STATE OF FLORIDA

OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, Florida 32399-1400
904-488-9330

JACK SHREVE
PUBLIC COUNSEL

May 8, 1992

Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0850

ORIGINAL
FILE COPY

Re: Docket No. 920260-TL

Dear Mr. Tribble:

Enclosed for filing in the above-referenced docket on behalf of the Citizens of the State of Florida are the original and 15 copies of the Citizens' First Motion to Compel and Request for In Camera Inspection of Documents.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Charles J. Beck
Deputy Public Counsel

Enclosure

ACK ✓
AFA
APP
CAF
CMU 3
CTR
EAG
LEG 1 W/m
LIN 6
OPC
RCH
SEC 1
WAS
OTH

DOCUMENT NUMBER-DATE
04613 MAY-8 1992
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone & Telegraph Company	)))))	Docket No. 920260-TL Filed: May 8, 1992

CITIZENS' FIRST MOTION TO COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, request the Florida Public Service Commission to compel BellSouth Telecommunications, Inc., to produce each of the documents responsive to the Citizens' first set of requests for production of documents dated March 20, 1992, and to conduct an in camera inspection of all documents and portions of documents withheld by BellSouth Telecommunications based on a claim of irrelevancy or privilege.

Background

1. On March 20, 1992 the Citizens served 31 requests for production of documents on BellSouth Telecommunications, Inc. The request identified BellSouth Telecommunications, Inc., as "BellSouth" and defined the terms "you" and "your" as Southern Bell together with its officers, employees, consultants, agents,

representatives, attorneys (unless privileged), and any other person or entity acting on behalf of BellSouth. BellSouth Telecommunications, Inc., filed its response and objections on April 24, 1992. It filed a number of general objections which apparently apply to all of the requests, as well as objections to certain specific requests.

BellSouth Telecommunications' objection to the definitions of the terms "you" and "your."

2. BellSouth Telecommunications argues that the terms "you" and "your" attempt to obtain documents in the possession, custody or control of entities that are not parties to this docket, and therefore object to the definition.

3. Discovery is not limited solely to documents in possession of a party. They can also be in the party's control. Parties thus can be requested to produce documents in the hands of their attorney, insurer, subsidiary, or another person outside the jurisdiction of the forum. Florida Civil Practice Before Trial, §16.56, citing 8 Wright & Miller, Federal Practice and Procedure, §2210. The term "control" is not equated to "possession." Trawick, Florida Practice and Procedure, §16-10 (1982).

4. In fact, Florida Rule of Civil Procedure 1.350(a) itself uses the terms "possession, custody or control." There would be

no need to use the word "control" in addition to the word "possession" if it were not intended to reach documents that might not necessarily be in the actual possession of the other party, but subject to that party's "control."

5. The reference by BellSouth Telecommunications to the case of Broward v. Kerr, 454 So2d. 1068 (4th D.C.A. 1984) is misplaced. That case simply stands for the obvious proposition that a party cannot be compelled to respond to interrogatories directed to an ex employee. In appropriate circumstances a party corporation can be compelled to produce documents held by an affiliate. Medivision of East Broward v. HRS, 488 So.2d 886 (Fla. 1st DCA 1986).

6. This request for production of documents did not specifically request documents to be produced from BellSouth Corporation, the parent corporation of BellSouth Telecommunications, Inc.[1] However, such documents must be produced to the extent they may be in the possession, custody or control of BellSouth Telecommunications. The Commission should

[1] However, today the Citizens are serving a request for production of documents that asks for all documents in the possession, custody or control of BellSouth Corporation which are responsive to any of the requests contained in the Citizens first set of requests for production of documents. The specific application of the Medivision case to the production of documents from BellSouth Corporation will be dealt with if BellSouth Telecommunications should object to producing those documents.

reject this objection of BellSouth Telecommunications and require the company to produce any documents it has withheld based on that objection.

BellSouth Telecommunications' objection to the definition of "document" or "documents"

7. BellSouth Telecommunications also complains about the definition of the terms "document" and "documents," claiming the definition used by the Citizens is overbroad and objectionable pursuant to the standards it claims were adopted by the case of Caribbean Security Systems v. Security Control Systems, Inc., 486 So.2d 654 (Fla 3d DCA 1986). That case, however, makes no findings about a broad definition of the term "documents." The Court found that the specific requests, not the definition of the term "documents," would cause the company to bring its business activities to a halt if it were required to respond to the requests. Caribbean Security Systems at 656.

