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

October 20, 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 Response and Memorandum in Opposition to Public Counsel's Ninth Motion to Compel and Request for in Camera Inspection of Documents and Expedited Decision, which we ask that you file in the 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 to the parties shown on the attached Certificate of Service.

Sincerely yours,

J. Phillip Carver

J. Phillip Carver

Enclosures

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

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG 1
MAS 6
OPC
RCH
SEC
WAS
OTH

**CERTIFICATE OF SERVICE**
**Docket No. 910163-TL**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 20th day of October, 1992, to:

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

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

J. Phillip Carver
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Petition on behalf of Citizens of the State of Florida to initiate investigation into integrity of Southern Bell Telephone and Telegraph Company's repair service activities and reports. | Docket No. 910163-TL<br><br>Filed: October 20, 1992 |

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S RESPONSE AND MEMORANDUM IN OPPOSITION TO PUBLIC COUNSEL'S NINTH MOTION TO COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS AND EXPEDITED DECISION**

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.037(b), Florida Administrative Code, and files its Response to the Office of Public Counsel's ("Public Counsel") Ninth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision.[1]

**A. ATTORNEY-CLIENT PRIVILEGE**

1. Both Southern Bell and Public Counsel have already stated on numerous occasions their respective arguments as to the applicability of the attorney-client privilege and work product

[1] Public Counsel's Motion recites that its purpose is to compel production of documents requested on August 10, 1992 and September 2, 1992. No documents, however, were requested in this proceeding on September 2, 1992. Although not specifically stated in the Motion, Public Counsel appears to move to compel production of documents requested in Public Counsel's 27th and 28th requests to produce, which were propounded on August 3, 1992 and August 10, 1992.

doctrine to previous similar requests to produce. Southern Bell will not burden the Commission with a restatement of legal authority that has previously been briefed. Instead, Southern Bell responds herein to only those portions of Public Counsel's motion that set forth pertinent facts and purportedly controlling authority that have not previously been argued.

2. The central question for this Commission to consider in resolving this attorney-client privilege dispute is set forth directly in Public Counsel's Motion to Compel: "Which corporate employees fall within the statutory definition of 'client' so that their statements are encompassed within the attorney-client privilege" (Motion to Compel at p. 6). This question was answered dispositively by the United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981) in a way that makes it clear that the statements of Southern Bell employees at issue are protected by the attorney-client privilege.

3. In Upjohn, the U.S. Supreme Court considered the parameters of the attorney-client privilege in the context of facts that are strikingly similar to those that pertain in our case. Specifically:

> Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with...laws,...[in various areas]....The communications concerned matters within the scope of the employees' corporate duties, and

> the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.

Id. at S. Ct. p. 685. In order to obtain information to render this advice, counsel for Upjohn conducted an investigation that included interviews of eighty-six employees.

4. The Internal Revenue Service, the company's opposition in Upjohn, argued for the application of the "control person" test. Under this test the statements from Upjohn's employees would not be privileged because they were not provided by controlling persons within the corporation, i.e., "those officers who play a 'substantial role' in deciding and directing a corporation's legal response." Id. at p. 684. The Supreme Court first criticized, then rejected outright, the "control person test" by stating that it,

> ...overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who could act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.
>
> * * *
>
> ...In the corporate context, however, it will frequently be employees beyond the control group...who will possess the information needed by the corporation's lawyers.

Id. at S. Ct. p. 683.

5. Therefore, the Supreme Court expressly rejected the control group test under circumstances that are virtually identical to those that pertain in our case, and ruled that the communication of information from corporate employees to lawyers under these circumstances is privileged.

6. Public Counsel argues only briefly and weakly that the attorney-client privilege of Southern Bell should not be sustained if the rule of Upjohn is applied. Its single argument that the Upjohn test has not been met in our case is comprised of a sort of waiver argument that is premised entirely on an essential misstatement of the relevant facts. Specifically, in referring to the employee statements, Public Counsel purports to quote a statement by Southern Bell that "this information deals with employee information unrelated to the employee's defined duties and responsibilities." (Motion at p. 8, par. 11) In a telling omission, however, Public Counsel neglects to define what is referred to by the term "this information."

