

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Comprehensive review of revenue requirements and rate stabilization plan of SOUTHERN BELL.

DOCKET NO. 920260-TL

In re: Investigation into the integrity of SOUTHERN BELL'S repair service activities and reports.

DOCKET NO. 910163-TL

In re: Investigation into SOUTHERN BELL'S compliance with Rule 25-4.110(2), F.A.C., Rebates.

DOCKET NO. 910727-TL
CLOSED

In re: Show cause proceeding against SOUTHERN BELL for misbilling customers.

DOCKET NO. 900960-TL
CLOSED

**ATTORNEY GENERAL'S RESPONSE TO SOUTHERN BELL'S
MOTION FOR RETURN OF DOCUMENTS HELD IN CAMERA**

The Office of the Attorney General responds to Southern Bell's Motion for Return of Documents Held In Camera and states:

I. INTRODUCTION

During the course of this proceeding, the Florida Public Service Commission (the Commission) obtained certain documents from Southern Bell to conduct an in camera inspection for the purpose of ruling on Southern Bell's motions for protective order and Public Counsel's motions to compel production. The documents in issue included Southern Bell internal investigative audits, panel recommendations, a statistical analysis, employee statements, summaries of employee statements, and human resource work notes.

The Commission ordered Southern Bell to produce the enumerated documents, and Southern Bell sought review before the Florida Supreme Court. Additionally, the Commission ordered Southern Bell to comply with the data requests of the NARUC audit team, and Southern Bell once again sought review before the Supreme Court.

II. THERE IS NO BASIS FOR RETURN OF ALL DOCUMENTS TO SOUTHERN BELL.

The Supreme Court in Southern Bell v. J. Terry Deason, Case Nos. 81,487, 81,716, 81,926, and 82,196 (Florida S. Ct. March 10, 1994) issued its opinion on March 10, 1994, sustaining Southern Bell's claim of privilege in part and ordering production of non-privileged documents. Southern Bell now seeks return of all documents presently in the custody of the Commission or, alternatively, just those documents which the Court found privileged. It is important to note at this juncture that Southern Bell has not raised any issue in its motion for return of documents with respect to the NARUC data requests. Nor has Southern Bell raised any issue in its motion for return of documents regarding its pending Notice of Intent to Request Confidential Classification of the very same documents. Accordingly, the Attorney General will presently address only the issues raised in Southern Bell's motion and will address issues related to confidential classification independently in due course.

Southern Bell asserts several grounds for return of all the documents. First, according to Southern Bell, Docket No. 910163-

TL (the repair docket) has been settled and remained open only due to the pendency of the appeal. However, the repair docket remains open due to ongoing workshops in connection with Southern Bell's repair and quality of service practices. Additionally, the repair docket is consolidated with Docket No. 920260-TL which also remains open. As recognized by the Supreme Court on page 2 of its opinion, the basis for the Commission's decision to consolidate the rate and investigative matters was that an attempt to isolate the issues would be inefficient and perhaps impossible. Southern Bell, at 2; Order No. PSC-93-0390-FOF-TC (March 15, 1993). Furthermore, Southern Bell continues to respond to Commission Staff data requests in connection with the NARUC audit in Docket No. 920260-TL, as consolidated with Docket No. 910163-TL, providing additional evidence of the ongoing status of the proceeding and the need for documents subject to the Supreme court's order to produce. Clearly, the dockets under which the documents were requested remain open, and the documents are relevant to those dockets.

Southern Bell also contends that the Commission holds none of the documents pursuant to a proper, currently operable discovery request. On the contrary, the Commission holds the documents as a direct consequence of Public Counsel's discovery requests. Conspicuously absent from the Settlement Agreement between Public Counsel and Southern Bell is any provision for return of the documents to Southern Bell. The legal status of the Commission's custody of the documents vested the instant the

Supreme Court's opinion became final on March 25, 1994. The Commission's only task is to implement the Supreme Court's ruling and turn the non-privileged documents over to Public Counsel and return the privileged documents to Southern Bell. The time it takes the Commission to complete the endeavor does not alter the legal status of the documents as of March 25, 1994. The Attorney General as a party has a right to access to documents produced in discovery by one party to another. The Supreme Court has ordered production of specified documents, and the Attorney General hereby asserts its right to access to those documents.

