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July 26, 1989

Mr. Steve C. Tribble
Director, Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

Re: Docket No. 870790-TL - Gilchrist County EAS

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Protest of Order No. 21453, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely yours,

E. Barlow Keener

E. Barlow Keener

ACK ____
AFA ____
APP 1 (Nancy)
CAF ____
CMU ____ Enclosures
CTR ____ cc: All Parties of Record
EAG ____ A. M. Lombardo
LEG 1 Joaquin R. Carbonell
LIN 6 R. Douglas Lackey
OPC ____
RCH ____
SEC 1
WAS ____
OTH Kay

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Extended Area Service Request throughout Gilchrist	)	Docket No. 870790-TL
	)	Filed: July 26, 1989

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
PROTEST OF ORDER NO. 21453

COMES NOW Southern Bell Telephone and Telegraph Company (Southern Bell or Company), pursuant to Rule 25-22.006(3)(d), Florida Administrative Code, and files its Protest of Order No. 21453, regarding the confidentiality of certain traffic studies, and as grounds therefor, states as follows:

BACKGROUND

1. On June 27, 1989, the Prehearing Officer issued an order denying Southern Bell's request for confidential treatment for interLATA traffic studies filed pursuant to Order No. 20607[1]. The order denying confidentiality set forth specific reasons why the

[1] Because of an apparent error on the part of the Commission Clerk's office, none of the parties of record, such as Southern Bell, AT&T or ALLTEL, received a copy of Order No. 21453 until July 13, 1989, at which time Southern Bell was given a copy by the Commission Clerk. Because of the Clerk's delay in sending out the order, Southern Bell requested, on July 13, 1989, an extension of time in which to file its protest of the order.

traffic studies should not be accorded confidential treatment. This protest will address each of those reasons separately.

ARGUMENT

2. Order No. 21453 stated that:

> ...all company data provided to this Commission shall become public record unless specifically exempted.

(emphasis added). This definition of public record varies from the definition set forth in Florida Statues. Section 119, Florida Statutes, provides that every document, confidential or not, that enters the possession of the Commission becomes a "public record". See, Sections 119.011(1), Florida Statutes. The statute also limits the disclosure of the "public record". See, Section 119.07(3)(a), Florida Statutes; Section 2.06 C.1.c., Administrative Procedures Manual. This is an important point because confidential treatment means that although the document is "public record" which may be viewed by those persons and attorneys who represent the parties to this proceeding, the document is not disclosed to the extent that it could harm the company. The purpose of confidential treatment is not to keep documents from the parties, but to prevent harm to the company while it is engaged in an administrative proceeding.

3. The order also states that "initially, it is notable that Southern Bell has not alleged that disclosure of the

information would impair its efforts to contract for service on favorable terms." (emphasis added) Order No. 20607. While Southern Bell did not initially address this issue because Southern Bell considers the information to fall within the definition of "trade secret", if this information is disclosed the disclosure could impair Southern Bell's ability to contract for AT&T's billing and collection services.

4. The traffic study prepared by Southern Bell shows a blueprint of interLATA traffic on a toll route in Gilchrist County. This information was derived by Southern Bell from raw data received from AT&T for billing and collection purposes. If the Commission were to publicly release the interLATA traffic study, Southern Bell, as well as AT&T, could be harmed by such a release. Southern Bell could be harmed because AT&T, fearful of the risk of public disclosure, may be reluctant to grant Southern Bell permission to use the raw data in Southern Bell's future traffic studies. Also, the threat of disclosure could assist AT&T in negotiating a more favorable price for Southern Bell's billing and collection services which would directly harm Southern Bell and ultimately its rate payers. Furthermore, Southern Bell requires this same raw data for planning its network. If AT&T withheld the raw data, it could possibly cause Southern Bell to

incur unnecessary additional expense in planning its network. Not only would Southern Bell be harmed, but so would its ratepayers.

5. In addition, if the traffic study was publicly released, AT&T would be harmed. The traffic study information is kept confidential by AT&T because if the information came into the hands of an AT&T competitor, such as MCI, that competitor would have the advantage of knowing which toll routes to target and how to plan its network on those toll routes. Without the raw data AT&T's competitors would have to expend money and resources to compile this information.