7. As part of Southern Bell's internal investigation, its attorneys conducted interviews of employees concerning information that they learned while doing their jobs. At the conclusion of the investigation, some of the employees interviewed were disciplined as a result of facts that came to light in the investigation. Southern Bell has revealed to Public

Counsel the identity of these disciplined employees, but takes the position that the names of employees disciplined should be treated confidentially pursuant to Florida Statutes Section 364.183(f). Specifically, Southern Bell contends that, under these circumstances, the names of these disciplined employees[2] are not directly related to their job responsibilities or duties. Southern Bell has never taken the position that the employee interviews taken during the investigation or the facts contained therein were not related to the proper or improper conduct of the jobs of those employees.

8. Thus, the position of Southern Bell quoted by Public Counsel refers to employee discipline, not to the information obtained by Southern Bell attorneys through the employee interviews. For Public Counsel to fail to acknowledge this distinction and represent to this Commission that Southern Bell has conceded that employees were not interviewed about job-related matters reveals, at best, a profound confusion about the facts of this case or, at worst, a surprising lack of candor.

9. Public Counsel, apparently aware that Southern Bell must prevail if the "subject matter test" approved in Upjohn is applied, argues that this Commission should reject the

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[2] Moreover, the group of employees disciplined overlaps, but is different and smaller than the group of employees interviewed in the investigation.

pronouncement of the U.S. Supreme Court in Upjohn, and instead apply the more restrictive control group test that was disapproved in Upjohn. While the Supreme Court was interpreting Federal Law in Upjohn, that case does provide an extremely persuasive and directly applicable rationale for adoption of the subject matter test. Indeed, there is neither sound reasoning nor legal precedent to support an argument that this Commission should reject the rationale of Upjohn and apply the control person test. Public Counsel's argument in support of the contrary position is badly flawed.

10. Public Counsel first argues for the more restrictive test by citing a footnote in Southern Bell Telephone & Telegraph Co. v. Beard, et al., 597 So.2d 873, 876, n.4, to imply that there is some distinction between state and federal law that has moved state courts to construe existing privileges more narrowly. In point of fact, the footnote cited merely points out that, to the extent a privilege does not exist in Florida, it cannot be created by the courts.[3] Certainly, Public Counsel would not argue that the attorney-client privilege does not exist in Florida. Thus, this citation has no applicability to the matter at issue. Instead, there is simply no case law to suggest that

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[3] The Court notes as an example the academic privilege discussed in Proctor & Gamble Co. v. Swilley, 462 So.2d 1188 (Fla 1st DCA 1985).

Upjohn has been, or should be, rejected by Florida Courts or this Commission.

11. Public Counsel next argues that because Southern Bell is a regulated company, it is entitled to assert only a version of the privilege that is restricted so radically as to be virtually non-existent. Again, there is simply no law to support this novel proposition.[4]

12. To support this flawed premise, Public Counsel embarks on a long, and essentially irrelevant, recounting of those portions of Chapter 364 of the Florida Statutes that set forth the power of this Commission to oversee regulated telecommunications companies. Public Counsel fails, however, to garner from Chapter 364 any support for the proposition that a regulated company is not entitled to the full benefit of the attorney-client privilege.

13. Next, Public Counsel cites, in ostensible support for this same argument for a restricted attorney-client privilege, an opinion letter from the Federal Communications Commission ("FCC")

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[4] In point of fact, the Upjohn case provides a rationale to support the precise contrary rule: "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,' [CITATION OMITTED]..., particularly since compliance with the law in this area [federal antitrust law] is hardly an instinctive matter." Upjohn at S. Ct. 684, emphasis added.

entitled In re: Notification to Columbia Broadcasting System, Inc. Concerning Investigations by CBS of Incidence of "Staging" by its Employees of Television News Programs 45 FCC 2d 119 (November 1973). (Hereinafter, "CBS"). Upon review of CBS, however, it is obvious that the dictates of that letter opinion are simply inapplicable to the circumstances of our case[5]. In CBS the television network allegedly staged six events that were then subsequently presented as newsworthy events that had spontaneously occurred. The FCC made an inquiry of CBS's action, which included not only an examination of the underlying facts of the staging, but also of the adequacy of the subsequent investigation by CBS. When the FCC inquired as to the specifics of this investigation, CBS replied, in part, by invoking the attorney-client and work product doctrine.

