IN THE SUPREME COURT OF FLORIDA

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Petitioner vs. THE FLORIDA PUBLIC SERVICE COMMISSION, Respondent	)	CASE NO. 81,417

RESPONSE OF FLORIDA PUBLIC SERVICE COMMISSION TO SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S PETITION FOR REVIEW OF NON-FINAL ADMINISTRATIVE ACTION

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Respondent, The Public Service Commission, is referred to in this brief as the "Commission". Petitioner, Southern Bell Telephone and Telegraph Company is referred to as "Southern Bell", or "Petitioner."

Commission Order No. PSC-93-0292-FOF-TL is referred to as the "Commission Order." Commission Order No. PSC-93-0151-PCO-TL is referred to as the "Prehearing Order." Citations to the Commission's appendix are referenced as App___.

INTRODUCTION

The Florida Public Service Commission ("Commission"), pursuant to Rule 9.100(h), Florida Rules of Appellate Procedure, files this response to the Petition for Review of Non-Final Administrative Action ("Petition") filed by Southern Bell Telephone and Telegraph Company ("Southern Bell").

The Commission concurs in the Statement of the Case set out at p. 4-5 of Southern Bell's Petition, with the exception of the characterization (on p. 5, l. 14-17) of the appealed-from Order. The Commission rejects the Introductory Statement, Petition, p. 1-3 and Statement of the facts, Petition, p. 5-11 for two reasons. First, this material not only sets forth facts, as such, but also legal conclusions stated as fact with which the Commission disagrees. Moreover, such facts as are presented are seriously incomplete and therefore misleading. Accordingly, the Commission includes its own Statement of the Facts.

STATEMENT OF THE FACTS

In February, 1991, the Public Counsel petitioned the Commission to investigate allegations that Southern Bell falsified information submitted to the Commission. The information concerned Southern Bell's compliance with rules requiring timely repair of phones and rebates to customers for failure to do so. App. 1.

Rules cited included Rule 25-4.070(2) and Rule 25-4,110(2), F.A.C. The latter states, in pertinent part:

> Each company shall make appropriate adjustments or refunds where the subscriber's service is interrupted by other than the subscriber's negligent or willful act, and remains out-of-order in excess of 24 hours after the subscriber notifies the company of the interruption.

Southern Bell responded in March 1991, indicating its intent to cooperate fully with discovery requests concerning the investigation. App. 2. The Commission, noting that its own informal investigation had already begun, formally initiated the investigation in May 1991. App. 3.

Significantly, the Commission consolidated the investigation docket with Southern Bell's rate case docket in January 1993. Quality of service is normally at issue in a rate case and was even more at issue because Southern Bell espouses "incentive regulation" in place of traditional "rate of return" regulation. Therefore, it was considered of special importance to determine if the new form of regulation and the allegations concerning Southern Bell's telephone repair services were related. App. 4, p. 4.

Public Counsel filed interrogatories directed toward ascertaining the identities of employees with knowledge of the falsity of various kinds of repair records. Southern Bell objected to providing this information on the grounds of work-product privilege, creating an obstacle to discovery of these matters which was not resolved until this Court denied Southern Bell's Petition For Review on February 4, 1993. Southern Bell Telephone & Telegraph Co. v. Beard, Case No. 80,004.

During the lengthy pendency of that discovery impasse, Public Counsel filed Motions To Compel discovery of the internal audits and panel recommendations on discipline at issue in this appeal. The Commission also sought the discovery that Public Counsel had requested. Southern Bell filed Oppositions to this discovery on the grounds of the attorney-client and work-product privileges. The orders of the Prehearing Officer and full Commission granting Public Counsel's Motions To Compel led to Southern Bell's Petition at issue before this Court. Orders No. PSC-93-0292-FOF-TL ("Commission Order") App. 5 and PSC-93-0151-PCO-TL ("Prehearing Order"). App 6.

