BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Show cause proceeding against SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY for misbilling customers	)	Docket No. 900960
In re: Comprehensive review of the revenue requirements and rate stabilization plan of SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY	)	Docket No. 920260
In re: Investigation into the integrity of SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY repair service activities and reports	)	Docket No. 910163 Date filed: 1-5-93

MOTION BY THE ATTORNEY GENERAL AND THE CITIZENS FOR ORDER CLARIFYING THE SCOPE AND PURPOSE OF THESE PROCEEDINGS

Attorney General Robert A. Butterworth and the Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, hereby jointly move for a clarifying Order that this Commission lacks jurisdiction over certain aspects of deregulated inside wire maintenance, and for the other relief set forth in paragraph 14 below. As grounds for this motion, the Attorney General and the Citizens state:

1. In 1986, the Federal Communications Commission ("FCC") issued its Final Order in Docket 79-105, preempting state jurisdiction over inside wire maintenance.

2. In compliance with the FCC's preemption Order, this Commission on December 31, 1986 issued its Order attached hereto as Exhibit A, deregulating Southern Bell's provision of inside wire maintenance and trouble isolation in Florida. That Order was amended on January 28, 1987 attached hereto as Exhibit B. Under the Order, as amended, Southern Bell's provision of inside wire maintenance and trouble isolation in Florida was deregulated, effective January 1, 1987.[1/]

3. Since the January 1, 1987 deregulation, Southern Bell has sold inside wire maintenance and a combined plan (consisting of inside wire maintenance and trouble isolation) to citizens of Florida through billing inserts, and by means of oral solicitations by service representatives. The Florida Public Service Commission has no jurisdiction over these sales because of its December 31, 1986 and January 28, 1987 deregulation Orders. See, e.g., Pennsylvania Bank v. Eastern Airlines, Inc., 731 F.2d 1113, 1122 (3rd Cir. 1984) ("Deregulation deprived the [Civil Aeronautics Board] of power to determine questions of reasonableness of tariff provisions . . . . After deregulation, the validity of the agreed value provision in Eastern's voluntarily published tariff, available in the Official Freight Rate Tariff Book, became a purely judicial question . . . ."); Michigan Bell Communications, Inc. v.

1/ The Commission may, however, impute the revenues earned from deregulated inside wire maintenance in setting rates for telephone service, and the Attorney General and Public Counsel seek that relief from the Commission in the rate proceeding.

Michigan Public Service Commission, 399 N.W.2d 49, 54 (Mich. Ct. App. 1986).

4. On December 31, 1989, an antitrust, treble damage class action suit, Davis v. Southern Bell, Civ. No. 89-2839 (S.D. Fla.) was filed in federal district court in Miami. It challenges Southern Bell's billing inserts, sales scripts and "negative option" sales of inside wire maintenance as deceptive, misleading and in violation of the U.S. antitrust laws. That litigation seeks treble damages and injunctive relief for alleged monopoly overcharges.[2/] The class action was brought on behalf of Florida consumers and small businesses.

5. On February 4, 1991, the federal court in Davis v. Southern Bell refused to dismiss the antitrust suit, as Southern Bell had requested, and also ruled that Southern Bell's "state action" defense for its conduct did not apply after this Commission's deregulation of inside wire maintenance effective January 1, 1987. A copy of the Court's decision is attached hereto as Exhibit C.

[2/] Southern Bell's current price for combined inside wire maintenance and trouble isolation, at $2.50 per month, $30 per year, per line, is believed to be one of the highest, if not the highest, in the United States. A comparable plan currently is provided by Pacific Bell in California for $.60 per month, less than one-quarter of Southern Bell's price in Florida.

6. On July 14, 1992, the Attorney General of the State of Florida filed a motion to intervene as an additional plaintiff in Davis v. Southern Bell, individually and as parens patriae on behalf of the citizens of the State of Florida.

7. A series of more than 40 depositions has been requested by Plaintiffs in Davis v. Southern Bell. Those depositions bear on Plaintiffs' underlying contentions that Southern Bell has monopolized inside wire maintenance through deceptive billing inserts and sales scripts, "negative option" billing inserts, and oral "negative option" sales (in which inside wire maintenance or the combined plan are "sold" by service representatives without a fair opportunity for the customer to understand and knowingly accept or reject the offer).

8. The Commission's proceedings have focused heavily on fraudulent sales by service technicians in Southern Bell's "Network Sales" Program, over which this Commission does have plenary jurisdiction. Grand Jury Report (September 16, 1992) attached hereto as Exhibit D at 4.[3/] "Network Sales" involve the misuse of

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[3/] Plaintiffs in Davis v. Southern Bell have asserted that Southern Bell encouraged "Network Sales" of inside wire maintenance and the combined plans as one means, among many others, of maintaining Southern Bell's monopoly in the inside wire maintenance market. Southern Bell has challenged the relevance of its "Network Sales" Program in Davis v. Southern Bell, but the federal district court in Miami has overruled Southern Bell's argument, and has held that discovery may proceed on Southern Bell's "Network Sales" Program. See Exhibit D, holding that the deposition of Donald Babair concerning Southern Bell's "Network Sales" Program is relevant to issues in Davis v. Southern Bell.

regulated service and repair technicians to sell deregulated services. Southern Bell's misuse and involvement of regulated non-sales personnel to sell deregulated services to customers is sufficient to invoke the Commission's jurisdiction. This Commission has no antitrust jurisdiction over Southern Bell's monopolization of deregulated inside wire maintenance or deregulated trouble isolation, allegedly achieved through deceptive billing inserts and scripts, "negative option" billing inserts, and oral "negative option" sales by service representatives.

9. The Attorney General and Public Counsel do not question this Commission's plenary jurisdiction to penalize Southern Bell, or reduce its rate of return, for Southern Bell's "Network Sales" Program, as the Statewide Grand Jury strongly requested this Commission in its September 16, 1992 Report (Ex. D hereto at 4-5). However, while this Commission has jurisdiction to enter an order penalizing Southern Bell for such conduct, it has no jurisdiction to enter an order which purports to divest the federal court in Davis v. Southern Bell of its jurisdiction to award antitrust treble damages or other damages against Southern Bell.

10. This Commission ordinarily lacks jurisdiction to award damages, including but not limited to the antitrust treble damages sought in Davis v. Southern Bell. E.g., Southern Bell v. Mobile America Corp., 291 So.2d 199 (Fla. 1974). This Commission's lack of jurisdiction over damages is all the more clear where injury

arises from the sale of deregulated services, which the Commission has not regulated or actively supervised since of January 1, 1987. For all of the above complementary (but independently sufficient) reasons, the Attorney General and the Citizens request that this Commission not take any action which might have the effect of interfering in any manner with the award of antitrust treble damages or other damages in Davis v. Southern Bell.

11. Nevertheless, Southern Bell has asked this Commission to do exactly that in its proposed Issue No. 4, in its list of Preliminary Issues, Issue ID Conference (November 4, 1992) which reads:

> Has the settlement that Southern Bell entered into with the Office of Statewide Prosecutor sufficiently compensated affected subscribers such that no additional compensation for subscribers or penalty or fine against Southern Bell is warranted?

(Emphasis added.)

12. Southern Bell's request in its proposed Issue No. 4 is highly improper because, as noted, damages in general, including antitrust treble damages, and particularly damages arising from the sale of deregulated services such as inside wire maintenance, are clearly outside the jurisdiction of this Commission. Southern Bell v. Mobile American Corp., 291 So.2d 191 (Fla. 1974).

13. Moreover, as noted above, Plaintiffs in Davis v. Southern Bell recently requested a series of more than forty (40)

depositions. It appears likely that the record will be closed in these Commission proceedings long before the requested discovery is completed in Davis v. Southern Bell. Thus, by necessity, the Commission will decide the issues in these dockets without the benefit of the full discovery record in Davis v. Southern Bell. For that reason as well, it would be highly improvident for this Commission to decide against or even unintentionally interfere with recovery by Florida consumers and small businesses in Davis v. Southern Bell.

14. Accordingly, the Attorney General and Citizens seek this Commission's Order clarifying that:

(a) In compliance with the FCC's preemption Order, this Commission deregulated Southern Bell's provision of inside wire maintenance and trouble isolation effective January 1, 1987, and since that date has not regulated or actively supervised Southern Bell's billing inserts, sales scripts or "negative option" sales of inside wire maintenance by Southern Bell's service representatives.

(b) As a consequence of deregulation, insofar as these proceedings concern inside wire maintenance or trouble isolation, the scope of these proceedings is limited, and does not include monopolization or attempted monopolization, nor issues relating to the sale of deregulated inside wire

maintenance plans or a combined plan (consisting of inside wire maintenance and trouble isolation) through billing inserts or sales scripts, "negative option" billing inserts or oral "negative option" sales by service representatives. These proceedings do, however, include, inter alia, "Network Sales" of inside wire maintenance or trouble isolation, because those sales were made by service and repair technicians or similar personnel, whose functions and activities are regulated and are not intended to include sales, and because the Statewide Grand Jury has specifically requested this Commission to investigate and penalize Southern Bell for those activities;

(c) Even as to "Network Sales," the record in these proceedings necessarily may close before the completion of discovery in Davis v. Southern Bell. As a consequence of this possible disparity in available evidence, negative findings or conclusions, if any, by this Commission concerning "Network Sales" should not be utilized to the detriment of Florida consumers or small businesses in Davis v. Southern Bell;

(d) This Commission has no jurisdiction to award damages in general, including but not limited to antitrust treble damages, and this is all the more clear with respect to the deregulated services such as inside wire maintenance and trouble isolation. The Commission, therefore, does not

intend, by decisions or findings in these dockets, to preclude or impede any damages or other relief in Davis v. Southern Bell; and

(e) More generally, because the scope of these Commission proceedings is different than the antitrust and other claims in Davis v. Southern Bell, and because the Commission does not have before it the full discovery that eventually may be available in the federal court action in Davis v. Southern Bell, any findings by the Commission are not intended by the Commission to be used to the prejudice or detriment of the citizens of the State of Florida in Davis v. Southern Bell.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 920260-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 5th day of January, 1993.

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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 5th day of January, 1993.

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CERTIFICATE OF SERVICE
Docket No. 900960-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 this 5th day of January, 1993.

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Deputy Public Counsel

Exhibit A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into earnings of Southern Bell Telephone and Telegraph Company.	)	DOCKET NO. 861362-TL
In re: Southern Bell Telephone and Telegraph Company's filing to charge cost compensatory rates for inside wire.	)	DOCKET NO. 860674-TL
In re: Petition of the Citizens of the State of Florida for determination of effective date for Southern Bell's new depreciation rates.	)	DOCKET NO. 861139-TL
In re: Investigation into NTS cost recovery.	)	DOCKET NO. 860984-TP ORDER NO. 17040 ISSUED: 12-31-86

The following Commissioners participated in the disposition of this matter:

JOHN R. MARKS, III, Chairman
GERALD L. GUNTER
JOHN T. HERNDON
KATIE NICHOLS
MICHAEL McK. WILSON

ORDER APPROVING STIPULATION

BY THE COMMISSION:

Docket No. 861362-TL was opened in order to investigate the current level of earnings of Southern Bell Telephone and Telegraph Company (Southern Bell) in light of the Tax Reform Act of 1986 and the current cost of equity capital in today's capital markets. Subsequent to the initiation of the docket representatives of Southern Bell, the Office of Public Counsel, and members of the Commission Staff met in a series of negotiations to determine if an appropriate settlement could be reached resolving the issues in the Commission's earnings investigation.

In the course of the negotiations the central issues relative to Southern Bell in Dockets Nos. 860674-TL, 861139-TL and 860984-TP were also addressed. These dockets deal with Southern Bell's plan for deregulation of inside wire maintenance, Public Counsel's petition for a determination of the effective date for Southern Bell's new depreciation rates, and the Commission's proposal to remove certain nontraffic sensitive costs from access charges, respectively. By Order No. 16965 AT&T Communications of the Southern States, Inc. (ATT-C) was granted intervention in Docket No. 861362-TL. Although a party, ATT-C did not actively participate in the negotiations. As a result of the negotiations the parties to this proceeding have reached an agreement, the terms and conditions of which are contained in the Stipulation attached to this Order as Appendix "A" and incorporated herein.

The agreement contains seven major provisions. First, Southern Bell will reduce its originating and terminating carrier common line charges to a specified level which result in an access charge revenue decrease of approximately $31 million. The access charge rate reductions will be effective on February 1, 1987. As a result of the agreement reached on this issue we understand that Southern Bell will not protest the Commission's action taken at the December 15, 1986 Special Agenda in which we determined to issue a

Notice of Proposed Agency Action which, if it becomes effective, will reduce access charge rates for each of the local exchange companies (LECs) in Florida.

