

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Primary jurisdiction referral)	DOCKET NO. 880815-TL
from the Circuit Court for the Sixth)	
Judicial Circuit, Pinellas County,)	ORDER NO. 21006
in Circuit Civil No. 87-14199-7)	ISSUED: 4-10-89

ORDER ON RENEWED MOTION TO STRIKE

At a hearing in the above-referenced matter conducted on March 23, 1989, we requested the parties to submit written pleadings concerning the objections raised by Home Shopping Network, Inc. (HSN) to certain testimony presented by witnesses for GTE Florida Incorporated (GTEFL). HSN had filed a Motion to Strike on January 17, 1989. On March 28, 1989, HSN filed a Renewed Motion to Strike Certain Pre-Filed Written Testimony, and on March 29, 1989, HSN filed a corrected copy of this pleading (the Renewed Motion). On March 30, 1989, GTEFL filed its Response (the Response).

Pursuant to our directions, HSN attached to the Renewed Motion interlined versions of the pre-filed testimony of GTEFL Witnesses: Patricia C. Bryan, Ben R. Pilcher, Brad Hicks and Robert E. Stewart, indicating the portions sought to be stricken. In support of the Renewed Motion, HSN raises six types of objections which are discussed below. The Attachment to this Order is a page and line listing of each respective witness's pre-filed testimony claimed by HSN to be inadmissible. It identifies the type of objection made by HSN with respect to each portion of the testimony.

A. SCOPE LIMITATION OBJECTION

HSN contends that portions of the testimony of Witnesses Bryan, Hicks and Stewart -- identified as Objection "A" on the Attachment -- relate to matters beyond the scope of referrals adopted by the Florida Supreme Court in Southern Bell Tele. and Tele. Co. v. Mobile America Corp., 291 So.2d 199 (Fla. 1974) (Southern Bell). In HSN's view, the holding in Southern Bell permits a court to refer to the Commission only "intricate problems of a technical nature," supra at 202, requiring the application of our regulatory expertise.

GTEFL responds that HSN has misinterpreted the Southern Bell holding, pointing out that the Supreme Court said that a court may find it desirable "to utilize the expertise of the PSC regarding statutory compliance as to service;" supra at 201. According to GTEFL, this ruling does not limit the scope of referral to purely technical information as urged by HSN. Moreover, GTEFL alleges that even technical information must not be considered in a vacuum, particularly regarding specific allegations about adequacy of service.

After considering the arguments and reviewing the testimony which is the subject of HSN's Scope Limitation Objection, we deny this objection in all instances raised by HSN because we do not interpret the Southern Bell holding in the same manner as HSN. We do not believe that the Supreme Court intended for this decision to limit to purely technical matters the scope of our consideration of issues referred by a court.

Any attempt to factor out non-technical evidence proffered in a hearing would prove counterproductive, in our view, since such a limitation could only serve to impede rather than promote our understanding of the issues under consideration. Accordingly, we reject in general the argument that our authority to consider referrals embraces only technical material. Our jurisdiction to answer referral questions must encompass a consideration of non-technical facts that provide useful background and explanatory information placing the evidence in a proper perspective, thereby facilitating our decision-making.

B. REFERRAL LIMITATION OBJECTION

HSN objects to certain matters contained in the testimony of Witnesses Bryan, Hicks and Stewart -- identified as Objection "B" on the Attachment -- on grounds that they are beyond the scope of the Commission's jurisdiction which is said to be limited by the Court's referral. HSN argues that the Court defined the scope of the Commission's jurisdiction by the questions it referred and that the testimony subject to this objection must be stricken because it exceeds the scope of the referred questions.

GTEFL replies that the Court's Referral Order specifies that each question is to be answered in relation to the adequacy of service provided HSN by GTEFL under applicable statutes and Commission rules. GTEFL maintains that the testimony covered by HSN's Referral Limitation Objection addresses whether GTEFL provided adequate service in accordance with these statutes and rules. As an example, GTEFL identifies issues concerning network functionality and the availability of alternative services as relating to the question of whether adequate service was furnished to HSN specifically.

According to GTEFL, the factual circumstances surrounding the issue of adequacy of service must be addressed in order for the Commission to determine how this question should be answered for the Court. Under Rule 25-4.071(3), Florida Administrative Code, telephone companies must design their networks based upon "realistic forecasts of growth." GTEFL claims that Witness Bryan's testimony illustrates that the growth component used in planning is derived, in part, from data provided by the company's high-volume customers. For this reason, information received from HSN about its traffic forecasts is said to be relevant to the question of whether the service provided by GTEFL was adequate. GTEFL believes that these facts furnish useful background information that allows us to place the technical aspects of service adequacy into proper context.

