

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the matter of :
Comprehensive Review of the :
Revenue Requirements and Rate : DOCKET NO. 920260-TL
Stabilization Plan of SOUTHERN:
BELL TELEPHONE AND TELEGRAPH :
COMPANY :

Show Cause Proceeding Against :
SOUTHERN BELL TELEPHONE AND :
TELEGRAPH COMPANY for : DOCKET NO. 900960-TL
Misbiling Customers. :

Petition on behalf of Citizens:
of the State of Florida to :
Initiate Investigation into : DOCKET NO. 910163-TL
Integrity of SOUTHERN BELL :
TELEPHONE AND TELEGRAPH :
COMPANY's Repair Service :
Activities and Reports. :

Investigation into SOUTHERN :
BELL TELEPHONE AND TELEGRAPH :
COMPANY's Compliance with : DOCKET NO. 910727-TL
Rule 25-4.110(2), F.A.C, :
Rebates. :

PROCEEDINGS: CONTINUATION OF
AGENDA CONFERENCE
ITEM NO. 17-A

BEFORE: CHAIRMAN J. TERRY DEASON
COMMISSIONER THOMAS M. BEARD
COMMISSIONER SUSAN F. CLARK
COMMISSIONER LUIS J. LAUREDO
COMMISSIONER JULIA L. JOHNSON

1 DATE: Thursday, February 18, 1993

2 TIME: Commenced at 9:10 a.m.
3 Concluded at 10:20 a.m.

4 PLACE: FPSC Hearing Room 106
5 Fletcher Building
6 101 East Gaines Street
7 Tallahassee, Florida

8 REPORTED BY: JOY KELLY, CSR, RPR
9 Official Commission Reporter

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11 PARTICIPATING:

12 HARRIS R. ANTHONY, BellSouth Telecommunications,
13 Inc., d/b/a Southern Bell Telephone and Telegraph Company.

14 JACK SHREVE, General Counsel, CHARLES J. BECK
15 and SUE RICHARDSON, Office of Public Counsel.

16 WILLIAM TALBOTT, FPSC Deputy Executive
17 Director/Technical.

18 STEVE TRIBBLE, Director, FPSC Records and
19 Reporting.

20 PRENTICE P. PRUITT, FPSC Office of the General
21 Counsel.

22 RICHARD BELLAK, FPSC Division of Appeals.

23 TRACY HATCH, FPSC Division of Legal Services.

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P R O C E E D I N G S

(Hearing convened at 9:10 a.m.)

CHAIRMAN DEASON: Mr. Bellak, how do you recommend that we proceed at this point?

MR. BELLAK: Well, I think we had heard from Bell, Southern Bell, and also Public Counsel; and if I may, I'd like to speak for a few minutes about this.

I think that the way the analysis went on this item, it came from the place that -- the case is established that ordinary business records don't become clothed with attorney-client privilege merely because they are handed over to an attorney. And in order to make the case that these are not ordinary business records, Southern Bell has represented that they were created solely for the purpose of obtaining legal advice and would not have been created but for that purpose. And, in fact, they cited a case which said that that's the only circumstances under which you can have a privileged document.

The problem with that is that apparently even Southern Bell doesn't believe that because on Page 23 of their motion, they've set out two much more compelling reasons as to why Southern Bell would have to have done this in-house monitoring of their operations in the context of a regulated entity. And

1 that is they say that if we don't clothe these
2 documents with privilege, they are going to do far
3 fewer of these in-house audits and, therefore, not be
4 able to find out what went wrong and how to correct it.

5 And that's the obvious reason why they had to
6 do this. They had to find out, in the face of all of
7 these investigations, what, if anything, had gone wrong
8 and how to correct it. And the reason that they would
9 have to do that notwithstanding any interest in getting
10 legal advice, is that they are facing fines and
11 penalties from the regulator, that is from you, unless
12 they undertake to find out what went wrong, if
13 anything, and how to correct it.

14 So, therefore, there's an underlying business
15 purpose to creating these documents, and they've pretty
16 well, at least roundabout, admitted that in their own
17 motion.

18 It simply does not seem to meet the standard
19 of common sense that in the face of all of these
20 challenges to their service operations, that they would
21 represent to this Commission that absent the need for
22 legal advice they would never have tried to find out
23 what went wrong and never have tried to find out how to
24 correct it.

25 COMMISSIONER BEARD: Mr. Bellak, are you

1 trying to establish a new legal standard of common
2 sense? (Laughter) You need to stop.

3 MR. BELLAK: It is also the case that
4 Southern Bell admitted in the prehearing that if the
5 Commission asked for that audit, they would have to
6 provide it. And at most what they could establish even
7 if there was some agreement, and there is no agreement
8 on the Commission, on the Staff's part, and certainly
9 none in this order that there's any privilege as to
10 these documents. But even if there were privilege as
11 to the documents, in the state of Florida the privilege
12 is statutory.

13 The Commission also has a statute which says
14 we can require a report on an emergency basis in
15 whatever form we need to establish that they are
16 complying with our regulations.

17 When you have two statutes heading toward
18 each other in that kind of a conflict, the Supreme
19 Court of Florida has always stated that you don't get
20 rid of one statute in favor of the other. You
21 harmonize them and find the proper context for each of
22 them to operate. And that's exactly what Commissioner
23 Clark's Prehearing Order did. It harmonized the proper
24 field of application for the Commission's ability to
25 investigate and Southern Bell's ability to claim

1 privilege.

2 And no one has asked to invade their actual
3 attorney-client privilege. No one has asked to find
4 out what their counsels' legal theories are or what
5 their communications about those legal theories are.

6 But as to these ordinary business records, in
7 the context of a regulated entity, the privilege does
8 not reach that far. And we're not the only agency
9 staff that's come to that conclusion. The FCC came to
10 the same conclusion when it was presented with the same
11 claim by CBS in that investigation.

12 The other remaining documents are the
13 personnel documents. That's an even easier issue to
14 dispose of, fortunately, because Southern Bell admitted
15 in its pleadings that it turned over those kinds of
16 documents to the Public Counsel where they applied to
17 management personnel who were disciplined. And the
18 reason they turned them over was they admitted that
19 carrying out discipline of employees is not a
20 privileged act; therefore, the documents that were
21 created for that purpose were not privileged.

22 The only difference here is they decided not
23 to carry out that discipline as to nonmanagement
24 employees. But that doesn't change the purpose for
25 which the documents were created. The purpose is the

1 same. It's a business purpose. The purpose was
2 disciplining those employees; even though they didn't
3 carry out the discipline, the nature of the documents
4 as not being privileged has been established.

5 Therefore, Staff would recommend that you
6 uphold Commissioner Clark's Prehearing Order.

7 CHAIRMAN DEASON: Do the parties wish to make
8 kind of a concluding argument before the Commissioners
9 ask questions?

10 MR. ANTHONY: If I could respond to Mr.
11 Bellak's statement very briefly?

12 CHAIRMAN DEASON: Yes.

13 MR. ANTHONY: As far as the panel
14 recommendations, the last set of documents that Mr.
15 Bellak addressed, I don't believe anybody disputes that
16 the personnel employees who created those documents
17 went to the privileged investigatory statements and
18 pulled information off those statements.

19 As we've discussed in our brief, the cases
20 are clear that just because you provide information to
21 a member of management, doesn't waive that privilege.
22 As long as that person has a legitimate need to know
23 the information, then there is no waiver.

24 So certainly the information from the
25 statements themselves that are listed on those

1 documents still retain their privileged status. And I
2 don't know of a case anywhere that would argue that
3 that information, or that status, rather, has been
4 waived simply because it has been provided to somebody
5 within management, and our brief discusses that --

6 COMMISSIONER CLARK: Let me ask you a
7 question though.

8 The purpose of providing it to those other
9 members of management was to carry out the business
10 purpose of disciplining employees. Is that correct?

11 MR. ANTHONY: Yes, ma'am. Absolutely. But
12 that does not in any way -- anytime you give something
13 to a member of management, it's going to be, in some
14 manner, related to a business purpose. And the cases
15 are clear that that's not the test. The test is
16 whether or not there has been a waiver of the
17 privileged status of that information.

