

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens )  
of the State of Florida to Initiate ) Docket No. 910163-TL  
Investigation into the Integrity of )  
Southern Bell Telephone and Telegraph ) Filed: December 16, 1992  
Company's Repair Service Activities )  
and Reports. )  
\_\_\_\_\_ )

**CITIZENS' TENTH MOTION TO COMPEL AND REQUEST FOR IN CAMERA  
INSPECTION OF DOCUMENTS AND EXPEDITED DECISION  
WITH SUPPORTING MEMORANDUM OF LAW**

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, request the Florida Public Service Commission ("Commission"): (1) to compel BellSouth Telecommunications, Inc., ("BellSouth") d/b/a/ Southern Bell Telephone and Telegraph Company to produce the statements of company employees/witnesses requested by Citizens on October 5, 1992; (2) to conduct an in camera inspection of these witnesses' statements and portions of documents withheld by BellSouth Telecommunications based on claims of attorney-client and work product privileges; and (3) to render an expedited decision.

**Citizens' Discovery Request and BellSouth's Objections**

1. Citizens' Twenty-ninth Set of Requests for Production of Documents to BellSouth Telecommunications, Inc., 6, ¶ 1, Docket no. 910163-TL (Oct. 5, 1992) [hereinafter Citizens' 29th Request] asked BellSouth to:

Please produce all employee statements made to company investigators during the company's internal investigation in this docket.

2. BellSouth raised the following specific objection to producing the statements:

In response to Request no. 1, Southern Bell objects to this request because it calls for the production of statements made by certain Company employees to Company investigators during the internal investigations of matters also being addressed in the docket. This investigation was specifically requested by the Legal Department. These statements were made to Company security personnel in anticipation of litigation regarding these matters and were the basis upon which legal opinions were rendered to Southern Bell by its attorneys. Accordingly, Southern Bell objects to the production of these statements on the basis of the attorney-client and work product privileges. Southern Bell is presently unaware of any statements made by individuals other than those statements made directly to the attorneys or the Company security personnel in connection with the privileged security investigation by the Legal Department.

Southern Bell Telephone and Telegraph Response and Objections to Citizens' Twenty-ninth Request for Production of Documents, 4, ¶ 8, Docket no. 910163-TL (Nov. 9, 1992) [hereinafter BellSouth's Objections]

3. In addition to its specific objection, BellSouth generally objected to Citizens' definition of "document(s)" and "you" and "your", as well as raising an objection as to the relevance of information that may be in the possession of affiliates. BellSouth's Objections at 2-4, ¶¶ 1-6. Citizens reiterate and incorporate herein their responses to BellSouth's

general objections, which have been briefed in their prior motions to compel.<sup>1</sup>

4. BellSouth has generally objected to Citizens' instructions to provide identifying information on each document for which a claim of privilege is asserted. The instruction stated:

If any document is withheld under any claim of privilege, please furnish a list identifying each document for which privilege is claimed, together with the following information: date, sender, recipients, recipients of copies, subject matter of the document, and the basis upon which such privilege is claimed.

Citizens' 29th Request at 1, ¶ 1. BellSouth stated that

To the extent a document responsive to any of the requests if [sic] subject to an applicable privilege, some of the information requested by Public Counsel would be similarly privileged and therefore not subject to discovery.

BellSouth's Objections at 2, ¶ 1.

**BellSouth's Conclusory Privilege Claim Is Legally Deficient**

5. BellSouth has the burden of demonstrating that the attorney-client privilege applies to any document so claimed. Hartford Accident & Indemnity Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); see e.g., S.E.C. v. Gulf & Western Indus., Inc. 518 F. Supp. 675, 682 (D.D.C. 1981). "A blanket assertion of the privilege is unacceptable." Id. BellSouth must prove each

---

<sup>1</sup> See e.g., Citizens' Motion to Compel and Request for In Camera Inspections of Documents, Docket No. 910163-TL (May 21, 1992).

element of the privilege claimed.<sup>2</sup> Id. For example, one element of the privilege is that any communication must be given for the purpose of securing legal advice. If the statements were taken for business purposes, then the privilege does not arise. See Skorman v. Hovnanian of Fla., Inc., 382 So. 2d 1376 (Fla. 4th DCA 1980). BellSouth used these statements to discipline a large number of its managers. As BellSouth has admitted, the disciplining of employees is a business decision. Southern Bell Telephone & Telegraph Company's Objections to Public Counsel's First Set of Requests for Admissions, Docket no. 920260-TL, 4, ¶ 14 (July 24, 1992).

