IN THE SUPREME COURT OF FLORIDA

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Petitioner, vs. THE FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 81,487

CITIZENS' RESPONSE TO SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S PETITION FOR REVIEW OF NON-FINAL ADMINISTRATIVE ACTION

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The Citizens of the State of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file their response in opposition to BellSouth Telecommunications, Inc. d/b/a/ Southern Bell Telephone and Telegraph Company's ("Southern Bell") petition for review of non-final administrative action and request the Supreme Court of Florida to deny the petition.

PREFATORY STATEMENT

A. THE FLORIDA PUBLIC SERVICE COMMISSION'S ORDER COMPELLING DISCOVERY COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF THE LAW.

The standard of review requires Southern Bell to demonstrate that the Florida Public Service Commission's ["Commission" or "PSC"] order is a departure from the essential requirements of law. E.g. Gulf Coast Motor Line v. Hawkins, 376 So. 2d 391 (Fla. 1979). To establish a departure from the essential requirements of law in a discovery order requires far more than allegations of legal error. Eyster v. Eyster, 503 So. 2d 340 (Fla. 1st DCA 1987) (only abuse of trial court's broad discretion on discovery issues constitutes fatal error); review denied, 513 So. 2d 1061 (Fla. 1987). "It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." Id. at 343 (quoting Justice Boyd's concurring opinion in Jones v. State, 477 So. 2d 566, 569 (Fla.1985)).

The Commission's findings that the five operational audits and panel disciplinary recommendations were factual documents created for a business purpose is presumptively correct. Gulf Coast, 376 So. 2d at 393. If this court chooses to reevaluate the facts and arguments as Southern Bell has presented them, it must conduct an in camera review of the withheld documents to determine the probative weight given to the prehearing officer's findings, which were also reviewed by the full Commission. See e.g. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 599 (8th Cir. 1977) (considering in camera material in appellate review); see also Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d DCA 1983) (directing trial court to conduct an in camera inspection of documents it had decided, without inspection, were not privileged as a matter of law). "The purpose of this examination is not to determine whether there is good cause to overcome the privilege, but rather to determine whether the items are, as a matter of law and fact, entitled to the privilege at all." International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (emphasis in original).

B. THE COMMISSION HAS ABSOLUTE AUTHORITY TO INSPECT ALL RECORDS OF MONOPOLIES IT REGULATES

Southern Bell's claim that it has the right to withhold records from Commission review has no basis in Florida regulatory law. The Legislature granted telecommunications companies a

service monopoly[1] that virtually guarantees them a profit. § 364.035, Fla. Stat. (1991). In exchange for the right to earn non-competitive profits, the Florida Legislature created the Commission as its enforcement arm[2] to protect the public health, safety and welfare of Florida citizens[3] by ensuring that monopoly services are effectively regulated in the public interest. Id. § 364.01(3). To effectuate its policy, the legislature granted the Commission pervasive investigative powers.[4] Id. chs. 350 & 364. Specifically, the legislature mandated that the Commission "shall have reasonable access to all company records" and mandated that discovery be conducted "in the

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[1] "'Monopoly service' means a telecommunications service for which there is no effective competition, either in fact or by operation of law." § 364.02, Fla. Stat. (1991).

[2] § 350.001, Fla. Stat. (1991) (establishing the Commission as a legislative entity).

[3] See City Gas Co. v. Peoples Gas Sys., Inc., 182 So. 2d 429, 432 (Fla. 1965) (noting that anti-monopoly statutes were created to prevent the deterioration of quality that results from monopolization of services).

[4] § 364.18(1), Fla. Stat. (1991) (right to "inspect all accounts, books, records, and papers"); id. § 364.18(2) (power to require the filing of reports by not only the monopoly but its parent and subsidiaries as well); id. § 364.185 (right to physically inspect any company facility and conduct on-site "investigations, inspections, examinations, and tests"); id. § 350.117 (authority to perform management and operation audits); id. § 350.123 (power to administer oaths, take depositions, issue protective orders and subpoenas, and compel the production of documents and attendance of witnesses); id. § 350.124 (authority to seek immunity for witnesses to compel testimony); id. § 350.127 (power to impose penalties of up to $5,000 a day for willful violations of agency rules); id. § 364.183 (power to issue protective orders for proprietary business information, i.e., trade secrets, internal audits).

manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure."[5] § 364.183, Fla. Stat. (emphasis added). The legislature determined that the Commission would have access to all audits and security measures, but that these documents may be treated as proprietary confidential business information. Id. The legislature could have granted the Commission access to all company records 'except those subject to a legally recognized privilege.' It did not do so.

1. Southern Bell's Argument Is Legally Flawed.

Southern Bell ignores this balancing of statutory law in the Commission's order in its mistaken assumption that the Florida Evidence Code and Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), are controlling. The legislature expressly determined that the Florida Evidence Code would not apply to administrative proceedings. §§ 90.103 & 120.58(1)(a), Fla. Stat.; Ehrhardt, Florida Evidence § 103.1 (1992 ed.). Therefore, privilege questions only arise in Commission proceedings through the discovery rules. See § 364.183, Fla. Stat.; Fla. R. Civ. P. 1.280(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action.") (emphasis added); Fla. Admin. Code R. 25-22.034 (adopting rules of civil procedure 1.280 to 1.400); but see City of Williston v.

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[5] Since a rule cannot countermand a statute, the rule only provides the procedural format parties are to follow in coordinating discovery.

Roadlander, 425 So. 2d 1175, 1177 (Fla. 1st DCA 1983) (concluding that statutory attorney-client privilege does not encompass judicially created work product immunity). Since the discovery rules do not define privilege, the Commission may turn to statutory and case law for a definition. However, the Commission must apply any definition of privilege that it adopts within the scope of its statutory mandate to protect the citizens of this state. [App. A at 6; App. B at 3] If the Commission were to accept Southern Bell's interpretation of privilege, it eventually would be faced with a utility's claim of accountant-client privilege[6] for financial and accounting records of a company. Obviously, this absurd result would nullify the Commission's ratesetting authority.

Southern Bell argues that it has a privilege to refuse to disclose to the Commission, the legislature's enforcement arm, any documents that would be inadmissible as evidence in a civil court. Petitioner's Brief at 19 ("The Commission was required to follow the Florida Evidence Code, specifically section 90.502 of the Florida Statutes."). Evidence inadmissible in a civil court is not barred in a Commission proceeding. See e.g., § 120.58(1)(a), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.") The Commission staff cannot be denied access to company records on a

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[6] § 90.5055, Fla. Stat. (1991).

discovery request that the company would have to disclose at hearing since no evidentiary privilege exists to bar their introduction. The Commission recognized its authority to demand production of these audits.[7] [App.B at 4; App. C: T 27-30; App. D: T 5-6; App. E: T 17-18 & 22] Southern Bell admitted as much in its prehearing argument.

