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STATE OF FLORIDA  
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111 West Madison Street  
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Tallahassee, Florida 32399-1400  
904-488-9330

March 25, 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 and Telegraph Company's Motion for Review of the 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.

Sincerely,

*Janis Sue Richardson*  
Janis Sue Richardson  
Associate Public Counsel

ACK \_\_\_\_\_

AFA 1

APP \_\_\_\_\_

CAF 1

CM 1 Enclosure

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EAG \_\_\_\_\_

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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 25, 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-93-0335-PCO-TL, which ordered Southern Bell to permit Mr. Dwane Ward<sup>1</sup>, Human Resource Operations Manager, to answer deposition questions concerning the

<sup>1</sup> Public Counsel has spelled Mr. Ward's name as "Dwane" and not "Dwayne" as this was the spelling he gave in his deposition at page 6, line 6.

acts or omissions comprising the basis for employee discipline, 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 Mr. Dwane Ward 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. 15, 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 Mr. Ward to answer deposition questions was improper. As Commissioner Clark has already found the underlying investigative information not to be privileged, then questions concerning the business use of that information are proper. Order Granting Public Counsel's Motions for In Camera Inspection of Documents and Granting Public Counsel's Motions to Compel, Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL, 2 (Feb. 23, 1993) (Order No. PSC-93-0294-PCO-TL expressly notes the prehearing officer's rejection of Southern Bell's privilege claim for the witness statements and summaries, which comprise the underlying information) [hereinafter Order No. PSC-93-0294-PCO-TL].

3. Southern Bell repeats its arguments for privilege that were addressed fully and denied.<sup>2</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

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<sup>2</sup> Order No. PSC-93-0335-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]; Order Granting Public Counsel's Motion to Compel, Dockets Nos. 910163-TL, 920260-TL, 900960-TL, 910727-TL, Order No. PSC-93-0317-PCO-TL (Mar. 1, 1993) (compelling Southern Bell's chief auditor, Ms. Shirley T. Johnson to answer deposition questions concerning the allegedly privileged audits).

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. Southern Bell's Motion at 3-4, ¶ 5. These arguments were addressed and disposed of by Commissioner Clark. Order No. PSC-93-0335-PCO-TL. Southern Bell's motion must be summarily denied.

4. Order No. PSC-92-0335-PCO-TL correctly decided that the company's arguments had no merit in fact or law. The prehearing officer determined that since the underlying witness statements and summaries were not privileged under either the attorney-client privilege or the work product doctrine then questions about those statements were not privileged. Order No. PSC-92-0335-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. To the extent that the Commission on reconsideration reevaluates the parties' original arguments as to whether the underlying witness statements and summaries are privileged,

Citizens reiterate their prior arguments and incorporate them herein. 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, Dockets Nos. 910163-TL, 920260-TL, 900960-TL, 910727-TL (Mar. 16, 1993) (request for reconsideration of Order No. PSC-93-0294-PCO-TL is pending).

6. To the extent that the Commission on reconsideration reevaluates the parties' original arguments before the prehearing officer as to whether Mr. Ward may refuse to answer questions under a claim of privilege, Citizens reiterate their prior arguments and incorporate them herein. 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 C: Ward deposition) [hereinafter Citizens' Motion to Compel Ward]. Since the underlying statements and summaries are not privileged, Mr. Ward has no privilege to refuse to answer Public Counsel's questions.

7. Even if the underlying witness statements and summaries 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)).

8. 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.



9. Southern Bell issued similar all-inclusive instructions to Mr. Ward during Public Counsel's deposition. Citizens' Motion to Compel Ward, supra ¶¶ 3, at 2-3 & Att. D (listing of all privilege claims). Mr. Beatty, company counsel, instructed Mr. Ward at the very beginning of the deposition as follows:

[M]r. Ward, as you know, the Southern Bell Legal Department conducted an investigation some time ago into the matters about which we will discuss here today. That investigation was conducted pursuant to the attorney/client privilege and the attorney work product doctrine and, therefore, everything pertaining to that investigation is privileged. And, thus, it is not to be disclosed in this deposition.

If you're asked a question that, by virtue of that question, you would otherwise talk about or discuss some matter pertaining to the investigation, I would request that you identify that fact before answering the question so that we can then make whatever objections we need to make or I can and we'll just proceed from that point forward. Any questions?