III. CERTAIN DOCUMENTS SHOULD BE RETURNED PURSUANT TO THE SUPREME COURT'S OPINION.

Counsel's summaries of employees' statements, the statistical analysis, employee statements made directly to counsel, if any, and human resource work notes based on counsel's summaries of employee statements and employee statements made directly to counsel should be returned to Southern Bell in accordance with the Supreme Court's opinion. However, as discussed below, Southern Bell has failed to sustain its burden of showing that any employee statements were made directly to counsel. Furthermore, contrary to Southern Bell's contention, the Supreme Court did not hold that the employees' statements were entitled to the work product privilege.

IV. THE INTERNAL INVESTIGATIVE AUDITS SHOULD NOT BE RETURNED.

The Supreme Court clearly held in Case No. 81,487 that the internal investigative audits must be produced. Southern Bell, at 16. For the reasons stated above in Section II, Docket No's

920260-TL and 910163-TL remain open and the Supreme Court's order to produce has vested. The Supreme Court was notified of the settlement between Public Counsel and Southern Bell and yet, though unaware that the dockets would remain open, considered the issues of great enough public importance to issue its opinion in order to avoid repetition. The documents in issue are relevant to the pending dockets and a repetition of the current dispute is a veritable certainty if the documents are returned. Therefore, the issue is ripe for resolution, and the audits must be produced.

V. PANEL RECOMMENDATIONS SHOULD NOT BE RETURNED TO SOUTHERN BELL.

The Supreme Court ordered Southern Bell to produce the panel recommendations, but authorized it to redact any "notes, thoughts, or impressions of Southern Bell's counsel that are printed directly on the materials." Southern Bell suggests return of the documents to them for this purpose. In light of the history of Southern Bell's obstinate resistance to production of these documents, it would be more prudent to conduct the redaction process on Commission premises under the supervision of the Commission. Consequently, the Attorney General objects to Southern Bell's request for the return of these documents, since a reasonable alternative is available which avoids the attendant risks.

VI. THE EMPLOYEES' STATEMENTS ARE NOT ENTITLED TO THE ATTORNEY-CLIENT PRIVILEGE AND SHOULD NOT BE RETURNED.

Southern Bell in its Statement of Facts on page 10 of its

Petition for Review in Case No. 81,487, made the following representation of fact to the Supreme Court:

Finally, Southern Bell's in-house counsel also requested that its **security department interview certain employees** and report back to counsel with their results. Southern Bell's counsel instructed and enlisted its security department to act as their agent in the process of fact gathering. Southern Bell's counsel directed and controlled, **and in most cases were present during, the interviews with employees.** (emphasis supplied).

A copy of page 10 of Southern Bell's Petition for Review in Case No. 81,487 is attached as Exhibit 1 hereto. The Supreme Court held that since the employees' statements were made directly to security personnel and not to the attorney, the attorney-client privilege does not apply. Southern Bell, at 16-17. In footnote 14 on page 17 of its opinion, the Court held that the presence of Southern Bell's counsel during the interviews does not invoke the privilege. Southern Bell, at 17.

Presumably, Southern Bell's counsel was diligent in determining the facts represented to the Supreme Court and presented the facts in Southern Bell's most favorable light under counsel's then understanding of the law of attorney-client privilege. In its present motion for return of documents, Southern Bell has attached affidavits which swear that the employees' statements were made **directly to counsel** and counsel was **in all cases** present during the employee interviews. It is apparent that Southern Bell, unhappy with the Court's ruling and blessed with 20-20 hindsight, has now tailored the facts to the law, or must have misrepresented the facts to the Supreme Court.

We are left to speculate as to which, if any, of Southern Bell's portrayals of the facts is true.

The Supreme Court's discussion of the attorney-client privilege in a corporate context is especially cogent here:

Thus, to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of privilege in the corporate context will be subjected to a heightened level of scrutiny.

