

IN THE SUPREME COURT OF FLORIDA

SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY,

Petitioner,

v.

J. Terry Deason, et al.,
as members of THE FLORIDA
PUBLIC SERVICE COMMISSION,

Respondent.

Case No. _____

Public Service Commission
Docket No. 910163-TL

SOUTHERN BELL TELEPHONE AND TELEGRAPH
COMPANY'S PETITION FOR REVIEW OF
NON-FINAL ADMINISTRATIVE ACTION

Florida Public Service Commission Order PSC-93-1214

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BellSouth Telecommunications,
Inc., d/b/a SOUTHERN BELL
TELEPHONE AND TELEGRAPH
COMPANY,

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**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
PETITION FOR REVIEW OF NON-FINAL ADMINISTRATIVE ACTION**

Petitioner, BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell"), pursuant to Rule 9.100(c), Florida Rules of Appellate Procedure, petitions for review of an order of the Florida Public Service Commission (the "Commission"), designated as PSC-93-1214-FOF-TL (Apx. A).¹ The order purports to "clarify" earlier orders, which are already on appeal and set for oral argument before this Court, and retroactively overrule Southern Bell's claims of attorney-client privilege and work product with respect to documents not evaluated or even mentioned in the prior orders.

INTRODUCTORY STATEMENT

The order below clearly shows the fallacy of the Commission's position on the attorney-client privilege and the work product

¹References to the attached appendix will be designated as "Apx. ____."

doctrine. The order purports to rule on claims by Southern Bell that certain documents are protected by the attorney-client privilege and the work product doctrine. Such claims require factual determinations as to the requisite elements of each. However, the order fails to make a single finding of fact with respect to any of the documents at issue. Rather, the order simply purports to "clarify" that the privileged status of the documents was "evaluated" in orders issued some six months prior, and which are themselves currently on appeal in cases 81,487 and 81,716.

The Commission's prior orders did not even mention the documents at issue here, let alone make a factual determination with respect to them. In fact, the prior orders did not make factual determinations with respect to the documents that actually were considered. Rather, the Commission therein announced its position that in effect no information provided to Southern Bell's attorneys in the course of investigating allegations by the Office of the Public Counsel ("OPC") could be privileged because the documents generated by that investigation dealt with Southern Bell's regulatory compliance, despite the fact that regulatory compliance was the very matter raised by OPC's Petition initiating the proceedings below. The Commission in effect implied a business motive for the documents' creation, in addition to the undisputed motive of enabling counsel to defend against OPC's allegations, and ruled that this implied "dual" motive negated application of the privilege or work product immunity.

Obviously this position is contrary to law; it completely denies to Southern Bell the right to communicate with counsel and prepare a defense in confidence. Indeed, anything generated with respect to OPC's allegations would be discoverable because it would deal with regulatory compliance. For that reason, the response briefs in the prior appeals desperately sought to find an evidentiary basis to support the Commission. The fact is, however, that the Commission considered no evidence at all in purporting to make its earlier findings of fact and in issuing its prior orders.

Here the Commission simply highlights its error. The Commission demonstrates that its position truly is that nothing communicated to counsel during counsel's investigation of OPC's Petition can be privileged. Nothing else can explain the Commission's overruling Southern Bell's privilege and work product claims merely by reference to prior orders, without making findings of fact or discussing the documents at issue.

The fact is that beneath all of the argument, and all of the post-hoc attempts to find some evidentiary basis to deny Southern Bell's privilege claims, the Commission simply feels that Southern Bell should have no privilege or work product rights in the first instance. The instant order simply brings that fact more clearly into focus.

JURISDICTION

This Court has jurisdiction pursuant to Article V, Section 3(b)(2) of the Florida Constitution and Section 350.128(1), Florida Statutes (1991).

