

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of 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.)

Docket No. 910163-TL

In re: Show Cause Proceeding Against)
Southern Bell Telephone & Telegraph)
Company for Misbilling Customers)

Docket No. 900960-TL

Comprehensive Review of the Revenue)
Requirements and Rate Stabilization)
Plan of Southern Bell Telephone and)
Telegraph Company)

Docket No. 920260-TL

January 29, 1993

CITIZENS' FOURTEENTH 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-first set of requests for production of documents and interrogatories dated October 22, 1992, and to grant Public Counsel an extension of its testimony filing date of thirty days after receipt of the requested information.

1. On October 22, 1992, Citizens served its thirty-first request for production of documents and interrogatories on BellSouth. Citizens requested the company to produce specific reports derived from customer repair and rebate records. Document request, Item no. 1 was the only item produced without objection. Document requests 2 and 3 sought production of customer repair and rebate records and the work papers, for Item no.1. Document requests 4, 5 and 6 and Interrogatory 6 requested a report showing the clearing to closing times on customer repair records that were greater than 12 hours with accompanying customer records. Document requests 7, 8 and 9, and Interrogatory 8 requested a report of the CON (carried over no) code with accompanying customer records. Document requests 10, 11 and 12 requested reports furnished to the Attorney General or the Statewide Prosecutor. Document requests 13 and 14, and Interrogatories 4 and 9 sought production of a report of the TOK (test-ok) dispositions of out-of-service reports closed within 5 minutes of receipt with accompanying customer records. Document requests 15 and 16, and Interrogatories 5 and 6 sought production of a report showing out-of-service over 24 hours trouble reports that had been excluded with accompanying customer records. Document requests 17 and 18, and Interrogatories 2 and 10 sought production of a report showing a 12 hour lag time between clearing and closing of out-of-service trouble reports with accompanying customer records. Document requests 19 and 20, and Interrogatories 3 and 11 sought production of a report showing out-of-service over 20 hours CON'd trouble reports with accompanying customer records.

Citizens' Thirty-first Set of Requests for Production of Documents to BellSouth Telecommunications, Inc. and Citizens' Thirty-first Set of Interrogatories to Southern Bell Telephone and Telegraph Company, Dockets Nos. 910163-TL, 900960-TL, & 920260-TL (Oct. 22, 1992) [hereinafter Citizens' 31st Request].

2. On November 23, 1992, BellSouth objected to producing these specific reports on the specific grounds that to do so was unduly burdensome, oppressive, and that it would interfere with its business operations. Southern Bell Telephone and Telegraph Company's Response and Objections to Public Counsel's Thirty-first Request for Production of Documents and Motion for Temporary Protective Order and Southern Bell Telephone and Telegraph Company's Response to Public Counsel's Thirty-first Set of Interrogatories, Docket No. 910163-TL (Nov. 23, 1992) [hereinafter BellSouth's Response]. BellSouth claimed that Citizens' request involved a labor intensive search and compilation of thousands of records. As to any reports furnished to the Attorney General or the Statewide Prosecutor, BellSouth objected that Citizens' request was overly broad, ambiguous, and might call for the production of documents improper to disclose under the grand jury secrecy rule, codified at section 905.27(1), Florida Statutes (1991).

3. In addition to its specific response, BellSouth also raised objections to Citizens' definitions of "document(s)", "you", and "your". BellSouth Response, 3-4, ¶¶ 5 & 6. Prehearing

Officer, Commissioner Clark has ruled on these objections; therefore, these objections are moot. In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company, Order No. PSC-93-0071-PCO-TL, Docket No. 920260-TL (Jan. 15, 1993) [hereinafter Order No. PSC-93-0071-PCO-TL].

4. BellSouth also generally objected to Citizens' instructions to provide identifying information on each document withheld under a claim of privilege. Citizens' 31st Request at 2, ¶ 1. BellSouth raised a general objection that to comport with this instruction was unduly burdensome and oppressive. BellSouth's Objections at 3, ¶ 4.

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 challenge the company's withholding of these reports. Furthermore, the company has not raised an objection to producing any of the requested documents on a claim of privilege, rather the objections raised are to burdensomeness of production and possible violation of the grand jury secrecy rule. Neither

relieves the company of providing the general index required by law, so that Public Counsel can frame an appropriate request for relief to the prehearing officer.

6. BellSouth also raised a general objection to Citizens' instructions¹ to provide the customer record information in an order corresponding to the reports produced. BellSouth Response, 2-3, ¶¶ 2 & 3. BellSouth stated that the order of the customer records, if produced, "should be self-evident" and that the instruction was improper.

7. As Public Counsel explained in its eleventh motion to compel, this instruction was made necessary due to BellSouth's prior production of customer records in no discernible order, which caused unnecessary effort and much wasted time to resort the records in telephone number order so that the records could be matched to the reports. Citizens adopt and incorporate that argument and supporting attachments by reference herein. Citizens' Eleventh Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (Dec. 16, 1992).