18 And under these circumstances, since these
19 people did have the need to know, it was within the
20 purview of the personnel employees to make these
21 recommendations regarding discipline, that would not
22 constitute a waiver.

23 Our last eight or nine pages of our brief
24 discuss that. I've forgotten the name of the case now.
25 It's something-Joyce. Bear with me just a second.

1 James Julian case.

2 It's almost on all fours with our situation
3 here. And I think it certainly describes that the
4 information, at a minimum, taken from the privileged
5 statements would remain privileged. That even if you
6 were to find the rest of the document is not
7 privileged, certainly that information itself would
8 have to be considered to be privileged.

9 As far as the --

10 COMMISSIONER CLARK: Let me ask you a
11 question.

12 How is this different from DeSoto versus
13 General Dynamics, where you had a following -- that
14 General Dynamics, following the crash of one of its
15 aircraft, did some -- prepared a report regarding the
16 crash?

17 MR. ANTHONY: Well, in the DeSoto case -- I'm
18 sorry.

19 COMMISSIONER CLARK: And one of the things
20 the Court said was that the fact that "The defendant
21 aircraft manufacturer anticipated a contingency
22 litigation following a crash of one of their craft did
23 not automatically qualify its in-house report
24 concerning the crash as work product for discovery
25 purposes. Given equally reasonable desire to improve

1 the product, to protect future pilots and passengers,
2 to guard against adverse publicity and to promote its
3 own economic interest."

4 MR. ANTHONY: I think there are a number of
5 distinctions.

6 First of all, as you quoted, it's a work
7 product case. And here we believe that the information
8 is protected not only by the work product option but by
9 the attorney-client privilege as well. But even beyond
10 that, I think there is more fundamental distinction.

11 I think that if you take a look at the case,
12 you'll find that every time there is a crash, this
13 company went out and conducted the same type of
14 investigation whether there was ever any threatened
15 litigation or not.

16 In our situation there wasn't just the
17 potential threat of litigation. There was active,
18 ongoing litigation. This Commission has opened up
19 Docket 910163; the Attorney General had an active
20 investigation of Southern Bell.

21 I think this case is much more similar to the
22 situation in Upjohn. And I think that everybody has
23 ignored the Upjohn case in these discussions. And I
24 think maybe we need to talk about that case.

25 You have a situation there where the IRS was

1 investigating whether or not Upjohn had made illegal
2 foreign payments. And the company made its
3 investigation and took statements from witnesses. I
4 don't think anybody would dispute that the IRS has
5 certain regulatory oversight over every taxpayer.
6 Certainly, President Clinton thought so last night in
7 his proposals.

8 There's a regulatory relationship there; the
9 company has an obligation to conform with IRS rules,
10 laws and regulations.

11 But the Supreme Court of the United States
12 found that under that circumstance where the company
13 went out and investigated what could have been a
14 potential violation of federal law, the Internal
15 Revenue Code, that that was not something that the IRS
16 could discover, so that was privileged information.

17 Now, it's the IRS versus the Public Service
18 Commission, but I think the relationships are very
19 similar. Every taxpayer has an obligation to comply
20 with those statutory provisions of the Internal Revenue
21 Code.

22 COMMISSIONER LAUREDO: Would that logic then
23 tell me that every American citizen and corporation is
24 a regulated industry?

25 MR. ANTHONY: No, sir. What I'm saying is

1 that I don't think just because we are a regulated
2 industry puts us in a different --

3 COMMISSIONER LAUREDO: Well, I mean, you're
4 trying to make the bridge to the relevancy of Upjohn by
5 arguing that the very fact they we are taxed by IRS
6 makes us, in fact, regulated.

7 MR. ANTHONY: Well, we are obligated by law
8 to comply with the Internal Revenue Code.

9 COMMISSIONER LAUREDO: I understand, but I'm
10 focusing on the word "regulated." Whether there is a
11 distinction in industries, whether one is regulated and
12 that there may be some responsibility inherent in
13 having that status or not. And it's kind of a new
14 concept. I've never heard of --

15 MR. ANTHONY: Well, I don't think I would
16 consider every taxpayer would be regulated in the same
17 sense as Southern Bell; certainly I agree with that.
18 But the important point is not whether we use the word
19 "regulated" or not. The point is that everybody has an
20 -- as I understand the argument of both Staff and
21 Public Counsel, the argument is that we are required to
22 comply with Chapter 364 and with the rules and
23 regulations of this Commission. We don't have any
24 contention with that at all. Certainly we agree with
25 that. Just as every taxpayer has an obligation to

1 comply with the Internal Revenue Code. There is no
2 difference there.

3 We are obligated to comply here; as an
4 individual, I'm required to comply with the Internal
5 Revenue Code.

6 But the Supreme Court didn't say just because
7 the Internal Revenue Service has the right to come in
8 audit Upjohn and to take a look at whether they comply
9 with that law, and because Upjohn is subject to
10 criminal penalty if it doesn't comply with that law,
11 didn't mean it didn't have a privilege. And that's the
12 point I'm trying to draw. Just because we have an
13 obligation doesn't obviate the privilege. And I think
14 that's what's gotten lost here.

15 COMMISSIONER BEARD: I think you are also
16 trying to make the point that people think of us the
17 same way they do the IRS.

18 COMMISSIONER LAUREDO: Well, let me just ask
19 a question.

20 You know, a problem with some of these things
21 is that if you get into too many of these cases and
22 some of the reasoning of both Staff and the Prehearing
23 Officer, you may cloud the conclusion you want to
24 reach. And I'm trying to be very -- reach a conclusion
25 in the most narrow sense so we don't open up a whole

1 series of questions. And there is danger all around me
2 on this decision here.

3 Counselor, explain to me, isn't, in fact,
4 what we're here today for to decide strictly on whether
5 there was an error in law or fact in the ruling? Or
6 are we here rehearing the evidence? Because it seems
7 to me that we merged the two.

8 MR. BELLAK: I think we're here on an error
9 of law or fact, and I think that Southern Bell has
10 argued that we've made both. We're taking the position
11 that we've made neither, but it inevitably gets into a
12 discussion of both law and fact.

13 But I would say in very briefly responding to
14 that, that there are big differences between the Upjohn
15 case and this case. That Southern Bell is failing to --

16 COMMISSIONER LAUREDO: Don't get into that.
17 I already read all of that stuff.

18 Let me ask you something: Could you define
19 for me error and law or fact as it relates to what I
20 have to decide today?

21 Do I have to make a -- I don't have to make a
22 subjective judgment of whether I thought the Prehearing
23 Officer made the right decision. I have to judge
24 whether she reviewed the facts and applicable law and
25 that she made no error in that, isn't it?

1 MR. BELLAK: That's correct.

2 COMMISSIONER BEARD: I'll tell you I've got a
3 little bit of a problem with that because -- and with
4 all due respect, Commissioner Clark will and will
5 always be a far better lawyer than I would ever even
6 think of being. But that isn't the point.

7 You have one person make a decision that's
8 now being appealed to a body of five. And I think it's
9 a little different than if the five of us make a
10 decision and we're asked for reconsideration. Perhaps
11 it shouldn't be, but there's some subtle difference
12 there. Having been overturned by the five before, I'm
13 familiar with that concept. Okay.

14 COMMISSIONER CLARK: I think what the
15 appropriate thing to do is if you disagree with what's
16 been done, is that you might not grant the Motion for
17 Reconsideration but reconsider on your own motion.

18 COMMISSIONER BEARD: Well, before we get
19 there, I've got some questions I want to ask.

20 The investigation with respect to these
21 matters that was going on with the Attorney General's
22 office, that's done, right?

23 MR. ANTHONY: Southern Bell has reached a
24 settlement with the Office of Statewide Prosecution
25 which has resolved those issues as far as the

1 corporation is concerned, yes, sir.

2 COMMISSIONER BEARD: Okay. So that is
3 settled. They have gone home. Because I think a part
4 of that settlement was this is done, it's over.

5 MR. ANTHONY: As far as the corporation.
6 They reserve the right to consider whether or not to
7 pursue individuals but as far as the corporation is
8 concerned, it's complete. Yes, sir.

