IN THE SUPREME COURT OF FLORIDA

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Petitioner, vs. J. Terry Deason, et al., as members of THE FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	Case No. 82,399

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

Florida Public Service Commission Order PSC-93-1214-FOF-TL

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MISCELLANEOUS

The Citizens of the State of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file their response in opposition to BellSouth Telecommunications, Inc. d/b/a/ Southern Bell Telephone and Telegraph Company's ("Southern Bell") petition for review of non-final administrative action and request the Supreme Court of Florida to deny the petition. Florida Public Service Commission ("Commission") Order No. PSC-93-1214-FOF-TL (clarifying order) clarifies the Commission's earlier orders on discovery. All this order does is clarify two prior orders on review at the supreme court.[1] These earlier orders are a complete disposition of the issues, the facts and law. The documents addressed by the clarifying order were reviewed in camera by the prehearing officer and addressed by the parties in their filings. The legal issues on discovery have been fully aired before the prehearing officer, the full Commission, and the supreme court. A further review would not be meaningful. Southern Bell is not harmed by this order; its petition should be denied.

STANDARD OF REVIEW

The standard of review requires Southern Bell to demonstrate that the Florida Public Service Commission's ("Commission")

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[1] Order PSC-93-292-FOF-TL held that the five system audits and the report of completed audit, which was included in the work papers under review, were not privileged under either the attorney-client or work product privileges. Order PSC-93-517-FOF-TL held that the employee statements and human resource department work notes were not privileged.

orders are a departure from the essential requirements of law. E.g. Gulf Coast Motor Line v. Hawkins, 376 So. 2d 391 (Fla. 1979). The Commission's clarifying order, correcting an omission referring to the filings of the parties, comports with the Commission authority to correct errors or omissions in non-final orders, and is, therefore, presumptively correct. Id. at 393.

RELATED APPEALS AND REQUEST FOR CONSOLIDATION

This appeal is directly related to three other appeals of Commission orders now pending before the supreme court and argued on October 4, 1993, as cases numbered 81,487, 81,716, and 82,196. These cases question whether Southern Bell may withhold factual evidence of its violation of rules under a claim of privilege. In case 81,487, Southern Bell is withholding five internal system audits and panel disciplinary recommendations. In case 81,716, Southern Bell is withholding a statistical analysis, employee statements, and human resources work notes. All of these documents are factual evidence of the company's internal management review and are the basis for the corrections to its internal operating policies and procedures. In case 82,196, Southern Bell is withholding factual evidence of the reasons for the discipline of many of its network managers by refusing to permit its human resources managers and assistant vice president for network to answer deposition questions. It had earlier refused to permit its chief auditor to respond to factual questions related to its internal audits.

Since resolution of these earlier cases will affect the decision in this case, and because the facts are intertwined, Citizens ask the supreme court to consolidate these appeals. Citizens also adopt and incorporate by reference their responses, filed on May 28, June 18, and September 7, 1993, to the three earlier appeals herein.

STATEMENT OF THE CASE AND FACTS

Citizens generally accept the company's statement of the case and facts, but offer the following additional facts omitted by Southern Bell.

Citizens filed their tenth motion to compel the company to produce the statements given by employees to company investigators, and their eleventh motion to compel the production of the fifth operational audit and human resource work notes for Dwane Ward and Hilda Geer on December 16, 1992.[2] [Apps. I & J][3]

Citizens filed their twelfth motion to compel the reports of the five completed audits on December 21, 1992. [App. K]

Southern Bell responded to the tenth and eleventh motions on December 28, 1992, and the twelfth motion on January 4, 1993. [Apps. L & M] In its response to Citizens' tenth motion seeking the production of employee statements, the company stated that

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[2] Citizens have attached to this response a flow chart of the dates of the pleadings and arguments for the court's convenience as attachment S. [App. S]

[3] All references to the appendix will be designated as "App.___."

> Public Counsel's Tenth Motion to Compel and the accompanying memorandum constitute an extended restatement of legal issues that have been previously briefed by the parties in relation to the facts that are either identical to or very similar to those that have already been addressed in previous filings by Public Counsel and Southern Bell. [App. L at 2]

Southern Bell did not attach any affidavits or documents as factual evidence of its claim that the employee statements were privileged. [App. L] Instead it chided Public Counsel for insisting that it produce an index of the disputed documents:

> Specifically, Public Counsel contends that Southern Bell must reveal, at a minimum, "who took the statements, which employees were interviewed, whether the employees were relating information that was within the scope of their duties, whether third parties were present, how the statements were recorded and under what conditions."
>
> * * * *
>
> Public Counsel fails, however, to provide any legal authority to support the contention that a claim of privilege is invalid unless if [sic] includes all of this information.
>
> 4. Public Counsel's position also fails because it is not supported by any logical view of the way in which the privilege functions. [App. L at 3-4, ¶¶ 2 & 7]

