BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Southern Bell ) DOCKET NO. 890256‑TL

Telephone and Telegraph Company's ) ORDER NO. 22662

Capital Recovery Position ) ISSUED: 3‑12‑90

SECOND ORDER ON CONFIDENTIALITY

On August 14, 1989, our Staff served its First Set of Interrogatories (the First Set) and First Request for Production of Documents (the First POD) on Southern Bell Telephone and Telegraph Company (Bell). On September 18, 1989, Bell submitted its responses to the First Set and to the First POD.

Bell filed a request for confidential classification (the First Request), pursuant to Section 364.183, Florida Statutes (the Statute), and Rule 25‑22.006, Florida Administrative Code (the Rule), of its responses to First Set Nos. 3, 4 & 5. We assigned Document No. 9352‑89 to the following documents covered by the First Request: (1) First Set No. 3: Material relating to the cost of placing fiber cable and electronics to a new Florida residence; (2) First Set No. 4: Material relating to the cost of replacing copper facilities with fiber facilities in a Florida residence; and (3) First Set No. 5: Material relating to revenues for each analog office for which Bell has submitted a CUCRIT study.

The First Request alleges that Bell's cost of obtaining and installing fiber optic facilities should not be publicly disclosed because vendors sell the company such equipment at discounts not offered to other customers and contractors install it at favorable rates. If these discounts and rates are disclosed, according to the company, then these vendors and contractors will be less willing to negotiate prices and rates that are favorable to Bell. Additionally, the First Request asserts that Bell's techniques of installing such facilities are trade secrets which were developed through time consuming and expensive experimentation to determine the most economical means of placing them. The company claims to have numerous competitors who are installing fiber optic facilities and complains that it has no means of obtaining cost and installation information about them. In such a circumstance, the First Request contends that Bell would be placed at a competitive disadvantage if its information is publicly disclosed.

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Bell also filed a request for confidential classification (the Second Request) of the documents submitted in response to First POD Nos. 3, 9, 15 & 19. We assigned the following Document Numbers to the documents covered by the Second Request: (1) First POD No. 3: 9354‑89; (2) First POD No. 9: 9355‑89; (3) First POD No. 15: 9356‑89; and (4) First POD No. 19: 9357‑89. These documents, listed by Document Number, are as follows:

Document No. 9354‑89: This Document Number was assigned to the following seven volumes of documents submitted as Attachment A to the Second Request which furnish information about Bell's market strategies, large customers, revenues and demand projections and equipment vendors:

(1) Southeast LATA Plan;

(2) Gainesville and Daytona Beach LATA Plans;

(3) Panama City LATA Plan;

(4) Appendix to Southeast LATA Plan: Tables 1 & 2 and Attachments 1‑5;

(5) Jacksonville LATA Plan;

(6) Orlando LATA Plan; and

(7) Pensacola LATA Plan and Interoffice Plan.

Document No. 9355‑89: Attachment C to the Second Request contains material concerning Bell's cost to obtain and install fiber optics facilities.

Document No. 9356‑89: Attachment E to the Second Request contains material concerning demand forecasts regarding the provision of Pulselink and Prestige Services.

Document No. 9357‑89: Attachment G to the Second Request contains material concerning Bell's operator services, including new features that its vendors intend to offer, vendor‑specific pricing information and Bell's costs.

Bell asserts that the Executive Summaries to its LATA Plans were classified as proprietary information by Order No. 19097, issued April 5, 1988. The Second Request states that one or more of the following six arguments (hereinafter, Arguments 1 through 6) applies to each specific portion of Document No. 9354‑89 for which classification is sought.

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1. Bell has spent time, money and effort on researching demographics in public records and its competitors should not be given the results of this research free of charge.

2. Revenues and demand for services projected by Bell are trade secrets which should not be disclosed to its competitors who would learn where the company expected growth to occur in a particular service.

3. Revenues and demand for digital and fiber optic facilities planned by Bell are trade secrets which, if disclosed, would permit Bell's competitors to "beat" the company to the market.

4. Bell's market strategy is a trade secret which, if disclosed, would be useful to its competitors in developing their own market strategy, allowing them to thwart the company's efforts.

5. Information is customer‑specific and its disclosure would violate customers' right to privacy.

6. Information concerns vendor plans to use or offer new services or capabilities which, if disclosed to the vendors' competitors, would impair Bell's ability to contract for goods and services because vendors would be reluctant to provide it.

