

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
)
) Date Filed: April 8, 1992
)

**CITIZENS' MOTION TO COMPEL
AND REQUEST FOR ORAL ARGUMENT**

The Citizens' of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, move the Commission to order BellSouth Telecommunications, Inc., doing business as Southern Bell Telephone and Telegraph Company ("Southern Bell"), to fully answer our twenty-first production of document request, item number 2, dated February 19, 1992.

Background

On February 19, 1992 Citizens' served our twenty-first production of documents request on Southern Bell. Item 2 requested the production of the September 1991 MOOSA (Mechanized Out-of-Service Adjustment) audit. MOOSA is the automatic rebating process for customer trouble reports that exceed 24 hours. See Fla. Admin. Code R. 25-4.110(2) ("Each company shall make appropriate adjustments or refunds where the subscriber's service is interrupted by other than the subscribers's negligent or willful act, and remains out of service in excess of twenty-four (24) hours after the subscriber notifies the company of the interruption."). Southern Bell filed its response and objections to the twenty-first production of documents request on March 25,

1992. Southern Bell claimed that the attorney-client privilege protected this document from discovery.

Relief Requested

Pursuant to section 350.0611, Florida Statutes, and Rule 1.280, Florida Rules of Civil Procedure, the Citizens move this Commission to compel Southern Bell to produce the September 1991 MOOSA audit, which has been withheld under a claim of attorney-client privilege. The Citizens request the Commission to conduct an in camera inspection of this audit under Florida Rule of Civil Procedure 1.280(c); and to conduct a hearing on the issues raised under Florida Administrative Code Rule 25-22.034.

Public Counsel, as statutory representative of the Citizens of Florida, has the right and obligation to appear in Commission proceedings and to conduct discovery subject to protective orders of the Commission, which are reviewable by the circuit court. Fla. Stat. § 350.0611 (1991).

The Citizens believe that the substantial, unwarranted and impermissible withholding of relevant documents and information, if sanctioned by the Commission, will constitute a denial of due process by preventing the adequate preparation of our case.

General Objections Subject to the Motion to Compel

Southern Bell objected to the production and consequently withheld the September 1991 MOOSA audit based on a claim of attorney-client privilege. The company has the burden of

establishing to the satisfaction of this Commission that the audit meets the legal standard for the claim. The attorney-client privilege should be narrowly construed in the regulatory context. See Consolidated Natural Gas Supply Co., 17 F.E.R.C. ¶ 63,048, 65,237-38 (Dec. 2, 1981) (commission's duty to protect the public interest is balanced with protection of a company's interests by a narrow application of the privilege). General conclusory statements will not suffice.

The Legislature granted the Commission broad investigatory powers in the performance of its statutory duty to regulate monopoly telephone companies. Fla. Stat. § 364.18 (1991) ("The commission, or any person authorized by the commission, may inspect the accounts, books, records, and papers of any telecommunications company; however, any person, other than a commissioner, who makes a demand for inspection of the books and papers shall produce in writing his authority from the commission."). Discovery proceeds according to the Florida Rules of Civil Procedure. Id. § 364.183(2). "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action. . . ." Fla. R.C.P. 1.280(b)(1) (emphasis added). Privileges are statutorily defined. See Fla. Stat. § 90.502 (attorney-client).

Any party resisting discovery may seek a protective order. Id. 1.280(c); Fla. Admin. Code R. 25-22.006. Confidential proprietary business information is exempt from the public records law. Fla. Stat. § 350.121. Internal audits are

proprietary confidential business information, which are expressly exempt from the public records law. Id. § 364.183(3)(b).

If the document meets the statutory definition of an "internal audit", the Commission may issue a protective order, which would allow the limited production and use of the audit by Citizens. Citizens would have the information they need to prepare their case; Southern Bell's business interests would be protected.

On its face, the attorney-client privilege does not apply to this business document and should, therefore, be denied. Southern Bell has sole control of the customer trouble reporting data base, the rebate/refund data base and the computer system by which this data is processed and analyzed. Allowing Southern Bell the discretion to disclose only that information that is helpful to its case while refusing to disclose that information that is harmful would be a denial of Citizens' due process and in contravention to the liberal discovery rules adopted by this Commission.

Citizens request this Commission to compel Southern Bell to produce the September 1991 audit immediately.

Attorney-Client Privilege

In Florida, the attorney-client privilege is derived from statute, not common-law. Corry v. Meggs, 498 So.2d 508 (Fla. 1st DCA 1986) (codified at § 90.502, Fla. Stat.), review denied, 506 So. 2d 1042 (Fla. 1987). The statutory privilege for

confidential communications does not encompass the work product privilege. City of Williston v. Roadlander, 425 So. 2d 1175 (Fla. 1st DCA 1983) (finding that work product privilege does not preclude access to city hospital's documents subject to disclosure under the public records law). In the absence of Florida case law on point, state courts may turn to federal decisions as persuasive. Id. at 510.

The attorney-client privilege applies to corporations. UpJohn v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1981) (holding that communications by UpJohn employees, who were outside the managerial group but who were communicating to the "in-house" counsel at the direction of superiors and whose responses were within their scope of duties, were protected by the attorney-client privilege). The privilege protects the communication not the underlying facts. Id.; In Re: Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984) ("[I]t is important to bear in mind that the attorney-client privilege protects communications rather than information; the privilege does not impede disclosure of information except to the extent that that disclosure would reveal confidential communications." citation omitted). "When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved." Hardy v. New York News, Inc., 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987).

The objecting party has the burden of establishing the existence of the privilege. Hartford Accident & Indemnity Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); International Tel. & Tel. Corp. v. United 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).¹ Only if clearly shown does the moving party have to demonstrate need to overcome the privilege. Id. Black Marlin Pipeline Co., 9 F.E.R.C. ¶63,015, 65,085 (Oct. 18, 1979) (applying 'narrow application' of privilege to deny a claim of privilege to an attorney's handwritten notes and memoranda where "advice - generating request for comments was also made to non-lawyer corporate officers.")

A final determination of privilege for the internal audit must be made by the Commission, not by the party asserting the privilege. The Commission can only determine the existence of a privilege after a careful examination and narrow application of the law to the specific documents in an in camera inspection. Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d DCA 1983) (directing the trial court to conduct an in camera inspection of documents it had decided, without inspection, were

¹ The elements of the attorney-client privilege are: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." International Tel. & Tel. Corp., 60 F.R.D. at 184-85 n.6, quoting 8 Wigmore, Evidence § 2292 at 554 (McNaughton rev. 1961).

not privileged as a matter of law). "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 Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (emphasis in original).

Southern Bell did not furnish the information requested by Citizens when making their claim of privilege. Citizens requested the sender, the recipients, the recipients of copies, and the basis upon which the privilege is claimed. This information is requested in order for Citizens and a reviewing tribunal to make an initial determination of whether the privilege applies to the documents or communication in question. The lack of this information mandates an in camera inspection of the audit. See generally Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 664-65 (S.D. Ind. 1991).

