

**Southern Bell**

Harris R. Anthony  
General Counsel-Florida

Southern Bell Telephone  
and Telegraph Company  
c/o Marshall Criser III  
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150 South Monroe St.  
Tallahassee, Florida 32301  
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August 4, 1992

Mr. Steve C. Tribble  
Director, Division of Records and Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, Florida 32301

**ORIGINAL  
FILE COPY**

Re: Docket No. 910163-TL - Repair Service Investigation

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Seventh Motion to Compel and Request for In Camera Inspection of Documents, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

- ACK
- ATA \_\_\_\_\_
- APP \_\_\_\_\_
- CT \_\_\_\_\_
- CP** \_\_\_\_\_
- CS \_\_\_\_\_
- Enclosures
- cc: All Parties of Record
- 1 A. M. Lombardo
- 6 R. Douglas Lackey
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
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- \_\_\_\_\_
- \_\_\_\_\_

Sincerely yours,  
*Harris R. Anthony*  
Harris R. Anthony  
*DJ*

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AUG 11 1992  
20  
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE  
08616 AUG -4 1992  
FPSC-RECORDS/REPORTING

**CERTIFICATE OF SERVICE**  
**Docket No. 910163-TL**

I HEREBY CERTIFY that a copy of the foregoing has been  
furnished by United States Mail this *4<sup>th</sup>* day of *August*, 1992,  
to:

Charles J. Beck  
Assistant Public Counsel  
Office of the Public Counsel  
111 W. Madison Street  
Room 812  
Tallahassee, FL 32399-1400

Tracy Hatch  
Division of Legal Services  
Florida Public Svc. Commission  
101 East Gaines Street  
Tallahassee, FL 32399-0863

Harris R. Anthony  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens ) Docket No. 910163-TL  
of the State of Florida to initiate )  
investigation into integrity of ) Filed: August 4, 1992  
Southern Bell Telephone and Telegraph )  
Company's repair service activities )  
and reports. )  
\_\_\_\_\_)

**SOUTHERN BELL TELEPHONE AND TELEGRAPH  
COMPANY'S OPPOSITION TO PUBLIC COUNSEL'S  
SEVENTH MOTION TO COMPEL AND REQUEST  
FOR IN CAMERA INSPECTION OF DOCUMENTS**

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.037, Florida Administrative Code, and herein files its Opposition to the Seventh Motion to Compel and Request for In Camera Inspection of Documents filed by the Office of Public Counsel ("Public Counsel") with regard to Public Counsel's Twenty-fourth Set of Request for Production of Documents dated June 3, 1992 and states as grounds in support thereof the following.

1. In its Response to Public Counsel's 24th Set of Requests for Production, Southern Bell objected to producing the documents requested in Request Nos. 7, 8, 9, 10 and 11. Request Nos. 7, 8, 9 call for the production of internal audits conducted at the specific request of Southern Bell's Legal Department of, respectively, the Key Service and Revenue Indicators ("KSRI"), the loop maintenance operations system, ("LMOS") and of the PSC

DOCUMENT NUMBER-DATE

08616 AUG -4 1992

FPSC-RECORDS/REPORTING

Schedule 11. Public Counsel has previously requested each of these audits in Docket No. 920260-TL, Southern Bell has objected therein to the production of these audits, and Public Counsel has moved to compel and Southern Bell has opposed each such motion.

2. In response to Public Counsels's Motion to Compel in Docket No. 920260-TL, Southern Bell filed a response, which included as exhibits affidavits filed by Shirley T. Johnson, Operations Manager of Southern Bell's Florida Internal Audit Department. These affidavits set forth the circumstances that establish that each of the three audits was performed as part of an ongoing investigation by Southern Bell's lawyers and at the direct request of those lawyers. Copies of these affidavits are attached hereto as composite Exhibit "A".

3. Finally, Public Counsel has previously requested, in its twenty sixth set of interrogatories, information from the audit of the PSC Schedule 11 that is requested herein in Item No. 9. Again, Southern Bell objected to producing this information on the basis of the attorney-client privilege and work product doctrine, Public Counsel moved to compel, and Southern Bell opposed that motion.