6. Furthermore, Southern Bell has a contractual obligation to protect this information regardless of whether or not the disclosure would harm Southern Bell. Southern Bell has been entrusted with raw data that Southern Bell is under a duty to protect. An analogous duty is the duty to maintain the confidentiality of the customer information entrusted to Southern Bell by its own customers. While Southern Bell could be harmed by the disclosure of customer information, it would be the customer's privacy that would suffer the greatest degree of harm. Southern Bell has been entrusted with raw data that Southern Bell is under a duty, just as with customer information, to protect.

7. With regard to the rationale in Order No. 21453, that the traffic study would not "impair Southern Bell's efforts to contract for services on favorable terms," Southern Bell assumes

that this rationale originated from Section 364.183, Florida Statutes, which states:

> (3) Proprietary confidential business information includes, but is not limited to:
> ...
>
> (a) Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the company to contract for services on favorable terms;....

Contrary to the conclusion set forth in Order No. 21453, that disclosure of the traffic study would not impair Southern Bell's efforts to contract for services, Southern Bell's negotiated rates for billing and collection services might be impaired if the Commission permits disclosure of this data because AT&T would be concerned that its proprietary data would be released. In contract negotiations, issues such as the ability to protect confidential information often play a role in negotiating a final price. Southern Bell is concerned that in its billing and collections negotiations with AT&T, the confidentiality issue might be used by AT&T as leverage to lower the negotiated price.

8. Additionally, Order No. 21453 concluded that:

> ...the data requested in Order No. 20607 would not <u>generally</u> be of a confidential nature.

(emphasis added). Southern Bell understands that this statement means that, in the past, traffic studies between two or more exchanges did not require confidential treatment. In part this

may have been true when there was no interLATA interexchange competition.

9. Nevertheless, contrary to the Commission's order, the traffic studies created by Southern Bell are information that is generally accorded confidential treatment. Not only has confidential treatment in the past been routinely granted for interLATA traffic studies, but these requests for such confidential treatment have gone unchallenged by any party or non-party. Furthermore, the full Commission recently granted confidential treatment for several interexchange carriers' facilities on the grounds that the disclosure of those facilities might permit a competitor to determine the amount of traffic carried by the interexchange carrier. In Order No. 21362, issued on June 9, 1989, the Commission agreed with the interexchange carriers' argument that if the facilities were disclosed to the public, competitors would take advantage of this information:

> Essentially, the companies argue that information regarding capacity is highly sensitive business information, which, if publicly disclosed, would be detrimental to their competitive positions in the highly competitive interexchange marketplace. They assert that the information qualifies for confidential classification as a trade secret under section 364.183(3)(a), Florida Statutes.
>
> All of the companies state that they take precautions to maintain the secrecy of their capacity information. They fear that if a competitor acquired this information, it could

> analyze the capacity of their networks, identify areas they are or could be capacity constrained, and would then focus its marketing efforts on those areas to their competitive disadvantage. The companies also argue that if the capacity weaknesses were known to their lessor carriers, they would be in a vulnerable bargaining position when negotiating their service contracts. The same can be said regarding their lessee carriers.
>
> The companies also argue that the decisions to establish certain amounts of capacity between various routes were based upon their own costly research and planning efforts. To give a competitor information regarding route by route capacity is, the companies contend, tantamount to giving it the benefits of such costly research and planning free of charge. Although our staff members were sympathetic to the pleadings of the company, they remained unpersuaded that the capacity information in the companies' annual reports qualified for confidential classification.
>
> We agree with the utilities on this issue.

(emphasis added). See, Order No. 21362, appended hereto as Attachment "A". The information complied by Southern Bell is much more specific than information regarding the interexchange carriers' (IXCs) facilities. Thus, contrary to the statement that such information is generally not accorded confidential treatment, the opposite has been true in earlier EAS proceedings and in the order cited above.

10. Order No. 21453 further explains:

> Nor do I find that the data is so unique as to be considered a trade secret.

(emphasis added). Southern Bell assumes that the order meant that interLATA traffic study data was not unique. In other words, one could speculate about the amount of traffic between two exchanges or one could conduct a survey of the customers to determine the amount of traffic between the exchanges, thus, in effect, duplicating the traffic study.

