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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Integrity of Southern Bell's Repair Service Activities and Reports	Docket No. 910163-TL
In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company	Docket No. 920260-TL Filed: September 16, 1992

CITIZENS' RESPONSE TO SOUTHERN BELL'S REQUEST FOR CONFIDENTIAL CLASSIFICATION AND MOTION FOR PERMANENT PROTECTIVE ORDER

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this response to the request for confidential classification and motion for permanent protective order filed by Southern Bell Telephone and Telegraph Company ("Southern Bell") on September 4, 1992.

1. Southern Bell seeks confidential treatment of the identity of its employees who were disciplined in connection with Southern Bell's repair service activities and reports. Additionally, Southern Bell has requested confidential treatment for a personnel department employee's notes, which are not protected by the attorney-client or work product privileges and which are subject to disposition under the public records law, chapter 119, Florida Statutes (1991). Citizens introduced these notes as exhibits 6 and 7 in Mr. Cuthbertson's deposition, taken on June 17, 1992, and as

exhibit 53 at a deposition of Southern Bell in-house experts, taken on June 18 - 19, 1992.[1]

Proprietary Confidential Information

2. Section 364.183, Florida Statutes (1991) states that the term "proprietary confidential information" includes, but is not limited to, employee personnel information unrelated to duties or responsibilities. Fla. Stat. § 364.183(3)(f) (1991) (emphasis added). The trouble with Southern Bell's argument is that the identification of employees disciplined in connection with Southern Bell's repair service activities and reports **is** related to the employees' duties and responsibilities. The statute implies that such information should not be shielded from public disclosure.

3. Southern Bell's motion fails to recognize that the Commission ruled against Southern Bell in a number of similar circumstances.[2] See Order Denying Southern Bell Telephone and

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[1] On August 21, 1992, Public Counsel filed a motion to compel the production of documents identified as late-filed exhibits to Mr. Cuthbertson's and Mr. Sander's deposition held June 17, 1992. Citizens's eighth motion, which is still pending, seeks discovery of related documents presently being withheld by Southern Bell under a claim of privilege.

[2] Note that attorneys have a duty to fully inform the tribunal of controlling law whether it is favorable or adverse to their client's position. Fla. Bar R. 4-3.3(a)(3) ("A lawyer shall not knowingly: . . .Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."); see Glassalum Engineering Corp. v. 392208 Ontario Ltd., 487 So. 2d 87, 88 n.2 (Fla. 3d DCA 1986) (suggesting severe consequences for intentionally failing to disclose controlling case law); Newberger v. Newberger, 311 So.

Telegraph Company's Motion for Confidential Treatment of Document No. 3878-91, 91 F.P.S.C. 10:356 (Oct. 1991) (Order no. 25238); Order Denying Southern Bell Telephone and Telegraph's Request for Confidential Classification of Document No. 0372-91, 91 F.P.S.C. 10:353 (Oct. 1991) (Order no. 25237); and Order Denying Request for Confidentiality, 91 F.P.S.C. 3:334 (Mar. 1991) (Order no. 24226)[hereinafter Order 24226].[3]

4. Southern Bell itself previously recognized that the names of employees in similar circumstances are not confidential. See Southern Bell Tel. & Tel. Co.'s Amendment to its Response and Objections to Public Counsel's Request for Production of Documents and Motion for a Temporary Protective Order (May 6, 1991, Docket 900960-TL). In that amendment Southern Bell dropped its request for confidential treatment of employee names and employee specific information, except for employee social security numbers.

5. The Commission has clearly determined the issue of whether employee names qualify for confidential treatment under these circumstances. Ruling that Southern Bell's employees' names and titles are not eligible for proprietary treatment, the Commission stated that

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2d 176, 176 n.1 (Fla. 4th DCA 1975).

[3] In connection with this last order, See also letter from Attorney General Robert A. Butterworth to Chairman Thomas M. Beard dated March 6, 1991, at page 2.

> [in] order to readily evaluate the relationship between compensation, duties, qualifications or responsibilities of an individual as well as the reliability of such information, it may well be necessary to identify the individuals. This is particularly so in this case where the actions of individuals are under scrutiny to determine whether these actions were sanctioned by or attributed to the company.

Order 24226 at 3:337.