4. Item Nos. 10 and 11 request a statistical analysis referred to in a document previously produced to Public Counsel as well as all other similar analyses. Both the documents

specifically referred to and all "similar documents" were created by Dan King, Assistant Vice President, Central Office Operations Support for BellSouth Telecommunications, Inc. at the specific request of the Legal Department as a part of its preparation for litigation in this docket. As set forth in the affidavit of Mr. King, attached hereto as Exhibit "B"<sup>1</sup>, these documents entail a number of reports setting forth the statistical analyses that were performed by Mr. King at the specific request of Southern Bell's Legal Department. This request was based on information obtained by the Legal Department in the context of the internal investigation of matters that are at issue in this docket.

5. Further, the information was requested by the Legal Department to aid in its investigation and to aid it further in the rendering of a legal opinion to Southern Bell. It was also in specific response to the issues raised in this docket.

6. In other words, the analytical reports, like the audits referred to above, were created at the specific request of Southern Bell's Legal Department as part of an ongoing investigation. Accordingly, the Florida law that provides that the audits are protected from disclosure by the attorney-client

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<sup>1</sup> Due to logistical difficulties, Mr. King was unable to sign the attached affidavit before the filing deadline for this response. An executed affidavit will be filed before the end of this week.

privilege and the work product doctrine applies equally to protect these analytical reports.

7. In the context of the previous motions to compel and responses referred to above, both Public Counsel has and Southern Bell has fully set forth their respective positions as to the applicability of the attorney-client and/or work product privileges. Given this, Southern Bell will not burden this Commission with a reiteration of arguments that have previously been made. There is, however, a potentially dispositive aspect of this issue that bears repeating in summary fashion.

8. Public Counsel's Motion to Compel includes a twenty-six page recitation of the general law applicable to the attorney-client privilege and work product doctrine. In its lengthy discourse, however, Public Counsel has failed to address specifically the factor that is central to the question of whether the privileges apply: the fact that each of the three audits and all of the analytical reports were prepared, not in the normal course of business, but at the specific request of Southern Bell's Legal Department.

9. In other words, in order to render a legal opinion, the legal department requested of certain Southern Bell manager/clients the distillation and analysis of specific information. This analysis was provided by the respective

manager/client to the attorneys for Southern Bell both to assist in the analysis and evaluation of the underlying facts and for the purpose of allowing these attorneys to render legal opinions to the client.

10. On the face of the case law previously cited both by Southern Bell and Public Counsel, it is clear that the attorney-client privilege protects not only legal advice given by the attorney to the client, but also information communicated from the client to the attorney for the purpose of obtaining this advice. The affidavits of Ms. Johnson and of Mr. King make it clear that this is precisely the instant situation. Information has been provided from these clients to the Southern Bell attorneys conducting an investigation in order to allow these attorneys to render a legal opinion. Accordingly, this information is clearly protected by the attorney-client privilege.

11. Given the circumstances under which this information was compiled and presented to the Legal Department, it is equally clear that it is protected by the attorney work product doctrine. The information at issue was compiled at the specific request of the Legal Department, within parameters dictated by the Legal Department, and the purpose of the request by the Legal Department was to allow the lawyers for Southern Bell to assess

the legal ramifications of these matters. Obviously, this entire process of compiling, distilling and analyzing information at the request of, and under specific directions given by, the Legal Department is intertwined inseparably with the mental impressions of the lawyers of Southern Bell regarding this docket. Therefore, even if the analysis of the pertinent information had not been provided by the client itself (i.e., Southern Bell managers), the fact remains that this compilation and analysis were performed by individuals who aided and assisted Southern Bell lawyers, and thereby acted as their agents. For this reason, the work product doctrine applies.

12. Finally, Public Counsel has argued that the applicable work product doctrine should not operate to bar production because the comparable information cannot be obtained without undue hardship. The affidavit in support of this contention attached to Public Counsel's Seventh Motion to Compel, however, makes it clear that the "hardship" referred to is nothing more than taking on a project that entails considerable labor.