In response to Citizens' eleventh motion to compel, Southern Bell again stated that the legal and factual issues had been addressed in prior filings. [App. M at 2-4, ¶¶ 2 & 7] Specifically, the Ward and Geer notes were "precisely the same type of document" as those requested in Citizens' eighth motion to compel, so "the legal analysis and surrounding circumstances are precisely the same." [App. M at 4 ¶ 7]

Southern Bell again failed to file an affidavit in support of its privilege claim or any factual documentary support. It

only attached the company's responses to Citizens' eighth motion to compel and the motion to compel Ms. Johnson, chief internal auditor, and Mr. Dwane Ward, author of one set of work notes, to answer deposition questions. [App. M]

In response to Citizens' twelfth motion to compel the production of the internal auditing department's reports of the five completed audits, the company again stated that the facts, issues and legal analysis had been covered in prior filings. [App. N at 4 ¶ 6 & n.2] Southern Bell referred to its response to Citizens' seventh motion to compel. [App. N at 4 n.2] The company also referred the Commission to Ms. Johnson's deposition taken by Public Counsel and the affidavits previously filed by Ms. Johnson as its factual support that the audit reports were privileged. [App. N at 4 ¶ 5] Southern Bell did not, however, attach either of these two documents in support of its motion, but did attach its three prior responses to Citizens' seventh, tenth and eleventh motions. [App. N]

On January 8, 1993, the prehearing officer heard oral argument on whether the audits were privileged. [App. R] All five audits were discussed. [App. R, p. 35] Also discussed were the Human Resource manager's work notes, which are similar to the notes taken by the Human Resource managers' notes at issue herein. [App. R, p. 33]

An in camera review of all of the audits, employee statements and summaries, and human resource department work notes took place in January and February of 1993. [App. A] A

second oral argument was made to the prehearing officer on February 23, 1993. [App. Q] Southern Bell's assertion of privilege for its internal investigation documents was heard by the full Commission at agenda conference on February 16 and 18, 1993. [Apps. O & P]

After the three motions at issue in Commission order PSC-93-1214-FOF-TL and the company's responses were filed, Ms. Nancy White, an attorney for Southern Bell, wrote to Jean Wilson, a Commission staff attorney, stating that the documents, facts, and issues in Citizens' tenth, eleventh, and twelfth motions had been reviewed by the prehearing officer. [App. S] Ms. White wrote that all but the human resource panel work notes had been included in order number PSC-93-0151-CFO-TL. [App. S] At a prehearing conference held on February 23, 1993, the parties discussed the staff's listing [matrix] of outstanding discovery motions and Southern Bell's letter to Ms. Wilson. [App.Q, pp. 8-11] Commissioner Clark stated that she understood Southern Bell's response to identify the specific motions that were still pending.[4] [App. Q, pp. 9-10]

At the full Commission hearing on reconsideration, Southern Bell argued its position as to the privileged nature of all five audits and its internal investigation generally. [App. P, pp.9-16 & App. O, pp. 7-60] Counsel for Southern Bell specifically stated that the fifth audit was included in the documents being

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[4] Ms. White's letter indicates that, unlike the motions at issue herein, Citizens' fourteenth motion was still to be argued.

argued. [App. O, p. 58] Counsel also argued its position on the use of the employee statements and summaries by the human resource department. [App. P, pp. 14-16] Its position and argument did not change.

ARGUMENT

I. THE COMMISSION'S CLARIFYING ORDER IS PROPER

A. The Commission's Clarifying Order Raises No New Issues of Fact or Law.

Southern Bell argues that the Commission's order departs from the essential requirements of law in three respects: (1) the order makes no findings of fact or law; (2) the order appears to require the production of documents that Southern Bell maintains are privileged under both the attorney-client and work product privileges; and (3) the order was issued without an opportunity for a formal hearing under section 120.57 of the Florida Statutes. Petitioner's Brief at 11-12.

The clarifying order identifies Citizens' three motions to compel and Southern Bell's responses, which were omitted in the earlier orders on discovery even though the documents had been reviewed in camera and the arguments had been considered. Order No. PSC-93-1214-FOF-TL.

All of the motions on the audits were ripe for review before the prehearing argument on those motions was held on January 8, 1993. [Apps. A, B & T] The operational review audit mentioned in the clarifying order was the subject of oral argument on Citizens' motion to compel at the prehearing conference. [App. Q,

pp. 35, 50] The prehearing officer conducted an in camera review of all five of the audits in January 1993. [App. A]

Southern Bell specifically referred to the fifth audit in its argument on reconsideration before the full commission. [App. O, pp. 58] The final order on discovery of the audits includes the fifth operational review audit. [App. H at 2 n.1]

Southern Bell is simply wrong -- the Commission did consider the facts and law for the company's claim of privilege for the fifth audit when it reviewed the privilege claim for the other four audits.

