

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petitions of SOUTHERN BELL)	DOCKET NO. 880069-TL
TELEPHONE AND TELEGRAPH COMPANY for)	
a rate stabilization and implemen-)	ORDER NO. 25328
tation orders and other relief)	
_____)	ISSUED: 11/12/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
 SUSAN F. CLARK
 J. TERRY DEASON
 BETTY EASLEY
 MICHAEL MCK. WILSON

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

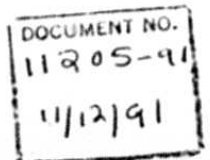
BY THE COMMISSION:

On September 9, 1991, pursuant to Rule 25-24.020, Florida Administrative Code, Southern Bell Telephone and Telegraph Company (Southern Bell) filed a Petition for a Declaratory Statement (Petition) regarding the Commission's "legal authority under Chapters 215, 350 and 364, Florida Statutes."

In support of its Petition, the Company argues that the Commission has expressed a willingness to consider alternatives to a refund of the excess funds, and that parties have suggested that the Commission consider using the funds to create a state-of-the-art infrastructure to provide access to "special needs" services.

The Company requests that the Commission define its legal authority under Chapters 350 and 364 regarding disposition of the funds in an alternative fashion. The Company notes that certain past Commission orders which provided disposition of similar funds by means other than a refund have withstood legal review. The Company also asks that the Commission determine whether "Florida's statutes (Title XIV) [and Chapter 215,] regarding taxation, appropriations and budgeting would permit the Commission to dispose of the funds for special needs projects, either directly or indirectly, to various state agencies and local governmental bodies." The Company believes that this is appropriate because creating the proposals will be an expensive project, and because a ruling on the Commission's authority at this point "will lift any cloud that might otherwise hang over further deliberations."

On September 30, 1991, both the Office of Public Counsel and the Attorney General of the State of Florida filed motions to



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dismiss Southern Bell's Petition. Public Counsel's argument in support of its motion is summarized as follows:

1. The Petition asks for a legal opinion as to the Commission's general authority under Chapters 215, 350 and 364, Florida Statutes, and omits any description of a specific project or any specificity as to how a statutory provision applies to Southern Bell in its particular circumstances as required by Section 120.656, Florida Statutes, and Rule 25-22.020, Florida Administrative Code;
2. Because of Southern Bell's failure to comply with the requirements of a declaratory statement, the Commission should not grant Southern Bell's request. [citations omitted]

The Attorney General's argument is summarized as follows:

1. Declaratory statements must be premised on an actual, present and practical need; may not be invoked where the relief is an advisory opinion or where there is no controversy; and must demonstrate a bona fide controversy, justifiable in the sense that it flows out of some definite and concrete assertion of right, involving legal or equitable relations between parties having adverse interests with respect to which the declaration is sought. [citations omitted]
2. Southern Bell failed completely to plead with specificity the statute, rule or order at issue and to state the concrete set of facts essential to providing a declaratory statement.
3. The Company failed to plead that its interests may be potentially impacted. Rather, it argues that "others" have made a suggestion for disposition of monies on special projects.
4. Failure to meet the minimal statutory and rule pleading prerequisites for declaratory statements dictates that the Commission dismiss the Petition.

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In addition to its argument, the Attorney General also requests that, pursuant to Rule 25-22.022, Florida Administrative Code, the Commission hold a hearing on an expedited basis.

On October 1, 1991, the Florida Cable Television Association (FCTA) also filed a Motion to Dismiss Southern Bell's Petition. The FCTA's argument is summarized as follows:

1. Southern Bell has failed to adequately describe "special needs" and that such failure precludes an response to the Petition.
2. The Petition's lack of specificity of the nature of special needs creates a question as to whether these projects will be monopoly or competitive services and which set of regulatory standards is appropriate under Chapter 364.
3. The special needs proposed by the Company are competitive services to be subsidized by ratepayers or monopoly services in violation of section 364.3381, Florida Statutes, and the Commission lacks jurisdiction to consider the Petition.

Section 120.565, Florida Statutes, sets forth both the authority for an agency to issue declaratory statements and the requirements with which the agency must comply. This Section provides:

A declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only.

The Commission's provisions regarding declaratory statements are found in Part III of Chapter 25-22, Florida Administrative Code. Rule 25-22.020(1) provides, in pertinent part,

Any person may seek a declaratory statement as to the applicability of a specific statutory provision or of any rule or order of the Commission as it applies to the Petitioner in his or her particular set of circumstances only.

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Rule 25-22.021 provides that:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of any statutory provision, rule or order as it does, or may, apply to petitioner in his or her particular circumstances only. The potential impact upon petitioner's interests must be alleged in order for petitioner to show the existence of a controversy, question or doubt.

The essential elements of both Section 120.656 and the Commission's rules are that a petition for declaratory statement be well-plead. A petition must state with specificity the particular factual situation of the petitioner as well as the specific statute, rule or order for which the petitioner seeks a ruling. Based on these standards, we find that Southern Bell has failed to well plead its Petition. In addition, since the basic subject of the Petition is currently the subject of litigation in this Docket, declaratory relief is particularly inappropriate. A review of the applicable case law further reinforces our conclusions.

