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February 22, 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, 910727-TL, 920260-TL

Dear Mr. Tribble:

Enclosed are an original and fifteen copies of Southern Bell Telephone and Telegraph Company's First Motion to Compel, Request for In Camera Inspection of Documents and Request for Expedited Decision 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.
Sidney J. White, Jr. (dy)

Enclosures

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

DOCUMENT NUMBER-DATE

02115 FEB 23 8

FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE

Docket No. 920260-TL

Docket No. 900960-TL

Docket No. 910163-TL

Docket No. 910727-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this 23rd day of February, 1993
to:

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(02)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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|--|---|--|
| In re: Show cause proceeding against Southern Bell Telephone and Telegraph Company for misbilling customers. |) | Docket No. 900960-TL |
| 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 |
| In re: Investigation into Southern Bell Telephone and Telegraph Company's compliance with Rule 25-4.110(2), F.A.C., Rebates. |) | Docket No. 910727-TL |
| In re: Comprehensive review of the revenue requirements and rate stabilization plan of Southern Bell Telephone and Telegraph Company. |) | Docket No. 920260-TL Filed: February 23, 1993 |

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
FIRST MOTION TO COMPEL, REQUEST FOR IN CAMERA INSPECTION
OF DOCUMENTS AND REQUEST FOR EXPEDITED DECISION

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(2), Florida Administrative Code, moves the Florida Public Service Commission ("Commission"): (1) to compel the Office of Public Counsel ("Public Counsel") to fully respond to Item Nos. 6, 9-12, and 19-29 of Southern Bell's First Set of Interrogatories and to produce each of the documents responsive to Southern Bell's First Request for Production of Documents, Request Nos. 6, 10, 12, 22, 26, and 29; (2) to conduct an in camera inspection of all documents and portions of documents withheld by Public Counsel based in its

claims of attorney work product privilege, and (3) to render an expedited decision on the Company's Motion.

A. BACKGROUND

1. On November 6, 1992, Southern Bell served its First Set of Interrogatories and First Request for Production of Documents on Public Counsel in Docket No. 900960-TL.¹ On December 11, 1992, Public Counsel filed its "responses" to Southern Bell's interrogatories and document requests.

2. Southern Bell's interrogatories and document requests are based on a statement made by Public Counsel at a Commission Agenda Conference held on October 20, 1992 concerning Public Counsel's intent to "present evidence about the hard sell of optional service by Southern Bell." (Agenda Conference transcript at p. 22). The interrogatories which Public Counsel claims are subject to the attorney work product privilege deal with whether and under what circumstances Public Counsel has had contact with any person connected to the lawsuit styled Linda Davis, David Efron, Linda Martens, and Genevieve Williams, individually and on behalf of all other similarly situated v. Southern Bell Telephone & Telegraph Co., a Georgia Corporation, United States District Court, Southern District of Florida, Miami Division, Case No. 89-2839-NESBITT. Attachment "A" to this

¹ This docket has now been consolidated with other dockets pending before the Commission, but the issues and information addressed in Southern Bell's discovery requests go to matters originally raised in the sales investigation docket.

Motion contains the pertinent interrogatories and requests for documents at issue herein.

3. Southern Bell's interrogatories are appropriate and should be answered. Clearly, a party may serve interrogatories for the purpose of obtaining the identities and locations of relevant documents. Buga v. Wiener, 277 So.2d 296 (4th DCA 1973); Alltmont v. United States, 177 F.2d 971 (3d Cir. Pa. 1949). Interrogatories are also appropriate for use in seeking information regarding the nature and summarization of documents or communications of fact. Leonia Amusement Corp. v. Loews, Inc., 18 FRD 503 (D.C.N.Y.). Once relevant documents are identified, a party may request the production of such documents. Rule 1.350, Florida Rules of Civil Procedure.

4. Interrogatory Nos. 19, 23 and 27 simply ask whether any relevant contacts have occurred between the law firms or individuals listed or whether Public Counsel has any special agreements or other arrangements with any of these law firms or individuals regarding this particular docket, or information relevant to this docket. Interrogatory Nos. 20-22, 24-26 and 28-29 merely ask Public Counsel to identify documents and explain the nature of the specific contacts it should have identified in response to Item Nos. 19, 23 and 27. Instead of responding, Public Counsel simply raises its transparent privilege shield in an improper attempt to avoid responding to any of the pertinent factual inquiries at issue.

