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J. Phillip Carver
General Attorney

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Phone (305) 530-5558

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 Eleventh Motion to Compel and Request For In Camera Inspection of Documents, 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

JPC

Enclosures

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

ACK
AFA
APP
CAF
CMU
CTR
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LEG 1
LIN 6
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RCH
SEC 1
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OTH Ray

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:

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

J. Phillip Carver
JPB

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 ELEVENTH MOTION TO COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

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 Eleventh Motion to Compel and Request For In Camera Inspection of Documents, and states as grounds for support thereof the following:

1. On October 20, 1992, Public Counsel propounded its Thirtieth Request for Production of Documents. In its response Southern Bell objected to producing two categories of requested documents: (1) an audit that is protected by the attorney-client privilege because it was performed as a part of the privileged internal investigation conducted by lawyers for Southern Bell; (2) the notes of two Operations Managers in Southern Bell's Personnel Department, Dwane Ward and Hilda Geer, which were taken

directly from information contained in that same privileged investigation.

2. Public Counsel's Eleventh Motion to Compel seeks production of these documents. In this Motion, Public Counsel once again argues legal issues and revisits factual situations that have been previously addressed on numerous occasions by both the Office of Public Counsel and Southern Bell in prior motions and responses thereto. In this particular instance, however, the repetition is not only of legal theory, but also of the specific factual situations at issue.

3. Specifically, during the deposition of Shirley Johnson, the Office of Public Counsel asked questions about the audit that is the subject of the Eleventh Motion to Compel as well as about other privileged audits. Southern Bell properly objected. When Public Counsel moved to compel production in "Citizens' Motion to Compel BellSouth Telecommunications' Operations Managers...To Answer Deposition Questions....", Southern Bell responded to that Motion with a statement of the reasons that this Audit is privileged.

4. In other words, the audit in question, the facts surrounding it, and the pertinent legal issues are precisely the same. The only difference is that the previous discovery request and resulting Motion to Compel dealt with deposition questions

about the audit, while the request now at issue deals with the audit itself.

5. Likewise, the notes that are the subject of the most recent Motion to Compel are those made by two managers in the personnel department who had access to the product of the privileged investigation performed by the legal department because they had a "need to know" the results of that investigation. These managers reviewed the investigation and, in some instances, made notes. The notes themselves are mere summaries of the contents of the Company's privileged investigation. Further, these summaries were made as part of the overall investigatory process.

6. During the panel deposition of C. L. Cuthbertson, Jr. and C. J. Sanders, taken on June 17, 1992, Public Counsel requested as a "late-filed exhibit" certain notes made by Mr. Cuthbertson as a result of his review of the privileged investigatory materials. Southern Bell properly objected to producing these documents on the basis of the attorney-client privilege and work product doctrine.

7. Public Counsel subsequently filed its's Eighth Motion to Compel, which addressed these documents, and Southern Bell responded to that Motion. Although the notes involved in the two sets of Motions to Compel and responses are different -- the

first dealing with Mr. Cuthbertson's notes, the instant Motion with the notes of Mr. Ward and Ms. Geer -- each set of notes represents precisely the same type of document. Thus, again, the legal analysis and surrounding circumstances are precisely the same.

8. Since Southern Bell has previously provided its position as to each of the above-described issues, it will refrain from restating at length its position here.[1] Instead, Southern Bell will respond briefly and directly to several of the points raised by Public Counsel in its Eleventh Motion to Compel.

9. Public Counsel first argues that Southern Bell has provided inadequate information about the subject Audit to assert the attorney-client privilege as to that Audit. This is the same argument that Public Counsel made, albeit in regard to different documents, in its Tenth Motion to Compel. Therefore, Southern Bell adopts herein its Response to that portion of Public Counsel's Tenth Motion to Compel. In summary, Public Counsel's position fails here, as in its Tenth Motion to Compel, because

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[1] For the Commission's reference, Southern Bell has attached hereto its responses 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, and Public Counsel's Eighth Motion to Compel.

its argument is nothing more than an improper attempt to argue form over substance.

