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IN THE SUPREME COURT OF FLORIDA

SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY,

petitioner,

v.

THE FLORIDA PUBLIC
SERVICE COMMISSION,

respondent.

81,487

Public Service Commission
Docket No. 910163-TL

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

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Petitioner, Southern Bell Telephone and Telegraph Company ("Southern Bell"), pursuant to Rule 9.100(c), Florida Rules of Appellate Procedure, moves to quash an order of the Florida Public Service Commission (the "Commission"), designated by the Commission as Order PSC-93-0292-FOF-TL, affirming an order of the Commission's Prehearing Officer, designated as Order PSC-93-0151-CFO-TL (referred to collectively as the "Orders"), which directs disclosure of certain documents protected under both the attorney-client privilege and the work product doctrine. Southern Bell is requesting oral argument on this matter by separate motion filed this same date.

INTRODUCTORY STATEMENT

Proceedings before the Commission were initiated in late February 1991 against Southern Bell for the purpose of investigating allegations that it had engaged in certain fraudulent actions, one of which was the manner in which Southern Bell reports

trouble repairs. In early April 1991, solely for purposes of representing Southern Bell in those proceedings, Harris Anthony and Robert Beatty, in-house counsel for Southern Bell, requested that Southern Bell's audit department analyze certain data. These requests were made in writing by Southern Bell's counsel and all responses were made in writing and sent directly to Mr. Anthony and Mr. Beatty, the former of whom is record counsel for Southern Bell before the Commission. The resulting communications, from Southern Bell personnel to its counsel in the course of legal proceedings, were held in the strictest confidence. It is these communications which are the subject of this petition.

All criteria necessary to obtain protection under the attorney-client privilege were met. Nevertheless, the Orders strip the communications of all protection. The Commission justifies this startling ruling on the grounds that (1) Southern Bell, as a regulated business, has an obligation to ensure regulatory compliance, and (2) these attorney-client communications would be helpful to Southern Bell in ensuring regulatory compliance. Based upon these premises, the Commission asserts it is entitled to imply a business motivation where none exists. Through this reasoning, the Commission has converted these attorney-client communications into mere business documents subject to full discovery.

The Orders also require production of unredacted copies of panel recommendations regarding craft discipline and panel recommendations requiring paygrade five and below discipline. These documents contain summaries of attorney-client communications

and the work product of Southern Bell in-house counsel resulting from interviews done under the direction of Southern Bell's counsel.

If the Orders are not reversed the attorney-client privilege will be effectively repealed as it pertains to corporations doing business in a regulated area in Florida. Moreover, governmental regulation pervades virtually all industries to some extent, obliging all businesses to ensure relevant regulatory compliance. Under the Commission's Order, corporations will be unable to communicate in confidence with counsel, even in the course of legal proceedings, if the information created and then communicated could help ensure regulatory compliance. Certainty, and thus candid communication with counsel, will be a thing of the past. It is an alarming result, yet the very result with which Southern Bell is faced here. This Court should not allow it.

The Orders, if upheld, will seriously impair a corporation's ability to investigate and respond to charges of impropriety. It will for all practical purposes eviscerate the attorney-client privilege for most businesses in Florida.

JURISDICTION

This Court has jurisdiction pursuant to Article V, Section 3(b)(2) of the Florida Constitution, and Section 350.128(1) of the Florida Statutes (1991).

STATEMENT OF THE CASE

Docket No. 910163-TL before the Florida Public Service Commission is styled In re: Petition on Behalf of Citizens of the State of Florida to Initiate Investigation into the Integrity of Southern Bell Telephone and Telegraph Company's Repair Service Activities and Reports.[1] Because the proceedings below involve a number of consolidated Commission dockets and multiple pleadings, the Court is referred to pages 1 through 3 of the Prehearing Officer's Order, attached as Appendix Exhibit B, for a detailed chronology of motion practice below.[2]

Briefly stated, the Office Of The Public Counsel ("Public Counsel") filed motions to compel production of the following Southern Bell documents, all of which Southern Bell claims are subject to the attorney-client privilege and work product doctrine:

1. (Internal Audit) Customer Adjustment - Loop Operations System (LMOS).
2. (Internal Audit) Mechanized Adjustments - Mechanized Out of Service Adjustments (MOOSA) - Florida.
3. (Internal Audit) Key Service Results Indicator (KSRI) - Network Customer Trouble Rate.
4. (Internal Audit) PSC Schedule II.

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[1] Several other dockets have been initiated before the Commission which arise out of the same basic circumstances. Docket Nos. 900960-TL, and 910727-TL have been consolidated with Docket No. 910163-TL and these, in turn, have been consolidated with Southern Bell's rate review, Docket No.920260-TL.

[2] References to Appendix Exhibits will be designated "Apx. ___"

5. (Internal Audit) Network Operational Review.[3]

6. Panel Recommendations regarding craft discipline.

7. Panel Recommendations regarding paygrade 5 and below discipline.

(Apx. A, p. 2)

On January 28, 1993, after ordering and conducting an in camera inspection, the Commission's prehearing officer issued Order No. PSC-93-0151-CFO-TL (the "Prehearing Order"), granting Public Counsel's various motions to compel and ordering production of the documents at issue. (Apx. B)

On February 23, 1993, the full Commission issued Order PSC-93-0292-FOF-TL (the "Commission's Order"), affirming the Prehearing Order's mandate to produce the referenced documents. (Apx. A) It is this Order which is the subject of this Petition. The Commission's Order, however, simply reviewed the Prehearing Order for error, rather than determining the dispute de novo, and is somewhat conclusory. (Apx. A) Accordingly, this Court's review should include the Prehearing Order as well in order to fully understand the ruling below.

STATEMENT OF FACTS

In late February 1991, Public Counsel initiated proceedings, Docket No. 910163-TL, by requesting that the Commission investigate certain alleged improprieties in Southern Bell's trouble repair

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[3] The Prehearing Officer's Order mistakenly designated Document No. 5 as a "statistical analysis." (Apx. B, p.3.) The Commission's Order corrected the error. (Apx. A, p. 2.)

practices and reporting. In early April 1991, solely to gather information in connection with the proceedings below, Southern Bell's in-house counsel requested the audit department to review and analyze certain data selected by counsel. On April 3, 1991, Southern Bell's counsel requested select information concerning Southern Bell's KSRI, LMOS, and PSC Schedule 11 activity. (Apx. C, D, and E, each at ¶ 2)[4] Finally, on August 3, 1991, Southern Bell's counsel requested analysis of select data concerning Southern Bell's MOOSA system. (Apx. G, ¶ 2) Southern Bell's responses to its attorneys' requests for information, which have come to be known as the "Investigative Audits," are five of the seven documents at issue in this Petition.

By letter dated April 3, 1991, Mr. Beatty, one of Southern Bell's in-house counsel, requested the necessary information.[5] His letter provided in full as follows:

> This letter is our request for the Internal Auditing Department to assist the Legal Department in performing an internal investigation concerning questions raised by Public Counsel, Jack Shreve, regarding alleged falsification of repair service records by Southern Bell employees. The purpose of this investigation is to enable the Legal Department to gather information in order to provide appropriate counsel and legal advice to the corporation in this matter.