The affidavits of Shirley T. Johnson and Danny L. King as to the audits and statistical analysis were not the only evidence of record on the issue of whether the internal audits in question were undertaken solely to obtain legal advice. As noted in the Prehearing order, p. 7, n. 4, Commission staff, in its 6th Set Of Interrogatories, requested that Southern Bell "describe in detail when and how Southern Bell determines when an audit of LMOS [and

the other audited operations at issue][1] will be conducted." Southern Bell's sworn response indicated that "many business issues" determined "whether and to what extent to audit particular subject areas...." Item 61, Staff's 6th Set of Interrogatories. App. 7. The response did not mention the goal of obtaining legal advice or claim that as the sole reason to perform such audits. In addition, the Hay memo, Attachment I, Public Counsel's Seventh Motion To Compel (7/23/92), illustrated the business management function of the audits and the changes which resulted. App. 8.

Since the allegations were not routine, it could be expected that the internal audits directed toward the areas the allegations concerned would not themselves be routine, either as to scheduling or form. In itself, that was not evidence against the business nature of the decision to perform the audits. Southern Bell has stated its willingness to make available what it describes as "routinely performed audits", Petition, p. 8, but that would appear to offer only such audits as were incapable of detecting the alleged problems, and thus useless for the purposes of this investigation.

Though the Argument, infra, will expound the Commission's consideration of these facts fully, the above suffices to demonstrate that the affidavits were not the only evidence as to why the audits at issue were performed. As noted in the Commission order, p. 3, Southern Bell itself related such activities to the

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[1] The audits were specifically those requested by Public Counsel in this case.

need "to find improper acts and correct them" in its Motion For Review (p. 23; 2/5/93) of the Prehearing order. App. 9. The significance of the above evidence of the business purpose of these audits is that even authority cited by Southern Bell requires a showing that "the documents that [a party] claims are privileged would not have been created had the corporation not needed the advice of counsel."[2]

As to the panel recommendations on discipline, the only issue brought forth in Southern Bell's Statement of the Facts requiring comment prior to analysis in the Argument herein is the new claim that the documents should be redacted. Petition, p. 11. Since Southern Bell's claim below was that the panel recommendations in their entirety were privileged as attorney-client material and work-product, ¶38-43, Motion For Review, 2-5-93, the new analysis asserting privilege for only part of these documents was not presented to the Commission and is not properly raised for the first time on appeal. App. 9.

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[2] First Chicago International v. United Exchange Co. Ltd., 125 F.R.D. 55, 57 (S.D.N.Y.) 1989.

ARGUMENT

I. THE COMMISSION'S ORDER TO COMPEL DISCOVERY OF SOUTHERN BELL'S INTERNAL AUDITS AND PANEL RECOMMENDATIONS ON DISCIPLINE COMPORTS WITH THE ESSENTIAL REQUIREMENTS OF LAW.

The Commission's order does not depart from the essential requirements of law. The Commission had competent, substantial evidence for its conclusion that the internal audits and panel recommendations on discipline were created for business reasons as well as to seek legal counsel, rather than solely for the latter purpose. Under established case law, such documents are not entitled to attorney-client privilege from discovery. Moreover, business documents are not clothed with privilege merely because they are handed over to an attorney. The Florida Evidence Code, §90.502, Fla. Stat., does not disclaim relevant case law on this issue, which includes cases cited by Southern Bell itself.

The Commission did not depart from the essential requirements of law in finding that the internal audits and panel recommendations on discipline were not work-product. The evidence established that they were business documents governed by caselaw parallel in concept to cases differentiating business documents from those privileged as attorney-client communications. Moreover, if the documents could be characterized as work-product, Southern Bell's refusal to allow answers to deposition questions concerning the documents meant that the documents were discoverable. In addition, Public Counsel demonstrated sufficient need to overcome the qualified privilege, if it attached.

The Commission did not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States in factoring into the analysis of these issues the relevant facts, law and policy applicable to regulated public utility monopolies. Indeed, by studiously ignoring all of these, Southern Bell has asserted a simplistic view of privilege which is at odds with the case-by-case approach of the authorities cited by Southern Bell itself, including the Upjohn[3] case and its progeny.

Moreover, Southern Bell's interpretation of privilege would nullify statutes and rules providing access to Southern Bell's records by the Commission in order to regulate this monopoly utility in the public interest.

