

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the )  
Integrity of Southern Bell's ) Docket No. 910163-TL  
Repair Service Activities and )  
Reports )

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

Show Cause Proceeding Against )  
Southern Bell Telephone and ) Docket No. 900960-TL  
Telegraph Company for Misbilling )  
Customers )

Investigation into Southern Bell )  
Telephone and Telegraph ) Docket No. 910727-TL  
Company's Compliance with Rule )  
25-4.110(2), F.A.C. )  
February 24, 1993

**CITIZENS' FIFTEENTH MOTION TO COMPEL AND REQUEST  
FOR IN CAMERA INSPECTION OF DOCUMENTS**

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, request the Florida Public Service Commission ("Commission") to compel BellSouth Telecommunications, Inc., ("BellSouth") d/b/a/ Southern Bell Telephone and Telegraph Company to produce each of the documents responsive to the Citizens' thirty-sixth set of requests for production of documents dated December 23, 1992, and to conduct an in camera inspection of all documents and portions of documents withheld by BellSouth based on claims of attorney-client and work product privileges.

1. Citizens' Thirty-sixth Set of Requests for Production of Documents to BellSouth Telecommunications, Inc., 6, Docket No. 910163-TL (Dec. 23, 1992) [hereinafter Citizens' 36th Request] asked BellSouth to:

1. Please provide Dave Mower's notes related to his responsibilities for disciplining individual employees, which may include but is not limited to his conversation with Mr. Charles Cuthbertson.

BellSouth raised the following specific objection to producing the requested information:

7. With respect to Request No. 1, Southern Bell objects to this request on the basis that it calls for the production of proprietary confidential business information in the form of information relating to Company employee-related disciplinary activities. These documents contain specific references to the individuals involved in disciplinary activities and other matters pertaining to such disciplinary activity, which documentation was created for internal Company purposes and was not intended for public disclosure. The information in such documents is unrelated to any normal compensation, duties, or responsibilities of such employees. Consequently, pursuant to § 364.183(f), Florida Statutes, this information is exempt from the inspection and review provisions of § 119.07, Florida Statutes. Notwithstanding this objection, Southern Bell will produce responsive documents, not otherwise privileged, that are in its possession, custody, or control at a mutually convenient time and place subject to the Company's Motion for Temporary Protective Order set forth above. Southern Bell objects to producing any responsive documents that comprise a substantive portion of or incorporate any of the substance of, the privileged internal investigations commissioned and supervised by attorneys for Southern Bell. These investigations, and the information generated as a result, are privileged on the basis of the Attorney Client Privilege and Work Product Doctrine.

Southern Bell Telephone and Telegraph Company's Response and Objections to Public Counsel's Thirty-Sixth Request for Production of Documents and Motions for Permanent and Temporary Protective Orders, 4-5, Docket No.910163-TL (Jan. 28, 1993) [hereinafter BellSouth's Response].

2. Citizens' also requested the company to:

2. Please provide all 1992 and 1993 audits or re-audits of the LMOS (Loop Operation Maintenance System), MOOSA (Mechanized Out of Service Adjustments), KSRI (Key Service and Revenue Indicators), PSC Schedule 11, and Operational Review audits first performed in 1991.

Citizens' 36th Request, at 6. BellSouth responded:

8. With respect to Request No. 2, Southern Bell objects to this request on the basis that it calls for the production of privileged documents. The documents responsive to this request were specifically generated as a result of audits conducted originally at the direct request of, and under the direct supervision of, attorneys for Southern Bell. Any reaudits were likewise conducted at the direct request and under the direct supervision of the Legal Department. The information obtained from these documents was used by attorneys for Southern Bell to render legal advice and counsel to the Company in anticipation of litigation.

BellSouth's Response, at 5-6 (emphasis added).

3. Citizens' requested the company to:

3. Please provide the pleadings and/or complaints, transcripts, and final case summaries, settlements and/or dispositions, for all grievances filed in 1992 by network employees relating to discipline imposed due to falsification of customer repair records or other issues related to this docket.

