

a

NANCY B. WHITE
General Attorney

Southern Bell Telephone
and Telegraph Company
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(404) 529-5387

ORIGINAL
FILE COPY

June 15, 1992

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

RE: Docket No. 920260-TL

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Supplement to Public Counsel's First Motion to Compel and Request for In Camera Inspection of Documents which we ask that you file in the above-captioned docket.

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 yours,

Nancy B. White
Nancy B. White

ACK ✓
AFA 3
APP _____
CAF _____

CMU Enclosures

CTR _____
EAG _____
LEG 1W/m _____
LIN 6 _____
OPC _____
RCH _____
SEC 1 _____
WAS _____
OTH _____

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

DOCUMENT NUMBER-DATE

06218 JUN 15 1992

FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 920260-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this 15th day of June, 1992 to:

Robin Norton
Division of Communications
Florida Public Service
Commission
101 East Gaines Street
Tallahassee, FL 32399-0866

Charles J. Beck
Deputy Public Counsel
Office of the Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Angela Green
Division of Legal Services
Florida Public Svc. Commission
101 East Gaines Street
Tallahassee, FL 32399-0863

Michael J. Henry
MCI Telecommunications Corp.
MCI Center
Three Ravinia Drive
Atlanta, Georgia 30346-2102

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Grandoff & Reeves
522 East Park Avenue,
Suite 200
Tallahassee, Florida 32301
atty for FIXCA

Richard D. Melson
Hopping Boyd Green & Sams
Post Office Box 6526
Tallahassee, Florida 32314
atty for MCI

Joseph Gillan
J. P. Gillan and Associates
Post Office Box 541038
Orlando, Florida 32854-1038

Rick Wright
Regulatory Analyst
Division of Audit and Finance
Florida Public Svc. Commission
101 East Gaines Street
Tallahassee, FL 32399-0865

Patrick K. Wiggins
Wiggins & Villacorta, P.A.
Post Office Drawer 1657
Tallahassee, Florida 32302
atty for Intermedia

Peter M. Dunbar
Haben, Culpepper, Dunbar
& French, P.A.
306 North Monroe Street
Post Office Box 10095
Tallahassee, FL 32301
atty for FCTA

Floyd R. Self, Esq.
Messer, Vickers, Caparello,
Madsen, Lewis & Metz, PA
Post Office Box 1876
Tallahassee, FL 32302
atty for US Sprint

Chanthina R. Bryant
Sprint
3065 Cumberland Circle
Atlanta, GA 30339

Nancy B. White (sg)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of) Docket No. 920260-TL
the Revenue Requirements and Rate)
Stabilization Plan of Southern) Filed: June 15, 1992
Bell Telephone and Telegraph)
Company (Formerly FPSC Docket)
Number 880069-TL))
_____)

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
OPPOSITION TO PUBLIC COUNSEL'S SUPPLEMENT TO
PUBLIC COUNSEL'S FIRST 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 25-22.037, Florida Administrative Code, and herewith files its Opposition to the Citizens' of Florida ("Public Counsel") Supplement to Public Counsel's First Motion to Compel with regard to Public Counsel's First Production of Documents Request dated March 20, 1992. In support of its Motion, Southern Bell shows the following:

1. On March 20, 1992, Public Counsel served Southern Bell with its First Request for Production of Documents. This request sought numerous BellSouth Corporation documents which were not in the possession, custody or control of Southern Bell. In addition, the request sought documents irrelevant to this docket, as well as documents protected by the attorney-client or attorney work product privilege or both.

2. On April 24, 1992, Southern Bell filed its Response and Objections to Public Counsel's First Request for Production of Documents. Southern Bell incorporates herein the contents of its Response and Objections.

DOCUMENT NUMBER-DATE
06218 JUN 15 1992
FPSC-RECORDS/REPORTING

3. On May 8, 1992, Public Counsel filed its First Motion to Compel and Request for In Camera Inspection of Documents. On May 15, 1992, Southern Bell filed its Opposition to Public Counsel's Motion to Compel, asserting attorney-client or attorney work product privilege or both and attaching a summary list of the internal audits prepared since January 1, 1990 covered by those privileges. Public Counsel has now filed a Supplement to its First Motion to Compel, claiming that both of the privileges should be denied based on an alleged showing of need and "undue hardship."

4. Communications between attorneys and their clients are shielded from discovery under Rule 1.280(b)(i) of the Florida Rules of Civil Procedure. This rule is codified at § 90-502, Fla. Stat. The attorney-client privilege applies to corporations. Upjohn v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The elements of the attorney-client privilege require that (1) the communication must be made in confidence, (2) by one who is a client, (3) seeking legal advice from an attorney, and (4) the communication is requested to be kept confidential and such privilege has not been waived. International Telephone & Telegraph Corp., 60 F.R.D. 177, 184-85 (M.D.Fla. 1973).

