

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition on Behalf of) DOCKET NO. 910163-TL
Citizens of the State of Florida)
to Initiate Investigation into)
the Integrity of SOUTHERN BELL)
TELEPHONE AND TELEGRAPH COMPANY'S)
Repair Service Activities and)
Reports)

Comprehensive Review of the) DOCKET NO. 920260-TL
Revenue Requirements and Rate)
Stabilization Plan of SOUTHERN)
BELL TELEPHONE AND TELEGRAPH)
COMPANY)

Show cause proceeding against) DOCKET NO. 900960-TL
SOUTHERN BELL TELEPHONE AND)
TELEGRAPH COMPANY for misbilling)
customers.)

Investigation into SOUTHERN BELL) DOCKET NO. 910727-TL
TELEPHONE AND TELEGRAPH COMPANY'S) ORDER NO. PSC-93-0151-CFO-TL
compliance with Rule 25-4.110(2),) ISSUED: 01/28/93
F.A.C.)

ORDER GRANTING PUBLIC COUNSEL'S MOTIONS FOR IN CAMERA
INSPECTION OF DOCUMENTS AND MOTIONS TO COMPEL

This Order resolves questions raised by motions to compel filed by Citizens of the State of Florida ("Public Counsel") and oppositions filed in response by BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell") in the above-styled consolidated dockets.

The motions to compel and oppositions were filed as follows:

Docket No. 920260-TL

Citizens' First Motion To Compel And Request For In Camera Inspection Of Documents (Filed May 8, 1992)

Southern Bell Telephone and Telegraph Company's Opposition To Public Counsel's First Motion To Compel And Request For In Camera Inspection of Documents (Filed May 15, 1992)

¹ The Commission voted to consolidated these dockets on January 19, 1993.

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Citizens' Supplement To Their First Motion To Compel And Request For In Camera Inspection Of Documents (Filed June 2, 1992)

Southern Bell Telephone and Telegraph Company's Opposition To Public Counsel's Supplement To Public Counsel's First Motion To Compel And Request For In Camera Inspection Of Documents (Filed June 15, 1992)

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Citizens' Motion To Compel And Request For Oral Argument (Filed April 8, 1992)

Southern Bell Telephone And Telegraph Company's Opposition To Public Counsel's Motion To Compel And Request For Oral Argument (Filed April 15, 1992)

Citizens' Motion To Compel And Request For In Camera Inspection Of Documents (Filed May 21, 1992)

Southern Bell Telephone and Telegraph Company's Opposition To Public Counsel's Motion To Compel And Request For In Camera Inspection Of Documents (Filed May 28, 1992)

(Citizens') Motion To Compel (Filed July 18, 1992)

Opposition Of Southern Bell Telephone And Telegraph Company To Public Counsel's Motion To Compel (Filed July 30, 1992)

Citizens' Motion To Compel (Filed July 20, 1992)

Southern Bell Telephone And Telegraph Company's Opposition To Public Counsel's Motion To Compel (Filed July 28, 1992)

Citizens' Seventh Motion To Compel And Request For In Camera Inspection Of Documents (Filed July 23, 1992)

Southern Bell Telephone And Telegraph Company's Opposition To Public Counsel's Seventh Motion To Compel And Request For In Camera Inspection Of Documents (Filed August 4, 1992)

Citizens' Eighth Motion To Compel And Request For In Camera Inspection Of Documents And Expedited Decision (Filed August 21, 1992)

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Southern Bell Telephone And Telegraph Company's Opposition To Public Counsel's Eighth Motion To Compel And Request For In Camera Inspection Of Documents (Filed September 2, 1992)

Citizens' Ninth Motion To Compel And Request For In Camera Inspection Of Documents And Expedited Decision (Filed October 8, 1992)

Southern Bell Telephone And Telegraph Company's Response And Memorandum In Opposition To Public Counsel's Ninth Motion To Compel And Request For In Camera Inspection Of Documents And Expedited Decision (Filed October 20, 1992)

An initial prehearing conference in which the above filings were discussed took place January 8, 1993. In the following prehearing conference, held January 15, 1993, Commissioner Susan F. Clark, as Prehearing Officer, ordered Southern Bell to deliver the documents at issue in the above-listed pleadings for an in-camera inspection scheduled on January 21, 1993.