The attorney client privilege does not apply to documents prepared for a business purpose,² to preexisting documents that would have been subject to disclosure when in the possession of the client (client cannot make unprivileged documents privileged

² Skorman v. Hovnanian of Fla., Inc., 382 So. 2d 1376, 1378 (Fla. 4th DCA 1980) (acting as escrowee in real estate transaction would not render communication privileged, but preparation of agreement, which involved legal advice, would).

by handing them over to his attorney),³ when the advice of the attorney is sought in furtherance of a crime or fraud,⁴ or to the extent that the attorney acted in a non-legal capacity.⁵

The Commission should compel Southern Bell to produce this audit. Internal audits are routine business procedures designed to evaluate and examine the adequacy and effectiveness of internal controls and the quality of the performance of assigned functions within the company. As such, internal audits may qualify for proprietary treatment but not qualify as a privilege from discovery. Southern Bell produced copies of an internal audit of its MOOSA function conducted on October 1989, under a temporary protective order. [Response to Citizens' 7th

³ Paper Corp. of America v. Schneider, 563 So. 2d 1134 (Fla. 3d DCA 1990) (turning over financial records to accountant did not shield records under accountant-client privilege); Tober v. Sanchez, 417 So. 2d 1053, 1055 (Fla. 3d DCA 1982), (finding that employee-prepared internal accident reports, which were subject to disclosure under the public records law, did not become privileged by transferring them to an attorney) review denied, 426 So. 2d 27 (Fla. 1983); Goldberg v. Ross, 421 So. 2d 669 (Fla. 3d DCA 1982) (judgment debtor's trust fund records held by attorney not privileged); but see Briggs v. Salcines, 392 So. 2d 263 (Fla. 2d DCA 1980) (tape recordings, which were privileged in hands of defendant under fifth amendment protection against compelled testimony of incriminating nature, were likewise privileged when transferred to attorney), pet. for review denied, 397 So. 2d 799 (Fla.), cert. denied, 454 U.S. 815 (1981).

⁴ See Florida Mining & Minerals Corp. v. Continental Cas. Co., 556 So. 2d 518, 519 (Fla. 2d DCA 1990) (prima facie evidence that petitioners affirmatively sought the advice of counsel to procure fraud is prerequisite to invoking crime-fraud exception); see also United States v. Zolin, 491 U.S. 554 (1989) (contents of the documents can be used to support independent evidence of the crime or fraud).

⁵ Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 671 (S.D. Ind. 1991) (legal advisor also acting as claims adjuster, claims process supervisor, and investigation monitor).

Production of Documents Request, Item 4, and Staff's 3d
Production of Documents Request, Item 7] The September 1991
MOOSA audit, like its predecessor, may qualify for proprietary
treatment, but not be privileged.

An audit of the company's rebate system must of necessity
examine customer trouble reports, the coding for those reports,
and the handling--manual or automatic--of credits to customers'
bills. Manifestly, the internal audit⁶ contains information
relevant to a central issue in this docket: whether Southern
Bell employees systematically falsified out-of-service repair
records thereby circumventing rebates to customers. If the
Commission finds that extraneous communication between the
attorney and non-legal employees are so entwined within the audit
to render it privileged, then Citizens' move the Commission to
order a copy, with those protected communications redacted, be
produced. If the information contained in this audit proves this
allegation and the Commission finds the entire document
privileged, then Citizens move the Commission to strike any
affirmative defense raised on this issue. Fla. Stat. § 90.510
(1991); see Affiliated of Fla., Inc. v. U Need Sundries, Inc.,
397 So. 2d 764 (Fla. 2d DCA 1981) (authority to strike defenses
relating to claim of attorney-client privilege did not exist
under pre-code law).

⁶ The company's internal investigation into the issues
involved in this case may merit a claim of work product
privilege. See Anchor Nat'l Fin. Servs., Inc. v. Smeltz, 546 So.
2d 760 (Fla. 2d DCA 1989) (finding internal investigation into
allegation of employee fraud was protected work product).

The internal audit was not a communication between the managerial staff and the staff attorney for the purpose of seeking legal advice, but rather a written employee (nonattorney) factual analysis of an investigation into the company's rebate procedures performed at the request of an attorney. [Southern Bell Telephone and Telegraph Company's Responses and Objections to Citizens' 21st Set of Request for Production of Documents and motion for a Temporary Protective Order, 3B, p. 3 (March 25, 1992)] As such, Southern Bell might claim a privilege for work product, but not the attorney client privilege.

Work Product Privilege

The Supreme Court of Florida has stated that the purpose of the discovery rules is to expedite the search for relevant facts, to facilitate trial preparation, and to assist the court in its search for truth and justice by eliminating gamesmanship, surprise and legal gymnastics as determining factors in litigation. Dodson v. Persell, 390 So. 2d 704 (Fla. 1980) (holding that surveillance films are not privileged when they will be used as evidence or, if the films are unique, when they are materially relevant and unavailable). The Supreme Court of Florida relied on federal precedent set by the United States Supreme Court decision in Hickman v. Taylor, 329 U.S. 495 (1974) as authority for claims based on the work product privilege. Hence, the work product privilege is derived from judicial rule and state case law, not statute. Fla. R. Civ. P. 1.280(b)(2).

The work product doctrine protects an attorney's mental impressions, investigative materials, legal theories, and personal notes from discovery when prepared in anticipation of litigation by an attorney or an employed investigator at the direction of a party. Id.; accord Reynolds v. Hofmann, 305 So. 2d 294 (Fla. 3d DCA 1974) (categorizing attorney's views of the evidence, witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts as work product). "The general rule for determining whether a document can be said to have been 'prepared in anticipation of litigation' is whether the 'document can fairly be said to have been prepared or obtained because of the prospect of litigation, . . . [and not] in the regular course of business. 8 Wright & Miller, Federal Practice & Procedure: Civil § 2024 (1970)." Carver v. Allstate Ins. Co., 94 F.R.D. 131 (1982); but see Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 661-622 n.2 (S.D. Ind. 1991) (disagreeing with the Carver court and concluding that documents prepared for the concurrent purposes of litigation and business "should not be classified as work product").

Work product is a more limited privilege than the attorney-client privilege. Work product only gives a qualified immunity from discovery for documents and tangible things prepared in anticipation of litigation by the attorney or at the attorney's request. Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188 (Fla. 1st DCA 1985). The attorney may be required to disclose the existence of privileged material, but not its contents, unless an

adverse party shows need and an inability to obtain the materials from other sources without undue hardship. Alachua Gen. Hosp. v. Zimmer USA, Inc., 403 So. 2d 1087 (Fla. 1st DCA 1981) (holding that work product immunity attaching to information in initial wrongful death suit carried forward to subsequent litigation); Fla. R. Civ. P. 1.280(b)(2); accord Transcontinental Gas Pipe Line Corp., 18 F.E.R.C. ¶ 63,043 (Feb. 9, 1982) (finding that materials that were related to the issue, which were prepared at the direction of counsel, were discoverable by the adverse party because the materials could not be duplicated without undue hardship).

