J. Phillip Carver
General Attorney

Southern Bell Telephone and Telegraph Company
c/o Marshall M. Criser III
Suite 400
150 So. Monroe Street
Tallahassee, Florida 32301
Phone (305) 530-5558

January 4, 1993

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

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 Twelfth 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

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 4th day of January, 1993, 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
PJ

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: January 4, 1993

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S OPPOSITION AND RESPONSE TO PUBLIC COUNSEL'S TWELFTH 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 and Response to Public Counsel's Twelfth Motion to Compel and Request for In Camera Inspection of Documents, and states as grounds in support thereof the following:

1. On November 5, 1992, the Office of Public Counsel ("Public Counsel") propounded its Thirty-Third Request for Production of Documents from Southern Bell, which included a request to produce a document entitled "Report of Completed Audit" for each of the five audits conducted in 1991 Southern Bell had previously objected to producing these audits on the bases of the attorney-client privilege and work product doctrine. On December 7, 1992, Southern Bell responded to the request to

produce the related Reports of Completed Audits by objecting to the production of the requested materials on the bases of the attorney-client privilege and work product doctrine. Public Counsel's Twelfth Motion to Compel followed.

2. Public Counsel first argues, as it has in the past, that the attorney-client privilege is unavailable because Southern Bell has not complied with every technical requirement for information that Public Counsel asks to be provided at the time the privilege is asserted.[1] In other words, Public Counsel contends that every assertion of the attorney-client privilege must be accompanied by an extensive listing of information about the documents withheld and that, without this listing, the otherwise available claim of privilege is lost. There is, however, no case law to support this unfounded contention. To the contrary, the case law cited by Public Counsel makes it clear that a party's duty to provide information about documents for which the privilege is asserted is limited to providing the reviewing tribunal with adequate facts to allow it to determine whether the privilege applies.

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[1] For a more thorough analysis of this argument by Public Counsel and Southern Bell's response thereto, please refer to Southern Bell's responses to Public Counsel's Tenth and Eleventh Motions to Compel (both responses were filed on December 28, 1992). For ease of reference, these responses are attached hereto as Attachments "A" and "B".

3. For example, the case relied upon by Public Counsel, Hartford Accident & Indemnity Company v. McGann, 402 So.2d 1361 (Fla 4th DCA 1981), in turn cites as its authority the earlier Florida case of Shurette v. Galiardo, 323 So.2d 53, (Fla 4th DCA 1975). Shurette provided that "the burden of establishing that the particular document is privileged and precluded from discovery rests on the party asserting that privilege (unless it appears from the face of the document sought to be produced that it is privileged)." Id. at p. 58.

4. In other words, if a document is privileged on its face, then a party need provide no additional information to sustain the burden of coming forward with facts to allow the tribunal to resolve the issue of privilege. When, as in our case, the applicability of the privilege is evidenced more by the surrounding facts than by a facial reading of the documents, then the party asserting the privilege must, as Southern Bell has done, provide adequate facts to allow the tribunal to review the claim of privilege. There is nothing in Hartford, Galiardo, or otherwise in Florida law, however, to suggest that there is some technical requirement to provide with each assertion of the privilege an exhaustive litany of information. Instead, under Florida law, Southern Bell, as the party claiming the privilege, has the burden only of demonstrating adequate facts, either on

the face of the privileged documents or from extrinsic circumstances, to allow this Commission to determine that the privilege applies. Southern Bell has sustained this burden.

5. Southern Bell previously filed in this docket (as Attachment "A" to its Opposition to Public Counsel's Seventh Motion to Compel and Request for In Camera Inspection of Documents, filed August 4, 1992), the affidavits of Shirley Johnson, an Operations Manager with Southern Bell's Florida Internal Auditing Department, who supervised the performance of each of the five audits in question. These affidavits, along with Ms. Johnson's deposition of October 14 1992, provide a more than adequate record as to the factual circumstances that surrounded the creation of the documents that comprise each of these audits, including the subject summary reports of the audits.

6. Although the pertinent facts have been set forth at length in Southern Bell's responses to previous motions to compel[2], they can be briefly stated as follows: Audits are done in one of two circumstances: (1) on a regularly scheduled basis in the ordinary course of business; (2) in response to a "demand", i.e., a specific request of a department within

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[2] See, e.g., Southern Bell's Response and Opposition to Public Counsel's Seventh Motion to Compel, a copy of which is attached hereto as Attachment "C".

