STATE OF FLORIDA

OFFICE OF THE PUBLIC COUNSEL

c/o The Florida Legislature
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JACK SHREVE
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ORIGINAL
FILE COPY

July 8, 1991

Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0850

Re: Docket No. 910163-TL

Dear Mr. Tribble:

Enclosed for filing in the above-captioned proceeding on behalf of the Citizens of the State of Florida are the original and 12 copies of Citizens' Response and Opposition to Southern Bell's Motion for Confidential Treatment and Permanent Protective Order to be filed in this docket.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

ACK ✓
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Sincerely,

Darlene Driscoll

Darlene Driscoll

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Integrity of Southern Bell's Repair Service Activities and Reports	)	Docket No. 910163-TL Filed: July 8, 1991

CITIZENS' RESPONSE AND OPPOSITION TO SOUTHERN BELL'S MOTION FOR CONFIDENTIAL TREATMENT AND PERMANENT PROTECTIVE ORDER

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this response and opposition to the motion for confidential treatment and permanent protective order filed by Southern Bell Telephone and Telegraph Company ("Southern Bell") on June 24, 1991.

1. Southern Bell's motion seeks to prohibit public disclosure of routine inspection reports of its installation and maintenance centers. These inspections are not conducted by auditors, or even by accountants. Instead, these inspections are the type routinely conducted in any large corporation where staff persons check the work of others. In this instance one group of employees in Southern Bell's network operations checked the work of other employees in network operations and made reports of their conclusions. The reports are not reports of internal auditors.

THERE IS NO PRIVILEGE FOR "CRITICAL SELF ANALYSIS" IN FLORIDA

2. These reports are not "reports of internal auditors" subject to confidentiality under Section 364.183(3)(b), Florida Statutes, but Southern Bell argues that the reports are "like" internal audits. Southern Bell would broadly expand the category of documents unavailable to the public to include any Southern Bell documents critical of the company, not just reports of internal auditors. Southern Bell argues that the Commission should use the rationale supporting a privilege that doesn't exist in Florida to expand the category of documents shielded from public disclosure. Southern Bell would have the Commission prohibit public disclosure of all documents created by or for Southern Bell that are critical of the company.

3. The federal common law privilege not recognized in Florida is a privilege against producing documents that contain critical self-analysis. In federal court litigation the federal courts have fashioned a privilege of self-critical analysis for three types of documents: hospital committee reports, certain internal investigatory reports, and various equal employment opportunity forms submitted to the government under Title VII[1]. The privilege does not apply, however, where (as here) the

[1]Note, "The Privilege of Critical Self Analysis," 96 Harvard Law Review 1083, 1090.

documents are sought by a government agency[2]. In addition, there are several guideposts for application of the privilege, including (1) materials protected have generally been those prepared for mandatory government reports, and (2) only subjective, evaluative materials have been protected; objective data contained in those same reports is not protected[3]. Even if there were such a privilege in Florida, it wouldn't apply to the Southern Bell documents at issue here.

4. Legislation in Florida rejects the privilege. Section 90.501, Florida Statutes, abolishes all common-law privileges and makes the creation of privileges dependent on legislative action or rule-making by the Florida Supreme Court.[4] Privileges in Florida are no longer creatures of judicial decision. State v. Castellano, 460 So.2d 480, 481 (Fla. 2d D.C.A. 1984); Proctor & Gamble Co. v. Swilley, 462 So.2d 1188, 1195 (Fla. 1st D.C.A. 1985). Neither the legislature nor the Florida Supreme Court recognize a privilege for critical self-analysis. This Commission should not attempt to follow this privilege or its rationale when neither the Florida Legislature nor the Florida Supreme Court accept it.

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[2]U.S. v. Dexter Corp., 132 F.R.D. 8, 9 (D. Conn. 1990), citing Federal Trade Commission v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980).