8. The term "documents" is commonly written broadly so that a respondent couldn't claim, for example, that a document kept as a computer file or as electronic mail on a corporate E-mail system isn't a "document." Florida Rule of Civil Procedure 1.350(a)

itself contains a rather broad definition of the term "document."

9. Moreover, it is particularly incongruous for BellSouth Telecommunications to object to this definition of the term "documents" because it uses virtually the same definition itself in discovery requests it sends to the Office of Public Counsel. See, e.g. Southern Bell's third request for production of documents to the Office of Public Counsel, docket 890256-TL, dated January 29, 1990.

10. There is no merit to BellSouth Telecommunications's objection; it should be rejected.

BellSouth Telecommunications' objection based on "relevancy"

11. BellSouth Telecommunications refuses to produce or identify those documents or portions of documents it considers irrelevant. Instead, the company simply advises the Citizens that it has redacted or not produced information it feels is irrelevant. BellSouth Telecommunications makes this objection both as a general objection to all requests, as well as to request #6 seeking internal audits.

12. BellSouth Telecommunications has made itself judge and jury concerning its objection based on relevancy. BellSouth Telecommunications does not disclose the specific information it

has deleted from the documents. BellSouth Telecommunications' statement that some material may contain references to unregulated services is insufficient. For example, the Citizens will likely advocate in this case that the Commission should impute the revenues and expenses from inside wire maintenance services above the line when determining the rates for other, regulated services. Information about unregulated services might also disclose whether costs are being fairly allocated among regulated and unregulated services.

13. BellSouth Telecommunications simply states that if, in its opinion, the information is not relevant, it has been deleted. This is a conclusion, not an objection grounded upon analysis. The Citizens request the Commission to direct BellSouth Telecommunications to produce each of the documents, and each piece of information, which it has withheld based upon its conclusion of irrelevancy. If the Commission should uphold any portion of this objection by BellSouth Telecommunications, the Citizens specifically request an in camera inspection of each of these documents to determine the basis and validity of BellSouth Telecommunications' objection.

BellSouth Telecommunications' objection based on claims the requests are overly broad, unduly burdensome, and oppressive

14. BellSouth Telecommunications makes repeated claims in response to specific requests that the requests are overly broad, unduly burdensome, and oppressive. However, despite making this claim repeatedly, BellSouth Telecommunications never alleges how the requests are overly broad, unduly burdensome, or oppressive; BellSouth Telecommunications simply gives its conclusion without providing any supporting allegation showing why this is so. An objection simply based on the conclusion of BellSouth Telecommunications, without any support whatsoever, is an insufficient basis to refuse to produce documents. The Commission should reject this objection because BellSouth Telecommunications provided no support for its conclusion.

BellSouth Telecommunications' objection based on privilege and attorney work product

15. BellSouth Telecommunications objects to requests 6, 21, 25, and 26 based on privilege and attorney work product, but the company provides no other information: it does not identify what documents were withheld, nor does it make any showing whatsoever to support the claim.[2] The Citizens ask the Commission to

[2] The first instruction in the request for documents stated "If any document is withheld under any claim of privilege, please furnish a list identifying each document for which

review these documents in camera and determine either that the claimed privilege doesn't apply or has been waived.

16. The attorney-client privilege is available when all the elements of the privilege are present. International Telephone & Telegraph Corp. v. United Telephone Co. of Florida, 60 F.R.D. 177, 184 (M.D. Fla. 1973). The elements are defined as "(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived." Id. at 184-185 n.6 (quoting 8 Wigmore, Evidence §2292 at 554 (McNaughton rev. 1961)). All of the elements must be proven in order for a court to find the existence of the attorney-client privilege. International Telephone, supra at 185 (mere attendance of an attorney at a meeting does not render the communications privileged); Hardy v. New York News, Inc., 114 F.R.D. 633, 644 (S.D.N.Y. 1987) (stating that Company's failure to treat documents as confidential by so marking them and segregating them from other business files refuted claim of privilege).

---

privilege is claimed, together with the following information: date, sender, recipients, recipients of copies, subject matter of the document, and the basis upon which such privilege is claimed." BellSouth Telecommunications ignored this instruction, even though the case law described later in this motion requires BellSouth Telecommunications to make a showing that it is entitled to claim the privilege.

17. The privilege applies to corporations. UpJohn v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (holding that communications by UpJohn employees, who were outside the managerial group but who were communicating to the "in-house" counsel at the direction of superiors and whose responses were within their scope of duties, were protected by the attorney-client privilege). The privilege protects the communication not the underlying facts. Id.

