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ORIGINAL
FILE COPY

July 11, 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' Motion to Compel 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.

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Enclosure

Sincerely,

Darlene Driscoll

Darlene Driscoll

RECEIVED & FILED

[Signature]
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EPSC-RECORDS/REPORTING

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 11, 1991

MOTION TO COMPEL

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, move the Commission to order Southern Bell Telephone and Telegraph Company ("Southern Bell") to fully answer interrogatories nos. 1 through 21 of the Citizens' third set of interrogatories dated June 6, 1991.

Background

(1) On June 6, 1991 the Citizens served 21 interrogatories on Southern Bell. These interrogatories may be placed in three categories:

(i) Interrogatories 1 through 10. These ten interrogatories ask Southern Bell to provide the name, address, and phone numbers of all persons known by Southern Bell to have any knowledge of certain types of incidents. For example, interrogatory no. 1 asks for the names, addresses, and phone numbers of all persons known by Southern Bell who have any

knowledge about falsifying completion times on repair service forms, reports, or records. Interrogatory no. 3 asks about persons having knowledge of recording out-of-service reports as affecting service on repair service forms, reports. Interrogatory no. 8 asks about persons having any knowledge about subscriber repair reports recorded or reported as employee repair reports on repair service forms, reports, or records. Each of the ten interrogatories ask Southern Bell to identify persons having knowledge about specific types of incidents.

(ii) Interrogatory no. 11 asks Southern Bell to identify each document in its possession, custody, or control which discusses, describes, implements, or evaluates any of the ten types of incidents described in the previous ten interrogatories.

(iii) Interrogatories nos. 12 through 21 ask Southern Bell to provide the name, address, and phone number of each customer affected by each of the ten specific types of incidents.

(2) Southern Bell filed its response and objections to the twenty one interrogatories on July 8, 1991.

Interrogatories Nos. 1 Through 10

(3) Southern Bell provided almost identical responses and objections to each of the first ten interrogatories. Southern Bell objected on three grounds: first, it stated that an internal investigation it is conducting is not yet complete; second, it claimed that the information requested is privileged; and third, it claimed that the interrogatories exceed the bounds of proper discovery because the interrogatories require an evaluation of the statements of persons interviewed in Southern Bell's investigation¹. Southern Bell then referred Public Counsel to an incomplete list of documents providing some names of some persons having some knowledge of the specific types of incidents. Southern Bell did not provide a complete list of names of persons having information about the incidents, nor did Southern Bell provide a complete list of documents containing such information.

(4) The Citizens are entitled to know the names of those persons known by Southern Bell to have knowledge of the types of incidents being investigated in this case. Commission Rule 25-22.034 states that parties may obtain discovery in the manner provided in Rules 1.280 through 1.400 of the Florida Rules of Civil Procedure. Rule 1.280(b)(1) of the Florida Rules of Civil

¹The interrogatories ask nothing about Southern Bell's internal investigation; instead, the questions ask Southern Bell to identify persons with knowledge about the types of incidents which are the subject of this docket, no matter how Southern Bell came about identifying such persons.

Procedure states that parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, including the identity and location of persons having knowledge of any discoverable matter.

(5) The case of Surf Drugs, Inc., v. Vermette, 236 So.2d 108 (Fla. 1970) dealt with claims similar to those made by Southern Bell here. In Surf Drugs the plaintiff refused to answer a number of interrogatories based upon an assertion of privilege and work product. The court described work product as personal views of the attorney as to how and when to present evidence, evaluations of its relative importance, knowledge of which witnesses will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, and diagrams and charts the attorney may refer to at trial for convenience, but not to be used as evidence. Surf Drugs at 112. However, the Florida Supreme Court firmly rejected the notion that all things known to an attorney for a litigant constitute work product immune from discovery procedures. Surf Drugs at 113. The court held that a party may be required to respond on behalf of himself, his attorney, agent, or employee and to divulge names and addresses of any person having relevant information, as well as indicate generally the type of information held by the person listed. Surf Drugs at 113. Thus, while the investigation conducted by a party's attorney may be work product, the actual identification of each person having relevant information to the

case cannot be concealed based upon a claim of work privilege. That is what Southern Bell is attempting to do here.

