

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the)
Integrity of Southern Bell's)
Repair Service Activities and)
Reports)
_____)

Docket No. 910163-TL

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

Docket No. 920260-TL

Show Cause Proceeding Against)
Southern Bell Telephone and)
Telegraph Company for Misbilling)
Customers)
_____)

Docket No. 900960-TL

Investigation into Southern Bell)
Telephone and Telegraph)
Company's Compliance with Rule)
25-4.110(2), F.A.C.)
_____)

Docket No. 910727-TL

February 24, 1993

**CITIZENS' MOTION TO COMPEL BELLSOUTH TELECOMMUNICATIONS' ASSISTANT
VICE-PRESIDENT, CENTRAL OPERATIONS MR. DANNY L. KING, AND BELLSOUTH
TELECOMMUNICATIONS' MANAGER, INFORMATION SYSTEMS, MS. ETTA MARTIN TO
ANSWER DEPOSITION QUESTIONS AND
MOTION TO STRIKE THE AFFIDAVIT OF MR. KING**

The Citizens of Florida ("Citizens"), by and through Jack Shreve,
Public Counsel, request the Florida Public Service Commission
("Commission"): (1) to compel BellSouth Telecommunications, Inc.,
("BellSouth") d/b/a Southern Bell Telephone and Telegraph Company to
issue an order requiring BellSouth Telecommunications Assistant Vice-
President, Central Operations, Mr. Danny L. King, and BellSouth
Telecommunications' Manager, Information Systems, Ms. Etta Martin to
answer questions asked during a deposition taken on January 12, 1993

in Birmingham, Alabama; (2) to strike the affidavit of Danny King, submitted with BellSouth's motion in opposition to Citizens' motion to compel discovery of a statistical analysis performed by Mr. King; and (3) to render an expedited decision.

1. Citizens deposed BellSouth Telecommunications Assistant Vice-President, Central Operations, Mr. Danny L. King, and BellSouth Telecommunications Manager, Information Systems, Ms. Etta Martin on January 12, 1993 at corporate headquarters in Birmingham, Alabama. During the deposition, counsel for BellSouth repeatedly directed Mr. King and Ms. Martin to refuse to answer questions. The questions generally asked about the preparation and factual contents of the company's 1991 third quarter internal audits and a statistical analysis¹ performed under Mr. King's direction.

2. Attachment A is a listing of each claim of privilege raised in the deposition. A single copy of the deposition accompanies this motion as Attachment B. Since the deposition extensively discusses analysis information claimed by BellSouth to contain confidential information, only one copy of the deposition is provided the Commission's Division of Records and Reporting. The Citizens expect BellSouth to soon file a line-by-line request for confidential

¹ Citizens requested the production of the statistical analysis in our twenty-fourth production of documents request served on June 3, 1992. The company withheld it under a claim of privilege. Citizens moved to compel its production on July 23, 1992. Citizens' Seventh Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (July 23, 1992).

treatment of the deposition and exhibits, at which time we will respond to that specific request.

3. Five audits were performed in the third quarter of 1991 on various aspects of the company's repair and rebate systems: LMOS (Loop Operation Maintenance System), MOOSA (Mechanized Out of Service Adjustments), KSRI (Key Service and Revenue Indicators), PSC Schedule 11, and Operational Reviews. A concurrent, but independent statistical analysis was performed under the direction of Mr. Danny L. King. The audits and the statistical analysis are claimed by BellSouth to be privileged from discovery under both the attorney-client and work product privileges.

4. BellSouth submitted an affidavit by Mr. King in support of its motion in opposition to Citizens' motion to compel production of the statistical analysis. See supra n.1. Essentially, Mr. King's affidavit claims that the statistical analysis was performed at the direction of the company's legal department "to determine the veracity of the information obtained in the investigation and to quantify any significant deviation." Affidavit, p.2, ¶ 3. [Attachment C] When asked to explain his statement that the company's legal department requested him to perform a statistical analysis of the way trouble reports were handled by various locations throughout Florida, Mr. King either limited his response to a very general statement [T44-45] or refused to answer under a claim of privilege. [T 45-47] Mr. King also refused to identify the "database" used in his analysis [T 47-48], the "various years" analyzed for his report [T 48-49], his means of determining what constituted a "significant deviation" in his analysis

[T 49-50], the "various areas throughout Florida" from which he pulled data [T 57], and the basis that certain company employees had a "need to know" the information contained in his analysis as a reason for his distribution of the analysis to them. [T 61-62].

5. BellSouth claims that the attorney-client privilege and work product doctrine allow it to not only withhold the audits and statistical analysis in their entirety, but also to refuse to answer questions concerning the factual content and structure of these reports. As the U.S. Supreme Court has stated, the attorney-client privilege protects communications not the underlying facts. Upjohn Co. v. United States, 449 U.S. 383 (1981). The audits and statistical analysis in question reviewed factual data drawn from statistical samples of customer repair records and, as such, do not comprise confidential communications. Neither the audits nor Ms. Martin's and Mr. King's possible responses to Citizens' questions regarding the factual content and structure of these reports are protected communications.

6. The prehearing officer, Commissioner Clark, found that the audits² were not privileged from discovery and ordered the company to produce these reports to Public Counsel. On reconsideration, the full Commission upheld Commissioner Clark's prehearing order at the February 18, 1993 agenda conference. The statistical analysis is a business document containing factual information. It is not

² Order Granting Public Counsel's Motions for In Camera Inspection of Documents and Motions to Compel, Dockets Nos. 910163-TL, 920260-TL, 900960-TL, 910727-TL; Order No. PSC-93-0151-CFO-TL (Jan. 28, 1993); aff'd on reconsideration, Feb. 18, 1993 (agenda conference vote 5/0).

privileged. Public Counsel has fully briefed his arguments on this issue and incorporates those arguments by reference herein. See Citizens' Seventh Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (July 23, 1992).

