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May 13, 1994

TL
022V

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, Florida 32301

920260-TL

Re: Docket No. (910163-TL) - Repair Investigation

Dear Mrs. Bayo:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Reply to Attorney Generals's Response to Motion for Return of Documents Held In Camera, 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,

Harris R. Anthony
Harris R. Anthony (WJ)

- ACK _____
- ATL _____
- ATL _____
- CFE _____
- CFE _____

CFE Enclosures

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

- 1 _____
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CERTIFICATE OF SERVICE
Docket No. 910163-TL

I HEREBY CERTIFY that a copy of the foregoing has been
furnished by United States Mail this 13th day of May, 1994
to:

Tracy Hatch
Division of Legal Services
Florida Public Svc. Commission
101 East Gaines Street
Tallahassee, FL 32399-0863

Charles J. Beck
Deputy Public Counsel
Office of the Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Michael B. Gross
Assistant Attorney General
Office of Attorney General
Department of Legal Affairs
PL-01 The Capitol
Tallahassee, FL 32399-1050

Harris R. Anthony
(copy)

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) Filed: May 13, 1994
integrity of Southern Bell)
Telephone and Telegraph Company's)
repair service activities and)
reports.)
_____)

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
REPLY TO ATTORNEY GENERAL'S RESPONSE TO MOTION
FOR RETURN OF DOCUMENTS HELD IN CAMERA**

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell"), and files this reply to the Attorney General's response to Southern Bell's Motion for Return of Documents Held In Camera (the "Motion"), which documents are also the subject of the March 10, 1994 order of the Florida Supreme Court.

1. Southern Bell has requested the return of all of its documents currently held in camera by the Florida Public Service Commission (the "Commission"). As stated in Southern Bell's Motion, Docket No. 910163-TL, the case in which the documents were at issue, has been settled and thus resolved with respect to all substantive issues. Neither the Office of Public Counsel (the "OPC"), the Commission, nor anyone else continues to take discovery in that docket. Indeed, the Office of the Attorney General ("AG") never took any discovery in this investigatory docket. Now, however, the AG attempts to inject itself into the proceedings at the Commission level -- proceedings that the

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parties have already settled -- and interfere with the orderly conclusion of the Docket by filing a response consisting of flawed logic, mischaracterizations of fact and law, and misplaced attacks on the integrity of Southern Bell and its counsel.

2. Most of the AG's assertions are incorrect on their face, and require no elaboration beyond reference to Southern Bell's initial Motion. Certain misstatements in the AG's response, however, warrant the following summary reply.

The Documents Held In Camera Are Not Held Pursuant to a Currently Operable Discovery Request

3. The AG disputes the notion that the Commission does not hold the documents pursuant to normal discovery procedures. Rather, the AG asserts that "the Commission holds the documents as a direct consequence of Public Counsel's discovery request."

4. The AG's logic is totally flawed. Certainly, the documents would never have been at issue but for OPC's discovery requests. However, this misses the mark. Southern Bell declined to produce the documents in response to discovery and asserted its privilege and work product rights. The Commission's current possession of Southern Bell's documents is only "as a direct consequence" of Southern Bell's agreement to produce the documents for in camera inspection, solely for the purpose of allowing resolution of Southern Bell's privilege and work product claims.

5. Counsel for the Commission appears to be of the same view. As noted in the April 22, 1994 correspondence from staff counsel for the Commission to the AG:

Each of the requested documents are in the possession of the Commission solely for the limited purpose of conducting an in camera inspection and resolution of the allegations of privilege. The documents are not in the Commission's possession pursuant to a response to discovery or otherwise in the conduct of business of the Commission.

(Copy attached, emphasis added).

6. By analogy, Rule 25-22.006(3)(a), Florida Administrative Code, provides that a regulated utility's obligation to file a notice of intent does not even begin to run until "staff has obtained the material." As was made crystal clear by the Commission's counsel, Mr. Bellak, in oral argument to the Supreme Court, the Commission's staff was never afforded access to the documents held in camera, nor would that have been appropriate.

7. It is simply beyond question that the Commission never received Southern Bell's documents in response to a discovery request, or for any purpose other than to allow the Commission to rule on Southern Bell's claims of privilege and work product. The case in which the documents were received for that limited purpose has now concluded. As the documents were never fully in the Commission's possession in the first place, they should now be returned.

The Audits

8. The AG asserts that the Audits "are relevant to the pending dockets and a repetition of the current dispute is a veritable certainty if the documents are returned." Even if the AG were correct and the Commission decided to hold workshops on service issues, the documents in question may or may not be relevant to the course of such proceedings, which would be separate from the proceedings predating the settlement. If they were, then the privileged status vel non of these documents has been resolved and appropriate discovery could be made. The AG's gratuitous claims to the contrary simply have no basis.

