

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
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In Re: Comprehensive Review of) the Revenue Requirements and) Rate Stabilization Plan of) SOUTHERN BELL TELEPHONE AND) TELEGRAPH COMPANY.)	DOCKET NO. 920260-TL
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In Re: Show cause proceeding) against SOUTHERN BELL TELEPHONE) AND TELEGRAPH COMPANY for) misbilling customers.)	DOCKET NO. 900960-TL
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In Re: Investigation into) SOUTHERN BELL TELEPHONE AND) TELEGRAPH COMPANY'S compliance) with Rule 25-4.110(2), F.A.C.,) Rebates.)	DOCKET NO. 910727-TL ORDER NO. PSC-93-0292-FOF-TL ISSUED: 02/23/93

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, CHAIRMAN
THOMAS M. BEARD
SUSAN F. CLARK
LUIS J. LAUREDO
JULIA L. JOHNSON

FINAL ORDER DENYING IN PART AND GRANTING IN PART SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY'S MOTION FOR
REVIEW OF ORDER NO. PSC-93-0151-CFO-TL

BY THE COMMISSION:

Order No. PSC-93-0151-CFO-TL (Order) issued by the Prehearing Officer on January 28, 1993, granted Public Counsel's motions for an in-camera inspection of certain documents and Motion's To Compel Southern Bell to produce those documents for discovery. The documents at issue comprised the following:

DOCUMENT NUMBER-DATE

02107 FEB 23 93

COMM-RECORDS/REPORTING

1. (Internal Audit) Customer Adjustments - Loop Operations System (LMOS) Significant Adverse Findings.
2. (Internal Audit) Mechanized Adjustments - Mechanized Out of Service Adjustments (MOOSA) - Florida Significant Adverse Findings.
3. (Internal Audit) Key Service Results Indicator (KSRI) - Network Customer Trouble Rate Significant Adverse Findings.
4. (Internal Audit) PSC Schedule II Significant Adverse Findings.
5. (Internal Audit) Network Operational Review.¹
6. Panel recommendations regarding craft discipline.
7. Panel recommendations regarding paygrade 5 and below discipline.

Southern Bell filed a Motion For Review of the Order on February 5, 1993, to which Public Counsel filed a Response and Opposition on February 12, 1993.

The appropriate standard to be applied is the legal standard for a motion for reconsideration. Order No. 25483 issued December 17, 1991. Southern Bell must establish, therefore, that the Prehearing Officer made an error of fact or law in her decision that requires that the full Commission reconsider her decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). With the exception of a corrected identification of an internal audit, this standard has not been met in Southern Bell's Motion for Review of Order No. PSC-93-0151-CFO-TL.

Southern Bell argues that the attorney-client privilege applied to the above internal audits under either the broad or

¹ As indicated in Southern Bell's Motion For Review at ¶44, the Network Operational Review was erroneously referred to as a "statistical analysis". Though the Motion For Review is otherwise denied, it is granted as to the limited issue of correcting this error.

narrow views of the privilege articulated in the Consolidated Gas Supply Corporation, 17 F.E.R.C., ¶63, 048 (December 2, 1981), opinion.

While that opinion does initially discuss different approaches based on the issue of when attorney advice to the client is privileged, the larger issue of how to apply the privilege in general is implicated as well. Not only does that opinion speak to the "continuing obligation" and "duty to protect the public" which a regulatory agency must take into account, but the actual method of applying the attorney-client privilege does so as well. Thus, rather than grant sweeping coverage of the privilege, the Consolidated judge elected to avoid "an overly broad corporate information shield in theory as well as in fact by allowing for excision of a document to permit discovery only of factual matters." (Citations omitted.) Moreover, "[s]imilar conclusions apply with regard to work product." (Citations omitted). ¶63,048, at p. 65,237.

In contrast, it is just such sweeping coverage of both privileges which Southern Bell seeks. Thus, on page 2 and pages 8 through 9 of the Order, the Prehearing Officer noted Southern Bell's admission that no actual attorney-client or work-product material is apparent on the face of any of these documents. In effect, under the Consolidated approach, there is nothing that has to be excised in order to make these documents discoverable. This Commission finds no error of fact or law in the Order, where the Prehearing Officer declined to create the overly broad corporate information shield which Southern Bell's theory of "privileged investigation" would encompass. The Order also noted that a simple analogy with Upjohn Co. v. United States, 449 US 383, 66 L.Ed 584, 101 S. Ct. 677 (January 13, 1981), is not dispositive where no regulated monopoly utility was at issue there.

Moreover, the Prehearing Officer did not err in rejecting Southern Bell's claim that its in-house audits and panel recommendations on discipline were undertaken solely to obtain legal advice and would not otherwise have been initiated. Southern Bell itself relates such activities to the need to find improper acts and to correct them. Motion For Review, p. 23. Numerous cases have held that, where other factors such as business goals led to the creation of documents, the attorney-client and work product privileges are inapplicable. See, e.g., First Chicago International v. United Exchange Co., Ltd., 125 F.R.D. 55, 57 (S.D.N.Y.) (1989) (Communication between a corporate employee and

corporate counsel will only be subject to the privilege if the communication would not have been made but for the pursuit of legal services."); Soeder v. General Dynamics Corp., 90 F.R.D. 253 (U. S. D. C. Nov. 1980) (in-house report prepared in anticipation of litigation, but also "motivated by the company's goals of improving its products, protecting future passengers and promoting its economic interests" was not privileged as work product). See also Order, p. 7, n. 4.

In view of the above cited cases, Southern Bell has not identified error of fact or law in the Order. The prehearing officer held that documents admittedly containing neither attorney-client nor work-product material as such were not privileged as part of an investigation where, as to the audits, they were created to find problems and correct them and, as to the panel recommendations, they were formulated to discipline employees. That they were also of use in formulating legal advice and were provided to corporate counsel would not, under a narrow view of the attorney-client and work-product privileges, make them undiscoverable, privileged documents.

Finally, where Southern Bell's teams of auditors, systems staff, statistical staff and network staff took some seven months to analyze the business operations under investigation, the prehearing officer did not err in accepting Public Counsel's representation that Public counsel could not replicate an equivalent analysis.

Southern Bell's control of its complex computer system and the customer data on which the audits were based provided a rationale for overcoming the work-product privilege as to these audits even were the privilege found to apply. Indeed, the prehearing officer's finding reflects the fact that the work-product doctrine provides a qualified, rather than absolute, privilege. Consolidated, supra, at p. 65,238.

Therefore, because Southern Bell has not established that Order No. PSC-93-0151-CFO-TL contains any error in fact or law (other than the minor technical error corrected at n. 1, supra.), this Commission will not review that Order.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Southern Bell Telephone and Telegraph Company's Motion for Review of Order

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No. PSC-93-0151-CFO-TL is hereby denied in part and granted in part. It is further

ORDERED that the title of the document identified in Order No. PSC-93-0151-CFO-TL as "Statistical Analysis" be correctly identified as "Network Operational Review."

By ORDER of the Florida Public Service Commission this 23rd day of February, 1993.



STEVE TRIBBLE, Director
Division of Records and Reporting

RCB

(S E A L)

FINAL1.MRD

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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.