STATE OF FLORIDA

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ORIGINAL FILE COPY

July 20, 1992

Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0850

Re: Docket No. 910163-TL

Dear Mr. Tribble:

Enclosed for filing in the above-captioned proceeding on behalf of the Citizens of the State of Florida are the original and 15 copies of Citizens' Motion to Compel.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Janis Sue Richardson
Associate Public Counsel

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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: July 20, 1992

CITIZENS' MOTION TO COMPEL

The Citizens' of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, move the Florida Public Service Commission ("Commission" or "PSC") to order BellSouth Telecommunications, Inc., doing business as Southern Bell Telephone and Telegraph Company ("Southern Bell"), to fully answer our twenty-sixth set of interrogatories, items 6, 7, and 8, dated June 3, 1992.

Background

1. On June 3, 1992 Citizens' served our twenty-sixth set of interrogatories on Southern Bell. Citizens discovered that Southern Bell had conducted an audit of its PSC schedule 11 reports and uncovered "significant adverse findings."[1] Citizens' interrogatories targeted this audit. Item 6 requested the company to "state every adverse finding discovered in the third quarter 1991 audit of the Florida PSC schedule 11 reports." See Fla. Admin. Code R. 25-4.0185 (requiring telecommunications

[1] See Attachment A to Southern Bell's Opposition to Public Counsel's First Motion to Compel and Request for In Camera Inspection of Documents, filed May 15, 1992. The decision on the motion is still pending.

companies to file schedule 11 reports on a quarterly basis). Item 7 asked the company to "state every finding on the third quarter 1991 audit of the Florida PSC schedule 11 reports that shows an inconsistency with the schedule 11s on file with the PSC." Item 8 asked the company to "state whether you believe, or have reason to believe, that any of the Florida PSC schedule 11 reports you submitted to the PSC have any inaccurate information." Southern Bell filed its response and objections to the twenty-sixth set of interrogatories on July 8, 1992. Southern Bell claimed that the attorney-client and work product privileges protected this information from discovery.

Relief Requested

2. Pursuant to section 350.0611, Florida Statutes, and Rules 1.280 and 1.340, Florida Rules of Civil Procedure, the Citizens move this Commission to compel Southern Bell to fully answer interrogatories 6, 7, and 8 of the Citizens' twenty-sixth set.

3. 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).

4. The Citizens believe that the substantial, unwarranted and impermissible withholding of relevant information, if sanctioned by the Commission, will constitute a denial of

Citizens' due process rights by preventing the adequate preparation of our case.

General Objections Subject to the Motion to Compel

5. Southern Bell objected to answering Citizens' interrogatories and consequently withheld the information on the accuracy of the schedule 11s on file at the Commission based on a claim of attorney-client and work product privileges. The company has the burden of establishing to the satisfaction of this Commission that the schedule 11 audit information 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.

6. 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).

7. Regulatory reports filed with the Commission are public records. Id. §§ 119.01 & 119.011(1). Schedule 11 reports detailing the customer service quality indicators must be filed with the Commission quarterly. Fla. Admin. Code R. 25-4.0185. Schedule 11s are public records. Any audit of the information contained in a schedule 11 is also public record.

8. Knowingly filing a false report with the Commission is a misdemeanor. Id. § 837.06. Since a company has a legal duty to file correct information with the Commission, it has a legal duty to correct inaccurate information on file with the Commission. Failure to do so once the inaccuracies are uncovered is tantamount to wilfully filing a false report. The company's audit, which uncovered inaccuracies in the schedule 11s presently on file with the Commission, must be immediately disclosed. This is information concerning a public record. If the company is permitted to hide its adverse findings under a broad claim of privilege, then all the information this company has filed with the Commission will be suspect.

9. On its face, the attorney-client privilege does not apply to this information, and should, therefore, be denied. Southern Bell has sole control of the customer trouble reporting

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 rights and in contravention to the liberal discovery rules adopted by this Commission.

10. Southern Bell has provided, by its own limited response, an admission that at least some of the information contained in the schedule 11s on file with the Commission is inaccurate. See Southern Bell's response to the twenty-sixth interrogatory, item 8. Southern Bell admitted that it discovered some inaccurate data in their schedule 11 reports pertaining to data submitted from its North Dade and Gainesville operations in 1990. What other significant adverse findings has the company uncovered? Unless the Commission compels Southern Bell to fully respond to Citizens' interrogatories, neither the Commission nor Citizens will know the truth or falsity of Southern Bell's regulatory reports.

11. Citizens request this Commission to compel Southern Bell to answer Citizens' twenty-sixth set of interrogatories, items 6, 7, and 8 immediately.

