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December 28, 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 Opposition and Response to Public Counsel's Tenth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision with Supporting Memorandum of Law, 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.

Sincerely yours,

J. Phillip Carver

Enclosures

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

CERTIFICATE OF SERVICE
Docket No. 910163-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 28th day of December 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 Carver
JPC

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: December 28, 1992

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S OPPOSITION AND RESPONSE TO PUBLIC COUNSEL'S TENTH MOTION TO COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS AND EXPEDITED DECISION WITH SUPPORTING MEMORANDUM OF LAW

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.037, Florida Administrative Code, and hereby files it Opposition and Response to Public Counsel's Tenth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision with Supporting Memorandum of Law, and states as grounds for support thereof the following:

1. On October 5, 1992, Public Counsel propounded to Southern Bell a request to produce the written statements of Company employees that were given to attorneys for Southern Bell during the course of an internal investigation conducted by Southern Bell's lawyers. Southern Bell timely objected to this request on the basis of the attorney-client privilege and work

product doctrine. Public Counsel then filed its Tenth Motion to Compel.

2. Public Counsel's Tenth Motion to Compel and the accompanying memorandum constitute an extended restatement of legal issues that have been previously briefed by the parties in relation to facts that are either identical to or very similar to those that have already been addressed in previous filings by Public Counsel and Southern Bell. Therefore, rather than undertaking a lengthy response to Public Counsel's voluminous Motion and Memorandum, Southern Bell will limit itself to addressing two types of issues: (1) arguments that are, at a minimum, a variation of those that have been raised previously by Public Counsel; (2) the portions of Public Counsel's Motion and Memorandum that misstate the pertinent facts or controlling law to such an extent that a remedial response is required to direct this Commission's attention to the applicable law and to the correctly stated facts.

RESPONSE TO PUBLIC COUNSEL'S MOTION TO COMPEL

3. Public Counsel first argues that Southern Bell has lost the applicable attorney-client privilege because its assertion of that privilege did not include enough information to adequately

describe the witness statements for which the privilege has been claimed. After a great deal of general citation to cases regarding the assertion of the privilege, Public Counsel arrives at its rendition of what would constitute adequate information about the privileged information to allow the Commission to review Southern Bell's claim of privilege. Specifically, Public Counsel contends that Southern Bell must reveal, at a minimum, "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." (Motion at pp. 5-6) Public Counsel fails, however, to provide any legal authority to support the contention that a claim of privilege is invalid unless if includes all of this information.

4. Public Counsel's position also fails because it is not supported by any logical view of the way in which the privilege functions. Public Counsel contends, in effect, that the privilege can only be asserted by divulging much of the substance of the privileged materials. To give one example, Public Counsel contends that Southern Bell must reveal the substance of the statements in enough detail to allow a determination as to whether the statements relate to the jobs of the employees who were interviewed. Obviously, it is not possible to provide these

specific facts without revealing the substance of the privileged statements.

5. More to the point, however, is the fact that Southern Bell has previously provided both in depositions and in its pleadings a clear statement of the facts at issue, i.e., the witness statements in question were obtained from Southern Bell employees by Southern Bell attorneys (or their agents) who questioned employees regarding information that these attorneys needed to obtain to provide Southern Bell with a legal opinion regarding issues similar to those raised in this docket. Thus, Public Counsel appears not to be truly attempting to discover the circumstances surrounding the privileges, but rather is advocating a technicality as the basis to deprive Southern Bell of the clearly applicable privileges. As set forth previously, however, this effort is supported by no case authority and should be rejected.

6. Public Counsel next argues that Southern Bell has somehow "acknowledged" that these statements are not privileged by producing employee statements in another, unrelated docket. (Motion, p. 7, par. 11) This argument borders on the frivolous. Public Counsel is well aware, Southern Bell did not concede a lack of privilege in that docket (Docket No. 900960-TL), but rather elected, prior to the institution of that proceeding, to

waive the applicable attorney-client privilege. There is simply no authority, legal or otherwise, to support an argument that the waiver of an attorney-client privilege regarding one matter constitutes a waiver of the privilege in another proceeding that deals with an entirely unrelated subject matter.

