

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petitions of SOUTHERN BELL)	DOCKET NO. 880069-TL
TELEPHONE AND TELEGRAPH COMPANY for)	
rate stabilization and implementation)	ORDER NO. 20862
orders and other relief)	
<hr/>		ISSUED: 3-7-89

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
 THOMAS M. BEARD
 GERALD L. GUNTER
 JOHN T. HERNDON

ORDER VACATING AUTOMATIC STAY
AND
DENYING MOTION TO HOLD REVENUE SUBJECT TO REFUND

BY THE COMMISSION:

I. BACKGROUND

On January 20, 1989, the Citizens of the State of Florida filed Notice of Appeal of Orders Nos. 20162 and 20503, issued October 13, 1988 and December 22, 1988, respectively. Those Orders relate to the rate and revenue determinations of the Commission regarding Southern Bell's Petition for Rate Stabilization and Other Relief.

In conjunction with its Notice of Appeal, Public Counsel also filed a Motion to Vacate the Automatic Stay Provision forth in Rule 9.310(b)(2), of the Florida Rules of Appellate Procedure. Rule 9.310(b)(2) provides that any administrative agency appealing an order is entitled to an automatic stay of that Order. The Rule also provides that upon motion, the Commission may vacate the stay or impose any lawful conditions.

In addition to its Motion to Vacate the Stay, Public Counsel has also asked the Commission to require Southern Bell to hold approximately 42 million dollars under bond or corporate undertaking subject to refund pending the outcome of the appeal. The 42 million dollars relates to our decision in Orders Nos. 20162 and 20503 declining to include stimulation in the rate reductions that were ordered for Southern Bell.

Southern Bell responded on January 30, 1988. Southern Bell does not oppose the Public Counsel's request for vacation of the stay but strenuously objects to the request to hold \$42 million additional dollars subject to refund. As discussed below, the motion to vacate the stay is granted and the motion to hold revenue subject to refund pending appeal is denied.

II. VACATION OF THE AUTOMATIC STAY

Public Counsel asks us to vacate the Automatic Stay Provision of Rule 9.310(b)(2), Rules of Florida Appellate Procedure. This Rule provides that timely appeal of an order by a "public official, board, commission or other public body" operates as an automatic stay pending review. That Rule also

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provides that, on motion, "the lower tribunal or the court may extend the stay, impose any lawful conditions or vacate the stay." In addition, Rule 25-22.061, Florida Administrative Code, sets forth the Commission's Rules regarding the status of a Stay pending appeal.

Public Counsel has asked the Commission to vacate the automatic stay in this case because the Order under consideration requires Southern Bell to decrease its rates. Public Counsel further states that this will allow the customers to receive the rate decreases required by Order No. 20162 pending Public Counsel's appeal. Southern Bell does not oppose vacating the stay.

In view of the lack of objections, we believe it would be appropriate to vacate the stay. This will allow Southern Bell's customers the immediate benefit of the rate reductions conferred by Order No. 20162. Accordingly, Public Counsel's motion to vacate the stay is granted.

III. REVENUES SUBJECT TO REFUND PENDING APPEAL

In addition to its request to vacate the automatic stay, Public Counsel has also asked the Commission to require Southern Bell to hold at least 42 million dollars under bond or corporate undertaking subject to refund pending the appeal by Public Counsel of the stimulation issue. In support of its request to hold the 42 million dollars subject to refund, Public Counsel states that, while the Order decreases rates, the Order does not decrease rates sufficiently. Public Counsel further argues that, just as the Commission routinely allows a rate increase order to go into effect subject to revenues being placed under bond or corporate undertaking, the Commission should now allow the rate decrease Order to go into effect but should place sufficient revenues subject to bond or corporate undertaking to protect the customers of Southern Bell in the event that the Citizens should prevail in their appeal.