STATEMENT OF THE CASE

Docket No. 910163-TL before the Florida Public Service Commission was initiated by the filing of an investigatory petition by OPC in February 1991. It is styled In re; Petition on Behalf of Citizens of the State of Florida to Initiate Investigation into the Integrity of Southern Bell Telephone and Telegraph Company's Repair Service Activities and Reports.²

The litany of motion practice below is set forth in the order below and in the prehearing officer's prior orders. (Apx. A, B and D) Briefly stated, the Office Of The Public Counsel filed motions to compel production of, inter alia, the following Southern Bell documents, all of which Southern Bell claims are subject to the attorney-client privilege and work product doctrine:

1. (Internal Audit) Customer Adjustment - Loop Operations System (LMOS).
2. (Internal Audit) Mechanized Adjustments - Mechanized Out of Service Adjustments (MOOSA) - Florida.

² Several other dockets have been initiated before the Commission which arise out of the same basic circumstances. Docket Nos. 900960-TL, and 910727-TL have been consolidated, and these in turn, with Docket No. 910163-TL, have been consolidated with Southern Bell's rate review, Docket No. 920260-TL. The Commission will hear these matters commencing in January 1994.

3. (Internal Audit) Key Service Results Indicator (KSRI) - Network Customer Trouble Rate.
4. (Internal Audit) PSC Schedule II.
5. (Internal Audit) Network Operational Review.³
6. Panel Recommendations regarding craft discipline.
7. Panel Recommendations regarding paygrade 5 and below discipline.

On January 28, 1993, after ordering and conducting an in camera inspection, the Commission's prehearing officer issued order PSC-93-0151-CFO-TL, granting Public Counsel's various motions to compel and ordering production of the documents at issue. (Apx. B) On February 23, 1993, the full Commission issued Order PSC-93-0292-FOF-TL, affirming the prehearing officer's mandate to produce the referenced documents. (Apx. C) This Order is the subject of case 81,487 before this Court, which has been consolidated with three other appeals and set for oral argument October 4, 1993.

On February 23, 1993, the Commission's Prehearing Officer issued order PSC-93-0294-PCO-TL, overruling Southern Bell's privilege and work product claims and granting OPC's motions to compel with respect to the following documents:

1. Statements made by Southern Bell employees to Southern Bell attorneys during an investigation initiated in response to the allegations below, and summaries of those statements prepared by the attorneys;
2. A statistical analysis performed by a Southern Bell employee, for and at the express request of

³ The Prehearing Officer's Order mistakenly designated Document No. 5 as a "statistical analysis." (Apx. B, at 3) The Commission's Order corrected the error. (Apx. C, at 2)

Southern Bell's attorneys, in response to the allegations below; and

3. Verbatim witness statements, summaries and work notes prepared by Human Resources personnel of facts disclosed by Southern Bell's attorneys' in-house investigation into the allegations of the proceedings below.

(Apx. D) Southern Bell sought review by the full Commission, which affirmed the prehearing order on April 6, 1993 via order PSC-93-0517-FOF-TL. (Apx. E) This order is the subject of case 81,716, also currently pending before this Court and set for consolidated argument on October 4, 1993.⁴

On August 20, 1993, the Commission issued order PSC-93-1214-FOF-TL, which is the order at issue here. (Apx. A) The Order was apparently issued sua sponte (as opposed to ruling on an application for review of a prehearing order), and purports to "clarify" that the prehearing orders referenced above⁵ also "evaluated" certain other documents, which were the subject of other motions to compel and which were not discussed or even mentioned by the prior prehearing orders. (Apx. A, at 2) The documents at issue are as follows:

1. All employee statements made to investigators during the course of Southern Bell's investigation of OPC's allegations;

⁴Two other appeals have been consolidated. Case no. 82,196 also involves claims of attorney-client privilege and work product doctrine. The Commission's order there also drew heavily on its prior orders. Case 81,926 involves the manner and extent to which a multi-state audit team may utilize the Commission's authority to compel production of documents from unregulated affiliates of Southern Bell.