7. Public Counsel next[1] argues for a waiver on the various theories that Southern Bell has (1) voluntarily disclosed documents to which the privilege is applicable; (2) allowed the privileged statements to be reviewed by Dwane Ward, an employee of Southern Bell; and (3) related the findings of the investigation to "individual employees as the reason for their being disciplined." (Motion at p. 13) In point of fact, each of these asserted of waiver arguments is flatly wrong.

8. The "voluntary" disclosure to which Public Counsel refers was an inadvertent disclosure of privileged materials that was followed immediately by a request that Public Counsel return the privileged document[2]. Such an inadvertent disclosure is not

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[1] Prior to the Section referred to herein, Public Counsel's Motion also contains an extended argument for invasion of Southern Bell's attorney-work product. Because this argument essentially duplicates one contained in Public Counsel's Memorandum, it is dealt with below in the context of Southern Bell's response to the memorandum.

[2] Public Counsel, of course, acknowledged this in footnote 7 of the Motion, yet misstates at page 13 these events, apparently in order to argue that the inadvertent product was a "voluntary waiver."

a waiver of the privilege as to the disclosed document, let alone undisclosed documents. See, Parkway Gallery v. Kittinger, 116 F.R.D. 46, 50 (M.D.N.C. 1987).

9. Public Counsel's second point is, in essence, that because the product of the privileged investigation was reviewed by an Operations Manager in the Personnel Department who inarguably had a "need to know," that this somehow constitutes a waiver. Again, there is no authority whatsoever for this proposition. In fact, the contrary is true. The courts have held that disclosure to a person with a need to know is not a waiver.[3]

10. Public Counsel's third point, that the privilege was waived because this information was communicated to disciplined employees, is likewise wrong. A review of the portions of Mr. Ward's deposition (Tr. pp. 24-26) cited by Public Counsel makes it clear that any disclosure of the contents of the investigation was limited to an extremely general statement to the employees of the type of conduct for which they were being disciplined. There is nothing in Mr. Ward's deposition or otherwise to suggest that

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[3] Upjohn, Supra; Diversified Industries, Inc. v. Meredith, 572 F2d 596, 609 (8th Cir. 1978) (which held that communication of privileged material to non-control group members within the corporation does not result in loss of the privilege if "the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.")

disciplined employees were told of specific facts that were discovered in the investigation.

11. Finally, as to Public Counsel's request for in camera inspection, Southern Bell believes that to grant this request would serve little purpose. The case law cited by Public Counsel generally allows an in camera inspection in certain circumstances when the attorney-client privilege is asserted. Such an inspection, however, would provide no real benefit to the Commission in determining whether the privilege applies in this situation.

12. In a situation in which the documents in question ostensibly contain the communication of a legal opinion from the attorney to the client, an in camera inspection may be useful to determine if some or all of the document is privileged. In this instance, however, the employee statements do not contain legal opinions per se. Instead, these statements contain information that was provided to the attorneys for Southern Bell in the context of privileged interviews with these employees.

13. Therefore, the pertinent factor in determining whether the attorney-client privilege or work product doctrine or both apply is not so much the specifics of the statements themselves, but rather the circumstances in which they were created. Thus, a review of the statements would do little to help this Commission

resolve the issue. Instead, this issue should be resolved by this Commission by finding that, on the basis of the circumstances set forth herein, the attorney-client and work product privileges apply.

RESPONSE TO PUBLIC COUNSEL'S MEMORANDUM OF LAW

14. Public Counsel begins its Memorandum of Law with a largely irrelevant survey of the status of the attorney-client privilege as defined by various courts prior to the United States Supreme Court's decision in Upjohn Co. v. United States, 449 US 383, 101 S.Ct. 677 (1981). The fact remains, however, that Upjohn is the latest and most complete statement by the Supreme Court of the parameters of the attorney-client privilege. Further, this privilege was applied in Upjohn on the basis of facts that are strikingly similar to those in our case. The Supreme Court set forth in Upjohn the following to describe the information for which the privilege was claimed in that case:

> Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with...laws...[in various areas]....and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being

> questioned in order that the corporation could obtain legal advice.

Id. at 394-395. Based upon these facts, the U.S. Supreme Court rejected the narrow "control person" test, and adopted instead the "subject matter" test. Under this test, communications between company attorneys and employees who have knowledge of the subject matter on which the legal opinion is to be given are deemed to be confidential.[4]

15. In its Ninth Motion to Compel, Public Counsel argues so weakly as to all but concede that if Upjohn is applied, Southern Bell must prevail on its claim of privilege.[5] In the Memorandum supporting its Tenth Motion to Compel, Public Counsel struggles vainly to distinguish the facts of Upjohn from the instant dispute. In doing so, Public Counsel relies heavily on the facts that, in Upjohn, a preliminary report of the Company's investigation was given to the Securities and Exchange Commission and to the Internal Revenue Service ("IRS"), and that the IRS was subsequently given a list of all employees interviewed.