6. Southern Bell has repeatedly failed to demonstrate that the names of their employees should be granted per se confidential treatment under section 364.183(3)(f), Florida Statutes. Southern Bell also has failed to demonstrate "that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations." Fla. Stat. § 364.183(3). As the First District Court of Appeals has recognized, the Commission must narrowly construe section 364.183(3), Florida Statutes, in the exercise of its discretionary powers. Southern Bell Tel. & Tel. Co. v. Beard, et. al, 597 So. 2d 873, 876 (Fla. 1st DCA 1992). A liberal interpretation would be contrary to the legislative intent of keeping public records open to the public. See id.

7. Southern Bell claims that disclosure of their employees' names would cause harm to the company. Southern Bell's Motion at 6-9. The harm envisioned includes public embarrassment for the employees named and the company, a lowering of morale, a potential loss of candor with higher management on the part of employees in future investigations, and an unwillingness by managers to

discipline employees for wrongdoing in the future. These allegations of harm to the company are not legally cognizable. See Southern Bell Tel. & Tel. Co., 597 So. 2d at 877 (Fla. 1st DCA 1992) (finding that the potential public embarrassment of the company's managers if documents were released to the public is not sufficient in itself to warrant proprietary treatment).

8. Employee morale may be of concern to a company; however, like public embarrassment, it is not the type of harm cognizable under section 364.183(3), Florida Statutes. Employee morale has already been affected by the company's own actions: company press statements that employees have been disciplined for mishandling customer records;[4] termination of employees found by the company to have falsified customer records; and disciplining of managers. Southern Bell's attempt to forestall further morale problems, while understandable, is not the harm encompassed by section 364.183(3), Florida Statutes.

9. The notion that employees will be more circumspect, less forthright in their cooperation with internal investigators, is also not cognizable under the "harm" standard. See Southern Bell Tel. & Tel. Co., 597 So. 2d at 875-76 & nn. 2, 4 & 5 (Fla. 1st DCA 1992) (rejecting Bell's argument that employees would be "less likely to provide frank, critical, honest, confidential information" to analysts in the future unless its Benchmark reports

[4] E.g., Sun-Sentinel, July 14, 1991, § A at 1, 12.

were granted proprietary treatment). The Legislature explicitly provided an exception for internal audits and security measures. Fla. Stat. § 364.183(3)(b)-(c). Information obtained from employees, who cooperate with company auditors and security personnel in internal investigations, may be explicitly exempt from public disclosure. Hence, Southern Bell's argument is illusory.

10. Lastly, the notion that managers may be hesitant to discipline employees for misconduct in the future is specious. Southern Bell is a regulated entity. As such, it has a legal and ethical duty to ensure that its employees fully comply with the law and the Commission's regulations. Any laxity in the exercise of that duty is itself punishable by sanctions, fines or penalties. Fla. Stat. § 364.285. When faced with the very real possibility of being the cause of the company's being penalized for failure to properly supervise employees, which includes administering discipline, managers are aware of where their duty lies.

11. The Legislature clearly intended to guide the Commission's exercise of its discretion in determining whether specified information may be exempt from the overriding mandate of public access to public records. The specific exemptions created deal with the potential "harm" to a company from disclosure of competitive business information, i.e. trade secrets, internal audits, security measures, bids, and contractual data. Fla. Stat. § 364.183(3)(a)-(d). One exception for employee information is

designed to protect an individual employee's right to privacy for personal matters, i.e. health, family, counseling or other matters that may be in a personnel file which are unconnected to job performance. Id. § 364.183(3)(f). This is supported by the limited exemptions from disclosure of the names, addresses, phone numbers, and health information of specified persons under the Public Records Act. Id. § 119.07. The Legislature did not exempt the identity of a government employee, who has been disciplined for wrongdoing from public disclosure. The only exemptions are for certain law enforcement and judicial employees' addresses, phone numbers, location of children's schools, and state employees' medical histories if unrelated to job performance. Id. Each exemption listed is grounded in a potential harm to the health, safety and welfare of specified persons or the potential harm to the state's competitive business interest in securing the lowest responsible bid on a government project. If this had been a judicial matter, Southern Bell could not have supported a claim for keeping the names of employees accused of wrongdoing secret. Our judicial system, and our legislative system mandate public disclosure.

