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March 8, 1993

Mr. Steve C. Tribble
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Florida Public Service Commission
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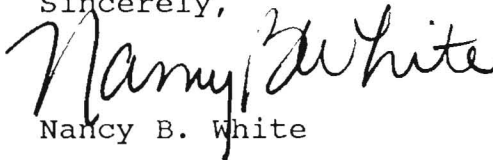
RE: Docket No. 920260-TL, 900960-TL, 910163-TL, 910727-TL

Dear Mr. Tribble:

Enclosed is an original and fifteen copies of a Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Fifteenth Motion to Compel and Request for In Camera Inspection of Documents. Please file this document in the above-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 on the parties shown on the attached Certificate of Service.

Sincerely,


Nancy B. White

Enclosures

cc: All Parties of Record
A. M. Lombardo
H. R. Anthony
R. D. Lackey

DOCUMENT NUMBER-DATE

02582 MAR-88

FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE

Docket No. 920260-TL
Docket No. 900960-TL
Docket No. 910163-TL
Docket No. 910727-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this 8th day of March, 1993 to:

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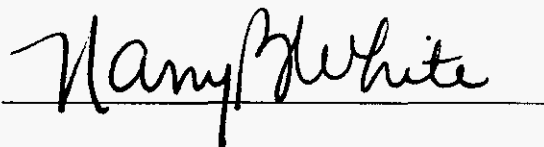
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Nancy White

1. In its Response to Public Counsel's Thirty-Sixth Set of Requests for Production, Southern Bell objected to producing the documents sought in Request Nos. 1, 2, 3, 5, and 9. Request No. 1 called for the production of the notes of Dave Mower related to his responsibilities for disciplining individual employees. Request No. 2 called for the production of 1992 and 1993 internal audits or reaudits of, respectively, the Key Service and Revenue Indicators ("KSRI"), the loop maintenance operations system, ("LMOS"), the PSC Schedule 11, the mechanized out of service adjustments ("MOOSA"), and the Operational Review Audit. Request No. 3 called for grievance records from 1992 concerning the discipline of network employees imposed due to the issues related to these dockets. Request No. 5 called for all documents related to these dockets written since January of 1992 that were not previously provided. Request No. 9 called for all internal documents dealing with the Statewide Grand Jury and Southern Bell's settlement with the Statewide Prosecutor.

2. Southern Bell filed a Notice of Withdrawal of Objection to Request No. 9, and part of Request No. 5. With regard to Request No. 3, Southern Bell has determined upon further review that an error was made in its original response. There are no documents responsive to Request No. 3 of Public Counsel's Thirty-Sixth Production of Documents. Thus, Public Counsel's motion concerning Request No. 3 is moot.

3. With regard to Request Nos. 1 and 2 and a portion of Request No. 5, the documents responsive thereto are subject to

the attorney-client privilege and the work product doctrine. Therefore, Southern Bell objected to production of these documents on that basis.

4. In the Request for Production, and specifically in Instruction No. 1, Public Counsel, inter alia, requested that Southern Bell provide an index of any documents that Southern Bell asserted to be privileged from discovery. In its Response and Objections to Public Counsel's Thirty-Sixth Request for Production, filed with the Commission on January 28, 1993, Southern Bell stated that it objected to Public Counsel's Instruction No. 1 as it sought information to which Public Counsel was not entitled. Public Counsel has now filed a Motion to Compel, in which it seeks to have Southern Bell furnish the index in question and further to have the Florida Public Service Commission (the "Commission") undertake an in camera inspection of the documents indexed. That inspection would be for the purported purpose of determining the validity of Southern Bell's claim of privilege. For the reasons set forth herein, the Motion should be denied.

5. The Commission's rules provide that "parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure." Rule 25-22.034. Pursuant to Rule 1.350, Florida Rules of Civil Procedure, one party may request another party to produce designated documents. Section (b) of that rule sets forth the procedures for a production of documents and provides that a

request for production shall be served on the other party and shall set forth the items to be inspected. This rule, however, does not contain a provision allowing the party serving the request for production of documents to require the responding party to provide an index of privilege documents. Rather, if such an index is requested, it is properly done pursuant to Rule 1.340, Florida Rules of Civil Procedure, which provides for interrogatories to parties. Therefore, Southern Bell's objection to providing the index requested by Public Counsel in a request for production of documents was proper.

