

FLORIDA PUBLIC SERVICE COMMISSION

Fletcher Building  
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Tallahassee, Florida 32399-0850

M E M O R A N D U M

December 9, 1993

TO : DIRECTOR, DIVISION OF RECORDS AND REPORTING  
FROM : DIVISION OF LEGAL SERVICES [WILSON, HATCH] <sup>Jrw</sup> *FE RNT*  
DIVISION OF COMMUNICATIONS [GREER] <sup>SLG</sup>  
RE : DOCKET NO. 920260-TL - COMPREHENSIVE REVIEW OF REVENUE  
REQUIREMENTS AND RATE STABILIZATION PLAN OF SOUTHERN BELL  
TELEPHONE AND TELEGRAPH COMPANY.

DOCKET NO. 900960-TL - SHOW CAUSE PROCEEDING AGAINST  
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY FOR  
MISBILLING CUSTOMERS.

DOCKET NO. 910163-TL - PETITION ON BEHALF OF CITIZENS OF  
THE STATE OF FLORIDA TO INITIATE INVESTIGATION INTO  
INTEGRITY OF SOUTHERN BELL TELEPHONE AND TELEGRAPH  
COMPANY'S REPAIR SERVICE ACTIVITIES AND REPORTS.

DOCKET NO. 910727-TL - INVESTIGATION INTO SOUTHERN BELL  
TELEPHONE AND TELEGRAPH COMPANY'S COMPLIANCE WITH RULE  
25-4.110(2), F.A.C., REBATES.

DOCKET NO. 911034-TL - REQUEST BY BROWARD BOARD OF COUNTY  
COMMISSIONERS FOR EXTENDED AREA SERVICE BETWEEN FT.  
LAUDERDALE, HOLLYWOOD, NORTH DADE AND MIAMI.

AGENDA: 12/20/93 - CONTROVERSIAL AGENDA - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

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

CASE BACKGROUND

This recommendation addresses Southern Bell's motions for  
reconsideration of Order Nos. PSC-93-0905-CFO-TL,  
PSC-93-0978-CFO-CFO-TL, PSC-93-0979-CFO-TL, PSC-93-1044-CFO-TL,  
PSC-1045-CFO-TL, PSC-1046-CFO-TL, PSC-93-1390-CFO-TL,  
PSC-93-1402-CFO-TL, PSC-93-1403-CFO-TL, PSC-93-1410-CFO-TL and

DOCUMENT NUMBER-DATE

13158 DEC-93

FPSC-RECORDS/REPORTING

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PSC-93-1421-CFO-TL, wherein the Prehearing Officer denied Southern Bell's motions for confidential classification for information regarding current and former Southern Bell employees in the Southern Bell investigation dockets. The specific information for which Southern Bell sought confidential classification is detailed in each instance below.

#### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission reconsider Order No. PSC-93-0905-CFO-TL, PSC-93-0978-CFO-TL, PSC-93-0979-CFO-TL, PSC-93-1044-CFO-TL, PSC-93-1045-CFO-TL and PSC-93-1046-CFO-TL?

**RECOMMENDATION:** No. Southern Bell has not identified any error or omission of fact or law in the decisions.

**STAFF ANALYSIS:** In Order Nos. PSC-93-0905-CFO-TL, PSC-93-0978-CFO-TL, PSC-93-0979-CFO-TL, PSC-93-1044-CFO-TL, PSC-93-1045-CFO-TL and PSC-93-1046-CFO-TL, the Prehearing Officer denied Southern Bell's motion for confidential classification for information regarding certain current and former Southern Bell employees in the investigation dockets.

The appealed Orders dispose of motions filed by Southern Bell which sought confidential classification for portions of the deposition transcripts of various Southern Bell employees, for portions of its answers to Staff's interrogatories, for portions of documents produced in response to Staff's production requests and for portions of late-filed deposition exhibits. Specifically, Southern Bell sought confidential classification for the identities of employees who stated during their depositions that they had been disciplined by Southern Bell, the names of employees who were disciplined by Southern Bell found in late-filed deposition exhibits, the names of current and former employees disciplined by Southern Bell which are contained in the Company's responses to Staff's interrogatories, the identity of current and former employees whose personnel records were produced in response to Staff's production request, the identities of current and former employees who filed grievances after they were disciplined by Southern Bell found in documents produced in response to Staff's production request and the identities of current and former employees identified by the Company as persons who may have knowledge regarding the issues in these dockets found in the Company's response to Staff's interrogatories.

