

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

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

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., Rebates.

DOCKET NO. 910727-TL

BEFORE:

CHAIRMAN J. TERRY DEASON
COMMISSIONER THOMAS M. BEARD
COMMISSIONER SUSAN F. CLARK
COMMISSIONER LUIS J. LAUREDO
COMMISSIONER JULIA L. JOHNSON

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ITEM NUMBER:

17A**

DATE:

Tuesday, February 16, 1993

PLACE:

FPSC-RECORDS/REPORTING

106 Fletcher Building
Tallahassee, Florida

REPORTED BY:

JANE FAUROT
Notary Public in and for the
State of Florida at Large

ACCURATE STENOGRAPHY REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(904) 878-2221

DOCUMENT NUMBER-DATE

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3 pages 910163TL.TRN

PARTICIPATING:

HARRIS ANTHONY, representing Southern Bell Telephone and Telegraph Company.

JACK SHREVE, CHARLES J. BECK and JANIS SUE RICHARDSON, Public Counsel Office, representing the Citizens of the State of Florida.

MICHAEL B. TWOMEY, representing the Attorney General of the State of Florida.

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STAFF RECOMMENDATIONS

Issue 1: Recommendation that, with one exception as to a factual error involving a misidentified audit, Southern Bell's motion for review of the prehearing officer's order should be denied.

Issue 2: Recommendation that these dockets remain open.

P R O C E E D I N G S

1
2 CHAIRMAN DEASON: I believe we are going to go
3 back and pick up an item, which we temporarily passed,
4 17A.

5 COMMISSIONER LAUREDO: I can go right into a
6 question. What is it that is being asked in all these
7 motions of -- is to make this information available to
8 whom? I'm trying to -- is it a limited access? Is
9 there a question today about making all of these
10 documents public under the Sunshine for everybody to
11 see, or are we talking about the interested party
12 restricted kind of --

13 MR. BELLAK: In this particular instance, the
14 Commission's normal confidentiality process is not
15 involved at all. In fact, any recommendation that the
16 Staff is making does not address that, and we are not
17 saying that if confidentiality were sought as to some
18 or all of these documents that it would not be
19 appropriate to grant it.

20 COMMISSIONER LAUREDO: So, this is like a first
21 wall of resistance? I'm using that word selectively.

22 MR. BELLAK: It's a different wall.

23 COMMISSIONER LAUREDO: They can, subsequently, for
24 example, if this motion was upheld, they can come back
25 and say, "Well, we want confidentiality treatment."

1 MR. BELLAK: That is correct. And this is a
2 different wall, because in this particular instance,
3 even if we granted confidentiality, the Public Counsel
4 would still have access to those documents under the
5 appropriate statute, even if the larger public would
6 not.

7 COMMISSIONER BEARD: All the parties would have
8 access to the documents under the appropriate
9 constraints.

10 MR. BELLAK: (Indicating yes.)

11 COMMISSIONER LAUREDO: All of the parties to the
12 docket?

13 COMMISSIONER BEARD: That's correct.

14 COMMISSIONER LAUREDO: Not somebody from the
15 public could come in and see them?

16 COMMISSIONER BEARD: If the AARP is a party to the
17 docket, the AARP has access to the documents.

18 MR. BELLAK: That is an issue I haven't --

19 COMMISSIONER BEARD: How do you participate in a
20 docket, and documents that two parties have but you
21 can't look at them? They sign the appropriate
22 protective agreements, they have access to the
23 documents. The Attorney General has access to the
24 documents.

25 MR. BELLAK: The only issue I considered was the

1 statute involving the Public Counsel, but --

2 COMMISSIONER LAUREDO: But what I'm saying, for
3 example, is a competitor or a member of the public
4 without any direct interest, or as being a party would
5 have access to this?

6 MR. BELLAK: Well, if they subsequently asked for
7 confidential treatment of all of these documents, then,
8 no; but that hasn't occurred yet.

9 COMMISSIONER BEARD: Commissioner, let me see if I
10 can help. If you uphold this motion, at a minimum the
11 parties to this docket, the participants in this
12 docket, would have access to it. At a minimum, under
13 the treatment of confidentiality -- they would probably
14 -- they would have to sign whatever protective
15 agreements to ensure -- any party, AT&T, okay, unless
16 they have changed the rules, would have access to it,
17 AARP, Cable, Attorney General, Public Counsel, whoever.
18 In addition to that, if they didn't get -- if they
19 sought confidentiality and it was not granted, then
20 every man, woman and child in the United States would
21 have access to the documents. But at a minimum, if you
22 uphold this, the parties to the docket will have
23 access. Am I incorrect? That's correct, isn't it,
24 Tracy?

