017

IN THE SUPREME COURT OF FLORIDA

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

vs.

THE FLORIDA PUBLIC SERVICE COMMISSION,

Respondent.

Case No. 81,487

Public Service Commission
Docket No. 910163-TL

ATTORNEY GENERAL'S RESPONSE TO PETITION FOR REVIEW OF NON-FINAL ADMINISTRATIVE ACTION

ROBERT A. BUTTERWORTH
Attorney General

JASON VAIL
Assistant Attorney General
Fla. Bar no. 298824

MICHAEL TWOMEY
Assistant Attorney General
Fla. Bar no. 234354

Department of Legal Affairs
The Capitol, Suite PL-01
Tallahassee, Fla. 32399-1050
(904)488-1573

original

RESPONDENT -5899

TABLE OF CONTENTS

TABLE OF CITATIONS

STANDARD OF REVIEW

In reviewing decisions of the Public Service Commission, this court determines whether they comport with the essential requirements of law and are supported by competent substantial evidence. International Telecharge Inc. v. Wilson, 573 So. 2d 816, 819 (Fla. 1991). This court has stated that, where PSC decisions are concerned, it does not re-weigh or reevaluate evidence; it is up to the PSC to resolve evidentiary conflicts and to make all required inferences and interpretations. Manatee County v. Marks, 504 So. 2d 763 (Fla. 1987).

PRELIMINARY STATEMENT

The Attorney General will refer to the Public Service Commission as the PSC.

Individual entries in the Attorney General's appendix are referred to by exhibit number.

We will refer to the following documents as "the audits":

1. Southern Bell internal audit of customer adjustment -- Loop Operations system (LMOS).

2. Southern Bell internal audit of mechanized adjustments -- Mechanized Out of Service Adjustments (MOOSA) -- Florida.

3. Southern Bell internal audit of key service results indicator (KSRI) -- Network Customer Trouble Rate.

4. Southern Bell internal audit PSC Schedule II.

5. Southern Bell internal audit Newwork Operational Review.

We will refer to the following documents as "the panel recommendations":

1. Panel recommendations regarding craft discipline.

2. Panel recommendations regarding paygrade 5 and below discipline.

STATEMENT OF THE ISSUES

Whether documents sought by the Public Service Commission from a regulated telephone company are sheltered by the attorney-client and work product privileges.

STATEMENT OF THE CASE AND FACTS

The Attorney General adopts the Public Counsel's statement of the case and facts.

SUMMARY OF ARGUMENT

The audits and panel recommendations are not shielded by the attorney-client privilege for three reasons. First, the Legislature, by enacting statutes giving the PSC access to all documents of a regulated utility, has abrogated the attorney-client privilege for all company-created documents. See ss. 364.18(1), 364.183(1) and 350.117(1), Fla. Stat. These specific statutes supercede the more general law governing privilege, s. 90.502, Fla. Stat.

Second, this court should not follow the opinion the petitioner relies upon, Upjohn Co. v. U.S., 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). (In Upjohn, the U.S. Supreme Court rejected the "control-group" test for determining when communications with corporate employees were entitled to privileged protection. Instead, under some circumstances, the court held that a communication with any corporate employee may be privileged.) Close analysis reveals that the rational underpinnings of this case are infirm. The Upjohn approach does not encourage employee/client open communication with the employer's attorneys. An employee will be encouraged to discuss matters with an attorney as a normal incidence of employment regardless of the test used by the court to define privilege. Moreover, when things go so wrong that attorneys begin investigating, employees may face possible corporate punishment, and their the interests and those of corporation may be at odds. Promises of confidentiality in such circumstances may be confusing to employees, who may assume the promise applies in internal disciplinary proceedings, which it clearly would not.

Rather, the court should apply the control-group test as a better balance between the competing interests in full disclosure of relevant facts and the need to preserve the confidentiality of attorney-client communications. Since neither the auditors, personnel managers nor Southern Bell employees are part of the Southern Bell control group, the cadre of officials who make binding company policy and who speak for the company, the audits and panel recommendations are not privileged.

Third, if Upjohn applies in PSC proceedings, the petitioner has failed to meet its requirements. The petitioner has offered no evidence that the communications by employees to corporate counsel occurred as a result of a corporate superior's order, a critical factor in Upjohn.

The panel recommendations are not privileged because they are not communications between a client and an attorney for obtaining legal services. They are a rehash of information allegedly collected by attorneys' investigators and rewrites of the audit reports. That is, they are new, separate versions of the underlying facts. Since the underlying facts are never privileged, these documents, as new accounts of the underlying facts, cannot be privileged. In addition, the petitioner admitted before the PSC that these documents were created for the sole business purpose of disciplining employees.

Nor are the panel recommendations work product. First, the statutes giving the PSC unrestricted access to company-created documents abrogates the work product privilege in PSC proceedings as to those documents requested by the PSC.

Second, the central concern in determining whether a document is work product is the intent of its creator. Here, the recommendations were created for the sole purpose of disciplining employees -- not for litigation. The fact that the recommendations drew on information that allegedly was work product does not mean that they are work product too.

The audits, as well, are not work product. Since they were requested by the PSC, they are not protected. Moreover, the petitioner has failed to meet its burden of proving that they were created for litigation purposes. It relies solely on hearsay, which while admissible in administrative matters is insufficient unless corroborated by independent admissible evidence. Since no corroborating evidence was offered, the petitioner failed to meet its burden.

The Public Counsel met his burden of showing need and undue hardship, overriding any work product claim. The undisputed evidence showed that it took Southern Bell's audit department seven months of full-time work to produce the audits. It would be unfair to impose that effort and cost on the public.

Finally, on the equal protection claim, there is a clear rational basis for any decision not to honor either the attorney-client or work product privileges in PSC regulatory proceedings.

ARGUMENT

I. SOUTHERN BELL'S AUDITS AND THE PANEL RECOMMENDATIONS ARE NOT SHIELDED BY THE ATTORNEY-CLIENT PRIVILEGE.

A. THE LEGISLATURE HAS ABROGATED THE ATTORNEY-CLIENT PRIVILEGE IN PSC PROCEEDINGS TO THE EXTENT THAT IT PERTAINS TO DOCUMENTS CREATED BY SOUTHERN BELL.