18. The party asserting the privilege has the burden of establishing the existence of the privilege. International Telephone, supra at 184; Consolidated Gas Supply Corp., 17 F.E.R.C. ¶63,048 (Dec. 2, 1981) ("under Rule 26(c) [model for Fla. R. Civ. P. 1.280] the burden is upon the party resisting discovery to show necessity by a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." Id. at 65,239 (citation omitted)).

19. The privilege may be waived. Id. at 186 (clients' introduction of part of correspondence waives the remainder). "Fundamental fairness and justice requires that if the defendant intends to waive the privilege at trial by the introduction of evidence within that privilege, then the defendant will be required to allow discovery with regard to matters material to that testimony." Id. Failure to allow pre-trial discovery of

confidential information that the party intends to introduce in the proceeding will preclude the introduction of that evidence, lead to dismissal of the action, or result in other appropriate sanctions. Fla. R. Civ. P. 1.380(b).

20. In the administrative context, the Federal Energy Regulatory Commission has applied a strict constructionist view of the attorney-client privilege. Consolidated Gas Supply Corp., ¶63,048 (Dec. 2, 1981) The "narrow view" protects communications between a client and his attorney "only to the extent they are based upon, and thus reveal, confidential information furnished by the client." Id. (citation omitted). Bruce Birchman, the administrative law judge, found that the "narrow view" was better suited to an administrative proceeding because "[it] distinctly avoids an overly broad corporate information shield in theory as well as in fact by allowing for excision of a document to permit discovery only of factual matters," and best ensures that the Commission can meet its continuing obligation to protect the public interest. Id. at 65,237. Judge Birchman found that documents prepared by corporate counsel in their continuing responsibility to keep the corporation updated on regulatory matters did not meet the attorney-client privilege. Some documents were not requests for legal advice, some were more in the nature of business advice than legal advice, some were "nothing more than scrivenings," and some did not contain confidential information. Id. at 65,242.

21. A narrow application has also been applied to deny a claim of privilege to an attorney's handwritten notes and memoranda where the "advice - generating request for comments was also made to non-lawyer corporate officers." Black Marlin Pipeline Co., 9 F.E.R.C. ¶63,015, at 65,085 (Oct. 18, 1979). An administrative law judge determined that a corporate clients' internal memoranda and communications that contained legal advice were only privileged to the extent they disclosed the corporation's privileged communication. Id.

22. Consequently, a final determination of privilege for all the documents so claimed must be made by the Commission, not by the party asserting the privilege. The Commission can only determine the existence of a privilege after a careful examination and narrow application of the law to the specific documents in an in camera inspection. Eastern Airlines, Inc. v. Gelbert, 431 So.2d 329 (Fla. 3d DCA 1983) (directing the trial court to conduct an in camera inspection of documents it had decided, without inspection, were not privileged as a matter of law). "The purpose of this examination is not to determine whether there is good cause to overcome the privilege, but rather to determine whether the items are, as a matter of law and fact, entitled to the privilege at all." International Telephone, supra at 185 (emphasis in original). If the Commission determines that the documents are privileged, Citizens have the opportunity to show need and inability to obtain equivalent materials to prepare

their case without undue hardship. Eastern Airlines, supra at 333 (citing Fla. R. Civ. P. 1.280(b)(2)).

23. Some documents prepared by the Company's counsel may not reveal any confidential communication of the corporation or may have been a general request for comments from legal and non-legal officers, which would not qualify for protection under the attorney-client privilege. A close inspection by the Commission of the disputed documents will assess the validity of the Company's claim of attorney-client privilege.

24. The Supreme Court of Florida has stated that the purpose of the discovery rules is to expedite the search for relevant facts, to facilitate trial preparation, and to assist the court in its search for truth and justice by eliminating gamesmanship, surprise and legal gymnastics as determining factors in litigation. Dodson v. Persell, 390 So.2d 704 (Fla. 1980) (holding that surveillance films are not privileged when they will be used as evidence or, if the films are unique, when they are materially relevant and unavailable). The Supreme Court of Florida relied on federal precedent set by the United States Supreme Court decision in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed.2d 451 (1947) as authority for claims based on the work product privilege. Id. at 707.

25. The work product doctrine protects an attorney's mental impressions, investigative materials, legal theories, and personal notes from discovery when prepared in anticipation of litigation by an attorney or an employed investigator at the direction of a party. Id. "The general rule for determining whether a document can be said to have been 'prepared in anticipation of litigation' is whether 'the document can fairly be said to have been prepared or obtained because of the prospect of litigation, ... [and not] in the regular course of business. 8 Wright & Miller, Federal Practice & Procedure: Civil §2024 (1970)." Carver v. Allstate Ins. Co., 94 F.R.D. 131 (1982).

