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February 5, 1993

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

Re: Docket Nos. 910163-TL; 920260-TL, 900960-TL and 910727-TL

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Motion for Review of Order Granting Public Counsel's Motion for In Camera Inspection of Documents and Motions to Compel, which we ask that you file in the captioned dockets.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely yours,

J. Phillip Carver (DJ)

J. Phillip Carver

Enclosures

cc: All Parties of Record
A. M. Lombardo
Harris R. Anthony
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 920260-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 5 day of February, 1993 to:

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CERTIFICATE OF SERVICE
Docket No. 910163-WS

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by United States Mail this 5 day of February, 1993, to:

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J. Phillip Carver

CERTIFICATE OF SERVICE
Docket No. 900960-WU

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 5th day of February, 1993, to:

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J. Philip Carver

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens of the State of Florida to initiate investigation into integrity of Southern Bell Telephone and Telegraph Company's repair service activities and reports.	)	Docket No. 910163-TL
In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone & Telegraph Company	)	Docket No. 920260-TL
In re: Investigation into Southern Bell Telephone and Telegraph Company's Non-Contact Sales Practices	)	Docket No. 900960-TL
In re: Investigation into Southern Bell Telephone and Telegraph Company's Compliance with Rule 25-4.110(2) (Rebates)	)	Docket No. 910727-TL

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S MOTION FOR REVIEW OF THE ORDER GRANTING PUBLIC COUNSEL'S MOTION FOR IN CAMERA INSPECTION OF DOCUMENTS AND MOTIONS TO COMPEL

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.038(2), Florida Administrative Code, and hereby files its Motion for Review of Order Granting Public Counsel's Motion for In Camera Inspection of Documents and Motions to Compel and states as grounds in support thereof the following:

1. On January 28, 1993, the Prehearing Officer entered Order No. PSC-93-0151-CFO-TL in response to a number of motions to compel filed by Public Counsel. Substantively, the Order addressed Southern Bell's assertion of both the attorney-client privilege and the work product doctrine as bases to object to the production of certain documents developed either by Southern Bell's attorneys or by their agents at the request of the attorneys as part of an internal investigation that Southern Bell attorneys conducted in order to render legal opinions to the Company on matters at issue in Docket Nos. 910163-TL and 910727-TL. The Order was specifically directed to two categories of documents: (1) internal audits that were prepared by Southern Bell's auditors at the request of Company attorneys and provided to these attorneys as the basis upon which to render to the Company their legal opinions; and (2) the recommendations of a panel of managers regarding prospective employee discipline, which recommendations contained the substance of certain communications to Southern Bell's attorneys in the form of both statements of Southern Bell employees and the attorneys' summaries of those employee statements.

2. The Prehearing Officer granted Public Counsel's Motion to Compel production of these two categories of documents and, in so doing, overruled Southern Bell's objection to production on

the basis of both the attorney-client privilege and the work product doctrine. Southern Bell respectfully submits, on the basis of the pertinent facts and the controlling law cited herein, that the Order includes numerous mistakes of both law and fact such that the full Florida Public Service Commission ("Commission") should review and reverse this decision.

INTERNAL AUDITS

3. In her Order, the Prehearing Officer concludes that the internal audits of Southern Bell are not protected by either the attorney-client privilege or the work product doctrine. This is based on an analysis that is premised upon three factual predicates: (1) Southern Bell has a duty to comply with applicable regulations of this Commission; (2) that in order to do so, Southern Bell must monitor its business operations; and (3) internal audits generally are a useful tool in the accomplishment of this monitoring process. Based on these three uncontroversial assertions, the Order leaps to the conclusion that, because audits can serve a business purpose, no internal audit can ever be privileged, even though a particular audit (like those in question here) is created under circumstances in which the attorney-client privilege and work product doctrine would otherwise certainly apply.

