

FLORIDA PUBLIC SERVICE COMMISSION

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M E M O R A N D U M

November 12, 1991

TO : DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM : DIVISION OF LEGAL SERVICES [SUMMERLIN] *W. Greer*
DIVISION OF COMMUNICATIONS [GREER, BOOKER, TAYLOR, *W. Greer*
WILLIAMSON] *SAS*

RE : 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.

AGENDA: 11/19/91 - CONTROVERSIAL - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

CASE BACKGROUND

This investigation was initiated to investigate the integrity of Southern Bell Telephone and Telegraph Company, Inc.'s (Southern Bell's) repair service activities and reports. This recommendation involves a discovery dispute between Southern Bell and Public Counsel. The Prehearing Officer has issued Order No. 25054 granting Public Counsel's Motions to Compel Southern Bell to respond to Items Nos. 1 through 21 of Public Counsel's Third Set of Interrogatories dated June 6, 1991, and Items Nos. 1 and 2 of Public Counsel's Fifth Set of Interrogatories. Southern Bell has subsequently filed a Motion for Reconsideration of the Prehearing Officer's Order No. 25054. Public Counsel has filed a Response to Southern Bell's Motion for Reconsideration and Southern Bell has filed a Reply to Public Counsel's Response.

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DISCUSSION OF ISSUES

ISSUE 1: Should the full Commission grant Southern Bell Telephone and Telegraph Company, Inc.'s Motion for Reconsideration of the Prehearing Officer's Order No. 25054?

RECOMMENDATION: No. The full Commission should affirm the Prehearing Officer's Order No. 25054.

STAFF ANALYSIS: Order No. 25054, issued September 23, 1991, granted Public Counsel's Motions to Compel Southern Bell to respond to Items Nos. 1 through 21 of Public Counsel's Third Set of Interrogatories and Items Nos. 1 and 2 of its Fifth Set of Interrogatories. Southern Bell filed a Motion for Reconsideration of this Order and Request for Oral Argument on September 23, 1991, to which Public Counsel filed an Opposition on September 30, 1991. Southern Bell subsequently filed a Reply to Public Counsel's Opposition on October 11, 1991.

I. The first matter to be determined is whether Southern Bell's Motion for Oral Argument should be granted. It is Staff's view that oral argument will not assist the Commission in making its decision on this matter. The pleadings filed by the parties are fully adequate and this recommendation has attempted to accurately reflect the positions of the parties. Therefore, Staff recommends that the Commission deny Southern Bell's Motion for Oral Argument on its Motion for Reconsideration of Order No. 25054.

II. The second matter for decision is the standard which the Commission will apply to Southern Bell's Motion for Reconsideration of Order No. 25054. The Commission may choose to apply a "de novo" standard to its reconsideration of the Prehearing Officer's Order No. 25054. In that instance, the Commission will consider the merits of Public Counsel's arguments in its Motions to Compel and Southern Bell's responses to those arguments as if it were acting as Prehearing Officer and making the initial decision.

The other alternative is for the Commission to apply a "reconsideration" standard in which instance it will examine Southern Bell's and Public Counsel's arguments to determine if the Prehearing Officer made any error in fact or law in issuing his Order No. 25054. Only if the Commission determines that the Prehearing Officer made an error in fact or law would the

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Commission grant Southern Bell's Motion for Reconsideration of Order No. 25054. If it finds no error in fact or law, the Commission would refuse to reconsider the Order.

The basis for Southern Bell's Motion for Reconsideration is that the Prehearing Officer did not accept the arguments it made in its opposition to Public Counsel's Motions to Compel. The Company has, in fact, reargued each and every argument it made previously. The Company argues that this is its right because the Commission's Rule 25-22.038(2), Florida Administrative Code, provides for full Commission review of a prehearing officer's discovery order. Southern Bell attempts to argue that a different standard applies to full Commission review of a prehearing officer's discovery order than applies to full Commission reconsideration of a full Commission order. The Company asserts that Rule 25-22.060, Florida Administrative Code, applies to full Commission reconsideration of a full Commission order. Therefore, the Company argues, it is basically guaranteed a "de novo" review of the prehearing officer's order.

Staff believes that the standard argued for by Southern Bell is inappropriate because it impinges on the prehearing officer's authority to resolve discovery disputes and handling the procedural matters involved in any particular docket. Therefore, Staff recommends that the appropriate standard to be applied is the legal standard for a motion for reconsideration. Staff believes the Company must establish that the prehearing officer made an error in fact or law in his decision that requires that the full Commission reconsider his decision. Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintence, 394 So.2d 161 (Fla. 1st DCA 1981). This standard has not been met in Southern Bell's Motion for Reconsideration of Order No. 25054.

III. The third matter to be determined is only necessary if the Commission finds that the legal standard for a motion for reconsideration has been met by Southern Bell. This matter is the substantive question of whether the Commission should reconsider the Prehearing Officer's Order No. 25054. Southern Bell states that Order No. 25054:

. . . contains no rationale for its holding that the mental processes of counsel for Southern Bell in evaluating the privileged statements are not attorney work product. The Order ignores the differences between

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the interrogatories propounded by Public Counsel to which Southern Bell objects and the holding of Surf Drugs that a party may request the identities of persons having relevant information. 236 So.2d 113.

This is simply not the case. Order No. 25054 discusses the significance of the holding in Surf Drugs and the arguments presented by Public Counsel and Southern Bell and then goes on to grant the Public Counsel's Motions to Compel. That, in and of itself, provides a "rationale" for the Company. The Prehearing Officer's holding indicates that, in his opinion, the limited "mental processes" involved in Southern Bell's attorneys' identification of persons having certain general types of knowledge do not constitute attorney work product.

Substantively, Southern Bell argues that the interrogatories propounded by Public Counsel are not permitted by Surf Drugs because they ask for the Company's attorneys' "mental processes" in evaluating the statements provided by the employees that have been interviewed during the Company's investigation. The Company is more than willing to provide Public Counsel a list of persons having some knowledge of general topics, but not the list of persons that have indicated knowledge that is relevant to this investigation. It is Staff's belief that the interrogatories propounded by Public Counsel to Southern Bell are completely within the scope of the Surf Drugs' holding and it is entirely inappropriate to permit Southern Bell to continue to delay the effective investigation of these matters by the parties to this proceeding. This was the holding of the Prehearing Officer in Order No. 25054 and Staff recommends that the full Commission not reconsider that Order.

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