The objecting party has the burden of first showing the existence of the privilege. Hartford Accident & Indem. Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981). Only if clearly shown does the moving party have to demonstrate need to overcome the privilege. Id.; accord Black Marlin supra at 65,088 (material written by non-attorney at request of attorney does not automatically make it privileged work product). Southern Bell has not yet claimed work product protection for the September 1991 MOOSA audit. If Southern Bell should choose at this point to do so, the Commission should review the document to determine whether it qualifies for even this limited privilege. Austin v. Barnett Bank of So. Fla., 472 So. 2d 830 (Fla. 4th DCA 1985) ("Where a claim of privilege is asserted, the trial court should hold an in camera inspection to review the discovery requested and determine whether assertion of the privilege is valid.").

Florida courts have distinguished between fact and opinion work product. E.g., State v. Rabin, 495 So. 2d 257 (Fla. 3d DCA 1986) (holding that attorney's fact work product was discoverable after the case terminated). "Generally, fact work product is subject to discovery upon a showing of 'need,' whereas opinion work product is absolutely, or nearly absolutely, privileged." Id. at 262; see Levingston v. Allis-Chalmers Corp., 109 F.R.D. 546 (S.D. Miss. 1985) (extending perpetual protection to opinion work product, but not fact work product, used in prior, terminated and unrelated cases).

Several exceptions to the work product doctrine exist: (1) opinion work product used by an expert witness in formulating his opinion or testimony is discoverable on the basis of need of the opposing party to prepare for effective cross-examination;⁷ (2) materials used by an opposing party to cross-examine or impeach a witness is discoverable to further effective cross-examination

⁷ Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983); Zuberbuhler v. Division of Admin., 344 So. 2d 1304 (Fla. 2d DCA 1977) (permitting discovery of opposing party's expert witness's evidentiary opinions while protecting expert's non-evidentiary opinions promotes fairness through encouraging settlements by exposing both parties strengths and weaknesses and by providing a more thorough examination of expert witnesses for the jury), cert. denied, 358 So. 2d 135 (Fla. 1978); but see Hamel v. General Motors Corp., 128 F.R.D. 281 (D. Kan. 1989) (concluding that opinion work product used by expert in preparation of testimony was not discoverable as the adverse party could not meet the "substantial need" test as the party failed to show that the expert was influenced by the documents in the development of his opinion or preparation for testimony).

and rebuttal;⁸ (3) work product protection may be waived by disclosure;⁹ and documents concurrently created for business purposes are discoverable.¹⁰

Internal audits are created for business purposes. Audits are designed to examine and evaluate company practices and procedures with an eye toward improving service and maintaining compliance with Commission rules. As such, the MOOSA audit is a business document that cannot be afforded work product protection merely because the company states that it was run as a special request from in-house counsel. See Soeder v. General Dynamics Corp., 90 F.R.D. 253, 255 (D. Nev. 1980) (company's in-house air crash accident report, while prepared in anticipation of litigation, was equally spurred by a desire to improve the quality of its product, to protect future passengers, to avoid adverse publicity, and to promote its own economic interests); cf. Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188, 1193 (Fla. 1st DCA 1985) (scientific and technical documents prepared in

⁸ Mims v. Casademont, 464 So. 2d 643 (Fla. 3d DCA 1985) (holding that reports prepared by experts expected to testify at trial were discoverable).

⁹ State v. Rabin, 495 So. 2d 257 (Fla. 3d DCA 1986).

¹⁰ Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655 (S.D. Ind. 1991); see United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) (tax pool analysis), cert. denied, 466 U.S. 944 (1984); accord Hardy, 114 F.R.D. at 644 (company's affirmative action plan sent to house counsel); United States v. Gulf Oil Corp., 760 F.2d 292 (Temp. Emer. Ct. App. 1985) (auditors' financial reports prepared pursuant to requirements of federal securities laws); Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980) (in-house reports on air crash); Consolidated Gas Supply Corp., 17 F.E.R.C. ¶63,048 (Dec. 2, 1981) (summary of corporation's business practices).

anticipation of litigation are not disqualified from work product immunity). Given Southern Bell's business interests, the MOOSA audit was prepared for ordinary business purposes, and therefore, is discoverable.

Citizens have a substantial need for the information contained in the audit and cannot replicate that information.¹¹ The September 1991 MOOSA audit is directly relevant to the issue in this case. The audit will provide factual data on the accuracy of the trouble reporting and automatic rebate processes, the accuracy of the amount and timing of customer rebates, and the accuracy of the error correction process.

According to company reports (schedule 11 and 11a) submitted to the Commission, in 1991, Southern Bell received 1,643,188 trouble reports. Of those, 670,535 were statused out-of-service. The October 1989 MOOSA audit indicated that over 280,000 adjustments were made in the first eight months of 1989 alone.¹² Obviously, that amount of data can only be processed by a computer.

MOOSA operates at the end of a series of linked computer programs. One program is activated by a customer calling in a trouble report. This data is processed through linked computer

¹¹ State Farm Mutual Auto. Ins. Co. v. LaForet, 591 So. 2d 1143 (Fla. 4th DCA 1992) (demonstration of need and undue hardship required under Fla. R. Civ. P. 1.280(b)(2)).

¹² See Attachment A - 1989 MOOSA audit produced in response to Citizens' 7th production of documents request, item 12. As this audit was produced under a claim of temporary protective order, it is being provided in a sealed envelope.

software into a 500 character record. This data storage record is accessed by at least two other software programs that generate PSC reports and the MOOSA adjustments. The rebate adjustment process has a series of programs that generate a variety of reports, as well as producing the actual credit on the customer's bill.¹³ Southern Bell is the sole proprietor of the data and the computer software programs involved in producing this audit. Southern Bell has sole control of the data and the software programs. Harris Semiconductor v. Gastaldi, 559 So. 2d 299 (Fla. 1st DCA 1990). The customers, who have provided the means to build this complex system, have the right to know how this regulated monopoly has handled the regulated side of customer repairs and rebates.

As an indication of the undue hardship Citizens' face in any attempt to reconstruct the internal audit, we proffer Southern Bell's responses to Citizens' and Staff's document requests. Staff's 14th Request for Production of Documents, Item 9, requested "the summaries of each district's monthly billing accounts for residential and business customers showing the total

¹³ See Attachments B - LMOS operating system document produced in response to Citizens' 17th request, items 2 & 3; C - BellSouth CRIS user guide and Revision #3 of Financial systems Documentation (FSD) produced in response to Citizens' 20th request, items 12 & 14; D - trouble report system flow chart produced along with the response to Citizens' 5th request, item 9; and E - MOOSA --Florida only-- Southern Bell procedures produced in response to Citizens' 7th request, items 4 & 6; F - AT&T Bell Labs program application instructions produced in response to Citizens' 17th request, items 1 & 3. All of these documents were produced under a temporary protective order; therefore, they are attached in sealed envelopes.

amounts billed by each class and the amounts rebated automatically through MOOSA and manually by each class for January 1, 1988 to the present." Southern Bell stated in their objection to this request that:

"the billing information for 1989 and 1988 is on microfiche which is kept at each accounting office (Jacksonville & Miami). The microfiche is categorized by revenue accounting classifications in each NNX. Southern Bell would have to manually summarize up to 50 accounting classifications, separating residence and business for each of approximately 850 NNX's. It is estimated that this would require 500 to 600 hours to complete."

