

**NANCY WHITE**  
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April 15, 1992

**ORIGINAL**

Mr. Steve C. Tribble  
Director, Division of Records and Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, Florida 32301

RE: Docket No. 910163-TL

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Motion to Compel and Request for Oral Argument which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely yours,

*Nancy B. White*  
Nancy B. White  
(22)

ACK

AFA \_\_\_\_\_

APP \_\_\_\_\_

CAF \_\_\_\_\_

CMU \_\_\_\_\_

CTR \_\_\_\_\_

Enclosures

EAG cc: All Parties of Record

LEG LW/m A. M. Lombardo

LIN 6 H. R. Anthony

OPC \_\_\_\_\_

RCH \_\_\_\_\_

SEC 1

WAS \_\_\_\_\_

OTH \_\_\_\_\_

RECEIVED & FILED

*[Signature]*  
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

03735 APR 15 1992

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the )  
Integrity of Southern Bell's )  
Repair Service Activities ) Docket No. 910163-TL  
and Reports ) Filed: April 15, 1991  
\_\_\_\_\_ )

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S  
OPPOSITION TO PUBLIC COUNSEL'S MOTION TO COMPEL  
AND REQUEST FOR ORAL ARGUMENT

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.037, Florida Administrative Code, and herewith files its Opposition to the Citizens' of Florida ("Public Counsel") Motion to Compel with regard to Item No. 2 of Public Counsel's Twenty-First Production of Documents Request dated February 19, 1992. In support of its Motion, Southern Bell shows the following:

1. Item No. 2 of Public Counsel's Twenty-First Production of Document Request, dated February 19, 1992, requested the production of the September 1991 Mechanized Out of Service Adjustment ("MOOSA") Audit (the "MOOSA Audit"). Southern Bell objected to the production of the MOOSA Audit on the basis that the audit was performed through and at the direction of counsel for Southern Bell and therefore constituted attorney/client privileged material. In the alternative, Southern Bell avers that the work product privilege also protects this document from discovery and that Public Counsel has not met and cannot meet its burden of proving "need" and "undue hardship".

2. Communications between attorneys and their clients are shielded from discovery under Rule 1.280(b)(i) of the Florida

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FPSC-RECORDS/REPORTING

Rules of Civil Procedure. This rule is codified at § 90-502, Fla. Stat. The attorney-client privilege applies to corporations. Upjohn Co. v. United States, 449 U.S. 383, (1981). The elements of the attorney-client privilege require that (1) the communication must be made in confidence, (2) by one who is a client, (3) seeking legal advice from an attorney, and (4) the communication is requested to be kept confidential and such privilege has not been waived. International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 184-85 (M.D.Fla. 1973).

3. The communication in issue involves legal advice sought from and rendered by counsel with regard to the Company's compliance with the Florida Public Service Commission's ("FPSC") rules and regulations. The communications were made in confidence and should be protected from disclosure. As shown by the attached affidavit of Shirley T. Johnson, the audit at issue was part of an internal investigation conducted by the Company's Legal Department into the issues raised in this docket. The audit was performed at the direct specific request of the Company's Legal Department in order to provide the Legal Department with the information necessary to render legal counsel. The results were relayed in confidence to the Legal Department and limited distribution was made to members of the Legal Department and Internal Auditing hierarchy. In accordance with such limited distribution, it was made clear that the information was confidential and subject to a claim of privilege. Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So.2d

764 (Fla. 2d D.C.A. 1981).

4. Public Counsel argues that the audit at issue is a routine business record prepared in the ordinary course of business and thus not subject to the attorney-client privilege. Motion to Compel at 7-9. While Public Counsel is correct in its assertion that internal audits are routinely performed on various aspects of the Company's business, as the affidavit of Ms. Johnson shows, this particular audit was specifically requested by the Legal Department and would not have been performed without that direct request. Thus, it does not constitute a routine business record, but rather a document extraordinarily related to a privileged internal legal investigation.

5. The Company sought legal advice from its counsel regarding its conformance with certain FPSC rules. For the Legal Department to be able to provide that advice it needed certain information, i.e., the MOOSA Audit, that it requested. The MOOSA Audit is information which is protected from discovery by the attorney-client privilege and, as such, should not be released to Public Counsel or any other person. Public Counsel's Motion to Compel should therefore be denied.

