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March 8, 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. 920260-TL - 900960-TL - 910163-TL - 910727-TL

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Response to Public Counsel's Motion to Compel BellSouth Telecommunications' Assistant Vice-President, Central Operations Danny L. King, and BellSouth Telecommunications' Manager, Information Systems, Ms. Etta Martin to Answer Deposition Questions and Motion to Strike the Affidavit of Mr. King, 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

Enclosures

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

A BELLSOUTH Company

DOCUMENT NUMBER-DATE

02611 MAR-83

FPSC-RECORDS/REPORTING

**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 *8<sup>th</sup>* day of *March*, 1993

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Harris R. Anthony

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

In re: Comprehensive Review of ) Docket No. 920260-TL  
the Revenue Requirements and Rate )  
Stabilization Plan of Southern )  
Bell Telephone & Telegraph Company )

In re: Investigation into Southern ) Docket No. 900960-TL  
Bell Telephone and Telegraph )  
Company's Non-Contact Sales )  
Practices )

In re: Investigation into ) Docket No. 910727-TL  
Southern Bell Telephone and )  
Telegraph Company's Compliance ) Filed: March 8, 1993  
with Rule 25-4.110(2) (Rebates) )  
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**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S  
RESPONSE TO PUBLIC COUNSEL'S MOTION TO COMPEL  
BELLSOUTH TELECOMMUNICATIONS' ASSISTANT VICE-PRESIDENT,  
CENTRAL OPERATIONS DANNY L. KING, AND BELLSOUTH  
TELECOMMUNICATIONS' MANAGER, INFORMATION SYSTEMS,  
MS. ETTA MARTIN TO ANSWER DEPOSITION QUESTIONS  
AND MOTION TO STRIKE THE AFFIDAVIT OF MR. KING**

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern  
Bell Telephone and Telegraph Company ("Southern Bell" or  
"Company"), pursuant to Rule 25-22.037(2)(b), Florida  
Administrative Code, and hereby files its Response to the Office  
of Public Counsel's ("Public Counsel") Motion to Compel BellSouth  
Telecommunications' Assistant Vice-President, Central Operations  
Danny L. King, and BellSouth Telecommunications' Manager,  
Information Systems, Ms. Etta Martin to Answer Deposition

Questions and Motion to Strike the Affidavit of Mr. King, and states as grounds in support thereof the following:

1. On January 12, 1993, Public Counsel took the deposition of a panel composed of Danny L. King and Etta Martin. During this deposition, Public Counsel examined these witnesses at length about their respective roles in an investigation conducted by attorneys for Southern Bell. Regarding their respective roles: it is uncontroverted that Mr. King prepared a statistical analysis during the course of the investigation conducted by attorneys for Southern Bell. Specifically, he was requested by Southern Bell attorneys to perform an analysis of the handling of trouble reports using specific information that was obtained by lawyers in the Florida Legal Department as part of the ongoing investigative effort. The results of his analysis were contained in a report that was provided to Southern Bell attorneys and utilized as a part of the basis for the rendering of legal advice to Southern Bell.

2. As reflected in her deposition, Ms. Martin played essentially a support role in the investigation in that she created computer programs to extract information that was analyzed in either the five privileged audits or in the statistical analysis performed by Mr. King, all of which were done at the request of Southern Bell attorneys. (See, e.g. Deposition pp. 37-38) Southern Bell has objected to producing both the audits and the statistical analysis performed by Mr.

King on the basis of the attorney-client privilege and the work product doctrine.

3. During the subject deposition, Public Counsel asked repeated questions that appeared to be designed specifically to invade the applicable privileges. For example, since Southern Bell had responded to Public Counsel's attempts to obtain Mr. King's analysis by appropriately invoking the applicable privileges, Public Counsel embarked on the gambit of asking Mr. King questions that could only be answered by revealing the substance of the privileged analysis. The ostensible basis for this tactic is the fundamental misapplication of the ruling of the United States Supreme Court in the Upjohn Co. v. United States, 449 US 383 (1981) that is reflected in Public Counsel's Motion to Compel.