Southern Bell has artfully managed to obscure the issues in this case. However, careful analysis, like a fresh breeze, quickly dissipates the smoke.

The petitioner starts from the assumption that the attorney-client privilege as to its documents applies in proceedings before the PSC. The assumption is superficially appealing, but it runs aground on statutes that clearly indicate that the Legislature has abrogated the privilege as to the documents of regulated telephone companies such as Southern Bell when requested by the PSC.

Here is why the privilege is not available.

Discovery in proceedings before the PSC "shall be in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure." Sec. 364.183(2), Fla. Stat.

Fla.R.Civ.P. 1.280(b)(1), setting out the scope of discovery, states, "Parties may obtain discovery regarding any matter, not privileged . . ." Thus, on the surface, it appears that the Legislature recognized that the statutory privilege in s. 90.502[1]/ applies in PSC proceedings.

---

[1] With the adoption of the Evidence Code, the Legislature converted all common law privileges in Florida into statutory ones. State v. Castellano, 460 So. 2d 480, 481 (Fla. 2d DCA 1984). Thus, it has been held, for instance, that the courts are not free to create a privilege where none is provided for by statute. Marshall v. Anderson, 459 So. 2d 384, 386 (Fla. 3d DCA 1984).

But only to a point.

At the same time, the Legislature has granted extraordinarily broad powers to the PSC to regulate public utilities enjoying monopolies in this state. This power has been called "plenary." See Southern Bell Telephone & Telegraph Co. v. Beard, 597 So. 2d 873, 874 (Fla. 1st DCA 1992)[2]/. "Plenary" means "complete in every respect: Absolute, unqualified . . . [synonym]: full."[3]/

Among these broad powers is the authority to have complete access to all of Southern Bell's records and documents. For example, s. 364.18(1), Fla. Stat., provides:

> The commission, or any person authorized by the commission, may inspect the accounts, books, records and papers of any telecommunications company . . .

In identical vein, s. 364.183(1) provides: "The commission shall have reasonable access to all company records . . ."

In addition, the PSC "may require such regular or emergency reports, including but not limited to, financial reports, as the commission deems necessary to fulfill its obligations under the law." Sec. 350.117(1), Fla. Stat. Thus, under this section, the PSC has the clear power to order Southern Bell to turn over the contested documents as "emergency reports."[4]/

---

2 Holding that Southern Bell "is subject to plenary regulation by the PSC."

3 Webster's Ninth New Collegiate Dictionary (1986), p. 903.

4 During the January 8, 1993, prehearing conference, Southern Bell admitted that, if the PSC compelled the company to do an audit of the matters at issue, it would have to conduct one. Exhibit 3, p. 27 lines 7-17, p. 28 lines 23-25 and p. 29 lines 1-16.

These are specific statutes dealing with particular documents. Stood up against the attorney-client privilege statute, s. 90.502, we find a classic conflict: one set of statutes requires full disclosure, while a second creates a privilege from disclosure. These statutes are irreconcilable -- unless this court applies the principle that specific statutes, such as those that address access in PSC proceedings to telephone company records, supercede broad statutes of general application, here the attorney client privilege. See e.g. Gretz v. Unemployment Appeals Commission, 572 So. 2d 1384 (Fla. 1991); Department of Health and Rehabilitative Services v. Healthcorp., 471 So. 2d 1312, 1314 (Fla. 1st DCA 1985).

The only way to resolve the tension between ss. 364.183(2) and s. 90.502 on the one hand and ss. 350.117(1), 364.18(1) and 364.183(1) on the other is for this court to find that a document may be privileged if sought by a party other than the PSC itself. However, if the PSC requests a company-created document, the regulated company cannot shield it with a claim of privilege.

Only this result will give full play to the Legislature's clearly expressed intention in three separate statutes to give the PSC plenary access to the documents of regulated companies.

There is strong reason to believe that the Legislature intended to significantly weaken, if not to abrogate, any exclusionary privilege in PSC proceedings. Note that s. 364.183(2) and (3) address documents containing trade secrets. In the ordinary case, trade secrets are privileged. Sec. 90.506. However, before the PSC, they are automatically considered not

privileged. Instead, they are only protected from disclosure to the public. The PSC, however, has full access to these privileged documents. It is thus clear that the Legislature intended for no statutory privilege to interfere with the PSC's access to the records and documents of a telecommunications company like Southern Bell.

In addition, it seems extremely unlikely that the Legislature intended s. 90.5055, Fla. Stat., concerning the accountants' privilege, to apply in PSC proceedings. If it did, regulated companies would be able to conceal mountains of financial data and analyses essential to PSC rate regulation.

It is significant that s. 364.183(3)(b) contemplates PSC access to internal audits -- the very documents at issue now. The Legislature has chosen to view such internal documents as only proprietary confidential business information and not as matters falling within any other potential privilege.

A legislative abrogation of the attorney-client privilege for company-created papers is consistent with the significant interests at stake in the telecommunications industry. In exchange for permission to operate a monopoly free from competition, Southern Bell must submit to regulation of its rates and the quality of its service, regulation that is in the public interest. See e.g., International Telecharge Inc. v. Wilson, 573 So. 2d 816, 819 (Fla. 1991); AT & T Communications v. Marks, 515 So. 2d 741, 743 (Fla. 1987); MCI Telecommunications v. Florida Public Service Commission, 491 So. 2d 539, 540 (Fla. 1986) (PSC had the authority to eliminate windfall in revenues to local telephone company).

In order to ensure that regulated telephone companies are operating in the public interest, broad access to company documents is essential. Without that access, a company may be able to shirk its duty to maintain quality service and it may be able to hide inefficiencies while requesting rate hikes.

