

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Citizens of the State )	DOCKET NO. 890190-TL
of Florida to investigate SOUTHERN BELL )	
TELEPHONE AND TELEGRAPH COMPANY'S cost )	ORDER NO. 24437
allocation procedures )	
	ISSUED: 4/25/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman  
 J. TERRY DEASON  
 BETTY EASLEY  
 GERALD L. GUNTER

ORDER DENYING RECONSIDERATION  
OF ORDER NUMBER 23634

BY THE COMMISSION:

On January 24, 1990, the Prehearing Officer issued Order No. 22461 disposing of numerous discovery motions relative to the Office of Public Counsel's (OPC's) First Set of Requests for Production of Documents to Southern Bell Telephone and Telegraph Company (Southern Bell or the Company), BellSouth Services, Inc., BellCore, Southern Bell Advanced Systems, Inc., and BellSouth Advanced Systems, Inc., and First Set of Interrogatories to Southern Bell, filed November 18, 1988. On February 6, 1990, Southern Bell filed a Response to Order No. 22461 and Motion for Clarification. On February 14, 1990, OPC filed the Citizens' Response to Southern Bell's Motion for Clarification of Order No. 22461.

Order No. 22461 addressed issues of relevancy and confidentiality raised in the various motions filed in response to OPC's November 18, 1988, discovery requests. Additionally, Order No. 22461 directed Southern Bell to submit certain documents for the Prehearing Officer's review.

In Order No. 22461, the Prehearing Officer rejected Southern Bell's claim that information regarding its operations in states other than Florida was irrelevant to this proceeding. In so holding, the Prehearing Officer directed Southern Bell to provide information on other states that had been excised from the thirty-one (31) documents filed under Commission Document No. 3357-89. Southern Bell subsequently provided the requested information to

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the Commission and requested that the data be granted confidential treatment.

In Order No. 22461, the Prehearing Officer also directed Southern Bell to furnish for the Prehearing Officer's review certain documents which the Company claimed were internal audits and thus proprietary, pursuant to the specific exemption granted by Section 364.183(3)(b), Florida Statutes. These are the documents identified as "A" and "B" in Section IV of Order No. 22461.

The final category of documents addressed in Order No. 22461 was those identified as "D" in Section IV of the Order, also generally referred to as the "Benchmark" documents. Southern Bell claimed that these documents were similar to internal audits and also contained trade secrets. The Prehearing Officer directed Southern Bell to have any confidential material highlighted in these documents because if they were not found to be within the internal audit classification, it would be necessary to discern which parts of the documents contained confidential material.

Southern Bell's Response to Order No. 22461 and Motion for Clarification were disposed of by the Prehearing Officer in Order No. 23634, issued October 18, 1990. For the document referred to as "A," the Prehearing Officer ruled as follows:

The document referred to as "A" in Order No. 22461 is a 29 page document entitled "Report of the Operations Review Team on the Part 64 Cost Allocation Process." This report has been filed with the Commission under Document No. 497-90. Southern Bell has requested that this entire report be granted confidential treatment because it is "like an internal audit." Basically, this report presents a review of the apportionment of costs between regulated and unregulated lines of business for Quarter 1 of 1988. A team of employees was assembled to review and analyze certain Southern Bell and South Central Bell reports and to form an opinion as to the reasonableness of the costs and degree of compliance of the Cost Separations System's (CCS's) methodology with the Cost Allocation Manual (CAM). This document is not an internal audit and, therefore, cannot be granted confidential status through the specific exemption granted by Section 364.183(3)(b), Florida Statutes. It is our belief that the specific statutory exemptions to

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the public records requirements of Section 119.07(1), Florida Statutes, are meant to be construed narrowly in order to further the strong concept of "government in the sunshine" in the State of Florida. To hold otherwise, we believe, would only serve to thwart what we see as a clear legislative mandate regarding public records in Florida.

Order No. 23634, at Pages 4-5.

The documents referred to as "B" were found to be actual internal audits and were granted confidential treatment in their entirety. Order No. 23634, at Page 5.

