

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Comprehensive review of revenue requirements and rate stabilization plan of SOUTHERN BELL.)	DOCKET NO. 920260-TL
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In Re: Investigation into the integrity of SOUTHERN BELL'S repair service activities and reports.)	DOCKET NO. 910163-TL
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In Re: Investigation into SOUTHERN BELL'S compliance with Rule 25-4.110(2), F.A.C., Rebates.)	DOCKET NO. 910727-TL
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In Re: Show cause proceeding against SOUTHERN BELL for misbilling customers.)	DOCKET NO. 900960-TL
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In Re: Request by Broward Board of County Commissioners for extended area service between Ft. Lauderdale, Hollywood, North Dade and Miami.)	DOCKET NO. 911034-TL
)	ORDER NO. PSC-93-1482-PCO-TL
)	ISSUED: October 11, 1993
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)	

ORDER GRANTING, IN PART, AND DENYING,
IN PART, MOTION TO COMPEL FILED BY
BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a
SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY

On November 6, 1992, BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone & Telegraph Company (Bell) served its First Set of Interrogatories and First Request for Production of Documents (POD) upon the Office of Public Counsel (OPC). On December 11, 1992, OPC served its responses and objections to Bells requests.

In its responses to Interrogatories Nos. 6 and 9-12, which relate to Bell's alleged "hard-sell" tactics, OPC referred Bell to documents previously produced by Bell for OPC, as well as the prefiled testimony of OPC witness Dr. Mark Cooper. As for Interrogatories Nos. 19-29, which sought information regarding contacts OPC may have had with attorneys or paralegals representing plaintiffs in the case Davis, et al v. Southern Bell Telephone &

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Telegraph Company, Case No. 89-2839 (S.D. Fla.), OPC objected on the grounds that these interrogatories asked for information protected by the work product privilege. Finally, in response to Bell's PODs, OPC stated that each of the documents sought was already in Bell's possession.

On February 23, 1993, Bell filed a motion to compel OPC to fully respond to Interrogatories Nos. 6, 9-12, and 19-29 and to produce documents responsive to PODs Nos. 6, 10, 12, 22, 26, and 29. Bell also requested an in camera inspection of all documents withheld by OPC under a claim of work product privilege. Lastly, Bell requested that this Commission render an expedited decision on its motion.

In its motion, Bell argues that, as the objecting party, OPC has the burden of demonstrating the existence of any privilege. Hartford Accident & Indemnity Co., 402 So.2d 1361 (Fla. 4th DCA 1981). However, Bell argues that OPC "has not even made a cursory attempt to show any validity to its claim of [work product] privilege". Bell also argues that since OPC is an agency of the State of Florida, it is subject to the Public Records Act, Chapter 119, Florida Statutes (the Act). Bell further argues that pursuant to the Act and the cases decided thereunder, OPC has only a very narrow work product privilege. According to Bell, none of the information sought to be discovered here lends itself to the narrow privilege afforded under the Act. Finally, Bell argues that the remainder of OPC's responses referenced in its motion to compel are essentially non-responsive.

On March 10, 1993, OPC filed a response to Bell's motion. With regard to the discovery requests which sought identification or production of documents previously produced for OPC by Bell, OPC argues that those documents are already in Bell's possession. OPC further contends that, to the extent that Bell's request is for OPC to identify and/or select specific documents out of those produced by Bell, such an exercise would constitute an improper foray into OPC's mental impressions, opinions, strategies, and theories. In support of its position, OPC cites Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985). OPC also maintains that under State v. Rabin, 495 So.2d 257, 261 (Fla. 3d DCA 1986), its "conversations, if any, with attorneys involved in a connected lawsuit filed against ... [Bell] are protected ... during the pendency of the case."

OPC also argues that not all documents in the possession of a state agency are necessarily public records. OPC contends that the documents requested by Bell are trial preparation materials which are not subject to production under the Act. OPC further argues

that, according to Wait v. Florida Power & Light Co., 372 So.2d 420, 425 (Fla. 1979), the differences between production under the Act versus under the rules governing discovery have been clearly elucidated. Since the instant dispute involves a discovery request, and not a public records request, OPC maintains that Bell's arguments regarding production under the Act are irrelevant.

