

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Comprehensive Review of) DOCKET NO. 920260-TL
the Revenue Requirements and) ORDER NO. PSC-94-1610-PCO-TL
Rate Stabilization Plan of) ISSUED: December 27, 1994
Southern Bell Telephone and)
Telegraph Company)
_____)

OMNIBUS ORDER RULING ON VARIOUS PREHEARING MOTIONS

This matter was set for hearing when the Communications Workers of America (CWA) filed a protest to Order No. PSC-94-0669-FOF-TL. On June 27, 1994, CWA filed a Notice of Appeal of Order No. PSC-94-0669-FOF-TL with the Florida Supreme Court. The Florida Public Service Commission filed a Motion to Dismiss the appeal as premature.

On August 19, 1994, a prehearing conference was held in this docket. The Commission considered the propriety of proceeding with the hearing scheduled for September 1, 1994, given the pending appeal before the Supreme Court. After allowing the parties present an opportunity to be heard on the issue, it was found that the matter should be held in abeyance until after the resolution of CWA's appeal of Order No. PSC-94-0669-FOF-TL. On August 25, 1994, the Florida Supreme Court granted the motion and dismissed CWA's appeal.

The hearing in this matter has been rescheduled for February 13, 1995. The Second Order Establishing Procedure-CWA Protest of Order No. PSC-94-0669-FOF-TL (Order No. PSC-94-1585-PCO-TL) was issued on December 22, 1994. That Order establishes the procedure to be utilized for this hearing, including revised dates for the filing of testimony, exhibits and post-hearing briefs. That Order also defines the scope of the issues to be considered in this proceeding.

Prior to and after the decision to hold the proceeding in abeyance, the parties filed numerous motions. This Order addresses all pending motions pertinent to CWA's protest of Order No. PSC-94-0669-FOF-TL, except for Southern Bell's Motion to Dismiss, Southern Bell's Renewal of Motion to Dismiss, and Southern Bell's Motion to Strike Portions of the CWA's Response in Opposition to Southern Bell's Renewal of its Motion to Dismiss, which will be considered by the panel at the January 17, 1995 agenda conference.

DOCUMENT NUMBER-DATE

12934 DEC 27 84

FPSC-RECORDS/REPORTING

I. COMMUNICATION WORKERS OF AMERICA, AFL-CIO'S MOTION TO APPEAR BY TELEPHONE

On August 29, 1994, CWA filed a Motion to Appear by Telephone. No response was filed by any party. The motion references "numerous discovery matters" pending in this proceeding. The motion states: "The time, expense and previous commitments of the parties make it extremely difficult to appear by telephone." Assumably, CWA means that the "time, expense and previous commitments of the parties" make it difficult to appear in person.

Given the contentious nature of the pleadings filed by both the CWA and Southern Bell to date in this matter, it is clear that both parties intend to vigorously litigate the questions raised in CWA's protest. For this reason alone, the attendance by all parties at all appearances before the Commission is preferred.

Oral argument was not requested on any of the motions pending in this docket. Attendance at the prehearing conference now scheduled for January 20, 1995 is required by Order No. PSC-94-1585-PCO-TL and consistent with the prompt and efficient resolution of CWA's protest. Therefore, CWA's Motion to Appear by Telephone is denied.

II. SOUTHERN BELL'S MOTION FOR PROTECTIVE ORDER

On August 17, 1994, Southern Bell filed a Motion for Protective Order. Southern Bell seeks to prevent CWA from taking the deposition of Mr. Joseph Lacher, or, in the alternative, to limit the scope of the deposition to Mr. Lacher's actual knowledge, if any, of the factual issues related to the \$10 million rate reduction to be implemented on July 1, 1994. The deposition was postponed by the Prehearing Officer at the Prehearing Conference on August 19, 1994.

On August 29, 1994, CWA filed a Response in Opposition to Southern Bell Telephone and Telegraph Company's Motion for Protective Order, Motion to Strike Portions of CWA's Prehearing Statement and CWA's Motion to Strike Pre-Hearing Statements and Motion to Compel Production. The portion of the pleading that addresses Southern Bell's Motion for Protective Order accuses Southern Bell of "attempting to deny the CWA its rightful opportunity to participate in these proceedings and for discovery in preparation of the... hearing." CWA also alleges that "Mr. Lacher was apparently involved in discussions with both PSC staff and the OPC in regards to the Stipulated Settlement and the Implementation Agreement in dispute."

