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June 11, 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. 920260-TL

Dear Mr. Tribble:

Enclosed are an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Fifth Motion to Compel which we ask that you file in the above-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 on the parties shown on the attached Certificate of Service.

Sincerely,

Sidney J. White, Jr.
Sidney J. White, Jr. (02)

ACK _____

AFA 1

APP _____

CAE 1
Enclosures

CMU _____

cc: All Parties of Record

CTR _____ A. M. Lombardo

E*3 _____ H. R. Anthony

LEG 1 _____ R. D. Lackey

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SEC 1

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OTH _____

DOCUMENT NUMBER-DATE

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11 83-RECORDS/REPORTING

CERTIFICATE OF SERVICE

Docket No. 920260-TL

Docket No. 900960-TL

Docket No. 910163-TL

Docket No. 910727-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this 11th day of June, 1993 to:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of)
the Revenue Requirements and Rate)
Stabilization Plan of Southern) Docket No. 920260-TL
Bell Telephone and Telegraph)
Company) Filed: June 11, 1993
_____)

SOUTHERN BELL TELEPHONE AND TELEGRAPH
COMPANY'S OPPOSITION TO PUBLIC COUNSEL'S
FIFTH MOTION TO COMPEL AND
MOTION FOR PROTECTIVE ORDER

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 Rule 1.280(c), Florida Rules of Civil Procedure and files (1) its Opposition to the Citizens' of Florida ("Public Counsel") Fifth Motion to Compel with regard to Public Counsel's Thirty-Fourth Request for Production of Documents, dated April 21, 1993, and (2) its Motion for Protective Order. In support of its Motion, Southern Bell shows the following:

MOTION FOR PROTECTIVE ORDER

1. Pursuant to Rule 25-22.006, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, Southern Bell moves the Prehearing Officer to issue a Protective Order directing that discovery not be had with respect to Public Counsel's original requests for documents, Request Nos. 478, 479, 480 and 481. As more specifically set forth herein, Southern Bell urges the Commission to balance public interest considerations against a purported need for these discovery

requests as currently framed and prohibit such discovery from being had. In the alternative, if the Commission decides that discovery is appropriate, Public Counsel should be directed to revise its discovery requests to conform to the specific issues in this docket.

2. On April 21, 1993, Public Counsel served its Thirty-Fourth Request for Production of Documents on Southern Bell. On May 24, 1993, Southern Bell responded to Public Counsel's discovery requests, objecting to document Request Nos. 478, 479, 480 and 481. The basis for these objections was that the requests were overly broad and burdensome, called for the production of information neither relevant to this docket nor reasonably calculated to lead to relevant and admissible information in this docket, and that production would breach the confidentiality assured to each employee who may have made a communication subject to Public Counsel's requests.

3. On June 4, Public Counsel filed its Fifth Motion to Compel responses to the above-referenced requests for documents. Southern Bell will address the various issues in the same order as they were raised in Public Counsel's motion.

4. Public Counsel first takes issue with Southern Bell's position that the definitions of the terms "document" and "documents" are overly broad and objectionable. However, Public Counsel fails to mention that despite making this objection, with the exception of the four requests substantively at issue as a result of Public Counsel's Motion to Compel, the Company either

produced or provided access to all of the documents which it in good faith found to be responsive to Public Counsel's requests contained in its Thirty-Fourth Request for Production of Documents. Consequently, this portion of Public Counsel's motion is moot. In Order No. PSC-93-0071-PCO-TL, issued January 15, 1993, addressing the identical issue, Commissioner Clark reached a similar conclusion, finding that Southern Bell had represented that it had made a good faith effort to produce all documents meeting the definition provided by Public Counsel. Order, at p. 4. The same is true in this case. Notwithstanding the breadth of the definition, Southern Bell hereby states that it has undertaken a diligent, good faith effort to produce all documents falling within the scope of Public Counsel's discovery requests. Nothing else is required, nor could be expected of the Company.

5. Next, Public Counsel takes issue with Southern Bell's general objection to Public Counsel's "instructions" regarding details of privileged documents. This objection is a standard one presented to make clear that, in certain cases, certain information related to privileged documents may also be privileged. This general objection merely reserves Southern Bell's right to withhold such information as appropriate; however, in this particular case, no documents have been withheld based on grounds of privilege. Therefore, this issue is also moot.

6. Finally, Public Counsel takes issue with Southern Bell's objections regarding requests for all records relating to any and all employee communications with the Company ombudsman's office via the ethics hotline and other related avenues of communications. Public Counsel's requests are not limited in any way to matters relevant to and admissible in this case, but rather seek production of all such contacts. These could include various irrelevant documents addressing such widely differing issues as sexual harassment, voucher fraud, discrimination, drug use, Acquired Immune Deficiency (AIDs) cases, salary issues, and other matters certainly worthy of Company investigation, but of no relevance to the instant rate case. Moreover, Public Counsel's belated attempt to cloak its overly broad document requests under a "quality of service" relevance standard supports Southern Bell's contention that the original requests were far too broad. Now, Public Counsel attempts to cure the deficiency by simply stating in its motion that "...information about ethics concerns and violations by Company employees...would likely affect quality of service." Motion at p. 6, paragraph 12.

