FLORIDA PUBLIC SERVICE COMMISSION

In re : Petition on Behalf of the 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

SOUTHERN BELL'S MOTION FOR RECONSIDERATION OF ORDER PSC-94-0672-PCO-TL

Respondent, BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell"), pursuant to Rule 25-22.038(2), moves for reconsideration by the full Florida Public Service Commission (the "Commission") of that certain Order Resolving Discovery issues Re: In Camera Documents, Order No. PSC-94-0672-PCO-TL (the "Order"), which was issued June 3, 1994 in response to Southern Bell's Motion For Return Of Documents Held in Camera, and states:

1. Southern Bell has requested the return of all of its documents currently held in camera by the Commission.

2. Briefly, during the pendency of the above-styled investigative docket, which was later consolidated into Southern Bell's rate review, Public Counsel requested production of a number of documents to which Southern Bell objected on grounds of attorney-client privilege and work product. Southern Bell never produced those documents. Instead, Southern Bell was required to tender those documents to the Commission in camera, in an effort to allow the Commission to resolve the privilege claims. The Commission resolved each of Southern Bell's claims adversely, and

Southern Bell petitioned for review by the Florida Supreme Court pursuant to Rule 9.100(c), Florida Rules of Appellate Procedure.[1]

3. The Supreme Court issued its opinion on the consolidated appeals March 10, 1994. See Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377 (Fla. 1994). The following paragraphs discuss the in camera documents in light of the Court's opinion, and highlight the Order's error in not requiring certain categories of documents to be returned in accordance with the Court's opinion.[2]

The Employee Statements

4. Among the categories of documents at issue are written statements taken by Southern Bell's attorneys from various Southern Bell employees. Under the terms of the Court's order they are clearly immune from discovery under both the attorney-client privilege and the work product doctrine, and each ground requires their return.[3]

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[1]Southern Bell Telephone and Telegraph Co. v. Deason, et al., Case Nos. 81,487, 81,716, 81,926 and 82,196.

[2]The Order correctly acknowledges that the Statistical Analysis and the Summaries of the Employee Statements were held to be protected and must be returned. Southern Bell does not challenge those portions of the Order.

[3]Schedule A to Mr. Beatty's affidavit, filed in support of Southern Bell's motion, lists the universe of employee statements entitled to work product protection, whether the statement was made to an attorney or to a security officer assisting counsel's investigation. Schedule B to Mr. Beatty's affidavit, and Schedule A of the other attorney affidavits, identify those statements which are also entitled to attorney-client privilege protection under the terms of the Court's order, as those statements were made directly to counsel.

5. The statements were taken as part of Southern Bell's counsel's investigation undertaken for purposes of defending against Public Counsel's allegations in the investigatory docket, Docket No. 910163-TL. As set forth in the affidavits attached to Southern Bell's motion, Southern Bell's President-Florida requested the legal department to advise and represent the Company in connection with Public Counsel's petition. Thereafter, Southern Bell's in-house attorneys made the determination to interview and take statements from a number of employees. The decision to interview and take statements from the Southern Bell employees, and the determinations of which employees to interview, were made by counsel following receipt of Public Counsel's petition and the Company's request for representation.

6. It is uncontroverted that counsel's purpose was to investigate and gather facts to enable them to provide legal advice to Southern Bell and to defend against Public Counsel's allegations.

7. Southern Bell's attorneys enlisted Southern Bell's security personnel to assist in scheduling and coordinating interviews between the attorneys and employees, to assist the attorneys in questioning the employees, and to assist in transcribing the employees' statements.

8. Each and every employee interview listed on Schedule A to the attorney's affidavits[4] comprised a communication from the employee to counsel. Security personnel were present during those

[4]Schedule B to Mr. Beatty's affidavit.

interviews merely to assist the attorney. Thereafter, the security personnel transcribed the substance of the communications, following which the attorneys reviewed the transcription, made amendments to the statements with the employees as necessary, and obtained the employees' execution of the statements.

