BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Integrity of Southern Bell's Repair Service Activities and Reports	Docket No. 910163-TL
Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company	Docket No. 920260-TL
Show Cause Proceeding Against Southern Bell Telephone and Telegraph Company for Misbilling Customers	Docket No. 900960-TL
Investigation into Southern Bell Telephone and Telegraph Company's Compliance with Rule 25-4.110(2), F.A.C.	Docket No. 910727-TL
	February 12, 1993

CITIZENS' RESPONSE AND OPPOSITION TO SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S MOTION FOR REVIEW OF ORDER GRANTING PUBLIC COUNSEL'S MOTION FOR IN CAMERA INSPECTION OF DOCUMENTS AND MOTIONS TO COMPEL

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this response to BellSouth Telecommunications, Inc. d/b/a/ Southern Bell Telephone and Telegraph Company's ("Southern Bell") request for reconsideration of the prehearing officers' Order No. PSC-93-0151-CFO-TL, which ordered Southern Bell to produce documents withheld under a claim

of privilege and to file any exemption from discovery for the workpapers associated with the withheld documents within seven days. Citizens request this Commission to deny Southern Bell's request for reconsideration and as grounds therefor state the following:

1. Southern Bell requests the full Commission to overturn the prehearing officer's order denying Southern Bell's claim of privilege for four internal audits[1] and a statistical analysis done on the company's customer repair and rebate systems, and for personnel department recommendations on employee discipline. Southern Bell Telephone and Telegraph Company's Motion for Review of Order Granting Public Counsel's Motion for In Camera Inspection of Documents and Motions to Compel, Dockets Nos. 910163-TL, 920260-TL, 900960-TL & 910727-TL (Feb. 5, 1993) [hereinafter Southern Bell's Motion].

2. Southern Bell has failed to meet the standard of review of a prehearing officer's order on reconsideration. The standard of review adopted by the Commission requires Southern Bell to

[1] The company conducted five audits in the fall of 1991. The prehearing officer's order only covers four of these as the company failed to disclose the existence of the fifth audit in its index attached to its response to Citizens' first motion to compel. The four audits are the Loop Maintenance Operation System [LMOS--repair system], Mechanized Out of Service Adjustments [MOOSA--rebate system], Key Service and Revenue Indicators [KSRI--service quality and revenue from Network], PSC Schedule 11 [schedule 11 reports filed with the PSC]. Order No. PSC-93-0151-CFO-TL at 3.

demonstrate that the prehearing officer made an error in fact or law in his decision that requires that the full Commission reconsider his decision. See 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, 91 F.P.S.C. 12:286, 287 (1991) (Docket No. 910163-TL, Order No. 25483, which was affirmed by the full Commission on reconsideration in Order no. PSC-92-0339-FOF-TL). The company has failed to show that the prehearing officer erred in her finding that the company's internal audits, statistical analysis, and personnel recommendations on employee discipline are not privileged. As Public Counsel noted in its motions to compel discovery of these documents, Southern Bell has the burden of first showing that the documents being withheld are in fact privileged.

3. Southern Bell repeats its arguments for privilege that were addressed fully and denied in Order No. PSC-93-0151-CFO-TL. To satisfy the standard for reconsideration, a motion must bring to the Commission's attention some matter of law or fact which the prehearing officer failed to consider or overlooked in her decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). The motion may not be used as an opportunity to reargue matters previously considered merely because the losing party disagrees with the judgment or order. Diamond Cab Co., 146 So. 2d at 891.

4. Should the Commission nonetheless entertain Southern Bell's repetition of its prior arguments, Citizens reassert their prior arguments, which were fully considered in Order No. PSC-92-0151-CFO-TL. See Citizens' First Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 920260-TL (May 8, 1992); Citizens' Supplement to Their First Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 920260-TL (June 2, 1992); and Citizens' Eighth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision, Dockets Nos. 910163-TL & 920260-TL (Aug. 21, 1992). If the Commission reweighs the arguments presented, it too will need to conduct an in camera review of all[2] the withheld documents. Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d DCA 1983). "The purpose of this examination is not to determine whether there is good cause to overcome the privilege, but rather to determine whether the items are, as a matter of law and fact, entitled to the privilege at all." International Tel. & Tel. Corp. v. United Te. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (emphasis in original). After reviewing the documents, the Commission will undoubtedly reach the same conclusions of fact and law as Commissioner Clark.