4. While Southern Bell does not take issue with the three premises set forth in the Order, the ultimate holding that internal audits prepared by a regulated entity can never be privileged simply does not follow logically from those premises. This conclusion is also unsupported by either the case law cited in the Order or by the legal authority that does, in fact, govern the attorney-client privilege and the work product doctrine as properly applied to our situation.

5. In reaching the conclusion that an internal audit performed by a regulated entity can never be privileged, the Order relies heavily upon Consolidated Gas Supply Corporation, 17 F.E.R.C., Par. 63,048 (December 2, 1981). Before discussing Consolidated, however, the Order first accurately states that Southern Bell's claim of the privileges is based squarely upon the analysis and holding of the United States Supreme Court in Upjohn Co. v. United States 449 U.S. 383, 101 S.Ct. 677, 66 L Ed 2nd 584 (January 13, 1981). The Order does not reject Southern Bell's contention that, if Upjohn applies to our situation, then Southern Bell is entitled to have its assertion of the privileges sustained. Instead, the Order avoids Upjohn by stating that Consolidated "is more closely on point." Order at p. 5. The Order further states that in Consolidated the Judge applied a "narrow view of the privilege more appropriate to an

administrative proceeding involving a regulated company." Id. The problem with this observation is that the "narrow view" applied in Consolidated provides no basis whatsoever for rejecting Southern Bell's claim of privilege. Instead, a review of the holding in Consolidated reveals that, under its analysis, the privilege must be sustained in our case under either the "narrow" or "broad" view discussed in that case.

6. In Consolidated, the Judge referred to a situation in which, "[w]hile certain advisory communications from the attorney to the client were not in direct response to a client request, it is evident that an ongoing attorney-client relationship existed." Consolidated at p. 3. Thus, the issue was whether the advice of the attorney in this context gave rise to a supportable claim of privilege as to that communication. The Judge first stated the "broad view" that "once the attorney-client privilege is established, virtually all communications from an attorney to a client, even if unsolicited, are subject to the privilege." Id. quoting, Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D. Ill 1980). The Judge then stated what he referred to as the narrow view, which suggests "that even legal opinions rendered by an attorney are not privileged per se, but rather are protected only to the extent that they are based upon, and thus reveal, confidential information furnished by the client." Id.

(Emphasis Added) Given the choice of these two views, the Judge chose the narrower. Therefore, Consolidated provides no support for the conclusion that an internal audit of a regulated entity can never be privileged.

7. In our case, the internal audits are privileged under both the narrow and broad views considered in Consolidated. These audits do not memorialize unsolicited or nonspecific legal advice from attorneys. Instead, the audits contain the very confidential communications that were provided to Southern Bell's attorneys for the express purpose of allowing them to render legal opinions, i.e., the audits are the "confidential information furnished by the client." Sealy. Thus, under the Consolidated analysis, Southern Bell's assertion of the privileges should be sustained.

8. Likewise, the Order cites to a number of cases in ways that either reflect a mistake as to the legal principle embodied in those cases or, alternatively, make it clear that the legal principle for which each case stands is simply inapplicable to our situation. For example, In re: Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2nd Circuit 1984) is cited for the proposition that, because the internal audits in question created factual data rather than legal theories per se, the audits are not privileged. Specifically, the language quoted from In re:

Grand Jury is that "the attorney-client privilege protects communications rather than information."

9. Thus, the Order apparently misconstrues Grand Jury to stand for the proposition that facts provided to an attorney are simply "information" rather than "communications" and, accordingly, not privileged. In point of fact, Grand Jury not only does not support the conclusion for which it was cited, its holding, read in context, strongly supports Southern Bell's assertion of the privilege. In Grand Jury, the documents for which the privilege was asserted were transactional documents relating to a possible corporate reorganization. These documents were transmitted to attorneys for the company to allow them to give tax advice as to certain aspects of the reorganization. The documents contained no legal theories. The Court, nevertheless, held that the privilege applied because the "documents reflect[ed]...requests for advice...relating to three transactions, and to each our review convinces us that the advice sought was legal rather than commercial in character." Id. at p. 1037.