A. THE COMMISSION CORRECTLY FOUND THAT THE INVESTIGATIVE AUDITS ARE NOT IMMUNE FROM DISCOVERY UNDER THE ATTORNEY-CLIENT PRIVILEGE.

1. Florida Evidence Code, §90.502 F.S.

Southern Bell's argument begins with the assertion that the Commission failed to apply the statutory codification of the attorney-client privilege in the Florida Evidence Code or even mention it:

> Noticeably absent from the Orders is any reference to the Florida Evidence code.

Petition, p. 16.

To the contrary, however, the analysis in the Prehearing Order, p. 4, l. 5, begins with that provision as a basis:

> Communications between attorneys and their clients are shielded from discovery under

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[3] Upjohn Company v. United States, 449 U.S. 383, 396 (1981).

> Florida Rule of Civil Procedure 1.280(b)(1); see, §90.502 Fla. Stat. [e.s.]

See also, related Order No. PSC-93-0294-PCO-TL,[4] which discusses the statutory conflict between §90.502 and, inter alia, §350.117(1) implicit in Southern Bell's overly broad assertion of privilege.

Accordingly, Southern Bell's baseless assertion that the Commission "ignored the statute" [§90.502] should be rejected.

2. Application of Upjohn and its progeny to this case.

As indicated in Ehrhardt, Florida Evidence, (1993), p. 249, there is no appellate decision by a Florida Court on the extent of the attorney-client privilege in the corporate context, nor is that addressed by the Evidence Code. Significantly, the United States Supreme Court denied that Upjohn Company v. United States, 449 U.S. 383, 386 (1981) provided a test or guideline beyond the facts of that case:

> We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so.

In view of the argument presented, infra, the Court should consider carefully that caveat in Upjohn itself before announcing the version of Upjohn advocated by Petitioner for corporations generally or, even more problematically, monopoly utilities regulated by the Commission. In Petitioner's view, merely labeling activities "internal investigation" confers Upjohn attorney-client privilege on them. This not only ignores Upjohn's essentially

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[4] Reference to this related order will give the Court a comprehensive view of the Commission's analysis of these issues. App. 10.

case-by-case approach, but all of the warnings in the caselaw, both pre- and post- Upjohn, against such broad claims of privilege.

Thus, the court, in SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 515 (D. Conn.), appeal dismissed, 534 F. 2d 1031 (2nd Cir. 1976), stated:

> legal departments are not citadels in which public, business or technical information may be placed to defeat discovery....

Petitioner's argument on behalf of such a "citadel" ignores entirely the fact that Florida statutes (and rules) address the public's interest in Commission access to Southern Bell's records as well as addressing the attorney-client privilege:

> §350.117(1) The Commission may require such regular or emergency reports... as the Commission deems necessary to fulfill its obligations under the law.

In pertinent part, Rule 25-4.019(1) F.A.C. states:

> The utility shall also furnish the Commission with any information concerning the utility's facilities or operations which the Commission may reasonably request and require.

These statutory and rule provisions, in turn, are essential to enable the Commission to perform its mandated responsibilities as a regulator:

> §364.01(3) The Commission shall exercise its exclusive jurisdiction in order to:
> (b) Protect the public health, safety and welfare by ensuring that monopoly services provided by a local exchange telecommunications company continue to be subject to effective rate and service regulation.

Though Southern Bell continually reiterates that the attorney-client privilege is codified in statutory form in Florida, Southern

Bell ignores the fact that this circumstance distinguishes this case from Upjohn (common-law privilege) and cuts against Southern Bell's view of this appeal. In order for the claimed absolute privilege to obtain, this Court would have to construe the conflicting statutes in such a way as to oust §350.117(1) F.S. entirely in favor of §90.502 F.S. This Court's statutory construction jurisprudence has always avoided that approach, preferring instead to harmonize conflicting statutes where possible in order to find a proper field of operation for each statute.[5]

In In re Notification to Columbia Broadcasting System, Inc. Concerning Investigations by CBS of Incidents of "Staging" by its Employees of Television News Programs ("CBS"), 45 F.C.C. 2d 119 (1973), the FCC rejected claims of attorney-client and work-product privilege for CBS' internal investigation. As stated by the FCC, 45, F.C.C. 2d, at 123:

> If, as we believe, the Commission has the right, where the circumstances call for it, to review the adequacy of a licensee's investigation, we cannot permit this process to be frustrated by a statement that employees of the licensee were interviewed by corporate or outside counsel and the claim that these statements are therefore protected against Commission inquiry. Whatever privilege exists the licensee has the power to waive, and we do not think assertion of such a privilege in this context is compatible with a licensee's duty to be forthcoming with information relevant to its operation under the statutory public interest standard.