⁵PSC-93-0151 and PSC-93-0294, dated January 28 and February 23, 1993, respectively. (Apx. B and D)

2. An "Operational Review" undertaken by Southern Bell personnel at counsel's request in the course of preparing to defend against OPC's allegations;
3. Notes taken by Southern Bell management personnel Geer and Ward pertaining to conversations concerning employee communications with counsel; and
4. Forms "IA10-DP Report of Completed Audit," summarizing the audit departments efforts to assist counsel in defense of OPC's allegations.

The order does not purport to state the outcome of any evaluation of these documents, nor does it either sustain Southern Bell's objections to discovery or order that the documents be produced. The order simply "clarifies" that the listed motions were "evaluated" by the prior prehearing orders.

STATEMENT OF FACTS

In late February 1991, OPC initiated these proceedings by requesting that the Commission investigate certain alleged improprieties in Southern Bell's trouble repair practices and reporting. Thereafter, Southern Bell's attorneys initiated an in-house investigation to gather the facts necessary to defend Southern Bell in the proceedings below. OPC's Petition put Southern Bell's business practices and regulatory compliance directly at issue, and counsel's efforts thus dealt with those same subjects.

The proceedings below have been plagued with disputes concerning the scope of Southern Bell's attorney-client privilege and work product immunity. The Commission's initial position was announced in the initial prehearing and full Commission orders

referenced above.⁶ Briefly stated, while acknowledging that the documents at issue were generated to assist counsel's legal representation, the Commission also held that Southern Bell had an implied "dual" business motive of monitoring the company's regulatory compliance:

Southern Bell's claim that its audits and statistical analysis were solely for the purpose of getting legal advice [is] hypertechnical rather than substantive . . . Where doubts about the compliance of its operations with regulatory requirements have arisen, Southern Bell has an independent business need to accurately monitor those operations which predates, post-dates and coexists with the timing of any particular audit undertaken to obtain legal advice.

* * * *

Because Southern Bell had an independent business need to monitor its activities accurately through the particular internal audits in question, as well as to obtain legal counsel by informing itself thereby, the factual data created by those audits and statistical analyses, as distinct from counsel's legal theories about them, are not privileged.

(Apx. B, at 6, emphasis added) The Commission held that this dual legal and Commission-supplied business motive for counsel's investigation negated application of the privilege or work product immunity. In effect, then, the Commission held that Southern Bell could not communicate in confidence with counsel concerning regulatory compliance.⁷ Southern Bell filed its position for

⁶Orders PSC-93-0151 and PSC-93-0292, dated January 28 and February 23, 1993, respectively. (Apx. B and C)

⁷Apparently, however, the Commission would allow the converse, that is, would allow counsel to communicate in confidence with his client. The order noted that the document did not contain counsel's legal advice (which it would have redacted). (Apx. B, at 4) The order failed to consider that it is unlikely to find a document from a client to an attorney which contains legal advice.

review with respect to these orders pursuant to Rule 9.100(c) on March 25, 1993.

Thereafter, another set of prehearing and full Commission orders issued on February 23 and April 6, 1993, respectively. (Apx. D and E).⁸ These orders also dealt with privilege and work product issues, and drew heavily on the principles announced in the Commission's previous orders. Southern Bell filed its petition for review of these orders pursuant to Rule 9.100(c) on May 6, 1993.

Southern Bell's appeals were assigned Case Nos. 81,487 and 81,716, respectively. On July 22, 1993, this Court ordered that those two appeals would be consolidated with yet another appeal currently pending, and set oral argument for October 4, 1993.⁹

On August 20, 1993, apparently sua sponte, the Commission issued the order below, announcing that two motions to compel filed by OPC on December 16, 1992, and one filed on December 21, 1992, should have been included by the prehearing officer in Orders PSC-93-0151 (Apx. B) and PSC-93-0294 (Apx. D). Those orders contain no discussion of or even reference to these motions or the documents at issue.¹⁰ These "forgotten" motions to compel concern Southern Bell's claims of attorney-client privilege and work product protection.

⁸Orders PSC-93-0294 and PSC-93-0517, respectively.