On March 31, 1993, Bell filed a reply to OPC's response to Bell's motion to compel. In its reply, Bell argues that, with regard to documents related to witness Cooper's testimony, OPC's assertion of the work product doctrine for the first time in its response to Bell's motion to compel is untimely. Accordingly, Bell argues that, under Continental Mortgage Investors v. Village By the Sea, 252 So.2d 833 (Fla. 4th DCA 1971), OPC has waived any such privilege that it may have had.

More importantly, Bell argues that OPC has no work product privilege to assert. According to Bell, under Sporck, once a witness has testified, opposing counsel may discover "which, if any, documents informed that testimony". Id., at 318. Bell, therefore, concludes that it is entitled to have OPC identify and produce all documents that relate in any manner to any matters addressed in witness Cooper's testimony. Bell also argues that, under American Motors Corporation v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981), once the materials or testimony are intended for use at trial, any privilege that OPC may have had disappeared.

Bell further argues that OPC's invocation of the work product doctrine with regard to conversations it may have had with attorneys for the plaintiffs in Davis, et al is unsupported by law. However, Bell cites no authority itself for the contrary position. Finally, Bell argues that OPC's argument that not all documents held by a state agency are public records is irrelevant, since OPC made no argument that Bell's requests would require the production of documents that are not public records.

Oral argument on these pleadings was heard at a status conference, held August 27, 1993. Essentially, both OPC and Bell reasserted their arguments previously made. However, based upon OPC's assertion that all documents relied upon by witness Cooper are attached to his testimony, Bell withdrew its motion to compel identification and/or production of those documents. OPC also asserted that no documents exist, other than certain cover letters that it has offered to provide, concerning its alleged conversations with attorneys involved in Davis, et al.

Upon consideration of the above, the Prehearing Officer finds as follows:

Interrogatories Nos. 6 & 9-12 & PODs Nos. 1-3 - it appears that OPC has attached all documents that it intends to rely upon to witness Cooper's testimony. Accordingly, to the extent that Bell has not withdrawn its motion to compel with regard to these PODs and interrogatories, it is denied. However, to the extent that OPC intends to put on any other witness or rely upon any other document regarding Bell's alleged "hard sell" tactics, OPC shall identify such witness or document;

Interrogatories Nos. 19-21, 23-25 & 27-29 & POD No. 6 - the mere existence of any conversations between OPC and attorneys involved in Davis, et al would not reveal any of OPC's mental impressions, opinions, strategies, or theories. Accordingly, whether such conversations took place is not protected under the work product doctrine. Bell's motion to compel is, therefore, granted, insofar as it relates to Interrogatories Nos. 19, 20, 23 & 24. However, the contents of any such conversations are protected under the work product doctrine. Bell's motion to compel is, therefore, denied with regard to Interrogatories Nos. 21, 25 & 27-29. Nevertheless, to the extent that any public records which may be responsive to these discovery requests exist, Bell's motion is granted and OPC shall produce these documents, obviating any need for an in camera inspection;

Interrogatories Nos. 22 & 26 & PODs Nos. 4-5 - since OPC has offered to produce certain "cover letters" for Bell, it appears that Bell's motion to compel is moot with regard to these interrogatories and PODs. However, to the extent that any other public records which may be responsive to these interrogatories exist, Bell's motion to compel is granted and OPC shall produce such documents, obviating any need for an in camera inspection or any ruling on Bell's motion thereon.

It is, therefore

ORDERED by Commissioner Susan F. Clark, as Prehearing Officer, that the motion to compel filed by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone & Telegraph Company is hereby granted, in part, and denied, in part, as set forth in the body of this Order.

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By ORDER of Commissioner Susan F. Clark, as Prehearing
Officer, this 11th day of October, 1993.



SUSAN F. CLARK, Commissioner and
Prehearing Officer

(S E A L)

RJP

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 wastewater 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.