In support of its motions for confidential classification, Southern Bell relied on the exemption from Florida's Public Records Law found in Subsection (f) of Section 364.183(3), Fla. Stat. Section 364.183(3)(f) exempts from public disclosure "employee personnel information unrelated to compensation, duties, qualifications or responsibilities." In ruling on these motions, the Prehearing Officer held that the information is related to the performance of the employees' jobs and, therefore, it is employee personnel information which is related to the employees' duties or responsibilities. Consequently, it was determined that this information is not "proprietary confidential business information" as defined by the legislature in Section 364.183(3)(f) and, hence, it is information not exempt from public disclosure by that provision.

Southern Bell has filed a motion for reconsideration of these Orders. The Company argues that it can be inferred from the Open Government Sunset Review Act that the legislature intended that the Prehearing Officer apply a balancing test which weighs the benefits to be derived from public disclosure against the detriment to the employees as part of its determination of whether, in each instance, the information falls under the language of the exemption found in Section 364.183(3)(f).

The Open Government Sunset Review Act, Section 119.14, Fla. Stat., is the criteria applied by the legislature in its determination of whether an exemption to Florida's Public Records Law will be created or readopted. The Open Government Sunset Review Act provides that exemptions may be created or maintained only if they serve an identifiable public purpose and may not be broader than necessary to accomplish that purpose. Subsection (4)(d)(2) of the Open Government Sunset Review Act provides that an identifiable public purpose is when the exemption "protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals . . . ."

The Company contends that while these provisions of the Open Government Sunset Review Act do not provide an exemption to Florida's Public Records Law, these provisions do provide insight into the legislative intent as to the proper application of existing exemptions to Florida's Public Records Law. Southern Bell contends that "[t]his Commission can only give effect to the

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legislative intent, and correct the error that inheres in the subject order by balancing the potentially grave damage to Southern Bell employees against the negligible benefit of publicly disclosing the identities of these employees."

The Prehearing Officer did not err by not applying the balancing test advocated by Southern Bell. Although not specifically addressed in each Order, the Prehearing Officer has rejected the argument raised by Southern Bell and correctly concluded that the Open Government Sunset Review Act does not inject a requirement which has not been expressed by the legislature in the statute which exempts the information from public disclosure. The Prehearing Officer presumes that the legislature has considered the criteria found in the Open Government Sunset Review Act in its decision to readopt the exemption to Florida's Public Records Law for "employee personnel information unrelated to . . . duties . . . and responsibilities" found in Subsection (f) of Section 364.183(3), Fla. Stat. The Prehearing Officer does not presume that the Open Government Sunset Review Act imposes a requirement which has not been expressed by the legislature in the statute which exempts the information from public disclosure.

The balancing of interests advocated by Southern Bell has already been made by the legislature in its adoption of Section 364.183(3)(f), Fla. Stat. The Prehearing Officer correctly declined Southern Bell's invitation to second guess the legislative directive embodied in Section 364.183(3)(f), Fla. Stat. Accordingly, Staff recommends that Southern Bell's motions for reconsideration be denied.

**ISSUE 2:** Should the Commission reconsider Order No. PSC-93-1390-CFO-TL, PSC-93-1402-CFO-TL, PSC-93-1403-CFO-TL, PSC-93-1410-CFO-TL and PSC-93-1421-CFO-TL?

**RECOMMENDATION:** No. Southern Bell has not identified any error or omission of fact or law in the decisions.

**STAFF ANALYSIS:** In Order No. PSC-93-1390-CFO-TL, PSC-93-1402-CFO-TL, PSC-93-1403-CFO-TL, PSC-93-1410-CFO-TL and PSC-93-1421-CFO-TL, the Prehearing Officer denied Southern Bell's motions for confidential classification for information regarding Southern Bell employees in the investigation dockets.

The appealed Orders disposed of motions filed by Southern Bell which sought confidential classification for portions of deposition transcripts wherein the deponent identifies specific Southern Bell employees by name and alleges that these employees may have engaged in improper activity or instances where the question asked by Public Counsel assumes that specific Southern Bell employees may have engaged in improper activity.

