BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Citizens of State of Florida for investigation of Talk America Inc. and its affiliate, The Other Phone Company, Inc. d/b/a Access One Communications, for willful violation of Rule 25-4.118, F.A.C.	DOCKET NO. 010409-TP ORDER NO. PSC-01-2374-PCO-TP ISSUED: December 7, 2001

ORDER GRANTING CITIZENS OF FLORIDA'S REQUEST FOR IN-CAMERA INSPECTION OF DOCUMENTS

BACKGROUND

On September 13, 2001, Citizens of Florida (Citizens or Office of Public Counsel) filed their "First Motion to Compel and Request for In Camera Inspection of Documents (Request) concerning Talk America, Inc.'s (Talk America) assertion of attorney-client privilege and attorney work product. These assertions were made by Talk America in response to Citizens First Request for Production of Documents #3. Citizens note that Talk America provided a privilege log identifying 14 documents that had been withheld from production.[1] Citizens further note that seven of these documents were authored by a non-attorney, Mr. Benjamin Serzo, Talk America's Director of Operations, and that "multiple corporate employees" were recipients of the documents claimed as privileged in addition to company attorneys. It is these seven documents that are the object of Citizens' Request.[2]

On September 26, 2001, Talk America filed its "Response to Citizens' First Motion to Compel and Request for In Camera Inspection of Documents" (Response). The Response incorporated by

[1] See, Attachment 1 to Citizens' Request.

[2] This Order assumes that action on the Citizens' Request for In Camera Inspection of Documents is necessary preliminary to consideration of the motion to compel production of those documents.

reference a letter dated September 6, 2001, on the same subject from Talk America to the Office of the Public Counsel. These pleadings debate the issue of whether the facts establish that seven documents authored by Mr. Serzo are protected from discovery based on attorney-client privilege pursuant to the standards established by the Florida Supreme Court in Southern Bell v. Deason, 632 So. 2d 1377, 1383 (1994):

> 1) the communication would not have been made but for the contemplation of legal services;
>
> 2) the employee making the communication did so at the direction of his or her corporate superior;
>
> 3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
>
> 4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
>
> 5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

DISCUSSION

At the outset, we note that the above-listed Southern Bell standards make it clear that regulated companies can invoke the privilege and that the protected communications can be from a corporate non-attorney employee to the corporation's attorneys. What remains ambiguous in this case is whether the "meeting minutes" created by Mr. Serzo were created for the purpose of obtaining legal counsel or for business purposes. See, Standards 1, 3, and 4, listed above. As noted in Southern Bell,

> When a corporation seeks the advice of an attorney, it is difficult to differentiate the role of a legal advisor from the role of a business advisor.

632 So. 2d at 1385. In this case, one of the corporation's two attorneys described as present at the bi-weekly "local call"

meeting was both its General Counsel and Executive Vice-President. The other attorney was Talk America's Associate General Counsel for Regulatory Affairs and a Corporate Counsel. Clearly, either or both could be a source of business advice as well as legal counsel. As further noted in Southern Bell, where statements were made by Southern Bell's employees to its security personnel, and not to attorneys, the privilege did not apply notwithstanding the presence of the attorneys at those employee interviews.

Id.

The issue of separating business advice from legal counsel is further explained in two cases cited in the Southern Bell opinion, First Chicago International v. United Exchange Co. Ltd., 125 F.R.D. 55, 57 (S.D.N.Y. 1989) and Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980).[3]

In First Chicago, for example, "the documents withheld by plaintiff would not have been created but for in-house counsel's initiation of an investigation of the facts surrounding the overdraft". [e.s.]

In Soeder, in contrast, an "in-house report" routinely created after every F-111 crash, even though prepared anticipating the contingency of litigation, was held to be prepared in the ordinary course of business where the goals of improving the aircraft, thereby saving lives and guarding against adverse publicity and detrimental economic consequences, were also furthered. Thus, the report was not qualified as "work product".

In this instance, Talk America states:

> The documents that Public Counsel seeks were prepared by a company employee, at the direction of his superiors, for the express purpose of facilitating discussion among company officials and its attorneys regarding the

---

[3] Though Soeder is a case involving the "work product doctrine" rather than attorney-client privilege, the Southern Bell Court found that "the legal issues associated with those concepts overlap in the instant case." 632 So. 2d at 1483.

