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## SYMBOLS AND DESIGNATIONS OF THE PARTIES

Respondent, the Florida 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 the "Company".

Commission Order No. PSC-93-1214-FOF-TL is referred to as the "Commission Order". Citations to the Commission's appendix are referred to 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 rejects Southern Bell's unsupported and argumentative Statement of the Case and Statement of Facts, as well as the Introductory Statement, supplying instead its own Statement of the Case and the Facts. The Commission incorporates by reference herein its response briefs in related Case Nos. 81,487, 81,716 and 82,196. The instant case concerns Commission Order No. PSC-93-1214-FOF-TL. App. A.

## STATEMENT OF THE CASE AND THE FACTS

Commission Docket No. 910163-TL was initiated by the filing of a petition by the Public Counsel in February 1991 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. This docket was consolidated with Docket Nos. 900960-TL, 910727-TL and 920260-TL, Southern Bell's rate review. These matters are scheduled for hearing in January 1994.

The investigation concerned allegations that Southern Bell falsified information submitted to the Commission. The information involved Southern Bell's compliance with rules requiring timely repair of phones and rebates to customers for failure to do so. App. B.

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. C. The Commission, noting that its own informal investigation had already begun, formally initiated the investigation in May, 1991. App. K.

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. D, 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 audits and reaudits, as well as reports of completed audits, a statistical analysis verifying the audits, employee statements and summaries and various kinds of personnel managers' notes. Southern Bell opposed these motions on the grounds that these documents were attorney-client communications privileged from discovery and immune as work-product. Public Counsel requested that the Commission inspect the documents in-camera as part of its decision-making process regarding this discovery dispute.



As a result, the documents which were the subject of the motions to compel and oppositions were examined in-camera in January 1993. The in-camera inspection was conducted by the Prehearing Officer, assisted by an aide and undersigned counsel. In functioning as advisor to the Prehearing Officer and Commissioners for matters related to the in-camera inspection, undersigned counsel, a member of the Commission's Appeals Division, was "walled-off" from the Legal Division staff members involved in litigating the rate case. Therefore, no information concerning what was seen in-camera has been available to the legal staff.

Two prehearing orders and two full Commission orders addressed the attorney-client privilege and work-product immunity issues raised concerning the large volume of documents inspected in-camera. They are Order Nos. PSC-93-0151-PCO-TL (1/28/93), App. E, PSC-93-0292-FOF-TL (2/23/93), App. F, PSC-93-0294-PCO-TL (2/23/93), App. G, and PSC-93-0517-FOF-TL (4/6/93), App. H. These orders addressed three major categories of documents:

- 1) audits (including reaudits, a statistical analysis and reports of completed audits)
- 2) employee statements and summaries
- 3) personnel managers notes

In turn various subcategories within these documents corresponded to seven different motions to compel and oppositions filed by the parties, nos. 1, 7, '8, 9, 10, 11 and 12. The argument in these pleadings was, in large part, repeated from document to document and the relationship of each sub-category to respective

pleading was not always clear. Southern Bell notes an aspect of this in its instant Petition, p. 9, n. 10:

It appears that OPC [Public Counsel] simply filed two motions seeking the same documents.

After the Commission had issued three of the four orders listed above, Southern Bell's Atlanta counsel supplied a letter clarifying the relationship of the sub-categories of documents examined in-camera with the respective pleadings. App. I. In pertinent part this letter noted that the documents which were the subject of motions to compel 10, 11 (except for Ward-Geer notes)<sup>1</sup> and 12 had been

viewed in camera by Commissioner Clarke (sic) and a decision rendered in Order No. PSC-93-0151-CFO-TL.

App. I, p. 3-4. Though this began a process of reviewing the orders to verify that they could be amended to accurately and completely link subcategories of documents with each of the respective pleadings, Southern Bell's perspective as to what was examined in-camera has not been in any doubt whatsoever since receipt of the February 22, 1993 letter. App. I. The Commission reasonably relied thereon.