5. Order No. PSC-92-0151-CFO-TL identified each of Southern Bell's arguments and correctly decided that each of the arguments

[2] Southern Bell did not deliver the audit workpapers or the statistical analysis for Commissioner Clark's review.

had no merit in fact or law. The prehearing officer determined that the internal audits, the statistical analysis, and personnel manager's notes were not privileged under either the attorney-client privilege or under the work product doctrine. Order No. PSC-92-0151-CFO-TL. No error of fact or law has been demonstrated to overturn the prehearing officer's order on reconsideration. See Grady v. Department of Prof. Reg., Bd. of Cosmetology, 402 So. 2d 438 (Fla. 1st DCA 1981) (holding that agency's interpretation of cosmetology licensing statute to include "esthetic" activities when the statutory wording did not explicitly include them was entitled to great weight and would not be overturned unless clearly erroneous), dismissed, 411 So. 2d 382 (Fla. 1981).

6. Southern Bell argues that internal audits, the statistical analysis, and the personnel documents, which admittedly do not contain any legal analysis, opinion, reasoning, or strategy, and which were used for a concurrent business purpose, are nevertheless privileged because the company attorney requested the information and dissemination was limited to those managers with a "need to know." Southern Bell then mischaracterizes the prehearing officer's thoughtful analysis of its privilege claim as "holding that internal audits prepared by a regulated entity can never be privileged. . . ." Southern Bell's Motion at 4, ¶ 4 (emphasis added). The order does not make this blanket ruling; rather, Commissioner Clark expressly states that "[a] number of relevant authorities establish that they (the documents) are not exempt from

discovery under the facts and circumstances of this case." Order No. PSC-93-0151-CFO-TL at 5 (emphasis added).

7. Commissioner Clark's order demonstrates that these documents were created for a business purpose, and as such, are not privileged. In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. 515 (N.D. Ill. 1990) (finding that General Electric's purpose of investigating the cause of the air crash in preparing its report to NTSB was a business purpose that did not shield certain documents under the attorney-client privilege). Southern Bell admits that the personnel documents have served a business purpose in its motion. Southern Bell's Motion at 27, ¶ 43 ("The fact that their need arose from a business rather than purely legal purpose does nothing to destroy the confidentiality of the documents or eradicate the otherwise applicable privileges.") Likewise, as Commissioner Clark points out, the audits and statistical analysis serve the business purpose of a "regulated business to inform itself about its operations and to report about those operations to a regulatory agency." Order No. PSC-93-0151-CFO-TL at 7.[3] The company significantly overhauled its repair, rebate, and internal reporting systems in early 1992 as a result of the "significant adverse findings" revealed by the audits and the statistical analysis. Obviously, as Commissioner Clark pointed out, these internal reviews had the business purpose of ensuring

[3] See In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. at 523 (technical documents prepared by employees were not privileged).

that the company complies with the rules promulgated by the Commission. It is inconceivable that the Commission, which is charged by the Legislature with protecting the public interest through delegation of broad, intrusive investigative powers, would be denied access to internal company review documents that reveal problems in its regulated operations. For example, the PSC Schedule 11 audit revealed "significant adverse findings" in the schedule 11 reports on file with the Commission; yet, the company has not filed corrected reports and refuses to release its own audit under a claim of privilege. How can the Commission fulfill its statutory mandate to protect Florida's citizens unless it can demand the release of business documents?

8. The company also argues for a liberal construction of the attorney-client privilege and work product doctrine. Commissioner Clark properly applied the narrow view to these privileges. Order No. PSC-93-0151-CFO-TL at 5-6. Because privileges hinder the search for truth and run counter to the liberal discovery rules, both federal and state courts narrowly construe privileges. See United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 604 & n.1 (D.C. 1979); In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. 515, 518 (N.D. Ill. 1990). As one federal district court noted:

> "[w]hen the privilege shelters important knowledge, accuracy declines. Litigants may use secrecy to cover up machinations, to get around the law instead of complying with it. Secrecy is useful to the extent it facilitates the candor necessary to obtain legal advice. The privilege extends no further."