9. As Southern Bell's efforts in defense of Public Counsel's petition broadened, it became necessary to hire outside counsel. Accordingly, many of the employee statements were taken by attorneys from the Miami law firm of Adorno & Zeder, pursuant to the same procedures set forth above. These attorneys also submitted affidavits in support of Southern Bell's motion. Security personnel continued to assist the outside counsel, as they had the in-house attorneys.

10. The Supreme Court ruled that all statements made by Southern Bell employees to Southern Bell's attorneys were protected by the attorney-client privilege. The affidavits of Southern Bell's attorneys conclusively demonstrate that the employee statements listed in their schedules resulted from communications made by Southern Bell's employees directly to Southern Bell's attorneys. This evidence is uncontroverted. Under the terms of the Court's Opinion, then, each and every one of these employee statements is privileged and must be returned to Southern Bell.

11. The Order refuses to accept the uncontroverted evidence, and alludes to a review of the statements themselves in an attempt

to create some basis for a finding of fact.[5] The employee statements at issue, however, are clearly consistent with the affidavits, and establish the fact that each employee listed on the Schedules engaged in a privileged communication with a Southern Bell attorney. The excerpt cited to the Court in case 81,716 is instructive:

> I understand this statement may be used as evidence ... I was advised by Phil Carver [a Southern Bell attorney who executed one of the affidavits the Order chose to disregard] that he is representing the corporate entity and he is not acting as the attorney for any individual. I was further advised that the interview is subject to the Attorney-Client privilege, that the privilege belongs to the corporate entity ... In order to assist in maintaining the privilege, I was asked to treat this interview as confidential, and I agreed to do so.

(Petition, at 10; emphasis added) There is simply no plausible way to claim that this employee statement was not a privileged communication between attorney and client, whether or not the statement itself was transcribed by a security person assisting Mr. Carver, or whether or not the security person asked an occasional question. Therefore, the Order's attempt to create the appearance of a bona fide factual determination should be reconsidered and reversed. The evidence is uncontroverted; there are no facts in dispute. The statements listed on the schedules to the affidavits are entitled to attorney-client protection.[6]

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[5]Both the Attorney General and now the Order have in effect challenged the integrity of the Southern Bell attorneys who executed affidavits. Again, there is a complete lack of any evidence whatsoever for this.

[6]The Order also cites a statement made by Southern Bell's appellate counsel, who was not involved in the investigation itself, in a brief to the Supreme Court. Although this statement

12. The Court also ruled that each of the employee interviews (including any not entitled to attorney-client protection) was conducted in anticipation of litigation within the meaning of Rule 1.280, Florida Rules of Civil Procedure. The Court noted:

> Pursuant to Florida Rule of Civil Procedure 1.280(b)(3), materials prepared in anticipation of litigation by or for a party or its representative are protected from discovery . . .

Southern Bell Telephone and Telegraph Co. v. Deason, 19 F.L.W. 119, 121 (March 10, 1994). The Court then stated:

> [I]t is evident that the employees' interviews with security personnel were directed by counsel in anticipation of litigation . . .

Id. The Court concluded:

> Southern Bell has proven that the employee interviews were conducted in anticipation of litigation . . .

Id. The Court thus directly rejected the Commission's position during the appeal that the employee statements were not protected work product prepared in anticipation of litigation.

13. Supporting the Court's conclusion in this regard, the attorneys' affidavits conclusively demonstrate that the employee

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is not competent evidence upon which the Commission may premise a factual determination, the statement is nonetheless completely consistent with the attorneys' affidavits. "Southern Bell's counsel directed and controlled, and in most cases [i.e. during the actual interviews of the employees listed on the schedules] were present during, the interviews with employees." See Southern Bell's Petition in case 81,716, at 9. Indeed, there were only a very few exceptions out of hundreds of statements -- most interviews were conducted by counsel, and those are all protected by the attorney-client privilege. This provides no basis to dispute, and, is consistent with, the affidavits by the attorneys with actual, first-hand knowledge.

statements were taken in anticipation of litigation, for the purpose of enabling counsel to advise and defend the Company with respect to Public Counsel's petition. Mr. Beatty's affidavit, for example, provides as follows:

> On February 18, 1991, the Office of the Public Counsel ("OPC") filed a petition to initiate an investigation into trouble repair and reporting practices at Southern Bell . . . Joseph Lacher, then president of Southern Bell's Florida operation, requested Southern Bell's legal department, of which I am a member, to provide legal advice and representation in connection with OPC's petition.
>
> Among other things, Southern Bell's in-house legal staff decided to interview and take statements from a number of Southern Bell's employees in connection with OPC's petition. Both the decision to take statements as well as the selection of employees from whom statements would be taken were made by Southern Bell's attorneys. Our purpose was to communicate with our client (i.e. Southern Bell), via its employees, to develop the facts necessary to provide legal advice and representation in connection with OPC's petition.

Beatty Affidavit, ¶¶ 3 and 4.

14. Moreover, each employee statement indicates on its face that the statement was taken in anticipation of litigation. The statement excerpt cited to the Court, for example, provides "I understand this statement may be used as evidence." What could be clearer? There simply cannot be any bona fide dispute on this issue.

15. Accordingly, as evidenced by the affidavits and the statements themselves, and indeed as noted in the Court's opinion, all of the employee statements were taken in anticipation of

litigation and are thus protected by the work product doctrine under Rule 1.280. Since no exception to the work product doctrine is applicable to the statements, they are not subject to discovery and must be returned to Southern Bell.

16. Nevertheless, the Order simply refuses to acknowledge this unassailable fact, and attempts to reconstruct the logic of the Supreme Court to reach a contrary result. In this, as in other respects, the Order clearly errs.

17. Briefly, the Court held that Southern Bell may redact any notes, thoughts or impressions of Southern Bell's counsel that are printed on the "panel recommendations." According to the Order, this means that counsel's summaries of the employee statements, "but not the information summarized (i.e. the employees' statements)," are work product. Order, at 6. This logic is flawed, however, and in no way authorizes this Commission to disregard the clear holding of the Supreme Court.

18. The panel recommendations were based upon communications from Southern Bell's attorneys to certain human resource personnel of information gleaned from the employee statements. The Court held that the panel recommendations themselves did not constitute work product because they were not prepared in anticipation of litigation.[7] The Court did not, however, indicate that "it was not prepared to hold that the statements taken by security personnel were work product when used for the ordinary business

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[7] The panel recommendations were prepared for disciplinary purposes, unlike the employee statements, which were taken in anticipation of litigation.

purpose of disciplining employees." See Order, at 6. Rather, the Court specifically noted that the genesis for panel recommendations, i.e., the employee statements, were protected work product. As stated by the Court:

> The [panel] recommendations contain the thoughts and impressions of the *personnel managers* based on counsel's communications to them. Although Southern Bell has proven that the employee interviews were conducted in anticipation of litigation, it has not proven that the panel recommendations were prepared for anything other than management's decision to consider whether it should discipline company employees. The disciplining of employees is a matter within the ordinary course of business even if it arises out of the PSC's investigation of Southern Bell. The fact that the panel recommendations were based on work product [i.e. the employee statements] does not convert them [the panel recommendations] into work product.

Southern Bell Telephone and Telegraph Co. v. Deason, 632 So.2d 1377, 1386 (Fla. 1994)(emphasis added).

19. The Order thus clearly misreads the logic of the Supreme Court's opinion. The Court specifically found the employee statements to be work product, and the Commission should reconsider and reverse the Order's departure from that ruling.

Human Resource Worknotes

20. Southern Bell's attorneys summarized certain statements given by Southern Bell's employees, and shared those summaries with Southern Bell's human resource managers. As noted above, the Supreme Court held that the attorneys' summaries were protected. The Supreme Court also held, directly and without equivocation, that the human resource managers' notes of counsel's summaries were

also privileged. The Court's opinion is absolutely clear, as it should have been.

21. Nevertheless, the Order substitutes its own view for that of the Court and holds that the worknotes taken of the attorney summaries are only privileged to the extent of counsel's "notes, thoughts and impressions."[8] The Supreme Court, however, does not say that; it states that the worknotes of counsel's summaries are privileged. The Order thus directly defies the Court, refusing to accept its mandate at face value. For this reason, the Order should again be reconsidered and reversed.

