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January 19, 1993

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

Re: Docket No. [redacted] - Rate Stabilization

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Response and Opposition to Motion by the Attorney General and Public Counsel for Order Clarifying the Scope and Purpose of these Proceedings, 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. 3 Copies have been served to the parties shown on the attached Certificate of Service.

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Sincerely yours,

J. Phillip Carver

(2)

Enclosures

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

CERTIFICATE OF SERVICE
Docket No. 920260-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 19th day of Jan, 1993 to:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Southern Bell Telephone and Telegraph Company's Non-Contact Sales Practices	Docket No. 900960-TL
In re: Petition on behalf of Citizens of the State of Florida to initiate investigation into integrity of Southern Bell Telephone and Telegraph Company's repair service activities and reports.	Docket No. 910163-TL
In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of S) Bell Telephone & Telegraph Company	Docket No. 920260-TL Filed: January 19, 1993

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S RESPONSE AND OPPOSITION TO MOTION BY THE ATTORNEY GENERAL AND PUBLIC COUNSEL FOR ORDER CLARIFYING THE SCOPE AND PURPOSE OF THESE PROCEEDINGS

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.037(b), Florida Administrative Code, and hereby files its Response and Opposition to the Motion by the Attorney General of the State of Florida ("Attorney General") and the Office of Public Counsel ("Public Counsel") "For Order Clarifying the Scope and Purpose of These Proceedings," and states as grounds in support thereof the following:

1. The Attorney General and Public Counsel (collectively "Movants") have requested an order for the ostensible purpose of clarifying the scope of these proceedings. Before arguing the substance of their Motion, however, Movants engage in a lengthy statement of their version of the pertinent facts. Most of this statement relates to the purported facts of Davis v. Southern Bell, Civ. No. 89-2839 (So. Fla.). In some instances, however, the Movants' statement of facts is more significant for what it omits then what it includes. In other instances, this statement is flatly wrong in its version of the facts. Therefore, before addressing the substance of this Motion, Southern Bell must provide this Commission with a more accurate statement of facts by responding to a number of the omissions and factual misstatements of Movants. Specifically:

(a) Movants state that the deregulation of inside wire maintenance was effective January 1, 1987. (Motion at p. 2) While this is technically correct, the Order that Movants have attached as Exhibit B clearly provides on its face for a six-month "transition" period during which Southern Bell was to ballot and contact customers as to whether or not they wished to continue to receive inside wire maintenance. This process took place according to guidelines set by the

Commission in the Order, and was under the Commission's active supervision.

(b) Movants state that the Davis v. Southern Bell lawsuit includes the "underlying contentions that Southern Bell has monopolized inside wire maintenance through deceptive billing inserts and sales scripts, 'negative option' billing inserts, and oral 'negative option' sales (in which inside wire maintenance or the combined plan are 'sold' by service representatives without a fair opportunity for the customer to understand and knowingly accept or reject the offer)." (Motion at p. 4.) To the contrary, the allegations of the Amended Complaint are limited solely to the contention that Southern Bell is liable for the content of written materials provided to subscribers in Florida. (See Plaintiffs' Amended Complaint at pars. 13 and 14.) There is absolutely no allegation of oral representations by anyone on behalf of Southern Bell. Although certainly the plaintiffs in Davis have tried to expand the discovery into a number of irrelevant areas, including oral contacts with customers, the fact remains that these allegations have not been made a part of the lawsuit by the legally operative pleadings.

(c) The Movants state that "the class action was brought on behalf of Florida consumers." (Motion at p. 3) Movants neglect to mention, however, that not only has the court not certified this as a class action, it has declined to do so until "such time as discovery has been developed fully as to the alleged antitrust claims" (Order Granting Partial Summary Judgment (p. 28), which Movants have attached to their Motion as Exhibit C)

(d) Movants claim that on February 4, 1991, the Federal Court in Davis v. Southern Bell "refused to dismiss" the antitrust suit. In point of fact, the court, while declining to dismiss the suit in its entirety at that junction, did grant a summary judgment in favor of Southern Bell as to all claims related to activity that occurred prior to January 1, 1987. Further, the Court's denial of Southern Bell's motions to dismiss and for summary judgment cannot in any way be read to be a dispositive finding in favor of Plaintiffs on any aspect of their claim. Instead, the order amounts to nothing more than a decision by the Court to reserve

ruling on the substance of plaintiff's claim pending further discovery. For this reason the court reopened discovery "for a period of six months or until such time as discovery has advanced to a state that further consideration by the Court of the antitrust claims...is appropriate." (Order at p. 28)

