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J. Phillip Carver  
General Attorney

Southern Bell Telephone  
and Telegraph Company  
c/o Marshall M. Criser III  
Suite 400  
150 So. Monroe Street  
Tallahassee, Florida 32301  
Phone (305) 530-5558

September 2, 1992

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

Re: Docket No. 910163-TL  
Docket No. 920260-TL

Dear Mr. Tribble:

Enclosed for filing in the above-referenced dockets are the original and fifteen copies of Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Eighth Motion to Compel and Request for an In Camera Inspection of Documents. Copies have been furnished to the all parties listed in the Certificate of Service.

A copy of this letter is enclosed. Please indicate on the copy that the original was filed and return the copy to me.

Sincerely yours,

*J. Phillip Carver*  
J. Phillip Carver  
(2x)

- ACK ✓
- AEA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG 1
- LIN 6
- OPC \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC 1
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

cc: All parties of record  
Mr. A. M. Lombardo  
Mr. H. R. Anthony  
Mr. R. Douglas Lackey

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**CERTIFICATE OF SERVICE**  
**Docket No. 920260-TL**

I HEREBY CERTIFY that a copy of the foregoing has been  
furnished by United States Mail this *2nd* day of *Sept.*, 1992  
to:

Robin Norton  
Division of Communications  
Florida Public Service  
Commission  
101 East Gaines Street  
Tallahassee, FL 32399-0866

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

Joseph A. McGlothlin  
Vicki Gordon Kaufman  
McWhirter, Grandoff & Reeves  
522 East Park Avenue,  
Suite 200  
Tallahassee, Florida 32301  
atty for FIXCA

Joseph Gillan  
J. P. Gillan and Associates  
Post Office Box 541038  
Orlando, Florida 32854-1038

Patrick K. Wiggins  
Wiggins & Villacorta, P.A.  
Post Office Drawer 1657  
Tallahassee, Florida 32302  
atty for Intermedia

Floyd R. Self, Esq.  
Messer, Vickers, Caparello,  
Madsen, Lewis & Metz, PA  
Post Office Box 1876  
Tallahassee, FL 32302  
atty for US Sprint

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

Michael J. Henry  
MCI Telecommunications Corp.  
MCI Center  
Three Ravinia Drive  
Atlanta, Georgia 30346-2102

Richard D. Melson  
Hopping Boyd Green & Sams  
Post Office Box 6526  
Tallahassee, Florida 32314  
atty for MCI

Rick Wright  
Regulatory Analyst  
Division of Audit and Finance  
Florida Public Svc. Commission  
101 East Gaines Street  
Tallahassee, FL 32399-0865

Peter M. Dunbar  
Haben, Culpepper, Dunbar  
& French, P.A.  
306 North Monroe Street  
Post Office Box 10095  
Tallahassee, FL 32301  
atty for FCTA

Chanthina R. Bryant  
Sprint  
3065 Cumberland Circle  
Atlanta, GA 30339

Michael W. Tye  
AT&T Communications of the  
Southern States, Inc.  
106 East College Avenue  
Suite 1410  
Tallahassee, Florida 32301

Dan B. Hendrickson  
Post Office Box 1201  
Tallahassee, FL 32302  
atty for FCAN

Thomas F. Woods  
1709-D Mahan Drive  
Tallahassee, FL 32308  
Atty for Florida Hotel  
& Motel Association

Monte Belote  
Florida Consumer Action Network  
4100 W. Kennedy Blvd. #128  
Tampa, FL 33609

Bill L. Bryant, Jr., Esq.  
Foley & Lardner  
Suite 450  
215 South Monroe Street  
Tallahassee, FL 32302-0508  
Attys. for AARP

Michael B. Twomey  
Assistant Attorney General  
Department of Legal Affairs  
Room 1603, The Capitol  
Tallahassee, FL 32399-1050

  
J. Phillip Carter (2)

CERTIFICATE OF SERVICE

DOCKET NO. 910163-TL

I HEREBY CERTIFY that a correct copy of foregoing was furnished by U. S. Mail to the following parties this 2<sup>nd</sup> day of Sept., 1992.