In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. at 518 (quoting 8 Wigmore, Evidence § 2291 (McNaughten rev. 1961). Under federal law the attorney-client privilege is derived from the common-law; in Florida, it is derived from statute.[4] The application of the privilege in the administrative context, therefore, must balance the legislative policy supporting the privilege and the policy supporting regulation of monopolies in Florida. This balance necessitates a narrow application of the privilege.

9. The attorney-client privilege, a narrow exception to discovery, rests on a public policy of encouraging full and frank communications between attorney and client. International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (allowing party to withhold evidence in discovery but introduce it later at trial contravenes policy supporting privilege). This policy is only furthered if the following conditions are satisfied:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the

[4] Fla. Stat. s. 90.502 (1991 & 1992 Supp.)

benefit thereby gained for the correct disposal of litigation.

Id. at 186 (quoting Wigmore, Evidence § 2285 at 527; emphasis in original).

10. The Commission's duty to protect citizens from the potential evils of state-sanctioned monopolies[5] outweighs any purported benefits obtained from permitting a broad application of privilege to cover all communications from any employee within Southern Bell. See S.E.C. v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 686 (D.C. 1981) ("In this case, the Commission, as protector of the public interest, could possibly show good cause to justify disclosure of any privileged information obtained by Dolkart [corporate counsel]."). Applying Southern Bell's interpretation of privilege would deny the Commission access to the information it needs to make a factual determination of the company's compliance with statutes and rules. Whereas, a narrow application would permit monopolies to retain the privilege for documents that contain legal advice, while disclosing documents containing the factual information required by the Commission to carry out its statutory mandate. The company argues that a narrow application of the privilege would have a "chilling effect" on a company's willingness to conduct intensive internal reviews in the future. Southern Bell's Motion at 23, ¶ 36. On the contrary, until faced with a Commission investigation, the company showed no desire

[5] See City Gas Co. v. Peoples Gas Sys., Inc., 182 So. 2d 429, 432 (Fla. 1965) (noting that anti-monopoly statutes were created to prevent the deterioration of quality that results from monopolization of services).

to conduct an investigation. It's internal operational reviews were designed to give feedback of improper activities to the very mangers responsible for those activities and not to upper-level officers. See Mike Maloy's Direct Testimony filed on Nov. 16, 1992 in Docket No. 920260-TL, pp. 42-43, 49-50, & 52. Furthermore, the penalty for non-compliance with Commission rules overrides any possible chilling effect perceived by a narrow application of discovery privileges. The company has failed to show that the prehearing officer's application of the narrow view is an erroneous interpretation of law under the facts of this case.

11. The company argues that Commissioner Clark's ruling is without factual or legal support. The obverse is true. The company's claim of privilege for the withheld documents is unsubstantiated. The burden of proving the existence of a privilege rests with Southern Bell. Hartford Accident & Indemnity Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); International Tel. & Tel. Corp. v. Untied Tel. Co. of Fla., 60 F.R.D. 177, 184 (M.D. Fla. 1973) (stating that all elements of the privilege must be proven in order to substantiate a claim). Rather than address the specific elements of a claim of privilege, Southern Bell presented the prehearing officer with a conclusory statement of privilege. "A blanket assertion of the privilege is unacceptable." Hartford Accident & Indem. Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981). Southern Bell failed to show that the withheld documents were "communications" made by "clients" to in-house

counsel for the "purpose of securing legal advice" as established by section 90.502, Florida Statutes. The prehearing officer rightly rejected Southern Bell's conclusory allegations as being "hypertechnical rather than substantive." Order No. PSC-93-0151-CFO-TL at 6.

