

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Citizens )  
of the State of Florida to )  
investigate SOUTHERN BELL )  
TELEPHONE AND TELEGRAPH )  
COMPANY'S Cost Allocation )  
Procedures )  
\_\_\_\_\_ )

DOCKET NO. 890190-TL  
ORDER NO. PSC-92-0424-FOF-TL  
ISSUED: 05/28/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman  
SUSAN F. CLARK  
J. TERRY DEASON  
LUIS J. LAUREDO

ORDER DENYING RECONSIDERATION

BY THE COMMISSION:

I. BACKGROUND

On November 15, 1991, Southern Bell Telephone and Telegraph Company (Southern Bell or the Company) filed a Motion for Reconsideration to the Full Commission of Order No. 25297 and Request for Oral Argument. On November 19, 1991, the Office of Public Counsel (OPC) filed its Opposition to Southern Bell's Motion for Reconsideration and Request for Oral Argument. Order No. 25297 set forth the Prehearing Officer's confidentiality determinations regarding Document No. 2902-91. The underlying material was requested by our audit staff on March 1, 1991. The Company's Motion addressed the Prehearing Officer's denial of confidential treatment of material associated with an F.C.C. mandated external audit which was performed by the accounting firm of Coopers and Lybrand.

We considered the matter at the March 10, 1992, Agenda Conference. At that time, the Company's Request for Oral Argument was denied. On March 31, 1992, we issued Order No. PSC-92-0135-FOF-TL which denied reconsideration and affirmed Order No. 25297. On April 15, 1992, the Company filed its instant Motion for Reconsideration of Order No. PSC-0135-FOF-TL. The instant pleading does not address the merits of the matter but instead questions whether we followed appropriate procedure in reaching our decision in the Order at issue.

DOCUMENT NUMBER-DATE

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The Company did not ask for Oral Argument upon reconsideration. Thus, pursuant to Rule 25-22.058, Florida Administrative Code, the Company waived Oral Argument on its instant Motion. Should we grant the instant Motion and decide to reconsider Order No. PSC-92-0135-FOF-TL, Southern Bell has asked for a hearing on its November 15, 1991, Motion.

A brief recounting of the events which have lead to this juncture follows:

1. On March 22, 1991, Southern Bell filed its Request for Confidential Classification of Document No. 2902-91, which is material requested by the Commission's audit staff on March 1, 1991.

2. On April 3, 1991, 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.

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.

12. At the September 24, 1991, Agenda Conference the Commission voted on outstanding motions regarding Document No. 2902-91 and set aside Order No. 24429 (See Number 3, above). These determinations were set forth in Order No. 25210, issued on October 11, 1991.

13. On November 5, 1991, the Prehearing Officer issued Order No. 25297, which granted in part and denied in part the Company's Supplemented Request for confidential treatment of the material at issue.

14. On November 15, 1991, Southern Bell filed a Motion for Reconsideration to the Full Commission of Order No. 25297 and Request for Oral Argument.

15. On November 19, 1991, OPC filed its Opposition to Southern Bell's Motion for Reconsideration and Request for Oral Argument.

16. On March 10, 1992, the Company's Motion was considered at the Commission Agenda Conference. The Commission voted to deny Oral Argument, deny reconsideration, and affirm Order No. 25297.

17. On March 31, 1992, the Commission issued Order No. PSC-92-0135-FOF-TL which denied reconsideration and affirmed Order No. 25297.

18. On April 15, 1992, Southern Bell filed the instant Motion for Reconsideration of Order No. PSC-92-0135-FOF-TL.

## II. MOTION FOR RECONSIDERATION

This installment of the ongoing saga of Document No. 2902-91 is simple. The Prehearing Officer issued an Order denying confidential treatment to part of a document. The Company asked for reconsideration of the Prehearing Officer's Order and for Oral Argument on the matter. We considered the Company's pleading and denied Oral Argument, decided that the Company's pleading did not reach the threshold for reconsideration and denied the Company's

Motion. We then also affirmed the Prehearing Officer's decision under a de novo standard of review. The Company now has asked for reconsideration of the full Commission's Order which denied reconsideration and affirmed the Prehearing Officer's decision. While the Company has not asked for Oral Argument on its instant pleading, it seeks a "hearing" on its previous (November 15, 1991) Motion for Reconsideration of the Prehearing Officer's Order.

To this end, the Company argues that the Commission, by its Order which both denied reconsideration and affirmed the Prehearing Officer's confidentiality determinations: 1) applied the wrong standard of review; 2) failed to "hear" the Company's case as required by Commission rules; 3) engaged in rulemaking by referencing a previous Commission Order concerning the standard of review.

While our rules do not provide for reconsideration of the Order at issue, we will, by way of clarification, address the Company's procedural arguments for reconsideration of Order No. PSC-92-0135-FOF-TL.