Attorney-Client and Work Product Privileges

12. Southern Bell has made the erroneous assumption that the documents, which were produced to Public Counsel, are privileged. In Florida, the attorney-client privilege is derived from statute, not common-law. Corry v. Meggs, 498 So.2d 508 (Fla. 1st DCA 1986)

(codified at § 90.502, Fla. Stat.), review denied, 506 So. 2d 1042 (Fla. 1987). The statutory privilege for confidential communications does not encompass the work product privilege. City of Williston v. Roadlander, 425 So. 2d 1175 (Fla. 1st DCA 1983) (finding that work product privilege does not preclude access to city hospital's documents subject to disclosure under the public records law). In the absence of Florida case law on point, state courts may turn to federal decisions as persuasive. Id. at 510. However, Florida courts have declined to extend the boundaries of privilege set by the Legislature. See e.g., Southern Bell Tel. & Tel. Co., 597 So. 2d at 876 n.4 (refusing to incorporate self-evaluative privilege into section 364.183(3) as a cognizable harm).

13. 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) (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.; In Re: Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984) ("[I]t is important to bear in mind that the attorney-client privilege protects communications rather than information; the privilege does not impede disclosure of information except to the extent that that disclosure would reveal confidential communications." citation

omitted). "When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved." Hardy v. New York News, Inc., 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987).

14. In the administrative context, the attorney-client privilege is narrowly applied to regulated utilities. E.g. 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 in administrative proceedings 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. Southern Bell's claim of privilege for the deposition exhibits, if sustained, will effectively blanket facts critical to a just determination of this case. The Commission's duty to protect the public interest mandates a finding that the documents in question are not privileged. No legal advice or opinion is contained in these business documents.

15. The objecting party has the burden of establishing the existence of the privilege. Hartford Accident & Indemnity Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 184 (M.D. Fla. 1973) (stating that all elements of the privilege must be proven in order to substantiate a claim).[5] Only if clearly shown does the moving party have to demonstrate need to overcome the privilege. Id. Black Marlin Pipeline Co., 9 F.E.R.C. ¶63,015, 65,085 (Oct. 18, 1979) (applying 'narrow application' of privilege to deny a claim of privilege to an attorney's handwritten notes and memoranda where "advice - generating request for comments was also made to non-lawyer corporate officers.")

16. The attorney-client privilege does not apply to documents prepared for a business purpose,[6] or to preexisting documents that would have been subject to disclosure when in the possession of the client (client cannot make unprivileged documents privileged by

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[5] The elements of the attorney-client privilege are: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser 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 adviser, (8) except the protection be waived." International Tel. & Tel. Corp, 60 F.R.D. at 184-85 n.6, quoting 8 Wigmore, Evidence § 2292 at 554 (McNaughton rev. 1961).

[6] Skorman v. Hovnanian of Fla., Inc., 382 So. 2d 1376, 1378 (Fla. 4th DCA 1980) (acting as escrowee in real estate transaction would not render communication privileged, but preparation of agreement, which involved legal advice, would).

handing them over to his attorney).[7] The privilege may be waived by disclosure. Fla. Stat. § 90.507.

17. Information related to employee discipline and personnel matters are business documents and not investigatory documents. While employee statements to internal investigators might contain privileged communications, a company's disciplinary actions against employees is strictly a business decision. As such, any documents related to personnel discipline do not qualify as privileged from discovery. Furthermore, the notes were not written by an attorney, they do not contain legal advice or opinion, and were clearly made for the purpose of furthering company personnel evaluation and review. Hartford Accident & Indemnity Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177 (M.D. Fla. 1973); see Mergentime Corp. v. Washington Metropolitan Area Transp. Auth., 671 F. Supp. 1 (D.C. 1991).

