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March 15, 1993

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

RE: Docket No. 920260-TL, 900960-TL, 910163-TL, 910727-TL

Dear Mr. Tribble:

Enclosed is an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Motion for Review of the Order Granting Public Counsel's Motion to Compel. 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

Nancy B. White

Enclosures

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

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 15th day of March, 1993 to:

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/Mary B. White

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company	Docket No. 920260-TL
In re: Show cause proceeding against Southern Bell Telephone and Telegraph Company for misbilling customers	Docket No. 900960-TL
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: Investigation into Southern Bell Telephone and Telegraph Company's compliance with Rule 25-4.110(2), F.A.C., Rebates	Docket No. 910727-TL Filed: March 15, 1993

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
MOTION FOR REVIEW OF THE ORDER GRANTING
PUBLIC COUNSEL'S MOTION 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 to Compel and states as grounds in support thereof the following:

1. On March 4, 1993, the Prehearing Officer entered Order No. PSC-93-0335-PCO-TL. 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 deposition questions posed on October 14, 1992 by Public Counsel

to Southern Bell employee Dwayne Ward, Operations Manager - Human Resources. The deposition questions focused on the actions or failures to take action by certain employees which might underlay the Company's discipline recommendations for those employees. These recommendations were based on the witness statements and summaries contained in the internal investigation which was conducted by Southern Bell's attorneys in order to render legal opinions to the Company on matters at issue in Docket Nos. 910163-TL and 910727-TL.

2. The Prehearing Officer granted Public Counsel's Motion to Compel answers to these deposition questions and, in so doing, overruled Southern Bell's objections to the line of questioning, which objections were based on 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 law such that the full Florida Public Service Commission ("Commission") should review and reverse this decision.

3. In her Order, the Prehearing Officer concludes that the questions in dispute were proper in light of the ruling in Order No. PSC-93-0294-PCO-TL to the effect that the underlying witness statements and summaries themselves are not protected by either the attorney-client privilege or the work product doctrine.[1] The analysis contained in the original ruling regarding these

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[1] Southern Bell is pursuing an appeal of this ruling to the full Commission.

statements and summaries (Order No. PSC-93-0294-PCO-TL), upon which the Order now under review was based, were premised upon two factual predicates: (1) Southern Bell, as a regulated entity, has an ongoing responsibility to comply with the regulations of this Commission and (2) that, in order to do so, Southern Bell conducts reviews, in various forms, of its business operations. Based on these assertions, the Prehearing Officer concluded that the underlying witness statements and summaries are not privileged, even though they were 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 two premises described above, the ultimate holding that these witness statements and summaries were not privileged simply does not follow logically from those premises. This conclusion was also unsupported either by the case law cited by the Prehearing Officer or by the legal authority that does, in fact, govern the attorney-client privilege and the work product doctrine as properly applied to Southern Bell's situation.

5. Southern Bell's arguments as to why the underlying audits are privileged under both the attorney client privilege and the attorney work product doctrine are described at length in the Company's Motion for Review of Order No. PSC-93-0294-PCO-TL. Southern Bell will not burden the Commission with another recitation of the arguments contained in that Motion for Review,

but rather incorporates herein by reference, those arguments.[2] As noted above, although the Commission rejected Southern Bell's arguments, the Company is currently preparing an appeal of the full Commission's affirmance of that order and stands by those arguments.

6. The only significant difference between the instant dispute and the one concerning the underlying witness statements and summaries is that Public Counsel tried a somewhat different approach in this instance to obtain the privileged information that as a matter of law, it is not entitled to discover. In this instance, rather than attempting to obtain the statements and summaries themselves, Public Counsel took the approach of attempting to force one who reviewed some of the factual findings of the investigation (and who obtained certain privileged information only as a result of that work) to divulge the privileged information.