14. The FCC found this invocation of the privilege inappropriate for three reasons, none of which apply in our case. (1) The FCC placed great emphasis upon the fact that it was charged with the duty to determine whether CBS had made a thorough investigation. The FCC pointed out that it could not do so if CBS refused, for whatever reason, to provide the FCC with the full details of their investigation. (2) The FCC also stated

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[5] Of course, even if CBS were applicable, it still does not constitute binding authority.

that the work-product doctrine created by Hickman v. Taylor[6] 320 U.S. 495, 67 S.Ct. 385 (1947) pertains only in adversarial proceedings. Thus, the FCC questioned its applicability, given the fact that its review of the investigation of CBS did not occur in an adversarial context. (3) The FCC stated that "there is considerable doubt whether the attorney-client privilege applies to statements of subordinate employees of the corporation taken by counsel for the corporation." Id. at p. 123. This doubt was, of course, dispelled seven years later by the dispositive interpretation of federal law contained in Upjohn.

15. Our case differs, of course, because this matter is being considered in an investigation by the Commission of whether Southern Bell violated Rule 25-4.110(2), Florida Administrative Code. The Commission is not relying upon the internal, privileged investigation of Southern Bell. Discovery in this docket has been proceeding for twenty months with tens of thousands of pages of documents produced and nearly one hundred depositions taken. It is this evidence upon which the Commission will base its decision. Thus, CBS is clearly factually distinguishable. Further, there can be no plausible argument

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[6] As will be discussed further below, this FCC opinion predated by seven years the seminal Upjohn case. Thus, the earlier Hickman case was the most direct Supreme Court pronouncement at that time on the attorney-client privilege and work product doctrine.

that this is not an adversarial proceeding or that Public Counsel has not positioned itself in this matter as an adversary of Southern Bell. Finally, CBS was influenced, at least in part, by the ambiguous state of federal law as to attorney-client privilege that existed in 1973. As Public Counsel no doubt knows, this ambiguity was eradicated by the Supreme Court's ruling in Upjohn.

16. Finally, having failed to provide case support for its position, Public Counsel resorts to the astounding statement that "[i]f a utility is permitted by judicial decision to hide evidence of its defrauding the public under a common-law claim of attorney-client privilege, the legislature's intent to provide the Commission all necessary power to protect the public will be defeated." Motion at p. 10. Thus, Public Counsel asks this Commission to assume that Southern Bell has engaged in wrong-doing, then to use this assumption as the basis to strip Southern Bell of the otherwise applicable attorney-client privilege. While this proposition is certainly a novel construction of the manner in which the attorney-client privilege -- and, indeed, the constitutional right to due process itself -- functions, it is obviously unworthy of consideration by this Commission.

17. Thus, it is clear that the rationale of the United States Supreme Court in Upjohn provides the best mechanism for

construing the limits of the attorney-client privilege. It is equally clear that, under Upjohn, information gathered by attorneys for Southern Bell from the Company's employees in order to render a legal opinion is privileged.

## B. WORK PRODUCT DOCTRINE

18. Since the information at issue is protected by the attorney-client privilege, Public Counsel's argument that an exception should be made to the work product doctrine is essentially moot. Even if there were no applicable attorney-client privilege, however, Public Counsel has still failed to make an adequate showing to support an exception to the work product doctrine.

19. In Upjohn, the Supreme Court stated in dictum that even if the subject memoranda by attorneys memorializing employee statements were not protected by the attorney-client privilege, they should be protected by the work-product privilege. "To the extent they do not reveal communications, they reveal the attorney's mental processes in evaluating the communications." Upjohn, S.Ct. at p. 688. Therefore, the Court went on to state the applicable standard: "As rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of

substantial need and inability to obtain the equivalent without undue hardship." Id.

20. Federal courts have gone even further in protecting opinion work product, i.e., that which consists of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Rule 26(b)(2), Federal Rules of Civil Procedure. This provision of Rule 26 has been interpreted to mean that "'opinion' work product is absolutely immune from discovery. U.S. v. Pepper's Steel & Alloys, Inc., 132 FRD 695, 698 (S.D. Fla 1990) (emphasis added)

21. In order to apply this standard, it is necessary to set forth a proper rendering of the facts that are involved. Contrary to Public Counsel's statement (Motion at p. 14), Southern Bell did not object to producing the names of employees "who have relevant information." Instead, Southern Bell objected to a discovery request that required it to make an assessment as to the subjective knowledge of employees regarding alleged wrong doing. Thus, for example, when Public Counsel later propounded a request for the names of employees disciplined, Southern Bell provided these names without objection.

22. Public Counsel then embarked upon a discovery process that, to date, has entailed deposing almost a hundred witnesses.