(e) Movants gratuitously criticize the price of Southern Bell's inside wire maintenance plan by unfavorably comparing its price to that of a allegedly comparable plan offered by Pacific Bell. Movants neglect to mention, of course, that Pacific Bell has been sued in T.W.A.R. Inc., et al. v. Pacific Bell, et al. C.A. 91-0573-SAW, a case in which certain of Pacific Bell's competitors have alleged that it has sold the inside wire maintenance plan at an unlawfully low price predatory pricing intended to drive its competitors out of the market. (Count I)

(f) Movants state that the Attorney General has moved to intervene in Davis both individually and as parens patriae on behalf of the Citizens of Florida. Movants failed to mention, however, that the Motion to Intervene had not been ruled upon at the time they filed the subject Motion. Subsequent to the filing of

that Motion, the Court in Davis entered an Order on January 13, 1993, which granted the Attorney General's office the right to intervene individually, but denied it the right to intervene in parens patriae. Thus, the Attorney General's office will be a class representation only if a class is later certified. Thus, it currently represents no one in Davis other than itself.

(g) Movants state that the plaintiffs in Davis have requested more than forty depositions. Movants do not reveal, however, that at this time all discovery in Davis has been stayed. The Order staying discovery stated that plaintiffs were to file a status report requesting any additional discovery they felt was necessary. (Order, July 28, 1992) The Order further stated that after the court had reviewed plaintiff's filing and any response by Southern Bell, it would then, "decide whether additional discovery is necessary to determine whether plaintiffs can adequately support their federal antitrust claims. ...If no additional discovery is necessary, the court will enter a schedule for the filing of pretrial motions." (Order at p. 3) Thus, while the plaintiffs have certainly requested

voluminous discovery, there is no reason to assume, as Movants apparently do, that this request will be granted. Instead, the court is currently considering whether to declare discovery closed and entertain dispositive motions immediately.[1]

(h) Finally, Movants misstate the clear language of the Statewide Grand Jury Report that is attached to their Motion as Exhibit D. Movants contend that the Grand Jury "specifically requested this Commission to investigate and penalize Southern Bell" for "'Network Sales' of inside wire maintenance or trouble isolation." (Motion at p. 8) In point of fact, the report attached to the Motion contains no reference whatsoever to network sales. Instead, it only requests the Commission to investigate certain other allegations related to trouble reporting. Further, the Grand Jury does not assume, as Movants apparently do, the result of the requested investigation.

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[1] This correct statement of the facts clearly belies Movants contention that, even if the subject matter of these proceedings and Davis are the same, this Commission should enter the requested Order because "the record will be closed in these Commission proceedings long before the requested discovery is completed in Davis v. Southern Bell" (Motion at p. 7)

2. At the conclusion of their long and frequently inaccurate factual rendition, Movants reach the point of their Motion, which appears to be to ask the Commission to resolve a controversy that simply does not exist. Contrary to the assertions of Movants, Southern Bell's proposed Issue number 4 was never intended by Southern Bell to have any effect on the Davis litigation. Specifically, the wording of this issue as contained in Docket No. 900960-TL is as follows:

> 14. Has the settlement that Southern Bell Telephone and Telegraph Company entered into with the Office of Statewide Prosecutor sufficiently compensated affected subscribers?

This language is quite similar to that originally proposed by Southern Bell. Since this issue is specifically directed to the settlement agreement, it is obvious that it is also limited to the matters that are within the scope of the settlement agreement. The only sales issues (i.e., those that could even remotely affect the Davis litigation) that were addressed by the settlement were "matters concerning the sale, billing and provision of certain optional services through Southern Bell's Network Sales program..., allegedly not ordered by certain Southern Bell subscribers...." (Settlement Agreement at pp. 2-3) Since neither Davis, per se, nor facts related to any properly pled allegation in Davis, was encompassed within the settlement

agreement, this issue clearly has no affect on the Davis lawsuit.

