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November 24, 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 - Repair Service Investigation

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Response and Opposition to Public Counsel's Motion to Compel BellSouth Telecommunications' Operations Manager -- Florida Internal Auditing Department -- Shirley T. Johnson, and BellSouth Telecommunications' Human Resource Operations Manager Dwane Ward, to Answer Deposition Questions and Motion to Strike the Affidavits of Shirley T. Johnson, 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.

ACK \_\_\_\_\_  
ATA \_\_\_\_\_ Sincerely yours,  
APP \_\_\_\_\_ *J. Phillip Carver*  
CAF \_\_\_\_\_ J. Phillip Carver  
CMT \_\_\_\_\_ (22)  
CTP \_\_\_\_\_

Enclosures

cc: All Parties of Record  
A. M. Lombardo  
Harris R. Anthony  
R. Douglas Lackey

ENC \_\_\_\_\_  
LES 1 \_\_\_\_\_  
LRI 6 \_\_\_\_\_

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

I HEREBY CERTIFY that a copy of the foregoing has been  
furnished by United States Mail this *24<sup>th</sup>* day of *Nov.*, 1992,  
to:

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

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

*J. Phillip Cover*  
\_\_\_\_\_  
(22)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of )  
Citizens of the State of Florida )  
to initiate investigation into )  
integrity of Southern Bell )  
Telephone and Telegraph Company's )  
repair service activities and )  
reports. )

Docket No. 910163-TL  
Filed: November 24, 1992

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S  
RESPONSE AND OPPOSITION TO PUBLIC COUNSEL'S MOTION  
TO COMPEL BELLSOUTH TELECOMMUNICATIONS' OPERATIONS  
MANAGER -- FLORIDA INTERNAL AUDITING DEPARTMENT --  
SHIRLEY T. JOHNSON, AND BELLSOUTH TELECOMMUNICATIONS'  
HUMAN RESOURCE OPERATIONS MANAGER DUANE WARD,  
TO ANSWER DEPOSITION QUESTIONS AND MOTION TO  
STRIKE THE AFFIDAVITS OF SHIRLEY T. JOHNSON**

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.037(b), hereby files its Response and Opposition to the Office of Public Counsel's ("Public Counsel") Motion to Compel BellSouth Telecommunications' Operations Manager -- Florida Internal Auditing Department -- Shirley T. Johnson, and BellSouth Telecommunications' Human Resource Operations Manager Dwane Ward, to Answer Deposition Questions and Motion to Strike the Affidavits of Shirley T. Johnson (the "Motion"), and states as grounds in support thereof the following:

1. The instant Motion, which is Public Counsel's tenth motion to compel in this docket, covers essentially the same issues that have been debated in the many previous discovery

DOCUMENT NUMBER-DATE

13832 NOV 24 1992

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disputes over the applicability of the attorney client privilege. To summarize briefly the situation that is the subject of these disputes: the legal department of Southern Bell performed an internal investigation into certain matters that relate to the issues in this docket. In this investigation, Southern Bell lawyers obtained facts from certain employees within the Company who had the most knowledge of these matters. In some cases, Southern Bell lawyers were also assisted by Company employees who, in effect, acted as their agents. These employees included personnel in both Southern Bell's Security and Auditing departments. Southern Bell has, of course, taken the position that internal audits performed at the request of the legal department as a part of this investigation, including both the manner in which they were conducted and the results that they yielded, are protected from disclosure by the attorney client privilege and work product doctrine. Similarly, when decisions to discipline employees based on the findings of the investigation were made, the underlying findings remained privileged. Southern Bell has, however, disclosed non-privileged information, including the nature of the discipline, any related entries into the employee's personnel file and any information provided to those employees at the time they were informed of the discipline.

2. Since both Public Counsel and Southern Bell have set forth at length their respective positions as to the

applicability of the attorney client and work product privileges to the internal investigation performed by Southern Bell lawyers, Southern Bell will not reiterate at length its position. Instead, Southern Bell will simply stand on its previous statement of the law.<sup>1</sup>

3. The only significant difference between the instant discovery dispute and previous ones is that Public Counsel has tried a somewhat different approach in this instance to obtain the privileged information that as a matter of law, it is not entitled to discover.

4. Public Counsel has previously included among its 255 individually numbered Requests to Produce in this docket a number of requests for documents that include privileged information from the Company's investigation. Having had these improper requests appropriately objected to, Public Counsel now has taken the approach of attempting to depose employees with knowledge of certain aspects of the investigation to attempt, through a slightly different route, to obtain this same privileged information.

5. Both Shirley Johnson and Duane Ward are employees who fall into this category. Ms. Johnson directly supervised the

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<sup>1</sup> The most directly applicable of the previous memoranda on these issues are Southern Bell's responses to Public Counsel's seventh, eighth and ninth motions to compel. Southern Bell's response to Public Counsel's seventh motion to compel deals specifically with the reasons that the internal audits at issue here are privileged.

five audits that were conducted at the request of the legal department as part of the investigation. Mr. Ward, as a necessary part of his function as Operations Manager, Human Resources and so that he could assist in providing recommendations regarding discipline, reviewed some of the factual findings of the investigation. After Southern Bell refused to give Public Counsel access to the privileged written results of the investigation, Public Counsel simply tried the tactic of deposing Ms. Johnson and Mr. Ward to attempt to extract from them this same privileged information. Obviously, if this information is, as Southern Bell contends, privileged, then it is protected from a written disclosure and protected equally from an oral disclosure during a deposition. For this reason, Public Counsel's attempt to obtain this information from both Ms. Johnson and Mr. Ward was objected to appropriately, and these objections should be sustained.