7. Mr. Ward, as a necessary part of his job function, reviewed some of the factual findings of the investigation conducted by the legal department. He did this so that he could assist in providing recommendations regarding discipline. After Southern Bell properly refused to give Public Counsel access to the privileged statements and summaries, Public Counsel simply tried the tactic of deposing Mr. Ward in an attempt to extract the same privileged information contained in the statements and

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[2] For the Commission's ease of reference, a copy of the Motion for Review of Order No. PSC-93-0294-PCO-TL, filed on March 4, 1993, is attached hereto as Attachment "A".

summaries.[3] Obviously, if this information is, as Southern Bell contends, privileged, then it is protected from not only written disclosure but also from disclosure during a deposition. For this reason, Southern Bell's assertion of the privileges should be sustained and the deposition inquiry should be ruled improper.

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 the line of deposition inquiry concerning the witness statements and summaries discussed herein, and denying Public Counsel's Motion to Compel.

Respectfully submitted this 15th day of March, 1993.

SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY

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[3] For example, during Mr. Ward's deposition, Public Counsel asked repeatedly what action(s) formed the basis of the discipline (pp. 18, 21, and 22).

ATTACHMENT "A"

Legal Department

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March 4, 1993

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

RE: Docket No. 920260-TL, 900960-TL, 910163-TL, 910727-TL

Dear Mr. Tribble:

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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.

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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Show cause proceeding against Southern Bell Telephone and Telegraph Company for misbilling customers.	Docket No. 900960-TL
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: Investigation into Southern Bell Telephone and Telegraph Company's compliance with Rule 25-4.110(2), F.A.C., Rebates.	Docket No. 910727-TL
In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell Telephone and Telegraph Company.	Docket No. 920260-TL Filed: March 4, 1993

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S MOTION FOR REVIEW OF THE ORDER GRANTING PUBLIC COUNSEL'S MOTIONS 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 February 23, 1993, the Prehearing Officer entered Order No. PSC-93-0294-PCO-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 three categories of documents: (1) statements of Southern Bell employees made to Southern Bell's attorneys and those attorneys' agents in the course of the attorneys' investigations into matters that are the subject of various Florida Public Service Commission ("Commission") dockets and the attorneys' summaries of those employee statements, all of which were relied on by the attorneys in rendering legal advice to the Company; (2) the worknotes prepared by Human Resources representatives regarding prospective employee discipline, which worknotes contained the substance of certain communications to Southern Bell's attorneys made in the statements and the attorneys' summaries of those employee statements described above; and (3) a statistical analysis prepared under the direction and supervision of Southern Bell employee, D.L. King, made at the request of Company attorneys and provided to these attorneys so that the attorneys could render to the Company their legal opinions.

2. The Prehearing Officer granted Public Counsel's Motions to Compel production of these three 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 law such that the full Commission should review and reverse this decision.

Witness Statements and Summaries

3. In her Order, the Prehearing Officer concluded that the witness statements of Southern Bell employees and the attorneys' summaries of those employee statements were not protected by either the attorney-client privilege or the work product doctrine. This is based on an analysis that is premised upon two factual predicates: (1) Southern Bell, as a regulated entity, has an ongoing responsibility to comply with the regulations of the Commission and (2) that, in order to do so, Southern Bell conducts reviews, in various forms, of its business operations. Based on these assertions, the Order concludes that, because these statements can serve a business purpose of a regulated entity, the in-house investigation is not privileged, even though it was conducted under circumstances in which the attorney-client privilege and work product doctrine clearly apply.

4. While Southern Bell does not take issue with the two premises set forth in the Order, the ultimate holding that witness statements and attorneys' summaries thereof, taken as part of an internal investigation prepared by a regulated entity and conducted by its legal department, 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 Southern Bell's situation.

5. In reaching the conclusion that these statements and summaries, all taken and created by in-house lawyers for 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 Southern Bell's situation, then Southern Bell is entitled to have its assertion of the privileges sustained. Instead, the Order avoids Upjohn by claiming that Consolidated is applicable in the regulatory context. Order at p. 3. The Order further states that in Consolidated the judge considered a narrow view of the privilege to be consistent with the regulator's obligations and duties to protect the public interest. Id. at 4. 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 Southern Bell's case under either the "narrow" or "broad" view.