25 MR. HATCH: (Indicating yes.)

1 COMMISSIONER BEARD: Yes. That's the way it has
2 always been, I think.

3 COMMISSIONER CLARK: I suppose the company would
4 have the opportunity to ask that it be restricted on
5 different grounds to different parties. It doesn't --
6 the normal course of business is, it's given to
7 everyone.

8 COMMISSIONER BEARD: What grounds in the statutes
9 and the rules exist for a treatment other than
10 proprietary and confidential? I'm not aware of one.

11 COMMISSIONER LAUREDO: How about competitive --
12 there may be some competitive considerations from some
13 of the parties other than the public.

14 COMMISSIONER CLARK: And you do have competitors
15 in a particular docket, competitors of Southern Bell.

16 COMMISSIONER LAUREDO: That's what I mean.

17 COMMISSIONER CLARK: And you deal with that in the
18 protective order. Generally what has happened is they
19 are given access, but there are -- the access is
20 limited to the attorneys and people who have a need to
21 know. In some instances you don't -- you could
22 foreseeably deny them access, because you don't believe
23 their competitive interest could be protected by
24 disclosing it. But we have not done that.

25 MR. BELLAK: To my understanding, Commissioners,

1 the reason that this is a different wall from the
2 confidentiality process is that under the statutes the
3 Public Counsel would have access to these documents,
4 even if confidentiality were granted. And it is the
5 Public Counsel that has sought access to them.

6 COMMISSIONER BEARD: All parties would have access
7 to it if they sign a protective agreement. It has been
8 that way. If you can show me in the statutes where, or
9 in any case we have done, ever, where we have denied
10 access to any party to a docket that would sign a
11 prospective agreement, I'd like to know when we did it.

12 MR. SHREVE: You have certainly denied access to
13 parties until a sufficient justification to this
14 Commission was given, because there are situations
15 where Southern Bell has not wanted, and probably
16 legitimately so, certain entities that were parties to
17 not have the information. And that has been covered by
18 this Public Service Commission in the past.

19 COMMISSIONER BEARD: When they sign -- if they
20 were willing to sign a protective agreement, we still
21 denied access to that document?

22 MR. SHREVE: It was done to the satisfaction of
23 this Commission, and this Commission has the ability to
24 order -- to keep a party from having access to it. But
25 that is not what we are talking about here today.

1 COMMISSIONER BEARD: I understand that.

2 MR. SHREVE: We are talking about a totally
3 different ball game that is not to be confused with
4 that.

5 COMMISSIONER LAUREDO: Right. I was just -- I'm
6 kind of asking ahead.

7 COMMISSIONER BEARD: All I am saying is, to the
8 extent that you uphold this motion, to my knowledge
9 there has never been an instance where a party to the
10 docket has been denied access if they sign a
11 prospective agreement, ever.

12 MR. SHREVE: If they signed the protective
13 agreement, and that protective agreement satisfied the
14 Public Service Commission, that is correct. But there
15 is not an instance where a party has received the
16 documents without due consideration by this Public
17 Service Commission.

18 COMMISSIONER LAUREDO: And that consideration may
19 include denying that information to that party, based
20 on it may be an irrelevant party, and they may be using
21 it for other than a legitimate purpose of the
22 investigation.

23 MR. SHREVE: That is exactly right. We may have a
24 need for the document, and they made a different type
25 of objection to a competitor having it, and that has

1 come up in the past.

2 CHAIRMAN DEASON: Mr. Anthony, I think this is
3 your motion.

4 MR. ANTHONY: Yes, sir. Hank Anthony on behalf of
5 Southern Bell.

6 I've lived with this for some time, so I'm going
7 to give you a little bit of background. If I'm getting
8 into too much background, and you are familiar with the
9 facts, please let me know.

10 Basically, Southern Bell, after some dockets at
11 this Commission, Docket 910163, had been opened, and
12 the Attorney General had announced that he was
13 conducting an investigation into certain matters of
14 Southern Bell, the Company decided and was asked by --
15 its chief executive officer asked the Legal Department
16 to conduct an investigation of the matters that had
17 been alleged in the docket, and the things that the
18 Attorney General was investigating. As a part of that
19 investigation the Legal Department then undertook, it
20 asked a group of managers within the Company, or within
21 the Internal Audits Department, to conduct some, what
22 have been called "the audits," here for the purpose of
23 providing to the lawyers information that they could
24 then use to render legal advice to the Company.

25 There were five audits that were actually provided

1 to the Prehearing Officer, Commissioner Clark, in this
2 case. The order, I think, mistakenly refers to a
3 statistical analysis that was not provided. There were
4 actually five audits. There were also two, what we
5 have come to call panel recommendations regarding
6 discipline, which were conducted by members of the
7 Company's Personnel Department. And those are the
8 seven documents that are in dispute today. It's the
9 Company's position that each of those documents is
10 privileged under both the attorney/client privilege and
11 the attorney work product doctrine, and that they are
12 privileged from any discovery whatsoever by any party.
13 It's true that if they were discovered, then parties --
14 if they are not privileged, then parties would be
15 within their rights to discover them, and we would then
16 have to discuss confidentiality, and so on. But at
17 this point, it's the Company's position that those
18 documents are privileged from discovery altogether;
19 and, therefore, we don't have to get to the
20 confidentiality issue.