In the present rate case, for instance, Southern Bell stands accused of having falsified repair reports. This matter was considered so serious that the Statewide Grand Jury looked into it. While the grand jury did not return indictments, it strongly recommended appropriate action by the PSC:

> In closing, it must be noted that the proposed settlement agreement does not contain any "punishment', per se, of the Company for its alleged failure to properly report to the Public Service Commission actual repair time for restoration of telephone service to customers whose telephones were out of service. This issue was raised in our investigation, but we have been advised that the United States Supreme Court's ruling H. J., Inc., et al v. Northwestern Bell Telephone Company, 112 S. Ct. 2306 (1992), casts doubt on our ability, or the ability of the criminal courts, to directly sanction the Company for such conduct, if it in fact occurred. We specifically note, however, that the Florida Public Service Commission has both the jurisdiction and concomitant discretion to impose severe monetary penalties on the Company if it finds that the Company has falsified reports required by PSC rules. We therefore strongly recommend that the Public Service Commission, in conjunction with its publicly mandated responsibility, investigate this matter, exercise its penal authority, and take into consideration this possible fraudulent conduct on the part of the Company in determining an appropriate rate of return.

See exhibit 1 p. 2.

If such falsifications are proven, the public interest may demand substantial adjustments in Southern Bell rates -- changes worth tens, if not hundreds, of millions of dollars.

Only full and complete disclosure of company documents ensures that the PSC can carry out its regulatory

responsibilities. By providing PSC access to all telecommunication company documents, the Legislature meant to ensure that full disclosure would be a reality. This is part of the price Southern Bell agreed to pay when it submitted to regulation in Florida.

The bulk of all records pertinent to regulation are maintained by the petitioner. Thus, full, unrestricted PSC access is essential. In view of the substantial public harm that can result from imposition of unjustified rates by a regulated monopoly, it is clear that the Legislature acted rationally by mandating unlimited PSC access to telephone company documents. Thus, public policy concerns justify a finding that privilege does not apply. See e.g., Owens-Corning Fiberglass Corp. v. Watson, 413 S.E. 2d 630 (Va. 1992) (submitting knowingly false interrogatory response waived attorney-client privilege for corporate employee's statement to counsel providing the actual factual basis for the response); Priest v. Hennessy, 409 N.E. 2d 983, 986 (N.Y. 1980) (at common law, strong public policy considerations may require disclosures over a claim of the attorney-client privilege).

In our case, not only has the Public Counsel sought the audits and the panel recommendations, but so has the PSC itself. See exhibit 7. Thus, the PSC's order requiring disclosure must be read as an affirmation of its own staff request -- a demand for which Southern Bell cannot, by law, claim any privilege.

Therefore, this court should find that the attorney-client privilege does not apply to either the audit reports or to the panel recommendations.

B. THIS COURT SHOULD NOT ADOPT THE MODIFIED SUBJECT-MATTER TEST OF UPJOHN v. U.S. AS A BASIS FOR ESTABLISHING CORPORATE ATTORNEY-CLIENT PRIVILEGE IN FLORIDA. A NARROW VIEW OF THE PRIVILEGE IS RIGHT FOR FLORIDA AND IN THESE REGULATORY PROCEEDINGS.

To the Attorney General's knowledge, this court has not determined the precise parameters of the attorney-client privilege for a corporation in general civil litigation let alone in specialized PSC proceedings. The petitioner suggests that the modified subject-matter test described in Upjohn v. U.S., 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), sheltering some communications from low-level employees, is an appropriate approach for Florida. No Florida court, to our knowledge, has adopted the Upjohn test, nor are Florida courts obliged to do so. Briggs v. Salcines, 392 So. 2d 263, 266 n. 2 (Fla. 2d DCA 1980). This is new ground for this court, and it involves complex and difficult policy considerations. If the court decides that the attorney-client privilege attaches to in-house corporate documents, the court should not follow Upjohn because the approach championed by the petitioner does not promote the reasons for the attorney-client privilege.

In Upjohn, the U.S. Supreme Court reviewed the question of whether reports from corporate employees outside the traditionally recognized "control-group" were shielded from a government subpoena by the common law attorney-client privilege. In holding that they were, the court rejected the control-group test. While disclaiming that it had adopted any criteria for reviewing similar questions in the future, the case in fact has

been read as having done just that. Specifically, the Upjohn court noted, "The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice." Upjohn, 101 S.Ct. at 685. Other courts have fathomed a test in Upjohn's language and applied it. See e.g., Bobkoski v. Board of Education of Cary Consolidated School District 26, 141 F.R.D. 88, 94 (N.D. Ill. 1992); compare Bobkoski with Marriott Corp. v. American Academy, 277 S.E. 2d 785, 791-792 (Ga. App. 1981), citing identical criteria, and calling it a modified subject-matter test.[5]/

The Supreme Court held that certain statements from low-level corporate employees were privileged for four reasons. First, the court believed that the control-group test, which protects only communications with top management, discourages attorneys from seeking significant information from low-level employees, who are more likely to have the data needed for the attorney's legal opinion. Upjohn, 101 S.Ct. at 684. For reasons not explained, the court felt that the absence of a privilege would discourage communications between a low-level employee and

---

[5] The Bobkoski court read Upjohn to set out four factors that must be satisfied before the attorney-client privilege attached to a communication with a low-level corporate employee:

1. The employee knew his or her information was needed to supply a basis for the attorney's legal advice;
2. The employee was directed by his or her corporate superior to provide the information;
3. The employee's information was helpful in enabling the attorney to provide legal advice; and
4. The information related to matters within the scope of the employee's employment.

Bobkoski, 141 F.R.D. at 94.

an attorney seeking to render legal advise to the corporation. Upjohn, 101 S.Ct. at 684.

Second, the court thought that the control-group test made "it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation policy." Ibid. Apparently, the court reasoned that to be effective in changing corporate policy an attorney's advice had to be communicated directly with low-level employees rather than top management.

Third, the court felt that the more narrow control-group test "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." Ibid. The court did not elaborate on the basis for this outlook. Evidently, this point is related to the court's concern that corporate counsel will be discouraged from making sufficient inquiries to ensure regulatory compliance.

Finally, the court saw the control-group test as "difficult to apply in practice" because of problems predicting which managers belonged to the control group. Ibid.

