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March 16, 1993

Steve Tribble, Director  
Division of Records and Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, FL 32399-0850

Re: Docket No. 920260-TL

Dear Mr. Tribble:

Enclosed for filing in the above-referenced docket on behalf of the Citizens of the State of Florida are the original and 15 copies of the Citizens' Response to Southern Bell Telephone & Telegraph Company's Motion for Review of Order Granting Public Counsel's Motion to Compel.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

- ACK ✓
- AFA 3
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- DMU (circled)
- CTR \_\_\_\_\_
- E'S \_\_\_\_\_
- LEG 1 W/M
- LIT 6
- CPS \_\_\_\_\_
- TRM \_\_\_\_\_
- SIS 1
- WIP \_\_\_\_\_
- OTL \_\_\_\_\_

Enclosure

Sincerely,

*Janis Sue Richardson*  
Janis Sue Richardson  
Associate Public Counsel

DOCUMENT NUMBER-DATE  
02861 MAR 16 93  
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the )  
Integrity of Southern Bell's ) Docket No. 910163-TL  
Repair Service Activities and )  
Reports )

Comprehensive Review of the )  
Revenue Requirements and Rate ) Docket No. 920260-TL  
Stabilization Plan of Southern )  
Bell Telephone and Telegraph )  
Company )

Show Cause Proceeding Against )  
Southern Bell Telephone and ) Docket No. 900960-TL  
Telegraph Company for Misbilling )  
Customers )

Investigation into Southern Bell )  
Telephone and Telegraph ) Docket No. 910727-TL  
Company's Compliance with Rule )  
25-4.110(2), F.A.C. )

Filed: March 16, 1993

**CITIZENS' RESPONSE TO SOUTHERN BELL TELEPHONE AND TELEGRAPH  
COMPANY'S MOTION FOR REVIEW OF THE ORDER GRANTING PUBLIC  
COUNSEL'S MOTION TO COMPEL**

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this response to BellSouth Telecommunications, Inc. d/b/a/ Southern Bell Telephone and Telegraph Company's ("Southern Bell") request for reconsideration of the prehearing officers' Order No. PSC-93-0317-PCO-TL, which ordered Southern Bell to permit Ms. Shirley T. Johnson, chief auditor, to answer deposition questions concerning the five internal audits, which the company considers privileged. Citizens

request this Commission to deny Southern Bell's request for reconsideration and as grounds therefor state the following:

1. Southern Bell requests the full Commission to overturn the prehearing officer's order denying Southern Bell's claim of privilege as its basis for refusing to allow Ms. Shirley T. Johnson to answer Public Counsel's deposition questions. Southern Bell Telephone and Telegraph Company's Motion for Review of the Order Granting Public Counsel's Motion to Compel, Dockets Nos. 910163-TL, 920260-TL, 900960-TL & 910727-TL (Mar. 10, 1993) [hereinafter Southern Bell's Motion].

2. Southern Bell has failed to meet the standard of review of a prehearing officer's order on reconsideration. The standard of review adopted by the Commission requires Southern Bell to demonstrate that the prehearing officer made an error in fact or law in her decision that requires that the full Commission reconsider that decision. See In re: Petition on Behalf of Citizens of the State of Fla. to Initiate Investigation into Integrity of Southern Bell Tel. & Tel. Co.'s Repair Service Activities and Reports, 91 F.P.S.C. 12:286, 287 (1991) (Docket No. 910163-TL, Order No. 25483, which was affirmed by the full Commission on reconsideration in Order No. PSC-92-0339-FOF-TL). The company has failed to show that the prehearing officer erred in her finding that the company's refusal to allow Ms. Johnson to answer deposition questions was improper. As this Commission has already

found the underlying audits not to be privileged, then questions concerning those audits are proper. Order Granting Public Counsel's Motion to Compel, Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL, 2 (Mar. 1, 1993) (Order No. PSC-93-0317-PCO-TL expressly notes the full Commission's rejection of Southern Bell's privilege claim for the five audits) [hereinafter Order No. PSC-93-0317-PCO-TL].