10. The authority cited by Public Counsel stands for the proposition that a party asserting the privilege must provide adequate information about the privileged material and the circumstances surrounding its creation to allow a determination as to whether the privilege applies. Unquestionably, information detailed enough to meet this standard was discovered by Public Counsel in the deposition of Shirley Johnson. Southern Bell does not concede that the initial information provided as to the privileged Audits was inadequate. Still, even if Public Counsel's argument that the privilege is unavailable because more information was not provided sooner were based on an accurate statement of facts, it is still legally unsupportable. All facts as to the circumstances surrounding the creation of this Audit have now been provided, and these circumstances demonstrate that the privilege applies. Given this, Public Counsel should not be allowed to misapply the controlling case authority in support of a hyper technical argument to the contrary.[2]

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[2] Although not stated directly, Public Counsel appears also to argue that because the existence of this Audit was not disclosed earlier, a waiver of the applicable privilege has occurred. Even if Public Counsel's rendition of the facts were correct, it still has not been prejudiced by these events, and there is no legal authority to support any argument that Southern Bell has waived the applicable privileges.

11. Public Counsel argues, once again, that it should be given the privileged audit because it would be too burdensome for it to obtain the equivalent information through its own efforts. This audit is protected by the attorney-client privilege, which is absolute in nature and which Public Counsel cannot violate even upon a showing of need.

12. Further, even if this audit were protected only by the work product privilege, Public Counsel has failed to make a showing of the type of need or undue burden necessary to avoid the otherwise available protection of the work product doctrine.

13. In an effort to establish that it would be burdensome for it to conduct its own analysis of the facts at issue, Public Counsel points to Requests Nos. 4 and 5 of its Thirty-First Request for Production of Documents. Specifically, Public Counsel contends that because its request for the generation of electronically stored information is unduly burdensome, it must necessarily follow that it would likewise be too burdensome for Public Counsel to independently analyze the hundreds of thousands of pages of documents that have been produced by Southern Bell. One issue, however, has nothing whatsoever to do with the other. Southern Bell has properly responded to the discovery sought by Public Counsel. Whether or not Public Counsel puts such data to good use is beyond Southern Bell's control.

14. Further, even if Public Counsel is contending that it needs all of the specific information requested in Request Nos. 4 and 5 to conduct its own analysis (which is not at all clear on the face of the Motion), the fact remains that Southern Bell offered in its response to produce a statistically valid sampling of the documents requested. There is no indication by Public Counsel that it could not perform its own analysis from the sample that has been offered. Indeed, this is how audits are normally performed: a sample of the underlying data, not all of it, is reviewed. Thus, Southern Bell's offer is reasonable and would cause no hardship to Public Counsel.

15. Public Counsel's attempt to violate Southern Bell's attorney work product on the justification of burden fails for a another reason. Public Counsel cites as ostensible support of its position the case of Xerox Corp. v. International Business Machines Corp., 64 F.R.D. 367 (S.D.N.Y. 1974). In that case, employees who at one time had knowledge of the underlying facts, had forgotten those facts. Therefore, the court allowed an intrusion into protected work product because the information was truly otherwise unavailable. That is, the witnesses who initially provided the underlying facts to the Company's attorneys, no longer had those facts.

16. Public Counsel has made no showing whatsoever that the facts that it would need to perform its own audit or comparable analysis are unavailable. To the contrary, Public Counsel has simply argued that conducting an analysis that it believes will yield information comparable to the privileged audit of Southern Bell entails more labor than it cares to undertake. The fact remains, however, that if Public Counsel were seriously interested in obtaining the information that would allow it to perform an analysis of the type performed in Southern Bell's audit, rather than taking the less laborious route of obtaining Southern Bell's work product, then it would at least make an effort to obtain access to the expertise, computer systems, etc., necessary to prepare its own analysis. Such an analysis by the Office of Public Counsel would not be "impossible" (the standard used in Xerox) as suggested by Public Counsel. Instead, the subject analysis would simply require an amount of work that Public Counsel would prefer to avoid by use of the alternative of invading Southern Bell's privilege and obtaining the efforts of Southern Bell's attorneys and their agents.