10. The Court went on to consider the argument that the Company's intent subsequently to disclose the information to certain employees for business purposes abrogated the otherwise applicable privileges. The Court rejected this contention and

stated the ruling that includes the language quoted in the Order now under review:

> The possibility that some of the information contained in these documents may ultimately be given to...[company]...employees does not vitiate the privilege. First, it 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. [citations omitted] Thus, the fact that certain information in the documents might ultimately be disclosed to...[company]...employees did not mean that the communications to...[the Company's attorney]...were foreclosed from protection by the privilege as a matter of law. Nor did the fact that certain information might later be disclosed to others create the factual inference that the communications were not intended to be confidential at the time they were made.

Id at 1037. Thus, In re: Grand Jury does not stand for the proposition that "information" communicated between attorney and client (as opposed to a legal opinion) is not a privileged communication. Instead, In re: Grand Jury holds that when a client communicates information to an attorney upon which a legal opinion is based, that *communication* is privileged, even when the underlying information is later utilized within the corporation for some other purpose.[1]

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[1] As will be discussed later, this legal proposition also provides strong support for Southern Bell's assertion of the privileges as to the panel recommendations.

11. The Order also cites to Hardy v. New York Times, Inc., 114 F.R.D. 633, 643 S.D.N.Y. (1987) for the proposition that when a "corporate decision is based on both a business policy and a legal evaluation, the business portion of the decision is not protected...." Order at pp. 6-7. Hardy, however, dealt with a situation in which there was "nothing to indicate that...[the attorney]...requested or received any of the documents at issue, or the information contained in them, in the capacity of a legal advisor and solely for the purpose of rendering legal advice to the corporation." Id. at p. 644. By contrast, there is no question but that the internal audits at issue here were provided to Southern Bell's attorneys for the express, specific intention that they would be used to render a legal opinion. Thus, while the legal proposition in Hardy is correctly noted, it is simply inapplicable to our facts.

12. Thus, none of the cases cited in the Order stands for the notion that audits performed by a regulated entity can never be privileged. Instead, it is obvious that the Order simply constructs, without the benefit of case support, the fiction that when an audit by Southern Bell is created with the intent to provide information to the Company's attorneys to assist them in the rendering of legal advice, it is, nevertheless, not privileged because of the requirements of the regulatory process.

Again, there is absolutely no case support of which Southern Bell is aware for this proposition. Further, the general rules on the creation of the privilege clearly contradict this result. In Cuno, Inc. v. Pall Corporation, 121 F.R.D. 198 (E.D.N.Y. 1988), the Court set forth the widely accepted test for determining when communications of information from a client to an attorney are privileged. Specifically:

> In order for the privilege to apply (1) the communications should have been made for the purpose of securing legal advice; (2) the employee making the communication should have done so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication should have been within the scope of the employee's duties; and (5) the communication should not have been disseminated beyond those persons who need to know the information.

Id. at 203.

13. A review of the affidavits submitted by Southern Bell and accurately paraphrased in the Order, makes it clear that the audits were performed by internal auditors who were requested to do so by Southern Bell's attorneys in order to allow them to render a legal opinion. Further, the subject matter of the communications (the audits) was clearly within their duties, and the information was not disseminated to anyone who did not have a need to know.

14. A compatible, somewhat abbreviated test was applied by the United States District Court in First Chicago International v. United Exchange Co. Ltd., 125 F.R.D. 55 (S.D.N.Y. 1989). The Court there held that a communication between a corporate employee and corporate counsel will only be subject to the privilege if "the communication would not have been made but for the pursuit of legal services." Id. at p. 57.