21 The purpose of the Legal Department's request for
22 these documents was to provide information to the
23 lawyers so that the Company could provide appropriate
24 advice to the Company, both in the context of the
25 dockets that are before you, as well as the Attorney

1 General's investigation. Those documents were prepared
2 not in the normal course of business, but solely at the
3 request of the Legal Department. We had provided
4 affidavits from one of the people involved in that, the
5 woman that heads up the internal auditing group for
6 Florida, which attests to the fact that they would not
7 have conducted those audits but for the legal
8 Department's request. There were no plans to do it.
9 They would not have done it whatsoever. Because of
10 that, the Company maintains that the privileges are
11 absolute here. The kind of tests, basically, are
12 whether communications are made as part of securing
13 legal advice; whether the communication was made at the
14 direction of a corporate superior; whether the request
15 was made so that the Company could get legal advice;
16 whether the subject matter was within the scope of the
17 person who gave the communication, within the scope of
18 that persons duties, and whether the communication was
19 distributed beyond the number of people who had a need
20 to know. And I think if you go through the facts in
21 this case, you will find that each of these documents
22 meet those requirements. It was the chief executive
23 officer of the corporation that asked the Legal
24 Department to provide advice. The communications were
25 made as a part of the provision, so the Company's

1 lawyers could provide that advice. It was, certainly,
2 within the scope of the auditors' responsibilities to
3 provide this kind of information to do the analysis and
4 provide the information. And the communication was
5 strictly disseminated to a very strictly limited group
6 of people who had a need to know the information that
7 was provided. So, for all of those reasons, the
8 Company thinks that the normal rules of privilege would
9 apply here.

10 Now, the order that the Prehearing Officer entered
11 in this matter takes a different tack and says that
12 because the Company is a regulated utility, that a more
13 narrow view of the privilege should apply here than
14 would might normally be applied, and bases this on a
15 couple of premises that the Company doesn't dispute.
16 The Company has a duty to comply with the Commission's
17 regulations. There is no dispute about that; that
18 Southern Bell has an ongoing obligation to monitor its
19 operations, again, we don't dispute that; and that
20 internal audits are often used as part of that
21 monitoring process. The difference here is that we
22 don't think that the narrow view that's discussed in
23 the Prehearing Officer's order takes these documents
24 out of the scope of privilege.

25 As we read the cases, the narrow view says that

1 legal opinions are privileged only to the extent that
2 they rely on and thus reveal confidential information
3 furnished by the attorneys' client. That is exactly
4 what we have here. We have confidential information
5 furnished by the Company's client to its lawyers. As a
6 result, it's that information itself that we are trying
7 to protect from disclosure. If the opinion can't be
8 disclosed because it would reveal confidential
9 information, then it doesn't make any sense to say that
10 the underlying information itself can be disclosed.
11 It's all part and parcel of the same thing, part of the
12 same privilege. And we think that a reading of the
13 Consolidated Gas Company case that's quoted in the
14 Prehearing Officer's order does discuss broad and
15 narrow views of privilege, but that under either test
16 we do have the privilege, and it should apply to these
17 documents.

18 There is also the question about whether or not
19 the work product doctrine would apply here. I think
20 that the attorney/client privilege protects these, so
21 the work product privilege may be moot, but I think I
22 ought to discuss it in any event. The work product
23 privilege applies when a lawyer is preparing his or her
24 case for litigation. And that is exactly what happened
25 here. The lawyers asked the people within the Company

1 to prepare certain information so the Company's lawyers
2 could litigate this case. They gave that information
3 to the lawyers, and that is being used as part of the
4 litigation. It's part of the information provided so
5 the Company's lawyers can provide advice on the
6 strategy of the litigation. But, because it's a part
7 of that it also means that it's privileged from
8 discovery.

9 Now, there is an exception to the work product
10 doctrine which would allow for discovery if there is an
11 undue hardship upon the other side. There is no way
12 they could reasonably duplicate the information. We
13 don't think that test has been made here. There is an
14 affidavit attached to Public Counsel's motion to compel
15 from Mr. Baer, that says that they could not possibly
16 duplicate what has been done. Well, the Company has
17 shown in its own affidavit that that's not true. We
18 believe that that can be done. An appropriate sampling
19 could be done. Once that sampling is obtained, then
20 any computer system can then analyze the documents any
21 way that anybody wants to analyze it. To argue
22 otherwise is to say that we somehow have a patent on
23 the ability to analyze this data, and I give my
24 opposition much more credit than that, I think.

