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July 23, 1993

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

Re: Docket Nos. 910163-TL  
920260-TL  
900960-TL  
910727-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 fifteen copies of the Citizens' Response to Southern Bell Telephone and Telegraph Company's Motion for Review of Order Granting Public Counsel's Fifteenth Motion to Compel and Request for in Camera Inspection of Documents.

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  
Associate Public Counsel

Enclosure

JSR:bsr

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

07971 JUL 23 93

FPSC-BUREAU OF RECORDS

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 )

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

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

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

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Filed: July 12, 1993

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

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-93-0977-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) reaudits of two of the company's customer repair and rebate systems,<sup>1</sup> and (2) personnel department work notes on employee discipline.<sup>2</sup> Southern Bell Telephone and Telegraph Company's Motion for Review of Order Granting Public Counsel's Fifteenth Motion to Compel and Request for In Camera Inspection of Documents, Dockets Nos. 910163-TL, 920260-TL, 900960-TL & 910727-TL (July 12, 1993) [hereinafter Southern Bell's Motion].

## II. Standard of Review

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

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<sup>1</sup> Network Operational Review reaudit dated January 1993 and Customer Adjustment to MOOSA [Mechanized Out of Service Adjustment] reaudit dated January 1993.

<sup>2</sup> Identified as notes made by human resource managers, Dave Mower and Charles Cuthbertson.

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 operational system reaudits, or personnel work notes on employee discipline are not privileged.

3. Southern Bell repeats its arguments for privilege that were addressed fully and denied in Order No. PSC-93-0977-PCO-TL and earlier orders. 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-92-0977-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 reaudits and personnel work notes were not privileged under either the attorney-client privilege or under the work product doctrine. Order No. PSC-92-0977-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).

5. Should the Commission reconsider its earlier decision, Citizens' adopt and incorporate by reference their earlier arguments in opposition to Southern Bell's motions for reconsideration. Citizens' Response and Opposition to Southern Bell Tel. & Tel. Co.'s Motion for Review of Order Granting Public Counsel's Motion for In Camera Inspection of Documents and Motions to Compel, Consolidated Dockets Nos. 910163-TL, 920260-TL, 900960-TL & 910727-TL (Feb. 12, 1993); Citizens' Response to Southern Bell Tel. & Tel. Co.'s Motion for Review of Order Granting Public Counsel's Motions for In Camera Inspection of Documents and Motions to Compel, Consolidated Dockets Nos. 910163-TL, 920260-TL, 900960-TL, 910727-TL (Mar. 16, 1993).

### III. In Camera Inspection

6. 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-93-0977-PCO-TL. See Citizens' Fifteenth Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (Feb. 24, 1993) [hereinafter Citizens' Fifteenth 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

7. 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.")

8. 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).

9. Southern Bell claims "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's Motion at 10, ¶ 16. If the purpose of the communication was to also seek non-legal advice, the information is not privileged. See e.g., In re Air Crash Disaster, 133 F.R.D. at 519. If the attorney is being used as a conduit to shield information from discovery, the information is not privileged. Id. at 523. "The privilege 'protects only those disclosures necessary to obtain informed legal advice which might

not have been made absent the privilege.'" Id. at 518.

Commissioner Clark determined after reviewing the documents and Southern Bell's arguments that these documents did not request legal advice, were created for business purposes, and would have been created out of the company's need to find improper acts and correct them. Order No. PSC-93-0977-PCO-TL.

10. The attorney-client privilege is not absolute. Courts and the legislature have created public policy exceptions. E.g., Sandberg v. Bankshares, Inc., 979 F.2d 332, 350 (4th Cir. 1992) (breach of fiduciary duty); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1031, 1038 (2d Cir. 1984) (crime/fraud exception); see also § 90.502(4), Fla. Stat. (1991 & Supp. 1992) (crime/fraud, common interest, testator's competence, attorney's breach of duty). When the policy of encouraging full and frank discussions between a client and his attorney are outweighed by a greater public benefit, such as the benefit to be gained by protecting shareholders from an abuse of trust by a corporate board, which is acting inimically to their interests, federal courts have ordered discovery of ostensibly privileged matters. Id. The Florida Legislature excepted the evidence code, and presumably evidentiary privileges, from all administrative proceedings. § 120.58, Fla. Stat. (1991). Additionally, the legislature has created an exception to the privilege for matters before the Public Service Commission by granting it access to all company records in order to protect ratepayers from abuse by utility monopolies. §§ 364.01 & 364.183, Fla. Stat. (1991).