12. Southern Bell has failed to factually or legally demonstrate that the employees, who conducted the audit, were "clients" as defined under Florida law, or that the audits, statistical analysis, or panel recommendations were "communications" solely for the purpose of seeking legal advice. United States v. Moscony, 927 F.2d 742 (3d Cir. 1991) and Staton v. Allied Chain Link Fence Co., 418 So. 2d 404 (Fla. 2d DCA 1982) deal with oral or written statements of persons with personal knowledge of the events in issue, not with an after-the-fact internal audit of a company's business operations. Public Counsel is not seeking employee/witness statements in these motions. But see Citizens' Tenth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision with Supporting Memorandum of Law, Docket No. 910163-TL (Dec. 16, 1992) (decision pending). An in camera review confirmed the prehearing officer's finding that the documents did not contain privileged communications. The prehearing officer reasoned that the audits and statistical analysis were business documents, which were created for the purpose of ensuring compliance with Commission rules. Order No. PSC-93-0151-CFO-TL. As business documents, which did not contain

any legal advice, the prehearing officer determined that these documents were not privileged under either the attorney-client privilege or the work product doctrine. Id. Southern Bell has failed to show any error of fact or law in Commissioner Clark's reasoning.

13. Under Southern Bell's analysis, everything any employee relates to company counsel becomes privileged. Southern Bell's Motion at 6, ¶ 7. Upjohn teaches that under the federal common-law of privileges[6]: (1) employees' oral and written statements to a corporate attorney relating their witnessing bribes paid to foreign officials are privileged because the facts related in those statements, not the statements themselves, were disclosable in deposition; and (2) the definition of "client" extends beyond the "control-group" or decision-makers, to encompass any employee who has witnessed events within the scope of his employment and divulges that information to corporate counsel at the request of his superior for the purpose of obtaining legal advice. Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn is not dispositive because: (1) it is based on a judicially interpreted common-law of privilege and Florida's attorney-client privilege is statutorily created; (2) the audits and panel discipline recommendations were not oral or written communications relating events that the employees had witnessed, but were the product of data gathering,

[6] Federal Rule of Civil Procedure 501 expressly adopts the judicially expanded common-law of attorney-client privilege except where state law provides the rule of decision.

analysis, and application within the corporation's regulated operations as part of these regulated employees daily work; (3) the audits, statistical analysis, and the panel disciplinary recommendations were a routine business response to a monopoly's need to comply with the rules of its regulatory body; and (4) the facts contained in the audits, the statistical analysis, and the panel recommendations have been withheld from Public Counsel in deposition by corporate counsel's refusal to allow these employees to answer questions regarding the facts uncovered by their efforts.[7]

14. The U.S. Supreme Court's holding in Upjohn does not apply specifically because the Court was dealing with a factual situation in which the opposing party [IRS] had access to the names of the employee/witnesses, had received a summary of Upjohn's internal

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[7] Public Counsel deposed Ms. Shirley T. Johnson, the chief auditor; Ms. Etta Martin, a systems specialist who contributed to the audits; Mr. Danny L. King, the director of the statistical analysis; Mr. C.L. Cuthbertson, the personnel director in charge of the panel recommendations; and Mr. C.J. Sanders, the vice-president in charge of the disciplining of network employees. In all of these depositions, company counsel refused to allow employees to answer questions under a claim of privilege. See Citizens' Motion to Compel BellSouth Telecommunications' Operations Manager -- Shirley T. Johnson, and BellSouth Telecommunications' Human Resource Operations Manager Dwane Ward, to Answer Deposition Questions and Motion to Strike the Affidavits of Shirley T. Johnson, Docket No. 910163-TL (Oct. 23, 1992) (decision pending); Citizens' Motion to Compel BellSouth Telecommunications Vice President Network--South Area C.J. Sanders and BellSouth Telecommunications General Manager C.L. Cuthbertson, Jr., to Answer Deposition Questions, Docket No. 920260-TL (July 2, 1992) (decision pending). Once the transcript of the Martin/King deposition is available, Public Counsel will file a motion to compel these employees to answer deposition questions.

review,[8] and had not attempted to depose any of the employees/witnesses. Southern Bell has refused to provide the names of employees/witnesses[9] and refused Public Counsel access to the facts in depositions. Clearly, Upjohn does not apply. Southern Bell has failed to demonstrate any error of fact or law in the prehearing officer's reasoning that Consolidated Gas Supply Corporation, 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981) was more closely analogous to this case.