25 The other documents that are being discussed here

1 today are these panel recommendations. These were
2 basically documents that were prepared, as I said, by
3 the Personnel Department to determine whether or not
4 anybody within the Company's ranks should be
5 disciplined. The documents contain information that
6 was derived directly from either the Company's
7 privileged investigation, statements that the Company
8 took as a part of its investigation of these matters,
9 or from summaries that were written by the Company's
10 lawyers summarizing those statements. And those are
11 subjects to other motions to compel, so I won't get
12 into any of that today. But the substantial portion of
13 that information that's in dispute in these documents
14 was derived directly from that, and simply summarizes
15 the information in those privileged statements and
16 summaries. Because of that, it's the Company's
17 position that those summaries themselves are
18 privileged.

19 Simply because information has been provided to
20 the Personnel Department does not mean that the Company
21 has waived the privilege as to that information. Those
22 people had a need to know. Even though, as the order
23 notes, it's a business-related need to know, that
24 doesn't take away from the fact that the information
25 itself is privileged, and there is no waiver of it.

1 These people had a reasonable business basis for
2 receiving the information, they obtained it, they
3 didn't disclosed it unnecessarily. The Company has
4 maintained its confidentiality; and, therefore, this
5 information itself is privileged as well.

6 In summary, I think the important point here is
7 that if the Prehearing Officer's order is affirmed,
8 then it tells me that if I ask somebody to go out and
9 do some work for me in anticipation of litigation, or
10 because I have to give legal advice to the corporation,
11 I'm requested by the corporation to provide advice, and
12 I ask a member of management or somebody else to
13 prepare that for me so that I can then review it and
14 provide legal advice, the signal that I'm being given
15 here is that I can't do that and maintain its
16 privileged nature. And I think that simply is not the
17 result that should be obtained here. I think that it's
18 true we are a regulated utility, but we still have the
19 same rights that any other entity has under American
20 Jurisprudence, that we do have a privilege, the narrow
21 view does not prevent us from maintaining that
22 privilege in this circumstance. And I would
23 respectfully request that the Prehearing Officer's
24 order be reversed, and that you find that the material
25 in question be considered privileged.

1 CHAIRMAN DEASON: Mr. Beck.

2 MR. BECK: Ms. Richardson is going to do this one.

3 CHAIRMAN DEASON: Ms. Richardson.

4 MS. RICHARDSON: Yes, Commissioners, thank you. I
5 think the first thing for me to say is that we support
6 Commissioner Clark's order, obviously since it's in our
7 favor. I think the next thing is for you to realize as
8 a Commission what is really at stake here.

9 First of all, the Legislature has given you, as a
10 Commission, as a panel, very broad investigative powers
11 to counterbalance the monopoly that has been given to
12 the telecommunications company here today. Part of
13 your broad investigative powers that were given to you
14 are for the purpose of protecting the public and
15 Southern Bell's customers from overreach by monopolies.
16 That is one of the inherent evils of a monopoly, as the
17 Florida Supreme Court indicated in its City Gas case,
18 as cited in my response.

19 In taking on that duty and that responsibility, in
20 order to meet that obligation that you have to protect
21 the public -- excuse me. In order to protect the
22 public it is, I think, inherent within your authority
23 to check into what is actually occurring. The Company
24 has conducted a series of audits that the Commissioner,
25 or Prehearing Officer here, has determined are

1 factually based. There are no legal opinions, no legal
2 analyses. They are simply the facts of what occurred,
3 what the Company found in its internal review.

4 In order to protect the public, then, what is at
5 stake is your ability to find the facts. You will be
6 going into a hearing in order to establish what the
7 facts really are in this matter. And if you don't have
8 access to the facts, I'm not sure how you're going to
9 accomplish that duty and that responsibility. This is
10 not to say that Commissioner Clark in her prehearing
11 order did not say that the Company did not have access
12 or did not have a right to the attorney/client
13 privilege. That is not what her order states. Her
14 order clearly states that on the facts and the
15 circumstances of this case, after she carefully
16 reviewed these documents and personally reviewed them,
17 she determined that these were business documents that
18 the Commission should have access to, and that the
19 attorney/client privilege nor the work product
20 privilege applied. And we agree with that, even though
21 we have not had access to an actual in camera review.

22 What Southern Bell has done here today is actually
23 re-argue the same arguments they argued before
24 Commissioner Clark. She heard those arguments, she
25 read the documents, she weighed the facts, she weighed

1 the law, and we believe she made the right decision.
2 If, as a Commission, you choose to go back and re-weigh
3 the facts and re-weigh the law that Southern Bell has
4 argued here before you today, then we suggest that you,
5 too, must go back and look at the actual documents.
6 That you as a panel must conduct an in camera review
7 to determine the facts on this particular issue and to
8 weigh the law on this particular issue in a
9 reconsideration.