Southern Bell's response at 13 (Feb. 18, 1992).

Citizens' Fifteenth Production of Documents Request, Item number 5, requested " the customer trouble report summaries (E-2700) for all exchanges, districts and areas for January, 1980 to the present." Southern Bell "estimated that in order to comply with this request as written, Southern Bell would be required to collect approximately 4 linear feet of documents from each IMC and ship them to Tallahassee." Southern Bell objected on the grounds that the request was unduly burdensome. [Southern Bell's response to Citizens' 15th document request, page 3]

The complexity of Southern Bell's system and the enormous amount of data that would have to be compared cannot be handled manually, even if it could be produced in a paper format. The Herculean task of doing so would indeed pose an unnecessary and undue hardship on Citizens. Citizens have attached an affidavit produced by its staff analyst, which factually demonstrates the

undue hardship Citizens would have to overcome to reproduce the audit.

Since Citizens cannot replicate the data nor the complex interconnected computer programming that is required to produce an audit of the company's rebate process, this Commission should order Southern Bell to produce the September 1991 MOOSA audit.

Citizens further asserts that we need the September 1991 MOOSA audit in order to prepare our case. By its very nature, the audit contains factual information that is reasonably calculated to lead to admissible evidence. Citizens needs this information in order to prepare cross-examination for company witnesses. Furthermore, withholding the audit would defeat the interest of justice. Southern Bell, as the sole proprietor of all the information relevant to this case, cannot be permitted to selectively disclose only those audits that bolster its case, while hiding unfavorable data behind a claim of privilege. To allow a regulated monopoly to dictate what information it will release to its regulatory agency and statutory consumer advocate would defeat the statutory mandate granted to this Commission by the Legislature.


Conclusion

Citizens assert that Southern Bell's September 1991 MOOSA audit is a business document containing factual information on the processing of customer trouble reports and credits that is directly relevant to a central issue in this case, and as such,

is not covered by the attorney-client privilege, nor the more limited work product privilege. A final determination can only be made by the Commission after an in camera review of the document in question. After this review, the Commission may find that the audit, while not privileged under statute or rule, may be entitled to proprietary treatment. Southern Bell should request such treatment under Commission rule 25-22.006, Florida Administrative Code. In any event, the Commission should compel Southern Bell to produce the September 1991 MOOSA audit.

Respectfully submitted,

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Attorneys for the Citizens
of the State of Florida

ATTACHMENTS A - F ARE
INDIVIDUALLY ATTACHED
IN SEPARATE ENVELOPES

**THESE DOCUMENTS ARE COVERED BY A TEMPORARY PROTECTIVE ORDER UNDER
COMMISSION RULE 25-22.006, FLORIDA ADMINISTRATIVE CODE.**

ATTACHMENT G
AFFIDAVIT OF NEED
and UNDUE HARDSHIP

AFFIDAVIT

STATE OF Florida

COUNTY OF Leon

BEFORE ME, the undersigned authority, personally appeared
Walter Baer, who stated that he is currently
a Regulatory Analyst with the Florida Office of the Public
Counsel, and has provided the following opinion on Southern Bell
Telephone's trouble reports.

1. To the best of my knowledge, Southern Bell trouble reports
are analyzed by computerized procedures to identify out-of-
service conditions that qualify for a refund to the consumer.
Generally known as the Mechanized Out Of Service Adjustment
(MOOSA) system, the process involves the MOOSA program drawing
information from the Loop Maintenance Operations System (LMOS),
the Mechanized Trouble Analysis System (MTAS), and the Customer
Record Information System (CRIS) to identify and adjust the
appropriate accounts. MOOSA only handles the simple accounts
like single line residential and business. More complex
situations involving multiple lines and systems, late payment
charges, denial of toll calls, and incorrect billing of service
order charges are handled by a manual adjustment system.

2. To evaluate the adequacy and effectiveness of internal controls and the quality of performance of these systems, Southern Bell performs internal audits. Such an audit took place in October 1989 and September 1991.

3. The necessity of utilizing computers to assist in the audits is obvious when one understands the enormous size of the data base, which represents the trouble reports that have to be analyzed to determine whether a refund is due to the consumer. The volume of total trouble reports of which the number of Out Of Service (OOS) reports are a subset, and trouble reports that are Out Of Service for greater than 24 hours, which is a subset of the OOS reports, can be seen by way of the Schedule 11 and 11a reports furnished to the Florida Public Service Commission by Southern Bell. I have summarized the figures from the Schedule 11 and 11a reports in the attached Charts A, B and C. Without access to Southern Bell's audit of September 1991, The Office of the Public Counsel Staff would have to receive all the manuals and procedures that explain how to read trouble reports, the paper copies of each trouble report, and each customer bill to determine whether a refund was furnished for an eligible trouble report. All this information would then have to be tabulated into some comprehensible form to determine the degree to which Southern Bell fulfills their obligations under the PSC rules and regulations.

4. It would be difficult to even estimate how long it would take for the Public Counsel staff to analyze just the 1,643,188 total reports for 1991, or the total OOS report for 1991 of 670,537. Indeed, given the complexity of the audit, the enormous amount of data, and the unique computer system required to process it, the task is impossible.

5. All of the customer data and the computer systems that are needed to produce such an audit are under the sole control of Southern Bell Telephone and Telegraph Company and cannot be obtained from any other source.

6. Graphs showing the number of reports - total, OOS and OOS over 24 hours - are attached. This data comes from public records on file with the Public Service Commission.

DATED at Tallahassee, FL, this 8th day
of April, 1992.

Walter Baer

Sworn to and subscribed before me this

8th day of April, 1992.

Synda Hagerty

NOTARY PUBLIC

State of Florida at Large

My commission expires:

Notary Public, State of Florida
My Commission Expires Oct. 26, 1993
Bonded Thru Troy Fain - Insurance Inc.

