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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE:

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.

DOCKET NO. 910163-TL

BEFORE:

Chairman Thomas M. Beard
Commissioner Betty Easley
Commissioner J. Terry Deason
Commissioner Susan Clark
Commissioner Luis J. Lauredo

PROCEEDINGS:

Agenda Conference

ITEM NUMBER:

11**

DATE:

Tuesday, April 21, 1992

PLACE:

106 Fletcher Building
Tallahassee, Florida

REPORTED BY:

PATRICIA L. GOMIA
Notary Public in and for the
State of Florida at Large

* * *

GOMIA AND ASSOCIATES
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PARTICIPATING:

- TRACY HATCH, Esquire, FPSC Legal Division
- HARRIS ANTHONY, Esquire, Southern Bell Telephone
- CHARLES BECK, Esquire, Office of Public Counsel

* * *

ISSUE 1: Recommendation that the Commission deny Southern Bell's request for reconsideration of the Commission's decision (Order No. 25483 "BR WN ES DS CL§) that the appropriate standard for review of a prehearing officer's order is the same as that applied for a motion for reconsideration.

ISSUE 2: Recommendation that the Commission deny Southern Bell's request for reconsideration of that portion of Order No. 25483 that affirms the prehearing officer's order to compel Southern Bell to respond to certain of Public Counsel's discovery requests.

ISSUE 3: Recommendation that this docket remain open.

P R O C E E D I N G S

1
2 CHAIRMAN BEARD: No. 11.

3 MR. HATCH: Commissioners, Item No. 11 is a Motion
4 for Reconsideration filed by Southern Bell. The
5 Commission's order affirming a prehearing officer's
6 determination to grant a Motion to Compel. It is also
7 a Motion for Reconsideration of the Commission's
8 decision to adopt a reconsideration standard on review
9 of the prehearing officer's orders.

10 One preliminary matter if I may raise at the
11 moment, this recommendation on the face of it is listed
12 as parties may participate. That is inconsistent with
13 the most recent Commission practice. It is not
14 inconsistent with a historic practice. We are still
15 sorting all of that out.

16 I have no objection to allowing parties to
17 participate. It is within your discretion to hear them
18 or not, as you wish. The last time it was before you
19 the parties did not participate on this matter.

20 COMMISSIONER EASLEY: Are you all here to answer
21 questions or to participate?

22 COMMISSIONER CLARK: They are both here to argue.

23 MR. ANTHONY: I was hoping to do more than that.

24 CHAIRMAN BEARD: As the prehearing officer, I have
25 heard these several times, and I would like you all to

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1 have the benefit of hearing it a time or two. So suit
2 yourselves.

3 COMMISSIONER EASLEY: Oh, no.

4 MR. HATCH: The confusion stems, Commissioners,
5 from the Commission's rules, the procedural rules, that
6 says in the post-hearing procedures after an
7 evidentiary hearing has been held there is no
8 participation.

9 COMMISSIONER EASLEY: Who goes first?

10 MR. HATCH: If you are going to hear them argue?

11 COMMISSIONER EASLEY: Yeah. Who goes first?

12 CHAIRMAN BEARD: It would be Southern Bell's
13 motion, if I'm not mistaken.

14 COMMISSIONER EASLEY: Well, it's kind of hard to
15 tell.

16 COMMISSIONER CLARK: Wait a minute, let me just
17 get clarification on this.

18 COMMISSIONER EASLEY: Okay.

19 COMMISSIONER CLARK: It would be, this is very
20 unusual to grant oral argument on this issue. This is
21 a reconsideration, right?

22 MR. ANTHONY: It's a reconsideration of the
23 Commission's previous order. It goes to two different
24 issues.

25 COMMISSIONER CLARK: Right.

1 MR. HATCH: Well, you've got two separate issues,
2 but the underlying issue is a discovery matter, and
3 whether parties are entitled to oral argument at any
4 point in a discovery process versus a substantive
5 evidentiary hearing.

6 COMMISSIONER CLARK: And what is at issue here is
7 the standard we used and something else?

8 MR. HATCH: There are two issues before you based
9 on the pleadings filed. The first issue is whether you
10 should reconsider your adoption of a reconsideration
11 standard of review of a prehearing officer's discovery
12 order. That is appropriate, an appropriate matter for
13 reconsideration because that is a shift in policy that
14 the Commission has announced.