6. Nevertheless, in order to avoid further controversy before the Commission, Southern Bell has set forth below a general index of those responsive documents which it has not provided under a claim of privilege. A review of this index reveals that each of these documents has been properly withheld and that Public Counsel's request for in camera inspection of such documents is not necessary and should be denied.

- A. Notes made during preparation for administering discipline by Dave Mower, 21 pages.
- B. Network Operational Review Reaudit - January 1993. Requested to be performed by the Legal Department on April 14, 1992.
- C. Customer Adjustment to MOOSA reaudit - January 1993. Requested to be performed by the Legal Department on April 14, 1992.

D. Notes made concerning discipline appeals of employees by Charles Cuthbertson, 5 pages.

As described more fully below, each of these documents was intended to be and has been kept confidential. Thus, each is privileged from discovery.

7. Turning to the substance of Southern Bell's objections, Request No. 1 concerns the work notes of Dave Mower regarding the discipline imposed on certain employees. The documents contain a summary of the facts derived from the investigation that formed the basis for the discipline. While these particular documents were not drafted by a lawyer, they contain information derived from the investigation and were itself prepared as a part of the investigation. Indeed, Request No. 1 is simply the notes of a manager of the company that memorializes the privileged information for internal purposes.

8. As Public Counsel concedes in its Motion to Compel, the names of all management employees who were disciplined have previously been provided. The only additional information that Public Counsel seeks to obtain from the disclosure of this document is information derived from the investigation by Southern Bell's Legal Department, which was the basis for the discipline of these employees. This information is clearly privileged or alternatively constitutes attorney work product.¹

¹ While Order Nos. PSC-93-0151-CFO-TL (aff'd by full comm'n in Order No. PSC-93-0292-707-TL) and PSC-93-0294-PCO-TL have rejected the argument that similar materials are subject to the attorney-client privilege and attorney work product doctrine, Southern Bell is pursuing appeals of these rulings.

9. Stated briefly, the facts which underly Southern Bell's assertion are as follows: In 1991, the legal department of Southern Bell undertook an internal investigation in order to render a legal opinion to the management of Southern Bell. This investigation was undertaken to allow the Company's attorneys to render legal advice regarding the subject matter of this docket, as well as with regard to the Attorney General's then pending criminal investigation of Southern Bell. At the conclusion of this investigation, the legal department informed a limited number of managers, including Mr. Mower, of Southern Bell with a "need to know" of the results of the investigation.

10. Based upon the case law that has been cited repeatedly in this docket, since the information obtained in the investigation by Southern Bell's attorneys was derived from the client in order to render a legal opinion, it is therefore protected by the attorney-client privilege. Moreover, the documents that set forth the facts obtained in this investigation are the protected work product of attorneys for Southern Bell. See Southern Bell's Motion for Review of Order No. PSC-93-0151-CFO-TL, filed on February 5, 1993 in Docket Nos. 910163-TL, 920260-TL, 900960-TL, and 910727-TL and Southern Bell's Motion for Review of Order No. 93-0294-PCO-TL, filed on March 4, 1993 in Docket Nos. 910163-TL, 920260-TL, 900960-TL, and 910727-TL. Since Mr. Mower had a need to know this information and since he derived it from the privileged investigation, his notes are themselves privileged. A disclosure of privileged information to

a corporate employee with a need to know is not a waiver of that privilege. See In Re: Grand Jury Subpoena Duces Tecum, 731 F.2d 1032 (2nd Cir. 1984) and James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D.Del. 1982).

11. Request No. 2 calls for 1992 and 1993 audits or reaudits of certain Southern Bell systems. Again, Southern Bell objected on the basis that these audits were performed through and at the direction of counsel for Southern Bell and therefore constituted attorney/client privileged material. In the alternative, Southern Bell avers that the work product privilege also protects these documents from discovery and that Public Counsel has not met and cannot meet its burden of proving "need" and "undue hardship".

12. The communications in issue involved legal advice sought from and rendered by counsel in connection with ongoing litigation, i.e., Docket No. 910163 pending at the Florida Public Service Commission ("Commission"). The communications were made in confidence and should be protected from disclosure. The audits at issue were part of an integral investigation conducted by the Company's Legal Department into the issues raised in this docket. See Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Motion to Compel, April 15, 1991, Docket No. 910163-TL; Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Seventh Motion to Compel, August 4, 1992, Docket No. 910163-TL; and Southern Bell Telephone and Telegraph Company's Opposition to Motion to Compel,

July 28, 1992, Docket No. 910163-TL. The audits were performed as part of the Legal Department's investigation in order to provide the Legal Department with the information necessary to render legal counsel. The results were relayed in confidence to the Legal Department and limited distribution was made to members of the Legal Department and Internal Auditing hierarchy. In accordance with such limited distribution, that the information was maintained on a confidential basis and this subject to a proper claim of privilege. Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So.2d 764 (Fla. 2d DCA 1981).