5. Even assuming that any of these answers to interrogatories and documents were privileged, which they aren't, Public Counsel itself has argued on numerous occasions in these consolidated dockets that Southern Bell should be required to provide similar information relating to the existence and nature of privileged documents and communications as well as to the facts surrounding the generation and receipt of such documents or communications. (citations omitted). Moreover, the type of information now being sought by Southern Bell is the same type of information relating to privileged information asked of, and provided by Southern Bell in these consolidated dockets. As an example, the Commission Staff in its Sixth Set of Interrogatories in Docket No. 910163-TL asked Southern Bell over six hundred interrogatories relating to the Company's privileged documents and communications. Southern Bell responded to these interrogatories with the same type of information currently being withheld by Public Counsel.

6. Public Counsel has argued in challenging Southern Bell's similar claims of privilege that:

The objecting party has the burden of first showing the existence of the privilege. Hartford Accident & Indem. Co. v. McGann, 402 So.2d 1361 (Fla. 4th DCA 1981). Only if clearly shown does the moving party have to demonstrate need to overcome the privilege. (emphasis added) Black Marlin Pipeline Co., 9 F.E.R.C. § 63,015, 65,088.

As will be established below, Public Counsel has not even made a cursory attempt to show any validity to its claim of privilege, but rather has merely provided conclusory, unsubstantiated claims

which Public Counsel itself has previously argued to be insufficient to support such a claim. Further, Public Counsel's non-responsive and evasive "responses" to discovery should not be tolerated by this Commission.

B. PUBLIC COUNSEL HAS A STATUTORY DUTY TO PRODUCE PUBLIC RECORDS AND ITS WORK PRODUCT PRIVILEGE OBJECTION IS WITHOUT SUPPORT IN THE PUBLIC RECORDS ACT

7. Regarding Public Counsel's objections to Interrogatory Nos. 19-29 on the basis of a purported work product privilege, Public Counsel has either intentionally or inadvertently ignored guiding statutory law and interpretational case law which clearly establish that the documents and other information being withheld are not only not privileged but are, in fact, discoverable public records. The fact that Southern Bell has requested public records in the possession of Public Counsel via interrogatories and requests for production of documents rather than via a "public records request" under § 119.01, Florida Statutes, is irrelevant to the ultimate issue of whether or not such documents should be produced. As will be shown below, there is no question that these documents are public records. Consequently, Public Counsel has absolutely no grounds on which to withhold production of such material. This could explain the total absence of any showing from Public Counsel as to why the material should be afforded privileged status. Rather, Public Counsel, in an attempt to avoid potentially embarrassing revelations² regarding

² However, a party is not excused from answering interrogatories simply because answering them would subject party to disgrace or embarrassment. Ballard v. Terrak, 58 FRD 184

relevant facts in these consolidated dockets, simply cites conclusory claims of privilege on all requests relating to sensitive matters, in an attempt to avoid disclosing such relevant information and documents. Public Counsel's use of a bald assertion of privilege is particularly anomalous since Public Counsel has repeatedly asserted in these consolidated dockets that Southern Bell must make an affirmative showing in order to establish the Company's similar claims of privilege and has requested that the Prehearing Officer conduct in camera inspections of Southern Bell's privileged documents to test the applicable assertions. (citations omitted). This is but another example of Public Counsel's attempt to apply to itself an impermissible dual standard in discovery.

8. The Public Records Act sets forth the general state policy on public records:

It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person. § 119.01(1), Florida Statutes.

Therefore, a presumption exists that state records shall be available to the public. Further "public records" are defined as:

... all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. § 119.011(1), Florida Statutes.

(E.D. Wisconsin); Hope v. Burns, 6 FRD 556 (D.C. Kentucky).

Any material "made or received" in connection with the transaction of official business by any agency of the State of Florida is deemed to be a public record. Public Counsel is a creature of statute, and as a state officer, is subject to the Public Records Act. Section 350.061(2), Florida Statutes. Southern Bell has sought public records from Public Counsel in the context of discovery which Public Counsel is improperly withholding on the basis of a non-existent work product privilege. As already shown, the Public Records Act creates a presumption of public access to public records. As will be established hereafter, no Public Records Act exemption exists to support Public Counsel's transparent work product privilege claim in this case.

9. Early Florida cases relating to the applicability of the work product doctrine in cases of discovery involving state and local agencies of government almost universally held that whether or not materials were work product³ was irrelevant. This was due to the overriding requirement of the Public Records Act to make all such materials available to the public and due to the fact that there was no statutory exemption of any kind for the work product of public agencies. Wait v. Florida Power and Light Co., 372 So. 2d 420 (Fla. 1979); Orange County v. Florida Land Company, 450 So. 2d 341 (5th DCA 1984); Hillsborough County Aviation Authority v. Azzarelli Construction Company, Inc., 436

³ These early cases made no distinction between fact or opinion work product. Both types of material were held to be equally subject to public access under the Public Records Act.