The process of amending the two full Commission orders to reflect the clarifying information supplied in Southern Bell's February 22, 1993 letter was slowed by the pendency of a succession

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<sup>1</sup> The letter accurately noted that the Ward-Geer notes had been "recently reviewed by Commissioner Clarke (sic)" as of the date of the letter. The Commission order confirms that they were shortly thereafter ruled on in PSC-93-0294-PCO-TL and PSC-93-0517-FOF-TL.

of four Petitions For Review filed by Southern Bell in this Court which necessitated both responsive briefing and oral argument of the cases as consolidated. Moreover, other discovery orders related to these matters have also been forthcoming in a steady stream.

Nonetheless, when it was possible to do so,<sup>2</sup> the order which is the subject of Southern Bell's instant Petition For Review (the fifth in the series), Order No. PSC-93-1214-FOF-TL, was issued on August 20, 1993. The evident purpose was of a "housekeeping" rather than substantive nature; i.e., to amend the prior orders to reflect the clarifying information supplied by Southern Bell itself in the February 22, 1993 letter.

Prior to issuing this order, the intention to do so was discussed with Southern Bell's Atlanta counsel who was the letter's author, Southern Bell's Florida counsel and the Public Counsel. No objections of any kind were raised.

Because the order is amendatory, it could have been issued administratively. Instead, it was placed as a regular agenda item on the August 17, 1993 agenda. No one protested at that agenda conference.

The order itself, when published, also provided notice that reconsideration of the order could be sought within 15 days.<sup>3</sup> No

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<sup>2</sup> The status of the "Reports of Completed Audit", documents that even Southern Bell itself had difficulty identifying, also had to be determined.

<sup>3</sup> Rule 25-22.060(3). Illogically, Southern Bell berates the Commission for not providing the Company less time (10 days) to ask for reconsideration, citing a rule which is inapplicable to

one sought reconsideration of the order. Since the Commission viewed this order as non-substantive in nature, alternative suggestions for how to clarify the proceeding orders in accordance with the information supplied by Southern Bell's February 22, 1993 letter would have been welcome, but none were forthcoming. Indeed, until Southern Bell filed its latest Petition For Review, the Commission had no notice whatever that Southern Bell's views of this matter were other than those expressed in its letter of February 22, 1993. Since Southern Bell presents argument throughout its petition without regard to labels such as "Introductory Statement", "Statement of the Case", and "Statement of the Facts", the Commission will address all of this material, however labeled, as argument.

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Commission (as opposed to prehearing) orders. Petition, p. 16.

## ARGUMENT

### I. SOUTHERN BELL IS ESTOPPED TO LITIGATE THIS APPEAL.

#### A. SOUTHERN BELL IS ESTOPPED TO LITIGATE THE COMMISSION'S ADOPTION OF SOUTHERN BELL'S FEBRUARY 22, 1993 CLARIFICATION.

On August 20, 1993, the Commission published Order No. PSC-93-1214-FOF-TL clarifying the pleadings and sub-categories of in-camera documents covered by its prior orders, PSC-93-0292-FOF-TL and PSC-93-0517-FOF-TL (and respective prehearing orders). In effect, the Commission adopted Southern Bell's clarification supplied in the letter written by the company's Atlanta counsel. App. I, p. 3-4, ¶11-13. Southern Bell's acknowledgment there that the listed documents had been ruled on creates an estoppel of the inconsistent position in the Petition.

Southern Bell's proclaimed incredulity at the Commission order therefore does not support this appeal. The Commission was as entitled to rely on Southern Bell's representations through its Atlanta counsel as through its Jacksonville counsel. Moreover, Atlanta counsel assured the Commission through the February 22, 1993 letter that no further documents were forthcoming in response to the listed pleadings because all had been either supplied and ruled on or were about to be ruled on. Therefore, Southern Bell's asserted surprise that the instant Commission order does not "order that the documents be produced", Petition, p. 7, is to the same extent precluded and estopped as the rest of this Petition. The clarification letter supplied by Southern Bell indicated that the documents had already been produced. Upon verifying that to be the

case, the Commission adopted Southern Bell's clarification. Southern Bell is estopped to disclaim its own previously supplied information. Noble v. Yorke, 490 So.2d 29, 31 (Fla. 1986) (no rule of law exempts statutory rights and defenses from operation of doctrine of estoppel); Pelican Island Property Owners Ass'n, Inc. v. Murphy, 554 So.2d 1179, 1181 (Fla. 2nd DCA 1989) (essence of estoppel is that person should not be permitted to unfairly assert inconsistent positions); Hill v. Winn-Dixie Stores, Inc., 721 F. Supp. 1226, 1232, affirmed in part, reversed in part, 934 F.2d 1518 (M.D. Fla. 1989) (party estopped to question what was previously stipulated to Court).