> COMMISSIONER CLARK: Let's assume Public Counsel hasn't asked for it, that the Commission has reason to believe that your Schedule 11 information provided to us is inaccurate for any reason, and we direct you to conduct a (sic) audit to determine the accuracy of your Schedule 11 audits. You can use what you've already done or you can do it again.
>
> MR. ANTHONY: Yes, ma'am. But what you cannot do is order us to waive a privilege that is validly enacted and we're entitled to assert. And if you were to order us to take that choice, we would have to go out and redo the audit.

[App. C: T 28-29]

2. The Legislature Circumscribes Privileges.

Since the legislature abrogated the common-law of privileges,[8] defining "privilege" for purposes of discovery in Commission proceedings has become a legislative function. It is

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[7] Commission Staff has also requested Southern Bell to produce the five audits and panel recommendations. Staff's 15th production request sought the MOOSA audit, Staff's 17th request sought the KSRI, LMOS, and PSC schedule 11 audit; and Staff's 23d request sought the Operational Review audit. [App. F] The panel recommendations were requested as late-filed exhibits from a deposition of a company human resource manager. [App. N: ¶ 1 at 2]

[8] § 90.102, Fla. Stat. (1991).

for the Legislature, not the courts, to decide to what extent a monopoly may conceal evidence of its compliance with legislatively mandated regulations. See generally, Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979) (holding that legislature only exempted statutory exemptions to public records law not common-law privileges). So, while the evidentiary privileges apply to corporations in civil proceedings, they only apply in Commission proceedings to the extent determined by legislative enactment.

Because the extent of the corporate privilege in a civil context does not appear to have been settled in Florida,[9] the Commission reviewed federal regulatory and civil law in determining that regulatory law was more closely analogous to the duties imposed on it by the legislature.[10] [App. A at 5; App. B at 3] Because privileges hinder the search for truth, both federal and state courts narrowly construe privileges in a civil context. See United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 604 & n.1 (D.D.C. 1979). As one federal district court noted:

> "When the privilege shelters important knowledge, accuracy declines. Litigants may use secrecy to cover up machinations, to get

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[9] § 90.502, Fla. Stat. (1991); Ehrhardt, Florida Evidence § 502.3 (1992 ed.).

[10] Federal court decisions, while often found persuasive in the absence of state law, are of limited assistance as the federal privilege law is rooted in the common law while the privilege in Florida is statutory. Corry v. Meggs, 498 So. 2d 508, 510 (Fla. 1st DCA 1986), review denied, 506 So. 2d 1042 (Fla. 1987).; Fed. R. Evid. 501.

> around the law instead of complying with it. Secrecy is useful to the extent it facilitates the candor necessary to obtain legal advice. The privilege extends no further."

In re: Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. 515, 518 (N.D. Ill. 1990) (quoting 8 Wigmore, Evidence, § 2291 (McNaughten rev. 1961). This application is even more narrow in an administrative forum where the Evidence Code does not apply. See § 120.58(1)(a), Fla. Stat. (permitting hearsay evidence); cf. Consolidated Gas Supply Corp., 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981) (applying narrow application in regulatory forum).

The application of the privilege in an administrative context also must balance the legislative policy supporting the privilege and the policy supporting the regulation of monopolies in Florida. Cf. S.E.C. v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 686 (D.D.C. 1981) (holding that corporation failed to show that the SEC improperly solicited privileged information from counsel); In re: Notification to Columbia Broadcasting Sys., 45 F.C.C.2d 119 (Nov. 1973) (demanding access to CBS investigation into staged news events under FCC duty to protect public). This balance necessitates a narrow application. See Consolidated Gas Supply Corp., 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981).

3. Public Policy Sustains the Commission's Application of Privilege.

The attorney-client privilege, a narrow exception to Florida's liberal civil discovery rules, rests on a public policy

of encouraging full and frank communications between attorney and client. International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. at 185. This policy is only furthered if the public perceives the injury suffered by chilling confidential communications to be greater than the benefits gained from a correct disposition of a case. Id. at 186 (citing Wigmore, Evidence § 2285 at 527). Fundamental fairness demands that both parties have access to the facts. See Proctor & Gamble v. Swilley, 462 So. 2d 1188, 1195 (Fla. 1st DCA 1985) (finding that the 'right to everyman's evidence' outweighed any potential adverse effect resulting from ordering company to disclose the results of its outside research).

The Commission's duty to protect the citizens from the potential evils of state-sanctioned monopolies outweighs any purported benefits obtained from permitting a broad application of privilege to cover all communications and technical reports of any Southern Bell employee. Applying Southern Bell's interpretation of privilege would deny the Commission access to the information it needs to make a factual determination of the company's compliance with statutes and rules. Whereas, a narrow application would permit monopolies to retain the privilege for documents that contain only legal advice, while disclosing documents containing the factual information required by the Commission to carry out its statutory mandate. The benefits obtained by competitive companies from a broad application of the privilege disappears in the context of monopoly regulation. The

obverse is true. The benefits obtained from regulatory oversight are lost if the regulator is denied access to the truth. The Commission recognized that legislative balance. [App. A at 6; App. B at 3] Furthermore, the Commission's interpretation of privilege in the administrative context does not abrogate any right to the privilege Southern Bell may have in a civil proceeding.

Southern Bell argues that affirming the Commission's orders will have a "chilling" effect on a company's willingness to conduct intensive internal reviews in the future. Petitioner's Brief at 27-29. On the contrary, until faced with a Commission inquiry, the company showed no desire to conduct its own investigation. [App. G at 10-11; App. E: T 31-32] It's internal operational reviews were designed to give feedback of improper activities to the very managers responsible for those activities and not to upper-level officers. Id. [App. H: Maloy testimony, pp. 42-43, 49-50, & 52] Furthermore, the penalty for non-compliance with Commission rules overrides any possible chilling effect perceived by a narrow application of discovery privileges. [App. A at 6; App. D: T 3-4] Southern Bell has failed to show the Commission's order was an abuse of its discretionary authority to compel discovery of business records withheld by a regulated monopoly in an administrative forum.

STATEMENT OF THE CASE AND FACTS

Public Counsel generally accepts the company's statement of the case and proffers the following additions. The prehearing officer considered Southern Bell's claim that its sole purpose in producing the disputed documents was to assist counsel in rendering legal advice. [App. A at 4-9] The prehearing officer found that Southern Bell had an independent business need to accurately monitor its customer service operations that predated, post-dated, and coexisted with the timing of any particular audit. [App. A at 6] The prehearing officer found that the panel recommendations, containing no legal opinions, were prepared for the business purpose of determining possible employee discipline. [App. A at 9] The full Commission, after reviewing the documents in camera and affording the company a full hearing,[11] found no error of fact or law in the prehearing officer's rejection of the company's claim that "its in-house audits and panel recommendations on discipline were undertaken solely to obtain legal advice and would not otherwise have been initiated." [App. B at 3] In fact, the Commission noted that "Southern Bell itself relates such activities to the need to find improper acts and to correct them. Motion For Review, p. 23." [App. B at 3]

The history of this case, the company's response to discovery, and ostensibly the documents themselves controvert Southern Bell's version of the facts.