With respect to Document No. 9355‑89, the Second Request offers Argument 3 regarding when and how much digital and fiber optic equipment Bell intends to install. Additionally, the Second Request argues that Bell's costs to provide certain services are trade secrets that would grant the company's competitors an advantage if they learned the prices and rates below which the company could not provide these services (hereinafter, Argument 7). Regarding Document No. 9356‑89, the Second Request presents Arguments 1 and 2 as being applicable. Concerning Document No. 9357‑89, the Second Request offers Arguments 1 through 7 and also alleges that the vendor‑specific pricing negotiated by Bell, if disclosed, would impair the company's ability to contract for goods and services on favorable terms.

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On September 21, 1989, OPC responded to the First and Second Requests and requested that a ruling be entered, claiming that it is prevented from preparing its case by its inability to gain access to these documents. OPC contends that its consultants need to review the documents and that it is unable to respond effectively to the First and Second Requests without obtaining them.

Bell submitted a supplemental response to the First POD No. 4 on September 20, 1989, and filed a request for confidential classification (the Third Request) of the documents submitted in response to this discovery request. We assigned Document No. 9479‑89 to the following documents, which concern marketing or economic studies showing customer demand for ISDN or BISDN Services to be offered by Bell, covered by the Third Request: (1) Chapter III, "Market Definition and Forecasts; and (2) Appendix E, "BellSouth Integrated Digital Services Forecasts.

The Third Request says that the documents describe Bell's projected demand for ISDN services, market share and revenues for services using ISDN. Bell claims that the disclosure of such information would impair the company's ability to compete because this would enable its competitors to "beat" Bell to the market, to "under‑price" Bell, to use Bell's pricing plans to develop their pricing strategies, to learn Bell's projections of growth and its timing, and to receive free of charge the benefits of Bell's time, money and efforts spent of research.

On August 24, 1989, OPC served Bell with a set of interrogatories (the OPC Set) and a request for production of documents (the OPC POD). Bell responded to the OPC POD on September 25, 1989, stating that it would make the requested ocuments available for inspection by OPC but would not permit OPC to take any of them into its possession pending a ruling on confidentiaIity. Bell filed a supplemental response to OPC POD No. 15 on September 27, 1989, asserting that the requested document was copyrighted by an affiliated corporation and therefore could not be lawfully copied by Bell. Bell offered to permit OPC to inspect the document as long as OPC agreed to return it after the inspection along with any notes concerning it.

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OPC inspected the documents on October 10, 1989, and requested possession of a document entitled "ISDN Wire Center Study Data." As a result, Bell filed this document under a motion for protective order (the First Motion) on October 11, 1989, and we assigned Document No. 10146‑89 to it. The First Motion makes Arguments 2, 4 and 7 in support of protecting the confidentiality of trade secrets contained in these documents. OPC filed an opposition to the First Motion on October 20, 1989, arguing that the assumptions, study inputs, projected revenues and service migration percentages contained in the document should not be classified as confidential.

On September 28, 1989, Bell submitted the responses to the OPC Set and filed a motion for protective order (the Second Motion) relating to Interrogatory No. l(b). We assigned Document No. 9741‑89 to the documents, which contain information regarding the development of Bell's CUCRIT studies, that are covered by the Second Motion. The Second Motion states that the CUCRIT studies are useful in determining the most economical means of expanding or replacing a central office that is nearing exhaustion or obsolescence. They contain trade secrets, in Bell's view, consisting of revenue and demand projections for competitive services, names of high priority customers and market strategies. The Second Motion raises Arguments I through 3, asserting additionally that its forecasted revenues by central office would grant competitors free access to research performed at Bell's expense. Bell would suffer a competitive disadvantage, according to the Second Motion, because its competitors would learn whether to enter a market in the area served by a central office. Such competitors would also learn which central office is expected by Bell to experience the most growth and the services believed responsible for it. The company maintains that its greatest competition centers around large customers because of the high revenues they account for and contends that the names of its large customers are trade secrets as well as the company's strategy for serving their needs and those of other large customers. The disclosure of such information would impair Bell's ability to compete, according to the Second Motion, because if competitors "know what's coming," they can "head it off."

The company has the burden of showing that the material for which confidential classification is sought qualifies for such treatment under the Statute and the Rule. The Statute

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provides several examples of proprietary, confidential information, which include trade secrets. The Rule requires that the utility demonstrate that material submitted falls into one of those statutory examples in order to justify satisfactorily our classifying such material as confidential.

