BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Development of local exchange telephone company cost study methodology(ies).	)	DOCKET NO. 900633-TL ORDER NO. PSC-92-0132-FOF-TL ISSUED: 3/31/92

The following Commissioners participated in the disposition of this matter:

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

ORDER UPON RECONSIDERATION OF ORDER NO. 25310

BY THE COMMISSION:

I. BACKGROUND

On February 1, 1991, Southern Bell Telephone and Telegraph Company (Southern Bell or the Company) filed a Request for Confidential Treatment of certain information provided in response to the Commission Staff's December 7, 1990, data request. The material involved represents details of the Company's computer cost models. On November 7, 1991, the Prehearing Officer issued Order No. 25310 which granted in part, and denied in part, the confidential treatment of Documents Nos. 0752-91 and 1044-91 which were the subject of the Company's February 1, 1991, Request. On November 18, 1991, the Company filed a Motion for Reconsideration to the Prehearing Officer of Order No. 25310. The Office of Public Counsel did not respond to the Company's Motion for Reconsideration. On February 6, 1992, in order to avoid multiple layers of reconsideration, and consistent with recent decisions, the Prehearing Officer referred this matter to the full Commission.

II. MOTION FOR RECONSIDERATION

Initially, we note that:

> The purpose of reconsideration is merely to bring to the attention of the trial court or, in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. It is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment of the order.

Diamond Cab Company of Miami v. King, 146 So.2d 889, 891 (Fla. 1962) (citations omitted).

The Company's Motion for Reconsideration straddles the line of this standard. The Motion more fully develops the arguments in the initial request and adds entirely new arguments. An example of this is the notion that some material, if divulged, could be used to "reverse engineer" Southern Bell's costs. The "reverse engineering" argument was not included in the Company's initial pleading. Neither new arguments nor better explanations are appropriate matters for reconsideration. While the Motion does question the Prehearing Officer's analysis in refusing to grant confidential treatment to some material, we find that, based upon the pleading which was before the Prehearing Officer, the results which he reached were correct. Upon review, we deny the Company's Motion for Reconsideration.

III. CONFIDENTIALITY OF INFORMATION IN DOCUMENTS NOS. 0752-91 AND 1044-91

As discussed above we denied the Company's request for reconsideration. However, due to the development of the Company's initial arguments, and the presentation of some new arguments in its Motion for Reconsideration, it appears that some additional material should be held confidential. While some of the arguments appear to be beyond the scope of reconsideration, in fairness to the Company, we shall, on our own motion, reconsider Order No. 25310 based upon the elaborated arguments set forth in the Company's November 18, 1991, Motion for Reconsideration. However, we caution the Company against relying on the availability of such latitude in the future. We have some concern that this decision may perpetuate the administrative quagmire which results from weak initial pleadings followed by more adequately reasoned motions for reconsideration.

The Company's arguments for the confidentiality of the material are found at Attachment A of its Request, and tied to the specific material through the use of a chart which is found at Attachment B of the Request. According to the Company, the material at issue falls into two general categories: that which is purported to a trade secret, and that which, if disclosed, would impair the ability of the Company to contract on favorable terms.

Trade secrets are exempt from the public records act pursuant to Section 364.183(a), Florida Statutes. However, they are not defined in Chapter 364, Florida Statutes. Chapter 688, Florida Statutes is the Uniform Trade Secret Act. Section 688.002(4) provides that:

> "Trade Secret" means information . . . 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.

Chapter 812, Florida Statutes addresses theft, robbery, and related crimes. Section 812.081(1)(c) provides that:

> [A] trade secret is considered to be: 1. Secret; 2. Of value; 3. For use or in use by the business; and 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

Upon initial review, some of the material at issue in the Company's Request appeared to be of little or no value under Section 688 and little or no advantage under Section 812. While the Company takes exception to the way in which the concepts were articulated in Order No. 25310, the Prehearing Officer denied confidential treatment of material in items 2b, 3, and 6b due to the Company's initial failure to support the value or advantage elements of the tests for a trade secret. Moreover, the "illustrative numbers" aspect of items 16d and 16f raised doubts that disclosure of the information would impair the ability of the Company to contract on favorable terms. Faced with a sparse pleading, a blank worksheet, "illustrative numbers," and information conceptually identical to that which had previously been disclosed by the Company, the Prehearing Officer found that certain material was not entitled to protection.

We note that the Company has the burden of proof in matters before the Commission, See, Florida Power Corporation v. Cresse,

413 So.2d 1187 (Fla. 1982) and find that if the Company wants material to be treated as confidential, it must provide the Commission with enough information to support that determination.

The Commission has characterized the enumerated items listed at Section 364.183(3)(a)-(f), Florida Statutes as per se proprietary business information which are entitled to confidential treatment under the Statute. However, merely asserting that material is an enumerated per se item does not relieve Southern Bell of the obligation to demonstrate that the material is indeed as purported. We find that an adequately reasoned pleading asserting that an item is a trade secret and entitled to confidential treatment under the Statute should begin by defining the elements of a trade secret and then demonstrating that the material meets each requirement. If the Office of Public Counsel, or another party, disagrees with either the definition, or with the application of the definition to the material at issue, such party can offer a counter position and the Commission will decide based upon the pleadings before it.