15. The Order under review correctly characterizes the affidavits filed by Southern Bell as stating that the audits "would not otherwise have been performed" but for the need for this information by Southern Bell attorneys and the specific "request by Southern Bell's legal department" that the information be communicated to them to aid in the rendering of legal opinions. Order at p. 5. Thus, the audits also meet the test enunciated in First Chicago International, supra.

16. Finally, the applicable case law makes it clear that the privilege applies whenever information is conveyed to the lawyer to obtain advice, even when the substance of the information is routine business matters. In United States v. Mosconv, 927 F.2d 742 (3rd Circuit 1991), the federal appellate court considered a situation in which the information for which protection was sought admittedly contained only a recitation of certain "office procedures." The court sustained the assertion

of the privilege based, in part, upon the specific finding that the documents were provided to legal counsel because the clients "intended to facilitate...[the] rendition of legal services to them." Id at 752. For this reason, they were held to be privileged.

17. Likewise, in the previously cited In re: Grand Jury, supra, business documents relating to a pending transaction were deemed privileged because they were provided to counsel to obtain an opinion.

18. The above-cited authority makes it clear that the instant circumstances provide each of the elements necessary to create an attorney-client privilege. It is equally clear that the communications embodied in these audits would not have occurred but for the need for a legal opinion to be rendered by attorneys for Southern Bell. Therefore, there can be no denial that the attorney-client privilege applies to the facts in the matter sub judice.

19. For this reason, the analysis as to these documents should end, and this Commission should sustain Southern Bell's assertion of the attorney-client privilege. Put differently, since the privilege applies and is absolute, any argument by Public Counsel that it is in need of these documents or that the

information cannot be otherwise obtained is simply beside the point. The privilege remains absolute and it must be sustained.

20. In Staton v. Allied Chain Link Fence Co., 418 So.2d 404 (Fla 2nd DCA 1982), the Second District Court of Appeal of Florida reviewed a case in which an insured had communicated certain information to his insurer with the intention that it would be subsequently relayed to the attorney defending the insured for the purpose of aiding him in the development of the insured's defense. The party seeking production argued that these statements were not protected by the attorney-client privilege, but only by the work product doctrine. The Court specifically rejected this argument and proclaimed that "[u]nder the law of Florida, such communications between an insured and its insurer made for the information and benefit of the attorney defending the insured fall within the attorney-client privilege, and are not subject to discovery." Id at 405-406.

21. The plaintiff in that case further argued that the production should be allowed because there was a basis to believe that the defendant insured had made a statement to his insurer contrary to his testimony under oath. The plaintiff thus claimed that this information should be disclosed for use as impeachment. The court first noted its concern that there might be an inconsistency in the defendant's statements, but then confirmed

that the protection of the attorney-client privilege is absolute. The prior conversation was, therefore, deemed to be undiscoverable. Accordingly, the Court found that the trial court's Order, which required disclosure of this communication, represented "a departure from the essential requirements of law" (Id). and the Order of the trial court was quashed.

22. The Prehearing Officer's Order rejects Southern Bell's assertion of the work product doctrine on the same basis as it rejected Southern Bell's assertion of the attorney-client privilege. In other words, both results are based on the notion that all of Southern Bell's audits are simply routine business documents. That analysis fails in regard to the work product doctrine for the same reasons that it fails in regard to the attorney-client privilege. That being the case, it is clear on the authority of Upjohn, et. al, that, because Southern Bell's attorneys requested internal auditors working on their behalf to develop audits that the attorneys would use to render a legal opinion, the resulting audits constitute attorney work product.

23. Further, the case relied upon in the Order in support of the contrary conclusion, Spoder v.General Dynamics Corp., 90 F.R.D. 253 (U.S.D.C. Nov. 1980), is factually distinguishable on its face. The Order cites to Spoder to show that an in-house report that is both prepared in anticipation of litigation, but

also "motivated by the Company's goals of improving its products, protecting future passengers and promoting its economic interests" is not necessarily protected by the work product doctrine. Order at p. 7. Soeder, however, is inapplicable for two reasons.

