

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition on Behalf of) DOCKET NO. 910163-TL
Citizens of the State of Florida)
to Initiate Investigation into)
the Integrity of SOUTHERN BELL)
TELEPHONE AND TELEGRAPH)
COMPANY'S Repair Service)
Activities and Reports.)
_____))
In Re: Comprehensive Review of) DOCKET NO. 920260-TL
the Revenue Requirements and)
Rate Stabilization Plan of)
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY.)
_____))
In Re: Show Cause Proceeding) DOCKET NO. 900960-TL
against SOUTHERN BELL TELEPHONE)
AND TELEGRAPH COMPANY for)
Misbilling Customers.)
_____))
In Re: Investigation into) DOCKET NO. 910727-TL
SOUTHERN BELL TELEPHONE) ORDER NO. PSC-93-0517-FOF-TL
COMPANY'S compliance with Rule) ISSUED: 04/06/93
25-4.110(2), F.A.C.)
_____))

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
THOMAS M. BEARD
SUSAN F. CLARK
LUIS J. LAUREDO
JULIA L. JOHNSON

ORDER DENYING MOTION FOR REVIEW

BY THE COMMISSION:

Background

Order No. PSC-93-0294-PCO-TL, (Order), issued by the Prehearing Officer on February 23, 1993, in the above consolidated docket, granted Public Counsel's Motions To Compel

DOCUMENT NUMBER-DATE

03702 APR-68

1993-04-06 10:00 AM

Production of three categories of documents comprising respectively statements and summaries, a statistical analysis and work-notes of Human Resources Representatives concerning craft/management disciplinary issues. Southern Bell in its request for review of that Order, filed March 4, 1993, asserted that "numerous mistakes of both law and fact" therein required that this Commission review and reverse that decision. Public Counsel filed its Response on March 16, 1993.

Discussion

Though error of fact or law would meet the appropriate standard for reconsideration if so found, Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 399 So. 2d 161 (Fla. 1st DCA 1981); Order No. PSC-92-0339-FOF-TL (5/13/92), we find no error of law or fact in the Order.

Southern Bell reargues here its basic premise that anything it identifies as part of its "internal legal investigation" of its service operations is privileged as either an attorney-client matter, work product, or both. This is claimed to be the case by direct analogy with the facts of Upjohn Co. v. United States, 449 U.S. 383, 66 L.Ed 2d 584, 101 S. Ct. 637 (January 13, 1981). That result is also said to obtain notwithstanding Consolidated Gas Supply Corporation (Consolidated), 17 F.E.R.C. ¶63,048 (December 2, 1981) or In re Notification to Columbia Broadcasting System Concerning Investigation by CBS of Incidents of "Staging" by its Employees of Television News Programs, 45 F.C.C. 2d, 19 (1973) (CBS). The former case, however viewed, is claimed to be consistent with Southern Bell's position, while the latter case is claimed to be inapplicable.

However, the facts in Upjohn are not analogous to those in this case. The "questionable payments" to foreign officials by Upjohn employees which were investigated by Upjohn's counsel for the purpose of rendering legal advice were obviously not regulated activities required by rule and statute and as to which continuing company and agency oversight were required. Instead, they were activities which were not permitted at all. The fact that the investigation was conducted solely to render legal advice was not, on the face of the opinion, even a matter of controversy.

Here, Southern Bell's service operations are required pursuant to rule and statute. Ongoing oversight by, inter alia, both the company and this Commission are required by both rule and statute. The specific documents in question, whether work-notes on employee discipline, statements and summaries related thereto, or a statistical analysis concerning internal audits of those service operations over a period of seven months are just as obviously related to the ongoing management and operation of those services in the face of allegations of mismanagement as they are to obtaining legal advice. That business use of the collected materials has been noted by Public Counsel. Citizens Response To Southern Bell Telephone and Telegraph Company's Motion for Review of Order Granting Public Counsel's Motions for In-Camera Inspection of Documents and Motions to Compel, p. 10. These considerations are, in contrast, absent from the facts of Upjohn. Therefore, error of law or fact has not been identified in the Prehearing Officer's rejection of the claimed analogy between this case and Upjohn. That claim founders because the assertion that all of these investigative activities took place solely to obtain legal advice and would not otherwise have been performed is unconvincing in these facts and circumstances. The Prehearing Officer justifiably relied on Southern Bell's own more realistic assessment of the activities as also relating to "the need to find improper acts and correct them." Order, p. 3.