13. Florida courts have stated repeatedly that the attorney work product doctrine will only be overcome upon a showing of both need and undue hardship. "Undue hardship" is generally found to exist only under circumstances in which the ability to obtain equivalent information through an alternative process is



all but non-existent. See, generally , Winn Dixie Stores, Inc. v. Gonyea, 455 So.2d 1342 (Fla. 2d DCA 1984); Colonial Penn Ins. Co. v. Blair, 380 So.2d 1305 (Fla. 1980).

14. In this particular instance, much of the underlying materials upon which the audits requested in Item Nos. 7, 8 and 9 were based have been produced to Public Counsel. Public Counsel also has the ability to depose employees of Southern Bell, and to obtain further documents and information from Southern Bell if it so deems necessary.<sup>2</sup> Public Counsel, nevertheless, argues that it would simply be too much work to perform its own audit and analysis of this material. Likewise, rather than conducting discovery of the facts at issue in this docket, then analyzing this information as it sees fit, Public Counsel is simply seeking the labor-saving device of obtaining the portion of Southern Bell's internal investigation that includes the analysis of Mr. King that was performed at the request of Southern Bell lawyers. This disinclination to take on a burdensome task falls far short of the type of hardship that will support a forced disclosure of attorney work product.

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<sup>2</sup> In point of fact, Public Counsel has already deposed almost one hundred Southern Bell employees in this matter, has propounded 24 separate requests to produce and has also propounded tens of interrogatories.

15. Finally, as to Public Counsel's request for in camera inspection, Southern Bell believes that to grant this request would serve little purpose. The case law cited by Public Counsel generally prescribes in camera inspection when the attorney-client privilege is asserted, and Southern Bell has no strong objection to this procedure. Such an inspection review, however, would provide no real benefit to the Commission in determining whether the privilege applies.

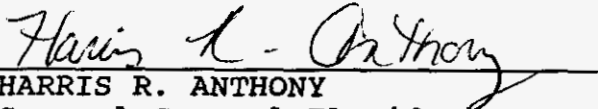
16. In a situation in which the documents in question ostensibly contain the communication of a legal opinion from the attorney to the client, an in camera inspection is obviously useful. In this instance, however, the documents in question do not contain legal opinions per se. Instead, these documents contain information that was provided to the attorneys for Southern Bell at their specific request in order to provide a legal opinion. Therefore, the pertinent factor in determining whether the attorney-client privilege or work product doctrine or both apply is not so much the specifics of the documents themselves, but rather the circumstances in which they were created. Although, again, Southern Bell is not entirely opposed to the Commission's reviewing these documents in camera, the circumstances surrounding the assertion of the privileges are such that this review would do little to help this Commission

resolve the issue. Instead, this issue should be resolved by this Commission by finding that, on the basis of the circumstances set forth in the attached affidavits, the attorney-client and work product privileges pertain.

WHEREFORE, Southern Bell Telephone and Telegraph Company respectfully requests the entry of an order denying Public Counsel's Seventh Motion to Compel.

Respectfully submitted,

SOUTHERN BELL TELEPHONE AND  
TELEGRAPH COMPANY

  
HARRIS R. ANTHONY  
General Counsel-Florida  
c/o Marshall M. Criser III  
150 So. Monroe Street, Suite 400  
Tallahassee, FL 32301  
(305) 530-5555

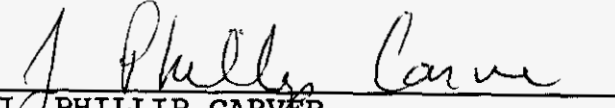
  
J. PHILLIP CARVER  
General Attorney  
c/o Marshall M. Criser III  
150 So. Monroe Street, Suite 400  
Tallahassee, FL 32301  
(305) 530-5558

EXHIBIT "A"

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of	)	
the Revenue Requirements and Rate	)	
Stabilization Plan of Southern	)	Docket No. 920260-TL
Bell Telephone and Telegraph	)	
Company (Formerly FPSC Docket	)	
Number 880069-TL)	)	
<hr/>		

STATE OF FLORIDA     )  
   )  
COUNTY OF DADE         )

AFFIDAVIT OF SHIRLEY JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in Docket No. 910163. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On April 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of the KSRI - Network Customer Trouble Report Rate as part of the internal investigation. The audit was not scheduled to be performed and would not have been performed without the request of the Florida

Legal Department.