[3]See Dowling v. American Hawaii Cruises, Inc., 133 F.R.D. 150, 152 (D. Hawaii 1990), citing Webb v. Westinghouse Electric Corporation, 81 F.R.D. 431 (E.D. Pa. 1978).

[4]See "Law Revision Council Note - 1976" to section 90.501, Florida Statutes.

5. In those jurisdictions accepting the privilege, the theoretical "harm" the privilege protects against is the possible chilling effect that might occur from disclosure of the information to the other party. In this case the documents have already been provided to the Public Counsel, so whatever theoretical "harm" could occur has already occurred. Southern Bell glosses over the distinction between producing the documents at all versus allowing the public to review documents already produced. The cases cited by Southern Bell go to whether the documents should be produced at all -- an issue not relevant here. Southern Bell makes no attempt to show what harm would occur if the public were to have access to reports already produced.

6. Even if a privilege for critical self-analysis existed in Florida, it still would have no bearing on the public records law. The law concerning claims of privilege does not determine whether a document is confidential under Florida's public records law. See Waite v. Florida Power and Light, 372 So.2d 420, 424 (Fla. 1979) ("in enacting section 119.07(2), Florida Statutes (1975), the legislature intended to exempt those public records made confidential by statutory law and not those documents which are confidential or privileged only as a result of the judicially created privileges of attorney-client and work product"). Although the Rules of Civil Procedure and the Public Records Law may overlap in certain areas, they are not coextensive in scope. See Department of Highway Safety and Motor Vehicles v. Kropfs, 455

So.2d 1068 (Fla. 3d D.C.A. 1984); Department of Professional Regulation vs. Spiva, 478 So.2d 382 (Fla. 1st DCA 1985) ("a document exempt from disclosure under the Public Record Act does not render it automatically privileged for the purpose of discovery pursuant to the Florida Rules of Civil Procedure in an administrative proceeding").

7. By enacting Section 364.183(3)(b), Florida Statutes, the legislature provided guidance to distinguish between the types of documents that should be public records and those that should not. The legislature specifically excluded reports of internal auditors and internal auditing controls from disclosure to the public. The list found in the statute citing reports of internal auditors is not necessarily an exhaustive list of such documents, but had the legislature intended to exempt all self-critical documents from public disclosure, it would have done so here. Instead, the legislature limited the relevant example to reports of internal auditors and internal auditing controls. The legislature failed to include all self-critical documents, just as it declined to enact a privilege in general for such documents in Florida. So, too, the Commission should decline to attempt to make such an exemption for Southern Bell in this case.

8. The purpose of the Public Records Act is the promotion of the policy of this state that all state, county and municipal records should at all times be open for a personal inspection by

any person. The act should be liberally construed in favor of open government to the extent possible in order to preserve our basic freedom. Downs v. Austin, 559 So.2d 246 (Fla. 1st D.C.A. 1990). Southern Bell would have this Commission go in the opposite direction by vastly expanding the types of documents shielded from public scrutiny. The Commission should reject Southern Bell's arguments.[5]

[5]Southern Bell's motion also asks the Commission to prohibit public disclosure of the names of Southern Bell employees who were disciplined in connection with the falsification of repair service records. Section 364.183(3)(f), Florida Statutes, states that confidential information includes employee personnel information unrelated compensation, duties, qualifications, or responsibilities. It appears the information is related to duties and responsibilities, thereby making this exemption from public disclosure inapplicable.

In other instances Southern Bell did not object to disclosure of the names of persons involved in these or comparable activities. See, e.g., the depositions of John Sainz and Jerry A. Sontag taken March 25, 1991; Southern Bell's amendment to its response and objections filed May 6, 1991 in docket 900960-TL.

WHEREFORE, the Citizens oppose the motion for confidentiality and permanent protective order filed by Southern Bell on June 24, 1991.

Respectfully submitted,

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Attorneys for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 910163-TL

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following persons on this 8th day of JuLY, 1991.

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Southern Bell Telephone and
Telegraph Company
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