6. In the alternative, Southern Bell submits that the September 19, 1991 MOOSA Audit constitutes the work product of attorneys and agents for Southern Bell which should be shielded from discovery under Rule 1.280(b)(1), Florida Rules of Civil Procedure. See also, Karch v. MacKay, 453 So.2d 452, 453 (Fla. 4th D.C.A. 1984). In Surf Drugs, Inc. v. Vermette, 236 So.2d

108, 113 (Fla. 1970), the Supreme Court of Florida held attorney work product to include: interviews, statements, memoranda, correspondence, briefs, personal impressions, and investigative materials prepared in anticipation of litigation by an attorney or an employee investigator at the direction of a party. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct 385, 91 L.Ed. 451 (1947). A document is prepared in anticipation of litigation if it is not one that would otherwise be required to be prepared. See Reynolds v. Hofmann, 305 So.2d 294 (Fla. 3d D.C.A. 1974). It does not matter whether the product is the creation of a party, agent, or attorney where the subject matter of the discovery is the work product of the adverse party. Atlantic Coast Line R.R. v. Allen, 40 So.2d 115 (Fla. 1949).

7. As can be seen by the attached affidavit of Shirley T. Johnson, the audit in question was prepared at the direct request of Southern Bell's Florida Legal Department, in connection with this docket, and was not an audit conducted in the regular scope of Southern Bell's business. Thus, it is clear that the audit was conducted in connection with this litigation and is subject to the work product privilege.

8. Florida Rules of Civil Procedure Rule 1.280(b)(2) states that the adverse party may not obtain material subject to the attorney work product privilege without a showing of need and an inability to obtain the materials from other sources without undue hardship. See Alachua General Hospital, Inc. v. Zimmer USA, Inc., 403 So.2d 1087 (Fla. 1st D.C.A. 1981). The affidavit

of Shirley T. Johnson demonstrates that Public Counsel cannot demonstrate either need or inability to replicate the information contained in the audit. As stated in the affidavit, the basic materials necessary to undertake such an audit are readily available. In order to undertake a similar random sample rebate audit for February of 1990 forward, Mechanized Trouble Adjustment System ("MTAS") data would be required. For an audit on rebates prior to that time, Display Long Extended Trouble History ("DLETH") data would be required. In addition, customer records associated with the particular samples used would be needed. Southern Bell has provided most of these materials to Public Counsel in response to previous interrogatories and requests for production filed in this docket. Southern Bell has provided education sessions for Public Counsel's personnel, as well as flow charts, trouble histories and data interpretations, in addition to other voluminous information. It is apparent that Public Counsel can conduct an audit of Southern Bell's MOOSA system similar to that done by Southern Bell by using information that it already has or which is readily available to it.

9. Southern Bell asserts that Public Counsel's Motion to Compel should be denied based on its showing of the attorney-client privilege covering the September 19, 1991 MOOSA Audit. In the alternative, the work product privilege should be found to be applicable and Public Counsel has not made the requisite showing of need and "undue hardship" in order to overcome the privilege. Southern Bell therefore respectfully requests that the FPSC deny

Public Counsel's Motion to Compel Item 2 of its Twenty-First  
Production of Document Requests.

Respectfully submitted this 15th day of April, 1992.

SOUTHERN BELL TELEPHONE  
AND TELEGRAPH COMPANY

  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the )  
Integrity of Southern Bell's )  
Repair Service Activities ) Docket No. 910163-TL  
and Reports )  
\_\_\_\_\_ )

STATE OF FLORIDA )  
 )  
COUNTY OF DADE )

AFFIDAVIT OF SHIRLEY T. JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in this docket. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On August 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of the Mechanized Out of Service Adjustment ("MOOSA") System as part of the internal investigation.

3.

The MOOSA System handles adjustments for single line residential and business customers.

4.

At the direction of the Legal Department, three time periods were selected for testing. Sample data were statistically selected from the total number of MOOSA eligible accounts for February of 1990, August of 1990 and May of 1991.

5.

The random sample accounts were tested and examined by tracing the trouble report from initial reporting to the customer's bill. Customer bills were pulled and examined for adjustments. Adjustments found were recomputed for accuracy.

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on September 27, 1991.

7.

The September of 1991 MOOSA Audit was carried out solely because the Legal Department requested that it be performed in connection with its representation of Southern Bell Telephone and Telegraph Company in this docket.

8.

Less than half a dozen copies of the September of 1991 MOOSA Audit exist. All are marked and treated as privileged, confidential, and subject to the attorney-client privilege and attorney work product doctrine. Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing department.

9.

The random sample method which formed the basis of the September of 1991 audit can be duplicated by use of the following records: 1) Mechanized Trouble Adjustment System ("MTAS") and/or Display Long Extended Trouble History ("DLETH") data and 2) customer records associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 14<sup>th</sup> day of April, 1992.

Shirley T. Johnson  
Shirley T. Johnson

Sworn to and subscribed  
before me this 14<sup>th</sup>  
day of April,  
1992.

Juda H. Byars  
Notary Public

My Commission Expires:

July 16, 1994