24. First, as has been set forth by Southern Bell in its previous responses to Public Counsel's Motions to Compel, the reports at issue in Soeder were routinely prepared in every instance in which an incident incurred. The Prehearing Officer's Order concludes that this circumstance is indistinguishable from our situation because Southern Bell has an ongoing duty to comply with Commission rules. According to the Order, "[w]hatever audits need to be done to trouble shoot its operations are part of that business routine, even though they may have additional functions such as the aiding in the giving of legal advice." Order at p. 8. The difficulty with this analysis lies in the uncontroverted fact that the particular audits in question were not done for the purpose of trouble shooting Southern Bell's operations. Instead, they were unscheduled audits requested by Southern Bell's legal department and they would not have been performed but for that request. These audits were not, as in Soeder, routinely performed reports that simply had the ancillary purpose of providing the basis for a legal opinion.

25. Second, Soadar is inapplicable for a reason that is manifest in the above-quoted language of the Order. The Soadar decision was based in large part on the fact that the company's "motivation" in generating the report was, at least in part, to further business interests rather than to obtain legal opinions. In other words, the issue was resolved by looking to the company's subjective motivation for preparing the report. It is clear in our case that Southern Bell was motivated to have audits prepared in order to aid Southern Bell's lawyers in the rendering of legal opinions. The Order, nevertheless, ignores this fact and indulges in the fiction that the audit was performed for a routine business purpose.

26. After concluding that the work product doctrine does not apply, the Order states that even if that doctrine did apply, "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." Order at p. 8. As stated previously, the audits in question are protected by the attorney-client privilege and, therefore, disclosure cannot be forced even if there were an adequate showing of hardship. In addition, the attorney work product doctrine also protects these audits. Even if this doctrine provided the sole source of protection, however, there

would still be no basis to force disclosure of this information because Public Counsel has failed to make a factual showing adequate to support disclosure of the protected material. To the extent that the above-quoted portion of the Order accepted the deficient factual assertions of Public Counsel on this point, it embodies either a mistake as to the facts of our situation or a mistake in the application of the pertinent law.

27. As Southern Bell has stated in its various responses to Public Counsel's Motions to Compel, the work product doctrine "was developed in order to discourage counsel from one side from taking advantage of trial preparation undertaken by opposing counsel, and thus both to protect the morale of the profession and to encourage both sides to a dispute to conduct thorough, independent investigations, in preparation for trial." U.S. v. 22.80 Acres of Land, 107 F.R.D. 20, 24 (U.S.D.C. Cal. 1985)

28. A similar statement of the purpose of the doctrine was provided by the Florida Supreme Court in Dodson v. Purcell, 390 So.2d 704 (Fla 1980). In that case, the Court considered the issue of whether the portion of surveillance materials that were not intended to be used at trial was discoverable. The Court held that these materials were work product and that they were not discoverable. In so doing, the Court first noted that attorney work product that is "not intended to be submitted as

evidence...[is] ...subject to discovery if [it is] unique and otherwise unavailable, and materially relevant to the cause's issues." Id. at p. 707. At the same time, the Court observed that "[c]learly, one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures." Id. at p. 708.

29. Further, Rule 1.280(b)(3), Florida Rules of Civil, provides that trial preparation materials (i.e., attorney work product) is discoverable only upon a showing that the requesting party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Accord, Mount Sinai Medical Center v. Schulte, 546 So.2d 37 (Fla 3rd DCA 1989); Humana of Florida Inc. v. Evans, 519 So.2d 1022 (Fla 5th DCA 1987). Further, Florida law is very clear on the point that hardship cannot be established simply because a party must incur the ordinary costs of discovery. See, Publix Supermarkets Inc. v. Kostrubanic, 421 So.2d 52 (Fla 1st DCA 1982).

