

**IN THE SUPREME COURT OF FLORIDA**

**CHARLES J. CRIST JR.,  
Attorney General, State of Florida;  
HAROLD McLEAN,  
Public Counsel, State of Florida;  
and AARP,**

**Appellants,**

**v.**

**Consolidated Case Nos.  
SC04-9, SC04-10, SC04-946**

**LILA A. JABER, Chairman, et al.,  
constituting the FLORIDA PUBLIC  
SERVICE COMMISSION, an agency of  
the STATE OF FLORIDA; BELLSOUTH  
TELECOMMUNICATIONS, INC.;  
VERIZON FLORIDA INC.; and  
SPRINT-FLORIDA, INC., et al.,**

**Appellees.**

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**RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC.  
AND BELLSOUTH LONG DISTANCE, INC. TO MOTIONS OF  
ATTORNEY GENERAL AND OFFICE OF PUBLIC COUNSEL  
RELATING TO CONFIDENTIAL DOCUMENTS**

Pursuant to rule 9.300, Florida Rules of Appellate Procedure, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (“BellSouth”) respond to the Attorney General’s Motion for Determination Regarding Public Disclosure of Brief and Court Record and the joinder in that motion by the Office of Public Counsel (“OPC”) and state:

1. The Attorney General's bombastic motion not only misstates the law and exaggerates the extent of confidential information relevant to this appeal, but it also falsely charges that BellSouth and other Appelles wish to "operate in the back room," "refuse the citizens of Florida access to the basis for the Court's decision" and "ban them [citizens] from oral argument." Attorney General's Motion at 1 and 7. Such incendiary rhetoric does not assist this Court in resolving the issues presented.

2. The facts are these: Pursuant to section 364.183, Florida Statutes, and rule 25-22.006, Florida Administrative Code, the Public Service Commission ("PSC") made formal findings that certain material in the record below constitutes "proprietary confidential business information," disclosure of which "would cause harm to the ratepayers or the company's business operations . . ." § 364.183(2) and (3), Fla. Stat. When the PSC makes such findings, the documents at issue are exempt from disclosure under Florida's Public Records Act, chapter 119, Florida Statutes. § 364.183(2), Fla. Stat.

3. In BellSouth's case, six orders granting confidential classification of documents were entered. R.V.15, 3002-3023; R.V.16, 3200-3206; R.V.18, 3561-3568; R.V.18, 3569-3573; R.V.18, 3574-3581; R.V.18, 3582-3591 (copies attached as Composite Appendix 1). In

compliance with section 364.183 and rule 25-22.006, BellSouth was required to demonstrate that the information met the definition of proprietary confidential business information in section 364.183(3), Florida Statutes. All documents were reviewed and evaluated, and a formal determination by the PSC was made that “[b]ased on the definition of proprietary confidential business information in Section 364.183(3), Florida Statutes, it appears that the material described therein is proprietary business information in accordance with Section 364.183, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. Disclosure of this information would give BellSouth’s competitors an artificial competitive advantage, allowing them to successfully compete against BellSouth without the usual market trial and error.” R.V.15, 3004; R.V.16, 3202; R.V.18, 3562; R.V.18, 3570; R.V.18, 3575-76; R.V.18, 3584.

4. At no time during the PSC’s consideration of BellSouth’s requests did any of the Appellants, all of whom were Intervenors in the proceeding below, object to the confidential treatment of any document, even though rule 25-22.006 establishes clear procedures for challenging such classification. *See* r. 25-22.006(3)(b) (“Any party to a formal proceeding may file an objection to the request for confidential classification within 14 days after service of the copy or summary.”); *see also* r. 25-

22.006(7)(a) (“Any person may file a petition to inspect and examine any material which the Commission has ruled exempt from s. 119.07(1), F.S. . . .”). Nor did any party ask that any order granting confidential classification be reconsidered. *See* r. 25-22.060 (relating to requests for reconsideration of a PSC order).

5. The only time any Appellant has ever raised an issue concerning confidential classification of certain documents was after the Order under review in this appeal was sent back to the PSC by this Court for a hearing on Motions for Reconsideration. At that time the Attorney General filed an Amended Motion for Oral Argument that included a blanket request that the PSC “make available to the public documents and testimony relevant to these arguments that do not disclose proprietary confidential business information . . . .” R.V.19, 3714-15 (attached as Appendix 2). The PSC, in its Order on Reconsideration, denied the Attorney General’s request to open documents that previously had been formally determined to constitute proprietary confidential business information, reasoning:

We find that the request cannot be granted, as it is untimely and not proper within the context of a Motion for Oral Argument. We are concerned by the fact that the Attorney General has not specified what material he would like released. Moreover, the prehearing officer has already issued Orders addressing all pending Requests for Confidential Classification. Thus, to the extent that material is currently being treated as

confidential, it has been accorded that treatment by an Order issued in this proceeding.

