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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 Motions for In Camera Inspection of Documents and Motions 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
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- SEC 1
- WAS _____
- OTC _____

Sincerely,

Janis Sue Richardson
Janis Sue Richardson
Associate Public Counsel

Enclosure

Jan

DOCUMENT NUMBER-DATE
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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 ORDER GRANTING PUBLIC COUNSEL'S
MOTIONS FOR IN CAMERA INSPECTION OF DOCUMENTS AND MOTIONS 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-93-294-PCO-TL, which ordered Southern Bell to produce documents withheld under a claim of privilege. Citizens request this Commission to deny Southern Bell's request for reconsideration and as grounds therefor state the following:

I. Background

1. Southern Bell requests the full Commission to overturn the prehearing officer's order denying Southern Bell's claim of privilege for (1) a statistical analysis done on the company's customer repair and rebate systems,¹ (2) personnel department work notes on employee discipline,² and (3) statements made by employees, who pleaded the fifth amendment privilege against self-incrimination as a basis for refusing to answer deposition questions posed by Public Counsel and by one employee now deceased.³ Southern Bell Telephone and Telegraph Company's Motion for Review of 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 (Mar. 4, 1993) [hereinafter Southern Bell's Motion].

II. Standard of Review

¹ Citizens' Seventh Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (July 23, 1992) (Citizens' twenty-fourth document request served June 3, 1992).

² Citizens' Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (May 21, 1992) (Citizens' twenty-second document request, filed March 25, 1992, sought documents related in any way to disciplinary actions taken against any present or past employees based on falsification of repair reports, manipulation of repair records to satisfy commission rules, and creation of fictitious reports).

³ Citizens' Ninth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision, Docket No. 910163-TL (Oct. 10, 1992) (Citizens' twenty-seventh document request served Aug. 3, 1992).

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 statistical analysis, personnel work notes on employee discipline, and statements made by employees unavailable for deposition are not privileged. As Public Counsel noted in its motions to compel discovery of these documents, Southern Bell has the burden of first showing that the documents being withheld are in fact privileged.

3. Southern Bell repeats its arguments for privilege that were addressed fully and denied in Order No. PSC-93-0294-PCO-TL. 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.

4. Order No. PSC-92-0294-PCO-TL identified each of Southern Bell's written and oral arguments and correctly decided that each of the arguments had no merit in fact or law. The prehearing officer determined that the statistical analysis, and personnel work notes, and the statements and summaries of unavailable employees were not privileged under either the attorney-client privilege or under the work product doctrine. Order No. PSC-92-0294-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).

III. In Camera Inspection

5. Should the Commission nonetheless entertain Southern Bell's repetition of its prior arguments, Citizens reassert their prior arguments, which were fully considered in Order No. PSC-92-0294-PCO-TL. See Citizens' Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (May 21, 1992); Citizens' Seventh Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (July 23, 1992); and

Citizens' Ninth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision, Dockets Nos. 910163-TL (Oct. 8, 1992) [hereinafter Citizens' Ninth Motion]. If the Commission reweighs the arguments presented, it too will need to conduct an in camera review of all the withheld documents. Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d DCA 1983). "The purpose of this examination is not to determine whether there is good cause to overcome the privilege, but rather to determine whether the items are, as a matter of law and fact, entitled to the privilege at all." International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (emphasis in original). After reviewing the documents, the Commission will undoubtedly reach the same conclusions of fact and law as Commissioner Clark.

IV. Privilege Analysis

6. The crux of this Commission's decision rests on whether the prehearing order correctly applies Florida's law of privilege to the documents being withheld by Southern Bell. The attorney-client privilege in Florida is statutory. Fla. Stat. § 90.502 (1991 & 1992 Supp.); cf. Fed. R. Civ. P. 501 (adopting judicially expanded common-law privilege). The work product doctrine is judicially created. Fla. R. Civ. P. 1.280; accord Fed. R. Civ. P. 26(b). Judicial application of the law of privilege from discovery acknowledges that privileges should be narrowly construed as privileges deny the tribunal access to the very facts it needs for

an efficient and just determination. See United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 604 & n.1 (D.D.C. 1979); Consolidated Gas Supply Corp., 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981); 8 Wigmore Evidence § 2291 at 554 (McNaughten rev. 1961) ("Nevertheless, the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . .It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.")

