

J. Phillip Carver
General Attorney

Southern Bell Telephone
and Telegraph Company
c/o Marshall M. Criser III
Suite 400
150 So. Monroe Street
Tallahassee, Florida 32301
Phone (305) 530-5558

September 4, 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. 910163-TL - Repair Service Investigation

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Motion for Confidential Treatment and Permanent Protective Order which we ask that you file in the above-referenced 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 to the parties shown on the attached Certificate of Service.

Sincerely yours,


J. Phillip Carver
(22)

Enclosures

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

DOCUMENT NUMBER-DATE

A BELLSOUTH Company

10242 SEP -8 1992

FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE

DOCKET NO. 910163-TL

I HEREBY CERTIFY that a correct copy of foregoing was
furnished by U. S. Mail to the following parties this 4th day of

Sept, 1992.

Charles J. Beck, Esq.
Assistant Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Tracy Hatch, Esq.
Division of Legal Services
Florida Public Service Comm.
101 E. Gaines Street
Tallahassee, FL 32301

J Phillip Carver
(22)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens) Docket No. 910163-TL
of the State of Florida to initiate)
investigation into integrity of) Filed: September 4, 1992
Southern Bell Telephone and Telegraph)
Company's repair service activities)
and reports.)
_____)

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
MOTION FOR CONFIDENTIAL TREATMENT
AND PERMANENT PROTECTIVE ORDER**

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.006, Florida Administrative Code, and files its Motion for Confidential Treatment and Permanent Protective Order.

1. On June 18 and 19, 1992, the Office of Public Counsel ("Public Counsel") took the deposition of a panel composed of Southern Bell employees Gary Hall, Rudolph Christian, April Ivy, Gerard Pellegrini and Phillip H. Peterson. During this deposition numerous questions were asked that called for the disclosure of the names of employees disciplined for matters that may relate to this docket as well as disclosure of the nature of the discipline. The requested information was provided in each respective response.

2. At the time of this deposition, counsel for Southern Bell stated that the Company would request confidential classification regarding the names of the disciplined employees. Public Counsel had previously announced in a different context

DOCUMENT NUMBER-DATE
10242 SEP -8 1992
FPSC-RECORDS/REPORTING

its intention to utilize this type of information during the hearing on this matter. Accordingly, Southern Bell and Public Counsel agreed that after receipt of the transcript of this deposition, Southern Bell would file the instant Motion for Confidential Treatment and Permanent Protective Order.

3. Prior to the deposition, certain documents that are subject to the attorney-client privilege and work product doctrine were inadvertently produced to Public Counsel. Public Counsel introduced one of these documents at the deposition (Exhibit 53) and also asked questions that paraphrased the contents of that document. Southern Bell requested that this document be returned to it. Southern Bell hereby requests that until such time as this document is returned, the exhibit and the related portions of the depositions also be treated confidentially for the reasons that are set forth more fully hereinafter.

4. Accordingly, pursuant to Rule 25-22.006, Florida Administrative Code, Southern Bell now files this Motion for Confidential Treatment and Permanent Protective Order with regard to (1) the names of employees disciplined in regard to this matter and (2) exhibit 53 and all portions of the deposition that contain information derived from material that is subject to the attorney-client privilege and work product doctrine.

5. Southern Bell has filed a highlighted version of the deposition and Exhibit 53 to the deposition in a sealed

container, which is marked as Attachment "A." Southern Bell has also filed two redacted copies of the deposition as Attachment "B." Finally, Southern Bell has filed as Attachment "C" a listing of specific pages and lines of the deposition that contain proprietary confidential information, all of which are confidential for the reasons set forth below.

6. Southern Bell seeks confidential treatment of the specific identities of the employees disciplined. This information is clearly confidential and proprietary under Florida Statutes, § 364.183(f), which provides that "proprietary confidential business information" includes "employee personnel information unrelated to compensation, duties, qualifications, or responsibilities."

7. The four areas of employee personnel information that are not, per se, confidential pursuant to § 364.183(f), Florida Statutes, are compensation, duties, qualifications, and responsibilities of an employee. A common sense reading of this list, as well as a review of the definitions of these items as contained in Webster's Seventh New Collegiate Dictionary demonstrate that the names of employees in connection with discipline do not fit any of the exceptions and thus are, per se, confidential under § 364.183(f), Florida Statutes.