11. What Southern Bell avoids discussing is the application of legal privilege to its position as a regulated monopoly. 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.

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.

12. 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 & 18, ¶¶ 21 & 31. 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. 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., 24, 1.15 & 33, 11.2-20 (Docket No. 920260-TL) (Feb. 15, 1993).

13. 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-93-0977-PCO-TL. Indeed, Southern Bell agreed that the Commission could simply order the company to reproduce the same investigation. Order No. PSC-93-0294-PCO-TL at 5. Southern Bell's arguments were rejected by the prehearing officer and should be rejected on reconsideration by the full Commission.

14. Commissioner Clark rejected Southern Bell's "broadly inclusive theory of 'privileged investigation'" as its basis for

claiming privilege for these business documents. Order No. PSC-93-0977-PCO-TL at 2. She relied upon this Commission's prior decisions on similar documents,<sup>3</sup> her in camera review of the documents, the parties' motions, and oral argument. Id. The Commission's earlier decisions on Southern Bell's privilege claim for the earlier similar audits harmonized Florida's statutory privilege with the Commission's statutory mandate to regulate telecommunications monopolies in the public interest. Orders Nos. PSC-93-0151-CFO-TL, PSC-93-0292-CFO-TL, PSC-93-0294-PCO-TL, & PAS-93-0517-FOF-TL. These orders also determined that Southern Bell's reliance on federal case law was misplaced. Id. Southern Bell has failed to demonstrate that Commissioner Clark erroneously applied the reasoning of these prior decisions or the case law to these documents.

15. Commissioner Clark found that the personnel work notes contained neither legal advice nor a request for legal advice. Order No. PSC-93-0977-PCO-TL at 2. She also found that the reaudits, like their earlier versions, were unprivileged business documents. Id. at 3. The earlier orders that are cited as a foundation for this most recent order rely upon two basic factual findings: 1) the audits and personnel records contained facts not legal advice or opinion; and 2) the documents were created for a business purpose. The underlying orders rest on three basic legal conclusions: 1) the first set of audits and

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<sup>3</sup> See Commission orders PSC-93-0517-FOF-TL issued April 6, 1993, and PSC-93-0292-FOF-TL issued February 23, 1993.

personnel notes were not prepared solely for the purpose of seeking legal advice; 2) the audits and notes were not the work product of company attorneys or employees acting as their agents; and 3) the Commission's statutory mandate to protect the public from monopoly abuse through guaranteed access to all company records is not eclipsed by the general statutory attorney-client evidentiary privilege.

16. If the personnel work notes inspected in camera are similar to other work notes, some of which were also prepared by Mr. Cuthbertson and voluntarily produced,<sup>4</sup> then these documents also contain facts about the disciplining of employees. 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 Order No. PSC-93-1016-FOF-TL (July 12, 1993). Southern Bell, through its employees and its system, has sole possession of the facts in this case.

17. Accepting Southern Bell's attorney'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 pointed out in an earlier order, the Commission has requested the same information and Southern Bell has admitted that, if requested, it

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<sup>4</sup> 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).

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. Commissioner Clark's application of the law to the facts in this case is the only reasonable interpretation and should be upheld.

#### V. The Operational Systems Reaudits

18. Southern Bell had the burden of proving that the attorney-client privilege or work product doctrine applied to the reaudits. International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177 (M.D. Fla. 1973); Hartford Accident & Indem. Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981). If the Commission adopts the federal test proposed by Southern Bell, the least the company had to prove was: (1) that the auditors knew these reaudits were needed to supply a basis for rendering legal advice in this docket; (2) that the auditors were directed by their supervisors to provide the information; (3) that the auditors were told their information would enable the legal staff to give this advice; and (4) that the reaudits related to the matters within the scope of the auditors' employment. See Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L. Ed. 2d 584 (1981). Southern Bell did not provide any factual evidence on any of these points. No affidavits, no deposition transcripts, no testimony of record from the employees involved were filed. The only "evidence" is Southern Bell's attorney's statement that the "internal re-audits [were] 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." Southern Bell's Motion at 2, ¶ 1.