⁹After subsequent consolidation, the four appeals which will be argued are case numbers 81,487; 81,716; 81,926 and 82,196.

¹⁰One of the motions does deal with employee statements, which are the subject of case 81,716. It appears that OPC simply filed two motions seeking the same documents.

The order below, however, is in curious form. Despite purporting to resolve claims of attorney-client privilege and work product immunity, no findings of fact are made. Further, the order does not direct any party to do anything, nor does the order grant or deny any motion. Rather, the order simply "clarifies" that Southern Bell's claims of privilege with respect to the motions at issue were "evaluated" by the prehearing officer in connection with specified sections of the prior orders, as follows:

This order clarifies that the privilege status of the above documents was evaluated in the two cited prehearing orders, review of which was denied in the two cited Commission orders,

(Apx. A, at 2). The order does not disclose the result of this evaluation process.

The order left Southern Bell in a quandry. On the one hand, the order does not grant or deny any motion, nor does it order any party to do anything. It simply announces that certain motions were evaluated in connection with the Commission's prior orders. On the other hand, since in its prior orders the Commission has yet to uphold any Southern Bell claim of protection under the attorney-client privilege or work product doctrine, Southern Bell believes that the Commission has somehow attempted to retroactively grant OPC's motions to compel by inserting the motions into the prior orders. As a result, in order to protect its appellate rights, Southern Bell is compelled to file this petition rather than rely solely on the claim that the order is in improper form.

RELIEF SOUGHT

Southern Bell seeks issuance of an order quashing the Commission's order PSC-93-1214-FOF-TL, as (assuming the order purports to require production by Southern Bell of the documents listed therein), the order departs from the essential requirements of law.

Southern Bell has no adequate remedy through review of final administrative action because once the attorney-client privilege and work product documents are disclosed, the confidentiality of the communications is forever lost.

ARGUMENT AND CITATION OF AUTHORITY

First, the order is in improper form. It, like the earlier orders which it purports to "clarify", makes no finding of fact with respect to Southern Bell's claims. It neither sustains nor overrules Southern Bell's discovery objections, and neither grants nor denies OPC's motions. It is in effect a nullity.

To the extent the order does attempt to grant OPC's motions to compel, the order errs in requiring Southern Bell to produce confidential communications from Southern Bell to its in-house counsel. These communications were requested by Counsel for the sole purpose of enabling Counsel to provide legal advice in connection with the proceedings below. They are protected under the attorney-client privilege as set forth in Section 90.502, Florida Statutes. Further, the order errs in requiring production of notes taken by Southern Bell management personnel of the

protected communications. Counsel is allowed to provide their client with access to protected materials, and OPC may not evade Southern Bell's discovery immunity simply by seeking management's notes of those materials.

In similar fashion, the order departs from the essential requirements of law in that the documents ordered produced are clearly protected under the work product doctrine. Public Counsel has failed to carry its burden of showing an inability without undue hardship to obtain substantially equivalent material by other means. In fact, the evidence of record is to the contrary.

Finally, in issuing its order the Commission failed to follow its own procedures. The order purports to "clarify" that the documents at issue were meant to be included in the Commission's earlier prehearing orders, despite the fact that those prehearing orders did not even reference the motions or the documents at issue here. Southern Bell has rights with respect to review of prehearing orders, particularly where findings of fact are required. By waiting some six months after the prior prehearing and full Commission orders and then attempting to retroactively "clarify" those orders to include the motions and documents at issue here, the Commission abrogated Southern Bell's rights in this respect and departed from the essential requirements of law.

I. In Purporting to Rule on Southern Bell's Privilege Claims Without Any Finding of Fact, the Commission Highlights the Error of its Position.

The Commission has failed to make any finding of fact with respect to the documents at issue. Rather, the Commission simply referred to its prior rulings on other documents claimed by Southern Bell to be subject to the attorney-client privilege and work product doctrine. In so doing, the Commission has highlighted the fact that its "findings of fact" with respect to those documents actually make no findings of fact at all.