8. A review of these terms, in the context of § 364.183(f), Florida Statutes, reveals their meaning. "Compensation" is the amount of money or other value that an

employee is paid to perform his or her job duties. "Duties" are the particular acts an employee is expected to perform as a part of his or her job. "Qualifications" are the skills, knowledge, and abilities needed to perform a particular job. Finally, "responsibilities" are those things that an employee is obliged to do as part of his or her job. These meanings are confirmed by the dictionary definition of these words. Webster's definitions of these terms are as follow:

- A. Compensation - payment, wages.
- B. Duty - the action required by one's position or occupation.
- C. Qualification - something that qualifies; a condition that must be complied with.
- D. Responsibility - the quality or state of being responsible.

Even a cursory reading of these commonly-understood definitions makes it clear that the disciplining of an employee is not encompassed within any of the concepts or definitions set forth above.

9. Thus, the names of the employees who have been disciplined do not relate to their compensation, duties, qualifications, or responsibilities. Instead, the name of an employee who has been disciplined is a personnel-related matter, the disclosure of which would be highly damaging to the reputation of the employee in the community at large. Certainly,

§ 364.183, Florida Statutes, was not intended to require such disclosure.

10. If this Commission were to interpret § 364.183, Florida Statutes, to require public disclosure of any employee information that bears a relationship, even of an indirect or tangential nature, to an employee's job responsibilities, wages, or qualifications, then there would be literally nothing protected from disclosure. Put another way, a broad reading of the exceptions to 364.183(f), Florida Statutes, would reduce the public disclosure exemption for employee information to the point of nonexistence. Obviously, if the legislature had intended for this statute to be read in a way that would make the employee information exemption uniformly unavailable and essentially pointless, then it would simply not have bothered to create the exemption in the first place.

11. In this particular case, though, there is an equally compelling reason that these documents should be treated as confidential. Section 364.183, Florida Statutes, provides that in addition to the specifically identified types of documents that are confidential, such as those enumerated in subsection (f), any document that, if disclosed, "would cause harm to the ratepayers or the person's or company's business operations...is also entitled to protection." The potential for harm to Southern Bell's business operations that would necessarily result from

disclosure of the subject information is both obvious and striking.

12. The discipline of Southern Bell's employees in this matter was the result of a thorough, privileged internal investigation that was designed to determine whether or not a repair reporting problem existed. It was never contemplated by either the Company or the individuals involved that, in the aftermath of this effort by Southern Bell to police itself, there would be a resulting forced public disclosure that would subject the disciplined employees to the additional punishment of public opprobrium and scorn. In effect, the public disclosure of the names of the disciplined employees would convert internal discipline into an inappropriate and inflammatory "public shaming" of these employees.

13. Inasmuch as this docket already has resulted in widespread publicity as to Southern Bell, it is probable that the public disclosure of the identities of these employees would also be widely published. This disclosure is particularly unnecessary where, as here, the public will have access to all disciplinary information, except for the names of the employees themselves. Thus, for example, the number of employees disciplined, the stated basis for the discipline and the type of discipline would all be publicly available.

14. The public disclosure of the names of disciplined employees would have a significantly deleterious effect on morale

that, in turn, would serve as a practical impediment to the functioning of the Company. Those who have cooperated with the efforts of the company to police itself have done so on the well-founded assumption that the information would be handled discreetly and appropriately, and that it would result in a level of discipline, if any, that was warranted. If Southern Bell is now forced to reveal publicly the names of the employees disciplined, then the employees who have cooperated will no doubt feel that their good faith efforts to address any problems that may have occurred have been betrayed. It is easy to see how this sense of betrayal could result in morale problems that would be both widespread and severe.

15. Moreover, public disclosure could well result not only in general morale problems, but also in a general employee wariness and concern that would make future attempts to remedy any problems that may arise far more difficult. Southern Bell can only effectively investigate an internal problem with the cooperation of its employees. If the lesson to be learned by employees in this particular instance is that any cooperation may result in exposure of disciplined employees to the additional ordeal of public ridicule, then the prospect of obtaining adequate employee cooperation to address effectively any possible future problems diminishes significantly.

16. Further, the managers of Southern Bell who are charged with the duty of administering employee discipline will

unquestionably be more hesitant to do so if they know that any employee disciplined for even the most minor infraction may later have that discipline publicly disclosed and widely published.

17. Finally, to reveal this information publicly would serve no purpose whatsoever. Arguably, if disclosure of the identities of these employees served some public purpose, or if this disclosure were necessary for this Commission to deal thoroughly with the issues of this docket, then a balancing test might be necessary. That is, the Commission would need to balance the benefits to be derived from public disclosure against the detriment to the Company and the employees. In this case, however, public disclosure will result in no benefit whatsoever.

