

FLORIDA PUBLIC SERVICE COMMISSION

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

M E M O R A N D U M

March 25, 1993

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING
FROM: DIVISION OF APPEALS (BELLAK) *RCB DS*
RE: DOCKET NOS. 910163-TL, **920260-TL**, 900960-TL, 910727-TL
AGENDA: MARCH 30, 1993 - CONTROVERSIAL - PARTIES MAY NOT PARTICIPATE
FILE NAME: ~~910163#2.RCM~~

920260.RCM

BACKGROUND

Order No. PSC-93-0294-PCO-TL, (Order), issued by the Prehearing Officer on February 23, 1993, in the above consolidated docket, granted Public Counsel's Motions To Compel Production of three categories of documents comprising respectively statements and summaries, a statistical analysis and work-notes of Human Resources Representatives concerning craft/management disciplinary issues. Southern Bell in its request for review of that Order, asserts that "numerous mistakes of both law and fact" therein require that this Commission review and reverse that decision.

DISCUSSION OF ISSUES

ISSUE 1: Should Southern Bell's Motion For Review be granted?

STAFF RECOMMENDATION: No. The motion should be denied.

STAFF ANALYSIS: Though error of fact or law would meet the appropriate standard for reconsideration if so found, Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 399 So. 2d 161 (Fla. 1st DCA 1981); Order No. PSC-92-0339-FOF-TL (5/13/92), staff recommends that no error therein of law or fact be found.

Southern Bell reargues here its basic premise that anything it identifies as part of its "internal legal investigation" of its service operations is privileged as either an attorney-client matter, work product, or both. This is claimed to be the case by direct analogy with the facts of Upjohn Co. v. United States, 449

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FPSO-RECORDS/REPORTING

DOCKET NO. 910163-TL
DOCKET NO. 920260-TL
DOCKET NO. 900960-TL
DOCKET NO. 910727-TL
March 25, 1993

U.S. 383, 66 L.Ed 2d 584, 101 S. Ct. 637 (January 13, 1981). That result is also said to obtain notwithstanding Consolidated Gas Supply Corporation (Consolidated), 17 F.E.R.C. ¶63,048 (December 2, 1981) or In re Notification to Columbia Broadcasting System Concerning Investigation by CBS of Incidents of "Staging" by its Employees of Television News Programs, 45 F.C.C. 2d, 19 (1973) (CBS). The former case, however viewed, is claimed to be consistent with Southern Bell's position, while the latter case is claimed to be inapplicable.

However, the facts in Upjohn are not analogous to those in this case. The "questionable payments" to foreign officials by Upjohn employees which were investigated by Upjohn's counsel for the purpose of rendering legal advice were obviously not regulated activities required by rule and statute and as to which continuing company and agency oversight were required. Instead, they were activities which were not permitted at all. The fact that the investigation was conducted solely to render legal advice was not, on the face of the opinion, even a matter of controversy.

Here, Southern Bell's service operations are required pursuant to rule and statute. Ongoing oversight by, inter alia, both the company and this Commission are required by both rule and statute. The specific documents in question, whether work-notes on employee discipline, statements and summaries related thereto, or a statistical analysis concerning internal audits of those service operations over a period of seven months are just as obviously related to the ongoing management and operation of those services in the face of allegations of mismanagement as they are to obtaining legal advice. That business use of the collected materials has been noted by Public Counsel. Citizens Response To Southern Bell Telephone and Telegraph Company's Motion for Review of Order Granting Public Counsel's Motions for In-Camera Inspection of Documents and Motions to Compel, p. 10. These considerations are, in contrast, absent from the facts of Upjohn. Therefore, error of law or fact has not been identified in the Prehearing Officer's rejection of the claimed analogy between this case and Upjohn. That claim founders because the assertion that all of these investigative activities took place solely to obtain legal advice and would not otherwise have been performed is unconvincing in these facts and circumstances. The Prehearing Officer justifiably relied on Southern Bell's own more realistic assessment of the activities as also relating to "the need to find improper acts and correct them." Order, p. 3.

DOCKET NO. 910163-TL
DOCKET NO. 920260-TL
DOCKET NO. 900960-TL
DOCKET NO. 910727-TL
March 25, 1993

Southern Bell has also not identified error in the Prehearing Officer's reliance on Consolidated and CBS, supra. Both of them involve the application of the attorney-client and work-product privileges to regulated entities (such as broadcasters, gas utilities or local exchange companies) and are more relevant to this case than Upjohn for that reason.