7. The prehearing officer determined that "[t]he more narrow view in Consolidated is applicable in the regulatory context, rather than Southern Bell's broad-brush claim of privilege." Order No. PSC-93-0294-PCO-TL at 3. Harmonizing Florida's statutory privilege with the Commission's statutory mandate to regulate telecommunications monopolies in the public interest, Commissioner Clark correctly determined that Southern Bell's reliance on federal case law was misplaced. Order No. PSC-93-0294-PCO-TL at 4. Southern Bell has failed to demonstrate that Commissioner Clark erroneously applied the law of privilege.

8. Commissioner Clark's prehearing order focuses on two further aspects of the law of privilege: (1) facts are not privileged⁴ and (2) documents created for a business purpose are

⁴ Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

not privileged.⁵ All of the documents in question contain relevant facts about the company's handling of customer repair reports. Southern Bell would deny not only Public Counsel, but the Commission as well, access to the critical facts needed to resolve the issues in this case through its overly broad claim of privilege. Witnesses are unavailable for deposition,⁶ so the facts contained in their statements to the company are the only record of their knowledge. Mr. Danny L. King, the author of the statistical analysis, has refused to answer questions of fact about that analysis under counsel's privilege objection.⁷ If the personnel work notes inspected in camera are similar to the work notes voluntarily produced by the Human Resource manager,⁸ then these documents also contain facts. Southern Bell impeded a full exploration of the facts contained in the work notes produced by directing the author of those notes to refuse to answer deposition questions under a claim of privilege. See Citizens' Tenth Motion,

⁵ See e.g., First Chicago Internat'l v. United Exch. Co., Ltd., 125 F.R.D. 55, 57 (S.D.N.Y. 1989).

⁶ Citizens' Ninth Motion.

⁷ Citizens' Motion to Compel BellSouth Telecommunications' Assistant Vice-President, Central Operations Mr. Danny L. King, and BellSouth Telecommunications' Manager, Information Systems, Ms. Etta Martin to Answer Deposition Questions and Motion to Strike the Affidavit of Mr. King, Dockets Nos. 910163-TL, 920260-TL, 900960-TL, 910727-TL (Feb. 24, 1993) (decision pending) [hereinafter Citizens' Motion to Compel King].

⁸ Citizens' Tenth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision with Supporting Memorandum of Law, 13-14 & exhibits B, C & D, Docket No. 910163-TL (Dec. 16, 1992) (decision pending).

supra note 8. Southern Bell, through its employees and its system, has sole possession of the facts in this case.

9. Accepting Southern Bell's statement of the facts and law would deny this Commission access to the facts it needs to fulfill its duty to protect the citizens of this state and to render a just decision. As Commissioner Clark points out, the Commission has requested the same information and Southern Bell has admitted that, if requested, it would have to perform the same investigation. Order No. PSC-93-0294-PCO-TL at 5. Clearly, the Legislature could not have intended such a nonsensical result when it passed these two statutes. Commissioner Clark's application of the law to the facts in this case is the only reasonable interpretation and should be upheld.

10. The attorney-client privilege protects communications of a client who seeks legal advice. Communications to attorneys for the purpose of seeking business advice are not privileged. Order No. PSC-93-0294-PCO-TL at 3 (citing First Chicago Internat'l v. United Exch. Co., Ltd., 125 F.R.D. 55, 57 (S.D.N.Y. 1989)). The business exception applies to the work product doctrine as well. E.g., Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987) (concluding that aggregate risk management documents, derived from individual attorneys reserve estimates, were business planning documents), cert. denied, 484 U.S. 917 (1987).

11. Southern Bell states 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."

Southern Bell Motion at 9, ¶ 14. What Southern Bell avoids discussing is the application of legal privilege to its position as a regulated monopoly. Lengthy citations to federal common law privilege cases do not controvert the reasoned application of privilege to the facts of this case.