App. 11.

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[5] State v. Collier County, 171 So. 2d 890, 892 (1965); n. 8, infra.

In this case, Southern Bell has already demonstrated how much of its claimed privilege it will waive on behalf of its "duty to be forthcoming with information relevant to its operation under the statutory public interest standard." Until this Court denied review in Case No. 80,004, Southern Bell was not even willing to divulge to Public Counsel or to the Commission the names of employees it had disciplined for violating Commission rules.

None of Southern Bell's attacks on CBS get even close to the real issue raised there. That is, why should the Commission assume, as has Southern Bell, that there is no limit to the coverage of Southern Bell's privilege claims under §90.502, but no scope whatever to the Commission's authority under §350.117(1) to get information needed to carry out its regulatory responsibilities?

Southern Bell's offer to give the Commission and Public Counsel all of the routine reports it generates, i.e., all of the reports that fail to detect the problems alleged, cannot assist the Commission in carrying out its responsibilities and is not a demonstration of candor. Moreover, §350.117(1) gives the Commission the right to decide what records it needs to fulfill its obligations under the law, not Southern Bell.

Though Southern Bell endlessly condemns the failure of the Commission to accord it privilege, it is the assertion that the privilege has open-ended scope that is actually before the Court. Under Southern Bell's approach, not only are requests for legal advice and the advice itself privileged, but every business

management document that Southern Bell has ever generated in response to the allegations is also. In this all or nothing approach, Southern Bell claims "all" and accuses the Commission of allowing "nothing" to be privileged. The Commission's position is that the Court should resolve the conflict between the applicable statutes. It is not the Commission's proper role merely to assume that the law contemplates the assertion of privilege incompatible with Southern Bell's "duty to be forthcoming with information relevant to its operation under the statutory public interest standard." CBS, supra; §350.117(1), F.S. The Commission's further position is that the standards developed in cases discussed herein permit the Commission to accord privilege when those standards are met, but that Southern Bell has not met them thus far. See, n. 8, infra.

Discovery of the internal audits is well within the proper ambit of §350.117(1) and the Commission's orders consistent with that did not err. Moreover, the statutory conflict is not merely theoretical, since the Commission has asked Southern Bell for the same discovery that Public Counsel has requested.

In Order No. PSC-93-0294-PCO-TL, p. 5, n. 1, the following question and answer from the Prehearing Conference (1/8/93, p. 28-29) was noted:

> Commissioner Clark (Prehearing Officer): Let's assume we direct you to conduct an audit to determine the accuracy of your Schedule II audits. You can use what you've already done or you can do it again.
> Mr. Anthony (Southern Bell Counsel):...And if you were to order us to take that choice, we would have to go out and redo the audit.

App. 12.

To the extent that the audits in question and the same audits redone are a difference without a distinction, Southern Bell's above-noted concession indicates that the asserted claim of privilege is moot.

In the Prehearing Order, p. 1, n. 1, the consolidation of the investigation and rate case dockets on January 19, 1993 was noted. As previously discussed, the basis of consolidating the dockets was Public Counsel's position that the quality of service issue raised by Southern Bell's replacement of traditional rate-of-return regulation with incentive regulation in the rate case docket was directly related to resolution of allegations concerning Southern Bell's repair service operations raised in the investigation dockets. See, e.g., Public Counsel's Seventh Motion To Compel, p. 13, n. 11. App. 8. To the extent that Southern Bell's rate case filing put the issue of its conduct of service operations under incentive regulation at issue, Southern Bell has waived any privilege as to, inter alia, the audits of those operations. Connell v. Bernstein-MaCaulay, Inc., 407 F. Supp. 420, 422-3 (S.D.N.Y. 1976).