18. Public Counsel can make its arguments in this matter, and the Commission can fully consider all issues pertinent to this docket, based on the information that Southern Bell has provided. Public Counsel has the names of the employees in question because Southern Bell provided that information without objection. It is only the public disclosure of employees' names to which Southern Bell objects. Southern Bell has stated that it does not object to public disclosure of the extent of the employee discipline, the type of discipline, and the job responsibilities of those disciplined. There simply is nothing to be gained by the additional, gratuitous public disclosure of the identities of the particular persons disciplined. Florida Statutes § 364.183(f) clearly provides that the names of these

employees should be kept confidential. To hold otherwise will do nothing more than damage, perhaps irreparably, the reputations of individual Southern Bell employees and expose them personally to public ridicule.

19. Certain of the information for which Southern Bell is requesting confidential treatment should not be publicly disclosed for another reason. During the deposition at issue, Public Counsel questioned the witnesses based upon the contents of the deposition exhibit that was identified as No. 53.

20. This exhibit is comprised, in whole or in part, of hand-written notes that are covered and protected by the work product doctrine and the attorney-client privileges. This document was inadvertently produced to Public Counsel by Southern Bell in response to a request for production that was propounded prior to the time of the deposition in question.

21. Upon discovering the inadvertent disclosure, counsel for Southern Bell verbally requested that Public Counsel return the document to Southern Bell. Thereafter, counsel for Southern Bell sent to Public Counsel a letter requesting the immediate return of this document. A similar letter request was made of and a letter sent to the Commission Staff's attorney. These letters, copies of which are attached hereto as Attachment "D", set forth the clear, persuasive case law that provides that the inadvertent disclosure of documents is not a waiver of the privilege. Public Counsel and Staff Attorney, nevertheless,

refused to return these documents. Public Counsel then utilized these documents in the instant deposition by asking questions that either quoted directly from the documents, or alternatively, paraphrased them in such a way that the transcript of the deposition reveals clearly the contents of the documents.

22. Southern Bell herein requests confidential treatment of Exhibit 53 of the deposition and of the designated portions of the deposition transcript that reflect the contents of this exhibit.

23. This Commission has broad discretion under § 364.183(3), Florida Statutes, to exempt from the public disclosure requirements of Florida Statutes § 119.07(1) proprietary confidential business information. The phrase "proprietary confidential business information" is, in turn, defined broadly by the statute to allow this Commission to protect from disclosure any information that is (1) intended to be private and treated accordingly by the company when (2) disclosure of the information would cause harm to the company's business operations.

24. It is obvious that the gratuitous public disclosure of confidential attorney-client communications has a significant prospect for harm to the company. The privilege itself was created because, in the words of one court, "in the interest of the administration of justice, ... persons seeking legal aid and counsel should be free to communicate with a confidential advisor

about the subject matter of their problem without fear of consequences or the apprehension of disclosure." Modern Woodmen of American v. Watkins, 132 F2d 352, 354 (5th Cir. 1942).

25. Likewise, the work product doctrine is of crucial importance in this situation. This "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 investigations in preparation for trial." U.S. v. 22.80 Acres of Land, 107 F.R.D. 20, 24 (U.S.D.C. Cal. 1985). The work product doctrine, and the compelling reasons for its existence, apply equally to situations such as ours in which the documents in question are created in anticipation of litigation. See generally, U.S. v. Real Estate Board of Metropolitan St. Louis, 59 F.R.D. 637 (U.S.D.C, Mo.1973).

26. In this instance, Southern Bell has likely already been harmed by the combination of the inadvertent disclosure of the privileged material and the subsequent refusal of Public Counsel to acknowledge the case law holding that no privilege was waived and to return the documents. This injury should not be compounded by the additional and unnecessary public disclosure of information that the company reasonably expected to be kept confidential.

27. The manner in which public disclosure of employee discipline could adversely effect future efforts to administer appropriate discipline has already been discussed. Likewise, managers of the company may be understandably disinclined in the future to seek legal advice if the inadvertent disclosure of this advice can be used to justify not only invading the attorney-client and work product privileges, but also making public the inherently confidential contents of this privileged communication.


28. All of the information for which Southern Bell requests confidential treatment is intended to be treated as confidential, and has not been disclosed except pursuant to statutory provisions or private agreement that provides that the information will not be released to the public.