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[7] Paper Corp. of America v. Schneider, 563 So. 2d 1134 (Fla. 3d DCA 1990) (turning over financial records to accountant did not shield records under accountant-client privilege); Tober v. Sanchez, 417 So. 2d 1053, 1055 (Fla. 3d DCA 1982), (finding that employee-prepared internal accident reports, which were subject to disclosure under the public records law, did not become privileged by transferring them to an attorney) review denied, 426 So. 2d 27 (Fla. 1983); Goldberg v. Ross, 421 So. 2d 669 (Fla. 3d DCA 1982) (judgment debtor's trust fund records held by attorney not privileged); but see Briggs v. Salcines, 392 So. 2d 263 (Fla. 2d DCA 1980) (tape recordings, which were privileged in hands of defendant under fifth amendment protection against compelled testimony of incriminating nature, were likewise privileged when transferred to attorney), pet. for review denied, 397 So. 2d 799 (Fla.), cert. denied, 454 U.S. 815 (1981).

18. Southern Bell has waived the attorney-client and work product privileges for this information by production of the very documents it seeks to have returned. The Florida Legislature has determined when a privilege has been waived in section 90.507, Florida Statutes (1991).

> A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if he, or his predecessor while holder of the privilege, voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication.

Fla. Stat. § 90.507 (emphasis added). Voluntary does not mean "knowing". Ehrhardt, Florida Evidence, § 507.1 (1992 ed.). Unintentional or inadvertent disclosure of a document for which privilege is later claimed results in waiver in this state. Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4th DCA 1982 ("It is black letter law that once the privilege is waived, and the horse out of the barn, it cannot be reinvoked."), cited with approval in Ray v. Cutter Laboratories, Div. of Miles, Inc., 746 F. Supp. 86, 88 (M.D. Fla. 1990) ("Florida would thus seem to be aligned with the traditional view holding that any disclosure, whether inadvertent or intentional, waives the privilege.").

19. 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 (1974) as authority for claims based on the work product privilege. Hence, the work product privilege is derived from judicial rule and state case law, not statute. Fla. R. Civ. P. 1.280(b)(2).

20. 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.; accord Reynolds v. Hofmann, 305 So. 2d 294 (Fla. 3d DCA 1974) (categorizing attorney's views of the evidence, witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts as work product). "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); but see Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 661-622 n.2 (S.D. Ind. 1991) (disagreeing with the Carver court and concluding that documents prepared for the concurrent purposes of litigation and business "should not be classified as work product").

21. Work product is a more limited privilege than the attorney-client privilege. Work product only gives a qualified immunity from discovery for documents and tangible things prepared in anticipation of litigation by the attorney or at the attorney's request. Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188 (Fla. 1st DCA 1985). 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 Gen. Hosp. 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); accord Transcontinental Gas Pipe Line Corp., 18 F.E.R.C. ¶ 63,043 (Feb. 9, 1982) (finding that materials that were related to the issue, which were prepared at the direction of counsel, were discoverable by the adverse party because the materials could not be duplicated without undue hardship).

22. The objecting party has the burden of first showing the existence of the privilege. Hartford Accident & Indem. 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.; accord Black Marlin supra at 65,088 (material written by non-attorney at request of attorney does not automatically make it privileged work product). The notes, which were written by a manager not an attorney, do not contain any legal

opinions or advice. The notes contain factual evidence that directly supports Citizens' allegations. As such, these documents are not work product.

23. The work product doctrine does not protect documents concurrently created for business purposes,[8] nor documents for which the privilege has been waived by disclosure.[9] Southern Bell has waived any privilege it may have had in connection with these business documents by voluntarily producing these documents to Public Counsel. Even in federal cases, inadvertent disclosure of documents ostensibly covered by a work product privilege, waives the privilege. Data General Corp. v. Grumman Sys. Support Corp., 139 F.R.D. 556 (D. Mass. 1991). Additionally, the voluntary relinquishment of these documents acts as a waiver to all other communications relating to the same subject matter. Ehrhardt, Florida Evidence, § 507.1 (1992 ed.).

24. Personnel decisions are business decisions. Decisions as to whether or not to discipline employees for their conduct while

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[8] Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655 (S.D. Ind. 1991); see United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) (tax pool analysis), cert. denied, 466 U.S. 944 (1984); accord Hardy, 114 F.R.D. at 644 (company's affirmative action plan sent to house counsel); United States v. Gulf Oil Corp., 760 F.2d 292 (Temp. Emer. Ct. App. 1985) (auditors' financial reports prepared pursuant to requirements of federal securities laws); Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980) (in-house reports on air crash); Consolidated Gas Supply Corp., 17 F.E.R.C. ¶63,048 (Dec. 2, 1981) (summary of corporation's business practices).