Second, Southern Bell will be allowed to provide inside wire installation and maintenance services on an unseparated basis pursuant to the Company's inside wire deregulation plan filed in Docket No. 860674-TL and incorporated by reference into the agreement. Principally, the agreement provides that basic local rates will be reduced by $0.55 on January 1, 1987, and the $0.55 credit will be eliminated with respect to those customers who had "opted-out" of Southern Bell's inside wire maintenance program. Even though inside wire will be deregulated on January 1, 1987, we understand that Southern Bell will retain the $.055 rate for inside wire maintenance service until June 30, 1987. The Company will continue to charge the existing lease rate for complex inside wire with no restriction on the use of the associated revenues. The maintenance charge on complex inside wire will be eliminated. The trouble location charge will continue to be regulated. The trouble isolation plan will be deregulated.

During a six-month transition period beginning January 1, 1987, each customer will have an opportunity to affirmatively "opt-in" to receive Southern Bell's inside wire maintenance service. For those customers who have not previously "opted-out", they must make an affirmative choice to take the inside wire maintenance service. If those customers currently receiving inside wire maintenance have not affirmatively "opted-in" by June 30, 1987, they will no longer receive inside wire maintenance service after June 30, 1987. The agreement reached regarding inside wire resolves all outstanding issues in Docket No. 860674-TL.

Third, Southern Bell will apply all tax expense savings for calendar year 1987 up to $54 million to offset capital recovery expense.

Fourth, Southern Bell will book an additional $20 million in 1986 intrastate depreciation expense as a non-recurring charge. This portion of the agreement resolves the outstanding issues in Docket No. 861139-TL.

Fifth, Southern Bell will book an additional $73 million in depreciation expense in 1987. Southern Bell's depreciation rates and amortization schedules will be designed to produce at least $98 million in increased depreciation expense in 1988. Further, Southern Bell will book an additional $17 million in depreciation expense in 1988 as a one-time charge.

Sixth, if Southern Bell earns in excess of 15% on equity per its regulated books for 1987, the Company will apply the excess amount as a credit to all business and residential single-line subscribers and party-line subscribers during 1988.

Seventh, Southern Bell shall not file a rate case for any reason prior to July 1, 1988. Subsequent to July 1, 1988, the Company may file a rate case for any reason except to recover additional depreciation expense, if any, in excess of the $98 million in additional 1988 depreciation expense previously discussed. Further, the parties agreed that none of the parties shall initiate or support any action before the Commission seeking to further reduce the Company's 1987 earnings or change its 1987 authorized rate of return.

We have reviewed the provisions of the agreement and upon consideration find that the terms and conditions of the agreement adequately balance the interests of the Company and the Company's ratepayers. Therefore, upon consideration, we find that the agreement attached as Appendix "A" is in the public interest and should be approved.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Stipulation entered into by Southern Bell Telephone and Telegraph Company, the Public Counsel, AT&T Communications of the Southern States, Inc., and the Commission Staff, dated December 16, 1986, and attached to this Order as Appendix "A" is hereby approved. It is further

ORDERED that Dockets Nos. 860674-TL, 861362-TL and 861139-TL be and the same are hereby closed.

By ORDER of the Florida Public Service Commission, this 31st day of DECEMBER, 1986.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

TH

by: Kay Flynn
Chief, Bureau of Records

ORIGINAL
FILE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Southern Bell Telephone and Telegraph Company's Tariff Filing to charge cost compensating rates for Inside Wire charges.	Docket No. 860674-TL
In re: Investigation into NTS Cost Recovery.	Docket No. 860984-TP
In re: Citizens' Petition to determine effective date for Southern Bell's depreciation rates.	Docket No. 861139-TL
In re: Investigation into earnings of Southern Bell Telephone & Telegraph Co.	Docket No. 861362-TL

STIPULATION

This Stipulation is entered into among Southern Bell Telephone and Telegraph Company (Southern Bell or Company), the Florida Public Service Commission Staff (Staff), the Citizens of the State of Florida, as represented by the Office of Public Counsel (Public Counsel) and AT&T Communications of Southern States, Inc. (AT&T). In order to facilitate the ultimate resolution of various issues in these proceedings, and further to avoid unnecessary litigation and expense and the uncertainties related thereto, the parties do hereby stipulate and agree with and among each other as follows:

1. Tax Reform Benefits - The parties hereby acknowledge that the Tax Reform Act of 1986 will restructure the calculation of taxable income for corporations and will tax corporate income at different tax rates than presently in effect. All parties to this Stipulation acknowledge and agree that the tax expense savings for calendar year 1987 that inure tc the benefit of Southern Bell shall be applied exclusively to offset capital recovery expense. This amount of tax savings to Southern Bell in calendar year 1987 is stipulated to be $54 million and in no event shall Southern Bell be required to apply more than $54 million in tax-related savings toward the total committed increase in capital recovery expense of $73 million in 1987.

2. Capital Recovery Expense - Intrastate depreciation rates for Southern Bell will not be determined by this agreement. However, it is agreed that changes to Southern Bell's depreciation rates and amortization schedules will be implemented in 1987 to produce at least $73 million in increased intrastate depreciation expense over the level which otherwise would be expensed in 1987 under existing 1986 depreciation rates and amortization schedules. The parties further agree that Southern Bell will not be required to increase its 1987 intrastate depreciation expense above this $73 million increase unless Southern Bell specifically requests such action. Increases in depreciation expense in the context of this agreement refer specifically to increases ordered by the

Commission as a consequence of new rates and not to increases occasioned by such factors as growth or change of plant mix.

It is further agreed that the implementation of changes to Southern Bell depreciation rates and amortization schedules will be designed to produce at least $98 million in increased intrastate depreciation expense in 1988 over the level which otherwise would be expensed in 1988 under existing 1986 depreciation rates and amortization schedules. In the event the Commission authorizes additional 1988 depreciation expense above $98 million, Southern Bell will not request any general rate increase during 1988 to offset the added expense. In addition Southern Bell agrees to book an additional $17 million in 1988 intrastate depreciation as a nonrecurring charge. In the event that the Company should be able to achieve a return on equity per its Florida regulated books for 1987 in excess of 15%, Southern Bell agrees to apply the excess amount as a credit to all business and residential single line subscribers and party line service subscribers during 1988.

3. The parties agree that Southern Bell shall book an additional $20 million in 1986 intrastate depreciation expense as a non-recurring charge.

4. Inside Wire - The parties agree that upon final approval of this Stipulation by the Commission, Southern Bell will be allowed to provide unregulated inside wire installation and

maintenance services on an unseparated basis pursuant to the accounting procedures outlined in the Company's inside wire deregulation plan filed in Docket No. 860674-TL and hereby incorporated by reference in this Stipulation. Southern Bell may provide such inside wire services beginning on January 1, 1987.

Basic regulated local exchange rates for all business and residential individual and party line service shall be decreased by 55 cents on January 1, 1987. For those customers who have previously opted out of inside wire maintenance, their corresponding 55 cent credit will be eliminated.

Further, with respect to the deregulated provision of inside wire services, the parties agree that station line rates will remain in place with no provision for specified use of resulting revenues. Station line maintenance rates will be eliminated.

The Trouble Location Charge will remain regulated while the Trouble Isolation Plan offering will be provided by Southern Bell as a deregulated service. The six month transitional plan as referenced in Southern Bell's Inside Wire Deregulation Plan, herein incorporated by reference, shall be approved.

5. Access Charges - Southern Bell will reduce its originating carrier common line charges to no less than 3.04, 1.98 and 1.22 cents for its respective day, evening and night periods. Further, Southern Bell agrees to reduce its terminating carrier

common line charges to no less than 3.82 cents. Both reductions shall be effective February 1, 1987, which will result in approximately a $31 million decrease in annual revenues.

6. The parties to this agreement will neither initiate nor support any action before the Commission seeking to further reduce Southern Bell's 1987 earnings or change its 1987 authorized rate of return. Further, the Company will not initiate a general rate increase or a general rate restructure before July 1, 1988.

7. This agreement is not intended to imply that access charge hearings should be dispensed with in 1987. To the contrary, hearings should take place in order for the Commission to determine appropriate future access charge levels and recovery mechanisms.

8. This proposal is based on the premise that it is a total package, a rejection of any single item cancels the entire agreement. This agreement shall have no precedential value for other proceedings. The amounts contained in this stipulation were arrived at through compromise negotiations. The parties to this agreement do not assert that the amounts stipulated to would necessarily be the same if each issue were treated separately.

9. This Stipulation has been entered into for the purpose of resolving outstanding issues currently pending in Docket Nos. 860984-TP, 861139-TL, 861362-TL and 860674-TL. Upon approval of this Stipulation by the Commission, such dockets and all issues

therein covered by terms of this Stipulation as adopted and approved by the Commission shall be considered resolved consistent with the terms of this Stipulation.

10. None of the parties hereto shall unilaterally recommend or support the modification of this Stipulation or discourage its acceptance by the Commission.

11. None of the parties hereto shall request reconsideration of, or appeal the order which approves this Stipulation.

12. If this Stipulation is not accepted in its entirety and without qualification by the Commission, it shall be null, void and of no further binding effect upon any party.

IN WITNESS WHEREOF, this Stipulation is entered into this 16th day of December, 1986.

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Exhibit B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into earnings of Southern Bell Telephone and Telegraph Company.	DOCKET NO. 861362-TL
In re: Southern Bell Telephone and Telegraph Company's filing to charge cost compensatory rates for inside wire.	DOCKET NO. 860674-TL
In re: Petition of the Citizens of the State of Florida for determination of effective date for Southern Bell's new depreciation rates.	DOCKET NO. 861139-TL
In re: Investigation into NTS cost recovery.	DOCKET NO. 860984-TP ORDER NO. 17040-A ISSUED: 1-28-87

AMENDATORY ORDER

BY THE COMMISSION:

On December 31, 1986, we issued Order No. 17040 in the above-referenced dockets. That Order contained certain errors and omissions which we hereby correct. The second full paragraph on page two of the Order is amended as follows:

> It is our understanding that each customer who has subscribed to new telephone service on or after July 4, 1983, has had an opportunity at the time of applying for service to affirmatively choose whether to receive inside wire maintenance service from Southern Bell. Those customers who had service prior to July 4, 1983, automatically received and currently receive inside wire maintenance as part of their local service. During a six-month transition period beginning January 1, 1987, each customer who has not previously had an opportunity to choose whether to receive inside wire maintenance from Southern Bell will have the opportunity to affirmatively "opt-in" to receive Southern Bell's inside wire maintenance service. If those customers who had service prior to July 4, 1983, have not affirmatively "opted-in" by June 30, 1987, they will no longer receive inside wire maintenance service after June 30, 1987. The agreement reached regarding inside wire resolves all outstanding issues in Docket No. 860674-TL.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Order No. 17040 is amended as set forth in the body of this Order. It is further

ORDERED that Order No. 17040 is affirmed in all other respects.

By ORDER of the Florida Public Service Commission, this 28th day of JANUARY, 1987.

STEVE TRIBBLE, Director
Division of Records and Reporting

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-2839-CIV-NESBITT

LINDA DAVIS, DAVID EFRON, LINDA MARTENS, and GENEVIEVE WILLIAMS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, a Georgia corporation,

Defendant.
_____/

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon the motion of Defendant Southern Bell Telephone & Telegraph Company ("Southern Bell") to dismiss, or, in the alternative, for summary judgment. Defendant moves for dismissal of the antitrust claims brought by Plaintiffs, customers of Southern Bell, on the grounds that the Plaintiffs lack antitrust standing. In the alternative, Defendant seeks summary judgment on the antitrust claims on the grounds that its conduct is immune from antitrust liability under the state action doctrine. For the reasons stated below, the Court denies the motion to dismiss for lack of antitrust standing and grants the Defendant partial summary judgment with respect to the antitrust claims based on the state action doctrine. The Court defers ruling on Defendant's motion with respect to the state law claims until the

federal antitrust issues have been resolved.

I. STATEMENT OF THE CASE

Plaintiffs, customers of Southern Bell, initiated this class action[1] seeking monetary damages for violations of the antitrust laws, Florida Civil Remedies for Criminal Practice Act ("Florida RICO"), restitution, breach of duty of good faith and fair dealing, and other statutory violations under Florida law.[2] The only federal claims stated are for monopolization and attempted monopolization in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. The Court has pendent jurisdiction over the remaining claims.

This suit arises out of the terms upon which Southern Bell furnished inside wire maintenance service ("IWMS") to its customers in the State of Florida since 1983. Inside wire is the telephone wire within the customer's home or office which connects the telephone jack to the telephone company's outside plant. It includes the telephone jacks, but not the customer's telephone equipment. The class of Plaintiffs allegedly consists of all residential and business customers of Southern Bell in the State

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[1] The Court has not yet certified the class.

[2] Plaintiffs seek treble damages for violations of § 2 of the Sherman Act and Florida Antitrust Act of 1980, Fla. Stat. § 542.19 (1987), treble damages for violations of the Florida RICO laws, and treble damages for violations of Fla. Stat. § 817.061.

of Florida who have paid for Southern Bell's optional IWMS between the time the service became optional through the date of class certification.