Panel Recommendations

22. The Supreme Court ruled that the panel recommendations are not in their entirety protected communications, but that Southern Bell is authorized to redact any notes, thoughts or impressions of Southern Bell's attorneys contained in the recommendations. Southern Bell has requested that its documents be returned to allow it to accomplish this redaction, as specifically authorized by the Court. The Order, however, unilaterally adds a new condition not contained in the Court's opinion -- that the Commission will retain complete, unredacted copies of the panel

[8]Counsel's notes and summaries are never discoverable. It has long been recognized that such materials, here shared with members of the client organization, are so steeped in counsel's own thoughts and impressions that one simply cannot separate fact from opinion. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 400-01 (1981). Even accepting the Order's flawed conclusion that only counsel's impressions are protected, this would encompass the entirety of the worknotes.

recommendations. This disregard of the Court's opinion is clearly inappropriate.

23. The Court ruled explicitly that certain portions of the panel recommendations were not subject to discovery. Southern Bell has the right to deny those portions to the Commission. The Commission has absolutely no authority to retain unredacted copies of the very documents the Court has specifically authorized Southern Bell to withhold -- it in effect defeats the purpose of the Court's order.[9]

24. One additional point should be made. The Order states that "given the length of this controversy and the evident need to resolve it expeditiously," the Attorney General recommended that Southern Bell be required to redact the panel recommendations on the Commission's premises. That is not accurate. The Attorney General in effect claimed that Southern Bell would not follow the Court's guidelines, accusing Southern Bell of "obstinate resistance to production" and therefore requested that Southern Bell be required to redact documents at the Commission's offices. This accusation clearly forms the basis for the Order's decision to retain unredacted copies.

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[9]Nor does the Order's implied offer to continue to maintain the copies in camera satisfy the Supreme Court's order. The Supreme Court ordered the Commission to allow Southern Bell to redact the documents along clear guidelines. At oral argument the Court specifically questioned (and indicated concern) over the practice of the Commission or members of its staff having even in camera access to the very documents claimed to be immune from discovery by the Commission. There is quite simply no basis or authority for the Order's announced position.

25. The Attorney General's accusation was, however, clearly unfounded. Southern Bell did not "obstinately" refuse to produce its documents; it tendered its documents to the Commission in camera. The Attorney General's frustration is simply that Southern Bell was diligent in asserting its privilege and work product rights. A substantial number of those assertions were upheld by the Florida Supreme Court, which flatly rejected a number of the somewhat novel positions taken by the Attorney General in those appeals. To characterize Southern Bell's discovery conduct as an "obstinate resistance to production" is thus simply revisionist history at its worst. It did not happen, and cannot justify the Order's departure from the requirements of the Court's opinion.

The Audits And Panel Recommendations

26. In February 1994, during the pendency of the appeals, the consolidated rate review (including the investigatory dockets) was settled. Accordingly, even though the Court later held that the Audits and, subject to Southern Bell's redaction rights, the Panel Recommendations were not immune from discovery, these documents should have been returned to Southern Bell. They were tendered to the Commission in camera, solely in an effort to allow the Commission to resolve the privilege claims. The proceeding in which the discovery was sought, and the privilege claims were raised, is concluded. Thus the documents should be returned.

27. The Order, however, asserts that the Commission's Staff still desires to review Southern Bell's documents despite the fact

that the proceeding in which they were tendered in camera has been settled. This is problematic in two respects.

28. First, there is no indication that Staff requested these documents during the pendency of the investigatory docket because of a desire to review them extraneous to those proceedings. Rather, as was discussed during the appeals, the timing of the Staff's various requests (i.e. immediately after Southern Bell claimed the privilege for those particular documents) indicates clearly that Staff's requests were made simply for tactical reasons, in an attempt to negate Southern Bell's claims of privilege in that docket.[10]

29. Second, the Order's post hoc justification -- that the Commission Staff has now decided it wants the documents outside the investigatory docket -- jeopardizes the fairness and the integrity of these proceedings. Public regulation of utilities requires a cooperative effort by both sides. Southern Bell cooperated here by tendering documents, which it legitimately believed to be immune from discovery (a position ratified to a substantial extent by the Supreme Court), to the Commission for an in camera review. Although this was akin to disclosing documents to a jury for an admissibility determination, Southern Bell, in the spirit of cooperation, tendered its documents in camera solely to allow the

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[10] During the appeals, the position was taken by Public Counsel and the Attorney General that while Southern Bell might have privilege rights as against Public Counsel, it had no privilege rights against the Commission itself. Staff's requests appear to have been made to set up this argument. The argument was rejected by the Supreme Court.