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[4] For the Court's convenience, the affidavits pertaining to privilege or work product allegations have been appended separately.

[5] This letter and the letter dated August 2, 1992, discussed immediately below, are protected under the attorney-client privilege and work product doctrine but were disclosed in camera to establish the privileges with respect to the Investigative Audits. Their disclosure here is for the same purpose, which does not result in waiver. § 90.508, Fla. Stat. (1991).

> The investigative Audit Report should be addressed to the attention of the undersigned and Mr. Harris R. Anthony, General Attorney-Florida. Further, the report should be marked "PRIVILEGED AND CONFIDENTIAL: SUBJECT TO THE ATTORNEY/CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT". If you have any questions about this matter, please do not hesitate to contact me. I thank you for your cooperation in this matter.

By letter dated August 2, 1991, Mr. Beatty again confirmed his request for the information. His letter provided in full as follows:

> This letter confirms that in accordance with my letter dated April 3, 1991, the Internal Auditing Department in Florida has either commenced or completed the following Network repair service audits:
>
> 1. KSRI - Network Trouble Report Rate, F10-53-15-A-SAF
> 2. Customer Adjustments - LMOS, F10-15-03-S-SAF
> 3. PSC Schedule 11, F10-63-04-A-SAF
> 4. Network Operations Review, F10-55-02-S-SAF
> 5. Customer Adjustments - MOOSA, F10-16-06-S-SAF
>
> Of course, since each of these audits were undertaken pursuant to the terms and conditions of the April 3, 1991 letter, all reports, work papers and related documents are privileged and confidential and are subject to the attorney/client privilege and attorney work product doctrine.
>
> Your assistance in this matter is greatly appreciated.

The Investigative Audits are simply written reports of the audit department's analyses of the various issues selected by Southern Bell's counsel, analyzed in accordance with directions given by counsel. Southern Bell was not obligated by any law or regulation to perform the Investigative Audits or to produce the written Investigative Audit reports. Nor did Southern Bell have a routine practice of auditing or analyzing its data in the fashion

requested by counsel. These Investigative Audits were performed solely because they were requested by counsel in connection with the legal proceedings below. Southern Bell does indeed conduct a number of routine audits. All routinely performed audits that have been requested were produced and are not at issue here.

The affidavits of the individuals responsible for creating these Investigative Audits are the only evidence of record with respect to them. It is uncontroverted that the Investigative Audits were performed at counsel's written request, and solely to enable counsel to provide legal representation in the proceedings below. Significantly, it is also uncontroverted that the Investigative Audits would not have been performed or communicated but for counsel's request, i.e. counsel was not simply provided with audits routinely performed by the audit department. In fact, counsel directed each of the Investigative Audits, thereby underscoring the fact that these are not routinely generated business documents. For example, with respect to the LMOS Audit, counsel directed the selection of two time periods for certain statistical sampling. (Apx. D, ¶ 4) With respect to the Network Operational Review, an analysis was conducted of specific information that was provided by counsel. (Apx. F, ¶ 3)[6]

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[6] The Orders below repeatedly characterize these Investigative Audits as audits in a routine or generic sense, stating that, for example, "internal audits are a routine vehicle to inform itself about its operations and to report about those operations to a regulatory agency." (Apx. B, p. 7) In so doing the Orders completely ignore the uncontroverted evidence of record. The Investigative Audits at issue are not routine, and would not have been performed absent the request from counsel. Data were analyzed at counsel's request for purposes of the legal

Consistent with the requirements of the privilege, less than half a dozen copies of these reports exist. (Apx. C-E & G, each at ¶ 8 and Apx. F, ¶ 4) All copies are marked and treated as privileged, confidential and subject to the attorney-client privilege and work product doctrine. (Id.) Distribution was limited to in-house counsel, certain top executives and the heads of internal auditing, the department that actually conducted the analyses and generated the reports. (Id; Apx. H)

For each of the Investigative Audits, the affidavits notify Public Counsel as to how it can perform its own, substantially equivalent analysis of Southern Bell's data. The affidavits identify the Southern Bell records used for statistical sampling (Apx. C-D and G, each at ¶ 9), and interrogatory responses notified Public Counsel that any mainframe computer could perform the analysis (Apx. I). All of the underlying data have either been produced by Southern Bell or are subject to production at the request of Public Counsel.

Despite these uncontroverted facts, the Commission ruled that the Investigative Audits were not communications with counsel motivated by the need for legal representation, or documents created specifically for purposes of litigation. The Commission ruled that the Investigative Audits were business documents, and thus subject to discovery notwithstanding the attorney-client privilege or the work product doctrine. (Apx. A, B) The Commission's logic was that: (1) Southern Bell, as a regulated

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representation. These are not business documents.

company, has a business need to monitor its regulatory compliance; (2) audits in a generic sense are helpful in monitoring regulatory compliance; and (3) therefore, no matter what the evidence of record is, there is implied a business motive for creation of the Investigative Audits, taking them outside the attorney-client privilege and work product doctrine. As will be discussed, the Commission's conclusion was incorrect.

Finally, Southern Bell's in-house counsel also requested that its security department interview certain employees and report back to counsel with their results. Southern Bell's counsel instructed and enlisted its security department to act as their agent in the process of fact gathering. Southern Bell's counsel directed and controlled, and in most cases were present during, the interviews with employees. Thereafter, counsel summarized and memorialized these conversations with employees, including in their notes their subjective impressions of the interviews. At the conclusion of these interviews, the legal department informed a limited number of managers of Southern Bell with a "need to know" of the results of the interviews.

These managers who "needed to know" the results of the interviews subsequently prepared panel recommendations regarding craft discipline and panel recommendations regarding paygrade five and below discipline (hereafter collectively "Panel Recommendations"). On the left side of these documents is information regarding the identities of disciplined employees. Southern Bell has no objection to the production of these portions

of these documents. The right side of these documents, however, contains a summary of attorney-client communications and the work product of Southern Bell's in-house counsel. Portions of the Panel Recommendations contain excerpts from interviews or summaries of interviews which are protected by the attorney-client privilege and work product doctrine. Southern Bell should be allowed to redact these privileged portions.

The Commission ordered production of unredacted copies of the Panel Recommendations, ruling that the Panel Recommendations were solely business records (Apx. A, B.) In doing so, the Commission ignored the fact that portions of the documents Southern Bell wishes to withhold are excerpts of the attorney's summaries of employee interviews taken as part of Southern Bell's in-house counsel's preparation to respond to the underlying proceeding.

RELIEF SOUGHT

Southern Bell seeks issuance of an order quashing the Commission's Order PSC-93-0292-FOF-TL, as the Commission's Order departs from the essential requirements of law and because compliance with it will irreparably harm Southern Bell. Southern Bell has no adequate remedy on any review of final administrative action by the Commission because once the attorney-client privilege and work product documents are disclosed to Public Counsel, the confidentiality of communication is forever lost.

ARGUMENT AND CITATION OF AUTHORITY

The Orders depart from the essential requirements of law in requiring Southern Bell to produce confidential communications from Southern Bell to its in-house counsel. These communications were requested by counsel for the sole purpose of enabling counsel to provide legal advice in connection with the proceedings below. They are protected under the attorney-client privilege as set forth under section 90.502 of the Florida Statutes.

