

FLORIDA PUBLIC SERVICE COMMISSION

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

M E M O R A N D U M

September 22, 1994

TO : DIRECTOR, DIVISION OF RECORDS AND REPORTING  
FROM : DIVISION OF APPEALS [BELLAK] RCB DES  
RE : DOCKET NOS. 910163-TL AND 920260-TL  
AGENDA: OCTOBER 4, 1994  
CRITICAL DATES: NONE  
SPECIAL INSTRUCTIONS: I:\PSC\APP\WP\910163#7.RCM

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CASE BACKGROUND

Order No. PSC-93-0977-PCO-TL (Order) issued by the Prehearing Officer on June 30, 1993, in the above-consolidated dockets, granted Public Counsel's Fifteenth Motion To Compel and Request for In-Camera Inspection of documents.

On July 12, 1993, Southern Bell filed a Motion For Review of that Order.

The documents at issue in the aforementioned pleadings respond to request Nos. 1, 2, and 5 of Public Counsel's Thirty-Sixth Request for Production.

- A. Notes made during preparation for administering discipline by Dave Mower.
- B. Network Operational Review re-audit - January 1993.
- C. Customer Adjustment to MOOSA re-audit - January 1993.
- D. Notes made concerning discipline appeals of employees by Charles Cuthbertson.

Staff's outstanding requests for production are also inclusive of these. Attachment I.

DISCUSSION OF ISSUES

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

RECOMMENDATION: No.

DOCUMENT NUMBER-DATE  
09778 SEP 22 1994  
FPSC-RECORDS/REPORTING

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STAFF ANALYSIS: Ordinarily, the appropriate standard to be applied is the legal standard for a Motion For Reconsideration. Order No. 25483 (December 7, 1991). In the usual case, Southern Bell would have to establish that the Prehearing Officer made an error of fact or law in her decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintence, 394 So. 2d 16 (Fla. 1st DCA 1981).

However, during the pendency of Southern Bell's Motion For Review of the Order in question, the Florida Supreme Court published its opinion in Southern Bell Telephone and Telegraph Company v. J. Terry Deason, et al., 632 So. 2d 1377 (Fla. 1994) (Southern Bell).

In addressing Case Nos. 81,487 and 81,716, the Court's opinion in Southern Bell authoritatively addressed the issues raised by Southern Bell's Motion For Review and Public Counsel's response with respect to the discovery status of both internal audits and worknotes on employee discipline in the context of Southern Bell's internal investigation. Southern Bell's Motion For Review in turn establishes that the re-audits and worknotes in question were part of the same internal investigation addressed by the Court:

These documents were created as part of an internal investigation that Southern Bell's attorneys conducted in order to render legal opinions to the company on matters at issue in Docket Nos. 910163-TL and 910727-TL.

Motion for Review, page 2<sup>1</sup>. Therefore, this recommendation applies the Florida Supreme Court's holdings to these categories of documents as set out in the Southern Bell opinion. To the extent the Order required results identical to the Court's Opinion in Southern Bell, the Motion For Review is moot.

I. NETWORK OPERATIONAL REVIEW AND MOOSA RE-AUDITS.

In Southern Bell, 632 So. 2d at 1385 the Court directed Southern Bell to "produce the five internal audits", including the Network Operational Review and MOOSA Audits. Since the Court held such documents to be discoverable, the result is consistent with

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<sup>1</sup> Docket No. 910727-TL, now closed, was consolidated with current Dockets 920260-TL and 910163-TL.

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denial of the Motion For Review of the Order, because that Order also held that these updated internal audits were discoverable.

II. CUTHBERTSON AND MOWER WORKNOTES ON EMPLOYEE DISCIPLINE.

An analogous, but somewhat more complicated question is raised by the worknotes on employee discipline. The question posed is whether the reasoning of Case No. 81,487 or Case No. 81,716 of the Southern Bell opinion is the applicable holding. If KCase No. 8,487 applies, the worknotes would be discoverable and the Motion For Review should be denied. If Case No. 81,716 applies, the worknotes would be privileged, and Southern Bell's Motion For Review should be granted.

The Southern Bell opinion indicates that the discovery status of disciplinary notes by management personnel depends on the status of the employee statement from which they derive. As set out in Order No. PSC-94-0672-PCO-TL, p. 4-7, the employee statements have been determined to be neither privileged nor immune, based on the application of the Southern Bell opinion. Accordingly, it is clear that Case No. 81,487 applies and the worknotes are neither privileged nor immune from discovery<sup>2</sup>.

Therefore, staff recommends that the Motion For Review should be denied, since the Order for which review is sought also concluded that the worknotes were discoverable.

ISSUE 2: Should these dockets remain open?

RECOMMENDATION: Yes.

RCB

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<sup>2</sup> Discovery of such documents is, however, subject to redaction by Southern Bell of Counsel's notes, thoughts and impressions. The redaction process is that which is set out at p. 7 of Order No. PSC-94-0672-PCO-TL.

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ATTACHMENT

LIST OF ITEMS REQUESTED BY COMMISSION STAFF  
FOR REPAIR INVESTIGATION

1. Staff's 1st POD Item 2 - SBT Internal Investigation
2. Staff's 2nd POD Item 6 - SBT Internal Investigation
3. Staff's 15th POD Item 2 - MOOSA Audit
4. Staff's 16th POD - All Documents related to disciplinary actions
5. Staff's 17th POD Items 7, 8, 9, and 28 - KSRI, LMOS, Schedule 11 Audits
6. Staff's 17th POD Item 21 - Provide all reviews
7. Staff's 22nd POD Item 1 - All Employee Statements
8. Staff's 23rd POD Item 2 - 1991 Operation Review Audit mentioned by Shirley Johnson
9. Staff's 23rd POD Items 4 and 5 - Notes for Ward and Geer's responsibilities for disciplining individual employees
10. Staff's 25th POD Item 1 - Report on completed audits