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July 12, 1993

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

RE: Docket Nos. 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 Fifteenth Motion to Compel and Request for In Camera Inspection of Documents. Please file this document in the above-captioned dockets.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White (B)

Nancy B. White

ACK ✓
AFA 1
APP 1
CAF 1
CMU
CTR
EAG
LEG 1
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RCH 1
SEC 1
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OTH

Enclosures

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

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: July 12, 1993

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S MOTION FOR REVIEW OF THE ORDER GRANTING PUBLIC COUNSEL'S FIFTEENTH MOTION TO COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

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 Fifteenth Motion to Compel and Request for In Camera Inspection of Documents and states as grounds in support thereof the following:

1. On June 30, 1993, the Prehearing Officer entered Order No. PSC-93-0977-PCO-TL in response to the Fifteenth Motion to Compel filed by the Office of Public Counsel ("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. These documents were created as part of an internal investigation that Southern Bell's 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 two categories of documents: (1) worknotes prepared by the Company's Human Resources representatives regarding prospective employee discipline and discipline appeals, which worknotes were derived from and contained the substance of certain privileged communications to Southern Bell's attorneys; and (2) internal re-audits prepared by Southern Bell's audit department at the request of Company attorneys and provided to those attorneys as the basis upon which to render legal advice to the Company.

2. The Prehearing Officer granted Public Counsel's Fifteenth Motion to Compel production of these two categories of documents. In her Order, the Prehearing Officer made mistakes of fact and law such that this Order should be reversed.

INTERNAL RE-AUDITS

3. In her Order, the Prehearing Officer concludes that the Network Operational Review and MOOSA re-audits are not protected by either the attorney-client privilege or the work product doctrine for the same reasons that the original audits were

incorrectly held not to be privileged in Order No. PSC-93-0151-CFO-TL, (the "First Order") aff'd on recon., Final Order No. PSC-93-0292-FOF-TL.[1] The First Order was based on an analysis premised upon three factual predicates: (1) Southern Bell has a duty to comply with applicable regulations of this Commission; (2) that in order to do so, Southern Bell must monitor its business operations; and (3) internal audits generally are a useful tool in the accomplishment of this monitoring process. Based on these three uncontroversial assertions, the Order leaps to the conclusion that, because audits can serve a business purpose, no internal audit can ever be privileged, even though a particular audit (like those in question here) is 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 three premises set forth in the First Order, the ultimate holding that these re-audits prepared are not privileged simply does not follow logically from those premises. This conclusion is also unsupported by either the case law cited in the First Order or by the legal authority that does, in fact, govern the attorney-client privilege and the work product doctrine as properly applied to our situation.

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[1] The final order is now on appeal to the Florida Supreme Court. Since the Prehearing Officer relied almost exclusively on her ruling in Order No. PSC-93-0151-CFO-TL, as affirmed in Order No. PSC-93-0292-FOF-TL, the following discussion relates to the arguments contained in Order No. PSC-93-0151-CFO-TL. The same infirmities in that Order apply equally to the Order for which Southern Bell seeks review.

5. In reaching the conclusion that these reviews are not privileged, the First Order relies heavily upon Consolidated Gas Supply Corporation, 17 F.E.R.C., Par. 63,048 (December 2, 1981). Before discussing Consolidated, however, the First Order 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 First Order does not reject Southern Bell's contention that, if Upjohn applies to this matter, then Southern Bell is entitled to have its assertion of the privileges sustained. Instead, the First Order avoids Upjohn by stating that Consolidated "is more closely on point." Order No. PSC-93-0151-CFO-TL at p. 5. The First Order further states that in Consolidated the Judge applied a "narrow view of the privilege more appropriate to an administrative proceeding involving a regulated company." Id. 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 our case under either the "narrow" or "broad" view discussed in that case.

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 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 Mattress 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. In the present matter, however, the privileged material in question consists not of communication from an attorney to its client, but from the client to the attorney. Thus, even under the narrow view, which holds the confidential communication from the attorney to the client privileged, the auditing departments communications to Southern Bell's attorneys are privileged from discovery.