8. Lastly, BellSouth has generally objected to producing documents containing data from other states, affiliated companies, and its unregulated services. BellSouth Response, 4-5, ¶ 9. Citizens believe that Prehearing Officer, Commissioner

¹ Citizens' Request, 4-5, ¶ 11.

Clark's, Order No. PSC-93-0071-PCO-TL requires the company to produce this information.

9. In a good faith attempt to negotiate a compromise, Public Counsel narrowed its request to the production of a "statistically significant, randomly selected, valid sample for each IMC [Installation and Maintenance Center]". [Attachment A: Letter from Janis Sue Richardson to Sidney J. White, Jr., dated December 9, 1992.] No written response has been received. After repeated, unreturned telephone calls, the company orally requested Public Counsel to further modify its request on the eve of Public Counsel's testimony filing date. To do so, would so limit the information as to render it useless as dispositive evidence. Citizens ask the prehearing officer to compel production of the requested documents immediately, either as originally propounded or as revised.

10. As the party objecting to production, BellSouth has the burden of proving that the requested production would be unduly burdensome, oppressive, or in violation of law. BellSouth has not met its burden. First City Dev. of Fla., Inc. v. Hallmark of Hollywood Condo. Assn., 545 So. 2d 502 (Fla. 4th DCA 1989) (finding that objectors must quantify the manner in which production would be overburdensome, e.g. number of manhours, volume of documents). Since this requires a factual determination, these complaints are resolved on a case-by-case

basis. See Freedom Newspapers, Inc. v. Egly, 507 So. 2d 1180, 1185 (Fla. 2d DCA 1987) (100 boxes of documents not overburdensome); accord Baxter Travenol Labs., Inc. v. LeMay, 93 F.R.D. 379, 383 (S.D. Ohio, W.D. 1981) (holding that production of 800,000 sales invoices from 2.8 million records at a cost of \$80,000 did not demonstrate overburdensomeness). "In cases involving similar discovery requests, courts have held that an unwieldy record-keeping system, which requires heavy expenditures in money and time to produce relevant records, is simply not an adequate excuse to frustrate discovery. Baxter Travenol Labs., Inc., 93 F.R.D. at 383; see Morrison Assurance Co. v. United States Fire Ins. Co., 515 So. 2d 995 (Fla. 1st DCA 1987) (all of excess carrier's Florida files where carrier was excess or primary carrier from 1980 to 1982). A balancing test between a party's need for the information and the objecting party's interest that would be protected by non-production is generally applied. Id. Public Counsel's modified request is reasonable in light of the fact that the company has sole control of the data and the system by which the data is processed. Only the company has the expertise to produce the relevant requested information.

11. Citizens have diligently sought production of the company's internal audits and investigation into the matters at issue in this case. BellSouth has consistently raised objections to producing this information on the basis of privilege, and has curtailed depositions on the same grounds. BellSouth has further

chided Public Counsel for not doing its own audits; yet, when Public Counsel sought to do just that, BellSouth objected on the grounds that to comply with Public Counsel's request would overburdensome. When Public Counsel narrowed its request, BellSouth simply ignored the request. Throughout the discovery phase of these dockets, BellSouth has persistently impeded and delayed lawful discovery. Public Counsel's deadline for filing its testimony in the repair docket is February 1, 1993. Without the requested, lawful discovery, Public Counsel has been prevented from preparing its case. Citizens' due process rights have been compromised. Citizens ask that the prehearing officer require BellSouth to immediately produce the requested information in the order sought and to give us thirty days from production of this and other withheld discovery² to file our testimony.

12. As to the objection that reports produced to the Attorney General or Statewide Prosecutor may violate the grand jury secrecy rule, BellSouth has not provided any case law to support its claim. It has again failed to carry its burden of proof on its claim. In applying section 905.27, Florida Statutes, the Eleventh Circuit Court of Appeals held that the grand jury secrecy requirement did not afford witnesses an evidentiary privilege. In re Grand Jury Proceedings, 832 F.2d

² See Citizens prior motions to compel filed in these dockets. Decisions are pending.

554, 560 (11th Cir. 1987) (compelling release of grand jury transcripts), rehearing denied, 835 F.2d 291.³ The purpose of the secrecy rule is to protect the grand jury process.⁴ Only documents that reveal some secret aspect of the grand jury investigation should be subject to the statutory restrictions. United States v. Phillips, 843 F.2d 438, 441 (11th Cir. 1988) (finding that documents subpoenaed by the grand jury, but which had never been presented to the grand jury, could not compromise the grand jury investigations). BellSouth has not claimed that any of the documents being withheld had been subpoenaed by the grand jury, nor that these documents had been seen by the grand jury. Rather, the documents produced to the Attorney General, were produced under a production of documents request in a civil suit. Clearly, the grand jury secrecy rule does not apply to those documents, and they should be immediately produced. Further, it is debatable whether any of the documents produced to the Attorney General are included as these documents are in the

³ The Supreme Court of Florida in State ex rel. Brown v. Dewell, 167 So. 687, 690 (Fla. 1936), quoted by the eleventh circuit, stated that the rule of secrecy was to protect grand jurors, not witnesses.

