

9



**JACK SHREVE**  
PUBLIC COUNSEL

**STATE OF FLORIDA**  
**OFFICE OF THE PUBLIC COUNSEL**

c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, Florida 32399-1400  
904-488-9330

October 12, 1992

Steve Tribble, Director  
Division of Records and Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, FL 32399-0850

Re: Docket No. 910163-TL

Dear Mr. Tribble:

Enclosed for filing in the above-captioned proceeding on behalf of the Citizens of the State of Florida are the original and 15 copies of Citizens' Response to Southern Bell Telephone and Telegraph Company's Protest of the Prehearing Officer's Preliminary Ruling in Order No. PSC-92-1003-CFO-TL.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

- ACK \_\_\_\_\_
- ADA \_\_\_\_\_
- APP \_\_\_\_\_
- CIF \_\_\_\_\_
- CMF \_\_\_\_\_
- CIF \_\_\_\_\_
- EDF \_\_\_\_\_
- LES 1 \_\_\_\_\_
- LES 1 \_\_\_\_\_
- G.C. \_\_\_\_\_
- RCH \_\_\_\_\_
- SDO 1 \_\_\_\_\_
- WAS \_\_\_\_\_
- GTH \_\_\_\_\_

Sincerely,

Janis Sue Richardson  
Associate Public Counsel

Enclosure

DOCUMENT NUMBER-DATE

11933 OCT 12 1992

FPSC-RECORDS/REPORTS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the )  
Integrity of Southern Bell's )  
Repair Service Activities and )  
Reports )  
\_\_\_\_\_ )

Docket No. 910163-TL  
Filed: October 12, 1992

**CITIZENS' RESPONSE TO SOUTHERN BELL TELEPHONE AND TELEGRAPH  
COMPANY'S PROTEST OF THE PREHEARING OFFICER'S PRELIMINARY  
RULING IN ORDER NO. PSC-92-1003-CFO-TL**

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this response to BellSouth Telecommunications, Inc. d/b/a/ Southern Bell Telephone and Telegraph Company's ("Southern Bell") request for reconsideration of the prehearing officers' order denying its request for confidentiality, which was filed on June 24, 1992. Citizens requests this Commission to deny BellSouth's request for reconsideration and as grounds therefor state the following:

1. BellSouth's request for reconsideration, entitled a protest, seeks confidentiality under section 364.183(3)(b), Florida Statutes (1991)<sup>1</sup> for internal review documents that were not prepared by internal auditors. BellSouth also seeks

---

<sup>1</sup> Section 364.183(3)(b), Florida Statutes (1991), provides an explicit exemption from the public records law for "proprietary confidential business information," which is defined as "[i]nternal auditing controls and reports of internal auditors."

confidentiality under section 364.183(f), Florida Statutes,<sup>2</sup> for the names of employees/witnesses who were disciplined in relation to their activities, which are under investigation in this docket.

2. BellSouth has failed to meet the standard of review of a prehearing officer's order on reconsideration. The standard of review adopted by the Commission requires BellSouth to demonstrate that the prehearing officer made an error in fact or law in his decision that requires that the full Commission reconsider his decision. See In re: Petition on Behalf of Citizens of the State of Florida to Initiate Investigation into Integrity of Southern Bell Telephone and Telegraph Company's Repair Service Activities and Reports, 91 F.P.S.C. 12:286, 287 (1991) (Docket no. 910163-TL, Order no. 25483, which was affirmed by the full Commission on reconsideration in Order no. PSC-92-0339-FOF-TL). The company has failed to show that prehearing officer erred in his finding that the company's internal reviews and employees names were not proprietary business information. As Public Counsel noted in its response to BellSouth's prior requests for confidential treatment of the names of its employees who had been disciplined by the company, this Commission has determined on a number of occasions that this personnel information is not proprietary. See Citizens' Response to Southern Bell's Request for Confidential Classification and Motion for Permanent Protective Order, filed Sept. 16, 1992.