Charles J. Beck, Esq.  
Assistant Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, FL 32399-1400

Tracy Hatch, Esq.  
Division of Legal Services  
Florida Public Service Comm.  
101 E. Gaines Street  
Tallahassee, FL 32301

J. Phillip Carter  
(2)

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. )  
\_\_\_\_\_ )

Comprehensive Review of the Revenue ) Docket No. 920260-TL  
Requirements and Rate Stabilization )  
Plan of Southern Bell Telephone & ) Filed September 2, 1992  
Telegraph Company )  
\_\_\_\_\_ )

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S  
OPPOSITION TO PUBLIC COUNSEL'S EIGHTH 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 hereby files its Opposition to the Eighth 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 Request for Late-Filed Exhibits to the panel deposition of C.L. Cuthbertson, Jr. and C.J. Sanders, taken on June 17, 1992, and states as grounds in support thereof the following:

1. At the time of the aforementioned panel depositions the Office of Public Counsel requested that certain documents be produced by Southern Bell. By agreement of the parties, these documents would be produced as "late-filed exhibits" without the necessity of a formal request to produce. Under the terms of

DOCUMENT NUMBER-DATE

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this agreement, Southern Bell reserved the right to object to the production of documents requested as late-filed exhibits at the time it filed its response.

2. On August 7, 1992, Southern Bell filed its Response to Public Counsel's Request for Late-Filed Exhibits. In this response, Southern Bell objected to the production of documents responsive to Requests for Late-Filed Exhibits Nos. 1 and 2 on the basis of the attorney-client privilege and work product doctrine.

3. Public Counsel subsequently filed on August 21, 1992 an eighteen page Motion to Compel Production of these two categories of documents. For most of these eighteen pages, Public Counsel simply recites once again its version of the law of attorney-client and work product privileges. These legal concepts have been amply briefed by both Public Counsel and Southern Bell over the course of Public Counsel's previous seven Motions to Compel and Southern Bell's responses thereto. There is no point in stating for an eighth time the applicable case law. Suffice it to say that Public Counsel's extremely general, and largely inapplicable, recitation of the law relating to the attorney-client and work product privileges misses the central questions at issue in this dispute: (1) whether the investigation by Southern Bell attorneys is privileged, a question that has already been exhaustively argued to this Commission in the previous motions; and (2) whether the two documents at issue are

themselves privileged as memorializations of that privileged information. The answer to both questions is yes.

4. Stated briefly, the pertinent background facts are as follow: In 1991, the legal department of Southern Bell undertook an internal investigation in order to render a legal opinion to the management of Southern Bell. The subject matter of this investigation was, of course, the issues that are the subject of this docket. In order to render a legal opinion to their client, Southern Bell's lawyers gathered the facts that were necessary for them to render a legal opinion. To this end, the legal department enlisted the company's security department to act as its agent in the process of fact gathering. At the conclusion of this investigation, the legal department informed a limited number of managers of Southern Bell with a "need to know" of the results of the investigation.

5. Based upon the case law that has been cited repeatedly in this docket, since the information obtained in the investigation by Southern Bell attorneys was derived from the client in order to render a legal opinion, it is therefore protected by the attorney-client privilege. Moreover, the documents that set forth the facts obtained in this investigation are the protected work product of attorneys for Southern Bell.

6. The requested Late-filed Exhibit No. 1 is a document that sets forth the names of disciplined management employees who are paygrade five and below. Of paramount importance for

purposes of Public Counsel's Motion, this document also contains a summary of the facts derived from the investigation that formed the basis for the discipline. While this particular document was not drafted by a lawyer, it contains information derived from the investigation and was itself prepared as a part of the investigation. Indeed, it is simply the notes of managers of the company that memorialize the privileged information for internal purposes.

7. As Public Counsel concedes in its Motion to Compel, the names of all management employees who were disciplined have previously been provided. The only additional information that Public Counsel seeks to obtain from the disclosure of this document is the statement of facts derived from the investigation by Southern Bell's Legal Department, which was the basis for the discipline of these employees.

