

SIDNEY J. WHITE, JR.
General Attorney

Southern Bell Telephone
and Telegraph Company
Suite 400
150 South Monroe Street
Tallahassee, Florida 32301
(404) 529-5094

February 5, 1993

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

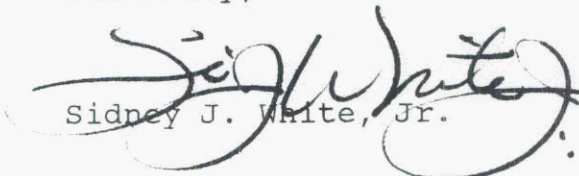
RE: Docket Nos. 900960-TL, 910163-TL and 920260-TL

Dear Mr. Tribble:

Enclosed are an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Response in Opposition To Public Counsel's Fourteenth 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,



Sidney J. White, Jr.

Enclosures

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

DOCUMENT NUMBER-DATE
01494 FEB-58
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 5th day of February, 1993 to:

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

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

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Grandoff & Reeves
716 - 315 S. Calhoun Street
Tallahassee, Florida 32301
atty for FIXCA

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

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

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

Floyd R. Self, Esq.
Messer, Vickers, Caparello,
Madsen, Lewis, & Metz, PA
Post Office Box 1876
Tallahassee, FL 32302
attys for McCaw Cellular

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

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

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

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

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

Michael W. Tye
AT&T Communications of the
Southern States, Inc.
Suite 1410
106 East College Avenue
Tallahassee, Florida 32301

Dan B. Hendrickson
Post Office Box 1201
Tallahassee, FL 32302
atty for FCAN

Benjamin H. Dickens, Jr.
Blooston, Mordkofsky, Jackson,
& Dickens
2120 L Street, N.W.
Washington, DC 20037

Monte Belote
Florida Consumer Action Network
4100 W. Kennedy Blvd. #128
Tampa, FL 33609

Michael B. Twomey
Assistant Attorney General
Department of Legal Affairs
Room 1603, The Capitol
Tallahassee, FL 32399-1050

Florida Pay Telephone
Association, Inc.
c/o Mr. Lance C. Norris
President
202 - 8130 Baymeadows Cir. West
Jacksonville, FL 32256

Mr. Cecil O. Simpson
General Attorney
Mr. Peter Q. Nyce, Jr.
General Attorney
Regulatory Law Office
Advocate General
Department of the Army
901 North Stuart Street
Arlington VA 22203-1837

Bill L. Bryant, Jr., Esq.
Foley & Lardner
Suite 450
215 South Monroe Street
Tallahassee, FL 32302-0508

Douglas S. Metcalf (Ad Hoc)
Communications Consultants, Inc.
P.O. Box 1148
Winter Park, FL 32790-1148

C. Everett Boyd, Jr.
Ervin, Varn, Jacobs, Odom &
Ervin
305 South Gadsen Street
Tallahassee, FL 32302
atty for Sprint

Laura L. Wilson, Esq.
Messer, Vickers, Caparello,
Madsen, Lewis & Metz, PA
Post Office Box 1876
Tallahassee, FL 32302
atty for FPTA

Mr. Michael Fannon
Cellular One
2735 Captial Circle, N.E.
Tallahassee, FL 32308

Seigler

CERTIFICATE OF SERVICE
Docket No. 910163-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 5th day of February, 1993 to:

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

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

A handwritten signature in cursive script, appearing to read "Tracy Hatch", written over a horizontal line. The signature is fluid and stylized, with a long horizontal stroke at the end.

CERTIFICATE OF SERVICE
DOCKET NO. 900960-TL

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail on this 5th day of February, 1993 to:

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

Suzanne Summerlin, Esq.
Division of Legal Services
Florida Public Svc. Commission
101 East Gaines Street
Tallahassee, FL 32301

A handwritten signature in cursive script, appearing to read "Suzanne Summerlin", written over a horizontal line.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Show Cause proceeding)
against Southern Bell Telephone) Docket No. 900960-TL
and Telegraph Company for)
misbilling customers)
_____)

In re: Petition on Behalf of)
Citizens of the State of Florida) Docket No. 910163-TL
to Initiate Investigation into)
Integrity of Southern Bell)
Telephone and Telegraph Company's)
Repair Service Activities and)
Reports.)
_____)