6. Generally, under federal rules this proof is made by sworn affidavit in which each of the documents are listed and described showing:

---

<sup>2</sup> Federal courts have generally accepted the test elements listed by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort, and (4) the privilege has been (a) claimed and (b) not waived by the client.

S.E.C. v. Gulf Western Indus., Inc., 518 F. Supp. 675, 681 (D.D.C. 1981).

(a) the identity and corporate position of the person or persons interviewed or supplying the information, (b) the place, approximate date, and manner of recording or otherwise preparing the instrument, (c) the names of the person or persons (other than stenographical or clerical assistants) participating in the interview and preparation of the document, and (d) the name and corporate position, if any, of each person to whom the contents of the document have heretofore been communicated by copy, exhibition, reading or substantial summarization.

E.g., Internat'l Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 93 (D. Del. 1974) ("An improperly asserted claim of privilege is no claim of privilege at all."); accord Miller v. Pancucci, 141 F.R.D. 292, 302 (C.D. Cal. 1992) (failure to provide index as to witnesses' statements, request no. 7, made by police officer employees to an internal affairs investigator resulted in court's overruling objection to their production). This is the type of information requested by Public Counsel for the express purpose of requiring BellSouth to provide the minimum of factual support for its claim of privilege.

7. Citizens ask this Commission to compel BellSouth to produce the statements made by employees/witnesses to company interviewers. BellSouth has not raised a legally supportable claim of attorney-client or work product privilege for these statements as the company has not produced the minimum facts necessary to demonstrate that these statements meet the requirements for either claim. Without knowing who took the statements, which employees were interviewed, whether the employees were relating information that was within the scope of

their duties, whether third parties were present, how the statements were recorded and under what conditions, this Commission is without the minimum of information needed to make a decision as to whether the attorney-client privilege conceivably applies. Without this information, Public Counsel cannot adequately challenge the company's withholding of these statements. As BellSouth has refused to provide even the minimal showing required for the Commission to determine the applicability of the privilege, its claim of privilege to the statements made by employees is null. The Commission should, therefore, order BellSouth to produce all the employees/witnesses' statements.

**These Witnesses' Statements Are Not Privileged**

8. Corporations may invoke the attorney-client privilege to prevent disclosure of communications between corporate counsel and the corporation's client. Fla. Stat. § 90.502 (Supp. 1992). One element of an attorney-client privilege requires the employee/witness making the statement to be a "client". Id. BellSouth has not demonstrated that the persons making the statements are "clients" and not "witnesses" within the meaning of the privilege. See Citizens' Memorandum of Law.

9. Because the privilege contravenes the legislative policy of liberal discovery and may deny parties access to relevant facts, it is narrowly applied. See United States v. American Tel.

& Tel. Co., 86 F.R.D. 603, 604 & n.1 (D. D.C. 1979). This is especially true when the corporation is a public monopoly.

10. The public policy, which authorizes extensive investigative powers to the Commission, supports a restricted definition of the term "client" for public utility monopolies. Only those corporate employees who have decision-making authority should be considered clients for purposes of Commission investigations. See Citizens' Memorandum of Law. Therefore, BellSouth's claim of attorney-client privilege does not protect the statements of these employees.

