

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Petition on behalf of Citizens)
of the State of Florida to Initiate) Docket No. 910163-TL
Investigation into the Integrity of)
Southern Bell Telephone and Telegraph) Filed: January 15, 1993
Company's Repair Service Activities)
and Reports.)
_____)

CITIZENS' THIRTEENTH MOTION TO COMPEL AND REQUEST
FOR IN CAMERA INSPECTION OF DOCUMENTS

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, request the Florida Public Service Commission ("Commission") to compel BellSouth Telecommunications, Inc., ("BellSouth") d/b/a/ Southern Bell Telephone and Telegraph Company to produce each of the documents responsive to the Citizens' thirty-fourth set of requests for production of documents dated December 1, 1992, and to conduct an in camera inspection of all documents and portions of documents withheld by BellSouth Telecommunications based on claims of attorney-client and work product privileges.

1. On December 1, 1992, Citizens served its thirty-fourth request for production of documents on BellSouth. Citizens requested the company to

Please provide the May 31, 1991, MTAS Daily Recirculation file used in the KSRI [Key Service and Revenue Indicators] audit.

Citizens' Thirty-fourth Set of Requests for Production of Documents to BellSouth Telecommunications, Inc., 6, ¶ 3, Docket

no. 910163-TL (Dec. 1, 1992) [hereinafter Citizens' 34th Request].

2. On January 4, 1993, BellSouth made the following specific objection:

With respect to Request No. 3, Southern Bell objects to this request on the basis that it calls for the production of documents that were generated at the direct request of, and under the supervision of, attorneys for Southern Bell. These documents were developed in anticipation of litigation and were the basis upon which legal opinions were rendered to Southern Bell by its attorneys. Accordingly, Southern Bell objects to the production of these documents on the basis of attorney-client and work product privileges. This request seeks the production of documents Southern Bell has consistently maintained to be privileged documents in this docket, and the Company incorporates by reference herein all arguments previously made in numerous motions and responsive pleadings made in support of the Company's consistent position relating to these documents (citations omitted).

Southern Bell Telephone and Telegraph Company's Response and Objections to Public Counsel's Thirty-fourth Request for Production of Documents and Motion for Permanent and Temporary Protective Order, 5, ¶ 10, Docket no. 910163-TL (Jan. 4, 1993) [hereinafter BellSouth Response].

3. In addition to its specific response, BellSouth also raised objections to Citizens' definitions of "document(s)", "you", and "your". BellSouth Response, 3, ¶¶ 3 & 4. BellSouth's objection and Citizens' response thereto have been extensively

briefed in prior motions to compel.¹ Citizens incorporate those arguments by reference herein. Citizens' Motion to Compel and Request for In Camera Inspection of Documents, Docket no. 910163-TL (May 21, 1992) (decision pending).

4. BellSouth also generally objected to Citizens' instructions to provide identifying information on each document withheld under a claim of privilege. The instruction stated:

If any document is withheld under any claim of privilege, please furnish a list identifying each document for which privilege is claimed, together with the following information: date, sender, recipients, recipients of copies, subject matter of the document, and the basis upon which such privilege is claimed.

Citizens' 34th Request at 1, ¶ 1. BellSouth stated that

To the extent a document responsive to any of the requests is subject to an applicable privilege, some of the information requested by Public Counsel would be similarly privileged and therefore not subject to discovery.

BellSouth's Objections at 3, ¶ 1.

5. Generally under federal rules, the party asserting a privilege provides proof by sworn affidavit in which each of the documents are listed and described showing information similar to that requested by Public Counsel. E.g., Internat'l Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 93 (D. Del. 1974) ("An improperly asserted claim of privilege is no claim of privilege at all."). Without this information, Public Counsel cannot adequately

¹ In a bench decision at the prehearing conference in Docket no. 920260-TL held on January 8, 1993, Commissioner Clark granted Citizens' motion in part. (written decision pending).

challenge the company's withholding of these reports. As BellSouth has refused to provide even the minimal showing required for the Commission to determine the applicability of either privilege, its claim of privilege to the KSRI audit documents is null. The Commission should, therefore, order BellSouth to produce these documents.

6. BellSouth has the burden of demonstrating that the attorney-client privilege applies to any document so claimed. Hartford Accident & Indemnity Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); see e.g., S.E.C. v. Gulf & Western Indus., Inc. 518 F. Supp. 675, 682 (D.D.C. 1981). "A blanket assertion of the privilege is unacceptable." Id. BellSouth must prove each element of the privilege claimed.² Id. For example, one element of the privilege is that any communication must be given for the

² Federal courts have generally accepted the test elements listed by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort, and (4) the privilege has been (a) claimed and (b) not waived by the client.