(6) In the Surf Drugs case the court found each of the following interrogatories entirely proper, even if the answers to the interrogatories themselves were developed through an investigation which otherwise would be entitled to a privilege:

Interrogatory no. 27 - State the exact names and addresses or information for the location of all persons known by you, your agents, or attorneys who were or purport to have been eyewitnesses to the within accident.

Interrogatory no. 28 - State the exact names and addresses or information for the location of all persons known by you, your agents, or attorneys who have any knowledge of the reasons for and/or cause of the death of Thelma Vermette.

Interrogatory no. 29 - State the exact names and addresses, or information for the location of all persons known by you, your agents, or attorneys who have any knowledge of the Plaintiff's claim for the death of Thelma Vermette.

Interrogatory no. 30 - Do you or your attorney, agents, servants or employees know of the existence of any photographs of the scene of the within accident, the instrumentalities involved, or of the persons involved? If so:

(a) State the name and address of the person or persons who took the various photographs.

(b) Indicate adjacent to each such person's name and address listed in (a) above, whether each photograph was taken independently of (photographer not employed by) your attorneys, agents, servants, or employees, or which photographs were taken at the request of your attorneys, agents,

servants, or employees, giving the date of all photographs taken.

(c) Indicate the subject matter of each photograph.

Interrogatory no. 31 - State whether you or any of your employees, agents, servants, or attorneys have obtained any written statements from anyone with regard to this incident.

Interrogatory no. 35 - Did the plaintiff himself, or anyone on his behalf, inquire of, or have any conversation with any officer, director or employee of the Defendant, concerning the matter set forth in the Complaint; and if so, state the name and addresses of each such person, and state fully their relationship to the Plaintiff.

Surf Drugs at 110, 113. Thus, Southern Bell's objection that an internal investigation into the subject matter of this docket is not yet complete, and that the information is privileged, cannot be used as a basis for refusing to identify the names, addresses, and telephone numbers of those persons having knowledge about the types of information which are the subject matter of this docket.

(7) Southern Bell's last objection to interrogatories nos. 1 through 10 is its claim that the interrogatory exceeds the bounds of proper discovery because it requires an evaluation of the witnesses' testimony. None of the interrogatories served by the Citizens asks Southern Bell to evaluate the substance of any testimony these persons might ultimately provide. Instead, each of the interrogatories simply ask Southern Bell to provide the names of persons having knowledge of those types of incidents - - not to

evaluate or provide conclusions that might be reached from that knowledge.

(8) In the Surf Drugs case the court sustained an objection to an interrogatory asking the plaintiff to state the name and address of any witness, expert or lay, who had advised the plaintiff, or who had given an opinion to the plaintiff or plaintiff's counsel that the defendant was negligent and careless. The court upheld the objection to that interrogatory because it required an evaluation of testimony. Surf Drugs at 110, 113. Unlike the Citizens' interrogatories in this case, that interrogatory asked for the name and addresses of persons who had reached a legal conclusion about negligence and carelessness. Had the Citizens asked Southern Bell to identify persons whose opinion is that Southern Bell was careless, wantonly reckless, or negligent, Southern Bell might have a point. But the Citizens' interrogatories are analogous to those of the many interrogatories sustained in Surf Drugs that asked for the names of persons who have knowledge about specific types of incidents. The Citizens' interrogatories do not ask Southern Bell to identify those persons who have certain opinions or who have formed certain legal conclusions.

(9) In another case the First District Court of Appeal, following the precedent set by the Florida Supreme Court in Surf Drugs, likewise found that a party could not object to divulging

the identity of all persons with knowledge of specific events, even if the identity of those persons came to light through an internal investigation conducted by or for the party's lawyer. In Cunningham v. Anchor Hocking Corporation, 558 So.2d 93 (Fla. 1st D.C.A. 1990), the court found that the trial court did not err in requiring the appellant to divulge the identity of all persons with knowledge of a special cleanup or the destruction of evidence. It stated that statements taken by the appellant from employees in anticipation of a lawsuit, and the associated investigative reports, are protected by the work product rule. Nevertheless, the First District Court of Appeal held that the trial court may require a party to divulge the names and addresses of anyone having relevant information.