10 I believe in terms of argument I would just leave
11 you with my pleading and let you re-weigh that. I
12 will be glad to answer any questions that you may have
13 in terms of the attorney/client privilege or the work
14 product doctrine. But I believe it's set out in my
15 pleadings, and I also believe that it's more than
16 adequately set out in the Prehearing Officer's order.
17 Thank you.

18 CHAIRMAN DEASON: Mr. Twomey.

19 MR. TWOMEY: Thank you, Mr. Chairman.

20 Commissioners, the Attorney General, as does
21 Public Counsel, would also support Commissioner Clark's
22 order, as does -- and the Commission Staff's
23 recommendation.

24 I would like to ask you to look at the practical
25 aspects of what is before you here today in an attempt

1 to view it with the clear, unclouded type vision that
2 the child had in the children's story of "The Emperor's
3 New Clothes." And not entertain any fictions here that
4 are not warranted by the facts.

5 In this proceeding Southern Bell, that is, in the
6 main case, Southern Bell is asking for continued
7 incentive regulation and higher than normal profits, in
8 part, on its assertion that it has been able to provide
9 quality of service, the necessary quality of service to
10 its customers, and that it was able to do so at lower
11 cost of service than before. Southern Bell has
12 publicly been accused of falsifying its repair reports
13 to the Public Service Commission in order to meet its
14 quality of service standards; that is, your quality of
15 service standards that all telephone companies have to
16 meet. If these charges are true, it will help explain
17 Southern Bell's ability to meet the standards at a
18 lower cost.

19 Southern Bell has conducted an internal audit,
20 which is the subject of this proceeding today, to
21 determine whether it's employees, in fact, cheated on
22 its repair reports submitted to this Commission. Bell
23 has purportedly disciplined some of its employees as a
24 result of the internal audit and the other documents
25 that came under the audit panel, and as a result of

1 certain repair report problems. The subject of the
2 audit goes to the heart of whether Southern Bell is
3 meeting its statutory responsibility to provide
4 efficient, adequate service to its customers and to do
5 so at a reasonable cost. It also goes to the heart of
6 this Commission's statutory responsibility to see that
7 Southern Bell meets the quality of standard set out in
8 the statutes and does so at reasonable cost. Whether
9 Southern Bell has cheated or not on its repair reports
10 colors every aspect of this rate case, not just those
11 portions addressed by the investigative docket opened
12 by your Staff and yourself.

13 This case was scheduled to go to hearing last
14 month, and that was delayed, and it's currently
15 scheduled to go now the middle of next month or
16 sometime next month.

17 I would submit to you that you don't have the
18 necessary information to fulfill your statutory
19 obligations if we go to hearing now. You don't have
20 the necessary information. The necessary information
21 is contained in the internal audit. I don't think it's
22 contained anyplace else. I don't think that the Staff
23 or anybody else, any other parties to this case has
24 asked sufficient questions that have been answered
25 sufficiently to let you know whether Southern Bell has,

1 in fact, cheated on these reports. I would think that
2 you would want to know that, that you have to know
3 whether, in fact, the reports meet your standards
4 correctly.

5 In conclusion, with respect to this Company, I
6 think you have to get the reports. You can't allow
7 Southern Bell's lawyers to control the internal audit
8 process so this Commission is impaired and impeded from
9 being able to find out the necessary information that
10 it has to have to meet its statutory responsibilities.
11 So, I would urge you, in order to get this information,
12 and to get it before the hearing begins, to affirm
13 Commissioner Clark's order. Thank you.

14 CHAIRMAN DEASON: Thank you.

15 Mr. Anthony, do you have a short response?

16 MR. ANTHONY: Yes, sir, just very briefly, just to
17 some comments made by Mr. Twomey.

18 The information that's contained in the audits, if
19 the other parties had wanted to take the appropriate
20 discovery and ask for the appropriate samples, done the
21 appropriate analyses, there is nothing that says that
22 that couldn't be, if not duplicated, certainly a
23 similar type of analysis performed. And I don't think
24 that the decision ought to turn on whether or not
25 somebody says you need this information. The question

1 is whether it's privileged or not. Nobody has abused
2 the process. Very little has been claimed to be
3 privileged in this process. Very little that has been
4 withheld from discovery. I think it needs to be put in
5 its proper context. Thank you.

6 CHAIRMAN DEASON: Thank you.

7 Commissioners, do you have questions?

8 COMMISSIONER BEARD: Mr. Twomey, do you disagree
9 that this audit was performed at the request of the
10 attorneys?

11 MR. TWOMEY: Commissioner Beard, I don't have a --
12 I heard what Mr. Anthony said. I'm not going to -- I'm
13 going to accept what he said as being true. I don't
14 have any basis for challenging that, and I wouldn't,
15 absent that.