17. The work product doctrine "was developed in order to discourage counsel from one side from taking advantage of trial preparation undertaken by opposing counsel, and thus both to protect the morale of the profession and to encourage both sides

to a dispute to conduct thorough, independent investigations and preparation for trial." U.S. v. 22.80 Acres of Land, 107 F.R.D. 20, 24 (U.S.D.C. Cal. 1985). Public Counsel's actions in this situation are precisely the type of effort to take advantage of the opposition's labor that was expressly denounced by the federal court in the above-referenced case. Accordingly, Public Counsel should not be allowed to invade Southern Bell's work product in lieu of the more labor-intensive alternative of simply preparing its own case.

18. As set forth previously, the issue of the notes made by managers in Southern Bell's Personnel Department has been briefed in prior Motions to Compel and responses thereto by Southern Bell. Southern Bell must, however, address two specific points raised on page 14 of the Motion to Compel. First, Public Counsel makes much of the fact that some of these notes were made at a time when "no attorney was present" (Motion at p. 14). As previously stated, Southern Bell attorneys made the results of its privileged investigation available for review by a very few managers within Southern Bell whose duties meant that they had a "need to know" the contents of the privileged audit. This does

not obviate the privilege.[3] In light of this fact, Public Counsel's position appears to be that if a client reviews a privileged written communication from an attorney outside of the presence of that attorney, then the communication somehow loses its protected status. This is, in a word, nonsense. The privileged information that was disseminated by Southern Bell attorneys to the Company on a very limited basis remains privileged, regardless of whether Southern Bell managers with the need to review the documents did so (or, alternatively, took notes on the substance of the documents) when no attorney for Southern Bell was physically present. The fact remains that they did so under the direction of Southern Bell's attorneys.

19. Second, Southern Bell is constrained to respond to page 14 of the Motion in order to rebut a clear misstatement. Public Counsel contends that the notes of "the Senior Personnel Manager" have been voluntarily produced by Southern Bell. In point of fact, as Public Counsel acknowledged in its Tenth Motion to Compel, Southern Bell contends that these documents are

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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 information 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.")

privileged and that they were inadvertently produced. Further, it is uncontroverted that as soon as these documents were inadvertently produced, Southern Bell immediately requested their return. Public Counsel has, of course, argued in the past that an inadvertent disclosure amounts to a voluntary disclosure and that, therefore, the privilege has been waived. In this context, however, Public Counsel goes even further than it has before: it skips altogether its incorrect legal argument that an inadvertent act amounts to a voluntary act, and mischaracterizes the production as voluntary. This simply is not the case.

20. 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 allows in camera inspection when the attorney-client privilege is asserted under certain circumstances. Such an inspection, however, would provide no real benefit to the Commission in determining whether the privilege applies in this situation.

21. 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 documents do contain such opinion. In this instance, however, the documents in question do not contain legal opinions per se. Instead, these documents

contain information that was provided to the attorneys for Southern Bell at their specific request in order to provide a legal opinion. 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 documents themselves, but rather the circumstances in which they were created. Therefore, this issue should be resolved by this Commission by finding that, on the basis of the circumstances described herein, and in the previous filings on these same issues, the attorney-client and work product privileges pertain.

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

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY

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Setpember 2, 1992

Mr. Steve Tribble
Director, Division of Records and Reporting
Florida Public Service Commission
101 E. Gaines Street
Tallahassee, Florida 32301

Re: Docket No. 910163-TL
Docket No. 920260-TL

Dear Mr. Tribble:

Enclosed for filing in the above-referenced dockets are the original and fifteen copies of Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Eighth Motion to Compel and Request for an In Camera Inspection of Documents. Copies have been furnished to the all parties listed in the Certificate of Service.

A copy of this letter is enclosed. Please indicate on the copy that the original was filed and return the copy to me.

