

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition on Behalf of) DOCKET NO. 910163-TL
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.)
_____)
In Re: Comprehensive Review of) DOCKET NO. 920260-TL
the Revenue Requirements and) ORDER NO. PSC-94-0672-PCO-TL
Rate Stabilization Plan of) ISSUED: June 3, 1994
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY.)
_____)

**ORDER RESOLVING DISCOVERY ISSUES RE:
IN CAMERA DOCUMENTS**

BACKGROUND

In Order No. PSC-94-0172-FOF-TL, issued February 11, 1994 (Order), the Commission approved a stipulation settling issues in Southern Bell's rate case and consolidated dockets. The Order provided that Docket No. 910163-TL, concerning an investigation of Southern Bell's repair service activities and reports, was to remain open. In addition, paragraph 19 of the stipulation provided for workshops to address such quality of service issues on an ongoing basis.

Prior to the settlement, numerous requests for production of documents had been filed by both the Public Counsel and the Commission, leading eventually to petitions for review in the Florida Supreme Court.¹ On March 10, 1994, the Florida Supreme Court issued its opinion disposing of these petitions for review. Southern Bell Telephone and Telegraph Company v. J. Terry Deason, et al. (Fla. Sup. Ct. March 10, 1994) (Southern Bell).

Southern Bell provides the basis on which the Commission must determine which of the documents, or portions thereof, responsive to the aforementioned discovery requests are discoverable and which are not. The documents themselves had been provided by Southern

¹ Cases Nos. 81,487, 81,716, 82,196 and 82,399. A fifth petition, Case No. 81,926, concerned a different issue (audit requests).

DOCUMENTS FILED-DATE

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Bell for inspection in camera for the Commission's determination of discovery issues and have remained in camera pending the Florida Supreme Court's review and the Commission's actions pursuant to that review.

But for further pleadings filed by parties, the Commission's ability to apply the Southern Bell holding to these documents would have commenced on March 25, 1994, the date that opinion became final. Indeed, review of the Court's opinion, the documents themselves and various pleadings previously filed with the Court had been ongoing since that date toward the end of applying the Court's holdings to these documents.

However, during this process, Southern Bell and the Attorney General filed additional pleadings with the Commission. On April 8, 1994, Southern Bell filed its Motion for Return of Documents Held In Camera. On May 2, 1994, the Attorney General filed his Response. On May 13, 1994, Southern Bell filed a Reply to the Attorney General's Response and on May 20, 1994, the Attorney General moved to strike Southern Bell's Reply.

This order addresses the further status of all documents held in camera in consolidated Dockets 910163-TL and 920260-TL, with the exception of documents responsive to Public Counsel's Fifteenth Motion To Compel, which is the subject of a separate recommendation addressed to the full Commission. Since the Attorney General's Motion To Strike is found to have merit in that Commission rules do not contemplate the reply to the Attorney General's Response filed by Southern Bell, the Commission's ability to apply the Southern Bell holdings to the in camera documents commenced May 2, 1994. Given the complexity and novelty of the task, it has been accomplished as expeditiously as circumstances permitted.

DISCUSSION

In its April 8, 1994 motion, Southern Bell moves for the return of all in camera documents for the following reasons:

1. The settlement resolved all substantive issues and Docket No. 910163-TL remained open solely pending the resolution of appeals covered by the Court's opinion.
2. There is no currently operable discovery request and the Commission has no current need for the documents.
3. Most of the documents are non-discoverable under the attorney-client privilege, work-product doctrine or both.

These arguments are rejected. As noted previously, Docket No. 910163-TL and paragraph 19 of the stipulated settlement are concerned with resolving issues relevant to Southern Bell's repair service. The staff has not withdrawn its requests for production of documents, which are proper and currently operable.² The documents sought are needed by the Commission to address quality of service concerns. Order, page 8.

Therefore, it is necessary to determine what, if any, discovery disclosure³ is required by the Southern Bell opinion as to each of the following categories of in camera documents:

- A. Audits (Moosa, Kisri, Lmos, PSC Schedule 11, Network Operational Review)
- B. Statistical Analysis
- C. Summaries of Employee Statements
- D. Panel Recommendations
- E. Human Resources Worknotes
- F. Employee Statements

As will be further discussed below, the Southern Bell opinion requires that these categories of documents be treated as follows:

- A. Audits - discoverable
- B. Statistical Analysis - not discoverable
- C. Summaries of Employee Statements - not discoverable
- D. Panel Recommendations - discoverable, subject to redaction
- E. Human Resources Worknotes - discoverable, subject to redaction
- F. Employee Statements - discoverable

Treating the non-discoverable materials first, the Court's opinion in Southern Bell, page 19, requires the conclusion that both the statistical analysis and counsel's summaries of employees' statements are non-discoverable work-product. As to the statistical analysis, the Court stated:

² See Attachment A for a listing of staff's requests for production of documents.

