

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Citizens of the State)	DOCKET NO. 890190-TL
of Florida to investigate SOUTHERN BELL)	
TELEPHONE AND TELEGRAPH COMPANY'S cost)	ORDER NO. 25210
allocation procedures)	
_____)	ISSUED: 10/11/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 SUSAN F. CLARK
 J. TERRY DEASON
 MICHAEL McK. WILSON

ORDER SETTING ASIDE ORDER NO. 24429
AND DISPOSING OF MOTIONS REGARDING THE
REQUEST FOR CONFIDENTIAL TREATMENT OF DOCUMENT NO. 2902-91

BY THE COMMISSION:

BACKGROUND

Pursuant to vote by the Full Commission at the Motions Hearing in this Docket on May 29, 1991, this matter was brought back before the Full Commission to address motions associated with the possible reconsideration of Order No. 24429 which denied Southern Bell Telephone and Telegraph Company's March 22, 1991, Request for Confidential Classification & Motion for Permanent Protective Order. The material at issue has been assigned Document No. 2902-91 by the Commission. The following is a chronology of pertinent documents and events:

1. On March 22, 1991, Southern Bell Telephone and Telegraph Company (Southern Bell or the Company) filed its Request for Confidential Classification of Document No. 2902-91, which is material requested by the Commission's audit staff on March 11, 1991.
2. On April 3, 1991, the Office of Public Counsel (OPC) filed its Opposition to the Company's March 22, 1991, Request.
3. On April 25, 1991, the Prehearing Officer entered Order No. 24429, denying Southern Bell's Request for Confidential Classification.

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4. On May 6, 1991, Southern Bell filed its Motion for Reconsideration of the Prehearing Officer's Order No. 24429 to the Full Commission and Request for Oral Argument.

5. On May 14, 1991, the Prehearing Officer issued Order No. 24529, which granted Oral Argument on Reconsideration to the Full Commission.

6. On May 17, 1991, OPC filed its Opposition to Southern Bell's Motion for Reconsideration and Request for Oral Argument.

7. On May 22, 1991, Southern Bell filed a Supplement to its March 22, 1991, Request for Confidential Classification.

8. On May 28, 1991, OPC filed its Motion to Strike Southern Bell's May 22, 1991, Supplement to its March 22, 1991, Request for Confidential Classification.

9. On May 29, 1991, the Full Commission convened to hear oral argument on reconsideration of Order No. 24429. At that time, in addressing preliminary matters, it was determined that Southern Bell's May 6, 1991, Request for Oral Argument and Reconsideration should have been brought before the Full Commission at an Agenda Conference rather than to the Prehearing Officer.

10. On May 30, 1991, the Prehearing Officer issued Order No. 24601, withdrawing Order No. 24529, which granted oral argument, as improvidently issued.

11. On June 4, 1991, Southern Bell filed its Response to OPC's May 28, 1991, Motion to Strike and also filed its Request to File Supplemental Pleading. OPC did not respond to Southern Bell's June 4, 1991, Request to File Supplemental Pleading.

DISCUSSION

The Company's March 22, 1991, Request for Confidential Treatment of Document No. 2902-91 was denied in Order No. 24429, issued on April 25, 1991. The information at issue was requested by our staff auditors on March 1, 1991. The Prehearing Officer found that the Company's March 22, 1991, pleading did not comply with the requirements of Rule 25-22.006 (4)(a), Florida Administrative Code which provides that "The utility . . . shall

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identify the page(s) and line(s) at which the confidential material is found and shall correlate the page(s) and line(s) identified with the specific justification proffered in support of the classification of such material." The Company's March 22, 1991, Request did not differentiate which portions of the contested materials are internal audits and which are external audits that are, arguably, like internal audits.

The Company's May 6, 1991, Motion for Reconsideration of Order No. 24429 to the Full Commission and Request for Oral Argument also failed to differentiate which of the enumerated items were internal audits and which were external audits, arguably, entitled to confidential treatment. As this left the materials at issue in an "all or none" posture with some items clearly entitled to protection and some items apparently not entitled to such protection, our legal staff suggested that Southern Bell might wish to file a supplemental pleading to differentiate which arguments applied to which materials so that we could meaningfully examine the confidentiality of the materials.

In its May 28, 1991, Motion to Strike Southern Bell's May 22, 1991, Supplement, OPC argues that Southern Bell cannot supplement a motion already ruled upon by the Prehearing Officer and now pending before the Full Commission for Reconsideration. OPC contends that the filing amounts to a new pleading that cannot, for the first time, be reconsidered by the Commission because it has never been ruled on by the Prehearing Officer.

OPC notes that the Southern Bell Supplement refers to communications between this Commission's attorneys and Southern Bell which encouraged the Company to amend its pleading. OPC asserts that "communications between parties to a proceeding cannot allow Southern Bell to amend a pleading already ruled upon by the Prehearing Officer." OPC contends that to allow amendment of a pleading after it has been ruled upon would lead to a never ending cycle of revised pleadings which never become final. OPC notes that Southern Bell "did not even seek leave to amend its pleading; it simply filed the 'supplement.'"