The complaint alleges the following facts. Prior to 1983, Southern Bell maintained all the inside wiring for residential and business customers. IWMS was part of, or was "bundled with," basic telephone service provided by Southern Bell pursuant to a monopoly franchise from the State of Florida and regulated by the Florida Public Service Commission ("PSC").[3] In 1982, the PSC ordered that IWMS be separated, or "unbundled," from basic telephone service. The PSC intended to promote competition in the IWMS market.

In June of 1983, Southern Bell for the first time offered its customers IWMS as a separate service, through a "negative option" contract announced in a billing insert. Plaintiffs allege that the insert contained untrue, deceptive, or misleading statements and omissions; specifically, it failed to inform customers that it was a contract offer and implied that repairing inside wire was a difficult task that could not be undertaken by the customer. Pursuant to the terms of the negative option contract, customers were to continue to receive IWMS from Southern Bell unless they affirmatively requested otherwise, and were charged $.55 per month for the service. The new $.55 charge for IWMS was included in the

[3] Inside wire is used in both interstate and intrastate communication and is regulated concurrently by both the State and the federal government.

charge for local telephone service.

From February to June of 1987, Southern Bell sent out two or more billing inserts to its customers, including a ballot check-off which provided that Southern Bell would continue to provide IWMS if the customer so requested. These inserts allegedly contained the same types of misrepresentations and omissions as the 1983 insert.

In March 1988, Southern Bell sent its customers another billing insert containing a second negative option contract for IWMS which increased the cost of service from $.55 per month to $1.00 per month. Customers would accept the new "offer" if they did not act. The billing insert contained defects similar to those contained in prior inserts. Another negative option contract mailed to customers in the late Spring of 1989 raised the charge for IWMS to $1.50 per month.

Plaintiffs allege that by this conduct, Southern Bell willfully either acquired or maintained, or attempted to acquire or maintain, monopoly power in the IWMS markets, which resulted in unlawful monopoly profits for Southern Bell.

The facts presented in connection with the motion to dismiss, or, in the alternative, for summary judgment provide additional information about the events Plaintiffs describe in the complaint. The parties agree that the PSC considered the unbundling of IWMS and new charges for the service at great length during the first half of 1983. Moreover, Jack Shreve, Esq., Public Counsel

appointed by the State legislature to provide representation for the people of the State of Florida in proceedings before the PSC, participated fully in the decision-making process. It is uncontroverted that Southern Bell had to obtain the approval of the staff of the PSC to use the billing insert containing the 1983 negative option contract prior to mailing the insert to customers. The staff did in fact approve the billing insert prior to mailing. Plaintiffs, however, have raised a genuine issue as to whether the Commissioners themselves ever considered the manner in which Southern Bell would offer IWMS to customers.

Finally, it is clear that by Order dated December 31, 1986, Order No. 17040, the PSC deregulated the IWMS market, effective January 1, 1987. By that Order (in conjunction with an Amendatory Order, dated January 28, 1987, Order No. 17040A) the PSC directed Southern Bell to give each customer receiving IWMS from Southern Bell since July 3, 1983 a chance to affirmatively "opt in" to Southern Bell's IWMS program.[4]

[4] For information regarding federal preemption and detariffing of IWMS, see National Ass'n of Regulatory Utility Com'rs v. F.C.C, 880 F.2d 422 (D.C. Cir. 1989); In the Matter of Detariffing the Installation of Maintenance of Inside Wiring, 5 F.C.C. Rec. 3407 (May 31, 1990)(second further notice of proposed rulemaking).

II. DISCUSSION

A. Antitrust Standing

Defendant first contends that the federal and state antitrust claims should be dismissed because Plaintiffs lack antitrust standing. Specifically, Defendant argues that Plaintiffs lack standing because they have not alleged an antitrust injury, that is, an injury "attributable to an anti-competitive aspect of the practice under scrutiny . . . ." Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1889 (1990). Plaintiffs contend that as consumers paying excessive monopoly prices, they clearly have standing under Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979), to raise violations of § 2 of the Sherman Act.

In determining whether Plaintiffs have standing to bring this antitrust action, the Court is bound by the four corners of the complaint. Mr. Furniture v. Barclays American/ Commercial, Inc., 919 F.2d 1517, 1520, (11th Cir. 1990); Austin v. Blue Cross and Blue Shield, 903 F.2d 1385, 1387 (11th Cir. 1990).[5] Viewed in the light most favorable to the Plaintiffs, the salient portions of the complaint allege that subsequent to the decision of the PSC to introduce competition in the IWMS market, Southern Bell willfully

[5] The Court recognizes that standing is jurisdictional and that a defendant may bring a factual attack on plaintiff's standing. In this case, however, Defendant clearly brings only a facial challenge to Plaintiffs' antitrust standing. See Defendant's "Statement of Material Facts Pursuant to Local Rule 10.J.2," at p. 1.

acquired and maintained a monopoly in the IWMS market through anticompetitive acts. The anticompetitive behavior includes offering IWMS to Southern Bell's customers through negative option contracts and making untrue, deceptive, and misleading representations of the service offered by Southern Bell. The complaint further alleges that Plaintiffs were injured by paying monopoly overcharges for IWMS from Southern Bell.

Section 4 of the Clayton Act, 15 U.S.C. § 15, which creates a private right of action for antitrust violations, provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . ." As noted by the United States Court of Appeals for the Eleventh Circuit, the concept of antitrust standing "has proved to be somewhat elusive." Mr. Furniture, 919 F.2d at 1520 (citing Blue Shield of Virginia v. McCready, 102 S. Ct. 2540, 2547 (1982). The Court must assess a series of interrelated factors to determine whether Plaintiffs have been injured "by reason of" an antitrust violation under the Clayton Act: "1) the existence of a causal connection between the antitrust violation and the alleged injury; 2) the nature of the plaintiff's alleged injury; 3) the directness or indirectness of the asserted injury and the related inquiry of whether the damages are speculative; 4) the potential for duplicative recovery or complex apportionment of damages; and finally, 5) the existence of a more direct victim of the alleged anticompetitive conduct." Austin, 903 F.2d at 1388 (citing

Associated General Contractors v. California State Council, 103 S. Ct. 897 (1983)); see also Mr. Furniture, 919 F.2d at 1520 (listing four similar factors).[6]

Defendant focuses primarily on the first of the five factors listed above. And indeed, a review of the case law reveals that the application of the remaining four factors favors a finding of antitrust standing in this case: the Supreme Court has held that direct consumers have standing to sue for injury resulting from prices "artificially inflated by reason of . . . . anticompetitive conduct . . . ." Reiter, 99 S. Ct. at 2332. As in Reiter, Plaintiffs in this case are direct consumers of the allegedly overpriced product.

The only substantial distinction in terms of antitrust standing between the instant case and Reiter is the nature of the alleged anticompetitive conduct and its nexus with the alleged injury. In Reiter, the nexus between the anticompetitive conduct and the injury is obvious because plaintiffs alleged that they paid higher prices due to price fixing, a per se violation of § 1 of the Sherman Act. In this case, the connection between the allegedly anticompetitive conduct and the injury is less certain. Thus, Defendant has identified correctly the most vulnerable aspect of Plaintiffs' case -- antitrust injury or injury "attributable to an

[6] The so-called "target zone test" used by the Eleventh Circuit to determine antitrust standing comprises the five factors enunciated by the Supreme Court in Associated General Contractors. Austin, 903 F.2d at 1389.

anti-competitive aspect of the practice under scrutiny . . . ." Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1889 (1990).[7] As an analysis of Reiter indicates that all the factors, except the first factor, support a finding that Plaintiffs have standing to bring these antitrust claims, the Court addresses below only remaining issue, the nexus between the alleged injury and the anti-competitive conduct.

Defendant disputes the existence of the requisite nexus between Plaintiffs' injury and Defendant's conduct primarily on the grounds that Plaintiffs do not allege sufficient facts showing Defendant's acts to be anticompetitive. Defendant contends that the improper acts alleged in the complaint, the negative option contracts and the misleading and deceptive representations, were acts which would give rise to state law claims, not federal antitrust claims. Clearly, the allegedly anticompetitive conduct that forms the basis for the antitrust claims also forms the basis for Plaintiffs' Florida RICO and other statutory claims, as well as for Plaintiffs' contract claims. Nevertheless, the mere existence of a tort or state law remedy for the improper conduct fails to preclude appropriate antitrust remedies. See International Travel Arrangers, Inc. v. Western Airlines, Inc., 623

[7] Stated another way, this aspect of antitrust standing requires that the injury alleged not only be "of the type the antitrust laws were intended to prevent [but also] flow from that which makes defendants' act unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 97 S. Ct. 690, 697 (1977).

F.2d 1255 (8th Cir. 1980)(use of misleading advertising by airline to gain monopoly and keep charter airline out of the market constitutes a violation of § 2 of the Sherman Act), cert. denied, 101 S. Ct. 787 (1980); see also Areeda & Turner, Antitrust Law, Vol. III § 737b (1978)("The existence of a tort remedy does not necessarily obviate antitrust concern. The public interest in competition is not necessarily vindicated by private tort remedies.").

Moreover, contrary to Defendant's assertions, the Court cannot find that the use of negative option contracts and misleading representations to customers is not anticompetitive as a matter of law. The Federal Communications Commission has stated that default procedures, or negative options, such as the ones used by Southern Bell, are anticompetitive. Memorandum Opinion and Order re: Investigation of Access and Divestiture Related Tariffs, 50 F.R. 25982 (June 24, 1985)(default options are against the public interest because they confer advantage on company due to historical monopoly position and deny benefits of competition). Furthermore, at oral argument, Plaintiffs alleged that where a negative option was used, a telephone company would capture more than 85% of the market, but where a positive option was used, the phone company would capture only 30% to 50% of the market.[8] Plaintiffs have

[8] Exhibit 9 to the Cresse deposition, filed in opposition to Defendant's motion, is entitled "Inside Wire Survey." This survey certainly would create an issue as to whether telephone companies using a negative option generally gained a

alleged that Southern Bell willfully captured a monopoly in the IWMS market through negative options and misleading representations, and the Court cannot at this stage of the proceeding find that these acts were not anticompetitive as a matter of law.

The district court's decision in Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417 (D.N.M. 1988) further bolsters Plaintiffs' position. Sollenbarger is virtually indistinguishable from the instant case on the facts,[9] although the question of antitrust injury arose in the context of plaintiffs' motion for class certification, rather than in a motion to dismiss for lack of standing. The court considered the defendant's argument that plaintiffs had not suffered an antitrust injury, and relying on Reiter v. Sonotone, supra, rejected it: "if [the defendant] in implicitly arguing that plaintiffs have not suffered an injury covered by § 4 of the Clayton Act, 15 U.S.C. § 15, [the defendant] is incorrect." 121 F.R.D. at 426.

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substantially greater share of the telephone users market than did the telephone companies that used positive options. (It should be noted, however, that the relevant market for measuring whether a particular company has a monopoly has not yet been defined.) Although Defendant brings only a facial attack on Plaintiffs' standing to bring the antitrust claims, the additional facts alleged by Plaintiffs highlight that the allegations of the complaint, viewed in the light most favorable to the plaintiff, support an inference of antitrust injury.

[9] Plaintiffs alleged that Mountain States Telephone and Telegraph Co. monopolized the market for IWMS in violation of § 2 of the Sherman Act through negative option contracts for IWMS. 121 F.R.D. at 420-21.

The Court believes that the antitrust standing requirements of § 4 of the Clayton Act do not require Plaintiffs to plead every fact necessary to tie the allegedly anticompetitive conduct to the injury. The facts necessary to show "antitrust injury" are often very complex, as in this case.[10] So long as the facts alleged, viewed in the light most favorable to Plaintiffs, indicate that Plaintiffs have suffered an antitrust injury, then Plaintiffs have met their threshold burden. Viewed in their best light, the facts alleged in the complaint support an inference of a "nexus between the assumed § [2] violation and [Plaintiffs'] injury . . . ." Mr. Furniture, 919 F.2d at 1521. Thus, Plaintiffs have carried their burden through this stage of the proceedings.

Resolution of the standing issue nevertheless does not assure recovery under the Sherman Act. Antitrust injury "is indeed a threshold requirement, but it is not only that." Areeda & Hovenkamp, Antitrust Law, 1989 Supp. § 334.3b (1989). Questions of standing, injury in fact, antitrust injury and damages are closely related concepts, and regardless of what it is called,

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[10] In footnote 10 to the supplemental brief, Plaintiffs offer to provide an affidavit from an expert witness setting forth the economic theory and evidentiary facts supporting Plaintiffs' assertion that competition would have limited the price of IWMS absent Southern Bell's practices. Moreover, at oral argument, Plaintiffs stated that Southern Bell intended to exclude Sears, Roebuck from the IWMS market. The Court need not consider these facts, as Defendant's challenge to Plaintiffs' standing is on the face of the complaint. These are the types of facts that Plaintiffs will ultimately need to prove, but clearly not all of them must be included in the complaint.

there must be some loss "attributable to an anti-competitive aspect of the practice under scrutiny" proven before Plaintiffs can recover. Id. at § 334.3.[11] Defendant therefore is not precluded from renewing its motion for summary judgment at any such time it appears that Plaintiff cannot satifsy all the necessary elements for recovery on the antitrust claim. Id.; see also Atlantic Richfield, 110 S. Ct. at 1888-89 (lack of antitrust injury before the court on motion for summary judgment); Brunswick Corp., 97 S. Ct. at 694-95 (lack of antitrust injury before the court on damage issue).