Southern Bell. The five audits in questions were not only demand audits (as opposed to those that are performed according to a regular schedule), they were performed at the specific request of attorneys for Southern Bell in the context of an ongoing investigation of underlying facts similar to those at issue in this docket for the purpose of rendering legal opinions to the Company. Specifically, Southern Bell's attorneys requested that its auditors compile and analyze certain facts so that this analysis would be available for the attorneys to consider when rendering to the Company a legal opinion.

7. The previous provision of this information to Public Counsel, both in the form of filed affidavits and Ms. Johnson's deposition, more than satisfies any burden that Southern Bell may have to set forth the circumstances surrounding the assertion of the privilege. Any attempt by Public Counsel to make a technical argument to the contrary must fail.

8. Public Counsel next argues that the subject reports of the underlying privileged audits are not themselves privileged because they were prepared in the ordinary course of business. Southern Bell does not dispute the proposition of law that documents prepared in the ordinary course of business are not normally privileged. In this case, however, the audit reports in dispute were not created in the ordinary course of business.

9. The very case law cited by Public Counsel, makes it clear that investigatory and other documents must be categorized as either created in the ordinary course of business or created in anticipation of litigation (See, e.g., Proctor & Gamble Company v. Swilley, 462 So.2d 1188 (Fla 1st DCA 1985); Skorman v. Hounanian of Florida, 382 So.2d 1376 (Fla 4th DCA 1980). The privilege then either applies or not, depending on the category into which the documents are determined to be properly placed. Public Counsel ignores this standard process and, instead, argues that a summary report containing substantive information[4] from a privileged audit was somehow performed in the ordinary course of business. Again, this approach is illogical and incorrect. The underlying audit is, as Southern Bell contends, privileged. Since the audit was not performed in the ordinary course of business, but rather is privileged, then a report that is part of the audit process and which partially summarizes the privileged information contained in that audit must also be privileged.

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[4] Although Public Counsel contends that any given report "does not reveal the substance of the audit" (Motion at p. 5), Public Counsel also states later in this same Motion that it seeks to obtain this report because it contains the "ratings" for the five audits. These ratings are, in effect, a conclusion as to whether the results of the Audit are positive or negative. Obviously, a summary conclusion, based upon the substantive factual findings of the audit, that the results are favorable or unfavorable is a matter of substance as well.

10. Finally, Public Counsel turns, as it has repeatedly in past motions to compel, to the contention that even if the work product privilege applies, this privilege should be invaded because Public Counsel needs the privileged documents. As Southern Bell has responded in the past, this point is essentially moot since these documents are also protected by the attorney-client privilege, and this privilege is absolute. It cannot be invaded, even upon a showing of need.[5]

11. Even if the attorney-client privilege did not apply, however, and these documents were protected only by the work product doctrine, Public Counsel has still failed to make a legally sufficient showing of need to support the invasion of Southern Bell's protected attorney work product. To support a finding of need sufficient to mandate the production of attorney work product, it must be virtually impossible for the adverse party to obtain the equivalent information through other means. See, generally, Winn Dixie Stores, Inc. v. Gonyea, 455 So.2d 1342 (Fla 2d DCA 1984); Colonial Penn Ins. Co. v. Clair, 380 So.2d 1305 (Fla 1980). The term "equivalent information" refers to the

[5] See, Southern Bell's respective Responses to Public Counsel's Eighth, Tenth and Eleventh Motions to Compel for a more complete analysis of the legal definition of "need" that must be shown before a party's privileged attorney work product must be disclosed. These Responses are attached hereto, respectively, as Attachment "D", Attachment "A" and Attachment "B".

underlying facts. Thus, Public Counsel would only be entitled to obtain this information if it were all but impossible to utilize discovery to obtain the underlying facts and to distill these facts into its own analysis. Public Counsel, however, has again completely misconstrued this legal proposition and, instead, argues that it needs to obtain this report because it cannot obtain through alternative means the comparable information contained in the privileged audit that is summarized by this report. Thus, Public Counsel has once again focused its efforts on trying to obtain Southern Bell's privileged analysis of the underlying facts rather than the facts themselves. This Public Counsel cannot do.

