

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

M E M O R A N D U M

May 5, 1993

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (PIERSON) *RP TP*
DIVISION OF AUDITING AND FINANCIAL ANALYSIS (DEVLIN) *193*

RE: DOCKETS NOS. 920260-TL - COMPREHENSIVE REVIEW OF REVENUE
REQUIREMENTS AND RATE STABILIZATION PLAN OF SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY
910163-TL - INVESTIGATION INTO THE INTEGRITY OF SOUTHERN
BELL TELEPHONE AND TELEGRAPH COMPANY'S REPAIR SERVICE
ACTIVITIES AND REPORTS
910727-TL - INVESTIGATION INTO SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY'S COMPLIANCE WITH RULE 25-4.110(2),
F.A.C., REBATES
900960-TL - SHOW CAUSE PROCEEDING AGAINST SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY FOR MISBILLING CUSTOMERS

AGENDA: MAY 18, 1993 - CONTROVERSIAL - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\920260.RCM

CASE BACKGROUND

On November 13, 1991, the National Association of Regulatory Utility Commissioners approved a resolution authorizing multi-state audits of the seven Regional Bell Operating Companies, including BellSouth Corporation and its affiliates, which operate in nine southeastern states. An audit team assembled from among these states proposed, and this Commission approved, that the audit be conducted under the authority of the Florida Commission.

On October 25, 1992, the audit team made a data request of BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (SBT). SBT failed to provide full access to the requested materials and, on February 2, 1993, the Commission voted to require SBT to respond to the data request, in writing, by February 10, 1993. The Commission's decision was codified by Order No. PSC-93-0424-FOF-TL, issued March 22, 1993.

DOCUMENT NUMBER-DATE

04926 MAY-68

FPSC-RECORDS/REPORTING

May 5, 1993

Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL

On February 10, 1993, SBT responded to the Commission's February 2 decision by objecting to the audit team's request for certain records of its affiliates and certain non-Florida information. On March 5, 1993, the Staff of this Commission moved to compel complete access to the following records:

AFFILIATE RECORDS

<u>Request No.</u>	<u>Affiliate(s)</u>
1-019	BellSouth Information Networks
2-001	Sunlink (partner CSL Chastain)
2-002	BellSouth Capital Funding Corp.
2-004	BellSouth Resources, Inc.
2-006	Data Serve Financial Services
3-008	BAPCO
3-016	LM Berry, Stephens Graphics, TechSouth, BellSouth Marketing Programs, Intelligent Media Services
3-023	BellSouth Enterprises, Inc.

NON-FLORIDA RECORDS

<u>Request No.</u>	<u>Records Requested</u>
1-013	Fiber Based Trials
3-002	Director Revenue
3-007	Revenue Sharing Factor
3-001	BAPCO Allocation Matrix
4-009.1	Billing and Collection Data

SBT responded to Staff's motion to compel on March 17, 1993. SBT's response basically consisted of two arguments. First, SBT argued that the breadth of the audit team's data request is not "reasonable" in accord with Section 364.183(1), Florida Statutes. Second, SBT argued that many of the records requested by the audit team are in the possession of foreign affiliates that have no connection with SBT's operations in Florida. Accordingly, SBT contended that the requests were unconstitutionally broad.

By Order No. PSC-93-0540-PCO-TL, issued April 9, 1993, the Prehearing Officer found that, under Sections 364.183(1), 364.18(2), 364.17, and 350.117(1), Florida Statutes, the Commission

May 5, 1993

Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL

had the authority to access the requested records. The Prehearing Officer also determined that "'[r]easonable', as used in Section 364.183(1), Florida Statutes, modifies 'access' in terms of time and place, not the quantity or quality of documents to which this Commission has access." Accordingly, having also found that the records requested by the audit team appeared relevant to the scope of the audit, the Prehearing Officer rejected SBT's first argument and directed it to provide access to the records.

As for SBT's second argument, while not directly passing on SBT's constitutional argument, the Prehearing Officer noted that the cases cited by SBT therein all involved attempts to invoke personal jurisdiction over foreign entities. Since the audit request was made directly of SBT, the Prehearing Officer concluded that SBT's argument regarding the exercise of personal jurisdiction over such entities was irrelevant.

On April 19, 1993, SBT filed a petition for review of Order No. PSC-93-0540-PCO-TL. Also on April 19, 1993, SBT filed a motion for a stay of Order No. PSC-93-0540-PCO-TL. The motion for stay was directed toward the Prehearing Officer and is, therefore, not before the Commission at this time.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission reconsider Order No. PSC-93-0540-PCO-TL?

RECOMMENDATION: No. SBT has not identified any facts overlooked by the Prehearing Officer, nor any mistake of fact or law. SBT should be ordered to produce the records within twenty days after the order denying its request for reconsideration is issued.

STAFF ANALYSIS: Although SBT has suggested that it may be entitled to a de novo review of Order No. PSC-93-0540-PCO-TL, the standard applied by this Commission for motions for review of a Prehearing Officer's order is the same as that applied for motions for reconsideration: whether the decision maker has failed to consider something that was before it or whether the decision maker has made any mistake of fact or law. A motion for reconsideration is not an appropriate vehicle for reargument or to bring up some additional matter that was not considered in the first place.

In its petition for review, SBT argues that the Prehearing Officer "overlooked the fact that Southern Bell is unable to compel its affiliates to produce the requested information." In support

May 5, 1993

Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL

thereof, SBT offers the affidavit of Karen Kaetz. However, this affidavit was not before the Prehearing Officer at the time the decision was rendered. Accordingly, it is improper as grounds for reconsideration. Even so, Staff is not persuaded by the affidavit of Ms. Kaetz since, if SBT has the ability to ask for and produce some of the records in the possession of its affiliates, it should have the same ability to ask for and produce other records in the possession of these affiliates, as discussed more fully hereunder.