Attorney-Client Privilege

12. 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.

13. 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).

14. The information contained in the schedule 11 audit is clearly comprised of facts not communications. Cf. Southern Bell's response, item 8. Citizens did not request statements made by employees to company counsel; Citizens asked for the facts, which showed the inaccuracies in the schedule 11s. Clearly this information is not privileged.

15. 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).[2] 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.")

16. A final determination of privilege for the information contained in the internal audit, which is responsive to Citizens'

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[2] 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).

interrogatories, must be made by the Commission, not by the party asserting the privilege. The Commission must determine whether the items are, as a matter of law and fact, entitled to the privilege, not whether there is good cause to overcome the privilege. See International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973).

17. The attorney client privilege does not apply to information prepared for a business purpose,[3] to preexisting documents that would have been subject to disclosure when in the possession of the client (client cannot make unprivileged documents privileged by handing them over to his attorney),[4] when the advice of the attorney is sought in furtherance of a

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[3] 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).

[4] 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).

crime or fraud,[5] or to the extent that the attorney acted in a non-legal capacity.[6]

18. The Commission should compel Southern Bell to produce the information contained in the schedule 11 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. The third quarter 1991 schedule 11 audit was conducted for the business purpose of determining the accuracy of regulatory reports on file with the Commission. This audit is not privileged, nor does it qualify for proprietary treatment since it is based upon an analysis of public record information. See Tober v. Sanchez, 417 So. 2d 1053 (Fla. 1982), review denied, 426 So. 2d 27 (Fla. 1983).

19. The schedule 11 audit information is based upon preexisting data, which was filed with the Commission. The preexisting data is not privileged because it is in the public domain; therefore, the subsequent information is not privileged.

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[5] 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).

[6] 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).

See id. Southern Bell cannot make it privileged by turning it over to its attorney. Id.

20. By its own admission, the information discloses significant adverse findings in the schedule 11s on file with the Commission. Southern Bell has a legal duty to immediately disclose any inaccuracies in reports filed with the Commission. See § 837.06, Fla. Stat. Attempts to cover-up this information and wilfully hide it from the Commission and other parties, perpetuates a fraud on the public. No information is privileged that is in furtherance of a crime or fraud. The Commission should order Southern Bell to immediately disclose this information and consider levying a penalty for each day the company continues in its willful disobedience.

21. Filing of regulatory reports is not a legal matter; it is a routine business matter. Auditing regulatory reports cannot be made a legal matter by having in-house counsel supervise the process. Clearly, the attorney-client privilege does not apply to the information sought by Citizens.

22. Once a party discloses a portion of the information sought, he waives his privilege to all of it. Ehrhardt, Florida Evidence, § 502.8 (1992 ed.) (citing West's F.S.A. § 90.502(1)(c)(1); Hoyas v. State, 456 So. 2d 1225, 1227 (Fla. 3d DCA 1984); International Tel. & Tel. Corp. v. United Tel., 60 F.R.D. 177, 185-86 (M.D. Fla. 1973)). Since the company has answered Citizens' interrogatories in part as to inaccuracies in

North Dade and Gainesville reports, it has waived the privilege as to all the information.

23. Under no stretch of the law or imagination can this information be considered privileged. Southern Bell has failed to demonstrate the existence of the attorney-client privilege in this instance. Even if the company had shown that the privilege applied, the information falls within the numerous exceptions to the privilege for business and public records, and waiver. The Commission should demand that Southern Bell answer Citizens' interrogatories immediately.

Work Product Privilege

24. Southern Bell has also claimed that the information sought is covered by the 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).

25. 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").

26. 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).

27. 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).

28. The Commission should review the interrogatories and the company's partial answers to determine whether the withheld information qualifies for even this limited privilege. The Commission should conduct an in camera inspection of the schedule 11 audit to determine if the privilege applies to the information sought. 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.").

29. 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).

30. 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]

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[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).

(2) materials used by an opposing party to cross-examine or impeach a witness is discoverable to further effective cross-examination and rebuttal;[8] (3) work product protection may be waived by disclosure;[9] documents concurrently created for business purposes are discoverable;[10] and public record information not expressly exempt from the Public Records Act.[11]

31. 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 schedule 11 audit, and the information contained therein, is a business document, containing factual data, that cannot be afforded work product protection merely because the company states that it was run at the request of in-house counsel. See Soeder v. General Dynamics Corp., 90 F.R.D. 253, 255 (D. Nev. 1980) (company's in-

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[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).

[11] Tober v. Sanchez, 417 So. 2d 1053 (Fla. 3d DCA 1982) (citing Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979), review denied, 426 So. 2d 27 (Fla. 1983).