Southern Bell also has no basis to claim that its appeal rights have been abrogated. The Commission discussed issues raised in Southern Bell's Opposition To The Tenth Motion To Compel in its Answer Brief in Case No. 82,196. Southern Bell made no objection. As Southern Bell candidly admits, in its instant Petition, p. 16,

The factual presentation with respect to the Operational Review and the Form IA10-DP Reports is the same as for the audits in case 81,487. The factual presentation with respect to the managers' notes is the same as for the worknotes in case 81,716, and the employee statements were also addressed in case 81,716.  
[e.s.]

This is exactly the point. As Southern Bell admits, the facts relevant to these documents were the same as those in Case Nos. 81,487 and 81,716. This circumstance, together with Southern Bell's letter, is what permitted the Commission to clarify its orders through Order No. PSC-93-1214-FOF-TL. Southern Bell has not identified anything supporting an appeal to this Court. Certainly,

lack of communication among Southern Bell's own lawyers cannot be the basis for an appeal.

**B. SOUTHERN BELL IS ESTOPPED TO RE-LITIGATE PRIOR APPEALS.**

Much of the instant Petition is devoted to re-litigating prior appeals which have been fully briefed. As of October 4, 1993, the Court has heard oral argument on Case Nos. 81,487, 81,716 and 82,196 as consolidated concerning privilege and work-product immunity claims as well as Case No. 81,926 concerning audits of Southern Bell's unregulated affiliates.

Since the Commission order adopts Southern Bell's clarification of the Commission's prior orders, Southern Bell is not only estopped to disclaim that clarification, but also estopped to use the order as a pretext to reargue cases which have previously been completely briefed and argued. Besides denying the merits of Southern Bell's attempted re-argument of those cases, the Commission would respectfully refer the Court to the Commission's answer briefs in Case Nos. 81,487, 81,716 and 82,196 and to its oral argument of those issues.

The Commission has noted throughout that its decisions were based on a consideration of all of the facts and circumstances, arguments, applicable case law and the in-camera inspection. As a result, a combined business management and legal investigation was found neither privileged nor immune because not solely conducted for the purpose of getting legal counsel. Case Nos. 81,487 and 81,716. In addition, assuming arguendo privilege could have been asserted, its improper and unauthorized use to hide the facts of

the case negated such privilege. Case No. 82,196. Finally, any such privilege was impliedly waived under the circumstances. Case No. 81,716. Southern Bell is also estopped to complain that the Commission's fact finding was not more explicit, since that merely reflects the stay of disclosure of the documents that Southern Bell sought and was granted. App. J. It has nothing to do with the instant Commission order, which merely adopted Southern Bell's own procedural clarification of prior orders nunc pro tunc.<sup>4</sup>

## II. SOUTHERN BELL HAS IDENTIFIED NO PROCEDURAL ERROR IN THE COMMISSION ORDER.

The discovery issues raised by motions to compel and oppositions thereto may be resolved by the full Commission or by a

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<sup>4</sup> All that remains unaddressed from the prior appeals are Southern Bell's post-briefing citations of supplemental authority, served September 2, 1993. These cases do not support Southern Bell's position. In Sporck v. Peil, 759 F.2d 312, 315 (3rd Cir. 1985), an attorney's selection of documents "out of the thousands produced..." was immune as work-product. See also, Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986). Here, in contrast, Southern Bell has not only "selected" most of the documents sought to be produced, but also claimed the documents themselves to be privileged. Thus, an immune Sporck or Shelton selection among documents not claimed to be privileged is not at issue at all in this case.