When reading the Supreme Court's rationale, it is surprising how sparse is the underlying factual predicate for its beliefs. The court, for example, cites no decisive source for its contention that corporate attorneys will be inhibited from interviewing low-level employees to gather sufficient information to enable them to give legal advice. Whether corporate counsel would be so inhibited is a factual matter of considerable complexity. In view of the tension between the exclusionary

nature of the privilege and the policy of open discovery,[6]/ one would expect such a major policy judgment to rest on a more solid foundation than mere supposition and assumption.

The Upjohn court recognized that the sole purpose of the privilege was to encourage open communication between attorney and client to facilitate legal representation. Upjohn 101 S.Ct. at 682.[7]/ But while deciding that a subject-based privilege best encouraged low-level employees to talk with counsel, the court relied on no facts, merely a set of fixed assumptions. On the same factual predicate available to the Supreme Court, it is possible to argue with equal force that the control-group approach neither discourages nor inhibits employee candor. Employees, it can be argued, have an interest in cooperating with corporate counsel regardless of whether their statements are privileged. Such cooperation is part of their jobs. If an employee doesn't cooperate and disclose information, corporate counsel can report this unwillingness to the employee's superiors. Disciplinary action may flow from that.

There is also reason to believe that a promise of confidentiality will not stimulate candor, and in fact may be misleading to the employee. Upjohn rests on the assumption that the employee's interests are identical to those of the company and that when things go wrong and legal problems surface the employee will put corporate interests ahead of individual ones.

---

6 See Consolidated Coal Co. v. Bucyrus-Erie Co., 432 N.E. 2d 250, 254-255 (Ill. 1982).

7 "we recognized that the purpose of the privilege to be 'to encourage clients to make full disclousre to their attorneys.'"

That is, because they are told that their statements are confidential, the employee will be encouraged to tell all for the good of the company. But when things go so wrong that an attorney-sponsored inquiry is warranted, it is reasonable for an employee to anticipate that in-house discipline may result. One's own skin or the skins of close friends may be at stake. (Where, then, is the incentive to be fully open and informative?)

When in-house discipline is a prospect, as it clearly was in this case -- witness the panel recommendations -- employees may regard a promise of confidentiality to apply in disciplinary proceedings as well as in litigation. That might be an unhappy assumption, producing statements that an employee might otherwise not make. This court must decide if the risk of unfairness to employees justifies the policy choice Southern Bell sponsors.

Moreover, it seems unbelievable that corporate counsel will simply ignore a problem and fail to investigate it out of fear that the investigation will not be protected from disclosure by some privilege. For a corporate attorney to act in such a fashion would be a breach of his or her professional responsibility to the client. Yet this is what the Supreme Court's rationale presumes.[8]/ We submit that such a pessimistic presumption is unjustified.

---

[8] See Bill Branch Chevrolet v. Philip L. Burnett, 555 So. 2d 455 (Fla. 2d DCA 1990), allegatioins of inadequate investigation or discovery by an attorney that forced the client to settle a lawsuit for a greater sum than its liability warranted stated a claim for attorney malpractice.

Thus, it cannot be said that the Supreme Court's first reason for expanding the corporate attorney-client privilege is a sound one.

The Supreme Court's second reason -- that the control group test makes it difficult to convey attorney advice to low-level employees -- is just as dubious. It presumes that top managers are out of touch with corporate problems and that when they issue instructions meant to be corporate policy they will not be heard and obeyed.

The court's third reason -- the enhancement of compliance with the law -- also lacks credibility. This point raises a curious issue, especially in this context, where the petitioner is a closely regulated business. A regulated monopoly business, such as the petitioner, has a significantly greater business interest in complying with applicable regulations than an ordinary, non-monopoly business -- a matter strongly noted by the PSC. Thus, compliance with governmental regulations affecting business presents at best a mixed question of business and legal purposes for attorney regulatory activity. After all, determining whether a business is or is not in compliance with applicable regulations can be done by the nonlawyer as well as a lawyer. Thus, an attorney dealing with many regulatory issues may not be acting in his or her capacity as an attorney. See e.g., Spectrum Systems International Corp. v. Chemical Bank, 581 N.E. 2d 1055 (N.Y. 1991), and Super Tire Engineering Co. v. Bandag Inc., 562 F.Supp. 439, 441 (E.D. Pa. 1983) (client confidences are secret only when the attorney is acting in his or

her role as a lawyer). In view of this mixed question, it is questionable whether the attorney-client privilege should apply with such broad scope as the petitioner suggests.

Fourth, the Supreme Court's conclusion that the control-group test is difficult to apply is subject to dispute. Whether a corporate officer is a member of the control group is a factual matter that can only be determined on a case-by-case basis. That is probably the weakness the Supreme Court sees in the control-group test. Upjohn, 101 S.Ct. at 684-685. However, the court's own test is subject to the same kind of case-by-case vagaries. For example, under the Upjohn approach, the claimant must show that the employee's communication was made at the direction of a corporate superior who was motivated by a desire to secure legal advice. How high up the chain of command must that superior be? That person's corporate role requires a measure of proof no more difficult than that involved in the control-group test.

Finally, the Supreme Court rejected a concern by lower federal courts that expanding the reach of the corporate attorney-client privilege would result in a "'zone of silence [that] grows large.'" Upjohn, 101 S.Ct. 685. The court said that there was little risk of this zone because the opponent could always depose employees to explore the depth of their personal knowledge of matters in litigation.

This view is fine in theory, but in the real world, theory sometimes stumbles over hard realities. In the real world, attorneys often inappropriately invoke privileges when opponents question employees about their personal knowledge. If the

opponent is determined to acquire the information, he or she must file a motion to compel and have it heard, a potentially needless waste of precious judicial time and a needless expense. In this case, for instance, Southern Bell repeatedly invoked the attorney-client privilege in the deposition of Shirley Johnson, the Southern Bell employee who supervised the internal audits, when the Public Counsel questioned her about her personal knowledge of those audits. See exhibit 2 pp. 12-13, 20-22, 37-47, 49-51, 64-65. Thus, in this case, the U.S. Supreme Court's theory about the ability of opponent's to easily secure comparable information through deposition seems less workable that one might hope.