As to the documents referred to as "D," the Prehearing Officer ruled as follows:

The final category of documents for which a ruling is required are those documents identified as "D" in Section IV of Order No. 22461. Southern Bell states that while these documents have been generally categorized as the "Benchmark" documents, they actually consist of two sets of unrelated documents. The first of these two sets is the group of documents filed under Commission Document No. 7790-89, which consists of three handwritten, unnumbered pages relating to, among other things, Southern Bell's "mark-up" on certain customer premises equipment (CPE) products. The Company has highlighted all of the numbers on these three pages, except for the very last number on unnumbered page three of the set. Southern Bell has requested that the highlighted data be granted specified confidential treatment because it relates to costs and revenue for unregulated lines of business. As stated in an earlier portion of this Order, unregulated businesses are not required to make all their records public documents. Accordingly, the rationale for granting confidential status to certain portions of Commission Document No. 1117-90 applies also to those highlighted portions of Commission Document No. 7790-89 discussed above.

The second of the two sets of unrelated documents identified as "D" in Order No. 22461 is a compilation of extractions from the so-called "Benchmark" reports and

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Southern Bell's response to those reports. In Order No. 22461, the Prehearing Officer declined to rule on Southern Bell's claim that these documents are "like internal audits." Rather, the Prehearing Officer directed the Company to resubmit these documents, with any asserted confidential information identified by highlighting, accompanied by justification for the requested confidential status. Southern Bell has not done so. Instead, Southern Bell has submitted one entire Benchmark report as a sample, under Commission Document No. 1118-90. The Company's stated rationale for so doing is that this should assist the Prehearing Officer in reaching the conclusion that these reports "are the equivalent of internal audits" and, therefore, confidential as a whole. Southern Bell states that "[u]sing the same procedure used to create an internal audit, Benchmark was retained to provide outside advice regarding the recombination of the regulated and CPE operations of Southern Bell." Southern Bell's Response to Order No. 22461, at page 4. Southern Bell characterizes this report as a "critical self-analysis." OPC's Response to this claim points to the fundamental factor which must be considered here: that "[h]ad the legislature intended to exempt from public disclosure every document critical of the company, it would have done so." OPC Response, at page 2. That is the position of this Commission. Accordingly, the rationale for denying confidential treatment to Commission Document No. 497-90 applies with equal force to Commission Document No. 1118-90. The specific statutory exemption from Section 119.07(1), Florida Statutes, contained in Section 364.18(3)(b), Florida Statutes, does not apply to this report and, therefore, confidential treatment cannot be accorded on this basis.

Order No. 23634, at Pages 5-6.

Finally, at the end of Order No. 23634, the Prehearing Officer directed that:

In accordance with the rulings contained herein, Southern Bell must now provide to OPC each and every document it has withheld from the November 18, 1988, discovery request based upon the claim that the

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responsive documents were pending rulings from the Commission regarding their confidentiality. These documents shall be provided within ten days of the date of this Order. The parties shall take all necessary steps to protect that information which has been granted specified confidential treatment.

Order No. 23634, at Page 7.

On October 25, 1990, Southern Bell filed a Motion for Extension of Time to respond to Orders Nos. 23633 and 23634. This Motion was granted, as reflected in Order No. 24143, issued February 21, 1991.

On November 1, 1990, Southern Bell filed a Motion for Partial Reconsideration by the Full Commission of Order No. 23634 and Request for Oral Argument. In response, OPC filed its Motion to Strike, or in the Alternative Deny, Southern Bell's Motion and Request for Oral Argument. On November 20, 1990, Southern Bell filed its Response to OPC's Motion.

Southern Bell's Motion for Partial Reconsideration of Order No. 23634 requests us to reconsider only that part of Order No. 23634 which held that a 29 page document entitled "Report of the Operations Review Team on the Part 64 Cost Allocation Process" and documents entitled the "Benchmark" reports should not be accorded confidential treatment. These are the documents referred to as "A" and "D" in Order No. 22461. As grounds for its Motion, Southern Bell asserts that:

Contrary to the holding of the Prehearing Officer, the Florida Legislature has not removed all discretion from the Commission regarding which documents it may or may not deem to be confidential. For instance, the Legislature has required the Commission to follow the Florida Rules of Civil Procedure in its quasi-adjudicatory role. Section 120.57, Florida Statutes. The Florida Rules of Civil Procedure provide that a court may in its discretion treat documents subject to discovery as confidential. Rule 1.280(c), Florida Rules of Civil Procedure. In addition, Florida case law provides that federal cases construing the Federal Rules of Civil Procedure may be used to construe the Florida Rules of Civil Procedure.