The burden of establishing the attorney-client privilege is on the party claiming it.

(citations omitted) Southern Bell, at 11. The Attorney General submits that Southern Bell's self-serving affidavits are utterly lacking in credibility at any level of scrutiny, much less at a heightened one, and Southern Bell has failed to meet its burden of establishing its claim of attorney-client privilege.

Case No. 81,716 also involved the status of the employees' statements. Although it is not as clear from Southern Bell's Statement of Facts in its Petition for Review in Case No. 81,716, as to whom the statements were made, security personnel or counsel, it is clear that the same employee interviews and statements are at issue and the facts are consistent with those represented in Case No. 81,487. A copy of page 9 of Southern Bell's Statement of Facts in its Petition for Review in Case No. 81,716 is attached hereto as Exhibit 2. It is also clear that the employee interviews described in the current affidavits address the same interviews. Significantly, Southern Bell, in Case No. 81,716, again admitted that the attorneys were not present at all interviews, so those interviews must have been

between security personnel and employees. Also significant is that Southern Bell's current affidavits do not suggest that there were two types of interviews, those involving employees' statements to security personnel and those involving statements to counsel. The inherent conflict in Southern Bell's various versions of the facts is fatal to the credibility of its current affidavits.

There are other observations in the affidavits that fly in the face of common sense and experience. According to the affidavits, security personnel present during 650 employee interviews sat mute and merely took notes without any direct communications with the employees, not even to ask for clarification. Moreover, these security personnel were left alone with the employees after the attorney left the room and still did not engage in any communications with the employees for clarification while the security person prepared the statements from notes taken during the interview. It is also not clear just how the attorneys, with no direct, personal knowledge of what transpired while they were not in the room, could imply in their affidavits that no such communications between security personnel and employees took place during the attorneys' absence.

Southern Bell's present position as to the facts seems to have been engendered by the Supreme Court's treatment of the employees' statements in Case No. 81,716. However, Southern Bell has misconstrued the Court's reasoning. The Court made it clear that any statements that were made to security personnel, as in

the case of the very same statements in Case No. 81,487, would not invoke the privilege. Southern Bell, at 19. Alternatively, the Court found that in the event of employee statements made directly to counsel, the privilege would apply, and the privilege attaching to any such statements would not be lost upon being shared with managers who need to know. Southern Bell, at 19-20.

The Court laid down the requisite legal principles, and it is a question of fact whether any of the employees' statements were made directly to counsel. Hypothetically, the work notes of Human Resources personnel are privileged to the extent they are based upon statements directly to counsel and counsel's summaries. The work notes are not privileged to the extent they are based upon statements to security personnel. As stated above, Southern Bell has failed, upon a high level of scrutiny, to meet its burden of showing that any of the statements were made directly to counsel.

Southern Bell's affidavits themselves fail to meet the Supreme Court's test even if they are assumed to be true. The Court held that statements made to security personnel did not invoke the privilege even in those instances when counsel was present. Southern Bell, at 17; see also footnote 14 at 17. The affidavits concede that the security person was in the room with the attorney for the purpose of taking notes of the employee's statement, but a different result must prevail because the attorney rather than the security person was asking the questions. Under any definition of communication, the security

person was on the receiving end of the employee's statement just as he was under the scenario of Case No. 81,487. Does it matter whether the employee was making eye contact with the attorney rather than the security person when uttering his or her responses? To draw a distinction is to elevate form over substance. It is difficult to conceive of how the Supreme Court would justify a distinction. The unavoidable inference is the Court deemed security personnel as merely other Southern Bell employees, and communication to the security personnel was a "dissemination" beyond those persons who "need to know."

Southern Bell, at 12.