Sincerely yours,

J. Phillip Carver

cc: All parties of record
Mr. A. M. Lombardo
Mr. H. R. Anthony
Mr. R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 920260-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 2nd day of Sept. , 1992 to:

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J. Phillip Carver

CERTIFICATE OF SERVICE

DOCKET NO. 910163-TL

I HEREBY CERTIFY that a correct copy of foregoing was furnished by U. S. Mail to the following parties this 2nd day of Sept., 1992.

Charles J. Beck, Esq.
Assistant Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
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Tracy Hatch, Esq.
Division of Legal Services
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Tallahassee, FL 32301

J. Phillip Carver

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
Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone & Telegraph Company	Docket No. 920260-TL Filed September 2, 1992

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S OPPOSITION TO PUBLIC COUNSEL'S EIGHTH MOTION TO COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

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 its Opposition to the Eighth Motion to Compel and Request for In Camera Inspection of Documents filed by the Office of Public Counsel ("Public Counsel") with regard to Public Counsel's Request for Late-Filed Exhibits to the panel deposition of C.L. Cuthbertson, Jr. and C.J. Sanders, taken on June 17, 1992, and states as grounds in support thereof the following:

1. At the time of the aforementioned panel depositions the Office of Public Counsel requested that certain documents be produced by Southern Bell. By agreement of the parties, these documents would be produced as "late-filed exhibits" without the necessity of a formal request to produce. Under the terms of

this agreement, Southern Bell reserved the right to object to the production of documents requested as late-filed exhibits at the time it filed its response.

2. On August 7, 1992, Southern Bell filed its Response to Public Counsel's Request for Late-Filed Exhibits. In this response, Southern Bell objected to the production of documents responsive to Requests for Late-Filed Exhibits Nos. 1 and 2 on the basis of the attorney-client privilege and work product doctrine.

3. Public Counsel subsequently filed on August 21, 1992 an eighteen page Motion to Compel Production of these two categories of documents. For most of these eighteen pages, Public Counsel simply recites once again its version of the law of attorney-client and work product privileges. These legal concepts have been amply briefed by both Public Counsel and Southern Bell over the course of Public Counsel's previous seven Motions to Compel and Southern Bell's responses thereto. There is no point in stating for an eighth time the applicable case law. Suffice it to say that Public Counsel's extremely general, and largely inapplicable, recitation of the law relating to the attorney-client and work product privileges misses the central questions at issue in this dispute: (1) whether the investigation by Southern Bell attorneys is privileged, a question that has already been exhaustively argued to this Commission in the previous motions; and (2) whether the two documents at issue are

themselves privileged as memorializations of that privileged information. The answer to both questions is yes.

4. Stated briefly, the pertinent background facts are as follow: In 1991, the legal department of Southern Bell undertook an internal investigation in order to render a legal opinion to the management of Southern Bell. The subject matter of this investigation was, of course, the issues that are the subject of this docket. In order to render a legal opinion to their client, Southern Bell's lawyers gathered the facts that were necessary for them to render a legal opinion. To this end, the legal department enlisted the company's security department to act as its agent in the process of fact gathering. At the conclusion of this investigation, the legal department informed a limited number of managers of Southern Bell with a "need to know" of the results of the investigation.

5. Based upon the case law that has been cited repeatedly in this docket, since the information obtained in the investigation by Southern Bell attorneys was derived from the client in order to render a legal opinion, it is therefore protected by the attorney-client privilege. Moreover, the documents that set forth the facts obtained in this investigation are the protected work product of attorneys for Southern Bell.

6. The requested Late-filed Exhibit No. 1 is a document that sets forth the names of disciplined management employees who are paygrade five and below. Of paramount importance for

purposes of Public Counsel's Motion, this document also contains a summary of the facts derived from the investigation that formed the basis for the discipline. While this particular document was not drafted by a lawyer, it contains information derived from the investigation and was itself prepared as a part of the investigation. Indeed, it is simply the notes of managers of the company that memorialize the privileged information for internal purposes.

7. As Public Counsel concedes in its Motion to Compel, the names of all management employees who were disciplined have previously been provided. The only additional information that Public Counsel seeks to obtain from the disclosure of this document is the statement of facts derived from the investigation by Southern Bell's Legal Department, which was the basis for the discipline of these employees.

