

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) ORDER NO. PSC-93-0977-PCO-TL) ISSUED: June 30, 1993)

ORDER GRANTING PUBLIC COUNSEL'S FIFTEENTH MOTION TO COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

On February 24, 1993, the Office of Public Counsel (Public Counsel) filed its Fifteenth Motion to Compel and Request for In Camera Inspection of Documents. Public Counsel seeks an order compelling production of documents responsive to its Thirty-Sixth Request for Production from BellSouth Telecommunications d/b/a Southern Bell Telephone and Telegraph Company (Southern Bell or the Company). Southern Bell filed its response to Public Counsel's motion on March 8, 1993. A review of the motion and response indicates that production requests nos. 1, 2 and 5 are in dispute. Part I of this order will address Southern Bell's objections based on the attorney-client privilege and work product doctrine with respect to documents it specified as responsive to requests nos. 1, 2 and 5. Part II of this order will address Southern Bell's objection that request no. 5 is oppressive and unduly burdensome.

DOCUMENT FILED-DATE
07012 JUN 30 93
FLORIDA PUBLIC SERVICE COMMISSION

I.

In Southern Bell's response to Public Counsel's motion, Southern Bell has identified the following documents as responsive to Public Counsel's production request:

- "A. Notes made during preparation for administering discipline by Dave Mower, 21 pages.
- B. Network Operational Review Reaudit - January 1993. Requested to be performed by the Legal Department on April 14, 1992.
- C. Customer Adjustment to MOOSA reaudit - January 1993. Requested to be performed by the Legal Department on April 14, 1992.
- D. Notes made concerning discipline appeals of employees by Charles Cuthbertson, 5 pages."

The Company objects to producing these documents on the basis of the attorney-client privilege and work product doctrine.

Based upon a review of the documents in camera, the motion, the opposition thereto and oral argument of counsel, Public Counsel's motion to compel the documents Southern Bell has withheld under claims of attorney-client privilege and work product doctrine is granted. As discussed below, the documents reviewed are found not to be immune from discovery.

A. Worknotes of Dave Mower and Charles Cuthbertson

1. Attorney-Client Privilege

Upon inspection, these documents appear to lack either legal advice or requests for legal advice. For the reasons discussed in sections III.A and I.A. of Order No. PSC-93-0294-PCO-TL, aff'd on recon., Final Order No. PSC-93-0517-FOF-TL, Southern Bell's assertion of privilege as to these business documents based on a broadly inclusive theory of "privileged investigation" is rejected.

¹ The in camera inspection revealed that the document provided by Southern Bell consisted of 7 pages.

2. Work-Product

The claim of work-product privilege for these documents is rejected. As discussed in Sections III.B and I.B. of Order No. PSC-93-0294-PCO-TL, aff'd on recon., Final Order No. PSC-93-0517-FOF-TL, the work product doctrine cases relate the availability of the privilege to a willingness on the part of those asserting the privilege to allow discovery to proceed by other means. This, Southern Bell has been unwilling to do. Southern Bell Telephone and Telegraph Co. v. Thomas M. Beard, etc. et al., Case No. 80,004 (Fla. 1993).

Moreover, the business nature of the documents, evident in their description and on inspection, would preclude a claim of work product. Soeder v. General Dynamics, 90 F.R.D. 253 (1980).

B. Network Operational Review and MOOSA Reaudits

1. Attorney-Client Privilege

For the reasons we held the audits and operational reviews not to be privileged in Order No. PSC-93-0151-CFO-TL, aff'd on recon., Final Order No. PSC-93-0292-FOF-TL, the reaudits are not protected from discovery despite Southern Bell's claim of attorney-client privilege.

2. Work Product

This Commission has previously rejected Southern Bell's claim that the audits and operational reviews are protected from discovery under the work product doctrine. For the reasons cited in Order No. PSC-93-0151-CFO-TL, aff'd on recon., Final Order No. PSC-93-0292-FOF-TL, the reaudits are not shielded from discovery despite Southern Bell's claim that the reaudits are work product.

II.

Southern Bell has moved for a protective order with regard to Public Counsel's request no. 5 on the grounds that the production request is oppressive and unduly burdensome. That request reads as follows:

- "5. Please provide all internal documents related to this docket written since January 1992 that were not previously provided. This includes any documents concerning disciplining of employees related to the Company's internal investigation."

As drafted, Public Counsel's request seeks all documents not previously provided which were written since January 1992 and relate to the issues in this docket, including documents concerning disciplining of employees related to the Company's internal investigation. The request as drafted is an overlybroad blanket request. At oral argument on the motion, Public Counsel stated:

"The fifth item that we requested were all discipline documents prepared after January 1992 relating to the same type of information and investigation. Southern Bell has made two objections: One that this request was ambiguous. And the second, that there were some pages being withheld under a claim of privilege. Again, discipline is a business matter. I believe this has been covered by prior Commission orders, and that these documents are not privileged."

(Transcript of Status Conference held on 5-21-93 at p. 20.).

Since it appears that Public Counsel intended to request documents in a defined category, i.e., discipline-related documents and that Southern Bell has either responded to Public Counsel's intended request or identified documents withheld under a claim of privilege, Southern Bell's motion for a protective order is apparently moot. To the extent Southern Bell has not provided documents concerning disciplining of employees related to the Company's internal investigation written since January 1992 that were not previously provided, or identified documents responsive to this request which were withheld under a claim of privilege, the Company is ordered to produce those documents within 10 days of the issuance date of this Order.

Based on the foregoing, it is

ORDERED that Public Counsel's Fifteenth Motion to Compel Production of Documents and for In Camera Inspection of Documents is granted as set forth in the body of this Order. It is further

ORDER NO. PSC-93-0977-PCO-TL

DOCKETS NOS. 920260-TL, 910163-TL, 910727-TL, 900960-TL

PAGE 5

ORDERED that Southern Bell shall produce all documents, it has not previously produced or identified as withheld under a claim of privilege, which concern disciplining of employees related to the Company's internal investigation written since January 1992 within 10 days of the issuance date of this Order.

By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 30th day of June, 1993.



Susan F. Clark, Commissioner
and Prehearing Officer

RCB
(S E A L)

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.

ORDER NO. PSC-93-0977-PCO-TL
DOCKETS NOS. 920260-TL, 910163-TL, 910727-TL, 900960-TL
PAGE 6

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.