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 anticipation of litigation are not disqualified from work product immunity).

32. Southern Bell is required to file schedule 11s with the Commission. The information contained in these regulatory reports must be accurate. Filing regulatory reports is a business function. Hence, the audit of the schedule 11 reports was prepared for ordinary business purposes, and therefore, is discoverable.

33. Schedule 11s are public record. The company audited the information that is contained in a public record. As the database for the original schedule 11s on file with the Commission and the third quarter audit is the same, the information contained in the audit is a matter of public record. Southern Bell cannot bury this information from public scrutiny by stating that the audit was performed at the request of its attorney in anticipation of litigation. How can the Commission or the Citizens' consumer advocate hope to perform their statutory oversight duties if a utility is allowed to submit inaccurate reports and then hide the facts? No stretch of the

judicial rule of work product privilege would permit such a manifestly unjust result.

34. Southern Bell has failed to demonstrate that the work product privilege applies to this information. Even if it had raised a colorable claim to the privilege, Citizens' need for the information would far outweigh any prejudice that could conceivably arise.

35. Citizens have a substantial need for the information contained in the audit and cannot replicate that information.[12] The third quarter 1991 schedule 11 audit is directly relevant to the issue in this case. The audit will provide factual data on the accuracy of the trouble reporting process and the accuracy of the error correction process.

36. According to uncorrected company reports (schedule 11 and 11a) presently on file with the Commission, in 1991, Southern Bell received 1,643,188 trouble reports. Of those, 670,535 were statused out-of-service. Obviously, that amount of data can only be processed by a computer.

37. The customer trouble reporting system, which is the data base for schedule 11 reports, operates within a series of linked computer programs.[13] One program is activated by a customer calling in a trouble report. This data is processed

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[12] 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)).

[13] The two major programs are the Loop Maintenance Operation System [LMOS] and the Mechanized Trouble Analysis System [MTAS].

through linked computer software into a 500 character record. This data storage record is accessed by another software program that generates the PSC schedule 11 reports. 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. The customers have the right to know what information reported to the Commission is trustworthy.

38. 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' Fifteenth Production of Documents Request, Item number 5, which 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]

39. 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 information contained in the audit.

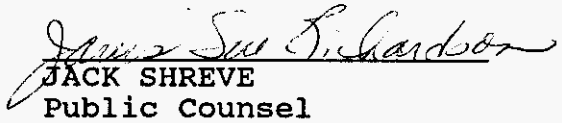
40. Since Citizens cannot replicate the data nor the complex interconnected computer programming that is required to produce an audit of the company's schedule 11s, this Commission should order Southern Bell to answer Citizens' interrogatories. Citizens further asserts that we need the information contained in the 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 public policy undergirding the regulatory process. Southern Bell, as the sole proprietor of all the information relevant to this case, cannot be permitted to selectively disclose only that information that bolsters 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 third quarter schedule 11 audit, and the information contained therein, is a business document containing public record data 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.

WHEREFORE, the Citizens respectfully request the Commission to compel Southern Bell to respond in full to Citizens' interrogatories.

Respectfully submitted,



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Attorneys for the Citizens
of the State of Florida

ATTACHMENT A

AFFIDAVIT OF NEED

and UNDUE HARDSHIP

AFFIDAVIT

STATE OF Florida

COUNTY OF Leon

BEFORE ME, the undersigned authority, personally appeared Walt 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 form the database for the schedule 11s filed with the Commission on a quarterly basis. Generally known as the Mechanized Trouble Analysis System [MTAS], the process involves the MTAS program drawing information from the Loop Maintenance Operations System (LMOS). MTAS generates the schedule 11 report information.

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 the third quarter 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 the accuracy of the reports filed with the Commission. 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 these reports, the Office of the Public Counsel Staff would have to receive all the manuals and procedures that explain how to read trouble reports and the paper copies of each trouble report, to determine which information on the filed reports was accurate. 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 20th day of July, 1992.

Walter Baer

STATE OF Florida

COUNTY OF Leon

The foregoing instrument was acknowledged before me this 20th day of July, 1992, by Walter Baer, who:

A) Walter Baer is/are personally known to me OR _____ who has/have produced _____ a driver's license OR _____ other identification: _____ as identification; and

B) Who did not did OR _____ did not take an oath.

Kay W Harder
Signature of Notary Public

Kay W. Harder
Printed name of Notary Public

Notary Public
Title or Rank

(SEAL/EXPIRATION DATE)

KAY W. HARDER
MY COMMISSION # CC 191547 EXPIRES
April 7, 1998
BONDED THRU TROY FAIN INSURANCE, INC.

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 20th day of July, 1992.

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