12. Southern Bell has an ongoing responsibility to adhere to Commission rules. Order No. PSC-93-0294-PCO-TL at 3. This responsibility was heightened when Southern Bell sought and won an opportunity to institute an experimental rate plan, referred to as "incentive regulation." In re: Petition of Southern Bell Tel. & Tel. Co., 88 F.P.S.C. 10:311 (Oct. 13, 1988) (Dockets Nos. 880069-TL, 870832-TL; Order No. 20162) [hereinafter Order No. 20162]. The Commission put Southern Bell on notice that it would be monitoring its customer service closely.

A final area of review would be Southern Bell's quality of service. There is concern that the company might improve earnings over the short run by letting quality of service slip. In order to discourage and detect such actions, our Staff will continue its ongoing review of service quality as required by Commission Rules and will consider more expanded or extensive service audits if any significant slippage in quality is detected. The Commission will be notified if service quality significantly deteriorates during the course of this plan, or if Commission Rules concerning service standards are violated. The Commission may then consider imposing a penalty on Southern Bell.

Order No. 20162 at 10:337 (emphasis added). Southern Bell clearly has a duty to reveal any document, whether produced by an attorney or another employee, that reveals a deterioration of service quality or a violation of Commission rules. This

regulatory business purpose, which is inherent under traditional ratesetting, was heightened under this experimental rate design.

13. Southern Bell has indicated that but for the opening of investigatory dockets it would not have conducted this internal investigation into allegations of customer abuse. Southern Bell's Motion at 13, ¶ 21. However, Southern Bell's own internal reviews, conducted prior to the opening of the recent legal dockets, warned the company that it had serious problems that demanded this intensive an investigation. C. Vinson, Southern Bell Tel. & Tel. Co. Repair Process Controls, 49 §6.2 "Adequacy of Management's Response to Problems" (Feb. 1993) (testimony filed Mar. 1, 1993 in Docket No. 910163-TL). To the extent it chose to ignore early warnings of customer abuse, which preceded the initiation of legal proceedings, it violated Order No. 20162 and its general duty to inform the Commission of any violation of rules or law. Clearly, Southern Bell had a general and specific business purpose in performing this investigation that preceded, juxtaposed and succeeds this case. Additionally, Southern Bell's use of the investigative materials to extensively overhaul its repair process and discipline 112 employees confirms its business purpose. J. Lacher, Testimony of Southern Bell Tel. & Tel. Co., 12, 1.15 & 33, 11.2-20 (Docket No. 920260-TL) (Feb. 15, 1993).

14. Commissioner Clark recognized that fact. She ruled that all of the withheld documents were created for a business purpose and, therefore, were not protected from discovery by either the attorney-client privilege or the work product

doctrine. Order No. PSC-93-0294-PCO-TL. Indeed, Southern Bell agreed that the Commission could simply order the company to reproduce the same investigation. Id. at 5. Southern Bell's arguments were rejected by the prehearing officer and should be rejected on reconsideration by the full Commission.

V. Employee Statements and Summaries

15. The employee statements and summaries requested by Public Counsel are limited to five employees who were unavailable for questioning because of death or pleading the fifth amendment in depositions conducted by Public Counsel. Citizens' Ninth Motion, supra note 3. Southern Bell argues that employee statements and summaries, which were used for a concurrent business purpose, are nevertheless privileged because the company attorney requested the information and dissemination was limited to those managers with a "need to know." Southern Bell then mischaracterizes the prehearing officer's thoughtful analysis of its privilege claim as "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. . . ." Southern Bell's Motion at 3, ¶ 4; see id. at 4, ¶ 5. (emphasis added).

16. The order does not make this blanket ruling; rather, Commissioner Clark expressly states:

The Commission has recently rejected this analysis, Order No. PSC-93-0151-CFO-TL, and that analysis is again rejected here. A major insufficiency in it is Southern Bell's

claim that its in-house investigation was undertaken solely to obtain legal advice and would not otherwise have been initiated. That claim is facially at odds with Southern Bell's ongoing responsibilities as a regulated utility, rules 25-4.070(2), 25-4.108, 25-4.019, especially where its specific operations subject to those rules have been under investigative scrutiny by a number of different state agencies and this Commission as well. Moreover, Southern Bell itself more realistically related its in-house investigation to the need to find improper acts and correct them. Motion For Review [of Order PSC-93-0151-CFO-TL] filed February 5, 1993, at p. 23.

