

a

Southern Bell

Harris R. Anthony
General Counsel-Florida

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July 28, 1992

**ORIGINAL
FILE COPY**

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

Re: Docket No. 910163-TL - Repair Service Investigation

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's Motion to Compel, which we ask that you file in the captioned docket.

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

Sincerely yours,

Harris R. Anthony
Harris R. Anthony
(27)

- ACK _____
- AFA _____
- APP _____
- CAT _____
- CRU _____

ENC - Enclosures

- EAC _____
- LEG 1 cc: All Parties of Record
- A. M. Lombardo
- 6 R. Douglas Lackey

- EVG _____
- FIN D _____

REC 1 RECEIVED & FILED

WAS _____

OTH _____

DOCUMENT NUMBER-DATE

08350 JUL 28 1992

FPC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 910163-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this ^{28th} day of *July*, 1992,
to:

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

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

Harris R. Anthony
(22)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens) Docket No. 910163-TL
of the State of Florida to initiate)
investigation into integrity of) Filed: July 28, 1992
Southern Bell Telephone and Telegraph)
Company's repair service activities)
and reports.)
_____)

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
OPPOSITION TO PUBLIC COUNSEL'S MOTION TO COMPEL**

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.037, Florida Administrative Code, and herewith files its Opposition to the Office of Public Counsel's ("Public Counsel") Motion to Compel with regard to Public Counsel's Twenty-Sixth Set of Interrogatories dated June 3, 1992. In support of its opposition, Southern Bell shows the following:

1. On June 3, 1992, Public Counsel served Southern Bell with its Twenty-Sixth Set of Interrogatories. Interrogatory Nos. 6, 7, and 8 sought information protected by the attorney-client privilege or the attorney work product privilege or both.

2. On July 8, 1992, Southern Bell filed its Response and Objections to Public Counsel's Twenty-Sixth Set of Interrogatories. Southern Bell incorporates herein the contents of its Response and Objections.

DOCUMENT NUMBER-DATE

08350 JUL 28 1992

FPSC-RECORDS/REPORTING

3. Southern Bell has asserted the attorney-client and attorney work product privileges over an analysis related to Southern Bell's Florida Public Service Commission Schedule 11 reports. In Items 6, 7, and 8, Public Counsel interrogated Southern Bell concerning the results of this analysis. Southern Bell properly asserted the privileges relating to its review but, as further discussed hereafter, it did respond to Item No. 8 by informing Public Counsel of certain filed information that was inaccurate, as well as by providing a compilation of corrected Schedule 11 results. As noted in its Response and Objections, Southern Bell obtained the information provided to Public Counsel independent of the privileged document and, thus, has not waived the applicable privileges.

4. A stated purpose of this docket is for the Florida Public Service Commission (the "Commission") to investigate whether or not Southern Bell has provided incorrect information concerning trouble reports.¹ When certain inaccuracies in the Schedule 11 results were discovered, Southern Bell provided Public Counsel with the correct information in its response to Item No. 8 of Public Counsel's interrogatories. If Southern Bell discovers further information that needs to be corrected, this

¹ Southern Bell has conducted its own, privileged investigation of this and related matters.

information will be provided. Thus, Public Counsel's claim that these inaccuracies have not been corrected is patently false and Public Counsel's accusations of fraud border on the absurd.

5. Southern Bell has not intentionally withheld any non-privileged information from the Commission. When it discovered inaccuracies, it so advised Public Counsel in responses to Public Counsel's discovery. Southern Bell has not attempted "to cover-up" this information and any claim by Public Counsel to the contrary is simply wrong. All Southern Bell has done, which it is well within its rights to do, is to maintain confidential certain information that is privileged. This is a right unquestionably available to Southern Bell.²

6. When one gets past the hyperbole of Public Counsel's Motion to Compel, the true basis of that Motion is the assertion by Southern Bell of the attorney-client and attorney work product privileges over the analysis concerning the Schedule 11 filings. As Southern Bell has demonstrated in previous pleadings, this document is protected from discovery because of these privileges.

7. Communications between attorneys and their clients are

² For further discussion of Public Counsel's assertions, see Southern Bell's Opposition to Public Counsel's Motion to Impose a Penalty on Southern Bell for Filing and Failing to Correct False Information Submitted to the Commission in Docket No. 920260-TL dated July 28, 1992, and in Docket No. 910163-TL dated August 3, 1992. The arguments contained in that response are expressly incorporated herein.

shielded from discovery Under Rule 1.280(b)(i) of the Florida Rules of Civil Procedure. This rule is codified at § 90-502, Florida Statutes. The attorney-client privilege applies to corporations. Upjohn v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The elements of the attorney-client privilege require that (1) the communication must be made in confidence, (2) by one who is a client, (3) seeking legal advice from an attorney, and (4) the communication is requested to be kept confidential and such privilege has not been waived. International Telephone & Telegraph Corp., 60 F.R.D. 177, 184-85 (M.D.Fla. 1973).

