

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Southern Bell)	DOCKET NO. 890256-TL
Telephone and Telegraph Company's)	ORDER NO. 22734
Capital Recovery Position)	ISSUED: 3-26-90
)	

THIRD ORDER ON CONFIDENTIALITY

On February 9, 1990, the Office of the Public Counsel (OPC) served a Request for Production of Documents (the POD) on Southern Bell Telephone and Telegraph Company (Bell). On March 12, 1990, Bell submitted its responses to the POD. On that day, Bell filed a request for confidential classification (the Request), pursuant to Rule 25-22.006, Florida Administrative Code (the Rule), of the documents that were responsive to POD Items 1, 2 & 7. Pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, Bell filed a motion for a protective order to prohibit OPC's disclosure of the information in the subject documents without the company's prior consent.

The Request alleges that Bell's plans for transporting CATV signals and for placing fiber to the home should not be publicly disclosed to the Florida Cable Television Association (FCTA), which is a party to this proceeding. In Bell's view, FCTA's goal is to prohibit the company from providing CATV transport, and if its plans, market strategies and network architectures are publicly disclosed, then FCTA will be placed in position to realize this goal.

Attachment A to the Request contains documents concerning Bell's Fiber to the Home Business Plan which were sought under POD Item 1; we assigned Document No. 2255-90 to these materials. The Request states that one or more of the following four arguments (hereinafter, Arguments 1-4) applies to each specific portion of Document No. 2255-90 for which classification is sought.

1. This material has been classified as proprietary, confidential information by Orders Nos. 21930 and 22116, issued September 21, 1989, and October 31, 1989, respectively.

2. Bell's labor rates and equipment and material acquisition and installation costs should not be disclosed because it would give the company's competitors an advantage by learning Bell's cost structure and costs to provide services under consideration.

DOCUMENT NUMBER-DATE

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3. The terms in contracts with outside suppliers contain Bell's costs of acquiring materials, and such information is protected by Section 364.183(3)(d), Florida Statutes, from public disclosure that would impair Bell's ability to contract for such goods on favorable terms.

4. The results of market research, including demand, revenues and willingness-to-pay, were acquired at Bell's expense in time, money and effort and should not be furnished without cost, to the company's competitors, thereby giving them insight into Bell's plans and strategies.

Attachment C contains documents concerning Bell's approach to CATV transport that was discussed in a May 19, 1989 memorandum from R. M. Wolfe to J. C. McPherson, Jr. These materials were sought under POD Item 2, and we assigned Document No. 2256-90 to them. The Request points out that Order No. 22116 has classified as proprietary that portion of this memorandum discussing this approach. As a result, Bell argues that these documents describing this approach in more detail should also be so classified. Specifically, these documents contain network diagrams and cost comparisons between various entities for implementing this approach, and the company alleges that these matters constitute trade secrets. Bell claims that, if the cable operators learned its immediate strategy for entering the CATV transport business, they could identify the target market and impair the company's marketing abilities by concentrating their efforts in these locations.

Attachment E contains documents concerning an impact statement and related information regarding CATV services. These materials were sought under POD Item 7, and we assigned Document No. 2257-90 to them. The Request states that one or more of Arguments 1-4 applies to each specific portion of Document No. 2257-90 for which classification is sought.

The company has the burden of showing that the material for which confidential classification is sought qualifies for such treatment under the Rule. The Statute provides several examples of proprietary, confidential information, which include trade secrets and contractual data. The Rule requires that the utility demonstrate that material submitted falls into one of those statutory examples in order to justify satisfactorily our classifying such material as confidential.

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With respect to the Company's trade secret argument, "trade secret" is defined in Sections 688.002 and 812.081, Florida Statutes. Section 688.002 defines it basically as information that is not readily ascertainable by persons who could obtain economic value from its disclosure. Section 812.081 defines it as information that would provide a business with an advantage over those who do not possess it. The principal thrust of these definitions is the disclosure of information held by a company to another entity which may derive economic benefit from the information to the detriment of the company. These two statutory definitions of "trade secrets" are provided in the context of one person or business enterprise wrongfully capitalizing upon the proprietary business information of another person or business. These statutes, one providing criminal sanctions (a third degree felony), and the other civil penalties (double damages and in cases of bad faith, attorney's fees) were written broadly to include all misappropriation in the context of competing businesses. They cannot be blindly applied in the context of a government created and protected monopoly.