6. The fallacy of Public Counsel's argument to the contrary is evident on its face. Specifically, Public Counsel argues that although an internal investigation conducted by the Southern Bell legal department may be privileged, the underlying facts are not privileged. (See Motion pp. 9-11) This is a correct statement of the law. This is also the reason that Public Counsel has the right to depose Southern Bell employees about non-privileged underlying facts and to propound requests for the production of non-privileged materials to discover the

underlying facts. While pursuing extensive discovery as to these underlying facts, however, Public Counsel has also continued to argue that it should be entitled to obtain the privileged results of Southern Bell's own investigation. Again, the only difference between this and prior efforts is that Public Counsel is now attempting, rather than to obtain documents created during the investigation, to force persons who worked on the investigation (and who obtained certain privileged information only as a result of that work) to divulge the privileged information. Although the approach is different, the result is the same: Public Counsel is still not attempting to discover underlying facts from witnesses with first-hand knowledge, but rather to obtain privileged information developed in the investigation. Public Counsel should not be allowed to obtain this privileged information from either Mr. Ward or Ms. Johnson.

7. Public Counsel has also argued in its motion that Ms. Johnson should be compelled to answer certain deposition questions by claiming that the purpose of the questions was to determine whether it would be possible for Public Counsel to conduct its own audit, and thereby obtain the equivalent information without invading the work product of Southern Bell. Any argument that this was the primary intention of this deposition, however, is belied by Public Counsel's own Motion and the types of questions asked. For example, Public Counsel alleges that BellSouth thwarted its "assertion of need for the

audit information by refusing to provide clear and complete answers to the method of sampling, the amount of data involved, and the process of tracing the sampled data to the customer troubles involved." (Motion at p. 7) (emphasis added). During Ms. Johnson's deposition, Public Counsel asked what "triggered" each individual audit, i.e., the purpose of the respective audit (Johnson deposition, pp. 23-24), and the substance of any recommendations made by the auditors as a result of their findings (*Id.* at p. 62). Clearly, these questions are not designed to determine whether Public Counsel can perform a comparable audit, but rather to obtain information about the processes involved in developing this particular privileged audit. This is important because, again, Public Counsel is not attempting to inquire here about underlying facts. It is, instead, attempting to invade the applicable privileges to obtain all specifics relating to the way that Southern Bell analyzed the underlying facts in this privileged audit.

8. Further, if Public Counsel has a serious interest in undertaking its own audit, then it would simply hire the necessary expertise in the form of auditing consultants, who could then provide them with instruction as to how to review the hundreds of thousands of pages of documents that have been produced by Southern Bell and perform an independent analysis. Instead, Public Counsel simply persists in its efforts to obtain the privileged results of the audits conducted by Southern Bell.



9. The superficiality of Public Counsel's contention that it cannot conduct its own audit is evidenced by the deposition questions that it refers to in an attempt to prove this proposition. For example, Public Counsel contends that because Ms. Johnson, a Southern Bell auditor, stated that she could not have done the audit without the use of Southern Bell's computer system, then any audit by Public Counsel is impossible. Likewise, Public Counsel argues that because Network employees who are untrained in auditing could not do their own audit, that this somehow translates into the conclusion that Public Counsel could not possibly marshal the resources and expertise necessary to conduct its own independent audit. It is simply nonsensical for Public Counsel to argue that any limitation on the ability of a Southern Bell employee to conduct an audit without use of company resources proves that Public Counsel cannot conduct an independent audit. Public Counsel has its own computer systems or can hire a consultant with such resources and the expertise to use them.

10. Finally, Public Counsel's motion arrives (at p. 9) at what is most likely its real concern, the fact that performing an independent audit would entail more labor than Public Counsel wishes to undertake. Public Counsel contends that because the results of the five audits fill 27 binders, then, "obviously these five audits or their equivalent, cannot be produced by Public Counsel." As set forth in previous Southern Bell

memoranda, a disinclination to undertake work is legally distinguishable from the type of "undue hardship" that will support an intrusion into materials protected by the work product doctrine.


11. Public Counsel further argues that because Southern Bell refused to allow extensive, intrusive examination of Ms. Johnson into privileged material, her affidavit should be stricken. The primary purpose and the clear substance of the affidavits of Ms. Johnson, which were originally filed as part of Southern Bell's opposition to producing these audits, was to set forth facts to demonstrate that the audits were performed at the express request of the legal department under circumstances that make them subject to the attorney client privilege and work product doctrine. A review of the transcript makes it clear, however, that after Public Counsel introduced one of the affidavits at Ms. Johnson's deposition, the questioning then quickly moved away from the substance of the affidavit and into matters that were far beyond anything stated in the affidavit and privileged. Southern Bell, accordingly, objected to these improper questions as to privileged matters. Based on these facts, Public Counsel contends that the affidavit should be stricken. There is, however, simply no law to support Public Counsel's preposition that a witness's refusal to reveal


privileged information mandates the striking of the particular witness' affidavit that contains non-privileged information.<sup>2</sup>

WHEREFORE, Southern Bell respectfully requests the entry of an order denying in full the Motion of Public to Compel and to Strike.

Respectfully submitted,

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TELEPHONE AND TELEGRAPH COMPANY

  
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<sup>2</sup> In support of this unlikely proposition, Public Counsel cites Rollins Burdick Hunter of New York, Inc. v. Euroclassics Ltd., Inc., 502 So.2d 959 (Fla 3rd DCA 1987). The cited case, however, merely stands for the proposition that when a party sues another in civil litigation, it cannot invoke the fifth amendment privilege against self-incrimination as a basis to refuse to admit facts that would support the defendant's affirmative defenses. The Court stated that, although a plaintiff is free to decline to criminally incriminate himself, the price of the invocation of this right may be the dismissal of the civil action. Obviously, this has no application to the instant situation.