At least one state supreme court has closely analyzed the issues presented in Upjohn and squarely rejected its approach. In Consolidated Coal Co. v. Bucyrus-Erie Co., 432 N.E. 2d 250 (Ill. 1982), one issue was whether the attorney-client privilege protected a report by an engineer that was sent to the company's attorneys during litigation. The Illinois Supreme Court extensively analyzed the major tests for determining when the attorney-client privilege attached to an employee communication. Upjohn was among the cases considered. Id., 432 N.E. 2d at 255-258. The court noted the tension generated by the competing interests in the privilege and in the openness of the litigation process, and said of the Upjohn test:

> Its potential to insulate so much material from the truth-seeking process convinces us that the privilege ought to be limited for the corporate client to the extent necessary to achieve its purposes.
>
> * * *

> The control-group test appears to us to strike a reasonable balance by protecting consultations with counsel by those who are the decisionmakers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery.

Id., 432 N.E. 2d at 257.

The Illinois Supreme Court decided that a narrow definition of the control group was not advisable, so it drew the boundaries of the control group somewhat more broadly than other courts have done. It included not only top managers, but also employees "whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority . . ." Id., 432 N.E. 2d at 258. An advisor becomes a part of the control group when "no final decision as to [the] litigation would be made without first consulting" him or her. Knief v. Sotos, 537 N.E. 2d 832, 835 (Ill. App. 1989).

Consolidated Coal makes clear that when the attorney-client privilege attaches to communications of corporate employees is a policy question. The critical issue is where to place the fulcrum between the interests.

We suggest that the Illinois Supreme Court's approach provides the best balance between these two compelling and conflicted interests. The Upjohn approach will inevitably tempt corporations to launder information through their attorneys to conceal it during discovery. Important, relevant information will be unavailable to the opponent, to the regulator, and, most importantly, to the court. The reliability of the regulatory and

judicial processes consequently will be undermined. Furthermore, Upjohn will generate much wasteful wrangling over discovery questions -- who is covered and who is not -- wrangling of the kind present in this very matter.

On the other hand, the Consolidated approach strikes the appropriate balance between the privilege and the need for open discovery. It broadens the boundaries of the attorney-client privilege to provide sufficient protection to employee communications to meet the purposes of the privilege. At the same time, it permits litigants access to valuable information and witnesses.

Applying the Consolidated control-group test to this case, we find that Southern Bell's privileges claims fail. Southern Bell cannot show, for instance, that the internal auditors or the personnel people who wrote the panel recommendations would ordinarily be "consulted for their opinions as to what legal action the corporation should pursue" in the matter before the PSC. Knief v. Sotos, 537 N.E. 2d at 835. In particular, the auditors merely provided technical analysis of the sort found not to be shielded by the privilege. See Archer Daniels Midland Co. v. Koppers Co., 485 N.E. 2d 1301 (Ill. App. 1985).

Therefore, the court should apply a control-group test to claims of corporate attorney-client privilege, and in this matter, it should conclude that Southern Bell's in-house documents are not subject to any such claim.

C. SOUTHERN BELL HAS FAILED TO MEET ITS BURDEN OF SHOWING ITS ENTITLEMENT TO THE ATTORNEY-CLIENT PRIVILEGE.

Southern Bell argues that it is entitled to the shield of the attorney-client privilege based on the principles enunciated in Upjohn Co. v. U.S., 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

Even if Upjohn, a common law privilege case, has any vitality in Florida, Southern Bell has failed to pass Upjohn's tests.

Upjohn is significant because in that case the U.S. Supreme Court expanded the possible reach of the attorney-client privilege to communications between employees of a client-corporation and its attorneys. Rejecting the "control-group" test, the court adopted a modified "subject-matter" test, holding that under limited circumstances communications between a corporation's low-level employees and corporate counsel were subject to the attorney-client privilege.

The Upjohn court identified four factors that must be satisfied before a claim of privilege can stand.

> The Court . . . did not protect all such communications from disclosure. Rather, the Court stressed: (1) that the employees knew their information was needed to supply a basis for legal advice; (2) that the employees were directed by their supervisors to provide such information; (3) that the employees' information was helpful in enabling the attorney to give his client sound and informed advice; and (4) that the information related to matters within the scope of the employees' employment. Upjohn, 449 U.S. at 394, 101 S.Ct. at 685 . . .

Bobkoski v. Board of Education of Cary Consolidated School District 26, 141 F.R.D. 88, 94 (N.D. Ill. 1992); Marriott Corp. v. American Academy, 277 S.E. 2d 785, 791-792 (Ga. App. 1981);

James Julian Inc. v. Raytheon, 93 F.R.D. 138, 141 (D. Del. 1982) (noting that the Upjohn court "held that communications between employees to corporate counsel, acting as such at the direction of corporate superiors in order to secure legal advice were privileged.")

For our present purposes, the second factor -- "that the employees were directed by their supervisors to provide such information" -- looms large. Southern Bell has provided not a single shred of evidence that the corporate employees making the communications were directed to do so by their supervisors or corporate superiors. Rather, Southern Bell's supporting affidavits demonstrate only that the disclosures were made at the request of the corporation's in-house attorneys. Petition exhibits C-G. There is no showing that these attorneys were the superiors of the internal auditors or of the people in the personnel department who wrote the panel recommendations.[9]/ (In fact, there is no factual showing of any kind about the panel recommendations, only assertions of counsel.)

Privileges should be narrowly construed because they work to exclude relevant, probative evidence. U.S. v. Suarez, 820 F.2d 1158 (11th Cir. 1987, cert. denied 484 U.S. 987, 108 S.Ct. 505, 98 L.Ed.2d 503 (1987); U.S. v. Wegner, 709 F.2d 1151, 1154 (7th Cir. 1983); Bobkoski, 141 F.R.D. at 91; Spectrum Systems Internationial Corp. v. Chemical Bank, 581 N.E.2d 1055, 1059 (N.Y. 1991). Moreover, the claimant of any privilege has the

---

9 Southern Bell's counsel admitted in the PSC prehearing that the documents were not requested by corporate superiors, but by the Southern Bell legal department. Exhibit 5 pp. 9, 15.

burden of demonstrating all the factors establishing its existence. State v. Rabin, 495 So. 2d 257, 260 (Fla. 3d DCA 1986). Such a showing is a factual matter that must be affirmatively proven by admissible evidence or affidavit (and not by bald attorney assertion). U.S. v. David, 131 F.R.D. 391, 402 (S.D. N.Y. 1990). These principles lead to the conclusion that when there is any doubt about the existence of a privilege, the court should find no privilege exists.