12. Moreover, even if Public Counsel were properly directing its efforts to obtaining underlying facts, it still has failed to demonstrate need. Public Counsel first argues that it needs to obtain the information contained in the summary reports of the audit because these will, in some undefined way, support its argument to compel production of the underlying privileged audits. (Motion at p. 6) In effect, Public Counsel argues that it "needs" a privileged summary of information in order to have a better chance of compelling the production of a more extensive and detailed version of the same privileged information.

Although this approach is certainly novel, it is also both misguided and legally insupportable.

13. Public Counsel continues with the argument that the summary reports of the audits are needed because it would allow Public Counsel to either "corroborate and/or impeach" (Motion at p. 7) the deposition testimony of Shirley T. Johnson about the underlying audits. Public Counsel then recites a lengthy catalog of information that it was ostensibly unable to obtain through deposing Ms. Johnson, but that it would obviously like to obtain. In summary, this allegedly unavailable information can be placed into one of two categories: (1) information that the Office of Public Counsel questioned Ms. Johnson about in her deposition, but that they contend she was not able to remember; (2) information that Public Counsel could not obtain in the deposition because the particular question invaded the attorney-client and work product privileges, and Ms. Johnson was consequently instructed by counsel for Southern Bell not to answer the question.

14. As to this first category of documents, Public Counsel appears to argue that the report contains non-privileged information that does not go to the substance of the audit findings, that Southern Bell did not object to providing this information in the deposition, but that Miss Johnson simply could

not remember the information sought. If this is Public Counsel's position, then there is an appropriate alternative to the intrusive and improper request for production of a privileged report: Public Counsel could simply ask these questions in the form of interrogatories. Instead, Public Counsel attempts to obtain a privileged document in its entirety with the purported justification that portions of that document are not privileged, and, therefore, should be produced. Again, however, if Public Counsel's true intent is to obtain whatever non-privileged information is contained in these reports, then a proper alternative exists to accomplish this result.[6]

15. Public Counsel has also made the argument that it must receive these audits to obtain information that is otherwise unavailable because Southern Bell has previously objected to providing this information on the basis of the attorney-client privilege. Specifically, Public Counsel states that it attempted to ascertain during Ms. Johnson's deposition whether reaudits were scheduled. Public Counsel now contends that the purpose of these questions was to deduce whether the audits contained significant adverse findings. (Motion at p. 7-8) As Public

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[6] Alternatively, Southern Bell is willing to consider a procedure whereby it would produce to Public Counsel redacted version of the audit reports that would disclose any non-privileged information, but not disclose information to which the privilege applies.

Counsel states, counsel for Southern Bell objected to the disclosure of this information at the time of the deposition.[7] Public Counsel is now attempting to obtain this same information by requesting production of the summary report of the privileged audit. Thus, Public Counsel has, in effect, taken the astounding position that when an appropriate objection is made to producing privileged material, this refusal to disclose the material makes it "otherwise unavailable," so that the adverse party may avoid this claim of privilege and obtain the information simply by requesting the same information a second time, albeit in a different format. At the risk of belaboring the obvious, Southern Bell will simply state that this argument is both frivolous and completely undeserving of consideration by this Commission.

16. Finally, Public Counsel has requested an in camera inspection of the documents in question. 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

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[7] During the deposition of Ms. Johnson, an exchange took place on the record in which Public Counsel contended that counsel for Southern Bell had "already revealed this information to us and waived the privileged [sic] in regard to how each of these five audits was rated." S. Johnson deposition, at p. 56. If this is, in fact, true then Public Counsel already has the information that it is seeking herein to obtain, and this portion of the instant Motion to Compel would seem to have no point beyond mere harassment.

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

17. 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. As set forth above, these circumstances were described fully and previously provided in the deposition and affidavits of Shirley Johnson. Therefore, this issue should be resolved by this Commission by finding that, on the basis of these circumstances, the attorney-client privilege and work product doctrine apply.