9 COMMISSIONER BEARD: Okay. Is there any
10 other investigation or any other action taking place
11 with the exception within this context of the Public
12 Service Commission with regard to these matters?

13 MR. ANTHONY: Well, you know, I ought to
14 correct something I just said.

15 It's true that we've reached a settlement.
16 Part of the settlement we reached with the Attorney
17 General's office is that they have oversight over our
18 compliance with the terms of the settlement for three
19 years and they've kept the investigation open. So
20 there is that caveat I guess I ought to add.

21 There's another case that's been filed
22 besides the ones that are pending here. In Federal
23 District Court, what's called the "qui tam action"
24 brought by a couple of previous Southern Bell
25 employees, a man named Frank Falsetti and a woman named

1 Nancy D'Allessio, who have sued the Company, in effect,
2 on behalf of the United States Government claiming they
3 are the originators of the information that has given
4 rise to all of this. And that the government has been
5 affected and, therefore, they are entitled to a share
6 of whatever the government would win. So there's also
7 that litigation as well.

8 COMMISSIONER BEARD: Let me try this again.
9 I've got seven documents that I took the time
10 to look at; in camera inspection. With respect to
11 those seven documents, okay, it doesn't sound like what
12 you've described relates to those seven documents
13 because I don't think there's anything in there that
14 would show who originated what.

15 MR. ANTHONY: Well, I think it does relate in
16 the sense that those documents might provide evidence
17 one way or the other that would be relevant in the qui
18 tam action as well. So to the extent that they were
19 found not to be privileged here, they could be
20 discovered in that other action as well and have some
21 bearing on that case.

22 COMMISSIONER BEARD: Well, in my limited
23 review, I don't remember anything anywhere that would
24 have given an indication of who originated what.

25 MR. ANTHONY: Oh, I'm sorry. I may have

1 misspoken. I was just trying to explain what qui tam
2 action was.

3 What they are alleging is that the government
4 -- is that there has been a manipulation of trouble
5 reporting and that the government has been adversely
6 affected. They are representing the government in a
7 suit to try to recover any damages they claim might be
8 available to the government. So it's the same
9 underlying issue.

10 I'm sorry. I probably said that in a
11 confusing way.

12 COMMISSIONER BEARD: I'm trying to, I guess,
13 apply some of this legal principle of common sense
14 here. It's scary.

15 And in reviewing these documents -- and stop
16 me if I get someplace I shouldn't be, as I discuss
17 this, okay, because I don't want to get into trouble.

18 But I reviewed those documents, and you look
19 at what was done, the time frames it was done in. And
20 I guess my first impression is why you wouldn't be
21 publicizing this in the front page of the Miami Herald.
22 Maybe you'd want to black out the names or something
23 like that to protect the not-so-innocent, but it's a
24 clear indication of what actions the Company took on
25 their own.

1 MR. ANTHONY: Well, in some respects I agree
2 with you. But the problem is, is that the management
3 of the Company has made the decision that it wants to
4 maintain the privileged nature of its investigation.
5 And I don't think anybody should draw any conclusions
6 from that good or bad; it's a right the Company has and
7 it's a decision that management has made.

8 If I were to voluntarily give up any portion
9 of that, I think everybody sitting at this table would
10 agree I, therefore, waive the subject matter of the
11 entire privileged information, and I would have no
12 privilege whatsoever at this point. And so I can't
13 pick and choose what I want to release or what I want
14 to keep private. And that's why I can't say I'd like
15 to have these released and maintain something else as
16 privileged.

17 COMMISSIONER BEARD: Okay. I understand
18 that.

19 And I have to think through the concept of
20 privilege, because this is clearly an internal audit,
21 and that is clearly covered in the statutes with
22 respect to confidentiality.

23 We're not talking about that today. But I
24 can read the statutes, and I think I know what an
25 internal audit is. We have debate over that sometimes,

1 but there couldn't be much debate in my mind at this
2 point on what this is.

3 MR. ANTHONY: I agree with that.

4 COMMISSIONER BEARD: But I just can't --

5 COMMISSIONER CLARK: Commissioners, this is
6 not an easy issue. I mean, to me if you go to the
7 heart of the issue, to me, to what extent does the
8 attorney-client privilege extend to those matters under
9 our regulation for which the Company is accountable to
10 us in terms of the investigation and how they do
11 business.

12 I think also the attorney-client privilege
13 protects communications, not facts. The facts are
14 discoverable.

15 COMMISSIONER BEARD: Let me tell you my
16 concern.

17 The facts are discoverable, okay. Somebody
18 else can go ask those same questions and do their own
19 surveys, there's no question about that.

20 I have a concern that, in my thought process,
21 well, the internal auditors did this, okay. And if the
22 lawyers had done it, then it would be okay. Well, the
23 lawyers have investigators to do things for them.
24 Okay.

25 COMMISSIONER CLARK: That's right. I don't

1 think that's the distinction.

2 COMMISSIONER BEARD: And it seems fairly
3 clear to me that this was done at the request of the
4 lawyers in this instance. I think it could just as
5 easily have been done at the request of any other
6 person in management.

7 COMMISSIONER CLARK: Right. Because they had
8 a business purpose to know what, if anything, was
9 wrong.

10 COMMISSIONER BEARD: And if the lawyers
11 hadn't requested it and anybody else in management
12 hadn't requested it, somebody would be in deep poo-poo
13 for not taking care of their own business.

14 And there's a violation when you have an
15 affirmative action or a sexual harassment, it's a
16 violation by an individual. What then becomes a bigger
17 violation is when the company doesn't take positive
18 action to correct that for the future. And that's what
19 protects the company. And -- what a mess.

20 CHAIRMAN DEASON: Have you finished, Mr.
21 Anthony?

22 MR. ANTHONY: Well, I just had -- in response
23 to a couple of things.

24 Commissioner Beard is correct that the
25 internal auditors were acting as our agents in effect

1 doing the investigation. We asked them to do it. I
2 don't think anybody has questioned that. At least I
3 hope not; I don't understand it.

4 The comment of Commissioner Clark that
5 communications and not the underlying facts are
6 protected I agree with as well. And that is why we've
7 maintained all along that other information can be
8 asked of us, can be analyzed, studies can be done by
9 other parties based on the information that we'll
10 provide and so on.

11 The key issue here, though, is that audit.
12 That is not an underlying fact, that is a compilation
13 of the facts with an analysis then appended to it done
14 at the request of the Legal Department. And that's a
15 communication to the lawyers, so the lawyers can then
16 make legal -- give legal advice to the Company itself.
17 And that's a distinction I think that --

18 COMMISSIONER CLARK: What is different --
19 what was done differently with respect to that audit
20 that is different from an internal audit?

21 MR. ANTHONY: These were audits done at the
22 specific request of the Legal Department --

23 COMMISSIONER CLARK: That's right.

24 MR. ANTHONY: -- as part of the litigation.
25 And that's the key distinction.

1 If you follow that logic then, Commissioner
2 Clark, I think that you never have a situation where
3 the lawyers can ask, in a regulated utility, ask
4 anybody else to do work for them. And if they give
5 them the information then that the lawyers ask for so
6 the lawyers can give advice, that information is never
7 going to be privileged. And I --

8 COMMISSIONER CLARK: The flip side of that is
9 you can make every investigation and every internal
10 audit you do privileged by just having your lawyers ask
11 for it.

12 MR. ANTHONY: Hypothetically, yes. But I
13 don't think anybody has ever alleged that we've done
14 that.

15 COMMISSIONER LAUREDO: But if you get the
16 broad interpretation of the client-lawyer privilege
17 theory that I read in your brief, that's a natural
18 management consequence. Everything, if I were running
19 that company, would have to go through your desk. You
20 would circumvent the public right to know inherent in
21 the statutes that we have to govern.

22 I mean, I'm not saying that that's what you
23 intend, but certainly we're providing you
24 unintentionally a tool that can broaden this thing to
25 frustrate our ability to get to the fact.

1 MR. ANTHONY: I don't think anybody has ever
2 said that anybody has abused the legal process here;
3 that we've tried to do this in a way that has abused
4 the rights of the Company to conduct a privileged
5 investigation. If they have, it's news to me.