In this instance, the petitioner has failed to carry its burden of proving all the elements necessary under Upjohn to establish an attorney-client privilege surrounding the audit reports and the panel recommendations. Therefore, based upon Southern Bell's own leading case, there is no privilege as to these documents.

D. THE PANEL RECOMMENDATIONS ARE NOT SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE.

There are peculiar facets of the panel recommendations that clearly make them non-privileged.

Section 90.502, Fla. Stat., applies only to:

1. Communications
2. Between a client and someone who either is an attorney or someone the client reasonably believes is an attorney
3. For the purpose of securing legal advice or legal services.

By Southern Bell's own admission, the panel recommendations don't satisfy any of these factors.

First, the panel recommendations are not communications between a client and an attorney. They are documents written by people in Southern Bell's personnel department for internal corporate use. Petition p. 10; exhibit 6, transcript of Feb. 18, 1993, PSC hearing pp. 7-8. There is no evidence that these documents themselves were used to transmit information between the client and its attorneys.

Second, the panel recommendations were created not to facilitate the provision of legal services, but as instruments justifying employee discipline. Southern Bell admitted this fact during questioning at the Feb. 18, 1993, PSC hearing:

> COMMISSIONER CLARK: Let me ask you a question though. The purpose of providing it [the panel recommendations] to those other members of management was to carry out the business purpose of disciplining employees. Is that correct?
>
> MR. ANTHONY [Southern Bell counsel]: Yes, ma'am. Absolutely.

Transcript of Feb. 18, 1993, PSC hearing, p. 8. At another point during PSC proceedings, Southern Bell's counsel admitted: "These were basically documents that were prepared, as I said, by the Personnel Department to determine whether or not anybody within the Company's ranks should be disciplined."[10]/

Southern Bell arrives at its privilege claim in an interesting fashion. It states that portions of the panel recommendations contain summaries of interviews conducted with its employees and summaries of the audit documents. Petition p. 11. Southern Bell contends that these summaries, because they

---

10 Exhibit 5, transcript of the Feb. 16, 1993, PSC hearing p. 15.

are based on allegedly privileged statements, are privileged too.[11]/

There is a widely held rule of law that "Facts are not necessarily privileged simply because they are recorded on a privileged or immune document." See Big Sun Health Care Systems Inc. v. Prescott, 582 So. 2d 756, 758 (Fla. 5th DCA 1991). Recognizing this rule, the U.S. Supreme Court has said:

> The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with an attorney . . . ' The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' But may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.'

Upjohn, 101 S.Ct. at 685.

Southern Bell's claim of privilege raises the issue spotted by the Upjohn court. Here, the summaries constitute a new and distinct recitation of the underlying facts -- they are not the communications to counsel themselves. However, Southern Bell seeks to immunize them because the facts were once communicated to its attorneys.

This is an improper invocation of the attorney-client privilege which this court should not tolerate. It constitutes a bold attempt to launder important, relevant information by passing it through the hands of counsel. This court should not sanctify such a perversion of the attorney-client privilege.

---

[11] So, Southern Bell says it will release the recommendations, but only if these summaries are deleted.

II. THE AUDITS AND THE PANEL RECOMMENDATIONS ARE NOT SHIELDED BY THE WORK PRODUCT PRIVILEGE.

A. THE WORK PRODUCT PRIVILEGE DOES NOT APPLY IN REGULATORY PROCEEDINGS BEFORE THE PSC UNDER CH. 364, FLA. STAT., TO DOCUMENTS CREATED BY THE REGULATED COMPANY WHEN REQUESTED BY THE PSC.

As noted above, the Legislature has granted the PSC plenary access to the documents of regulated telephone companies. See ss. 350.117, 364.18 and 364.183, Fla. Stat.

These statutes abrogate the work product privilege for documents created in-house by nonlawyer employees of regulated companies like Southern Bell when requested by the PSC.

Since the PSC staff requested the documents at issue (see exhibit 7)[12]/ and the PSC itself ordered disclosure, the documents are not privileged.

B. THE PANEL RECOMMENDATIONS ARE NOT WORK PRODUCT.

The work product privilege is a creature of the Rules of Civil Procedure. Fla.R.Civ.P. 1.280(b)(3). Without a showing of need and undue hardship, one party may not discover materials created by an opponent in anticipation of litigation or for

---

12 Exhibit 7 consists of four documents: PSC staff's 15th, 17th and 23rd requests for production of documents, and Southern Bell's Response to Request of Public Counse for Late-Filed Exhibits.

Staff requested the audits in its production requests. See staff's 15th request p. 2, 17th request pp. 3 and 8, and 23rd request pp. 3-4.

In the Response to Request for Late-Filed Exhibits, Southern Bell notes that the parties had requested the disclosure of the panel recommendations during the deposition of Southern Bell official C. L. Cuthbertson.

Furthermore, the PSC's order to disclose the documents serves to trigger its powers under ss. 350.117, 364.18 and 364.183(1), Fla. Stat.

trial. Humana of Florida Inc. v. Evans, 519 So. 2d 1022 (Fla. 1st DCA 1987).

Work product comes in two general types: fact work product and opinion work product (generally the mental impressions, opinions, conclusions, and legal theories of counsel). State v. Rabin, 495 So. 2d 257, 262 (Fla. 3d DCA 1986).

These panel recommendations, however, were not created for the purpose of litigation or for trial -- they were created by Southern Bell's personnel department to discipline employees. Exhibit 6, transcript of Feb. 18, 1993, PSC hearing p. 7-8. The fact that these documents may have been based on allegedly privileged work product does not convert them into work product themselves.

> [T]he primary motivating purpose behind the creation of the document must be to aid in trial preparation . . . Materials assembled in the ordinary course of business, or pursuant to pubic requirements unrelated to litigation, or for other nonlitigation purposes are not entitled to [work product protection].