Citizens' 36th Request, at 6. BellSouth responded:

9. With respect to Request No. 3, Southern Bell objects to this request on the basis that some of

the information contained in the documents responsive to the request is either privileged information or proprietary confidential business information. To the extent information contained in any of the documents otherwise responsive to this request, constitutes a substantive record of the details of any privileged audit or other investigatory activity, such information is not discoverable based on the Attorney Client Privilege or the Work Product Doctrine, or both. In addition, some of the responsive documents contain proprietary confidential business information in the form of employee specific personnel information unrelated to compensation, duties, qualifications or responsibilities. This information is specifically considered to be proprietary confidential business information pursuant to Section 364.183(f), Florida Statutes. Notwithstanding this objection, Southern Bell will produce these responsive documents, to the extent not privileged in whole or in part, in its possession, custody, or control at a mutually convenient time and place, subject to the Company's Motion for Temporary Protective Order set forth above.

BellSouth's Response, at 6-7 (emphasis added).

4. Citizens requested the company to:

5. Please provide all internal documents related to this docket written since January 1992 that were not previously provided. This includes any documents concerning disciplining of employees related to the company's internal investigation.

Citizens' 36th Request, at 6-7. BellSouth responded:

11. With respect to Request No. 5, Southern Bell objects to this request on the basis that it is overly vague and ambiguous, and Southern Bell cannot determine with reasonable certainty what documents are being sought. Public Counsel's request seeks documents "...written since January, 1992 that were not previously provided." Read literally, this request seeks all documents that Southern Bell has in its possession, custody, or control, created after January, 1992, which Public Counsel also has not yet requested. Such an overly broad and vague reference to unspecified documents is both inappropriate and objectionable. However, since Public Counsel has specified that

it is seeking production of certain documents "...concerning disciplining of employees..." related to matters covered under this docket, Southern Bell will produce such responsive documents, subject to the same objections and conditions set forth in the Company's response to Request No. 3.

BellSouth's Response, at 7.

5. Citizens requested the company to:

9. Please provide a copy of all internal and public documents dealing with the report of the Statewide Grand Jury and the settlement with the Statewide Prosecutor, including but not limited to news releases prepared by the company, briefings for higher management and notification of employees and retirees.

Citizens' 36th Request, 6-7. BellSouth responded:

15. With respect to Request No. 9, Southern Bell will produce responsive documents, not otherwise privileged, that are in its possession, custody, or control at a mutually convenient time and place.

BellSouth's Response, at 8 (emphasis added).

6. In addition to the specific above objections, BellSouth repeated its general objections to Citizens' instructions to provide a "list identifying each document for which privilege is claimed, together with the following information: date, sender, recipients, recipients of copies, subject matter of the document, and the basis upon which such privilege is claimed." Citizens' 36th Request, 1, ¶ 1. BellSouth stated that "[to] the extent a document responsive to any of the requests is subject to an applicable privilege, some of the information requested by Public Counsel would be similarly privileged and therefore not subject to discovery."

7. BellSouth also generally objected to Citizens' request that the company provide a description of the sequence or order of any DLETHs or customer billing records and the identity of persons providing the information. Citizens' 36th Request, 4, ¶ 9. The company claims that this request is "patently unreasonable" and that any sequence or order would be readily apparent. BellSouth's Response, 3, ¶ 2. This instruction was added to Citizens' requests when the company produced a box full of DLETHs in no discernible order. See Citizens' Fourteenth Motion to Compel and Request for In Camera Inspection of Documents, Dockets Nos. 910163-TL, 900960-TL, 920260-TL (Jan. 28, 1993). The DLETHs were not in any discernible order -- not by telephone number, date, or order corresponding to the Operational Review that they were to match. Additionally, several DLETHs were provided that were not requested. It took Public Counsel's staff a full week just to reorder the DLETHs in sequence corresponding to the Operational Review. BellSouth stated that the information had been provided in the same order as it was stored. However, in order to avoid wasted time and effort on future productions, Public Counsel asked BellSouth to describe the order of these types of documents and the persons pulling the documents so any questions as to order could easily be traced back to the originator. Public Counsel feels that this request is reasonable in light of prior production problems.

8. BellSouth generally objected to Public Counsel's definition of "document(s)" and "you" and "your" and relevance of affiliate information. Public Counsel has responded to these general objections in prior motions and adopts its response by reference herein.

