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April 19, 1993

Mr. Steve C. Tribble  
Director, Division of Records and Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, Florida 32301

RE: Docket No. 920260-TL, 900960-TL, 910163-TL, 910727-TL

Dear Mr. Tribble:

Enclosed is an original and fifteen copies of a Southern Bell Telephone and Telegraph Company's Petition for Review of Order No. PSC-93-0540-PCO-TL. Please file this document in the above-captioned dockets.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

*R. Douglas Lackey*  
R. Douglas Lackey

Enclosures

cc: All Parties of Record  
A. M. Lombardo  
H. R. Anthony

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**CERTIFICATE OF SERVICE**

**Docket No. 920260-TL**

**Docket No. 900960-TL**

**Docket No. 910163-TL**

**Docket No. 910727-TL**

I HEREBY CERTIFY that a copy of the foregoing has been  
furnished by United States Mail this 19th day of April, 1993 to:

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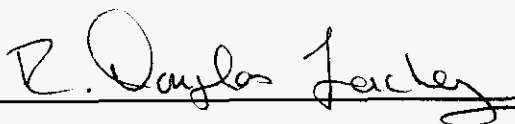
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R. Douglas Jackson



being conducted by the FPSC, its origins actually lie in an effort by the National Association of Regulatory Utility Commissioners (NARUC) to conduct a region-wide audit of BellSouth's affiliated transactions. Since NARUC does not have the statutory authority to conduct such an audit, the audit is being conducted under the jurisdiction of a single state, Florida.

2. The audit in question is being performed by an audit team which consists of members of the Florida staff as well as employees of at least one other commission. The audit team has given Southern Bell over 200 interrogatories and requests for documents. Southern Bell has provided the information requested in the vast majority of cases. However, a problem has arisen because of Staff's insistence on receiving financial statements and total access to the general ledgers of a number of Southern Bell affiliates.<sup>1</sup>

3. Southern Bell suggested an alternative solution for dealing with the records of affiliates with which Southern Bell had transactions. For those affiliates involved in direct transactions, the affiliates voluntarily agreed to produce all documents necessary to demonstrate that these transactions met the standards for affiliated transactions as established by the

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<sup>1</sup> 1-019 - BellSouth Information Networks; 2-001 - Sunlink (partner CSL Chastain); 2-002 - BellSouth Capital Funding Corp.; 2-004 - BellSouth Resources Inc.; 2-006 - DataServe Financial Services; 3-008 - BAPCO; 3-016 - LM Berry; 3-016 - Stephens Graphics; 3-016 - TechSouth; 3-016 - BellSouth Marketing Programs; 3-016 - Intelligent Media Services; 3-023 - BellSouth Enterprises, Inc.

Cost Allocation Manual (CAM). That is, Southern Bell and the affected affiliated companies were and are willing to demonstrate that all transactions between them either are correctly priced at "fully distributed costs" ("FDC") or that the transactions were priced at an appropriate "market price". The affiliates having possession of the relevant documents also agreed to produce any documents necessary to demonstrate that any "chained" FDC transactions were correctly charged in the event that the Staff's audit of a direct transaction revealed any "chained" FDC transactions. However, for those affiliates with which Southern Bell had no direct transactions and, to the extent the requests sought more than the information necessary to support any transactions, Southern Bell objected. Southern Bell's objections were based on the grounds that (1) the requests go well beyond the "reasonable access" to affiliate records afforded by Section 364.183(1), Florida Statutes, and (2) the information sought was not necessary to reach conclusions related to cost allocations or possible cross subsidies.

4. Notwithstanding Southern Bell's efforts to resolve its disagreement with the audit team, no agreement could be reached. The audit team filed its Motion to Compel, arguing that Section 364.183(1), Florida Statutes, allows the Staff to have complete and unfettered access to the records of Southern Bell's affiliates. Even though Southern Bell has agreed to allow the Staff to trace any affiliated transaction to either (1) the source documents underlying the transaction or (2) a "market"

price transaction, Staff apparently concluded that this was not sufficient.

