

Southern Bell

Harris R. Anthony
General Counsel-Florida

Southern Bell Telephone
and Telegraph Company
c/o Marshall Criser III
Suite 400
150 South Monroe St.
Tallahassee, Florida 32301
Phone (305) 530-5555

July 30, 1992

Mr. Steve C. Tribble
Director, Division of Record &
Reporting
Florida Public Service Commission
101 E. Gaines Street
Tallahassee, Florida 32399-0850

ORIGINAL
FILE COPY

Re: Docket No. 920260-TL

Dear Mr. Tribble:

Enclosed for filing is the original and fifteen copies of Southern Bell Telephone and Telegraph Company's Corrected Opposition to Public Counsel's Motion to Impose a Penalty on Southern Bell Telephone and Telegraph Company for Filing and Failing to Correct False Information Submitted to the Commission. Due to a printer error, page 5 merged with page 6.

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.

- CK
- WFL 5
- APP _____
- CAF _____
- STU
- CEO _____
- ENC _____
- LEE 1 w/m
- LIN 6
- OPC _____
- COM _____
- SEC 1
- WAS _____
- OTH _____

Enclosures

All parties of record
Mr. A. M. Lombardo
R. Douglas Lackey, Esq.

[Signature]
FPSC-BUREAU OF RECORDS

Sincerely yours,

[Signature: Harris R. Anthony]
Harris R. Anthony
(2)

DOCUMENT NUMBER-DATE

08428 JUL 30 1992

FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 920260-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this ^{30th} day of *July*, 1992
to:

Robin Norton
Division of Communications
Florida Public Service
Commission
101 East Gaines Street
Tallahassee, FL 32399-0866

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

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Grandoff & Reeves
522 East Park Avenue,
Suite 200
Tallahassee, Florida 32301
atty for FIXCA

Joseph Gillan
J. P. Gillan and Associates
Post Office Box 541038
Orlando, Florida 32854-1038

Patrick K. Wiggins
Wiggins & Villacorta, P.A.
Post Office Drawer 1657
Tallahassee, Florida 32302
atty for Intermedia

Floyd R. Self, Esq.
Messer, Vickers, Caparello,
Madsen, Lewis & Metz, PA
Post Office Box 1876
Tallahassee, FL 32302
atty for US Sprint

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

Michael J. Henry
MCI Telecommunications Corp.
MCI Center
Three Ravinia Drive
Atlanta, Georgia 30346-2102

Richard D. Melson
Hopping Boyd Green & Sams
Post Office Box 6526
Tallahassee, Florida 32314
atty for MCI

Rick Wright
Regulatory Analyst
Division of Audit and Finance
Florida Public Svc. Commission
101 East Gaines Street
Tallahassee, FL 32399-0865

Peter M. Dunbar
Haben, Culpepper, Dunbar
& French, P.A.
306 North Monroe Street
Post Office Box 10095
Tallahassee, FL 32301
atty for FCTA

Chanthina R. Bryant
Sprint
3065 Cumberland Circle
Atlanta, GA 30339

Michael W. Tye
AT&T Communications of the
Southern States, Inc.
106 East College Avenue
Suite 1410
Tallahassee, Florida 32301

Dan B. Hendrickson
Post Office Box 1201
Tallahassee, FL 32302
atty for FCAN

Monte Belote
Florida Consumer Action Network
4100 W. Kennedy Blvd. #128
Tampa, FL 33609

Harris R. Anthony
(27)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of) Docket No. 920260-TL
the Revenue Requirements and Rate)
Stabilization Plan of Southern) Filed: July 30, 1992
Bell Telephone and Telegraph)
Company (Formerly FPSC Docket)
Number 880069-TL))
_____)

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S CORRECTED
OPPOSITION TO PUBLIC COUNSEL'S MOTION TO IMPOSE
A PENALTY ON SOUTHERN BELL TELEPHONE AND TELEGRAPH
COMPANY FOR FILING AND FAILING TO CORRECT FALSE
INFORMATION SUBMITTED TO THE COMMISSION

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 Office of Public Counsel's ("Public Counsel") Motion to Impose a Penalty on Southern Bell for Filing and Failing to Correct False Information submitted to the Commission, dated July 20, 1992. In support of its opposition, Southern Bell shows the following:

1. On March 20, 1992, Public Counsel served Southern Bell with its First Request for Production of Documents in Docket No. 920260, in which Public Counsel sought various internal audits conducted by the Company. In its responses and objections dated April 24, 1992, Southern Bell objected to production of some of these on the basis of attorney-client and attorney work product privileges. Public Counsel filed a Motion to Compel on May 8, 1992, in Docket No. 920260 requesting, among other things, the

DOCUMENT NUMBER-DATE

08428 JUL 30 1992

FPSC-RECORDS/REPORTS...

privileged third quarter 1991 audit related to Southern Bell's Florida Public Service Commission Schedule 11 filings. Public Counsel filed a supplement to its Motion to Compel on June 8, 1992. Southern Bell filed its oppositions to these pleadings on May 15 and June 15, 1992, respectively.