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[11] See Burroughs Corp. v. White Lumber Sales, Inc., 372 So. 2d 122 (Fla. 4th DCA 1979).

A. THE AUDITS AND PANEL RECOMMENDATIONS SERVED SOUTHERN BELL'S BUSINESS PURPOSES.

1. History of the Case.

This case actually began in 1988 with the Commission's approval of Southern Bell's request for an experimental rate design. [App. E: T 20]; see In re: Petition of Southern Bell Tel. & Tel. Co., 88 F.P.S.C. 10:311 (Oct. 13, 1988) Dockets Nos. 880069-TL, 870832-TL; Order No. 21062) [hereinafter Order 21062: Incentive Regulation] The Commission approved Southern Bell's request to experiment with a rate sharing plan that would hypothetically provide "incentives" to the company to maximize customer service efficiencies in exchange for an opportunity to retain a greater share of any profits arising therefrom. See Order No. 21062. Mindful of its statutory duty to protect the ratepayers, the Commission put Southern Bell on notice that it would be monitoring its customer service activities closely throughout the period of the plan's effectiveness.[12]

> A final area of review would be Southern Bell's quality of service. There is concern that the company might improve earnings over the short run by letting quality of service slip. In order to discourage and detect such actions, our Staff will continue its ongoing review of service quality as required by Commission Rules and will consider more expanded or extensive service audits if any significant slippage in quality is detected.

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[12] Order 20162: Incentive Regulation placed the plan in effect for two years from January 1, 1988 to December 31, 1990. Id. at 10:337. The Commission extended the plan at Southern Bell's request until December 31, 1992. In re: Petition of Southern Bell Tel. & Tel. Co., 91 F.P.S.C. 2:100, 102 (Feb. 5, 1991) (Docket No. 880069-TL; Order No. 24066).

> The Commission will be notified if service quality significantly deteriorates during the course of this plan, or if Commission Rules concerning service standards are violated. The Commission may then consider imposing a penalty on Southern Bell.

Id. at 10:337 (emphasis added).

Southern Bell was on notice as to the need to investigate allegations of violations of Commission rules prior to Public Counsel's filing a petition to initiate an investigation. [App. E: T 31-32[13]] The Attorney General opened an investigation into the alleged falsification of records by Southern Bell in August 1990. [App. E: T 31-32] These events predate the February 1991 filing by Public Counsel.

Southern Bell had a duty and a clear business purpose to closely monitor its service quality. It had to conduct more expanded or extensive service audits when customer service standards began to slip. At the hearing, Southern Bell's counsel admitted that it would have to reproduce and disclose the very same audits it refused to produce through discovery if the Commission required them to do so. [App. C: T 28-29] This renders its factual argument that it was under no legal

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[13] Mr. Shreve's reference was to, among others, testimony filed by Mike Maloy, Chief Investigator for the Attorney General for the Tenth Statewide Grand Jury on November 16, 1992. [App. G ¶ 10 at 10] That grand jury investigated allegations of fraudulent billing and repair practices at Southern Bell. Mr. Maloy's testimony supports Public Counsel's statement that upper level managers of Southern Bell knew of problems in its customer repair operations in 1988, 1989 and 1990. [App. E: T 31-32; App. H at 39-52 & Exhibit 4]

obligation to produce these documents "hypertechnical rather than substantive." [App. A at 6]

2. Southern Bell's Discovery Responses.

Southern Bell quotes from a letter purportedly written by Mr. Robert Beatty, dated April 3, 1991, as dispositive of its argument that the sole purpose of the company's internal investigation was to assist counsel in rendering legal advice. Petitioner's Brief at 5. However, in responding to Interrogatories 57, 59, 61 and 63 propounded by Commission Staff, Mr. Beatty states that "[d]eterminations regarding whether and to what extent to audit particular subject areas are made based on consideration of many business issues." [App. A at 4 n.4 (emphasis in original; quoting, In re: Southern Bell Tel. & Tel. Co., Docket No. 910163-TL, Staff's 6th Set of Interrogatories, Items Nos. 57, 59, 61 & 63 (Dec. 18, 1992) [hereinafter Staff's 6th Interr. (App. I)]. He stated that no unique criteria existed for determining whether to audit the specific repair and rebate systems herein involved, i.e. MOOSA, KSRI, LMOS, PSC Schedule 11,[14] versus any other operational aspect of the business. [App. I] Further, in response to Interrogatories 56, 58, 60, and 62,

[14] MOOSA (Mechanized Out of Service Adjustments) programs automatic rebates for service outages; LMOS (Loop Operation Maintenance System) is an interactive mechanized system for processing trouble reports; KSRI (Key Service and Results Indicators) evaluates individual employee contributions to meeting company service quality standards; and PSC Schedule 11 reports are required quarterly reports on the company's compliance with Commission service quality rules.

Mr. Beatty refused to compare the audits at issue to other audits performed of the same systems. [App. I] The company refused to state why it performed these audits and the purpose for the audits on the basis of the attorney-client and work product privileges.[15] [App. I: e.g., Interrogatories 50I (p-u)] The company stated that the audit reports discussed the intended use of each of the audits. [App. I: e.g., 50I (tt-uu)] These reports were presumably reviewed by the Commissioners in their in camera review of these documents. [App. D: T 15, 17; App. E: T 19, 30] Based on their review, the Commissioners found that these audits served a business purpose. [App. B at 3]

Southern Bell claims that it is "uncontroverted fact," based upon the affidavits of its chief auditor, Ms. Shirley T. Johnson,[16] that these audits were done solely to obtain legal advice. Petitioner's Brief at 8. Both Public Counsel and Commission Staff through interrogatories and depositions have requested information from the company as to the reasons, use and purpose for the audits. Southern Bell has refused to provide answers under a claim of privilege. On October 14, 1992, Public Counsel deposed Ms. Johnson. [App. C: T 37] On Mr. Beatty's

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[15] Staff posed interrogatories to Southern Bell in the expectation that the responses would "provide a factual basis for making an adequate and reasoned ruling on the attorney-client and work product privilege claims." [App. C: T 63-64]

[16] Southern Bell has also proffered the affidavit of Mr. King. Mr. King's affidavit relates to the company's statistical analysis. Even though Order No. PSC-93-0151-CFO-TL does not address the statistical analysis, Mr. King's affidavit suffers from the same infirmities as Ms. Johnson's.