8. Public Counsel states in its Motion that an in camera inspection is necessary to determine whether the information is privileged, and that "[a]ny legal advice or opinion that may be entwined with the facts may be excised in an in camera review" (Motion, page 5). The reality, however, is that Public Counsel has already obtained all information contained in these documents that is not privileged. The notes themselves are mere summaries of the contents of the company's privileged investigation. These summaries were made as part of the investigatory process. Thus, Public Counsel's attempt to compel production of this document is

simply one more effort to invade Southern Bell's attorney/client privilege and to obtain the work product of its attorneys. As such, this effort should be denied.

9. The requested Late-filed Exhibit No. 2 is a similar document that sets forth the names of craft employees who were interviewed in the investigation, as well as some employees not interviewed who were, nevertheless, mentioned in the interviews. The document also summarizes the facts derived from the investigation that suggest whether any particular employee either did or did not engage in any activity that might be deemed improper. Additionally, the document sets forth preliminary recommendations for discipline of certain employees.

10. Unlike management employees, however, craft employees have never been disciplined in the context of the matters that are the subject of this docket. Thus, the document which is the subject of Late-Filed Exhibits No. 2 is not discoverable for a number of reasons. First, just as is the case with Late-Filed Exhibit No. 1, Exhibit No. 2 contains summaries of Southern Bell's privileged investigation and, just as with Exhibit No. 1, these summaries are themselves privileged. Moreover, since no discipline was taken, the document in question does not memorialize personnel-related decisions. Instead, it is little more than a "road map" through the investigation, which map was created as a part of that investigation. The names of the craft employees that counsel for Southern Bell decided to interview,

and the facts that informed the decisions as to whom to interview, are inextricably intertwined with the mental impressions that were formed by Southern Bell's legal counsel as the investigation progressed.

11. If Public Counsel is arguing that an attempt to obtain the names of the employees interviewed by Southern Bell's Legal Department (and the information derived by these interviews) is not simply an attempt to obtain the results of the privileged investigation, then this argument is incorrect. Nevertheless, Public Counsel appears to make precisely this argument.

12. In its Motion, Public Counsel states that "no attorney was involved in the discussions on craft employee discipline" (page 8). Then, after acknowledging that no craft employees were, in fact, disciplined, Public Counsel concludes that it "is evident from the deposition that the discussions regarding disciplinary recommendations for craft employees is [sic] not a privileged communication between Staff and Company Counsel..." (page 9). Thus, Public Counsel appears to advance the novel proposition that privileged information communicated from a lawyer to representatives of the client is no longer privileged if it is discussed, for the purpose for which it was given, among those representatives of the client. In other words, Public Counsel argues that a discussion, among authorized representatives of the client, of attorney-client privileged information, even a discussion that leads to no additional action

by the client, has the effect of destroying the privilege. This argument simply finds no support in Florida law.

13. Finally, Public Counsel makes the argument that by disclosing, in response to formal discovery, the names of managers who were disciplined, Southern Bell has waived any objection to disclosing the otherwise privileged names of craft employees for whom the subject of discipline *vel non* was discussed, even when there was no subsequent discipline of these employees. To the contrary, the distinction between the names of management employees and the names of craft employees is clear. Some management employees were disciplined. The act of disciplining these employees was not privileged and, accordingly, the names of employees who received discipline are not privileged. There can be no claim of privilege for the discipline itself, nor has Southern Bell attempted to advance a claim of privilege for these personnel-related actions by the Company.

14. The situation as to craft employees is altogether different because no action by the Company has ever been taken with regard to these employees. Instead, there were nothing more than discussions, and proposed recommendations as to possible discipline, that were based entirely upon privileged information derived from the investigation and provided by Southern Bell attorneys. No act, which itself would not be privileged, ever occurred. Public Counsel deals with the obvious distinction

between these two categories of employees by simply acting as if the distinction does not exist.