---

<sup>2</sup> Section 364.183(3)(f), Florida Statutes (1991) provides an explicit exemption from the public records law for "proprietary confidential business information," which is defined as "[e]mployee personnel information unrelated to compensation, duties, qualifications, or responsibilities."

3. BellSouth repeats its arguments for confidential classification that were addressed fully and denied in Order No. PSC-92-1003-CFO-TL. To satisfy the standard for reconsideration, a motion must bring to the Commission's attention some matter of law or fact which it 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). The motion may not be used as an opportunity to reargue matters previously considered merely because the losing party disagrees with the judgment or order. Diamond Cab Co., 146 So. 2d at 891.

4. Should the Commission nonetheless entertain BellSouth's repetition of its prior arguments, Citizens reasserts its prior arguments, which were fully considered in Order no. PSC-92-1003-CFO-TL.

5. Order no. PSC-92-1003-CFO-TL identified each of BellSouth's arguments and correctly decided that each of the arguments had no merit in fact or law. The prehearing officer determined that the internal review documents were not exempt under the express statutory exemption of section 364.183(3), Florida Statutes, nor was the harm shown sufficient to meet the discretionary standard for granting proprietary treatment under that section. Order no. PSC-92-1003-CFO-TL. No error of fact or law has been demonstrated to overturn the prehearing officer's order on reconsideration. See Grady v. Department of Prof. Reg., Bd. of Cosmetology, 402 So. 2d 438 (Fla. 1st DCA 1981) (holding that agency's interpretation of cosmetology licensing statute to

include "esthetic" activities when the statutory wording did not explicitly include them was entitled to great weight and would not be overturned unless clearly erroneous), dismissed, 411 So. 2d 382 (Fla. 1981).

6. BellSouth argues that internal reviews, whether conducted by its internal auditing staff or others, are the same as internal audits and, therefore, are exempt under the listed exceptions to the public records law rather than the discretionary exception allowed under a showing of harm to the company or the ratepayers. Fla. Stat. § 364.183(3). This interpretation was rejected by the Commission in Order no. 92-PSC-1003-CFO-TL. A similar interpretation for self-critical documents was rejected by the Commission for the company's Benchmark reports and upheld by the First District Court of Appeal. Southern Bell Tel. & Tel. Co. v. Beard, 597 So. 2d 873 (Fla. 1st DCA 1992).

7. The company also argues for a liberal construction of the term "audit" as found in a Random House dictionary. The Commission has enacted a rule to guide its determinations of proprietary confidential business information. Fla. Admin. Code R. 25-22.006. The Commission's interpretation of its statute in rule and orders takes precedence over the company's urging of a dictionary definition. Pan Am. World Airways, Inc. v. Florida Pub. Serv. Comm'n, 427 So. 2d 716, 719 (Fla. 1983) (deferring to the PSC's long-standing interpretation of its rule on customer deposits, even though the rule was capable of reasonable alternative

interpretations). The company has failed to show that the prehearing officer's order is erroneous.

8. The company's argument that the Commission failed to consider the legislative intent behind the confidentiality provision is insufficient to meet the standard of review for reconsideration. See Grady v. Department of Prof. Reg., Bd. of Cosmetology, 402 So. 2d 438 (Fla. 1st DCA 1981), dismissed, 411 So. 2d 382 (Fla. 1981). BellSouth's argument that the legislative intention of section 119.14 was to afford a broad construction of section 364.183, Florida Statutes, is simply incorrect. The courts have repeatedly stated that any exceptions to public access to public records must be construed narrowly. E.g., Southern Bell Tel. & Tel. Co. v. Beard, 597 So. 2d 873, 876 (Fla. 1st DCA 1992). A liberal interpretation would be contrary to the legislative intent of keeping public records open to the public. See id. Additionally, section 364.183(5), Florida Statutes, expressly exempts this section from sunset review under section 119.14. There has been no error of fact or law in the Commission's interpretation of section 364.183 as applied to BellSouth's request for confidential treatment of personnel information.