Commission to make a privilege determination in the context of the investigatory docket. Now that that dispute has been settled the Order in effect changes the rules and announces that Southern Bell's documents will be retained for other purposes. This is an inappropriate and ill-advised position to take, which the Commission should reconsider and reverse.

30. Further, because the proceedings have been settled the Commission's own rules require that the Audits be returned to Southern Bell.

31. The Audits are proprietary, confidential information within the meaning of Sections 119.07(3)(i) and 364.183(2), Florida Statutes. See for example section 364.183(3)(b), which provides that the term "proprietary confidential business information" includes:

> Internal auditing controls and reports of internal auditors.

§ 364.183(3)(b), Fla. Stat. Thus the Audits are subject to the Commission's rules for confidential materials.[11]

32. Moreover, the Audits were obtained pursuant to formal discovery requests in a formal proceeding before the Commission, i.e. the investigatory docket.

33. Rule 25-22.006(5)(d), Florida Administrative Code, deals directly and explicitly with confidential information discovered during formal proceedings, as follows:

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[11]Even though the Audits have yet to be produced to Staff within the meaning of Rule 25-22.006(3)(a) (see Order, at 2), Southern Bell, in an abundance of caution, has already filed its notice of intent to seek confidential treatment for the Audits.

> Confidential information which has not been entered into the official record of the proceeding shall be returned to the utility or person who provided the information no later than sixty days after the final order, unless the final order is appealed.

Rule 25-22.006(5)(d), Florida Administrative Code (emphasis added).

34. This rule is directly applicable here. One, the Audits are proprietary confidential information provided for in camera inspection only, and not truly "discovered" and have never been discovered. Even accepting the Order's incorrect premise that they have been discovered, however, they would have been discovered pursuant to formal discovery. Two, they have not been entered into the official record of the proceeding, and will never be entered into the official record of the proceeding because the proceeding has been settled. Three, it has now been 60 days since the Commission issued its order approving the settlement.[12] Accordingly, the Audits must be returned to Southern Bell pursuant to the Commission's own rules. There is quite simply no basis for dispute -- the Rule is clear and explicit, leaving no room for discretion.

35. Unless and until Rule 25-22.006 is amended or abrogated pursuant to Chapter 120, Florida Statutes, the Commission has no discretion to depart from it. A failure to follow a clear and

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[12]It has been contended that the Audits may be pertinent to workshops to be conducted in the future. Nevertheless, it is clear that the investigation docket has concluded, remaining technically pending solely because of the pendency of the appeals. Order No. PSC-94-0172-FOF-TL, at 8. There will never be an official record of this proceeding in which the Audits will be entered, and thus the rules require that they be returned.

explicit administrative rule constitutes reversible error. See e.g. Gadsen State Bank v. Lewis, 348 So.2d 343, 345 n.2 (Fla. 1st DCA 1977). Accordingly, the Order errs in denying Southern Bell's motion for the Audits' return, and should be reconsidered and reversed.[13]

* * * *

For the reasons stated, Southern Bell respectfully requests that the Commission reconsider those portions of the Order identified above. The facts, the law and the Court's opinion are clear, the consolidated rate review has been settled, and there is simply no reason to continue these dated discovery disputes.

Respectfully submitted,

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[13]This same reasoning applies to all of the documents at issue in this case. They are confidential materials, discovered (if one accepts the premise that they have been discovered) in formal proceedings, and have not been made part of the formal record. Southern Bell incorporates this argument in all sections of this motion, though there are also other reasons why the balance of the documents must be returned.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to the following via U.S. Mail on this 13th day of June, 1994:

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