15 The second issue before you is the reconsideration
16 by the full Commission of the full Commission's
17 determination of the order affirming the prehearing
18 officer's determination. That's a separate matter.

19 CHAIRMAN BEARD: You would have to decide? the
20 first one and then --

21 MR. HATCH: In a sense we are all balled up in
22 whatever your standard of review is is going to
23 ultimately determine what ultimately happens. The
24 background to all of this as we have shifted over time,
25 the underlying basic issue is how many bites at the

1 discovery apple are you going to allow parties.

2 The rules technically the way they are drafted now
3 provide four opportunities, if you use every
4 opportunity, and historically all four of those
5 opportunities have been used, the prehearing officer's
6 order, reconsideration by the prehearing officer, de
7 novo review by the Commission, reconsideration by the
8 Commission.

9 We have attempted to streamline that process
10 because it is broke and it needs to be fixed. And what
11 we have attempted to ask the Commission to do, which
12 they have done thus far, is to have the prehearing
13 officer issue the initial determination, put it out for
14 reconsideration standard on review, and then it goes
15 away. Two bites.

16 COMMISSIONER EASLEY: That apple is down to a
17 seedless grape by now. What do you want to do?

18 CHAIRMAN BEARD: Hey, I'm the prehearing officer.

19 MR. HATCH: But the initial threshold is whether
20 you want to hear peoples' -- parties --

21 COMMISSIONER CLARK: Mr. Chairman, I don't mean to
22 open up the door to have oral argument on every issue
23 that comes before us, but I think we did adopt a new
24 standard of review. And I would like to hear from the
25 parties, but with the caveat I don't want to hear from

1 them for more than five minutes on each point. And I
2 think to come some extent we tend to get carried away,
3 but on this issue I would like to hear from them.

4 CHAIRMAN BEARD: Well, barring my usual nature
5 with respect to participation on oral arguments, which
6 we already know where I am, I will certainly defer to
7 you.

8 Five minutes, is that agreeable, Gentlemen? My
9 watch.

10 MR. ANTHONY: Yes, sir. Five minutes for both
11 issues or on each issue?

12 CHAIRMAN BEARD: I think you have one issue before
13 you first, and that is the standard.

14 MR. ANTHONY: Yes, sir.

15 CHAIRMAN BEARD: And that is the one you are
16 participating, because it's quote/unquote a shift in
17 policy. Okay. Once you get done with that one, okay,
18 then if it's held in your favor, then we go to the
19 other one. And my position there is you would not
20 participate because that is standard reconsideration.

21 Now, Commissioner Clark, you are the attorney up
22 here and whoever else, you tell me, have I
23 misunderstood?

24 COMMISSIONER CLARK: I think that procedure you
25 set up is fine.

1 CHAIRMAN BEARD: Okay.

2 MR. ANTHONY: Thank you.

3 CHAIRMAN BEARD: You got half of it, didn't you?

4 MR. ANTHONY: Well, it's a start.

5 CHAIRMAN BEARD: Okay.

6 MR. ANTHONY: The first issue that Southern Bell
7 has brought before you on reconsideration has to do
8 with the standard of review. There was a motion to
9 compel discovery that underlies all of this. The
10 prehearing officer ruled against Southern Bell.
11 Southern Bell moved for the Commission to review that
12 decision.

13 At the agenda where that was considered, the
14 Commission applied a standard, it's the same as it
15 applies to reconsideration of its own orders. In other
16 words it applied the Diamond Cab standard, which
17 basically gives the tribunal the opportunity to
18 consider matters which it failed to consider or it
19 overlooked. It was mistake of law or fact in effect.

20 It's Southern Bell's position that that is the
21 incorrect standard to apply on review of a prehearing
22 officer's order.

23 The cases that the order relies on, first of all,
24 had to do with situations where the court in these
25 cases was reconsidering its own order. The court had

1 had the opportunity to fully consider all the issues
2 the first time it heard argument, it heard evidence,
3 wherever it may have been.

4 In this particular case that is not the case. The
5 prehearing officer, Chairman Beard, heard those
6 arguments, but the full Commission didn't have the
7 opportunity. So it's Southern Bell's position
8 initially that those cases on their face don't apply to
9 that particular review.