5. The communication in issue involves legal advice sought from and rendered by counsel with regard to the Company's compliance with the Florida Public Service Commission's ("FPSC") rules and regulations. The communications were made in

confidence and should be protected from disclosure. As shown by the attached affidavits of Shirley T. Johnson, the audits at issue were part of an internal investigation conducted by the Company's Legal Department into the issues raised in Docket No. 910163. The audits were performed at the direct specific request of the Company's Legal Department in order to provide the Legal Department with the information necessary to render legal counsel and advice. The results were relayed in confidence to the Legal Department which has relied on the results of these audits for the formulation of advice and litigation strategy. Limited distribution was also made to the Internal Auditing hierarchy. In accordance with such limited distribution, it was made clear that the information was confidential and subject to a claim of privilege. Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So.2d 764 (Fla. 2nd DCA 1981).

6. Public Counsel argues that the audits at issue were routine business records prepared in the ordinary course of business and thus not subject to the attorney-client privilege. While Public Counsel is correct in its assertion that internal audits are routinely performed on various aspects of the Company's business, as the affidavits of Ms. Johnson show, these particular audits were specifically requested by the Legal Department and would not have been performed without that direct request. Thus, they do not constitute routine business records, but rather documents extraordinarily related to a privileged internal legal investigation.

7. The Company sought legal advice from its counsel regarding its conformance with certain FPSC rules. For the Legal Department to be able to provide that advice it needed certain information, i.e., the audits that it requested. The audits are information which is protected from discovery by the attorney-client privilege and, as such, should not be released to Public Counsel or any other person. Public Counsel's Motion to Compel should therefore be denied.

8. In the alternative, Southern Bell submits that the audits involved constitute the work product of attorneys and agents for Southern Bell which should be shielded from discovery under Rule 1.280(b)(1), Florida Rules of Civil Procedure. See also, Karch v. MacKay, 453 So.2d 452, 453 (Fla. 4th D.C.A. 1984). In Surf Drugs, Inc. v. Vermette, 236 So.2d 108, 113 (Fla. 1970), the Supreme Court of Florida held attorney work product to include: interviews, statements, memoranda, correspondence, briefs, personal impressions, and investigative materials prepared in anticipation of litigation by an attorney or an employee investigator at the direction of a party. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct 385, 91 L.Ed. 451 (1947). A document is prepared in anticipation of litigation if it is not one that would otherwise be required to be prepared. See Reynolds v. Hofmann, 305 So.2d 294 (Fla. 3d D.C.A. 1974). It does not matter whether the product is the creation of a party, agent, or attorney where the subject matter of the discovery is the work product of the adverse party. Atlantic Coast Line R.R.

v. Allen, 40 So.2d 115 (Fla. 1949).

9. Public Counsel cites Soeder v. General Dynamics Corp., 90 F.R.D. 253, 255 (D.Nev. 1980) for the proposition that the internal audits are not attorney-work product because they also had the incidental effect of causing changes in the systems audited. It should be noted that in Soeder, in-house accident reports were created routinely after every crash. In Southern Bell, the audits at issue were not prepared in the ordinary course of business. Rather, as the attached affidavits show, the driving motivation behind the performance of the audits was Southern Bell's internal legal investigation into whether or not the Company was complying with Commission rules. See International Systems and Controls Corporation Securities Litigation, 91 F.R.D. 552 (S.D.Texas 1981), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982) (special audit requested by attorneys and conducted by accountants treated as work product in anticipation of litigation).

10. As can be seen by the attached affidavits of Shirley T. Johnson, the audits in question were prepared at the direct request of Southern Bell's Florida Legal Department, in connection with Docket No. 910163, and were not audits conducted in the regular scope of Southern Bell's business. Thus, it is clear that the audits were conducted in connection with this litigation and are subject to the work product privilege.

11. Florida Rules of Civil Procedure, Rule 1.280(b)(2) states that the adverse party may not obtain material subject to

the attorney work product privilege without a showing of need and an inability to obtain the materials from other sources without undue hardship. See Alachua General Hospital, Inc. v. Zimmer USA, Inc., 403 So.2d 1087 (Fla. 1st D.C.A. 1981). The affidavits of Shirley T. Johnson demonstrate that Public Counsel cannot demonstrate either need or inability to replicate the information contained in the audit. As stated in the affidavits, the basic materials necessary to undertake such audits are readily available. Southern Bell has provided most of these materials to Public Counsel in response to previous interrogatories and requests for production filed in Docket No. 910163. Southern Bell has provided education sessions for Public Counsel's personnel, as well as flow charts, trouble histories and data interpretations, in addition to other voluminous information. It is apparent that Public Counsel can review Southern Bell's systems in a manner similar to the audits done by Southern Bell by using information that it already has or which is readily available to it.