Next, SBT attacks a discussion in Order No. PSC-93-0540-PCO-TL, contained in a footnote, by which the Prehearing Officer analogized the present situation to production under Rule 34(a), Federal Rules of Civil Procedure. Although the discussion in the footnote is neither dispositive of the matter, nor the rationale behind the Prehearing Officer's decision, since SBT devoted nearly all of its efforts toward refuting it, SBT's arguments are addressed, below.

SBT argues that In Re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D.Ill. 1977), and Zervos v. S.S. Sam Houston, 79 F.R.D. 593 (S.D.N.Y. 1978), are factually distinguishable from the case at hand. Without getting too deeply into the alleged distinctions, Staff notes that the Prehearing Officer did not cite these two cases for their factual underpinnings. Folding Carton was cited solely for the general proposition that "a party need not have actual possession of documents to be deemed in control of them." Zervos, on the other hand, merely stands for the general proposition that the controlling issue in deciding whether to compel production is not whether the records are within the jurisdiction of the tribunal, but whether the party from whom production was requested has "control" over the records. That these cases may be factually distinguishable from the case at hand in no way dilutes the general rules of law that they represent. SBT's arguments regarding these cases are, therefore, inapposite.

SBT also argues that Camden Iron & Metal v. Marubeni America Corp., 138 F.R.D. 438 (D.N.J. 1991) is distinguishable because the Court found that the two corporations had "acted as one", the same standard applied by the Court in Medivision v. Dept. of Health & Rehab. Serv., 488 So. 2d 886 (Fla. 1st DCA 1986). According to SBT, there is no evidence that it and its affiliates have acted as one in any of the activities at issue in this case. Again, Staff is not persuaded by SBT's argument.

The affiliates from which records are sought provide products and services to SBT, some of which are indispensable with regard to its provision of telecommunications services. There are

May 5, 1993

Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL

transactions between these affiliates and allocations of costs between and among the affiliates as well as between and among regulated and unregulated activities. At the center stands BellSouth Corporation (Bell), the parent company. As such, it was Bell's choice how to arrange its corporate structure, including what activities to spin off into separate corporate identities. Given the level of inter-corporate activity, it is difficult to believe that there is not an equally high degree of horizontal and vertical integration between Bell and its various subsidiaries, including SBT, or that Bell does not or cannot exert control over its subsidiaries. Moreover, the separate corporate identities were presumably created as a matter of convenience. Although it may be proper to use these separate corporations to limit the liability of the parent and/or its shareholders, Staff does not believe that evading lawful, effective regulation is a legitimate use of the corporate fiction.

Further, the Camden Iron Court did not limit production solely to where corporations are acting as one. In fact, the Court stated that

[W]here the litigating corporation is the subsidiary and the parent possesses the records, courts have found control to exist on the following alternate grounds:

(1) the alter ego doctrine which warranted "piercing the corporate veil";

* * *

(3) The relationship is such that the agent-subsubsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation;

(4) There is access to documents when the need arises in the ordinary course of business;

* * *

Camden Iron, at 441-442 (citing Gerling Intern. Ins. Co. v. C.I.R., 839 F.2d 131, 140-141 (3d Cir. 1988)).

The Court went on to discuss a number of indicia that the companies had acted as one, including the fact that records had

May 5, 1993

Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL

previously been supplied, that profits on the deal in question were to be divided up at a later date, and that an employee had been transferred from the parent to the subsidiary for purposes of negotiating the deal. Accordingly, the Court held that:

The facts of this case support a finding that defendant MAC has easy and customary access to . . . [its parent's] documents involving this transaction, and MAC possesses the ability to obtain such documents from . . . [its parent] for its usual business needs. One such business need is to provide highly relevant documents in litigation.

Camden Iron, at 443-444 (emphasis added).

Again, it is difficult to believe, and SBT has not argued, that it is not able to secure documents for its own business needs or for use in litigation, or that it has no access to documents when the need arises in the ordinary course of business. As noted above, SBT even "volunteered" to supply some of the requested records. If it has control over these documents, it has control over the other documents requested by the audit team and should be required to produce them.

Notwithstanding the above, the Prehearing Officer's decision is not even based upon the rules regarding discovery or the cases cited in the footnote to Order No. PSC-93-0540-PCO-TL. The purpose of the footnote was to establish a baseline: the law as it stands with regard to production of documents between litigants. However, under Sections 364.183(1), 364.18(2), 364.17, and 350.117(1), Florida Statutes, the Commission's authority to examine records of telecommunications companies and their affiliates is much broader than a party's right to request production under the rules of discovery. The Commission, and in this case, the audit team, must be able to examine the records of SBT's affiliates. Without such access, it will be impossible to determine whether there are inappropriate transactions between affiliates, whether there are cross subsidies flowing between regulated and unregulated activities of SBT and its affiliates, and whether the prices for products and services supplied by SBT's affiliates are reasonable and prudent. If the audit team can only examine those records "volunteered" by SBT, how can this Commission know that it has seen the whole picture and satisfactorily carried out its statutory duty?

May 5, 1993

Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL

Since SBT failed to point out anything that the Prehearing Officer overlooked or to identify any mistake of fact or law in Order No. PSC-93-0540-PCO-TL, and for all of the reasons discussed above, Staff recommends that the Commission deny SBT's motion for review of Order No. PSC-93-0540-PCO-TL. Accordingly, SBT should be ordered to provide access to the requested records within twenty days of the date of the order that will issue from the Commission's present decision.