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

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY

Harris R. Anthony
HARRIS R. ANTHONY
J. PHILLIP CARVER
c/o Marshall M. Criser III
150 So. Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 530-5555

R. Douglas Lackey
R. DOUGLAS LACKEY
SIDNEY J. WHITE, JR.
4300 Southern Bell Center
675 W. Peachtree St., NE
Atlanta, Georgia 30375
(404) 529-3862

Attachment A

J. Phillip Carver
General Attorney

BellSouth Telecommunications, Inc.
Museum Tower Building
Suite 1910
150 West Flagler Street
Miami, Florida 33130
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 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 any 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] See, International Telephone and Telegraph Corporation v. United Telephone Company of Florida, 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,

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY

Harris R Anthony
HARRIS R. ANTHONY
J. PHILLIP CARVER
c/o Marshall M. Criser III
150 So. Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 530-5555

R Douglas Lackey
R. DOUGLAS LACKEY
SIDNEY J. WHITE, JR.
4300 Southern Bell Center
675 W. Peachtree St., NE
Atlanta, Georgia 30375
(404) 529-3862

Attachment B

J. Phillip Carver
General Attorney

BellSouth Telecommunications, Inc.
Museum Tower Building
Suite 1910
150 West Flagler Street
Miami, Florida 33130
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

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
JRB

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

HARRIS R. ANTHONY
J. PHILLIP CARVER
c/o Marshall M. Criser III
150 So. Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 530-5555

R. DOUGLAS LACKEY
SIDNEY J. WHITE, JR.
4300 Southern Bell Center
675 W. Peachtree St., NE
Atlanta, Georgia 30375
(404) 529-3862

Attachment C

Southern Bell

Harris R. Anthony
General Counsel-Florida

Southern Bell Telephone
and Telegraph Company
c/o Marshall Criser III
Suite 400
150 South Monroe St.
Tallahassee, Florida 32301
Phone (305) 530-5555

August 4, 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 to Public Counsel's Seventh 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,

Harris R. Anthony

Harris R. Anthony

Enclosures

cc: All Parties of Record
A. M. Lombardo
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 4th day of August, 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

Harris R. Anthony
OF

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: August 4, 1992

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S OPPOSITION TO PUBLIC COUNSEL'S SEVENTH 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 herein files its Opposition to the Seventh 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 Twenty-fourth Set of Request for Production of Documents dated June 3, 1992 and states as grounds in support thereof the following.

1. In its Response to Public Counsel's 24th Set of Requests for Production, Southern Bell objected to producing the documents requested in Request Nos. 7, 8, 9, 10 and 11. Request Nos. 7, 8, 9 call for the production of internal audits conducted at the specific request of Southern Bell's Legal Department of, respectively, the Key Service and Revenue Indicators ("KSRI"), the loop maintenance operations system, ("LMOS") and of the PSC

Schedule 11. Public Counsel has previously requested each of these audits in Docket No. 920260-TL, Southern Bell has objected therein to the production of these audits, and Public Counsel has moved to compel and Southern Bell has opposed each such motion.

2. In response to Public Counsels's Motion to Compel in Docket No. 920260-TL, Southern Bell filed a response, which included as exhibits affidavits filed by Shirley T. Johnson, Operations Manager of Southern Bell's Florida Internal Audit Department. These affidavits set forth the circumstances that establish that each of the three audits was performed as part of an ongoing investigation by Southern Bell's lawyers and at the direct request of those lawyers. Copies of these affidavits are attached hereto as composite Exhibit "A".

3. Finally, Public Counsel has previously requested, in its twenty sixth set of interrogatories, information from the audit of the PSC Schedule 11 that is requested herein in Item No. 9. Again, Southern Bell objected to producing this information on the basis of the attorney-client privilege and work product doctrine, Public Counsel moved to compel, and Southern Bell opposed that motion.

4. Item Nos. 10 and 11 request a statistical analysis referred to in a document previously produced to Public Counsel as well as all other similar analyses. Both the documents

specifically referred to and all "similar documents" were created by Dan King, Assistant Vice President, Central Office Operations Support for BellSouth Telecommunications, Inc. at the specific request of the Legal Department as a part of its preparation for litigation in this docket. As set forth in the affidavit of Mr. King, attached hereto as Exhibit "B"[1], these documents entail a number of reports setting forth the statistical analyses that were performed by Mr. King at the specific request of Southern Bell's Legal Department. This request was based on information obtained by the Legal Department in the context of the internal investigation of matters that are at issue in this docket.