As shown above, this logic is faulty. Not all these issues affect Southern Bell's quality of service. Thus, Public Counsel's requests seek Southern Bell to produce irrelevant documents. A few examples will illustrate this point. Public Counsel's Request Nos. 478, 479, 480 and 481, as framed, would call for the production of documents communicating information

relating to unethical sexual advances made against an employee in the workplace. This employee could likely have been in extremely sensitive internal situations that caused them to contact the confidential hotline. Another example is information relating to an employee who is alleged to have AIDS and workplace concerns relating thereto. This employee could likely have been in extremely sensitive internal situations that caused them to contact the confidential hotline. Another example is information relating to an employee who is alleged to have AIDS and workplace concerns relating thereto. Clearly, such matters may be of paramount importance to the affected employees and to the corporation. However, such documents clearly are irrelevant to this rate case, nor could they possibly lead to the discovery of relevant and admissible evidence in this case. Furthermore, Public Counsel did not frame its original document request in any way to limit its search to documents relating to or affecting "quality of service" as it now attempts to assert. Rather, Public Counsel has attempted a classic "fishing expedition." Its requests, however, are overly broad and objectionable.

7. An equally compelling reason to deny Public Counsel's motion is the effect a contrary ruling would have on the continued viability of BellSouth's corporate ombudsman's office. The BellSouth Office of Vice-President-Corporate Responsibility and Compliance is constituted as an independent and neutral entity within BellSouth Corporation and operates under an express promise to employees of the corporation that communications

between employees and members of the office will remain strictly confidential.¹ Moreover, the office operates to assure such confidentiality by inter alia, notifying callers to the ethics hotline that they are entitled to confidentiality of their communications and protection of their individual identities if so desired.

8. A Commission order compelling disclosure of the information communicated to BellSouth's ombudsman would destroy the reputation of that office by invading the principle of confidentiality that is the cornerstone of the office and which is absolutely necessary for its effective performance. It is the function of the ombudsman to receive, investigate and remedy workplace problems in a strictly confidential atmosphere. Without this confidentiality, the office would be just one more non-confidential opportunity for employees to air disputes. The ombudsman's office provides employees an opportunity for complete and unedited disclosure without the threat or fear of retaliation that may exist in other arenas. Wholesale compelled disclosure of this information would result in a chilling effect on internal communications vital to the goals of continuous corporate improvement and the internal policing of the Company's affairs. Such a result would be contrary to the public interest. This Commission has the obligation and responsibility to balance

¹ Typical of most, if not all, other corporate ombudsman offices, BellSouth advertises to its employees that their communications will be kept confidential. In fact, the Code of Ethics of the Corporate Ombudsman Association expressly provides for the confidentiality of such communications.

Public Counsel's purported need for this discovery against the overriding public policy supporting ombudsman programs and the extremely sensitive and important role they play for the corporation and society as a whole.²

9. BellSouth's office of the ombudsman actually serves to mediate and resolve disputed issues, virtually all of which are unrelated to this rate case. Moreover, since some of the documents created or statements made during such negotiations concern compromise of disputed issues, they constitute inadmissible evidence.³ Such information also cannot reasonably be expected to lead to the discovery of admissible evidence. Therefore, such documents and communications are not discoverable.⁴

10. Public Counsel states that, with respect to Southern Bell's confidentiality argument, existing Commission rules would adequately address the Company's concerns. This position totally disregards the fact that the confidentiality referred to by Southern Bell is the appropriately held perception by Company employees that there is a justifiable expectation of strict confidentiality of communications between these employees and the ombudsman's office. Any disclosure of the statements or other

² The resolution of problems informally is more desirable than other more formal procedures and can mitigate the chances for costly complaints, grievances and litigation regarding such issues.

³ Rule 90.408, Florida Rules of Evidence

⁴ Rule 1.280, Florida Rules of Civil Procedure

communications received by the ombudsman to anyone, be it Public Counsel or otherwise, would send the extremely destructive signal to Company employees that "confidential" does not really mean confidential. This would likely render the ombudsman program far less effective, with fewer employees taking advantage of it.

11. If a program promises confidentiality, and later it is found that such confidentiality does not exist, or that information discussed purportedly in confidence may be disclosed in legal proceedings, such employees are unlikely to trust the system and will abandon it.⁵ If this were to occur, the ironic result would be that information or communications that could be conveyed and used as a catalyst for positive improvement within the Company will not be communicated, and this vehicle for informal and timely responses to a broad array of workplace problems and issues will be disabled.

⁵ In some respects, employees may reasonably believe that such communications are tantamount to being privileged. In fact, in other jurisdictions, several cases have applied the Federal Rules of Evidence and have found that confidential communications made to company ombudsmen are protected from disclosure. Kientzy v. McDonnell Douglas Corporation, 133 FRD 570 (ED Mo. 1991); Monoranjan Roy v. United Technologies Corp., Civil Cause No. H89-680 (JAC) (D. Conn. 1990). These cases are instructive and discuss the four factors to be considered in determining whether to grant or deny discovery of ombudsman materials. The four factors are: 1) whether the parties believed that the communications were confidential; 2) the need for confidentiality; 3) whether society would recognize the value of the confidential relationship, and 4) a comparison of the benefits of disclosure compared to the corresponding injury that might result.

CONCLUSION

The Commission has the discretion, and should exercise it in this case, to issue an order denying discovery in the manner sought by Public Counsel, and to require Public Counsel to pose alternative discovery if necessary to address relevant issues in this docket without invading the sanctity of the office of the ombudsman.

WHEREFORE, Southern Bell respectfully urges the Commission to deny Public Counsel's Motion to Compel, consistent with the arguments made above, and to grant the Company's Motion for Protective Order urging that discovery not be had in the manner requested. In the alternative, if the Commission decides that discovery is appropriate, Public Counsel should be required to revise its discovery requests to conform to the specific issues in this docket.

Respectfully submitted this 11th day of June, 1993.

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