objection, Ms. Johnson refused to answer questions as to what triggered each of these audits. [App. J: Johnson deposition, pp. 23-24] Public Counsel's motion to compel Ms. Johnson to answer deposition questions has been granted, but awaits this court's review of that Commission action.[17]

Public Counsel introduced a joint memo from D.W. Hay, Assistant Vice President of Network Operations Support, and Mr. D.L. King, Assistant Vice President Central Office Operations Support, as evidence of the business nature of these documents.[18] [App. L: att. G; App. S: att. I] In November 1991, Mr. King prepared a memo reporting the results of the audits for Mr. Lloyd Nault. [App. I: 50II(pp)-(qq) (KSRI), 50III(pp)-(qq) (LMOS), & 50IV (pp)-(qq) (PSC 11s). On January 1, 1992, Southern Bell instituted a number of changes to the trouble reporting and rebating systems. The Hay/King memo provides details of the numerous changes that were made to these systems. It is clear

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[17] Citizens' Motion to Compel BellSouth Telecommunications' Operation 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. 190163-TL (Oct. 23, 1992); granted by prehearing off'r, In re: Southern Bell Tel. & Tel. Co., Consolidated Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL (Mar. 1, 1993) (Order No. PSC-93-0317-PCO-TL); aff'd by full Comm'n, Order No. PSC-93-0518-FOF-TL (Apr. 6, 1993) (vote 5-0).

[18] [App.L: Citizens' Supplement to Their First Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 920260-TL (June 2, 1992) (Att. G: Hay memo); App. S: Citizens' Seventh Motion to Compel and Request for In Camera Inspection of Documents, Docket No. 910163-TL (July 23, 1992) (Att. I: Hay memo)]

that the information derived from these audits was used for a business purpose.

Citizens have a substantial need for the information contained in these audits and cannot replicate the information. [App. L: ¶¶ 12-21 at 8-14 & attachments; App. S: ¶¶ 41-47 at 21-25 & attachments]. Citizens' introduced documentary evidence as to the scope and complexity of Southern Bell's repair and rebate systems. [Apps. L & S attachments] Southern Bell has sole control over the system and the customer data stored within it. Specialized knowledge of the company's customer repair and billing systems and internal auditing procedures is required to conduct these audits. [App. I: e.g. 50I (ll)-(nn)] Additionally, specialized computer programs would have to be written to obtain the equivalent of the data comprising the LMOS and PSC schedule 11 audits. [App. I: 50III(z) & 50IV(z)] It took a team of internal auditors working with a team of systems experts, statisticians, and network operational staff seven months to produce these audits. [App. C: T 37] Four of the five audits total 43 separate volumes, binders and 20 boxes of records. [App. I: 50I(o) (MOOSA), 50II(o) (KSRI), 50III(o) (LMOS), & 50IV(o) (PSC Schedule 11)]

Southern Bell, despite its recent claims to the contrary, has denied Citizens access to the underlying data. [App. L: ¶ 19 at 12-13; App. S: ¶¶ 44-45 at 23-24; App.M: ¶ 12 at 9-10

(operational review audit)][19] Not only has Southern Bell refused to produce customer records under a claim of overburdensome production, the company has also denied Citizens access to the underlying work papers to these audits,[20] and denied Citizens access to the factual information contained in these audits in depositions.[21]

There is equally compelling evidence of the business purpose and use of the panel disciplinary recommendations.[22] Southern Bell stated that the personnel notes were written by business managers "for their own subsequent use." [App. A at 8] No attorney was involved in the panel discussions and the discussions were solely to discuss discipline. [App. N: ¶ 10 at 8] Southern Bell admits that the personnel documents, which were informed by the audits and investigative materials, served a business purpose. [App. O: ¶ 43 at 27 ("The fact that their need arose from a business rather than a purely legal purpose does

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[19] Southern Bell produced the operational review audit for Commissioner Clark's in camera inspection rather than the statistical analysis. Citizens' eleventh motion, while not directly mentioned in the prehearing order, contains arguments as to this particular audit.

[20] The prehearing officer directed Southern Bell to produce the work papers. [App. A at 9-10]

[21] See deposition of Ms. Shirley T. Johnson attached. [App. J] Southern Bell directed Ms. Johnson not to answer Public Counsel's questions about the substance of the audits based on attorney-client and work product privileges.

[22] Southern Bell's proffer of redacted copies with the names only revealed follows the supreme court's recent ruling that it must release the names of employees with knowledge of the facts at issue. Southern Bell Tel. & Tel. Co. v. Beard et al., Case No. 80,004 (Feb. 4, 1993).

nothing to destroy the confidentiality of the documents or eradicate the otherwise applicable privileges.")] Additionally, the company has waived privilege for the panel recommendations because it voluntarily produced some of the personnel department notes on managerial discipline recommendations to Public Counsel.[23] [App. C: T 33]

ARGUMENT

A. THE COMMISSION'S DECISION IS LEGALLY SOUND

Southern Bell claims the Commission's decision is legally flawed in three respects: (1) the operational audits and personnel documents, which admittedly do not contain any legal analysis, opinion, reasoning, or strategy, and which were used for a concurrent business purpose, are nevertheless not discoverable under the attorney-client privilege and work product doctrine because the company attorney requested the information and dissemination was limited to those managers with a "need to know"; (2) the narrow application of the attorney-client

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[23] Southern Bell claims that the personnel manager's handwritten notes and typed index produced in response to Public Counsel's twenty-second request had been "inadvertently" produced and were, therefore, still privileged. Southern Bell Tel. & Tel. Co.'s Request for Confidential Classification and Motion for Permanent Protective Order, Dockets Nos. 910163-TL, 920260-TL (Sept. 4, 1992). As Public Counsel pointed out in its responsive pleading, the production was voluntary. Under section 90.507, Florida Statutes, any privilege attaching to the documents and further discovery of the subject matter of those documents has been waived. Citizens' Response to Southern Bell's Request for Confidential Classification and Motion for Permanent Protective Order, ¶ 18, at 12, Dockets Nos. 910163-TL, 920260-TL (Sept. 16, 1992) (decision pending).

privilege unconstitutionally discriminates against Southern Bell, thus violating the company's fourteenth amendment rights to equal protection; and (3) Public Counsel did not make the requisite showing of need to overcome Southern Bell's claim of work product immunity. Petitioner's Brief at 12, 32-33 & 36-39.

1. The Commission Correctly Applied the Attorney-Client Privilege in Orders Nos. PSC-92-0292-FOF-TL and PSC-93-0151-CFO-TL.

