

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of SOUTHERN BELL ) DOCKET NO. 880069-TL  
TELEPHONE AND TELEGRAPH COMPANY for rate )  
stabilization and implementation orders ) ORDER NO. 25806  
and other relief. )  
\_\_\_\_\_ ) ISSUED: 02/25/92

The following Commissioners participated in the disposition of this matter:

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

ORDER DISPOSING OF MOTION FOR  
RECONSIDERATION OF ORDER NO. 25541  
AND DISPOSING OF MOTION FOR REVIEW  
OF ORDER NO. 25524

BY THE COMMISSION:

I. BACKGROUND

By Order No. 25541, issued December 26, 1992, this Commission found it appropriate to hold an expedited hearing to address "whether Southern Bell's cost of capital has significantly changed beyond what was contemplated by rate stabilization such that a new ROE should be set; if so, whether any revenues should be placed subject to refund pending the outcome of Southern Bell's impending rate case; and if so, the amount to be placed subject to refund." Section II(C) of the Order reflects our decision made at our December 3, 1991 Agenda Conference to conduct an expedited proceeding to examine Southern Bell's ROE. On January 10, Southern Bell filed a Request for Reconsideration of Section II, Paragraph C, of Order No. 25541. On January 16, 1992, Public Counsel filed a Response to Southern Bell's Motion for Reconsideration.

By Order No. 25524, the Prehearing Officer established a procedural schedule to govern the expedited proceeding. The hearing was scheduled for February 10 and 11, 1992, with direct and rebuttal testimony to be filed on January 16 and 30, 1992, respectively. In addition Order No. 25524 also set forth the following issues to be addressed by the parties' testimony:

What is an appropriate allowed return on common equity for Southern Bell Telephone and Telegraph Company for the purposes of this limited proceeding?

How should the revenue to be placed subject to refund, if any, be calculated?

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On January 3, 1992, Southern Bell filed a Motion for Review of Order No. 25524. The Attorney General filed a Response to Southern Bell's Motion for Review on January 15, 1992. Public Counsel responded to Southern Bell's Motion on January 16, 1992.

II. Motion for Reconsideration of Order No. 25541

Southern Bell's Motion for Reconsideration of Section II(C) Order No. 25541 raises essentially four arguments. First, Southern Bell argues that the decision to examine the Company's ROE in the scheduled expedited proceeding is directly contrary to the Commission's holding in Order No. 25482<sup>1</sup>. Second, Southern Bell argues that the terms of the rate stabilization plan do not contemplate that any proceeding can be established merely because of purported change in Southern Bell's cost of capital. Further, only an unforeseen precipitous occurrence which places the interest of the company or its ratepayers in substantial jeopardy would justify alteration or termination of the plan. Third, since Order No. 25541 does not base the institution of the current proceeding on a change in Southern Bell's earnings or any other unforeseen precipitous event, it errs as a matter of law. Fourth, Southern Bell argues the Commission recognized the need for full and complete information that reflected the operations of the Company under the Plan and that changes in the terms of the Plan would distort those results. In addition, the Company states that to begin to break the Plan apart and examine it by piece-parts does not foster the policy of encouraging risk taking inherent in the Plan.

Public Counsel responded arguing that nothing in Chapter 364, Florida Statutes, requires a showing of significant unforeseen circumstances before the Commission may exercise its authority to set reasonable rates. Public Counsel states that Section 364.14, Florida Statutes, mandates that the Commission shall determine the just and reasonable rates to be charged as well as limit the compensation to a level that is fair and reasonable. Public Counsel further argues that prior orders of the Commission cannot change or abrogate the Commission's statutory duty to set Southern Bell's rates at reasonable levels. In support, Public Counsel

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<sup>1</sup>Order No. 25482 disposed of motions for reconsideration of Order No. 24066. Order No. 24066 embodies the Commission's decision to continue the parameters of the rate stabilization plan but without resetting rates for 1991 and 1992.

cites to Order No. 22352 in the GTE Tax Savings Investigation as well as numerous cases whose citations are omitted here.

