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**Southern Bell**

Harris R. Anthony  
General Counsel-Florida

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August 3, 1992

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

ORIGINAL  
FILE COPY

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 Impose a Penalty on Southern Bell Telephone and Telegraph Company for Filing and Failing to Correct False Information Submitted to the Commission, which we ask that you file in the captioned docket.

- ACK
- AFA
- APP
- CAF
- CML
- CTR
- EAG
- LEG
- LIN
- OFC
- ROH
- SEC
- WAS
- OTH

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 *702*

Enclosures

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

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

00559 AUG-3 1992

FPSC-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 *3<sup>rd</sup>* day of *August*, 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 H. Anthony  
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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: August 3, 1992  
Southern Bell Telephone and Telegraph )  
Company's repair service activities )  
and reports. )

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SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S  
OPPOSITION TO PUBLIC COUNSEL'S MOTION TO IMPOSE  
A PENALTY ON SOUTHERN BELL TELEPHONE AND TELEGRAPH  
COMPANY FOR FILING AND FAILING TO CORRECT FALSE  
INFORMATION SUBMITTED TO THE COMMISSION

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 Impose a Penalty on Southern Bell for Filing and Failing to Correct False Information submitted to the Commission, dated July 20, 1992. In support of its opposition, Southern Bell shows the following:

1. On March 20, 1992, Public Counsel served Southern Bell with its First Request for Production of Documents in Docket No. 920260, in which Public Counsel sought various internal audits conducted by the Company. In its responses and objections dated April 24, 1992, Southern Bell objected to production of some of these on the basis of attorney-client and attorney work product privileges. Public Counsel filed a Motion to Compel on May 8,

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1992, in Docket No. 920260 requesting, among other things, the privileged third quarter 1991 audit related to Southern Bell's Florida Public Service Commission Schedule 11 filings. Public Counsel filed a supplement to its Motion to Compel on June 8, 1992. Southern Bell filed its oppositions to these pleadings on May 15 and June 15, 1992, respectively.

2. On June 3, 1992, Public Counsel filed its Twenty-Sixth Set of Interrogatories in Docket No. 910163, seeking the findings of the third quarter 1991 Schedule 11 internal audit (Item Nos. 6 and 7). Public Counsel also asked whether Southern Bell had reason to believe that any of the Schedule 11 reports filed with the Florida Public Service Commission ("Commission") were inaccurate (Item No. 8).

3. Southern Bell filed its Responses and Objections to the Twenty-Sixth Set of Interrogatories on July 8, 1992. In response to Item Nos. 6 and 7, Southern Bell objected to providing the information sought on the basis that the analysis in question is protected under the attorney-client and attorney work product privileges. See Southern Bell's Opposition to Public Counsel's Supplement to Public Counsel's First Motion to Compel, dated June 15, 1992. In response to Item No. 8, Southern Bell objected on the same grounds to the extent that the interrogatory called for information protected by either or both of the privileges.

However, Southern Bell responded to the interrogatory with whatever non-privileged information it had, i.e., information that was independent of that contained in the analysis. Thus, Public Counsel's assertion that the information provided by Southern Bell sprang from the privileged analysis (see paragraph 7 of Public Counsel's Motion) is, on its face, patently incorrect and misleading. Southern Bell provided all information called for by the interrogatories so long as it was not privileged.

4. Public Counsel now claims that the Commission should impose a penalty on Southern Bell for the Company's allegedly filing false Schedule 11s.<sup>1</sup> Public Counsel bases its argument on the theory that, because the analysis referred to above contains "adverse findings", the form 11s in question must be false. Public Counsel then argues that, because Southern Bell has not "corrected" these form 11s based on the information contained in the privileged analysis, it must be guilty of something and therefore a penalty should be imposed. In essence Public Counsel argues that the public records law is superior to the attorney-client privilege as well as the attorney work product privilege.

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<sup>1</sup> Public Counsel filed a motion identical to this one in Docket No. 920260-TL. Southern Bell filed its response to that motion on July 28, 1992.

5. The mere fact that an analysis may be related to data that may otherwise be a public record has no bearing on the privileged status of the analysis itself. The analysis process involved the selection, review and interpretation of various data, which process clearly removes the analysis from the realm of public record. It is not the basic data that are privileged; Public Counsel has access to those data, many of which have been provided to it in discovery. Rather, it is the conclusions drawn from the complex analytical process and that process itself which are protected from discovery. If one were to accept Public Counsel's logic, almost no analysis or audit could ever be privileged since the ultimate source data reviewed in the analysis will rarely, if ever, be privileged. Such a conclusion would clearly be incorrect and Public Counsel's assertion should be rejected out of hand.

6. As previously discussed, the information provided in response to Item No. 8 of Public Counsel's Twenty-Sixth Set of Interrogatories in Docket No. 910163 did not stem from the privileged analysis. Moreover, the information provided was not discovered until after the relevant Schedule 11 was filed and was promptly provided to Public Counsel and the Commission in response to Public Counsel's interrogatories. Thus, no penalty

is warranted. Southern Bell conducted itself properly in correcting the errors.