So. 2d 153 (2d DCA 1983); Williston v. Roadlander, 425 So. 2d 1175 (1st DCA 1983); City of Tampa v. Titan Southeast Construction Corporation, 535 F. Supp. 163 (1982); Tober v. Sanchez, 417 So. 2d 1053 (3d DCA 1982). Also, similar cases held that not even the attorney-client privilege was applicable as an exemption for communications between lawyers and governmental clients from disclosure under the Public Records Act. Miami Herald Publishing Company v. City of North Miami, 452 So. 2d 572 (3d DCA 1984); Brevard County v. Nash, 468 So. 2d 240 (5th DCA 1984).

10. In many of the above-cited cases, the courts were cognizant of, and in many cases expressly recognized, that these interpretations of the Public Records Act were onerous, but the courts properly held that it was up to the Legislature to determine what exemptions from the Public Records Act were appropriate. Hillsborough County Aviation, 436 So. 2d at 155; Tober v. Sanchez, 417 So. 2d at 1055; Orange County, 450 So. 2d at 343; City of North Miami, 468 So. 2d at p. 219. Moreover, since the Legislative had not seen fit to craft any specific public agency attorney-client privilege or work product exemptions to the Public Records Act, no such privileges were deemed to exist.

11. Subsequently, the Legislature enacted a very limited and transitory exemption to the public inspection and examination provisions of the Public Records Act only for certain opinion work product prepared by government attorneys in anticipation of

litigation. That limited exemption is now found at § 119.07(3)(n), Florida Statutes and provides that:

A public record which was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from the provisions of subsection (1) until the conclusion of the litigation or adversarial administrative proceedings. When asserting the right to withhold a public record pursuant to this paragraph, the agency shall identify the potential parties to any such criminal or civil litigation or adversarial administrative proceedings. If a court finds that the document or other record has been improperly withheld under this paragraph, the party seeking access to such document or record shall be awarded reasonable attorney's fees and costs in addition to any other remedy ordered by the court.

12. This section defines a limited⁴ opinion work product exemption to the Public Records Act which relates only to attorney prepared litigation files. City of Melbourne v. A.T.A. Melbourne, Inc., 475 So.2d 270 (5th D.C.A. 1985); City of North Miami v. Miami Herald Publishing Company, 468 So.2d 218 (Fla. 1985). Importantly, the current Public Records Act does not expressly exempt other public records that would fall into the

⁴ As further evidence of the Legislature's preference toward maximum access to public records, even a public agency's attorney's opinion work product, which outside the public agency context is considered unconditionally privileged, is only given temporary exemption from the Public Records Act until the end of the case. Thereafter, the public may have access to such attorney's opinion work product.

category of fact work product which Public Counsel appears to be asserting in its objections. Consequently, even assuming that the material being withheld was fact work product, which it isn't, the material would nevertheless still be subject to discovery under the Public Records Act because no express exemption protects such information from public disclosure. When the Legislature crafted its limited opinion work product exemption, it presumably acted as it deemed appropriate both with respect to the scope and duration of the narrow exemption. In construing legislation, courts will not assume that the Legislature acted pointlessly. City of North Miami v. Miami Herald, 468 So.2d 218 (Fla. 1985). In this case, the Legislature chose to carefully limit any work product exemption for public agencies. It could have done more, but it didn't. That is the Legislature's prerogative.

13. None of the interrogatories or document requests served by Southern Bell on Public Counsel seek Public Counsel's mental impressions, conclusions, litigation strategies, or legal theories. Neither do they seek the attorney's litigation files. Rather, this discovery merely seeks facts within the sole control and knowledge of Public Counsel and which are relevant to the instant case. Such facts are not exempt from discovery and Public Counsel has completely failed to present any colorable argument regarding why it should not be forthwith compelled to produce this information. The Commission should order Public

Counsel to answer Southern Bell's interrogatories and produce all responsive documents immediately.

C. PUBLIC COUNSEL'S RESPONSES TO SOUTHERN BELL'S DISCOVERY REQUESTS ARE NON-RESPONSIVE

14. Southern Bell has asked a number of direct, fact-seeking interrogatories of Public Counsel, and has sought relevant documents relating to such facts. In "response", Public Counsel has provided certain answers that are totally non-responsive. A few examples will illustrate this point:

15. Interrogatory No. 6 requested Public Counsel to "Identify all documents that relate in any manner to any instance described in response to Interrogatory No. 4 above" (which asked about specific details of alleged instances of "hard sell" practices). Public Counsel "responded" as follows:

Please see the documents provided by you in response to requests for production of documents in this docket and in Docket 920260-TL.