15. Commissioner Clark also determined that the panel recommendations on employee discipline were not entitled to the attorney-client privilege. Order No. PSC-93-0151-CFO-TL at 8-9. Southern Bell argues that its decision to proceed or not to proceed with the disciplining of employees is a privileged decision because the decision derived from allegedly privileged summaries of witnesses' statements. "This is plainly an unwarranted extension of the privilege." Cuno Inc. v. Pall Corp., 121 F.R.D. 198, 204

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[8] Southern Bell cites First Chicago Intern'l v. United Exchange Co. Ltd., 125 F.R.D. 55 (S.D.N.Y. 1989) in support of its claim of attorney-client privilege. Southern Bell's Motion at 11, P14 -15. In First Chicago, however, the work papers of the audit department were produced; the privilege was only asserted for the audits themselves. Southern Bell refused to produce not only the audits, but the work papers as well. The company also did not produce the work papers for the prehearing officer's review.

[9] The Commission upheld Public Counsel's right to the names of the employees interviewed in Order No. PSC-92-0339-FOF-TL, issued May 13, 1992. Southern Bell appealed that order to the Supreme Court of Florida. Southern Bell Tel. & Tel. Co. Petition for Review of Non-Final Administrative Action, Case No. 80,004 (filed June 10, 1992) (petition denied; Feb. 4, 1993).

(E.D.N.Y. 1988) ("Cuno cites no authority for the novel proposition it advances here; namely, that a decision of a company to proceed with or forego a certain course of action is itself privileged where that decision is in whole or in part based upon legal advice on the apparent theory that the decision itself necessarily reflects the advice."). Southern Bell has failed to demonstrate any error of fact or law in the prehearing officer's decision that the panel recommendations were non-privileged business documents.

16. Commissioner Clark found that these business documents were not attorney work product as none of the documents contain legal advice, opinion, strategy, or theory, and even if the documents had been attorney work product, Public Counsel had made the requisite showing of need to overcome the privilege. Order No. PSC-93-1051-CFO-TL at 7-9. Southern Bell has failed to demonstrate that the prehearing officer has made a mistake of fact or law. Southern Bell admits that none of the documents were prepared by an attorney. Southern Bell admits that none of the documents contain corporate counsel's mental impressions or legal reasoning. Rather, these documents contain facts revealing significant problems in Southern Bell's customer repair and rebate processes, which led personnel managers to discuss the disciplining of a large number of the company's network managerial and craft employees. See United States v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695, 697 (S.D. Fla. 1990) ("Facts gathered from documents by a party's representative are not protected as 'fact work

product.'"); In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. at 520 (finding that documents must not be solely concerned with "underlying evidence" but must contain legal advice, strategy, opinion, etc.). As Commissioner Clark determined, the company has an overriding business purpose in preparing these documents, which exempts them from work product protection. Id.

17. Even if these documents had qualified for limited protection as fact work product, the prehearing officer determined that Public Counsel had demonstrated sufficient need to overcome the protection. Order No. PSC-93-0151-CFO-TL at 8. Southern Bell dismisses the prehearing officer's finding that Public Counsel could not replicate the audits and statistical analysis because the complexity of the company's computer system cannot be replicated by any outside source. Southern Bell's Motion at 19 ¶ 30. As Public Counsel stated in its motion to compel, Southern Bell has sole control over the complex, integrated computer system and customer data required to produce these audits. This information is unavailable from any other source. See Xerox Corp. v. Internat'l Bus. Machines Corp. [IBM], 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974) ("A party should not be allowed to conceal critical, non-privileged, discoverable information, which is uniquely within the knowledge of the party and which is not obtainable from any other source, simply by imparting the information to its attorney and then attempting to hide behind the work product doctrine after the party fails to remember the information."). Southern Bell's claim

that Public Counsel did not provide sufficient proof of need is belied by the affidavit and the attachments[10] to his motion to compel. Southern Bell's cavalier dismissal of Public Counsel's showing of need is a mere rearguing of the facts. Neither the facts or case law[11] as interpreted by Southern Bell demonstrate any mistake of fact or law in Commissioner Clark's order.