> operational and legal issues facing Talk America in a number of jurisdictions. [e.s.]

Response, p. 1

In view of the excerpts from Southern Bell cited previously, the fact that "operational" as well as "legal" issues were discussed fails to provide assurance that only privileged legal communications are involved, rather than some mixture of privileged legal and non-privileged business operations communications in unknown proportions.

The analysis in the September 6th letter fails to resolve these ambiguities.[4] As to the first standard of the Southern Bell test, Talk America states:

> The communications between the employees and the company's attorneys would not have occurred, but for the presence of the attorneys.

Response, Attachment 3, p. 1. However, the Southern Bell standard speaks to the contemplation of legal services, not to the mere presence of attorneys. As noted previously, the presence of attorneys at employee interviews with security personnel in the Southern Bell case did not serve to invoke privilege for those interviews. Moreover, the bi-weekly scheduled nature of the "local call" meeting to which the documents at issue relate seems more closely analogous to the routinely created in-house crash report at issue in Soeder found to be prepared in the ordinary course of business than to the communications to attorneys made in the investigation of the unique criminal event at issue in First Chicago.

These ambiguities do not demonstrate that the communications in the "meeting minutes" are not privileged, only that the Response

---

[4] Nor did the September 6th letter establish that the Meeting Minutes were only disseminated to those that needed to know their contents. However, the number of persons was described as limited, controlled and restricted.

and Letter offered by Talk America do not, in themselves, unambiguously establish that privilege is properly invoked as to the communications. The propriety of that further step can only be resolved pursuant to in camera inspection of the documents by the pre-hearing officer.

As to that process, Talk America states:

> Given the above-stated position of Talk America that the Meeting Minutes are subjected to the attorney-client privilege, Talk America respectfully submits that the law does not compel the company to permit the disclosure of such documents to any outside party.

Response, p. 6.

However, the various classes of documents reviewed in Southern Bell were all claimed to be privileged by that company and, nonetheless, subjected to in camera inspection by the Commission. Subsequently, the Court disallowed the claim of privilege as to many of the documents at issue in that case even while finding that, as a general matter, regulated companies were not disallowed from claiming the attorney-client privilege and work-product exemptions from discovery for communications between corporate employees and attorneys that met the standards set out in the Southern Bell opinion. Since the Commission's orders in that case stated the fact of the in camera inspections as part of the procedural history thereof, the Court's opinion and its further actions therein may be assumed to reflect the fact that the Commission is not "any outside party", as Talk America alleges, but the tribunal which must rule on the contested pleadings at issue. Thus, compelling the company to disclose is not the point here. Instead, the company's assertion of privilege from discovery allows the presumption that the Commission may take action necessary to adjudicate the propriety of applying or not applying the privilege based on whether the contents of the documents established their purpose to be legal or business. Given the ambiguities in the pleadings noted above, in camera inspection of the documents is necessary to resolve this contested issue, and therefore, required. Specifically, documents 4, 5, 7, 9, 10, 12 and 13 on the Privilege

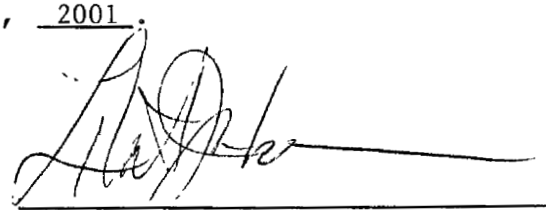
Log are to be inspected. Accordingly, OPC's request for in camera inspection is granted in that regard.

In light of the above, it is

ORDERED by Commissioner Lila A. Jaber as Prehearing Officer, that the Request by the Office of Public Counsel for in camera inspection is granted and the Meeting Minutes (specifically, Documents 4, 5, 7, 9, 10, 12 and 13 on the Privilege Log) described herein are to be tendered by Talk America, Inc. for in camera inspection within 15 days of the issuance of this order. It is further

ORDERED that the disposition of Public Counsel's Motion to Compel is deferred pending the in camera inspection.

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer, this 7th day of December, 2001.



LILA A. JABER
Commissioner and Prehearing Officer

(S E A L)

RCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, 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 wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, 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.