

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition on Behalf of) DOCKET NO. 910163-TL
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.)
)
In Re: Comprehensive Review of) DOCKET NO. 920260-TL
the Revenue Requirements and)
Rate Stabilization Plan of)
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY.)
)
In Re: Show cause proceeding) DOCKET NO. 900960-TL
against SOUTHERN BELL TELEPHONE)
AND TELEGRAPH COMPANY for)
misbilling customers.)
)
In Re: Investigation into) DOCKET NO. 910727-TL
SOUTHERN BELL TELEPHONE AND) ORDER NO. PSC-93-0294-PCO-TL
TELEGRAPH COMPANY'S compliance) ISSUED: 02/23/93
with Rule 25-4.110(2), F.A.C.,)
Rebates.)
)

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

In the above-styled consolidated dockets, Public Counsel has filed a number of Motions To Compel (and Motions For In-Camera Inspection of Documents) and 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 7th Motion To Compel (filed July 23, 1992)
Southern Bell's Opposition (filed August 4, 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 and worknotes prepared by Human Resources

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representatives concerning craft/management discipline issues relating to repair service matters sought in Public Counsel's 22nd Request For Production. The second listed motion concerned a statistical analysis performed under the direction of D. L. King sought in Item 10 of Public Counsel's 24th Request for Production. The third 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.

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 were contained in four boxes labeled "Box 1A," "Box 1B," "Box 1C," and "Box 2." Boxes "1A", "1B" and "1C" contained statements and summaries, along with other appended material of a routine business nature, as discussed below, whereas "Box 2" contained the statistical analysis and worknotes prepared by Human Resources representatives concerning craft/management discipline issues relating to repair service matters.

Based on a review of the legal authorities cited by the parties and after inspection of the documents at issue, Public Counsel's Motions To Compel are granted. As discussed below, the documents reviewed are found not to be privileged from discovery under either the attorney-client or work-product doctrines.

I. Statements and Summaries

A. 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). The party asserting the privilege has the burden of establishing the existence of the privilege, Id. at 184.

Southern Bell has, in its oppositions at issue, relied on a purported direct analogy with the facts in Upjohn Co. v. United States, 449 US 383, 66 L.Ed 2d 584, 101 S. Cit. 637 (January 13,

1981). Therein, an investigation involving privileged communications between company employees and the general counsel was held not restricted to a "control group." Thus, Southern Bell reasons that its in-house investigation of operations which are the subject of the four investigation dockets in this case are privileged under the attorney-client doctrine.

The Commission has recently rejected this analysis, Order No. PSC-93-0151-CFO-TL, and that analysis is again rejected here. A major insufficiency in it is Southern Bell's claim that its in-house investigation was undertaken solely to obtain legal advice and would not otherwise have been initiated. That claim is facially at odds with Southern Bell's ongoing responsibilities as a regulated utility, rules 25-4.070(2), 25-4.108, 25-4.019, especially where its specific operations subject to those rules have been under investigative scrutiny by a number of different state agencies and this Commission as well. Moreover, Southern Bell itself more realistically related its in-house investigation to the need to find improper acts and correct them. Motion For Review [of Order PSC-93-0151-CFO-TL] filed February 5, 1993, at p. 23.

Numerous cases have held that, where other factors such as business goals led to the creation of documents, the attorney-client privilege is inapplicable. See, e.g., First Chicago International v. United Exchange Co., Ltd., 125 F.R.D. 55, 57 (S.D.N.Y. 1989) (Communication between a corporate employee and corporate counsel will only be subject to the privilege if "the communications would not have been made but for the pursuit of legal services").

In Consolidated Gas Supply Corporation, 17 F.E.R.C. ¶63,048 (December 2, 1981) which, unlike Upjohn, did involve regulated entities, the motions judge rejected attorney-client privilege for documents not containing a specific request for legal advice. Id., at 65, 241 (No. 53). In contrast, as Southern Bell has often indicated, attorney-client privilege has been sought for Southern Bell's documents only in the context of its "privileged investigation", not because the documents themselves contain privileged material on their face. See, e.g., ¶30, p. 16 of Southern Bell's Opposition To Public Counsel's Ninth Motion To Compel.

The more narrow view in Consolidated is applicable in the regulatory context, rather than Southern Bell's broad-brush claim of privilege. In Consolidated, the judge avoided

"an overly broad corporate information shield in theory as well as in fact by allowing for excision of a document to permit discovery only of factual matters. (Citations omitted) (Similar conclusions apply with respect to work-product)."

Id., at p. 65, 237.

The Consolidated judge considered a narrow view of the attorney-client privilege to be consistent with the F.E.R.C.'s "continuing obligation" and "duty to protect the public interest". Id., at p. 65, 237-8.