The Commission's flawed logic makes the prior orders somewhat confusing. Stripped of the verbiage, however, the prior orders simply hold that Southern Bell failed to demonstrate a "legal motive" for the creation of the documents at issue there.

Briefly, the attorney-client privilege requires that a communication be made in connection with the "rendition of legal services to the client." Section 90.502, Fla. Stat. (1991). The work product doctrine requires that the documents be generated "in anticipation of litigation." Rule 1.280(b)(3), Fla. R. Civ. P. Accordingly, Southern Bell submitted affidavits to the effect that the communications at issue would not have occurred but for Counsel's need for information in the course of defending Southern Bell below. These affidavits, and the documents themselves, were the only items upon which the Commission based its determination in

its prior orders that the documents were not within either the attorney-client privilege or the work product doctrine.¹¹

The Commission chose to discount Southern Bell's affidavits based solely upon their review of the documents. The Commission accepted Southern Bell's assertion that the documents were created for purposes of enabling Counsel to represent Southern Bell below. The Commission noted, however, that the documents contained information which would be useful in monitoring Southern Bell's regulatory compliance. Further, the Commission held that Southern Bell had a "business need" to ensure its regulatory compliance. Accordingly, the Commission implied a business motive as well, holding that the documents and communications were "dual motive" documents, created both for legal and Commission-supplied business purposes. According to the Commission, this dual motive negated application of the attorney-client privilege or the work product doctrine.

The fact is, however, that the OPC petition which initiated the proceedings below involved allegations concerning Southern Bell's regulatory compliance. Anything generated to enable counsel to defend Southern Bell against those allegations would have to deal with Southern Bell's regulatory compliance. In effect, then, by holding that all documents dealing with regulatory compliance would have an implied "dual" motive, the Commission announced a

¹¹The prehearing officer also had in camera access to, for example, the written request by Counsel for information from selected Southern Bell personnel. These items were consistent with Southern Bell's affidavits and, in fact, consistent with the communications generated in response.

position that nothing provided or communicated to counsel in the course of Counsel's investigation below could be subject to the attorney-client privilege or work product doctrine, because it would all have a Commission-supplied dual motive.

The documents at issue here, employee statements, the Operational Review, and the Form IA10-DP reports summarizing the audit department's assistance to counsel, were all provided to counsel solely as part of counsel's continuing efforts to defend Southern Bell in the proceedings below. As such they are protected under the attorney-client privilege and work product doctrine. The notes taken by Southern Bell's managers of communications between Southern Bell employees and Southern Bell's counsel are likewise protected, as they directly reveal the substance of the protected communications. As stated, the Commission makes no finding of fact to dispute these claims. Rather, the Commission relies on the mere fact that these documents arose from counsel's in-house investigation as its basis for overruling Southern Bell's objections.

These matters are appropriately at issue in Southern Bell's prior appeals. The order below, however, drives home the point even more clearly that the Commission is simply supplying its own business motive for any document generated in the course of counsel's in-house investigation. As stated in those earlier appeals, this is clearly inappropriate. The Commission may not abrogate Southern Bell's ability to communicate in confidence with counsel concerning a matter of legal representation, simply because

the subject matter of the representation involves regulatory compliance.

Southern Bell's initial briefs in cases 81,487 and 81,716, which pertain to the orders purportedly "clarified" in the order at issue here, are appended. The Commission's reasoning with respect to the order here simply relies on the orders in those cases, and is addressed in both briefs. The factual presentation with respect to the Operational Review and the Form IA10-DP Reports is the same as for the audits in case 81,487. The factual presentation with respect to the managers' notes is the same as for the worknotes in case 81,716, and the employee statements were also addressed in case 81,716. For the reasons stated there, the instant order should likewise be quashed.

II. The Commission Failed to Follow its Own Procedures and Deprived Southern Bell of its Rights Under the Law

The Public Service Commission is required to adopt rules of practice and procedure. § 120.53, Fla. Stat. (1991). Those rules are contained in Chapter 25-22, F.A.C.