13. Public Counsel argues that the audits at issue were routine business records prepared in the ordinary course of business and thus not subject to the attorney-client privilege. Motion to Compel at 7-9. While Public Counsel is correct in its assertion that internal audits are routinely performed on various aspects of the Company's business, these particular audits would not have been performed but for the Legal Department's investigation. Thus, they do not constitute a routine business record, but rather documents extraordinarily related to a privileged internal legal investigation. Public Counsel's Motion to Compel should therefore be denied in this regard as well.

14. In the alternative, Southern Bell submits that the audits constitute the work product of attorneys and agents for Southern Bell which should be shielded from discovery under Rule 1.280(b)(1), Florida Rules of Civil Procedure. See also Karch v. MacKay, 453 So.2d 452, 453 (Fla. 4th DCA 1984). In Surf Drugs,

Inc. v. Vermette, 236 So.2d 108, 113 (Fla. 1970), the Supreme Court of Florida held attorney work product to include: interviews, statements, memoranda, correspondence, briefs, personal impressions, and investigative materials prepared in anticipation of litigation by an attorney or an employee investigator at the direction of a party. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct 385, 91 L.Ed. 451 (1947). A document is prepared in anticipation of litigation if it is not one that would otherwise be required to be prepared. See Reynolds v. Hofmann, 305 So.2d 294 (Fla. 3d DCA 1974). It does not matter whether the product is the creation of a party, agent, or attorney where the subject matter of the discovery is the work product of the adverse party. Atlantic Coast Line R.R. v. Allen, 40 So.2d 115 (Fla. 1949).

15. Florida Rules of Civil Procedure, Rule 1.280(b)(2) states that the adverse party may not obtain material subject to the attorney work product privilege without a showing of need and an inability to obtain the materials from other sources without undue hardship. See Alachua General Hospital, Inc. v. Zimmer USA, Inc., 403 So.2d 1087 (Fla. 1st DCA 1981). The affidavits previously filed demonstrate that Public Counsel cannot demonstrate either need or inability to replicate the information contained in the audit. See Affidavits of Shirley Johnson filed with Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Motion to Compel, April 15, 1991, Docket No. 910163-TL; Southern Bell Telephone and Telegraph Company's

Opposition to Public Counsel's Seventh Motion to Compel, August 4, 1992, Docket No. 910163-TL; and Southern Bell Telephone and Telegraph Company's Opposition to Motion to Compel, July 28, 1992, Docket No. 910163-TL. As stated in those affidavits, the basic materials necessary to undertake such an audit are readily available to Public Counsel.

16. With respect to Request No. 5, Southern Bell has withdrawn its objection to the majority of the responsive documents founds. There are five pages of notes for which Southern Bell still maintains its objection for the same reasons discussed herein at Paragraphs 7-10. In addition, Southern Bell objected to the entirety of Request No. 5 as inappropriate. Essentially, Public Counsel is requesting all documents created after January, 1992 which it has not requested previously. This request is unreasonable, as it would require Southern Bell to review every request made in these dockets (well over one thousand), to pore over every document produced thus far (hundreds of thousands), and then attempt to compare these documents to every document created by Southern Bell since January, 1992 to determine whether there were any documents responsive to this request. Therefore, this request is oppressive, unduly burdensome, and inappropriate. Thus, Public Counsel's Motion to Compel a response to Request No. 5 should also be denied.

17. In addition, Public Counsel complains of Southern Bell's objection to the Instruction by Public Counsel requesting

a description of the sequence of the DLETHs and customer billing records being produced. Since no DLETHs or customer billing records were requested, Public Counsel cannot be heard to complain about whether this instruction was followed by Southern Bell.

18. Southern Bell also filed general objections to Public Counsel's definition of "document". As stated in previous responses, Southern Bell made a good faith effort in conducting a reasonable search for responsive documents. However, Southern Bell has filed these objections because the definitions are overly broad and no one could insure that, with these definitions, every "document" responsive to the requests had been provided. No documents were withheld on the basis of these general objections.

WHEREFORE, Southern Bell respectfully requests the entry of an order denying Public Counsel's Fifteenth Motion to Compel.

Respectfully submitted this 8th day of March, 1993.

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