Order No. PSC-93-0294-PCO-TL at 3.

17. Southern Bell argues that Commissioner Clark's order avoids Upjohn Co. v. United States, 449 U.S. 383 (1981) by applying Consolidated Gas Supply Corp., 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981). Southern Bell's Motion at 4, ¶ 5. Under Southern Bell's analysis, everything any employee relates to company counsel becomes privileged. Upjohn teaches that under the federal common-law of privileges⁹: (1) employees' oral and written statements to a corporate attorney relating their witnessing bribes paid to foreign officials are privileged because the facts related in those statements, not the statements themselves, were disclosable in deposition; and (2) the definition of "client" extends beyond the "control-group" or decision-makers, to encompass any employee who has witnessed events within the scope of his employment and divulges that

⁹ Federal Rule of Civil Procedure 501 expressly adopts the judicially expanded common-law of attorney-client privilege except where state law provides the rule of decision.

information to corporate counsel at the request of his superior for the purpose of obtaining legal advice. Upjohn Co. v. United States, 449 U.S. 383 (1981).

18. Upjohn is not dispositive because: (1) it is based on a judicially interpreted common-law of privilege and Florida's attorney-client privilege is statutorily created; (2) the employee statements and summaries are the only available accounts of the knowledge of these witnesses as they, unlike the employees in Upjohn, are not available for deposition;¹⁰ (3) the statements, summaries, personnel work notes and statistical analysis were a routine business response to a monopoly's need to comply with the rules of its regulatory body; and (4) the facts contained in these documents have been withheld from Public Counsel in deposition by corporate counsel's refusal to allow its employees to answer questions regarding the facts uncovered by their efforts.¹¹

¹⁰ Citizens explained in their ninth motion to compel that depositions of these witnesses had been delayed due to the company's appeal of the Commission's order to release the names of persons with knowledge. See Southern Bell Tel. & Tel. Co. v. Florida Pub. Serv. Comm'n, No. 80,004 (Fla. Feb. 4, 1993) (petition for review denied, vote 7-0). Over a year later, when Public Counsel had the opportunity to depose these employees, one was deceased and the others refused to testify. Citizens' Ninth Motion at 14, ¶ 18. Commissioner Clark recognized that the delay impeded discovery and justified production of these statements under the need exception to the work product doctrine. Order No. PSC-93-0294-PCO-TL at 5.

¹¹ Public Counsel deposed Mr. Danny L. King, the director of the statistical analysis; Mr. C.L. Cuthbertson, the personnel director who authored or directed the compilation of the work notes; and Mr. C.J. Saunders, the vice-president in charge of the disciplining of network employees. In all of these depositions, company counsel refused to allow employees to answer questions

19. The U.S. Supreme Court's holding in Upjohn does not apply specifically because the Court was dealing with a factual situation in which the opposing party [IRS] had access to the names of the employees/witnesses, had received a summary of Upjohn's internal review, and had not attempted to depose any of the employees/witnesses. Southern Bell refused to provide the names of employees/witnesses¹² and refused Public Counsel access to the facts in depositions. Clearly, Upjohn does not apply. Southern Bell has failed to demonstrate any error of fact or law in the prehearing officer's reasoning that Consolidated Gas Supply Corp., 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981) was more closely analogous to this case.

20. Southern Bell argues that the prehearing officer improperly rejected its claim of work product immunity for the employee statements and summaries as these documents reflect its attorneys' mental impressions and not just facts. Southern Bell's Motion at 16, ¶ 27. Therefore, these statements are opinion work product and not discoverable. Id. Southern Bell further argues

under a claim of privilege. See Citizens' Motion to Compel King, supra note 7; Citizens' Motion to Compel BellSouth Telecommunications' Vice President Network--South Area C.J. Saunders and BellSouth Telecommunications' General Manager C.L. Cuthbertson, Jr., to Answer Deposition Questions, Docket No. 920260-TL (July 2, 1992), granted, In re: Southern Bell Tel. & Tel. Co., Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL (Mar. 4, 1993) (Order No. PSC-93-0334-PCO-TL).