7. Public Counsel's basic assertion, repeated again in its Motion to Impose a Penalty, that the attorney-client and attorney work product privileges do not apply to the internal analysis is wrong. Communications between attorneys and their clients are 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 Florida Public Service 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 (the signed original of which is

attached to and filed with Southern Bell's Opposition to Public Counsel's Supplement to Public Counsel's First Motion to Compel 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. 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.<sup>2</sup> In accordance with such limited distribution, it is clear that the information was confidential and subject to a valid 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

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<sup>2</sup> Limited distribution was also made to the Internal Auditing hierarchy.



particular analysis was specifically requested by the Legal Department and would not have been performed without that direct request. Thus, it does not constitute a routine business record, 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, i.e., the analysis that it requested. The analysis is information that 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. Southern Bell also submits that the analysis constitutes the work product of attorneys and agents for Southern Bell which should be shielded from discovery under Rule 1.280(b)(i), 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 discretion of a party. Hickman v. Taylor, 239 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). A document is prepared in anticipation of litigation if it is one that would not otherwise be required to be prepared. See Reynolds v. Hoffman, 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, 50 So.2d 115 (Fla. 1949).

12. 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). It was prepared at the direct request of Southern Bell's Florida Legal Department, in connection with Docket No. 910163, 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.

13. Florida Rules of Civil Procedure, Rule 1.280(b)(2) states that an 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 provided most of these materials to Public Counsel in response to previous interrogatories and requests for production filed in Docket No. 910163. 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 by Public Counsel to the contrary would simply be a request for the Commission to order Southern

Bell to do Public Counsel's work for it. This should not be permitted.

14. Ultimately, a review of the arguments contained in Public Counsel's Motion to Impose a Penalty, when taken in conjunction with its Motion to Compel dated July 20, 1992, reveals that the former motion is no more than one more attempt, through the back door, to obtain Southern Bell's privileged audit. Public Counsel should not be permitted to so obtain this document.

15. In its Motion to Impose a Penalty, Public Counsel argues that the analysis must be provided because it may have some hypothetical bearing on whether or not Southern Bell has filed with this Commission Schedule 11 reports containing incorrect information. From this premise, Public Counsel jumps to the conclusion that Southern Bell should be penalized for failing to provide this analysis, which may or may not contain information regarding the correctness of Southern Bell's Schedule 11 filings. Yet, what Public Counsel has done is to place the cart before the horse. The ultimate issue in this proceeding is whether any of Southern Bell's employees may have falsified trouble reports such that the Company may have inadvertently filed incorrect reports with the Commission. Public Counsel is seeking to have this Commission, in the middle of this pending

docket, penalize Southern Bell for purported acts, whose existence or not is the ultimate issue in this very same docket. It seeks to do this even prior to the conclusion of discovery in this matter, let alone a finding by an impartial tribunal of any wrongdoing on the part of any employee of Southern Bell.

16. Information regarding the correctness vel non of particular Schedule 11 filings for the North Dade and Gainesville exchanges was determined as a consequence of Southern Bell's responses to particular discovery requests filed by Public Counsel in this matter. In no way did Southern Bell seek to hide or otherwise prevent Public Counsel and the Commission from obtaining this information. To argue, as does Public Counsel, that Southern Bell should be penalized in this context is, at best, self serving. The issue of whether or not Southern Bell's Schedule 11 filings are incorrect is clearly before the Commission. Southern Bell has responded properly and fully to discovery propounded upon it. The Company determined that in two instances a Schedule 11 filing may have been affected and so informed Public Counsel and this Commission. There is nothing left to correct in this regard. Thus, Public Counsel cannot correctly argue that Southern Bell should be penalized for failing to alert the Commission to this problem - the Company has already done so.

17. With respect to the privileged analysis in dispute, as explained above, Public Counsel has access to the same information as did Southern Bell when the analysis was performed. Public Counsel has demonstrated throughout this and other proceedings that it is a highly sophisticated party, capable of analyzing large amounts of complex data. If Public Counsel so wishes, it can conduct the same type of study as performed in the analysis, using the data provided to it in discovery. The results of such a study, if not otherwise objectionable, can be used in the hearing that will be held in this proceeding. At that time, and based upon the evidence presented, Public Counsel will be able to argue whether or not Southern Bell has filed improper reports with the Commission and, if so, what the consequences should be. For Public Counsel to argue today, however, that the Commission should impose a fine on Southern Bell is grossly premature. Southern Bell has provided to this Commission and Public Counsel all non-privileged information. Public Counsel cannot simply argue that there may have been incorrect filings to breach Southern Bell's fundamental legal right to maintain, on a protected basis, privileged information. Indeed, it appears that the reason for Public Counsel's making this argument is an effort to obtain what it cannot otherwise properly get: Southern Bell's privileged analysis. This

Commission should not permit this and should deny Public Counsel's Motion in its entirety.

Southern Bell therefore respectfully requests that the Florida Public Service Commission deny Public Counsel's Motion to Impose a Penalty on Southern Bell.

Respectfully submitted this 28th day of July, 1992.

ATTORNEYS FOR SOUTHERN BELL  
TELEPHONE AND TELEGRAPH COMPANY

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"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 12<sup>th</sup> day of June, 1992.

Shirley T. Johnson  
Shirley T. Johnson

Sworn to and subscribed  
before me this 12<sup>th</sup>  
day of June,  
1992.

Kiki Papadopoulos  
Notary Public

My Commission Expires:

Notary Public, DeKalb County, Ga.  
My Commission Expires Feb. 24, 1995