B. State Action

Defendant also argues that it is entitled to summary judgment on the grounds that its actions were "state action" exempt from

[11] It would not be enough, for example, to show that Southern Bell abused its monopoly power by overcharging customers for IWMS: the courts have held that exploitative monopoly pricing is not unlawful in and of itself. See Continental Cablevision of Ohio v. American Elec. Power Co., 715 F.2d 1115 (6th Cir 1983); Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 100 S. Ct. 1061 (1980). Rather, to entitle them to judgment Plaintiffs must prove that absent Southern Bell's anticompetitive practices, Southern Bell would not have enjoyed a monopoly in the IWMS market and competition would have resulted in lower prices for consumers. The Court need not decide at this juncture whether consumers of the IWMS should also be deemed competitors in the IWMS market. See Homeco Dev. v. Markborough Properties Ltd., 709 F. Supp. 1137 (S.D. Fla. 1989) (consumers also competitors).

antitrust law.[12] The Court agrees that Southern Bell's actions were immunized from prosecution under the antitrust laws throughout the period when the PSC regulated inside wire maintenance service.

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if "there is no genuine issue as to any material fact and [if] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) mandates summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the case, on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552-53 (1986). Further, the non-moving party must raise an issue for trial by showing that there is sufficient evidence for a jury to return a verdict for the non-moving party. If the evidence is merely colorable or not significantly probative, summary judgment will be granted. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510-11 (1986).

Private conduct becomes state action immune from antitrust liability when the challenged restraint meets a two-pronged test: 1) it must be "clearly articulated" as State policy, and 2) the policy must be "actively supervised" by the State. Consolidated

[12] Plaintiffs initially requested more time for discovery if the Court were inclined to grant Defendant's motion for summary judgment. By affidavit filed June 21, 1990, Plaintiffs' counsel withdrew the request for any additional discovery, and subsequently have failed to reinstate the request for additional discovery.

Gas Co. v. City Gas Co., 880 F.2d 297, 301 (11th Cir. 1989), reinstated, en banc, 912 F.2d 1262 (11th Cir. 1990)(citing California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 100 S. Ct. 937 (1980)). Each prong of the test is discussed below.

1. Clearly Articulated State Policy

As to the first prong of the test, State policy need not compel the challenged conduct of the private party. Southern Motor Carriers Rate Conference Inc. v. U.S., 105 S. Ct. 1721, 1729 (1985).[13] Rather, the State need only permit the alleged restraint:

> [a] private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the Midcal test is satisfied.

Id. at 1730 (citations omitted).

It is undisputed that the Florida legislature has given the PSC broad authority to regulate telephone common carriers. See Fla. Stat. §§ 364.01, 364.02(3), 364.03(1), 364.035, 364.04(1), 364.05(1), and 364.19; see also § 350.001 ("The Florida Public

[13] Plaintiffs rely heavily on Cantor v. Detroit Edison Co., 96 S. Ct. 3110 (1976), to support their position that a "clearly articulated" State policy is not present in this case. The Court finds that the Plaintiffs' reliance on Cantor is misplaced in light of the more recent Southern Motor Carriers opinion. See Metro Mobile CTS, Inc. v. Newvector Communications, Inc., 661 F. Supp. 1504, 1513 (D. Ariz. 1987)(reliance on Cantor misplaced), aff'd on other grounds, 892 F.2d 62 (9th Cir. 1989).

Service Commission has been and shall continue to be an arm of the legislative branch of government."). Under § 364.19, the PSC "may regulate, by reasonable rules, the terms of telephone service contracts between telephone companies and their patrons." The term service "is used in this chapter in its broadest and most inclusive sense." Fla. Stat. § 364.02(3). Section 364.03(1) provides that "the facilities, instrumentalities, and equipment furnished by [Southern Bell] shall be safe and kept in good condition and repair and its appliances, instrumentalities, and service shall be modern, adequate, sufficient, and efficient." The authorizing legislation gives the PSC substantial latitude to determine how to set rates for service:

> In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all telephone companies under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered, including energy conservation and the efficient use of alternative energy resources; the value of the service to the public; and the ability of the telephone company to improve such service and facilities . . . .

Fla. Stat. § 364.035(1).

Moreover, the "clearly articulated" prong of the state action test is satisfied if the action is of a kind contemplated by the legislature. Hallie v. Eau Claire, 105 S. Ct. 1713, 1719 (1985). The legislature need not contemplate the precise action complained of as long as the anticompetitive effects are a foreseeable result of regulation. Metro Mobile CTS, Inc. v. Newvector Communications,

Inc., 661 F. Supp. 1504, 1510 & n.4 (D. Ariz. 1987), aff'd on other grounds, 892 F.2d 62 (9th Cir. 1989). Plaintiffs acknowledge that prior to the effective date of Order No. 11345, dated November 22, 1982, IWMS had always been "bundled with," or automatically included in, basic telephone service. Given this fact and the broad authority granted to the PSC, the legislature must have contemplated that the PSC would regulate the terms upon which Southern Bell offered customers IWMS. That the PSC's decision involved a minor detail of the regulatory scheme -- the manner in which IWMS was offered to the public -- does not alter the state action analysis. Newvector, 661 F. Supp. at 1512 (citing Southern Motor Carriers, 105 S. Ct. at 1730.).

Plaintiffs emphasize, however, that the PSC's primary reason for unbundling IWMS from Southern Bell's basic service in 1983 appears to have been to foster "the development of a competitive environment for the provision and maintenance of inside wire." Order of the Public Service Commission, No. 11711, dated March 11, 1983, at 3. They contend that in light of the PSC's decision to promote competition in the IWMS market, Defendant's state action argument fails because Florida has no clearly articulated policy to displace competition in the IWMS market. Plaintiffs further argue that the policy to displace competition applies only to basic telephone service and the PSC's decision indicates that the legislature has chosen competition over regulation in the IWMS market. Although superficially appealing, the Court finds that

upon closer inspection, Plaintiffs' argument lacks merit.

In Metro Mobile CTS, Inc. v. Newvector Communications, Inc., supra, the court rejected a similar argument. Plaintiff argued that "the regulatory policy of the State of Arizona as it is defined by the [Commission] is intended to foster competition rather than to replace competition with regulation." 661 F. Supp. at 1514. In response to this argument, the court carefully reviewed Southern Motors, and concluded that "[s]o long as the state as sovereign has exercised the power to regulate, has established the method by which it will execute its policy to regulate, and retains the power to alter that method, it does not forfeit that power by introducing competition into the regulation." Id. at 1516. The court reasoned that "if inclusion of antitrust principles of competition as a part of a state's public policy prevents the state from enforcing its policy outside the constraints of the antitrust laws, states will be inclined to eliminate antitrust goals in favor of other state economic goals." Id. at 1515.

This Court adopts the reasoning of the court in Newvector, and finds that the first prong of the state action test is met in this case. See also Areeda & Hovenkamp, Antitrust Law, 1989 Supp. § 212.3 (1989)(conclusion in Newvector "seems inescapable."). The State of Florida clearly established a policy of regulating contracts for phone service between Southern Bell and customers. At the time Florida established this policy, IWMS was included in

basic telephone service. The PSC, pursuant to its authority to regulate service contracts, decided that the best means of fulfilling its legislative mandate was to introduce competition into the IWMS market. Plaintiffs have not argued that the PSC acted outside the scope of its authority in making this decision. Moreover, although the PSC now has deregulated the market for IWMS, there is no apparent reason that the PSC could not resume regulating IWMS with respect to price regulation, terms and conditions of service regulation, and providers of last resort regulation.[14]

To hold that antitrust immunity is destroyed because the PSC introduced competition into the State regulatory scheme would be incongruous. That the PSC ultimately chose to deregulate the IWMS market entirely does not affect the Court's analysis with respect to whether the State had a clearly articulated policy of regulation.[15] As noted by the Court in Newvector, the impact of

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[14] The F.C.C. currently intends to preempt the regulation of IWMS to the extent of requiring that such service be unbundled from other services. The F.C.C., however, has stated that in light of the Court of Appeals decision in National Ass'n of Regulatory Utility Com'rs v. F.C.C., 880 F.2d 422 (D.C. Cir. 1989), it does not intend to preempt price regulation, regulation of terms and conditions of service, or provider's last resort regulation. See In the Matter of Detariffing the Installation of Maintenance of Inside Wiring, 5 F.C.C. Rec. 3407 (May 31, 1990)(second further notice of proposed rulemaking).

[15] In Newvector, the court noted that footnote 25 of the Supreme Court's opinion in Southern Motor Carriers, supra, could be read to preclude antitrust immunity where the PSC could choose competition as a method of fulfilling its legislative mandate. 661 F. Supp. at 1516. The example the Supreme Court refers to in

the PSC's decision to deregulate is better understood in terms of the second prong of the state action test: "[t]he question of whether a particular product, market or services, 'deregulated' at the time of the alleged anticompetitive conduct, is subject to antitrust scrutiny is better considered under the active supervision prong of the Midcal test." 661 F. Supp. at 1518 n.11. In sum, the Court finds that the legislature's policy of regulation with respect to telephone service satisfies the first prong of the state action test.

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footnote 25 of a case in which the State failed to clearly articulate a policy is Community Communications Co. v. Boulder, 102 S. Ct. 835 (1982). Boulder, however, is completely inapposite upon the facts of the instant case. See Newvector, 661 F. Supp. at 1516 n.8. In Boulder, the State constitution gave municipalities "home rule" powers. 102 S. Ct. at 837. Pursuant to the "home rule" law, the City of Boulder enacted an ordinance prohibiting a local cable company from expanding its business. 102 S. Ct. at 837-38. The cable company sued the City of Boulder.

The Supreme Court held that the home rule law did not amount to a clearly articulated policy permitting the City of Boulder's anticompetitive conduct, stating that "[a] State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought." 102 S. Ct. at 843. In contrast, in this case, the legislature of the State of Florida gave the PSC broad authority to regulate the entire field of basic telephone service, which at the time included IWMS. Thus, unlike Boulder, in which there was absolutely no relation between the "home rule" law and the City's restriction of cable service, in the instant case the State authorized regulation of a specific field and thus the anticompetitive conduct was clearly within the legislature's contemplation. See also Auton v. Dade City, 783 F.2d 1009 (11th Cir. 1986)(distinguishing Boulder).

2. Active Supervision

The second prong of the state action test, the "active supervision" prong,

> `requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.'

Consolidated Gas Co., 880 F.2d at 303 (quoting Patrick v. Burget, 108 S. Ct. 1658, 1663 (1988)).

Thus, "some state involvement or monitoring" will not immunize otherwise private conduct from the federal antitrust laws, id., and Southern Bell cannot rely on the "`gauzy cloak of state involvement'" -- the PSC's "mere acquiescence" or "passive acceptance" -- to shield it from antitrust liability. Consolidated Gas Co., 880 F.2d at 303 (quoting Midcal at 100 S. Ct. at 942-43.). Rather, the Defendant must show that the PSC "exercise[d] ultimate control over the challenged anticompetitive conduct." Patrick v. Burget, 108 S. Ct. 1658, 1663 (1988).

The PSC has extensive procedures in place for supervising telephone companies, including the presence of Public Counsel appointed by the State legislature "to provide legal representation for the people of the state in proceedings before the commission." See Fla. Stat. § 350.0611; see generally Fla. Stat. §§ 350.001, et seq. Moreover, the Supreme Court of Florida and the District Court

of Appeal, First District, review challenges to the PSC's decisions pursuant to Fla. Stat. § 350.128. In this case, it is undisputed that on January 27, 1983, the PSC issued an Order which suspended, pending hearing, the implementation of the new charges, including the unbundled IWMS charges, proposed by Southern Bell to the PSC on November 23, 1982 ("1982 Rate Case"). On March 3, 1983, the PSC issued a Notice of Hearing on the issue of Southern Bell's rates, including the rates for IWMS. The Notice set a prehearing conference on April 1, 1983, and scheduled the final hearing for April 25 - May 6, 1983.

After suspending Southern Bell's proposed tariff, the PSC conducted a comprehensive analysis and hearing concerning the propriety of Southern Bell's proposed rates, which included the proposed schedule of rates and charges for IWMS. Public Counsel was present at these hearings. Indeed, in the Final Order on the 1982 Rate Case, the PSC found that "Public Counsel conducted discovery, presented evidence at the hearing, and otherwise fully participated as a party in this case." Order No. 12221, dated July 13, 1983. By this same Order, the PSC directed Southern Bell to prepare a billing insert announcing the options for IWMS, inter alia, and stated that "[t]he bill stuffer shall be submitted to the Commission staff for review and approval prior to its use." Order No. 12221 at 52. Southern Bell submitted the 1983 billing insert containing the negative option plan and the alleged misrepresentations and omissions to the PSC staff for approval, as

directed by the Commissioners. It is uncontroverted that the staff reviewed the relevant insert, revised it twice, and approved it.