7. Clearly, neither the audits nor the statistical analysis are privileged. Therefore, BellSouth has no basis for its refusal to allow Mr. King and Ms. Martin to answer the questions posed by Public Counsel. Citizens' request the Commission to compel Ms. Martin and Mr. King to answer Public Counsel's questions related to these five audits and the statistical analysis.

8. Mr. King refused to respond to questions directed to his sworn affidavit filed by the company with the Commission. Citizens have the right to full and complete answers to questions concerning affidavits filed with the Commission by the company in support of its opposition to Citizens' motion to compel discovery.

9. The attorney-client privilege and work product doctrine do not apply to affidavits, which have become matters of public record upon filing with the Commission. Hence, Mr. King's responses to Public Counsel's questions concerning statements made in his affidavit are not privileged. Mr. King's refusal to answer these questions on the instruction of counsel has impeded Public Counsel's ability to prepare its case. It also calls into question the company's assertion that Public Counsel has not shown the requisite level of need to overcome the company's claim of work product privilege for the statistical analysis. Without definite answers as to the scope of the analysis, the database forming the basis for it, and the customer

records involved, Public Counsel is unable to refute the company's arguments raised in opposition to discovery. Citizens, therefore, request the Commission to strike Mr. King's affidavit.

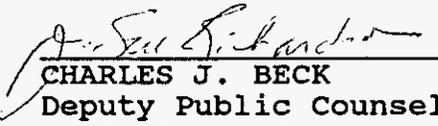
10. Upon a showing of need and an inability to reproduce the substantial equivalent without undue hardship, a party may be required to disclose the factual content of technical documents. Harris Semiconductor v. Gastaldi, 559 So. 2d 299 (Fla. 1st DCA 1990). The database and the computer system from which the statistical analysis was produced to form the factual basis for Mr. King's analysis are under the sole control of the company. BellSouth has stonewalled Citizens' assertion of need for the analysis by refusing to provide clear and complete answers to the method of statistical sampling, the database, the scope of the analysis, and the definition of significant deviations.

WHEREFORE Citizens ask this Commission to compel Ms. Martin and Mr. King to fully answer deposition questions and to strike Mr. King's

affidavit submitted with BellSouth's motion in opposition to Citizens' request for discovery of its statistical analysis.

Respectfully submitted,

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ATTACHMENT A: BELLSOUTH PRIVILEGE CLAIMS

<u>Page/Line</u>	<u>Page/Line</u>
15--22	77-7, 23
34--9 and following	100--20
45--8	125--5
46--3	128--2
47-1, 23	138--21
49-3, 22	187--13
51--18	208--19
53-4, 17	210--22
56-11, 20	211--21
57--8	212--23
60--19	223--16
61-6, 19	226--17
65-12, 16	
73--8	
74-2, 13	
76-7, 23	

ATTACHMENT B: DEPOSITION TRANSCRIPT

ATTACHMENT C: KING AFFIDAVIT

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens)	Docket No. 910163-TL
of the State of Florida to initiate)	
investigation into integrity of)	
Southern Bell Telephone and Telegraph)	
Company's repair service activities)	
and reports.)	

STATE OF ALABAMA)
)
 COUNTY OF JEFFERSON)
 _____)

AFFIDAVIT OF DANNY L. KING

BEFORE ME, the undersigned authority, personally appeared Danny L. King who stated that he is currently the Assistant Vice President, Central Office Operations Support for BellSouth Telecommunications, Inc., and further states the following:

1.

In May of 1991, he was requested to assist the Florida Legal Department in performing an internal investigation that relates to certain of the issues raised in this Docket. His role in the investigation was to assist the Legal Department in gathering and analyzing information necessary to render legal advice to the Company.

2.

Specifically, he was requested by the Legal Department to perform a statistical analysis of the manner in which trouble reports were handled at various locations throughout Florida. This process was initiated at the express request of the Legal Department and would not have been performed without the request of the Department.

3.

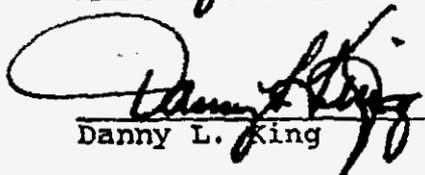
He was provided with specific information that was obtained by lawyers in the Florida Legal Department as part of the ongoing investigation. He then utilized a database that contained trouble histories for various years to analyze the information provided by the Legal Department. The purpose of the analysis was to determine the veracity of the information obtained in the investigation and to quantify any significant deviation. He continued the above-described efforts until the early part of 1992.

4.

During this time frame, he provided a number of reports to the Legal Department that set forth the results of the analysis. A very small number of copies of these reports exist. All have been marked and treated as privileged and attorney work product doctrine. The distribution of these reports was limited to appropriate members of the Legal Department and to certain member of the Management of Southern Bell who had a need to know the information contained therein.

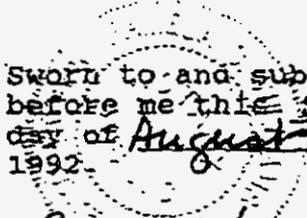
FURTHER AFFIANT SAYETH NOT.

Dated this 5th day of August, 1992.



Danny L. King

Sworn to and subscribed before me this 5th day of August, 1992.


Samela B. Williams
Notary Public

My Commission Expires:
Notary Public, Alabama State at Large
My Commission Expires February 10, 1995
Bonded by Hartford Fire Insurance Company

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 24th day of February, 1993.

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