8. The communication in issue involves legal advice sought from and rendered by counsel with regard to the Company's compliance with the Commission's rules and regulations. The communications were made in confidence and should be protected from disclosure. As shown by the attached affidavit of Shirley T. Johnson, attached hereto as Exhibit A (the signed original of which is attached to Southern Bell's Opposition to Public Counsel's Supplement to Public Counsel's First Motion to Compel in Docket 920260-TL dated June 15, 1992), the analysis at issue was part of an internal investigation conducted by the Company's Legal Department into the issues raised in Docket No. 910163-TL. The analysis was performed at the direct specific request of the

Company's Legal Department in order to provide the Legal Department with the information necessary to render legal counsel and advice. The results were relayed in confidence to the Legal Department, which has relied on the results of this analysis for the formulation of advice and litigation strategy. Limited distribution was also made to the internal auditing hierarchy. In accordance with such limited distribution, the information is confidential and subject to a claim of privilege. Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So.2d 764 (Fla. 2nd DCA 1981).

9. Public Counsel argues that the analysis at issue was a routine business record prepared in the ordinary course of business and thus not subject to the attorney-client privilege. While Public Counsel is correct in its assertion that internal audits are routinely performed on various aspects of the Company's business, as the affidavit of Ms. Johnson shows, this particular analysis was specifically requested by the Legal Department and would not have been performed without that direct request. Thus, it does not constitute routine business records, but rather a document inextricably related to a privileged internal legal investigation.

10. The Company sought legal advice from its counsel regarding its conformance with certain Commission rules. For the

Legal Department to be able to provide that advice it needed certain information, including the analysis in dispute. The analysis is information which is protected from discovery by the attorney-client privilege and, as such, should not be released to Public Counsel or any other person. Public Counsel's Motion to Compel should therefore be denied.

11. For similar reasons, Public Counsel's argument that, since the data underlying the analysis are not themselves privileged, the analysis itself cannot be privileged must also be rejected. As explained more fully in Southern Bell's response to Public Counsel's Motion to Impose a Penalty, the status of the underlying material has no bearing whatsoever on the question of the analysis' privileged status. It is the process itself, with its informed selection of data to review, subsequent analysis and ultimate conclusions, that clearly distinguishes the analysis from the underlying data and warrants, under the circumstances, the application of the privileges.

12. In the alternative, Southern Bell also submits that the analysis involved constitutes the work product of attorneys and agents for Southern Bell which should be shielded from discovery under Rule 1.280(b)(1), Florida Rules of Civil Procedure. See also, Karch v. MacKay, 453 So.2d 452, 453 (Fla. 4th D.C.A. 1984). In Surf Drugs, Inc. v. Vermette, 236 So.2d 108, 113 (Fla. 1970),

the Supreme Court of Florida held attorney work product to include: interviews, statements, memoranda, correspondence, briefs, personal impressions, and investigative materials prepared in anticipation of litigation by an attorney or an employee investigator at the direction of a party. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct 385, 91 L.Ed. 451 (1947). A document is prepared in anticipation of litigation if it is not one that would otherwise be required to be prepared. See Reynolds v. Hofmann, 305 So.2d 294 (Fla. 3d D.C.A. 1974). It does not matter whether the product is the creation of a party, agent, or attorney where the subject matter of the discovery is the work product of the adverse party. Atlantic Coast Line R.R. v. Allen, 40 So.2d 115 (Fla. 1949).

13. The analysis at issue was not prepared in the ordinary course of business. Rather, as the attached affidavit shows, the driving motivation behind the performance of the analysis was Southern Bell's internal legal investigation into whether or not the Company was complying with Commission rules. See International Systems and Controls Corporation Securities Litigation, 91 F.R.D. 552 (S.D.Texas 1981), vacated on other grounds, 693 F.2d 1235 (5th Cir. 1982) (special audit requested by attorneys and conducted by accountants treated as work product in anticipation of litigation).

14. As can be seen by the attached affidavit of Shirley T. Johnson, the analysis in question was prepared at the direct request of Southern Bell's Florida Legal Department, in connection with Docket No. 910163-TL, and was not an analysis conducted in the regular scope of Southern Bell's business. Thus, it is clear that the analysis was conducted in connection with this litigation and is subject to the work product privilege.


