

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of)
Citizens of the State of)
Florida to initiate investi-)
gation into integrity of)
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY'S repair)
service activities and reports)

Docket No. 910163-TL

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MOTION FOR STAY PENDING JUDICIAL REVIEW

Southern Bell Telephone & Telegraph Company, Inc. ("Southern Bell"), pursuant to Rule 25-22.061(2), F.A.C., moves this Commission to stay the Order rendered by this Commission on May 13, 1992 and states:

1. On May 13, 1992, this Commission issued its Order No. PSC-92-0339-FOF-TL (the "Order"). The Order requires Southern Bell to produce, by May 26, 1992, responses to the Office of Public Counsel's ("Public Counsel") Third Set of Interrogatories, (Items Nos. 1-21) and items No. 1 and 2 of Public Council's Fifth Set of Interrogatories (the "Interrogatories").

2. Southern Bell intends to avail itself of its right to judicial review of the Order, provided by Section 364.381, Florida Statutes, and pursuant to the provisions of Rule 9.100(c), Florida Rules of Appellate Procedure.

3. Pursuant to Rule 9.100(c), Southern Bell must file its Petition for Review of non-final administrative action within thirty (30) days of rendition of the Order.

4. A stay of the Order while judicial review is being sought by Southern Bell is warranted as the right to judicial

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review will be meaningless if Southern Bell must comply with the ten (10) days given it by this Commission in its Order.

5. Rule 25-22.061(2), F.A.C., provides that the following criteria, among others, be considered by the Commission when deciding whether a stay pending appeal is appropriate:

A. Whether the Petitioner is likely to prevail on appeal;

B. Whether the Petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and

C. Whether the delay will cause substantial harm or be contrary to the public interest.

See, e.g., In re Application of St. Johns Service Company, 87 FPSC 9:198 (1987).

6. Southern Bell submits that it is extremely likely it will prevail on appeal. The case cited by the Commission as support for its Order, Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla. 1970), is the controlling decision in this case and should have led this Commission to deny Public Council's Motion to Compel. Each of the Interrogatory items at issue in this case seeks not the "names and addresses of any person having relevant knowledge as well as the general type of information held by the person listed" which was held to be a proper interrogatory question by the Supreme Court in Surf Drugs, Inc. v. Vermette, id. at 113, but seeks in each and every instance to go far beyond that limited inquiry.

7. A review of the interrogatories at issue reveals that rather than seeking the information authorized by Surf Drugs, Inc. v. Vermette, Public Counsel has attempted, via interrogatories, to obtain Southern Bell's work product analysis on ultimately legal issues. For example, rather than properly asking Southern Bell to identify its personnel who are responsible for compiling repair service forms, reports or records dealing with completion times and then pursue discovery by deposition of those individuals, interrogatory number 1 asks Southern Bell to identify all persons who have any knowledge about "falsifying completion times on repair service forms, reports or records" and requests Southern Bell to intervene and sit as judge and jury to identify possible improprieties (emphasis supplied). Proper procedure is to identify those in the relevant department and then depose them. Whether any completion times or other items were falsified is the central legal and factual issue presented for this Commission's determination. As set forth in Southern Bell's response to that interrogatory, Southern Bell was conducting its own internal investigation into these matters, which investigation was undertaken in anticipation of litigation. Further, it is clear that in order to respond to the interrogatory, counsel will have to evaluate the actions of each person who may have been in a position to fill in repair service forms, reports or records, question them concerning their knowledge about these forms, make an independent legal conclusion that this employee knew that

somehow records were being falsified as well as make a legal judgment as to the employee's credibility.

8. In order to answer these improper interrogatories would require the divulgence of Southern Bell's attorneys' mental thoughts and processes and the attorneys' analysis of the employees' credibility and the legal effect of their actions. In Surf Drugs, Inc. v. Vermette, the Court held that "a party may not be required to set out the contents of statements . . . or to divulge his or his attorneys' evaluation of the substance of statements taken in preparation for trial." 236 So.2d at 113.

9. The Court in Surf Drugs, Inc. v. Vermette, held that an interrogatory which requested the defendant to identify any witness who had given an opinion to plaintiff or his attorney that the defendant was negligent constitutes an improper interrogatory.

10. The interrogatories at issue in this case suffer from the same impropriety as those condemned by the Supreme Court in Surf Drugs, Inc. v. Vermette. Rather than asking for the names of witnesses who may have knowledge about, e.g., preparing repair service reports, the interrogatories require Southern Bell to admit the existence of violations of this Commission's rules or other rules of law, which is the ultimate subject to be determined by this Commission's investigation. As stated, this is prohibited.

11. The interrogatories all suffer from this infirmity. For example, interrogatory number 2 requests identification of witnesses with knowledge about "falsifying" commitment times.