In post-Upjohn cases, the Courts have not relaxed their concern about over-broad claims of privilege in the corporate context. In First Chicago International v. United Exchange Co., Ltd., 125 F.R.D. 55, 57 (S.D.N.Y. 1989), the Court noted that extending the attorney-client privilege to

> corporations risks creating an intolerably large zone of sanctuary since many

> corporations continually consult attorneys. Any standard developed, therefore, must strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery.

Another post-Upjohn opinion, Consolidated Gas Supply Corporation, 17 FERC ¶63,048, related these same concerns to the context of regulated industries by taking a "narrow view" of the application of the privilege in order to avoid "an overly-broad corporate information shield...." Consolidated, supra, at p. 65, 237.

Though Southern Bell launches a lengthy attack on every aspect of the Commission's citations of Consolidated, the Commission believes that review of the Commission and Prehearing orders by this Court is unaffected thereby. Most of that citation of Consolidated merely relates the same caveat against overly broad application of the attorney-client privilege noted in First Chicago, supra, to regulated industries. To that extent, it is unexceptionable and relates back to the caveat in Upjohn itself that a case-by-case approach is necessary in this area.

Though Petitioner is much more convinced than the Commission that Consolidated dealt only with attorney-to-client rather than client-to-attorney communications (see, e.g., Consolidated at p. 65, 240, #4: "The document appears to solicit legal advice."), Petitioner's implication that documents transferred from client-to-attorney are privileged per se, post-Upjohn, is inconsistent with First Chicago. Though Petitioner also criticizes the Commission's statement that the documents contained no privileged material on

their face as irrelevant, Southern Bell itself supplied that information, which was duly noted. The Commission noted it because that waived any claim that the Commission disclosed such material and focused the analysis on issues actually presented.[6]

None of this affects the Commission order, which, at p. 3, squarely rejected Southern Bell's claim of attorney-client privilege because the Commission was as unconvinced as the Prehearing Officer that the audits were undertaken solely to obtain legal advice. The case cited therein, First Chicago, was also cited by Southern Bell itself. The First Chicago court considered that a party claiming privilege made a sufficient showing by demonstrating that "the documents that it claims are privileged would not have been created had the corporation not needed the advice of counsel." 125 F.R.D. at 57.

The Prehearing order found that the standard had not been met, stating at p. 6, l. 28-31:

> Southern Bell had an independent business need to monitor its activities accurately through the particular internal audits in question...

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[6] Since the gravamen of the attorney-client privilege analysis in the Commission order under review in this appeal is First Chicago, Commission order, p. 3, debating every issue in Consolidated would serve no useful purpose. Indeed, some of the attacks on the Commission's reasoning are actually attacks on quotations from Consolidated. Petition, p. 22. However, both Consolidated and First Chicago assert in common the need to constrain overly-broad privilege claims, and Southern Bell cited First Chicago, as did the Commission. Moreover, both the Commission order and the Prehearing order, p. 7, premised the rejection of Southern Bell's claim on the failure to demonstrate that seeking legal advice was the sole purpose of the audits. That is, in fact, the First Chicago test.

The Prehearing order also noted, p. 7, n. 4, the responses to Staff's interrogatories to the effect that the audits were conducted for "various business reasons." Thus, both the Commission and Prehearing orders are firmly grounded on reasoning derived from First Chicago, independently of the debate about Consolidated with which the petitioner would divert the Court's attention.

Southern Bell argues that the intent of the client controls the issue of whether the communication would have been made but for the client's need for legal services. However, it is the Commission that must determine that intent, not Southern Bell itself. If the asserting entity's description of its motivation were dispositive, no such claims would or could ever be rejected. The Commission rejected Southern Bell's claim in this instance because it was found unconvincing in view of the evidence presented and for the reasons cited.