Upon consideration, we find that the decision to hold an expedited hearing is not inconsistent with the holding in Order No. 25482. That Order dealt with motions for reconsideration of Order No. 24066. The scope of the Commission's determination in Order No. 25482 was limited to whether any party had revealed an error of fact or law in reaching its decision in Order No. 24066. The scope of the reconsideration decision was limited to the record before the Commission at the time it reached its decision in Order No. 24066. The Commission determined that there were no errors of fact or law based on the record at the time the Commission made its decision in December, 1990. Order No. 25482 did not hold that Southern Bell's current ROE is endorsed by the Commission as appropriate. The question set forth by the Commission in Order 25541 is the appropriateness of Southern Bell's current ROE.

With respect to Southern Bell's second, third and fourth arguments, we find that as a matter of law the Commission is not precluded from conducting a hearing to establish a reasonable ROE for purposes of holding revenues subject to refund pending a full review of the rate stabilization plan in the broader context of a full rate case. This interim measure simply protects both the customers as well as the Company until the case is completed. Since no substantive changes to Southern Bell's rates are being considered in expedited proceeding, merely setting revenues subject to refund will not distort the results of the plan. Accordingly, we find it appropriate to deny Southern Bell's request for reconsideration of Section II(C) of Order No. 25481.

### III. Motion for Review of Order No. 25524

Southern Bell's Motion for Review of Order No. 25524 asks that the Commission review the Prehearing Officer's procedural order and remand with directions to establish a hearing schedule that "allows the parties to have a fair and equitable hearing, including a reasonable opportunity for discovery" and further, to "have parties identify and include only those issues which are germane to the scope of the proceeding established in Order No. 25541." Southern Bell argues that the procedural schedule does not allow an adequate opportunity for any reasonable discovery and to that extent, it constitutes an unconstitutional denial of due process. In support, Southern Bell cites to Florida Gas Co. v. Hawkins, 372 So.2d 1118, 1121 (Fla. 1979), in which the Court stated:

When factual matters affecting the fairness of utility rates are being considered by a regulatory commission the rudiments of fair play and due process require that the Company must be afforded a fair hearing and an opportunity to explain or rebut those matters. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to avoid delay, when the minimal requirement of a fair hearing has been neglected or ignored. (citations omitted)

With respect to discovery, Southern Bell argues that it requires discovery to understand the other parties positions and the evidence which may be presented. The Company further claims that although it promptly served its first discovery, the responses would not be due until January 20, 1992; that the Company has had to guess at which parties might choose to participate; and that there is not enough time after rebuttal testimony is filed for discovery.

Southern Bell's Motion for Review also argues that the issues set forth in Order No. 25524 must be redefined because they do not reflect the Commission's decision in Order No. 25541. Southern Bell states that the difference between the text of the issues in Order No. 25524 and the Commission's expressions in Order No. 25541 would foreclose the very arguments that the Commission acknowledged in Order No. 25541. Specifically, the Company argues that there is an issue as to whether it is fundamentally unfair to try and change the rate-setting point at this time, since, the Commission denied reconsideration of the Order No. 24066, which continued the rate stabilization parameters but declined to reset rates. Southern Bell finally argues that placing revenues subject to bond would jeopardize Southern Bell's earnings and destroys the incentives that the Commission created through the adoption of the rate stabilization plan.

Public Counsel responded, arguing that Southern Bell has had more than two months from the date the Commission decided to hold the expedited hearing and that this is more than an adequate amount of time in which to prepare for the hearing. Public Counsel notes that in a similar action by the Commission regarding a limited proceeding to reset United Telephone Company's ROE, the Commission took less than forty days from its initial decision to hold an expedited hearing to the actual hearing. Public Counsel further notes that no party made any claims of due process violations based on that time schedule. Public Counsel also argues that Southern Bell's reliance on Florida Gas v. Hawkins is misplaced. In



addition, Public Counsel notes two statutory provisions, Sections 407.50(9)(b) and 120.54(4), Florida Statutes, that provide for evidentiary hearings to be conducted within a thirty-day period. Public Counsel further states that for every day of delay in a decision by the Commission, customers lose the possibility of ultimately recovering Southern Bell's overcharges. With regard to Southern Bell's arguments on the issues, Public Counsel states that the issues are written broadly enough to allow Southern Bell to argue all of the matters raised in its motion.