Disputes concerning the attorney-client privilege and work product doctrine require factual determinations. Thus, a hearing is required. Section 120.57, Fla. Stat. (1991); 120.68(6), Fla. Stat. (1991). The hearing is to be conducted by a prehearing officer, who issues a prehearing order. Rule 25-22.038, F.A.C. Any party adversely affected by the prehearing order may seek the Commission's review by filing a motion within ten days. Rule 25-

22.038(2), F.A.C. If not raised within that time, any claim of error is waived absent good cause shown. Rule 25-22.038(2), F.A.C.

Prehearing orders PSC-93-0151 and PSC-93-0294 were issued on January 28, 1993 and February 23, 1993, respectively. The orders purported to make findings of fact with respect to the documents listed therein, and overruled Southern Bell's attorney-client and work product objections with respect to those documents. Thereafter, Southern Bell timely filed its motions for review by the full Commission. The motions were denied, leading to appeals 81,487 and 81,716.

Neither of those prehearing orders dealt with or even mentioned the motions listed in the order here, or made factual determinations with respect to the documents at issue in those motions. Now, however, some six months later, the Commission attempts to retroactively amend those prehearing orders by inserting these additional documents and, without even making a single finding of fact, overrule Southern Bell's objections as to attorney-client privilege and work product doctrine with respect to completely new categories of documents.

In so doing, the Commission has neglected its duty to make a factual determination with respect to Southern Bell's claims. Further, the Commission has denied to Southern Bell the right to seek review of the prehearing officer's determination by the full Commission as to these documents. Finally, the Commission has denied to Southern Bell the right to fully brief these issues for this Court in the prior appeals.

Agencies must honor their own substantive rules until they are amended or abrogated pursuant to procedures established by law. Gadsen State Bank v. Lewis, 348 So.2d 343, 345 n.2 (Fla. 1st DCA 1977). As noted by the court:

An administrative rule or regulation is operative and binding on those coming within its terms from its effective date until it is modified or superseded by subsequent legislation or by subsequent regulations adopted in compliance with duly ordained standards of administrative procedure, and it expires with the repeal of the statute from which it gains its life.

Hulmes v. Division of Retirement, Dept. of Administration, 418 So.2d 269, 270 (Fla. 1st DCA 1982). Cf., United Telephone Company of Florida v. Mayo, 345 So.2d 648 (Fla. 1977) (purely procedural departures do not necessarily warrant reversal, if no prejudice results). Here the Commission failed to follow its rules, and prejudiced Southern Bell's rights for review.

Further, this dispute involves contested issues of fact with respect to the purpose of Counsel's investigation below, and the Commission failed to make findings of fact with respect to any of the documents listed in the order. It is reversible error for an agency to fail to make the necessary factual determination. Central Truck Lines v. King, 146 So.2d 370 (Fla. 1962).

Finally, the order here in effect precludes Southern Bell from seeking full review by the Commission of a prehearing officer's determination of fact. Thus in purporting to retroactively issue its ruling, the Commission attempts to negate both Southern Bell's right to seek the full Commission's determination as well as its ability to fully brief this Court under Rule 9.100(c) within thirty

days from entry of the full Commission order, should that order commit error.

For these reasons, then, the order departs from the essential requirements of law in that it fails to follow the Commission's own procedures, and fails to make the required factual determination with respect to the documents at issue, and the order should thus be quashed.

CONCLUSION

The Commission simply failed to follow its rules in issuing the order below. In the process, it denied to Southern Bell its right to have a factual determination made with respect to its claims of privilege and work product and, further, its right to utilize the set procedure to seek review of those determinations or the Commission's ultimate ruling. The Commission's conduct emphasizes its position that Southern Bell has absolutely no privilege or work product rights with respect to communications to counsel in its attempts to defend against OPC's allegations. For these reasons, then, it is clear that the Commission has departed repeatedly from the essential requirements of law, and the order at issue should be quashed.

Respectfully submitted,

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