WHEREFORE, Southern Bell requests that the Commission grant

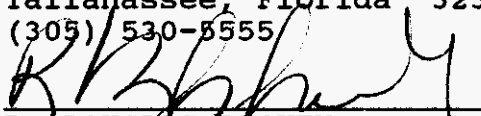
its Motion for Confidential Treatment and Permanent Protective
Order.

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY


HARRIS R. ANTHONY (22)

J. PHILLIP CARVER
c/o Marshall M. Criser III
150 So. Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 530-5555


R. DOUGLAS LACKEY
NANCY B. WHITE
4300 Southern Bell Center
675 W. Peachtree St., NE
Atlanta, Georgia 30375
(404) 529-3862

FPSC DOCKET 910163-TLTRANSCRIPT OF DEPOSITIONS OF
HALL, CHRISTIAN, IVY, PELLEGRINI, AND PETERSON

JUNE 18, 1992

JUSTIFICATION FOR CONFIDENTIALITY REQUEST

1. The confidential and proprietary information that is contained in this listing is all employee-personnel information that is not related to qualifications, duties, responsibilities or compensation. Accordingly, these documents are exempted from the Public Records Act by the express provisions of Section 364.183, Florida Statutes.

2. The information contained in this listing is Attorney/Client work product and is, therefore, proprietary and privileged information.

The following information identified by page and line numbers is considered confidential and proprietary:

<u>Page Nos.</u>	<u>Line Nos.</u>	<u>Reasons Proprietary</u>
109	4, 5, 11, 12, 21-24	1 & 2
111	16-18	1
112	1, 4-8, 11-12	1
113	13, 14, 16	1
123	13-15	1
127	2, 11	1
<u>EXHIBIT 53</u>		
Pages 1-14, 16	All Lines	1 & 2
Page 15	All Lines	2

ATTACHMENT "D"

Harris A. Anthony
General Attorney-Florida

Southern Bell Telephone
and Telegraph Company
Museum Tower Building
Suite 1910
180 West Flagler Street
Miami, Florida 33130
Phone (305) 530-5556

May 28, 1992

Mr. Charles J. Beck, Esq.
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
Room 812
111 West Madison Street
Tallahassee, Florida 32399-1400

RE: Docket No. 910163-TL

Dear Charlie:

On March 21, 1992, Public Counsel issued its Twenty-Second Set of Requests for Production of Documents in the above captioned matter. Southern Bell filed its Responses and Objections to same on April 29, 1992, wherein it objected to the request to the extent it sought documents covered by the attorney/client privilege or attorney work product privilege or both. The documents so protected were described as notes compiled by the Personnel Department and derived from the privileged internal legal investigation.

On May 21, 1992, at a panel deposition conducted by the Florida Public Commission Staff, it was brought to Southern Bell's attention that certain privileged information had inadvertently and accidentally been disclosed in the responses filed on April 29, 1992. This material consisted of 14 pages, numbers 56 through 70, which contained Personnel Department notes as described above. As counsel for Southern Bell, I informed you of the mistake and requested the return of the privileged material. You refused to return the privileged material.

In accord with United States v. Pepper's Steel & Alloys, Inc., 742 F.Supp. 641 (S.D. Fla. 1990), the privilege remains with respect to this set of notes and they should immediately be returned to Southern Bell. In Pepper's Steel, the court adopted the test of Parkway Gallery v. Kittinger, 116 F.R.D. 46, 50

A BELLSOUTH Company

PO15/040

TO ATLANTA REGULATORY

09-03-92 12:04PM

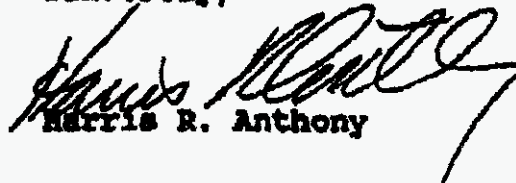
Mr. Charles J. Beck
May 27, 1992
Page 2

(M.D.N.C. 1987) in which five factors were used in determining whether an inadvertent production waives privilege:

(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error.

These factors clearly demonstrate that Southern Bell's inadvertent production of this set of notes did not waive the privilege. Southern has taken every reasonable precaution to protect its privilege in a case where voluminous discovery is taking place. This letter is an immediate attempt to rectify the disclosure. In accord with Pepper's Steel and Georgetown Manor, Inc. v. Ethan Allan, Inc., 753 F.Supp. 936 (S.D.Fla. 1991), the inadvertent disclosure of the privileged documents is not a waiver of the privilege. I therefore request that you immediately return to me all copies of the above described material in your possession or control.

Sincerely,


Harris R. Anthony

cc: Tracy Hatch