10 Secondly, the Commission's rules themselves apply
11 a different standard. It's Rule 25-22.0382, and that
12 is the standard for review of a prehearing officer's
13 order, and it sets forth two different alternatives for
14 a party that wishes to seek some review. First of all
15 the party can seek reconsideration to the prehearing
16 officer himself or herself, or if the party wishes it
17 can seek review. That is the word it uses, not
18 reconsideration which it uses to go back to the
19 prehearing officer, but review to the full Commission.

20 Since the rule itself distinguishes between
21 reconsideration and review, I think it reflects what
22 those cases say, that when the full body has heard or
23 the prehearing officer has heard the arguments there is
24 no need to repeat those arguments. But if you are
25 going from the prehearing officer to the full body that

1 hasn't had the opportunity to hear all the arguments,
2 the parties ought to be allowed to present those full
3 arguments.

4 Now, secondly, even if, as Mr. Hatch stated, this
5 was a change in direction for review, what standard the
6 Commission has applied, and in the past what this
7 Commission has done when you've had a review requested
8 of a prehearing officer's order it has gone to the full
9 Commission and it's been a full review of all the
10 issues. In fact that was done in Southern Bell's 1988
11 Rate Stabilization Case, or orders on discovery where
12 the prehearing officer ruled one way, and then it was
13 taken up to the full Commission, the Commission heard
14 argument and the order was basically denied in part and
15 affirmed in part, and all that had to do with
16 discovery.

17 Here for the first time the Commission has decided
18 to impose a different standard, the standard that it
19 applies on reconsideration from its own full Commission
20 orders. And it would be Southern Bell's position with
21 regard to that, that that is a change of policy or
22 practice.

23 And under the Administrative Procedures Act,
24 Section 120.5216, that is something that has to be done
25 as a rule. And this Commission hasn't undertaken a

1 rulemaking process as a result, although it may, as Mr.
2 Hatch said, want to implement rules to do something
3 like that. Up to now it hasn't. It's just in one
4 particular order implemented a new change in policy
5 that should be a rule, and that that policy hasn't been
6 properly effectuated.

7 I hope I beat my five minutes.

8 CHAIRMAN BEARD: You did fine.

9 MR. ANTHONY: Thank you.

10 MR. BECK: Commissioners, quite politely, your
11 rules do not say what standard is applied anywhere, so
12 you've simply got to decide it. There is no guidance
13 in your rules for it.

14 We think that your standard has to be a limited
15 review by, after the first hearing, because there is no
16 sense in having the prehearing officer rule at all if
17 you are simply going to hear all the same arguments
18 again the next time, plus there is no incentive for the
19 party to make their best arguments and the appropriate
20 arguments the first time. Don't waste our time, don't
21 waste your time if you are not going to uphold the
22 first one and look only at the second level of review
23 for an error or an abuse of discretion.

24 This case is a perfect one. Your system is
25 broken. Look when we asked for this discovery. It was

1 in June 6th, 1991, ten and a half months ago. Early
2 last week you mentioned, in the United depreciation
3 case you took note of a problem United had of getting
4 some discovery from an intervenor in the case. There
5 was one motion for reconsideration in that case. We
6 went to the hearing without having had a final ruling
7 on the intervenor of whether they had to produce the
8 documents.

9 Here we've got a very important docket, looking at
10 the integrity of Southern Bell's repair service
11 activities and reports. Discovery is the most basic
12 you can get. We've asked Southern Bell to give us the
13 names of the persons with knowledge about these type of
14 events.

15 I am winning every argument I get here. The
16 prehearing officer went with me. The full Commission
17 went with me. It's been ten and a half months, and I
18 don't have an answer.

19 Your system is broke. I think you've got to have
20 a limited number of times where the parties can come
21 in, and it should be for an abuse of discretion or an
22 error in law or fact.

23 COMMISSIONER EASLEY: Either that, or you've got
24 to stop winning.

25 MR. BECK: I'm winning, but I'm not. I don't have

1 the answers.

2 CHAIRMAN BEARD: A shallow victory.

3 COMMISSIONER CLARK: Mr. Chairman, I think there
4 are valid points made on both sides, and I think one of
5 the extremes we could go to is not allowing an appeal
6 of any order on discovery by the prehearing order, and
7 allow that the prehearing officer's order to stand.
8 I'm not sure that at this point I'm -- I would like to
9 consider that further to think that that is a good
10 idea.