The burden of establishing privilege for the audits and panel recommendations rests with Southern Bell. Hartford Accident & Indem. Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. at 184 (stating that all elements of the privilege must be proven in order to substantiate claim); see e.g., S.E.C. v. Gulf & Western Indus., Inc., 518 F. Supp. at 681.[24] Southern Bell's conclusory assertions of privilege are insufficient; it must prove each element of the privilege claimed. Id. For example, one element of the privilege is that any communication must be given for the purpose of securing legal advice. § 90.502, Fla. Stat.; S.E.C., 518 F. Supp. at 681. Since the documents were

[24] The elements of the attorney-client privilege are: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." International Tel. & Tel. Co. v. United Tel. Co. of Fla., 60 F.R.D. at 184-85 n.6, quoting 8 Wigmore, Evidence § 2292 at 554 (McNaughten rev. 1961); accord §§ 90.502 & 90.507, Fla. Stat.

prepared for business purposes, Southern Bell failed to prove one essential element of privilege. See Skorman v. Hovnanian of Fla., Inc., 382 So. 2d 1376 (Fla. 4th DCA 1980) (acting as escrowee in real estate transaction would not render communication privileged, but preparation of agreement, which involved legal advice, would); accord Soeder v. General Dynamics, 90 F.R.D. 253 (D.D.C. 1980) (in-house report prepared in anticipation of litigation, but also motivated by economic interests were not privileged). "When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved." Hardy v. New York News, Inc., 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987); accord In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. 515 (N.D. Ill. 1990) (finding that General Electric's purpose of investigating the cause of the air crash in preparing its report to NTSB was a business purpose that did not shield certain documents under the attorney-client privilege). Statutorily, Southern Bell has no privilege from producing for the Commission inspection all "internal audits" and "security measures," but the company may request these documents be kept confidential. § 364.183, Fla. Stat. [App. A at 7 n.3]

The prehearing officer found that the documents were business records and that the company had failed to substantiate its burden of proving that the documents were prepared solely for a legal purpose. [App. A at 6] Based upon this finding of fact,

the Commission concluded that the company had failed to establish the essential elements of either the attorney-client privilege or work product immunity. [App. B at 3-4; App. A at 3-9]

Lastly, it is manifestly unfair for Southern Bell to submit ex parte a letter from Mr. Beatty, for which it attempts to retain privilege status, and deny Public Counsel and Commission Staff the opportunity to uncover the factual foundation for its assertion that the documents had no business purpose. International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 92 (D. Del. 1974) (compelling discovery of underlying documents and response to interrogatories). To remedy this imbalance, Southern Bell's affidavits, Mr. Beatty's letter, and the accompanying argument, should be stricken. Rollins Burdick Hunter of N.Y., Inc. v. Euroclassics Ltd., Inc., 502 So. 2d 959 (Fla. 3d DCA 1987); see § 90.510, Fla. Stat. (granting court authority to conduct in camera review and dismiss claim when party uses privilege as both shield and sword).

a. Southern Bell Failed to Prove These Documents Were Client Communications.

A second essential element of the attorney-client privilege claim is that a "communication" must have occurred between a "client" and an "attorney". § 90.502, Fla. Stat.; S.E.C., 518 F. Supp. at 681. According to Ms. Johnson, chief auditor, a number of employees outside of auditing staff were involved in

performing the audits.[25] Southern Bell claims that every employee involved in the audits and panel recommendations were "clients" without providing factual support for that conclusion. Evidence of all the employees with knowledge of any portion of the contents of the internal documents, the nature of their participation, the reason for their participation, whether their participation was within the scope of their duties, and the use each made of the information obtained, must be provided to prove a privilege claim. Conclusory statements by counsel were insufficient to prove the claim.

Some communications between clients and their attorneys are privileged. § 90.502, Fla. Stat. The difficulty arises in the absence of state law defining "client." Early federal decisions defined employees as mere "witnesses." Hickman v. Taylor, 329 U.S. 495 (1947). Federal courts then constructed various tests[26] that were followed until the Court opted for a case-by-

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[25] Southern Bell's auditors replied to Staff's 6th Interrogatories, but failed to list the systems staff, statisticians, billing staff, and operational staff consulted by auditors in performing the audits. [App. I: 50I(l)-(n), (qqq)-(rrr) (MOOSA); 50II(l)-(n), (qqq)-(rrr) (KSRI); 50III(l)-(n), (qqq)-(rrr) (LMOS); 50IV(l)-(n), (qqq) & (rrr) (PSC 11s)] Ms. Johnson provided general information of their involvement in deposition. [App. C: T 37; App. J at 17-20]

[26] Cf. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962) (applying a 'control-group' test whereby only communications from upper-level employees with decision-making authority fell within the privilege); cert. denied sub nom. General Elec. Co. v. Kirkpatrick, 372 U.S. 943, 83 S. Ct. 937, 9 L. Ed. 2d 969 (1963); Harper Row Pub., Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by a divided court, 400 U.S. 348 (1971) (adopting a 'subject matter' test protecting communications from any employee given at the direction of his

(continued...)

case approach in Upjohn Co. v. United States, 449 U.S. 383 (1981). Southern Bell cites Upjohn as dispositive for its conclusion that everything any employee relates to company counsel becomes privileged. Petitioner's Brief at 13-14.

Southern Bell's insistence that federal case law is dispositive is misplaced. Upjohn teaches that under the federal common-law of privileges[27]: (1) employees' oral and written statements to a corporate attorney relating facts they perceived are privileged, but the facts related in those statements were not privileged because the facts were disclosable in deposition; and (2) the definition of "client" extends beyond the "control-group" or decision-makers, to encompass any employee who has witnessed events within the scope of his employment and divulges that information to corporate counsel at the request of his superior for the purpose of obtaining legal advice. Upjohn Co.

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[26](...continued)
superiors on a subject within the scope of his duties); Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (modifying the subject matter test to permit dissemination of protected communications to "those persons who, because of the corporate structure, need to know its contents"); In re: Ampicillin Antitrust Litigation, [1978-1] Trade Reg. Rpt. (CCH) ¶ 62,043, 74,510 (D.D.C. 1978) (modifying subject matter test for communications "reasonably believed to be necessary to the decision-making process"); Upjohn Co. v. United States, 449 U.S. 383 (1981) (rejecting control-group test and applying subject matter test); but see Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103, 432 N.E.2d 250 (Ill. 1982) (adopting the control-group test despite Upjohn); see generally, Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443, 454-56 (1982).