16 COMMISSIONER BEARD: Here's, I guess, the context
17 I'm trying to put it in. There was, I guess, maybe
18 there still is an investigation with the Attorney
19 General. The Attorney General, I'm assuming, has as a
20 part of its investigation interviewed people, made
21 notes, developed work product associated with that
22 investigation in preparation for going to trial. Is
23 that a fair assessment?

24 MR. TWOMEY: I assume that is correct.

25 COMMISSIONER BEARD: Okay. Would it be the

1 Attorney General's position that they would be glad to
2 turn that work product or the underlying facts that
3 support that work product over to the Company prior to
4 trial?

5 MR. TWOMEY: I'm sorry. You're asking would it be
6 the Attorney General's position that he should turn
7 that over?

8 COMMISSIONER BEARD: Sure.

9 MR. TWOMEY: The answer would be no.

10 COMMISSIONER BEARD: Okay. Isn't that, in effect,
11 what is occurring or being requested here?

12 MR. TWOMEY: No, sir, it's not. And the reason
13 it's not, is that there is a statute that says -- and
14 it's Section 119.073(d), that provides protection from
15 the public records, that is, protection from members of
16 the public or others from asserting that they have
17 access to those documents, and it's provided by
18 statute. Now, it's the Attorney General's position
19 that that doesn't necessarily provide, that is, the
20 statute doesn't necessarily provide that those
21 documents cannot be disclosed if it is in the public
22 interest, but that it provides protection from the
23 public demand to see it.

24 COMMISSIONER CLARK: Commissioner Beard, you're
25 obviously struggling with the same things that I

1 struggled with. But I came down the way I did based on
2 the fact that I think Southern Bell has a continuing
3 obligation to assure itself, and secondarily the
4 Commission, that it's conducting its business in
5 compliance with the Commission rules and statutes. And
6 one of the things the case, the leading case from the
7 Supreme Court, the Upjohn case says is that it is
8 communications that is protected, not facts. And with
9 respect to these audits, they were audits which
10 revealed facts. But I think more importantly that it
11 was the type of audit that should be done in the normal
12 course of business when you have indications that what
13 you're doing is not -- the reporting mechanism is not
14 producing accurate reports. And you cannot, in the
15 regulated environment, shield yourself from discovery
16 of those facts by using an attorney to request the
17 information. It was my view that this type of audit,
18 if not this particular audit, is something that would
19 be done in the normal course of business. Companies
20 always do audits to assure themselves that their
21 operations are in compliance with the rules and
22 regulations. And the fact that they did this as a
23 result of some indication that the computer system and
24 reporting system they had is not producing, or is
25 somehow being manipulated, and thereby they are using

1 an attorney to ask for it does not shield that
2 information.

3 COMMISSIONER BEARD: Well, I guess -- and I don't
4 have a lot of knowledge of investigations, just what I
5 read in the paper, which I believe all of, but my
6 understanding of what took place was as a result of the
7 Attorney General. I don't know if you opened a docket,
8 or filed a case, or how you do it, but conducting an
9 investigation with the potential of RICO charges and
10 other things. And at some point, if I'm a client, I
11 had better start my defense. I don't want to wait
12 until everything is out on the table and say, "Well,
13 let me look into it now." I can do that from the
14 bottom of the jail. And I -- that's a concern. The
15 problem is I haven't seen the documents. And what I
16 have found in the past, quite frankly, is when you
17 actually look at the documents, quite often, it's much
18 ado about nothing. Okay. And I will say that as
19 caution. I haven't looked at these, and they may be
20 the most terrible things in world, I don't know. But I
21 can tell you a lot of the noise that's done about these
22 documents isn't worth the time of day for us to be here
23 arguing about it. One, they probably aren't relevant
24 and aren't used in the case. And, number two, if they
25 were, it ain't that big a deal. Most of them probably

1 should be public. I don't know, because I haven't look
2 at them. The basic issue is my concern. And that is
3 why I asked Mr. Twomey the question. I would not think
4 that any party should be treated differently.

5 COMMISSIONER CLARK: Well, Commissioner Beard, I
6 will tell you there were cases that discussed such
7 things as a company's investigation into an airplane
8 accident. Quite clearly, in my mind that company can
9 contemplate some litigation regarding that accident.
10 However, that tribunal found that that was not
11 protected, because that is the type of investigation
12 they would conduct for business purposes, and that is
13 to identify any problems that they had with the
14 airplane or with the training of the people who are
15 flying the airplane, to correct it on an ongoing basis.
16 And that was not held confidential. And it sure would
17 seem that if that is not confidential, certainly, this
18 is not.

19 MR. ANTHONY: Mr. Chairman --

20 COMMISSIONER CLARK: It's not an easy decision.
21 There are good arguments both ways.

22 CHAIRMAN DEASON: Commissioners, let me make a
23 comment at this point. I don't mean to cut you off,
24 Mr. Anthony, but, as I'm sure you have noticed, the
25 number of people in the audience has grown

1 substantially.