Though Southern Bell focuses on the initial debate in Consolidated, the judge therein "short circuited" that debate in favor of "allowing for excision of a document to permit discovery only of factual matters." Consolidated, at p. 65, 237. Where Southern Bell has admitted that no privileged material was apparent on the face of the documents, Order p. 3, ¶ 4, Consolidated was properly relied on to deny the claims of privilege. In effect, under the Consolidated approach, there was nothing to excise from these documents.

Southern Bell has also not demonstrated error in the Prehearing Officer's citation of CBS, supra. Southern Bell claims that case inapplicable for three reasons: First, CBS predated Upjohn. Second, the Public Counsel is in an adversarial relationship to Southern Bell whereas the FCC was not an adversary of CBS. Third, the FCC relied on CBS's investigation instead of performing its own. However, these arguments do not demonstrate CBS to be inapplicable.

First, the infirmities of Southern Bell's Upjohn analogy have already been discussed. Whether CBS' "control group" analysis was later overturned in Upjohn is irrelevant. That issue, the main point of Upjohn, is not the question presented by Southern Bell's claim of privilege. The relevant question presented by that claim is whether a "broad corporate shield of secrecy", Consolidated, supra, can be created for certain of a regulated entity's business activities by having the entity's legal department request these activities. CBS' prescient analysis of that issue has not been affected by Upjohn, nor was the Prehearing Officer's reliance on it erroneous.

Second, while the Public Counsel may be in an adversarial relationship with Southern Bell, this Commission appears to relate to Southern Bell the way the FCC related to CBS. This Commission has sought the same discovery as has the Public Counsel. Thus, CBS is not inapplicable for the second reason advanced by Southern Bell.

DOCKET NO. 910163-TL
DOCKET NO. 920260-TL
DOCKET NO. 900960-TL
DOCKET NO. 910727-TL
March 25, 1993

Finally, Southern Bell's attempt to distinguish CBS because the FCC relied on CBS' investigation instead of conducting its own is frivolous. The FCC was not concerned with regulating CBS' investigations, it was concerned with regulating CBS' conduct as a broadcaster. The Commission's concern with Southern Bell's conduct of its service activities is analogous. Southern Bell's attempt to surround those activities with secrecy through a broad brush claim of privilege raises the same concerns as the FCC addressed in CBS. The Prehearing Officer did not commit error in citing the analysis therein. See also, the general discussion of these issues in Order Nos. PSC-93-0151-CFO-TC (January 28 1993) and PSC-93-0292-FOF-TL (February 23, 1993).

Finally, staff recommends that no error be found as to the Prehearing Officer's denial of privilege from discovery for the statements or summaries reviewed in-camera. As described in Southern Bell's Opposition to Public Counsel's Motion to Compel (Opposition) filed May 28, 1992, some of these statements are "notes compiled by the Personnel Department...in order to determine whether any individual should be disciplined and to what extent." Opposition, p. 2-3. This description is appropriate to documents compiled for business purposes rather than documents privileged from discovery under the attorney-client or work-product privileges. Although Southern Bell additionally describes the documents as "derived from the privileged internal legal investigation", Opposition p. 2, the privileged status based on Upjohn for that investigation in toto that Southern Bell asserts has been rejected for reasons previously stated.

Since neither the attorney-client or work-product privilege attaches pursuant to Southern Bell's privileged investigation theory, it is unnecessary to determine whether events since the date of the Order (i.e. the Supreme Court's ruling in Case No. 80,004) have affected whether any work-product privilege can be overcome. It is additionally unnecessary to determine whether fact work-product or opinion work-product more accurately describes these materials, which the Prehearing Officer correctly found to be not privileged.

DOCKET NO. 910163-TL
DOCKET NO. 920260-TL
DOCKET NO. 900960-TL
DOCKET NO. 910727-TL
March 25, 1993

However, it should be noted that even if these materials were found to be work-product, they would be discoverable under Upjohn. Thereunder, the qualified work-product privilege applies only if the corporate employees can be deposed so that the facts can be discovered indirectly, if not directly from the statements themselves. 449 US at 399.

In depositions already held in this case, Southern Bell has announced that its theory of "privileged investigation" forecloses any questioning as to the facts developed therein. Attachment I. In effect, the shield of secrecy as to the underlying facts that Southern Bell asserts is as broad in depositions as it is in document production. Thus, even were Upjohn applicable, Southern Bell's theory remains infirm. Southern Bell's employees are, in effect, unavailable for deposition as to these facts, even though facts, as such, are not privileged. 449 US at 395. Similarly unavailable for deposition are those deponents that invoked the Fifth Amendment privilege and a deceased employee.