The documents at issue comprise the following:

1. (Internal Audit) Customer Adjustments - Loop Operations System (LMOS) Significant Adverse Findings
2. (Internal Audit) Mechanized Adjustments - Mechanized out of Service Adjustments (MOOSA) - Florida Significant Adverse Findings
3. (Internal Audit) Key Service Results Indicator (KSRI) - Network Customer Trouble Rate Significant Adverse Findings
4. PSC Schedule 11 - Significant Adverse Findings
5. Statistical analysis
6. Panel recommendations regarding craft discipline
7. Panel recommendations regarding paygrade 5 and below discipline

Based on a review of the legal authorities cited by the parties, as more fully set out in this Order, and after inspection in camera of the documents at issue, Public Counsel's Motions To

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Compel are granted. As discussed below, the documents are not privileged from discovery under either the attorney-client privilege or the work-product privilege.

I. Audit And Statistical Analysis Documents

Communications between attorneys and their clients are shielded from discovery under Florida Rule of Civil Procedure 1.280(b)(1); see, §90-502 Fla. Stat. The elements required for the privilege to be invoked include (1) a communication made in confidence, (2) by one who is a client, (3) seeking legal advice from an attorney, and (4) the communication is requested to be kept confidential and such privilege has not been waived. International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 184-85 (M.D. Fla. 1973). The privilege has been held to apply to corporations. Upjohn v. United States, 449 U.S. 383 (1981).

On page 8 of its Opposition to Public Counsel's Seventh Motion To Compel, Southern Bell states that the documents at issue therein (audits/statistical analysis)

"do not contain legal opinions per se. Instead, these documents contain information that was provided to the attorneys for Southern Bell at their specific request to provide a legal opinion. Therefore, the pertinent factor in determining whether the attorney-client privilege or work-product doctrine or both apply is not so much the specifics of the documents themselves, but rather the circumstances in which they were created". [e.s.]

The in camera inspection confirms what Southern Bell has already acknowledged; that discovery of these documents will not provide Southern Bell's litigation adversaries with Southern Bell's attorneys' legal opinions, or for that matter, their work product; i.e., views of the evidence, witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams or charts. Reynolds v. Hoffman, 305 So. 2d 294 (Fla. 3d DCA 1974). The documents are devoid of such material, as Southern Bell states. Opposition To Seventh Motion To Compel, pg. 8.

Instead, Southern Bell's more indirect theory is that these materials are privileged as attorney-client communications because they were formulated as part of legal counsel's internal investigation of the company's compliance with the Florida Public

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Service Commission's ("Commission") rules and regulations for the purpose of giving legal advice.

Affidavits are attached to Southern Bell's opposition which recite facts relevant to this theory. In effect, the affidavits state that:

- 1) the audits were carried out solely pursuant to a request by the Southern Bell's legal department, were not otherwise scheduled and would not otherwise have been performed.
- 2) the audits were treated as privileged and only shown to Southern Bell's lawyers and certain members of the Internal Audit Department.

Thus, the question presented is whether these documents are exempt from discovery as part of a privileged internal investigation under either the attorney client or work-product privileges. A number of relevant authorities establish that they are not exempt from discovery under the facts and circumstances of this case.

A. Attorney-Client Privilege

In Upjohn Co. v. United States, 449 US 383, 66 L.Ed 2d 584, 101 S. Ct. 677 (January 13, 1981), the company's general counsel investigated questionable payments made by company employees to foreign officials by means of questionnaires sent to the employees. The United States Supreme Court held the communications from the employees to the general counsel exempt from discovery under the attorney-client privilege, even though the employees were not part of the company's "control group". However, the Court noted that the privilege applied to communications, not to the underlying facts. 449 U.S. 395-6

While Southern Bell analogizes directly from Upjohn to its claim of attorney-client privilege for its audits and statistical analysis, Consolidated Gas Supply Corporation, 17 F.E.R.C. ¶63,048 (December 2, 1981), involving a regulated company, is more closely on point. Therein, the motions judge found a narrow view of the privilege more appropriate to an administrative proceeding involving a regulated company:

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It distinctly avoids an overly broad corporate information shield...
Consolidated at p. 65, 239.