8. Public Counsel states in its Motion that an in camera inspection is necessary to determine whether the information is privileged, and that "[a]ny legal advice or opinion that may be entwined with the facts may be excised in an in camera review" (Motion, page 5). The reality, however, is that Public Counsel has already obtained all information contained in these documents that is not privileged. The notes themselves are mere summaries of the contents of the company's privileged investigation. These summaries were made as part of the investigatory process. Thus, Public Counsel's attempt to compel production of this document is



simply one more effort to invade Southern Bell's attorney/client privilege and to obtain the work product of its attorneys. As such, this effort should be denied.

9. The requested Late-filed Exhibit No. 2 is a similar document that sets forth the names of craft employees who were interviewed in the investigation, as well as some employees not interviewed who were, nevertheless, mentioned in the interviews. The document also summarizes the facts derived from the investigation that suggest whether any particular employee either did or did not engage in any activity that might be deemed improper. Additionally, the document sets forth preliminary recommendations for discipline of certain employees.

10. Unlike management employees, however, craft employees have never been disciplined in the context of the matters that are the subject of this docket. Thus, the document which is the subject of Late-Filed Exhibits No. 2 is not discoverable for a number of reasons. First, just as is the case with Late-Filed Exhibit No. 1, Exhibit No. 2 contains summaries of Southern Bell's privileged investigation and, just as with Exhibit No. 1, these summaries are themselves privileged. Moreover, since no discipline was taken, the document in question does not memorialize personnel-related decisions. Instead, it is little more than a "road map" through the investigation, which map was created as a part of that investigation. The names of the craft employees that counsel for Southern Bell decided to interview,

and the facts that informed the decisions as to whom to interview, are inextricably intertwined with the mental impressions that were formed by Southern Bell's legal counsel as the investigation progressed.

11. If Public Counsel is arguing that an attempt to obtain the names of the employees interviewed by Southern Bell's Legal Department (and the information derived by these interviews) is not simply an attempt to obtain the results of the privileged investigation, then this argument is incorrect. Nevertheless, Public Counsel appears to make precisely this argument.

12. In its Motion, Public Counsel states that "no attorney was involved in the discussions on craft employee discipline" (page 8). Then, after acknowledging that no craft employees were, in fact, disciplined, Public Counsel concludes that it "is evident from the deposition that the discussions regarding disciplinary recommendations for craft employees is [sic] not a privileged communication between Staff and Company Counsel..." (page 9). Thus, Public Counsel appears to advance the novel proposition that privileged information communicated from a lawyer to representatives of the client is no longer privileged if it is discussed, for the purpose for which it was given, among those representatives of the client. In other words, Public Counsel argues that a discussion, among authorized representatives of the client, of attorney-client privileged information, even a discussion that leads to no additional action

by the client, has the effect of destroying the privilege. This argument simply finds no support in Florida law.

13. Finally, Public Counsel makes the argument that by disclosing, in response to formal discovery, the names of managers who were disciplined, Southern Bell has waived any objection to disclosing the otherwise privileged names of craft employees for whom the subject of discipline vel non was discussed, even when there was no subsequent discipline of these employees. To the contrary, the distinction between the names of management employees and the names of craft employees is clear. Some management employees were disciplined. The act of disciplining these employees was not privileged and, accordingly, the names of employees who received discipline are not privileged. There can be no claim of privilege for the discipline itself, nor has Southern Bell attempted to advance a claim of privilege for these personnel-related actions by the Company.

14. The situation as to craft employees is altogether different because no action by the Company has ever been taken with regard to these employees. Instead, there were nothing more than discussions, and proposed recommendations as to possible discipline, that were based entirely upon privileged information derived from the investigation and provided by Southern Bell attorneys. No act, which itself would not be privileged, ever occurred. Public Counsel deals with the obvious distinction

between these two categories of employees by simply acting as if the distinction does not exist.