With respect to the Company's trade secret argument, "trade secret" is defined in Sections 688.002 and 812.081 Florida Statutes. Section 688.002 defines it basically as information that is not readily ascertainable by persons who could obtain economic value from its disclosure. Section 812.081 defines it as information that would provide a business with an advantage over those who do not possess it. The principal thrust of these definitions is the disclosure of information held by a company to another entity which may derive economic benefit from the information to the detriment of the company. These two statutory definitions of "trade secrets" are provided in the context of one person or business enterprise wrongfully capitalizing upon the proprietary business information of another person or business. These statutes, one providing criminal sanctions (a third degree felony), and the other civil penalties (double damages and in cases of bad faith, attorney's fees) were written broadly to include all misappropriation in the context of competing businesses. They cannot be blindly applied in the context of a government created and protected monopoly.

This Commission is authorized by Section 364.183, Florida Statutes, to grant confidential treatment to proprietary confidential business information. That Section lists several statutory categories of information deemed to be confidential proprietary information, one of which is "trade secrets." Inherent in this finding is the Commission's obligation to balance the conflict between the demands of the Public Records Act and the nature of proprietary business information. This conflict stems from the strong policy of this state that documents utilized by the Commission in making its decisions should be public information and the policy that parties have a right to have their confidential proprietary business information protected. This balancing process requires the Commission to make a very careful examination, leading to

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determinations of whether information is a "trade secret" within the terms of Sections 688.02 and 812.081 and whether those definitions control our decisions in the context of the "trade secrets" as listed in Section 364.183. In view of our Public Records responsibilities and the broad nature of these Sections we take a narrower view of "trade secret" than contemplated in the purely competitive context. The purely competitive entities are not faced with the public disclosure demands placed upon us by the Public Records Act.

While we do not view these definitions as strictly controlling, we do see them as instructive as to the nature of information which the Legislature authorized us to protect from disclosure. The public interest demands that we make an independent determination of whether the information is a "trade secret" in the context of utilities regulated by this Commission. As discussed above the basic test is whether the information, if disclosed, would cause harm to the company.

After considering the arguments made in the pleadings outlined above and reviewing the subject documents at an In Camera inspection, I find that Bell has made a sufficient showing to warrant classifying those portions of the documents identified on Appendix A to this Order as proprietary, confidential information. Accordingly, only those portions of the subject documents identified in Appendix A to this Order (with exceptions as noted) are classified as proprietary, confidential information that is exempt from the requirements of the Public Records Act, Chapter 119, Florida Statutes. Thus, I specifically find that the exceptions noted in Appendix A and the material contained in the balance of the documents are not classified as proprietary, confidential information under the Act and the Rule and not exempt from public disclosure.

Bell has sufficiently demonstrated that portions of the information meet the definition of a "trade secret" and that the public interest does not require that this information be made public. In the main, the material specified proprietary herein consists of Bell's future projections of revenues from specific competitive services that are to be offered in identified locations and, in some instances, to specified customers. In my opinion, disclosure of this particular information to Bell's competitors would equip them with knowledge of the company's plans that would unfairly position

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these competitors to gain marketing advantages that are not available through their own efforts. It is my belief that Bell would suffer harm in marketing its competitive services in particular locations and to specific customers through the disclosure of such information to its competitors. Therefore, I find that the subject information is qualified for specified confidential classification. The company's requests for protective orders are granted to the extent that the relevant material is shown on Appendix A to this Order as being proprietary. However, OPC shall be provided the information in question and shall maintain its confidentiality consistent with this Order.

Now therefore it is

ORDERED by Commissioner John T. Herndon, as Prehearing Officer, following In Camera inspections of the documents described in this Order, that only those portions of the documents identified in Appendix A to this Order (with exceptions as noted) are classified as proprietary, confidential information pursuant to Rule 25‑22.006, Florida Administrative Code, in response to Southern Bell Telephone and Telegraph Company's requests for confidentiality and motions for protective orders. It is further

ORDERED that the requests for confidential classification and the motions for protective orders filed by Southern Bell Telephone and Telegraph Company and the responses and requests filed by the Office of the Public Counsel are hereby granted to the extent identified in this Order and denied in all other respects. It is further

ORDERED that if a protest is filed within 14 days of the date of this Order, it will be resolved by the appropriate Commission panel pursuant to Rule 25‑22.006(3)(d), Florida Administrative Code. It is further

ORDERED that if no timely protest is filed, this ruling shall become final pursuant to Rule 25‑22.006(2)(f) & (3)(d), Florida Administrative Code.

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By ORDER of Commissioner John T. Herndon, as Prehearing Officer, this 12th day of MARCH, 1990.

JOHN T. HERNDON, Commissioner

and Prehearing Officer

( S E A L )

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.

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.

SEE APPENDIX A ATTACHED TO ORIGINAL ORDER