

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
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In Re: Investigation into the integrity of SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S repair service activities and reports.)	DOCKET NO. 910163-TL
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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
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In Re: Show cause proceeding against SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY for misbilling customers.)	DOCKET NO. 900960-TL
)	ORDER NO. PSC-93-1311-FOF-TL
)	ISSUED: September 9, 1993
)	
)	

The following Commissioners participated in the disposition of this matter:

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

ORDER ON RECONSIDERATION

BY THE COMMISSION:

I. ORDER NO. PSC-93-0823-CFO-TL

On January 7, 1993, the Staff of this Commission (Staff) took the deposition of Walter S. Reid, an employee of BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone & Telegraph Company (Bell). During said deposition, Staff requested that Mr. Reid submit certain late filed exhibits. On February 5, 1993, Bell submitted some of these exhibits. On February 17, 1993, Bell submitted the remainder of the requested exhibits, which were designated as Document No. 1894-93, along with its request for

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confidential classification of some of the materials. By Order No. PSC-93-0823-CFO-TL, issued June 1, 1993, the Prehearing Officer granted Bell's request, in part, and denied it, in part.

On June 11, 1993, Bell filed a motion for reconsideration of Order No. PSC-93-0823-CFO-TL. Its arguments are set forth under the heading of the exhibits to which they apply, below.

A. Late-Filed Exhibit No. 2

1. **Pages 621-626** - This material relates to a pro forma adjustment to reconcile audited to reported Percent Intrastate Usage (PIU). Bell argues that the information is entitled to confidential classification because it was provided to Bell by interexchange carriers (IXCs) pursuant to nondisclosure agreements. Bell bases its claim upon the following highlighted language contained in Section 364.183, Florida Statutes:

(3) The term "proprietary confidential business information" means information . . . which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless pursuant to a . . . private agreement that provides that the information will not be released to the public. (Emphasis added.)

Apparently, Bell believes that the underlined language is self-actuating. We do not agree. As a threshold issue, in order to qualify for confidential classification, the information must not have been previously disclosed. Nondisclosure agreements merely provide a safe harbor for disclosure on a limited basis. Just because materials are acquired subject to nondisclosure agreements does not automatically guarantee that they shall be found to be confidential: the information must also be of a type that would cause harm to the ratepayers or its owner's business operations if disclosed.

Under Rule 25-22.006(4)(e), Florida Administrative Code, it is the burden of the party claiming confidential status either to demonstrate the harm that would occur if the material is disclosed. In this regard, Bell argues that, if the information is disclosed,

the IXCs may be less likely to voluntarily cooperate in future PIU audits. We are not persuaded by this argument. IXCs are required to furnish information to Bell regarding PIU. If an IXC fails to cooperate with a PIU audit, Bell can resolve the problem by filing a motion to compel with the Commission.

Bell also argues that the information in question is customer specific information, which this Commission has historically held to be confidential. Bell's reliance on this argument is somewhat misplaced. Although the information is specific to the IXCs from which it was gathered, it is not the type of information that we believe should be held confidential. Generally, such information includes the names, addresses and telephone numbers of subscribers, which are exempt from disclosure pursuant to Section 119.07(3)(w), Florida Statutes. We have also held, as confidential, information relating to specific customers' competitive interests, based upon Section 364.183(3)(e), Florida Statutes. The information sought to be protected herein consists of adjustments between audited and reported PIU. The Prehearing Officer determined that such data would not harm the IXC's competitive interests. Bell has not advanced any argument which persuades us otherwise.

Bell also states that "Southern Bell has already publicly provided the total intrastate revenue effect of the combined PIU audits for the 1991 and 1992 time frames. No legitimate purpose would be served by further public release of the amounts individually recovered from each of Southern Bell's IXC customers." This statement underscores what appears to be a fundamental misapprehension on Bell's part. Confidentiality does not turn on whether any legitimate purpose would be served by disclosure. The fulcrum upon which confidentiality turns is whether disclosing the material would harm the IXCs' or Bell's business operations, or their ratepayers.

For the reasons set forth above, Bell's motion for reconsideration of the Prehearing Officer's decision in this regard is denied.