³ This order addresses at its conclusion the subject of requests for confidential treatment which may be granted as to some or all of these documents pursuant to Section 364.183. See, page 8, infra.

. . . the nature of the document and the factual circumstances under which the analysis was created support a finding that the analysis is work-product.

As to the summaries, the Court stated:

Counsel's summaries of the employees' statements, whether the statements were communicated to counsel, to security, or to any other personnel, are protected as work-product.

Therefore, these materials will be returned directly to Southern Bell.

The disposition of the internal audits (Moosa, Kisri, Lmos, Schedule 11 and Network Operational Review) is similarly straightforward. On page 16 of its opinion, the Court stated: ". . . Southern Bell is directed to produce the five internal audits."

Therefore, these materials will be turned over to staff.

The three remaining categories, panel recommendations, worknotes and employee statements, are found to be discoverable, based on the Court's directives in Southern Bell, and on further inspection of the documents in camera.

The Court held that

employees' statements made directly to counsel are privileged. Statements made to security personnel . . . are not protected by the privilege.

Southern Bell, page 19. In Case No. 81,487, Southern Bell stated:

. . . Southern Bell's in-house counsel also requested that its security department interview certain employees and report back to counsel with the results. Southern Bell's counsel instructed and enlisted its security department to act as their agent in the process of fact gathering. Southern Bell's counsel directed and controlled, and in most cases were present during, the interviews with employees.

Southern Bell Petition, page 10 (Case No. 81,487). In Case No. 81,716, Southern Bell again only claimed that counsel were present at the employee interviews "in most cases." Petition, page 8.

In contrast to what was filed with the Florida Supreme Court, Southern Bell's Motion for Return of Documents filed after the Court ruled states at paragraph 15:

Each and every employee interview subject to the Commission's in camera inspection involved communications from an employee to a Southern Bell attorney.

However, in paragraph 16 of the affidavit of Robert G. Beatty, attached to the motion, it is noted that, for some employees interviewed, identification of the attorneys who were present is not possible "due to an apparent clerical omission." Moreover, the statements themselves are facially inconsistent with Southern Bell's claim, though that can only be demonstrated by inspection in camera while this controversy is ongoing.

The Attorney General noted in its Response to Southern Bell's Motion, page 7, that in view of these varying presentations of the facts, "[w]e are left to speculate as to which, if any, of Southern Bell's portrayals of the facts is true." It is concluded that more weight has to be given the facts that were presented to the Court, since those were the facts relied upon by the Court in its opinion. Based on those pleadings, re-inspection of the documents and application of the Court's holdings in Southern Bell, the employee statements are not privileged.⁴

Moreover, the Court did not hold, in Case No. 81,716, which considered the discovery status of the employee statements, that the statements were work-product. The Court held only that counsel's summaries of them were work-product. Southern Bell, pages 19-20.

Southern Bell, therefore, attempts to imply such a holding from the Court's discussion of Case No. 81,487, involving not employee statements directly, but panel recommendations based on counsel's communications to personnel managers. However, as noted previously, the Court explicitly held counsel's summaries of

⁴ Significantly, the Court noted that Southern Bell's claim that counsel directed, controlled, and was sometimes present at the employee interviews does not invoke the privilege. Southern Bell, page 17, n. 14.

employee statements (i.e., their communications to the personnel managers) to be work-product, not the statements themselves.

It is significant that the Court noted:

Although Southern Bell has proven that the employee interviews were conducted in anticipation of litigation, it has not proven that the panel recommendations were prepared for anything other than management's discussion to consider whether it should discipline company employees. The disciplining of employees is a matter within the ordinary course of business even if it arises out of the PSC's investigation of Southern Bell.

Southern Bell, page 18.

Similarly, while the Court agreed that counsel's summaries of the statements were work-product, it was not prepared to hold that the statements taken by security personnel were work-product when used for the ordinary business purpose of disciplining employees.