Southern Bell's argument in opposition can be summarized as follows:

1. The Commission has already twice-denied Public Counsel's assertion that the Commission should have taken stimulation into account in determining the rate reductions for Southern Bell.
2. The purpose of the Stay is to preserve the status quo or to delay the effect of the Order on the losing party pending appeal. However, Public Counsel's request for bond does not have anything to do with the operation of the Order.
3. Granting Public Counsel's request for bond would be an unwise precedent. It could lead to a series of scenarios in which the utility would be entitled to increases in rates pending appeal of a denial for all the increases the utility sought.

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4. There is simply no authority which requires the party which does not appeal a judgment to post a bond covering the difference between what the court awarded and what the appealing party demanded. Public Counsel's theory creates a presumption of incorrectness of Commission Orders and will foster more appellate litigation.

5. Public Counsel has no special rights or privileged entitling it to require a non-appealing party to post security pending appeal.

6. Pursuant to Rule 25-22.061(1), (2) and (3)(a), Florida Administrative Code, the Commission lacks the authority to require a party to post a bond who: (1) has not appealed an order, (2) has not asked for a stay, or (3) has not asked for a waiver of an automatic stay. Public Counsel is attempting to create a hybrid, where the appealing party asks for a waiver of the automatic stay, but seeks to impose a bonding requirement on a second party which has taken no appeal and which has sought no waiver of the automatic stay.

7. There appears to be no case anywhere in which anyone has sought, much less been granted, the kind of relief Public Counsel seeks.

Southern Bell's principal argument is that pursuant to Rule 25-22.061(1)(2) and (3)(a), Florida Administrative Code, the Commission lacks the authority to require a party who has not appealed an order, has not asked for a stay or has not asked for a waiver of the automatic stay to post a bond pending appeal. According to Southern Bell, Public Counsel is attempting to create a hybrid situation where the appealing party asks for a waiver of the automatic stay but seeks to impose the bonding requirement on a second non-appealing party who has not sought a waiver of the automatic stay.

Southern Bell correctly points out that Public Counsel's request does not fall within the conditions set forth in Rule 25-22.061(1), (2) and (3)(a). However, we note that Rule 25-22.061(3)(b), provides that "when a public body or public official appeals an order that does not involve an increase in rates, the Commission may vacate the stay or impose any lawful conditions." Pursuant to Rule 25-22.061(3)(b), this Commission has the authority to grant Public Counsel's request. Further, there is some Commission precedent for requiring that monies be held subject to refund pending appeal. See Orders Nos. 8349 and 8511; affirmed City of Plant City v. Mann, 400 So. 2d 952 (Fla. 1981).

Beyond its claims that the Commission lacks authority to grant Public Counsel's request, Southern Bell intimates that, if Public Counsel's request is granted, in the future when the Company is not granted its full rate request it will ask for a rate increase pending appeal of the Commission's final order setting rates. This argument by Southern Bell points out that Southern Bell like Public Counsel, can ask for relief pending appeal from this Commission. However, all such requests for

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relief must be judged on a case by case basis on the merits particular to each case. The Commission is free to make a case by case determination as to the propriety of each request as each request is made with the overriding factor being protection of the public interest.

Under the circumstances of this case, we find that Public Counsel's request that 42 million dollars be held subject to refund with interest pending the outcome of this appeal should be denied. We maintain that our decision in Orders Nos. 20162 and 20503 is the appropriate action. We do not wish to raise any doubt as to our resolve on this. We are also concerned that embarking on a course of holding revenues subject to refund pending appeal may have undesirable future effects. More importantly, we do not perceive any irreparable harm stemming from denying Public Counsel's request. It appears that conditioning the money in question is superfluous because we believe that, should the Supreme Court reverse us on the stimulation issue, any corrective action that would be necessitated by the Court's decision would date from the date of the final Order in this case.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Public Counsel's motion to vacate the Automatic Stay of Orders Nos. 20162 and 20503 is granted as set forth in the body of this Order. It is further

ORDERED that Public Counsel's motion to hold 42 Million subject to refund pending appeal of Orders Nos. 20162 and 20503 is denied as set forth in the body of this Order.

By ORDER of the Florida Public Service Commission,
 this 7th day of MARCH, 1989.


 STEVE TRIBBLE, Director
 Division of Records and Reporting

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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.

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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.