5. Further, the information was requested by the Legal Department to aid in its investigation and to aid it further in the rendering of a legal opinion to Southern Bell. It was also in specific response to the issues raised in this docket.

6. In other words, the analytical reports, like the audits referred to above, were created at the specific request of Southern Bell's Legal Department as part of an ongoing investigation. Accordingly, the Florida law that provides that the audits are protected from disclosure by the attorney-client

[1] Due to logistical difficulties, Mr. King was unable to sign the attached affidavit before the filing deadline for this response. An executed affidavit will be filed before the end of this week.

privilege and the work product doctrine applies equally to protect these analytical reports.

7. In the context of the previous motions to compel and responses referred to above, both Public Counsel has and Southern Bell has fully set forth their respective positions as to the applicability of the attorney-client and/or work product privileges. Given this, Southern Bell will not burden this Commission with a reiteration of arguments that have previously been made. There is, however, a potentially dispositive aspect of this issue that bears repeating in summary fashion.

8. Public Counsel's Motion to Compel includes a twenty-six page recitation of the general law applicable to the attorney-client privilege and work product doctrine. In its lengthy discourse, however, Public Counsel has failed to address specifically the factor that is central to the question of whether the privileges apply: the fact that each of the three audits and all of the analytical reports were prepared, not in the normal course of business, but at the specific request of Southern Bell's Legal Department.

9. In other words, in order to render a legal opinion, the legal department requested of certain Southern Bell manager/clients the distillation and analysis of specific information. This analysis was provided by the respective

manager/client to the attorneys for Southern Bell both to assist in the analysis and evaluation of the underlying facts and for the purpose of allowing these attorneys to render legal opinions to the client.

10. On the face of the case law previously cited both by Southern Bell and Public Counsel, it is clear that the attorney-client privilege protects not only legal advice given by the attorney to the client, but also information communicated from the client to the attorney for the purpose of obtaining this advice. The affidavits of Ms. Johnson and of Mr. King make it clear that this is precisely the instant situation. Information has been provided from these clients to the Southern Bell attorneys conducting an investigation in order to allow these attorneys to render a legal opinion. Accordingly, this information is clearly protected by the attorney-client privilege.

11. Given the circumstances under which this information was compiled and presented to the Legal Department, it is equally clear that it is protected by the attorney work product doctrine. The information at issue was compiled at the specific request of the Legal Department, within parameters dictated by the Legal Department, and the purpose of the request by the Legal Department was to allow the lawyers for Southern Bell to assess

the legal ramifications of these matters. Obviously, this entire process of compiling, distilling and analyzing information at the request of, and under specific directions given by, the Legal Department is intertwined inseparably with the mental impressions of the lawyers of Southern Bell regarding this docket. Therefore, even if the analysis of the pertinent information had not been provided by the client itself (i.e., Southern Bell managers), the fact remains that this compilation and analysis were performed by individuals who aided and assisted Southern Bell lawyers, and thereby acted as their agents. For this reason, the work product doctrine applies.

12. Finally, Public Counsel has argued that the applicable work product doctrine should not operate to bar production because the comparable information cannot be obtained without undue hardship. The affidavit in support of this contention attached to Public Counsel's Seventh Motion to Compel, however, makes it clear that the "hardship" referred to is nothing more than taking on a project that entails considerable labor.

13. Florida courts have stated repeatedly that the attorney work product doctrine will only be overcome upon a showing of both need and undue hardship. "Undue hardship" is generally found to exist only under circumstances in which the ability to obtain equivalent information through an alternative process is

all but non-existent. See, generally , Winn Dixie Stores, Inc. v. Gonyea, 455 So.2d 1342 (Fla. 2d DCA 1984); Colonial Penn Ins. Co. v. Blair, 380 So.2d 1305 (Fla. 1980).

14. In this particular instance, much of the underlying materials upon which the audits requested in Item Nos. 7, 8 and 9 were based have been produced to Public Counsel. Public Counsel also has the ability to depose employees of Southern Bell, and to obtain further documents and information from Southern Bell if it so deems necessary.[2] Public Counsel, nevertheless, argues that it would simply be too much work to perform its own audit and analysis of this material. Likewise, rather than conducting discovery of the facts at issue in this docket, then analyzing this information as it sees fit, Public Counsel is simply seeking the labor-saving device of obtaining the portion of Southern Bell's internal investigation that includes the analysis of Mr. King that was performed at the request of Southern Bell lawyers. This disinclination to take on a burdensome task falls far short of the type of hardship that will support a forced disclosure of attorney work product.