30. Public Counsel's primary arguments that it should be allowed to invade the otherwise applicable work product privilege amount to nothing more than the contention that the ordinary process of preparing its case would involve so much labor as to

constitute a hardship. The fact remains, however, that Public Counsel has requested and received discovery of hundreds of thousands of pages of documents and, assuming that their discovery requests have been focused on the pertinent issues, they should now have at their disposal the underlying facts and data necessary to perform their own analyses. The Prehearing Officer is apparently cognizant of this, because the Order does not in any way premise its finding of hardship on Public Counsel's contention that to perform its own analysis would be burdensome. Instead, the Order disallows the assertion of the work product doctrine based on what appears to be a finding that the complexity of Southern Bell's computer system is such that Public Counsel cannot replicate the audit in question.

31. First, it is important to note that there is no requirement that the documents must be produced even if Public Counsel cannot replicate the audits in dispute. As stated in Rule 1.280, there is no hardship if Public Counsel is able to obtain substantially equivalent material, i.e., some audit or analysis that would suffice for the purpose of digesting and analyzing the material at issue. Public Counsel has provided nothing to demonstrate that this cannot be done, and has apparently not even attempted to determine if such an equivalent analysis could be provided.

32. Second, Public Counsel has offered virtually no information as to whether the "complexity" of Southern Bell's system is an impediment to Public Counsel's obtaining a substantially equivalent analysis. Specifically, it has submitted only the Affidavit of Walter W. Baer (dated December 16, 1992), which states first of all that to "the best of [his] knowledge," Southern Bell's customer's trouble reports are analysed using the Loop Maintenance Operation System. (Affidavit, at par. 1) Mr. Baer then goes on to state that the volume and complexity of the data require the use of "some" computer system to assist in performing any analysis. (par. 3) He then states in conclusory fashion that for Public Counsel to perform an equivalent audit would be "impossible" because of "the complexity of the audits, the enormous amount of data, and the unique computer system required to process it."[2] Id. at par. 4. Thus, the Order's finding that Public Counsel cannot create an equivalent audit appears to be based on nothing more than an unsupported conclusory allegation contained in a single affidavit. Clearly, Public Counsel has failed to sustain its

[2] To the contrary, as Southern Bell's Response No. 50 I.(bb) to the Staff's Sixth Set of Interrogatories demonstrates, the analysis can be performed on any mainframe type of computer.

burden of demonstrating hardship. To the extent that the Order holds otherwise, this holding cannot be sustained.

PANEL RECOMMENDATION

33. Both the analyses as to attorney-client privilege and the work product doctrine that Southern Bell has offered in support of its objections to producing the internal audits apply equally to the panel recommendations of discipline. Although these documents were created under slightly different factual circumstances, the law is clear that the privileges apply to them as well.

34. The panel recommendations are comprised of specific information that has been extracted by Southern Bell personnel from materials prepared by Southern Bell's attorneys during the course of the investigation. The underlying materials are the statements made by employees interviewed as part of Southern Bell's investigation. They are, therefore, clearly privileged communications from the client that were made for the purpose of obtaining a legal opinion. See Upjohn, supra. The materials extracted in drafting the panel recommendations are also derived from summaries of the interviews that were made by Southern Bell's attorneys who were involved in the investigation. Thus, these materials also contain the substance of the confidential

communications from the company to Southern Bell's attorneys as well as the attorney's impressions of that material. They are, therefore, protected by the attorney-client privilege. Both categories of documents are also encompassed within the work product doctrine because they are clearly a part of the investigative materials that were prepared either by the attorneys or by agents working on their behalf. Accordingly, they are protected by the privileges on the basis of the previously cited cases, i.e., Cuno, First Chicago, et. al, supra.

35. The Order applies the same improper analysis to these documents as to the audits and reaches the erroneous conclusion that the investigation is a normal business function because of the existence of "regulatory requirements and the resulting business necessity [for Southern Bell] to oversee its employees' conduct." Order at p. 9. This rationale for ordering disclosure, even if it were legally supportable generally, is even less plausible when applied to employee statements and summaries.