9. No statutory basis exists for granting confidential treatment to internal reviews or employee specific information. See Fla. Stat. §§ 119.07 & 364.183(3) (1991). In the absence of an express statutory exemption from the Public Records Act, Florida courts have refused to expand specific exemptions through judicial construction. See e.g., Wait v. Florida Power & Light Co., 372 So.

2d 420 (Fla. 1979) (refusing to construe section 119.07(2), Florida Statutes as incorporating the common-law privileges of attorney-client and work product).

10. Since public utilities are granted a monopoly to provide services to this state's citizens and do so under a legislative mandate, utility employees are quasi-public employees. The Second District Court of Appeal held that section 119.07(2), Florida Statutes, which exempted all public records "deemed by law to be confidential", exempted government employees' personnel files from public inspection. Wisher v. News-Press Pub. Co., 310 So. 2d 345 (Fla. 2d DCA 1975) (emphasis added); rev'd 345 So. 2d 646 (Fla. 1977). Following Wisher, the Legislature revised the wording of "deemed by law" to "provided by law". Wait, 372 So. 2d at 424. Hence, under the Supreme Court of Florida's construction of section 119.07 in Wait, only express statutory exemptions will be considered confidential. See Gadd v. News-Press Pub. Co., Inc., 412 So. 2d 894, 895 (Fla. 2d DCA 1982) (finding that exemptions from chapter 119 must be expressly made by the Legislature and not incorporated by courts under pronouncements of public policy), review denied, 419 So. 2d 1197 (Fla. 1982); Warden v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1976) (holding that names and addresses of junior college employees were not exempt). This comports with the overriding purpose of the Public Records Act that "the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person." Downs v. Austin, 559 So. 2d 246 (Fla. 1st DCA 1990) (granting an award of

attorney's fees at trial level because polygraph tests were not confidential under the express statutory exemption for criminal investigative files), review denied, 574 So. 2d 140 (Fla. 1990).

11. The prehearing officer rejected BellSouth's argument that public disclosure of personnel information would cause harm. The prehearing officer found that potential public embarrassment of disciplined employees was not cognizable under Florida law. Cf., News-Press Pub. Co. v. Wisher, 345 So. 2d 646, 648 (Fla. 1977) ("No policy of the state protects a public employee from the embarrassment which results from his or her public employer's decision or action on the employee's failure to perform his or her duties properly."); Michel v. Douglas, 464 So. 2d 545 (Fla. 1985) (public employee personnel records are open to public inspection and subject to publication).


12. The prehearing officer reached the correct legal decision. As the Second District Court of Appeal stated to a public hospital, which was forced to disclose its personnel records to a newspaper, its solution was simple: persuade the legislature to add a specific exemption to the public records law. Gad, 412 So. 2d at 897.



13. BellSouth has failed to demonstrate any error of fact or law in the prehearing officer's order; therefore, its protest (motion for reconsideration) should be denied.

Respectfully submitted,

JACK SHREVE  
Public Counsel

  
CHARLES J. BECK  
Deputy Public Counsel  
JANIS SUE RICHARDSON  
Associate Public Counsel

Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, Florida 32399-1400

(904) 488-9330

Attorneys for the Citizens  
of the State of Florida

**CERTIFICATE OF SERVICE  
DOCKET NO. 910163-TL**

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following persons on this 12th day of October, 1992.

Marshall Criser, III  
BellSouth Telecommunications,  
Inc. (Southern Bell Telephone  
& Telegraph Co.)  
150 S. Monroe St., Suite 400  
Tallahassee, FL 32301

John Hoag  
Department of Legal Affairs  
Presidential Circle  
4000 Hollywood Blvd., Suite 505-S  
Hollywood, FL 33021

Tracy Hatch  
Jean Wilson  
Division of Legal Services  
Fla. Public Service Commission  
101 East Gaines Street  
Tallahassee, FL 32301

David Wells  
Robert J. Winicki  
William S. Graessle  
Mahoney, Adams & Criser, P.A.  
3300 Barnett Center  
50 North Laura Street  
P.O. Box 4099  
Jacksonville, FL 32201

  
Janis Sue Richardson  
Associate Public Counsel