Southern Bell further asserts that the Commission discarded §90.502, F.S. and treated Southern Bell differently from the way that non-regulated corporations would have been treated under the statute. However, as earlier pointed out, the Commission's argument did not discard §90.502, it began with it. Southern Bell was not subjected to a constitutionally infirm standard, it was subjected to the case-by-case adjudication of privilege issue claims that all authorities, including Upjohn, recommend. Southern Bell's rights to Equal Protection under the Fourteenth Amendment were not violated. Instead, an examination of the facts of Upjohn

demonstrates that Southern Bell's assumption that this case is "almost identical", Petition, p. 14, is wrong.

In Upjohn, the company's general counsel performed an internal investigation of allegations that employees paid bribes to foreign officials, a practice prohibited by federal law. Obviously, there was no government mandated, monitored and regulated program requiring and monitoring those illegal payments analogous to Southern Bell's mandated, monitored and regulated telephone service operations in this case. The entire class of business management documents aimed at conforming Southern Bell's telephone repair service operations to the ongoing affirmative requirements of the governing regulations -- in Southern Bell's own words, "finding out what went wrong and correcting it" -- would not even have existed in Upjohn.

As noted in the Prehearing order, p. 7:

> 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. Rule 25-4.019, F.A.C. 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.

Though Petitioner asks the Court to view Upjohn as dispositive, Upjohn cannot be dispositive because First Chicago, addressing an issue not even present in Upjohn, is dispositive. Under the facts and circumstances of Upjohn, the issue of whether the internal investigation in that case was conducted solely for the purpose of obtaining legal advice was never even raised. In

this case, because the facts are so different, that issue was crucial and Southern Bell's argument was found insufficient to meet the test Southern Bell itself cited as authoritative.[7] That test precludes Southern Bell's attempt to cloak a vast and open-ended number of business management documents with privilege from discovery by means of a simplistic analogy with Upjohn.[8]

The privilege claim asserted by Southern Bell would have had this Commission conclude, or this Court require the conclusion, that in the face of multiple government investigations of intensively regulated telephone repair service operations serving millions of Southern Bell customers in Florida, Southern Bell would have conducted no timely internal audits tailored to the allegations being investigated, but for the need to obtain legal advice. Since even Southern Bell's own pronouncements on the subject were contradictory, the Commission did not err in rejecting the assertion or in questioning its credibility in these

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[7] For that reason, the Commission believes the issue of whether to adopt a modified subject matter test for corporate attorney-client privilege in Florida, weighty though that is, is not the central issue presented by this case. Under First Chicago, Southern Bell's audits would not be privileged even if Upjohn were adopted.

[8] Though privilege analysis is necessarily performed on a case-by-case basis, the Commission would suggest that the First Chicago test illustrates how §90.502 attorney-client privilege may be harmonized with §350.117(1); n. 5, supra.

circumstances, so different from those in Upjohn.[9] The Commission was required to be fair, but not naive.

B. THE COMMISSION CORRECTLY DETERMINED THAT THE INTERNAL AUDITS ARE NOT IMMUNE FROM DISCOVERY UNDER THE WORK-PRODUCT PRIVILEGE.

1. Soeder precludes Southern Bell's claim that the internal audits are work-product.

The Commission order did not err in applying Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980) to reject Southern Bell's claim that the internal audits were privileged from discovery as work-product. Soeder held that where a "dual motive" led to the creation of documents -- preparing for litigation and improving the company's products -- the documents were not privileged.

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[9] The discussion in Upjohn, 449 U.S. 392, about the complex array of regulations confronting modern corporations does not strengthen Southern Bell's Upjohn reasoning, though cited for that purpose. Petition, p. 27-28. The example given there of antitrust law demonstrates that regulation of monopoly utilities was not at issue. The word "regulation" in Upjohn refers to prohibitions generally applicable to corporations. As the Upjohn opinion noted, compliance with such "regulations" as the Sherman Act is hardly an instinctive matter and attorneys must therefore be consulted constantly.