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[4] For a more thorough analysis of Upjohn and its application to the investigation at issue, please see Southern Bell's Response to Public Counsel's Ninth Motion to Compel, especially pages 2-6, 10 and 11.

[5] Since the Supreme Court was interpreting federal law in Upjohn, that case is not necessarily binding on the states. Upjohn does provide, however, an extremely persuasive and directly applicable basis for Florida to follow the lead of many states and adopt the subject matter test.

16. Despite Public Counsel's attempt to place undue emphasis to these facts, a reading of Upjohn makes it clear that these two particular aspects of the case were not salient factors in the decision they reached by the Supreme Court. Nor can the creation and application of the subject matter test be seen as somehow uniquely flowing from these factors.

17. Further, even if these factors were crucial, Public Counsel's attempt to distinguish Upjohn from our situation on the basis of these facts still must fail. First, Public Counsel argues that in Upjohn a list of interviewed employees was provided, but that Southern Bell has here refused to provide the names of employees interviewed. To the contrary, as Public Counsel acknowledges, the Request for Production that Public Counsel propounded to Southern Bell was for the names of employees with knowledge of various facts, such as "the falsification of customer trouble reports." (Motion at p. 8) Southern Bell objected to this production because it would require an analysis and legal determination as to which employees had "knowledge of falsification." This is entirely different than simply requesting the names of the employees interviewed. In point of fact, Public Counsel has not requested at any time the names of all employees who were interviewed as part of the investigation.

18. Public Counsel next argues that Upjohn is different from our situation because the company in Upjohn released a preliminary report of its investigation. Public Counsel argues that it necessarily follows from this difference that Southern Bell has concealed facts. Public Counsel then goes on to cite to the Supreme Court's statement in Upjohn of the applicable legal standard:

> The protection of the privilege extends only to the communications and not to facts. A fact is one thing and a communication concerning the fact is an entirely different thing. The client cannot be compelled to answer the question, 'what did you say or write to the attorney' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

(Motion at p. 9, quoting Upjohn pp. 395-396) This is, of course, a correct statement of the law. Inexplicably, however, Public Counsel continues to blatantly and repeatedly misapply this law.

19. To apply the language of Upjohn to the facts of this case once again: Public Counsel is entitled to inquire as to the underlying facts known by Southern Bell employees. Public Counsel can conduct an inquiry as to these facts by simply taking the depositions of these employees and asking them what they know. Public Counsel, however, is not entitled to inquire as to what these employees told attorneys for Southern Bell who were

conducting a privileged investigation on behalf of the Company. A written statement provided by an employee to an attorney in the context of the investigation is nothing more than a privileged, written communication from the employee to the attorney. To demand, as Public Counsel has, that these statements be produced, is clearly to demand the privileged and protected communication of the underlying facts, not the underlying facts themselves. For some reason, Public Counsel continues to quote the correct legal standard from Upjohn then misapply it to the facts of our situation, despite the fact that our facts are virtually identical to those involved in Upjohn.

20. Next, Public Counsel turns to a variation on the "public policy" argument it first advanced in its Ninth Motion to Compel. This argument is, in essence, that a regulated utility is not entitled to the protection of the attorney-client privilege or, at most, is entitled only to a version of the privilege that is so restricted as to be virtually non-existent. Although Public Counsel has made this argument on more than one occasion, the fact remains that there is absolutely no case law to support it.

21. Public Counsel begins the current incarnation of this argument by stating that the application of the attorney-client privilege to interviews of lower level employees has developed in

furtherance of the notion that a corporation should be encouraged to police itself. Public Counsel follows this uncontroversial proposition with the astounding statement that a regulated utility has little or no duty to police itself. Public Counsel states that "the greater benefit derived from allowing the Commission access to the facts known by employees/witnesses of public monopolies...outweighs any putative benefit obtained by a utility's being encouraged to police its own activities under a broad application of the privilege." (Memorandum at p. 13) If accepted, this argument would compel the conclusion that a regulated utility has no right to the attorney client privilege or the work product doctrine. Such, of course, is not the case.[6] Moreover, if one were to take this argument seriously, then it would also compel the assumption that a regulated utility cannot, under any circumstances, be vicariously culpable for <u>any</u> improper actions of its employees because the utility has no duty to police their actions. Of course, no sensible person could agree with such a position, and Public Counsel has, in fact, contradicted this position later in its own Memorandum.