The most recent Orders addressing Requests for Confidentiality were issued on March 8, 2004. The time for seeking reconsideration of those Orders ran on March 18, 2004. No party responded in opposition to any of the requests for confidential classification, and no party sought reconsideration of any of the Orders granting confidentiality. Florida case law is clear that we are without authority to extend the time for seeking reconsideration of an Order, even if we were otherwise inclined to do so. *See City of Hollywood v. Public Employee Relations Commission*, 432 So. 2d 79 (Fla. 4<sup>th</sup> DCA 1983).

R.V.19, 3820 (emphasis supplied) (attached as Appendix 3).

6. The Attorney General and OPC now seek a blanket order from this Court that every PSC order granting confidential classification be invalidated with no analysis of the basis for any particular order and that “all aspects of the record” be opened. Attorney General’s Motion at 8. This request represents an improper collateral attack on the PSC’s application of the longstanding and judicially approved statutory procedure for determining when information submitted by a utility constitutes “proprietary confidential business information,” and it should be denied.

7. In *Florida Society of Newspaper Editors, Inc. v. Florida Public Service Commission*, 543 So. 2d 1262 (Fla. 1<sup>st</sup> DCA 1989), the court evaluated section 364.183 and a similar exemption applicable to public utilities. The court found that unlike other statutory exemptions from the

Public Records Act, sections 364.183 and 366.093 require the PSC to exercise its discretion. The court reasoned:

In most cases, a determination of exemption from the Public Records Act does not involve an exercise of discretion, but merely a comparison of the document in question with the pertinent exemption provision. If the document contains the information specified in the exemption provision, it is exempt; if it does not, it is not exempt and must be made available. . . . But sections 364.183 and 366.093 are worded differently from other exemption provisions. These statutes exempt from section 119.07(1) any records *which are shown to be* “proprietary confidential business information.” This term is defined in both sections to include, “*but is not limited to,*” trade secrets and other enumerated types of information. . . .

The language of these exemption statutes indicates that determination of an exemption for “proprietary confidential business information” requires an exercise of discretion, unlike most other exemptions . . . .

*Id.* at 1264-65 (emphasis in original).

8. The court went on to find that those dissatisfied with the PSC’s exercise of discretion under the statutes have “an adequate administrative remedy under rule 25-22.006 to challenge the Commission’s determination of confidentiality under sections 364.183 and 366.093,” and that PSC decisions on those challenges are subject to review pursuant to section 120.68, Florida Statutes, the Administrative Procedure Act.<sup>1</sup> Neither the

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<sup>1</sup> Although rule 25-22.006 has been revised since the opinion in the *Florida Society of Newspaper Editors*, the fundamental premise that it

Attorney General nor OPC availed themselves of available remedies during the course of the proceeding at the PSC. Thus, they have waived the right to now ask this Court to second-guess the PSC's statutory grant of authority to exercise discretion relating to protection of proprietary confidential business information. *See, e.g., Dober v. Worrell*, 401 So. 2d 1322, 1324 (Fla. 1981) (inappropriate to raise issues for the first time on appeal); *J.T.A. Factors, Inc. v. Philcon Services, Inc.*, 820 So. 2d 367, 370 (Fla. 3d DCA 2002) (errors not preserved before the lower tribunal are deemed waived); *Saka v. Saka*, 831 So. 2d 709, 711 (Fla. 3d DCA 2002) (“[I]n order to preserve an issue for appellate review, the appellant must present a record indicating that an adequate and timely objection was interposed in the proceedings below challenging the acting sought to be reviewed on appeal.”)

9. The Attorney General misstates the law when he argues that no legal basis exists to continue the confidential classification of documents determined by the PSC to constitute “proprietary confidential business information.” Case law from this Court interpreting Florida Rule of Judicial Administration 2.051 makes clear that documents exempt from public access under chapter 119, Florida Statutes, are also exempt under rule 2.051. *See State v. Buenoano*, 707 So. 2d 714, 718 (Fla. 1998). In *Buenoano*, this

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provides remedies for those dissatisfied with PSC determinations relating to confidentiality remains unchanged.