3. Southern Bell repeats its arguments for privilege that were addressed fully and denied.<sup>1</sup> To satisfy the standard for reconsideration, a motion must bring to the Commission's attention some matter of law or fact which the prehearing officer failed to consider or overlooked in her decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). The motion may not be used as an opportunity to reargue matters previously considered merely because the losing party disagrees with the judgment or order. Diamond Cab Co., 146 So. 2d at 891. Southern Bell has done just that by simply adopting its arguments in prior motions already disposed of by the Commission. Southern Bell's Motion at 3, ¶ 5. Southern Bell's motion must be summarily denied.

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<sup>1</sup> Order No. PSC-93-0317-PCO-TL; Order Granting Public Counsel's Motions for In Camera Inspection of Documents and Motions to Compel, Dockets Nos. 910163-TL, 920260-TL, 900960-TL, 910727-TL; Order No. PSC-93-0151-CFO-TL (Jan. 28, 1993) (compelling Southern Bell to produce its five internal audits on its repair and rebate processes) [hereinafter Order No. PSC-93-0151-CFO-TL].

4. Order No. PSC-92-0317-PCO-TL correctly decided that the company's arguments had no merit in fact or law. The prehearing officer determined that since the audits were not privileged under either the attorney-client privilege or the work product doctrine then questions about those audits were not privileged. Order No. PSC-92-0317-PCO-TL. No error of fact or law has been demonstrated to overturn the prehearing officer's order on reconsideration. See Grady v. Department of Prof. Reg., Bd. of Cosmetology, 402 So. 2d 438 (Fla. 1st DCA 1981) (holding that agency's interpretation of cosmetology licensing statute to include "esthetic" activities when the statutory wording did not explicitly include them was entitled to great weight and would not be overturned unless clearly erroneous), dismissed, 411 So. 2d 382 (Fla. 1981). Hence, the Commission must affirm the prehearing officer's order.

5. Even if the underlying audits had not been privileged, Public Counsel's questions as to the underlying facts would still have been proper. United States v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695 (S.D. Fla. 1990). The United States District Court for the Southern District of Florida recently dealt with this issue. Id. Florida Power & Light [FP&L] deposed U.S. Fidelity and Guaranty's [USF&G] supervising examiner for its liability division. Id. at 697. As liaison to the insurance coverage counsel, the court's opinion suggests that USF&G's manager had reviewed documents prepared by counsel in preparation for litigation. Id. at 697 & 699. The district court summarized the work product privilege under federal law as encompassing both fact and opinion

work product. Id. at 697-99; Fed. R. Civ. P. 26(b)3; accord Fla. R. Civ. P. 1.280(b) (trial preparation materials discoverable on showing of need and inability to obtain substantially equivalent information by other means without undue hardship). The district court concluded that "[f]acts gathered from documents by a party's representative are not protected as 'fact work product.'" Id. at 697. USF&G asserted that the documents reviewed by its manager contained counsel's mental impressions and were thus not discoverable as opinion work product. Id. at 698. The district court stated that this did not "permit a deponent to assert the work product privilege merely because the inquiry involves facts which are contained in those documents." Id. (citing Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, et al., 120 F.R.D. 504, 509 (W.D. La. 1988)).

6. USF&G's counsel had instructed the manager as follows:

I'll allow the witness to answer over my objection, to the extent that the witness can answer and conclude that any other information that you have on this was received not on the basis of working with counsel in connection with this litigation or that you did not obtain this information in respect to the handling of this claim after litigation between Pepper's and USF & G.

If you can make that determination, Mr. Anderson, prior to the institution of this litigation and, if you make the determination outside of working in connection with litigation either with counsel or with your colleagues at USF & G, then, I'll allow you to answer the question.

Otherwise, I'm going to direct the witness not to answer on the ground that it called for privilege communications.

. . . .

...if you've ever seen a document in connection with your working with counsel on this litigation or if you've seen a document subsequent to the institution of the litigation between Pepper's and USF & G, then, I'll direct you not to answer that.