In essence, Public Counsel's answer to Interrogatory No. 6 is that Southern Bell should somehow search through hundreds of thousands of pages of documents previously produced in Docket Nos. 900960-TL and 920260-TL to find documents which Public Counsel claims to be responsive to this particular request.⁵ Such a position is intolerable and evidences a blatant disregard for the Florida Rules of Civil Procedure. When asked a direct question seeking the identification of documents which are relevant in that they are purportedly the basis for certain

⁵ Public Counsel's "responses" to Interrogatory Item Nos. 9-12 suffer from the same infirmity.

factual allegations, Public Counsel cannot merely respond by saying, "You go try to find them if they exist at all." Public Counsel should, and must, be compelled to produce the requested list of documents, if they exist. Since Public Counsel did not deny the existence of such documents, it must produce whatever documents Public Counsel knew to be responsive to Southern Bell's original request.

16. Public Counsel used a similar evasive tactic when "responding" to Southern Bell's First Request for Production of Documents, which was the companion filing to the First Set of Interrogatories. Request No. 1 sought "... each and every document identified in response to Interrogatory No. 6 of Southern Bell's First Set of Interrogatories ..."

Public Counsel responded as follows:

Each of the documents identified in the interrogatories referenced in your document requests are already in the possession of Southern Bell.

Public Counsel's answer to Southern Bell's legitimate discovery request for specific documents is that the documents it "identified" in answer to Interrogatory No. 6 (which, of course, were not identified at all) are business documents derived from Southern Bell in previous discovery and which the Company supposedly has in its possession. Public Counsel could have just as easily said, "It's a secret", and Southern Bell would have received equal "discovery" regarding the factual basis for Public Counsel's proposed testimony in this proceeding. The Commission

should not tolerate Public Counsel's deliberate attempt to thwart Southern Bell's discovery efforts in this manner.

17. Public Counsel's tactics are particularly anomalous based on its constant desire to have Southern Bell be as specific as possible when the Company answers interrogatories or produces documents sought by Public Counsel. Southern Bell has cooperated with Public Counsel in this regard and has specifically directed Public Counsel to where such responsive information or documents can be located. In fact, Southern Bell specifically references the particular interrogatory response(s) containing the requested information or the document production under which responsive documents can be found, particularly if such documents have been previously produced. Moreover, when the Company provides documents to Public Counsel, it clearly marks the documents as being responsive to the applicable set of document requests and to the particular item within such requests. However, when Southern Bell seeks similar discovery, Public Counsel responds with the wholly evasive and non-responsive answers cited above. Such inconsistency and blatant disregard for acceptable standards of discovery should not be tolerated.

18. Public Counsel's cavalier responses (or more appropriately in many cases, non-responses) to Southern Bell's various discovery requests indicate that Public Counsel must believe it is somehow subject to a different standard than other parties in matters pertaining to prehearing discovery before the Florida Public Service Commission (the "Commission"). However,

this Commission's rules do not afford Public Counsel any preferential treatment in the context of discovery. To the contrary, Public Counsel, as a party to Commission proceedings, is equally subject to the Florida Rules of Civil Procedure as is any other party to such proceeding. See: Rule 25-22.035(3), Florida Administrative Code, generally adopting the Florida Rules of Civil Procedure as governing Commission proceedings. Furthermore, as already clearly shown above, Public Counsel's transparent work product privilege objection and other evidence of non-responsiveness to Southern Bell's legitimate discovery requests amount to nothing more than a willful resistance to the production of public records and other information in the possession of Public Counsel. Such resistance is not only in bad faith, it is also in violation of the Florida Rules of Civil Procedure as well as § 119.01, Florida Statutes. (See discussion in Section B above).

CONCLUSION

Public Counsel has withheld documents and interrogatory responses concerning matters at issue in this case under conclusory claims of privilege and has otherwise provided non-responsive answers to Southern Bell's discovery requests. It is evident that the documents being withheld are not privileged. The Commission should not permit Public Counsel to deliberately delay the discovery process by transparent claims of privilege.

WHEREFORE, Southern Bell requests this Commission to promptly order Public Counsel to provide complete answers to

Southern Bell's interrogatories and produce all responsive documents immediately. In the alternative, the Commission should conduct an in camera review of the withheld documents and responses on an expedited basis, and at the conclusion of the review, to compel Public Counsel to produce all non-privileged documents and interrogatory responses forthwith.