Southern Bell therefore respectfully requests that the FPSC deny Public Counsel's First Motion to Compel its First Production of Document Requests.

Respectfully submitted this 15th day of June, 1992.

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY

Harris R. Anthony

HARRIS R. ANTHONY
PHILLIP J. CARVER (02)
c/o Marshall M. Criser
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 530-5555

R. Douglas Lackey

R. DOUGLAS LACKEY (02)
NANCY B. WHITE
4300 Southern Bell Center
675 West Peachtree St., N.E.
Atlanta, Georgia 30375
(404) 529-3862
(404) 529-5387

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of)
the Revenue Requirements and Rate)
Stabilization Plan of Southern) Docket No. 920260-TL
Bell Telephone and Telegraph)
Company (Formerly FPSC Docket)
Number 880069-TL))
_____)

STATE OF FLORIDA)
)
COUNTY OF DADE _____)

AFFIDAVIT OF SHIRLEY JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in Docket No. 910163. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On August 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of the Mechanized Out of Service Adjustment ("MOOSA") System as part of the internal investigation. The audit was not scheduled to be performed and would not have been performed without the request

of the Florida Legal Department.

3.

The MOOSA System handles adjustments for single line residential and business customers.

4.

At the direction of the Legal Department, three time periods were selected for testing. Sample data were statistically selected from the total number of MOOSA eligible accounts for February of 1990, August of 1990 and May of 1991.

5.

The random sample accounts were tested and examined by tracing the trouble report from initial reporting to the customer's bill. Customer bills were pulled and examined for adjustments. Adjustments found were recomputed for accuracy.

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on September 27, 1991.

7.

The September of 1991 MOOSA Audit was carried out solely because the Legal Department requested that it be performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.

8.

Less than half a dozen copies of the September of 1991 MOOSA Audit exist. All are marked and treated as privileged, confidential, and subject to the attorney-client privilege and

attorney work product doctrine. Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing department.

9.

The random sample method which formed the basis of the September of 1991 audit can be duplicated by use of the following records: 1) Mechanized Trouble Adjustment System ("MTAS") and/or Display Long Extended Trouble History ("DLETH") data and 2) customer records associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 12th day of June, 1992.

Shirley T. Johnson
Shirley T. Johnson

Sworn to and subscribed
before me this 12th
day of June,
1992.

Kiki Papadopoulos
Notary Public

My Commission Expires:

Notary Public, DeKalb County, Ga.
My Commission Expires Feb. 24, 1996

Attachment B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of)
the Revenue Requirements and Rate)
Stabilization Plan of Southern) Docket No. 920260-TL
Bell Telephone and Telegraph)
Company (Formerly FPSC Docket)
Number 880069-TL))
_____)

STATE OF FLORIDA)
)
COUNTY OF DADE)

AFFIDAVIT OF SHIRLEY JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in Docket No. 910163. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On April 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of the KSRI - Network Customer Trouble Report Rate as part of the internal investigation. The audit was not scheduled to be performed and would not have been performed without the request of the Florida

Legal Department.

3.

The KSRI - Network Customer Trouble Report Rate measurement is one of fifteen indicators used in calculating the financial Team Incentive Awards to all Company Employees.

4.

At the direction of the Legal Department, the March, April and May, 1991 Customer Trouble Report Summary Combined District Report OTC INTEGRIS Report, Form E2700C, was obtained for the fourteen Florida Maintenance Centers (MC) for review. An extraction of the May 31, 1991 MTAS daily recirculation file was examined. An additional extraction was obtained by MC from MTAS for February, 1990 to May, 1991 to determine if trouble reports were closed to the appropriate disposition codes.

5.

Audit tests were performed to evaluate the procedures and controls over the data used to generate the Network Trouble Report Rate and to verify its integrity. The data obtained from the extractions was traced to the Form E2700C to verify the accuracy of the measurement.

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on August 2, 1991.

7.

The August, 1991 KSRI - Network Customer Trouble Report Rate

Audit was carried out solely because the Legal Department requested that it be performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.

8.

Less than half a dozen copies of the August of 1991 KSRI - Customer Trouble Report Rate Audit exist. All are marked and treated as privileged and attorney work product doctrine. Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing Department.

9.