Finally, Southern Bell asserts that none of the cases in the Order establishes that an internal legal investigation performed by a regulated entity can never be privileged. Motion For Review, p. 8. However, the Prehearing Officer did not conclude that either. The question presented was not whether any such investigation could ever be privileged, but whether the documents at issue in this case were privileged under the facts and circumstances presented. The Prehearing Officer did not err in concluding that they were not privileged from discovery in this case. See, e.g., First Chicago International v. United Exchange Co., Ltd., 125 F.R.D. 55, 57 (S.D.N.Y. 1989); Soeder v. General Dynamics Corp., 90 F.R.D. 253 (U.S.D.C. Nov. 1980).

ISSUE 2: Should this docket remain open?

STAFF RECOMMENDATION: Yes.

RCB
Attachment

¹ In view of the finding that the statements and summaries are not work-product, no analysis is presented as to whether discovery might be precluded of materials found to be opinion work-product. 449 US 399.

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BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

IN RE: Petition on behalf of Citizens
of the State of Florida to Initiate
Investigation into the Integrity of
Southern Bell Telephone and Telegraph
Company's Repair, Service Activities and
Reports.

Docket No. 910163-TL

Comprehensive Review of the Revenue
Requirements and Rate Stabilization
Plan of Southern Bell Telephone &
Telegraph Company.

Docket No. 920260-TL

S T I P U L A T I O N

IT IS STIPULATED AND AGREED by and
between the parties through their
respective counsel that the depositions
of DAN L. KING and ETTA MARTIN may be
taken before Kerry K. Thames,

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Foshee & Turner

REGISTERED PROFESSIONAL REPORTERS

1 Q. I'm sorry, the AMS ID --

2 MS. MARTIN ANS.

3 Q. ANS?

4 MS. MARTIN: Yes.

5 Q. Okay, is that the access
6 system security code identification?

7 MS. MARTIN: Yes.

8 Q. And that's for every single
9 status line now, is what you're saying,
10 on a dealer?

11 MS. MARTIN: That's my
12 understanding. I would have to look at
13 the AT&T documentation to make sure
14 that it's every status line, but what
15 I'm understanding is it should be every
16 status line.

17 MR. KING: The intention was
18 that it would be for each transaction
19 that is completed.

20 Q. And can you tell me why this
21 particular enhancement was made?

22 MR. CARVER: Let me stop
23 right there. With this or with any

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1 Commissioner, at 3535 Colonnade
2 Parkway, Conference Room 3-B, Birming-
3 ham, Alabama, on the 12th day of
4 January, 1993, commencing at 9:35 a.m.

5 IT IS FURTHER STIPULATED AND
6 AGREED that the signature to and
7 reading of the deposition by the
8 witness is not waived.

9 IT IS FURTHER STIPULATED AND
10 AGREED that notice of filing of
11 deposition by commissioner is waived.

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21 particular enhancement was made?

22 MR. CARVER: Let me stop
23 right there. With this or with any

008

1 other change to the system, to the
2 extent it was made as a result of
3 something that came out of the
4 privileged investigation, I'm going to
5 ask you not to answer that. Now, if
6 you know the reason for the change and
7 if it's something that's unrelated to
8 the investigation, you can answer. But
9 if it has any relation to that, I'm
10 going to instruct you not to answer on
11 the basis of the attorney-client
12 privilege.

13 MS. MARTIN: Well, I would
14 say it would be under the basis of the
15 attorney-client privilege, as far as I
16 know.

17 MR. CARVER: Then I instruct
18 you not to answer.

19 MS. MARTIN: As far as I
20 know, the reason why we installed that
21 feature.

22 Q. (BY MS. RICHARDSON) Just for
23 the record, Ms. Martin, you're refusing

to answer my question based upon Mr. Carver's objection?

MS. MARTIN: Yes.

Q. And you have information that is responsive to my question, in other words, you could answer but for the objection?

MR. CARVER: In other words, you know the answer, but the answer deals with information that's come out of the investigation, and I've instructed you not to relay that information?

MS. MARTIN: Yes.

MR. CARVER: Okay.

Q. (BY MS. RICHARDSON) Don't let me confuse you.

MS. MARTIN: Okay.

Q. All right. If you don't understand, say I don't understand, and I'll try to rephrase it more clearly than I have just done.

MS. MARTIN: Okay.