2. Page 890 - This material consists of early retirement costs for subsidiaries of BellSouth Corporation. Bell originally argued that disclosure of the information would impair its affiliates' competitive interests. However, it did not explain how disclosure would affect such interests. Since it is Bell's burden to articulate the harm that would result from disclosure, the

Prehearing Officer denied Bell's request for confidential classification of these materials.

In its motion for reconsideration, Bell argues that competitors could use the early retirement cost information to forecast the potential ability of its affiliates' to downsize and thus, the potential degree to which they may be able to reduce prices. According to Bell, such information could allow competitors to gain an advantage by reducing their prices first or by a greater amount.

Since Bell did not make this argument in its original request, it is not appropriate as a basis for reconsideration. Accordingly, we hereby reject Bell's request for reconsideration of the Prehearing Officer's decision on this matter.

B. Late-Filed Exhibit No. 3

1. Page 957 - This information depicts certain financial information of BellSouth Advertising and Publishing Company (BAPCO). Bell originally argued that disclosure of the information could allow BAPCO's competitors to develop "strategies". However, it did not state how disclosure would allow competitors to develop strategies or what kind of strategies it referred to. Its request was, therefore, denied.

In its motion for reconsideration, Bell first argues that by Order No. PSC-93-0823-CFO-TL the Prehearing Officer "acknowledges" that the material is confidential. Order No. PSC-93-0823-CFO-TL acknowledges that it appears that the material has not been disclosed, not that it is confidential. Bell goes on to argue that competitors could use the information to ascertain the costs below which BAPCO would be unable to profitably compete, impairing its competitive interests. However, Bell did not make this argument in its original request and we do not believe that it is an appropriate ground for reconsideration.

By letter dated August 2, 1993, Bell requested that we consider Order No. PSC-93-0326-CFO-TL as supplemental authority for its motion for reconsideration. By that order, the Prehearing Officer granted Bell's request for confidential classification of certain BAPCO information contained in Document No. 10539-92, including itemized expense, net income, and forecasted revenue and expense information. Although some of the information is similar, the materials at issue here consist of capitalization and capital

structure information. Moreover, it must be noted that, in its request for confidential classification of Document No. 10539-92, Bell provided a much more detailed description of how disclosure of the information would impair the competitive interests of BAPCO, something it failed to do in this instance.

Since Bell did not demonstrate that the materials qualify for confidential classification, and since we do not believe that disclosure would harm Bell or BAPCO in any event, we hereby deny Bell's motion for reconsideration of Order No. PSC-93-0823-CFO-TL in this regard.

2. Page 958 - Bell also requested reconsideration of Order No. PSC-93-0823-CFO-TL insofar as it denied confidential classification of lines 10 and 12. Order No. PSC-93-0823-CFO-TL actually granted Bell's request for confidential classification of these lines. However, it appears that it may be appropriate to reconsider this portion of the order anyway.

In its original request for confidential classification, Bell argues that:

This information relates to competitive interests and/or unregulated operations, the disclosure of which would impair the competitive business, and/or unregulated operations of Southern Bell and/or other companies. In particular, this information discusses aspects of BAPCO's publishing and advertising business. As such, this information is classified as confidential business information pursuant to Section 364.183, Florida Statutes, and is exempt from the Open Records Act.

As discussed above and elsewhere in this recommendation, the burden of demonstrating that information qualifies for confidential classification rests squarely upon Bell. Conclusory statements, without anything more, do not satisfy this burden. Further, we have reexamined the material and do not believe that disclosure of the information would harm either Bell or BAPCO. Accordingly, we shall reconsider this portion of Order No. PSC-93-0823-CFO-TL and deny Bell's request for confidential classification of this information.

C. Late-Filed Exhibit No. 6

This information again deals with PIU adjustments between audited and reported amounts. Bell argues that the Commission should reconsider the denial of confidential classification of this material for the same reasons set forth under "Late-Filed Exhibit No. 2". Bell also points out that Order No. PSC-93-0823-CFO-TL contains a misstatement in that it refers to the PIU of other LECs operating in Florida and that these LECs might be hesitant to provide the information in the future if disclosed.

For the same reasons given above, we hereby deny Bell's motion for reconsideration of this portion of Order No. PSC-93-0823-CFO-TL. However, we shall correct Order No. PSC-93-0823-CFO-TL to state "IXC" in place of "LEC" in the discussion of Late-Filed Exhibit No. 6.

