BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request by Lake Mary City Commission for extended area service from the Sanford and Geneva exchanges to the Orlando and Apopka exchanges.	)	DOCKET NO. 910762-TL ORDER NO. PSC-93-0737-FOF-TL ISSUED: May 13, 1993

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
THOMAS M. BEARD
SUSAN F. CLARK

ORDER DENYING REQUEST FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

Following hearings, we approved separately surveying the customers in the Geneva and Sanford exchanges under the 25/25 plan with regrouping. A decision on what action should be taken if one or both surveys fail and what action should be taken on the MarketReach℠ and Enhanced Optional Extended Area Service (EOEAS) plans was deferred until the survey results were known. The survey results were considered at our January 19, 1993, Agenda Conference where we required implementation of the hybrid $.25 message rate plan for residence customers, with a measured plan of $.10 for the initial minute and $.06 for all additional minutes for business customers. The EOEAS premium flat rate option was continued for residence customers. Other EOEAS options and the MarketReach℠ plan were discontinued. Order No. PSC-93-0305-FOF-TL, issued February 25, 1993, reflects these actions.

The City of Lake Mary and Seminole County filed a Motion to Apply Correct Version of Rule 25-4.063, Florida Administrative Code, in Considering Subscriber Survey Results on December 31, 1992. BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (Southern Bell) filed its Response to this Motion on January 12, 1993.

On February 26, 1993, the City of Lake Mary and Seminole County filed a Motion for Reconsideration of Order No. PSC-93-0305-FOF-TL and Request for Oral Argument. The Office of Public Counsel (OPC) adopted the positions and arguments of the City of Lake Mary and Seminole County in their Response filed on March 10, 1993.

Southern Bell filed its response on March 10, 1993, but after the close of business; therefore, the response was filed on March 11, 1993. Southern Bell then filed a Motion for Extension of Time.

DISCUSSION

First, we shall address the December 31, 1992, the Motion to Apply Correct Version of Rule 25-4.063, Florida Administrative Code. Lake Mary and Seminole County argue at length that we should evaluate the Sanford/Lake Mary vote under the new version of the EAS subscriber survey rule. These arguments are essentially the same arguments put forth in Lake Mary and Seminole County's Motion for Reconsideration, which is discussed in a later portion of this Order.

The December 31st Motion shall be denied. Lake Mary and Seminole County wanted us to consider this Motion at our January 19, 1993, Agenda Conference. However, the item was before us at that time for final agency action following a hearing, where parties are not allowed to participate. We believe that if the December 31st Motion had been considered at that time, this would have amounted to allowing the parties to participate through their written, rather than spoken, word.

Our rules provide that parties may not participate when a vote is taken following a hearing because we must base our decision solely on the record from the hearing. Arguments made by parties after the hearing has concluded are not evidence and are not part of the record. Such arguments should not in any way influence the decision making process. For this reason, we believe it was proper not to have considered the December 31st Motion when we took final action at the January 19, 1993, Agenda Conference. Accordingly, this Motion shall be denied.

Next, we address the Motion for Extension of Time filed by Southern Bell on March 12, 1993. The Motion seeks a one day extension for Southern Bell's Response to Lake Mary and Seminole County's Motion for Reconsideration of Order No. PSC-93-0305-FOF-TL and Request for Oral Argument. Southern Bell states that it inadvertently failed to deliver its response, which was due to be filed on March 10, 1993, until after the close of business. Therefore, the response was technically filed on March 11, 1993, one day late. Neither Lake Mary, Seminole County, nor OPC objected

to Southern Bell's request for the one day extension. Accordingly, we find it appropriate to grant the Motion for Extension of Time.

This brings us to Lake Mary and Seminole County's Request for Oral Argument. Oral argument is granted solely at our discretion, pursuant to Rule 25-22.060(1)(f), Florida Administrative Code. We find it appropriate to deny the Request for Oral Argument, since the Motion for Reconsideration merely reargues Lake Mary and Seminole County's position and does not point out any error of fact or law. We do not believe that oral argument would aid us in comprehending and evaluating the issues under consideration.