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Motion, at Pages 2-3. From there, the Company next cites a number of federal cases finding that critical self-analysis should be treated as privileged non-discoverable information, as well as a Harvard Law Review article supporting the holdings of the federal cases. Southern Bell then asserts that:

The same rationale used by the Federal Courts for holding critical self-analysis as non-discoverable information should be used by the Commission to protect critical self-analysis from public disclosure.

Motion, at Page 6. Southern Bell urges us to take such action to "protect the Company and its ratepayers from harm that is likely to occur otherwise." Motion, at Page 7.

The purpose of a motion for reconsideration is to point out some matter of law or fact which the Commission failed to consider or overlooked in its prior decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). Southern Bell has not made such a showing, but instead, merely reargues its original position another time. Contrary to Southern Bell's claims, the Prehearing Officer did not believe he was without discretion; rather, the Prehearing Officer exercised his discretion when he denied the Company's request for confidential treatment of the "Operations Review Team" and "Benchmark" documents. Accordingly, we find it appropriate to affirm Order No. 23634 and deny Southern Bell's Motion for Reconsideration.

We wish to make it clear that by affirming the Prehearing Officer's ruling, we are not foreclosing the possibility that a claim of confidentiality could exist for documents that are "like internal audits." We do not, however, believe that the facts presented here warrant such a finding.

Southern Bell requested that it be granted oral argument on its Motion for Reconsideration. We did not schedule this matter for separate oral argument, but granted Southern Bell's request to the extent of allowing participation at our Agenda Conference.

Next, we address the November 8, 1990, Motion to Strike, or in the Alternative to Deny, Southern Bell's Motion for Reconsideration filed by OPC. OPC asserts that Southern Bell's Motion for Reconsideration of Order No. 23634 amounts to a request for

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reconsideration of an order disposing of a request for reconsideration. However, a review of the events leading up to the issuance of Order No. 23634 clearly shows that the items for which Southern Bell is presently seeking reconsideration were ruled upon for only the first time in Order No. 23634. Accordingly, OPC's Motion to Strike shall be denied. By our action in affirming the Prehearing Officer's ruling, OPC's Alternative Motion to Deny Southern Bell's Motion for Partial Reconsideration of Order No. 23634 has been granted.

Finally, as noted in Order No. 24320, issued April 3, 1991, information from the "Benchmark" documents has been used in the prefiled testimony of OPC's witness Kimberly Dismukes. Southern Bell cited its pending request for reconsideration of Order No. 23634 as grounds for granting specified confidential treatment to the references in Ms. Dismukes testimony to information contained in the "Benchmark" documents. As the Prehearing Officer stated in Order No. 24320, the confidentiality of the "Benchmark" documents is being determined here, upon the request for reconsideration of Order No. 23634, which has been denied as set forth above.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Partial Reconsideration by the Full Commission of Order No. 23634 filed by Southern Bell Telephone and Telegraph Company on November 1, 1990, is hereby denied for the reasons set forth herein. It is further

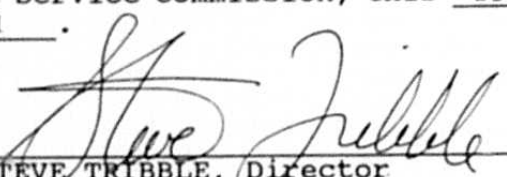
ORDERED that Southern Bell Telephone and Telegraph Company's Request for Oral Argument filed November 1, 1990, is hereby granted to the extent set forth herein. It is further

ORDERED that the Office of Public Counsel's Motion to Strike filed November 8, 1990, is hereby denied while its Alternative Motion to Deny is hereby granted for the reasons set forth herein. It is further

ORDERED that Commission Documents Nos. 7789-89, 8012-89, 497-90, and 1118-90 are hereby denied specified confidential treatment for the reasons discussed in the body of this Order.

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By ORDER of the Florida Public Service Commission, this 25th  
day of APRIL, 1991.

  
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STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

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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 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



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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.