Thus, it appears that the PSC exercised "ultimate control over the challenged anticompetitive conduct," in this case, the decision to offer IWMS to Southern Bell's current customers through a negative option plan. The PSC's conduct was clearly more than "mere acquiescence" to Southern Bell's plan. The PSC had to act affirmatively and approve the billing insert if Southern Bell customers were to be offered IWMS through a negative option contact. The PSC's action appears on its face to satisfy the second prong of the state action test.

Plaintiffs, however, argue that Defendant fails to show that its conduct was actively supervised because the individual members of the PSC never specifically addressed the method by which Southern Bell would offer the options regarding IWMS to its customers.[16] As support for this proposition, Plaintiffs introduce substantial evidence to suggest that Southern Bell never presented the Commissioners of the PSC, as opposed to the staff, with the negative option issue.[17] Moreover, Plaintiffs contend that the

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[16] Plaintiffs do not dispute that the PSC had the authority to decide the manner in which IWMS options would be offered to customers.

[17] Plaintiff present substantial evidence to raise a genuine issue as to whether the Commissioners themselves considered the negative option issue. For example, former Commissioner Cresse testified as follows:

Q. Did you authorize a negative option . . . .?

staff's approval of the negative option is inadequate to confer antitrust immunity because 1) the Commissioners did not intend to delegate this decision to the staff, and 2) under Fla. Stat. § 120.57, any delegation would have been invalid.

The Court declines to review the propriety of the Commissioners' failure to decide the negative option issue, or their decision to delegate the issue to their staff, or the staff's misunderstanding of the boundaries of their authority, or any related issue. Although Plaintiffs contend that the Commissioners failed to consider the negative option issue because Southern Bell did not raise the issue at any time before submitting the billing insert to the staff, there is also uncontroverted evidence in the record that the Commissioners generally were aware of the negative option issue. At the Special Agenda Conference, held June 22, 1983, Commissioner Gunter stated,

> Well, you know, the problem with a majority of people, and I think we need to address this one carefully. The problem with a majority of people in the Centel [another local telephone, serving northern Florida] service area did not have the wildest idea that they could elect to avoid a cost, because they didn't read all of that bill stuffer and they didn't call. But they put the burden on the customer to call and not get that maintenance option. Or he automatically got it.

> A. If, I guess you could answer that two ways, if by saying you submit this to the staff and have the staff review and approve it, then to that extent yes, we authorized it. But did we [the Commissioners] address specifically this language, the answer is no.

Cresse deposition, April 12, 1990, at 25.

Transcript (Volume VI), FPSC Docket No. 820294-TP, at 763. The record does not reflect that the Commissioners specifically addressed the issue of a negative option offering of IWMS, despite Commissioner Gunter's concern.

Regardless of what the evidence indicates or what the Commissioners knew or should have known, or decided or should have decided, this Court clearly may not delve into the internal workings of the PSC. As a general rule, the federal courts do not probe for defects in the State's decision to authorize the anticompetitive conduct. As stated by the Ninth Circuit, "actions otherwise immune [under the state action doctrine] should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law." Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985). This applies to errors of law, fact, or judgment, errors of either substance or procedure. Id.

There are two reasons for the courts to shun such an inquiry. First, the State's immunity from the antitrust laws "springs from an essential principle of federalism." Thus, "``[o]rdinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.'" Id. (quoting Areeda, Antitrust Immunity for "State Action" After Lafayette, 95 Harv.L.Rev. 435, 453 (1981)). If the federal antitrust court undertook an inquiry into the appropriateness of the decision to authorize the anticompetitive conduct, it would

> inevitably become the standard reviewer of governmental agencies whenever it is alleged that the agency, though possessing the power to engage in the challenged conduct, has exercised its power erroneously.

Id.

Second, "there should be a defense [to antitrust liability] for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized." Lease Lights Inc. v. Public Service Co., 849 F.2d 1330, 1334 (10th Cir. 1988), cert. denied, 109 S. Ct. 817 (1989). The absence of such a defense "would require regulated industries to seek judicial review of every order of a regulatory agency to ensure that compliance does not later subject them to antitrust liability." Id.

Plaintiffs contention that the PSC did not actively supervise Southern Bell's conduct must fail because it is little more than an allegation that the State exercised its power erroneously. Moreover, Southern Bell had the right to rely on the PSC's approval of the twice-revised insert regarding IWMS. Nothing in the record indicates that Southern Bell should have been aware that using a negative option was improper; indeed, Centel's use of a negative option clearly established precedent for Southern Bell's decision to offer IWMS through a negative option contract. Whether the staff incorrectly approved the insert or the Commissioners improperly or negligently delegated the decision to its staff is a matter of internal agency procedure and the laws of the State of Florida, which should be left for State tribunals, not this Court,

to decide.[18]

Thus, the Court finds that Southern Bell is immune from antitrust liability under the state action doctrine for any antitrust liability resulting from the 1983 negative option contracts. Defendant, however, has failed to show that its activities subsequent to 1986 were supervised by the PSC. Therefore, the Court finds that Southern Bell's conduct after December 31, 1986 is not immunized from antitrust liability.

III. CONCLUSION

Accordingly, it is ORDERED and ADJUDGED that the motion to dismiss, or, in the alternative, motion for summary judgment, is GRANTED IN PART and DENIED IN PART for the reasons stated above. The motion to dismiss Counts I-IV for lack of antitrust standing is DENIED.[19] The motion for summary judgment on the antitrust claims is GRANTED IN PART. Southern Bell is immunized from antitrust liability through December 31, 1986, when the PSC

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[18] The Court notes that this case differs significantly from the case in which the regulated utility misrepresents facts to the relevant agency. Southern Bell completely disclosed its intended use of a negative option to the PSC when it submitted the bill stuffer to the staff of the PSC for approval.

[19] The Court also denies Defendant's motion to dismiss Plaintiffs' leveraging allegations for failure to state a cause of action under § 2 of the Sherman Act because Plaintiffs may be able to prove facts which would entitle them to judgment on the federal antitrust claims.

deregulated IWMS.[20]

In addition, the Court DEFERS ruling on the Plaintiffs' motion for class certification until such time as discovery has been developed fully as to the alleged antitrust claims. The Court also DEFERS ruling on the viability of the pendant claims until discovery has fleshed out the relevant facts as to those claims. It is further

ORDERED that discovery is reopened for a period of six months or until such time as discovery has advanced to a stage that further consideration by the Court of the antitrust claims and pendent claims is appropriate.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of January 1991.

LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

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[20] In light of this Court's ruling on the state action doctrine, the Court finds Defendant's argument regarding the Keogh doctrine moot.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-2839-Civ-NESBITT

LINDA DAVIS, DAVID EFRON, LINDA MARTENS, and GENEVIEVE WILLIAMS, etc., et al.,

Plaintiffs,

vs.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, a Georgia Corporation,

Defendant.
_____/

O R D E R

This cause comes before the Court upon (1) Plaintiffs' emergency motion to reinstate briefing schedule; (2) Plaintiffs' motion for clarification of Magistrate Palermo's Order; (3) Plaintiffs' motion for oral argument on two pending motions; (4) Defendants' motion to strike testimony of Ex-PSC Commissioners; (5) Defendant's motion to expedite ruling on motion to strike; (6) Defendant's motion to strike Plaintiffs' notice of filing of depositions of ex-PSC Commissioners; (7) Defendant's motion to strike punitive damages; (8) Defendant's emergency motion to compel and enlargement of time; and (9) Defendant's motion to reset status conference due to scheduling conflict. After due consideration, it is hereby

ORDERED and ADJUDGED that

1. Plaintiffs' emergency motion to reinstate briefing schedule is DENIED as MOOT.

2. Plaintiffs' motion for clarification of Magistrate Palermo's Order is DENIED. The Court has reviewed Magistrate

Palermo's Order of May 23, 1990 and found it clear and unambiguous.

3. Plaintiffs' motion for oral argument is DENIED in part as MOOT and DEFERRED to the extent that it relates to the motion for class certification.

4. Defendant's motion to strike testimony of ex-PSC Commissioners is DENIED as MOOT to the extent that the testimony relates to the issue of "state action." See this Court's Order Granting Partial Summary Judgment, dated January 31, 1991. Should the testimony become relevant at another point in the proceedings, the Court will reconsider the issue upon the appropriate motion of the Defendant.

5. Defendant's motion to expedite ruling on motion to strike is DENIED as MOOT.

6. Defendant's motion to strike Plaintiffs' notice of filing of depositions of ex-PSC Commissioner is DENIED as MOOT to the extent that the testimony relates to the issue of "state action." See this Court's Order Granting Partial Summary Judgment, dated January 31, 1991. Should the testimony become relevant at another point in the proceedings, the Court will reconsider the issue upon the appropriate motion of the Defendant.

7. Defendant's motion to strike punitive damages is GRANTED. Florida law is clear that Plaintiffs must plead an independent tort claim against Defendant to state a claim for punitive damages. Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982). Plaintiffs have failed to state an independent cause of action against Defendant grounded in tort rather than in contract.

8. Defendant's emergency motion to compel and for an enlargement of time is DENIED. After hearing oral argument on the matter on May 17, 1990, the Honorable Peter R. Palermo issued a report recommending that the motion be denied. The Court denies the motion for the reasons set forth in the Magistrate's report, and in addition, emphasizes that in response to interrogatory 15, Plaintiffs indicate their willingness to bear the costs of litigation. No further inquiry by Defendants is necessary: "once the representative plaintiff shows [a] willingness ultimately to bear the costs of litigation, further discovery of personal finances should not be allowed by the court." 3 H. Newberg, Newberg on Class Actions § 15.21 at 234-235.

9. Defendant's motion to reset status conference due to scheduling conflict is DENIED as MOOT.

DONE and ORDERED in chambers, Miami, Florida this 31st day of January 1991.

Lenore C. Nesbitt

LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: counsel of record

Exhibit D

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JANUARY TERM, 1991

CASE NUMBER 78,035

FILED - Sealed
9-16-92
Sid J. White, Clerk
Supreme Court of Florida
By: Mid White
Deputy Clerk

Advisory Opinion
of the
Tenth Statewide Grand Jury
SWP Case Number 91-7-NFB

A TRUE COPY
Attest:
SID J. WHITE, Clerk
Supreme Court of Florida
By: Mid White
Deputy Clerk

In July of 1991, the Tenth Statewide Grand Jury embarked upon an investigation of possible fraudulent business practices by Southern Bell Telephone and Telegraph Company (the "Company") and its employees. Our inquiry focused on allegations of misconduct in four major categories: (1) the intentional overbilling of customers through the fraudulent "sale" of optional telephone services by Company employees whose primary responsibility was the installation and repair of telephones; (2) the intentional failure to repay customers for overbillings which the Company discovered during its own analysis of some of its billing records; (3) the intentional failure to pay required compensatory rebates for non-working telephone service to customers who notified the Company that their telephone was out of service; and (4) the intentional failure of the Company to properly report trouble and repair information to the Public Service Commission (the "Commission").

During the course of this detailed investigation, numerous witnesses testified, including former and current Company employees, ranging from craft level workers to executive officers. Also during this investigation a multitude of Company documents were examined and analyzed.

After careful deliberation of the evidence produced, we have determined that Southern Bell created, promoted, and sustained an atmosphere that served to foster and reward certain fraudulent practices. As one example: The Company established an extensive sales incentive program that included such prizes as cruises and appliances, which amounted to an engraved invitation for both craft employees and management alike to commit fraud on unsuspecting and defenseless customers by "selling" them services they did not need or want. The program was rife with overt pressure on employees to produce sales, but contained no provisions for verification of actual sales activity. By this and similar actions, we believe that the Company countenanced the conception of a culture that allowed corporate executives to look the other way when the specter of consumer fraud stared them in the face.

The individuals currently in charge of the Company have become aware of our investigation and they have promised to eliminate the Company's suspect sales and refund practices, many of which were uncovered as a direct result of our inquiry. We are gratified by their repentant and responsible attitude, which has been reflected in the recent implementation of revised sales practices, refund programs, and an emphasis on ethics training for all employees.

The Company has requested that the Statewide Prosecutor, this body's Legal Adviser, resolve our investigation short of criminal prosecution of the Company. As a result, the Tenth Statewide Grand Jury has considered a proposed settlement agreement between the Company and the Office of Statewide Prosecution.

Respectfully submitted to the Honorable Frederick T. Pfeiffer, Presiding Judge, and to Melanie Ann Hines, Statewide Prosecutor and Statewide Grand Jury Legal Adviser, this 16th day of September, 1992.