Further, the Orders depart from the essential requirements of law in that the documents ordered produced are clearly protected under the work product doctrine. Public Counsel has failed to carry its burden of showing an inability without undue hardship to obtain substantially equivalent material by other means. In fact, the evidence of record is to the contrary. Southern Bell has under oath informed Public Counsel as to the means by which Public Counsel can perform its own analysis of Southern Bell's data.

Finally, there are both constitutional and practical problems with the Commission's ruling. From a constitutional standpoint, the Commission should have applied a facially neutral statute (section 90.502 of the Florida Evidence Code) to Southern Bell. Instead, it held Southern Bell to a stricter standard based solely on its status as a regulated company, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

A. The Investigative Audits Are Attorney-Client Communications For The Purpose Of Obtaining Legal Representation And Are Not Discoverable.

Florida has codified the attorney-client privilege. Briefly, the privilege applies to "the contents of confidential communications [between a lawyer and a client] . . . made in the rendition of legal services to the client." § 90.502(2), Fla. Stat. (1991). Communications are "confidential" if not intended to be disclosed to third persons (i) other than in the course of the legal representation or (ii) other than as reasonably necessary for the transmission of the communication. § 90.502(1)(c), Fla. Stat. (1991). The privilege protects large corporations like Southern Bell as well as individual clients. § 90.502(1)(b), Fla. Stat. (1991); Tail of the Pup, Inc. v. Webb, 528 So. 2d 506, 507 (Fla. 2d DCA 1977).

When these elements are applied to the instant matter, it is clear that the Investigative Audits are "confidential communications." They were communications from client to attorney, marked and maintained in strict confidence. The communications were from Southern Bell employees with responsibility for auditing Southern Bell's data. The sole purpose for the communications was to enable counsel to represent Southern Bell in the proceedings below. Accordingly, absent evidence of waiver or one of the statutory exceptions (which are not at issue here), the Investigative Audits are absolutely privileged and are not discoverable.

This case is almost identical to the watershed case of Upjohn Company v. United States, 449 U.S. 383 (1981). That case analyzed the privilege in the context of internal investigations by in-house counsel. Upjohn has become the template by which virtually all such claims of privilege are judged and, in fact, Upjohn is controlling authority for investigations by counsel of alleged corporate misconduct.[7]

In Upjohn, the company's in-house counsel learned of activity by a foreign subsidiary potentially violative of the Foreign Corrupt Practices Act, and initiated an internal investigation to determine Upjohn's compliance with statutory requirements. As here, the communications at issue were communications from employees to counsel in response to counsel's request for information. Again as here, the employees knew of the legal representation, and knew to maintain the communications in confidence. See Upjohn, 449 U.S. at 386-87, 394-95. Unlike this case, in Upjohn no legal proceedings had yet been initiated. Nevertheless, the Supreme Court recognized the communications as privileged. The Supreme Court held that such communications between client and attorney must be protected in order to make possible the open and honest communication necessary to provide a

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[7] Florida courts have not explicitly adopted Upjohn, though it is always cited favorably. See Burt v. Government Employees Ins. Co., 603 So. 2d 125 (Fla. 2d DCA 1992); State v. Rabin, 495 So. 2d 257, 261 (Fla. 3d DCA 1986); Russell & Axon v. B & W Ltd., Inc., 444 So. 2d 457, 459 (Fla. 5th DCA 1983). Given the almost universal acceptance of Upjohn, given the factual similarity with the case at hand, and given the fact that it correlates perfectly with Florida's statutory attorney-client elements, Upjohn should be considered dispositive.

basis for sound legal advice. Upjohn, 449 U.S. at 348. This is consistent with Florida's policy favoring full disclosure to counsel of all facts, whether favorable or unfavorable, so that counsel can provide informed, effective representation. State v. Rabin, 495 So. 2d 257, 259 (Fla. 3d DCA 1986).

In short, this case presents classic attorney-client communications under both section 90.502 of the Florida Statutes and Upjohn. Unfortunately, the Orders applied neither Upjohn nor section 90.502 elements to the facts of record. Rather, the Commission (i) ignored the statute and discarded Upjohn in favor of an obscure 1981 Federal Energy Regulatory Commission ("FERC") opinion and then completely misconstrued the FERC opinion, (ii) confused the attorney-client privilege with the work product doctrine, borrowing an exception to the work product doctrine and applying it to the previously unqualified privilege, and (iii) completely ignored the uncontradicted (and in fact the only) evidence of record, holding instead that the Investigative Audits are simply routine business records subject to routine discovery. In each instance, the Commission departed from the essential requirements of law.

1. The Orders fail to rely upon Section 90.502 of the Florida Evidence Code which controls over any conflicting federal regulatory agency opinion.

The Orders concede that this case falls within the principles announced in Upjohn. They distinguish this case, however, ruling that Southern Bell is a "regulated" company and that the opinion in

Consolidated Gas Supply Corporation, 17 F.E.R.C. ¶ 63,048 (December 2, 1981), is thus more closely on point. The Prehearing Order concludes:

> While Southern Bell analogizes directly from Upjohn to its claim of attorney-client privilege for its audits and statistical analysis, Consolidated Gas Supply Corporation, 17 F.E.R.C. ¶ 63,048 (December 2, 1981), involving a regulated company, is more closely on point.
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> * * *
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> Here, too, as in Consolidated, the context is one in which the continuing obligation of this Commission to regulate and to protect the public interest and the reciprocal responsibilities of Southern Bell to comply with that regulation, make Southern Bell's claim that its audits and statistical analysis were solely for the purpose of getting legal advice hypertechnical rather than substantive. Southern Bell has a continuing obligation to comply with Commission Rule 25-4.100(2), F.A.C. Where doubts about the compliance of its operations with regulatory requirements have arisen, Southern Bell has an independent business need to accurately monitor those operations which predates, post-dates and coexists with the timing of any particular audit undertaken to obtain legal advice. Unlike Upjohn's "questionable payments" episode, Southern Bell's need to comply with Commission regulation is a routine, continuing obligation, as is its self-monitoring toward that end.

(Apx. B, p. 6)

In turn, the Commission's Order accepts the Prehearing Order's conclusion, stating:

> The Order also noted that a simple analogy with Upjohn Co. v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (January 13, 1981), is not dispositive where no regulated monopoly utility was at issue there.

(Apx. A, p. 3)

Noticeably absent from the Orders is any reference to the Florida Evidence Code. Instead, the Orders rely upon an Article I

federal administrative agency opinion, the 1981 FERC opinion in Consolidated Gas. However, section 90.102 of the Florida Statutes provides that the Florida Evidence Code "shall replace and supersede existing statutory or common law in conflict with its provisions." In addition, section 90.103(1) of the Florida Statutes provides: "Unless otherwise provided by statute, this Code applies to the same proceedings that the general law of evidence applied to before the effective date of this Code."