Respectfully submitted this 23rd day of February, 1993.

SOUTHERN BELL TELEPHONE
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ATTACHMENT "A"

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
FIRST SET OF INTERROGATORIES
ITEM NOS. 6, 9-12, AND 19-29

6. Identify all documents that relate in any manner to any instance described in response to Interrogatory No. 4 above.
9. If your response to Interrogatory No. 7 is in the affirmative, please list the name and address of every person who has any knowledge that relates in any way to this contention.
10. If your response to Interrogatory No. 7 is in the affirmative, please list each and every document that relates in any way to your contention.
11. Please identify every person who has not been previously listed who has information relating to the "hard sell," as defined by you in response to Interrogatory No. 1 above, of optional services by Southern Bell.
12. Please list each and every document that has not been previously listed that contains information relating to the "hard sell," as defined by you in response to Interrogatory No. 1 above, optional services by Southern Bell.
19. Have you had any contact whatsoever, either oral or written, with the attorneys or paralegals representing the plaintiffs in the lawsuit styled Linda Davis, David Efron, Linda Martens, and Genevieve Williams, individually and on behalf of all other similarly situation, v. Southern Bell Telephone and Telegraph Company, a Georgia Corporation, United States District Court Southern District of Florida Case No. 89-2839, including, but not limited to, attorneys or paralegals employed with or affiliated with the law firms of Bailey Hunt Jones & Busto; Powell Goldstein Frazer & Murphy; and/or Fine, Kaplan & Black, concerning the existence of alleged "hard sell" tactics by Southern Bell?
20. If you answer to Interrogatory No. 19 is in the affirmative, please list each such contact, including whether the contact was written or oral and the attorney with whom the contact occurred.
21. If your answer to Interrogatory No. 19 is in the affirmative and if the contact referred to in response to Interrogatory No. 20 was oral, please provide a complete detailed description of the conversation.

22. If your answer to Interrogatory No. 19 is in the affirmative and if the contact referred to in Interrogatory No. 20 was in writing, please identify every document by which this contact occurred.
23. Have you had any contact whatsoever, either oral or written, with the attorneys or paralegals representing the plaintiffs in the lawsuit styled Linda Davis, David Efron, Linda Martens, and Genevieve Williams, individually and on behalf of all other similarly situation, v. Southern Bell Telephone and Telegraph Company, a Georgia Corporation, United States District Court Southern District of Florida Case No. 89-2839, including, but not limited to, attorneys or paralegals employed with or affiliated with the law firms of Bailey Hunt Jones & Busto; Powell Goldstein Frazer & Murphy; and Fine, Kaplan & Black, concerning any issue other than alleged "hard sell" tactics that you contend is relevant to the issues in this docket?
24. If your answer to Interrogatory No. 23 is in the affirmative, please list each such contact, including whether the contact was written or oral and the attorney with whom the contact occurred.
25. If your answer to Interrogatory No. 23 is in the affirmative and if the contact referred to in response to Interrogatory No. 24 was oral, please provide a complete detailed description of the conversation.
26. If your answer to Interrogatory No. 23 was in the affirmative and if the contact referred to in Interrogatory No. 24 is in writing, please identify every document by which this contact occurred.
27. Have you entered into any fee arrangement, contract, work-sharing environment, arrangement to share information, or other agreement of any sort with any of the attorneys identified in response to interrogatory Nos. 19 and 23 above?
28. If your answer to Interrogatory No. 27 is in the affirmative, please provide a detailed description of the particular arrangement.
29. If your answer to Interrogatory No. 27 is in the affirmative and this arrangement(s) is set forth in writing, please identify specifically the document(s) that sets forth this arrangement.

ATTACHMENT "A"

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
ITEM NOS. 6, 10, 12, 22, 26, AND 29

1. Please produce each and every document identified in response to Interrogatory No. 6 of Southern Bell's First Set of Interrogatories to Public Counsel.
2. Please produce each and every document identified in response to Interrogatory No. 10 of Southern Bell's First Set of Interrogatories to Public Counsel.
3. Please produce each and every document identified in response to Interrogatory No. 12 of Southern Bell's First Set of Interrogatories to Public Counsel.
4. Please produce each and every document identified in response to Interrogatory No. 22 of Southern Bell's First Set of Interrogatories to Public Counsel.
5. Please produce each and every document identified in response to Interrogatory No. 26 of Southern Bell's First Set of Interrogatories to Public Counsel.
6. Please produce each and every document identified in response to Interrogatory No. 29 of Southern Bell's First Set of Interrogatories to Public Counsel.