Citizens' Motion to Compel Ward, supra, Att. C: Ward deposition, at 5, ll. 9-25 (emphasis added). Excerpted pages of Mr. Ward's deposition are appended to this motion as Attachment A.<sup>3</sup> Throughout the deposition, Mr. Beatty repeatedly instructed Mr. Ward not to answer Public Counsel's questions. For example, when questioned as to the reasons why certain employees had been disciplined, Mr. Beatty objected:

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<sup>3</sup> The company has requested confidential treatment of a portion of Mr. Ward's deposition, page 6, lines 9 and 10, and page 20, lines 1, 9, and 12. Southern Bell Tel. & Tel. Co. Motion for Confidential Treatment and Permanent Protective Order, Docket No. 910163-TL (Nov. 20, 1992).

Q: (By MS. RICHARDSON): Okay. And why were these people being disciplined?

MR. BEATTY: I object at this time on the fact that the disclosure of information regarding the investigation will come with the answer to that question; therefore, I instruct the witness not to respond.

Q: Okay. Again, Mr. Ward, for the record, do you have -- do you have information that is responsive to my question; yes or no?

A: Yes.

Q: Are you refusing to answer my question based upon Mr. Beatty's objection?

A: Yes.

Id. at 18, 11. 7-20 (Ward deposition).

10. Southern Bell, just as 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. The privilege was designed to prevent an opposing party from building its case upon the mental efforts of an attorney. See e.g., Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970). It was not designed to permit the first party to the scene to gather the evidence and then deny access to the factual evidence under a claim of privilege.<sup>4</sup> As the Supreme Court of Florida noted, the

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<sup>4</sup> An excerpt from a deposition of Mr. Edward Butch Olsen taken by Mr. John Hoag, Assistant Attorney General, indicates that this is precisely what Southern Bell intended. Mr. Olsen states:

I don't even remember who said it, but the company was interviewing a number of key people up and down the coast, securing statements from them and scooping up all that

privilege was never intended to be an all inclusive shield to discovery. Id. at 113.<sup>5</sup> 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 to scrutinize a monopoly's service in order to protect the ratepayers from abusive practices.

11. Southern Bell's claim of attorney-client privilege as a basis for instructing Mr. Ward not to answer Public Counsel's questions, like its work product claim, is without legal foundation. The attorney-client privilege protects communications

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information with the intent, I was told, to call that attorney-client privileged information.

Q: Meaning that -- Was it your understanding then that that information couldn't be given to anyone else?

A: Yes. That's innuendo on my part. It's an assumption on my part.

Olsen deposition, p. 74, ll. 5-15 (Attachment B).

<sup>5</sup> Quoting 4 Moore, Federal Practice, p. 1435 (1969), the court noted the soundness of this analysis:

In other words, probably by properly phrased interrogatories a party can be required to state the substance of interviews with witnesses, whether obtained by his attorney or by others and whether or not reduced to writing. The party cannot refuse to answer on the ground that he has no personal knowledge of the facts, but must obtain the information from his attorneys or agents.

Surf Drugs, Inc. V. Vermette, 236 So. 2d 108, 113 & n.15 (Fla. 1970).

not facts. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) (emphasis added). Mr. Ward 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>6</sup>

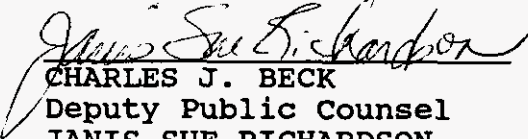
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<sup>6</sup> This case came before the second circuit court on an allegation of defrauding the U.S. government on satellite contracts by submitting expense claims containing false statements. Id. at 941. The company counsel directed its employees to 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 Mr. Ward 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 WARD DEPOSITION**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

1  
2 Comprehensive Review of )  
Customer Rebates for Trouble ) Docket No.910163-TL  
3 Reports of Southern ) 910727-TL  
Bell Telephone & Telegraph )  
4 Company )  
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5 Fort Lauderdale, Florida

6 October 15, 1992

7 2:00 o'clock P.M.  
8

9  
10 DEPOSITION

11 OF

12 DWANE WARD  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 place of record.

2 First, the deposition's taken pursuant to  
3 proper notice as to date, time and place.

4 Second, the parties stipulate and agree to  
5 reserve all evidentiary objections except as to  
6 form and occasional relevance. We do not waive  
7 the reading if, in fact, the deposition is  
8 transcribed.

