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July 9, 1992

**ORIGINAL
FILE COPY**

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 BellSouth Telecommunications Vice President Network-South Area C. J. Sanders and BellSouth Telecommunications General Manager-Human Resources C. L. Cuthbertson, Jr. to Answer Deposition Questions which we ask that you file in the above-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.

- ACK _____
- AFA _____
- APP _____
- CAF _____
- GML _____

Sincerely yours,

Nancy B. White
Nancy B. White *02*

CTR Enclosures

- EAG _____
- LEG cc. All Parties of Record
- LD/MA A. M. Lombardo
- 6 H. R. Anthony
- _____ R. D. Lackey
- OFC _____
- ROH _____
- SEC 1 _____
- WAS _____
- OTH _____

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02
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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 9th day of July, 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
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Nancy B. White 07

conducted in anticipation of the issues that have been raised in the litigation surrounding Docket No. 910163-TL.

2. Southern Bell has, on numerous previous occasions, properly refused to divulge information concerning the internal investigation, based on both the attorney-client and the attorney work product privileges. Thus, when Public Counsel interrogated the deponents concerning the investigation, counsel for Southern Bell again asserted these privileges and instructed the witnesses not to respond to questions that would divulge the specific contents of that investigation.

3. Public Counsel's questions were not directed to requiring Southern Bell solely to name persons who had knowledge regarding Southern Bell's compliance with FPSC's rules and regulations as would be permitted. Instead, Public Counsel sought to have Southern Bell's witnesses provide detailed information regarding specific acts or omissions that particular employees may have taken or omitted to take. Thus, Public Counsel sought to have the Southern Bell witnesses divulge the substance of the internal investigation.

4. 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).

5. The communications made to Southern Bell's counsel or their agents in this investigation involve legal advice sought from and rendered by counsel with regard to the Company's compliance with the FPSC's 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).

6. The Company sought legal advice from its counsel. For the Legal Department to be able to provide that advice, it needed certain information and it thus undertook the investigation in question. That investigation, as well as the notes taken therefrom by the Personnel Department and any independent recollection of the matters contained therein by Messrs. Sanders and Cuthbertson, are all information which is protected from discovery by the attorney-client privilege and, as such, are protected from discovery.

7. In addition, the information sought in the deposition 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 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).

8. Southern Bell's counsel properly objected to the witnesses' responding to the deposition questions on the basis that those questions called for the provision of information that was privileged as attorney-client communication or attorney work product or both. Each of the deposition questions involved the disclosure of the substance of Southern Bell's investigation. This information is attorney-client or attorney work product or both, and is thus privileged. See, Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla., 1970). Public Counsel has never disputed that the investigation is privileged.

9. In an effort to obtain information not permitted to be discovered under the ruling of the Surf Drugs case, Public Counsel sought to obtain from the Southern Bell deponents

information such as the names of employees, who were referred to other than by name in privileged documents that were inadvertently and accidentally released by Southern Bell to Public Counsel in response to a discovery request. See, e.g. page 110, line 9; page 113, line 19; and page 114, lines 5, 17, and 24. At the deposition, counsel for Southern Bell requested the return of the privileged material which consisted of approximately 39 pages of notes compiled by the Personnel Department from the privileged internal legal investigation and a typed index of employee names. Public Counsel refused to return the privileged material.

10. It is Southern Bell's position that these materials remain privileged and, therefore, any attempt to gain information therefrom is improper. To the extent Public Counsel is seeking these names from privileged materials, Public Counsel is seeking information which forms the basis of the investigation itself and which is privileged.

11. In addition to names, Public Counsel interrogated Southern Bell's deponents on the basic issues addressed by the privileged internal investigation. Specifically, Public Counsel questioned Southern Bell's witnesses on the information contained in privileged statements contained in the internal investigation. Examples of these questions are contained in Paragraph 12 below. Surf Drugs clearly does not permit this. Surf clearly states that:

A party may not be required to set out the contents of statements, absent rare and

exceptional circumstances, or to divulge his or his attorney's evaluation of the substance of statements taken in preparation for trial.

236 So.2d at 113.

Further, the Court in Surf stated that a plaintiff was not required to "...summarize or evaluate the information available." Id. Thus, any questions regarding the detailed substance of the investigation were improper.

12. An analogy to litigation concerning a car accident is instructive in this regard. Public Counsel would be allowed to ask general questions regarding whether a person was a witness and whether he had knowledge of the accident and whether he had made a statement. Public Counsel could even ask the general nature of that statement, i.e., that the person was a witness to the accident. Public Counsel, however, would not be allowed under Surf Drugs to ask specifics and details concerning whether the witness' statement said the day was hot or cold; the light red or green; or the speed fast or slow. That, however, is exactly what Public Counsel was attempting to do in the deposition. Public Counsel did not ask if the statements related to trouble reporting. Rather, for example, Public Counsel's questions included "Was there any feeling that the craft employees were simply following the directions of management" (pg. 30, line 10) and "What specific acts and omissions were discussed that formed the basis for your recommendation" (pg. 34, line 16). Many questions were also posed along the line of "What acts or omissions by [name of employee] formed the basis of his

discipline (pg. 16, line 21; pg. 47, line 19; pg. 48, line 7).

13. The above illustrative questions are improper because they are prohibited by the tenets of Surf Drugs. They are specific questions, seeking details of privileged material, not general questions about the subject matter. Essentially, Public Counsel was asking Southern Bell's witnesses to summarize the substance of the investigation. Such questions were inappropriate and Public Counsel's Motion to Compel should be denied.

14. 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, and Southern Bell acted properly in not allowing its witnesses to respond to Public Counsel's questions.

15. 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 1084 (Fla. 1st D.C.A. 1981). Such a showing has not been made by Public Counsel.

16. 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 BellSouth Telecommunications Vice President Network-South Area C. J. Sanders and BellSouth Telecommunications General Manager-Human Resources C. L. Cuthbertson, Jr., to Answer Deposition Questions.

Respectfully submitted this 9th day of July, 1992.

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