(10) Here, the fact that Southern Bell is conducting an investigation does not excuse it from providing the names of persons who have knowledge about types of incidents subject to this investigation. In the Cunningham case, the court found that Rule 1.280(b)(2) does not immunize from discovery the information contained in the subject's statement, nor the identities of persons having knowledge of these facts. Cunningham at 100, citing Landrum v. Tallahassee Memorial Regional Medical Center, Inc., 525 So.2d 994, 996 (Fla. 1st D.C.A. 1988).

Interrogatory No. 11

(11) Interrogatory no. 11 asks Southern Bell to identify each document in its possession, custody, or control which discussed, described, implemented, or evaluated specific types of events. Southern Bell objected, claiming the interrogatory was burdensome. Additionally, Southern Bell objected to providing the information to the extent it related to an internal investigation and objected by claiming a privilege of attorney work product.

(12) None of these objections warrant Southern Bell's refusal to even identify responsive documents.

(13) The party asserting a privilege has the burden of establishing the existence of a privilege. International Telephone and Telegraph Company v. United Telephone Company of Florida, 60 F.R.D. 177, 184 (M.D. Fla. 1973); Consolidated Gas Supply Corporation, 17 F.E.R.C. 63,084 (Dec. 2, 1981) (the burden is upon the party resisting discovery to show necessity by a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.

(14) A final determination of privilege for all documents claimed to be privileged must be made the Commission, not by Southern Bell by merely asserting the privilege. The Commission can only determine the existence of a privilege after a careful

examination and narrow application of the law to the specific documents in an in camera inspection. Eastern Airlines, Inc., v. Gelbert, 431 So.2d 329 (Fla. 3d D.C.A. 1983) (directing the trial court to conduct an in camera inspection of documents it had decided, without inspection, were not privileged as a matter of law). "The purpose of this examination is not to determine whether there is good cause to overcome the privilege, but rather to determine whether the items are, as a matter of law and fact, entitled to the privilege at all." International Telephone, supra. at 185.

(15) Here the question isn't even producing the documents, but merely whether Southern Bell should be required to identify them. There is no basis upon which Southern Bell can refuse to even identify those documents it claims to be privileged. The Commission should therefore require Southern Bell to identify each document it claims to be privileged in each of the various parts to Southern Bell's responses to the Citizens' interrogatory no. 11.

Interrogatories No. 12 Through 21

(16) Here again Southern Bell continues to maintain it may refuse to identify the names of persons affected by the types of incidents being investigated in this docket on the basis of privilege. For the same reasons discussed in the preceding section concerning interrogatories nos. 1 through 10, Southern Bell cannot

use a claim of privilege to refuse to even identify the names of persons affected by the types of incidents being investigated in this case. The Commission should order Southern Bell to identify each such person.

Conclusion

(17) If this case concerned a claim of negligence in an automobile accident, there is no question that Southern Bell would be required to identify the names of each passenger in the car involved in the accident, as well as all witnesses who saw the accident from the sidewalk. Yet by analogy to this case, Southern Bell is refusing to identify the names of passengers in the car and the persons on the sidewalk who saw the accident because, it claims, it has developed such information through an internal investigation. Although Southern Bell might be able to object to providing statements it obtained from such persons as work product, both Rule 1.280(b)(1) and related case law make it clear that Southern Bell must identify the names of persons having knowledge about incidents subject to the docket. It must do so whether it developed the names of such persons through an internal investigation or by other means. The Commission should soundly reject Southern Bell's objections to identifying witnesses having knowledge about the types of incidents subject to this investigation.

WHEREFORE, the Citizens respectfully request the Commission to order Southern Bell to fully respond to the Citizens' interrogatories nos. 1 through 21 of the Citizens' third set of interrogatories dated June 6, 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 11th day of July, 1991.

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