2. On June 3, 1992, Public Counsel filed its Twenty-Sixth Set of Interrogatories in Docket No. 910163, seeking the findings of the third quarter 1991 Schedule 11 internal audit (Item Nos. 6 and 7). Public Counsel also asked whether Southern Bell had reason to believe that any of the Schedule 11 reports filed with the Florida Public Service Commission ("Commission") were inaccurate (Item No. 8).

3. Southern Bell filed its Responses and Objections to the Twenty-Sixth Set of Interrogatories on July 8, 1992. In response to Item Nos. 6 and 7, Southern Bell objected to providing the information sought on the basis that the analysis in question is protected under the attorney-client and attorney work product privileges. See Southern Bell's Opposition to Public Counsel's Supplement to Public Counsel's First Motion to Compel, dated June 15, 1992. In response to Item No. 8, Southern Bell objected on the same grounds to the extent that the interrogatory called for information protected by either or both of the privileges. However, Southern Bell responded to the interrogatory with

whatever non-privileged information it had, i.e., information that was independent of that contained in the analysis. Thus, Public Counsel's assertion that the information provided by Southern Bell sprang from the privileged analysis (see paragraph 7 of Public Counsel's Motion) is, on its face, patently incorrect and misleading. Southern Bell provided all information called for by the interrogatories so long as it was not privileged.

4. Public Counsel now claims that the Commission should impose a penalty on Southern Bell for the Company's allegedly filing false Schedule 11s. Public Counsel bases its argument on the theory that, because the analysis referred to above, contains "adverse findings", the form 11s in question must be false. Public Counsel then argues that because Southern Bell has not "corrected" these form 11s, based on the information contained in the privileged analysis, it must be guilty of something and therefore, a penalty should be imposed. In essence Public Counsel argues that the public records law is superior to the attorney-client privilege as well as the attorney work product privilege.

5. The mere fact that an analysis may be related to data that may otherwise be a public record, has no bearing on the privileged status of the analysis itself. The analysis process involved the selection, review and interpretation of various

data, which process clearly removes the analysis from the realm of public record. It is not the basic data that are privileged; Public Counsel has access to those data, many of which have been provided to it in discovery. Rather, it is the conclusions drawn from the complex analytical process and that process itself which are protected from discovery. If one were to accept Public Counsel's logic, almost no analysis or audit could ever be privileged since the ultimate source data reviewed in the analysis will rarely, if ever, be privileged. Such a conclusion would clearly be incorrect and Public Counsel's assertion should be rejected out of hand.

6. As previously discussed, the information provided in response to Item No. 8 of Public Counsel's Twenty-Sixth Set of Interrogatories in Docket No. 910163 did not stem from the privileged analysis. Moreover, the information provided was not discovered until after the relevant Schedule 11 was filed and was promptly provided to Public Counsel and the Commission in response to Public Counsel's interrogatories. Thus, no penalty is warranted. Southern Bell conducted itself properly in correcting the errors.

7. Public Counsel's basic assertion, repeated again in its Motion to Impose a Penalty, that the attorney-client and attorney work product privileges do not apply to the internal analysis is

wrong. 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 Statutes. The attorney-client privilege applies to corporations. Upjohn v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (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 Telephone & Telegraph Corp., 60 F.R.D. 177, 184-85 (M.D.Fla. 1973).

8. 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 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 signed original of which is attached to and filed with Southern Bell's Opposition to Public Counsel's Supplement to Public Counsel's First Motion to Compel dated June 15, 1992), the analysis at issue was part of an internal investigation conducted by the Company's legal Department into the issues raised in Docket No. 910163. The

analysis 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 and advice. The results were relayed in confidence to the Legal Department, which has relied on the results of this analysis for the formulation of advice and litigation strategy.¹ In accordance with such limited distribution, it is clear that the information was confidential and subject to a valid claim of privilege. Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So.2d 764 (Fla. 2nd DCA 1981).

9. Public Counsel argues that the analysis at issue was a routine business record prepared in the ordinary course of business and thus not subject to the attorney-client privilege. 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 analysis 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 inextricably related to a privileged internal legal investigation.

¹ Limited distribution was also made to the Internal Auditing hierarchy.

10. The Company sought legal advice from its counsel regarding its conformance with certain Commission rules. For the Legal Department to be able to provide that advice it needed certain information, i.e., the analysis that it requested. The analysis is information that 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.

11. Southern Bell also submits that the analysis constitutes the work product of attorneys and agents for Southern Bell which should be shielded from discovery under Rule 1.280(b)(i), 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 discretion of a party. Hickman v. Taylor, 239 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). A document is prepared in anticipation of litigation if it is one that would not otherwise be required to be prepared. See Reynolds v. Hoffman, 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, 50 So.2d 115 (Fla. 1949).