OPC requests that we strike Southern Bell's pleading filed May 22, 1991, and that we refuse to allow Southern Bell to amend a pleading that has already been ruled upon by the Prehearing Officer.

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In its June 4, 1991, Response to OPC's Motion to Strike and Southern Bell's Request to file Supplemental Pleading, Southern Bell addresses OPC's Motion to Strike. The Company relies on 40 Florida Jurisprudence 2d, Pleadings, at Section 188 for the proposition that striking a pleading is a severe remedy which should be granted sparingly. The Company asserts that the Motion to Strike should be denied in order to proceed with the administration of justice. The Company concludes that fairness dictates that this Commission have available all relevant information regarding the basis for granting or denying confidential treatment. The Company argues that this Commission needs the information in Southern Bell's supplemental pleading in order to balance the conflicting public and private interests which involve far reaching precedential implications for the Company, others similarly situated, and for this Commission's access to similar information in the future.

We find that the administration of justice will be better served if we have before us the substantive arguments for each of the individual items of information contained in the Supplement. Therefore, in the interest of finding a reasoned balance between the public and private interests involved, OPC's May 22, 1991, Motion to Strike is hereby denied.

As discussed above, Southern Bell initially failed to seek leave to amend its pleading. The Company belatedly rectified this failure, and in its June 4, 1991, Response and Request, notes that the Florida Rules of Civil Procedure deal with amended and supplemental pleadings. The Company quotes Trawick, Florida Practice and Procedure, at sections 14-1 and 14-3, for the proposition that the Florida Rules allow liberal supplements and amendments to pleadings. Southern Bell acknowledges that under Rule 1.190, Florida Rules of Civil Procedure, "a party may amend his pleading only by leave of court or by written consent of the adverse party." However, Southern Bell contends that while it did not ask permission to amend its pleading, that its Supplement complied with the Prehearing Officer's determination in Order No. 22429 that he could not differentiate between the internal and external audit information identified in Southern Bell's March 22, 1991, Request. The Company argues that its Supplement addresses and elaborates on the Prehearing Officer's discussion regarding the distinction between internal and external audits.

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While it is Southern Bell's position that Order No. 24429 invited the Company to supplement its pleading, the Company now requests this Commission to permit it to amend its original pleading with the supplemental pleading filed May 22, 1991. The Company urges us to grant leave to amend in the furtherance of justice. The Company asserts that this approach is consistent with Rule 1.190(e).

OPC did not oppose Southern Bell's June 4, 1991, Motion to file Supplemental Pleading. However, as discussed above, OPC's Motion to Strike did address concerns inherent in amending pleadings after a ruling has been entered by the Prehearing Officer---that being a never ending cycle of pleadings.

We find that, in the interest of reaching a reasoned balance between the public and private interests involved, Southern Bell's Request to Supplement its March 22, 1991 pleading shall be granted. However, OPC has raised legitimate concerns that this amendment precedent may yield never ending pleading cycles. For this reason, we remind the Company that denial of a confidentiality request based upon an inadequate pleading is permissible and appropriate under Rule 25-22.006(4)(e).

Since the Company's supplemental arguments have not been addressed by this Commission previously, they are procedurally in a different posture than the underlying Order which denied the Company's original request for confidentiality. The supplemental arguments are not ripe for reconsideration. This issue was raised by OPC in its May 28, 1991, Motion to Strike.

The Prehearing Officer's Order, based upon the information which was before him, was correctly decided. However, in the interest of fairness to all parties, and based upon the Prehearing Officer's language in Order No. 24429 (where he noted that some of the material appeared to be entitled to confidential treatment, but for the Company's inadequate pleading) we find that we shall not reconsider the Prehearing Officer's Order. Rather, we shall set aside the Prehearing Officer's Order and consider the material at issue along with the supplemental arguments de novo. This will make the Company's May 6, 1991, Motion for Reconsideration and Request for Oral Argument on Reconsideration moot.

Traditionally we have assigned the Prehearing Officer the task of making Confidentiality determinations on behalf of the

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Commission. In the instant case, since the initial confidentiality order has been set aside, we now find that it is appropriate for the Prehearing Officer to enter a ruling on the Company's supplemental request for confidential treatment of the material at issue.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's May 28, 1991, Motion to Strike Southern Bell's May 22, 1991, Supplement is hereby denied. It is further

ORDERED that Southern Bell's June 4, 1991 Request to file Supplemental Pleading is hereby granted. It is further

ORDERED that Order No. 24429 is hereby set aside. It is further

ORDERED that setting aside Order No. 24429 makes moot the Company's May 6, 1991, Motion for Reconsideration and Request for Oral Argument on Reconsideration. It is further

ORDERED that the Prehearing Officer shall enter a ruling on the Company's supplemented request for confidential treatment of the material at issue.

By ORDER of the Florida Public Service Commission, this 11th day of OCTOBER, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

CWM

Commissioner Deason dissented, preferring that the matter be heard at the Agenda rather than returned to the Prehearing Officer for an initial determination.

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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 Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.