11 But I think Mr. Beck is right that to the extent
12 we don't adhere to a narrow scope of review, we are
13 inviting parties not to put on their full case at the
14 initial point they are fighting discovery, and we have
15 got to put into effect those mechanisms that will make
16 them present their full case initially so that we can
17 move on with our discovery.

18 With respect to the fact that the full Commission
19 might not have heard the arguments, that happens in
20 courts all the time. You make motions and very likely
21 you won't be heard on them, at least in federal court,
22 you will get an order out of it and very rarely do they
23 have oral arguments on motions.

24 I think the final point I would make is that if
25 the prehearing officer is wrong, and it's something

1 that -- two things can happen. It can be corrected on
2 appeal. They can allege that it resulted in some
3 material harm to them. If it's a situation where we
4 have granted discovery of something they feel is
5 confidential, they have the avenue of immediately
6 appealing that because they will be irrevocably harmed
7 if they have to make discovery of confidential
8 information.

9 Moreover, if one of us is adopting a policy that
10 the rest of us don't agree with, there is always the
11 opportunity to go to rulemaking, or a Commissioner can
12 move to reconsider it on their own motion.

13 So I would have to say that I would concur with
14 staff that we have adopted the appropriate standard of
15 review because we do have to give some force and effect
16 to the orders of our prehearing officers.

17 COMMISSIONER DEASON: Let me ask Tracy a question.

18 In your opinion do we need to change our rules, or
19 are our rules sufficiently vague that we can do this,
20 either way?

21 MR. HATCH: Your rules provide within them the
22 discretion in this case to do what you think you need
23 to do. The rules are not ironclad and specific as to
24 the appropriate avenue.

25 As to the first part of your question, we are in

1 the process of revising or looking at the rules and
2 changing them and making a list of the things that we
3 need to change and clarify and fix. That is going on
4 all across the board in all the rules. The procedural
5 rules are no different.

6 Your rules do not preclude you or compel you to do
7 any particular thing in this instance. As far as the
8 procedural rules in this instance, all it says is the
9 party is entitled to review by the Commission. The
10 standard of review is what the issue is now.

11 COMMISSIONER EASLEY: And you would have to
12 assume, if you did a de novo approach, you would have
13 to assume that review equates to rehearing.

14 MR. HATCH: Yes, ma'am.

15 COMMISSIONER EASLEY: And I see no reason why the
16 full Commission cannot review without rehearing. And
17 if after review decides rehearing is appropriate can
18 still do so, and I would not want the rules to preclude
19 that possibility.

20 MR. HATCH: You may on your own motion conduct a
21 full rehearing if that is appropriate. The question is
22 which opportunities are you going to hang out for the
23 parties to put their hat on.

24 COMMISSIONER EASLEY: If you made a motion --

25 COMMISSIONER CLARK: I move staff.

1 COMMISSIONER LAUREDO: Let me ask you. Counsel
2 for Southern Bell said that the cases that were quoted
3 in support of I guess your motion or rather your
4 opposition were not relevant because they were
5 reconsiderations of what he called quote full court
6 rather than, the full court's own orders. Is there in
7 the judicial process when judges or courts delegate to
8 magistrates, what kind of parallel can we draw from
9 that? Is the magistrate, actually in essence works as
10 a prehearing officer, doesn't he, in the federal court?

11 MR. HATCH: In federal practice that is my
12 understanding, yes, sir.

13 COMMISSIONER LAUREDO: Is his rulings, his orders,
14 reviewable by the court?

15 MR. BECK: I'm not sure of the answer to that.

16 MR. HATCH: I don't know.

17 MR. ANTHONY: Commissioner Lauredo, we have a
18 court case right now in federal court in the Southern
19 District of Florida, a federal case. Discovery issues
20 have been delegated to a magistrate, and the court does
21 reserve the power to review those. Whether there is
22 oral argument or not, sometimes there has been and
23 sometimes there hasn't been. In that particular case I
24 think it depends on what the judge wants to do.

25 If I could just address one other point that

1 Commissioner Clark raised, I would like to say that I
2 think this is the only discovery dispute that has
3 arisen in this case that I'm aware of, and Mr. Beck may
4 tell me if I'm right or wrong about that.