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[2] In point of fact, Public Counsel has already deposed almost one hundred Southern Bell employees in this matter, has propounded 24 separate requests to produce and has also propounded tens of interrogatories.

15. 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 prescribes in camera inspection when the attorney-client privilege is asserted, and Southern Bell has no strong objection to this procedure. Such an inspection review, however, would provide no real benefit to the Commission in determining whether the privilege applies.

16. 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 is obviously useful. 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. Although, again, Southern Bell is not entirely opposed to the Commission's reviewing these documents in camera, the circumstances surrounding the assertion of the privileges are such that this review 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 in the attached affidavits, the attorney-client and work product privileges pertain.

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

Respectfully submitted,

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY

HARRIS R. ANTHONY
General Counsel-Florida
c/o Marshall M. Criser III
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 530-5555

J. PHILLIP CARVER
General Attorney
c/o Marshall M. Criser III
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 530-5558

Attachment D

J. Phillip Carver
General Attorney

Southern Bell Telephone
and Telegraph Company
c/o Marshall M. Criser III
Suite 400
150 So. Monroe Street
Tallahassee, Florida 32301
Phone (305) 530-5558

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

J. Phillip Carver
(JE)

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:

Robin Norton
Division of Communications
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0866

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

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Grandoff & Reeves
522 East Park Avenue,
Suite 200
Tallahassee, Florida 32301
atty for FIXCA

Joseph Gillan
J. P. Gillan and Associates
Post Office Box 541038
Orlando, Florida 32854-1038

Patrick K. Wiggins
Wiggins & Villacorta, P.A.
Post Office Drawer 1657
Tallahassee, Florida 32302
atty for Intermedia

Floyd R. Self, Esq.
Messer, Vickers, Caparello,
Madsen, Lewis & Metz, PA
Post Office Box 1876
Tallahassee, FL 32302
atty for US Sprint

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

Michael J. Henry
MCI Telecommunications Corp.
MCI Center
Three Ravinia Drive
Atlanta, Georgia 30346-2102

Richard D. Melson
Hopping Boyd Green & Sams
Post Office Box 6526
Tallahassee, Florida 32314
atty for MCI

Rick Wright
Regulatory Analyst
Division of Audit and Finance
Florida Public Svc. Commission
101 East Gaines Street
Tallahassee, FL 32399-0865

Peter M. Dunbar
Haben, Culpepper, Dunbar
& French, P.A.
306 North Monroe Street
Post Office Box 10095
Tallahassee, FL 32301
atty for FCTA

Chanthina R. Bryant
Sprint
3065 Cumberland Circle
Atlanta, GA 30339

Michael W. Tye
AT&T Communications of the
Southern States, Inc.
106 East College Avenue
Suite 1410
Tallahassee, Florida 32301

Dan B. Hendrickson
Post Office Box 1201
Tallahassee, FL 32302
atty for FCAN

Thomas F. Woods
1709-D Mahan Drive
Tallahassee, FL 32308
Atty for Florida Hotel
& Motel Association

[illegible]
Florida Consumer Action Networ
4100 W. Kennedy Blvd. #128
Tampa, FL 33609

Bill L. Bryant, Jr., Esq.
Foley & Lardner
Suite 450
215 South Monroe Street
Tallahassee, FL 32302-0508
Attys. for AARP

Michael B. Twomey
Assistant Attorney General
Department of Legal Affairs
Room 1603, The Capitol
Tallahassee, FL 32399-1050

J. Phillip Carver (GW)

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
Room 812
Tallahassee, FL 32399-1400

Tracy Hatch, Esq.
Division of Legal Services
Florida Public Service Comm.
101 E. Gaines Street
Tallahassee, FL 32301

J. Phillip Carver (2)

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 theXnames 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 (2#)
J. PHILLIP CARVER
c/o Marshall M. Criser III
150 So. Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 530-5555

R. DOUGLAS LACKEY
NANCY B. WHITE
SIDNEY J. WHITE, JR.
4300 Southern Bell Center
675 W. Peachtree St., NE
Atlanta, Georgia 30375
(404) 529-3862