3.

The KSRI - Network Customer Trouble Report Rate measurement is one of fifteen indicators used in calculating the financial Team Incentive Awards to all Company Employees.

4.

At the direction of the Legal Department, the March, April and May, 1991 Customer Trouble Report Summary Combined District Report OTC INTEGRIS Report, Form E2700C, was obtained for the fourteen Florida Maintenance Centers (MC) for review. An extraction of the May 31, 1991 MTAS daily recirculation file was examined. An additional extraction was obtained by MC from MTAS for February, 1990 to May, 1991 to determine if trouble reports were closed to the appropriate disposition codes.

5.

Audit tests were performed to evaluate the procedures and controls over the data used to generate the Network Trouble Report Rate and to verify its integrity. The data obtained from the extractions was traced to the Form E2700C to verify the accuracy of the measurement.

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on August 2, 1991.

7.

The August, 1991 KSRI - Network Customer Trouble Report Rate

Audit was carried out solely because the Legal Department requested that it be performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.

8.

Less than half a dozen copies of the August of 1991 KSRI - Customer Trouble Report Rate Audit exist. All are marked and treated as privileged and attorney work product doctrine. Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing Department.

9.

The methodology used to verify the integrity of the KSRI data for the August of 1991 audit can be duplicated by use of the following records: Mechanized Trouble Adjustment System ("MTAS") and the Form E2700C report associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 12th day of June, 1992.

Shirley T. Johnson

Shirley T. Johnson

Sworn to and subscribed before me this 12th day of June, 1992.

Kiki Papadopoulos  
Notary Public

My Commission Expires:  
Notary Public, DeKalb County, Ga.  
My Commission Expires Feb. 24, 1998

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of )  
 the Revenue Requirements and Rate )  
 Stabilization Plan of Southern ) Docket No. 920260-TL  
 Bell Telephone and Telegraph )  
 Company (Formerly FPSC Docket )  
 Number 880069-TL) )  
 \_\_\_\_\_ )

STATE OF FLORIDA )  
 )  
 COUNTY OF DADE )

AFFIDAVIT OF SHIRLEY JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in Docket No. 910163. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On April 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of the Customer Adjustments - LMOS System as part of the internal investigation. The audit was not scheduled to be performed and would not have been performed without the request of the Florida Legal

Department.

3.

The Loop Maintenance Operations System (LMOS) programmatically determines how each trouble report will be routed for correction based on pre-established screening rules.

4.

At the direction of the Legal Department, two time periods were selected for testing. Data sampled was statistically selected for each of the fourteen Florida Installation and Maintenance Centers (MCs) for February, 1990 through August, 1990 and September, 1990 through March, 1991.

5.

Audit tests were performed to attest to the accuracy in scoring subscriber trouble reports by the MCs. Each test was designed to isolate and evaluate one element of the refunding process while maintaining all other factors constant.

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on August 2, 1991.

7.

The August, 1991 Customer Adjustment - LMOS Audit was carried out solely because the Legal Department requested that it be performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.



8.

Less than half a dozen copies of the August of 1991 Customer Adjustment - LMOS Audit exist. All are marked and treated as privileged, confidential, and subject to the attorney-client privilege and attorney work product doctrine. Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing Department.

9.

The random sample method which formed the basis of the August of 1991 audit can be duplicated by use of the following records: 1) Mechanized Trouble Adjustment System ("MTAS") and/or Display Long Extended Trouble History ("DLETH") data and 2) customer records associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 12<sup>th</sup> day of June, 1992.

Shirley T. Johnson  
Shirley T. Johnson

Sworn to and subscribed  
before me this 12<sup>th</sup>  
day of June,  
1992.