Herman A. Robandt

Herman A. Robandt
Foreperson
Tenth Statewide Grand Jury
of Florida

Received in Open Court by the Honorable Frederick T. Pfeiffer this 16th of September, 1992, but sealed until further order of the Court on motion of the Legal Adviser.

Frederick Pfeiffer

Frederick T. Pfeiffer
Presiding Judge
Tenth Statewide Grand Jury
of Florida

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JANUARY TERM, 1991

CASE NUMBER 78,035

FILED - Sealed
9-16-92
Sid J. White, Clerk
Supreme Court of Florida
By: [signature]
Deputy Clerk

FINAL REPORT OF THE TENTH STATEWIDE GRAND JURY

SEPTEMBER, 1992

A TRUE COPY.
Attest:
SID J. WHITE, Clerk
Supreme Court of Florida
By: [signature]
Deputy Clerk

FINAL REPORT OF THE TENTH STATEWIDE GRAND JURY

SEPETEMBER, 1992

I N D E X

I. INTRODUCTION

The Tenth Statewide Grand Jury was impaneled on July 30, 1991, and was seated in Orlando, Florida. The Grand Jury has convened almost monthly to investigate allegations of multi-circuit, organized crime throughout the State. The Grand Jury's original term expired after twelve months, but was extended to October 30, 1992. The Grand Jury is adjourning one month early, subject to recall, if necessary.

The purpose of this Report is to record for posterity the work and recommendations of this Grand Jury, with the hope that its collective voice will be heard and that the citizens of this State will benefit from its efforts.

II. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

We embarked upon our investigation of Southern Bell at the beginning of our term. During the course of the investigation, we heard testimony from numerous witnesses, including former and current Southern Bell employees who held positions ranging from craft level workers to Company officers. We have also had the opportunity to examine a multitude of company documents.

The primary focus of our investigation concerned allegations of company misconduct in four major categories: (1) the intentional overbilling of customers generated by the fraudulent "sale" of optional services by Company employees whose primary responsibility was supposed to have been the installation and repair of telephones; (2) the intentional failure to pay the full amount owed for allegedly unintentional customer overbillings discovered during the Company's analysis of some of its billing records; (3) the intentional failure to pay required rebates to compensate customers who informed the Company that their telephone was out of service; and (4) the intentional failure to properly report trouble and repair information to the Public Service Commission.

Our Legal Adviser, the Statewide Prosecutor, has negotiated a settlement agreement with the Company, in the nature of a pre-trial diversion opportunity, which calls for, among other things:

--complete and expeditious restitution to affected customers;
--cooperation with the State in any investigations arising out of these matters;
--implementation of revised billing practices, fraud preventative procedures, and ethics training;
--a three year review period, subjecting the Company to periodic audits and compliance monitoring;
--funding by the Company of the review program, audits, and monitoring;

--discretion to void the agreement and pursue prosecution vested in the Statewide Prosecutor;
--funding provided by the Company to support prosecution of these allegations, if necessary;
--no restrictions on the prerogative of the Statewide Prosecutor to investigate any other allegations of Company fraud, and to prosecute where appropriate;
--a prohibition against including any costs associated with the agreement in the rate base of the customers.

In our Advisory Opinion, issued this date, we recommended that the Statewide Prosecutor proceed with the settlement of this investigation because we believe it to be in the best interest of the people of this State. The agreement will provide the Company with the opportunity to reform the negative aspects of the corporate environment. However, it will not exonerate the Company for repayment of its debts to our society. We are hopeful that the Company will prove itself worthy of this unique and beneficial opportunity.

In closing, it must be noted that the proposed settlement agreement does not contain any "punishment", per se, of the Company for its alleged failure to properly report to the Public Service Commission actual repair time for restoration of telephone service to customers whose telephones were out of service. This issue was raised in our investigation, but we have been advised that the United States Supreme Court's ruling H.J., Inc., et al v. Northwestern Bell Telephone Company, 112 S. Ct. 2306 (1992), casts doubt on our ability, or the ability of the criminal courts, to directly sanction the Company for such conduct, if it in fact occurred. We specifically note, however, that the Florida Public Service Commission has both the jurisdiction and concomitant discretion to impose severe monetary penalties on the Company if it finds that the Company has falsified reports required by PSC rules. We therefore strongly recommend that the Public Service Commission, in conjunction with its publicly mandated responsibility, investigate this matter, exercise its penal authority, and take into consideration this possible fraudulent conduct on the part of the Company in determining an appropriate rate of return.

III. REGULATING UTILITIES

Our investigation of Southern Bell led us to an inquiry into some of the regulatory activities of the Florida Public Service Commission, and the rules and statutes governing this function.

We wish to make it clear that time constraints did not afford us the opportunity to fully investigate every issue brought before us, but we heard sufficient testimony to convince us that changes must be made in this process to protect the utility consumers of this State and to renew the faith of the people in its government.

The recommendations we have proposed are addressed to the Florida Legislature and the Public Service Commission. We hope these recommendations will be given serious consideration.

A. Ex Parte Communications

In January of this year, we issued an Interim Report entitled, "Regulating Utilities - Recommendations to Enhance The Integrity of the Process." This report discussed the necessity for strict rules and laws prohibiting ex parte communications with Public Service Commissioners and Commission staff by utility representatives on regulatory matters. We noted that communication to a judge by an interested party, concerning an issue to be decided by that judge, is prohibited in American courts of law unless all interested parties have an opportunity to be present during the communication. Such communication is considered improper because it gives an unfair advantage to the party with the most access to the judge. Since the members of the Commission have responsibilities equivalent to that of a judge, we proposed a strict prohibition against all forms of ex parte communication in our interim report.

We note with some dismay that the State Legislature has not yet enacted any of our proposals. An amendment to the ex parte section of Chapter 350 of the Florida Statutes, though not as efficacious as our suggestions, was passed by the State House of Representatives, but it did not come to a vote in the Senate. We urge the Legislature to allocate time during its next session to consider and pass the recommendations contained in our Interim Report.

B. Prohibitions on Employment of Commissioners

Immediately after resigning, a former Public Service Commissioner recently accepted a lucrative position with an affiliate of one of the utilities he used to regulate. News reports indicated that his starting salary was twice that of his Commission salary. It appears that nothing restricted the ability of that utility from courting the Commissioner during the regulatory process, and nothing prevented the Commissioner from seeking such employment during his tenure on the Commission. Coupled with the almost unfettered ability to discuss regulatory matters with Commissioners and Commission staff, the existence of such relationships creates an appearance of impropriety the Commission can ill afford to bear.

We are therefore concerned that the Legislature failed to enact another necessary reform in the many sessions held this year: a law prohibiting Public Service Commissioners from accepting employment with the utilities regulated by the Commission.

The House and the Senate both passed bills which included a provision requiring former Commissioners to wait two years before accepting employment with a regulated utility or its affiliates, but neither of those respective bills came to a vote in the other chamber, and hence could not become law.

We therefore strongly recommend that the Legislature move quickly and without hesitation to enact the proposed statutory provision of a two year prohibition on the acceptance of employment by a Commissioner with a regulated utility. Any person desiring to serve the people of the State of Florida as a member of the Public Service Commission should be more than agreeable to such a limitation. The people deserve no less.

C. Regulation of the Sale of Optional Services

Our investigation of Southern Bell, and the recommended settlement, focused on the sale of optional services during a program specially designed for telephone installation and repair personnel. One of the questions left for another day is whether the overall sales practices of Southern Bell are plagued with the potential for fraud. Due to the outpouring of complaints reported recently in the media from Southern Bell customers paying for services they did not order and do not want, we find it necessary to briefly address this potential question.

It would appear that many of the practices which could lead to such a result may well be violations of consumer protection laws. However, we note with much concern that the fraudulent practice of misleading utility customers as to the nature and cost of certain services is not covered by the Consumer Protection and Telemarketing Acts currently on the books. Sections 501.212 and 501.604, Florida Statutes, specifically exempt utility activities regulated by the PSC. We note also that there are few PSC rules designed to protect utility consumers from unscrupulous sales people.

Inasmuch as few utility customers have a choice in selecting their common service provider, we strongly recommend that the Public Service Commission adopt similar, if not more restrictive rules, for the sales and marketing techniques of optional services to which these same customers are subjected.

The consumer protection statutes require written and signed verification of orders for goods or services taken by telephone. Section 501.059(5),(6), Florida Statutes specifically states:

A contract made pursuant to a telephonic sales call:

1. Shall be reduced to writing and signed by the consumer.

2. Shall comply with all other applicable laws and rules.

3. Shall match the description of goods or services principally used in the telephone solicitations.

4. Shall contain the name, address, and telephone of the seller, the total price of the contract, and a detailed description of the goods or services being sold.

5. Shall contain, in bold, conspicuous type, immediately preceding the signature, the following statement:

"You are not obligated to pay any money unless you sign this contract and return it to the seller."

6. May not exclude from its terms any oral or written representations made by the telephone solicitor to the consumer in connection with the transaction."

The Telemarketing Act further protects the consumers of this State by requiring a statement of consumer rights, providing a three day right of rescission, entitlement to full refund if the Act is violated, and payment of costs of cancellation by the seller. The Act also provides for criminal penalties when deception is used in connection with an offer to sell.

Requiring utilities to obtain and maintain written authorizations from customers is an easy method to prevent fraud by corporate deception. Detection of such fraud should not be the sole responsibility of the customer. Many customers, perhaps hundreds of thousands of them, would not know they were paying too much for phone service unless they read their phone bill each month in microscopic detail, assuming they received a detailed bill each month. A customer told that the bill for monthly basic service will be, for example, $20 per month, but not told $8 of that monthly fee is for optional services, will in all probability pay the written bill each month without a quibble. After all, that was the price quoted by the telephone company representative and the bill matches the price. If the company only itemizes these costs in a yearly billing summary, and the customer does not read the summary, the customer can easily be given the false impression that the bill contains only mandatory charges.

The Legislature has an obligation to prevent victimization of all the citizens of this State. If the Public Service Commission does

not implement similar consumer protection requirements for the utility activities it regulates, then the Legislature should strike the exemptions in Sections 501.212 and 501.604, Florida Statutes, and subject utilities to the standards of fair trade practice outlined in the statute.

D. Cost Allocation Procedures

Southern Bell, like other providers of local telephone service, is a regulated utility. In exchange for being regulated by a government entity, that portion of the business which is regulated is allowed to charge certain specified amounts to its customers for the regulated telephone service it provides. If a utility is unable to achieve the minimal level of return to which the PSC decides it is entitled, the company can ask the Commission to approve an increase in the amount customers pay for regulated telephone service. All of the expenses incurred in the provision of regulated telephone service are passed directly on to the customers, including the salaries and benefits of all employees during the time those employees are working on a regulated activity.

By Public Service Commission Rule, the amount of time employees spend on unregulated activities is supposed to be deducted from the amount paid by customers of regulated telephone service. Thus, there arises a question of "cost allocation." The utility must accurately allocate costs so that customers of regulated telephone services are not subsidizing the cost of unregulated activities. The PSC is charged with the responsibility of monitoring and regulating the cost allocation process.

This question arose in the context of our inquiry regarding the sale of certain unregulated optional services by installation and repair personnel (regulated). We reached no conclusion as to whether the cost allocation process is currently being misused, but we determined that the opportunity and temptation to move salary and benefit allocations to the regulated side of a utility appeared to be great. While not a matter in which we hold a great deal of expertise, we have considered the implications of a failure to accurately allocate costs and believe that better methods of detection and enforcement must be implemented to prevent the unlawful subsidy of the unregulated side of the utility by the regulated side.

We therefore recommend that the PSC initiate quarterly unannounced spot reviews and a complete audit and regulatory review of the cost allocation process on an annual basis. The audits should, at a bare minimum, follow the generally accepted auditing standards established by the Auditing Standards Board of the American Institute of Public Accountants.

As we understand it, a complete audit of regulated utility cost allocation practices is only likely to occur during a rate hearing, although some cost and revenue information is provided every four years. However, a complete rate hearing is sometimes held less frequently. More than eight years passed between Southern Bell's last rate case and the current rate case filed this year. Therefore, it is currently possible for a utility to avoid a complete independent audit for an undetermined number of years.

In addition, the PSC should develop its own cost allocation manual to provide specific formulas for allocating regulated and unregulated costs, rather than relying on the Federal Communications Commission's (FCC) cost allocation manual, which concerns telephone services involving more than one state. Although it may be appropriate to use that manual for the specific intended purpose, applying it to an intrastate issue can sometimes lead to a rule that is, at best, difficult to explain. For example, according to the FCC manual, a Southern Bell repair and installation worker must spend at least 15 minutes on activities related to an unregulated service before being required to allocate any time to that activity. This means such an employee could solicit the sale of an unregulated activity for 14 minutes with each customer he comes in contact with each day without allocating one minute of his time to the unregulated activity. This results in the evil sought to be avoided by proper cost allocation: subsidy of profit making activity by regulated activity.