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 Matress 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 witness statements and attorneys' summaries thereof taken during an internal legal investigation by the attorneys of a regulated entity can never be privileged.

7. In Southern Bell's case, the witness statements and summaries are privileged under both the narrow and broad views

considered in Consolidated. These documents do not memorialize unsolicited or nonspecific legal advice from attorneys. Instead, they 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 statements and summaries 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 another case in a way that either reflects a mistake or understanding as to the legal principle embodied in that case or, alternatively, makes it clear that the legal principle for which the case stands is simply inapplicable to Southern Bell's situation. That case is an opinion letter from the Federal Communications Commission ("FCC") entitled In re: Notification to Columbia Broadcasting System, Inc. Concerning Investigations by CBS of Incidence of "Staging" by its Employees of Television News Programs 45 FCC 2d 119 (November 1973). ("CBS"). Upon review of CBS, however, it is obvious that the dictates of that letter opinion are simply inapplicable to the circumstances of Southern Bell's case. In CBS, the television network allegedly staged six events that were subsequently presented as newsworthy events that had occurred spontaneously. The FCC made an inquiry of CBS's action, which included not only an examination of the underlying facts of the staging, but also of the adequacy of the subsequent investigation by CBS. When the FCC inquired as to the specifics of this

investigation, CBS replied, in part, by invoking the attorney-client and work product doctrine.

9. The FCC found this invocation of the privilege inappropriate for three reasons, none of which apply in this case. The FCC stated that the work-product doctrine created by Hickman v. Taylor, 320 U.S. 495, 67 S. Ct. 385 (1947)[1] pertains only in adversarial proceedings. Thus, the FCC questioned its applicability, given the fact that its review of the investigation of CBS did not occur in an adversarial context. (2) The FCC next stated that "there is considerable doubt whether the attorney-client privilege applies to statements of subordinate employees of the corporation taken by counsel for the corporation." Id. at p. 123. This doubt was, of course, dispelled seven years later by the dispositive interpretation of federal law contained in Upjohn. Finally, the FCC placed great emphasis upon the fact that it was charged with the duty to determine whether CBS had made a thorough investigation. The FCC pointed out that it could not do so if CBS refused, for whatever reason, to provide the FCC with the full details of their investigation.

10. This case differs, of course, because there can be no plausible argument that this is not an adversarial proceeding. In addition, CBS was influenced, at least in part, by the

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[1]As will be discussed further below, this FCC opinion predated by seven years the seminal Upjohn case. Thus, the earlier Hickman case was the most direct Supreme Court pronouncement at that time on the attorney-client privilege and work product doctrine.

ambiguous state of federal law as to attorney-client privilege that existed in 1973. This ambiguity was eradicated by the Supreme Court's ruling in Upjohn. Last, the issue in this matter is not the adequacy of Southern Bell's investigation, but rather the proprietary vel non of the matters that were the subject of that investigation. Thus, CBS is clearly inapplicable.

11. None of the cases cited in the Order stands for the notion that an internal legal investigation performed by a regulated entity can never be privileged. Instead, the Order simply constructs, without the benefit of case support, the fiction that when an internal legal investigation by Southern Bell is conducted 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.

12. A review of the facts submitted by Southern Bell makes it clear that the internal legal investigation was performed by internal lawyers and their agents in order to allow them to render a legal opinion. Further, the subject matter of the communications (the statements) was clearly within their duties, and the information was not disseminated to anyone who did not have a need to know. Accordingly, the statements and the summaries are privileged.

13. 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.

14. 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. Moscony, 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.

15. Likewise, the case of In re: Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2nd Cir. 1984), 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 as to each our review convinces us that the advice sought was legal rather than commercial in character." Id. at p. 1037.