11. In other cases, BellSouth has impliedly, if not expressly, acknowledged its duty to fully disclose the contents of employee statements taken under a claim of privilege to the Commission. In a companion docket,<sup>3</sup> BellSouth produced employees/witnesses' statements given to company investigators in response to Citizens' first request for production of documents in January 1991. These statements are clearly marked "attorney-client privilege". Attachment A provides a sample statement.<sup>4</sup>

---

<sup>3</sup> In re: Show Cause Proceeding Against Southern Bell Tel. & Tel. Co. for Misbilling Customers, Docket no. 900960-TL (Dec. 6, 1990) (staff-initiated investigation into allegations that the company was billing customers for inside wire maintenance not ordered by the customers).

<sup>4</sup> BellSouth requested confidential treatment for employee social security numbers and customer specific information, which was granted by Order no. 24778, issued July 9, 1991. In accordance with that order, Public Counsel has submitted only one copy in a sealed envelope to the Director of Records.

**These Witnesses' Statements Are Not Immune from Discovery**

12. Unlike the attorney-client privilege, work product immunity is derived from procedural rules, not statutory law. Fla. R. Civ. P. 1.280(b)(2). Work product protects an attorney's mental notes, legal opinions, impressions, and theories, from an opponent's discovery. Dodson v. Persell, 390 So. 2d 704 (Fla. 1980). Because work product immunizes relevant information from discovery, it is narrowly applied. BellSouth must first show that the statements are work product. Once shown, this Commission may compel the production of fact work product on Public Counsel's showing of need and an inability to obtain the substantial equivalent through alternative means of discovery. See Citizens' Memorandum of Law.

13. On June 6, 1991, Public Counsel sought the names of employees with knowledge of the falsification of customer trouble reports.<sup>5</sup> The company refused to release the names so Public Counsel was unable to depose them.<sup>6</sup> On March 25, 1992, Citizens served their twenty-second document request seeking the names of all employees who had been disciplined for improper handling of customer records. On April 29, 1992, BellSouth produced

---

<sup>5</sup> Citizens' Third Set of Interrogatories to Southern Bell Telephone and Telegraph Company, Docket no. 910163-TL (June 6, 1991).

<sup>6</sup> The Commission upheld Public Counsel's right to the names of the employees interviewed in Order no. PSC-92-0339-FOF-TL, issued May 13, 1992. Southern Bell appealed that order to the Supreme Court of Florida. Southern Bell Tel. & Tel. Co. Petition for Review of Non-final Administrative Action, Case no. 80,004 (filed June 10, 1992) (decision pending).



documents prepared by the personnel department, which listed the names of employees/witnesses who had been disciplined for improperly handling customer records or failing to adequately supervise employees who had improperly handled records.<sup>7</sup> On June 17, 1992, Citizens deposed the author of the notes and the key discipline decision-maker. Invoking the attorney-client privilege and work product immunity, BellSouth repeatedly directed the two deponents to refuse to answer the questions about the facts supporting the disciplinary actions taken.<sup>8</sup>

14. Following this deposition, Citizens scheduled the deposition of eighty employees the week of July 27, 1992. Twenty-nine employees were unavailable that week, one was deceased. Of those employees who appeared for depositions, four invoked their fifth amendment privilege to remain silent. Citizens continued their depositions of disciplined employees on October 14 and 15, 1992.

---

<sup>7</sup> Southern Bell alleges that the handwritten notes of its Human Resources Manager [Attachment B] were inadvertently produced in response to Citizens' 22d document request and has requested their return. [Attachment C: Letter from Harris Anthony to Charles Beck, dated May 28, 1992] Citizens maintains that the documents were voluntarily produced and any alleged privilege has been waived by their production. [Attachment D: Letter from Charles Beck to Harris Anthony, dated June 15, 1992] Note that only one copy of Attachment B is being filed with the Director of Records and Reporting as the privilege and proprietary status of this document has not yet been determined.

<sup>8</sup> See Citizens' Motion to Compel BellSouth Telecommunications Vice President Network-South Area C.J. Sanders and BellSouth Telecommunications General Manager C.L. Cuthbertson, Jr., to Answer Deposition Questions, Docket no. 920260-TL (July 2, 1992) (decision pending).