19. Citizens did present factual evidence that the reaudits were produced as part of the company's routine business practice. Citizens' Motion at 8-9, ¶ 13. Southern Bell's chief auditor, Ms. Shirley T. Johnson, stated in her sworn testimony that it was company practice to reaudit any internal audit that was rated "significant adverse findings." The initial audits were so rated. Hence, the reaudits were scheduled according to routine company business practices. Southern Bell cannot now mend the evidence gap by pointing to an internal company memo hidden in an in camera review and not available for review by all parties concerned to establish the privilege.

20. Not only are the reaudits not privileged because the initial audits were not privileged, but also because Southern Bell failed its burden of proving the existence of privilege for the reaudits. This burden applies to each document. See e.g., In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. 515, 518 (N.D. Ill. 1990). It cannot be assumed that all subsequent documents of a similar nature are likewise privileged client communications. Yet, this is precisely Southern Bell's position. The Commission rejected this position in its prior orders, and should do so here. Orders Nos. PSC-93-151-CFO-TL, PSC-93-0292-FOF-TL, PSC-93-0294-PCO-TL, PSC-93-0517-FOF-TL, PSC-93-0317-PCO-

TL, PSC-93-0518-FOF-TL (presently under supreme court review as Cases Nos. 81,487 & 81,716).

21. Southern Bell again argues that the Commission's factual determination that Public Counsel had met the test to overcome a claim of work product for the audits is wrong.<sup>5</sup> Southern Bell's Motion at 17-18, ¶ 29. Southern Bell attacks Public Counsel's showing of need and impossibility of reproduction by claiming that the audits can be reproduced on any mainframe computer. Id. This ignores the evidence offered that no matter how many mainframe computers Public Counsel may have access to, without the specific software and the data, which are in Southern Bell's sole control, the audits can never be reproduced. The Commission did not accept Southern Bell's reasoning in its prior decisions and should reject it now. Order No. PSC-93-0151-CFO-TL, aff'd on recon., Final Order No. PSC-93-0292-FOF-TL (Feb. 23, 1993).

22. The prehearing officer determined that the reaudits were not privileged based upon the Commission's prior rulings. Southern Bell has failed to demonstrate any error of fact or law in the prior orders or this order. The Commission should deny the company's request.

#### VI. Work Notes of Personnel Managers

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<sup>5</sup> Florida Rule of Civil Procedure 1.280(b)(3) permits discovery of work product materials upon an adversary's showing of "need for the material in the preparation of a case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

23. 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 18-22, ¶¶ 30-37. 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 24, ¶ 41.

24. Commissioner Clark's prehearing order rejected the company's factual and legal analysis. Order No. PSC-93-0977-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 through unimpeded depositions of employees. Id.; Order No. PSC-93-0294-PCO-TL at 5; Order No. PSC-93-0517-FOF-TL at 5-6.

25. The work notes are not privileged. See Cuno, Inc. v. Pall Corp., 121 F.R.D. 198 (E.D.N.Y. 1988) (finding that documents communicated for a business purpose to non-legal employees were not privileged); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984) (the confidentiality of privileged communications is not destroyed by the creation of a factual inference that the information is expected to be distributed in the future; however, an actual distribution would



destroy confidentiality and waive any privilege). When documents are distributed to those employees who need to know the information in order to act upon the legal advice contained therein or to transmit the information to counsel for the purpose of generating that advice, the privilege is extended to the non-legal personnel. Cuno, 121 F.R.D. at 203; accord § 90.502(1)(c), Fla. Stat. (including those persons who assist in the rendering of legal advice and those necessary for the transmission of the communication); see generally Freedom Newspapers, Inc. v. Egly, 507 So. 2d 1180 (Fla. 2d DCA 1987) (no privilege when non-legal staff communications served business purpose). The personnel managers' work notes were created for the purpose of disciplining employees--a business decision. Order No. PSC-93-0517-FOF-TL at 5. Not only was the disclosure of the information to the personnel managers a waiver of any claim of privilege as to the underlying statements, the statements themselves were not privileged. Order No. PSC-93-0977-PCO-TL. Southern Bell has failed to demonstrate any error of fact or law in the prehearing order on this point.