6 COMMISSIONER LAUREDO: No. I wasn't making a
7 judgmental -- I'm just saying I thought you were
8 arguing for the broadest interpretation of the concept.
9 And my common sense -- not legal sense, maybe that's
10 where I'm wrong -- tells me if we grant that motion,
11 we're opening a very bad precedent for --

12 MR. ANTHONY: I'm sorry. I didn't mean to
13 cut you off.

14 COMMISSIONER LAUREDO: -- for management to
15 abuse it. Not management in the sense of your company.
16 I'm talking theoretically. I'm beyond this particular
17 company.

18 MR. ANTHONY: Yes, sir, and I understand
19 that. I don't mean to say that anybody is impugning
20 Southern Bell here or its motives. What I am saying is
21 that here it was done properly.

22 And if you take a look at our brief, we say
23 that if you look at the narrow scope of the privilege
24 that's discussed in the Consolidated Gas Company, that
25 it would apply here. As we discussed on Tuesday, that

1 says that the broad scope, as I recall, is that any
2 advice or information given to a lawyer or any advice
3 given by the lawyer would be protected. And the
4 hearing officer in that case said no, that shouldn't be
5 the rule. It should be that to the extent the advice
6 gives away, or would provide to the public, information
7 that -- confidential information that was provided to
8 the lawyer to render the advice, that's the narrow
9 scope. And here what we're talking about is that very
10 information that was provided. So I think this fits
11 very neatly within that very narrow scope of the
12 privilege.

13 COMMISSIONER BEARD: Well, there is another
14 piece here. You have to be very careful what you ask
15 for because you might get it. And in this instance,
16 let's -- I've tried to think through this, all the way
17 through as well, the implications, the risk associated
18 with setting this precedent. And it may well be that
19 if you don't win here today, or even if you do we'd
20 probably end up in the Supreme Court and you all can
21 argue before the "great legal minds" in the state of
22 Florida.

23 But the risk I see here, in addition to that
24 is, if we can't look at this -- there's been some
25 allegations of misbehavior on the part of the Company.

1 Okay. And like I said, the first step is, did they
2 occur? And the second test is, what did the Company do
3 about it?

4 Well, if the allegation is made and upheld
5 that they occurred, what did the Company do about it?
6 There's a big blank spot on my desk because none of
7 this information is available. You can tell us what
8 you did, but there's nothing to support it. And
9 there's nothing to support it because you don't want to
10 show it to us.

11 MR. ANTHONY: I understand some of the
12 ramifications of my position here today. But going
13 back to -- and it's a quandary that I'm in. But in
14 terms of this setting a precedent, I don't think that
15 -- I don't think difficult facts should make what I
16 thing would be bad law, and that's where we're heading
17 here, with all due respect to the Prehearing Officer's
18 order. It's a difficult situation and --

19 COMMISSIONER CLARK: I take none of this
20 personally, I assure you.

21 MR. ANTHONY: But it seems to me that we're
22 worried about potential abuse when there hasn't been
23 any allegation of abuse here. And to deny what I think
24 is appropriate application of privilege here, because
25 somebody might abuse it in the future, is putting the

1 cart before the horse.

2 COMMISSIONER BEARD: We're just learning from
3 the legislature --

4 COMMISSIONER LAUREDO: I started by saying
5 today that it's a very dangerous -- and I'm not a
6 lawyer, but I know that I want to try to keep this as
7 focused as possible because we're going to step all
8 over and create a lot of bad things for deciding what I
9 would otherwise call "a narrow issue." And I don't
10 want to go on in discussing too many of my feelings and
11 reactions to some of the pleadings, because I don't
12 want it to be on the record.

13 But if you want to be specific, one of the
14 things that struck me, without quoting -- I can refer
15 to the document without quoting it, can't it?

16 MR. ANTHONY: Well, I don't think you can
17 have --

18 COMMISSIONER LAUREDO: And I don't think you
19 can paraphrase.

20 COMMISSIONER CLARK: You have to be careful
21 about disclosing confidential information.

22 COMMISSIONER LAUREDO: Well, how about
23 sequence of events?

24 COMMISSIONER CLARK: I don't think you can.

25 COMMISSIONER LAUREDO: Well, I asked on

1 Monday -- and I'd like counselor, just before we vote,
2 to maybe to clarify this.

3 I have very two clear principles that I have
4 pretty much fixed in my mind: One is the issue of the
5 day, crossing today's bridge. And the other one is one
6 of confidentiality.

7 As I tried to explain to you, I, not
8 understanding the two, if I vote to deny the motion to
9 uphold the Prehearing Officer, it does not in any way
10 open up this information for all parties; is that
11 correct? That -- we'll cross this.

12 MR. BELLAK: Right.

13 COMMISSIONER LAUREDO: Because my -- I do
14 have a -- and I could be wrong on the law, but just how
15 I feel. I do believe that -- by the way, before I get
16 to that to make sure I don't -- they protect the public
17 and the continuing obligation clauses or arguments that
18 you used basically to put forth your case, are -- they
19 flow through the Public Service Commission. Yes or no?

20 MR. BELLAK: Those are quotations from a
21 regulated industry case that we were relying on, but
22 they are certainly reflected in the statutes.

23 COMMISSIONER LAUREDO: My question is very
24 narrow. Yes or no. You're referring to the Public
25 Service Commission, not to other parties. For example,

1 Public Counsel.

2 To protect the public and continue an
3 obligation counts as Florida Public Counsel?

4 MR. BELLAK: I was talking about the Public
5 Service Commission.

6 COMMISSIONER LAUREDO: Well, I happen to
7 think that -- and I have said that I consider them
8 kind of co-equal partners with this Commission. And I
9 think that there is a qualitative difference between
10 Public Counsel. I believe it's probably sound in the
11 statutes and any of the other parties.

12 I have been here long enough to know there is
13 an awful lot of other parties with their own agendas
14 that is not the public good. I know, and I'm confident
15 that Public Counsel's only agenda is the public good.
16 And I want to make sure that I am accommodating the
17 pursuit of their statutory obligations and the pursuit
18 of public confidence in the investigation that is
19 inherent in their statutes.

20 I'm not opening up the door for everybody
21 else's little agenda that is independent from this
22 case. And that is where I'm not quite clear yet. I
23 will get another shot at that after today?

24 MR. BELLAK: I believe you would in terms of
25 confidentiality.

1 COMMISSIONER LAUREDO: I mean, without naming
2 any names, you know what I'm saying, right?

3 Just because the people are a party to the
4 docket does not put them in my book at the same level,
5 statutory or morally, than the Public Counsel. Is that
6 consistent logic?

7 MR. BELLAK: I believe so.

8 COMMISSIONER BEARD: I'm sorry. We've got to
9 talk about this.

10 COMMISSIONER CLARK: Yes.

11 COMMISSIONER BEARD: And, Commissioner Clark,
12 you better jump in tell me where I'm wrong.

13 With all due respect to Public Counsel, they
14 are a party to a proceeding just as cable, pay
15 telephone and the phone company are, from a legal
16 standpoint, as I understand it.

17 Now, do they have an obvious interest in this
18 information that the others may not have? Yes. Can we
19 just by nature preclude the others from looking at it?
20 No.

21 We may want to set up some hoops for them to
22 jump through, but I can tell you, and let's just call
23 it like it is, if pay phone or cable comes in here and
24 they want to assist this Commission in proving that
25 this is a bad company doing bad things and therefore

1 they ought not be allowed into certain businesses
2 because they would abuse it, they will be right in here
3 wanting that information. And you may get your hands
4 on it and you may not.

5 MR. BELLAK: The only thing I'm addressing is
6 whether this decision forecloses those hoops. And my
7 answer is that it doesn't.

8 COMMISSIONER LAUREDO: Well, my analogy on
9 Monday was, this is the first wall or the first river
10 we have to cross and we have the other one. I'm just
11 not clear. Now, he's even muddled it more.

12 You know, I just put it in the context of
13 what I already said. I believe that there's a public
14 purpose; there is a protect-the-public and
15 continuing-obligation clause that I do think somehow,
16 though maybe not legally, flows to Public Counsel as
17 well. I don't think it flows to a lot of other folks.