1. Reconsideration of Order No. PSC-92-0135-FOF-TL is inappropriate pursuant to Rule 25-22.060(1)(a), Florida Administrative Code, because that Order disposed of a motion for reconsideration.

The Company's instant Motion for Reconsideration is filed pursuant to Rule 25-22.060, Florida Administrative Code and asks us to reconsider Order No. PSC-92-0135-FOF-TL which disposed of the Company's November 15, 1991, Motion for Reconsideration of Order No. 25297. The instant Motion shall be denied because, pursuant to Rule 25-22.060(1)(a), Florida Administrative Code: "[t]he Commission will not entertain any motion for reconsideration of any order which disposes of a motion for reconsideration."

2. The standard for review which the Company now asserts is appropriate was not previously raised by the Company and thus, was not addressed in Order No. PSC-92-0135-FOF-TL.

The Company asserts that Order No. PSC-92-0135-FOF-TL erred in concluding that the standard of review to be used by the Commission regarding a confidentiality Order issued by the Prehearing Officer is the same standard that applies to reconsideration of a final Order. It is the Company's view that the Order fails to distinguish between the provisions of Rule 25-22.006(3)(c), Florida Administrative Code, (which provides for the protest of a Prehearing Officer's confidentiality determination) and Rule 25-22.060, Florida Administrative Code, (which provides for the Commission to undertake reconsideration of its own Orders). The

Company argues that while a reconsideration standard is proper for reconsideration of full Commission decisions, such a standard is not proper for review of a Prehearing Officer's determinations regarding confidentiality. The Company contends that using a reconsideration standard in full Commission review of a Prehearing Officer's confidentiality determinations denies the Company its right to be heard pursuant Rule 25-22.006(3)(c), Florida Administrative Code.

It is not surprising that, as the Company asserts, we did not distinguish between Rule 25-22.006(3)(c), Florida Administrative Code, and Rule 25-22.060, Florida Administrative Code. Indeed, the Order at issue fails to even mention the two rules. Rule 25-22.006(3)(c), Florida Administrative Code---which the Company now contends is the appropriate standard for review for reconsideration of a Prehearing Officer's confidentiality determination---was not referenced in the Company's November 15, 1991, Motion for Reconsideration which was the subject of Order No. PSC-92-0135-FOF-TL. Moreover, the Company's November 15, 1991, Motion for Reconsideration was filed pursuant to Rule 25-22.038, Florida Administrative Code, and not Rule 25-22.060. Thus, the Company has asserted that Order No. PSC-92-0135-FOF-TL failed to distinguish between two rules which were entirely absent in the pleading which we addressed in that Order. We find that such an argument is without merit.

3. Pursuant to a recent appellate decision, Southern Bell, having relied on one authority until it suffered an adverse ruling, is now foreclosed from arguing another basis after that ruling.

In a recent decision regarding a Southern Bell request for confidentiality in this Docket, the First District Court of Appeal reasoned that Southern Bell, having relied on one authority until it suffered an adverse ruling, was foreclosed from arguing another basis after that ruling. Southern Bell telephone and Telegraph v. Thomas M. Beard, 17 FLW D95, 96, at n.3 (Fla. 1st DCA, April 10, 1992). In the instant case, we find that the Company filed a pleading pursuant to one authority (Rule 25-22.038, Florida Administrative Code) and now is attempting to argue another basis (Rule 25-22.006(3)(c), Florida Administrative Code) after an adverse ruling in Order No. PSC-92-0135-FOF-TL.

4. Southern Bell was "heard" on reconsideration of the Prehearing Officer's confidentiality determination.

The Company argues that Rule 25-22.006(3)(c), specifies that "the Commission panel assigned to the case will hear any protest to the prehearing officer's ruling." The Company cites a standard

dictionary for the definition of "hear." The Company also relies on Kay v. Kay, 430 So.2d 532 (Fla. 4th DCA 1983), which is an appeal of a dissolution of marriage case, for the proposition that, in the context of filing exceptions to a special master's report in a dissolution of marriage case, to be heard means to appear before the judge and present one's arguments. Based on these authorities, the Company concludes that Oral Argument on reconsideration by the full Commission of a Prehearing Officer's confidentiality determinations is the Company's right under Commission rules.

The Florida Supreme Court has addressed the issue of the essentials of a "hearing" on rehearing. We quote the Court's description of the circumstances and rationale for denying the Appellant's petition:

Appellant has now before this Court a petition to vacate and set aside the affirmance of April 19, 1949, based upon the premise that notwithstanding all seven Justices of this Court have considered his appeal and participated in the judgment affirming the decree appealed, he has not been heard, because oral argument on rehearing has not been had. The appellant has been "heard" on rehearing on his brief and the record. Oral argument is not an essential to rehearing. Jergens v. Gallop, 40 So.2d 775 (Fla. 1949).