II. ORDER NO. PSC-93-0388-CFO-TL

On October 30, 1992, Bell filed a request for confidential classification of certain information submitted in response to Staff's Seventh Set of Interrogatories, Nos. 258, 264, and 273. The responses were designated as Document No. 12789-92. By Order No. PSC-93-0388-CFO-TL, issued March 15, 1993, the Prehearing Officer determined that the materials consisted of adjustments between audited and reported PIU and that individual usage could not be determined therefrom. Accordingly, Bell's request was denied.

On March 25, 1993, Bell filed a motion for reconsideration of Order No. PSC-93-0388-CFO-TL. Essentially, Bell made the same arguments here as discussed under the discussion of its motion for reconsideration of Order No. PSC-93-0823-CFO-TL. For the same reasons set forth thereunder, we hereby deny Bell's motion for reconsideration of Order No. PSC-93-0388-CFO-TL.

**III. ORDERS NOS. PSC-93-0411-CFO-TL
PSC-93-0414-CFO-TL, & PSC-93-0415-CFO-TL**

On December 9, 1992, Bell filed a request for confidential classification for certain information provided in response to Staff's Thirteenth Set of Interrogatories, No. 371. The response was designated as Document No. 14306-92. By Order No. PSC-93-0415-CFO-TL, the Prehearing Officer found that the requested information consisted of aggregate toll usage data by mileage band and customer

classification, and that it would provide no useful information to any of Bell's competitors. Accordingly, the Prehearing Officer denied Bell's request.

On December 21, 1992, Bell filed a supplemental response to Staff Interrogatory No. 371, along with a request for confidential classification of certain information contained therein. The response was designated as Document No. 14757-92. By Order No. PSC-93-0411-CFO-TL, the information contained therein was also found to consist of aggregate toll usage data by mileage band and customer classification. Since it was determined that such data would provide no useful information to Bell's competitors, this request for confidentiality was also denied.

On December 30, 1992, Bell filed a request for confidential classification of information included in its response to Staff's Sixteenth Set of Interrogatories, No. 427(a), which was designated as Document No. 15023-92. By Order No. PSC-93-0414-CFO-TL, the Prehearing Officer determined that the information consisted of aggregate MTS, Saver Service, WATS and 800 service information grouped by mileage band and time of day. Since it was also found that the data would provide no useful information to competitors, Bell's request for confidential classification of this material was denied.

On March 29, 1993, Bell filed a motion for reconsideration of Orders Nos. PSC-93-0411-CFO-TL, PSC-93-0414-CFO-TL, and PSC-93-0415-CFO-TL. Bell argues that the information that was denied confidential classification relates to competitive interests and that competitors could use the information to target the most lucrative markets and "siphon-off" business, to the detriment of Bell and its ratepayers.

The information discussed in these orders only reveals patterns of usage. It does not include any customer- or location-specific information which competitors could use to target and siphon off business. In addition, information analogous to that shown in Document No. 15023-92 has already been disclosed in MFR Schedule E-1A, filed by Bell in Docket No. 920260-TL. Moreover, as noted in Order No. PSC-93-0414-CFO-TL, Bell "has failed to distinguish the material at issue from information which it has routinely disclosed".

Bell also argues that the materials discussed in Orders Nos. PSC-93-0411-CFO-TL and PSC-93-0414-CFO-TL are exactly the same type

of information afforded confidential classification in Order No. 19775, issued August 9, 1988. According to Bell, under Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966) and Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So.2d 249 (Fla. 1982), we may only modify preexisting orders when new evidence is presented which warrants such a change. Along the same lines, Bell also cites Florida Motor Lines Corp. v. Douglas, 4 So.2d 856 (Fla. 1941), for the proposition that "[c]hanged conditions and circumstances arising out of the rapid development of the state may justify or require changes or modifications of orders made by the Commission."

Bell's arguments in this regard are not persuasive. For one thing, the information at issue here is not exactly the same type of information discussed in Order No. 19775. More importantly, however, is that Bell's reading of the above-noted cases is overbroad. Both Peoples Gas and Reedy Creek involved attempts to modify specific decisions in specific cases. No attempt has been made to modify Order No. 19775. Accordingly, Peoples Gas and Reedy Creek are not applicable to the matter at hand.