In reaching that conclusion, the Consolidated opinion emphasized the Federal Energy Regulatory Commission's "duty to protect the public" and "continuing obligation" to determine the company's compliance with regulations. Thus, in the context of regulation, the narrow view of the privilege "best ensures effectuation of the privilege by balancing interests deserving protection with the conflicting needs of all participants in order to obtain the truth." Consolidated, at p. 65, 240.

Here, too, as in Consolidated, the context is one in which the continuing obligation of this Commission to regulate and to protect the public interest and the reciprocal responsibilities of Southern Bell to comply with that regulation, make Southern Bell's claim that its audits and statistical analysis were solely for the purpose of getting legal advice hypertechnical rather than substantive. Southern Bell has a continuing obligation to comply with Commission Rule 25-4.110(2), F.A.C. Where doubts about the compliance of its operations with regulatory requirements have arisen, Southern Bell has an independent business need to accurately monitor those operations which predates, post-dates and coexists with the timing of any particular audit undertaken to obtain legal advice. Unlike Upjohn's "questionable payments" episode, Southern Bell's need to comply with Commission regulation is a routine, continuing obligation, as is its self-monitoring toward that end.

Because Southern Bell had an independent business need to monitor its activities accurately through the particular internal audits in question, as well as to obtain legal counsel by informing itself thereby, the factual data created by those audits and statistical analyses, as distinct from counsel's legal theories about them, are not privileged. See, e.g. In Re: Grand Jury Subpoena Duces Tecum, 731 F. 2d 1032, 1037 (2d Cir 1984) ("[I]t is important to bear in mind that the attorney-client privilege protects communications rather than information; the privilege does not impede disclosure of information except to the extent that disclosure would reveal confidential communications." "When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved.")

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Hardy v. New York News, Inc., 114 F.R.D. 633, 643-445 S.D.N.Y. 1987).

Internal audits are a routine vehicle for a regulated business to inform itself about its operations and to report about those operations to a regulatory agency.² Those business documents do not become privileged merely because non-routine developments require audits to be scheduled out of sequence or because the documents are handed over to an attorney. See e.g., Goldberg v. Ross, 421 So. 2d 669 (Fla. 3d DCA 1982) (judgment debtor's trust fund records held by attorney not privileged).³

B. Work-Product Privilege

The same reasoning leads to the conclusion that the internal audits and statistical analysis are not privileged under the work-product doctrine of Hickman v. Taylor, 329 U. S. 495, 675 Ct. 385, 91 L.Ed 451 (1947). Thus, in Soeder v. General Dynamics, 90 F.R.D. 253 (1980), the Court held that in-house air accident reports, though prepared in anticipation of litigation, were also motivated by the company's goals of improving its products, protecting future passengers and promoting its economic interests. They were not, therefore, entitled to the work-product privilege. See also, Consolidated, supra, (document which summarized corporation's business practices and did not contain legal opinions was discoverable). In essence, Southern Bell's business need to comply

² Under Rule 25-4.019, F.A.C., Southern Bell "must furnish the Commission with any information concerning the utility's facilities or operations which the Commission may reasonably request and require."

³ We note that, on a proper showing, internal audit materials are treated confidentially by the Commission pursuant to §364.183(3)(b), but that such materials are available to Public Council. §350.0611.

⁴ In staff's 6th Set of Interrogatories, staff requested that Southern Bell "describe in detail when and how Southern Bell determines when an audit of LMOS [and the other audited operations] will be conducted. Southern Bell's response, as typified by Item 61, was that "Determinations regarding whether and to what extent to audit particular subject areas are made based on consideration of many business issues." [e.s.]

