

ORIGINAL
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Southern Bell

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E. Barlow Keener
Attorney

August 14, 1990

Mr. Steve C. Tribble
Director, Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

In re: Docket No. 891194-TL

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Response to Public Counsel's Motion to Compel and Request for In Camera Inspection of Documents, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

- ACK _____
- AFA _____
- APP _____
- CAF _____
- CML** _____
- CTR _____ Enclosures

Sincerely yours,
E. Barlow Keener
E. Barlow Keener mm

- EAG cc _____ All Parties of Record
- LEG 1 _____ A. M. Lombardo
- LIN 6 _____ Harris R. Anthony
- OPC _____ R. Douglas Lackey
- _____ John P. Fons

- RCH _____
- SEC 1 _____
- WWS _____ RECEIVED & FILED

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BUREAU OF RECORDS

A BELL SOUTH Company

DOCUMENT NUMBER: 07350
AUG 14 1990
FSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed tariff filings by) Docket No. 891194-TL
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY clarifying when) Filed: August 14, 1990
a nonpublished number can be)
disclosed and introducing Caller)
ID to Touchstar Service)
_____)

SOUTHERN BELL TELEPHONE AND TELEGRAPH
COMPANY'S RESPONSE TO PUBLIC COUNSEL'S
MOTION TO COMPEL AND REQUEST FOR
IN CAMERA INSPECTION OF DOCUMENTS

COMES NOW Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rules 25-22.034 and 25-22.037, Florida Administrative Code, and files its Response to Public Counsel's Motion to Compel and Request for In Camera Inspection of Documents in the above-referenced docket and states the following:

1. On June 19, 1990, Public Counsel served Southern Bell with Citizens' First Requests for Production of Documents in this docket. On June 21, 1990, Public Counsel served Southern Bell with Citizens' Second Requests for Production of Documents. On July 24, 1990, Southern Bell filed its Response and Objections to

the Office of Public Counsel's Request for Production of Documents and its Motion for Temporary Protective Order. On July 26, 1990, Southern Bell filed its Response and Objections to the Office of Public Counsel's Second Request for Production of Documents.

2. On August 7, 1990, Public Counsel filed its Motion to Compel and Request for In Camera Inspection of Documents. Public Counsel's Motion seeks: (a) an order requiring Southern Bell to produce documents in the possession, custody or control of BellSouth Services, Inc., and BellSouth Corporation and (b) an in camera inspection by this Commission of "all documents or portions of documents, withheld by Southern Bell based on a claim of attorney-client privilege or irrelevancy."

3. Southern Bell objected to Public Counsel's attempt to direct its Request for Production of Documents to BellSouth Corporation and BellSouth Services, Inc. (hereinafter "BellSouth Services"). Neither BellSouth Corporation nor BellSouth Services is a party to this proceeding and Public Counsel cannot make them parties by naming them in Requests for Production of Documents or by including them in the definitions section of his Requests. Requests for Production of Documents filed pursuant to Rule 1.350 of the Florida Rules of Civil Procedure may only be directed to parties. Neither BellSouth Corporation nor BellSouth Services has

petitioned the Commission to allow it to intervene in this proceeding nor has the Commission on its own motion made either of them a party. Public Counsel's attempt to define the terms "you" and "your" to include BellSouth Corporation and BellSouth Services and his attempt to treat BellSouth Corporation and BellSouth Services as parties are, therefore, improper.

4. It should also be noted that in Public Counsel's Motion to Compel, Public Counsel states that he served his First and Second Requests for Production of Documents on Southern Bell, BellSouth Services, and BellSouth Corporation. In fact, Public Counsel served neither BellSouth Services nor BellSouth Corporation; the Requests were served only upon Southern Bell. It would be procedurally improper for Public Counsel to attempt to serve non-parties, such as BellSouth Services and BellSouth Corporation, by service on counsel for an entity that is a party to the proceeding. As stated above, Rule 1.350 of the Florida Rules of Civil Procedure allows service of requests for production of documents only on parties to a proceeding.

5. Even though BellSouth Services is not a party, Southern Bell has produced all relevant, responsive documents in the possession, custody or control of BellSouth Services which are subject to the control of Southern Bell because of its ownership

of BellSouth Services, or which relate to BellSouth Services acting on behalf of Southern Bell. As Southern Bell stated in each of its responses to Public Counsel's Requests for Production:

As in earlier proceedings, to the extent that BellSouth Services, Inc., is an entity "acting on behalf of Southern Bell," Southern Bell will produce those documents in the possession, custody or control of BellSouth Services which are responsive to Public Counsel's Request, subject to the other general and specific objections contained herein. Moreover, to the extent Southern Bell has in its possession, custody or control, BellSouth Corporation documents which are responsive to Public Counsel's Request, these documents will be produced subject to the general and specific objections contained in this pleading.

Neither BellSouth Services nor BellSouth Corporation, however, may be properly treated as a party to this proceeding.