Initially, we are compelled to point out that our jurisdiction derives from Chapter 364, Florida Statutes, and cannot be expanded or contracted by the Court. However, the questions referred by the Court do limit the scope of our inquiry into the adequacy of GTEFL's service to HSN. These questions clearly relate to issues of service adequacy raised by HSN in its complaint filed with the Court.

ORDER NO. 21006
DOCKET NO. 880815-TL
PAGE 3

Upon review of the subject testimony, we deny the Referral Limitation Objection in each instance that HSN raises it because this testimony falls within the scope of the question relating to service adequacy. The testimony relates to HSN's traffic information that is possessed by GTEFL. It concerns GTEFL's attempts to convey to HSN this data indicating that large numbers of calls were not being answered by HSN. We find this testimony to be relevant to the service adequacy question because it tends to show that GTEFL, as obligated by Rule 25-4.071(3), attempted to exchange information with HSN. This testimony is relevant to GTEFL's efforts to design its network which is, in part, dependent upon the capabilities of HSN, as a subscriber with a large traffic load, in handling calls delivered to it. We believe such informational efforts to be an important part of the adequacy of service equation.

C. HEARSAY OBJECTION

HSN asserts that certain parts of the testimony of all four GTEFL witnesses is hearsay, see the testimony identified as Objection "C" on the Attachment. HSN complains that this testimony relies on statements made by persons who are not testifying in this proceeding. Because these statements are offered by these witnesses to prove the truth of the matter asserted, HSN asks that they be stricken as hearsay.

GTEFL charges that hearsay is evidence that is admissible in our proceedings. GTEFL cites Section 120.58(1)(a), Florida Statutes, which provides as follows:

. . . Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. This paragraph applies only to proceedings under s. 120.57.

GTEFL cites a line of legal precedents which hold that administrative agencies are not bound by the strict rules of evidence that are enforced by the courts. Moreover, GTEFL asserts that Judge Rives is aware of the standards of admissibility that govern administrative hearings and has no expectation that any other standards would be employed in answering the questions referred.

Additionally, GTEFL states that "virtually all of its hearsay testimony was corroborated by live witnesses who appeared at the hearing." As an example, GTEFL says that GTEFL Witness Bryan's testimony relates to that of GTEFL Witness Hicks and HSN Witness Craig, both of whom testified at the hearing. Finally, GTEFL claims that Witness Bryan was tendered as an expert witness; therefore, she may render opinions based on facts and data other than her personal knowledge in accordance with Section 90.704, Florida Statutes.

After reviewing the testimony covered by HSN's Hearsay Objection, we conclude that the testimony offered by Witness Bryan is admissible and that the testimony offered by the other three GTEFL witnesses is admissible for the limited purpose of

ORDER NO. 21006
DOCKET NO. 880815-TL
PAGE 4

supplementing or explaining non-hearsay testimony. As a result, we deny this objection in all instances asserted by HSN; however, the non-expert testimony is admitted at this time on a conditional basis.

We note that the record contains testimony which is not subject to any objection as to admissibility by HSN, and we believe that this testimony may furnish an independent basis upon which findings in this docket may be supported. However, no decision can be reached at this time regarding whether the record is adequate to support ultimate findings. For this reason, our decision here regarding the Hearsay Objection asserted against Witnesses Pilcher, Hicks and Stewart is conditioned upon our ultimate finding that the record in this proceeding contains independent non-hearsay evidence sufficient to support a final ruling in this docket.

D. INCOMPETENT WITNESS OBJECTION

Certain testimony of Witnesses Bryan, Hicks and Stewart -- identified as Objection D on the Attachment -- is argued by HSN to extend beyond their competence to testify because the matters exceed the scope of the witnesses' experience. Since these matters are outside the firsthand knowledge of each witness, HSN argues that these parts of their testimony should be stricken as inadmissible.

GTEFL retorts that its witnesses are competent to testify on the disputed matters because their testimony is credible and corroborated. GTEFL asserts that no court decision can be located that compels our striking such testimony on the sole basis that it lies beyond the witnesses' firsthand knowledge. As an example, GTEFL claims that HSN's objection to the testimony of Witness Hicks regarding his efforts to inform HSN about its traffic volume is groundless because he has firsthand knowledge of such activities. Additionally, GTEFL says that the disputed testimony of Witness Stewart concerning HSN's "erratic line forecasts" overlooks the evidence that he received line forecasts from HSN and attended HSN planning sessions devoted to future growth. Finally, as explained above, GTEFL reiterates that Witness Bryan was tendered as an expert witness, thereby relieving her of any requirement to have firsthand knowledge.