Florida Motor Lines involved a petition for judicial review of several Railroad Commission orders granting one bus company's application for extension of operating rights and denying another's. Although it denied the petition, the court nevertheless stated that changed circumstances might justify or even require modification of the Commission's rulings. Again, since no attempt has been made to change or modify Order No. 19775, we fail to see how the Florida Motor Lines ruling applies to the instant issue.

For the reasons set forth above, we hereby deny Bell's motion for reconsideration of Orders Nos. PSC-93-0411-CFO-TL, PSC-93-0414-CFO-TL, and PSC-93-0415-CFO-TL.

IV. ORDER NO. PSC-93-0318-PCO-TL

On September 11, 1992, OPC filed a motion to require Bell to offer sworn testimony regarding its quality of service reports. Bell filed a response in opposition to OPC's motion on September 18, 1992. The Prehearing Officer heard arguments on this matter at the January 15, 1993 Prehearing Conference, and granted OPC's motion to the extent of requiring Bell to designate a person or persons who can respond to questions regarding the truthfulness of its quality of service reports.

At a January 29, 1993 Motion Hearing, Bell stated that it had designated Mr. Wayne Tubaugh as the person who would be available to respond to questions about the Schedule 11 Reports. Bell stated that Mr. Tubaugh had verified the input data with each of the individuals who compiled it.

At a Motion Hearing on February 12, 1993, OPC argued that it had deposed Mr. Tubaugh and did not believe that Mr. Tubaugh was competent to testify, on behalf of Bell, that the reports are truthful. OPC, therefore, made an oral motion to require Bell to file written testimony attesting to the veracity of its Schedule 11 Reports.

By Order No. PSC-93-0318-PCO-TL, issued March 1, 1993, the Prehearing Officer found that OPC could satisfy its concerns in this regard under a burden of proof standard. In other words, to the extent that Mr. Tubaugh or the other witnesses proffered by Bell are incompetent to resolve issues dealing with the Schedule 11 Reports or quality of service, Bell will not have met its ultimate burden of persuasion. The Prehearing Officer, therefore, denied OPC's motion.

On March 11, 1993, OPC filed a motion for review of Order No. PSC-93-0318-PCO-TL. In its motion, OPC recites the facts that lead it to believe that Mr. Tubaugh is incompetent to testify in this regard. OPC concludes that this Commission cannot allow the matter to be resolved as an evidentiary issue and that it must order Bell to sponsor a witness who is competent to testify regarding the Schedule 11 Reports.

On March 18, 1993, Bell filed a response in opposition to OPC's motion. Essentially, Bell argues that OPC's motion for review fails to demonstrate any error of fact or law and that it must, therefore, fail.

Bell is correct in this regard. OPC's motion does not raise any matter that the Prehearing Officer overlooked, or point out any error of fact or law. It is merely reargument over a point that has already been determined, albeit adversely to OPC. Accordingly, we hereby deny OPC's motion for review.

It is, therefore,

ORDERED by the Florida Public Service Commission that the motion for reconsideration of Order No. PSC-93-0823-CFO-TL, filed

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by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone & Telegraph Company, is hereby denied, as set forth in the body of this Order. It is further

ORDERED that this Commission has reconsidered Order No. PSC-93-0823-CFO-TL on its own motion, insofar as it disposed of the request for confidential classification of Document No. 1894, page 958, lines 10 and 12, and that request is hereby denied, as set forth in the body of this Order. It is further

ORDERED that the motion for reconsideration of Order No. PSC-93-0388-CFO-TL, filed by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone & Telegraph Company, is hereby denied, as set forth in the body of this Order. It is further

ORDERED that the motion for reconsideration of Orders Nos. PSC-93-0411-CFO-TL, PSC-93-0414-CFO-TL, and PSC-93-0415-CFO-TL, filed by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone & Telegraph Company, is hereby denied, as set forth in the body of this Order. It is further

ORDERED that the motion for reconsideration of Order No. PSC-93-0318-PCO-TL, filed by the Office of Public Counsel, is hereby denied, as set forth in the body of this Order. It is further

By ORDER of the Florida Public Service Commission this 9th day of September, 1993.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

RJP

Commissioner Laredo dissented from the decisions regarding Orders Nos. PSC-93-0823-CFO-TL and PSC-93-0318-PCO-TL.

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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.