22. Specifically, Public Counsel states that "a public monopoly has a duty to keep the Commission informed of any

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[6] <u>See</u>, <u>International Telephone and Telegraph Corporation v. United Telephone Company of Florida</u>, 60 F.R.D. 177 (1973)

wrongdoing that adversely affects its customers." (Motion at p. 17) It is simply inconceivable that Public Counsel can make this statement while arguing in good faith that a public utility is not entitled to the protection of the attorney-client privilege because it has no duty to police itself in an attempt to discover the very alleged wrongdoing that Public Counsel contends it must report.

23. Public Counsel next cites to In re: Notification to Columbia Broadcasting System, Inc. Concerning Investigations by CBS of Incidents of "Staging" by Some Employees of Television News Program, 45 FCC 2d 119 (Nov. 1973) (hereafter "CBS") in an attempt to buttress its public policy argument. Since this case also was dealt with at length in Public Counsel's Ninth Motion to Compel and in Southern Bell's response thereto, Southern Bell will not repeat in detail its argument that CBS does not apply, but will simply refer this Commission to the above-referenced response.

24. Southern Bell will note, however, that, as Public Counsel concedes (Memorandum at p. 14), CBS was a federal matter that was decided prior to Upjohn. Accordingly, the FCC based its decision in large part on the fact that in 1973 there was "considerable doubt whether the attorney-client privilege applies to statements of subordinate employees of the corporation taken

by counsel for the corporation." Id. at p. 123. This doubt was, of course, resolved seven years later by the opinion in Upjohn, in which the Supreme Court ruled on the basis of facts similar to ours that the subject statements were privileged.

25. Finally, Public Counsel attempts to advance the argument that public utilities have fewer rights than do non-regulated entities by pointing to an ostensible distinction in the level of protection for certain confidential information contained in Florida Statutes § 364.183 and § 90.506. In point of fact, however, there is no pertinent distinction between the treatment of confidential information under the two referenced statutes.

26. Section 90.506, Florida Statutes, contemplates that, under certain circumstances, a party may refuse to disclose trade secrets. As stated by the revisers of this statute, "the purpose of the privilege is to prohibit a party from using the duty of a witness to testify as a method of obtaining a valuable trade secret when a lack of disclosure will not jeopardize more important interests." New Revision Council Note - 1976, Florida Statutes Annotated, p. 521. The commentators further stated that the purpose of the statute is to extend the protection of Rule 1.280(c)(7), Florida Rules of Civil Procedure, "'which permits the trial judge, upon motion of a party from whom discovery is

sought, to issue a protective order that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way'...to evidentiary matters at trial." Id.

27. Thus, there are three salient aspects of this statute. First, it is intended to create a rule for trial that is the same as the discovery rule set forth in Rule 1.280(c)(7), Florida Rules of Civil Procedure. Of course, the rules of civil procedure are expressly applicable to proceedings before the Commission. Rule 25-22.034, Florida Administrative Code; See also, Rule 25-22.0375, Florida Administrative Code.

28. Second, the ability of a party to refuse absolutely to comply with discovery would only come into play under § 90.506 when the discovery was, in effect, a subterfuge to obtain a trade secret. If a party to a Commission docket requested information from a competitor when it was not relevant to a proceeding, and there was no legitimate basis otherwise for the requested discovery, then the Commission would certainly have the authority to issue a protective order to sustain an objection to this improper use of the discovery process.

29. Third, as the commentators also provide:

> This section permits the judge to order disclosure in any manner designed to protect the secret. While the most common means would probably be the in camera proceeding,

> other possible means of protecting the secret may include sealing the part of the record describing the secret, prohibiting disclosure of the secret to a witness, admitting details of the secret for the record, and wording the opinion in terms avoiding disclosure of the secret.

Id. at pp. 521-522.