15. With notably few exceptions, the employees, who had been disciplined for improper handling of customer records, denied any personal wrongdoing or any knowledge of any wrongdoing. [Affidavit of Walt Baer--only one copy of which is being filed under seal with the Director of Records and Reporting pursuant to BellSouth's motions for protective order for information contained therein] BellSouth repeatedly instructed employees not to answer questions that would reveal information communicated in the internal investigation. So, even though the company has disciplined a significant number of its Florida managers based in part upon facts obtained through employee interviews, Citizens have been denied access to the same facts by the company's refusal to identify witnesses and by disciplined employees denial of any knowledge of wrongdoing.

16. Only employees of the company have personal knowledge of the facts at issue in this case and only employees have access to the data base of customer records. The company's extensive discipline of its managerial ranks and the handwritten notes of employee wrongdoing indicate that the company is hiding the facts behind its claim of privilege.

17. Discovery through document production has also been impeded by the company. In 1991, the company conducted a series of five internal audits into their repair and rebate systems.<sup>9</sup>

---

<sup>9</sup> See Citizens' 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

On February 19 and June 3, 1992, Citizens sought production of four of these audits. The company refused to produce them.<sup>10</sup> BellSouth has chided Public Counsel for not conducting its own audit despite the fact that the company's own chief auditor stated that these audits were performed with the company's computer systems and customer data base, over which it has sole control.<sup>11</sup> When Public Counsel requested the company to produce statistical information and corresponding customer records from the company's data base, the company objected to the production as overburdensome and oppressive and refused to produce it.<sup>12</sup>

18. Public Counsel has exhausted all traditional methods of discovery. Without intervention by the Commission, the facts of this case will remain hidden within the company's control. See Citizens' Memorandum of Law. Without access to the facts, the Commission cannot hope to fulfill its legislative role as the

---

Affidavits of Shirley T. Johnson, Docket no. 910163-TL, (Oct. 23, 1992) (decision pending) [hereinafter Citizens' Motion to Compel Johnson and Ward to Answer Deposition Questions]

<sup>10</sup> See Citizens' Motion to Compel and Request for Oral Argument, which requested the company's audit of its rebating system (MOOSA), filed April 8, 1992; Citizens' Motion to Compel, which requested Southern Bell's response to interrogatories targeting the company's PSC schedule 11 audit, filed July 20, 1992; Citizens' Seventh Motion to Compel and Request for In Camera Inspection of Documents, which requested the company's repair system audits (KSRI, LMOS, PSC Schedule 11) and statistical analysis, filed July 23, 1992. Decisions are pending.

<sup>11</sup> See Citizens' Motion to Compel Johnson and Ward to Answer Deposition Questions, supra n.9.

<sup>12</sup> See Citizens' Eleventh Motion to Compel, Docket no. 910163-TL (Dec. 16, 1992) (filed same date as this motion).

protector of the consumers' welfare, or to meet the challenge posed by the Tenth Statewide Grand Jury, which noted

that the Florida Public Service Commission has both the jurisdiction and concomitant discretion to impose severe monetary penalties on the Company if its finds that the Company has falsified reports required by PSC rules. We therefore strongly recommend that the Public Service Commission, in conjunction with its publicly mandated responsibility, investigate this matter, exercise its penal authority, and take into consideration this possible fraudulent conduct on the part of the Company in determining an appropriate rate of return.

Final Report of the Tenth Statewide Grand Jury, p.2 (Sept. 1992).

19. The widespread falsification of customer records is at issue. Citizens need these statements for corroboration of witnesses statements and to ascertain the facts. Additionally, Citizens need these statements to impeach those employees, who stated at their depositions that they had no knowledge of any wrongdoing, yet, who appear from the handwritten personnel notes (Attachment B) to have ordered, condoned, or participated in falsifying customer trouble reports. Citizens assert that they have demonstrated good cause to overcome BellSouth's work product claim. See 4 Moore's Federal Practice, ¶ 26.64, 26-369 & n.8; United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 631 & n.1 (D.C. 1979); Xerox Corp. v. Internat'l Bus. Machines Corp., 64 F.R.D. 367 (S.D. N.Y. 1974) (finding sufficient need where employees/witnesses were unable to recall facts in deposition). The Commission should compel BellSouth to produce these statements.

