

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition on Behalf of Citizens of the State of Florida to Initiate Investigation into the 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 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., Rebates.)	DOCKET NO. 910727-TL ORDER NO. PSC-93-0263-PCO-TL ISSUED: 2-19-83

PRELIMINARY ORDER GRANTING PUBLIC
COUNSEL'S MOTIONS FOR IN-CAMERA INSPECTION
OF DOCUMENTS AND GRANTING IN PART
PUBLIC COUNSEL'S MOTIONS TO COMPEL

In the above-styled consolidated dockets, Citizens of the State of Florida (Public Counsel) has filed a number of Motions To Compel and BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (Southern Bell) has filed oppositions thereto. As relevant to this Order, they are listed as follows:

Public Counsel's Motion To Compel (filed May 21, 1992)
Southern Bell's Opposition (filed May 28, 1992)

Public Counsel's Ninth Motion To Compel (filed October 8, 1992)
Southern Bell's Opposition (filed October 20, 1992)

The first of the above-listed motions concerned witness statements and summaries sought in Public Counsel's 22nd Request For Production of Documents. The second listed motion concerned statements and summaries of statements sought in Item 6 of Public Counsel's 27th Request for Production and Items 8 and 9 of Public Counsel's 28th Request for Production.

DOCUMENT NUMBER-DATE

01954 FEB 1983

FPSC-RECORDS/REPORTING

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By order of Commissioner Susan F. Clark, as Prehearing Officer, the relevant documents were delivered to the Commission for in-camera inspection on February 3-5, 1993. The documents produced by Southern Bell were contained in four boxes labeled "Box 1A," "Box 1B," "Box 1C," and "Box 2." The decision on whether the attorney-client privilege, work-product privilege or both apply to these materials, which in the main, consists of statements and summaries of those statements, is reserved pending the issuance of a further order addressing that question. However, as discussed below, it is determined as a preliminary matter that the facts of the identities of those making the statements and the general areas of knowledge of those individuals regarding repair service activities, possible misbillings and compliance with Commission rules on rebates are not immune from discovery under either the attorney-client or work-product privilege and must, accordingly, be disclosed.

I. Attorney-Client Privilege

Communications between attorneys and their clients are shielded from discovery under Florida Rule of Civil Procedure 1.280(b)(1); see §90-502 Fla. Stat. The elements required for the privilege to be invoked include: (1) a communication made in confidence, (2) by one who is a client, (3) seeking legal advice from an attorney, and (4) the communication is requested to be kept confidential and such privilege has not been waived. International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 184-5 (M.D. Fla. 1973).

In Upjohn Co. v. United States, 449 US 383, 66 L.Ed 2d 584, 101 S. Cit. 637 (January 13, 1981), the company's general counsel investigated questionable payments made by company employees to foreign officials by means of questionnaires sent to the employees. The United States Supreme Court held the communications from the employees to the general counsel exempt from discovery under the attorney-client privilege, even though the employees were not part of the company's "control group." However, the Court stated that the privilege applied to communications, not to the underlying facts. 449 U.S. 395-6. The Court noted the fact that the special agents conducting the investigation were given a list of all those interviewed and all those who responded to the questionnaire, thereby allowing the Internal Revenue Service to discover the facts without requiring the disclosure of the privileged communications.

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With this in mind, though the decision on whether the statements and summaries themselves are privileged under the attorney-client privilege is reserved pending a further order addressing that issue, it is determined that the identities of those making the statements and the general areas of knowledge of those individuals regarding repair service activities, possible misbillings and compliance with Commission rules on rebates are not privileged. Upjohn, supra.

II. Work-Product Privilege

Disclosure of the identities of those making the statements and the general areas of knowledge as described above are also not privileged from discovery as work-product under the doctrine of Hickman v. Taylor, 329 US 495 (1974), or this Court's decision in Surf Drugs, Inc. v. Verrette, 236 So. 2d 108 (Fla. 1970). Again, this conclusion is announced as a matter preliminary to the issue of whether the work-product privilege protects the statements and summaries in their entirety from discovery, which will be addressed in a subsequent order.


The basis for this preliminary conclusion is that the issues of whether the identities of the individuals making the statements and the general areas of knowledge of those individuals are privileged has been decided by the Florida Supreme Court in an order issued February 4, 1992. Southern Bell petitioned the Florida Supreme Court for review of a Commission order requiring Southern Bell to identify persons with knowledge of specific categories of information. The Court denied Southern Bell's petition, thus agreeing the information was not privileged.

In view of the above, it is

ORDERED that the identities of those making the statements inspected in-camera February 3-5, 1993, and the general areas addressed therein be disclosed.

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BY ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 19th day of February, 1993.


SUSAN F. CLARK, Commissioner
and Prehearing Officer

RCB

(S E A L)
CIT1.MRD

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearings or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.