The methodology used to verify the integrity of the KSRI data for the August of 1991 audit can be duplicated by use of the following records: Mechanized Trouble Adjustment System ("MTAS") and the Form E2700C report associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 12th day of June, 1992.

Shirley T. Johnson

Shirley T. Johnson

Sworn to and subscribed
before me this 12th
day of June,
1992.

Kiki Papadopoulos
Notary Public

My Commission Expires:
Notary Public, DeKalb County, Ga.
My Commission Expires Feb. 24, 1993

Attachment C

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of)
the Revenue Requirements and Rate)
Stabilization Plan of Southern) Docket No. 920260-TL
Bell Telephone and Telegraph)
Company (Formerly FPSC Docket)
Number 880069-TL))
_____)

STATE OF FLORIDA)
)
COUNTY OF DADE)

AFFIDAVIT OF SHIRLEY JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in Docket No. 910163. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On April 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of the Customer Adjustments - LMOS System as part of the internal investigation. The audit was not scheduled to be performed and would not have been performed without the request of the Florida Legal

Department.

3.

The Loop Maintenance Operations System (LMOS) programmatically determines how each trouble report will be routed for correction based on pre-established screening rules.

4.

At the direction of the Legal Department, two time periods were selected for testing. Data sampled was statistically selected for each of the fourteen Florida Installation and Maintenance Centers (MCs) for February, 1990 through August, 1990 and September, 1990 through March, 1991.

5.

Audit tests were performed to attest to the accuracy in scoring subscriber trouble reports by the MCs. Each test was designed to isolate and evaluate one element of the refunding process while maintaining all other factors constant.

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on August 2, 1991.

7.

The August, 1991 Customer Adjustment - LMOS Audit was carried out solely because the Legal Department requested that it be performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.

8.

Less than half a dozen copies of the August of 1991 Customer Adjustment - LMOS Audit exist. All are marked and treated as privileged, confidential, and subject to the attorney-client privilege and attorney work product doctrine. Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing Department.

9.

The random sample method which formed the basis of the August of 1991 audit can be duplicated by use of the following records: 1) Mechanized Trouble Adjustment System ("MTAS") and/or Display Long Extended Trouble History ("DLETH") data and 2) customer records associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 12th day of June, 1992.

Shirley T. Johnson
Shirley T. Johnson

Sworn to and subscribed
before me this 12th
day of June,
1992.

Kiki Papadopoulos
Notary Public

My Commission Expires:
Notary Public, DeKalb County, Ga.
My Commission Expires Feb. 24, 1996

Attachment D

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of)
the Revenue Requirements and Rate)
Stabilization Plan of Southern) Docket No. 920260-TL
Bell Telephone and Telegraph)
Company (Formerly FPSC Docket)
Number 880069-TL))
_____)

STATE OF FLORIDA)
)
COUNTY OF DADE)

AFFIDAVIT OF SHIRLEY JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in Docket No. 910163. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On April 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of PSC Schedule 11 as part of the internal investigation. The audit was not scheduled to be performed and would not have been performed without the request of the Florida Legal Department.

3.

The PSC Schedule 11 is a statement of compliance with Florida Public Service Commission (FPSC) rule 25.4.070. The rule stipulates the service objective for a service affecting trouble as "scheduled to insure that at least 95% of such reports are cleared within 72 hours of report in each exchange as measured on a monthly basis."

4.

At the direction of the Legal Department, all data tested was from February, 1990 through March , 1991. Statistical sampling was performed when there was a high volume of trouble reports meeting the specified criteria for a given month within an exchange.

5.

Audit tests were performed to determine if all trouble reports that should have been counted in the FPSC Schedule 11 were appropriately included. Each test was designed to isolate and evaluate one facet of the routing process from receipt of the trouble report to the Mechanized Trouble Analysis System (MTAS).

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on August 2, 1991.

7.

The August, 1991 PSC Schedule 11 Audit was carried out solely because the Legal Department requested that it be

performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.

8.

Less than half a dozen copies of the August of 1991 KSRI - Customer Trouble Report Rate Audit exist. All are marked and treated as privileged, confidential, and subject to the attorney-client privilege and attorney work product doctrine. Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing Department.

9.

The random sample method which formed the basis of the August of 1991 audit can be duplicated by use of the following records: 1) Mechanized Trouble Adjustment System ("MTAS") and/or Display Long Extended Trouble History ("DLETH") data and 2) customer records associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 12th day of June, 1992.

Shirley T. Johnson
Shirley T. Johnson

Sworn to and subscribed
before me this 12th
day of June,
1992.

Kiki Papadopoulos
Notary Public

My Commission Expires:

Notary Public, DeKalb County, Ga.
My Commission Expires Feb. 24, 1996