Our conclusion with respect to the Incompetent Witness Objection is similar to that explained above regarding the Hearsay Objection. Concerning the testimony of Witness Bryan, we will deny the Incompetent Witness Objection in all instances because she is accepted as an expert witness, and as such, she may base her testimony on information acquired from others.

The testimony of Witnesses Hicks and Stewart is deemed admissible, on a conditional basis, for the limited purpose of supplementing or explaining other admissible testimony. We find that De Groot v. L. S. Sheffield, 95 So.2d 912, 916 (Fla. 1957), permits us to admit their testimony if it is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." They have acquired information in the performance of their employment duties, and while it is not based on their

ORDER NO. 21006
DOCKET NO. 880815-TL
PAGE 5

firsthand knowledge, we believe the information so acquired is acceptable to us as adequate.

As noted above, some testimony is not covered by any HSN objection and may furnish an independent basis to support our ultimate findings. Therefore, our decision here regarding the Incompetent Witness Objection covering the testimony of Witnesses Hicks and Stewart is conditioned upon our concluding that the record contains independent evidence sufficient to support a final ruling here.

E. NO FOUNDATION OBJECTION

The testimony identified as Objection E on the Attachment is said by HSN to be opinion testimony by Witness Bryan, as an expert witness, for which the requisite foundation has not been established. We have examined her testimony in light of this objection and found that it contains facts upon which an expert witness can properly base an opinion. Therefore, the No Foundation Objection covering the testimony of Witness Bryan is denied in all instances asserted by HSN.

With regard to the testimony of Witnesses Hicks and Stewart identified as Objection E on the Attachment, HSN charges that it is inadmissible because no foundation has been set for demonstrating the involvement or experience of these non-expert witnesses. GTEFL repeats its earlier arguments in response to HSN's No Foundation Objection, asserting that Witnesses Hicks and Stewart have personal knowledge of the matters in their testimony, which is not based on opinion.

HSN objects to the assertion of Witness Hicks that "HSN needed to hire more operators if it wanted to answer more calls." HSN also objects to the statements of Witness Stewart that "HSN's projections of future growth in terms of facility requirements were in a constant state of flux" and that "HSN employees were confused about future growth." For the reasons explained above, we find this objection to be one of "the formalities in the introduction of testimony common to the courts of justice" that is not strictly employed in administrative agencies, *Id.* We find this testimony admissible because it is relevant evidence that can be reasonably accepted as adequate support for the witnesses' conclusions. Accordingly, we deny the No Foundation Objection in all instances asserted by HSN against the testimony of Witnesses Hicks and Stewart.

F. EXHIBIT NO. 12-B OBJECTION

HSN requests that we strike the document identified as Exhibit No. 12B which is attached to the Amended Direct Testimony of Witness Stewart filed on March 21, 1989. According to HSN, the "designation of this late-filed exhibit violates the Commission's Prehearing Order." GTEFL claims that this objection was raised at the hearing in this docket and overruled by the Commission. Therefore, GTEFL believes that the transcript of this proceeding demonstrates that this objection has been resolved, making it improper for further consideration.

ORDER NO. 21006
DOCKET NO. 880815-TL
PAGE 6

We have reviewed pages 487-504 of the transcript and concluded that, while the document complained of by HSN was identified as Exhibit No. 12-B, it was never moved for admission into evidence by GTEFL. For this reason, Exhibit No. 12-B is not part of the record in this proceeding. In light of this circumstance, HSN's objection to the document's admission is moot.

G. SURREBUTTAL TESTIMONY OF WITNESS BRYAN

HSN objects to the Surrebuttal Testimony of Witness Bryan filed by GTEFL in its entirety, complaining that no rebuttal testimony has been admitted to justify the introduction of any surrebuttal testimony. GTEFL charges that HSN has waived any objection to the introduction of this testimony: first, by failing to take the opportunity extended to HSN to argue its objections at the motion hearing set for March 7, 1989, and second, by waiving its objections at the hearing by failing to object when the testimony was inserted into the record. Finally, GTEFL argues that Witness Bryan's testimony is particularly useful information.

We find that the Surrebuttal Testimony presented by Witness Bryan contains important information useful to our consideration of the issues in this proceeding. Any statements in the testimony directed to the pre-filed testimony of HSN Witness Adler, which was not offered at the hearings, are of no legal consequence. However, the decisions by HSN to not call Witness Adler to testify and to not introduce her pre-filed testimony do not diminish the usefulness to the Commission of those portions of the Surrebuttal Testimony of Witness Bryan that furnish additional information relevant to the issues. Accordingly, HSN's objection to the admission of this testimony is denied.

