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NANCY B. WHITE
General Attorney

150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(404) 529-5387

May 15, 1992

ORIGINAL
FILE COPY

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

RE: Docket No. 920260-TL

Dear Mr. Tribble:

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

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely yours,

Nancy B. White
Nancy B. White

(28)

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WAS	<u> </u>
GTH	<u> </u>

Enclosures

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

RECEIVED & FILED

IB

EPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

04989 MAY 15 1992

EPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 920260-TL

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

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

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

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

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

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

Nancy B. White
(22)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
OPPOSITION TO PUBLIC COUNSEL'S FIRST MOTION TO
COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

COMES NOW BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.037, Florida Administrative Code, and herewith files its Opposition to the Citizens' of Florida ("Public Counsel") First Motion to Compel with regard to Public Counsel's First Production of Documents Request dated March 20, 1992. In support of its Motion, Southern Bell shows the following:

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

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

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04989 MAY 15 1992
FPSC-RECORDS/REPORTING

3. Turning to the specifics of Public Counsel's motion, Public Counsel first addresses Southern Bell's objection to Public Counsel's attempt to include BellSouth Corporation as a party to this proceeding. While Southern Bell does not object, assuming the request is not otherwise objectionable, to producing BellSouth Corporation documents it has in its possession, it is entirely improper to attempt to subject BellSouth Corporation to discovery in this proceeding in the manner Public Counsel has utilized.

4. Public Counsel has not sought discovery from Southern Bell's parent with regard to specific interrogatories, (until its Sixth Set of Production of Documents dated May 8, 1992) but instead addressed the discovery to BellSouth Telecommunications. Public Counsel then attempted to include BellSouth Corporation in the definitional section of the request in a way that requires BellSouth to respond to every request posed by Public Counsel. Public Counsel's request should be denied because not only has it failed to carry its burden to show that Southern Bell and BellSouth Corporation have "acted as one" in this docket, the request was not even addressed to BellSouth Corporation. See Medivision of East Broward County, Inc. v. Department of Health and Rehabilitative Services, 488 So.2d 886 (Fla. 1st D.C.A. 1986).

5. Public Counsel also objects to Southern Bell's position that the definition of the term "document" is overbroad and objectionable. Despite the Company's objection, Southern Bell

either produced or provided access to all of the documents responsive to Public Counsel's First Request to Produce despite this definition. Thus, this portion of Public Counsel's motion is moot.

6. Public Counsel's motion is further directed to Southern Bell's position that discovery of documents should only be allowed if they are relevant to Florida or reasonably calculated to lead to the discovery of admissible evidence in this proceeding. Southern Bell's position is simply based on the provisions of Rule 1.280, Florida Rules of Civil Procedure. Again, the correctness of Southern Bell's position can be demonstrated by reference to Public Counsel's first request, where Public Counsel asked for "each" document showing monthly variances of actual financial performance as compared to budgeted financial performance in 1991. Since the financial performances referred to are not limited by Public Counsel to a specific state, one could argue that documents detailing the variances in North Carolina would be responsive. Prior Commission Rulings hold that such material is not discoverable. See e.g., In re: Petitions of Southern Bell Telephone & Telegraph Co. for Rate Stabilization and Implementation Orders and Other Relief, Docket No. 880069-TL, Orders 19681 (July 15, 1988) and 19685 (July 18, 1988). In addition, Southern Bell omitted information concerning unregulated activities. Matters related to deregulated businesses, over which this Commission has no jurisdiction cannot be relevant to this proceeding. As the Commission has held, such

documents are clearly irrelevant to this proceeding. See infra and Order No. 19420 (June 2, 1988) of Docket No. 880069-TL. Consequently, Public Counsel's request for an order requiring Southern Bell to produce any documents withheld for this reason is obviously inappropriate and should be rejected.

7. Turning from Southern Bell's general objections, Public Counsel also takes issue with Southern Bell's individual responses, particularly those which claim that the requests are overly broad, unduly burdensome, and oppressive. Public Counsel alleges that Southern Bell states only conclusions and not support for such statements. Southern Bell would first point out the obvious to Public Counsel by stating that Public Counsel is well aware of the huge amount of documents it has requested be produced, documents consisting of several linear feet. Despite the burdensome nature of each of these requests, Public Counsel was either provided the documents sought or given access to them.