**BellSouth Has Waived Any Privilege it Might Have Claimed**

20. Voluntary disclosure of confidential, privileged, information waives the right to any further claim as disclosure is inconsistent with the purpose supporting privileges. Fla. Stat. § 90.507 (1991); see State v. Rabin, 495 So. 2d 257 (Fla. 3d DCA 1986); see also, Weil v. Investment/Indicators, Res. & Mgmt., Inc., 647 F.2d 18 (9th Cir. 1981) (finding that inadvertent disclosure of house counsel's advisory letter to opposing party waived privilege as to document and further discovery regarding substance of letter). BellSouth produced a personnel manager's, Mr. C.L. Cuthbertson, handwritten notes of information based upon the company's internal investigation, employee interviews and statistical information.<sup>13</sup> [Attachment B] Mr. Cuthbertson's notes were then related to another personnel manager, Mr. Dwane Ward, to use in writing the discipline entries for inclusion in employee personnel records (B forms).<sup>14</sup> [T 14-15] Mr. Ward also assisted in administering the discipline. [T 16] The findings were then related to the individual employees as the reason for their being disciplined. [T 24-26] This series of disclosures is obviously inconsistent with a claim of confidentiality, which is a key element of the attorney-client and work product privileges. See generally,

---

<sup>13</sup> See supra n.7.

<sup>14</sup> Only one copy of the Deposition of Dwane Ward, Attachment E, is being filed in a sealed envelope with the Director of Records as BellSouth filed a Motion for Confidential Treatment and Permanent Protective Order on Nov. 20, 1992, in Docket no. 910163-TL. The decision is pending.

Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111 (Fla. 4th DCA 1982) (counsel announced details of settlement at public hearing). BellSouth has waived its right to confidential treatment for these statements.

#### Request for In Camera Inspection

21. A final determination of privilege for the documents withheld must be made by the Commission, not by the party asserting the privilege. The Commission can only determine the existence of a privilege after a careful examination and narrow application of the law to the specific documents in an in camera inspection. Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d DCA 1983) (directing the trial court to conduct an in camera inspection of documents it had decided, without inspection, were not privileged as a matter of law). "The purpose of this examination is not to determine whether there is good cause to overcome the privilege, but rather to determine whether the items are, as a matter of law and fact, entitled to the privilege at all." International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (emphasis in original). The Commission can protect against disclosure of any privileged matter by ordering redacted copies to be produced, which contain only factual data.

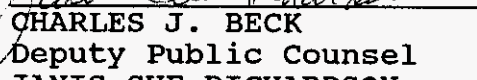
22. Regardless, the Commission must order the release of the facts contained in these statements so Public Counsel can

prepare its case. Even if the privilege were to apply to a few statements, public policy demands that the facts contained in those statements be revealed so that the Commission can render a just and equitable decision.

WHEREFORE, Citizens respectfully request the Commission to conduct an in camera inspection of the employee statements and compel the production of the documents requested.

Respectfully submitted,

JACK SHREVE  
Public Counsel

  
CHARLES J. BECK  
Deputy Public Counsel  
JANIS SUE RICHARDSON  
Associate Public Counsel

Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, Florida 32399-1400

(904) 488-9330

Attorneys for the Citizens  
of the State of Florida

**CERTIFICATE OF SERVICE  
DOCKET NO. 910163-TL**

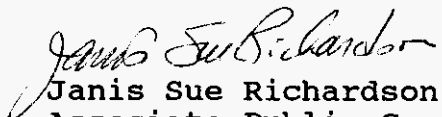
I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following persons on this 16th day of December, 1992.

