> because of concern that the "overly broad corporate information shield" Southern Bell would create is inconsistent with the Commission's "duty to protect the public" and "continuing obligation" to determine the company's compliance with regulations. These were all concerns in the Consolidated opinion cited by the prehearing officer as to why a narrow view of the privilege was more appropriate than an over broad corporate information shield. Though the motion judge in Consolidated discussed specifically advice from attorney to client, the concern is equally applicable to broad claims of privilege from discovery as to information facially devoid of any requests for legal advice, lacking such advice and of general business use, but, in addition, sent to counsel. The inconsistency of that result with the regulatory context is as

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<sup>1</sup> Consolidated Gas Supply Corporation, 17 F.E.R.C., ¶63, 048 (December 2, 1981).

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obvious in view of this Commission's statutory responsibility as it was as to the F.E.R.C. in Consolidated.<sup>2</sup> Thus, §364.01(3) states

The Commission shall exercise its exclusive jurisdiction in order to b) Protect the public health, safety, and welfare by ensuring that monopoly services provided by a local exchange telecommunications company continue to be subject to effective rate and service regulation.

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<sup>2</sup> See also, In re Notification to Columbia Broadcasting System Concerning Investigation by CBS of Incidents of "Staging" by its Employees of Television News Programs, 45 F.C.C. 2d 119 (1973). Therein, the F.C.C. responded to CBS' claim that its self-investigations were privileged as attorney-client and work-product as follows:

"If, as we believe, the Commission has the right, where the circumstances call for it, to review the adequacy of a licensee's investigation, we cannot permit this process to be frustrated by a statement that employees were interviewed by corporate or outside counsel and the claim that these statements are therefore protected against Commission inquiry... [W]e do not think assertion of such a privilege in this context is compatible with a licensee's duty to be forthcoming with information relevant to its operation under the statutory public interest standard". Id. at 123.

While the motions to compel at issue here do not even involve statements, the inability of Southern Bell to accommodate its privilege theories to the requisites of the regulatory context is similar to the position the F.C.C. rejected outright in CBS.

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In pursuit of that mandatory exercise of exclusive jurisdiction,

The Commission may require such regular or emergency reports... as the Commission deems necessary to fulfill its obligations under the law.

§350.117(1); see also, §364.18(1) Fla. Stat.

Thus, the Commission could require such audits at any time. Accordingly, Southern Bell's claim of an absolute attorney-client privilege, §90-502, Fla. Stat., for its audits identifies at most a potential conflict with the above-cited statutes. In accommodating a narrow view of the attorney-client privilege with the Commission's regulatory responsibilities, the Prehearing Officer's Order is in accord not only with the cases cited, but also with the favored principle of statutory construction that gives each statute a field of operation. Carawan v. State, 315 So. 2d 161 (Fla. (1987)). Southern Bell's insistence on a broad and absolute application of the privilege is inconsistent with that principle as is its overreliance on Upjohn, where no monopoly provider with regulated rates and service was at issue. The Prehearing Officer did not say that no privilege existed, but only that the privilege did not reach these materials which had other business and regulation functions and which contained no legal advice or attorney work product.<sup>3</sup>

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<sup>3</sup> Southern Bell also misconstrues the Prehearing Officer's citation of cases. The dichotomy between communications and facts is relevant here not because the nature of the privilege is misunderstood in the Order, it is not, but because the underlying facts in those audits were necessary for Southern Bell to comply with PSC regulation, and in the regulatory context presented by this case, where they contain neither legal advice or work-product as such, the audits are not reached by a narrow view of the privilege.

Southern Bell's claim of privilege is, in fact, contextual rather than literal. Citing Upjohn, Southern Bell claims that, in the context of a privileged investigation, these audits, etc., are privileged. The factual predicate is lacking, however, because

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Southern Bell's own motion also highlights the facial inconsistency of its position. Thus on p. 23, Southern Bell states,

If a regulated utility's attorneys cannot conduct a privileged investigation, then the utility may be far more hesitant to have such an investigation undertaken. This would result in a lessened ability to find improper acts and to correct them,

Yet, on p. 11, Bell asserts that these audits "would not have been performed" but for the need of its attorneys to render legal advice. Since the position Southern Bell asks the Commission to approve is that such audits will never be undertaken to find improper acts and correct them, but solely to obtain legal advice, the claim that rejecting that position would result in far less such necessary audits is obviously absurd. Staff believes that Southern Bell has identified no error<sup>4</sup> of fact or law, as to the Prehearing Officer's accommodation of the attorney-client privilege to legitimate regulatory concerns.

## II. Panel Recommendations Regarding Discipline

Here again, staff believes that Southern Bell's broad re-argumentation of the case law establishes its disagreement with the Prehearing Officer's view, but not error of fact or law. Southern Bell had no objection to supplying analogous materials as to executives who were disciplined. Southern Bell simply has no valid explanation why the mere decision not to discipline other employees would change the application of either privilege to their similar documents, since all the documents at issue were prepared for the same non-privileged purpose; i.e., to discipline employees.

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Southern Bell never relates this claim to the regulatory context which requires that they not be included. Consolidated, CBS, supra.

<sup>4</sup> The issue of the misidentification of one of the audits will be discussed separately, infra.

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### III. Misidentified Audit

The misidentification of the audit described in ¶44 of Southern Bell's motion did, in fact, occur. Accordingly, staff recommends that the ruling be reversed on this point only, and that the application of both privileges as to the statistical analysis and the Network Operational Review be addressed in a subsequent order.

ISSUE 2: Should this docket remain open?

STAFF RECOMMENDATION: Yes.

RCB

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