⁴ United States v. Phillips, 843 F.2d 438, 441 (11th Cir. 1988). The reasons for secrecy include:

- (1) preventing the escape of persons against whom an indictment may be contemplated;
- (2) insuring the utmost freedom of deliberation to the grand jury;
- (3) preventing the subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear as witnesses at the trial;
- (4) encouraging free disclosure of information concerning the commission of a crime; and
- (5) protecting the innocent accused, who is later exonerated, from disclosure of the fact that he has been under investigation.

company's possession as the defendant. See In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299, 305 (S.D.N.Y. 1982).

Finally, BellSouth has not produced an index of the withheld documents identifying the means of their production, e.g. by grand jury subpoena or civil document request, the parties receiving the documents, and their use. Without this information, neither Citizens nor the prehearing officer can test the sufficiency of the company's claim.

13. For any documents presented to a federal grand jury under an official grand jury subpoena, the rule is not absolute. Parties may obtain subpoenaed documents on a showing of particularized need. In re Matter of Petitions for Disclosure of Documents Subpoenaed by the Grand Jury from Gary Sack, 617 F. Supp. 630 (S.D. Fla. 1985). The exception permits a showing of need on the grounds of avoidance of a possible injustice in another judicial proceeding, the need is greater than the need for continued secrecy, and the request is narrowly tailored. Id. at 632.

14. Citizens will be hampered in the preparation of its case without these documents as BellSouth is the sole source for the information; no other means are available to obtain this information. Second, there is little need to protect the grand jury secrecy at this time as the grand jurors have been released from their duties and the investigation has led to a published

report. Final Report of the Tenth Statewide Grand Jury, Case No. 78,035 (Sept. 1992) [hereinafter Final Report]. The settlement reached between the company and the Statewide Prosecutor holds the grand jury investigation open for a three-year review period. Id. Settlement Agreement at 13, ¶ 15. The settlement does release the company from any and all civil actions that the Statewide Prosecutor may have brought or could be brought in the future. Id. at 11-12, ¶ 12. The agreement further releases the company from any further criminal actions as long as it does not breach the agreement. Id. at 12, ¶ 13. However, it does not release individuals from the possibility of criminal actions. Id. Most importantly, the Tenth Statewide Grand Jury has charged the Commission with the responsibility of investigating the company's "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." Final Report at 2, ¶ II. The Citizens and the Commission have need of these documents to carry out the grand jury's charge. Finally, there is no evidence that the release of these documents would discourage the testimony of prospective witnesses in this or any other case. In re Matter of Petitions for Disclosure of Documents Subpoenaed by the Grand Jury from Gary Sack, 617 F. Supp. at 632. Hence, even for any documents subpoenaed by the grand jury, if any, Citizens' need outweighs any putative benefits from continued non-disclosure. The Commission should

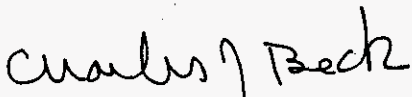
require BellSouth to produce all the documents withheld from Citizens' thirty-first requests 10, 11, and 12.

15. Citizens need these reports to prepare our case, to corroborate and/or impeach the testimony of the company's witnesses. The information is not privileged. As narrowed, the request is not overburdensome or unreasonable. BellSouth's deliberate delay and unresponsiveness have seriously infringed Citizens' due process rights and impeded a fair and impartial hearing in these cases.

WHEREFORE, the Citizens request the Commission to conduct an in camera review of any documents withheld, compel BellSouth immediately to produce these documents and the reports requested, and grant Public Counsel an extension of its testimony filing date of thirty days after receipt of the requested information.

Respectfully submitted,

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Attorneys for the Citizens
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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 29th day of January, 1993.

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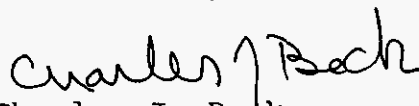
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December 9, 1992

Mr. Sidney J. White, Jr.
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Telegraph Company
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Re: Docket 910163-TL Discovery Request

Dear Sid:

I have received the DLETHs that you sent in response to my letter of November 13, 1992. This was a small sample that I requested to verify whether the DLETHs that corresponded to a large rebate shown on the company's 9156 manual rebate records for January 1992, which was based on historical information, would provide further factual information as to the miscoding of customer records or was due to technical problems with the phase out of CORDNET and transfer of MOOSA traffic to CRIS as indicated by Mr. Hall in his response to Citizens' 29th Interrogatory, Item no. 2. Mr. Hall indicated that some troubles that should have been rebated were not due to the technical problem.