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

Filed: February 5, 1993

SOUTHERN BELL'S RESPONSE IN OPPOSITION
TO PUBLIC COUNSEL'S FOURTEENTH 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"), and pursuant to Rule 25-22.037, Florida Administrative Code, hereby files its Opposition and Response to Public Counsel's Fourteenth Motion to Compel and Request for In Camera Inspection of Documents, and states as grounds in support thereof the following:

1. On October 22, 1992, the Office of the Public Counsel ("Public Counsel") served its Thirty-First Request for Production of Documents on Southern Bell. The majority of these requests¹

¹ Request Nos. 2-9, 13-14, and 17-20 seek massive amounts of documents from Company databases.

seek the production of hundreds of thousands of documents which would have to be searched for and then extracted from Company databases. The rest of the objectionable requests² seek documents which Southern Bell produced for the Attorney General and the Office of the Statewide Prosecution ("Statewide Prosecutor") in conjunction with certain investigations in which these parties were involved.

2. On November 23, 1992, Southern Bell filed its Response and Objections to Public Counsel's Thirty-First Request for Production of Documents and its Motion for Temporary Protective Order. In that response, Southern Bell explained in detail why Public Counsel's requests, as framed, were overly burdensome and unreasonable. Southern Bell hereby incorporates by reference all arguments contained therein in this response. In addition, Southern Bell also suggested in its response that if Public Counsel would identify a reasonable sample of documents, Southern Bell would be willing to provide such reasonable documentation.

3. Rather than identifying such a sample, Public Counsel sent a letter to Southern Bell on December 9, 1992, purporting to suggest an alternative to its original request, which in essence sought to have Southern Bell either conduct special "statistically significant, randomly selected, valid sample(s) of

² Request Nos. 10-12 seek documents that were produced for the Attorney General or the Statewide Prosecutor. It is noteworthy that several of the other items in this same set of requests appear to be extremely similar, if not identical, to previous requests served on Southern Bell by the Attorney General and Statewide Prosecutor.

the original documents" or to have Company personnel analyze the raw data and derive certain information and create new documents from such data.

4. From December 9, 1992 to January 29, 1993, when Public Counsel filed its Fourteenth Motion to Compel, Southern Bell has attempted to resolve this discovery matter with Public Counsel without the need of bringing the matter before the Florida Public Service Commission (the "Commission").

5. On January 29, 1993, Public Counsel filed its Fourteenth Motion to Compel and Request for In Camera Inspection. As evidenced by its Motion, Public Counsel is still unwilling to revise its discovery request to seek a more reasonable sample of the hundreds of thousands of documents originally requested. Rather, Public Counsel offers two alternatives. First, Public Counsel seeks all the documents it originally requested, some of which would necessarily consist of new documents containing analytical work product which Public Counsel seeks to have Southern Bell create for Public Counsel. In the alternative, Public Counsel asks to have Southern Bell perform special statistical studies and other analytical work relating to the existing data for Public Counsel, to create documents summarizing such analyses, and to produce the newly created documents. Neither of these alternatives is reasonable or permitted under permissible discovery standards.

6. Rule 1.350, Florida Rules of Civil Procedure, provides that a party may request any other party to produce designated

documents that are in the possession, custody, or control of the party to whom the request is directed. However, production cannot be required of a document that does not exist. Balzebre v. Anderson, 294 So. 2d 701 (3d DCA 1974). It is also black letter law that it is inappropriate discovery to request a party to prepare a document for another party. 23 AM. JUR. 2d Depositions and Discovery § 252; Moore's Federal Practice, § 34.05[1], and cases cited therein. Consequently, Public Counsel's "alternatives" are equally deficient and inappropriate.

Request Nos. 2-9, 13-14, and 17-20

7. As clearly shown in Southern Bell's original response to Public Counsel's document requests, the effort required to produce all the documents Public Counsel seeks is both unduly burdensome and would result in unreasonable interference with the Company's normal business operations. A representative sample of the type of effort that would be required by Southern Bell to comply with Public Counsel's requests can be found by examining Public Counsel's Request No. 5, which seeks:

... all DLETHs that correspond to the clearing/closed reports requested in item No. 4, above³, AND produce the DLETHs in the same order that the record appears in the clearing/ closed reports provided, AND attach the DLETHs to each of their corresponding clearing/closed report.

