J. Phillip Carver
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ORIGINAL
FILE COPY

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March 31, 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. 900960-TL 920260-TL

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Reply to Public Counsel's Response to Southern Bell's First Motion to Compel and Request for In-Camera Inspection of Documents and Request for Expedited Decision, 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,

J. Phillip Carver

J. Phillip Carver (22)

Enclosures

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

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CERTIFICATE OF SERVICE
Docket No. 920260-TL
Docket No. 900960-TL
Docket No. 910163-TL
Docket No. 910727-TL

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 31st day of March, 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 Filed: March 31, 1993

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S REPLY TO PUBLIC COUNSEL'S RESPONSE TO SOUTHERN BELL'S FIRST MOTION TO COMPEL AND REQUEST FOR IN-CAMERA INSPECTION OF DOCUMENTS AND REQUEST FOR EXPEDITED DECISION

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), and files its Reply to the Office of Public Counsel's ("Public Counsel") Response to Southern Bell's First Motion to Compel and Request for In-Camera Inspection of Documents and Request for Expedited Decision, and states as grounds in support thereof the following:

1. On November 6, 1992, Southern Bell served upon Public Counsel its First Set of Interrogatories and First Request for Production of Documents. Public Counsel filed its response on December 11, 1992. Southern Bell subsequently moved to compel production on February 22, 1993, and Public Counsel responded on March 10, 1993. Southern Bell now files its Reply for the purpose of addressing two specific points raised by Public Counsel.

2. First, Public Counsel contends that its "selection" of documents from those previously produced by Southern Bell

constitutes work product. The controlling authority, however, is clearly to the contrary.

3. Southern Bell's Interrogatory No. 6 and Nos. 9 through 12 essentially inquire as to Public Counsel's previously stated position in this docket that Southern Bell has inappropriately engaged in the "hard sell" of services. Specifically, Interrogatory Nos. 6, 10 and 12 requested Public Counsel to identify documents that related to this contention. Interrogatories 9 and 11 requested Public Counsel to name persons who had knowledge that related to its contention. Public Counsel responded only by identifying (1) the prefiled testimony of Dr. Mark Cooper in Docket No. 920260-TL, and (2) all documents that Southern Bell had previously produced to Public Counsel in both this docket and in 920260-TL. Public Counsel made no objection to the request by Southern Bell.

4. For Public Counsel to respond to these interrogatories by merely stating that the factual basis for the position it takes exists somewhere in the hundreds of thousands of pages of documents that Southern Bell has produced to it is grossly inadequate. For this reason, Southern Bell moved to compel better answers by Public Counsel. In its response to Southern Bell's Motion, Public Counsel argued for the first time that the request called for the production of work product because it required Public Counsel to identify particular documents among

those previously produced by Southern Bell, and that this "selection process" constitutes work product. In point of fact, however, the controlling authority makes it clear that Public Counsel's belated assertion of the work product doctrine is simply frivolous.

5. If Public Counsel truly believed that Southern Bell's interrogatories called for the production of its work product, then it could have objected or, alternatively, moved for a protective order at the time that it answered the interrogatories. Instead, Public Counsel simply provided vague and inadequate answers. It was only when pressed for sufficient answers by Southern Bell's Motion to Compel that Public Counsel belatedly asserted the work product doctrine. Public Counsel's election to answer the interrogatories (albeit inadequately) rather than timely asserting the work product doctrine and objecting accordingly constitutes a waiver of any privilege that might have existed. See, generally, Continental Mortgage Investors v. Village By the Sea, 252 So.2d 833 (Fla 4th DCA 1971).

6. More to the point, however, is the fact that under circumstances sub judice, there simply is no privilege. In support of its fallacious argument to the contrary, Public Counsel cites to Sporck v. Peil, 759 F.2d 312 (3rd Circuit 1985). Not only does Sporck not support Public Counsel's position, the

facts of that case aptly illustrate the misapplication by Public Counsel of the work product doctrine to this situation. In Sporck, a defendant prepared for a deposition by reviewing certain documents that he had previously produced to the plaintiff. The attorney who deposed the defendant insisted on an identification of the specific documents that he reviewed. Counsel for the deponent/defendant stated that he would allow questions about the deponent's "reliance on individual documents in the context of specific factual questions," (Sporck at 314) but would not allow an identification of all the documents the deponent reviewed to prepare for the deposition. The deponent's counsel in effect, conceded that it was proper for the plaintiff to seek production of all relevant documents, and that it was proper to seek the identification of the specific documents relied upon by the defendant. The defendant argued, however, that by asking to see all the specific documents that his attorney had chosen to have him review to prepare for his deposition (as opposed to identifying those that supported his position) opposing counsel was seeking to obtain the mental impressions of his attorney. The court sustained this position.

7. Specifically, the Court held that the document selection process constituted work product in this context only because deposing counsel "failed to lay a proper foundation ... for production of the documents selected by [opposing] counsel".