2 COMMISSIONER LAUREDO: I haven't noticed.

3 CHAIRMAN DEASON: And I don't think it's because
4 of the merits of the argument we have heard, even
5 though they may wish that to be the case. I certainly
6 don't mean to cut off this debate. My only question to
7 the Commission is that if we are going to have a
8 prolonged debate, and that is fine if we are, we may
9 need to do that after the lunch hour, because we have
10 some other business which we need to attend to at this
11 time. However, if the Commission feels like this is
12 something we can do in relatively a short time basis,
13 perhaps we can go ahead and resolve this matter before
14 the lunch hour. So, I will just throw that out and see
15 if we have a desire on the Commission's part to do one
16 or the other.

17 COMMISSIONER LAUREDO: Well, it's neither prudent
18 nor recommended that I disagree with the Chairman, but
19 I think it would be -- some degree of discourtesy,
20 these people have already been postponed once. I think
21 we ought to move on and not have them come back again.
22 I think we asked them earlier to -- most of the parties
23 have busy schedules, I think we ought to move on. We
24 may have a quick resolution. I recommend we move --

25 COMMISSIONER BEARD: My concern is this: I'm

1 going to have a great deal of difficulty in voting to
2 uphold this motion without looking at the documents.
3 Public Counsel's position on that, at a minimum before
4 I move to deny that, I ought to look at them. Okay.
5 Because of my concern of much ado about nothing.
6 Conversely, to do that means deferral, deferral means
7 delay, delay is the last thing we need. So, I'm caught
8 in the crux of what to do.

9 COMMISSIONER CLARK: Can I recommend that we -- we
10 have heard the argument. I think this is an important
11 enough issue that we can bring it -- start it back up
12 after lunch and debate it further. And maybe you will
13 have time to go look at the documents. They are not
14 long.

15 COMMISSIONER LAUREDO: I'd rather -- I disagree.
16 I would rather move on. We have delayed -- this is
17 holding up a lot of things. I had a very few brief
18 questions, and I am ready to move.

19 CHAIRMAN DEASON: You know, the Chairman's job is
20 really easy when all the Commissioners agree.

21 Commissioner, I certainly don't want to cut debate
22 off. But at the same time, if a Commissioner is
23 willing to make a motion, we will see what happens.
24 And it may be that we can resolve this matter. If
25 there is a Commissioner who is completely

1 uncomfortable, even with going forward at this point, I
2 think that we normally take those wishes into
3 consideration and defer or temporarily pass. And I'm
4 not -- certainly, I'm not opposed to doing that. At
5 this point I'm going to request if a Commissioner is so
6 inclined to make a motion, to do so at this time. If
7 not, we will temporarily pass. Any motion forthcoming?
8 Hearing none --

9 COMMISSIONER BEARD: Well, let me -- rather than
10 TP, let me tell you, I got this at 4:00 o'clock
11 yesterday. Okay. And I'm -- it's not an easy
12 decision. And it's not one that I am going to make
13 quickly, if I can help it. And it's not one I'm going
14 to make without looking at the documents. And I think
15 at this point, with what I've heard, it is one that I
16 am going to want to think on, because I haven't had
17 much time, getting it at 4:00 o'clock yesterday.
18 Actually, getting it today, because at 4:00 o'clock
19 yesterday I was down here in another hearing, after the
20 one I had in the morning.

21 CHAIRMAN DEASON: And I certainly realize that
22 that is a problem. Part of the consideration which
23 went into that is that it's going to be awhile before
24 we have another agenda conference. Now, perhaps we can
25 set up some type of a special agenda to handle it at a

1 later time, but we were confronted with the situation
2 of having this prolonged, and we fell down on the side
3 of trying to get it to the Commission, and, hopefully,
4 for a resolution.

5 COMMISSIONER BEARD: Could we TP it to like
6 Thursday morning?

7 COMMISSIONER CLARK: I think that's a solution.

8 COMMISSIONER JOHNSON: Yes.

9 CHAIRMAN DEASON: Well, I have no objection to
10 that.

11 COMMISSIONER BEARD: Is that okay with you?

12 COMMISSIONER LAUREDO: No, I want to vote today.

13 CHAIRMAN DEASON: Is there any particular strong
14 objection for some reason by the parties?

15 MR. SHREVE: Commissioner, I would like to clarify
16 something that Commissioner Beard said. And I know he
17 wouldn't want to influence the other Commissioners by a
18 misstatement of the facts. I'm sure that -- I don't
19 know whether Bell started their investigation or not
20 due to the Attorney General's investigation. But I do
21 know, and I think you probably just are not familiar
22 with this, but it's certainly out there. These facts
23 were brought to Bell's attention before they were ever
24 brought to the Attorney General's attention or to our
25 attention. The next person -- the next group that had

1 the facts of the manipulation brought to their
2 attention was the Public Service Commission. Then, as
3 far as I know, the next ones were us, and then possibly
4 the Attorney General, but I'm not sure about that time.
5 But they were not started in the Attorney General's
6 office. The facts were brought to Southern Bell first,
7 and they were aware of it. And that has been shown in
8 some of the affidavits that have been filed in this
9 case. As far as your feeling that the discovery has
10 much ado about nothing in general, perhaps it's just
11 when you don't get the discovery that you're trying to
12 get.