The other cases cited have already been addressed in Case No. 82,196. The third, fourth and fifth citations concerned depositions of attorneys or others inextricably involved in the litigation, unlike Southern Bell's deponents. The sixth case, Clute v. Davenport Co., 118 F.R.D. 312, 316 (Conn. 1988), involved questions that would have elicited case strategy, unlike the questions asked of Southern Bell's deponents. Southern Bell's other authority is similarly distinguishable: Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp., 125 F.R.D. 578, 591 (N.D.N.Y. 1989) (questions about draft interrogatories); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 516-17 (D.C. Conn. 1976) (questions would have disclosed legal advice); In re: LTV Securities Litigation, 89 F.R.D. 595, 606 (N.D. Tex. 1981) (questions about conversations with counsel). Such questions are not at issue in this case.



prehearing officer, at the Commission's option. Rule 25-22.038(1), F.A.C.<sup>5</sup> The Commission order, PSC-93-1214-FOF-TL was decided by the full Commission at an agenda conference scheduled for that purpose. No prehearing officer was required. Southern Bell neither attended nor raised any objection. In addition, Southern Bell was given notice of a 15-day period of time in which to seek reconsideration of the order. Southern Bell did not request that. See, n. 3, supra.

Southern Bell received all of the rights conferred by the statutes and rules. Though the Commission's factfinding was less explicit than it would have been had disclosure of the documents not been stayed pending appeal, App. J., the resulting findings of fact are not the same as no factfinding at all. Using the instant Commission procedural order to attempt to make that claim is merely a pretext to reargue already completed cases and as such should be disregarded.

Finally, in view of Southern Bell's February 22, 1993 letter, the Company has identified no appeal rights foreclosed by the Commission order. Southern Bell stated its position on these matters in late February. The Commission verified that information and, when time permitted and after notice to all, adopted Southern Bell's own position. Ample further opportunity for input at the Commission level was offered. None was received from Southern Bell. Moreover, Southern Bell admits, Petition, p. 16, that the

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<sup>5</sup> ..."prehearing officer" shall refer to ... a member of a commission panel assigned to the case that has been designated by the Chairman as a prehearing officer. [e.s.]


applicable facts are those presented in prior fully briefed and argued appeals. Lastly, the documents in question need not be produced because they were already produced, reviewed in camera and ruled on, as described in Southern Bell's own information. App. I. The Commission has committed no procedural error and has not prejudiced Southern Bell in issuing its order adopting Southern Bell's own clarification of prior orders. Noble; Pelican Island; Hill; supra.

CONCLUSION

Southern Bell is estopped to raise these issues under the circumstances described above. Accordingly, its frivolous, burdensome and cumulative Petition For Review should be dismissed.

Respectfully submitted,

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Dated: October 18, 1993

B82399.MRD

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**SUPPLEMENTAL APPENDIX**

- A. ORDER CLARIFYING ORDERS NOS. PSC-93-0292-FOF-TL AND PSC-93-0517-FOF-TL
- B. PETITION TO INITIATE INVESTIGATION
- C. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S RESPONSE TO PUBLIC COUNSEL'S PETITION TO INITIATE INVESTIGATION
- D. ORDER CONSOLIDATING DOCKETS AND DENYING MOTIONS FOR REVIEW
- E. ORDER GRANTING PUBLIC COUNSEL'S MOTIONS FOR IN CAMERA INSPECTION OF DOCUMENTS AND MOTIONS TO COMPEL
- F. FINAL ORDER DENYING IN PART AND GRANTING IN PART SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S MOTION FOR REVIEW OF ORDER NO. PSC-93-0151-CFO-TL
- G. ORDER GRANTING PUBLIC COUNSEL'S MOTIONS FOR IN CAMERA INSPECTION OF DOCUMENTS AND GRANTING PUBLIC COUNSEL'S MOTIONS TO COMPEL
- H. ORDER DENYING MOTION FOR REVIEW
- I. SOUTHERN BELL'S COMMENTS ON THE INDIVIDUAL MOTIONS CONTAINED IN THE MATRIX - LETTER OF FEBRUARY 22, 1993
- J. AGENDA CONFERENCE TRANSCRIPT EXCERPT (2/18/93)
- K. ORDER INITIATING INVESTIGATION