When this Court originally adopted the Florida Evidence Code, it concurred with the Legislature's views that the Code superseded all previous conflicting authority. It stated: "These rules shall govern all proceedings within their scope subsequent to that date [July 1, 1979], and all present rules of evidence established by case law or express rules of the court are hereby superseded to the extent that they are in conflict with the code." In re Florida Evidence Code, 372 So. 2d 1369 (1979); see In re Amendment of Florida Evidence Code, 404 So. 2d 743 (1981).

Similarly, section 90.501 of the Florida Statutes limits privileges to those which are recognized under the Florida Evidence Code. "Thus, privileges in Florida are no longer creatures of judicial decision." State v. Costalano, 460 So. 2d 480, 481 (Fla. 2d DCA 1984).

Section 90.502 of the Florida Statutes defines the lawyer-client privilege in Florida. It defines "lawyer" to be a person "authorized to practice law in any state or nation." There is no exception or distinction between in-house versus outside counsel.

Furthermore, a "client" is defined to be "any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." The definition of a client for purposes of the attorney-client privilege includes both corporations, as well as public bodies. No distinction is made whatsoever in section 90.502 with respect to the nature of the enterprise in which the client is engaged.

Section 90.502 of the Florida Statutes then goes on to define a privileged communication as the contents of a confidential communication between a client and a lawyer made in the rendition of legal services to the client, as discussed more fully above. More important, subsection 4 of section 90.502 specifically lists five different exceptions to the attorney-client privilege. The Florida Evidence Code has thereby codified the exceptions to the attorney-client privilege. None of them have anything to do with the matter at issue.

There is no exception in section 90.502 which even comes close to resembling a different standard for application of the attorney-client privilege when the client is a regulated company. The Commission, as a creature of statute with limited jurisdiction, cannot abrogate the attorney-client privilege because the issue of privilege arose in "a context of a regulated industry where the agency is charged with regulating and protecting the public interest." Prehearing Order at 6 (Apx. B, p. 6). See Florida

Bridge Co. v. Bevis, 363 So. 2d 799, 802 (Fla. 1978)(quoting City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 496 (Fla. 1973)).

The Commission was required to follow the Florida Evidence Code, specifically section 90.502 of the Florida Statutes. It has no discretion to ignore section 90.502's mandates. The Commission erred in relying upon a 1981 FERC opinion to determine the applicability of the attorney-client privilege to the Investigative Audits.

2. The Orders misconstrue the narrow and broad views of the attorney-client privilege by adopting the narrow view and then misapplying it.

Relying upon an obscure opinion by a federal administrative agency, the Commission not only subjects a corporation doing business in Florida, without notice, to a standard contrary to section 90.502 of the Florida Statutes, it then even misapplies the standard. In Consolidated Gas the Federal Energy Regulatory Commission applied the "narrow" rather than the "broad" view of the privilege because it had a duty to protect the public interest. The Orders below seize on this language, holding that since the Commission also protects the public interest, it should also apply the "narrow" view of the privilege, and it must order the Investigative Audits produced to avoid an "overly broad corporate information shield." (Apx. A, p.3)

The Commission has completely misconstrued the narrow and broad views of the attorney-client privilege.[8] The narrow and broad views of the privilege involve the extent to which communications from attorney to client are privileged. There, however, is no debate about the cornerstone of the privilege. It is the protection of communications from client to attorney so as to encourage frank communication from client to attorney. See Rabin, 495 So. 2d at 259; Fisher v. United States, 425 U.S. 391, 403 (1976). The narrow view, then, extends the privilege only to statements from attorney to client that in fact reveal a communication from client to attorney. The broad view, on the other hand, protects virtually all communications from attorney to client, assuming that any statement by the attorney will indirectly reveal client communications. See Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 27-29 (N.D. Ill. 1980).

The problem with the Commission's reliance on the "narrow" view language of Consolidated Gas is that all of the communications at issue here are from client to attorney, rather than the converse. The narrow/broad debate has no application whatsoever to this case. Communications from client to attorney for purposes of the legal representation are universally privileged, and their protection from discovery depends in no way on whether the body

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[8] There are several other flaws in the Commission's logic, and in fact the Orders are somewhat confusing because of it. For example, the Orders often consider work product factors in discussing the privilege and in effect merge these two distinct concepts. The Orders also disregard the uncontroverted evidence concerning the circumstances surrounding the communications. These issues are discussed below.

seeking the information has a public interest motive. Accordingly, the Commission erred in narrowing the scope of Southern Bell's privilege based on Consolidated Gas.

3. The Orders below confuse the attorney-client privilege and the work product doctrine by applying an inappropriate standard to the attorney-client privilege claims.

In finding that the Investigative Audits were not privileged attorney-client communications, the Commission relied on the fact that no attorney work product, such as legal theories or opinions, appeared on the face of the documents. (Apx. A, p. 3; Apx. B, pp. 4, 6). Had such material been present, the Commission was prepared to excise or redact the documents prior to production to protect counsel's legal opinions. This highlights the Commission's error.

Considerations concerning counsel's work product, opinions and legal theories, and excision to protect them from discovery while producing factual information, are appropriate in evaluating an exception to the work product doctrine. See Fla. R. Civ. P. 1.280(b)(3); Rabin, 495 So. 2d at 262 (Fla. 3d DCA 1986). These considerations though have no application to a privilege analysis. See City of Williston v. Roadlander, 425 So. 2d 1175, 1177 (Fla. 1st DCA 1983)(attorney-client privilege and work product doctrines are separate and distinct). To the contrary, the purpose of the privilege is to protect confidential communications from client to attorney. Upjohn, 449 U.S. at 389; Ohio-Sealy, 90 F.R.D. at 28. One would not expect to find counsel's thoughts and opinions in communications from the client.

The attorney-client privilege is absolute, save for narrow statutory exceptions not at issue here. Diversified Industries v. Meredith, 572 F.2d 596, 602-03 (8th Cir. 1977). There is no balancing of interests, and no showing of need can overcome it. See Staton v. Allied Chain Link Fence Co., 418 So. 2d 404, 406 (Fla. 2d DCA 1982)(even cause to believe that there are inconsistencies between attorney-client statements and testimony under oath does not vitiate the privilege -- the privilege is absolute save for the statutory exceptions). By injecting into its privilege analysis the factor of whether counsel's mental impressions would be disclosed by production of the Investigative Audits, the Commission created a new exception to the privilege, and in the same breath decided that it would use the privilege and order disclosure of documents.

The Commission inappropriately created an exception to the attorney-client privilege and then used that exception to justify an order requiring production:

> Thus, rather than grant sweeping coverage of the privilege, the Consolidated judge elected to avoid "an overly broad corporate information shield in theory as well as in fact by allowing for excision of a document to permit discovery of only factual matters." Moreover, "similar conclusions apply with regard to work product."

(Apx. A, p.3, emphasis added)

Because the Investigative Audits were communications from a client to its counsel and, therefore, did not contain counsel's legal opinions, the Commission found that the audits were discoverable under the Commission's newly created exception to the privilege. (Id.) In so ordering, the Commission basically turned

the privilege inside-out, attempting to protect counsel's opinions (which are only derivatively protected by the privilege) while allowing discovery of communications from clients to attorneys, the very thing the privilege primarily is meant to protect.