5 MR. BECK: It's wrong.

6 CHAIRMAN BEARD: I would have been shocked.

7 MR. ANTHONY: It's the only one that I can recall
8 that at least has gotten to this phase. Maybe he can
9 point out where I'm wrong.

10 But Southern Bell has tried to cooperate in
11 discovery in this matter. This isn't a matter of
12 confidentiality. It's not anything like that. It goes
13 far beyond that as far as Southern Bell is concerned.
14 It's a matter of attorney privilege, work product
15 privilege, which is fundamental to the process. And
16 that's why Southern Bell has thought it appropriate to
17 take it to this full body because it is something that
18 is fundamental to the entire workings of not only the
19 judicial process, but this administrative process. It
20 goes to the investigation that Southern Bell did, and
21 that's why Southern Bell has taken it the way it has.

22 COMMISSIONER CLARK: Well, and I understand that,
23 and I understand based on the standard of review that
24 we would adopt here that unless you could show that the
25 prehearing officer was -- it was a mistake of law or

1 fact or didn't understand something, then you would
2 immediately appeal it to the appellate court and bypass
3 the full Commission, which I think is the way to go,
4 because we need to eliminate the steps in order to
5 encourage people to make their best case to the
6 prehearing officer.

7 CHAIRMAN BEARD: Commissioners, let me if I can,
8 this needs to be resolved, because this isn't getting
9 simpler. This wasn't a matter of a few documents. We
10 are talking mag tapes of data. We are talking spending
11 a lot of time reading and rereading the statutes to get
12 clarification in our mind about what the statutes
13 clearly indicated you could not hold
14 confidential, name and address kind of things.

15 And if you rehear it, to further rehear it, you
16 better go look at not only the statutes but all the
17 papers. I don't think you want to be in a position of
18 doing that because then we do need to eliminate the
19 prehearing officer, we don't need them anymore.

20 MR. ANTHONY: Chairman Beard, this only has to do
21 with names that Public Counsel has requested. And
22 again it's a question of privilege not confidentiality.
23 It doesn't go to any of those other issues about
24 confidentiality.

25 CHAIRMAN BEARD: Well, there was a lot of stuff

1 that came through at that time, mag tapes of material
2 to be precise. Okay. This was one of those. And it
3 took hours and hours and hours, both mine and Bill
4 Gibson's time going through those meticulously. Okay.
5 And once you open it up for one piece, I don't care if
6 it's this document or any document, you open it for all
7 of them.

8 COMMISSIONER EASLEY: Mr. Chairman, I'm going to
9 second Commissioner Clark's motion.

10 CHAIRMAN BEARD: Okay.

11 COMMISSIONER LAUREDO: What are we voting on here?
12 On Issue 1 or --

13 COMMISSIONER EASLEY: Just the whole thing,
14 approve staff, I believe was the motion.

15 COMMISSIONER CLARK: That was my motion.

16 COMMISSIONER LAUREDO: Counselor, there is no way
17 that I can vote on this without creating precedent.

18 COMMISSIONER EASLEY: About what?

19 MR. HATCH: I don't believe so, Commissioner.

20 COMMISSIONER CLARK: You are getting ready to get
21 the remedial course, Commissioner Lauredo.

22 CHAIRMAN BEARD: Depending on which side you agree
23 with.

24 COMMISSIONER LAUREDO: Especially when you read
25 this late at night they don't jump at you as

1 controversial.

2 CHAIRMAN BEARD: Well, we don't have the benefit
3 of the oral argument to really enlighten us.

4 COMMISSIONER LAUREDO: I just thought it was
5 wonderful last night. I was all --

6 CHAIRMAN BEARD: We have a motion and a second.
7 All of those in favor signify by saying aye.

8 Opposed.

9 (Whereupon, discussion on the above item concluded.)
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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, PATRICIA L. GOMIA, Professional Shorthand Reporter, and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing agenda conference proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter reduced to typewriting under my supervision; and the foregoing pages numbered 1 through 20 are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, nor financially interested in the foregoing action.

WITNESS MY HAND AND SEAL this, the 24th day of APRIL, A. D., 1992 IN THE CITY OF TALLAHASSEE, COUNTY OF LEON, STATE OF FLORIDA.

PATRICIA L. GOMIA
216 West College Avenue
U.S. Post Office, Room 122
Tallahassee, Florida 32301

My Commission expires: June 17, 1994

GOMIA AND ASSOCIATES