4. Specifically, Public Counsel states that "as the U.S. Supreme Court has stated, the attorney-client privilege protects communications, not the underlying facts. Upjohn Co. v. United States, 449 US 383 (1981)." Motion at p. 4. Public Counsel then goes on to make a factual observation that belies any notion that its misinterpretation of Upjohn is proper: "The audits and statistical analysis in question reviewed factual data drawn from statistical samples of customer repair records...." (Id., emphasis added) Although Public Counsel is correct in noting that the attorney-client privilege protects communications and not underlying facts, Public Counsel has simply failed to

identify what constitutes the underlying facts in our situation.

5. The underlying facts referred to in Upjohn cannot be comprised of an analysis of factual data that is requested by attorneys and used to render legal advice to their client. Instead, the "underlying facts" are comprised of the actual data that is analyzed. As Public Counsel is obviously well aware, the statistical analysis that Mr. King performed at the direction of Southern Bell attorneys "reviewed factual data drawn from customer repair records." (Motion at p. 6) It is these customer repair records that make up the underlying facts to which Public Counsel is entitled, not the privileged analysis of these facts performed at the request of, and under the direction of, Southern Bell's attorneys.

6. Public Counsel has, of course, received in response to its voluminous and numerous requests to produce literally hundreds of thousands of page of documents. Among these are a considerable volume of customer-related records. To the extent that Public Counsel may have a need for additional "underlying facts" in the form of customer records, this need is simply a result of its own failure to request the pertinent documents, not of the proper assertion of privilege by Southern Bell. Despite this, Public Counsel continues to ignore the availability of the underlying facts, and argue instead that it is entitled to obtain a privileged statistical analysis of these facts. To the contrary, the analysis is privileged, and this fact remains

regardless of whether Public Counsel attempts to obtain the product of the privileged analysis by obtaining a written analysis or inquiring at the deposition of its author as to the substance of written analysis.

7. Likewise, although Public Counsel devotes most of its attention to arguing in opposition to Southern Bell's assertion of the privilege as to Mr. King, the work performed by Ms. Martin is also privileged. As set forth above, Ms. Martin stated clearly in her deposition that her role in the investigation was limited to creating programs to extract information at the express request of either internal auditors working on the privileged audits or Mr. King. In each instance, the persons who requested the information from her were working on behalf of the attorneys of Southern Bell who conducted the investigation.

8. After completing its argument that to inquire orally about the substance of a privileged document is somehow different than asking for the document itself, Public Counsel next specifically contradicts this fallacious argument. Public Counsel states that if, as the Prehearing Officer has ruled, this analysis is not privileged, then the questions about it are not privileged either. While Southern Bell agrees that the statistical analysis in written form and deposition questions about the analysis have the same status (i.e., either privileged or not), Southern Bell also strenuously takes issue with the ruling of the Prehearing Officer. For this reason, Southern Bell



has moved for reconsideration of the Order (entered on March 4, 1993) of the Prehearing Officer that this analysis is not privileged.

9. Public Counsel is mistaken in its contention that the Order of the Prehearing Officer regarding this statistical analysis has been upheld by the full Commission. To the contrary, the order cited by Public Counsel (Motion p. 4, footnote 2) erroneously contained a ruling as to the statistical analysis when, in fact, it had not be reviewed. The full Commission acknowledged this in Order No. PSC-93-0292-FOF-TL. The prehearing officer subsequently entered an order that did rule that the statistical analysis is not privileged. Order No. PSC-93-0294-PCO-TL, entered February 23, 1993. Accordingly, it is this Order that Southern Bell has moved the full Commission to review.

10. Public Counsel next argues, without the benefit of factual or legal support, that Mr. King's affidavit should be stricken. Public Counsel's argument to this effect begins, once again, with a fundamental misstatement. Public Counsel states that "Mr. King refused to respond to questions directed to a sworn affidavit filed by the Company with the Commission." Motion at p. 5. To the contrary, a review of the pertinent questions makes it clear that Public Counsel was not asking about the affidavit itself. Instead, Public Counsel was attempting to go beyond the Affidavit and to ask substantive questions about

the analysis performed by Mr. King. Although Public Counsel appears to confuse these two types of questions, the distinction is, in fact, quite clear.