VII. THE EMPLOYEES' STATEMENTS ARE NOT ENTITLED TO THE WORK PRODUCT PRIVILEGE AND SHOULD NOT BE RETURNED.

In Case No. 81,487, Southern Bell argued, alternatively, that the panel recommendations are protected by work product. Southern Bell is relying on certain language in the opinion as a holding by the Court that the employees' statements are work product. Although finding that the panel recommendations were not work product the Court stated "it is evident that the employees' interviews were directed by counsel in anticipation of litigation," and "Southern Bell has proven that the employee interviews were conducted in anticipation of litigation." While the Court recognized that the interviews were conducted in anticipation of litigation, it nevertheless did not hold the employee statements to be work product. At the bottom of page 17 of its opinion, the Court referred to the product of Southern

Bell's investigation as "memorialized in an **alleged** work product." (emphasis supplied). Southern Bell, at 17. It is presumed that the court used the term, "alleged," intentionally and not gratuitously, and all subsequent references to work product in the same context are subject to the same qualification. The Court then explained that even assuming, arguendo, the results of the interviews were work product, the panel recommendations were not. The coup de grace is that the Court authorized Southern Bell to redact "any notes, thoughts, or impressions of...counsel", i.e., opinion work product, but emphasized that "the information recited to the managers by...counsel is not to be redacted." Southern Bell, at 18; see also footnote 15 at 18. The Court distinguished fact and opinion work product as follows:

Fact work product traditionally protects information which relates to the case and is gathered in anticipation of litigation. Opinion work product consists primarily of the attorney's mental impressions, conclusions, opinions, and theories.

(citations omitted) Southern Bell, at 12-13. In effect, the Court concluded that counsel's notes, mental impressions, etc., i.e., counsel's summaries, were protected opinion work product, but information otherwise shared with management, i.e., employees' statements, did not qualify as fact work product.


In conclusion, the employees' statements are not protected under either the attorney-client or the work product privilege. WHEREFORE, the Attorney General respectfully requests the Commission to enter an order denying Southern Bell's motion for

return of documents.

Dated this 2nd day of May, 1994.

Respectfully submitted,

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company, has a business need to monitor its regulatory compliance; (2) audits in a generic sense are helpful in monitoring regulatory compliance; and (3) therefore, no matter what the evidence of record is, there is implied a business motive for creation of the Investigative Audits, taking them outside the attorney-client privilege and work product doctrine. As will be discussed, the Commission's conclusion was incorrect.

Finally, Southern Bell's in-house counsel also requested that its security department interview certain employees and report back to counsel with their results. Southern Bell's counsel instructed and enlisted its security department to act as their agent in the process of fact gathering. Southern Bell's counsel directed and controlled, and in most cases were present during, the interviews with employees. Thereafter, counsel summarized and memorialized these conversations with employees, including in their notes their subjective impressions of the interviews. At the conclusion of these interviews, the legal department informed a limited number of managers of Southern Bell with a "need to know" of the results of the interviews.

These managers who "needed to know" the results of the interviews subsequently prepared panel recommendations regarding craft discipline and panel recommendations regarding paygrade five and below discipline (hereafter collectively "Panel Recommendations"). On the left side of these documents is information regarding the identities of disciplined employees. Southern Bell has no objection to the production of these portions

statute or other mandate that would obligate Southern Bell to perform this Statistical Analysis. The Analysis was performed solely and exclusively to communicate to counsel the information counsel felt was needed for their defense of Southern Bell below. It is not a business document, as the orders below would have the Court believe.

b. The Statements to Counsel of Southern Bell Employees.

Also in response to Public Counsel's petition below, counsel initiated interviews with certain employees, culminating in written statements and counsel's summaries of those statements. Southern Bell's security department assisted counsel in this process. Counsel directed and controlled, and in most cases were present during, the interviews with employees. Counsel's summaries include their subjective evaluation and impressions of these interviews. Thereafter, Southern Bell's attorneys shared the results of the interviews with a limited number of Southern Bell's management personnel who had a "need to know."

Southern Bell's Human Resources managers took personal notes of the material disclosed to counsel, including notes of counsel's summaries. With this knowledge, the management personnel considered whether and to what extent employee discipline might be warranted. Because these notes contained the substance of privileged communications between Southern Bell employees and

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by the U.S. Mail this 2nd day of May 1994 to the following persons:

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