3. In point of fact, if there is any blurring in the distinction between the Davis litigation and the matters now before this Commission, it is being caused by the Movants and the plaintiffs in Davis, not by Southern Bell. To cite only a few examples: as set forth above, Movants contend that the scope of Davis is considerably broader than the allegations of the pleadings. In support of this, Movants note that the plaintiffs in Davis have attempted to take depositions that do not relate to the matters set forth within their pleadings, but that are ostensibly related to the "network sales" program.[2]

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[2] Movants, of course, also argue that the Court's allowing Plaintiffs to take such a deposition (at Footnote 3, p. 4) is somehow tantamount to a finding by the court that network sales are properly encompassed within the Davis case. To the contrary, it simply reflects the policy that has been pursued by the court of initially allowing broad discovery of any matters that may ultimately prove to be relevant, rather than to narrowly limit the scope of discovery initially. As Magistrate Palermo stated at a hearing held January 21, 1992:

> Discovery is like a triangle with a broad base at the bottom, like I know some attorneys who have been before me agree that it's a triangle, but the broad base is at the top.
>
> This Court considers it a triangle. You start out and you get to the point where you narrow the issues and you are ready to go to trial.

Transcript, Vol. I, p. 52.

4. Movants then reveal their apparent confusion as to whether inside wire is within this Commission's jurisdiction. At first, Movants make the argument that because inside wire is deregulated, it is not properly within the jurisdiction of this Commission. Specifically, Movants state that "the sale of deregulated services such as inside wire maintenance, are clearly outside of the jurisdiction of this Commission."[3] (Motion at p. 6) At the same time, Movants make the illogical argument that this Commission has jurisdiction of the sale of inside wire maintenance to the extent that it is sold by network employees, even though the service has been deregulated. It would appear that the Movants "want their cake and to eat it too." The Movants, however, cannot have it both ways.

5. Finally, Movants request from this Commission a preemptive order to the effect that absolutely nothing it does in any of the above-captioned dockets will have an effect on the Davis litigation. This request is not only procedurally

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[3] At another point, Movants contend that this Commission lacks jurisdiction of the issues in Davis because it lacks the authority to award damages (which would seem to be a moot point if the subjects of these proceedings and of Davis are, in fact, separate). In some instances, however, what a party (or class) defines as damages may in reality be a refund, which this Commission is empowered to Order. See, e.g., Richter v. Florida Power Corporation, 366 So.2d 798 (Fla 2d DCA 1979).

improper, it also seeks an Order that simply cannot have the legal effect that Movants desire.

6. There is an abundance of case law that governs the effect of regulatory oversight of a given subject area on the subsequent exercise of jurisdiction by a civil court over the same subject matter. Some of this case law relates to the state action doctrine, which has already been applied by the Court in Davis in the Order Granting Partial Summary Judgment referred to above. The Davis Court held specifically that this Commission's active oversight of Southern Bell's inside wire maintenance plan was such that the plan constituted state action. Accordingly, Southern Bell was held to be immune as a matter of law from antitrust liability for any actions prior to January 1, 1987.

7. Likewise, the doctrines of primary jurisdiction and exhaustion of administrative remedies may dictate that these proceedings will have a legal impact on similar issues in subsequent litigation. Both legal doctrines were explained succinctly in Florida Society of Newspaper Editors, Inc. v. the Florida Public Service Commission, 543 So.2d 1262 (Fla 1st DCA 1989) as follows:

> The companion doctrines of primary jurisdiction and exhaustion of administrative remedies are not statutory creatures but judicial, together constituting a "doctrine of self-limitation which the courts have evolved, in marking out the boundary lines

> between areas of administrative and judicial action." The one counsels judicial abstention when claims otherwise cognizable in the courts have been placed within the special competence of an administrative body; the other, when available administrative remedies would serve as well as judicial ones. Even though the legislature power may not presume to characterize an adequate administrative remedy as "exclusive," courts will so regard it.

Id. at p. 543, quoting State ex rel Department of General Services v. Willis, 344 So.2d 580, 589 (Fla 1st DCA 1977). Either of these doctrines could possibly be applied in the future by a Court (including the Court in Davis) that is called upon to rule on some matter, if that matter has been dealt with as part of the subject dockets.