To this request, Southern Bell responded that the request was:

...unduly burdensome and oppressive, and the production of all documents responsive to the

³ This particular request seeks documents dating back seven years, from January 1, 1985 to November 1992.

request would unnecessarily disrupt the Company's normal business operations. Public Counsel's request would call for the extraction of no less than 695,000 records from Company databases. Thereafter, additional manual exercises would be required to extract additional documents from its databases and evaluate these documents for responsiveness. Such a monumental and labor intensive exercise is unwarranted, oppressive and objectionable.

The unreasonableness of such a request, including the suggestion by Public Counsel that Company representatives individually sort and staple or otherwise "attach" the thousands of DLETHs to their corresponding reports, is patently obvious from this example. Other Public Counsel document requests in this particular set of discovery are similarly burdensome and unreasonable.

8. Public Counsel's cases, cited in headnote form, do not parallel the facts in this particular case. Moreover, Southern Bell has clearly met its burden of quantifying the manner in which production would be overly burdensome and therefore unreasonable. Each individual objection raised by Southern Bell on the basis that the request is overly burdensome has specifically set forth the unreasonable effort that would be required to comply with the request. Public Counsel's argument is simply without merit.

9. Notwithstanding Southern Bell's continuing objections to the requests which Public Counsel has originally propounded, Southern Bell continues to be willing to provide some reasonable sample of such documentation to the extent Public Counsel seeks existing documents and does not seek to have Southern Bell do

analytical work or create new documents for Public Counsel. However, to date, Public Counsel has been unwilling to agree to an alternative sample methodology, and this fact has impeded the resolution of this particular discovery matter.

10. A party in discovery cannot be required to do the work of an opposing party, particularly as it relates to the analysis of documents obtained in such discovery. However, this is exactly what Public Counsel is asking Southern Bell to do. Southern Bell recognizes that it has a legal duty to produce relevant documents, but it is inappropriate for Public Counsel to further request that Southern Bell also analyze such documents or conduct special studies to glean other information from such documents. Once documents that are otherwise properly discoverable are produced, Public Counsel would then be free to analyze such documents in any manner it deems appropriate. Public Counsel can summarize, organize, or derive whatever additional information it wishes from these documents, but it is improper to suggest that Southern Bell do these exercises for Public Counsel.

11. Contrary to Public Counsel's assertions, the extraction of information from the type of raw data being sought by Public Counsel requires no specialized knowledge. The exercise is admittedly burdensome, even for any reasonable sample of the hundreds of thousands of documents Public Counsel has sought; however, the process itself is a simple one. Whatever analysis of the data Public Counsel wishes to do must be made by Public

Counsel. It is not Southern Bell's responsibility to analyze, organize, or otherwise manipulate raw data for Public Counsel's convenience. That responsibility correctly resides with Public Counsel.

12. Based on the above-stated reasons, Southern Bell opposes Public Counsel's Fourteenth Motion to Compel as it relates to Request Nos. 2-9, 13-14, and 17-20, and requests that the Prehearing Officer deny Public Counsel's Motion on the grounds already stated.

Request Nos 10-12

13. Regarding Public Counsel's request for reports furnished to the Attorney General or the Statewide Prosecutor, such request could require Southern Bell to violate the statutory mandate of Grand Jury secrecy. Following is a brief historical summary of the factual background leading to the production of documents to the Attorney General and Statewide Prosecutor.

14. Beginning in June of 1991, the Statewide Prosecutor propounded a series of formal document requests upon Southern Bell. The process of issuing formal requests was done pursuant to an agreement between the parties. It was designed to foster cooperation and avoid the necessity of obtaining a Grand Jury or other subpoena.

15. The initial civil investigative demand referenced a joint investigation between the Civil RICO Section of the Office of the Attorney and the Statewide Prosecutor. All formal requests were submitted on the letterhead of the Statewide

Prosecutor and were signed by John Hoag, an Assistant Attorney General who was also cross-designated as an Assistant Statewide Prosecutor.⁴ In addition to the formal requests, John Hoag made oral requests for documents. Southern Bell responded to the oral requests as if they were formal written requests.