8. Public Counsel also takes issue with Southern Bell's objections to providing attorney-client or attorney work product privilege or both in Requests No. 6, 21, 25, and 26. Request No. 6 required provision of "each" internal audit prepared since January 1, 1990 and "each" workpaper and document associated therewith. Southern Bell responded with a summary list of audits and an invitation to view those audits at a mutually agreeable time and place. Southern Bell also claimed attorney-client or attorney work product privilege or both on some of the audits but inadvertently did not provide a summary list of those audits.

Attachment A contains that summary list. Southern Bell objected to the production of these specific audits on the basis that the audits were performed through and at the direction of counsel for Southern Bell and therefore constituted attorney/client privileged material. Furthermore, the work product privilege also protects these documents from discovery and Public Counsel has not met and cannot meet its burden of proving "need" and "undue hardship" to overcome that privilege.

9. Request No. 21 required production of "each" document evaluating or discussing lawsuits, judgments or settlements in 1991. Southern Bell responded by providing all material which was not privileged but objected to providing documents which are clearly within the scope of the aforementioned privileges. The documents involved consist of the internal investigation undertaken by the Legal Department in connection with the issues raised in Docket No. 910163-TL, evaluations of lawsuits which contain opinion work product and mental impressions of the attorney-author as well as other work product material.

10. Requests No. 25 and 26 required production of "each" document discussing the inside wire maintenance market and revenues and expenses of those services. Southern Bell responded by providing all material which was not privileged but objected to providing documents which are clearly within the scope of the aforementioned privileges. The documents involved consist of material prepared at the request of the Legal Department concerning inside wire movement activity which material was

prepared for use in connection with pending lawsuits and investigations.

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

12. The communications in issue involve legal advice sought from and rendered by counsel with regard to the Company's compliance with the Florida Public Service Commission's ("FPSC") rules and regulations as well as legal advice concerning lawsuits and other matters. The communications were made in confidence and should be protected from disclosure. For example, the audits were performed at the direct specific request of the Company's Legal Department in order to provide the Legal Department with the information necessary to render legal counsel. The results were relayed in confidence to the Legal Department and limited distribution was made to members of the Legal Department and Internal Auditing hierarchy. In accordance with such limited distribution, it was made clear that the information was

confidential and subject to a claim of privilege. Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So.2d 764 (Fla. 2d D.C.A. 1981).

13. While Public Counsel may argue that the audits at issue were routine business records prepared in the ordinary course of business and thus not subject to the attorney-client privilege, this is not the case. These particular audits were specifically requested by the Legal Department and would not have been performed without that direct request. Thus, they do not constitute routine business records.

14. The Company sought legal advice from its counsel. For the Legal Department to be able to provide that advice it needed certain information. The audits, as well as the legal advice rendered, are information which is protected from discovery by the attorney-client privilege and, as such, should not be released to Public Counsel or any other person.

15. With regard to Request No. 21, the documents for which the Company claimed privilege consist of legal evaluations of general litigation in which the Company is involved and for which legal advice was sought. The material contains opinion work product, the mental impressions of the attorney-authors and other work product. To require Southern Bell to respond to this request would be tantamount to granting Public Counsel access to the opinions, thought processes, and efforts of counsel for Southern Bell. Protection of an attorney's mental process is essential to the proper functioning of the adversary system.

State of Florida v. Rabin, 495 So.2d 257, 263 (Fla. App. 3rd Dist. 1986).

16. In the alternative, Southern Bell submits that the information sought in Request No. 21 constitutes the work product of attorneys and agents for Southern Bell which should be shielded from discovery under Rule 1.280(b)(1), Florida Rules of Civil Procedure. See also Karch v. MacKay, 453 So.2d 452, 453 (Fla. 4th D.C.A. 1984). In Surf Drugs, Inc. v. Vermette, 236 So.2d 108, 113 (Fla. 1970), the Supreme Court of Florida held attorney work product to include: interviews, statements, memoranda, correspondence, briefs, personal impressions, and investigative materials prepared in anticipation of litigation by an attorney or an employee investigator at the direction of a party. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct 385, 91 L.Ed. 451 (1947). A document is prepared in anticipation of litigation if it is not one that would otherwise be required to be prepared. See Reynolds v. Hofmann, 305 So.2d 294 (Fla. 3d D.C.A. 1974). It does not matter whether the product is the creation of a party, agent, or attorney where the subject matter of the discovery is the work product of the adverse party. Atlantic Coast Line R.R. v. Allen, 40 So.2d 115 (Fla. 1949).

17. The information in question was prepared either by or at the direct request of Southern Bell's Florida Legal Department and was not information gathered in the regular scope of Southern Bell's business. Thus, it is clear that the information is subject to the work produce privilege.