The regulated activities being investigated here, in contrast, i.e., whether telephone repairs reported as taking less than 24 hours actually took longer, thus entitling customers to rebates which they were not getting, are not legal-intensive matters, they are fact-intensive. The Commission must have access to these factual matters to protect the public. For Southern Bell to take the position that such facts are sought only to obtain legal advice is an artificial, pretextual misreading of Upjohn which is precluded by First Chicago. If accepted, it would quickly make regulation of this utility either ineffectual or impossible. It is unsupported in Florida law or the cases cited by Southern Bell itself. In contrast to the antitrust laws discussed in Upjohn, the number of hours in a day is an instinctive matter, not requiring consultation with an attorney.

The Commission had before it the previously mentioned evidence of the business purpose which led to the audit: the interrogatory responses so stating, the Hay memorandum re: the resulting management changes and the description by Southern Bell itself of the need to find wrong acts and correct them. Moreover, the ongoing need to conform Southern Bell's required service operations to governing rules is part of the background of this case, as is the fact of the investigation of those required services by three government agencies. Though Petitioner takes particular exception to the discussion of this last factor by the Prehearing Officer,[10] the reasoning is not dissimilar from what Southern Bell itself said in its Motion For Review about the need to find out what went wrong and how to correct it.

Clearly, Soeder is on point. Petitioner's position could hardly be less convincing than when it argues,

> 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.

Petition, p. 35.

Petitioner's argument is that ongoing investigations of its required telephone service operations by three government agencies caused Southern Bell no business concern. The Commission did not err in accepting the evidence that contradicted this representation.

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[10] Petitioner's argument Petition, p. 33-34, simply ignores the text which is there quoted. The Prehearing order did not say the audits were not prepared in anticipation of litigation, but noted that other factors were present as well, as in Soeder.

2. The Commission did not err in finding that the equivalent to Southern Bell's audits could not be obtained without undue hardship.

The parties respective positions on this issue were set out in Public Counsel's Seventh Motion To Compel, p. 21-25, App. 8, and Southern Bell's Opposition thereto, p. 6-7, App. 13.

The Public Counsel described both the need for the information and inability to replicate it. The need was identified as concerning the accuracy of the trouble reporting system as that related to questions concerning incentive regulation and employee motivation. Seventh Motion To Compel, p. 21-23.

The undue hardship involved in replicating the information resulted from the enormous amount of data involved and the complexity of BellSouth's interconnected computer programming, both of which were addressed in an affidavit by Public Counsel's staff analyst. The specificity was sufficient for the purposes offered.

Though the issue of Public Counsel's diligence in preparing for trial was not directly addressed, the intensity of the motion practice which has characterized this proceeding established that indirectly.

Accordingly, the Commission did not err in its finding. Procter and Gamble v. Swilley, 462 So. 2d 1188, 1194-5 (Fla. 1st DCA, 1985).

C. THE COMMISSION CORRECTLY DETERMINED THAT THE PANEL RECOMMENDATIONS ON DISCIPLINE ARE NOT IMMUNE FROM DISCOVERY UNDER THE ATTORNEY-CLIENT OR WORK-PRODUCT PRIVILEGES.

Petitioner's title to this section of its argument in itself sets out two mistaken assumptions already evident previously:

> The Commission erred by ignoring uncontroverted evidence and ruling that the panel recommendations were composed entirely of business as opposed to legal communications.

Petition, p. 29.

First, there was no uncontroverted evidence that these documents were created solely to obtain legal counsel. Southern Bell, in its response to Public Counsel's Request For Admissions, #14, admitted that the act of disciplining employees was a business act. App. 14. On the basis of that and consistent with it, Southern Bell permitted discovery of information related to discipline of management employees since the act of disciplining employees was a business act. App. 15, p. 5-8.

However, Southern Bell distinguished the documents at issue, which concern non-management employees, from those concerning management employees, because discipline of non-management employees was not carried out. The Commission rejected this theory because the relevant cases hold, both as to attorney-client First Chicago, and work-product, Soeder, that the test for privilege from discovery relates to the purpose for creating the documents. In determining whether the purpose was solely to obtain legal advice or another purpose in addition, the question of whether the additional purpose was ultimately carried out is irrelevant.

Southern Bell's own reasoning established that at least one purpose of creating all of these documents was to discipline employees -- a business act -- whether or not the purpose was carried out in all cases. That is sufficient to contradict the

claim that they were created solely to obtain legal advice as well as to defeat the privilege claim under the attorney-client or work-product doctrines. First Chicago; Soeder.