7. In this case, the internal re-audits are privileged under both the narrow and broad views considered in Consolidated. These audits do not memorialize unsolicited or nonspecific legal advice from attorneys. Instead, the audits 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 audits 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, Order No. PSC-93-0151-CFO-TL cites to a number of cases in ways that either reflect a mistake as to the legal principle embodied in those cases or, alternatively, make it clear that the legal principle for which each case stands is simply inapplicable to our situation. For example, In re: Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2nd Circuit 1984) is cited for the proposition that, because the internal audits in question created factual data rather than legal theories per se, the audits are not privileged. Specifically, the language quoted from In re: Grand Jury is that "the attorney-client privilege protects communications rather than information."

9. Thus, Order No. PSC-93-0151-CFO-TL apparently misconstrues Grand Jury to stand for the proposition that facts provided to an attorney are simply "information" rather than "communications" and, accordingly, not privileged. In point of fact, Grand Jury not only does not support the conclusion for which it was cited, its holding, read in context, 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. The documents contained no legal theories. Indeed, how could they since they were communication from the

client to the attorney. The Court held that the privilege applied because the "documents reflect[ed]...requests for advice...relating to three transactions, and to each our review convinces us that the advice sought was legal rather than commercial in character." Id. at p. 1037.

10. 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 in the Order now under review:

> 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 from client to attorney (as opposed to a legal opinion) is not a privileged communication. 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]

11. Order No. PSC-93-0151-CFO-TL also cites to Hardy v. New York Times, Inc., 114 F.R.D. 633, 643 S.D.N.Y. (1987) for the proposition that when a "corporate decision is based on both a business policy and a legal evaluation, the business portion of the decision is not protected...." Order at pp. 6-7. Hardy, however, dealt with a situation in which there was "nothing to indicate that...[the attorney]...requested or received any of the documents at issue, or the information contained in them, in the capacity of a legal advisor and solely for the purpose of rendering legal advice to the corporation." Id. at p. 644. By contrast, there is no question but that the internal audits at issue here were provided to Southern Bell's attorneys for the express, specific and sole intention that they would be used to render a legal opinion. Thus, while the legal proposition in Hardy is correctly noted, it is simply inapplicable to our facts.

12. Thus, none of the cases cited in Order No. PSC-93-0151-CFO-TL stands for the notion that re-audits performed by Southern Bell were not privileged. Instead, it is obvious that the First Order simply constructs, without the benefit of case support, the fiction that when these audits by Southern Bell were created with

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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 Human Resources worknotes.

the intent to provide information to the Company's attorneys to assist them in the rendering of legal advice, they were, nevertheless, not privileged because of the requirements of the regulatory process. Again, there is absolutely no case support 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.

13. A review of Southern Bell's Opposition to Public Counsel's Fifteenth Motion to compel makes it clear that the re-audits were performed by internal auditors who were requested to do so by Southern Bell's attorneys in order to allow them to render a legal opinion which had been requested by the Company's upper management. Further, the subject matter of the communications (the re-audits) was clearly within the scope of

the auditors' duties, and the information was not disseminated to anyone who did not have a need to know.

14. 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.

15. Order No. PSC-93-0151-CFO-TL, upon which the Order under review was based, correctly characterizes Southern Bell's position as stating that the original audits "would not otherwise have been performed" but for the need for this information by Southern Bell attorneys and the specific "request by Southern Bell's legal department" that the information be communicated to them to aid in the rendering of legal opinions. Order No. PSC-93-0151-CFO-TL at p. 5. The same holds true for the re-audits. Thus, the re-audits also meet the test enunciated in First Chicago International, supra.

16. Finally, 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. For this reason, they were held to be privileged. Likewise, in the previously cited In re: Grand Jury, supra, business documents relating to a pending transaction were deemed privileged because they were provided to counsel to obtain an opinion.

