

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Comprehensive review of) DOCKET NO. 920260-TL
revenue requirements and rate)
stabilization plan of SOUTHERN)
BELL TELEPHONE AND TELEGRAPH)
COMPANY.)
_____)
In Re: Investigation into the) DOCKET NO. 910163-TL
integrity of SOUTHERN BELL)
TELEPHONE AND TELEGRAPH)
COMPANY'S repair service)
activities and reports.)
_____)
In Re: Investigation into) DOCKET NO. 910727-TL
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY'S compliance)
with Rule 25-4.110(2), F.A.C,)
Rebates.)
_____)
In Re: Show cause proceeding) DOCKET NO. 900960-TL
against SOUTHERN BELL TELEPHONE) ORDER NO. PSC-93-0540-PCO-TL
AND TELEGRAPH COMPANY for) ISSUED: 04/09/93
misbilling customers.)
_____)

ORDER GRANTING STAFF'S FIRST MOTION
TO COMPEL COMPLETE AUDIT ACCESS

On November 13, 1991, the National Association of Regulatory Utility Commissioners approved a resolution authorizing multi-state audits of the seven Regional Bell Operating Companies, including BellSouth Corporation and its affiliates, which operate in nine southeastern states. An audit team assembled from among these states proposed, and this Commission approved, that the audit be conducted under the authority of the Florida Commission.

On October 25, 1992, the audit team made a data request of BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (SBT). SBT failed to provide full access to the requested materials and, on February 2, 1993, this Commission voted to require SBT to respond to the data request, in writing, by February 10, 1993. This Commission's decision was codified by Order No. PSC-93-0424-FOF-TL, issued March 22, 1993.

On February 10, 1993, SBT responded by objecting to the audit team's request for certain records of its affiliates, certain non-

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Florida information, and certain non-financial information. On March 5, 1993, the Staff of this Commission moved to compel complete access to the following information:

AFFILIATE RECORDS

<u>Request No.</u>	<u>Affiliate(s)</u>
1-019	BellSouth Information Networks
2-001	Sunlink (partner CSL Chastain)
2-002	BellSouth Capital Funding Corp.
2-004	BellSouth Resources, Inc.
2-006	Data Serve Financial Services
3-008	BAPCO
3-016	LM Berry, Stephens Graphics, TechSouth, BellSouth Marketing Programs, Intelligent Media Services
3-023	BellSouth Enterprises, Inc.

NON-FLORIDA RECORDS

<u>Request No.</u>	<u>Records Requested</u>
1-013	Fiber Based Trials
3-002	Director Revenue
3-007	Revenue Sharing Factor
3-001	BAPCO Allocation Matrix
4-009.1	Billing and Collection Data

SBT responded to Staff's motion to compel on March 17, 1993. SBT's response basically consists of two arguments. First, SBT argues that the breadth of the audit team's data request is not "reasonable" in accord with Section 364.183(1), Florida Statutes. Second, SBT argues that the data request is unconstitutional insofar as it attempts to reach certain records of certain affiliates. Its second argument will be dealt with first.

According to SBT, many of the records requested by the audit team are in the possession of foreign affiliates that have no

connection with SBT's operations in Florida. SBT argues that, under International Shoe v. Washington, 326 U.S. 310 (1945), Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1958), April Industries, Inc. v. Levy, 411 So.2d 303 (Fla. 3d DCA 1982), and Qualley v. International Air Service Co., Ltd., 595 So.2d 194 (Fla. 3d DCA 1992), these affiliates do not maintain sufficient minimum contacts with Florida to subject them to long-arm jurisdiction. SBT, therefore, suggests that the data request is unconstitutionally broad.

Although this Commission lacks jurisdiction to specifically rule on SBT's argument regarding the constitutionality of the data request, it should be noted that all of the cases cited by SBT involved attempts to invoke personal jurisdiction over foreign entities under long-arm statutes. The audit team has neither attempted to invoke personal jurisdiction over, nor made any data requests of, any of SBT's affiliates. The audit team's data requests were directed solely to SBT, pursuant to this Commission's jurisdiction over SBT, based upon SBT's ability to obtain the records from its affiliates.¹ SBT's arguments regarding the exercise of personal jurisdiction under the long-arm statute are, therefore, irrelevant and unpersuasive.

