

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 21, 1992  
Company's Repair Service Activities )  
and Reports. )  
\_\_\_\_\_)

**CITIZENS' TWELFTH MOTION TO COMPEL AND REQUEST  
FOR IN CAMERA INSPECTION OF DOCUMENTS**

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, request the Florida Public Service Commission ("Commission") to compel BellSouth Telecommunications, Inc., ("BellSouth") d/b/a/ Southern Bell Telephone and Telegraph Company to produce each of the documents responsive to the Citizens' thirty-third set of requests for production of documents dated November 5, 1992, and to conduct an in camera inspection of all documents and portions of documents withheld by BellSouth Telecommunications based on claims of attorney-client and work product privileges.

1. On November 5, 1992, Citizens served its thirty-third request for production of documents on BellSouth. Citizens requested the company to

Please produce form IA10-DP "Report of Completed Audit" or its present equivalent for all five third quarter 1991 audits: LMOS,

KSRI, MOOSA, Schedule 11, and Operational Review.<sup>1</sup>

Citizens' Thirty-third Set of Requests for Production of Documents to BellSouth Telecommunications, Inc., 1, ¶ 1, Docket no. 910163-TL (Nov. 5, 1992) [hereinafter Citizens' 33d Request].

2. On December 7, 1992, BellSouth made the following specific objection:

In response to Request No. 1, Southern Bell objects because this request calls for the production of documents that were generated at the direct request of, and under the supervision of, attorneys for Southern Bell. These documents were developed in anticipation of litigation 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 documents on the basis of attorney-client and work product privileges. This request seeks the production of documents Southern Bell has consistently maintained to be privileged documents both in this docket and in Docket No. 920260-TL, and the Company incorporates by reference herein all arguments previously made in support of the Company's consistent position relating to these documents.

Southern Bell Telephone and Telegraph Company's Response and Objections to Public Counsel's Thirty-third Request for Production of Documents and Motion for Protective Order, 3, ¶ 7, Docket no. 910163-TL (Dec. 7, 1992) [hereinafter BellSouth Response].

3. In addition to its specific response, BellSouth also raised objections to Citizens' definitions of "document(s)",

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<sup>1</sup> LMOS is Loop Operation Maintenance System; MOOSA is Mechanized Out of Service Adjustments; KSRI is Key Service and Revenue Indicators. The function of each of these systems is described in Citizens' prior motions to compel listed infra n.3.

"you", and "your". BellSouth Response, 2, ¶¶ 2 & 3. BellSouth's objection and Citizens' response thereto have been extensively briefed in prior motions to compel. Citizens incorporate those arguments by reference herein. Citizens' Motion to Compel and Request for In Camera Inspection of Documents, Docket no. 910163-TL (May 21, 1992) (decision pending).

4. BellSouth also generally objected to Citizens' instructions to provide identifying information on each document withheld under a claim of privilege. 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' 33d Request at 1, ¶ 1. BellSouth stated that

To the extent a document responsive to any of the requests is [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.

5. Generally under federal rules, the party asserting a privilege provides proof by sworn affidavit in which each of the documents are listed and described showing information similar to that requested by Public Counsel. 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."). Without this information, Public Counsel cannot adequately

challenge the company's withholding of these reports. As BellSouth has refused to provide even the minimal showing required for the Commission to determine the applicability of either privilege, its claim of privilege to the reports is null. The Commission should, therefore, order BellSouth to produce the five reports of completed audits for the 1991 LMOS, KSRI, PSC Schedule 11, MOOSA, and Operational Review audits.

6. 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 element of the privilege claimed.<sup>2</sup> Id. For example, one element

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<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).

of the privilege is that any communication must be given for the purpose of securing legal advice. If the reports of completed audits were prepared in the ordinary course of business, then the privilege does not arise. See Skorman v. Hovnanian of Fla., Inc., 382 So. 2d 1376 (Fla. 4th DCA 1980). BellSouth routinely prepares a report of completed audit for every internal audit produced. As such, it is not privileged.

7. A report of completed audit does not reveal the substance of the audit. It does not contain any legal analysis, opinion, or advice. It is not a communication by a client to corporate counsel. Rather, a report of completed audit contains factual information, such as the number of audit days, the amount of fieldwork involved, the departments involved, whether the audit discloses significant findings, the name of the auditor, the starting date, and an approval signature. A sample form is attached. [Attachment A] As this form has been produced under a motion for temporary protective order, Citizens' have filed only one copy with the Director of Records and Reporting under seal. These reports contain facts not communications. Facts are not privileged. Upjohn v. United States, 449 U.S. 383 (1981). Furthermore, as no legal advice, opinion, or theories are present in the reports, they are not protected under the work product doctrine. As can be seen from the sample, there is no basis for BellSouth's privilege claims.

8. The attorney-client privilege does not apply to these business documents and should, therefore, be denied. Citizens

have extensively briefed the company's privilege claims to the five audits for which these reports were prepared in our prior motions and incorporate those arguments by reference herein.<sup>3</sup> Furthermore, the facts contained in these reports are unavailable from any other source. Public Counsel's deposition of the company's internal auditor failed to disclose the information contained in these reports. In the interest of justice, these reports should be produced. See Xerox Corp. v. Internat'l Bus. Machines Corp., 64 F.R.D. 367 (S.D.N.Y. 1974).

