

NANCY B. WHITE  
General Attorney

Southern Bell Telephone  
and Telegraph Company  
150 South Monroe Street  
Suite 400  
Tallahassee, Florida 32301  
(404) 529-5387

ORIGINAL  
FILE COPY

May 28, 1992

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 In Camera Inspection of Documents 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 to the parties shown on the attached Certificate of Service.

Sincerely yours,

*Nancy B. White*  
Nancy B. White

- ACK
- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU
- CTR \_\_\_\_\_ Enclosures
- EAG \_\_\_\_\_
- LEG 1 w/SC \_\_\_\_\_
- LIN 6 \_\_\_\_\_
- OFC \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC 1 \_\_\_\_\_
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

All Parties of Record  
A. M. Lombardo  
H. R. Anthony  
R. D. Lackey

DOCUMENT NUMBER-DATE

05495 MAY 28 1992

FPSC-RECORDS/REPORTING

**CERTIFICATE OF SERVICE**  
**Docket No. 910163-TL**

I HEREBY CERTIFY that a copy of the foregoing has been  
furnished by United States Mail this 28th day of May, 1992 to:

Charles J. Beck  
Assistant Public Counsel  
Office of the Public Counsel  
111 W. Madison Street  
Room 812  
Tallahassee, FL 32399-1400

Robert Vandiver  
Division of Legal Services  
Florida Public Svc. Commission  
101 East Gaines Street  
Tallahassee, FL 32399-0863

Tracy Hatch  
Division of Legal Services  
Florida Public Svc. Commission  
101 East Gaines Street  
Tallahassee, FL 32399-0863

Nancy B. White

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens ) Docket No. 910163-TL  
of the State of Florida to initiate )  
investigation into integrity of ) Filed: May 28, 1992  
Southern Bell Telephone and Telegraph )  
Company's repair service activities )  
and reports. )  
\_\_\_\_\_)

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S  
OPPOSITION TO PUBLIC COUNSEL'S MOTION TO  
COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

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 Public Counsel's Twenty-Second Production of Documents Request dated March 25, 1992. In support of its Motion, Southern Bell shows the following:

1. On March 25, 1992, Public Counsel served Southern Bell with its Twenty-Second Request for Production of Documents. This request sought numerous BellSouth Corporation documents which were not in the possession, custody or control of Southern Bell. In addition, the request sought documents protected by the attorney-client or attorney work product privileges or both.

2. On April 29, 1992, Southern Bell filed its Response and Objections to Public Counsel's Twenty-Second Request for Production of Documents. Southern Bell incorporates herein the contents of its Response and Objections.

DOCUMENT NUMBER-DATE

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3. Public Counsel objected to Southern Bell's position that the definition of the term "document" is so overbroad and objectionable. Despite the Company's objection, Southern Bell either produced or provided access to all of the documents responsive to Public Counsel's Twenty-Second Request to Produce despite this definition. Thus, this portion of Public Counsel's motion is moot.

4. Public Counsel also addresses Southern Bell's objection to Public Counsel's attempt to include BellSouth Corporation as a party to this proceeding. While Southern Bell does not object, assuming the request is not otherwise objectionable, to producing BellSouth Corporation documents it has in its possession, it is entirely improper to attempt to subject BellSouth Corporation to discovery in this proceeding in the manner Public Counsel has utilized. Public Counsel has failed to carry its burden to show that Southern Bell and BellSouth Corporation have "acted as one" in this docket. See Medivision of East Broward County, Inc. v. Department of Health and Rehabilitative Services, 488 So.2d 886 (Fla. 1st D.C.A. 1986). Nevertheless, all responsive materials were provided.

5. Public Counsel also takes issue with Southern Bell's objections to providing responsive materials which are protected by the attorney-client or attorney work product privilege or both with regard to Request No. 1. Southern Bell objected to the production of notes compiled by the Personnel Department and derived from the privileged internal legal investigation in order

to determine whether any individual should be disciplined and to what extent. These materials not only constitute attorney-client privileged material, but the work product privilege also protects these documents from discovery and Public Counsel has not met and cannot meet its burden of proving "need" and "undue hardship" to overcome that privilege.

6. Communications between attorneys and their clients are shielded from discovery under Rule 1.280(b)(i) of the Florida Rules of Civil Procedure. This rule is codified at § 90-502, Florida Statute. 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).

7. The communications in issue involve 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. Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So.2d 764 (Fla. 2d D.C.A. 1981).

8. The Company sought legal advice from its counsel. For the Legal Department to be able to provide that advice it needed

certain information. The investigation, as well as the notes taken therefrom by the Personnel Department, are 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.

9. In the alternative, Southern Bell submits that the information sought in Request No. 1 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).

10. The information in question was prepared either by or at the direct request of Southern Bell's Legal Department and was

not information gathered in the regular scope of Southern Bell's business. Thus, it is clear that the information is subject to the work product privilege.

11. 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). Such a showing has not been made by Public Counsel.

12. Southern Bell asserts that Public Counsel's Motion to Compel should be denied based on the Company's showing of the attorney-client privilege covering the information in issue. In the alternative, the work product privilege is 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 its Twenty-Second Production of Documents Requests.

Respectfully submitted this 28th day of May 1992.

ATTORNEYS FOR SOUTHERN BELL  
TELEPHONE AND TELEGRAPH COMPANY

Harris R. Anthony  
HARRIS R. ANTHONY  
PHILLIP J. CARVER  
c/o Marshall M. Criser  
150 South Monroe Street  
Suite 400  
Tallahassee, Florida 32303  
(305) 530-5555

R. Douglas Lackey  
R. DOUGLAS LACKEY  
NANCY B. WHITE  
4300 Southern Bell Center  
675 West Peachtree Street, N.E.  
Atlanta, Georgia 30375  
(404) 529-3862  
(404) 529-5387