26. Recent depositions taken of company employees has revealed a further reason that the underlying statements were not privileged. In some instances, union representatives were present during the entire interview. [Attachment A: Deposition excerpts<sup>6</sup>] In most if not all of the interviews, a security

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<sup>6</sup> The excerpts are being submitted in a sealed envelope as the statement is under a temporary protective order.

employee was present. [Att. A] The company's failure to lay a proper foundation for the presence of these third parties at the interviews waives the privilege for the underlying statements and any subsequent use of the statements. Southern Bell failed to prove two essential elements of privilege: 1) the sole reason for taking the statements was to obtain legal advice, and 2) the statements were intended to be and were kept confidential. § 90.502, Fla. Stat.; International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973).

27. First, the company had to show that the purpose of the interviews was to assist counsel in rendering legal advice to the corporation. The presence of the union representative confirms the disciplinary purpose of these interviews. A union representative attends meetings between corporate management and craft employees when disciplinary measures and grievance proceedings can reasonably be expected to result. See generally N.L.R.B. v. J. Weingarten, Inc. 420 U.S. 251, 95 S. Ct. 959, L. Ed. 2d 171 (1975) (holding that denial of employee's request for union representative to attend security interview that she reasonably feared might result in disciplinary action constituted an unfair labor practice). Further, the statements were given to the personnel department for the purpose of disciplining employees. Southern Bell's conclusory claim of privilege for the statements and the work notes is simply inadequate to establish its claim.

28. Second, the presence of a third party raises additional doubts as to the confidentiality of these interviews.<sup>7</sup> Southern Bell failed to show that the security employees or union representatives were acting as agents of the attorney in the investigation. The union representatives were aligned with the interest of the craft employees, whose interests in not being unfairly disciplined are directly adverse to the company's position. Clearly, the union representatives' presence waives the privilege, as the company has failed to show that the interviews were expected to be confidential. See generally In re Alexander Grant & Co. Litigation, 110 F.R.D. 545, 547 (S.D. Fla. 1986) (adverse party counsel must allow a proper foundation to be laid as to persons present, agent status, purpose of interview). Southern Bell failed to prove that the interviews were conducted in confidence and that confidentiality had been maintained.

29. The personnel notes are not work product. See e.g., Simon v. G.D. Searle & Co., 816 F.2d 397, 402 (8th Cir. 1987), cert. denied, 484 U.S. 917 (1987); United States v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695, 699 (S.D. Fla. 1990). Work product protects an attorneys' preparation for litigation, mental

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<sup>7</sup> The mere presence of a third person at the interview between the client and his attorney does not necessarily void the privilege if the third person is necessary to the representation. Compare Miller v. Haulmark Transp. Sys., 104 F.R.D. 442 (E.D. Penn. 1984) (insurance agent's presence did not waive privilege as he assisted attorneys in preparation of answer) with United States v. Landof, 591 F.2d 36 (9th Cir. 1978) (presence of corporate attorney, who was neither agent nor Landof's attorney, at meeting between Landof, state's witness, and their counsel, waived privilege).

impressions, legal advice and opinions. See Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970). After reviewing the work notes, Commissioner Clark found that the documents did not contain attorney work product. Order PSC-93-0977-PCO-TL at 2. Southern Bell has admitted that the work notes are the product of personnel employees, who used their notes to make business decisions as to employee discipline. The notes were not created at the attorneys' request for assistance in giving legal advice, nor were the personnel managers acting as agents for the attorneys in the rendering of legal advice to the corporation.