State Brd. of Public Welfare v. Tioga Pines, 592 N.E. 2d 1274, 1277 (Ind. App. 1992). See also Procter & Gamble v. Swilley, 462 So. 2d 1188, 1193 (Fla. 1st DCA 1985), and Waste Management Inc. v. Florida Power & Light, 571 So. 2d 507 (Fla. 2d DCA 1990) (company's OSHA report, based on work product, was not privileged).

Formulated simply, the problem is this: Southern Bell developed information through an investigation that it memorialized in an alleged work product document. The company then took this work product, extracted information from it, and created a second set of documents which it used for a business

purpose. The second set of documents -- the panel recommendations -- cannot be work product because they were created for a business purpose. Surely the disciplining of employees is a matter within the ordinary course of business, even if it arises out of a matter connected with litigation.

If this court accepts Southern Bell's position, it will create an enormous exemption from discovery for any document mentioning information that a party contends was originally generated as work product -- even though the information is later used in another document for another, nonlitigation purpose. Parties, particularly corporations, will then be able to shelter an infinite variety of documents containing relevant, probative information in clear violation of the general policy of open discovery. Cf., Super Tire Engineering Co. v. Bandag Inc., 562 F.Supp. 439, 441 (E.D. Pa. 1983) (documents are not privileged merely because they are sent to an attorney).

The work product privilege is intended to shield one party's litigation preparation from its opponent's eyes. When information generated during litigation is used for strictly business purposes, it should loose that protection because the purposes behind the privilege are no longer being served. Indeed, if there was a business purpose for the information, it can be said that it would have been collected even if litigation was not underway. Thus, the party denied protection is in the same position as if litigation was neither contemplated nor ongoing.

Therefore, since the primary purpose for the creation of the panel recommendations was to discipline Southern Bell employees, the PSC was correct in concluding that the recommendations are not work product. The documents should be disclosed unredacted.

C. SOUTHERN BELL FAILED TO MEET ITS BURDEN OF ESTABLISHING THE AUDITS AS WORK PRODUCT.

Southern Bell has filed affidavits indicating that the audits were ordered by Southern Bell's legal department. See petition exhibits C-G. These affidavits are defective to the extent that they attempt to establish that the audits were created in preparation for litigation or for trial. The affidavits are not made upon personal knowledge,[13]/ for example, but instead, they recite hearsay. See e.g. petition exhibit E paragraph 1. In the absence of other evidence, such hearsay assertions cannot carry Southern Bell's burden of proof. See s. 120.58(1)(a), Fla. Stat.

Fully recognizing the defect, Southern Bell attempts to disguise it by quoting purported letters from its in-house counsel ordering the audits because of the rate case. Petition p. 6-7. Such an assertion in the petition is insufficient. It is only an attorney claim, not evidence. These letters or an affidavit from counsel were essential to Southern Bell's meeting its burden of proof. Southern Bell should have filed the letters below, authenticating them as the Rules of Evidence require.

---

13 Personal knowledge means first hand experience. Visser v. Packer Engineering Associates Inc., 924 Fo.2d 655 (7th Cir. 1991).

Southern Bell asserts that it submitted the letters in camera to Commissioner Clark, sitting as a hearing officer. Petition p. 6 n. 5. However, such a submission constituted an ex parte communication, and this court should not tolerate it by considering Southern Bell's argument on the point.

D. THE DOCUMENTS SHOULD BE DISCLOSED BECAUSE THE PUBLIC COUNSEL MET HIS BURDEN OF DEMONSTRATING NEED AND UNDUE HARDSHIP.

Assuming that these documents are, in fact, work product, the Public Counsel made a sufficient showing of need and undue hardship to warrant the PSC's order to disclose them.

When the Public Counsel took the deposition of one of Southern Bell's internal auditors, he learned that conducting the five audits in question took at least four people working full time from April-October 1991 -- seven months. Exhibit 2 p. 33. See also exhibit 8, transcript of Jan. 8, 1993, prehearing p. 37. In fact, these five audits were the only audits conducted by Southern Bell's in-house auditors during that time. Exhibit 2 p. 33. Furthermore, Shirley Johnson, the audit supervisor, testified that the audits couldn't be duplicated without using Southern Bell's computer system. Exhibit 2 p. 11-14, 58.

Given the complex nature of the audits and the enormous expense in doing them, which if duplicated by the PSC or the Public Counsel would be borne by the public, there is competent substantial evidence to support a conclusion of need and undue hardship. It is simply unreasonable to impose the cost of verifying Southern Bell's compliance with regulatory requirements

on the public, especially when allegations of fraud are involved. In essence, the consuming public, having paid Southern Bell to conduct the audit, must pay the Public Counsel and the PSC to do all the work over again.

The documents also should be disclosed because the petitioner actively obstructed the Public Counsel's and PSC's attempts to learn how they were done, essential in determining the hardship of duplicating them. If the Public Counsel or the PSC are to duplicate the audits, obviously they must know precisely how they were conducted. Moreover, an inquiry into the means is appropriate to determine whether the hardship criteria in Fla.R.Civ.P. 1.280 are met. When the Public Counsel sought detailed information from Ms. Johnson on how the audits were conducted, at every turn Southern Bell frustrated the Public Counsel by claiming an unspecified privilege -- not for communications, but for Ms. Johnson's personal knowledge of facts. See Exhibit 2 pp. 12-13, 20-22, 37-47, 49-51, 64-65.

These objections were unwarranted because the Public Counsel's inquiries did not go to the substance of the work product, nor tend to reveal it. Rather, they went to the personal actions of the deponent and what she did in preparing the documents or what she knew about the underlying facts, so that, if needed, the Public Counsel or the PSC could duplicate the result.

A party may not obstruct discovery on a particular issue and then offer argument and evidence against the opponent. See Dodson v. Persell, 390 So. 2d 704, 708 (Fla. 1980); Hagerty v.

Southern Bell Telephone & Telegraph Co., 199 So. 570, 572, 145 Fla. 51 (1940) Cf. Roberts v. Jardine, 358 So. 2d 588, 589 (Fla. 2d DCA 1978); Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1979).