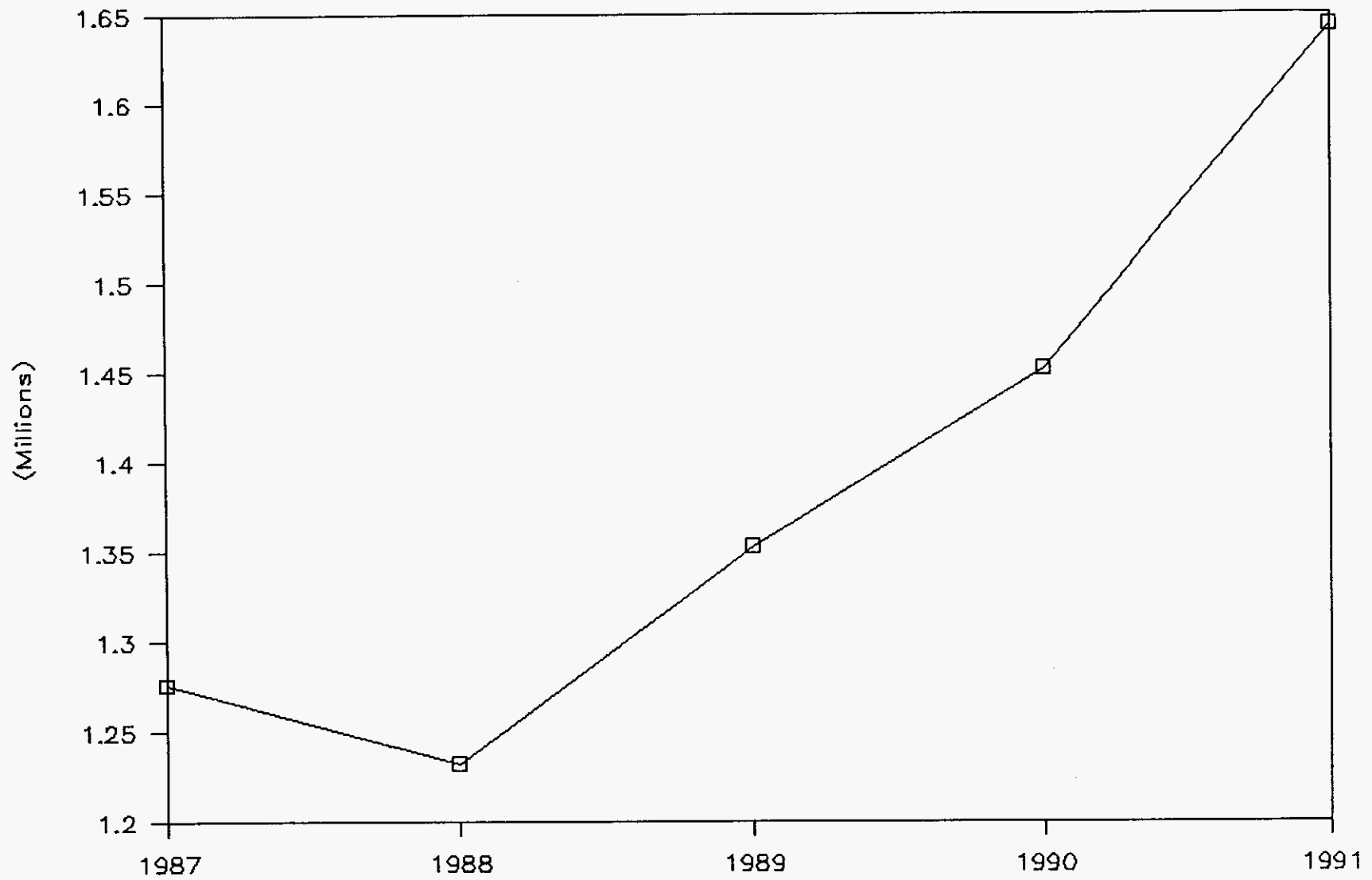
CHART A

TOTAL TROUBLE REPORTS - FLORIDA
Source: Schedule 11a

| | 1987 | 1988 | 1989 | 1990 | 1991 |
|---------------------|-----------|-----------|-----------|-----------|-----------|
| Jan. | 113,579 | 102,933 | 103,709 | 114,610 | 131,981 |
| Feb. | 96,604 | 97,937 | 88,552 | 104,880 | 111,720 |
| Mar. | 106,111 | 105,345 | 107,347 | 112,496 | 125,549 |
| Apr. | 97,858 | 94,100 | 104,754 | 112,079 | 132,356 |
| May | 100,168 | 92,591 | 109,894 | 113,841 | 132,523 |
| Jun. | 103,174 | 103,297 | 122,791 | 133,633 | 146,135 |
| Jul. | 119,247 | 109,465 | 122,336 | 136,731 | 157,929 |
| Aug. | 108,363 | 117,044 | 131,791 | 149,120 | 151,135 |
| Sep. | 109,612 | 111,206 | 120,142 | 120,533 | 135,174 |
| Oct. | 111,773 | 101,807 | 122,180 | 131,459 | 166,431 |
| Nov. | 106,536 | 102,540 | 107,206 | 115,554 | 127,835 |
| Dec. | 103,131 | 94,212 | 112,392 | 107,336 | 124,420 |
| Sum= | 1,276,156 | 1,232,477 | 1,353,094 | 1,452,272 | 1,643,188 |
| Ave= | 106,346 | 102,706 | 112,758 | 121,023 | 136,932 |
| Total 1987 - 1991 = | | | | | 4,448,554 |