[9] State v. Rabin, 495 So. 2d 257 (Fla. 3d DCA 1986).

performing their assigned work are management concerns. Management may be concerned over the impact on employee morale if a large number of employees are disciplined, or the potential impact of adverse publicity if the information as to large scale discipline is made public, or the adverse impact on its future negotiations with its employees' union, or the possible loss of a number of highly trained employees. These concerns do not make the documents privileged work product. See Soeder v. General Dynamics Corp., 90 F.R.D. 253, 255 (D. Nev. 1980) (company's in-house air crash accident report, while prepared in anticipation of litigation, was equally spurred by a desire to improve the quality of its product, to protect future passengers, to avoid adverse publicity, and to promote its own economic interests); cf. Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188, 1193 (Fla. 1st DCA 1985) (scientific and technical documents prepared in anticipation of litigation are not disqualified from work product immunity). Given Southern Bell's business interests, these documents were prepared for ordinary business purposes, and therefore, would not have been privileged even before waiver.

25. The company's legal reasoning is inapposite. Southern Bell has not shown that the documents in question merit protection under the attorney-client or work product privileges. Furthermore, the cases cited by the company are not dispositive. The U.S. District Court in United States v. 22.80 Acres of Land, 107 F.R.D. 20 (N.D. Cal. 1985) held that a property appraisal prepared by

government attorneys was not protected by the work product privilege as it was a business document used for purposes other than litigation, expert witnesses used the appraisal to refresh their memories before deposition, and counsel failed to demonstrate that the appraisal was prepared in anticipation of litigation. The U.S. District Court stated that

> [t]he work product doctrine, which is reflected in this Rule [Fed. R. Civ. P. 26(b)], is, like other privilege rules, to be narrowly construed because its application can derogate from the search for truth. The party seeking to invoke the work product doctrine bears the burden of establishing all the elements that trigger the protection; doubts must be resolved against the party asserting the privilege.

22.80 Acres of Land, 107 F.R.D. at 22. The U.S. District Court in United States v. Real Estate Board of Metropolitan St. Louis, 59 F.R.D. 637 (E.D. Mo. 1973) held that interview statements, which were taken by an attorney, were privileged work product, but that the names and addresses of the persons interviewed, whose statements were protected, were not. The U.S. District Court ordered the production of the names and addresses of the persons interviewed under the general rule that

> the discovery of work product material will be denied if the party seeking discovery can obtain the information he desires by taking the deposition of witnesses.

Real Estate Bd. of Metro. St. Louis, 59 F.R.D. at 640. In this case, the notes were not written by an attorney and Southern Bell has refused to release the names of the craft persons disciplined. In Modern Woodmen of America v. Watkins, 132 F.2d 352 (5th Cir.

1942), the Fifth Circuit Court of Appeals held that confidential statements made to an attorney in his role as a friend and not for the purposes of seeking legal advice were not privileged communications; therefore, the jury was entitled to hear what the deceased said to the attorney related to the issue of suicide. These cases simply do not support Southern Bell's assumption of attorney-client and work product privileges for the documents in issue. Statements by counsel are not competent evidence. 22.80 Acres of Land, 107 F.R.D. at 22. Absent any cases on point, Southern Bell's assumption of privilege and proprietary information for these documents "remains a bald, unsupported assertion; as such, the court can give it virtually no weight." Id.

Conclusion

26. Southern Bell has waived the work product privilege concerning these documents by producing them. The issue is moot. Southern Bell cannot undo whatever harm has been done by asking opposing parties to return the documents. Granting confidential treatment to these documents would damage the truth seeking process by inhibiting the first amendment rights of the press, by denying ratepayers access to the truth, and by sacrificing one of the Commission's most powerful enforcement tools--the power to disclose a company's culpability to the final arbiter, the citizens of this state.

27. It is evident that these documents are not privileged. These documents are related to personnel actions taken by non-legal managers in accordance with company personnel practices. Further, these documents have been produced by the company, which waives any ostensible claim of privilege the company is asserting. The Commission should not permit regulated utilities to deliberately delay the investigation process by transparent claims of privilege or spurious requests for proprietary treatment. Past Commission rulings and judicial interpretation of section 364.183(3) make it equally obvious that the identities of employees who were or may be disciplined and the reason for the discipline are not proprietary business information.