18 And I am not comfortable with them signing
19 confidentiality agreements where they will just laugh
20 at and leak it to outside sources for their own
21 commercial purposes -- which is fine with me. I'm all
22 for the free market and all of that stuff, but I don't
23 want to be a ploy in those games.

24 The hardest thing in this case is keeping
25 focus because there are so many things going on outside

1 of this room to try to influence this Commission:
2 games, public relations, and otherwise, that, you know,
3 I think it's a disservice generally to the public that
4 we're supposed to serve. And I just don't want to be
5 making a decision today. And to this degree I think
6 Public Counsel will have a great degree of the
7 responsibility to pursue the integrity of what I'm
8 saying; that I think there's a difference between them
9 and their purposes and other people's purposes and
10 reasons for being parties to this case. And that is
11 the one gap I'm still not comfortable with.

12 I mean, I've already -- you can see the drift
13 of where I'm going on the decision today. And you're
14 contradicting counsel by saying once we cross today,
15 you're opening up a whole -- you won't be able to
16 protect --

17 COMMISSIONER BEARD: Well, let me tell you,
18 if you think that you're going to make those hoops
19 moral hoops to jump through because you think Public
20 Counsel has a different reason for wanting it than
21 another party, that's fine. But they're not moral
22 hoops, they're legal hoops.

23 COMMISSIONER LAUREDO: They are not moral. I
24 think they arise out of the statute. The only party in
25 the proceeding that has a statutory basis for being

1 here is defined as -- I don't have the thing, but I'm
2 sure I can almost use the same words "protect the
3 public in a continuing obligation that flows from us
4 through them or through them through us or jointly
5 together."

6 COMMISSIONER BEARD: There's a statutory --

7 COMMISSIONER LAUREDO: And that I can put
8 aside, and I believe in that. I just don't know all
9 the other parties.

10 COMMISSIONER BEARD: There's a statutory
11 basis for those other parties being a part of this
12 proceeding, too. Okay. They rise out of the --

13 COMMISSIONER LAUREDO: Yes, but Public
14 Counsel has statutory -- is a statutorily created
15 entity.

16 COMMISSIONER BEARD: That's fine, but that
17 doesn't give them additional legal rights within the
18 legal system of this country. Okay. They are not the
19 judge. Because they arise out of a statute, the
20 Statewide Prosecutor doesn't necessarily get, when they
21 get before a judge, some special right. The Public
22 Defender doesn't get special right. They have to play
23 by the same rules.

24 MR. BELLAK: Well, I think there's one
25 statute which is relevant. And that is that assuming

1 down the road that there are requests for
2 confidentiality, the only party that would have a
3 statute allowing access to confidentiality-protected
4 materials would be the Public Counsel.

5 CHAIRMAN DEASON: Let me ask a question at
6 this point.

7 I think that we're, perhaps, at this point
8 getting the horse before the cart, because we're
9 talking confidentiality. And it's my understanding
10 that it's not the nature of the motion; that's not the
11 nature of the Prehearing Officer's ruling; it's a
12 question of privilege. And while I think this is a
13 good healthy debate, I think it may be a little
14 premature at this point.

15 What I'd like to do is believe that --
16 Commissioner Johnson may have a question, but I'd want
17 to get back. I want Mr. Anthony to conclude his
18 argument. I want Public Counsel to make their closing
19 argument, then, again, open it up for questions from
20 the bench. And then hopefully we would be able to make
21 a decision.

22 Mr. Anthony, have you concluded your
23 argument?

24 MR. ANTHONY: I would just reiterate that it
25 was done as part of the litigation by the Legal

1 Department to render legal advice. I don't see any
2 difference in this than any other context, and I
3 believe it's privileged.

4 CHAIRMAN DEASON: Commissioner Johnson, do
5 you want to ask a question at this point or do you want
6 to hear from Public Counsel first?

7 COMMISSIONER JOHNSON: Let me ask a couple of
8 questions and they may want to, in their presentation,
9 also respond. But to counsel for Southern Bell.

10 Now, in your brief and in your argument
11 Tuesday, you very succinctly laid out the elements for
12 attorney-client privilege and why you thought it
13 applied. But what we didn't get into was the rationale
14 for the attorney-client privilege. That may be good
15 for the members of this bench to actually understand
16 why it should apply in a generic sense and why it
17 should apply to these specific facts.

18 And I think Counsel Bellak brought up a good
19 point when he cited to Page 23 in your brief and he
20 stated that these are activities that by -- or in his
21 opinion, by your own admission would have occurred or
22 could have occurred anyway, which kind of lessens the
23 rationale for having an attorney-client privilege.

24 But if you could walk through the privilege,
25 the rationale for the privilege, why it should apply in

1 this situation and why your rights have not been
2 lessened by the regulatory scheme, that might be
3 helpful.

4 MR. ANTHONY: I'd be happy to. Thank you.

5 A client, whether it's corporate or
6 individual, to come to an attorney, provide information
7 to that attorney so that the attorney can provide
8 advice on legal matters, and know that that is going to
9 be maintained solely between the client and the
10 attorney. The information provided to the attorney, as
11 well as the advice then given from the attorney to the
12 client, has a special status and relationship, so that
13 there is a free flow of information so that people's
14 rights can be discussed between the client and the
15 attorney, and then advice given without fear of
16 disclosure.

17 If there were the fear of disclosure, it
18 would create that chilling effect that Mr. Bellak
19 discussed in our brief. If it were then to be made
20 public, if a court could come in and say to a client or
21 a lawyer, "Tell me what you two discussed," then it
22 would certainly prevent the free flow of information.
23 People wouldn't be able to exercise their rights, to
24 the same extent as they are, given the existence of
25 this privilege.

1 I think that it exists exactly the same for
2 Southern Bell as it would exist for anybody else,
3 because Southern Bell needs legal advice. They need it
4 now more than it ever has, given all the allegations
5 that have been made. But the Company certainly has a
6 right to ask its lawyers to gather up the information
7 on which it needs to have that advice, and then to
8 provide that advice to the Company.

9 If the Company can't do that in a
10 confidential manner, if it's afraid that if there is a
11 genuine risk that that information will be made public,
12 then it's less likely to ask for that information. It
13 may try to discover these things in a different way,
14 but lawyers have a unique training and knowledge and
15 understanding of the process here, I think, certainly
16 within the Company, when you add all the other factors
17 that go into the practice. And they are in a somewhat
18 unique situation and they can bring certain things to
19 bear that other methods of investigation do not.

20 They have an understanding of the big picture
21 that others may not have. And as a consequence, the
22 Company can turn to the lawyers in special
23 circumstances and say, "We want you to gather up the
24 pertinent information. Get the information that we
25 need so that you can provide us legal advice." What

1 should we do in this situation? Should the Company
2 fight this? Should the Company agree to try to settle
3 this? Should the Company do whatever? How should the
4 Company try to fight it? What are the rights the
5 Company has, given the information that you've gather
6 up? And if the Company can't do that within the
7 context of a privileged nature of those conversations
8 and dissemination of the information, then that's where
9 that chilling effect comes in.

10 And that's what I meant; those were my words
11 in the brief. And I'm afraid that if you have this
12 sort of thing, that the lawyers will be precluded from
13 doing what historically has been their role, and that
14 is to conduct this sort of investigation so that they
15 can provide the advice.

16 If you tell the Company that, "Well, you do
17 this anyhow." Well, then the Company will go ahead and
18 do it but the Company doesn't do this anyhow in this
19 manner. There is a distinction.

20 The Company has a Security Department. The
21 Company has an auditing group and they go out and they
22 do audits all the time. And the security group does
23 investigations all the time. And we've provided plenty
24 of those investigations -- plenty of those audits in
25 discovery in this case. There has been no claimed

1 privilege there. But here this is a unique situation.
2 Here there was ongoing litigation. Here there was a
3 threat of criminal indictment.

