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FILE COPY**

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July 18, 1991

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

Re: Docket No. 910163-TL

Dear Mr. Tribble:

Enclosed for filing in the above-referenced docket is the original and fifteen copies of Opposition of Southern Bell Telephone and Telegraph Company to Public Counsel's Motion to Compel. All parties of record have been served as indicated on the attached Certificate of Service.

A copy of this letter is enclosed. Please indicate on the

ACK  \_\_\_\_\_  
AFA \_\_\_\_\_  
APP \_\_\_\_\_  
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OPC \_\_\_\_\_  
RCH \_\_\_\_\_  
SEC  \_\_\_\_\_  
WAS \_\_\_\_\_  
OTH \_\_\_\_\_

copy that the original was filed and return the copy to me.

Sincerely yours,

*Harris R. Anthony*  
Harris R. Anthony

cc: All parties of record  
Mr. A. M. Lombardo  
Mr. R. Douglas Lackey

RECEIVED & FILED

FLORIDA BUREAU OF RECORDS

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CERTIFICATE OF SERVICE

DOCKET NO. 910163-TL

I HEREBY CERTIFY that a correct copy of foregoing was  
furnished by U. S. Mail to the following parties this 18 day of  
July, 1991.

Charles J. Beck, Esq.  
Assistant Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
111 West Madison Street  
Room 812  
Tallahassee, FL 32399-11400

Suzanne Summerlin, Esq.  
Division of Legal Services  
Florida Public Service Comm.  
101 E. Gaines Street  
Tallahassee, FL 32301

Harris R. Anthony

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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 18, 1991

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

COMES NOW 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 Interrogatories Nos. 1 through 21 of Public Counsel's Third Set of Interrogatories:

1. Southern Bell first notes that Public Counsel concedes in its Motion that, in appropriate circumstances, the work product of attorneys and agents for Southern Bell will be shielded from discovery under Rule 1.280(b)(i), Florida Rules of Civil Procedure. Motion to Compel at p. 4. See also, Karch v. MacKay, 453 So.2d 452, 453 (Fla. App. 4th Dist. 1984) Attorney work product was described by the Supreme Court of Florida in Surf Drugs, Inc. v. Vermette, 236 So.2d 108, 112 (1970) to include:

Personal views of the attorney as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony,

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[and] personal notes and records as to witnesses....

2. As is indicated in its responses to Public Counsel's Interrogatories, Southern Bell is currently conducting an internal investigation to determine whether certain types of activities may have occurred in its provision of repair services. This investigation is being conducted by, through and at the direction of counsel for Southern Bell. It is with regard to statements given to Southern Bell's counsel and counsel's agents and the memoranda and notes evaluating and analyzing such statements that Southern Bell has claimed the privilege of attorney work product:

A party may not be required to set out the contents of statements, absent rare and exceptional circumstances, or to divulge his or his attorneys' evaluation of the substance of statements taken in preparation for trial.

Id., at p. 113. To date, Public Counsel has not contested Southern Bell's assertion of the work product privilege with regard to these statements or to the associated documents prepared by or under the direction of counsel for Southern Bell.

3. Because Public Counsel's Motion has grouped his interrogatories into three categories and addressed each group separately in his Motion to Compel, Southern Bell will respond using the same groupings.

4. Interrogatory Nos. 1 through to 10 each seek to have the attorneys representing Southern Bell evaluate the possible testimony of the persons whose names and addresses are sought. Thus, they exceed the bounds of proper discovery. See, Surf Drugs, supra, 236 So.2d at p. 113. The pattern for these 10 interrogatories is set by Interrogatory No. 1, which requests the identification of witnesses "who have any knowledge about falsifying completion times or repair service forms, reports, or records." Southern Bell can respond to this inquiry only after the Company's counsel's analyzes the statements provided in its internal investigation to determine who may have known of the activities in question. This answer thus requires an indication of the personal thought, views, knowledge, or evaluation by an attorney, litigant or agent, and therefore falls within the attorney work product privilege. Colonial Penn Ins. Co. v. Blair, 380 So.2d 1305, 1306 (Fla. App. 5th Dist. 1980).

5. In an effort to circumvent this rule, Public Counsel has listed each interrogatory approved by the Florida Supreme Court in the Surf Drugs case. See, Motion to Compel at pp. 5-6. None of the interrogatories which the Court in that case found to be permissible, though, asked for any analysis such as is requested by Public Counsel in his interrogatories. See Surf Drugs, supra, at p. 110.

6. Public Counsel argues that his interrogatories do not ask Southern Bell to evaluate the substance of any testimony that the persons interviewed by Southern Bell's attorneys may ultimately provide. Public Counsel's Motion to Compel, p. 6. However, what Public Counsel ignores is that for counsel for Southern Bell to determine, for example, who if anyone may have knowledge of falsification of completion times, requires an evaluation by counsel of the information each person has provided. Counsel would be required to determine whether a person knew of completion times being changed and, if so, whether such changes were done properly or for improper reasons. To compel such an interpretive process oversteps the bounds of proper discovery. Public Counsel seeks to have Southern Bell do what the Court in Surf Drugs said it cannot do - evaluate the testimony of potential witnesses. Surf Drugs, supra, at 113.