15. Finally, Public Counsel argues that it can not successfully develop the issues for hearing without invading the attorney/client privilege of Southern Bell. Specifically, Public Counsel states that "BellSouth's claim of privilege for the late-filed deposition exhibits, if sustained, will effectively blanket the facts critical to a just determination of this case." (Motion p. 5). To the contrary, a proper ruling sustaining Southern Bell's claim of privilege will simply require that Public Counsel do its job, i.e., the job of every litigant, which is to develop evidence in support of its case through proper discovery rather than by invading the work product of counsel for its adversary.

16. The work product "doctrine was developed in order to discourage counsel from one side from taking advantage of trial preparation undertaken by opposing counsel, and thus both to protect the morale of the profession and to encourage both sides to a dispute to conduct thorough, independent investigations in preparation for trial." U.S. v. 22.80 Acres of Land, 107 F.R.D. 20, 24 (U.S.D.C. CAL. 1985). The work product doctrine, and the compelling reasons for its existence, apply equally to situations such as ours in which the documents in question are created in anticipation of litigation. See generally, U.S. v. Real Estate Board of Metropolitan St. Louis, 59 F.R.D. 637 (U.S.D.C. MO. 1973).

17. Rather than conduct its own "independent investigation" into the matters at issue in this proceeding, Public Counsel is simply making one more attempt to save labor by obtaining the product of the efforts of attorneys for Southern Bell. The often-repeated argument by Public Counsel that it cannot properly develop its case without following in the footsteps of the investigating attorneys for Southern Bell is simply frivolous. Public Counsel has already taken the depositions of almost one hundred employees in this matter and has expressed an intention to take depositions of at least an additional thirty employees in the near future. Yet Public Counsel still argues that it cannot possibly determine which craft employees to depose without having the result of the privileged investigation conducted by Southern Bell attorneys to serve as a "blue print" of sorts for its discovery efforts. This is not correct and this argument should be summarily rejected.

18. Finally, Public Counsel requests an in camera inspection of the two documents in question. While it is true that the case law relating to attorney-client privilege generally prescribes an in camera inspection to determine if a document is, in fact, privileged, the circumstances of our particular situation are such that an inspection would serve little or no purpose. At best, an in camera inspection of these documents would allow the Commission to determine that the representations by Southern Bell contained herein as to the contents of the

documents are accurate. This inspection would do little to aid the Commission in resolving the question of whether the information contained in these documents is privileged.

19. In a situation in which the documents in question ostensibly contain the communication of a legal opinion from an attorney to a client, an in camera inspection is obviously useful. It shows whether or not such a communication was made. In this instance, however, the documents in question do not contain legal opinions per se. Instead, these documents contain information that was obtained by attorneys for Southern Bell and which formed the basis for the rendering of a legal opinion to the client. After this information was given to the client, i.e. those managers of Southern Bell with a need to know, some of these managers memorialized the information in notes for their own subsequent use. Again, this information was not disclosed to any third party in any way that would waive the privilege. It was simply written down by the individuals to whom the information was provided. Therefore, the documents at issue do not on their face necessarily reveal that they memorialize privileged communications. In other words, this is a situation in which the most important factor in determining whether the attorney-client privilege and work product doctrine pertain is not so much what the documents reveal on their face, but rather the specific circumstances that demonstrate that the information


was related from attorney to client and then memorialized by the client in written form.


20. Accordingly, while Southern Bell is not entirely opposed to the Commission reviewing these documents in camera, the circumstances surrounding the assertion of the privileges by Southern Bell are such that this review would do little to help this Commission resolve the issue. Instead, this issue should be resolved by this Commission finding that, on the basis of the uncontested circumstances surrounding the creation of these documents, the attorney/client privilege and work product doctrine apply.

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

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL  
TELEPHONE AND TELEGRAPH COMPANY

  
HARRIS R. ANTHONY (24)  
J. PHILLIP CARVER  
c/o Marshall M. Criser III  
150 So. Monroe Street  
Suite 400  
Tallahassee, Florida 32301  
(305) 530-5555

  
R. DOUGLAS LACKEY  
NANCY B. WHITE  
SIDNEY J. WHITE, JR.  
4300 Southern Bell Center  
675 W. Peachtree St., NE  
Atlanta, Georgia 30375  
(404) 529-3862