Second, the Commission never claimed, as Petitioner repeatedly accuses it of having done, Petition, p. 34, 39, that these documents were of no use in obtaining legal advice or preparing for litigation. The Commission has only determined that they are "dual motive" documents for which privilege from discovery is unavailable under the relevant caselaw authority. That authority represents the only means of preventing corporations from creating citadels out of their legal departments in which business and other documents are placed to defeat discovery. SCM Corp. v. Xerox Corp, supra.

In the instance of the panel recommendations, Petitioner's misstatement of the Commission's analysis appears related to a new claim -- improperly raised for the first time on appeal -- that these documents should be redacted. Petitioner now asks that the "business" part of the document be separated from the "legal" part, whereas the position asserted to the Commission below was that the documents were privileged in their entirety. Since the purpose for creating the documents properly guided the Commission's denial of the privilege claim, Petitioner's new theory has not identified error in the Commission order.

Since Petitioner did not meet its burden to demonstrate that the work-product privilege was applicable, the related law concerning the circumstances under which transmitting the documents

to others within the corporation waives or does not waive the privilege is inapposite. However, in this case, even were the privilege found applicable, it would not immunize these documents from discovery.

Under Upjohn, the work-product privilege is qualified, rather than absolute. Documents so privileged are not discoverable only if the asserter of the privilege is willing to permit the underlying facts to be discovered in depositions. U.S. v. Peppers Steel and Alloys, Inc., 132 F.R.D. 695, 699 (1990). This Southern Bell has thus far been steadfastly unwilling to do. See, Deposition of Dwane Ward, p. 5, 15, 18, 21, 22, 26. App. 16. See also, Case No. 80,004.

II. COMPLIANCE WITH ORDER NO. PSC-93-0292-FOF-TL WILL NOT CAUSE IRREPARABLE HARM TO SOUTHERN BELL.

Based on a simplistic analogy with Upjohn, Southern Bell has attempted to cloak with immunity from discovery non-privileged documents concerning the business management of its telephone service operations which might shed light on the allegations being investigated.

Though affirming the Commission's order may impact Southern Bell's ability to conduct its business operations in secret, that is not a goal which is relevant to the policy reasons for the attorney-client or work-product privileges. It forms no basis for a claim of irreparable harm.

While Southern Bell has not demonstrated irreparable harm from being compelled to participate in discovery as ordinarily required, the Commission would be harmed in its ability to carry out its

statutory responsibility to regulate monopoly telephone service in the public interest if Southern Bell is granted the relief it seeks and successfully obstructs discovery in this case. Moreover, the process Southern Bell advocates is unconstrained by any limits. If any document Southern Bell identifies as "internal investigation" is privileged, Southern Bell could simply conduct its business through its Legal Department and evade Commission regulation entirely.

CONCLUSION

Petitioner's arguments in this appeal are, in essence, an invitation to approve the use of Southern Bell's legal department as a citadel in which business and other documents may be placed to defeat discovery. Southern Bell would substitute an exercise in merely labeling documents "internal investigation" for the case-by-case analysis which the balancing of privilege and discovery requires. The applicable law included in the Commission's view, the regulatory law providing access to Southern Bell's records for the protection of the public, as well as the Florida Evidence Code, and the full reach of the applicable cases, not merely fragments or formulas extracted from them. In the ordinary case, overbroad privilege immunity from discovery may frustrate the correct resolution of the litigation. In the regulatory context, overbroad privilege immunity from discovery may make it impossible for the Public Service Commission to resolve the rate issues properly or regulate this utility in the public interest. The Commission order did not depart from the essential requirements of law and should, accordingly, be affirmed.

Respectfully submitted,

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Dated: June 1, 1993

CERTIFICATE OF SERVICE

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APPENDIX 15 - Southern Bell Telephone And Telegraph Company's Opposition To Public Counsel's Eighth Motion To Compel And Request For An In Camera Inspection Of Documents

APPENDIX 16 - Deposition Of Dwane Ward, p. 5, 15, 18, 21, 22, 26 (9/14/92)