The Stipulated Settlement and Implementation Agreement are not, contrary to CWA's assertion, at issue in this proceeding. The Stipulated Settlement and Implementation Agreement approved in Order No. PSC-94-0172-FOF-TL are final. The time for appeal of that Order has expired. Any inquiries into matters pertaining to those agreements are not reasonably calculated to lead to admissible evidence, and, as such, not permissible discovery. The purpose of the February hearing is to determine the appropriate rate reductions to be implemented July 1, 1994, as required by Order No. PSC-94-0172-FOF-TL. Accordingly, Southern Bell's Motion for Protective Order is granted to the extent that any deposition of Mr. Lacher shall be limited to his knowledge of, if any, the factual issues related to the \$10 million rate reduction at issue in this proceeding.

III. SOUTHERN BELL'S MOTION TO STRIKE PORTIONS OF CWA'S PREHEARING STATEMENT

On August 17, 1994, Southern Bell filed a Motion to Strike Portions of the Prehearing Statement filed by the Communications Workers of America. Southern Bell states that CWA, in its Prehearing Statement "listed the names of five witnesses, in addition to that of Mr. Robert Kruckles, the only witness listed by the CWA who has prefiled direct testimony." Southern Bell alleges that since the Order Establishing Procedure (Order No. PSC-94-0893-PCO-TL) requires that "each party shall prefile, in writing, all testimony it intends to sponsor." Southern Bell states that due to the failure to prefile direct testimony "the listing of all witnesses, other than Mr. Kruckles should be deleted from the CWA's Prehearing Statement and these witnesses should be prohibited from testifying. Southern Bell asserts claims of privilege as to Harris Anthony, the former general counsel for Southern Bell and cites its Motion for Protective Order (granted in the alternative in this Order) as to Joseph Lacher.

On August 29, 1994, CWA filed the previously referenced Response in Opposition to Southern Bell Telephone and Telegraph Company's Motion for Protective Order, Motion to Strike Portions of CWA's Prehearing Statement and CWA's Motion to Strike Pre-Hearing Statements and Motion to Compel Production. The portion of the pleading that seems to address the Motion to Strike suggests that Mr. Anthony and Mr. Harris had discussions with Staff and OPC "in regards to the Stipulated Settlement and the Implementation Agreement in dispute..." As stated above, the Stipulated Settlement and Implementation Agreement approved in Order No. PSC-94-0172-FOF-TL are final. The time for appeal of that Order has expired. Any testimony pertaining to those agreements is of questionable relevance to the appropriate allocation of the ten

million dollar rate reduction required by Order No. PSC-94-0172-FOF-TL.

The Second Order Establishing Procedure Order - CWA Protest of Order No. PSC-94-0669-FOF-TL (Order No. PSC-94-1585-PCO-TL) requires that all parties file a new Prehearing Statement on or before January 13, 1995. Any infirmities in those Prehearing Statements filed previously in preparation for the hearing on this matter are moot. Therefore, Southern Bell's Motion to Strike Portions of the Prehearing Statement filed by the Communications Workers of America is denied as moot. The parties are again advised that, as stated in the Second Order Establishing Procedure Order - CWA Protest of Order No. PSC-94-0669-FOF-TL (Order No. PSC-94-1585-PCO-TL), all direct testimony must be prefiled. The failure to do so will result in any and all such witnesses being precluded from testifying.

IV. CWA'S MOTION TO STRIKE PREHEARING STATEMENTS AND MOTION TO COMPEL PRODUCTION

On August 29, 1994, CWA filed the previously referenced Response in Opposition to Southern Bell Telephone and Telegraph Company's Motion for Protective Order, Motion to Strike Portions of CWA's Prehearing Statement and CWA's Motion to Strike Pre-Hearing Statements and Motion to Compel Production. The portion of the pleading that addresses the request to strike the Prehearing Statements of Southern Bell, McCaw Cellular and the Florida Cable Television Association, Inc. alleges that the Prehearing Statements were received two or three days after the due date.

In a response filed September 14, 1994, Southern Bell states:

With respect to CWA's Motion to Strike Southern Bell's Prehearing Statement, even a cursory review of the facts reveals that Motion to be fallacious and without any merit whatsoever. In Order No. PSC-94-0893-PCO-TL, Order Establishing Procedure, in this docket, the Commission stated:

Pursuant to Rule 25-22.038(3), Florida Administrative Code, a prehearing statement shall be required of all parties in this docket. Staff will also file a prehearing statement. The original and fifteen copies of each prehearing statement shall be prefiled with the Director of the Division of Records and Reporting by the close of business, which is 4:45 p.m., on the date due. A copy of the

prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission.