¹² The Commission upheld Public Counsel's right to the names of the employees interviewed in Order No. PSC-92-0339-FOF-TL, issued May 13, 1992. Southern Bell appealed that order to the Supreme Court of Florida. Southern Bell Tel. & Tel. Co. v. Fla. Pub. Serv. Comm'n., No. 80,004 (Feb. 4, 1993) (petition for review denied).

that Public Counsel no longer has a need for these documents as it has released the names of persons with knowledge pursuant to a supreme court order and can now depose other employees. Id. Public Counsel does not have access to deposing the deceased employee or those employees who have pled the fifth amendment. Nor does he have access to full disclosure where corporate counsel curtails testimony by an overly broad assertion of attorney-client privilege. See United States v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695, 699 & n.2 (S.D. Fla. 1990) (finding counsel's instruction to not answer any question if deponent's knowledge came from working with counsel completely erroneous).

21. Commissioner Clark found sufficient cause to compel production of these documents. "There is no doubt that production of a statement should be ordered if a witness has a faulty memory and can no longer relate details of the event The mere lapse of time is in itself enough to justify production of material otherwise protected as work product." Xerox Co. v. Internat'l Bus. Machines Corp., 64 F.R.D. 367, 377 n.4 (S.D.N.Y. 1974) (quoting United States v. Murphy Cook & Co., 52 F.R.D. 363, 364 (E.D. Pa. 1971). Additionally, these statements, which arose from the company's need to comply with commission rules, are business documents not work product. Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987) (individual case reserves set by the legal department that were used by the risk management department for a variety of business planning purposes including budget, profit, and insurance considerations

were not work product), cert. denied, 484 U.S. 917 (1987).

Southern Bell has failed to demonstrate any error of fact or law in Commissioner Clark's order.

VI. Statistical Analysis

22. Southern Bell argues that the statistical analysis performed by a non-legal employee is privileged because the employee was acting as an agent of the legal department and the analysis would not have been done but for the request of the legal department. Southern Bell's Motion at 21-22, ¶¶ 37-39. The company further argues that Public Counsel has not shown the requisite need to overcome the company's claim. Id. at 24-25, ¶¶ 44-45.

23. Commissioner Clark found that the analysis, which the company admitted contained no legal opinions only facts, was a business document and not privileged. Order No. PSC-93-0294-PCO-TL at 6. She further found that Public Counsel had demonstrated sufficient need to overcome the company's claim of work product immunity should it apply. Id.

24. Business documents are not privileged. E.g. Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987), cert. denied, 484 U.S. 917 (1987). The statistical analysis contains facts concerning the company's handling of customer trouble reports in various centers throughout the state. Citizens' Motion to Compel King, supra note 7 & attachment C: King affidavit. Mr. King gave written and oral report summaries to various non-legal personnel.

Id. Attachment B: Deposition transcript at 59-63 & 90-91. Facts do not become privileged by relating them to attorneys. Upjohn Co., 449 U.S. at 395; In re Six Grand Jury Witnesses, 979 F.2d 939, 945 (2d Cir. 1992) (finding that factual information produced by technical employees at attorney's request was not privileged just because it was developed in anticipation of litigation). This is even more true when the same facts are known by non-legal employees. See Pepper's Steel & Alloys, Inc., 132 F.R.D. at 699 (company cannot shield itself from discovery by claiming privilege for facts non-legal employee learned while reviewing documents selected by counsel). Public Counsel was denied the opportunity to discover the facts contained in Mr. King's statistical analysis or even the facts supporting his affidavit by his refusal to testify under a claim of privilege. Citizens' Motion to Compel King, supra note 7, ¶¶ 1-5 at 2-4 & Attachment B. Southern Bell's claim that Public Counsel did not provide sufficient proof of need is belied by the affidavit and attachments to his motion to compel. Hence, Commissioner Clark's ruling is factually and legally sound.