16. 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 below:

> 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 privileged. 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.[2]

17. 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 witness statements and summaries would not have occurred but for the need for a legal opinion to be rendered by attorneys for Southern Bell.

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[2]As will be discussed later, this legal proposition also provides strong support for Southern Bell's assertion of the privileges as to the worknotes of the Human Resources Representatives.

Therefore, the attorney-client privilege applies to the facts in the matter sub judice.

18. 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 to these documents or that the information cannot be otherwise obtained is simply beside the point. The privilege remains absolute and it must be sustained.

19. 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.

20. 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.

21. 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 Southern Bell's internal legal investigation is simply a routine business document. 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 took statements from employees and summarized the same, as part of an internal legal investigation that was undertaken as a result of Public Counsel's filing of a petition to have this Commission initiate a docket to investigate Southern Bell's trouble reporting procedures, and as a further consequence of the Attorney General's criminal investigation of Southern Bell, that these statements and summaries were to be and

actually were used by Southern Bell attorneys to render a legal opinion. Therefore, the resulting documents constitute attorney work product.

22. Further, the case relied upon in the Order in support of the contrary conclusion, Soeder 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 Soeder 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. 6. Soeder, however, is inapplicable for two reasons.

23. 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, "the Commission could request the same investigation Southern Bell has already performed." The difficulty with this analysis lies in the uncontroverted fact that the investigation in question was not conducted for the purpose of trouble shooting Southern Bell's operations. The investigation was not, as in Soeder, a routinely

performed report that simply had the ancillary purpose of providing the basis for a legal opinion.

24. Second, Soeder is inapplicable for a reason that is manifest in the Order. The Soeder 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 the legal investigation 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 investigation was performed for a routine business purpose.

25. In Upjohn, the Supreme Court stated in dictum that even if the subject memoranda memorializing employee statements produced by attorneys were not protected by the attorney-client privilege, they should be protected by the work-product privilege. "To the extent they do not reveal communications, they reveal the attorney's mental processes in evaluating the communications." Upjohn, S.Ct. at p. 688. Therefore, the Court went on to state the applicable standard: "As rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." Id.

26. Federal courts have gone even further in protecting opinion work product, i.e., that which consists of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Rule 26(b)(2), Federal Rules of Civil Procedure. This provision of Rule 26 has been interpreted to mean that "'opinion' work product is absolutely immune from discovery. U.S. v. Pepper's Steel & Alloys, Inc., 132 FRD 695, 698 (S.D. Fla 1990) (emphasis added).

27. In this regard, the statements and the summaries are more than just factual. They contain the attorneys' mental impressions. The statements are a synthesis of what the witnesses told the attorneys or their agents while the summaries themselves pick out what the attorneys believe to be the most important part of the statements. They are therefore protected from discovery for this reason as well. In any event, the Order's assertion that Public Counsel was prejudiced because of Southern Bell's good faith claim of privilege with regard to Public Counsel's Third Set of Interrogatories, which was the subject of the Supreme Court's recent ruling (Case No. 80,004) and thus entitled to the discovery now in dispute is misplaced. Although Southern Bell's good faith argument of privilege was not accepted by the Commission and Southern Bell's Petition to the Supreme Court was denied, Public Counsel now has access to that information and can conduct further discovery. Public Counsel therefore has access to the very information it has sought. For

all these reasons, Southern Bell respectfully asserts that the witness statements and summaries in dispute are privileged and that the Order should be reversed.

Worknotes of Human Resources Representatives

28. Both the analyses as to attorney-client privilege and the work product doctrine that Southern Bell has offered with regard to the internal legal investigation apply equally to the worknotes of Human Resources representatives concerning discipline issues. Although these documents were created under slightly different factual circumstances, the law is clear that the privileges apply to them as well.

29. The worknotes 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 obtained from 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 worknotes were 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, e.g., Cuno, First Chicago, et. al, supra.