Id. at 3. This same order, at page 6, then sets the date for filing and service of prehearing statements as August 15, 1994. Southern Bell has fully complied with these requirements. It filed its Prehearing Statement with the Director of the Division of Records and Reporting on August 15, 1994.... On the same date, Southern Bell served all parties, including the CWA, with a copy of the same Prehearing Statement. Accordingly, Southern Bell has fully complied with the Commission's Order Establishing Procedure. The fact that the CWA may not have received Southern Bell's Prehearing Statement until August 18, 1994, is of no legal consequence whatsoever. For these reasons, CWA's Motion to Strike Southern Bell's Prehearing Statement is baseless and should be rejected out of hand.

Southern Bell is correct that for service purposes, as is customary in American jurisprudence, pleadings need only be mailed when filed, not physically delivered to all parties by that date. Thus, the prehearing statements of Southern Bell, McCaw and the Florida Cable Television Association were timely served on CWA.

The Second Order Establishing Procedure - CWA Protest of Order No. PSC-94-0669-FOF-TL (Order No. PSC-94-1585-PCO-TL) requires that all parties file a new Prehearing Statement on or before January 13, 1995. Any infirmities in those Prehearing Statements filed previously in preparation for the hearing on this matter are moot. Therefore, CWA's Motion to Strike Prehearing Statements is denied as moot.

V. CWA'S MOTIONS TO COMPEL

On August 11, 1994, three weeks before the hearing scheduled for September 1, 1994, CWA served, via U.S. Mail its First Request for Production to Southern Bell. CWA sought production, on or before August 19, 1994 of seven types of documents:

1. All documents referred to in Southern Bell Telephone and Telegraph Company's Pre-Hearing Statement.

2. All documents related to the \$10 million refund proposal indicating how it will offset Company rates, revenues, and/or refunds.
3. All documents related to Southern Bell's position on CWA's proposal.
4. All documents directly related to the Southern Bell/Office of Public Counsel ("PSC") settlement in this docket.
5. All documents that support Southern Bell's proposal (as accepted by the PSC) as to the \$10 million refund.
6. All documents reflecting, by customer class, how much each type of customer will receive the \$10 million refund as outlined in the proposed agency action (including customers who are expected to receive a refund).
7. All documents reflecting Southern Bell Telephone and Telegraph Company expenditures on citizen or community activities for the past three years (wherein those documents also indicate whether such costs were carried "above or below the line," i.e., passed on to rate payors (sic)).

On August 26, 1994, Southern Bell served its Objections to CWA's First Request For Production of Documents to CWA. Southern Bell objected to four of the seven requests:

1. With respect to Request No. 1, Southern Bell objects on the grounds that the information sought consists of legal pleadings filed with the Commission and thus, are public record, equally available to the CWA.
2. With respect to Request No.3, Southern Bell objects on the grounds that the information sought consists of legal pleadings filed with the Commission and thus, are public record, equally available to the CWA.
3. With respect to Request No. 4, Southern Bell objects on the grounds that all relevant information concerning the settlement was filed with the Commission in legal pleadings and thus,

are public record, equally available to the CWA. Any information sought beyond such pleadings is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence related to the appropriate distribution of the unallocated \$10 million resulting from the Settlement.

4. With regard to Request No. 7, Southern Bell objects on the grounds that the information sought is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence related to the appropriate distribution of the unallocated \$10 million resulting from the Settlement.

On August 29, 1994, CWA filed the previously mentioned Response in Opposition to Southern Bell Telephone and Telegraph Company's Motion for Protective Order, Motion to Strike Portions of CWA's Prehearing Statement and CWA's Motion to Strike Pre-Hearing Statements and Motion to Compel Production. The portion of the pleading that addresses the Motion to Compel seeks to compel both the deposition of Mr. Joseph Lacher and the Request for Production.

With respect to Mr. Lacher's deposition, CWA alleges that:

Neither the Florida Rules Of Civil Procedure or any other rule excuse a witness simply because they are too important or too busy to appear at a deposition. Additionally, Mr. Lacher was apparently involved in discussions with both PSC staff and the OPC in regards to the Stipulated Settlement and the Implementation Agreement in dispute. Any communications between the PSC staff, the OPC and Southern Bell, or Mr. Lacher are clearly both relevant to the issues in dispute and are not privileged communications despite Southern Bell's assertion to the contrary.