TOTAL TROUBLE REPORTS — FLORIDA

Source: Schedule 11a



TOTAL TROUBLE REPORTS — FLORIDA

Source: Schedule 11a

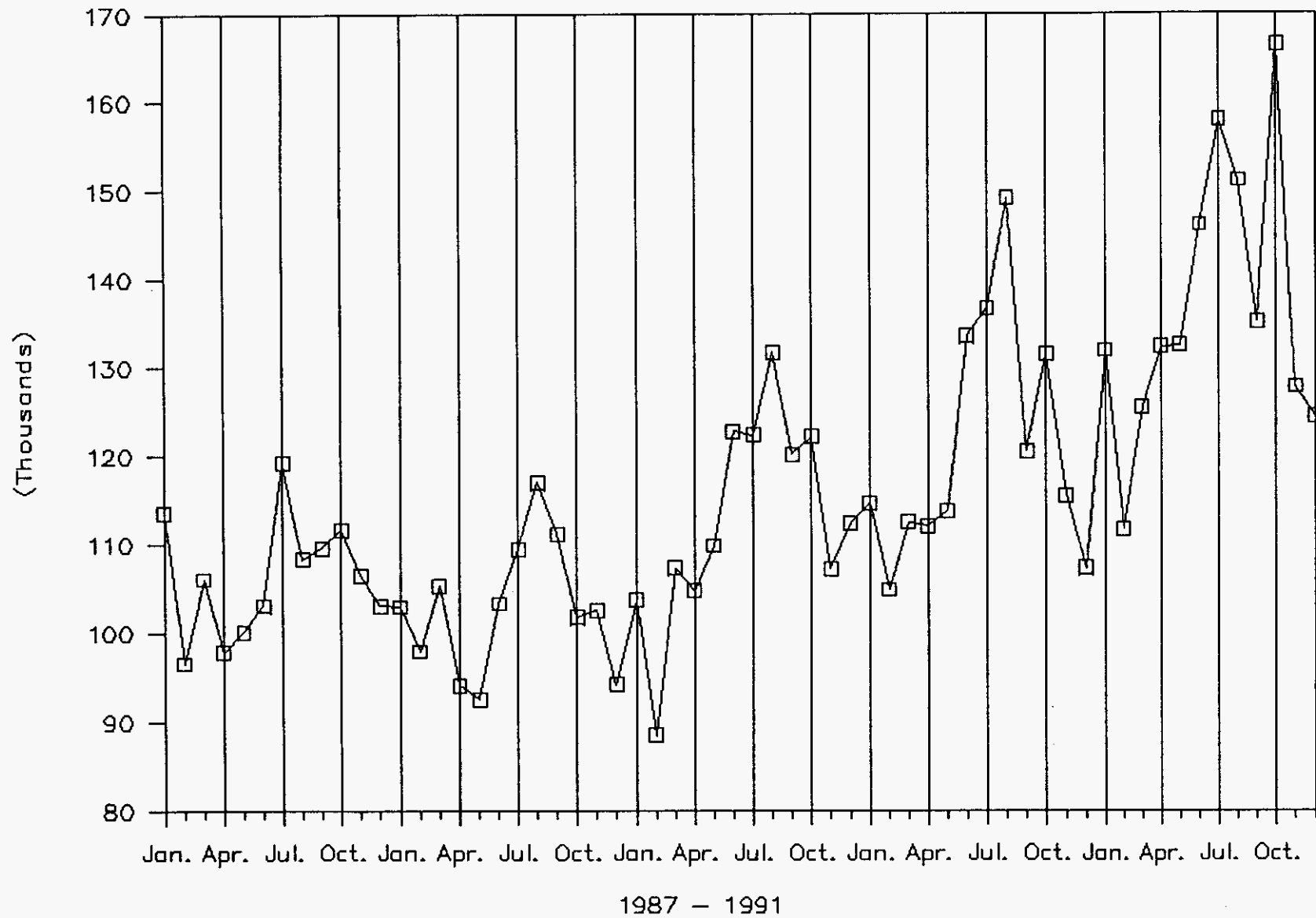


CHART B

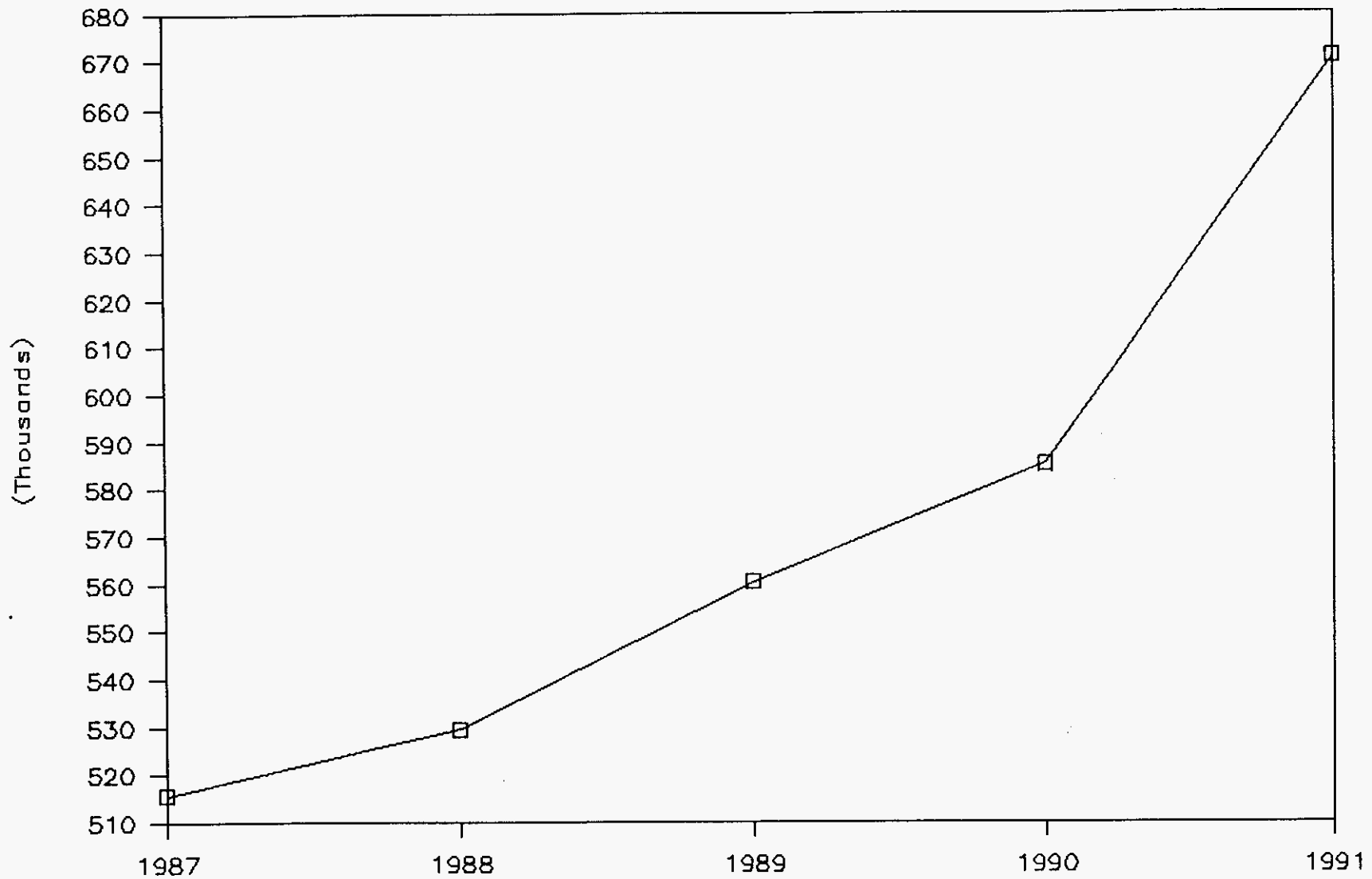
TOTAL OOS TROUBLE REPORTS - FLORIDA
Source: Schedule 11a

| | 1987 | 1988 | 1989 | 1990 | 1991 |
|------|---------|---------|---------|---------|---------|
| Jan. | 41,124 | 44,918 | 41,225 | 45,321 | 51,227 |
| Feb. | 36,436 | 43,942 | 36,380 | 42,433 | 42,828 |
| Mar. | 39,789 | 46,581 | 44,723 | 46,900 | 48,204 |
| Apr. | 35,935 | 40,458 | 45,206 | 47,942 | 53,108 |
| May | 39,171 | 39,960 | 45,889 | 46,079 | 53,621 |
| Jun. | 41,285 | 45,033 | 53,087 | 55,939 | 62,239 |
| Jul. | 50,617 | 47,806 | 51,317 | 56,719 | 67,818 |
| Aug. | 45,255 | 51,322 | 54,376 | 62,556 | 60,637 |
| Sep. | 46,898 | 46,769 | 51,080 | 48,141 | 55,946 |
| Oct. | 47,910 | 42,267 | 48,500 | 50,052 | 71,557 |
| Nov. | 46,685 | 42,712 | 42,730 | 43,604 | 51,881 |
| Dec. | 44,612 | 37,680 | 45,821 | 39,559 | 51,471 |
| Sum= | 515,717 | 529,448 | 560,334 | 585,245 | 670,537 |
| Ave= | 42,976 | 44,121 | 46,695 | 48,770 | 55,878 |