Citizens' Motion to Compel and Request for In Camera Inspection of Documents, (Docket no. 910163-TL, May 21, 1992). Prehearing Officer, Commissioner Clark, has ruled on these objections; therefore, these objections are moot. In re: Comprehensive Review of the Revenue Requirements and Rate Stabilization Plan of Southern Bell Telephone and Telegraph Company, Order No. PSC-93-0071-PCO-TL, Docket No. 920260-TL (Jan. 15, 1993) [hereinafter Order No. PSC-93-0071-PCO-TL].

9. On January 28, 1993, Commissioner Clark issued a prehearing order finding that the company's internal audits and panel discipline recommendations were not privileged under either the work product doctrine or the attorney-client privilege. Order Granting Public Counsel's Motions for in Camera Inspection of Documents and Motions to Compel, Dockets Nos. 910163-TL, 920260-TL, 9101727-TL, 900960-TL; Order No. PSC-93-0151-CFO-TL (Jan. 28, 1993); aff'd by full comm'n, Feb. 18, 1993 agenda conf. (bench vote 5/0). Commissioner Clark found that the company's need to continuously monitor its monopoly operations to ensure compliance with Commission rules required it to perform such audits as a business necessity. Id. She found that decisions on whether to discipline employees was a business function, which precluded these documents from either the attorney-client privilege or the work product doctrine. Id. For the same reasons, none of the withheld documents are privileged.

10. Citizens assert that their requests, items 1, 2, 3, and 5 all seek essentially the same information. Item 1 seeks the production of notes made by a personnel manager related to the disciplining of employees. Item 2 seeks the production of the

reaudits performed in 1992 of the same audits found not to be privileged in Commissioner Clark's order. Item 3 seeks all final dispositions of grievances filed by employees, who have been disciplined in relation to the issues in this docket. As Commissioner Clark found, disciplining employees is a business decision, which does not preclude these documents from discovery privileges.

11. Item 5 asks the company to provide all documents relevant to this docket that were produced since January 1992, specifically those documents related to employee discipline. Any discipline information relevant to the repair services docket has already been ruled open to discovery. Order No. PSC-93-0151-CFO-TL.

12. Item 9 asks the company to produce all internal and public documents related to the company's settlement with the Statewide Prosecutor. BellSouth has claimed privilege for documents it has withheld. Without a listing of withheld documents and the basis of the privilege claim, Citizens cannot present their arguments against privilege. If the basis for the privilege claim is the grand jury secrecy rule, then Citizens reassert their prior arguments and incorporate those arguments by reference herein. See Citizens' Fourteenth Motion to Compel and Request for In Camera Inspection of Documents, Dockets Nos. 910163-TL, 900960-TL, 920260-TL (Jan. 29, 1993).

13. In respect to Item 2, the reaudits of the five audits found to be not privileged by the Commission, BellSouth's chief auditor, stated that the company's policy was to reaudit any internal audit that was rated "significant adverse findings" in the succeeding year.



Deposition of Shirley T. Johnson, p.55, lines 17-19.<sup>1</sup> As these audits were so rated,<sup>2</sup> it would be standard company policy to reaudit these five audits in a subsequent year. As this is a routine business practice, the reaudits are not privileged under the business exception to the attorney-client and work product privileges. See Soeder v. General Dynamics, 90 F.R.D. 253 (1980); Order Granting Public Counsel's Motions for In Camera Inspection of Documents and Motions to Compel, Dockets Nos. 910163-TL, 920260-TL, 900960-TL, 910727-TL (Jan. 28, 1993); aff'd on reconsideration, agenda conf. (Feb. 18, 1993).

14. BellSouth has failed to demonstrate that the documents being withheld are privileged. See Hartford Accident & Indem. Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981). Nevertheless, the Commission can only determine the existence of a privilege after a careful

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<sup>1</sup> Ms. Johnson's deposition was taken on October 14, 1992. Citizens filed a motion to compel her answers to certain deposition questions on October 23, 1992. Citizens' Motion to Compel BellSouth Telecommunications' Operations Manager -- Florida Internal Auditing Department -- Shirley T. Johnson, and BellSouth Telecommunications' Human Resource Operations Manager Dwane Ward, To Answer Deposition Questions and Motion to Strike the Affidavits of Shirley T. Johnson, Docket No. 910163-TL (Oct. 23, 1992) (decision pending). A complete copy of her deposition transcript is attached to that motion. A decision is pending on the confidentiality of page 7, lines 6-7 of that deposition. No request for confidentiality was received for page 55, which is attached. [Attachment A]

<sup>2</sup> See Attachment A to Southern Bell Telephone and Telegraph Company's Opposition to Public Counsel's First Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 920260-TL (May 15, 1992), which indicates that four of the audits in question were so rated. The rating for the fifth audit (Operational Review) would be disclosed by the company's Report of Completed Audit, which is the subject of another pending motion. Citizens' Twelfth Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (Dec. 21, 1992).