36. As discussed above, the stated basis of the Prehearing Officer for holding that the internal audits are not privileged was the fact that some audits (although not the ones in dispute) are routinely done on an ongoing basis and that audits can serve a useful business function. The Order contains no indication,

however, as to how this erroneous analysis might conceivably apply to the above-described investigative materials. Obviously, interviews of employees conducted by Southern Bell's legal department in response to allegations of wrong doing cannot, by any stretch of the imagination, be categorized as occurring in the routine conduct of business.

37. The Order, of course, purports to reach this conclusion on the basis of the "regulatory requirements" that pertain to Southern Bell. If, however, these requirements can properly be held to support the notion that an internal investigation conducted by the Company's legal department occurs as a routine part of business and, thus, produces no privileged communication, then in the regulatory context, the attorney-client privilege and work product doctrine are not only limited in application, they simply do not exist. Moreover, the Order appears not to have considered the chilling effect of such a ruling. If a regulated utility's attorneys cannot conduct a privileged investigation, then the utility may be far more hesitant to have such an investigation undertaken. This would result in a lessened ability to find improper acts and to correct them. Fortunately, there is no legal authority to support this even more extreme

version in the Order of the effect of the regulatory process on the availability of the privileges.[3]

38. Finally, in its rejection of Southern Bell's claims of privilege as to the panel recommendations, the Order appears to rely heavily on the fact that this extraction of confidential material was used by Southern Bell managers who were considering possible discipline for both management and craft employees. The Prehearing Officer thus concluded that their "need to know" related more to the "business matter of possible employee discipline" than to the need for legal advice. Order at p. 9. On this basis, the Order concludes that the privilege is not available.

39. As stated by the Court in Grand Jury, supra, however, communications to an attorney for the purpose of seeking a legal

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[3] The Order does not reach the issue of whether --- assuming the attorney client privilege does not apply, but the work product doctrine does --- Public Counsel has demonstrated any basis for a finding that undue hardship would compel production. Southern Bell submits that if the Commission reaches this issue, it must find that no showing of hardship can justify an intrusion into work product materials. The process of interviewing witnesses and summarizing witness statements necessarily entails and reveals the mental impressions of Southern Bell's attorneys. Thus, the documents yielded by this process constitute opinion (as opposed to fact) work product and, therefore, are "accorded an almost absolute protection from discovery." Sporck v. Peil, 759 F.2d 312, 316 (3rd Cir. 1985); Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1976). See also, U.S. v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695 (S.D. Fla 1990)

opinion remain privileged, even though that same information may subsequently be utilized for a business purpose. A similar result was reached, after an even more instructive analysis by the court, in James Julian Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982). In that case, the court first notes that the "need to know" analysis is pertinent to the question of whether the attorney-client privilege has been negated by a failure to treat the communication confidentially. The court then considered whether the defendant/corporation's internal business use of privileged documents was tantamount to a failure to maintain confidentiality.

40. Specifically, the corporation had stamped certain legal memoranda "private," but then indexed and filed the memoranda according to the general corporate filing system. Therefore, a number of individuals working on a particular project could have access to the documents. The party seeking production argued that by doing this, the defendants had "in effect, published the documents waiving any privilege to which they might previously have been entitled." Id. at p. 142. The defendants argued that the project files that contained the privileged memoranda,

> ...were open only to corporate employees and that distribution within the corporation does not constitute a waiver. They further assert that the placement of such documents in the project file where they can be reviewed by project personnel who need to know their

> content is essential to the corporation's efficient operation. It would be impossible, or at least difficult, they argue, to conduct day-to-day business if they were forced to pull essential project documents out of their logical file sequence to place them in special, locked, confidential files.

Id.