4. The Commission erred by ignoring uncontroverted evidence and ruling that the Investigative Audits were merely business as opposed to legal communications.

It is also uncontroverted that the Investigative Audits were requested by in-house counsel in the course of representing Southern Bell in the proceedings below. It is uncontroverted that the Investigative Audits would not have been performed but for counsel's need in connection with the legal representation. In other words, the Investigative Audits were communications solely to facilitate legal representation, rather than communications with any business purpose.

The Commission, however, chose to supply its own views as to the purpose of these Investigative Audits. According to the Prehearing Order:

> Southern Bell has a continuing obligation to comply with Commission Rule 25-4.110(2) F.A.C. Where doubts about the compliance with its operations with regulatory requirements have arisen, Southern Bell has an independent business need to accurately monitor those operations which pre-dates, post-dates and co-exists with the timing of any particular audit undertaken to obtain legal advice. Unlike Upjohn's "questionable payments" episode, Southern Bell's need to comply with Commission regulation is a routine, continuing obligation, as is its self-monitoring toward that end.
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> Because Southern Bell had an independent business need to monitor its activities accurately through the particular audits in question, as well as to obtain legal

> counsel by informing itself thereby, the factual data created by those audits and statistical analyses, as distinct from counsel's legal theories about them, are not privileged.[10]
>
> * * * *
>
> Numerous cases have held that, where other factors such as business goals led to creation of documents, the attorney-client and work product privileges are inapplicable.

(Apx. A, p.3) In other words, the argument goes, Southern Bell has a business need to ensure regulatory compliance, the Investigative Audits at issue would be helpful for that purpose, and thus the Commission will, after the fact, unilaterally imply a business as opposed to legal motive for these communications and strip them of all protection from discovery.

Similarly, the Prehearing Order states:

> Internal audits are a routine vehicle for a regulated business to inform itself about its operations and to report about those operations to a regulatory agency. Those business documents do not become privileged merely because non-routine developments require audits to be scheduled out of sequence or because the documents are handed over to an attorney.

(Apx. B, p. 7) The Prehearing Order obviously speaks in this regard of audits in the generic sense. This completely ignores the evidence of record, however, as noted above, and fatally flaws the Commission's logic.

The evidence is uncontroverted that the Investigative Audits would not have been performed but for the need for legal representation in the proceedings below. The April 3, 1991 and

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[10] Note here again the Commission improperly injects a work product factor into its privilege analysis.

August 2, 1991 letters by Mr. Beatty, quoted above, are conclusive on this point. The affidavit with respect to the KSRI Audit is further illustrative:

> The August, 1991 KSRI - Network Customer Trouble Report Rate Audit was carried out solely because the legal department requested that it be performed in connection with its representation of Southern Bell Telephone and Telegraph Company in Docket No. 910163.

(Apx. C, ¶ 7)

Where "the communication would not have been made but for the client's need for legal advice services," it is a privileged attorney-client communication. First Chicago Int'l v. United Exchange Co., Ltd., 125 F.R.D. 55, 57 (S.D.N.Y. 1989). Moreover, it is the intent of the client, rather than any intent implied by the Commission, that controls this issue. § 90.502, Fla. Stat. (1991)(Sponsor's Note, subsection one); cf. Rabin, 495 So. 2d at 260 ("In determining whether a privileged attorney-client relationship exists, the primary focus is on the intent of the person claiming the privilege.") No claim by the Commission that Southern Bell could have used the Investigative Audits in a business sense to ensure regulatory compliance will change the fact that, under the only evidence of record, the Investigative Audits were motivated by the need for legal representation.

The Prehearing Order attempts to buttress its claim that the Investigative Audits are business as opposed to legal documents by noting that the privilege protects communications only, not the underlying factual data. (Apx. B, p. 6) That, however, is precisely why the Investigative Audits are immune from discovery.

The Investigative Audits are not factual data, nor do they create factual data as claimed below. The Investigative Audits are confidential communications to counsel concerning Southern Bell's factual data. At counsel's request, Southern Bell analyzed selected data and reported the analyses in the Investigative Audits. These analyses are not discoverable even though the underlying data are. In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2d Cir. 1984)(privilege applies to communications concerning facts even if facts are not confidential); In re Ampicillin Anti-Trust Litig., 81 F.R.D. 377, 389 (D.D.C. 1978) ("In order for the privilege to apply the client's communications must be made with the intention of confidentiality . . . it is not necessary that the information be confidential.").

For example, in United States v. Moscony, 927 F.2d 742 (3d Cir. 1991), cert. denied, 111 S. Ct. 2812 (1991), discovery was sought concerning a communication between attorney and client. The privilege was disputed because the communications simply concerned non-confidential office procedures. The Third Circuit disagreed. Though the office procedures (which were at issue in the case) were discoverable, the client's communication to the attorney concerning the procedures were not. Here, of course, Southern Bell's data are analogous to the office procedures which are discoverable, though communications concerning them are not.

Southern Bell's factual data have been subject to extensive discovery and remain so. It has been subject to extensive discovery, and remains thus. It is only the Investigative Audits,

confidential communications about the factual data, that are privileged. No facts are being withheld. Application of the privilege in these circumstances is routine, and in fact leaves Public Counsel no worse off than had the communications never been made in the first instance. See Upjohn, 449 U.S. at 395.

B. Far From Being In The Public Interest, The Ruling Below Will Seriously Impair A Corporation's Efforts To Ensure Regulatory Compliance.

Contrary to the Commission's statements concerning the public interest, abrogating the attorney-client privilege as the ruling below does will work against the public interest, by discouraging full and frank communication between client and attorney.

For legal representation to be effective, the client must be free to disclose all facts, favorable and unfavorable, without fear of the communication being used against him. Upjohn, 449 U.S. at 389, 393 n.2; see also Fisher, 425 U.S. at 403; First Chicago International v. United Exchange Co., Ltd., 125 F.R.D. 55, 56 (S.D.N.Y. 1989). As stated in Fisher:

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

Fisher, 425 U.S. at 403.

Modern businesses need effective legal advice in order to ensure compliance with the vast array of governmental regulation. However, limiting the privilege as was done below, by holding that all communications with counsel concerning regulatory compliance

are discoverable, will have a particularly troublesome impact on large businesses, the very entities that we most want to be in regulatory compliance. Upjohn, 449 U.S. at 390. As noted by the Supreme Court:

> The narrow scope given the attorney-client privilege by the court below . . . threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter.

Upjohn, 449 U.S. at 392 (citations omitted). Accordingly, any change to the privilege's application should consider the detrimental effect on the free flow of information from client to attorney, to gauge accordingly the impact on companies' ability to obtain effective legal counsel. This concept has been stated thus:

> Would application of the privilege under the circumstances of this particular case foster the flow of information to corporate counsel regarding issues about which corporations seek legal advice.

First Chicago, 125 F.R.D. at 57 (citing John E. Sexton, A Post-Upjohn Consideration of the Attorney Client Privilege, 57 N.Y.U.L. Rev. 443, 449 (1982)). If the answer is yes, the privilege should apply. If the answer is no, then the document at issue would have been created anyway as a business as opposed to legal document.