15. Finally, Public Counsel argues that it can not successfully develop the issues for hearing without invading the attorney/client privilege of Southern Bell. Specifically, Public Counsel states that "BellSouth's claim of privilege for the late-filed deposition exhibits, if sustained, will effectively blanket the facts critical to a just determination of this case." (Motion p. 5). To the contrary, a proper ruling sustaining Southern Bell's claim of privilege will simply require that Public Counsel do its job, i.e., the job of every litigant, which is to develop evidence in support of its case through proper discovery rather than by invading the work product of counsel for its adversary.

16. The work product "doctrine was developed in order to discourage counsel from one side from taking advantage of trial preparation undertaken by opposing counsel, and thus both to protect the morale of the profession and to encourage both sides to a dispute to conduct thorough, independent investigations in preparation for trial." U.S. v. 22.80 Acres of Land, 107 F.R.D. 20, 24 (U.S.D.C. CAL. 1985). The work product doctrine, and the compelling reasons for its existence, apply equally to situations such as ours in which the documents in question are created in anticipation of litigation. See generally, U.S. v. Real Estate Board of Metropolitan St. Louis, 59 F.R.D. 637 (U.S.D.C. MO. 1973).

17. Rather than conduct its own "independent investigation" into the matters at issue in this proceeding, Public Counsel is simply making one more attempt to save labor by obtaining the product of the efforts of attorneys for Southern Bell. The often-repeated argument by Public Counsel that it cannot properly develop its case without following in the footsteps of the investigating attorneys for Southern Bell is simply frivolous. Public Counsel has already taken the depositions of almost one hundred employees in this matter and has expressed an intention to take depositions of at least an additional thirty employees in the near future. Yet Public Counsel still argues that it cannot possibly determine which craft employees to depose without having the result of the privileged investigation conducted by Southern Bell attorneys to serve as a "blue print" of sorts for its discovery efforts. This is not correct and this argument should be summarily rejected.

18. Finally, Public Counsel requests an in camera inspection of the two documents in question. While it is true that the case law relating to attorney-client privilege generally prescribes an in camera inspection to determine if a document is, in fact, privileged, the circumstances of our particular situation are such that an inspection would serve little or no purpose. At best, an in camera inspection of these documents would allow the Commission to determine that the representations by Southern Bell contained herein as to the contents of the

documents are accurate. This inspection would do little to aid the Commission in resolving the question of whether the information contained in these documents is privileged.

19. In a situation in which the documents in question ostensibly contain the communication of a legal opinion from an attorney to a client, an *in camera* inspection is obviously useful. It shows whether or not such a communication was made. In this instance, however, the documents in question do not contain legal opinions *per se*. Instead, these documents contain information that was obtained by attorneys for Southern Bell and which formed the basis for the rendering of a legal opinion to the client. After this information was given to the client, *i.e.* those managers of Southern Bell with a need to know, some of these managers memorialized the information in notes for their own subsequent use. Again, this information was not disclosed to any third party in any way that would waive the privilege. It was simply written down by the individuals to whom the information was provided. Therefore, the documents at issue do not on their face necessarily reveal that they memorialize privileged communications. In other words, this is a situation in which the most important factor in determining whether the attorney-client privilege and work product doctrine pertain is not so much what the documents reveal on their face, but rather the specific circumstances that demonstrate that the information

was related from attorney to client and then memorialized by the client in written form.

20. Accordingly, while Southern Bell is not entirely opposed to the Commission reviewing these documents in camera, the circumstances surrounding the assertion of the privileges by Southern Bell are such that this review would do little to help this Commission resolve the issue. Instead, this issue should be resolved by this Commission finding that, on the basis of the uncontested circumstances surrounding the creation of these documents, the attorney/client privilege and work product doctrine apply.

WHEREFORE, Southern Bell Telephone and Telegraph Company respectfully requests the entry of an order denying Public Counsel's Eighth Motion to Compel.

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY

HARRIS R. ANTHONY
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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.

Sincerely yours,

J. Phillip Carver

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 24th 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 Carver
(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

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.[1]

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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[1] 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 marshall 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.[2]

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

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY

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