7. Public Counsel could have simply requested the names and addresses of all persons who have any knowledge of the procedures related to the allegations that are the subject of Interrogatory Nos. 1 - 10. Indeed, Southern Bell has offered (and now renews that offer) to provide Public Counsel with a list of all persons who worked in Southern Bell's Installation and Maintenance Centers ("IMCs") during any time period relevant to the inquiries in this docket. Public Counsel, however, has

refused Southern Bell's effort to reach a compromise of this discovery controversy.

8. Public Counsel concedes that he may not seek disclosure of the substance of any statement given to counsel for Southern Bell. See, Motion to Compel, p. 7. However, by seeking to require Southern Bell to characterize each witness' knowledge, Public Counsel seeks to accomplish indirectly what he acknowledges he cannot ask for directly.

9. Southern Bell objects to Interrogatory Nos. 12 through 21 for the reasons stated above with regard to Interrogatory Nos. 1 through 10. To the extent that counsel for Southern Bell has identified any customer whose service appears, for example, to have had a trouble clear time "backed up", Public Counsel requests that Southern Bell evaluate whether such backing up was proper or improper. This Public Counsel cannot do. Nevertheless, to the extent that responsive information is not privileged or objectionable, Southern Bell provided appropriate responses to Interrogatory Nos. 12 through 21 in its response to Public Counsel's Third Set of Interrogatories.

10. Interrogatory No. 11 asks Southern Bell to identify certain documents in its possession. Southern Bell has complied with this interrogatory and identified all responsive documents except for the statements, memoranda, notes and other documents

which are a part of its internal investigation. With regard to those investigation related documents, Southern Bell asserts the attorney-client privilege and the attorney work product privilege. Southern Bell agrees with Public Counsel that the ultimate determination of whether these privileges apply must be made by the Commission. However, Southern Bell does not now waive any privilege with regard to its investigation.

Furthermore, it should also be noted that, contrary to Public Counsel's implication, Southern Bell, in its objection to Interrogatory No. 11, did make reference to its investigation of the matters raised in this docket. Public Counsel is thus aware that the statements provided to counsel in that investigation, as well as the related memoranda, notes and analyses, are the documents for which the privilege is asserted. A review of Southern Bell's response also demonstrates that Southern Bell has further complied with this interrogatory by identifying all documents in its possession which are responsive and which are not privileged.

11. In its responses to Interrogatory Nos. 1 - 21, Southern Bell also specifically stated that the internal investigation which is protected by the work product privilege is not yet complete. It would thus be premature in any event to require Southern Bell to perform the analysis sought by Public Counsel

for the simple reason that, not having completed its investigation, Southern Bell cannot draw the conclusions which Public Counsel apparently desires Southern Bell to make. For this additional reason, Public Counsel's Motion to Compel should be denied.

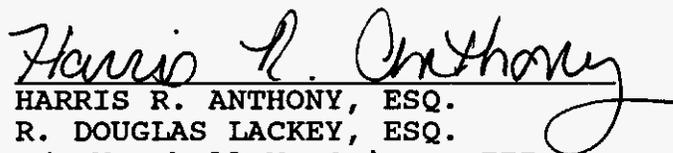
12. In his conclusion, Public Counsel attempts to analogize its discovery requests as similar to requests to identify witnesses of an automobile accident. Motion to Compel at p. 11. Public Counsel's interrogatories, however, go much further. By requesting that Southern Bell characterize the witnesses' prospective testimony, Public Counsel is actually asking Southern Bell to identify not only the names of witnesses but to tell what counsel for Southern Bell believes the witnesses will say. At the heart of the privilege of attorney work product is a concept of underlying fairness that "one party is not entitled to prepare his case through the investigative work product of his adversary." Dodson v. Persell, 390 So.2d 704, 708 (Fla. 1980); Pinellas County v. Carlson, 242 So.2d 714, 719 (Fla 1971). To require Southern Bell to answer the interrogatories of Public Counsel and disclose not only the names of witnesses identified by Southern Bell, but also to characterize the witnesses' knowledge would be tantamount to granting Public Counsel access to the opinions, thought processes and efforts of counsel for

Southern Bell. Protection of an attorney's mental process is essential to the proper functioning of the adversary system. The State of Florida v. Rabin, 495 So.2d 257, 263 (Fla. App. 30 Dist., 1986).

WHEREFORE, for the foregoing reasons, Southern Bell respectfully requests that the Commission deny Public Counsel's Motion to Compel dated July 11, 1991.

Respectfully submitted,

SOUTHERN BELL TELEPHONE AND  
TELEGRAPH COMPANY

  
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