The answer in this case is clear. If Southern Bell's communications with counsel are to be subject to disclosure simply because they could assist in ensuring regulatory compliance, Southern Bell will be less likely to communicate with counsel on that subject. In all likelihood, the Investigative Audits would

never have been created if Southern Bell's counsel had known they would be disclosed to the very parties who had initiated proceedings against which Southern Bell's counsel was defending. What the Commission sees as being in the public interest in this particular case would create a Pandora's Box in the future for counsel representing regulated companies: (1) request the information and risk disclosure; or (2) do nothing and hope the information was not necessary to assist in the litigation. One result is certain - there would be no increase in communication concerning regulatory compliance.[11] Simply put, the decision below is the wrong one from a public interest[12] standpoint.

C. The Commission Should Have Applied A Facially Neutral Statute, Section 90.502 of the Florida Evidence Code. In Failing to Do So, It Violated The Equal Protection Clause of the Fourteenth Amendment to the United States Constitutions.

The Commission violated Southern Bell's equal protection rights when it admittedly restricted the scope of Southern Bell's attorney-client privilege based on Southern Bell's status as a regulated company.

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[11] As noted above, there is no detriment to Public Counsel or the Commission from such a ruling. The data continue to exist, and they are no worse off than had Southern bell not performed its own data analysis in the first place. See Upjohn, 449 U.S. at 395.

[12] The Commission's citation to its public interest motive is incorrect in another more fundamental respect. The Legislature has announced its view that the public interest is served by § 90.502. There is simply no authority for the Commission to substitute its own view of the public interest for that of the Legislature.

Southern Bell is afforded the privilege to refuse to disclose attorney-client communications under section 90.502 of the Florida Statutes. That section is facially neutral. On its face, it applies equally to all parties subject to its terms. The term "client" is defined to include "any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer for the purposes of obtaining legal services." The Commission, however, has by fiat admittedly narrowed the scope of protection to which Southern Bell would otherwise be entitled under section 90.502 simply by virtue of the fact that Southern Bell is a regulated company.

The Prehearing Order, for example, noted that, as in Consolidated Gas, Southern Bell is a regulated company. Accordingly, the Prehearing Order discards the statute and Upjohn in favor of a narrower view based solely upon Southern Bell's status as a regulated company:

> Here, too, as in Consolidated, the context is one in which the continuing obligation of this Commission to regulate and to protect the public interest and the reciprocal responsibilities of Southern Bell to comply with that regulation, makes Southern Bell's claim that its audits and statistical analyses were solely for the purpose of getting legal advice, hypertechnical rather than substantive.

(Apx. B, p.6) The full Commission's Order agreed that the privilege would apply differently to Southern Bell based on its status as a regulated company:

> The Order also noted that a simple analogy with Upjohn Co. v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (January 13, 1981), is not dispositive where no regulated monopoly utility was at issue there.

(Apx. A, p.3) In so doing, the Commission has violated the constitutional guarantee of equal protection.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the unequal administration of a facially neutral statute. E & T Realty v. Strickland, 830 F.2d 1107, 1112 n.5 (11th Cir. 1987), cert. denied, 485 U.S. 961 (1988). As stated by the United States Court of Appeals for the Eleventh Circuit:

> The unlawful administration by state officers of a state statute fair on its face resulting in application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.
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> * * *
>
> Unequal administration of facially neutral legislation can result from either misapplication (i.e., departure from or distortion of the law) or selective enforcement (i.e. correct enforcement in only a fraction of cases). In either case, a showing of intentional discrimination is required.

E & T Realty, 830 F.2d at 1113; see also St. Johns North Utility Corp. v. Florida Public Service Comm'n, 549 So. 2d 1066, 1069 (Fla. 1st DCA 1989); Amos v. Department of Health and Rehabilitative Servs., 444 So. 2d 43, 47 (Fla. 1st DCA 1983). Intentional and purposeful discrimination in unequally applying a facially neutral statute exists where defendants' conduct is "deliberately based on an unjustified, group-based standard." E & T Realty, 830 F.2d at 1114.

Section 90.502 is facially neutral. Whether or not it could have, the Legislature declined to permit differential application

of the statute based upon the parties' status as regulated companies. Accordingly, Southern Bell is entitled to have the statute applied to it as to any other, non-regulated company. See Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536 (1933)(corporations are as much entitled to equal protection under the law as are natural persons).

D. The Investigative Audits, Prepared Solely For Purposes Of The Legal Proceedings Below, Are Protected From Discovery Under The Work Product Doctrine.

Materials prepared in anticipation of litigation by or for a party or its representative are qualifiedly protected from discovery. Rule 1.280(b)(3), Fla. R. Civ. P. Though existing data are not protected, materials selected from a larger group of data and meaningfully assembled (e.g. the Investigative Audits) are protected if done in anticipation of litigation. In re International Sys. & Control Corp. Sec. Litig., 91 F.R.D. 552, 561 (S.D. Tex. 1981), vacated on other grounds, 693 F.2d 1235, 1238 (5th Cir. 1982)(appellate court reversed order requiring production of work product and stated documents in special review binders were clearly work product). Protected work product can be generated by either the attorney or the client. International Sys., 91 F.R.D. at 556.

The work product privilege from discovery can be overcome only by a showing that the party seeking discovery has need of the material and is unable without undue hardship to obtain the

substantial equivalent. Id. The policy behind the doctrine has been stated thus:

> [O]ne party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.

Dodson v. Purcell, 390 So. 2d 704, 708 (Fla. 1980).

The instant dispute with respect to the work product doctrine centers on two issues. First, the Commission claims the Investigative Audits were not prepared in anticipation of litigation because there was a business motive for their creation. This argument is identical to the Commission's attorney-client argument. Second, the Commission claims Public Counsel has met its burden of showing an inability to obtain the substantial equivalent without undue hardship. The Commission erred in both respects.

1. The Investigative Audits were prepared for purposes of the proceedings below.

To reiterate, the uncontroverted evidence is that the Investigative Audits were prepared specifically at counsel's request in connection with defense of the proceedings below and that is the sole reason for their existence. They would not have been performed and communicated to counsel but for the litigation. See Anchor National Fin. Serv. v. Smeltz, 546 So. 2d 760, 760-61 (Fla. 2d DCA 1989)(work product established based on unrefuted affidavits). Nevertheless, the Commission held that other, business factors (Southern Bell's need to monitor and "troubleshoot" operations) led to the creation of the Investigative

Audits and thus they were not prepared in anticipation of litigation:

> Southern Bell's obligation to conform its operations to such regulations as Rule 25-4.110(2), F.A.C. is not extraordinary, it is a routine aspect of its regulated business. Whatever audits need to be done in order to troubleshoot its operations are part of that business routine, even though they may have additional functions such as aiding in the giving of legal advice.

(Apx. B, p.8).[13] In other words, if the Commission cannot find a business motive, it will imply one, stating that Southern Bell should have done the Investigative Audits for business purposes.