Court noted that rule 2.051(c)(8) exempts from public access “all records presently deemed to be confidential by . . . Florida Statutes.” *Id.* at 718. Rejecting an argument that records previously exempt from the Public Records Act became public when they were placed in a court file, this Court reasoned:

Rule of Judicial Administration 2.051 does not change our conclusion that the documents at issue are not subject to public inspection. Although the documents when given to Buenoano were placed in Volume IV of the court record, rule 2.051(c)(8) specifically adopts statutory public records exemptions. That rule exempts from public access ‘all records presently deemed to be confidential by . . . Florida Statutes.’ Since we have determined that the documents are exempt from public access under chapter 119, they are likewise exempt under rule 2.051.

*Id.* (emphasis supplied) (internal citations omitted); *see also Florida Publishing Co. v. State*, 706 So. 2d 54, 55 (Fla. 1<sup>st</sup> DCA 1998) (“The sole task before us is to construe rule 2.051, Florida Rules of Judicial Administration, relating to access to records of the judicial branch and to determine whether the rule exempts from disclosure those materials which are exempt from disclosure pursuant to section 119.07(3), Florida Statutes (1995). . . . We find that rule 2.051(c)(8), Florida Rules of Judicial Administration, specifically adopts the statutory exemptions . . .”).

10. The Attorney General chose not to apprise this Court of the case law interpreting rule 2.051(c)(8), though his Motion discusses the rule

in detail, and he in effect makes the same argument that was rejected by this Court in *Buenoano*. Even the Government-in-Sunshine Manual, prepared by the Attorney General's own lawyers, states the established rule that "documents that are exempt from public access under Ch. 119, F.S., are likewise exempt under rule 2.051." First Amendment Foundation, Vol. 26, Government-in-the-Sunshine Manual, at 67 (2004 ed.).<sup>2</sup>

11. The Attorney General also vastly overstates the significance of confidential information in this appeal. A review of the briefs filed by the Attorney General and OPC contradicts arguments that they "cannot prosecute this appeal nor represent effectively the interests of the People" without reference to the confidential information. *See* Attorney General's Motion at 2. Even this Court noted in its Order of September 9, 2004, that OPC's brief "contains scattered highlighted references to allegedly confidential information while the substantial majority of the brief discloses no confidential information." The 53-page redacted brief served by the Attorney General on September 8, 2004 (stricken by this Court the

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<sup>2</sup> BellSouth notes that subsection (c)(7) of rule 2.051 also provides a basis for exemption of the documents from the public disclosure requirement.

following day), also includes only scattered references to confidential information.<sup>3</sup>

12. Finally, the Attorney General's arguments that Appellees somehow wish to bar the public from oral argument or from reviewing the briefs in this case is baseless. This Court has previously established procedures for handling documents classified as confidential by the PSC that would work well in this appeal. In *Florida Industrial Power Users Group v. Jaber*, Case No. SC02-187, this Court entered an Order approving parameters for addressing confidential information that were proposed in a motion by Tampa Electric Company (TECO). A copy of this Court's Order is attached as Appendix 4. Using the procedures adopted by the Court in the

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<sup>3</sup> Confidential information redacted from the Attorney General's original brief consists of one sentence on page 10; portions of a footnote on page 16; four percentage figures and a portion of one sentence on page 17; one sentence on page 19; one sentence on page 20; a portion of a sentence on page 35; one-and-one-half sentences on page 29; four percentage figures on page 42 (these are the same figures referenced on page 17); one sentence on page 46; and a partial sentence on page 48. OPC's 45-page brief references confidential information in two partial sentences on page 17; in six dollar or percentage figures on page 18; in six figures on page 19; in one figure each on pages 22, 23, 26, 35, 36, and 40; and in two figures on page 41. The Amended Initial Brief served by the Attorney General on September 14, 2004, does not appear to include any additional confidential information; rather, the information simply is reformatted as required by this Court's Order of September 9, 2004. Such sporadic references to protected information belie the Attorney General's assertion that confidential documents constitute "the heart of the record" in this case. See Attorney General's Motion at 2.

*Florida Industrial Power Users Group* case, as well as this Court's direction in the September 9, 2004, Order to the Attorney General and OPC concerning use of confidential information, BellSouth proposes the following procedure:

- The Court and counsel for all parties to the appeal have full access to, and the ability to refer to, confidential information to the extent necessary, but without publicly disclosing the information.
- All references to any material designated as confidential by the PSC shall be contained in a separate appendix to the briefs. Briefs may make reference to the appendices as necessary. The Clerk of the Court will keep the appendices under seal.
- Reference to confidential information during oral argument could be made in a manner that does not disclose the subject matter of the confidential information, but that clearly allows the Court to inquire and any party to present and respond to questions from the Court that may relate to the confidential information.