[27] Federal Rule of Civil Procedure 501 expressly adopts the judicially expanded common-law of attorney-client privilege except where state law provides the rule of decision.

v. United States, 449 U.S. 383 (1981). Upjohn is not dispositive because: (1) it is based on a judicially interpreted common-law of privilege and Florida's attorney-client privilege is statutorily created; (2) the audits and panel discipline recommendations were not oral or written communications relating events that the employees had witnessed, but were the product of data gathering, analysis, and application within the corporation's regulated operations as part of these regulated employees daily work; (3) the audits and the panel disciplinary recommendations were a routine business response to a monopoly's need to comply with the rules of its regulatory body; and (4) the facts contained in the audits and the panel recommendations have been withheld from Public Counsel in deposition by corporate counsel's refusal to allow these employees to answer questions

regarding the facts uncovered by their efforts.[28] [App. G: ¶ 14 at 14]

The U.S. Supreme Court's holding in Upjohn does not apply specifically because the Court was dealing with a factual situation in which the opposing party [IRS] had access to the names of the employees/witnesses, had received a summary of Upjohn's internal review, and had not attempted to depose any of the employees/witnesses. Southern Bell, however, refused to provide the names of employees/witnesses[29] and refused Public Counsel access to the facts in depositions. [App G: ¶ 14 at 14] Unlike Upjohn, Southern Bell has pursued a strategy of concealing, not only allegedly privileged communications, but

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[28] Public Counsel deposed Ms. Shirley T. Johnson, the chief auditor; Ms. Etta Martin, a systems specialist who contributed to the audits; Mr. Danny L. King, the director of the statistical analysis; Mr. C.L. Cuthbertson, the personnel director in charge of the panel recommendations; and Mr. C.J. Saunders, the vice-president in charge of the disciplining of network employees. In all of these depositions, company counsel refused to allow employees to answer questions under a claim of privilege. See Citizens' Motion to Compel BellSouth Telecommunications' Operations Manager -- 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), granted by full Comm'n, Order No. PSC-93-0518 FOF-TL (Apr. 6, 1993); Citizens' Motion to Compel BellSouth Telecommunications Vice President Network--South Area C.J. Saunders and BellSouth Telecommunications General Manager C.L. Cuthbertson, Jr., to Answer Deposition Questions, Docket No. 920260-TL (July 2, 1992), granted by prehear'g off'r, Order No. PSC-93-0334-PCO-TL (Mar. 4, 1993), aff'd by full Comm'n, Agenda Conf. (May 25, 1993).

[29] The Commission upheld Public Counsel's right to the names of the employees interviewed in Order No. PSC-92-0339-FOF-TL, issued May 13, 1992. Southern Bell appealed that order to the Supreme Court of Florida. Southern Bell Tel. & Tel. Co. Petition for Review of Non-Final Administrative Action, Case No. 80,004 (filed June 10, 1992) (petition denied; Feb. 4, 1993).

also the facts from the agency mandated with ensuring that it does not take advantage of its monopoly status to harm the citizens of this state. Clearly, Upjohn does not apply. Southern Bell has failed to demonstrate any error of fact or law in the Commission's reasoning that Consolidated Gas Supply Corporation, 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981), was more closely analogous to this case.

b. Southern Bell Failed to Prove the Confidentiality of the Information.

A third essential element of an attorney-client privilege claim is confidentiality. Id. At least one personnel manager told employees, who were being disciplined, the general findings that were summarized by the personnel group.[30] [App. C: T 32-33, referring to Public Counsel's deposition of Dwane Ward, manager human resources] Southern Bell did not raise a legally supportable claim of privilege for these documents since it failed to produce the minimum of facts necessary to demonstrate its entitlement to the claim.

2. The Commission's Application of Privilege Does Not Violate the Fourteenth Amendment.

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[30] Southern Bell neglected to provide the names of those disciplined employees who received oral summarizations of the findings contained in the employee statements when human resource personnel administered their discipline in its response to Staff's sixth interrogatories, items 53.VIII (z), (aa)-(bb) & (hh). [App. I]

Southern Bell argues that the Commission's narrow application of the attorney-client privilege based upon the company's status as a regulated monopoly violates the fourteenth amendment[31] of the U.S. Constitution.[32] Petitioner's Brief at 12, 29-32. The attorney-client privilege is a statutory right not a fundamental, constitutional right.

Southern Bell has the burden of proving the Commission's application of privilege is unconstitutional. See Village of N. Palm Bch. v. Mason, 167 So. 2d 721, 726 (Fla. 1964). Absent a suspect classification, an invasion of a fundamental right, or invidious intent, Southern Bell must show that the Commission's application of privilege is not rationally related to a legitimate state interest. E.g., Jackson v. Marine Exploration Co., Inc., 583 F.2d 1336, 1346 (5th Cir. 1978); see Sasso v. Ram Prop. Mgmt., 431 So. 2d 204 (Fla. 1st DCA 1983) (some reasonable basis standard equates to rational basis test in Florida), app'd, 452 So. 2d 932 (Fla. 1984), appeal dismissed 469 U.S. 1030, 105 S. Ct. 498, 83 L. Ed. 2d 391 (1984); Florida High School Activities Ass'n, Inc. v. Thomas, 434 So. 2d 306 (Fla. 1983)

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[31] The fourteenth amendment of the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

[32] The company has not claimed any violation of the equal protection clause in article 1, section 2 of the Florida Constitution. Article 1, section 2 of the Florida Constitution guarantees that "[a]ll natural persons are equal before the law." In a concurring opinion, Justice Whitfield asserted that the inalienable rights accorded to natural persons under the state constitution could be conferred upon corporations by statute. Miami Laundry Co. v. Florida Dry Cleaning & Laundry Bd., 134 Fla. 1, 183 So. 759 (1938).

(requires a showing of "no conceivable factual predicate which would rationally support the classification under attack" (emphasis in original)).

The state, acting under its police power, may create regulatory and economic classifications to promote the public health, safety and welfare without violating the fourteenth amendment. Atchison, Topeka & Santa Fe R.R. Co. v. Matthews, 174 U.S. 96, 19 S. Ct. 609, 43 L. Ed. 909 (1899). Equal protection only requires the state to treat those persons similarly situated in a like manner. Id. at 104. Further, the Commission is presumed to have acted in good faith. Its decision cannot be set aside without a showing that it intentionally singled out Southern Bell from all other regulated utilities for discriminatory treatment. See Jackson, 583 F.2d at 1347 (citing Snowden v. Hughes, 321 U.S. 1, 8-9, 64 S. Ct. 397, 401, 88 L. Ed. 497 (1943)).

Southern Bell has offered no shred of evidence that the Commission has intentionally applied the law of privileges in this case any differently that it has in other cases. Southern Bell's status as a state-sanctioned monopoly is sufficient justification for a more narrow application of discovery privileges in Commission proceedings than the company enjoys in civil proceedings. Furthermore, there is sufficient evidence to show that Southern Bell is not similar to other regulated utilities. No other regulated utility has been granted an opportunity to increase its profits through the incentive

regulation plan proposed by Southern Bell. Only Southern Bell has been subject to complaints of falsifying customer records to increase its profits under incentive regulation. Hence, its discriminatory treatment claim is without factual or legal foundation.