A petition for a declaratory statement regarding a matter which is currently the subject of litigation must raise a bona fide doubt or dispute which is incapable of resolution in the litigation proceeding. See, Couch v. State, 377 So.2d 32, 33 (Fla 1st DCA 1979); Fox v Board of Osteopathic Medical Examiners, 395 So.2d 192, 193 (Fla. 1st DCA 1981) ("[D]eclaratory statement proceedings . . . are not properly filed on issues simultaneously litigated in judicial or other administrative proceedings . . ." In Fox, the First District Court of Appeals affirmed an agency decision which denied a petition for a declaratory statement where all issues posed in the petition related to matters connected with the pending Section 120.57 proceeding.); Lawyers Professional Liability Insurance Company v. Shand, Morahan & Company, Inc., 394 So.2d 238, 240 (Fla. 1st DCA 1981) (Court reversed and remanded an agency order where there was no showing "that circumstances existed which would warrant a departure from the rule that an action for declaratory relief, initiated when a suit is already pending which involves the same issues and which would afford full, adequate and complete relief will not be permitted to proceed." Id. at 240) (emphasis added) citing, Taylor v. Cooper, 60 So.2d 534 (Fla. 1952) (In Taylor, the Florida Supreme Court held that a declaratory

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judgment will be denied when the parties can obtain complete relief in another pending civil litigation.)

The Commission is not obligated under the Florida Statutes to "give advice as to the jurisdiction of a court to determine matters then pending before the court, or to issue opinions or decisions settling doubts or questions as to the outcome of controversies then pending in a court." See, Friends of Children v. Dept. of HRS, 504 So.2d 1343, 1345 (Fla. 1st DCA 1987).

Additionally, the Company's Petition, if granted, will result in a final order which may serve as a preemption of rights in the proceeding in the instant docket before the Commission. See Section 120.656. The First District Court of Appeal has reasoned that it is

. . . an abuse of authority for an agency to either permit the use of the declaratory statement process by one party to a controversy as a vehicle for obstructing an opposing party's pursuit of a judicial remedy, or as a means of obtaining, or attempting to obtain, administrative preemption over legal issues then pending in a court proceeding involving the same parties. Friends at 1345.

It is improper to answer hypothetical questions with a declaratory statement. In its Petition, Southern Bell has failed to define "Special Needs." Indeed, the entire purpose of the Petition appears on its face to be an effort to have the Commission to define the parameters of the Commission's jurisdiction regarding "special needs" projects without the benefit of any specific facts regarding such "special needs." Therefore, there are no concrete facts for the Commission to address in light of the applicable law.

Declaratory statements should only be granted where the petition has clearly set forth specific facts and circumstances which show that the question presented relates only to the petitioner and his particular set of circumstances. Thus, petitions which provide only cursory factual recitation or which use broad, undefined terms . . . should be carefully scrutinized. Florida

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Optometric Association v. Department of Professional
Regulation, Board of Opticianry, 567 So.2d 928, 937 (Fla
1st DCA 1990).

Additionally, the Company has asked the Commission to define the Commission's powers under specified statutes. The Company does not request the Commission's opinion regarding statutes as they apply to Southern Bell. Rather, it generically asks for a determination of what the Commission may do pursuant to the Florida Statutes. This is not the purpose of Section 120.565. As the Attorney General argues, the Petition places the Commission in the untenable position of applying non-specific law to unstated facts.

Southern Bell has asked the Commission to define, in a vacuum, its statutory role regarding alternative methods of disposition of funds which have accrued through nonrecurring charges. Should the Commission determine, by means of a declaratory statement, that alternative disposition of funds accrued through nonrecurring charges is within our powers, other regulated entities reasonably may be expected to line up for such alternative dispositions.

Under Chapter 120, Florida Statutes, this sort of a determination is appropriate on a specific set of facts, in the hearing context or in a rule-making proceeding. However, such a determination does not appear to be appropriate under Chapter 120 in the circumstances presented by the instant Petition. Indeed, the First District Court of Appeal has reasoned that "declaratory statements are not to be used as a vehicle for the adoption of broad agency policies, nor are they to be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons." Florida Optometric Association at 937.

Comparing the Petition with the standards discussed above, it is clear that Southern Bell's Petition fails to meet the minimal standards necessary to grant a request for a declaratory statement. Therefore, we find it appropriate to deny Southern Bell's Request for Declaratory Statement and to dismiss the Petition.

With respect to the Attorney General's request for a hearing, Rule 25-22.022, Florida Administrative Code, provides that the Commission may hold a hearing to dispose of a petition submitted

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pursuant to Section 120.565, Florida Statutes. A hearing pursuant to Rule 25-22.022 is discretionary with the Commission. In light of our decision to dismiss Southern Bell's Petition, the request for hearing becomes moot.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Southern Bell Telephone and Telegraph Company's Petition for Declaratory Statement is denied as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 12th day of NOVEMBER, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

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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.