9 And, four, Mr. Ward, as you know, Southern  
10 Bell Legal Department conducted an investigation  
11 sometime ago into the matters about which we  
12 will discuss here today. That investigation was  
13 conducted pursuant to the attorney/client  
14 privilege and the attorney work product doctrine  
15 and, therefore, everything pertaining to that  
16 investigation is privileged. And, thus, it is  
17 not to be disclosed in this deposition.

18 If you're asked a question that, by virtue  
19 of that question, you would otherwise talk about  
20 or disclose some matter pertaining to the  
21 investigation, I would request that you identify  
22 that fact before answering the question so that  
23 we can then make whatever objections we need to  
24 make or I can and we'll just proceed from that  
25 point forward. Any questions?



1 Beyond that, I have to --

2 Q Okay. Did you receive any information on  
3 the reasons for each of these 14 people's discipline?

4 A Of why they were being disciplined?

5 Q Mm-hm.

6 A Yes.

7 Q Okay. And why were these people being  
8 disciplined?

9 MR. BEATTY: I object at this time on the  
10 fact that the disclosure of information  
11 regarding the investigation will come with the  
12 answer to that question; therefore, I instruct  
13 the witness not to respond.

14 Q Okay. Again, Mr. Ward, for the record, do  
15 you have - do you have information that is responsive  
16 to my question; yes or no?

17 A Yes.

18 Q Are you refusing to answer my question  
19 based upon Mr. Beatty's objection?

20 A Yes.

21 Q After you received this assignment from  
22 Mr. Cuthbertson, what was the next thing that you did?

23 A After I received the physical assignment,  
24 we visited Jacksonville. I've talked about preparing  
25 the notes, prepared the B form entries, returned to the

**ATTACHMENT B: EXCERPTS OF OLSEN DEPOSITION**

SWORN STATEMENT

OF

EDWARD BUTCH OLSEN

**ORIGINAL**

TAKEN IN THE PRESENCE OF JOHN HOAG,  
ASSISTANT ATTORNEY GENERAL, MIKE MALOY, FINANCIAL  
INVESTIGATOR, ALLEN THOMPSON, FDLE AGENT, ROBERT  
SAYLOR, ATTORNEY FOR MR. OLSEN AND JULIE M. ANDRUS,  
CERTIFIED SHORTHAND REPORTER AND NOTARY PUBLIC IN AND  
FOR THE STATE OF FLORIDA AT LARGE, AT ROBERT SAYLOR'S  
OFFICE, 215 5TH STREET, WEST PALM BEACH, FLORIDA, ON  
THE 28TH DAY OF JANUARY, 1992, COMMENCING AT 10:30  
O'CLOCK A.M.

1           A     I don't remember who told me, but I had  
2 heard several months ago that the company was  
3 interviewing a number of people and that's why -  
4 where I pick up the word key.

5                     I don't even remember who said it, but the  
6 company was interviewing a number of key people up  
7 and down the coast, securing statements from them and  
8 scooping up all that information with the intent, I  
9 was told, to call that attorney-client privileged  
10 information.

11           Q     Meaning that -- Was it your understanding  
12 then that that information couldn't be given to  
13 anyone else?

14           A     Yes. That's innuendo on my part. It's an  
15 assumption on my part.

16           Q     Okay. And do you know if they took a  
17 statement from Curtis Guyer?

18           A     I think I heard that they did.

19           Q     Did you hear anything else about what he  
20 said in his statement?

21           A     No. I've not spoken to Curtis since my  
22 dismissal.

23           Q     What was your impression of Curtis?

24           A     Curtis was always highly thought of. As I  
25 said, he spent the majority of his management career,

**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 25th day of March, 1993.

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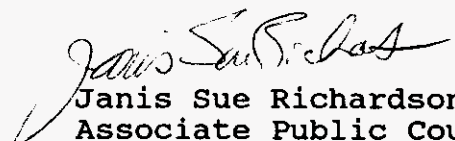
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& Cowdery  
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Janis Sue Richardson  
Associate Public Counsel