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 re-audits would not have occurred but for the need for a legal opinion to be rendered by attorneys for Southern Bell. Therefore, there can be no proper denial that 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 of 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. The Prehearing Officer's Order for which Southern Bell seeks review also 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 all of Southern Bell's re-audits are simply routine business documents. That analysis was incorrect with regard to the attorney-client privilege. Similarly, the Order contains error of law and fact in holding that the work product doctrine does not apply. The re-audits were created solely at the request of the Company's lawyers to provide those attorneys with information that could be used in their defense of Southern Bell in the current proceedings.

20. The case relied upon in Order No. PSC-93-0151-CFO-TL 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 Prehearing Officer relies on 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. 7. Soeder, however, is inapplicable for two reasons.

21. 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. Order No. PSC-93-0151-CFO-TL concludes that this circumstance is indistinguishable from the present situation because Southern Bell has an ongoing duty

to comply with Commission rules. According to the First Order, "[w]hatever audits need to be done to trouble shoot its operations are part of that business routine, even though they may have additional functions such as the aiding in the giving of legal advice." Order No. PSC-93-0151-CFO-TL at p. 8. The difficulty with this analysis lies in the uncontroverted fact that the particular re-audits in question were not done for the purpose of trouble shooting Southern Bell's operations. Instead, they were re-audits requested by Southern Bell's legal department and they would not have been performed but for that request. These re-audits were not, as in Soeder, routinely performed reports that simply had the ancillary purpose of providing the basis for a legal opinion.

22. Second, Soeder is inapplicable for a reason that is manifest in the above-quoted language of Order No. PSC-93-0151-CFO-TL. 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 this case that Southern Bell was motivated to have re-audits 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 re-audits were performed for a routine business purpose.

23. After concluding that the work product doctrine does not apply, Order No. PSC-93-0151-CFO-TL states that even if that doctrine did apply, "the complexity of Southern Bell's computerized operations at issue is such that the inability of Public Counsel to obtain that information from other sources would constitute an undue hardship." Order at p. 8. As stated previously, the re-audits in question are protected by the attorney-client privilege and, therefore, disclosure cannot be forced even if there were an adequate showing of hardship. In addition, the attorney work product doctrine also protects these audits. Even if this doctrine provided the sole source of protection, however, there would still be no basis to force disclosure of this information because Public Counsel has failed to make a factual showing adequate to support disclosure of the protected material. To the extent that the above-quoted portion of the First Order accepted the deficient factual assertions of Public Counsel on this point, it embodies either a mistake as to the facts of this situation or a mistake in the application of the pertinent law.

24. 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 investigation, in preparation for trial." U.S. v. 22.80 Acres of Land, 107 F.R.D. 20, 24 (U.S.D.C. Cal. 1985).

25. A similar statement of the purpose of the doctrine was provided by the Florida Supreme Court in Dodson v. Purcell, 390 So.2d 707 (Fla. 1980). In that case, the Court considered the issue of whether a 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 first noted that attorney work product that is "not intended to be submitted as evidence...[is]...subject to discovery if [it is] unique and otherwise unavailable, and materially relevant to the cause's issues." Id. at p. 707. At the same time, 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.

26. Rule 1.280(b)(3), Florida Rules of Civil Procedure, 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).

27. 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, deposed hundreds of Southern Bell employees, and, assuming that its discovery requests have been focused on the pertinent issues, Public Counsel should now have at its disposal the underlying facts and data necessary to perform its own analyses. The Prehearing Officer is apparently cognizant of this, because Order No. PSC-93-0151-CFO-TL does not in any way premise its finding of hardship on Public Counsel's contention that to perform its own analysis would be burdensome. Instead, the Order disallows the assertion of the work product doctrine based on what appears to be a finding that the complexity of Southern Bell's computer system is such that Public Counsel cannot replicate the re-audit in question.

28. First, it is important to note that there is no requirement that the documents must be produced even if Public Counsel cannot replicate the re-audits. As stated in Rule 1.280, there is no hardship if Public Counsel is able to obtain substantially equivalent material, i.e., data that allow for its

own analysis. Public Counsel has provided nothing to demonstrate that it cannot perform its own analysis and, indeed, apparently not even attempted to determine if such an equivalent analysis could be performed.