The DLETHs produced are all closed to a 900 (Found-OK-out) disposition code, which was a non-rebatable code in 1990, as indicated by the company in its response to Citizens' Ninth Interrogatory, Item no. 4. Hence these reports appear to reflect a change in company policy of rebating found-ok troubles, and/or evidence that these troubles had been miscoded at the time they were closed and not corrected until January 1992.

In my letter to you, I indicated that my purpose in viewing the DLETHs was to better understand the rebating process and to provide me a basis on which to decide whether to search through the remaining 18 boxes of 9156 forms and request the further corresponding DLETHs. I did not agree that the sample produced would be in lieu of all the DLETHs or only those comprising historical rebates dated January 1992. Based upon the sample produced, I feel that the DLETHs provide factual evidence of the

company's finding problems with the coding of customer trouble reports.

I have contacted Phil Carver regarding my sorting through the remaining 18 boxes for the other historical rebates. Once that is accomplished and the total number of DLETH records involved is determined, we can then discuss whether you will voluntarily furnish the rest of the historical DLETHs.

As to your response to Citizens' thirty-first production of documents request and interrogatories, you stated that the company would be willing to produce "reasonable documentation" for several of the items sought. If the company would produce a statistically significant, randomly selected, valid sample for each IMC, Citizens would consider this request met. As to specific responses, I can accept the following:

Production of Documents and Interrogatories

POD Nos. 2 & 3 requested the DLETHs and rebate records for internal reviews produced in item 1. Public Counsel would accept those DLETH and rebate records for those reports found inaccurate by the company's reviewer.

Nos. 4, 5 and 6, and Interrogatory 6 requested a report that showed clearing to closing times greater than 12 hours with accompanying DLETH and rebate records. Public Counsel would accept these reports for 1990 with customer telephone records provided in sequential order by NPA, NNX and number. If the company contends that this is still overburdensome, Public Counsel would accept a total of the universe and a statistically significant, randomly selected, valid sample for each IMC.

Nos. 7, 8 and 9, and Interrogatory 8 requested a report of the CON code with accompanying DLETH and rebate records. Public Counsel would accept these reports for 1990 with customer telephone records provided in sequential order by NPA, NNX and number. If the company contends that this is still overburdensome, Public Counsel would accept a total of the universe and a statistically significant, randomly selected, valid sample for each IMC.

Nos. 13 and 14, and Interrogatories no. 4 and 9 requested a report of TOK dispositions of customer OOS reports closed within 5 minutes of receipt with accompanying DLETHs records. Public Counsel would accept total of the universe and these reports for 1990 with customer telephone records provided in sequential order by NPA, NNX and number. If the company contends that this is still overburdensome,

Public Counsel would accept a total of the universe and a statistically significant, randomly selected, valid sample for each IMC.

Nos. 15 and 16, and Interrogatories 5 and 6 requested an OOS over 24 hours excluded report with accompanying DLETHs and rebate records. Public Counsel would accept these reports for 1990 with customer telephone records provided in sequential order by NPA, NNX and number. If the company contends that this is still overburdensome, Public Counsel would accept a total of the universe and a statistically significant, randomly selected, valid sample for each IMC.

Nos. 17 and 18, and Interrogatories 2 and 10 requested a clearing/closing time report for OOS troubles showing a 12 hour lag time between clearing and closing with accompanying DLETHs and rebate records. Public Counsel would accept this reports for 1990 with customer telephone records provided in sequential order by NPA, NNX and number. If the company contends that this is still overburdensome, Public Counsel would accept a total of the universe and a statistically significant, randomly selected, valid sample for each IMC.

Nos. 19 and 20, and Interrogatories 3 and 11 requested an OOS over 20 hours CON report with accompanying DLETHs and rebate records. Public Counsel would accept a total of the universe and this report for 1990 with customer telephone records provided in sequential order by NPA, NNX and number. If the company contends that this is still overburdensome, Public Counsel would accept a total of the universe and a statistically significant, randomly selected, valid sample for each IMC.

Finally, with respect to your response to our request to produce documents that had been produced for the Attorney General, Public Counsel will accept those documents produced to the Attorney General under a general request, which would have applied to its civil case. This would not invoke the grand jury secrecy exception. It's debatable whether any of the documents produced to the Attorney General are included as they are in your

possession as the defendant. See In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299, 305 (S.D.N.Y. 1982). Those documents

specifically requested for the grand jury by the Attorney General or Statewide Prosecutor should be listed according to the indexing instructions so that we may file a motion to compel.

Yours truly,



Janis Sue Richardson
Associate Public Counsel