Since the Court authorized Southern Bell to redact notes, thoughts and impressions of counsel from the panel recommendations but not "the information recited to the managers by Southern Bell's counsel", Southern Bell, page 18, n. 15, it is clear that the Court held counsel's summaries, but not the information summarized (i.e., the employees' statements), to be work-product.⁵

⁵ Although Southern Bell urges the Commission to infer a different conclusion, the Court's explicit holdings are clearly stated and do not require holdings to be inferred. It would negate the Court's intent, therefore, to infer conclusions that would nullify some parts of that opinion or render other parts pointless.

The Court noted, at page 17 of its opinion, that, "[i]n this case, the line between law-related communications and business communications is especially blurry." The Court also stated, at page 11, that, ". . . to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny." On p. 13, the Court noted that "the legal issues associated with these concepts [attorney-client privilege and work-product doctrine] overlap in the instant case."

Because the employee statements are neither privileged nor immune as work-product, the panel recommendations, as well as the worknotes of human resources personnel, are discoverable, subject to redaction of counsel's notes, thoughts and impressions. Southern Bell, page 18.⁶

Given the length of this controversy and the evident need to resolve it expeditiously, the Attorney General has recommended that the redaction be accomplished by Southern Bell on Commission premises in camera. The documents have already been inspected in camera by certain Commission staff selected for that purpose and therefore walled-off from the staff conducting the investigation in these dockets. Accordingly, such a procedure would not subject Southern Bell to additional risk of disclosure of protectable information.

However, the same result can also be achieved by returning the documents to Southern Bell for redaction while retaining copies during the redaction process. That alternative will be followed in this case, with 21 days from the date of return of the documents allowed for the redaction process and reforwarding of the redacted documents to the Commission.

A remaining concern involves the possible application of confidential treatment to these documents. As previously noted, the Commission's ability to apply the Florida Supreme Court's holdings in Southern Bell to the in camera documents would have commenced March 25, 1994 had not further pleadings of parties been filed which changed that date to May 2, 1994.

The purpose of the process which commenced as of that date was to determine whether any documents for which attorney-client privilege and work-product immunity had been claimed could, in fact, be discovered.

Thus, while the issues were close, it must be assumed that Southern Bell made its best presentation to the Court of both facts and law and that the Court's explicit holdings on those issues are to be carried out. The suggestion to infer further holdings inconsistent with other parts of the opinion must, accordingly, be declined.

⁶ Conversely, had it been established that any of the statements were given directly to counsel and were, therefore, privileged, the worknotes based on those privileged statements would be treated as privileged. Southern Bell, page 20.

Therefore, though the parties have made various arguments seeking to apply time periods specified in the Commission's confidentiality rules to the in camera documents, those arguments - as well as any notices of intent filed -- were premature. In effect, the Commission had not yet identified any of the documents as being discoverable, let alone considered their possible confidential status.

Rule 25-22.006(3)(a), Florida Administrative Code, provides that a utility may secure temporary exemption from Section 119.07(1), Florida Statutes, by filing a notice of intent to request confidential classification prior to the staff obtaining any material. A request for confidential classification must be filed within 21 days after the staff has obtained the material to maintain continued confidential handling.

In order to afford the utility the opportunity to seek the protection provided by Section 364.183(2), Florida Statutes, the documents found discoverable will be maintained in camera for a period of 21 days from the date of this Order or disposition of reconsideration or appeal thereof, if any, prior to being transferred to staff conducting the investigation. During that 21 day period, a request for confidential treatment must be filed if further confidential treatment is sought.

In view of the above, it is

ORDERED that documents held in camera in this docket be further treated as follows: statistical analysis and counsel's summaries are to be returned to Southern Bell; investigative audits and employee statements are to be provided to legal staff; worknotes and panel recommendations are to be copied for retention in camera, returned to Southern Bell for redaction of counsel's notes, thoughts and impressions and then returned to the Commission as discovery. It is further

ORDERED that, for a 21 day period from the date of this Order or disposition of reconsideration or appeal thereof, if any, the documents herein found discoverable shall be maintained in camera, within which time a request for confidential treatment must be filed if further confidential treatment is sought. It is further

ORDERED that these dockets remain open.

ORDER NO. PSC-94-0672-PCO-TL
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BY ORDER of Commissioner Susan F. Clark as Prehearing Officer
this 3rd day of June, 1994.



SUSAN F. CLARK, Commissioner
and Prehearing Officer

(S E A L)

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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 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.