We therefore strongly recommend that the PSC develop its own guidelines tailored to the specific needs of this State. The formation of a Task Force comprised of consumer advocates, regulated utilities and Commission staff, with public hearings throughout the State, would generate the most fair and effective cost allocation procedures.

E. Rate of Return

The National Association of Regulatory Utility Commissioners recently compared three methods of calculating rate of return and, as a result, reached the conclusion that "utilities were both less risky and more profitable investments than the average non-regulated corporation".

Section 364.03 (1), Florida Statutes, states that the regulated portion of utility companies, ".. may not be denied a reasonable rate of return." We understand that what is reasonable to one expert hired by a regulated utility may be entirely unreasonable to an expert hired by a consumer advocacy group. It is all very subjective. The PSC has to take that subjective standard and apply it to the real world. We realize that is a very difficult task.

It is our belief that regulated companies should have the right to a rate of return similar to a non-regulated company of equal risk. In other words, a risky business venture should have the right to a much higher rate of return than a relatively safe venture like the exclusive provision of certain basic telephone services to all of the people in a given geographic region who are in need of that service.

We suggest that the Public Service Commission appoint a Blue Ribbon panel of experts selected by consumer advocates, including but not limited to the Public Counsel, regulated utilities and PSC staff to develop specific economic parameters to eliminate some of the subjectivity inherent in the current ratemaking process. For example, the group may wish to consider the possibility of tying, in some way, the maximum rate of return for relatively low risk regulated utilities to the interest rate of long term United States Treasury Bonds, taking into account the economic circumstances at the time the rate is set.

We have learned that several years can elapse before a rate of return is changed. This regulatory gap fails to provide for rapid changes in economic circumstances, such as a decline in interest rates and inflation. Basing the rate of return on a selected, easily measurable economic parameter, or an average of several such parameters, would make it easier to revise the rate of return on a yearly basis if economic circumstances warrant it.

We realize that any definitive recommendation in this regard is beyond the scope and expertise of this Grand Jury. We merely wish to point out that it is an area worthy of close scrutiny and vigorous debate in a public forum.

IV. GANG AND GANG-RELATED ACTIVITY

The Statewide Grand Jury also embarked upon an investigation of gangs and gang-related activity in the State of Florida.

The results of our work can be found in the Indictments listed in the attached chart as SWGJ Case Numbers 1 and 1A. These charges represent the first known occasion that the Street Terrorism Act and the Racketeering Act were joined together in one prosecution in Florida to dismantle a criminal gang involved in everything from narcotics trafficking to arson. It has been reported to us that the gang, known as the 34th Street Players, has not re-formed or resurfaced since the incarceration of the defendants on these charges.

During the course of this investigation, we conducted a survey to identify the magnitude of the gang problem in the State. Our examination, conducted with the assistance of State and local Law Enforcement agencies, revealed that no central repository exists

for the collection and exchange of information concerning gangs and gang-related activity. Thus, the results of statewide intelligence gathering techniques were pieced together to obtain the best possible picture of gang activity in the State. The results of this survey are outlined in our Interim Report #2, issued in January, entitled: "Gangs and Gang-Related Activity; Recommendations to Assist Law Enforcement."

This Grand Jury recommended the establishment of a statewide youth and street gang computer data base with a requirement of mandatory reporting of such data from all law enforcement agencies. We noted that the Street Terrorism Enforcement and Prevention Act of 1990 originally established such a database, but the funding portion of the bill was later deleted. We strongly urge the Legislature to invest the necessary funds in the future of this State.

We are disheartened by the total lack of interest demonstrated by the Legislature in this matter. Without an accurate accounting of the impact of gangs on the criminal justice system, necessary reforms in criminal laws cannot be made, nor can adequate funding formulas for law enforcement be produced. We urge the Legislature to be more far-sighted in this regard.

V. ADMINISTRATIVE RECOMMENDATIONS

The Grand Jury is vested with enormous power, and with it a profound responsibility. It has an intimidating and deterrent effect on those who violate the law. It also has the power and duty to protect the innocent against prosecution. The responsibilities of the Grand Jury are truly awesome.

The Statewide Grand Jury is a unique organization from a number of standpoints that require special consideration. The Statewide Grand Jury, impanelled by the Florida Supreme Court, is made up of citizens from all corners of the State. Jurors must travel many miles to and from the court site for each session. For us, this has almost been monthly, for a period of fifteen months. Sessions have lasted from two to three days, and the average day's work is in excess of the typical eight hour day. Because the location is far from home, Grand Jurors are "sequestered" from their families, homes, and occupations during the length of the sessions.

This is not a voluntary service. Jurors are chosen by the court and must serve or face contempt charges.

Given the unique nature of the logistics and practicalities of our existence, we have discussed a number of areas where consideration should be given to treat Statewide Grand Jurors in a more equitable manner.

A. Insurance Coverage

Currently, no accident or accidental death insurance is provided for Jurors, as they are not considered employees or agents of the State. Jurors must then rely on their own insurance coverage in the event of an emergency or jury related injury. However, since the jurors are chosen from a cross-section of the population, it is possible that many do not have any, or adequate, insurance protection of their own. Also, since the service is mandatory, rather than elective, as in certain employment situations, the State should provide insurance for accidental injury or death of Grand Jurors travelling for and attending Grand Jury sessions.

Moreover, it appears to us that Grand Jurors have no protection from law suit for their actions and would have to stand the expense of their own defense should they be sued for allegedly exceeding their authority. While the prosecutor who advised the Grand Jury in a particular matter would be covered by the State's Risk Management Policy, it appears that Grand Jurors would not.

We ask the Legislature to consider our concerns and make the appropriate provision for protection of Statewide Grand Jurors in these matters.

B. Grand Juror Fees

The current fee of $10 per day for Statewide Grand Jurors is woefully inadequate. It amounts to approximately one-third of the minimum wage for the average work day, and does not take into account the extraordinary conditions of our service.

Our service, as distinguished from petit jury service, often results in expenses not considered in the setting of the fee structure: long distance telephone calls to communicate with family and to maintain ties to jobs; kennel costs for the care of animals; the purchase of special travel items, ranging from toiletries to suitcases, and so forth. These matters have apparently been ignored in the decision making process.

It is obvious that the State is in dire financial circumstances. It is also obvious, however, that the criminal justice system could not function without individual citizens discharging their civic duty to act as fair and impartial jurors. While no one can be fired for jury duty, there appears to be no restriction on the ability of an employer to withhold salary dollars during the affected time periods. Further, self-employed business people may experience lost opportunities that could have an adverse economic impact on their livelihoods for years to come. Citizens facing such economic hardship are unlikely to pay complete attention to the matters before them, and may choose to expedite

the proceedings at the expense of the rights of others. While we have successfully guarded against such a travesty, in part based on the considerations afforded by the Legal Adviser and her staff in response to our needs, we do not know when this unconscionable possibility might reach fruition.

We have learned that the Federal Grand Jury fee is $40 per day. We urge the Legislature to consider parity in this matter.

VI. CONCLUSION AND ACKNOWLEDGEMENTS

The remainder of the work of this Grand Jury is summarized in the attached schedule of cases.

We are particularly gratified that one of our cases went to trial during our term, resulting in the convictions of two law enforcement professionals who deliberately subverted the criminal justice system through perjury and subornation of perjury. We are proud to have been a part of bringing them to justice.

Service as a member of the Tenth Statewide Grand Jury has been an education in citizenship, the likes of which cannot be taught in the classroom. It has been a unique and memorable experience and we are proud to have made this contribution to our State.

We wish to thank the following individuals and their respective offices for assisting us in the performance of our responsibilities:

The Honorable Frederick Pfeiffer, Presiding Judge
The Honorable Richard Conrad, Alternate Presiding Judge
The Honorable Fran Carlton, Circuit Court Clerk
Richard Sletten, Orange County Court Administrator
Lt. Doug Huffman, Orange County Sheriff's Office
Commissioner Tim Moore, Florida Department of Law Enforcement

Respectfully submitted to the Honorable Frederick Pfeiffer, Presiding Judge, this 16th day of September, 1992.

Herman A. Robandt

Herman A. Robandt
Foreperson
Tenth Statewide Grand Jury
of Florida

I, MELANIE ANN HINES, Legal Adviser, Tenth Statewide Grand Jury, for the State of Florida, hereby certify that I, as authorized and required by law, have advised the Grand Jury which returned this report this 16th day of September, 1992.

MELANIE ANN HINES
Statewide Prosecutor
Statewide Grand Jury Legal Adviser

I, JOHN A. HOAG, Legal Adviser, Tenth Statewide Grand Jury, for the State of Florida, hereby certify that I, as authorized and required by law, have advised the Grand Jury which returned this report this 16th day of September, 1992, with regard to the matters contained in section III.

JOHN A. HOAG
Special Assistant Statewide Prosecutor
Statewide Grand Jury Legal Adviser

The foregoing report was returned before me in open court this 16th day of September, 1992, and is hereby sealed until further order of the Court on motion by the Legal Adviser.

Judge Frederick T. Pfeiffer
Presiding Judge
Tenth Statewide Grand Jury

TENTH SAGJ FINAL REPORT					
SAGJ CASE #	OSAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
1	91-12-SFB	JULIO RODRIGUEZ	Racketeering; Trafficking in Cocaine in Excess of 400 grams; Conspiracy to Traffic in Cocaine in Excess of 400 grams; Sale, Purchase or Delivery of a Controlled Substance-2 cts; Trafficking in Cocaine in Excess of 28 grams but less than 200 grams (2 cts); Total counts-7.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1	91-12-SFB	WILLIAM BARRIOS	Racketeering; Trafficking in Cocaine in Excess of 400 grams; Conspiracy to Traffic in Cocaine in Excess of 400 grams; Trafficking in Cocaine in Excess of 28 grams but less than 200 grams; Total counts-4.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1	91-12-SFB	CARLOS FERNANDEZ	Racketeering; Sale, Purchase or Delivery of a Controlled Substance-9 cts; Total counts-10.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1	91-12-SFB	DAVID NADAL	Racketeering; Trafficking in Cocaine in Excess of 400 grams-4 cts; Conspiracy to Traffic in Cocaine in Excess of 400 grams-3 cts; Total counts-8.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1	91-12-SFB	ROBERTO RODRIGUEZ	Racketeering; Trafficking in Cocaine in Excess of 400 grams-2 cts; Conspiracy to Traffic in Cocaine in Excess of 400 grams-2 cts; Burglary of a Structure; Grand Theft; Total counts-7.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1	91-12-SFB	ANTHONY SMITH	Racketeering; Trafficking in Cocaine in Excess of 400 grams-2 cts; Conspiracy to Traffic in Cocaine in Excess of 400 grams-2 cts; Burglary of a Structure; Grand Theft; Total counts-7.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.

TENTH SWGJ FINAL REPORT					
SWGJ CASE #	OBAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
1	91-12-SFB	NELSON VEGA	Racketeering; Trafficking in Cocaine in Excess of 400 grams-2 cts; Conspiracy to Traffic in Cocaine in Excess of 400 grams-2 cts; Total counts-5.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1	91-12-SFB	MODESTO ELIAS	Racketeering; Trafficking in Cocaine in Excess of 400 Grams; Conspiracy to Traffic in Cocaine in Excess of 400 grams; Total counts-3.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1	91-12-SFB	ELISEO MONTIJO	Racketeering; Sale, Purchase of Delivery of a Controlled Substance-3 cts; Total counts-4.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1	91-12-SFB	JULIO TERZADO	Racketeering; Trafficking in Cocaine in Excess of 400 grams; Conspiracy to Traffic in Cocaine in Excess of 400 grams; Total counts-3.	Dade	Indictment issued 9/12/91. Status conference 10/2/91.
1-A	91-12-SFB	JULIO RODRIGUEZ	Racketeering; Trafficking in Cocaine in Excess of 400 grams; Conspiracy to Traffic in Cocaine in Excess of 400 grams; Sale, Purchase or Delivery of a Controlled Substance-2 cts; Trafficking in Cocaine in Excess of 28 grams but less than 200 grams-2 cts; Total counts-7.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
1-A	91-12-SFB	WILLIAM BARRIOS	Racketeering; Trafficking in Cocaine in Excess of 400 grams; Conspiracy to Traffic in Cocaine in Excess of 400 grams; Trafficking in Cocaine in Excess of 28 grams but less than 200 grams; Sale of Cocaine; Trafficking in Cocaine; Total counts-6.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
1-A	91-12-SFB	CARLOS FERNANDEZ	Racketeering; Sale, Purchase or Delivery of a Controlled Substance-9 cts; Total counts-10.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.