H. PRIOR RULINGS

GTEFL points out in its response that the Commission has entered rulings on some of HSN's objections to the admissibility of testimony and that some of these objections have improperly been renewed in the Renewed Motion. With regard to the Amended Direct Testimony of Witness Stewart and dedicated facilities, the Renewed Motion seeks to have declared inadmissible the answers to three questions. The first question concerns discussions with HSN representatives about optional nodal network, see Tr. 510. GTEFL asserts that the Commission has ruled that this testimony is admissible; however, the Commission entered no ruling at the hearing with regard to this material.

The second two questions deal with a letter from a HSN executive to a GTEFL executive, see Tr. 511. GTEFL asserts that the Commission has ruled that this testimony is admissible. We find that this material has been ruled admissible by the Commission. Therefore, HSN's attempt to renew this objection is inappropriate.

GTEFL objects to HSN's renewed attempts to have the expert testimony of Witness Bryan declared inadmissible after agreeing that it would be admissible if corroborated. In view of the corroboration of Witness Hicks, GTEFL argues that HSN's objection has already been denied. We agree.

ORDER NO. 21006
DOCKET NO. 880815-TL
PAGE 7

Nothing in this Order should be construed as altering, through reconsideration or otherwise, those rulings on the admissibility of evidence that were entered by the Commission at the hearings on March 23 and 24, 1989. To the extent that HSN has included objections in the Renewed Motion which have already been ruled on by the Commission, the transcript of the March 23rd and 24th hearings shall govern these objections, and this Order shall have no effect on those admissibility rulings.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Motion to Strike filed on January 17, 1989, and the Corrected Renewed Motion to Strike Certain Pre-Filed Written Testimony filed on March 29, 1989, by Home Shopping Network, Inc., are hereby denied subject to the limitations upon the admissibility of certain testimony for limited purposes imposed in the body of this Order. It is further

ORDERED that the objections of Home Shopping Network, Inc., to the admission of certain testimony are hereby denied subject to the conditions imposed in the body of this Order upon the admission of this testimony. It is further

ORDERED that any conflict between the transcript of the hearings in this docket conducted on March 23 and 24, 1989, and this Order with regard to the admission of evidence shall be resolved in favor of rulings reflected in the transcript.

By ORDER of MICHAEL McK. WILSON, as Chairman of the Florida Public Service Commission, this 10th day of April, 1989.


MICHAEL McK. WILSON
Chairman

(S E A L)

TH/DLC

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.

ORDER NO. 21006
DOCKET NO. 880815-TL
PAGE 8

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 sewer 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.

TESTIMONY OF GTEFL WITNESS BRYAN

<u>Page</u>	<u>Line</u>	<u>Objection</u>
3	11-24	A, B, C, D, E
23	11-24	C, D
24	3-8	A, B, C, D, E
24	13-22	C, D, E
24-25	25-4	A, B, C, D, E
25	18-20	A, B, C, D, E
25-26	25-10	A, B, C, D, E
26	15-25	A, B, C, D, E
29-30	10-1	C, D, E
30	4-9	A, B, C, D
30	14-24	A, B, C, D, E
31	4-13	C, D
32	4-5	A, B, C, D, E
32	13-15	C, D, E
33	1-3	C
33	11-19	C
34	4-10	A, B, C, D, E
35	4-10	C
35	21-23	C
36	6-15	A, B, C, D
36	17-25	A, B, D, E
37	1-11	A, B, C, D, E
37-38	22-2	C
38	7-12	C
38	18-22	A, B, C, D
39	1-17	A, B, C, D, E
41	6-17	C, D,
42	13-15	C, D
45	16-25	C
48	1-3	C, E
50	13-22	C, E
51	10-11	C

TESTIMONY OF GTEFL WITNESS PILCHER

<u>Page</u>	<u>Line</u>	<u>Objection</u>
5	17-23	C
6	15-20	C
6-7	24-1	C

TESTIMONY OF GTEFL WITNESS HICKS

<u>Page</u>	<u>Line</u>	<u>Objection</u>
2	14-18	A, B, D, E
3	1-25	A, B
4	1-22	A, B

TESTIMONY OF GTEFL WITNESS STEWART

<u>Page</u>	<u>Line</u>	<u>Objection</u>
6	8-14	A, B
7	4-19	A, B, C
7-8	21-4	A, B, C
8	8-12	A, B
8-9	16-7	A, B
9-10	9-3	A, B
10	7-18	A, B
11	1-10	B, C, D, E