12. The analysis at issue was not prepared in the ordinary course of business. Rather, as the attached affidavit shows, the driving motivation behind the performance of the analysis was Southern Bell's internal legal investigation into whether or not the Company was complying with Commission rules. See, International Systems and Controls Corporation Securities Litigation, 91 F.R.D. 552 (S.D. Texas 1981), vacated on other grounds 693 F.2d 1235 (5th Cir. 1982) (special audit requested by attorneys and conducted by accountants treated as work product in anticipation of litigation). It was prepared at the direct request of Southern Bell's Florida Legal Department, in connection with Docket No. 910163, and was not an analysis conducted in the regular scope of Southern Bell's business. Thus, it is clear that the analysis was conducted in connection with this litigation and is subject to the work product privilege.

13. Florida Rules of Civil Procedure, Rule 1.280(b)(2) states that an 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 analysis. As stated in the affidavit, the basic materials necessary to undertake such an analysis are readily available. Southern Bell has provided most of these materials to Public Counsel in response to previous interrogatories and requests for production filed in Docket No. 910163. 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 review Southern Bell's systems in a manner similar to the analysis done by Southern Bell by using information that it already has or which is readily available to it. Any claim by Public Counsel to the contrary would simply be a request for the Commission to order Southern Bell to do Public Counsel's work for it. This should not be permitted.

14. Ultimately, a review of the arguments contained in Public Counsel's Motion to Impose a Penalty, when taken in conjunction with its Motion to Compel of July 20, 1992, reveals

that the former motion is no more than one more attempt, through the back door, to obtain Southern Bell's privileged audit. Public Counsel should not be permitted to so obtain this document.

15. In its Motion to Impose a Penalty, Public Counsel argues that the analysis must be provided because it may have some hypothetical bearing on whether or not Southern Bell has filed with this Commission Schedule 11 reports containing incorrect information. From this premise, Public Counsel jumps to the conclusion that Southern Bell should be penalized for failing to provide this analysis, which may or may not contain information regarding the correctness of Southern Bell's Schedule 11 filings. Yet, what Public Counsel has done is to place the cart before the horse. The ultimate issue in this proceeding is whether any of Southern Bell's employees may have falsified trouble reports such that the Company may have inadvertently filed incorrect reports with the Commission. Public Counsel is seeking to have this Commission, in the middle of this pending docket, penalize Southern Bell for purported acts, whose existence or not is the ultimate issue in this very same docket. It seeks to do this even prior to the conclusion of discovery in this matter, let alone a finding by an impartial tribunal of any wrongdoing on the part of any employee of Southern Bell.

16. Information regarding the correctness vel non of particular Schedule 11 filings for the North Dade and Gainesville exchanges was determined as a consequence of Southern Bell's responses to particular discovery requests filed by Public Counsel in this matter. In no way did Southern Bell seek to hide or otherwise prevent Public Counsel and the Commission from obtaining this information. To argue, as does Public Counsel, that Southern Bell should be penalized in this context is, at best, self serving. The issue of whether or not Southern Bell's Schedule 11 filings are incorrect is clearly before the Commission. Southern Bell has responded properly and fully to discovery propounded upon it. The Company determined that in two instances a Schedule 11 filing may have been affected and so informed Public Counsel and this Commission. There is nothing left to correct in this regard. Thus, Public Counsel cannot correctly argue that Southern Bell should be penalized for failing to alert the Commission to this problem - the Company has already done so.

17. With respect to the privileged analysis in dispute, as explained above, Public Counsel has access to the same information as did Southern Bell when the analysis was performed. Public Counsel has demonstrated throughout this and other proceedings that it is a highly sophisticated party, capable of

analyzing large amounts of complex data. If Public Counsel so wishes, it can conduct the same type of study as performed in the analysis, using the data provided to it in discovery. The results of such a study, if not otherwise objectionable, can be used in the hearing that will be held in this proceeding. At that time, and based upon the evidence presented, Public Counsel will be able to argue whether or not Southern Bell has filed improper reports with the Commission and, if so, what the consequences should be. For Public Counsel to argue today, however, that the Commission should impose a fine on Southern Bell is grossly premature. Southern Bell has provided to this Commission and Public Counsel all non-privileged information. Public Counsel cannot simply argue that there may have been incorrect filings to breach Southern Bell's fundamental legal right to maintain, on a protected basis, privileged information. Indeed, it appears that the reason for Public Counsel's making this argument is an effort to obtain what it cannot otherwise properly get: Southern Bell's privileged analysis. This Commission should not permit this and should deny Public Counsel's Motion in its entirety.

Southern Bell therefore respectfully requests that the Florida Public Service Commission deny Public Counsel's Motion to Impose a Penalty on Southern Bell.

Respectfully submitted this 28th day of July, 1992.

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY



HARRIS R. ANTHONY (2P)
J. PHILLIP CARVER
c/o Marshall M. Criser
150 South Monroe Street
Suite 400
Tallahassee, FL 32301
(305) 530-5555



R. DOUGLAS LACKEY
NANCY B. WHITE
4300 Southern Bell Center
675 W. Peachtree St., N.E.
Atlanta, GA 30375
(404) 529-3862