Finally, we turn to Lake Mary and Seminole County's Motion for Reconsideration of Order No. PSC-93-0305-FOF-TL. This Order required implementation of the $.25 message rated plan for residence customers, with a measured plan of $.10 for the initial minute and $.06 for additional minutes for business customers. The plan is to be implemented on the Geneva/Orlando and Sanford/Orlando routes. The existing EOEAS plans were ordered cancelled, with the exception of the residence premium option, which was continued. The MarketReach℠ plan was also ordered to be terminated.

Lake Mary and Seminole County argue that the customer surveys should have been conducted under our new rule, which became effective on October 5, 1992. The surveys were discussed at our August 18, 1992, Agenda Conference and ordered under the then-existing survey rule (Rule 25-4.063), except that a simple majority of eligible subscribers would be sufficient for passage. Since the surveys were conducted in accordance with Order No. PSC-92-0992-FOF-TL, further discussion was not necessary at the January 19, 1993, Agenda Conference when the survey results were reported. However, an alternative recommendation was presented to us which did discuss the results under the revised survey rule, with the caution that the provisions could not be directly applied to the balloting results, because the tabulation information may substantially affect the voting behavior of the customers. Under the old rule, ballots not returned are tabulated as "no" votes, while under the new rule, only returned ballots are included in the tabulation of the results.

Lake Mary and Seminole County want us to disregard Order No. PSC-92-0992-FOF-TL and the rules effective at the time that Order was issued, and instead, make the revised survey rules apply retroactively. Even then, Lake Mary and Seminole County only want us to consider the survey results, and not the other provisions in

the revised rules, such as the required advertisement two weeks in advance of mailing ballots, as well as the statement of the threshold for voter approval (a majority of all respondents required to be surveyed vote favorably, with at least 40% of all ballots returned). Lake Mary and Seminole County believe that a confusing ballot was sent out, that the number of ballots mailed was improper, and that the change in the rules has "poisoned the well." Lake Mary and Seminole County do not believe the Sanford subscribers should be reballoted under the new rule.

In support of its position that we proceeded under the wrong version of the rule, Lake Mary and Seminole County cite a number of court cases that, by their own admission, do not involve the application of administrative rules. Lake Mary and Seminole County then argue that the result they seek "logically flows" from the cited cases. We disagree. However, even if we were to agree with this argument, the remedy sought is the wrong one. If we were to agree that the new rule should apply to the survey, then the remedy would be to conduct a survey fully under the new version of the rule. Instead, Lake Mary and Seminole County advocate a smorgasbord approach where the survey has been instituted under one version of the rule but then can be judged under another version. We simply do not believe that such a result could "logically flow" from the cases cited.

Further, even if we were to accept the argument that an insufficient number of ballots was mailed (30,028 vs. 37,923), the survey still would have failed, even if all the 7,895 missing ballots had been returned with a "yes" vote in favor of EAS, which would be very unlikely. The Sanford survey results in that scenario would be as follows:

	Existing Survey Results		Including 7,895 "Yes" Ballots	
	Number	Percent of Total	Number	Percent of Total
Ballots Mailed	30028	100.00	37923	100.00
Ballots Returned	12512	41.67	20407	53.81
Unreturned	17516	58.33	17516	46.19
For EAS	6806	22.67	14701	38.77

Against EAS	5616	18.70	5616	14.81
Invalid	90	.30	90	.20
Needed to Pass	15015	>50%	18962	>50%

As demonstrated in the tabulation above, the survey would have failed by 4,261 ballots (18,962 vs. 14,701) required for the simple majority approval. Under this scenario, only 38.77 percent of the Sanford customers voted in favor of extended area service.

We believe the balloting was conducted in accordance with Order No. PSC-92-0992-FOF-TL and that it should stand. Accordingly, we find it appropriate to deny Lake Mary and Seminole County's Motion for Reconsideration.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the City of Lake Mary and Seminole County's Motion to Apply Correct Version of Rule 25-4.063, Florida Administrative Code, filed December 31, 1992, is hereby denied for the reasons set forth herein. It is further

ORDERED that the Motion for Extension of Time filed on March 12, 1993, by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company is hereby granted as discussed herein. It is further

ORDERED that the Motion for Reconsideration of Order No. PSC-93-0305-FOF-TL and Request for Oral Argument filed February 26, 1993, by the City of Lake Mary and Seminole County and adopted by the Office of Public Counsel in its March 10, 1993, Response is hereby denied for the reasons set forth in the body of this Order. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission this 13th day of May, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

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NOTICE OF 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 the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.