4 COMMISSIONER JOHNSON: Let me make sure I
5 understand. I really didn't follow the "chilling
6 effect" argument because, I guess, I was following the
7 rationale that the Company would have done this anyway,
8 and that the Company is almost obligated by the rules
9 and regulations to conduct these types of audits
10 whenever there is a complaint. So I was really having
11 a hard time following the chilling effect argument, but
12 you just stated that you don't think that the Company
13 would have conducted this in this manner had it not
14 been for the legal request.

15 MR. ANTHONY: I think you have to look at the
16 facts in this particular situation where there was the
17 investigation by the Attorney General. There was the
18 the pendency of these particular dockets at this
19 Commission, and this sort of investigation rose to a
20 different level. It wasn't something where somebody --
21 Commissioner Beard had mentioned sexual harassment. A
22 very important issue, but it's not something that goes
23 to the heart of the Company as the allegations here do.
24 That's an individual situation.

25 Here we have somebody claiming that the

1 Company has condoned misconduct on the part of its
2 employees for a period of time, from top to bottom.
3 Now, the Company disputes that and disputes that
4 vigorously, and that will be what we discuss, present
5 evidence on. So we're not going to get into that now.
6 But because of the nature of those allegations, it was
7 the Legal Department that was called in to do that.

8 Now, certainly you can say that the Company
9 might have investigated it. I don't know what the
10 Company would have done. I can only tell you what the
11 Company did do, and that was to ask the Legal
12 Department to conduct as thorough an investigation as
13 it possibly could, and that's what was done. And that
14 was done for the purpose of the Company providing
15 advice to the management of the Company in the context
16 of that litigation and the threat of criminal
17 indictment and all the rest that was pending at the
18 time. And that makes it different from the typical
19 investigation. And I think that is the very reason for
20 the privilege.

21 I know you don't want to hear about Upjohn,
22 but in Upjohn there was an investigation done. It was
23 an investigation of allegations of criminal wrong
24 doing, but the Supreme Court said just because it's an
25 investigation that the company probably would have had

1 to have done anyhow, that doesn't mean that it's not
2 privileged.

3 COMMISSIONER BEARD: I've got to understand
4 something here. You made a statement, correctly so, your
5 internal audit group does internal audits all the time.

6 MR. ANTHONY: Yes, sir.

7 COMMISSIONER BEARD: A variety of nature,
8 both operational and financial, I'm sure. The Security
9 Department does work all the time on those kinds of
10 things. And the difference here then is once that's
11 done, as I understand it, then the lawyers take over.
12 Now, we can say the lawyers asked them to do that, but
13 I didn't find anything where you gave these internal
14 auditors some special training, some special
15 instructions that caused them to do the job differently
16 than they've been trained as professional certified
17 internal auditors to finish.

18 But at that point your analysis begins and
19 your thought process as an attorney begins. And you
20 look at that data and you begin to formulate a position
21 upon which to move the Company forward for the purposes
22 of litigation. And you form your strategies and you
23 begin to take actions in preparation for that, whatever
24 they may be. But it's based on data that's gathered,
25 as I can best see it, no differently than that data

1 would have been gathered had Mr. Lacher ordered an
2 internal audit. I'm assuming he's not an attorney.

3 MR. ANTHONY: He's not an attorney.

4 In this case, I think there is a distinction.
5 In this case, the lawyers specifically asked the
6 auditors their reviews. The lawyers specifically told
7 the auditors what it was they wanted them to look at.
8 The lawyers specifically gave some general parameters.
9 They certainly didn't say, "Here's how you conduct your
10 specific review, but here are the things that we need
11 to know so that we can provide advice to the Company."
12 Those are the things the auditors had no plans to do
13 and would not have done, but for the fact that the
14 lawyers asked them to do it because the lawyers needed
15 that information to render the advice. This wasn't a
16 separate process; the lawyers initiated those audits.

17 COMMISSIONER BEARD: I understand that.

18 MR. ANTHONY: They set the ground rules for
19 those audits.

20 COMMISSIONER BEARD: You didn't have, in your
21 five year audit plan, to do an investigation on these
22 kinds of activities. I understand that; that's
23 typically of an internal audit.

24 In the electric business you find out you've
25 got a couple of shade-tree meter readers out there,

1 then your internal auditor stops what he was doing over
2 here in the warehouse and he goes out here and he does
3 an investigation on that.

4 MR. ANTHONY: But the difference here is that
5 it was the lawyers who, within the context of their
6 bigger investigation and in their attempt to render
7 advice to the Company, specifically requested those
8 particular topics to be audited. It could have been
9 any one of a thousand different topics, but it was the
10 lawyers who said, "We want you to look at this, we want
11 you to look at this, we want you to look at this, this
12 and this." And that was done at the specific request
13 of the lawyers. It wasn't something where the auditors
14 said, "Well, we've got some information. We better
15 look at this." And then the lawyers came along and
16 said, "Well, now that we know that's there, we'll use
17 that." That clearly would not be privileged. It would
18 just be as somebody said earlier, just because a
19 document is created and given to a lawyer doesn't
20 render it privileged. We're not arguing that here.

21 This was part and parcel of what the lawyers
22 were doing. It was just simply, rather than the
23 lawyers taking the time and effort to do that, they
24 asked somebody else to do it for them as their agent.
25 And I think that's an important distinction here.

1 CHAIRMAN DEASON: Commissioner Johnson, do
2 you still have questions?

3 COMMISSIONER JOHNSON: No.

4 CHAIRMAN DEASON: Mr. Beck. Ms. Richardson.

5 MR. BECK: Briefly. We've not asked for any
6 of the attorneys' analysis, any of their strategy, any
7 of the attorneys' recommendations; we've asked for the
8 data that was contained in the audits.

9 We fully agree with the arguments presented
10 by Mr. Bellak.

11 We'd like to mention one other precedent that
12 the Commission has, and that is this full Commission
13 has twice considered essentially the same arguments by
14 Southern Bell.

15 Twenty months ago we sent an interrogatory to
16 Southern Bell asking them to identify each of the
17 persons known to the Company that had knowledge about
18 falsification of repair records. The Company came back
19 and raised all the arguments you've heard here today.
20 That they've learned the identity of some persons
21 through this claimed privileged investigation that
22 they've conducted. And they refused to disclose the
23 identity of these persons, saying it was both covered
24 by the attorney-client privilege and by the work-
25 product privilege. Commissioner Beard rejected that

1 argument in an order. He compelled them to answer the
2 interrogatories we sent. That was twice reviewed by
3 this Commission. Each time the full Commission upheld
4 Commissioner Beard's order. The last order was taken
5 to the Florida Supreme Court by Southern Bell. Two
6 weeks ago today we had an order by the Florida Supreme
7 Court deciding seven to zero to dismiss Southern Bell's
8 petition for review.

9 Essentially, I think you're hearing the same
10 argument by Southern Bell here today. It has taken the
11 position that facts that they come into possession of,
12 as a result of their investigation, are privileged and
13 it's simply not the law.

14 We're not asking for their attorney's
15 analysis, strategy and so forth, we're looking for the
16 facts, and we believe you should rule today just like
17 you did before.

18 COMMISSIONER BEARD: Why am I not surprised
19 that you brought that up?

20 MR. SHREVE: I don't want to argue either one
21 of these. And I think you're exactly right about the
22 confidentiality being the cart before the horse.

23 I am concerned about some questions that were
24 raised, and whether or not they would influence the
25 vote at this time. Would it be possible just to

1 explain exactly what the procedure is, and how the
2 Commission remains in control of that, for Commissioner
3 Lauredo?

4 COMMISSIONER LAUREDO: I disagree with the
5 Chairman on his analysis that the discussion on the
6 confidentiality is putting the cart before the horse.
7 It's certainly important to this horse to understand it
8 before I cross this bridge. And I've tried for two days
9 now to try to understand it and it will influence my
10 decision.

11 CHAIRMAN DEASON: All right. Let's discuss
12 confidentiality. And, Mr. Anthony, I want you to discuss
13 it too, and we're going to hear it all. Let's get
14 started.