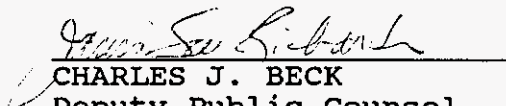
examination and narrow application of the law to the specific documents in an in camera inspection. Eastern Air Lines v. Gellert, 431 So. 2d 329 (Fla. 3d DCA 1983).

15. BellSouth has asserted that documents responsive to requests 1 and 3 are proprietary, confidential business information. BellSouth Response, 4-5, ¶ 7; 6-7, ¶ 9. The information deals with employee disciplinary matters. BellSouth's motion fails to recognize that the Commission ruled against it in a number of similar circumstances. See Order Denying Southern Bell Telephone and Telegraph Company's Motion for Confidential Treatment of Document No. 3878-91, 91 F.P.S.C. 10:356 (Oct. 1991) (Docket No. 900960-TL; Order No. 25238); Order Denying Southern Bell Telephone and Telegraph's Request for Confidential Classification of Document No. 0372-91, 91 F.P.S.C. 10:353 (Oct. 1991) (Docket No. 900960-TL; Order No. 25237); and Order Denying Request for Confidentiality, 91 F.P.S.C. 3:334 (Mar. 1991) (Docket No. 900960-TL; Order No. 24226). Public Counsel has fully briefed its position on this issue in prior motions and adopts its arguments by reference herein. Citizens' Response to Southern Bell's Request for Confidential Classification and Motion for Permanent Protective Order, Docket No. 910163-TL (Sept. 17, 1993).

WHEREFORE Citizens respectfully request this Commission to conduct an in camera inspection of the withheld documents and to compel BellSouth to produce the documents to Public Counsel.

Respectfully submitted,

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**ATTACHMENT A: EXCERPT FROM DEPOSITION OF  
SHIRLEY T. JOHNSON**

ORIGINAL

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 910163-TL

FILED: October 7, 1992

In the Matter of:

Petition on behalf of  
CITIZENS OF THE STATE OF FLORIDA  
to initiate investigation into integrity of  
SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY'S  
repair service activities and reports.

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DEPOSITION OF: SHIRLEY T. JOHNSON

DATE: October 14, 1992

TIME: Commenced at: 11:00 a.m.  
Concluded at: 12:25 p.m.

PLACE: Southern Bell Telephone and Telegraph Co.  
666 Northwest 79th Avenue, Room 674  
Miami, Florida 33126

REPORTED BY: JOHN J. BLUE,  
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TAKEN BY: The Citizens of Florida, by and through  
Janis Sue Richardson,  
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ORIGINAL

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1           A.       No.    The voucher I referred to would be  
2 several years old.

3           Q.       I see.

4           A.       And also I believe there was a contract  
5 audit.   There could be other audits and have been.  
6 So, no.

7           Q.       Are followup audits done?

8           A.       Yes.

9           Q.       When?

10           MR. BEATTY:   When generally?

11           Q.       (BY MS. RICHARDSON):   Generically,  
12 generally, yes.

13           A.       On audits that are rated satisfactorily  
14 with findings SF, followup is performed after the  
15 departments have stated the corrective action will  
16 take place, but no more than a year after the audit.

17                    On audits which are rated significant  
18 adverse findings, a reaudit is performed, generally  
19 within a year.

20           Q.       How were these five audits rated?

21           MR. BEATTY:   Objection.

22           Q.       (BY MS. RICHARDSON):   How were these  
23 particular five audits rated?

24                    MR. BEATTY:   Objection.   For her to  
25 answer that question would obviously reveal

**CERTIFICATE OF SERVICE  
DOCKET NO. 920260-TL**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 24th day of February, 1993.

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