Therefore, the court should find that the Public Counsel met his burden of showing both need and undue hardship, and affirm the order requiring the release of the audits and the panel recommendations.

III. THE PSC DID NOT VIOLATE SOUTHERN BELL'S RIGHTS TO EQUAL PROTECTION.

Southern Bell contends that the PSC violated its rights to equal protection under the U.S. Constitution because it did not recognize an attorney-client privilege for the audits and the panel recommendations.

Regardless of how one looks at the matter, because Southern Bell is a regulated utility enjoying a noncompetitive monopoly market, there is a substantial rational basis for differential treatment.

The equal protection clause forbids states from denying to people within their borders equal protection of the law, which is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982).

In deciding equal protection cases, the courts use three different standards, depending on the circumstances. When the

case involves a suspect class or when government action impinges on fundamental constitutional rights, the courts apply the "strict scrutiny" test. City of Cleburne, 105 S.Ct. at 3254. Suspect classes are those whose members have suffered a history of deep-seated prejudice and "have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" Plyler v. Doe, 102 S.Ct. at 2394 n. 14.[14]/ Rights deserving strict scrutiny analysis are those having their sources in the constitution, either explicitly or implicitly. Plyler v. Doe, 102 S.Ct. 2395 n. 15; City of Cleburne, 105 S.Ct. at 3254.

The courts give heightened, or intermediate tier, review in limited situations involving "recurring constitutional difficulties." Plyler v. Doe, 102 S.Ct. at 2395 and n. 16. For example, sex-based classifications of governmental actions have enjoyed this level of review because they bear "'no relation to the individual's ability to participate in and contribute to society'". City of Cleburne, 105 S.Ct. at 3254-3255. In these cases, the court inquires into whether governmental action "may fairly be viewed as furthering a substantial interest of the State." Plyler v. Doe, 102 S.Ct. at 2395.

Matters not eligible for consideration under these two standards are examined using a rational basis test. City of Cleburne, 105 S.Ct. at 3254: "The general rule is that legislation is presumed to be valid and will be sustained if the

---

14 Such groups generally involve classification by race, alienage or national origin. City of Cleburne, 105 S.Ct. at 3254.

classification drawn by the statute is rationally related to a legitimate state interest." See also Gregory v. Ashcroft, 111 S.Ct. 2395, 2406 (1991); Alamo Rent-a-Car Inc. v. Sarasota-Manatee Airport Authority, 825 F.2d 367, 370 (11th Cir. 1987).

The petitioner is not a member of a suspect class, nor are its fundamental rights implicated.

Moreover, the petitioner's claim does not qualify for intermediate review, since it does not involve those characteristics that bear on an individual's ability to participate in and contribute to society.

Thus, the petitioner's claims must be judged using the rational basis test. See United Telephone Long Distance v. Nichols, 546 So. 2d 717 (Fla. 1989) (apparently applying a rational basis equal protection test); Washington Gas Light Co. v. Public Service Commission, 483 A. 2d 1164, 1170 (D.C. App. 1984) (District of Columbia PSC may treat two utilities differently as long as it can articulate a rational reason for such treatment). Under this test, the legislative enactment must be presumed valid. Gregory v. Ashcroft, 111 S.Ct. at 2406. The court must sustain it if there is any conceivable reason that is rationally related to a legitimate governmental objective. Cash Inn of Dade County v. Metro Dade County, 938 F.2d 1239, 1242 (11th Cir. 1991).

Futhermore:

> The burden is upon the party challenging the statute or regulation to show that there is no conceivable factual predicate which would rationally support the classification under attack. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained.

The Florida High School Activities Association v. Thomas, 434 So. 2d 306, 308 (Fla. 1983), emphasis in original.

Here, the governmental interest is plain: protection of the public interest. International Telecharge Inc. v. Wilson, 573 So. 2d 816, 819 (Fla. 1991); Wisconsin Power & Light Co. v. Public Service Commission, 172 N.E. 2d 639, 641-641 (Wisc. 1969) (the predominant purpose underlying public utilities law is the protection of the consuming public rather than the competing utilities); People v. City of Fresno, 62 Cal.Rptr. 79, 82, 254 Cal.App.2d 76 (Cal. App. 5th Dist. 1967) (the PSC "fulfills a vital and significant role in the scheme of government. In fact it is the only public agency constitutionally constructed to protect the public from the consequences of monopoly in public service industries . . .").

Abrogating the attorney-client and work product privileges for a regulated monopoly is rationally related to the need to protect consumers and the public interest. On its face, the open document policies behind ss. 350.117, 364.18 and 364.183 give the PSC broad power to ensure that regulated companies are complying with regulatory mandates.

The petitioner has failed to offer a single reason why there are absolutely no conceivable factual predicates justifying this open document policy. So, the petitioner has failed to carry its burden of persuasion that the PSC has violated its rights to equal protection.

In any event, it is clear that there is a substantial rational basis for the policy.

Therefore, the court should find no constitutional violation.

CONCLUSION

For the foregoing reasons, the Attorney General submits that Southern Bell's internal audits and panel recommendations are sheltered by neither the attorney-client nor work product privileges in PSC proceedings. The court should uphold the PSC's order that Southern Bell must disclose these documents in that forum.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

JASON VAIL
Assistant Attorney General
Fla. Bar no. 288824

MICHAEL TWOMEY
Assistant Attorney General
Fla. Bar no. 234354

Department of Legal Affairs
The Capitol, Suite PL-01
Tallahassee, Fla. 32399-1050
(904)488-1573

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to J. TERRY DEASON, Chairman, Florida Public Service Commission, 101 E Gaines Street Tallahassee, FL 32399-0863; CHARLES J BECK, Office of the Public Counsel, 111 W Madison Street, Room 812, Tallahassee, FL 32399-1400 and MARSHALL M CRISER, ROBERT WINICKI, DAVID M. WELLS, WILLIAM DEEM, Post Office Box 4099, Jacksonville, FL 32201 by U. S. Mail on this 27th day of May, 1993.

Jason Vail

<jay>bell.l