26. The attorney may be required to disclose the existence of privileged material, but not its contents, unless an adverse party shows need and an inability to obtain the materials from other sources without undue hardship. Alachua General Hospital v. Zimmer USA, Inc., 403 So.2d 1087 (Fla. 1st DCA 1981) (holding that work product immunity attaching to information in initial wrongful death suit carried forward to subsequent litigation); Fla. R. Civ. P. 1.280(b)(2); Transcontinental Gas Pipe Line Corp., supra (finding that materials that were related to the issues, which were prepared at the direction of counsel, were discoverable by the adverse party because the materials could not be duplicated without undue hardship).

27. The objecting party has the burden of first showing the privilege. Hartford Accident & Indemnity Co. v. McGann, 402 So.2d 1361 (Fla. 4th DCA 1981). Only if clearly shown does the moving party have to demonstrate need to overcome the privilege. Id. Black Marlin, supra at 65,088 (material written by non-attorney at request of attorney does not automatically make it privileged work product). Citizens asserts that the Company must affirmatively show that documents prepared by non-attorneys are indeed qualified for this protection.

28. Florida Courts have distinguished between fact and opinion work product. E.g., State v. Rabin, 495 So.2d 257 (Fla. 3d DCA 1986) (holding that attorney's fact work product was discoverable after the case was terminated). "Generally, fact work product is subject to discovery upon a showing of 'need,' whereas opinion work product is absolutely, or nearly absolutely, privileged." Id. at 262; See Levingston v. Allis-Chalmers Corp., 109 F.R.D. 546 (S.D. Miss. 1985) (extending perpetual protection to opinion work product, but not fact work product, used in prior, terminated and unrelated cases). The privilege is qualified and not absolute. Id. at 552.

29. Work product immunity, as attorney-client privilege, has a number of judicially recognized exceptions. Work product protection may extend to privileged documents carried forward to subsequent cases when the cases are related, but not when the

prior case is terminated and wholly unrelated. Id.; cf. Alachua General Hospital v. Zimmer USA, Inc., 403 So.2d 1089 (Fla. 1st DCA 1981) (extending privilege beyond terminated case but relatedness between cases was not in issue).

30. Another exception to the privilege occurs when opinion work product is used by an expert witness in formulating his opinion or testimony. Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983) ("In particular, the protection has been waived because immunized materials should not remain undiscoverable after they have been used to influence and shape testimony." Id. at 407 [citation omitted]). Where documents containing mental impressions of an attorney are reviewable by an expert witness in forming his opinion, the work product rule is waived. Id. This public policy exception, underpinning the purpose of discovery, supports an adverse party's access to materials that will enable him to prepare for effective cross-examination and impeachment of an expert witness. Id. See Zuberbuhler v. Division of Administration, 344 So.2d 1304 (Fla. 2d DCA 1977) (permitting discovery of opposing party's expert witness's evidentiary opinions while protecting expert's non-evidentiary opinions promotes fairness through encouraging settlements by exposing both parties strengths and weaknesses and by providing a more thorough examination of expert witnesses for the jury); but see Hamel v. General Motors Corp., 128 F.R.D. 281 (D. Kan. 1989) (concluding that opinion work product used by expert in

preparation of testimony was not discoverable as the adverse party could not meet the "substantial need" test because the party failed to show that the expert was influenced by the documents in the development of his opinion or preparation for testimony); Grace A. Detwiler Trust v. Offenbecher, 124 F.R.D. 545 (S.D.N.Y. 1989) (permitting discovery of all documents relating to expert's role as trial witness but not to his role as a consultant).

31. Also, the work product privilege does not protect materials used by an opposing party to cross-examine or impeach witnesses. Mims v. Casademont, 464 So.2d 643 (Fla. 3d DCA 1985) (holding that reports prepared by experts expected to testify at trial were discoverable). "[T]he broadening of discovery under the federal rules resulted from the growing recognition that discovery of expert trial witnesses was needed for effective cross-examination and rebuttal in 'cases present[ing] intricate and difficult issues as to which expert testimony is likely to be determinative.'" Id. at 644.