6. Public Counsel asserts that "BellSouth Services, Inc., and BellSouth Corporation are acting as one for the purpose of Southern Bell's Caller ID proposal, and that these affiliates of Southern Bell are therefore open to requests for production of documents." This assertion is erroneous as a matter of law as well as on the facts. In Medivision of East Broward v. H.R.S., 488 So.2d 886 (Fla. 1st DCA 1986), relied upon by Public Counsel, the court found that the subsidiary affiliate was "a corporate entity created by [the parent] solely for the purpose of applying

for, constructing, and operating a single surgical center." Id. at 887. The court found that the facts presented by the record indicated that the parent corporation and its subsidiary had acted "as one" for the purpose of applying for a Certificate of Need. However, the court specifically cautioned that its holding was "expressly limited to the facts herein, and this opinion is not intended to announce a rule of law that permits discovery of documents of parent corporations in all cases where their subsidiaries are parties to the litigation." Id. at 888. Medivision clearly does not stand for the broad authority for which it is cited by Public Counsel.

7. Public Counsel likewise erroneously asserts that BellSouth Corporation played an "intricate, involved" role concerning the way Southern Bell would offer Caller ID. Public Counsel refers to several documents produced by Southern Bell in this proceeding as supporting this proposition. As is clear from the fact that Public Counsel has relied on them, Southern Bell obviously has produced those documents which were relevant and responsive to Public Counsel's Requests and concerning which BellSouth Services was acting on Southern Bell's behalf. Nevertheless, Public Counsel continues to suggest that BellSouth Services should be "open to requests for production of documents."

8. With respect to BellSouth Corporation, Public Counsel disingenuously cites a single memorandum from a BellSouth Corporation officer concerning public perceptions about Call Trace as proof that BellSouth Corporation remained "intimately involved with Caller ID service." To assert that a single communication such as the one cited constitutes "acting as one" sufficient to subject a non-party corporate affiliate to the annoyance and expense of discovery does not meet the test of Medivision and is simply not credible.

9. Public Counsel also urges the Commission to hold an in camera inspection to "review the discovery requested and to determine whether assertion of the [attorney-client] privilege is valid." While Public Counsel relies on Austin v. Barnett Bank of South Florida, N.A., 475 So.2d 830 (4th DCA 1985), he has clearly misapprehended the true holding of the case.

In Austin, the court considered the meaning of Rule 1.380(d), Florida Rules of Civil Procedure, which states in pertinent part:

The failure to [respond to discovery authorized by, among others, Rule 1.350, Florida Rules of Civil Procedure] may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 1.280(c).

The court specifically held that Rule 1.380(d), Florida Rules of Civil Procedure, should be construed as referring "only to items which are within the scope of discovery; that is, not privileged [citation omitted], but to which objection is made for one of the reasons set forth in rule 1.280(c). Thus rule 1.380(d) does not require timely objection to privileged matters." (emphasis added).

In Austin, the petitioner's assertion of the Fifth Amendment privilege against self-incrimination had been made untimely. It was under those circumstances, where an objection had not been made timely, that the court held that there should be an in camera inspection to review the discovery requested in order to determine whether the assertion of the privilege is valid.

As recognized by the court in Austin, Rule 1.280(b)(1) of the Florida Rules of Civil Procedure authorizes discovery by parties only with respect to matters "not privileged." Under Rule 1.280(b)(1), Public Counsel is not entitled to discover even the existence of privileged matters. Southern Bell, therefore, is under no obligation to identify privileged documents.¹

¹ Public Counsel also relies in on Boca Raton Hotel and Club v. Dunn, 15 F.L.W. D1742 (4th DCA July 13, 1990). This case is totally inapposite since it deals with the so-called "work product privilege," which is not a statutory privilege at all. See Sections 90.501-90.510, Florida Statutes.

10. Finally, Public Counsel complains that Southern Bell has "either not provided documents responsive to the requests which Southern Bell deems to be irrelevant, or Southern Bell has purged information it determined was irrelevant from the documents it was willing to produce." Once again, Public Counsel is mistaken. In its responses to both of Public Counsel's Requests, Southern Bell stated:

Consistent with prior decisions of the Commission and in order to facilitate discovery in this proceeding, Southern Bell will produce, subject to the other objections contained herein, those documents which are responsive and which contain both relevant and irrelevant information, with the irrelevant information removed.

Southern Bell has not asserted that it was refusing to produce responsive documents because they were irrelevant. Southern Bell simply objects to producing these portions of responsive documents that contain information regarding Southern Bell's operations in other states. The Commission has previously considered this issue in Docket No. 880069-TL and held that other states' information is not relevant. See Order Nos. 19421 and 19681. Southern Bell's refusal to produce other states' information is in full accord with the Commission's previous orders. Nevertheless, as Southern Bell stated in its responses to Public Counsel's Requests, "[I]f the Commission wants to do so, for the purpose of insuring that

only irrelevant information has been removed, Southern Bell will produce the information which has been removed for an in camera inspection by the Commission. Although Southern Bell will produce this information for in camera inspection if ordered to do so by the Commission, such an inspection is totally unnecessary. As explained above, all of the information in question relates to other states. A review of the information contained in these documents will not assist the Commission in determining whether such information is relevant to this proceeding. Therefore, an in camera inspection will be of no benefit.

WHEREFORE, Southern Bell respectfully requests the Commission to deny Public Counsel's Motion to Compel and Request for In Camera Inspection of Documents.

Respectfully submitted this 14th day of August, 1990.

Southern Bell Telephone
and Telegraph Company



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CERTIFICATE OF SERVICE
Docket No. 891194-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this 14th day of August, 1990
to:

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