Kiki Papadopoulos  
Notary Public

My Commission Expires:  
Notary Public, DeKalb County, Ga.  
My Commission Expires Feb. 24, 1999

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of )  
 the Revenue Requirements and Rate )  
 Stabilization Plan of Southern ) Docket No. 920260-TL  
 Bell Telephone and Telegraph )  
 Company (Formerly FPSC Docket )  
 Number 880069-TL) )

STATE OF FLORIDA )  
 )  
COUNTY OF DADE )

AFFIDAVIT OF SHIRLEY JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in Docket No. 910163. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On April 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of PSC Schedule 11 as part of the internal investigation. The audit was not scheduled to be performed and would not have been performed without the request of the Florida Legal Department.

3.

The PSC Schedule 11 is a statement of compliance with Florida Public Service Commission (FPSC) rule 25.4.070. The rule stipulates the service objective for a service affecting trouble as "scheduled to insure that at least 95% of such reports are cleared within 72 hours of report in each exchange as measured on a monthly basis."

4.

At the direction of the Legal Department, all data tested was from February, 1990 through March, 1991. Statistical sampling was performed when there was a high volume of trouble reports meeting the specified criteria for a given month within an exchange.

5.

Audit tests were performed to determine if all trouble reports that should have been counted in the FPSC Schedule 11 were appropriately included. Each test was designed to isolate and evaluate one facet of the routing process from receipt of the trouble report to the Mechanized Trouble Analysis System (MTAS).

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on August 2, 1991.

7.

The August, 1991 PSC Schedule 11 Audit was carried out solely because the Legal Department requested that it be

-2-

performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.

8.

Less than half a dozen copies of the August of 1991 KSRI - Customer Trouble Report Rate Audit exist. All are marked and treated as privileged, confidential, and subject to the attorney-client privilege and attorney work product doctrine. Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing Department.

9.

The random sample method which formed the basis of the August of 1991 audit can be duplicated by use of the following records: 1) Mechanized Trouble Adjustment System ("MTAS") and/or Display Long Extended Trouble History ("DLETH") data and 2) customer records associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 12th day of June, 1992.

Shirley T. Johnson  
Shirley T. Johnson

Sworn to and subscribed  
before me this 12th  
day of June,  
1992.

Viki Papadopoulos  
Notary Public

My Commission Expires:

Notary Public, DeKalb County, Ga.  
My Commission Expires Feb. 24, 1998

EXHIBIT "B"

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens ) Docket No. 910163-TL  
of the State of Florida to initiate )  
investigation into integrity of )  
Southern Bell Telephone and Telegraph )  
Company's repair service activities )  
and reports. )  
\_\_\_\_\_ )

STATE OF ALABAMA )  
 )  
COUNTY OF JEFFERSON )  
\_\_\_\_\_ )

AFFIDAVIT OF DANNY L. KING

BEFORE ME, the undersigned authority, personally appeared Danny L. King who stated that he is currently the Assistant Vice President, Central Office Operations Support for BellSouth Telecommunications, Inc., and further states the following:

1.

In May of 1991, he was requested to assist the Florida Legal Department in performing an internal investigation that relates to certain of the issues raised in this Docket. His role in the investigation was to assist the Legal Department in gathering and analyzing information necessary to render legal advice to the Company.

2.

Specifically, he was requested by the Legal Department to perform a statistical analysis of the manner in which trouble reports were handled at various locations throughout Florida. This process was initiated at the express request of the Legal Department and would not have been performed without the request of the Department.

3.

He was provided with specific information that was obtained by lawyers in the Florida Legal Department as part of the ongoing investigation. He then utilized a database that contained trouble histories for various years to analyze the information provided by the Legal Department. The purpose of the analysis was to determine the veracity of the information obtained in the investigation and to quantify any significant deviation. He continued the above-described efforts until the early part of 1992.

4.

During this time frame, he provided a number of reports to the Legal Department that set forth the results of the analysis. A very small number of copies of these reports exist. All have been marked and treated as privileged and attorney work product doctrine. The distribution of these reports was limited to appropriate members of the Legal Department and to certain member of the Management of Southern Bell who had a need to know the information contained therein.

FURTHER AFFIANT SAYETH NOT.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1992.

\_\_\_\_\_  
Danny L. King

Sworn to and subscribed  
before me this \_\_\_\_\_  
day of \_\_\_\_\_.  
1992.

\_\_\_\_\_  
Notary Public

My Commission Expires:  
\_\_\_\_\_