If you could otherwise separate the information that you obtained in that regard, then, I'll allow you to answer, Mr. Anderson; otherwise, if you can't separate it in your mind or if you conclude that the answer to [opposing counsel's] question was obtained through conversations with counsel or your handling of this litigation, then, I'll direct you not to answer.

Id. at 699 n.2. The district court held that the manager must answer FP&L's questions as "USF&G cannot shield itself from discovery by objecting to all questions which would require the deponent to testify regarding facts learned while reviewing documents selected by USF & G's counsel." Id. at 699.

7. Southern Bell issued similar all-inclusive instructions to Ms. Johnson during Public Counsel's deposition. Citizens' Motion to Compel BellSouth Telecommunications' Operations Manager--Florida Internal Auditing Department--Shirley T. Johnson, and BellSouth Telecommunications' Human Resource Operations Manager Dwane Ward, to Answer Deposition Questions and Motion to Strike the Affidavits of Shirley T. Johnson, Docket No. 910163-TL (Oct. 23, 1992) (Attachment A: Johnson deposition) [hereinafter Citizens' Motion

to Compel Johnson]. Mr. Beatty, company counsel, instructed Ms. Johnson at the very beginning of the deposition as follows:

[M]iss Johnson, as you know, the Southern Bell Legal Department conducted an investigation regarding the matters pertaining to this particular docket about which we are here today. That investigation, as you also know, was undertaken pursuant to the attorney-client privilege and the attorney work product doctrine and thus is it [sic] privileged and protected from disclosure to third persons. Because of that, we would request that you not divulge any information at all regarding the substance of that investigation. Of course, you are always permitted to testify with regard to any personal knowledge that you have that was not obtained from the investigation.

In order to ensure that everything is very clear on the record, in the event that the question is asked of you, and that your answer would reveal something pertaining to the investigation, then please identify that your answer would pertain to the investigation, so that opposing counsel can understand very clearly and the record can be clear that this information that you believe is protected for which the company will make objection.

Citizens' Motion to Compel Johnson, Att. A: Johnson deposition, at 4-6, 1.25 - 1.3 (emphasis added). Excerpted pages of Ms. Johnson's deposition are appended to this motion as Attachment A.<sup>2</sup> Throughout the deposition, Mr. Beatty repeatedly instructed Ms. Johnson not to answer Public Counsel's questions. For example, when questioned as to a statement in her affidavit, a matter of public record, Mr. Beatty objected:

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<sup>2</sup> The company has requested confidential treatment of a portion of Ms. Johnson's deposition, page 7, lines 6-7. Southern Bell Tel. & Tel. Co. Motion for Confidential Treatment and Permanent Protective Order, Docket No. 910163-TL (Nov. 20, 1992).



Q: (By MS. RICHARDSON): You state that data was statistically selected. Would you please explain that selection process?

MR. BEATTY: I'm going to object. I'm going to object and instruct her not to answer on the grounds that to go at this juncture beyond this affidavit would be to get into the substance of the protected information regarding the investigation.

THE WITNESS: I have knowledge, but I will not answer based on legal counsel or based on the legal privilege of these audits.

Id. at 37-38, ll. 20-7 (Johnson deposition).

8. Southern Bell, like USF&G has attempted to shield itself from discovery by an over-inclusive definition of work product and attorney-client privileges. This it may not do. To permit Southern Bell to hide the facts behind broad claims of privilege would impede this Commission's just resolution of this case and nullify its statutory authority. Additionally, to permit the company to make factual assertions in its affidavits and then deny Public Counsel the opportunity to uncover the basis for those assertions would be manifestly unfair. See Internat'l Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 92 (D. Del. 1974).