Interrogatory number 4 requests the same type of information for all persons who "falsely" reported that they had contacted a customer as does interrogatory number 5. Interrogatory number 6 seeks identification of witnesses who recorded "improper" exclusion codes. Interrogatory number 7 seeks identification of those persons who have "changed" repair service forms. Interrogatory number 8 seeks the names of persons who have "changed" subscriber repair reports to employee repair reports. Interrogatory number 9 deals with "fictitious" repair service forms. Interrogatory number 10 refers to "fraudulent or knowingly false" repair service forms. Interrogatory number 11 seeks to have Southern Bell identify every document dealing with ten separate areas, each of which deals with the alleged "falsification" or "alteration" of repair service forms, reports or records. (It should be noted that Southern Bell has produced numerous non-privileged documents in response to this interrogatory.) Interrogatory number 12 refers to "falsified completion times." Interrogatory number 13 refers to "falsified commitment times." Interrogatory number 14 refers to the "alteration" of repair service order forms or records. Interrogatory number 15 again seeks "falsification" of repair service order, forms or records stating that customers were contacted when they were not. The remainder of the interrogatories contain the identical infirmity.

12. Because the interrogatories constitute an improper attempt to have Southern Bell admit violations of this Commission's rules and perhaps other statutory requirements, they

are on their face patently improper. Further, the answers to these interrogatories require Southern Bell's attorneys to evaluate the actions and credibility of Southern Bell's employees and pass legal judgment on their actions in order to provide the answers being properly sought by Public Counsel. As such, the interrogatories are violative of the work product privilege recognized and reaffirmed by the Court in Surf Drugs, Inc. v. Vermette and as subsequently clarified and affirmed by the United States Supreme Court in Upjohn Company v. United States, 449 U.S. 383, 66 L.Ed.2d 584, 101 S.Ct. 677 (1981). Discovery is not to be used to compel an adversary to investigate his opponent's case for him, as each party is required to prepare for trial on the product of his own work. Dodson v. Persell, 390 So.2d 704 (Fla. 1980); Pinellas County v. Carlson, 242 So.2d 714 (Fla. 1970). Accordingly, there is a substantial likelihood that Southern Bell will prevail on this appeal and that Public Counsel will have to ask proper interrogatories and make its own determination, based upon its own investigation and legitimate discovery as to whether the Southern Bell employees whose names it seeks have "knowingly falsified" service repair reports or otherwise acted "improperly."

13. Southern Bell will be irreparably harmed if this Commission does not issue an Order staying Southern Bell's compliance with the Order until appellate review is obtained. In the context of this case, failure to grant a stay will cause irreparable damage to Southern Bell in that it would be letting the proverbial "cat out of the bag," which once let out, cannot

be put back in. See, e.g., Williston v. Roadlander, 425 So.2d 1175 (Fla. 1st DCA 1983) (recognizing the irreparable harm from an order allowing discovery). Accord, Pearce v. Doral Mobile Home Villas, Inc. 521 So.2d 282 (Fla. 2d DCA 1988); Procter & Gamble Co. v. Swilley, 462 So.2d 1188 (Fla. 1st DCA 1985); Industrial Tractor Co. v. Bartlett, 454 So.2d 1067 (Fla. 5th DCA 1984). The fact that this Commission has ordered Southern Bell to comply within ten days from the date of the Order, while appellate review may be had by filing the necessary petition within thirty days from the Order, has been addressed above. Southern Bell cannot avail itself of any meaningful appellate review of this Commission's Order unless a stay is granted or Southern Bell simply ignores the Order, which it certainly cannot do.

14. There will be no harm to the public, to this Commission or to Public Counsel if a stay is entered and an appeal of the Order is allowed to run its course. Southern Bell has consistently represented that it would provide names and addresses of witnesses who have knowledge of the record repair compilations. Southern Bell has merely refused to engage in the onerous, and arguably unethical, process of divulging its attorneys' judgment of its own witnesses' credibility and having its attorneys constitute themselves as a court and pass judgment on the legality or propriety of their employees' actions. See Vignes v. Weiskopf, 42 So.2d 84 (Fla. 1949). If the Florida Supreme Court ultimately rules that Southern Bell must comply

with the Order, it will of course do so. On the other hand, if as Southern Bell believes, the Florida Supreme Court rules that the interrogatories are patently improper, objectionable and should be quashed, then the discovery underway in this docket may proceed accordingly. While there is inevitably a delay with any appeal, this delay should not prejudice the public, the Commission or Public Counsel as other aspects of this docket can proceed while the propriety and legal correctness of the Order can be reviewed by the Florida Supreme Court.


WHEREFORE, for the foregoing reasons, Southern Bell respectfully requests that this Commission issue its Order authorizing a stay while Southern Bell seeks review of this Commission's Order.

Respectfully Submitted,

**SOUTHERN BELL TELEPHONE AND
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to **JACK SHREVE, PUBLIC COUNSEL, CHARLES J. BECK, ASSISTANT PUBLIC COUNSEL**, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400; **TRACY HATCH, ESQUIRE**, Division of Legal Services, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32301; and **ROBERT VANDIVER, ESQUIRE**, Division of Legal Services, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32301, this 22nd day of May, 1992.



Attorney

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