13 COMMISSIONER BEARD: Well, don't misconstrue what
14 I said, okay? One, I told you I didn't have a lot of
15 detailed knowledge about the sequence of the events in
16 investigations. So, I wasn't misleading anybody.

17 MR. SHREVE: No, that's not what I said.

18 COMMISSIONER BEARD: My comment about much ado
19 about nothing is, quite frankly, directed at the
20 Company, that they quite often request confidentiality
21 of things that nobody cares about from the standpoint
22 of them being confidential of a business interest.
23 Okay? That was where my point was directed.

24 MR. SHREVE: Fine.

25 COMMISSIONER BEARD: There are occasions where I

1 have seen multiple data requests, where I question that
2 all that data is ever looked at. And that is not
3 directed to Public Counsel. I mean, it's just a part
4 of this process. But my comment was more directed at
5 some requests for confidentiality that I find humorous
6 sometimes.

7 COMMISSIONER CLARK: Mr. Chairman, I would offer
8 to all of you that we have -- the cases that were cited
9 in the various motions are available. And I think it's
10 helpful to read the rationale and the factual
11 circumstances that come into play in those cases as you
12 analyze them and compare them to this case.

13 CHAIRMAN DEASON: Mr. Bellak, is there any problem
14 in continuing this item until 9:00 o'clock Thursday
15 morning?

16 MR. BELLAK: No, sir.

17 CHAIRMAN DEASON: No problem.

18 COMMISSIONER LAUREDO: And do the parties in any
19 way object to -- you are the petitioner, the original
20 petitioner, Mr. Shreve, are you unduly burdened by
21 this?

22 MR. SHREVE: I think you should take the time to
23 make the decision that you are comfortable with and
24 feel knowledgeable of. I think we are going to run
25 into a situation on timing throughout the docket on

1 motions like this. I think it's better to do it right
2 than to rush it.

3 CHAIRMAN DEASON: Well, this item will be
4 continued and taken up Thursday morning at 9:00
5 o'clock.

6 MR. ANTHONY: Mr. Chairman?

7 CHAIRMAN DEASON: Yes.

8 MR. ANTHONY: This is just -- it's a selfish
9 question. Could we have this at, say, 10:00 o'clock,
10 so I didn't have to come in the night before?
11 Otherwise, I can't catch a flight in the morning to
12 come up here. If we could just put it to 10:00
13 o'clock?

14 CHAIRMAN DEASON: You know, the problem we have is
15 that we have fuel adjustment hearings going on, and my
16 hopes were, if the fuel adjustment hearing is going to
17 be going on on Thursday, that we could do this at 9:00,
18 and perhaps not delay the continuation of the fuel
19 adjustment too long.

20 COMMISSIONER BEARD: Well, perhaps, if he wanted
21 to agree to stay through the entirety of the fuel
22 adjustment hearing, we could accommodate him.

23 MR. ANTHONY: 9:00 o'clock will be fine, thank
24 you.

25 (Laughter)

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COMMISSIONER BEARD: A prudent decision.

CHAIRMAN DEASON: 9:00 o'clock Thursday. Thank
you all.

* * * * *

1 CERTIFICATE OF REPORTER

2 STATE OF FLORIDA)

3 COUNTY OF LEON)

4 I, JANE FAUROT, Court Reporter, Notary Public in
5 and for the State of Florida at Large:6 DO HEREBY CERTIFY that the foregoing proceedings
7 was taken before me at the time and place therein
8 designated; that before testimony was taken the
9 witness/witnesses were duly sworn; that my shorthand notes
10 were thereafter reduced to typewriting; and the foregoing
11 pages numbered 1 through 35 are a true and correct record of
12 the proceedings.13 I FURTHER CERTIFY that I am not a relative,
14 employee, attorney or counsel of any of the parties, nor
15 relative or employee of such attorney or counsel, or
16 financially interested in the foregoing action.17 WITNESS MY HAND AND SEAL this 23rd day of
18 February, 1993, in the City of Tallahassee, County of Leon,
19 State of Florida.20
21 
22 JANE FAUROT, Court Reporter
23 Notary Public in and for the
State of Florida at Large

24 My Commission Expires: July 16, 1993

25