In the instant case, we find that the Company was "heard" on reconsideration by the full Commission on its motion and on the record.

5. The Company's attempt to use reconsideration procedure to argue the merits of a rule challenge is improper.

The procedure for a rule challenge is set forth at Section 120.535, Florida Statutes, which is cited by the Company in its instant Motion. Section 120.535, does not provide for a rule challenge upon reconsideration of an Order.

6. Commission reference in Order No. PSC-92-0135-FOF-TL to Order No. 25483 does not constitute rulemaking.

The Company contends that Commission reliance on Order No. 25483 as a new standard of review constitutes improper rulemaking pursuant to Florida case law and Section 120.535, Florida Statutes (1991). On page 4 of Order No. PSC-92-0135-FOF-TL, we stated that:

Upon review, and consistent with our determination which is set forth in Order No. 25483, issued in Docket No.

910163, on December 17, 1991, we find that the Company is not entitled to a de novo review of the Prehearing officer's Order and that the appropriate standard for review is that which is set forth in Diamond Cab [Company of Miami v. King, 146 So.2d 889 (Fla. 1962)] as urged by OPC.

The Company has seized upon a subsequent reference to Order No. 25483, in Order No. PSC-92-0135-FOF-TL, as an inappropriate adoption of a new Commission policy regarding the standard of review for a Prehearing Officer's confidentiality determinations. We find that Southern Bell's motion mischaracterizes the actual analysis set forth in Order No. PSC-92-0135-FOF-TL, wherein we considered the arguments and adopted OPC's position that the appropriate standard for review was that set forth in Diamond Cab.

Moreover, Order No. PSC-92-0135-FOF-TL is styled: Order Denying Reconsideration and Affirming Order No. 25297. In Order No. PSC-92-0135-FOF-TL, we found:

that had the matter been considered de novo, the results would be the same based upon the reasons set forth in the Prehearing Officer's Order. Thus, we both affirm Order No. 25297, and deny Southern Bell's November 15, 1991, Motion for Reconsideration. Id. at 5.

While the Company characterizes this analysis as "gratuitous," we find that having considered the matter under both a de novo standard and a reconsideration standard, there can be no basis for the Company's claim of improper rulemaking regarding adoption of a single standard of review. To the extent that a reference in Order No. PSC-92-0135-FOF-TL to an Order issued in another docket could constitute improper rulemaking, we find that, having reviewed the matter under both standards, any hypothetical rulemaking must be construed as harmless error.

7. Analysis in Order No. 25483 regarding impinging on Prehearing Officer's determinations in discovery matters is analogous to Commission concern regarding a Prehearing Officer's prerogatives in Confidentiality determinations. Thus, reference to that Order in Order No. PSC-92-0135-FOF-TL was both logical and appropriate.

The Company asserts that the Commission's reliance on Order No. 25483 as a basis for imposing the reconsideration standard of review is misplaced. The Company argues that the reasoning set forth in Order No. 25483 that a de novo review upon reconsideration would impinge on the Prehearing Officer's authority regarding discovery matters is inapplicable to the instant case.

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We reiterate that the Company filed the pleading, which was addressed in the Order at issue, pursuant to Rule 25-22. 038, Florida Administrative Code. Subsection 2 of that Rule addresses reconsideration of Orders issued by Prehearing Officers. We find that if the reasoning of Order No. PSC-92-0135-FOF-TL is faulty it is because that Order reflects the Company's failure to make the case it now would have us consider. We can find no fault with a reference in Order No. PSC-92-0135-FOF-TL to Order No. 25483. Both involved the reconsideration of a Prehearing Officer's determination based upon a pleading made pursuant to Rule 25-22.038, Florida Administrative Code.

Additionally, we note that at the May 29, 1991, Motions Hearing regarding the material which underlies the Company's instant Motion, the issue of the prerogatives of the Prehearing Officer was raised in the context of who actually determined whether Oral Argument before the full Commission should be granted. Indeed, issues concerning the responsibilities of the full Commission versus those of the Prehearing Officer have been an ongoing theme in the confidentiality decisions in this Docket. Thus, we find that the concerns addressed in Order No. 25483 regarding impinging on the Prehearing Officer are analogous to the instant case and reference to the Order was proper.

Based upon the foregoing, it is,

ORDERED by the Florida Public Service Commission that Southern Bell Telephone and Telegraph Company's Motion for Reconsideration of Order No. PSC-92-0135-FOF-TL is hereby denied.

By ORDER of the Florida Public Service Commission, this 28th day of May, 1992.

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STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

CWM

by: Kay Hagan  
Chief, Bureau of Records

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NOTICE OF 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 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.