Southern Bell has also not identified error in the Prehearing Officer's reliance on Consolidated and CBS, supra. Both of them involve the application of the attorney-client and work-product privileges to regulated entities (such as broadcasters, gas utilities or local exchange companies) and are more relevant to this case than Upjohn for that reason.

Though Southern Bell focuses on the initial debate in Consolidated, the judge therein "short circuited" that debate in favor of "allowing for excision of a document to permit discovery only of factual matters." Consolidated, at p. 65, 237. Where Southern Bell has admitted that no privileged material was apparent on the face of the documents, Order p. 3, ¶ 4, Consolidated was properly relied on to deny the claims of privilege. In effect, under the Consolidated approach, there was nothing to excise from these documents.

Southern Bell has also not demonstrated error in the Prehearing Officer's citation of CBS, supra. Southern Bell claims that case inapplicable for three reasons: First, CBS predated Upjohn. Second, the Public Counsel is in an adversarial relationship to Southern Bell whereas the FCC was not an adversary of CBS. Third, the FCC relied on CBS's investigation instead of performing its own. However, these arguments do not demonstrate CBS to be inapplicable.

First, the infirmities of Southern Bell's Upjohn analogy have already been discussed. Whether CBS' "control group" analysis was later overturned in Upjohn is irrelevant. That issue, the main point of Upjohn, is not the question presented by Southern Bell's claim of privilege. The relevant question presented by that claim is whether a "broad corporate shield of secrecy", Consolidated, supra, can be created for certain of a regulated entity's business activities by having the entity's legal department request these activities. CBS' prescient analysis of that issue has not been affected by Upjohn, nor was the Prehearing Officer's reliance on it erroneous.

Second, while the Public Counsel may be in an adversarial relationship with Southern Bell, this Commission appears to relate to Southern Bell the way the FCC related to CBS. This Commission has sought the same discovery as has the Public Counsel. Thus, CBS is not inapplicable for the second reason advanced by Southern Bell.

Finally, Southern Bell's attempt to distinguish CBS because the FCC relied on CBS' investigation instead of conducting its own is frivolous. The FCC was not concerned with regulating CBS' investigations, it was concerned with regulating CBS' conduct as a broadcaster. The Commission's concern with Southern Bell's conduct of its service activities is analogous. Southern Bell's attempt to surround those activities with secrecy through a broad brush claim of privilege raises the same concerns as the FCC addressed in CBS. The Prehearing Officer did not commit error in citing the analysis therein. See also, the general discussion of these issues in Order Nos. PSC-93-0151-CFO-TC (January 28 1993) and PSC-93-0292-FOF-TL (February 23, 1993).

Finally, we find no error as to the Prehearing Officer's denial of privilege from discovery for the statements or

summaries reviewed in-camera. As described in Southern Bell's Opposition to Public Counsel's Motion to Compel (Opposition) filed May 28, 1992, some of these statements are "notes compiled by the Personnel Department...in order to determine whether any individual should be disciplined and to what extent." Opposition, p. 2-3. This description is appropriate to documents compiled for business purposes rather than documents privileged from discovery under the attorney-client or work-product privileges. Although Southern Bell additionally describes the documents as "derived from the privileged internal legal investigation", Opposition p. 2, the privileged status based on Upjohn for that investigation in toto that Southern Bell asserts has been rejected for reasons previously stated.

Since neither the attorney-client or work-product privilege attaches pursuant to Southern Bell's privileged investigation theory, it is unnecessary to determine whether events since the date of the Order (i.e. the Supreme Court's ruling in Case No. 80,004) have affected whether any work-product privilege can be overcome. It is additionally unnecessary to determine whether fact work-product or opinion work-product more accurately describes these materials, which the Prehearing Officer correctly found to be not privileged.

However, it should be noted that even if these materials were found to be work-product, they would be discoverable under Upjohn.¹ Thereunder, the qualified work-product privilege applies only if the corporate employees can be deposed so that the facts can be discovered indirectly, if not directly from the statements themselves. 449 US at 399.

In depositions already held in this case, Southern Bell has announced that its theory of "privileged investigation" forecloses any questioning as to the facts developed therein. Attachment I. In effect, the shield of secrecy as to the underlying facts that Southern Bell asserts is as broad in depositions as it is in document production. Thus, even were

¹ In view of the finding that the statements and summaries are not work-product, no analysis is presented as to whether discovery might be precluded of materials found to be opinion work-product. 449 US 399.

Upjohn applicable, Southern Bell's theory remains infirm. Southern Bell's employees are, in effect, unavailable for deposition as to these facts, even though facts, as such, are not privileged. 449 US at 395. Similarly unavailable for deposition are those deponents that invoked the Fifth Amendment privilege and a deceased employee.