Total 1987 - 1991 = 1,816,116

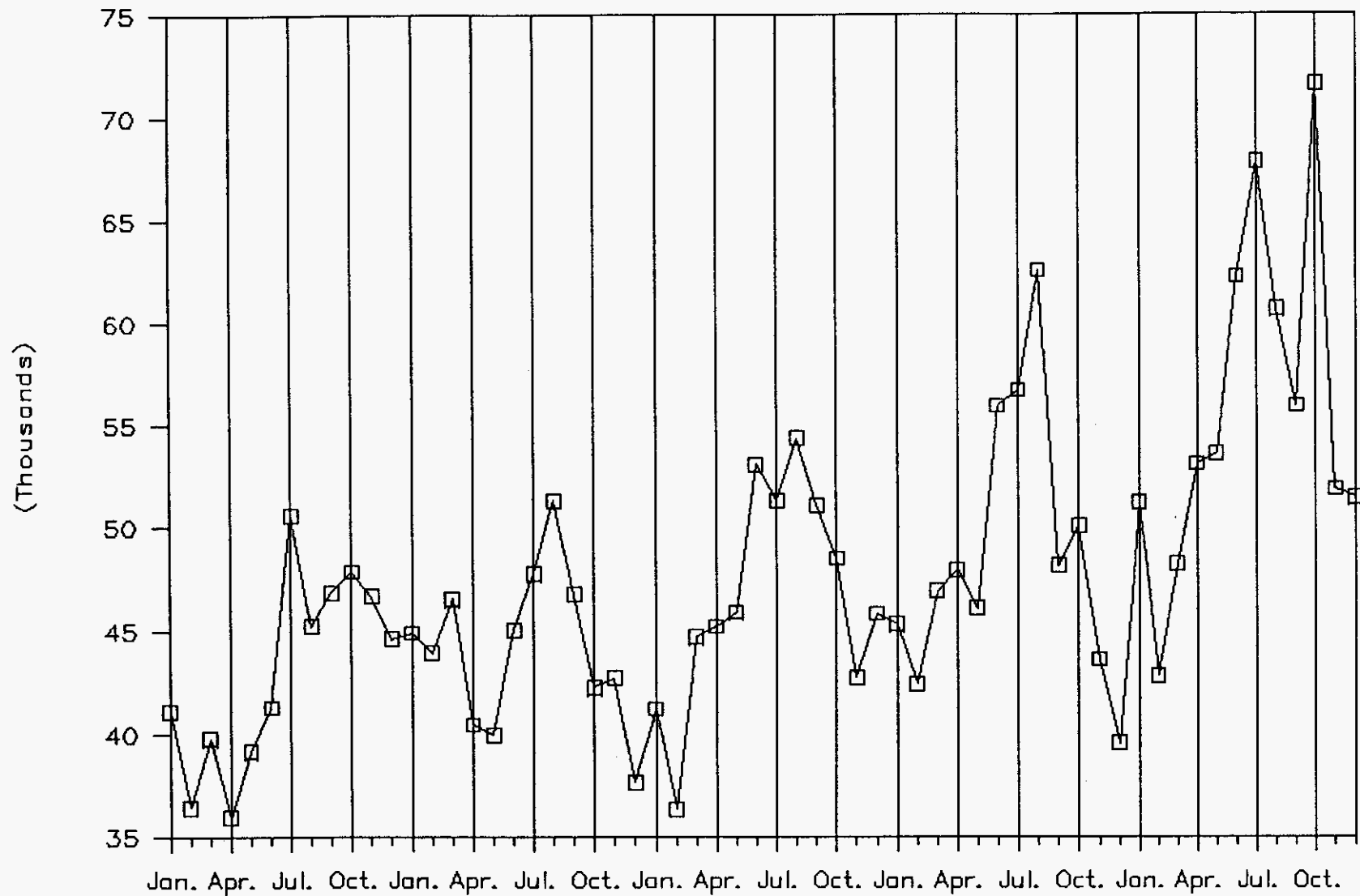
TOTAL OOS TROUBLE REPORTS – FLORIDA

Source: Schedule 11a



TOTAL OOS TROUBLE REPORTS – FLORIDA

Source: Schedule 11a



1987 - 1991

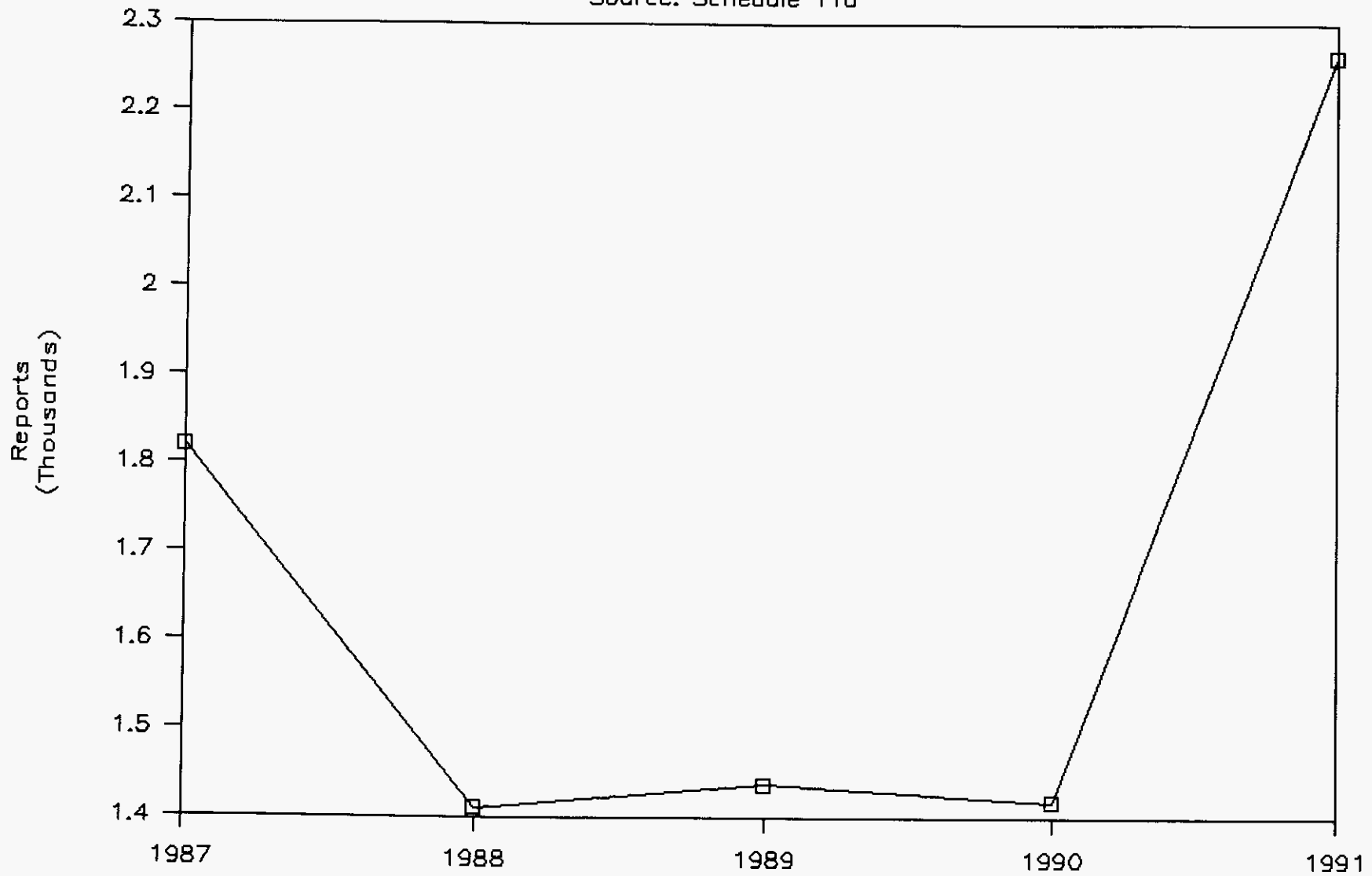
CHART C

TOTAL OVER 24 HOURS TROUBLE REPORTS - FLORIDA
Source: Schedule 11a

| | 1987 | 1988 | 1989 | 1990 | 1991 |
|---------------------|--------|--------|--------|--------|--------|
| Jan. | 1,452 | 1,372 | 733 | 1,298 | 1,293 |
| Feb. | 878 | 1,131 | 513 | 796 | 811 |
| Mar. | 1,225 | 955 | 1,604 | 917 | 1,275 |
| Apr. | 1,030 | 884 | 863 | 1,036 | 1,351 |
| May | 1,360 | 898 | 892 | 962 | 1,496 |
| Jun. | 1,552 | 1,432 | 1,620 | 1,720 | 2,662 |
| Jul. | 2,461 | 2,295 | 1,605 | 2,601 | 3,604 |
| Aug. | 1,562 | 2,288 | 1,851 | 3,483 | 2,925 |
| Sep. | 1,910 | 2,962 | 1,464 | 1,092 | 1,904 |
| Oct. | 2,087 | 1,245 | 2,440 | 1,364 | 5,125 |
| Nov. | 4,323 | 842 | 1,756 | 893 | 2,191 |