18. Florida Rules of Civil Procedure Rule 1.280(b)(2) states that the adverse party may not obtain material subject to the attorney work product privilege without a showing of need and an inability to obtain the materials from other sources without undue hardship. See Alachua General Hospital, Inc. v. Zimmer USA, Inc., 403 So.2d 1087 (Fla. 1st D.C.A. 1981). Such a showing has not been made by Public Counsel.

19. Southern Bell asserts that Public Counsel's Motion to Compel should be denied based on the Company's showing of the attorney-client privilege covering the information in issue. In the alternative, the work product privilege is applicable and Public Counsel has not made the requisite showing of need and "undue hardship" in order to overcome the privilege. Southern Bell therefore respectfully requests that the FPSC deny Public Counsel's Motion to Compel its First Production of Documents Requests.

Respectfully submitted this 15th day of May, 1992.

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY


HARRIS R. ANTHONY (22)
PHILLIP J. CARVER
c/o Marshall M. Criser
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 530-5555

[SIGNATURES CONTINUED ON NEXT PAGE]

R. Douglas Lackey

R. DOUGLAS LACKEY

NANCY B. WHITE

4300 Southern Bell Center

675 West Peachtree St., N.E.

Atlanta, Georgia 30375

(404) 529-3862

(404) 529-5387

"Attachment A"

LIST OF COMPLETED AUDITS CLASSIFIED AS ATTORNEY WORK PRODUCTS

LEGEND OF ABBREVIATIONS USED:

- | | | | | | |
|----|-----------|-----|--------------------------------|------------------|---------------------|
| 1. | RATING | S | - SATISFACTORY | | |
| | | SF | - SATISFACTORY WITH FINDINGS | | |
| | | SAF | - SIGNIFICANT ADVERSE FINDINGS | | |
| 2. | COMPANIES | BSC | - BELLSOUTH CORPORATION | | |
| | | BSE | - BELLSOUTH ENTERPRISES | | |
| | | BSS | - BELLSOUTH SERVICES | | |
| | | BST | - BELLSOUTH TELECOMMUNICATIONS | | |
| | | SBT | - SOUTHERN BELL | | |
| | | SCB | - SOUTH CENTRAL BELL | | |
| 3. | STATES | AL | - ALABAMA | KY - KENTUCKY | NC - NORTH CAROLINA |
| | | FL | - FLORIDA | LA - LOUISIANA | SC - SOUTH CAROLINA |
| | | GA | - GEORGIA | MS - MISSISSIPPI | TN - TENNESSEE |

<u>CYCLE & FUNCTION</u>	<u>TITLE</u>	<u>RAT- ING</u>	<u>AUDITED COMPANY(IES)</u>	<u>ATTORNEY</u>
<u>First Quarter 1990</u>				
17-12	Public Communications Proposals for Broward County	S	SBT	H. R. Anthony
17-13	Accuracy of Coin Commission Payments	SAF	SBT	H. R. Anthony
51-02	Personnel Guidelines	S	SBT	H. R. Anthony
<u>Second Quarter 1990</u>				
17-10	Service Center - Public Communications	SAF	SBT	L. E. Gill
17-14	Commission Accuracy - Coin	SAF	SBT	A. S. Povall, Jr
17-15	Commission Accuracy - Coin	SAF	SBT	F. Walters
17-16	Coinless Telephone Commission Accuracy	SAF	SBT	L. E. Gill
18-01	Coin Telephone Settlements	SAF	SBT	L. E. Gill
<u>Third Quarter 1991</u>				
15-03	Customer Adjustments - Loop Maintenance Operations System (LMOS)	SAF	BST-FL	H. R. Anthony
16-06	Mechanized Adjustments - Mechanized Out of Service Adjustments (MOOSA) - Florida	SAF	BST-FL	H. R. Anthony
53-15	Key Service Indicator (KSRI) - Network Customer Trouble Rate	SAF	BST-FL	H. R. Anthony
63-04	PSC Schedule 11	SAF	BST-FL	H. R. Anthony

<u>CYCLE & FUNCTION</u>	<u>TITLE</u>	<u>RAT- ING</u>	<u>AUDITED COMPANY(IES)</u>	<u>ATTORNEY</u>
<u>Fourth Quarter 1991</u>				
G10-21-15	Independent Contractor vs. Employee Status	SAF	BSC, BSE BST-ALL STATES	K. W. Kochler
B10-62-02	Environmental Management	SAF	BST-ALL STATES	K W Kochler