9. Moreover, even if one were to accept the AG's premise that the Audits are currently held pursuant to a formal discovery request, the documents must be returned pursuant to Rule 25-22.006(5)(d), Florida Administrative Code.

10. With respect to "confidential information" obtained pursuant to formal discovery, Rule 25-22.006(5)(d), Florida Administrative Code, provides:

Confidential Information which has not been entered into the official record of the proceeding shall be returned to the utility or person who provided the information no

later than 60 days after the final order,
unless the final order is appealed.¹

This is directly applicable here. The Audits are clearly proprietary confidential information under sections 119.07(3)(a), 364.183(2) and 364.183(3)(b), Florida Statutes.² It has now been more than 60 days since the Commission issued its order approving the settlement. Accordingly, the Audits should be returned to Southern Bell pursuant to the Commission's own rules.

Panel Recommendations

11. The AG accuses Southern Bell of "obstinate resistance to production" and requests that Southern Bell be required to redact documents at the Commission's offices.³ This accusation is clearly unfounded. Southern Bell did not refuse to produce its documents; it produced its documents to the Commission in camera. The AG's apparent concern is that Southern Bell asserted its privilege and work product rights. A substantial number of

¹ Rule 25-22,006(5)(d) pertains to materials obtained in formal discovery. Obviously Southern Bell disputes that these materials have been obtained by the Commission in discovery, as opposed to merely produced in camera. Even accepting the AG's position, however, the Rule requires the documents to be returned.

² Even though the Audits have yet to be provided to Staff within the meaning of Rule 25-22.006(3)(a), Southern Bell, to protect its rights, has filed its notice of intent to seek confidential treatment.

³ Again, as with all other document categories, the Commission need not even reach this argument, because the case has been settled, all documents held in camera should be returned. See supra and Southern Bell's initial Motion.

those assertions were upheld by the Florida Supreme Court, which flatly rejected many of the somewhat novel positions taken by the AG in those appeals. To characterize Southern Bell's discovery conduct as an "obstinate resistance to production" is thus simply revisionist history in the making. It did not happen. Accordingly, there is no reason for the Commission to take the extraordinary step of refusing to return the documents in question to Southern Bell so that it can redact them per the Supreme Court's order.

Employee Statements

12. Attorney/Client Privilege. The Supreme Court's opinion was very clear. Statements made directly to counsel are privileged; statements made to security personnel are not. Southern Bell v. Deason, 19 F.L.W. 119, 122 (March 10, 1994). Southern Bell supported its Motion, insofar as it relates to the return of certain employee statements, with competent evidence -- affidavits from the very individuals who took the statements -- that those statements were communications directly to the attorneys. The evidence with respect to those identified statements is undisputed. Under the Supreme Court's opinion, then, the statements identified in the affidavits are privileged.

13. The AG argues that security personnel were in the room during the employee interviews at issue.⁴ The Court's opinion, however, does not state that attorneys cannot have an assistant in the room when statements are taken. Attorneys take privileged statements every day with investigators, paralegals and secretaries in the room. What the Court held was that statements made directly to security personnel are not privileged. This is a far cry from saying that the privilege would be waived merely because security personnel were in the room and assisting counsel.

14. The AG's response also seeks to attack Southern Bell's credibility by stating, for example, "the Attorney General submits that Southern Bell's self-serving affidavits are utterly lacking in credibility at any level of scrutiny, much less at a heightened one..." Implicit in this statement is the fact that the AG has no evidence to refute Southern Bell's affidavits, and thus must resort to personal attacks. There is simply no basis for such charges, and the AG's vitriolic attacks on the credibility of Southern Bell's counsel should be disregarded in

⁴ Briefly, Southern Bell's attorneys created a procedure whereby they interviewed certain Southern Bell employees with security personnel in the room. The security personnel took notes and prepared draft statements for the attorneys' review and discussion with the employees. In other words, the security personnel provided logistical assistance to the attorneys with respect to the Statements identified in the affidavits.

toto. Absent some evidentiary assertion, the AG's response adds absolutely nothing of value.

15. Work Product. The Court noted that materials prepared in anticipation of litigation by or for a party or its representative are protected from discovery. Id. at 121. Even with respect to employee statements taken by security personnel (which the AG argues are not privileged as attorney-client communications) the Court stated "it is evident that the employees' interviews with security personnel were directed by counsel in anticipation of litigation" and concluded "Southern Bell has proven that the employee interviews were conducted in anticipation of litigation." Id. For all practical purposes, this should end any dispute concerning the employee statements. Nevertheless, in its fervor to avoid the Court's opinion, the AG asserts that it can deliver a "coup de grace" showing that, notwithstanding the Court's conclusions, the employee statements are not work product prepared in anticipation of litigation. AG Response, at 11. In this the AG is simply wrong.