9. Southern Bell's claim of attorney-client privilege as a basis for instructing Ms. Johnson not to answer Public Counsel's questions, like its work product claim, is without legal foundation. The attorney-client privilege protects communications not facts. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) (emphasis added). Ms. Johnson does not have any privilege to

refuse to provide answers to Public Counsel's fact-finding questions. In re Six Grand Jury Witnesses, 979 F.2d 939, 945 (2d Cir. 1992) (finding that "the underlying information or substance of the communication is not, as appellants incorrectly believe, so privileged").<sup>3</sup>

10. To the extent that the Commission on reconsideration reevaluates the parties' original arguments as to whether the underlying audits are privileged, Citizens reiterate their prior arguments and incorporate them herein. Citizens' Response and Opposition to Southern Bell Telephone and Telegraph Company's Motion for Review of Order Granting Public Counsel's Motion for In Camera Inspection of Documents and Motions to Compel, Dockets Nos. 910163-TL, 920260-TL, 900960-TL, 910727-TL (Feb. 12, 1993).

11. To the extent that the Commission on reconsideration reevaluates the parties' original arguments as to whether Ms. Johnson may refuse to answer questions under a claim of privilege, Citizens reiterate their prior arguments and incorporate them herein. Citizens' Motion, supra ¶ 7, at 6. Since the audits are not privileged, Ms. Johnson has no privilege to refuse to answer Public Counsel's questions.


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<sup>3</sup> This case came before the second circuit court on an allegation of defrauding the U.S. government on satellite contracts by submitting expense claims containing false statements. Id. at 941. The company counsel directed its employees to investigate. Id. at 942. The company then directed its employees to assert the attorney-client and work product privileges in refusing to answer grand jury questions. Id.

WHEREFORE, Citizens request this Commission to deny Southern Bell's motion and compel the company to direct Ms. Johnson to answer Public Counsel's questions.

Respectfully submitted,

JACK SHREVE  
Public Counsel

  
CHARLES J. BECK  
Deputy Public Counsel  
JANIS SUE RICHARDSON  
Associate Public Counsel

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Attorneys for the Citizens  
of the State of Florida

**ATTACHMENT A: EXCERPTS OF JOHNSON DEPOSITION**

**ORIGINAL**

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 910163-TL

FILED: October 7, 1992

In the Matter of:

Petition on behalf of  
CITIZENS OF THE STATE OF FLORIDA  
to initiate investigation into integrity of  
SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY'S  
repair service activities and reports.

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DEPOSITION OF: SHIRLEY T. JOHNSON

DATE: October 14, 1992

TIME: Commenced at: 11:00 a.m.  
Concluded at: 12:25 p.m.

PLACE: Southern Bell Telephone and Telegraph Co.  
666 Northwest 79th Avenue, Room 674  
Miami, Florida 33126

REPORTED BY: JOHN J. BLUE,  
Registered Professional Reporter,  
Notary Public,  
State of Florida At Large  
Suite 1014, Ingraham Building  
25 Southeast 2nd Avenue  
Miami, Florida 33131

TAKEN BY: The Citizens of Florida, by and through  
Janis Sue Richardson,  
Associate Public Counsel

JOHN J. BLUE & ASSOCIATES - MIAMI, FLORIDA

**ORIGINAL**

1 THEREUPON:

2 SHIRLEY T. JOHNSON,

3 having been first duly sworn, was  
4 examined and testified as follows:

5 MS. RICHARDSON: Mr. Beatty, did you  
6 want to make a statement?

7 MR. BEATTY: I do. My name is Robert  
8 Beatty, and I represent BellSouth  
9 Telecommunications, Inc., doing business in  
10 Florida as Southern Bell.

11 Just a few comments I'd like to  
12 make; four, to be exact. One is the fact  
13 that this deposition is taken pursuant to  
14 proper notice, so that there is no  
15 objection to either the time or the place  
16 of this depo.

17 Second, that the parties stipulate  
18 and agree to reserve all evidentiary  
19 objections except as to form and as to  
20 relevance. At least occasionally as to  
21 relevance.