With respect to the Request for Production, CWA alleges that:

...CWA's Request for Documents goes to the heart of the matters being litigated in this dispute, i.e., the legality of the agreement, the negotiation and settlement discussions related to the Stipulation and Settlement agreements, determination of who would receive the unspecified refunds under the \$10 million settlement and how these funds would be disbursed.

CWA asks that the Florida Public Service Commission reschedule the deposition of Joseph Lacher; and order Southern Bell to produce documents pursuant to CWA's Request for Production.

On September 12, 1994, CWA filed another Motion to Compel stating that "Southern Bell's failure or refusal to respond to the Request for Production and reset the deposition of Joseph Lacher is without substantial justification." CWA asks for the same relief as in its August 29, 1994 Motion to Compel.

On September 14, 1994, Southern Bell filed its Response to CWA's Motion to Strike Prehearing Statement and Motion to Compel Production. The response was admittedly filed out-of-time. Counsel for Southern Bell alleges that the failure to timely respond was an administrative oversight and constituted excusable neglect. No party moved to strike the filing.

In its response, Southern Bell states:

In the CWA's Motion, it also argues that the Commission should compel Southern Bell to respond to certain discovery propounded by CWA. Again, CWA's Motion should be denied. In its Order Establishing Procedure, the Commission set forth the three issues to be litigated and resolved in this matter. Those issues are:

ISSUE 1: Under the terms of the Settlement, is the Florida Public Service Commission required to hold hearing (sic) on the rate design issues to implement the proposed rate reductions? (a, f, g).

ISSUE 2: Under applicable law, does the Commission have the authority to adopt the CWA proposal? (b, c, e).

ISSUE 3: Whether the rate reductions described in Order PSC-94-0669-FOF-TL are in the best interest of the payor (sic)? (d).

Thus, these proceedings are limited to issues surrounding the disposition of \$10 million scheduled for July 1, 1994 pursuant to the terms of Commission Order No. 94-0172-FOF-TL, which approved the Settlement in this docket. That Order is now a final order since it has never been subject to any protest or appeal. Any

discovery in the case at bar must therefore relate to the disposition of the \$10 million and not the underlying settlement.

On September 19, 1994, Southern Bell filed a Response and Opposition to CWA's Motion to Compel filed September 12, 1994. Southern Bell states in the response:

With regard to CWA's Motion to Compel dated September 2, 1994 (filed with the Commission on September 12, 1994), it once again raises the same issues it has argued in various other motions. For the very same reasons set forth by Southern Bell, the CWA's Motion to Compel should also be denied.

All questions concerning the propriety and scope of Mr. Lacher's deposition were addressed in the ruling on Southern Bell's Motion for Protective Order. Therefore, as to the deposition of Mr. Lacher, CWA's Motion to Compel is granted to the extent consistent with the ruling on Southern Bell's Motion for Protective Order (Section II of this Order). The scope of Mr. Lacher's deposition shall be limited to his knowledge of, if any, the factual issues related to the \$10 million rate reduction at issue in this proceeding.

All questions concerning the propriety and scope of Southern Bell's Responses to CWA's First Request for Production are addressed in the ruling on Southern Bell's Second Motion for Protective Order, detailed in Section VI of this Order. Therefore, as to the Request for Production of Documents, CWA's Motion to Compel is denied consistent with the ruling on Southern Bell's Motion for Protective Order in Section VI of this Order.

VI. SOUTHERN BELL'S MOTION FOR PROTECTIVE ORDER

On September 15, 1994, Southern Bell filed its Response and Objections to the Communications Workers of America's first request for Production and Motion for Protective Order. Southern Bell agreed to produce "responsive documents that are in its possession, custody or control at a mutually convenient time and place for CWA's Requests nos. 2, 5, 6, and 7."

In its request, CWA sought:

1. All documents referred to in Southern Bell Telephone and Telegraph Company's Pre-Hearing Statement.

3. All documents related to Southern Bell's position on CWA's proposal.
4. All documents directly related to the Southern Bell/Office of Public Counsel ("PSC") settlement in this docket.

With respect to Requests nos. 1 and 3, Southern Bell alleges "...that the information sought consists of legal pleadings filed with the Commission and thus, are public record, equally available to the CWA."