16. In its argument, the AG cites to the Court's opinion with respect to the panel recommendations. Briefly, the Court held that Southern Bell may redact any notes, thoughts or impressions of Southern Bell's counsel that are printed on the panel recommendations. Id. According to the AG, this means that counsel's notes, thoughts or mental impressions were protected opinion work product, "but information otherwise shared with

management, i.e., employee statements, did not qualify as fact work product." AG Response, at 11. This is a blatant mischaracterization of the Court's opinion and shows the AG's objection to be wholly lacking in foundation.

17. The panel recommendations were based upon communications from Southern Bell's attorneys to certain human resource personnel of information gleaned from the employee statements. Id. The Court held that the panel recommendations themselves did not constitute work product because they were not prepared in anticipation of litigation.⁵ Id. The Court did not, however, hold that the employee statements themselves "did not qualify as fact work product." as suggested by the AG. Rather, the Court specifically noted that the genesis for the panel recommendations, i.e., the employee statements, were protected work product. As stated by the Court:

The recommendations contain the thoughts and impressions of the personnel managers based on counsel's communications to them. Although Southern Bell has proven that the employee interviews were conducted in anticipation of litigation, it has not proven that the panel recommendations were prepared for anything other than management's decision to consider whether it should discipline company employees. The disciplining of employees is a matter within the ordinary course of business even if it arises out of the PSC's investigation of Southern Bell. The fact that the panel recommendations were

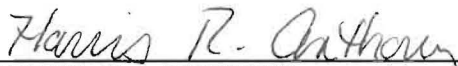
⁵ Any of counsel's notes, thoughts or impressions which were reproduced in the panel recommendations were entitled to work product treatment.

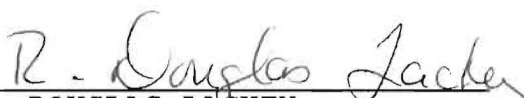
based on work product [i.e. the employee statements] does not convert them [the panel recommendations] into work product.

(emphasis added) Id. The AG's response thus clearly mischaracterized the Court's opinion, which noted specifically that the employee statements were prepared in anticipation of litigation and thus are work product.

WHEREFORE, for the reasons stated above, and for the reasons stated in Southern Bell's initial Motion for the Return of Documents Held In Camera, the AG's position be rejected, and all of Southern Bell's documents should be returned.

Respectfully submitted,


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Public Service Commission

April 22, 1994

Michael A. Gross, Esq.
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399

Re: Public Records Request

Dear Mr. Gross:

This letter is in response to your request for immediate access to the documents subject to the Florida Supreme Court's decision in Southern Bell Telephone and Telegraph Company v. J. Terry Deason et al., Cases Nos. 81,487; 81,716; 81,926; 82,196 (Fla. S. Ct. March 10, 1994). Each of the requested documents are in the possession of the Commission solely for the limited purpose of conducting an *in camera* inspection and resolution of the allegations of privilege. The documents are not in the Commission's possession pursuant to a response to discovery or otherwise in the conduct of business of the Commission.

As you are aware, Southern Bell has filed a motion seeking the return of all the documents on the basis that the documents are held solely for *in camera* inspection and not public records subject to inspection and that they are either privileged or that there is no current underlying discovery seeking to obtain the information. It is my understanding that the Attorney General intends to file a response to Southern Bell's Motion. Until this motion and your response are considered and resolved, there remains the question of whether these documents are subject to inspection pursuant to Chapter 119, Florida Statutes. It is the Staff's intent to bring these matters before the Commission as expeditiously as possible to obtain a ruling.

In addition, each of the documents subject to your request for inspection is subject to a Notice of Intent to request confidentiality or subject to continuing unresolved claims of attorney client privilege or work product privilege or both. To the extent that any of the documents are not privileged they remain subject to the provisions of Section 304.183,

Michael A. Gross, Esq.
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Florida Statutes, and Rule 25-22.006, Florida Administrative Code. Until the Commission resolves the claims of privilege and the requests for confidentiality, the documents are not subject to disclosure. Accordingly, the documents cannot be provided to you at this time.

With respect to the NARUC documents, the Staff Auditors have provided their document requests to Southern Bell. At this time, the Company has provided responsive documents to only one of the requests. The responsive documents were provided subject to a Notice of Intent pursuant to Rule 25-22.006. Accordingly, these documents cannot be provided to at this time.

At the time that the Commission disposes of the pending claims regarding the documents or the status of the documents changes, I will be happy to so inform you. If you have any questions please do not hesitate to call me at (904) 497-2740.

Sincerely


Tracy Hatch
Staff Counsel