Marshall Criser, III  
BellSouth Telecommunications,  
Inc. (Southern Bell Telephone  
& Telegraph Co.)  
150 S. Monroe St., Suite 400  
Tallahassee, FL 32301

John Hoag  
Department of Legal Affairs  
Presidential Circle  
4000 Hollywood Blvd., Suite 505-S  
Hollywood, FL 33021

Tracy Hatch  
Jean Wilson  
Division of Legal Services  
Fla. Public Service Commission  
101 East Gaines Street  
Tallahassee, FL 32301

David Wells  
Robert J. Winicki  
William S. Graessle  
Mahoney, Adams & Criser, P.A.  
3300 Barnett Center  
50 North Laura Street  
P.O. Box 4099  
Jacksonville, FL 32201

  
Janis Sue Richardson  
Associate Public Counsel



ATTACHMENT C

Letter from C. Beck to H. Anthony

RECEIVED

MAY 28 1992

Office of  
Public Counsel

Harris R. Anthony  
General Attorney - Florida

Southern Bell Telephone  
and Telegraph Company  
Museum Tower Building  
Suite 1910  
150 West Flagler Street  
Miami, Florida 33130  
Phone (305) 530-5555

May 28, 1992

FILE COPY

Mr. Charles J. Beck, Esq.  
Deputy Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
Room 812  
111 West Madison Street  
Tallahassee, Florida 32399-1400

RE: Docket No. 910163-TL

Dear Charlie:

On March 21, 1992, Public Counsel issued its Twenty-Second Set of Requests for Production of Documents in the above captioned matter. Southern Bell filed its Responses and Objections to same on April 29, 1992, wherein it objected to the request to the extent it sought documents covered by the attorney/client privilege or attorney work product privilege or both. The documents so protected were described as notes compiled by the Personnel Department and derived from the privileged internal legal investigation.

On May 21, 1992, at a panel deposition conducted by the Florida Public Commission Staff, it was brought to Southern Bell's attention that certain privileged information had inadvertently and accidentally been disclosed in the responses filed on April 29, 1992. This material consisted of 14 pages, numbers 56 through 70, which contained Personnel Department notes as described above. As counsel for Southern Bell, I informed you of the mistake and requested the return of the privileged material. You refused to return the privileged material.

In accord with United States v. Pepper's Steel & Alloys, Inc., 742 F.Supp. 641 (S.D. Fla. 1990), the privilege remains with respect to this set of notes and they should immediately be returned to Southern Bell. In Pepper's Steel, the court adopted the test of Parkway Gallery v. Kittinger, 116 F.R.D. 46, 50

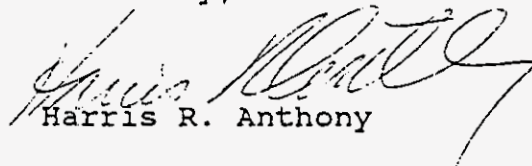
Mr. Charles J. Beck  
May 27, 1992  
Page 2

(M.D.N.C. 1987) in which five factors were used in determining whether an inadvertent production waives privilege:

(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error.

These factors clearly demonstrate that Southern Bell's inadvertent production of this set of notes did not waive the privilege. Southern has taken every reasonable precaution to protect its privilege in a case where voluminous discovery is taking place. This letter is an immediate attempt to rectify the disclosure. In accord with Pepper's Steel and Georgetown Manor, Inc. v. Ethan Allan, Inc., 753 F.Supp. 936 (S.D.Fla. 1991), the inadvertent disclosure of the privileged documents is not a waiver of the privilege. I therefore request that you immediately return to me all copies of the above described material in your possession or control.

Sincerely,

  
Harris R. Anthony

cc: Tracy Hatch

ATTACHMENT D

Letter from H. Anthony to C. Beck

56



STATE OF FLORIDA  
OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, Florida 32399-1400  
904-488-9330

FILE COPY

JACK SHREVE  
PUBLIC COUNSEL

June 15, 1992

Mr. Harris R. Anthony  
BellSouth Telecommunications, Inc.  
d/b/a/ Southern Bell Telephone  
& Telegraph Company  
Museum Tower Building, Suite 1910  
150 West Flagler Street  
Miami, Florida 33130

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. Hovas 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,



Charles J. Beck  
Deputy Public Counsel

cc: Tracy Hatch, FPSC legal