S.E.C. v. Gulf Western Indus., Inc., 518 F. Supp. 675, 681 (D.D.C. 1981).

purpose of securing legal advice. If the MTAS daily recirculation files were prepared in the ordinary course of business, then the privilege does not arise. See Skorman v. Hovnanian of Fla., Inc., 382 So. 2d 1376 (Fla. 4th DCA 1980). By its very title, "MTAS [Mechanized Trouble Analysis System] Daily Recirculation" file, this document appears to be routinely prepared in BellSouth's daily course of business. As such, it is not privileged.

7. BellSouth has not provided any description of the nature of the information contained in the documents being withheld. From the title, it appears that the daily recirculation file does not reveal legal opinions, advice, theories or communications. Rather, it appears that these documents contain factual data culled from the daily customer trouble report records. As such, they are not a communication by a client to corporate counsel. These reports contain facts not communications. Facts are not privileged. Upjohn v. United States, 449 U.S. 383 (1981). Furthermore, as no legal advice, opinion, or theories are present in the reports, they are not protected under the work product doctrine. As BellSouth has failed to prove that these documents qualify for protection under either the attorney-client or work product privilege, the Commission should order the documents to be produced.

8. The attorney-client privilege does not apply to these business documents and should, therefore, be denied. Citizens have extensively briefed the company's privilege claims to the

KSRI audit, for which these reports were prepared, in our prior motion. Citizens incorporate those arguments by reference herein.³ Furthermore, the facts contained in these reports are unavailable from any other source. In the interest of justice, these reports should be produced. See Xerox Corp. v. Internat'l Bus. Machines Corp., 64 F.R.D. 367 (S.D.N.Y. 1974).

9. BellSouth has failed to show that the reports are attorney work product. The reports are routine business documents. As such, no privilege attaches. Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980); cf. Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188 (Fla. 1st DCA 1985) (in-house research report protected work product as outside researcher's report was available on showing of need). Citizens have need of this information to build our case, to cross-examine company witnesses on the issues of the impact of incentive regulation on the company's ability to maintain a sufficient quality of service, and for impeachment. BellSouth has sole control of the employee incentives and bonus pay data base, customer trouble reporting data bases (MTAS), the rebate/refund data base and the computer system by which this data is processed and analyzed. There is no other source for this information.

10. Citizens assert that BellSouth has failed to meet its initial burden of showing that the attorney-client or work product privileges apply to these reports. These reports are

³ See Citizens' Seventh Motion to Compel and Request for In Camera Inspection of Documents, Docket no. 910163-TL (July 23, 1992) (LMOS, KSRI, PSC Schedule 11). Decision pending.

business documents containing factual information used in producing the KSRI audit, and as such, they are directly relevant to whether the audit itself is covered by the attorney-client or work product privilege. A final determination can only be made by the Commission after an in camera review of the documents in question. Austin v. Barnett Bank of South Florida, N.A., 472 So. 2d 830 (Fla. 4th DCA 1985); Boca Raton Hotel & Club v. Dunn, 563 So. 2d 218 (Fla. 4th DCA 1990). After this review, the Commission may find that the reports, while not privileged under statute or rule, may be entitled to proprietary treatment. BellSouth should request such treatment under Commission rule 25-22.006, Florida Administrative Code.

11. BellSouth has requested a permanent protective order for personnel evaluation forms for an ex-employee. BellSouth Response, 1-2. Both parties have extensively briefed this issue in prior motions.⁴ Citizens' adopt the arguments briefed in prior motions and incorporate them by reference herein. The information is directly related to the employee's performance of his duties and is, therefore, not confidential. The Commission should deny the company's request.

⁴ See e.g., Southern Bell Telephone and Telegraph Company's Motion for Confidential Treatment and Permanent Protective Order, Docket No. 910163-TL (Sept. 9, 1992) and Citizens' Response to Southern Bell's Request for Confidential Classification and Motion for Permanent Protective Order, Dockets Nos. 910163-TL & 920260-TL (Sept. 16, 1992) (decision pending).

WHEREFORE, the Commission should conduct an in camera review of the reports and then compel BellSouth immediately to produce the May 31, 1991 MTAS Daily Recirculation file used in the KSRI audit.

Respectfully submitted,



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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 15th day of January, 1993.

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