15 MR. SHREVE: As much as it will bother you,
16 Mr. Anthony is probably going to agree with me.

17 There is a statute that provides -- say this
18 or any other information is received by us, whether
19 they fight it or not; if they voluntarily give it to us
20 and they ask for confidentiality treatment, it's
21 automatically granted until this Commission acts on
22 that and makes a ruling on that request for
23 confidential treatment. It's by statute so that we can
24 go ahead and receive the information that is then
25 excluded from the Public Records Law. If the

1 Commission maintains that it is confidential, then it
2 stays confidential and is excluded from the Public
3 Records Law. If the Commission says it is not
4 confidential, then it, of course, is open but subject
5 to appeal.

6 Beyond that there are many times that the
7 utilities have not wanted specific businesses or other
8 parties to have information that we might -- that they
9 might not mind us having because they know we need to
10 process the case with it. And that's happened in
11 several situations. Sometimes that is taken care of by
12 an agreement between the attorneys, and in that
13 situation it's a mutual agreement. In other words, if
14 Bell entered an agreement with one of the other parties
15 and they were satisfied with it, then you probably
16 would too, if they were. Let's say that agreement did
17 not come about; someone else want the information from
18 Bell and Bell refused to give it to them. The Company
19 would then have the opportunity, if they are a party,
20 to come in and file a Motion to Compel Bell to give
21 them the information. This Commission would be the one
22 making the ruling on that. They could deny it. They
23 could put any parameters that they wanted on that, how
24 the information was used and what was to be given to
25 them. So this Commission still maintains control of

1 the confidentiality and who gets it.

2 COMMISSIONER BEARD: Based -- correct me if
3 I'm wrong -- based on them showing some need to be able
4 to pursue their case. They need this information and
5 excepting that they would sign -- what is the term,
6 proprietary --

7 MR. SHREVE: Nondisclosure agreement.

8 COMMISSIONER BEARD: -- nondisclosure
9 agreement, they typically have received the information
10 or they have said, "We really don't want it that bad.
11 We're not willing to sign that agreement." And then they
12 don't get it.

13 MR. SHREVE: Well, not necessarily. The
14 Commission still makes the ruling. If they reach an
15 agreement with the other company and there is a
16 nondisclosure agreement, then the two parties have
17 agreed and Bell would be willing to give it to them.
18 The Commission would not make a ruling in that case.
19 But if there is no agreement, and many, many times
20 there is no agreement, the Commission is still in
21 control because the other party would have to come to
22 this Commission and say, "Compel Bell to give me this
23 information." If you decide Bell doesn't have to give
24 them the information, Bell doesn't have to give them
25 the information.

1 COMMISSIONER CLARK: Or if they don't have a
2 need to know.

3 MR. SHREVE: That's right. It's your
4 decision.

5 COMMISSIONER BEARD: And I don't want to
6 argue out somebody else's case, but let's assume, for
7 the purposes of discussion today, we compel them to
8 give you this information.

9 MR. SHREVE: Okay.

10 COMMISSIONER BEARD: We've done it once.
11 Now, along comes one of the other parties and they say,
12 "Look, we think these guys are a bunch of bad nasties,
13 too, and we don't want them in our business and we don't
14 want to have to compete with them, and we think you ought
15 to tie them up in a little box and keep them in a padded
16 cell." Okay. And to prove that case I need the same
17 information because, quite frankly, we don't think Public
18 Counsel is to going to do such a hot job with this, and we
19 want to be able to deal with it. We set the precedent of
20 compelling the information once --

21 MR. SHREVE: I would assume first in that,
22 you're going to say that Bell wants it kept confidential
23 because they would have to make that request.

24 COMMISSIONER BEARD: I'm assuming if they
25 want it kept today from you --

1 MR. SHREVE: They're keeping the information
2 from us, and I would assume they're probably going to
3 ask that it be confidential. That's not necessarily
4 so, though, but I think they probably will. If Bell
5 asked it to be held confidential, then you would make a
6 final ruling as to whether or not it would be.

7 The big problem with us is we can't even
8 enter a nondisclosure agreement and you can't either,
9 because we're under the Public Records Law. The law
10 says this is an exception to the Public Records Law.
11 If they request confidential treatment, it's excluded
12 from the Public Records Law and we keep it
13 confidential. The Public Service Commission then rules
14 on whether or not they are correct. It's a whole
15 different ballgame. Just as you said, we're in a
16 little bit different position than the other parties.
17 And here again, you've had to rule on information that
18 Gulf Power didn't want other people to have that they
19 didn't mind us having, but they couldn't give it to us
20 until they got a ruling at that point.

21 COMMISSIONER LAUREDO: In other words, by our
22 vote today, we don't waive that right to look at it.
23 That's my whole point. And you concur with our Counsel
24 that I will then have the ability to hear each individual
25 request independently of each other as to confidentiality

1 and make the vote on that, and this precedent or vote
2 today does not preclude my judgment at that time. That's
3 the real cycle I wanted to get out of, because I didn't
4 want to do something today that took away my ability to
5 make that judgment later. And you're saying that will not
6 happen and our counsel is saying that will not happen, is
7 that what you said to me? And I don't know what the
8 company's --

9 MR. ANTHONY: On a theoretical basis that's
10 all correct. On a practical level that's incorrect.
11 And it goes to what Commissioner Beard was saying.

12 There are allegations in our rate case docket
13 that Southern Bell has acted improperly, and that
14 because of that we should not be allowed to have
15 incentive regulations. There are some parties who
16 posited that position. And accordingly, anything that
17 goes to -- anything that would be relevant -- any
18 information that's relevant to whether or not Southern
19 Bell acted properly or improperly would be relevant to
20 that position.

21 Now, if I were to come in here and say,
22 "Don't allow cable TV or any other party to have this
23 information," I have to do it because there is no
24 relevance to the document. It's not going to lead to
25 admissible evidence. It's even broader than whether

1 it's relevant in terms of admissible at the hearing.
2 It's the question of whether it may lead to admissible
3 evidence at the hearing.

4 I don't think I can, in good faith, come in
5 here and make that argument to you. If you say that
6 Public Counsel is going to have this information, as a
7 practical matter, although, yes, I can come in and refuse
8 to give information to somebody else, and then they'll
9 file their Motion to Compel, they're going to make the
10 argument that this gets into whether or not --

11 COMMISSIONER LAUREDO: Well, Counselor,
12 excuse me, you're getting a little bit too far ahead of
13 where I wanted to be.

14 My only concern was you're trying to argue
15 the merits of it, and I'm saying do I have the right to
16 make the decision on those merits?

17 COMMISSIONER CLARK: Commissioner Lauredo,
18 may I say something in terms of what I think Mr.
19 Anthony is saying is, while I have the theoretical
20 right to do that I have to put forth a meritorious
21 argument. And what he's saying is, I would be hard
22 pressed to put forth a meritorious argument when there
23 are parties in here who have competitive interests in
24 this docket, who believe that the incentive program
25 should not again be renewed, and have taken the

1 position that one of the reasons is because they have
2 not performed -- they have not given quality of service
3 in the past under this, that he will be -- based on the
4 merits, he will be unable to show that they should be
5 precluded from seeing that. But I think one other
6 thing has to be determined and that is the nature of
7 the protective agreements. It doesn't mean if they
8 sign a nondisclosure agreement they can disseminate it
9 to every one in their company. You set parameters in that
10 disclosure agreement that it's the lawyer who sees it, and
11 the consultant, or whoever is working on it, that needs to
12 know. It is not perfect by any means, but you limit the
13 dissemination of that to protect Southern Bell.

14 MR. HATCH: Just as an addition to that
15 historically --

16 COMMISSIONER LAUREDO: Let me just follow up
17 before I forget. Both of you made the same point, and
18 I'm having a hard time communicating today so I want to
19 try again.

20 I don't want you to take me past the line --
21 I want to just answer the question whether I have the
22 right and ability to make the judgment. Unless you're
23 telling me that you, as Counsel to the Company, in your
24 own judgment, from within your duties in the Company,
25 will not be able to make the case, then that's -- in

1 all honesty, that's your problem; that's not what I'm
2 discussing today.

3 What I'm discussing today, if you were to
4 find it in your belief to make that point in that
5 petition, whether I will have the right to vote; that's
6 all I want, that's all I want to know. And if the
7 answer is yes, that's all I need is the answer to that.