16. The Statewide Grand Jury that investigated Southern Bell was impaneled on July 30, 1991. The Statewide Prosecutor played a vital role in the Grand Jury proceedings, including spearheading the investigation, calling witnesses, presenting evidence, and ultimately negotiating a settlement.

17. Although Southern Bell does not know which or how many of the documents the Company produced for the Statewide Prosecutor were ultimately presented as evidence, the Grand Jury confirmed that it "had the opportunity to examine a multitude of Company documents." Final Report of the Tenth Statewide Grand Jury, Case No. 78,035 (January Term, 1991). Therefore, it is reasonable to assume that the documents to which the Grand Jury referred were likely among the same documents provided to the Statewide Prosecutor pursuant to the various formal and oral document requests. However, Southern Bell has no specific knowledge of which documents given to the Statewide Prosecutor were actually used by the Grand Jury in its deliberations. This information resides solely with the Grand Jury.

⁴The first six requests were also signed by David Forrestier, an Assistant Statewide Prosecutor.

18. Public Counsel has mistakenly characterized Southern Bell's objection to Request Nos. 10-12 as the assertion of an evidentiary privilege. Southern Bell has not suggested that the documents are privileged. Rather, there is a statutory bar to producing the documents in the manner requested by Public Counsel. "Grand jury proceedings are secret..." § 905.24, Florida Statutes (1991). This law of Grand Jury secrecy is designed to shield Grand Jury proceedings from public scrutiny. Clein v. State, 52 So. 2d 117, 120 (Fla. 1952). Consequently, persons involved in the Grand Jury process and persons appearing before the Grand Jury are prohibited from disclosing testimony of a witness or evidence received unless required by a court to do so under certain exceptions. § 905.27, Florida Statutes (1991).⁵ Southern Bell appeared before the Grand Jury through various employees called to testify. Southern Bell is thus subject to the requirement of non-disclosure.

19. The documents at issue herein are not restricted simply because they were presented to the Grand Jury. In re: Grand Jury Investigation Spring Term 1988, 543 So. 2d 757, 759 (2d

⁵ The relevant text of § 905.27 is as follows:

(1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the Grand Jury shall not disclose the testimony of a witness examined before the Grand Jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:

- (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;
- (b) Determining whether the witness is guilty of perjury; or
- (c) Furthering justice. (emphasis added)

DCA), rev. denied, 547 So. 2d 1210 (Fla. 1989). Rather, the question is whether production will violate the Grand Jury's secrecy. It is a fact that production to Public Counsel of all documents given by Southern Bell to the Statewide Prosecutor could reveal many, if not most or all, of the documents presented to the Grand Jury. Public Counsel concedes that "documents that reveal some secret aspect of the Grand Jury investigation should be subject to the statutory restrictions." (Citizens' Fourteenth Motion to Compel and Request for In Camera Inspection of Documents, at p. 9.) In this case, the production of those documents could reveal secret aspects of the Grand Jury's investigative process.

20. Public Counsel cites United States v. Phillips, 843 F. 2d 438 (11th Cir. 1988), which held that documents subpoenaed but never presented to the Grand Jury, would not compromise the Grand Jury's investigation. Not only is this case factually inapposite, but also Public Counsel's reliance on federal case law, such as Phillips, is misplaced. The federal Grand Jury secrecy requirement, which is set forth in Rule 6, Federal Rules of Criminal Procedure, has one significant difference from the Florida requirement -- a witness before a federal Grand Jury is not obligated to keep silent after he or she has testified. In re: Application of Eisenberg, 654 F. 2d 1107, 1113 n.9 (5th Cir. Unit B 1981). Someone who appears before a federal Grand Jury can thus disclose his or her testimony and the evidence presented. The federal scheme thus presents no applicable

guidance on the issue of whether Southern Bell can produce the subject documents.

21. Moreover, none of the documents at issue in Phillips were presented to the Grand Jury. In this case, however, although Southern Bell has no way of knowing which specific documents were presented to the Grand Jury, there is no doubt that many of the documents were presented for consideration. Consequently, Southern Bell risks violating the secrecy requirement if it produces any of the documents.