These witnesses can be divided into essentially three categories: (1) fact witnesses, (2) experts as to the subject matter at issue in this proceeding and (3) those witnesses who have neither been deposed as subject matter experts per se, nor because of any direct knowledge of the facts. Instead, this third category of witnesses is comprised of those who assisted Southern Bell's legal department in its investigation and associated matters relating to Southern Bell's trouble reporting practices. Public Counsel's purpose in deposing these witnesses has apparently been to obtain privileged information from them in order to avoid the labor involved in conducting its own discovery. C. J. Sanders (Vice President Network-South Area) and C. L. Cuthbertson, Jr. (General Manager-Human Resources) fall into this third category.

23. Southern Bell did object to questions designed to force these witnesses to reveal privileged communications that took place as a result of the investigation. It is absolutely insupportable, however, for Public Counsel to imply that when it subsequently deposed employees who were disciplined, Southern Bell substantially restricted its ability to question these deponents. Instead, Public Counsel was afforded nearly unfettered ability to inquire as to any underlying facts known to these employees.

24. It is true that four of the dozens of deponents in this matter asserted the Fifth Amendment privilege and refused to provide information to Public Counsel. In a proceeding, however, in which the Office of Public Counsel has taken almost one hundred depositions and propounded hundreds of requests to produce and interrogatories, there can be no serious argument that their ability to conduct discovery and to develop their case has been impeded in any meaningful way by the refusal of these four witnesses to testify.

25. Further, the invocation of the Fifth Amendment was an act by individual employees based upon the advice of their personal counsel. Public Counsel has made no attempt to test the validity of the invocation by attempting to compel answers to any of the questions asked in these four depositions. Instead, Public Counsel has been content to be the beneficiary of this decision by third parties and to use it to attempt to invade the otherwise applicable work-product doctrine.

### C. OVERBURDENSOME REQUESTS

26. Once again, before addressing the subject legal issue, it is necessary to provide a statement of facts to remedy the misstatements contained in Public Counsel's Motion. Specifically, in paragraph 20 of its Motion, Public Counsel

creates the impression that Southern Bell has simply refused to provide existing backup documents from which Public Counsel could attempt to validate customer rebates. The real situation, which was properly described in Southern Bell's response to Request Nos. 10 and 11 of Public Counsel's Twenty-Eighth Request to Produce filed on September 14, 1992, is much different.

27. Public Counsel requested that Southern Bell produce all 9156 forms (a form used to make manual changes to customer accounts) for those customers who received rebates within a period of approximately eighteen months. Public Counsel further requested that Southern Bell provide DLETHs (a type of trouble history) for each of these customers. There simply is no currently existing repository of documents from which DLETHs for these specific customers can be gathered and produced. Instead, in order to respond to Public Counsel's request for DLETHs, it would be necessary to review each of the approximately twenty boxes of 9156 forms produced to extract the telephone number for each customer, then to use the LMOS system to access each respective customer record in order to produce a DLETH.

28. Given this, Southern Bell responded by objecting on the basis of the burdensome nature of the request. Southern Bell did, however, agree to make two of the twenty boxes of 9156 forms immediately available and further offered that if, after this

review, Public Counsel wished to see the remaining boxes, then Southern Bell would make the additional eighteen boxes available for inspection as well.

29. To this date, Public Counsel has only reviewed two of the twenty boxes of 9156 forms. Nevertheless, despite their failure to review the voluminous documents that have been made available, Public Counsel demands in its Motion that Southern Bell perform the obviously burdensome and extremely time-consuming task of extracting more information regarding these customer accounts. Southern Bell submits that it should not be forced to undergo this extremely labor intensive process to create additional documents when Public Counsel has failed even to review the documents that have been made available to it.

30. As to Public Counsel's request for an in camera inspection, Southern Bell has previously briefed at length the reasons that a review of the documents would not be helpful to the Commission. To summarize these reasons, the existence of the privilege is most convincingly demonstrated by the circumstances surrounding the creation of the investigative documents. A review of the contents of these documents would, in this situation, be of little or no use.

WHEREFORE, Southern Bell respectfully requests the entry of an Order denying in all respects Public Counsel's Ninth Motion to

Compel and Request for In Camera Inspection of Documents and Expedited Decision.

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY

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

R. Douglas Lackey
R. DOUGLAS LACKEY
SIDNEY J. WHITE, JR.
4300 Southern Bell Center
675 W. Peachtree St., NE
Atlanta, Georgia 30375
(404) 529-3862