30. The Order applies the same improper analysis to these documents as to the witness statements and summaries and again reaches the erroneous conclusion that the investigation is a normal business function. For the reasons discussed above, this conclusion is incorrect as a matter of law. The underlying documents, as discussed above, are themselves privileged. Therefore, the information derived from them is likewise privileged and the worknotes are, accordingly, not subject to discovery.

31. In its rejection of Southern Bell's claims of privilege as to the worknotes, the Order appears to rely heavily on the fact that this extraction of confidential material was made and 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. On this basis, the Order concludes that the privilege is not available.

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

opinion remain privileged, even though the 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 noted 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.

33. 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.

34. 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)

35. 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 the privileged material to corporate employees with a need to know for a business purpose, is plainly contradicted by the applicable law.

36. 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.

Statistical Analysis

37. The analyses relating to attorney-client privilege and the work product doctrine that Southern Bell has offered in support of its objections to producing the witness statements, summaries, and worknotes apply equally to the statistical analysis created by D. L. King. Although this document was created under slightly different factual circumstances, the law is clear that the privileges apply to it as well.

38. The statistical analysis was created by Dan King, Assistant Vice President, Central Office Operations Support for BellSouth Telecommunications, Inc., at the specific request of the legal department as a part of its preparation for litigation in these dockets. This analysis encompasses a number of reports

setting forth the statistical analyses that were performed by Mr. King at the specific request of Southern Bell's legal department. This request was made by the legal department in the context of the internal investigation of matters that are at issue in this docket and that were also the subject of the Attorney General's criminal investigation.

39. The law that provides that the internal investigation is protected from disclosure by the attorney-client privilege and the work product doctrine applies equally to protect these analytical reports. The information at issue was compiled at the specific request of the legal department, within parameters dictated by the legal department, and the purpose of the request by the legal department was to allow the lawyers for Southern Bell to assess the legal ramifications of these matters and thus to provide legal advice to the Company. If this work had been performed by the lawyers themselves, the process of compiling, distilling and analyzing information for the purpose of rendering legal advice would, without question, have been privileged. The fact that this process was performed by an agent of those attorneys, under their direction and within guidelines set forth by them, in no way alters that conclusion.

40. 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)

41. 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 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.

42. 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).

43. 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.

44. It is important to note that there is no requirement that the documents must be produced even if Public Counsel cannot replicate the analysis 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 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.

45. 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 that the volume and complexity of the date require the use of "some" computer system to assist in performing any analysis. Public Counsel then states, in conclusory fashion,

that to perform an equivalent analysis would be impossible because of the complexity of the analysis, the enormous amount of data, and the unique computer system required to process it. Thus, the Order's finding that Public Counsel cannot create an equivalent analysis appears to be based on nothing more than unsupported conclusory allegations. Indeed, to the contrary, Southern Bell has agreed to cooperate with Public Counsel's providing a statistically valid sample of relevant data. Clearly, Public Counsel has failed to sustain its burden of demonstrating hardship. To the extent that the Order holds otherwise, this holding should not be sustained.

Conclusion

46. This Commission should reverse the holding of the Order under review because it is based upon essential mistakes of law. As stated above, the Order is premised upon the fundamentally flawed notion that because an internal legal investigation might serve a business function, its creation necessarily occurs in the routine course of the business of a regulated entity, despite the surrounding circumstances that would otherwise render the investigation 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 worknotes that were derived from privileged communications that clearly would not have occurred but for the internal investigation of Southern Bell's attorneys nor to the statistical analysis.

Therefore, neither the investigation nor the worknotes nor the statistical analysis were created in the normal course of business and all are privileged.

47. Under the rule of Upjohn, the employee statements, summaries, worknotes, and statistical analysis 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 documents. Finally, there is nothing in the limited internal disclosure by Southern Bell of the investigatory materials to the drafters of the subsequent worknotes 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, thereby sustaining Southern Bell's assertion of the privileges as to all three categories of documents, and denying Public Counsel's Motions to Compel.

Respectfully submitted this 4th day of March, 1993.

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