The Commission attempts to characterize the Investigative Audits as "dual motive" documents because there is authority to the effect that regular investigations, audits or incident reports, motivated as much by a desire to correct a problem as to prepare for litigation, are not protected work product. See Airocar, Inc. v. Goldman, 474 So. 2d 269, 270 (Fla. 4th DCA 1985)(bus driver reported all incidents to company, which would then decide if further investigation warranted; initial report for routine business purpose); United States v. El Paso Co., 682 F.2d 530, 543 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984)("tax pool analysis" concerning potential impact of litigation on company's tax liability motivated by desire to conform accounting procedures to securities laws); Soeder v. General Dynamics Corp., 90 F.R.D. 253, 255 (D. Nev. 1980)(defendant had dual motive of preparing for

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[13] It should be noted that the myriad of audits regularly conducted by Southern Bell of its data are and have been subject to discovery. It should also be noted that there is absolutely no requirement, anywhere, that Southern Bell perform the Investigative Audits at issue here.

litigation and improving its product and thereby saving lives); Galambus v. Consolidated Freightways Corp., 64 F.R.D. 468, 472 (N.D. Ind. 1974)(statement from driver taken pursuant to ICC regulations). None of these cases apply here.

Soeder both demonstrates the principle the Commission attempted to apply and why that principle should not apply herein. In Soeder the defendant plane manufacturer prepared in-house accident reports after every aircraft accident. In addition to anticipating litigation, the company testified that the reports were motivated in part:

> . . . because of a desire by Defendant to constantly improve its product, thereby saving lives and guarding against adverse publicity and the detrimental economic consequences which may flow from repeated crashes of their aircraft.

Soeder, 90 F.R.D. at 255. For Soeder to apply here, then, there would have to be evidence that the Investigative Audits were motivated at least in part by some business concern. There is none. The only evidence is that the Investigative Audits were motivated solely by the need for legal representation in the proceedings below,[14] and the Commission's attempts to imply a dual motive where one does not exist do not take the Investigative Audits outside the scope of work product.

The Commission also attempts to support the ruling that the Investigative Audits are not work product by noting that they

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[14] The Court will note that the addressee of the Investigative Audits, Southern Bell's in-house counsel, is of record and has taken the lead role in the proceedings below. In addition, he is also counsel of record in this appeal.

contain no "attorney" work product such as counsel's mental impressions or legal opinions. However, that is as it should be. The Investigative Audits were created by Southern Bell, not the attorney, and indicate counsel's "opinion" work product only to the extent indicated through counsel's direction. To the extent, however, that the Commission implies that factual work product prepared by the client does not fall within the work product doctrine, the Orders are clearly in error. See International Systems, 91 F.R.D. at 556; Rabin, 495 So. 2d at 262.

2. There has been no showing of an inability to obtain the substantial equivalent without undue hardship.

The proceedings below will necessarily involve analyses of various Southern Bell data. Since Public Counsel initiated the proceedings prior to Southern Bell's attorneys ever requesting that the Investigative Audits be performed, Public Counsel must have intended to perform its own analyses of such data. Public Counsel has access to all of Southern Bell's underlying data. How is it, then, that Public Counsel can no longer perform its own audits of Southern Bell's data? The answer, of course, is that it can. It simply wants Southern Bell's analyses as well and the insight this would give into counsel's thoughts and plans.

It should be remembered that the Investigative Audits are not mere clerical tabulations. These are Southern Bell's analyses of data that go to crucial matters at issue in the proceedings below that were performed for Southern Bell's counsel. Public Counsel certainly should do its own analysis of that data in order to carry

its burden. It has no need to scavenge Southern Bell's attorney-client privilege and work product protected documents.

The evidence of record, by persons with personal knowledge, is that the data analysis in the Investigative Audits can be replicated using certain identified Southern Bell records and a mainframe computer. It is routine in complex litigation for the parties to conduct their own audit of the opponent's data. Where the data are difficult to access or understand, records custodian depositions are the standard means to resolve the problem.

Public Counsel has not tried the standard practice. Instead, Public Counsel simply submitted an affidavit, not even made on personal knowledge, which states in essence:

1. Southern Bell maintains computerized processing of its customer trouble reports;

2. Southern Bell audits its processing of customer trouble reports;

3. Computers are necessary to audit the data;

4. It would be a substantial effort for Public Counsel to perform its own audit of the data;

5. It would be almost impossible to analyze <u>all</u> trouble reports (which assumes that Southern Bell audits all rather than a statistical sampling of its reports); and

6. The computer data (already produced) and the computer system necessary to audit the data are under Southern Bell's control and cannot be obtained elsewhere.

(Apx. J) This affidavit is erroneous in several respects, which is not surprising since it is based on speculation.

First, it would obviously be a substantial undertaking to analyze each of the trouble reports received by Southern Bell, though Public Counsel is clearly entitled to do so if it so

desires. More appropriate, however, would be a statistical sampling based upon an audit protocol to be determined by Public Counsel. Southern Bell, for purposes of the litigation, created its own audit protocol and analyzed the data as it saw fit. Public Counsel should be required to do the same rather than simply relying on Southern Bell's work product. United States v. Davis, 131 F.R.D. 391, 406 (S.D.N.Y. 1990), reconsideration granted in part, 131 F.R.D. 427 (S.D.N.Y. 1990); In re LTV Sec. Litig., 89 F.R.D. 595, 613 (N.D. Tex. 1981).

Second, the affidavit misses the mark in stating that the data and the computer systems necessary to analyze the data are within Southern Bell's sole possession. The data have already been produced. If Public Counsel needs additional data, the discovery rules remain available. Moreover, as noted in interrogatory responses, the data can be analyzed on any mainframe computer. (Apx. I) It strains credulity for Public Counsel to suggest that the State of Florida does not have access to a mainframe computer.

Obviously, then, Public Counsel could conduct its own analysis of Southern Bell's data. The question becomes, then, would this be an undue hardship? The answer is no. The law in Florida is clear that bare assertions of undue hardship are inappropriate. There must be specific explanations and reasons. North Broward Hosp. Dist. v. Button, 592 So. 2d 367 (Fla. 4th DCA 1992); State Farm Mut. Auto. Ins. v. LaForet, 591 So. 2d 1143 (Fla. 4th DCA 1992). Given Public Counsel's flawed affidavit, there is nothing more than a bare assertion of undue hardship here.

The most that can be even implied credibly from Public Counsel's affidavit is that it would take substantial time and expense for Public Counsel to do its own analysis of the data. Of course, Public Counsel must have contemplated doing its own analysis when it initiated these proceedings. Moreover, the law in Florida is clear that costs of discovery do not constitute an undue hardship. Publix Supermarkets, Inc. v. Kostrubank, 421 So. 2d 52, 53 (Fla. 1st DCA 1982); see United States v. Chatham City Corp., 72 F.R.D. 640, 644 (S.D. Ga. 1976) (The cost or inconvenience of discovery is not sufficient to meet the undue hardship standard).

Southern Bell has or is willing to provide its data to Public Counsel. Public Counsel should thus be required to carry its own burden and conduct its own analysis of the data, rather than capitalizing on Southern Bell's trial preparation efforts.

E. The Commission Erred by Ignoring Uncontroverted Evidence and Ruling that the Panel Recommendations were Composed Entirely of Business as Opposed to Legal Communications.