*See* TECO's Supplemental Motion to Maintain Confidential Treatment of Portions of the Record at 2-3, Case No. SC02-187 (attached as Appendix 5).

13. As in the *Florida Industrial Power Users Group* case, BellSouth believes confidential information can be protected while providing the public with access to the briefs and to oral argument. As illustrated by the redacted briefs served by the Attorney General and OPC, the majority of material classified as confidential consists of dollar figures and percentage figures. These can be referenced in briefs and in oral argument as illustrated by the TECO parameters without actually being disclosed. The public still will be able to follow and understand the issues and arguments in this case.

For the reasons expressed, BellSouth respectfully requests that this Court deny the Attorney General's Motion for Determination Regarding Public Disclosure of Brief and Court Record and adopt the procedure for handling confidential documents outlined in this Response.

Respectfully submitted this \_\_\_\_ day of September, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.  
AND BELLSOUTH LONG DISTANCE, INC.

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Susan F. Clark, Florida Bar No. 0179580  
Donna E. Blanton, Florida Bar No. 948500  
Radey Thomas Yon & Clark, P.A.  
313 N. Monroe Street, Suite 200  
Tallahassee, FL 32301  
(850) 425-6654 (phone)  
(850) 425-6694 (fax)

**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing was served by U.S. Mail this  
\_\_\_ day of September 2004, on the following:

Charles J. Crist, Jr.  
Jack Shreve  
Christopher M. Kise  
Lynn C. Hearn  
Office of the Attorney General  
PL-01, The Capitol  
Tallahassee, FL 32399-1050

David E. Smith  
Richard Melson  
Beth Keating  
Felicia R. Banks  
C. Lee Fordham  
Patricia Ann Christensen  
Division of Legal Services  
Room 370  
Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Richard A. Chapkis  
Elizabeth B. Sanchez  
Kimberly Caswell  
201 North Franklin Street  
FLTC007  
Tampa, FL 33602

Harold McLean  
H. F. Mann  
Charles Beck  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street, #812  
Tallahassee, FL 32399-1400

John P. Fons  
Major B. Harding  
Ausley & McMullen  
P. O. Box 391  
Tallahassee, FL 32303

Lisa Sapper  
AT&T  
1200 Peachtree Street NE  
Atlanta, GA 32309

Michael B. Twomey  
P.O. Box 5256  
Tallahassee, FL 32314-5256

Mark Cooper  
AARP  
504 Highgate Terrace  
Silver Spring, MD 20904

Michael A. Gross  
Florida Cable Telecommunications  
246 East 6th Avenue  
Tallahassee, FL 32303

Charles Rehwinkel  
Sprint-Florida, Inc.  
1313 Blairstone Road  
Tallahassee, FL 32301

Donna McNulty  
MCI WorldCom Communications  
1203 Governors Square Blvd.  
Suite 201  
Tallahassee, FL 32301-2906

Susan Masterson  
Sprint-Florida, Inc.  
P.O. Box 2214  
Tallahassee, FL 32316

George N. Meros  
Karen Jusevitch  
Carlos Muniz  
Gray Robinson  
P.O. Box 11189  
Tallahassee, FL 32302-3189

John Feehan  
Knology of Florida, Inc.  
1241 O.G. Skinner Drive  
West Point, GA 31833

Tracy W. Hatch  
AT&T Communications, Inc. of  
the Southern States, LLC  
101 N. Monroe Street, Suite 700  
Tallahassee, FL 32301

Floyd R. Self  
Gary Early  
Messer Caparelo & Self  
P. O. Box 1876  
Tallahassee, FL 32302-1876

De O'Roark  
MCI WorldCom Communications  
6 Concourse Parkway  
Suite 3200  
Atlanta, GA 30328

Harris Anthony  
BellSouth Long Distance, Inc.  
400 Perimeter Center Terrace  
Suite 350  
Atlanta, GA 30346-1231

Anthony Gillman  
Verizon Select Services, Inc.  
201 N. Franklin Street  
3th Floor MC FLTC0007  
Tampa, FL 33602-5167

Micki Chen  
Verizon Long Distance  
1515 N. Courthouse Road  
5th Floor  
Arlington, VA 22201

Ben Wilcox  
Common Cause Florida  
704 West Madison St.  
Tallahassee, FL 32304

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DONNA E. BLANTON