Sporck at 318. The Court noted that the deposing attorney's error was to ask the defendant/deponent at the outset of the deposition which documents his attorney had him review. Instead, the deposing attorney should have elicited deposition testimony, then questioned the deponent as to "which, if any, documents informed that testimony". Id.

8. This method of seeking documents approved in Sporck is precisely what Southern Bell has followed in this case. Southern Bell merely has inquired as to the documents that support Public Counsel's stated position, which position Public Counsel has represented is wholly contained in the pre-filed testimony of Dr. Cooper. Unlike defendant's counsel in Sporck, Public Counsel has taken the absurd position that Southern Bell is entitled to know nothing more than what is contained in the testimony that Public Counsel has filed in this case. Public Counsel is thus contending that Southern Bell has no right to make the same type of inquiry as that which was specifically sustained in Sporck.

9. Further, Public Counsel's position is clearly contrary to Florida Law. In American Motors Corporation v. Ellis, 403 So.2d 459 (Fla 5th DCA 1981), the Fifth District Court of Appeals stated that "if the materials are only to aid counsel in trying the case, they are 'work product' but any 'work product' privilege that existed ceases once the materials or testimony are intended for trial use." Clearly, Southern Bell is not

requesting work product prepared by Public Counsel. Instead, Southern Bell is requesting only that Public Counsel identify the documents it has obtained from Southern Bell that Public Counsel contends supports its position in this case, which position is set out in the testimony of Dr. Cooper. Moreover, even if Public Counsel had some basis to claim the protection of the work product doctrine for these documents, it is clear under American Motors that Public Counsel cannot refuse to identify documents it intends to use. Neither can it refuse to identify the documents that relate to a specific position that it has taken in the proceeding. Thus, even if Public Counsel's "selection" of documents is privileged, this privilege is lost by the fact that the documents ostensibly support Public Counsel's contentions and the testimony filed to assert those contentions. Public Counsel cannot contend that its testimony is supported by potential evidence and then refuse to identify that evidence.

10. The second contention of Public Counsel that Southern Bell addresses herein is its misguided notion that the mere fact of Public Counsel's contact with attorneys who have no relation whatsoever to this case can somehow constitute work product. In Interrogatories Nos. 19 through 29, Southern Bell inquired as to whether Public Counsel made any contact regarding its assertion of "hard sales" by Southern Bell with certain attorneys working on civil litigation filed against Southern Bell. The

interrogatories requested that Public Counsel state whether such contact had occurred (No. 19) and with whom (No. 20), describe any documents setting forth these contacts (No. 22), and describe the content of any oral conversations (No. 21). Public Counsel responded to this request with the patently unsupportable contention that it may refuse to answer each of these interrogatories by assertion of the work product doctrine.

11. Public Counsel's Response includes a seemingly random citation of cases that bear no relation whatsoever to the issue at hand. Public Counsel first cites cases for the proposition that an attorney's notes taken while interviewing a fact witness in ongoing litigation are privileged (Response at p. 3, citing Surf Drugs v. Vermette, 263 So.2d 108 (Fla 1970); State v. Rabin, 495 So.2d 257 (Fla 3rd DCA 1986)).[1] Public Counsel then expends considerable effort in an attempt to establish that not all documents held by a state agency are "public records." Yet, Public Counsel never even contends that Southern Bell's request would necessarily require the production of documents that are not "public records." Response at p. 5.

12. Public Counsel finally argues that Southern Bell would not be able to depose Public Counsel as to certain of its conversations with witnesses. Public Counsel's argument to this

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[1] This position is most curious in light of Public Counsel's motions to compel production of statements taken by Southern Bell's attorneys in Docket No. 910163-TL.

effect, however, has nothing to do with the instant circumstances. Public Counsel weakly attempts to address the obvious fact that Southern Bell has not requested its deposition by making, without the support of legal authority or logic, the argument that Southern Bell's interrogatories are "the equivalent of a written deposition." Response at p. 6. The fact remains, however, that Southern Bell has not attempted to depose any individual in the Office of Public Counsel. Instead, Southern Bell has simply sent to Public Counsel interrogatories inquiring about contact that it has had with other attorneys who have been involved in other litigation.

13. The substance of these conversations is not protected by the work product doctrine because it does not involve the type of factual investigations that were at issue in the cases cited by Public Counsel. (See, Surf Drugs, supra) However, even if the substance of these contacts were protected, there is absolutely no legal authority to support the notion that Public Counsel can assert the work product doctrine as a basis to refuse to state whether these contacts ever took place, with whom they took place, or whether any agreements exist between Public Counsel and other attorneys as a result of these contacts. Again, Public

Counsel's contention to the contrary is plainly unsupported by Florida law.[2]

WHEREFORE, Southern Bell respectfully requests that this Commission grant its Motion to Compel in its entirety.

Respectfully submitted,

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[2] These arguments are also directly contrary to positions Public Counsel has taken in various motions to compel in Docket No. 910163-TL.