5. The Prehearing Officer, in the referenced order, essentially agreed with the audit team. Southern Bell believes that it is entitled to a de novo review of its arguments; however, even applying the standards of Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962), it is evident that the Prehearing Officer has made errors of law and fact in reaching the decision under review. See In Re: Petition of Citizens of the State of Florida to investigate Southern Bell Telephone and Telegraph Company's cost allocation procedures, Docket No. 890190-TL, Order No. PSC-92-0135-FOF-TL (1992)

6. In its response to the audit team's Motion to Compel, Southern Bell pointed out, as the Prehearing Officer correctly noted, that there were constitutional questions as to whether this Commission had the jurisdiction to reach the entities that have the records which the audit team is seeking to compel. For the sake of brevity, the arguments and citations made in Southern Bell's original response are incorporated herein by reference. The Prehearing Officer avoided this entire issue by noting, at page 3 of the order, that the Commission was not seeking to exercise personal jurisdiction over these foreign entities, but that the "...requests were directed solely to SBT, pursuant to this Commission's jurisdiction over SBT, based upon SBT's ability to obtain the records from its affiliates." (Footnote omitted) The difficulty with this argument is that Southern Bell had

already stated in its response to the audit team's request that it had neither possession, custody nor control of the documents requested. Since the Prehearing Officer directed Southern Bell to provide the Staff with access to the documents requested within twenty days, it is evident that the Prehearing Officer has overlooked the fact that Southern Bell is unable to compel its affiliates to produce the requested information. See Affidavit of Karen Kaetz, (Attachment 1)

7. In support of the Prehearing Officer's contention that Southern Bell should produce the documents in question, a number of federal decisions from other jurisdictions were cited. A review of those decisions makes it clear that the cases cited are distinguishable from the case at bar. For instance, in Zervos v. S.S. Sam Houston, 79 F.R.D. 593 (S.D.N.Y. 1978), the records at issue involved banking transactions and the Court concluded that the party from whom the discovery was sought should have at least requested the records at issue from the bank, even though he himself did not have copies. In that case, the Court concluded that even though Zervos "...attests to having none of the requested documents in his 'possession,' there has been absolutely no showing that the banking records are not within his 'control.'" Id. at 595. That is not the case here. As the affidavit of Karen Kaetz, attached hereto attests, Southern Bell does not have the affiliated records that the audit team has requested in its possession, custody or control. In fact, this affidavit further shows that Southern Bell has requested that the



entities having possession allow the Staff to have access but those entities have declined to do so. In these circumstances, another portion of Zervos seems more applicable. There the Court said:

Under ordinary circumstances, a party's good faith averment that the items sought simply do not exist, or are not in his possession, custody, or control, should resolve the issue of failure of production since one 'cannot be required to produce the impossible....'  
(citations omitted)

Id. at 595.

In a second case, In Re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D.Ill. 1977), the issue involved documents in the possession of former employees who were still receiving payments from the party from whom the discovery was sought. In that case the employer refused even to try to get the requested documents from the former employees. The Court concluded that at "...the very least, defendants should make inquiry of such former employees" Id. at 423. The Court also concluded that if the employees did not cooperate "...we can then consider what further action may be required." Id.

8. Similar results are obtained from a review of the other cases cited in the referenced order. There is no doubt that the principle announced in Hubbard v. Rubbermaid, Inc., 78 F.R.D. 631 (D.Md. 1978), regarding the control of a subsidiary's documents when its parent is a party to a proceeding, is appropriate. If

the parent corporation is a party defendant, then its wholly owned subsidiaries' documents are subject to its "control." However, BellSouth Corporation is not a party to this proceeding and it is not subject to the jurisdiction of this Commission, except to the extent that the statutes relied upon by the audit team create such jurisdiction. This last point, however, is the very issue which Southern Bell has challenged and which the Prehearing Officer failed to resolve.

9. Another case, Camden Iron & Metal v. Marubeni America Corp., 138 F.R.D. 438 (D.N.J. 1991), involved a situation where the defendant was a subsidiary of the entity having the relevant documents. There the Court considered the issue in terms of the two corporations "acting as one," which is precisely the same standard used in Florida. See Medivision v. Dept of Health & Rehab. Serv., 488 So.2d 886 (Fla.App.1 Dist. 1986). Again, in the case at bar, there is not one shred of evidence that Southern Bell and its affiliates have "acted as one" in any activity relevant to this audit. Indeed, the audit team has not even alleged that such activities have occurred.