41. Thus, the defendants in James argued expressly for a "need to know" standard that was based upon their need to disseminate the privileged information on a limited basis within the corporation for an ongoing business purpose. The Court specifically sustained the position of the defendants and held that these documents did not lose their privileged status by virtue of their subsequent availability for business use. In so doing, the Court stated that "[t]he documents in question were not broadly circulated or used as training materials; they were simply indexed and placed in the appropriate file where they would be available to those corporate employees who needed them." Id. (emphasis added)

42. Therefore, the "need to know" standard cannot be applied in some mechanical fashion as a basis for eradicating an otherwise existing attorney-client privilege. Instead, it must be applied in a logical way that goes to the ultimate question of whether the party asserting the privilege has maintained the materials in question in such a way as to keep them confidential.

As set forth in James, the limited dissemination of privileged information to corporate employees having a "need to know" for business purposes is entirely consistent with the confidentiality that must be maintained to preserve the privilege. Thus, the ad hoc rule created by the Prehearing Officer, that the attorney-client and work product privileges are destroyed by the disclosure of privileged material to corporate employees with a need to know for a business purpose, is plainly contradicted by the applicable law.

43. In summary, the legal proposition at the heart of the "need to know" standard is that the privilege is preserved so long as the privileged material is not disclosed in such a manner as to destroy the confidentiality of the privileged communication. It is uncontroverted that the investigatory materials at issue were disseminated to only a few Southern Bell managers who had a need for this information. The fact that their need arose from a business rather than purely legal purpose does nothing to destroy the confidentiality of the documents or eradicate the otherwise applicable privileges.

44. In its listing of documents reviewed by the Prehearing Officer, the Order contains a fundamental mistake of fact. Among the documents identified as having been reviewed and ruled upon, the Order lists a "statistical analysis." Order, no. 5 at p. 3.

This is presumably the statistical analysis that was performed by Danny L. King and was the subject of his Affidavit, which was filed in this case to set forth the circumstances surrounding the creation of the analysis. At the time that this Order was entered, this analysis had been neither requested by the Prehearing Officer nor provided for her review. At the same time, there was submitted for review pursuant to the express instruction of the Prehearing Officer, an additional audit, the Network Operational Review. The Order makes no reference to a ruling on the assertion of the privileges as to this audit. Thus, the Order contains a factual mistake in that it purports to rule upon materials that were not before it while providing no ruling on other materials that were provided at the Prehearing Officer's direction. This, of course, constitutes a mistake of fact that is sufficient to mandate that this Commission reverse the Order as to this point.

CONCLUSION

45. This Commission should reverse the holding of the Order under review because it is based upon essential mistakes of both law and of fact. As stated above, the Order is premised upon the fundamentally flawed notion that because audits can, and sometimes do, serve a business function, their creation

necessarily occurs in the routine course of the business of a regulated entity, despite the surrounding circumstances that would otherwise render the audits in question privileged. This proposition is not supported by the case law cited in the Order and is, in fact, plainly contradicted by the case law that does control. Further, this theory cannot be applied in any logical way to the panel recommendations that were derived from privileged communications that clearly would not have occurred but for the internal investigation of Southern Bell's attorneys. Therefore, neither the audits nor the panel recommendations can be said to have been created in the normal course of business.

46. Under the rule of Upjohn, both the audits and panel recommendations are protected by the attorney-client privilege and by the work product doctrine. Even if, however, they were protected only by the work product doctrine, there has been no showing of hardship sufficient to invade the protection of this privilege and compel disclosure of the documents. Finally, there is nothing in the limited internal disclosure by Southern Bell of the investigatory materials to the drafters of the subsequent panel recommendations that would destroy the confidentially of the privileged communications, and thus there is nothing to eradicate the otherwise existing privileges.

WHEREFORE, Southern Bell respectfully requests the entry of an order by this Commission reversing the Order of the Prehearing Officer, sustaining Southern Bell's assertion of the privileges as to both categories of documents, and denying Public Counsel's Motions to Compel.

Respectfully submitted,

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