With respect to Request no. 4, Southern Bell objected:

on the grounds that all relevant information concerning the settlement was filed with the Commission in legal pleadings and thus, are public record, equally available to the CWA. Any information sought beyond such pleadings is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence...

CWA did not file a specific response to Southern Bell's second Motion for Protective Order. In neither Motion to Compel does CWA address Southern Bell's contention that CWA's requests are nothing more than "legal pleadings filed with the Commission and thus, are public record, equally available to the CWA." It appears that CWA's requests are nothing more than "legal pleadings filed with the Commission and thus, public record, equally available to the CWA." For this reason Southern Bell's second Motion for Protective Order is granted with respect to CWA's First Request for Production nos. 1 and 3.

Given the scope of this proceeding, as discussed in the Second Order Establishing Procedure - CWA Protest of Order No. PSC-94-0669-FOF-TL (Order No. PSC-94-1585-PCO-TL), documents "directly related to the Southern Bell/Office of Public Counsel("PSC") settlement in this docket" are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Therefore, Southern Bell's second Motion for Protective Order is granted with respect to CWA's First Request for Production no. 4.

VII. CWA'S MOTION TO RESET HEARING AND MOTION FOR CLARIFICATION

On September 12, 1994, CWA filed a Motion to Reset Hearing and Motion for Clarification. The Motion references outstanding discovery motions and the lack of a date for the rescheduled final hearing. The motion asks that the final hearing be reset and that

the Commission enter an order "clarifying the PSC's position on discovery matters." The motion alleges that as "a result of the numerous Southern Bell motions, the CWA has been unable to obtain any discovery in this matter."

On September 19, 1994, Southern Bell filed a response to the motion saying that it had no objection to the rescheduling of the hearings in this docket. Southern Bell alleged that it could not "respond to the CWA's request for an order clarifying the Public Service Commission's position on discovery matters, since it does not understand the relief sought by the CWA." The response also takes issue with CWA's claim that "the CWA has been unable to obtain any discovery in this matter." Southern Bell states that it "has provided all appropriate discovery to the CWA. For example, Southern Bell has produced numerous documents in response to the CWA's Request for Production of Documents dated August 11, 1994."

The final hearing on the protest has been reset for February 13, 1995. It is assumed that in asking for an order "clarifying the PSC's position on discovery matters" CWA is seeking rulings on all relevant motions. All pending discovery motions have been addressed in this order. Therefore, CWA's Motion to Reset Hearing and Motion for Clarification is granted to the extent delineated in the Second Order Establishing Procedure - CWA Protest of Order No. PSC-94-0669-FOF-TL (Order No. PSC-94-1585-PCO-TL) and in the rulings on the specific motions addressed in this Order.

In consideration of the foregoing, it is

ORDERED that CWA's Motion to Appear by Telephone is denied. It is further

ORDERED that Southern Bell's Motion for Protective Order is granted to the extent that any deposition of Mr. Lacher shall be limited to his knowledge of, if any, the factual issues related to the \$10 million rate reduction at issue in this proceeding. It is further

ORDERED that Southern Bell's Motion to Strike Portions of the Prehearing Statement filed by the Communications Workers of America is denied as moot. It is further

ORDERED that CWA's Motion to Strike Prehearing Statements is denied as moot. It is further

ORDERED that, as to the deposition of Mr. Lacher, CWA's Motion to Compel is granted to the extent consistent with the ruling on

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Southern Bell's Motion for Protective Order (Section II of this Order). The scope of Mr. Lacher's deposition shall be limited to his knowledge of, if any, the factual issues related to the \$10 million rate reduction at issue in this proceeding. It is further

ORDERED that as to the Request for Production of Documents, CWA's Motion to Compel is denied consistent with the ruling on Southern Bell's Motion for Protective Order in Section VI of this Order. It is further

ORDERED that Southern Bell's second Motion for Protective Order is granted with respect to CWA's First Request for Production nos. 1, 3 and 4. It is further

ORDERED that CWA's Motion to Reset Hearing and Motion for Clarification is granted to the extent delineated in the Second Order Establishing Procedure - CWA Protest of Order No. PSC-94-0669-FOF-TL (Order No. PSC-94-1585-PCO-TL) and in the rulings on the specific motions addressed in this Order.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 27th day of December, 1994.



SUSAN F. CLARK, Commissioner and
Prehearing Officer

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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.