10. In light of the above, it is clear that the Prehearing Officer's order is factually inaccurate, in that it seeks to order the production of documents that Southern Bell does not have in its possession custody or control, and that the order is legally insufficient in that the authorities relied upon are not applicable to the facts of this matter. Southern Bell does not have the documents that the audit team wants and it has been

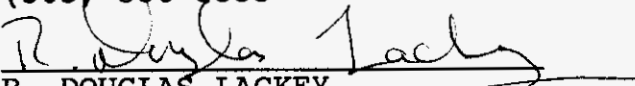
unable to secure them from the entities that do have them. Southern Bell and its affiliates are not in a parent/subsidiary relationship and there has been no allegations that Southern Bell and its affiliates have "acted as one" with regard to the matters involved here. Consequently, the Prehearing Officer's order is in error and must be reversed.

WHEREFORE, Southern Bell respectfully requests the entry of an order reversing the Prehearing Officer's order, cited above, and denying Staff's Motion to Compel in its entirety.

Respectfully submitted this 19th day of April, 1993.

SOUTHERN BELL TELEPHONE  
AND TELEGRAPH COMPANY

  
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Attachment 1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Comprehensive review of revenue requirements and rate stabilization plan of SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

DOCKET NO. 920260-TL

In Re: Investigation into the integrity of SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S repair service activities and reports.

DOCKET NO. 910163-TL

In Re: Investigation into SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S compliance with Rule 25-4.110(2), F.A.C., rebates.

DOCKET NO. 910727-TL

In Re: Show cause proceeding against SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY for misbilling customers.

DOCKET NO. 900960-TL  
FILED: April 19, 1993

STATE OF ALABAMA

COUNTY OF JEFFERSON

AFFIDAVIT OF KAREN KAETZ

Personally appeared before the undersigned, an officer duly authorized to administer oaths in the State of Alabama, KAREN KAETZ, who after being sworn, deposes and says as follows:

1. My name is KAREN KAETZ and my business address is 3700 Colonnade Parkway, Birmingham, Alabama 35243.

2. I am employed as a manager by BellSouth Telecommunications, Inc. As a part of my responsibilities, I have

been assigned the task of coordinating the receipt of and response to the various data requests posed by the audit team in connection with an audit being conducted by the Florida Public Service Commission in Docket No. 920260-TL.

3. As a part of my responsibilities in connection with this audit, I receive requests designated by the audit team, including Request No. 1-019, 2-001, 2-002, 2-004, 2-006, 3-008, 3-016 and 3-023, all of which were the subject of Order No. PSC-93-0540-PCO-TL.

4. The information sought by those requests is not in the possession, custody or control of BellSouth Telecommunications, Inc. As was my standard practice with regard to all audit team requests which sought information not in the possession, custody or control of BellSouth Telecommunications, Inc., I sent each of those requests to the appropriate person, designated by the entity actually having possession, control and custody of the responsive documents, to receive such requests.

5. As was stated in the responses to the referenced data requests, the entities having possession, custody or control over the information requested by the audit team voluntarily agreed to provide any and all information necessary to demonstrate that the cost of these transactions was correctly calculated and charged, including any information necessary to support the correctness of any "chained" transactions.

6. However, in each instance, the entity having possession, custody or control of all of the documents necessary to satisfy fully the requests of the audit team declined to produce all of the

documents requested.

7. BellSouth Telecommunications, Inc., has no authority or power over the entities actually having possession, custody and control over the responsive documents and therefore BellSouth Telecommunications, Inc. is limited to simply requesting the responsive documents, which it has done.

8. As a consequence, BellSouth Telecommunications, Inc., was unable to respond to the referenced data requests of the audit team other than in the manner it did since it did not have possession or custody of the requested documents and does not have the authority to exercise control over the entities that do.

9. The foregoing is based on my personal knowledge and information obtained by me as I processed the referenced data requests.

*Karen Raetz*  
KAREN RAETZ

Sworn to and subscribe before me  
this 19th day of April, 1993.

*Flores A. Dix*  
Notary Public *Alabama State at Large*

My commission expires:  
MY COMMISSION EXPIRES NOVEMBER 30, 1993