30. Even if the notes were attorney work product, Public Counsel has demonstrated sufficient need to overcome the company's claim. See Xerox Corp. v. International Bus. Machines Corp. [IBM], 64 F.R.D. 367, 382 (S.D.N.Y. 1974) (denying privilege claim on basis that information known only to IBM employees, whose collective loss of memory during depositions thwarted legitimate discovery, was an attempt to hide relevant facts behind privilege). Southern Bell impeded Citizens' investigation by its refusal to disclose the names of employees who have relevant information. Order No. PSC-93-0977-PCO-TL at 3. The company directed employees not to answer Public Counsel's questions concerning any information revealed during the company's internal investigation on a claim of privilege, thus the depositions were curtailed.<sup>8</sup> The company similarly

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<sup>8</sup> Southern Bell delayed the depositions of company employees by refusing to release the names of employees with knowledge until the resolution of its appeal of a Commission

foreclosed Public Counsel's deposition of the author of the work notes.<sup>9</sup> Only Southern Bell through its employees have access to the facts of what actually occurred. Commissioner Clark found that Citizens had met the test to overcome any applicable claim of work product immunity. Commissioner Clark's order is factually and legally correct.

31. Southern Bell's production to Public Counsel of the personnel manager's work notes waived any privilege to those documents produced and the employee statements on which the notes were based. § 90.507, Fla. Stat.; Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111 (Fla. 4th DCA 1982); Ray v. Cutter Labs, 746 F. Supp. 86 (M.D. Fla. 1990) (inadvertent disclosure waives privilege); see Ehrhardt, Florida Evidence, § 507.1 & n.12 (1993 ed.) ("Generally, the courts find that disclosure of a single communication results in disclosure of all other communications relating to the same subject matter."). Furthermore, its selective in-house disclosure of the employee statements and the statistical analysis is inconsistent with the confidentiality

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order granting discovery. Southern Bell Tel. & Tel. Co. v. Beard, et al., Case No. 80,004 (Fla. Feb. 4, 1993). While that case was pending, Public Counsel deposed a number of employees, who had been disciplined. However due to the delay, one employee was deceased, some refused to testify, and others refused to answer questions under a broad claim of privilege. Order No. PSC-93-0517-FOF-TL at 5 & att. A.

<sup>9</sup> Citizens' Motion to Compel BellSouth Telecommunications' Vice President Network-South Area C.J. Sanders and BellSouth Telecommunications General Manager-C.L. Cuthbertson, Jr., to Answer Deposition Questions (filed July 2, 1992), granted Order No. PSC-93-0334-PCO-TL (3/4/93), aff'd on recon. Order No. PSC-93-1016-FOF-TL (7/12/93).

requirement of the privilege. § 90.502(c), Fla. Stat. Southern Bell has admitted that the purpose of disclosing the statements to the personnel managers was for the business purpose of disciplining employees, not for the purpose of rendering "legal services." Id. See generally Freedom Newspapers v. Egly, 507 So. 2d 1180 (Fla. 2d DCA 1987).

#### VII. Conclusion

32. Commissioner Clark's order demonstrates that these documents were created for a business purpose, and as such, are not privileged. Obviously, as Commission orders have 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. The Commission's orders correctly harmonize 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.").

33. The Commission's duty to protect citizens from the potential evils of state-sanctioned monopolies<sup>10</sup> outweighs any purported benefits obtained from permitting a broad application of privilege to cover all communications by 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 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.

34. 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 reaudits and work notes 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

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<sup>10</sup> 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).

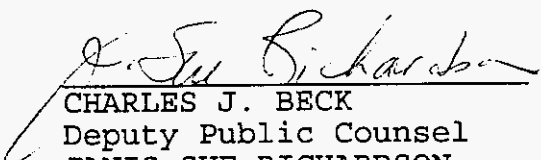
the simple expedient of having corporate counsel ask for the information. This would permit the absurd result of monopoly utilities denying the Commission access to security investigations, financial reviews, or affiliated transactions that were suspect simply by having corporate counsel make a special 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 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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**CERTIFICATE OF SERVICE**

Dockets Nos: 920260-TL  
910163-TL  
900960-TL  
910727-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 15th day of July, 1993.

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