22 Third, that we do not waive reading  
23 or signing of the deposition if it is in  
24 fact transcribed.

25 And fourth, Miss Johnson, as you

JOHN J. BLUE & ASSOCIATES - MIAMI, FLORIDA

1 know, the Southern Bell Legal Department  
2 conducted an investigation regarding the  
3 matters pertaining to this particular  
4 docket about which we are here today.  
5 That investigation, as you also know, was  
6 undertaken pursuant to the attorney-client  
7 privilege and the attorney work product  
8 doctrine and thus is it privileged and  
9 protected from disclosure to third  
10 persons. Because of that, we would  
11 request that you not divulge any  
12 information at all regarding the substance  
13 of that investigation. Of course, you are  
14 always permitted to testify with regard to  
15 any personal knowledge that you have that  
16 was not obtained from the investigation.

17 In order to ensure that everything  
18 is very clear on the record, in the event  
19 that the question is asked of you, and  
20 that your answer would reveal something  
21 pertaining to the investigation, then  
22 please identify that your answer would  
23 pertain to the investigation, so that  
24 opposing counsel can understand very  
25 clearly and the record can be clear that

1 this is information that you believe is  
2 protected for which the company will make  
3 objection.

4 THE WITNESS: Yes, sir.

5 MR. BEATTY: Any questions?

6 THE WITNESS: No.

7 MS. RICHARDSON: And Miss Johnson,  
8 other than the instructions you've just  
9 been given, were you asked to limit your  
10 responses here today in any way?

11 THE WITNESS: No.

12 MS. RICHARDSON: Then will you give  
13 us your full and complete responses to any  
14 questions that we may ask?

15 THE WITNESS: Yes.

16 MS. RICHARDSON: Thank you.

17 DIRECT EXAMINATION

18 BY MS. RICHARDSON:

19 Q. To begin, would you please state your  
20 name and spell your name for the Court Reporter so  
21 we'll have it accurately.

22 A. Shirley T. Johnson. S-H-I-R-L-E-Y. T.  
23 Johnson, J-O-H-N-S-O-N.

24 Q. Would you please give him your full  
25 business address?



1 a precursor exhibit.

2 THE WITNESS: All right.

3 MS. RICHARDSON: Let's go off the  
4 record a minute.

5 (Discussion off the record, with the  
6 agreement of the witness and all parties present)

7 MS. RICHARDSON: We're back on the  
8 record.

9 Q. (BY MS. RICHARDSON): I'm going to show  
10 you your affidavit that we discussed a little bit  
11 earlier. I'll let you look at the first page so you  
12 can identify it. And if you would look at page two,  
13 paragraph four.

14 MR. BEATTY: Let me just --  
15 (examining instrument). You want her to  
16 look at what?

17 MS. RICHARDSON: Page two; page two,  
18 paragraph four.

19 THE WITNESS: Okay.

20 Q. (BY MS. RICHARDSON): You state that data  
21 was statistically selected. Would you please  
22 explain that selection process?

23 MR. BEATTY: I'm going to object.  
24 I'm going to object and instruct her not to  
25 answer on the grounds that to go at this

1            juncture beyond this affidavit would be to  
2            get into the substance of the protected  
3            information regarding the investigation.

4            THE WITNESS: I have knowledge, but I  
5            will not answer based on legal counsel or  
6            based on the legal privilege of these  
7            audits.

8            MS. RICHARDSON: Thank you.

9            Q.        (BY MS. RICHARDSON): Why were February  
10           and August of 1990 and May of 1991 used, as opposed  
11           to other dates?

12           MR. BEATTY: I'm going to again  
13           object, to the extent that this information  
14           would reveal something of the substance of  
15           the investigation, and request that the  
16           witness not respond.

17           THE WITNESS: I have knowledge, but  
18           will not answer based on the legal  
19           privilege of these audits.

20           Q.        (BY MS. RICHARDSON): Do you have any  
21           information other than information connected to the  
22           investigation as to why these dates were chosen?

23           A.        No, I do not.

24           Q.        Would you look at paragraph five?

25           A.        (Examining instrument). Okay.

**CERTIFICATE OF SERVICE  
DOCKET NO. 920260-TL**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 16th day of March, 1993.

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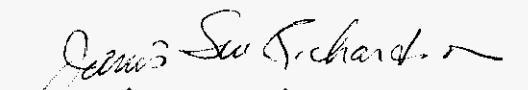
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