The Commission's statutory power to access records of telecommunications companies and their affiliates is relatively

¹ Had this been a discovery request, SBT and its affiliates would not have been able to shield the records based upon its corporate structure. In construing Rule 34(a), F.R.C.P., the federal rule analogous to Rule 1.350(a), Fla.R.Civ.P., the courts have held that "a party need not have actual possession of documents to be deemed in control of them." In Re Folding Carton Antitrust Litigation, 76 F.R.D. 420, 423 (N.D.Ill. 1977). The party need only have "the legal right, authority or ability to obtain documents upon demand". Camden Iron & Metal v. Marubeni America Corp., 138 F.R.D. 438, 441 (D.N.J. 1991). This is true even if the documents are beyond the jurisdiction of the court. Zervos v. S.S. Sam Houston, 79 F.R.D. 593, 595-596 (S.D.N.Y. 1978). Thus, the courts have held that documents in the possession of a foreign, nonparty parent were under the control of its subsidiary. Camden, 138 F.R.D. 438; M.L.C., Inc. v. North American Philips Corp., 109 F.R.D. 134 (S.D.N.Y. 1986); Cooper Industries, Inc. v. British Aerospace, 102 F.R.D. 918 (S.D.N.Y. 1984). The courts have also held that documents in the possession of a nonparty subsidiary were under the control of its parent. Hubbard v. Rubbermaid, Inc., 78 F.R.D. 631 (D.Md. 1978). Although the court's decision was based, in part, upon a finding that they had acted "as one", at least one court has held that documents in possession of a sister corporation were under the control of its affiliate. Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos., 99 F.R.D. 309 (N.D.Ga. 1983).

broad. For instance, Section 364.183(1), Florida Statutes, provides, in pertinent part, that:

The commission shall have reasonable access to all company records, and to the records of the telecommunications company's affiliated companies, including its parent company, regarding transactions or cost allocations among the telecommunications company and such affiliated companies, and such records necessary to ensure that a telecommunications company's ratepayers do not subsidize the company's unregulated activities.

In addition, Section 364.18(2), Florida Statutes, states, in part, that:

The commission may require the filing of reports and other data by a telecommunications company or its affiliated companies, including its parent company, regarding transactions or allocations of common costs among the telecommunications company and such affiliated companies that affect regulated rates. The commission may also require such reports or other data necessary to ensure that a company's regulated rates do not subsidize the company's unregulated activities.

Further, under Section 364.17, Florida Statutes:

The commission may, in its discretion, prescribe the forms of any and all reports, accounts, records, and memoranda to be furnished and kept by any telecommunications company whose facilities extend beyond the limits of this state, which are operated partly within and partly without the state, so that the reports, accounts, records, and memoranda show any information required by the commission concerning the business done, receipts, and expenditures appertaining to those parts of the facility within the state.

Finally, Section 350.117(1), Florida Statutes, states that:

The commission may require such regular or emergency reports, including, but not limited to, financial reports, as the commission deems necessary to fulfill its obligations under the law.

Reading these sections in pari materia, the statutory scheme is clear: this Commission is to have complete and unfettered access to records of telecommunications companies and their affiliates, in order to ensure that the companies' ratepayers do not subsidize unregulated activities.

SBT argues, however, that the data requests are beyond the scope of this Commission's authority over telecommunications companies. In support of this argument, SBT focuses on the portion of Section 364.183(1), Florida Statutes, which grants this Commission "reasonable" access to records. SBT contends that the requests go beyond reasonable, and suggests that the audit team should be satisfied with those documents "offered" by SBT.

"Reasonable", as used in Section 364.183(1), Florida Statutes, modifies "access" in terms of time and place, not the quantity or quality of documents to which this Commission has access. SBT's interpretation of the statute would essentially eviscerate the very power that it is intended to confer. Moreover, if SBT and, ultimately, BellSouth Corporation, are allowed to determine what is reasonable, they could effectively evade scrutiny and frustrate regulation by this or any other state utility commission.

As noted, these data requests were made pursuant to an audit. This Commission defines the scope of the audit, not SBT. The general scope of this audit is to determine whether there are inappropriate transactions between affiliates, whether there are cross subsidies flowing between the regulated and unregulated activities of SBT and its affiliates, and whether the prices for products and services supplied by SBT's affiliates are reasonable and prudent. At a minimum, the audit must include an evaluation of research and development costs, central management services, directory operations, billing and collecting operations, affiliate transactions, and cost allocations. However, other forms of possible cross subsidization may also be investigated and the scope of the audit is subject to change should information uncovered through the audit indicate further investigation. Although SBT has

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made no argument regarding the relevance of the requested records, all of the data requests appear reasonably related to the general scope of the audit. Accordingly, the audit team must be allowed complete access to the requested records.

Therefore, based on the foregoing, it is

ORDERED by Commissioner Susan F. Clark, as Prehearing Officer, that Staff's motion to compel is hereby granted. It is further

ORDERED that BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company shall provide Staff with access to the requested documents within twenty days of the date of this Order.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 9th day of April, 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)

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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.