TENTH SWGJ FINAL REPORT					
SWGJ CASE #	CBAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
1-A	91-12-SFB	DAVID NADAL	Racketeering; Trafficking in Cocaine in Excess of Excess of 400 grams-4 cts; Conspiracy to Traffic in Cocaine in Excess of 400 grams-3 cts; Possession of Cocaine; Total counts-9.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
1-A	91-12-SFB	ROBERTO RODRIGUEZ	Racketeering; Trafficking in Cocaine in Excess of 400 grams-2 cts; Conspiracy to Traffic in Cocaine in Excess of 400 grams-2 cts; Burglary of a Structure; Grand Theft-2 cts; Armed Robbery; Conspiracy to Commit Armed Robbery; Total counts-10.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
1-A	91-12-SFB	ANTHONY SMITH	Racketeering; Trafficking in Cocaine in Excess of 400 grams-2 cts; Conspiracy to Traffic in Cocaine in Excess of 400 grams-2 cts; Burglary of a Structure; Grand Theft; Armed Robbery; Conspiracy to Commit Armed Robbery; Total counts-9.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
1-A	91-12-SFB	NELSON VEGA	Racketeering; Trafficking in Cocaine in Excess of 400 grams-2 cts; Conspiracy to Traffic in Cocaine in Excess of 400 grams-2 cts; Total counts-5.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
1-A	91-12-SFB	MODESTO ELIAS	Racketeering; Trafficking in Cocaine in Excess of 400 Grams; Conspiracy to Traffic in Cocaine in Excess of 400 grams; Total counts-3.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
1-A	91-12-SFB	ELISEO MONTIJO	Racketeering; Sale, Purchase of Delivery of a Controlled Substance-3 cts; Total counts-4.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.

TENTH SMGJ FINAL REPORT					
SMGJ CASE #	OSAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
1-A	91-12-SFB	JULIO TERZADO	Racketeering; Conspiracy to Traffic In Cocaine In Excess of 400 grams; Trafficking In Cocaine In Excess of 400 grams; Total counts-3 .	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
1-A	91-12-SFB	RONALD BAKER	Racketeering; Armed Robbery; Conspiracy to Commit Armed Robbery; Total counts-3.	Dade	Superseding Indictment issued 11/14/91. Status conference 10/2/91.
2	90-59-WFB	CHARLES C. AMOS	Racketeering; Grand Theft-Second Degree-4 cts; Grand Theft First Degree-4 cts; Organized Fraud. Total counts-9.	Pinellas	Indictment issued 11/14/91. Trial set 01/19/93.
2	90-59-WFB	JOHN H. FESSENDEN	Racketeering; Grand Theft-First Degree-6 cts; Grand Theft-Second Degree; Organized Fraud. Total counts-9.	Pinellas	Indictment issued 11/14/91. Trial set 01/19/93.
2-A	90-59-WFB	CHARLES C. AMOS	Racketeering; Grand Theft-Second Degree-4 cts; Grand Theft-First Degree-7 cts; Organized Fraud; Total counts-13.	Pinellas	Superseding Indictment issued 05/13/92. Trial set 01/19/93.
2-A	90-59-WFB	JOHN H. FESSENDEN	Racketeering; Grand Theft-First Degree-7 cts; Grand Theft-Second Degree; Organized Fraud. Total counts-8.	Pinellas	Superseding Indictment issued 05/13/92. Trial set 01/19/93.
3	91-16-NFB	DAVID L. SANDERS	Conspiracy to Commit Perjury; Subornation of Perjury-3 cts; Total counts-4.	Bay	Indictment issued 11/14/91. Guilty Verdict-3 cts; 1 ct. Subornation dismissed; 6 months County Jail; 5 years probation; Costs motion set for October 1992.

TENTH SVGJ FINAL REPORT					
SVGJ CASE #	OSAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
3	91-16-NFB	TOMMY LEE CARTER	Conspiracy to Commit Perjury; Subornation of Perjury-3 cts; Total counts-4.	Bay	Indictment issued 11/14/91. Guilty Verdict-3 cts; 1 ct. Subornation dismissed; .6 months County Jail; 5 years probation; Costs motion set for October 1992.
4	91-93-WFB	ALAN ROSS	Conspiracy to Traffic in Cocaine; Murder in the First Degree; Conspiracy to Commit First Degree Murder; Total counts-3.	Broward	Indictment issued 12/11/91; Trial set 10/19/92.
4	91-93-WFB	RAMON DESPOSSE	Conspiracy to Traffic in Cocaine; Murder in the First Degree; Conspiracy to Commit First Degree Murder; Attempted Murder; Armed Robbery; Total counts-5.	Broward	Indictment issued 12/11/91; Trial set 10/19/92.
4	91-93-WFB	ALLAIN STRONG	Conspiracy to Traffic in Cocaine; Murder in the First Degree; Conspiracy to Commit First Degree Murder; Attempted Murder; Armed Robbery; Total counts-5.	Broward	Indictment issued 12/11/91; Trial set 10/19/92.
4	91-93-WFB	JAMES ALLARDYCE	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Indictment issued 12/11/91; Trial set 10/19/92.
4	91-93-WFB	(SEALED)	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Indictment issued 12/11/91; Fugitive.
4	91-93-WFB	(SEALED)	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Indictment issued 12/11/91; Fugitive.
4	91-93-WFB	THOMAS M. PRITCHETT	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Indictment issued 12/11/91; Trial set 10/19/92.

TENTH SVGJ FINAL REPORT					
SVGJ CASE #	OBAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
4	91-93-WFB	GEORGE ALEXANDER	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Indictment issued 12/11/91; Trial set 10/19/92.
4-A	91-93-WFB	ALAN ROSS	Conspiracy to Traffic in Cocaine; Murder in the First Degree; Conspiracy to Commit First Degree Murder; Total counts-3.	Broward	Superseding Indictment issued 01/14/92. Trial set 10/19/92.
4-A	91-93-WFB	RAMON DESROSSE	Conspiracy to Traffic in Cocaine; Murder in the First Degree; Conspiracy to Commit First Degree Murder; Attempted Murder; Armed Robbery; Total counts-5.	Broward	Superseding Indictment issued 01/14/92. Trial set 10/19/92.
4-A	91-93-WFB	ALLAIN STRONG	Conspiracy to Traffic in Cocaine; Murder in the First Degree; Conspiracy to Commit First Degree Murder; Attempted Murder; Armed Robbery; Total counts-5.	Broward	Superseding Indictment issued 01/14/92. Trial set 10/19/92.
4-A	91-93-WFB	JAMES ALLARDYCE	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Superseding Indictment issued 01/14/92. Trial set 10/19/92.
4-A	91-93-WFB	[redacted] Sealed	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Superseding Indictment issued 01/14/92. Trial set 10/19/92.
4-A	91-93-WFB	[redacted] Sealed	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Superseding Indictment issued 01/14/92. Trial set 10/19/92.
4-A	91-93-WFB	THOMAS M. PRITCHETT	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Superseding Indictment issued 01/14/92. Trial set 10/19/92.

TENTH SVGJ FINAL REPORT					
SVGJ CASE #	OSAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
4-A	91-93-WFB	GEORGE ALEXANDER	Conspiracy to Traffic in Cocaine; Total counts-1.	Broward	Superseding Indictment issued 01/14/92. Trial set 10/19/92.
5	91-96-SFB	(SEALED)	Racketeering; Trafficking in Marijuana in Excess of 2,000 pounds, but less than 10,000 pounds; Conspiracy to Traffic in Marijuana in Excess of 2,000 pounds, but less than 10,000 pounds; Total counts-3.	Broward	Indictment issued 12/11/91. Fugitive.
5	91-96-SFB	(SEALED)	Racketeering; Trafficking in Marijuana in Excess of 2,000 pounds, but less than 10,000 pounds; Conspiracy to Traffic in Marijuana in Excess of 2,000 pounds, but less than 10,000 pounds; Total counts-3.	Broward	Indictment issued 12/11/91. Fugitive.
6	91-103-CFB	CAROL H. QUINN	Fraudulent Representations as Socially or Economically Disadvantaged Business Enterprise; Conspiracy to Commit Fraudulent Representations as Socially or Economically Disadvantaged Business Enterprise; Total counts 2.	Seminole	Indictment issued 1-14-92. Charges dismissed 9/11/92. To be refiled by Information.
	91-103-CFB	EDWARD T. QUINN, JR.	Conspiracy to Commit Fraudulent Representations as Socially or Economically Disadvantaged Business Enterprise; Total counts-1.	Seminole	Indictment issued 1/14/92. Trial date set November 17, 1992.
6	91-103-CFB	SUE BELL	Conspiracy to Commit Fraudulent Representations as Socially or Economically Disadvantaged Business Enterprise; Total counts-1,.	Seminole	Indictment issued 1/14/92. Trial date set November 17, 1992.
7	91-92-WFB	BYRON R. WALKER	Racketeering; Conspiracy to Commit Racketeering; Organized Fraud; Grand Theft-12 cts; Total counts-15.	Pinellas	Indictment issued 2/12/92. Pre-trial hearing set 10/26/92.

TENTH SAGJ FINAL REPORT					
SAGJ CASE #	OSAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
7	91-92-WFB	JOYCE A. HUNTER	Racketeering; Conspiracy to Commit Racketeering; Organized Fraud; Grand Theft-12 cts; Total counts-15.	Pinellas	Indictment issued 2/12/92. Pre-trial hearing set 10/26/92.
7	91-92-WFB	GRAMON C. TUCKER	Racketeering; Conspiracy to Commit Racketeering; Organized Fraud; Grand Theft-12 cts; Total counts-15.	Pinellas	Indictment issued 2/12/92. Pre-trial hearing set 10/26/92.
7	91-92-WFB	MARY W. TUCKER	Racketeering; Conspiracy to Commit Racketeering; Organized Fraud; Grand Theft-12 cts; Total counts-15.	Pinellas	Indictment issued 2/12/92. Pre-trial hearing set 10/26/92.
8	91-66-SFB	JAMES RAY TRAINA	Murder in the First Degree; Armed Burglary; Armed Robbery; Total counts-3.	Broward	Indictment issued 2/13/92. Trial set for October 19, 1992.
8	91-66-SFB	KERRY JAY CARBONELL	Murder in the First Degree; Armed Burglary; Total counts-2.	Broward	Indictment issued 2/13/92. Defendant deceased 8/21/92.
9	91-14-SFB	RICARDO GOLDMAN	Racketeering-1 ct; Grand Theft-2nd Degree-4 cts; Grand Theft-3rd Degree-20; Forgery-35 cts; Uttering a Forged Document-33 cts; Total counts-93.	Dade	Indictment issued 3/17/92. Trial set for October 19, 1992.
10	91-67-WFB	ROBERT S. BASHA	Criminal Usury-1 ct; Burglary-1 ct; Kidnapping-2 cts; Extortion-1 ct; Total counts-5.	Broward	Indictment issued 6/11/92. In Federal custody; trial to be set at a later date.
10	91-67-WFB	RAYMOND J. BASHA	Criminal Usury-1 ct.	Broward	Indictment issued 6/11/92. In Federal custody; trial to be set at a later date.

TENTH SVGJ FINAL REPORT					
SVGJ CASE #	OBAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
10	91-67-WFB	MICHAEL V. MONAHAN	Criminal Usury-1 ct; Burglary-1 ct; Kidnapping-2 cts; Extortion-1 ct; Total counts-5.	Broward	Indictment issued 6/11/92. In Federal custody; trial to be set at a later date.
11	92-240-SFB	SEALED	Racketeering-1 ct; Conspiracy to Commit Racketeering-1 ct; Armed Kidnapping-3 cts; Conspiracy to Kidnap-2cts; Armed Robbery-5 cts; Armed Burglary-4 cts; Grand Theft-5 cts; Falsely Personating an Officer-2 cts; Conspiracy to Commit Armed Robbery-4 cts; Attempted Armed Robbery-1 ct; Burglary of a Structure-2 cts; Conspiracy to Commit Burglary-2 cts; Total counts-32.	Dade	Indictment issued 9/16/92.
11	92-240-SFB	SEALED	Racketeering-1 ct; Conspiracy to Commit Racketeering-1 ct; Armed Kidnapping-3 cts; Conspiracy to Kidnap-2 cts; Unlawful Possesion of a Fiream-1 ct; Falsely Personating an Officer-3 cts; Armed Robbery-7 cts; Armed Burglary-4 cts; Grand Theft-5 cts; Attempted Armed Robbery-1 ct; Conspiracy to Commit Armed Robbery-5 cts; Burglary of a Structure-2 cts; Conspiracy to Commit Burglary-2 cts; Total counts-37.	Dade	Indictment issued 9/16/92.
11	92-240-SFB	SEALED	Racketeering-1 ct; Conspiracy to Commit Racketeering-1 ct; Conspiracy to Kidnap-1 ct; Armed Robbery-1 ct; Conspiracy to Commit Armed Robbery-1 ct; Total counts-5.	Dade	Indictment issued 9/16/92.

TENTH SMGJ FINAL REPORT					
SMGJ CASE #	OCAP CASE #	DEFENDANT	CHARGE	VENUE	DISPOSITION
11	92-240-SFB	SEALED	Racketeering-1 ct; Conspiracy to Commit Racketeering-1 ct; Dealing in Stolen Property-1 ct; Burglary of a Structure-2 cts; Conspiracy to Commit Burglary-2 cts; Grand Theft-2 cts; Total counts-9.	Dade	Indictment issued 9/16/92.