29. Second, Public Counsel has offered virtually no information as to why the "complexity" of Southern Bell's system is an impediment to Public Counsel's obtaining a substantially equivalent analysis. Specifically, it has submitted only the Affidavit of Walter W. Baer (dated December 16, 1992), which states that to "the best of [his] knowledge," Southern Bell's customer's trouble reports are analyzed using the Loop Maintenance Operation System. (Affidavit, at par. 1) Mr. Baer then goes on to state that the volume and complexity of the data require the use of "some" computer system to assist in performing any analysis. (par. 3) He then states in conclusory fashion that for Public Counsel to perform an equivalent audit would be "impossible" because of "the complexity of the audits, the enormous amount of data, and the unique computer system required to process it."[3] Id. at par. 4. Thus, the Order's finding that Public Counsel cannot create an equivalent audit appears to be based on nothing more than an unsupported conclusory allegation contained in a single affidavit that is not even based on personal knowledge. Clearly, Public Counsel has failed to

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[3] To the contrary, as Southern Bell's Response No. 50 I.(bb) to the Staff's Sixth Set of Interrogatories demonstrates, the analysis can be performed on any mainframe type of computer.

sustain its burden of demonstrating hardship. To the extent that the Order holds otherwise, this holding cannot be sustained.

WORKNOTES OF HUMAN RESOURCES REPRESENTATIVES

30. Both the analyses as to attorney-client privilege and the work product doctrine described above apply equally to the Human Resources representatives worknotes concerning discipline issues. Although these documents were created under slightly different factual circumstances, the law is clear that the privilege and work product doctrine apply to them as well.

31. The worknotes are comprised of specific information that has been extracted by Southern Bell personnel from materials communicated to and 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, again 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 in anticipation of the litigation of these dockets. Accordingly, they are protected by the privileges on the basis of the previously cited cases, e.g., Cuno, First Chicago, et. al, supra.

32. The Order under review is, as noted above, based upon Order No. PSC-93-0294-PCO-TL, aff'd on recon., Final Order No. PSC-93-0517-FOF-TL. The Final Order is now on appeal to the Florida Supreme Court. Order No. PSC-93-0294-PCO-TL applies the same improper analysis to these documents 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 are themselves privileged. Therefore, the information derived from them is likewise privileged and the worknotes are, accordingly, not subject to discovery.

33. 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 Company employees. The Prehearing Officer thus appears to have concluded that the Human Resources employee 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.

34. 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.

35. 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.

36. 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)

37. 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 privilege and work product doctrine are destroyed by the disclosure of the privileged material to corporate employees with a need to know for a subsequent business purpose, is plainly contradicted by the applicable law.

38. Likewise, Order No. PSC-93-0294-PCO-TL 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 spontaneous newsworthy events. 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 privilege and work product doctrine.

39. 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)[4] 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.

40. This case differs, of course, because there can be no plausible argument that this is not an adversarial proceeding. In addition, CBS was influenced by the different state of federal law as to attorney-client privilege that existed in 1973 to today. Last, the issue in this matter is not the adequacy of

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[4] 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.

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.

41. 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 subsequent business rather than purely legal purpose does nothing to destroy the confidentiality of the documents or eradicate the otherwise applicable privileges.

CONCLUSION

42. This Commission should reverse the holding of the Order under review because it is based upon essential mistakes of fact and law. As stated above, the Order is premised upon the fundamentally flawed notion that because an internal legal investigation, including re-audits, 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 relied upon in the Order and is, in fact, plainly contradicted by the case law that does control. This theory cannot be applied in any logical way to the material in dispute

in this case. Since neither the re-audits nor the worknotes were created in the normal course of business, they are protected from discovery by the attorney-client privilege and the attorney-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 both categories of documents, and denying Public Counsel's Fifteenth Motion to Compel.

Respectfully submitted this 12th day of July, 1993.

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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 12th day of July 1993 to:

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