32. Waiver is yet another exception to work product immunity. State v. Rabin, 495 So.2d 257 (Fla. 3d DCA 1986) (indicating that client can waive work product immunity for factual information once a case is terminated despite attorney's interest). A disclosure of work product information that is inconsistent with

maintaining secrecy against opponents results in a waiver of the privilege. cf. United States v. Gulf Oil Corp., 760 F.2d 292 (1985) (finding that adversaries, who had shared information under a guarantee of confidentiality during merger negotiations prior to litigation, had not waived work product immunity). In determining whether a disclosure results in a waiver, courts will consider the nature of the "common interest" between the parties and whether the transfer of documents was made concurrently with a guarantee of confidentiality. Id. at 296.

33. Federal courts have also excepted documents from work product immunity that were primarily created for business purposes. United States v. El Paso, supra (finding that tax pool analysis, which was created with an eye toward business needs, not legal needs, was discoverable); Hardy v. New York News, Inc., 114 F.R.D. 633 (S.D.N.Y. 1987) (holding that documents prepared in connection with Company's affirmative action plan, even though sent to house counsel, were discoverable business records and not protected work product); United States v. Gulf Oil Corp., 760 F.2d 292 (Temp. Emer. Ct. App. 1985) (holding that auditors' financial reports prepared pursuant to requirements of federal securities laws were business records and not entitled to work product privilege); Soeder v. General Dynamics Corp., 90 F.R.D. 253 (1980) (holding that in-house reports on air crash, prepared with an eye toward possible future litigation, were essentially motivated by company to promote its own economic interests, and

were not, therefore, entitled to work product immunity); Consolidated Gas Supply Corp., 17 F.E.R.C. ¶63,048 (Dec. 2, 1981) (finding document no. 55 that summarized corporation's business practices and did not contain legal opinions was discoverable); Black Marlin Pipeline Co., 9 F.E.R.C. ¶63,015 (Oct.18, 1979) (finding that advice of counsel that primarily involved business, rather than legal advice was not privileged).

34. If any documents withheld by BellSouth Telecommunications were primarily motivated by an economic concern for boosting profits, enhancing its competitive advantage in the marketplace, or in response to regulatory requirements, the Commission should determine that the business aspect overrides the legal aspect of the contested documents and compel full disclosure.

35. The Citizens request the Commission to conduct a thorough in camera inspection of documents prepared by employees and attorneys acting in a management role to determine whether the documents contains privileged attorney work product or whether the document falls within one of the many exceptions to the privilege: business purpose, legal opinions proffered by nonlegal personnel, or factual information (discoverable on a showing of need and undue hardship).

36. The Commission may direct its staff to redact attorney opinion from relevant documents before making them available to Citizens.

37. Where a claim of privilege is made, the fact finding tribunal should hold an in camera inspection to review the discovery requested and to determine whether assertion of the privilege is valid. Austin v. Barnett Bank of South Florida, N.A., 472 So.2d 830 (4th DCA 1985); Boca Raton Hotel and Club v. Dunn, 15 F.L.W. D1742 (4th DCA July 13, 1990).

WHEREFORE, the Citizens respectfully request the Florida Public Service Commission to compel BellSouth Telecommunications, Inc., to produce each of the documents responsive to the Citizens' first set of requests for production of documents dated March 20, 1992, and to conduct an in camera inspection of all documents and portions of documents withheld by BellSouth Telecommunications based on a claim of irrelevancy or privilege.

Respectfully submitted,

Jack Shreve
Public Counsel

Charles J. Beck
Deputy Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

(904) 488-9330

Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 920260-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 8th day of May, 1992.

Marshall Criser, III
Southern Bell Telephone and Telegraph Company
150 S. Monroe St., Suite 400
Tallahassee, FL 32301

Harris B. Anthony
Southern Bell
150 W. Flagler St., Suite 1910
Miami, FL 33130

Robin Norton
Division of Communications
Fla. Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Doug Lackey
Southern Bell
4300 Southern Bell Center
Atlanta, GA 30375

Mike Twomey
Department of Legal Affairs
Attorney General
The Capitol Bldg., 16th Floor
Tallahassee, FL 32399-1050

Angela Green
Division of Legal Services
Fla. Public Service Commission
101 East Gaines Street
Tallahassee, FL 32301

Edward Paschall
Florida AARP Capital City Task Force
1923 Atapha Nene
Tallahassee, FL 32301

Fla. Consumer Action Network
4100 W. Kennedy Blvd., #128
Tampa, FL 33609

Charlotte Brayer
275 John Knox Rd., EE 102
Tallahassee, FL 32303

Richard D. Melson
Hopping, Boyd, Green & Sams
23 South Calhoun Street
P.O. Box 6526
Tallahassee, FL 32314

Charles J. Beck
Deputy Public Counsel