The Attorney General, in its response, argues that Southern Bell's contention, that holding any revenues subject to refund will deny the Company due process, is wrong and over-stated. The Attorney General argues that, because Southern Bell will continue to collect revenues from its current rates even though subject to refund, there is no "taking" of property in the constitutional sense. The Attorney General further notes that the Commission's statutory obligation to monitor the compensation levels of regulated utilities and to prevent excessive compensation requires the Commission to know whether Southern Bell's current compensation levels are reasonable. The Attorney General also argues that Southern Bell's claim that over two months time is insufficient to adequately conduct its case is specious. The Attorney General, like Public Counsel, argues that Florida Gas v. Hawkins is inapplicable here. Finally, the Attorney General states that the Commission jurisdiction over revenues related to the alleged excessive compensation is irretrievably lost every day the Commission fails to act.

Upon consideration, we find that the procedural schedule set forth in Order No. 25524 provides an adequate due process opportunity for Southern Bell to put on its case. As Southern Bell stated, the Company promptly served discovery on the parties seeking to identify which parties were proposing to provide a witness as well as other information regarding any proposed witnesses. In conjunction with its discovery requests Southern Bell also filed a motion for expedited response to the requests. All of the parties on whom discovery was served responded within Southern Bell's requested expedited timeframe. Direct testimony was filed as scheduled on January 16, 1992. All of the cost of capital witnesses, except Southern Bell's, were deposed by our Staff during the week of January 27 through January 31, 1992. Southern Bell participated in each of those depositions subject to a general objection based on its instant claim that the entire process was inappropriate. Even though this proceeding is on an expedited basis, more than an adequate time has been provided for

Southern Bell to conduct discovery. Moreover, every party expeditiously responded to Southern Bell's discovery requests.

With respect to Southern Bell's reliance on Florida Gas v. Hawkins, we find such reliance misplaced. In that case the Commission dismissed a rate increase request, without any hearing, solely on the basis that the utility was earning within its authorized range as illustrated on its then current surveillance report. The Court, in overturning the Commission's decision, chastised the Commission for failing to give the utility an opportunity for a hearing to contest the basis of the Commission's decision. In the case now before us, the hearing scheduled for February 10 and 11 is the due process opportunity that the Court found lacking in Florida Gas v. Hawkins.

We also disagree with Southern Bell's suggestion that placing any revenues subject to refund either is an unconstitutional taking or jeopardizes Southern Bell's earnings. The only action contemplated is that potentially some amount of Southern Bell's earnings may be placed subject to refund at the conclusion of the impending rate case. Such action "takes" nothing from Southern Bell. It merely implements a mechanism to protect Southern Bell's customers until a determination can be made as to whether the revenues in question constitute excessive compensation to which Southern Bell is not entitled. If it is determined that the revenues are in excess of the amount the Commission ultimately determines fair, just and reasonable, Southern is still not deprived of anything to which it is entitled and the revenues will be returned to the customers; if not, Southern Bell will continue to retain the revenues. If any revenues are "taken" from Southern Bell via refunds to Southern Bell's customers, such action will be pursuant to full due process opportunities at the conclusion of the rate case. The same rationale applies equally to the notion that Southern Bell will be deprived of any incentives under the rate stabilization plan. Southern Bell will not be deprived of anything, if at all, until the conclusion of the rate case.

With respect to Southern Bell's arguments concerning the issues set forth in Order No. 25524, the issues were intentionally left few in number and drafted broadly to allow parties the latitude to make any argument they felt necessary to raise within the general scope of the proceeding. Due process requires that parties have reasonable notice of the matters at issue and an opportunity to present argument and evidence relevant to the issues. While it appears that Southern Bell may desire a larger number of more strategically drafted issues, the existing list

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easily accommodates the issues and testimony so far presented by Southern Bell. Nor is the list of issues inconsistent with the Commission's discussion in Order No. 25541.

Based on the foregoing discussion, we find it appropriate to deny Southern Bell's request for review and remand of Order No. 25524.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Southern Bell Telephone and Telegraph Company's Motion for Review of Order No. 25524 is denied as set forth in the body of this Order. It is further

ORDERED that Southern Bell's Motion for Reconsideration of Section II(C) of Order No. 25541 is denied as set forth in the body of this Order.

By ORDER of the Florida Public Service Commission, this 25th day of FEBRUARY, 1992.

  
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STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

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Commissioner Beard dissented from the Commission's decision in Section II of this Order denying Southern Bell's Motion for Reconsideration of Section II(C) of Order No. 25541.

NOTICE OF 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

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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 the Commission's final action in this matter may request 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.