15. Florida Rules of Civil Procedure, Rule 1.280(b)(2) states that the adverse party may not obtain material subject to the attorney work product privilege without a showing of need and an inability to obtain the materials from other sources without undue hardship. See Alachua General Hospital, Inc. v. Zimmer USA, Inc., 403 So.2d 1087 (Fla. 1st D.C.A. 1981). The affidavit of Shirley T. Johnson demonstrates that Public Counsel cannot demonstrate either need or inability to replicate the information contained in the analysis. As stated in the affidavit, the basic materials necessary to undertake such an analysis are readily available. Southern Bell has already provided most of these materials to Public Counsel in response to previous interrogatories and requests for production filed in Docket No. 910163-TL. Southern Bell has provided education sessions for Public Counsel's personnel, as well as flow charts, trouble


histories and data interpretations, in addition to other voluminous information. It is apparent that Public Counsel can review Southern Bell's systems in a manner similar to the analysis done by Southern Bell by using information that it already has or which is readily available to it. Any claim to the contrary is belied by Public Counsel's sophistication and expertise in complex regulatory matters.

Southern Bell therefore respectfully requests that the Commission deny Public Counsel's Motion to Compel its Twenty-Sixth Set of Interrogatories.

Respectfully submitted this 28th day of July, 1992.

ATTORNEYS FOR SOUTHERN BELL
TELEPHONE AND TELEGRAPH COMPANY


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"Exhibit A"

"Exhibit A"

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Comprehensive Review of)
the Revenue Requirements and Rate)
Stabilization Plan of Southern)
Bell Telephone and Telegraph)
Company (Formerly FPSC Docket)
Number 880069-TL))

Docket No. 920260-TL

STATE OF FLORIDA)
)
COUNTY OF DADE)

AFFIDAVIT OF SHIRLEY JOHNSON

BEFORE ME, the undersigned authority, personally appeared Shirley T. Johnson, who stated that she is currently an Operations Manager with Southern's Florida Internal Auditing Department ("Internal Auditing"), and further states the following:

1.

On April 3, 1991, Internal Auditing was requested to assist the Florida Legal Department in performing an internal investigation of the issues raised in Docket No. 910163. The purpose of the investigation was to assist the Legal Department in gathering information necessary to render legal advice to the Company.

2.

On April 3, 1991, Internal Auditing was requested by the Florida Legal Department to perform an audit of PSC Schedule 11 as part of the internal investigation. The audit was not scheduled to be performed and would not have been performed without the request of the Florida Legal Department.

3.

The PSC Schedule 11 is a statement of compliance with Florida Public Service Commission (FPSC) rule 25.4.070. The rule stipulates the service objective for a service affecting trouble as "scheduled to insure that at least 95% of such reports are cleared within 72 hours of report in each exchange as measured on a monthly basis."

4.

At the direction of the Legal Department, all data tested was from February, 1990 through March, 1991. Statistical sampling was performed when there was a high volume of trouble reports meeting the specified criteria for a given month within an exchange.

5.

Audit tests were performed to determine if all trouble reports that should have been counted in the FPSC Schedule 11 were appropriately included. Each test was designed to isolate and evaluate one facet of the routing process from receipt of the trouble report to the Mechanized Trouble Analysis System (MTAS).

6.

The entire audit was performed under the supervision of the undersigned and the results of the audit were forwarded to the Florida Legal Department on August 2, 1991.

7.

The August, 1991 PSC Schedule 11 Audit was carried out solely because the Legal Department requested that it be

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performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.

8.

Less than half a dozen copies of the August of 1991 KSRI - Customer Trouble Report Rate Audit exist. All are marked and treated as privileged, confidential, and subject to the attorney-client privilege and attorney work product doctrine.

Distribution was limited to appropriate members of the Legal Department and certain hierarchy of the Internal Auditing Department.

9.

The random sample method which formed the basis of the August of 1991 audit can be duplicated by use of the following records: 1) Mechanized Trouble Adjustment System ("MTAS") and/or Display Long Extended Trouble History ("DLETH") data and 2) customer records associated with samples used.

10.

FURTHER AFFIANT SAYETH NOT.

Dated this 12th day of June, 1992.

Shirley T. Johnson
Shirley T. Johnson

Sworn to and subscribed
before me this 12th
day of June,
1992.

Kiki Papadopoulos
Notary Public

My Commission Expires:

Notary Public, DeKalb County, Ga.
My Commission Expires Feb. 24, 1996