18. Southern Bell's claim that it has provided Public Counsel with the substantial equivalent is also false. Without access to the computer system and data, Public Counsel cannot replicate these audits that took teams of auditors, systems staff, statistical staff, and network staff approximately seven months to complete.[12]

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[10] Southern Bell simply ignores the attachments submitted with Mr. Baer's affidavit. The company would have the Commission second guess the prehearing officer's finding of fact with only some of the facts in review. Even so, Mr. Baer's affidavit clearly demonstrates that Public Counsel is unable to obtain the substantial equivalent of the audits or the statistical analysis from any source other than Southern Bell.

[11] Publix Supermarkets, Inc. v. Kostrubanic, 421 So. 2d 52 (Fla. 1st DCA 1982) is inapposite as Public Counsel has deposed nearly 100 employees and is not seeking the documents in question to avoid the cost of depositions. Humana of Fla., Inc. v. Evans, 519 So. 2d 1022 (Fla. 5th DCA 1988) and Mount Sinai Med. Ctr. v. Schulte, 546 So. 2d 37 (Fla. 3d DCA 1989) are inapposite as both rest on the statutory exemption, s. 395.041(4), Florida Statutes, from discovery for hospital medical records. No such special exemption exists for personnel managers' notes.

[12] See Shirley T. Johnson's, chief auditor, deposition attached to Citizens' Motion to Compel BellSouth Telecommunications' Operations Manager -- Shirley T. Johnson, and BellSouth Telecommunications' Human Resource Operations Manager Dwane Ward, to Answer Deposition Questions and Motion to Strike the Affidavits of Shirley T. Johnson, docket No. 910163-TL (Oct. 23, 1992).

19. The panel recommendations are not work product. Southern Bell misapplies the law to the facts. The panel recommendations were not written by attorneys, but by personnel managers. The panel recommendations do not contain any legal advice or opinion. Order No. PSC-93-0151-CFO-TL at 8-9. Southern Bell implies that the panel recommendations are corporate counsel's summarization of employee interviews. Southern Bell's Motion at 24 n.3. This is not the case. Rather the panel recommendations were written by non-lawyer personnel managers. Order No. PSC-93-0151-CFO-TL at 8. Hence, Southern Bell's cases are not apposite. Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986) merely holds that corporate counsel cannot be compelled to disclose in deposition which documents he has selected in preparation of his case. Accord Spork v. Peil, 759 F.2d 312 (3d Cir. 1985). Shelton did not involve a company's refusal to produce documents, nor whether internal review documents, which were produced by non-legal employees, were covered by the work product doctrine.

20. Southern Bell also mischaracterizes the law of privilege by stating that the attorney-client privilege is absolute. Southern Bell's Motion at 12, ¶ 19. Under Florida law, the privilege may be waived and is not available to further a crime or fraud. Fla. Stat. s. 90.502. Southern Bell has waived the privilege as it relates to the panel recommendations by producing some of the personnel manager's notes to Public Counsel. See Citizens' Tenth Motion to Compel and Request for In Camera Inspection of Documents and

Expedited Decision with Supporting Memorandum of Law, Docket No. 910163-TL, 13-14 & attachments B, C, D (Dec. 16, 1992). Commissioner Clark did not address the question of waiver as she found that none of the documents were privileged.

21. The prehearing officer reached the correct legal decision. Southern Bell attempts to distinguish the case law cited in Commissioner Clark's order on the basis that the audits and statistical analysis would not have been done but for the request from corporate counsel. If carried to its logical conclusion, this reasoning would permit any monopoly to hide factual information of its compliance with Commission rules under the simple expedient of having corporate counsel ask for the information. This would permit the absurd result of monopoly utilities denying the Commission access to security investigations, financial reviews, or affiliated transactions that were suspect simply by having corporate counsel make a special request for information. This would turn the Legislature's delegation of regulatory oversight upside down. Monopolies would have the power to tell the Commission that, even though they have sole control over the information which revealed significant adverse findings, the Commission would have to simply take the company's word for it that no problem exists.

22. Southern Bell has failed to demonstrate any error of fact or law in the prehearing officer's order; therefore, its motion for

reconsideration should be denied. As Citizens' need this information to prepare their case, Citizens' ask the Commission to order Southern Bell to release all of the withheld documents immediately.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 12th day of February, 1993.

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