This Commission is authorized by Section 364.183, Florida Statutes, to grant confidential treatment to proprietary confidential business information. That Section lists several statutory categories of information deemed to be confidential proprietary information, one of which is "trade secrets." Inherent in this finding is the Commission's obligation to balance the conflict between the demands of the Public Records Act and the nature of proprietary business information. This conflict stems from the strong policy of this state that documents utilized by the Commission in making its decisions should be public information and the policy that parties have a right to have their confidential proprietary business information protected. This balancing process requires the Commission to make a very careful examination, leading to determinations of whether information is a "trade secret" within the terms of Sections 688.02 and 812.081 and whether those definitions control our decisions in the context of the "trade secrets" as listed in Section 364.183. In view of our Public Records responsibilities and the broad nature of these Sections we take a narrower view of "trade secret" than contemplated in the purely competitive context. The purely competitive entities are not faced with the public disclosure demands placed upon us by the Public Records Act.

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While we do not view these definitions as strictly controlling, we do see them as instructive as to the nature of information which the Legislature authorized us to protect from disclosure. The public interest demands that we make an independent determination of whether the information is a "trade secret" in the context of utilities regulated by this Commission. As discussed above the basic test is whether the information, if disclosed, would cause harm to the company.

Another category of information listed in Section 364.183 as being confidential proprietary information is certain "contractual data." A similar balancing process must be implemented for contractual data, and proprietary classification of such material is deemed appropriate only if the company can show that it will be harmed by public disclosure.

After considering the arguments made in the pleadings outlined above and reviewing the subject documents at an In Camera inspection, I find that Bell has made a sufficient showing to warrant classifying those portions of the documents identified below as proprietary, confidential information. Accordingly, only those portions of the subject documents so identified are classified as proprietary, confidential information that is exempt from the requirements of the Public Records Act, Chapter 119, Florida Statutes. Thus, I specifically find that the balance of the documents are not classified as proprietary, confidential information under the Act and the Rule and not exempt from public disclosure.

Through underlining, the company has identified those portions of the documents believed to be proprietary and confidential. When used below, the term "Material" shall mean underlined words and numbers contained within the text of a document and shall include underlined column headings, line explanations or other narrative labels used in charts or graphs contained within the documents. The term "Data" shall refer exclusively to underlined drawings and numbers that appear within such charts and graphs. The following portions of the subject documents are classified proprietary and confidential:

- (1) Document No. 2255-90: On Page 2: only the numbers and percentages. On Pages 9, 10 & 32: only the dollar amounts. On Page 19: all Material.

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- (2) Document No. 2256-90: On Pages 3, 4, 8, 9 & 10: all Material and all Data.
- (3) Document No. 2257-90: On Pages 6, 18, 31, 33, 34 & 39: all Material.

In the main, the material specified proprietary herein consists of Bell's projected revenues, network design plans and cost data -- some of which is from supplier contracts and some of which is comparative. In my opinion, disclosure of this particular information to Bell's competitors would equip them with knowledge of the company's plans that would unfairly position these competitors to gain marketing advantages that are not available through their own efforts. It is my belief that Bell would suffer harm in marketing its cable television services through the disclosure of such information to its competitors. Therefore, I find that the subject information is qualified for specified confidential classification. The company's motion for a protective order is granted to the extent that the relevant material is identified above as being proprietary. However, OPC shall be provided the information in question and shall maintain its confidentiality consistent with this Order.

Now therefore it is

ORDERED by Commissioner John T. Herndon, as Prehearing Officer, following In Camera inspections of the documents described in this Order, that only those portions of the documents identified in the body of this Order are classified as proprietary, confidential information pursuant to Rule 25-22.006, Florida Administrative Code, in response to Southern Bell Telephone and Telegraph Company's request for confidentiality and motion for a protective order. It is further

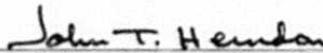
ORDERED that the request for confidential classification and the motion for a protective order filed by Southern Bell Telephone and Telegraph Company are hereby granted to the extent identified in this Order and denied in all other respects. It is further

ORDERED that if a protest is filed within 14 days of the date of this Order, it will be resolved by the appropriate Commission panel pursuant to Rule 25-22.006(3)(d), Florida Administrative Code. It is further

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ORDERED that if no timely protest is filed, this ruling shall become final pursuant to Rule 25-22.006(2)(f) & (3)(d), Florida Administrative Code.

By ORDER of Commissioner John T. Herndon, as Prehearing Officer, this 26th day of MARCH, 1990.



JOHN T. HERNDON, Commissioner
and Prehearing Officer

(S E A L)

DLC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or

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sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.