In its Motion for Reconsideration, Southern Bell argued that, under a trade secret analysis, there is, in essence, no threshold standard for value and that any value will suffice. We note that Southern Bell is quite protective of seemingly all information and that, in some cosmic sense of economic theory, any information which is not previously known, but later becomes known, may have some infinitesimally small value. Thus, absent a very close examination of the concept of value, it would appear that, in the case of Southern Bell, the trade secret exemption of Section 364.183, Florida Statutes could swallow the public records law. Ultimately, the judiciary may need to define for us the threshold definition of "value" to be used in the determination of whether an item is a trade secret under the Florida Statutes, in the context of regulated monopolies in the telecommunications industry.

In the instant case, we find that the Company's pleadings are more conclusory than demonstrative regarding the concepts of value and advantage under the statutory tests for a trade secret. The same is true of the Company's arguments that disclosure of the material will impair the ability of the Company to contract. However, in this instance, we do not disagree with the Company's conclusions.

There is no dispute regarding the material which the Prehearing officer held to be confidential. Such material shall remain confidential upon reconsideration. The items which were denied confidential treatment in Order No. 25310 are of two types. First, there are three sets of printouts which show how Southern Bell computes certain cost factors. These are:

Item 2b, Attachment B
administrative expense factors
Item 3, Attachments A & B
annual cost factors
Item 6b, Attachments A & B
common equipment and power factor

Factors derived using these worksheets are input into various incremental cost models.

In its Motion for Reconsideration, Southern Bell offers two arguments for the confidential treatment of its cost factors. First, the Company asserts that "By taking the Cost Factor Data, competitors and Southern Bell's vendors can effectively 'reverse engineer' into specific knowledge of Southern Bell's actual costs." We find that this argument misses the purpose of these factors.

Fundamentally, factors generated using the computations in the worksheets are intended to ensure that certain directly attributable costs are included in an incremental cost study. For example, when determining the cost of a new service, the cost analyst intuitively knows that the introduction of the service will result in an increase in certain direct administrative expenses; the difficulty, however, is identifying, in a cost-effective manner, precisely what these expenses are.

The approach typically taken by LEC cost analysts assumes that there are linear relationships between investment and certain categories of expenses -- e.g., for each dollar of additional investment made, there will be a given percent increase in expenses. In developing an administrative expense factor, a cost analyst would determine, from historic or perhaps budgeted data, a ratio of expenses to investments added. In an incremental cost study, this factor would be multiplied by an investment amount to impute an amount for administrative expenses to the service being studied.

The key point is that the cost factor worksheets merely show ways that Southern Bell analyzes certain costs; absent the appropriate Company-specific data required for the computations, nothing is revealed about Southern Bell's costs. In this context, the Company's "reverse engineering" argument is irrelevant because no cost information is involved. Moreover, we find that the engineering metaphor is generally inappropriate in regard to expenses.

Southern Bell's second argument regarding the Cost Factor Data is that the Prehearing Officer erred in concluding that these factor worksheets have little value because they are conceptually identical to those described in the Florida Private Line/Special Access Cost Study Manual. The Company's claim appears to be that even if these worksheets are conceptually identical to those discussed in the Cost Study Manual, they have economic value because they indicate the specific computations required to derive the cost factors. This detailed information is held secret by Southern Bell, and we agree that knowledge of the specific algorithms could be beneficial to a third party. Accordingly, solely on this basis and in an abundance of caution, we find that the Cost Factor Data shall be afforded confidential treatment.

The second type of material relates to the Switching Cost Information System (SCIS), a BellCore proprietary cost model. Item 16d is a SCIS output report for a 5ESS switch, while Item 16f is the input report used to generate Item 16d. The Company's "reverse engineering" argument, presented for the first time in its Motion for Reconsideration, is persuasive regarding this material. With that elaboration by the Company, we agree that disclosure of the material could impair the ability of the Company to contract. Thus, with the exception of the material discussed below, the requested material in Items 16d and 16f shall be afforded confidential treatment.

Item 16(f), Attachment A is an SCIS input report. In response to Staff's Second Set of Data Requests, Item No. 3, Southern Bell provided virtually identical information. However, in that instance the Company requested confidential treatment for only two numbers on the document. Thus, analogous numbers have been previously disclosed. Additionally, the values on the instant document do not represent actual results. Therefore, we find that confidential treatment for 16(f), Attachment A is appropriate for only the two numbers which are analogous to those which have not

been previously disclosed by the Company. The numbers in question appear to represent discount percentages which Southern Bell has been able to negotiate with a switch manufacturer. We find that revealing the figures would impair the Company's ability to contract with vendors. Thus, the only numbers within Item 16(f), Attachment A which qualify for confidential treatment are those found on line 5.

Thus, on our own motion, in light of the Company's arguments in its initial Request, as elaborated by those in its Motion for Reconsideration, we grant confidential treatment to all of the material at issue except for the previously disclosed material in Item 16(f), Attachment A (discussed above).

Therefore, based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that each and every finding set forth herein is approved in every respect. It is further,

ORDERED that Southern Bell's Request for Reconsideration of Order No. 25310 is hereby denied. It is further,

ORDERED that the Commission shall reconsider Order No. 25310 on its own motion. It is further,

ORDERED that confidential treatment is hereby granted to all of the requested material with the exception of portions of Item 16(f), Attachment A. It is further,

ORDERED that the only material within Item 16(f) which shall be afforded confidential treatment are the two requested numbers on line 5 of that Item.

By ORDER of the Florida Public Service Commission, this 31st day of March , 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

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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 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.