| Dec. | 2,011 | 631 | 1,905 | 853 | 2,513 |
| Sum= | 21,851 | 16,935 | 17,246 | 17,015 | 27,150 |
| Ave= | 1,821 | 1,411 | 1,437 | 1,418 | 2,263 |
| Total 1987 - 1991 = | | | | | 61,411 |

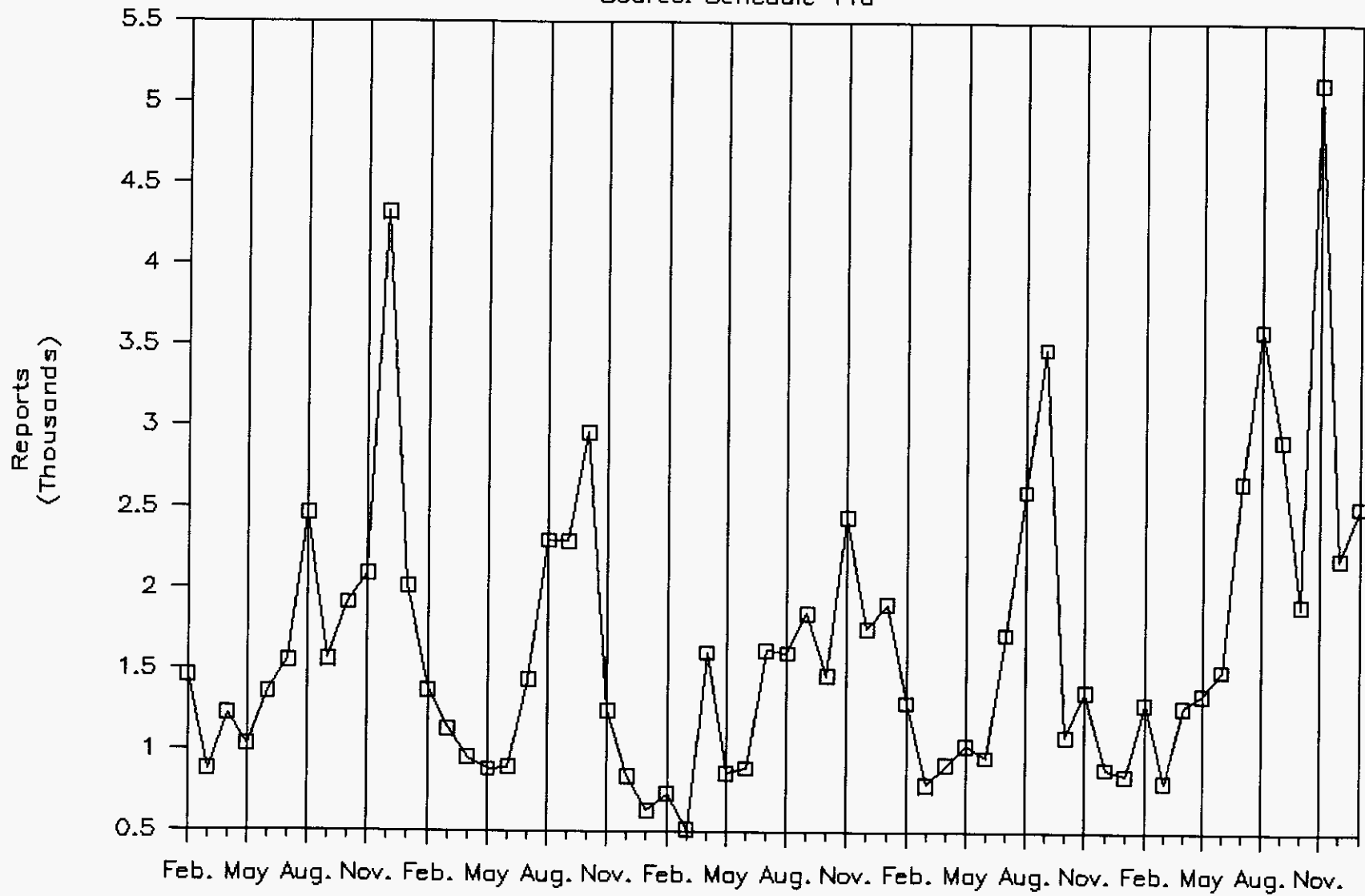
TOTAL OVER 24 HOURS OOS REPORTS

Source: Schedule 11a



TOTAL OVER 24 HOURS OOS REPORTS

Source: Schedule 11a



**CERTIFICATE OF SERVICE
DOCKET NO. 910163-TL**

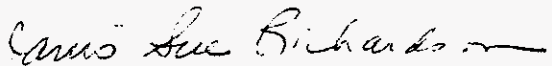
I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following persons on this 8th day of April, 1992.

*Marshall Criser, III
BellSouth Telecommunications,
Inc. (Southern Bell Telephone
& Telegraph Co.)
150 S. Monroe St., Suite 400
Tallahassee, FL 32301

Tracy Hatch
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*Only Southern Bell Telephone &
Telegraph Company has received a
copy of attachments A-F.

John Hoag
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Janis Sue Richardson
Associate Public Counsel