9. BellSouth has failed to show that the reports are attorney work product. The reports are routine business documents. As such, no privilege attaches. Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980); cf. Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188 (Fla. 1st DCA 1985) (in-house research report protected work product as outside researcher's report was available on showing of need). Citizens have need of this information to support our arguments to compel production of the five audits being withheld under a claim of privilege. See Citizens' motions to compel, supra note 3. BellSouth has sole control of the employee time reporting data base, customer trouble reporting data base, the rebate/refund

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<sup>3</sup> See Citizens Seventh Motion to Compel and Request for In Camera Inspection of Documents, Docket no. 910163-TL (July 23, 1992) (LMOS, KSRI, PSC Schedule 11); Citizens' Motion to Compel and Request for Oral Argument, Docket no. 910163-TL (April 8, 1992) (MOOSA); Citizens' Eleventh Motion to Compel and Request for In Camera Inspection of Documents, Docket no. 910163-TL (Dec. 16, 1992) (Operational Review). Decisions are pending.

data base and the computer system by which this data is processed and analyzed. There is no other source for this information.

10. Citizens need these reports to corroborate and/or impeach the deposition testimony of Shirley T. Johnson.<sup>4</sup> Ms. Johnson was unable to provide Public Counsel with the number of auditing staff and operational staff hours involved in performing the five audits.<sup>5</sup> [Johnson deposition, p. 32-34, 43] While Ms. Johnson testified as to the beginning and ending dates for the five audits, [Johnson deposition, p. 32] the reports would give the specific number of days and the number of staff involved. While Ms. Johnson stated that some of the audits were within the "audit universe" of audits routinely performed by the company in a five-year period, [Johnson deposition, p. 51] the reports of completed audit would show which of these audits were within the company's routine audit plan. While Ms. Johnson refused to disclose the ratings for each of these five audits, [Johnson deposition, pp. 55-57] the reports would reveal the ratings. Reaudits are performed within a year following any audit

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<sup>4</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 Affidavits of Shirley T. Johnson, Docket no. 910163-TL (Oct. 23, 1992) (decision pending).

<sup>5</sup> Ms. Johnson's deposition was submitted under confidential seal with Citizens' motion to compel her answer to questions, supra note 4. BellSouth filed a motion for confidential treatment of portions of Ms. Johnson's deposition on November 20, 1992. Southern Bell Telephone and Telegraph Company's Motion for Confidential Treatment and Permanent Protective Order, Docket no. 910163-TL (Nov. 20, 1992) (decision pending).

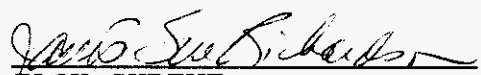
containing significant adverse findings. [Johnson deposition, p. 55] Ms. Johnson was unable to recall which of the five audits, if any, were not scheduled for reauditing. [Johnson deposition, p. 57] Citizens' need the reports of completed audits to answer the questions Ms. Johnson refused to answer or could not recall.

11. Citizens assert that BellSouth has failed to meet its initial burden of showing that the attorney-client or work product privileges apply to these reports. These reports are business documents containing factual information on the processing of the five 1991 third quarter audits, and as such, they are directly relevant to whether the audits themselves are covered by the attorney-client or work product privilege. A final determination can only be made by the Commission after an in camera review of the documents in question. Austin v. Barnett Bank of South Florida, N.A., 472 So. 2d 830 (Fla. 4th DCA 1985); Boca Raton Hotel & Club v. Dunn, 563 So. 2d 218 (Fla. 4th DCA 1990). After this review, the Commission may find that the reports, while not privileged under statute or rule, may be entitled to proprietary treatment. BellSouth should request such treatment under Commission rule 25-22.006, Florida Administrative Code.



WHEREFORE, the Commission should conduct an in camera review of the reports and then compel BellSouth immediately to produce the five reports of completed audits for the LMOS, MOOSA, KSRI, PSC Schedule 11, and Operational Review audits.

Respectfully submitted,

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

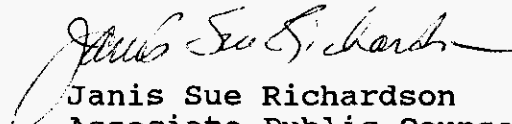
I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following persons on this 21st day of December, 1992.

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**ATTACHMENT A**

Florida Public Service Commission  
 Southern Bell Telephone & Telegraph  
 Docket No. 920260-TL  
 Test Year 01/01/92 - 12/31/92

Historic [ ] or Projected [x]  
 Average [x] or Year End [ ]

FPSC MFR Schedule E-1a  
 Page \_\_\_ of \_\_\_  
 Witness :

Present and Proposed Rates and Revenues  
 E006 SWITCHED ACCESS SERVICE

Line No.	Tariff Section/ Page or Source Ident.	Tariff Code	Service Description	Revenue R'qment* If Known	Type of Cost STD. Use	ITEMS BEING TRANSFERRED TO ANOTHER TARIFF OR HAVING PRICING STRUCTURE MODIFICATIONS							
						Average Billing Units	Pres. Rate	Prop. Rate	\$ Incr. (Decr.)	% Incr. (Decr.)	Annual Pres. Rev.	Annual Prop. Rev.	Annual Rev. Change
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
1			TOTAL TRANSFERS			0					\$0	\$0	\$0
2													
3													
4											\$133,680,964	\$133,680,964	\$0
5											\$728,583	\$728,583	\$0
											\$0	\$0	\$0
6													
7											\$134,409,547	\$134,409,547	\$0

\* Unless otherwise specified, the revenue requirement used for the proposed rates is based on incremental/resource cost.