8 MR. ANTHONY: That is correct. But I don't
9 think you can make the decision that's before you today on
10 that basis, because while you have the theoretical right
11 to do it, as a practical matter --

12 COMMISSIONER LAUREDO: Oh, I am not making a
13 decision today on that basis. I was trying to, as a
14 relatively new Commissioner, to try to understand, and
15 as a nonlawyer, the concept, because common sense tells
16 me that there is continuity to this process, and I
17 cannot, as much as you all will try to make me
18 segregate the two, there is a link between the two, and
19 I have very strong feelings on one issue and other
20 feelings on the other one, and I want to be able to
21 maintain my flexibility to decide on each individual
22 issue, on its merits. And I may lose in each of those,
23 but at least as one Commissioner, I want to be able to
24 say I'm not, by voting today one way, waiving all these
25 other votes. That's the only thing I really wanted. And

1 I probably haven't made it clear, but I think now that I
2 understand that all three of you say, yes, I will have
3 that right; notwithstanding how difficult it may be.

4 MR. ANTHONY: You have that right on a
5 theoretical level.

6 COMMISSIONER LAUREDO: May I ask Counselor
7 one question --

8 COMMISSIONER CLARK: Have I stated it
9 correctly, though?

10 MR. ANTHONY: Yes, you have, Commissioner
11 Clark.

12 COMMISSIONER LAUREDO: I respect the weight
13 of what you're saying and I understand. I didn't want
14 to get that far out.

15 MR. ANTHONY: My only point is that you open
16 the door, you can't open it just a crack.

17 COMMISSIONER LAUREDO: You now hit right on
18 the head. I'm trying to figure out how far I need to
19 open the door to get past today.

20 Counselor, is the issue today strictly the
21 seven documents, or a decision today would open up the
22 door wider than the seven documents?

23 MR. BELLAK: We're only talking about these
24 seven documents.

25 COMMISSIONER LAUREDO: If there are any other

1 documents that would have the same arguments, they
2 would, on themselves, have to be argued on their own
3 merit, in camera?

4 MR. BELLAK: That's correct. And in fact, I
5 think this --

6 COMMISSIONER CLARK: It's on its way.

7 MR. BELLAK: This order demonstrates that
8 we're taking a very case-by-case approach.

9 COMMISSIONER LAUREDO: Okay. So one could
10 rephrase this whole issue as saying that we have to
11 decide on whether or not there was an error in fact or
12 law by the Prehearing Officer, and the two ways to do
13 that is to have read or reviewed the items, the seven
14 items in camera, and whether the applicable law, which
15 is a matter of interpretation, was correct.

16 We don't have to judge the Prehearing
17 Officer's interpretation of the law, do we? Or is that
18 what you mean by the "an issue of law"?

19 MR. BELLAK: If you have a different
20 interpretation you can take that into account.

21 COMMISSIONER LAUREDO: But as to the question
22 of fact, it refers to the seven documents.

23 MR. BELLAK: That's correct.

24 COMMISSIONER LAUREDO: And the facts that arise
25 out of that incident and not the broader picture.

1 I am prepared -- it may be premature. This
2 is a very difficult issue, Commissioner Clark, and I'll
3 tell you, I have had people ask me, you know, the
4 difficulty of this job and all these votes that, you
5 know, you pass millions of dollars here and there,
6 people from both sides mad at you, and I don't find
7 those difficult at all. This is the most difficult
8 part of this job, the one I hate the most. I wish
9 there was a rule that would prohibit us from overruling
10 a fellow Commissioner or having that review, but I
11 understand because I think those people --

12 COMMISSIONER CLARK: Don't worry about that.

13 COMMISSIONER LAUREDO: But it bothers me.
14 And I have taken a lot of time to make sure that,
15 therefore, to try to as a nonlawyer to come to the
16 right conclusion.

17 I've read the documents and I've read the
18 applicable law, and I think the ruling was correct in
19 its narrower sense, and I will make a motion to uphold
20 the Prehearing Officer's ruling.

21 CHAIRMAN DEASON: That would be to approve
22 Staff's recommendation on Issue 1.

23 COMMISSIONER LAUREDO: Yes, sir.

24 COMMISSIONER JOHNSON: Second.

25 COMMISSIONER BEARD: Motion and second, all

1 in favor say aye.

2 (All Commissioners say aye.)

3 CHAIRMAN DEASON: Opposed? Issue 1 is approved.

4 COMMISSIONER CLARK: Let me --

5 CHAIRMAN DEASON: Do we have more than one
6 issue? I thought there was some clarification.

7 COMMISSIONER CLARK: We're going to -- there
8 is no doubt as to what we saw, we just misidentified it
9 and we'll issue an order correcting that. And it is,
10 in fact, an internal -- would you give us the correct
11 title?

12 MR. ANTHONY: It's a "Fifth Audit Review"
13 performed by the internal auditing group on --

14 MR. RICHARDS: Operational reviews.

15 COMMISSIONER CLARK: Network operational
16 reviews?

17 MR. ANTHONY: Yes, ma'am. And that was the
18 document that was provided rather than the statistical
19 analysis, which was provided in the --

20 THE REPORTER: I'm sorry, I couldn't hear
21 what you said.

22 MR. ANTHONY: I said its this Network
23 Operation Review audit that was provided, rather than a
24 statistical analysis that was provided in the second
25 round of in camera investigations.

1 COMMISSIONER BEARD: Commissioner Lauredo,
2 this job is a walk in the park, Central Park at
3 mid-night, the Everglades National Park during
4 alligator mating season, but a walk in the park.

5 COMMISSIONER LAUREDO: I'm a Catholic and I
6 believe in confession, and that honesty and openness is
7 the best policy, and let the judgment move forward. And I
8 think that underlines some of my philosophy as well.

9 MR. ANTHONY: Commissioner, and I hesitate to
10 request this of the Commission, but my Company's going
11 to have to decide whether or not to take this on
12 appeal, your decision on appeal. And we'll have a
13 period of time within which to make that decision.

14 Can I request that you stay the effect of
15 your order until such time as the time for appeal has
16 run so that -- otherwise, if I'm required --

17 COMMISSIONER CLARK: I don't think we have a
18 choice. In order to give you the right of appeal we
19 have to stay it because otherwise you would have no
20 remedy.

21 MR. ANTHONY: Thank you.

22 CHAIRMAN DEASON: We also need a vote on
23 Issue 2. I think it's foregone that we have to leave
24 the docket open, but nevertheless, Staff's recommendation
25 on Issue 2 is to approve without objection.

1 Anything further?

2 MR. ANTHONY: The effect of the order is
3 stayed until we can decide whether or not --

4 CHAIRMAN DEASON: Mr. Bellak, is that your
5 understanding?

6 MR. BELLAK: Yes.

7 COMMISSIONER CLARK: Until the time for
8 appeal has run. But I would request that if the
9 Company has made a decision not to, that they produce
10 the documents at that point.

11 MR. BELLAK: I have to discuss this with the
12 management of the Company. As soon as we have a
13 decision, we'll let you know. Thank you.

14 (Thereupon, the hearing concluded at 10:20 a.m.)

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1 F L O R I D A)
2 :
3 COUNTY OF LEON)

CERTIFICATE OF REPORTER

3 I, JOY KELLY, Official Commission Reporter,
4 DO HEREBY CERTIFY that the hearing in this
5 cause, Docket Nos. 920260-TL, 900960-TL, 910163-TL and
6 910727-TL, was heard by the Florida Public Service
7 Commission at the time and place herein stated; it is
8 further

9 CERTIFIED that I reported in shorthand the
10 said proceedings; that the same has been transcribed
11 under my direct supervision, and that this transcript,
12 consisting of 60 pages, constitutes a true and accurate
13 transcription of my notes of said proceedings; it is
14 further

15 CERTIFIED that I am neither of counsel nor
16 related to the parties in said cause and have no
17 interest, financial or otherwise, in the outcome of
18 this docket.

19 IN WITNESS WHEREOF, I have hereunto set my
20 hand at Tallahassee, Leon County, Florida, this 22nd
21 day of February, A. D., 1993.

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23
24
25


JOY KELLY, ESR, RPR
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FLORIDA PUBLIC SERVICE COMMISSION