In its motions for reconsideration, Southern Bell argues that the Prehearing Officer erred by interpreting the statutory exemption from public disclosure found in Section 364.183(3)(f), Fla. Stat., in a way that will render it illogical and by interpreting this exemption in a manner which does not give effect to the legislative intent.

Southern Bell's first point on reconsideration has already been considered by the Prehearing Officer in ruling on the underlying motions. In its motions for confidential classification, Southern Bell contended that if the Prehearing Officer interprets Subsection (f) of Section 364.183(3), Fla. Stat. to require public disclosure of any employee information that bears a relationship, even of an indirect or tangential nature to an employee's job responsibilities or duties, then there would be literally nothing protected from disclosure. Southern Bell contended that a "broad reading" of Subsection (f) of Section 364.183(3), Fla. Stat. would reduce the public disclosure exemption for employee information to the point of nonexistence. The Company contended that if the legislature had intended for this statute to be read in a way that would make the employee information exemption uniformly unavailable and essentially pointless, then it would simply not have bothered to create the exemption in the first place. In its motion for reconsideration, Southern Bell contends the Order is illogical because the Order, in effect, interprets the exemption so that any employee personnel related information that has some relationship, no matter how tenuous, to the employee's employment would not be exempt from disclosure. Southern Bell contends that the Prehearing Officer's narrow construction of the exemption found in the Orders covers virtually any activity while on the job.

It is noted that the Prehearing Officer stated in the Orders that exemptions to Florida's Public Records Law would be applied on a case-by-case basis. The Prehearing Officer stated that the exemption was applied to the information which was the subject of

the specific request for confidentiality. In ruling on each motion, the Prehearing Officer was not expressing an opinion, as Southern Bell suggests, that all activity while on the job is related to performance of the employees' duties or responsibilities. In this instance, the Prehearing Officer simply has concluded that the identities of employees who allegedly engaged in improper activity in the performance of their jobs is information related to those employees' duties and responsibilities.

As its second point on reconsideration, Southern Bell contends that the Prehearing Officer's narrow construction of the exemption ignored the clearly stated legislative intent, found in the Open Government Sunset Review Act, to avoid the disclosure of defamatory information that will cause unwarranted damage to individuals. Moreover, the Company contends that the resolution of any statutory ambiguity should be done in such a way that will give effect to the clearly stated legislative intent found in the Open Government Sunset Review Act.

Despite Southern Bell's arguments to the contrary, the Prehearing Officer did not find the exemption for "employee personnel information unrelated to duties or compensation" found in Section 364.183(3)(f) to be ambiguous. Furthermore, if the Florida Legislature had intended that exemptions to Florida's Public Records Act were to be interpreted so as to avoid the public disclosure of defamatory statements and the resulting unwarranted damage, it would have written such a requirement in the statutory exemption.

Southern Bell characterizes the information in the depositions as vague, unsupported allegations which may have the effect of defaming innocent employees. Yet, an allegation that an employee engaged in improper conduct in the performance of his job would not be defamatory if the information is true. If the legislature had intended that information related to an employee's duties or responsibilities would not be subject to public disclosure without a determination of the truth or falsity of the information, it certainly would have articulated this requirement in the exempting statute.

The legislature has considered the criteria set forth in the Open Government Sunset Review Act in its decision to exempt from disclosure only "employee personnel information unrelated to

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compensation, duties, qualifications or responsibilities." Section 364.183(3)(f), Fla. Stat. Accordingly, Staff recommends that Southern Bell's motion for reconsideration be denied.

Finally, Southern Bell seeks reconsideration of that portion of these Orders which deny Southern Bell's motion for confidential classification for portions of the deposition transcripts which disclose information found in Southern Bell's Supplemental Answers to Public Counsel's Third Interrogatories. In support of its motions for reconsideration, Southern Bell adopts the arguments it raised in its motion for reconsideration of Order No. PSC-93-1046-CFO-TL. For the reasons discussed in Issue 1 of this recommendation, Staff recommends that Southern Bell's motion for reconsideration be denied.

**ISSUE 3:** Should these dockets be closed.

**RECOMMENDATION:** No.

**STAFF ANALYSIS:** These dockets should remain open.