11. If one could speculate about the amount of traffic between the exchanges, then the traffic study would not be necessary for an EAS proceeding. The very fact that a competitor would have to pay for a customer survey that would not be as accurate as a traffic study underscores the uniqueness and value of the traffic study. The traffic study has value to an IXC competitor for the obvious reason: the IXC competitor could use this detailed information to determine which particular exchange to target and which class of customer to target (e.g., if 4% of the customers make 80% of the calls, then the IXC competitor could target those customers making a high percentage of calls and could ignore the remainder being confident that the remainder was a poor market). Moreover, the competitor could determine how to arrange its facilities for its future growth. Without the traffic study the competitor would be forced to speculate or conduct a customer

survey of its own. In the case at hand, an IXC competitor need only inform its marketing department not to conduct a market survey of the Gilchrist County exchange call rates because the Commission will require Southern Bell to disclose its interLATA survey thus obviating the need for the IXC to conduct its own survey. This would save the IXC money and give it accurate and valuable information at no cost.

12. Section 668.002, Florida Statutes, defines trade secret as:

> (4) "Trade Secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(emphasis added). The confidential traffic study in question falls within this definition of a trade secret.

13. Furthermore, Order No. 21453 states that Southern Bell is not the "source" of the traffic study and may not, therefore, make a request for confidential treatment. The Prehearing Officer

explained:

> Once notice is given by Southern Bell that data will be filed with the Commission, the IXC as owner or "source" of this data must file the request to have it exempted from the public record law. See Rules 25-22.006(1)(i) and 25-22.006(4)(c).

Order No. 21453. This novel interpretation of the definition of a "source" is contrary to the use of the term "source" set forth in the Commission's rules. Section 25-22.006(2)(f), Florida Administrative Code, states:

> An inquiry will terminate 40 days after the Clerk transmits a notice thereof to any source from whom material has been obtained incident to the inquiry. The notice will include a list of all materials obtained from the source...

(emphasis added). Thus, this rule implies that the "source" is the company from whom the Commission received the documents from and not the ultimate owner of the raw data. Moreover, Rule 25-22.006(e), Florida Administrative Code, states:

> During an inquiry the Commission may in its discretion retain or, after consulting with the source(s), destroy or return to the source any general confidential material obtained during the inquiry.

(emphasis added). This portion of the rule implies that the "source" is the same company from whom the Commission obtained the document ("returned to the source") and not the ultimate owner of the original data. Also, Rule 25-22.006(2)(f), Florida

Administrative Code, states:

> An inquiry will terminate 40 days after the Clerk transmits a notice thereof to any source from whom the material has been obtained incident to the inquiry. The notice will include a list of all materials obtained from the source...

(emphasis added). Again, the rule refers to the "source" as the company "from whom the material has been obtained." In this case, the traffic study was obtained from Southern Bell, not AT&T.

14. In addition, Rule 25-22.006(5)(a), Florida Administrative Code, contemplates that the source is a party to the proceeding because it discusses the "party" not the "source" as the person filing motions for confidential protective orders:

> A party objecting to discovery on the grounds of confidentiality shall file a motion for a protective order...

(emphasis added). In fact throughout section (5) of Rule 25-22.006, Florida Administrative Code, the rule requires that the "parties" which provide the confidential information to be the same parties that must request confidential treatment. When taken in the context of the entire section, "source" and "party" are one in the same.

15. The Commission requested the traffic study from a "party," Southern Bell, and pursuant to Rule 25-22.006, Florida Administrative Code, Southern Bell filed a Request for Confidential Treatment. To require the person who ultimately owns

the original raw data, to file a request for confidential treatment would not only be contrary to the Commission's rules but would have an impractical result.

WHEREFORE, Southern Bell requests that the Commission grant Southern Bell's Protest of Order No. 21453.