The Panel Recommendations contained two types of information. The first type of information (contained on the left hand side) relates to the identity of individuals disciplined by Southern Bell. Southern Bell no longer has objection to producing this information and in fact, has contemporaneously offered to produce copies of the Panel Recommendations with privileged excerpts described below redacted. Public Counsel, in fact, already has many of the names of the individuals at issue. The second type of information contained in the Panel Recommendations are excerpts

taken from interviews with Southern Bell employees taken under the direction and control of Southern Bell's in-house counsel and undertaken solely for the purpose of advising Southern Bell in this proceeding, as well as from counsel's summaries and impressions of those interviews. These interviews of the employees taken under the control and guidance of Southern Bell's in-house counsel to provide legal advice to Southern Bell are clearly privileged under the attorney-client privilege and work product doctrine. The inclusion of this information in the Panel Recommendations drafted by Southern Bell management who kept this information confidential does not destroy the privilege.

As set forth above, information obtained by in-house counsel, including the interviews of corporate employees, falls squarely within the principles announced in Upjohn. In addition, counsel's notes and summaries of the employee interviews are privileged. These counsel's notes not only disclose substantive attorney-client communications but also disclose counsel's mental impressions, which are sacrosanct under the work product doctrine. Upjohn, 449 U.S. at 440-01. Every effort must be made to avoid disclosing both the statements and counsel's thoughts and mental impressions. Id.; Fla. R. Civ. P. 1.280(b)(3); Rabin, 495 So. 2d at 262.

The Commission ruled that the Panel Recommendations were business documents because Southern Bell's need to ensure regulatory compliance purportedly strips the documents of any protection for discovery. This argument should be rejected for the same reasons as set forth above.

The Commission also ruled that these documents were business documents subject to full discovery because they had been disclosed to certain management employees who needed to know the information. The Prehearing Officer concluded that the managers' "need to know" basis related more to the "business matter of possible employee discipline" than to the need for legal advice (Apx. B, p. 9). As stated by the United States Court of Appeals for the Second Circuit in Grand Jury, communications to an attorney for purposes of seeking a legal opinion remain privileged, even though that same information is subsequently utilized for a business purpose. The communication remains privileged and immune from discovery. In re Grand Jury Subpoena, 731 F.2d at 1037. The portion of the documents sought to be protected from discovery by Southern Bell are so privileged. Southern Bell is willing to produce the portions of the documents for which a colorable argument could be made that they were created for business purposes, i.e., the names of employees whom Southern Bell disciplined. The excerpts of the confidential interviews under the control and direction of in-house counsel and excerpts of counsel's view of these interviews, however, remain privileged, and Southern Bell should be allowed to redact these privileged communications.

Southern Bell is only seeking to protect those portions of the Panel Recommendations that contain privileged information. The privileged nature of the interviews with Southern Bell's employees is not destroyed by making the confidential communications available to corporate employees who need them for business

purposes. In James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982), the district court considered whether a defendant corporation's internal business use of privileged documents, and the information contained herein, was tantamount to a failure to maintain confidentiality thereby stripping the communications of their privileged status. In that case, the documents were indexed and placed in files where they were available to corporate employees who needed them. The opposing party insisted that making confidential communications available to corporate employees for business purposes waived any immunity from discovery. The court disagreed, noting that it is "only when facts have been made known to persons other than those who need to know them that confidentiality is destroyed." James Julian, 93 F.R.D. at 142. The evidence is uncontroverted that the portions of the Panel Recommendations referring to confidential communications between Southern Bell employees and its in-house counselor's agents were only disseminated to those managers who needed such information.

The Prehearing Order in essence creates an ad hoc rule that privileges are destroyed any time a document is shared with a corporate employee who has a need to know. To the contrary, as James Julian makes clear, it is only the dissemination of confidential communication to those without a need to know that destroys the privilege. Thus, recitation in the Panel Recommendations of portions of privileged material does not destroy that privileged status of that material, and the portion of the Panel Recommendations at issue is protected for discovery.

Counsel has a duty to its client to disclose information that could affect on going operations. There is simply no basis for requiring counsel to chose between satisfying its duty to communicate with its clients and maintaining the confidentiality of attorney-client communications. Therefore, the Commission erred in ruling that the excerpts of the confidential and privileged communications contained in the Panel Recommendations must be produced.

The interviews of the employees by counsel or counsel's agents are clearly protected under both the attorney-client privilege and work product doctrine. The documents memorializing these interviews are also privileged, especially the summaries of the interviews by counsel, as these reveal counsel's mental thoughts and impressions which are absolutely not discoverable. Fla. R. Civ. P. 1.280(b)(3). Public Counsel has not shown an inability to obtain the substantial equivalent of the portions of the Panel Recommendations containing information protected by the work product doctrine without undue hardship.

Southern Bell is willing to produce the portions of the Panel Recommendations which list those employees who have been disciplined by Southern Bell as a result of Southern Bell's internal interviews. Public Counsel, therefore, is free to depose and otherwise question these employees as to the reasons for their discipline. In fact, Public Counsel has already deposed many of them. The only information Public Counsel could garner from the Panel Recommendations which could not be discovered by depositions

of disciplined employees would be the excerpts of counsel's notes on interviews with employees which reveal counsel's mental impressions, conclusions, and opinions concerning the interviews, information which absolutely cannot be discovered. Fla. R. Civ. P. 1.280(b)(3).

Public Counsel should be forced to conduct its own depositions of the discipline witnesses, rather than seeking to discover Southern Bell's internal thought processes of its attorneys.

Southern Bell should not be forced to reveal those portions of the Panel Recommendations which contained privileged information, and the Commission erred in ordering the production of unredacted copies of Panel Recommendations.

CONCLUSION

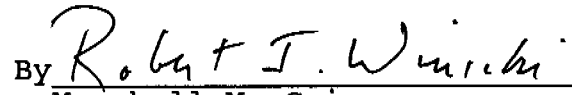
Southern Bell, like any business, communicates in confidence with its attorneys. When proceedings are brought against Southern Bell, such communication should be open and frank with respect to all aspects of the allegations at issue. In this case, it is perhaps expedient for the Commission, an administrative agency, to order disclosure of the information communicated to Southern Bell's counsel because its existence has been disclosed in a well-publicized proceeding. That expedience has a price. The next time legal proceedings are brought against a regulated company, the information will not be communicated and will not exist. The purpose behind the attorney-client privilege, open and frank communication with counsel, will have been sacrificed for

expedience in this particular administrative proceeding. That price is too high and this Court should not allow it.

For the reasons stated, the Investigative Audits and Panel Recommendations at issue are protected from discovery under both the attorney-client privilege and the work product doctrine. In its attempt to articulate a factual basis to vitiate the protection from discovery, the Commission has not only misconstrued the law, it has ignored the uncontroverted evidence in the record and supplied its own views on how Southern Bell should communicate concerning its response to proceedings initiated against it. In so doing, not only has the Commission erred, it has created a precedent which, if not overturned, will vitiate the privilege and drastically alter the means by which Florida businesses can avail themselves of legal representation. This Court should set aside the Commission's erroneous and harmful order.

Respectfully submitted,

MAHONEY ADAMS & CRISER, P.A.

By 

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I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following by U.S. Mail this 25th day of March, 1993:

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