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with Commission regulations imposed an ongoing necessity to monitor its operations which predated, postdated and coexisted with the timing of the particular audits in question. The factual documents, as distinct from counsel's mental impressions about them, are, therefore, not privileged as work-product. Southern Bell attempts to distinguish Soeder by arguing that General Dynamics produced air accident reports routinely. However, it cannot be disputed that Southern Bell's continuing obligation to conform its operations to such regulations as Rule 25-4.110(2), F.A.C. is not extraordinary, it is a routine aspect of its regulated business. Whatever audits need to be done to troubleshoot its operations are part of that business routine, even though they may have additional functions such as aiding in the giving of legal advice.

Moreover, even had the qualified work-product privilege applied, the complexity of Southern Bell's computerized operations at issue is such that the inability of Public Counsel to obtain that information from other sources would constitute an undue hardship. Transcontinental Gas Pipe Line Corp., 18 F.E.R.C. ¶63,043 (Feb. 9, 1982) (finding that materials that related to the issue, which were prepared at the direction of counsel, were discoverable by the adverse party because the materials could not be duplicated without undue hardship).

II. Panel Recommendations Regarding Craft Discipline and Grade 5 and Below Discipline

As previously indicated, these documents are not privileged as exempt from discovery under either the attorney-client or work-product privileges. On page 10 of its Opposition To Public Counsel's Eighth Motion To Compel, Southern Bell notes that the documents at issue

"do not contain legal opinions per se. Instead, these documents contain information that was obtained by attorneys for Southern Bell and which formed the basis for the rendering of a legal opinion to the client. After this information was given to the client, i.e., those managers of Southern Bell with a need to know, some of these managers memorialized the information in notes for their own subsequent use . . . In other words, this is a situation in which the most

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important factor in determining whether the attorney-client privilege and work-product doctrine pertain is not so much what the documents reveal on their face, but rather the specific circumstances that demonstrate that the information was related from attorney to client and then memorialized by the client in written form."

Opposition To Eighth Motion To Compel, p. 10. [e.s.]

These statements read in context appear to indicate that the managers with "a need to know" were personnel managers with a need to know regarding the business matter of possible employee discipline, rather than managers with a need for legal advice. The fact that the discipline was not carried out would not change the business nature of the purpose for which the documents were prepared. Moreover, counsel's own statement indicates that neither legal opinions per se nor indications of attorney work-product are apparent on the face of these documents. Indeed, the inspection of them in camera indicates that the presence or absence of certain conduct by certain employees was listed without any indication whatsoever of the legal implications vel non for those employees or the company.

Here again, based on Southern Bell's continuing obligation to conform its practices to regulatory requirements and the resulting business necessity to oversee its employees' conduct, the previously cited authorities relevant to a narrow view of the attorney client privilege, Consolidated Gas Supply Corp., supra, differentiation between information and communications, In Re: Grand Jury Subpoena Duces Tecum and Hardy v. New York, supra, and the coexisting business goal behind the creation of the documents, Soeder v. General Dynamics, supra, preclude either privilege being applicable as an exemption from discovery for these materials.⁵

Because Southern Bell's general theory does not create an exemption from discovery for the audit results that have been examined in camera, the associated workpapers, which have not been examined in camera, are not, pursuant to Southern Bell's general

⁵ Certain personnel related materials are, on a proper showing, accorded confidential treatment by the Commission §364.183(3)(f), but such materials would be available to the Public Counsel. §350.0611.

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theory, exempt from discovery under the attorney-client or work-product privileges. However, a more particularized claim of privilege as to the workpapers or any part of them including the rationale and the pages and lines to which it applies, may be made within seven days from the date of this Order.

Finally, in view of this decision, it is not necessary to reach the issue discussed in Public Counsel's Ninth Motion To Compel regarding whether production of customer repair records (DLETH's) by Southern Bell "would be unduly burdensome, oppressive and would cause unreasonable interference with the company's business operations."

In view of the above, it is

ORDERED that the above-described materials for which the attorney-client and work-product privileges for exemption from discovery have been claimed, be provided by Southern Bell to Public Counsel. It is further

ORDERED that any claim as to privilege for exemption from discovery for workpapers associated with the above-described materials be made within seven days from the date of this Order.

BY ORDER of Commissioner Susan F. Clark as Prehearing Officer this 28th day of January, 1993.


SUSAN F. CLARK,
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearings or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.