VII. Work Notes of Human Resources on Discipline

25. Southern Bell argues that the prehearing officer erred in holding that the work notes of personnel employees are not privileged. Southern Bell's Motion at 17-21, ¶¶ 28-36. The company proposes that since the facts in the work notes were gleaned from employee statements and summaries prepared by the

legal department that any privilege pertaining to the original documents flows to any byproducts. Id. The company argues that it does not matter whether the personnel employees' "need to know" the facts arose from a business (discipline) or legal purpose. Id. at 21, ¶ 36.

26. Commissioner Clark's prehearing order rejected the company's factual and legal analysis. Order No. PSC-93-0294-PCO-TL at 6-7. She found that the work notes lacked any legal opinion, were created for a business purpose, and Public Counsel had established a need for the documents due to the company's unwillingness to allow discovery by other means. Id.

27. The personnel notes are not work product. See e.g., Simon, 816 F.2d at 402; Pepper's Steel, 132 F.R.D. at 699. Even if the notes were attorney work product, Public Counsel has demonstrated sufficient need to overcome the company's claim. See Xerox, 64 F.R.D. at 382 (denying privilege claim on basis that information known only to IBM employees, whose collective loss of memory during depositions thwarted legitimate discovery, was attempt to hide relevant facts behind privilege). Commissioner Clark's order is factually and legally correct.

VIII. Conclusion

28. Commissioner Clark's order demonstrates that these documents were created for a business purpose, and as such, are not privileged. Obviously, as Commissioner Clark pointed out, the company's internal review had the business purpose of

ensuring that the company complies with the rules promulgated by the Commission. It is inconceivable that the Commission, which is charged by the Legislature with protecting the public interest through delegation of broad, intrusive investigative powers, would be denied access to internal company documents that reveal problems in its regulated operations. Commissioner Clark's prehearing order correctly harmonizes Florida's statute granting corporations the attorney-client privilege with the statutes granting the Commission its regulatory powers. Order No. PSC-93-0294-PCO-TL at 4 ("Southern Bell's insistence on a broad and absolute application of the privilege is inconsistent with that principle as is its over-reliance on Upjohn, where no monopoly provider with regulated rates and service was at issue.").

29. The Commission's duty to protect citizens from the potential evils of state-sanctioned monopolies¹³ outweighs any purported benefits obtained from permitting a broad application of privilege to cover all communications from any employee within Southern Bell. See S.E.C. v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 686 (D.C. 1981) ("In this case, the Commission, as protector of the public interest, could possibly show good cause to justify disclosure of any privileged information obtained by Dolkart [corporate counsel]"). Applying Southern Bell's interpretation of privilege would deny the Commission access to

¹³ See City Gas Co. v. Peoples Gas Sys., Inc., 182 So. 2d 429, 432 (Fla. 1965) (noting that anti-monopoly statutes were created to prevent the deterioration of quality that results from monopolization of services).


the information it needs to make a factual determination of the company's compliance with statutes and rules. Whereas, a narrow application would permit monopolies to retain the privilege for documents that contain legal advice, while disclosing documents containing the factual information required by the Commission to carry out its statutory mandate.

30. The prehearing officer reached the correct legal decision. Southern Bell attempts to distinguish the case law cited in Commissioner Clark's order on the basis that the employee statements, summaries, work notes and statistical analysis would not have been done but for the request from corporate counsel. If carried to its logical conclusion, this reasoning would permit any monopoly to hide factual information of its compliance with Commission rules under the simple expedient of having corporate counsel ask for the information. This would permit the absurd result of monopoly utilities denying the Commission access to security investigations, financial reviews, or affiliated transactions that were suspect simply by having corporate counsel make a special request for information. This would turn the Legislature's delegation of regulatory oversight upside down. Monopolies would have the power to tell the Commission that, even though they have sole control over the information that revealed customer abuses, the Commission would have to simply take the company's word for it that no problem exists.

WHEREFORE, Southern Bell's motion for reconsideration should be denied as it has failed to demonstrate any error of fact or law in the prehearing officer's order. As Citizens' need this information to prepare their case, Citizens' ask the Commission to order Southern Bell to release all of the withheld documents immediately.

Respectfully submitted,

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of the State of Florida

**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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