WHEREFORE, the Citizens file this response to the assumption of attorney-client and work product privileges, the request for confidential classification, and the motion for permanent protective order filed by Southern Bell Telephone and Telegraph

Company ("Southern Bell") on September 4, 1992, and request the Commission to deny the company's motion.

Respectfully submitted,

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ATTACHMENT A

(Public Counsel's reply letter to Southern Bell's request for the return of exhibit documents)

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JACK SHREVE
PUBLIC COUNSEL

FILE COPY

June 15, 1992

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VIA FAX: 305-375-0209

Re: Docket No. 910163-TL

Dear Hank:

I have received your request to return the personnel department handwritten notes that you produced in response to our twenty-second set of document requests. As you stated, Sue Richardson handed you the document in question at the May 21, 1992 panel deposition before distributing it to the other parties present. She did this as a curtesy to allow you time to review the documents and formulate any objection you might have as to confidentiality. After a half-hour break, you informed us that the notes had been produced by mistake and asked for their return. Being unable to comply with your request, we agreed to a compromise -- we would withhold introduction of the document at that day's deposition in order to give you time to formally request their return, but we retained the right to introduce them at the June 18, 1992 deposition of Mr. Cuthbertson, the author of the notes.

I do not believe that your company's legal reasoning for return of the documents is apposite. First, you have not shown that the documents in question merit protection under the attorney-client or work product privileges. The notes are not written by an attorney, do not contain legal advice or opinion, and were clearly made for the purpose of furthering company personnel evaluation and review. Hartford Accident & Indemnity Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177 (M.D. Fla. 1973); see Mergentime

Corp. v. Washington Metropolitan Area Transp. Auth., 671 F. Supp. 1 (D.C. 1991).

Second, the cases cited in your letter are not dispositive of the question you raise. In Florida, privilege is statutorily, not judicially defined. Corry v. Meggs, 498 So. 2d 508 (Fla. 1st DCA 1986), review denied, 506 So. 2d 1042 (Fla. 1987). The Florida Legislature has determined when a privilege has been waived in section 90.507, Florida Statutes (1991).

> A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if he, or his predecessor while holder of the privilege, voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication.

Fla. Stat. § 90.507 (emphasis added). Voluntary does not mean "knowing." Ehrhardt, Florida Evidence, § 507.1 (1992 ed.). Unintentional or inadvertent disclosure of a document for which privilege is later claimed results in waiver in this state. Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4th DCA 1982 ("It is black letter law that once the privilege is waived, and the horse out of the barn, it cannot be reinvoked."), cited with approval in Ray v. Cutter Laboratories, Div. of Miles, Inc., 746 F. Supp. 86, 88 (M.D. Fla. 1990) ("Florida would thus seem to be aligned with the traditional view holding that any disclosure, whether inadvertent or intentional, waives the privilege.").

Even in federal cases, inadvertent disclosure of documents ostensibly covered by a work product privilege, waives the privilege. Data General Corp. v. Grumman Sys. Support Corp., 139 F.R.D. 556 (D. Mass. 1991).

Your voluntary relinquishment of these documents acts as a waiver to all other communications relating to the same subject matter. Ehrhardt, Florida Evidence, § 507.1 (1992 ed.). Therefore, I expect full and complete responses by Mr. Cuthbertson and Mr. Sanders to my questions concerning these notes in the deposition scheduled on June 18, 1992. Hoyas v. State, 456 So. 2d 1225 (Fla. 3d DCA 1984).

Finally, as a government entity, this office is subject to the disclosure requirements of the Public Records Act. I would need to consider the implications of our possession of this document in light of this further statutory mandate.

Public Counsel, as statutory counsel for the citizens of this state, is under a legal and an ethical duty to zealously represent the citizens. The documents in question are direct evidence of Southern Bell's falsification of its repair records--the key issue in this case. I must respectfully deny your request.

Yours truly,

Charlie Beck

Charles J. Beck
Deputy Public Counsel

cc: Tracy Hatch, FPSC legal

CERTIFICATE OF SERVICE
DOCKET NO. 910163-TL

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following persons on this 16th day of September, 1992.

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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 16th day of September, 1992.

Marshall Criser, III
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