Finally, the attorney-client privilege in Florida is statutory and cannot be considered to be more absolute than such statutes as §364.01(3) and 350.117(1), which provide this Commission with broad investigative powers with respect to utilities such as Southern Bell. A narrow view of the attorney-client privilege which accommodates the Commission's regulatory responsibilities is in accord not only with the cases cited, but also with the favored principle of statutory construction that gives each statute a field of operation. Carawan v. State, 315 So. 2d 161 (Fla. 1987). Southern Bell's insistence on a broad and absolute application of the privilege is inconsistent with that principle as is its over-reliance on Upjohn, where no monopoly provider with regulated rates and service was at issue. See also, In re Notification to Columbia Broadcasting System Concerning Investigation by CBS of Incidents of "Staging" by its Employees of Television News Programs, 45 F.C.C. 2d, 119 (1973) (CBS):

we cannot permit this process to be frustrated by a statement that employees were interviewed by corporate or outside counsel and the claim that these statements are therefore protected against Commission inquiry ... [W]e do not think assertion of such a privilege in this context is compatible with a licensee's duty to be forthcoming with information relevant to its operation under the statutory public interest standard.

Id., at p. 123.

B. Work-Product Privilege

With respect to the work-product privilege, this case is easily distinguished from not only Upjohn and Hickman v. Taylor, 329 US 495 (1947), but also Consolidated. Therein, access to statements was typically denied because the "identity [of those who made the statements] was well known and [their] availability to petitioner appear[ed] unimpaired". Hickman, supra at 508. Thus, discovery could be obtained through deposition, without need for the statements.

In contrast, Southern Bell has declined to answer interrogatories which could have made relevant employees readily available for deposition. Whether or not so intended, this has delayed discovery in this case. Only recently, the Florida Supreme Court denied Southern Bell's Petition for Review of the Commission's orders requiring Southern Bell to answer these interrogatories. Case No. 80,004, February 4, 1993.

In this connection, it is noted that the Commission has requested the same discovery as the Public Counsel. Southern Bell has not explained why this Commission, any more than the FCC in CBS, supra, should "accede to a blanket claim of confidentiality", id., at p. 123, given the statutory authority cited earlier and Southern Bell's responsibility to be forthcoming as to its adherence to Commission rules.

Southern Bell agreed at the prehearing conference¹ that the Commission could request the same investigation Southern Bell has already performed. Thus, the broad assertion of work-product privilege for it may simply amount to a claim that ratepayers must fund the same investigation twice if they are to share with Southern Bell the benefits of finding out what, if anything, went wrong and how to correct it. This is not only imprudent, but would serve to frustrate the Commission's ability to regulate in the

¹ Prehearing conference, 1/8/93, p. 28-29. Commissioner Clark: Let's assume ... we direct you to conduct an audit to determine the accuracy of your Schedule 11 audits. You can use what you've already done or you can do it again. Mr. Anthony: ... And if you were to order us to take that choice, we would have to go out and redo the audit.

public interest. Therefore, relying, inter alia, on CBS, it is rejected.²

II. Statistical Analysis

A. Attorney-Client Privilege

On p. 8, ¶15, 16 of its opposition to Public Counsel's 7th Motion To Compel, Southern Bell admits that legal opinions per se are not evident on the face of these documents. Therefore, in accord with a narrow view of the attorney-client privilege, discussed in Section I.A., supra, and the concurrent business purpose for Southern Bell's internal auditing of its repair operations, Order No. PSC-93-0151-CFO-TL, p. 4-8, no attorney-client privilege from discovery is found.

B. Work-Product Privilege

Based on the same analysis found at Order No. PSC-93-0151-CFO-TL, p. 7-8, including the concurrent business purpose of Southern Bell's internal audits, these business documents are not privileged under the work-product doctrine. Soeder v. General Dynamics, 90 F.R.D. 253 (1980). Moreover, given the practical impossibility of replicating an equivalent, Public Counsel has demonstrated sufficient need for the material to overcome that privilege, if applicable. Transcontinental Gas Pipe Line Corp., 18 F.E.R.C. ¶63,043, (Feb. 9, 1982).

III. Worknotes of Human Resources Representatives Concerning Craft/Management Discipline Issues

A. Attorney-Client Privilege

Upon inspection, these documents appear to lack either legal advice or requests for legal advice. For reasons earlier stated in Section I.A., supra, Southern Bell's assertion of attorney-client privilege as to these business documents based on a broadly inclusive theory of "privileged investigation" is rejected.

² The statements and summaries which have been found non-privileged in section I of this order also contain numerous attachments of routine business documents. Those attached documents are also found to lack any privilege from discovery.

B. Work-Product Privilege


The claim of work-product privilege for these documents is rejected. As discussed in Section I.B., supra, the work-product privilege cases relate the availability of the privilege to a willingness on the part of those asserting the privilege to allow discovery to proceed by other means. This, Southern Bell has been unwilling to do. Southern Bell Telephone and Telegraph Co. v. Thomas M. Beard, etc. et al., Case No. 80,004 (Fla. 1993).

Moreover, the business nature of the documents, evident in their description and on inspection, would preclude a claim of work-product privilege. Soeder v. General Dynamics, 90 F.R.D. 253 (1980).

In view of the above, it is

ORDERED that the above-described materials for which the attorney-client and work-product privileges for exemption from discovery have been claimed, be provided by Southern Bell to Public Counsel.

BY ORDER of Commissioner Susan F. Clark as, Prehearing Officer, this 23rd day of February, 1993.


SUSAN F. CLARK, Commissioner
and Prehearing Officer

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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 hearing 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 wastewater 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.