Even if Southern Bell was similarly situated with all non-regulated corporations under section 90.502 of the Florida Statutes, the Commission may still apply the attorney-client privilege more narrowly as long as there is some reasonable basis for doing so. In re Southern Bell Tel. & Tel. Co., 123 P.U.R. 4th 83, 105 (Ga. 1991) (citing Schweiker v. Wilson, 450 U.S. 221, 234, 101 S. Ct. 1074, 67 L. Ed. 2d 186, 197-198 (1981) and Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171, 176 (1979)).

When it compels discovery, the Commission stands in a different posture than a civil court or most other state agencies. The legislature has granted it exclusive and plenary power to regulate government-protected monopolies. Chs. 350 & 364, Fla. Stat. In many ways the Commission makes managerial type decisions with one overriding duty--to protect the public. Cf. Florida E. Coast Ry. Co., 259 F. Supp. at 997; City Gas, 182 So. 2d at 432. Southern Bell's discovery privilege must be harmonized with the Commission's plenary powers in the regulatory arena where non-regulated corporations do not appear. To incorporate a civil court evidentiary privilege into a Commission proceeding would eviscerate the legislature's regulatory scheme.

The Commission's harmonizing of Southern Bell's privilege claim with its statutory authority is rationally related to a legislative intent to protect the public from monopoly abuses. Singleton v. State, 554 So. 2d 1162, 1163 (Fla. 1990); accord Florida E. Coast Ry. Co. v. United States, 259 F. Supp. 993, 996 (M.D. Fla. 1966) (harmonizing antitrust law with Interstate Commerce Act to permit railway merger), aff'd, 386 U.S. 544, 87 S. Ct. 1299, 18 L. Ed. 285 (1967). Such regulation would be ineffective without full access to the business records of Southern Bell.[33] [App. D: T 5-6]

3. The Commission Correctly Applied the Work Product Doctrine in Orders Nos. PSC-93-0292-FOF-TL and PSC-93-0151-CFO-TL.

Southern Bell argues that the third fatal flaw in the Commission's decision was an incorrect application of work product immunity. The company argues that the Commission's determination that these documents, which were used for business purposes, were exempt from work product immunity is incorrect. Petitioner's Brief at 12 & 32-33. Additionally, Southern Bell argues that the Commission's finding that Public Counsel had made the requisite showing to overcome any possible work product immunity is incorrect. Petitioner's Brief at 12 & 36-39.

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[33] In granting liberal access to a utility's records, the legislature balanced a company's loss of privilege with a broad confidentiality provision. § 364.183, Fla. Stat. The legislative intent behind this policy informed the Commission's decision. [App. E: T 3-9; App. D: T 45-56]

Southern Bell claims that Public Counsel's affidavit, which has only been partially produced by Southern Bell, is speculative and that Public Counsel has access to all the facts. Petitioner's Brief at 37-38.

The prehearing officer found that these business documents were not attorney work product as none of the documents contain legal advice, opinion, strategy, or theory, and even if the documents had been attorney work product, Public Counsel had made the requisite showing of need to overcome the immunity. [App. A at 7-9] After an in camera review and hearing, the Commission affirmed the prehearing officer's findings. [App. B at 4]

a. The Work Product Doctrine

The supreme court relied on federal precedent set by the United States Supreme Court decision in Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1974), as authority for claims based on the work product privilege.[34] See Upjohn Co. v. United States, 449 U.S. at 396 (applying opinion work product immunity to notes of internal employee interviews conducted by

[34] In Hickman, the dispute was over the written statements taken in an attorney's interviews of the four survivors of a tugboat accident, who had previously testified at a public hearing and were, therefore, already identified. The U.S. Supreme Court stated that the attorney's notes and mental impressions fell outside the scope of the attorney-client privilege as the interviewees were third parties. Hickman, 329 U.S. at 508. Since the opposing party had not shown undue prejudice in the preparation of his case or need, and as he could also interview the four survivors, the Court found no reason to require the disclosure of the witnesses' statements and the attorney's notes. Id. at 509.

in-house counsel). Hence, the work product privilege is derived from judicial rule and state case law, not statute. See City of Williston v. Roadlander, 425 So. 2d at 1177; Fla. R. Civ. P. 1.280(b)(3).

Work product only gives a qualified immunity from discovery for documents and tangible things prepared in anticipation of litigation by the attorney or at the attorney's request, e.g. attorney notes, legal theories. Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188 (Fla. 1st DCA 1985); accord Reynolds v. Hofman, 305 So. 2d 294 (Fla. 3d DCA 1974). The attorney may be required to disclose the existence of privileged material, but not its contents, unless an adverse party shows need and an inability to obtain the materials from other sources without undue hardship. See Alachua Gen. Hosp. v. Zimmer USA, Inc., 403 So. 2d 1087 (Fla. 1st DCA 1981); Fla. R. Civ. P. 1.280(b)(3); accord Transcontinental Gas Pipe Line Corp., 18 F.E.R.C. ¶ 63,043 (Feb. 9, 1982) (finding that materials that were related to the issue, which were prepared at the direction of counsel, were discoverable by the adverse party because the materials could not be duplicated without undue hardship).

Only if clearly shown by the objecting party does the moving party have to demonstrate need to overcome the privilege. Hartford Accident & Indem. Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981); accord Black Marlin Pipeline Co., 9 F.E.R.C. ¶ 63,015, 65,088 (Oct. 18, 1979) (material written by non-attorney at request of attorney does not automatically make it privileged

work product). Southern Bell has failed to show that the work product privilege applies to these documents.

i. Audits

Southern Bell had numerous business reasons for conducting the operational audits that it now claims were "solely" done for the purpose of seeking legal advice. Regardless, Southern Bell had a clear duty to reveal any document, whether produced by an attorney or another employee, that reveals a deterioration of service quality or a violation of Commission rules. Order 20162: Incentive Regulation at 10:337. This regulatory business purpose, which is inherent under traditional ratesetting, was heightened under this experimental rate design. The Commission concluded that the investigatory documents, which were created for concurrent business and legal reasons, were not qualified for work product immunity as the documents contained no legal advice, opinion, or reasoning. [App. B at 4]

Even if these documents had qualified for limited protection as fact work product, the Commission found that Public Counsel had demonstrated sufficient need to overcome the protection. [App. A at 8; App. B at 4] Southern Bell dismisses the Commission's finding that the complexity of the company's computer system prevents Public Counsel from replicating the audits. Petitioner's Brief at 36-39. As Public Counsel stated in its motion to compel, Southern Bell has sole control over the complex, integrated computer system and customer data required to

produce these audits. This information is unavailable from any other source. See Xerox Corp. v. Internat'l Bus. Machines Corp. [IBM], 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974) ("A party should not be allowed to conceal critical, non-privileged, discoverable information, which is uniquely within the knowledge of the party and which is not obtainable from any other source, simply by imparting the information to its attorney and then attempting to hide behind the work product doctrine after the party fails to remember the information."). Southern Bell's claim that Public Counsel did not provide sufficient proof of need is belied by the affidavit and the attachments[35] to his motion to compel and the company's response to Staff's sixth set of interrogatories. Southern Bell's cavalier dismissal of Public Counsel's showing of need is a mere rearguing of the facts. Neither the facts nor case law as interpreted by Southern Bell demonstrate any mistake of fact or law in the Commission's order.