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

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ATTACHMENT A

OFFICE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Protest by U.S. Sprint Communications Company, Ltd., of Tentative Ruling of Nonconfidentiality of 1987 Construction and Capacity Report.	DOCKET NO. 890253-TI
In re: Protest by Telus Communications, Inc., of Tentative Ruling of Nonconfidentiality of 1988 Annual Report.	DOCKET NO. 890322-TI
In re: Protest by U.S. Sprint Communications Company, Ltd., of Tentative Ruling of Nonconfidentiality of 1988 Annual Report.	DOCKET NO. 890323-TI
In re: Protest of MCI Telecommunications Corporation of Tentative Ruling of Nonconfidentiality Regarding Certain Network Capacity Information Contained in its 1988 Annual Report.	DOCKET NO. 890517-TI ORDER NO. 21362 ISSUED: 6-9-89

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING CONFIDENTIAL CLASSIFICATION TO IXC CONSTRUCTION AND CAPACITY REPORTS

Rule 25-24.480(6), F.A.C., requires interexchange companies (IXCs) to file, each year, construction and capacity reports showing their construction and capacity increases of the past year and their proposed plans for the foreseeable future. The reports must contain information regarding: interexchange construction; terminals; switches; and network capacity. Also, with their reports, companies must include maps of newly installed routes.

Recently, when several companies file their capacity and construction reports, they also filed requests that the information regarding capacity and location of their routes be classified as confidential. Because our staff was unconvinced that the disclosure of this information would harm the companies or the ratepayers, our Office of General Counsel issued tentative rulings denying these requests. U.S. Sprint Communications, Ltd. (Sprint), Telus Communications, Inc. (Telus), and MCI Telecommunications Corporation (MCI) protested these tentative rulings. Sprint also protested the ruling regarding its 1987 construction and capacity report. These protests are the subject of this order.

Since filing their protests, Telus and Sprint have filed motions to amend their requests for specified confidential classification. Attached to those motions were their amended

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confidentiality requests which reduced the amount of information that they were seeking to be classified as confidential.

Originally, Sprint and Telus sought to keep not only capacity, but location of routes confidential as well. In Sprint's amended request, it is no longer asking confidential classification of its points of presence. Telus' amended request, more in line with MCI's request, only seeks confidential treatment of capacity information. The companies also clarify their reasoning for justifying confidential classification. Because their amended motions give this Commission more information upon which to base its decision and will allow the Commission to dispose of these separate protests in a uniform manner, we will grant the companies' motions.

Essentially, the companies argue that information regarding capacity is highly sensitive business information, which, if publicly disclosed, would be detrimental to their competitive positions in the highly competitive interexchange marketplace. They assert that the information qualifies for confidential classification as a trade secret under section 364.183(3)(a), Florida Statutes.

All of the companies state that they take precautions to maintain the secrecy of their capacity information. They fear that if a competitor acquired this information, it could analyze the capacity of their networks, identify areas they are or could be capacity constrained, and would then focus its marketing efforts on those areas to their competitive disadvantage. The companies also argue that if the capacity weaknesses were known to their lessor carriers, they would be in a vulnerable bargaining position when negotiating their service contracts. The same can be said regarding their lessee carriers.

The companies also argue that the decisions to establish certain amounts of capacity between various routes were based upon their own costly research and planning efforts. To give a competitor information regarding route by route capacity is, the companies contend, tantamount to giving it the benefits of such costly research and planning free of charge. Although our staff members were sympathetic to the pleadings of the company, they remained unpersuaded that the capacity information in the companies' annual reports qualified for confidential classification.

We agree with the utilities on this issue. Since this information is useful to the Commission, it would appear to be, ipso facto, useful to competitors and, thus, harmful to the protesters. Therefore, we shall grant the requests of MCI and the amended requests of Sprint and Telus.

Notwithstanding the foregoing, staff may continue to use capacity information in reports and workpapers, provided the information is used in the aggregate or in some other fashion that will not identify any particular IXC, its vendors, or its capacity.

In consideration of the foregoing, it is

ORDERED that Telus' and Sprint's motions to amend their confidentiality request is hereby approved. It is further

ORDERED that the confidentiality request of MCI and the amended confidentiality requests of Telus and Sprint are hereby granted. It is further

ORDERED that staff may continue to use capacity information in reports and workpapers, provided the information is used in the aggregate or in some other fashion that will not identify any particular IXC, its vendors, or its capacity.

By ORDER of the Florida Public Service Commission this 9th day of JUNE, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

WJB

by: Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes (1985), to notify parties of any administrative hearing or judicial review of Commission orders that may be available, as well as the procedures and time limits that apply to such further proceedings. 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 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.

2622G

CERTIFICATE OF SERVICE
Docket No. 870790-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 26th day of July, 1989 to:

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