22. Southern Bell does not contest that Public Counsel may otherwise be entitled to the same documents if it couched its request in some way that does not seek the exact documents that were delivered to the Statewide Prosecutor. For example, if a letter from X to Y dated January 1, 1990, was produced to the Statewide Prosecutor, Public Counsel could be entitled to that document if it phrases its request in terms of seeking all letters from X, or all letters to Y. In fact, Southern Bell has already previously produced to Public Counsel certain documents that were also produced to the Statewide Prosecutor where Public Counsel's requests were posed directly without making reference to the documents previously produced to the Attorney General or Statewide Prosecutor.

23. Public Counsel has demonstrated the ability to frame its requests in a manner that will result in direct requests for the documents without transgressing Grand Jury secrecy. Public Counsel can avoid all these issues simply by tailoring its

requests for the specific documents it wants without reference to documents delivered to the Statewide Prosecutor. Public Counsel's Motion to Compel should be denied to the extent it specifically seeks the documents Southern Bell has previously produced for the Attorney General or Statewide Prosecutor.

24. Public Counsel has also raised issues relating to Southern Bell's objections to certain instructions and definitions contained in Public Counsel's request. Southern Bell will address each of these issues individually.

25. Public Counsel first argues that Southern Bell's objections to Public Counsel's definitions of "document(s)" and "you" and "your" are moot as a result of Order No. PSC-93-0071-PCO-TL (the "Order"). With regard to the "document(s)" issue, Commissioner Clark acknowledged in the Order that Southern Bell "... had made a good faith effort to produce all documents meeting the definition provided." Order, at p. 4. Accordingly, for purposes of the motions addressed in the Order the issue was moot. Nevertheless, the "document" definition used by Public Counsel in its Thirty-First Request for Production of Documents is so broad that Southern Bell must object to it. Again, the Company is not refusing to produce documents on this basis, but is only noting that it has conducted a reasonable, diligent search for documents.

26. Regarding the "you" and "your" objection, the Order directed Southern Bell to "... ensure that BellSouth Corporation conducts a full and reasonable search for any documents

responsive to the Office of the Public Counsel's discovery requests..." Southern Bell is complying with this order. Nevertheless, the order specifically addresses BellSouth Corporation, and therefore Southern Bell's continuing objection to the definition of "you" and "your" remains equally valid with regard to other non-parties to these proceedings.

27. Public Counsel's next argument regarding Southern Bell's objection to the "general index" instructions relating to any documents withheld on the basis of privilege is moot in this case because Southern Bell has not asserted that any privileged documents have been withheld in response to any of the request items in Public Counsel's Thirty-First Request for Production of Documents.

28. Regarding Public Counsel's instruction on "SORTING AND ORDERING INFORMATION", Southern Bell clearly stated in its General Objections that, notwithstanding the Company's objection to this instruction in its literal sense, it will produce documents "...in an orderly fashion and in a manner that will not impede Public Counsel's review of such documents." Southern Bell is aware of no further obligation to organize, sort, or otherwise place documents in a sequence desired by a party requesting the documents, and Public Counsel has cited no authority for such a proposition.

29. Regarding Public Counsel's last argument which relates to information on unregulated services and other states' information, Southern Bell simply notes that the Thirty-First

Request for Production of Documents did not seek any such documents. Thus, there is no need to address this matter at this time.

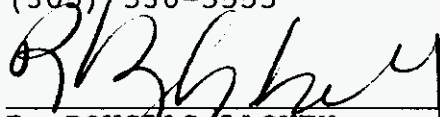
WHEREFORE, based on the foregoing, Southern Bell respectfully requests the Prehearing Officer to enter an Order denying Public Counsel's Fourteenth Motion to Compel to the extent set forth herein.

Respectfully submitted this 5th day of February, 1993.

BELLSOUTH TELECOMMUNICATIONS, INC.



HARRIS R. ANTHONY (24)
J. PHILLIP CARVER
c/o Marshall M. Criser, III
Suite 400
150 South Monroe Street
Tallahassee, Florida 32302
(305) 530-5555



R. DOUGLAS LACKEY
SIDNEY J. WHITE, JR.
4300 Southern Bell Center
675 W. Peachtree Street
Atlanta, Georgia 30375
(404) 529-5094