Public Counsel does not have access to the substantial equivalent of these internal audits. Without access to the computer system and data, Public Counsel cannot replicate these audits that took teams of auditors, systems staff, statistical staff, and network staff approximately seven months to complete. [App. A at 8; App. B at 4] Based upon Public Counsel's full

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[35] Southern Bell simply ignores the attachments submitted with Mr. Baer's affidavit. The company would have the supreme court second guess the Commission's findings of fact with only some of the facts. Even so, Mr. Baer's affidavit clearly demonstrates that Public Counsel is unable to obtain the substantial equivalent of the audits from any source other than Southern Bell.

affidavit and statement of need, the prehearing officer found that Public Counsel had factually demonstrated adequate support to overcome a claim of work product immunity. [App. A at 8] Public Counsel has attached to his motion the supporting documentation attached to Mr. Baer's affidavit,[36] which Southern Bell has omitted.

ii. Panel Recommendations

The Commission determined that the panel recommendations on employee discipline were not attorney work-product. [App. A at 8-9; App. B at 3-4] Southern Bell admits that the panel recommendations are not privileged. However, it argues that the comments written by the personnel managers are privileged because the comments derived from allegedly privileged summaries of witnesses' statements. Petitioner's Brief at 40-44. Southern Bell has failed to demonstrate any error of fact or law in the Commission's decision that the panel recommendations were non-privileged business documents.

Southern Bell admits that none of the documents were prepared by an attorney. After an in camera review, the Commission found that none of the documents contain corporate counsel's mental impressions or legal reasoning. [App. A at 8-9; App. B at 4] Rather, these documents contain facts revealing

[36] The supporting documentation is submitted in a sealed envelope as it was originally presented to the Commission under a temporary protective order. § 364.183, Fla. Stat. (1991). A decision on the confidentiality of these documents is pending before the Commission.

significant problems in Southern Bell's customer repair and rebate processes, which led personnel managers to discuss the disciplining of a large number of the company's network managerial and craft employees. See United States v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695, 697 (S.D. Fla. 1990) ("Facts gathered from documents by a party's representative are not protected as 'fact work product.'"); In re Air Crash Disaster at Sioux City, Iowa, 133 F.R.D. at 520 (finding that documents must not be solely concerned with "underlying evidence" but must contain legal advice, strategy, opinion, etc.). As the Commission determined, the company has an overriding business purpose in preparing these documents, which exempts them from work product protection. [App. A at 9; App. B at 3-4] Citizens demonstrated need and an inability to obtain the substantial equivalent of the panel disciplinary recommendations. [App. N: ¶ 22 at 16-17] Southern Bell withheld the names of employees/witnesses with knowledge of the facts at issue in this case.[37] No attorney was present for the panel discussions. [App. N: ¶ 10 at 8-9; App. I: 53.VIII(j)] The panel reviewed audits and employee statements. [App. N; App. I: 53.VIII(e)-(f) & (q)] Citizens cannot reproduce this information without access to the facts contained in the privileged material and knowledge

[37] Southern Bell's privilege claim to the identities of these employees was summarily denied by the supreme court. Southern Bell Tel. & Tel. Co. v. Beard, Case No. 80,004 (Feb. 4, 1993). The fact that the company has had to belatedly release these names does not alter the fact that it had impeded discovery of any facts known only to the company through its employees.

of the company's repair service operations and employee discipline process. [App. I: 53.VIII(s) & (u)] Substantial competent evidence exists to support a determination that Citizens' have shown the requisite need for these documents.

Southern Bell has waived work product immunity by disclosing panel disciplinary recommendations for management employees.[38] State v. Rabin, 495 So. 2d 257 (Fla. 3d DCA 1986). [App. R; App. N: ¶ 11 at 9-10] These documents primarily consist of handwritten notes of a company personnel manager. These notes indicate the names of several management employees who have some knowledge of using improper procedures and/or falsification of customer repair records. The panel recommendations at issue herein are no different. Even if the work product privilege were to apply, Southern Bell has waived any objection it might have had to the discovery requested. § 90.507, Fla. Stat. (1991); Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111, 1114 (Fla. 4th DCA 1982) ("It is black letter law that once the privilege is waived, and the horse out of the barn, it cannot be reinvoked.") Further, Southern Bell's voluntary disclosure of some of the notes of the personnel managers waives its objections to producing the rest. Ehrhardt, Florida Evidence. § 507.1 (1992 ed.); see Hoyas v. State, 456 So. 2d 1225 (Fla. 3d DCA 1984).

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[38] Southern Bell alleges that the documents in question were inadvertently produced and has requested their return. [App. P] Citizens maintain that the documents were voluntarily produced and any alleged privilege has been waived by their production. [App. Q] Additionally, Public Counsel is under a statutory duty to protect public records, which these documents became upon their receipt by Public Counsel.

The Commission reached the correct legal decision. Southern Bell attempts to distinguish the case law cited in the Commission's orders on the basis that the audits would not have been done but for the request from corporate counsel. If carried to its logical conclusion, this reasoning would permit any monopoly to hide factual information about its noncompliance with Commission rules under the simple expedient of having corporate counsel ask for the information. This would permit the absurd result of monopoly utilities denying the Commission access to security investigations, financial reviews, or affiliated transactions simply by having corporate counsel make a special request for information. This would turn the legislature's delegation of regulatory oversight upside down. Monopolies would have the power to tell the Commission that, even though they have sole control over the information which revealed significant adverse findings, the Commission would have to take the company's word that no problem exists.

Southern Bell is the sole custodian of the facts in this case. Allowing Southern Bell to withhold the facts would be manifestly unjust. No monopoly, regulated in the public interest, guaranteed an opportunity to profit from the rates it charges the Citizens of this state, should be permitted to close and lock the door on its wrongdoing. If the Commission required Southern Bell to reconstruct its internal review, there is no question that the company would have to comply.

CONCLUSION

Southern Bell's argument that these business documents containing facts about the events at issue in this case are immune from discovery under a claim of work product immunity and attorney-client privilege was properly rejected by the Commission. Despite the legal arguments and specters of "chilling" effects, Southern Bell has failed to show that Order No. PSC-93-0292-FOF-TL was an essential departure from the law or that it would be irreparably harmed by complying with this lawful order.

WHEREFORE, Citizens respectfully request this court to deny Southern Bell's petition.

Respectfully submitted,

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