30. Thus, Florida Statutes Section 90.506 clearly contemplates that, in most circumstances, an adverse party would be able to obtain confidential information, but its use of that information at trial may be limited by a variety of mechanisms to protect from a disclosure beyond that which is necessary for the purposes of the proceeding. This is precisely the same procedure that pertains in matters before the Commission.

31. Thus, Florida Statutes Section 90.506 provides, albeit in somewhat different language, for precisely the same practices that pertain in Commission proceedings pursuant to Section 364.183, Florida Statutes. Indeed, Section 364.183 addresses only the confidential status of trade secrets once it has been determined that such information must be disclosed. Nothing in that section would prevent a utility from objecting to the disclosure of a trade secret under Section 90.506. Public Counsel's citation to this statute in support of some claimed schematic distinction between the rights of regulated and non-regulated entities thus must clearly fail. The evidentiary

rights are the same for both regulated and non-regulated entities. There is simply no legal basis to argue that because Southern Bell is regulated, it is not entitled to the protection of the attorney-client privilege.

32. Finally, Public Counsel argues, once again, that, to the extent the information it seeks is covered by the work product privilege, the privilege should be invaded because Public Counsel cannot otherwise obtain the information at issue. Since this information is also protected by the attorney-client privilege (which is absolute) Public Counsel's argument for an exception to the work product doctrine is essentially moot. Even if there were no applicable attorney-client privilege, however, Public Counsel has still failed to make an adequate showing to support an exception to the work product doctrine.

33. In Upjohn, the Supreme Court stated in dictum that even if the subject memoranda by attorneys memorializing employee statements were not protected by the attorney-client privilege, they should be protected by the work-product privilege. "To the extent they do not reveal communications, they reveal the attorney's mental processes in evaluating the communications." Upjohn, S.Ct. at p. 688. Therefore, the Court went on to state the applicable standard: "As rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of

substantial need and inability to obtain the equivalent without undue hardship." Id.

34. Public Counsel, of course, argues that the information contained in the privileged investigation by Southern Bell attorneys is completely unavailable to Public Counsel, and therefore, the work product of Southern Bell attorneys should be disclosed. In fact, Public Counsel melodramatically claims in its Motion that it "has exhausted all traditional methods of discovery." (Motion at p. 11)

35. The fact of the matter, however, is that Public Counsel has engaged in extensive and voluminous, but, regrettably, unproductive discovery. Even while it contends that the "underlying facts," are unavailable to it, Public Counsel has deposed over a hundred witnesses in this docket, propounded hundreds of interrogatories and received several hundred thousand pages of documents in response to its many requests for production of documents. Thus, any argument by Public Counsel that it has been somehow denied the opportunity to conduct discovery is clearly without basis.

36. In reality, Public Counsel has conducted voluminous discovery, but apparently has simply not gotten the answers it had hoped for. This is not undue hardship such that the work product doctrine should be obviated. An example of Public

Counsel's confusion between a party's ability to engage in discovery and a party's obtaining the result it desires from discovery can be seen in paragraph 25 of its memorandum. Public Counsel states that it "did depose a large number of employees....[but]...[m]ost of these employees denied knowledge of any wrong doing." (Memorandum at p. 19) Thus, Public Counsel is really arguing that because it did not obtain the answers it sought at the depositions of these employees, it has somehow been denied the right to conduct discovery. In other words, Public Counsel is arguing that it should be entitled to receive the results of Southern Bell's privileged investigation because, despite the voluminous and burdensome discovery it has conducted, it has found little to support the allegations that it has made against Southern Bell.

37. Finally, Public Counsel argues for the invasion of Southern Bell's attorney work product by citation to Xerox Corp. v. International Business Machines Corp., 64 F.R.D. 367 (S.D.N.Y. 1974). Xerox is distinguishable from our case, however, because there the employees interviewed did not remember facts that they had previously communicated to attorneys for the Company. Therefore, those facts could not be obtained.

38. In our case, Public Counsel has failed entirely to demonstrate that it cannot obtain relevant information through

the normal discovery process. At most, it has demonstrated that its discovery has not so for supported its repeated allegations of wrong doing by Southern Bell. To invade the work product privilege on the basis of nothing more than this would be to reward a party for its failure to develop its case. It is difficult to see how justice could possibly be served by this result.

WHEREFORE, Southern Bell respectfully requests the entry of an order denying Public Counsel's Tenth Motion to Compel in its entirety.

Respectfully submitted,

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