8. Finally, since the Attorney General is now a party to Davis as well as the subject dockets, any position that it takes in this proceeding may have the effect of estopping it from taking a contrary position in Davis. See generally, Wooten v. Rhodes 470 So.2d 844 (Fla 5th DCA 1985).

9. These doctrines exist as a matter of both Florida and federal law. Therefore, to the extent that the Movants improperly broaden the issues in these dockets beyond those that should properly be encompassed herein, they run the definite risk that any resulting determination by the Commission may have a legal effect on Davis or any other future litigation that

involves the same or similar issues. Again, it is not that these doctrines necessarily will apply, or that the issues in this docket necessarily will overlap with those in Davis. Instead, these are contingencies that would apply only if, through the facts adduced at the respective hearings or otherwise, these dockets are improperly broadened beyond the matters within their proper scope.

10. Given this, it is grossly inappropriate for Movants to request the Commission to enter an order at this juncture that will have the purported result of holding that this proceeding will have no effect on the Davis litigation, regardless of the nature and scope of the facts that are entered into evidence at the time of the hearing. Such an Order would be tantamount to an instruction by this Commission to any subsequent reviewing Court that it cannot apply the judicial doctrines of primary jurisdiction or exhaustion of administrative remedies, or allow the defenses of the State action doctrine or estoppel, even if the Court determines that the facts are such that these doctrines would otherwise apply. The impropriety of such an Order by this Commission is obvious. Moreover, it is extremely doubtful that this requested order could function legally to divest a subsequent trial or appellate court of the ability to apply established legal doctrines to the facts addressed in the

hearings of these dockets or to any resulting ruling by this Commission.

11. Finally, it is somewhat strange, to say the least, that the Movants have chosen to raise the issue of the scope of these proceedings at this time and in this manner. Again, the Movants have misstated the intent of Southern Bell's Issue 4 and the version of this issue adopted in both Docket Nos. 900960-TL and 910163-TL. If there is nothing more to this Motion than Movants' confusion as to what this issue was intended to address, then this confusion should be remedied by Southern Bell's statement herein of its position. In that case, no order is necessary.

12. To the extent that Movants have a good faith belief that this issue encompasses matters that might be heard in Davis, the appropriate way to deal with this issue would be as with all other issues, i.e., to respond to it in the context of the hearings.

13. Again, it is the plaintiffs in Davis and the Movants herein who have attempted to blur the issues between the instant dockets and the Davis litigation. The preemptive order Movants seek would, in effect, amount to a ruling by this Commission that Movants are free to improperly introduce irrelevant and prejudicial material that is outside of the scope of these dockets and that this tactic would not have the normal legal

effect on the jurisdiction of the court in Davis, or in any other further civil litigation. In other words, it would allow Movants to attempt to improperly broaden the scope of these proceedings without having the concomitant legal effect of allowing a trial court the ability to decline to hear these same issues at a later date. As stated above, it is extremely doubtful whether any order entered by this Commission could have that legal effect. Even if it could, however, it would be inappropriate for this Commission to enter such an order before it ultimately defines the scope of these proceedings by its rulings on what will be admissible at the respective hearings. Movants should not be allowed cart blanche to introduce irrelevant and prejudicial material into these proceedings without the legal consequences on other subsequent proceedings[4] that would clearly follow as a matter of law. To the contrary, if Movants wish to keep the issues in these dockets separate from Davis, then they should simply conduct themselves accordingly as they proceed in the hearings on these dockets.

14. As stated above, Southern Bell agrees that the matters at issue in the above-captioned dockets are essentially different than the issues in Davis. Assuming that Movants herein confine

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[4] Southern Bell, of course, reserves the right to object at the appropriate time to the attempted introduction, if any, of such material.

themselves to the matters that are properly within the scope of this Commission's jurisdiction and that are within the scope of these dockets, there should be no overlap with Davis, no resulting legal impact on Davis, and most importantly, no need for the order that Movants seek herein.

WHEREFORE, Southern Bell respectfully requests the entry of an order denying in its entirety the Attorney General and Public Counsel's Motion for Order Clarifying the Scope and Purpose of These Proceedings.

Respectfully submitted,

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