Finally, Southern Bell asserts that none of the cases in the Order establishes that an internal legal investigation performed by a regulated entity can never be privileged. Motion For Review, p. 8. However, the Prehearing Officer did not conclude that either. The question presented was not whether any such investigation could ever be privileged, but whether the documents at issue in this case were privileged under the facts and circumstances presented. The Prehearing Officer did not err in concluding that they were not privileged from discovery in this case. See, e.g., First Chicago International v. United Exchange Co., Ltd., 125 F.R.D. 55, 57 (S.D.N.Y. 1989); Soeder v. General Dynamics Corp., 90 F.R.D. 253 (U.S.D.C. Nov. 1980).

In view of the foregoing, it is

ORDERED by the Florida Public Service Commission that Southern Bell's Motion for Review of Order No. PSC-93-0294-PCO-TL be denied. It is further

ORDERED that this docket remain open.

By ORDER of the Florida Public Service Commission this 6th day of April, 1993.

STEVE TRIBBLE, Director
Division of Records & Reporting

(S E A L)

RCB

910163#2.ORD

by: Kay Flynn
Chief, Bureau of Records

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.

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 Civil Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition on behalf of)
CITIZENS OF THE STATE OF FLORIDA)
to Initiate Investigation into)
Integrity of SOUTHERN BELL)
TELEPHONE & TELEGRAPH COMPANY'S)
Repair Service Activities and)
Reports.)

DOCKET NO. 910163-TL

COPY

DEPOSITION OF: CHERIE BEYER CALVERT
TAKEN AT THE INSTANCE OF: The Citizens of the State of Florida, by and through Jack Shreve, Public Counsel
DATE: Wednesday, July 29, 1992
TIME: Commenced at 4:15 p.m.
Concluded at 5:30 p.m.
LOCATION: 666 N. W. 79th Avenue
Room 642
Miami, Florida
REPORTED BY: JANE FAUROT
Notary Public in and for the State of Florida at Large

ACCURATE STENOGRAPHY REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(904) 878-2221

APPEARANCES:

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ALSO PRESENT:

CARL S. VINSON, JR., FPSC Division of Research and
Regulatory Review.

STAN GREER, FPSC Division of Communications.

* * * * *

I N D E X

WITNESS:

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CHERIE BEYER CALVERT

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S T I P U L A T I O N S

1
2 The following deposition of CHERIE BEYER CALVERT
3 was taken on oral examination, pursuant to notice, for
4 purposes of discovery, for use in evidence, and for such
5 other uses and purposes as may be permitted by the Florida
6 Rules of Civil Procedure and other applicable law. Reading
7 and signing of said deposition by the witness is not waived.
8 All objections, except as to the form of the question, are
9 reserved until final hearing in this cause; and notice of
10 filing is waived.

11 * * * * *

12 Thereupon,

13 CHERIE BEYER CALVERT

14 was called as a witness, having been first duly sworn, was
15 examined and testified as follows:

16 MR. ANTHONY: Ben, before we begin, there are some
17 stipulations that we have had for all three days of
18 these depositions that I just wanted to let you know
19 about.

20 First of all, the deposition is taken pursuant to
21 proper notice. Secondly, we won't go off the record
22 without Ms. Calvert's consent. Third, that reading and
23 signing won't be waived, and, fourth, that we will save
24 any objection until the time of the use of the
25 transcript at the hearing or wherever it may be used.

1 Are those agreeable with you?

2 MR. KUEHNE: That is acceptable.

3 MR. ANTHONY: One other thing, Ms. Calvert, as you
4 are probably aware, this deposition is part of the
5 investigation of the Florida Public Service Commission
6 into Southern Bell's trouble reporting practices. As I
7 am sure you are also aware, the Company conducted its
8 own investigation of trouble reporting practices, and
9 that investigation was done under the control and
10 guidance of the Legal Department; and, therefore, is
11 privileged, which means that no outside party can get
12 to it. It is the Company's, and no one is allowed to
13 discover. It's not likely, but in the event that any
14 question is directed toward you and seeks any
15 information that is a part of that privileged
16 information, your participation in the investigation,
17 if any, what you may have learned during the
18 investigation, I am going to instruct you not to answer
19 the question. By the same token, to the extent that
20 you have knowledge about any of that information
21 independent of the investigation, then, of course, you
22 should answer the question and answer it fully and
23 completely and honestly. Is that clear?

24 THE WITNESS: Uh-huh.

25 MR. ANTHONY: Okay. Thank you.