11. Mr. King's Affidavit was originally filed in order to provide information as to the circumstances under which his statistical analysis was performed. Obviously, these facts are crucial to a determination that the analysis is, as Southern Bell contends, privileged. Likewise, at the depositions of Mr. King and Ms. Martin, counsel for Southern Bell allowed the Office of Public Counsel to inquire fully of both witnesses as to the circumstances surrounding their involvement in the investigations. Southern Bell objected, however, to Public Counsel's repeated efforts to inquire as to the statistical analysis in a way that would necessarily reveal the substance of this privileged information. For example, Public Counsel inquired as to the nature of the analysis (p. 44), the procedures utilized (Motion p. 46), the pertinent database (p. 47) and the years for which records were reviewed (p. 49). Thus, the objections by Southern Bell to these questions were not, as Public Counsel contends, a limitation on the ability of Public Counsel to inquire about the subject of the affidavit, i.e., the circumstances surrounding Mr. King's involvement in the investigation. Instead, the objections represented an appropriate effort to protect from disclosure the privileged information contained in the underlying statistical analysis.

The fact that Public Counsel attempted to obtain this privileged information by using the affidavit as a starting point is simply immaterial.<sup>1</sup>

12. Finally, Public Counsel has argued, once again, that Southern Bell's assertion of the attorney-client privilege and work product doctrine has somehow prevented it from obtaining information that it would need to do its own analysis. The ability of Public Counsel to do its own analysis would, of course, obviate any need that might otherwise exist to invade Southern Bell's attorney work product.<sup>2</sup> Thus, Public Counsel makes the circular and essentially non-sensical argument that by attempting to protect privileged information and its own work product, Southern Bell has thereby created a hardship for Public Counsel that will justify invasion into the otherwise protected work product.

13. Public Counsel has also misapplied the standard for hardship that will justify the invasion of the work product doctrine. Specifically, Public Counsel argues that it cannot

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<sup>1</sup> Further, Public Counsel has asked that, on the basis of its fallacious argument, the Affidavit be stricken. Public Counsel fails, however, to provide any case support for the notion that this is an appropriate remedy under the circumstances at issue.

<sup>2</sup> As set forth above, the information in question is protected not only by the work product doctrine, but also the attorney-client privilege. Since the attorney-client privilege is absolute, no showing of hardship (even if Public Counsel had made sufficient showing here) would justify ordering that this information be revealed.

perform an analysis of its own without being allowed to inquire as to every minute detail regarding the analysis of Mr. King on behalf of Southern Bell. This argument fails for two reasons: One, if Public Counsel were correct, then a party could never assert the work product doctrine without revealing so much of the substance of the protected information, that it would, in effect, waive the protection of the doctrine.

14. Two, it is simply unnecessary for Public Counsel to have the information it seeks. As Public Counsel acknowledges, (Motion, p. 6) and as clearly stated in the Florida Rules of Civil Procedure, Rule 1.280(b)(3) a party is entitled to obtain an adversary's work product only upon a clear showing of its inability to obtain the "substantial equivalent" of the protected material. There is no necessity that a party be able to duplicate the precise same work product by virtue of the precise same process. To the contrary, if Public Counsel's real goal were to make a good faith effort to perform a statistically valid analysis, then it would simply take the thousands of pages of documents that it has been supplied and attempt to acquire, through the retention of an expert or otherwise, the expertise to determine whether a suitable, comparable analysis can be done. Obviously, Public Counsel has failed to do so in what is yet another example of the continuing tactic of attempting to rely upon the efforts of Southern Bell while refusing to develop its own case through its own labor.

WHEREFORE, Southern Bell respectfully requests the entry of an order denying in its entirety Public Counsel's Motion to Compel.

Respectfully submitted,

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