Southern Bell is also wrong as to the reports of completed audits, the employee statements and human resource work notes. Ms. White's letter also states that Citizens' tenth, eleventh, and twelfth motions had been addressed by the prehearing officer's in camera review and the prehearing order PSC-93-0151-CFO-TL issued January 28, 1993. [App. S] That letter was discussed at a prehearing conference held on February 23, 1993. The letter acknowledged that the staff matrix properly identified the motions that had been acted upon. [App. Q, pp. 9-11] In its letter, Southern Bell represented that the human resource work notes were reviewed by the prehearing officer and that the company was waiting for the decision. Southern Bell should be estopped from denying its earlier representation to the Commission and the parties who have relied upon its assertion in good faith.

B. The Commission's Clarifying Order Merely Corrects a Clerical Oversight.

The Commission, like a court, has the authority on its own motion to correct an error in any order under its control without hearing provided that the parties cannot suffer and the matters corrected had been covered by prior testimony. Cf. Boyd v. Southeastern Tel. Co., 105 So. 2d 889, 893-94 (Fla. 1958) (order vacating approval of interim rates without hearing was valid as approval order was still under Commission's control and pending final hearing) with Peoples Gas Sys., Inc. v. Mason, 187 So. 2d 335 (Fla. 1966) (holding that the Commission was without authority to modify a territorial agreement four years after its initial order).

Generally, a court at any time may correct, on its own motion or motion of a party, clerical mistakes arising from accidental omissions not affecting the substance of the decision. State, Dep't of Envtl. Reg. v. Apelgren, 611 So. 2d 72 (Fla. 4th DCA 1992) (court's reference to penalty paragraph was clerical error as court had rejected department's proposed penalties, but deletion of defendant was an impermissible substantive change); Yavitz v. Martinez, Charlip, Delgado, etc., 568 So. 2d 103 (Fla. 3d DCA 1990) (reservation of jurisdiction discussed on record but omitted from final order), review denied, 576 So. 2d 295 (Fla. 1991); Willis v. Ryals, 328 So. 2d 475 (Fla. 1st DCA 1976) (property description corrected), cert. denied, 341 So. 2d 1087 (Fla. 1976); Fla. R. Civ. P. 1.540(a); cf. Fla. Admin. Code R. 60Q-2.032 ("The Hearing Officer may enter a corrected order at

any time sua sponte."). The lower court must seek an appellate court's approval if the correction is made during the pendency of an appeal. Fla. R. Civ. P. 1.540(a); but see Luhrs v. State, 394 So. 2d 137 (Fla. 5th DCA 1981) (as no comparable criminal rule for correction of errors existed, trial court could issue a nunc pro tunc order correcting a procedural matter while case was pending appellate review); Apelgren, 611 So. 2d at 73 (Rule 1.540(a) permits correction of clerical errors even pending appeal).

A clerical error can be shown by reference to the record below. Marks v. Wertalka, 475 So. 2d 273 (Fla. 3d DCA 1985) (record may be established by the transcript of what was said in open court or through the submission of proof other than the formal record of the proceedings). Since Southern Bell has affirmatively stated to the Commission that the documents that are the subject of Citizens' tenth, eleventh, and twelfth motions were addressed by the prehearing order and were reviewed in camera, the Commission's clarifying order is proper.

Thus, Southern Bell's first two arguments are without merit. The Commission's clarifying order relies upon findings of fact and conclusions of law expressed in its prior orders, which reviewed these documents and found them not privileged, and ordered their production. There has been no error shown, no injury, and no harm. The supreme court should deny Southern Bell's petition for review.

C. Southern Bell Was Heard.

Southern Bell claims that a formal administrative hearing is required on these motions to determine the facts. Petitioner's Brief at 16. Yet, Southern Bell has failed to point to any fact that was not addressed in the prior orders now pending appellate review. Southern Bell has not stated that the documents covered by Citizens' tenth, eleventh, and twelfth motions are different documents than those reviewed by the prehearing officer, argued at the prehearing conference, or decided by the Commission in the orders on reconsideration. In fact, Southern Bell's letter of February 22, 1993, states that the documents in these three motions were reviewed in camera and the legal issue of privilege determined by the prehearing order. Southern Bell's responses to Citizens' motions state that all the facts and issues concerning these documents had been addressed by prior filings. According to Southern Bell's position before the Commission, nothing new remained to be discussed. Since there were no new facts or legal arguments to be addressed, the Commission's clarifying order was proper.

1. Southern Bell Had a Meaningful Opportunity to be Heard.

Southern Bell was heard. Its pleadings were reviewed by the prehearing officer. Southern Bell did not proffer any new factual evidence with its responses to Citizens' motions -- no affidavits were attached, no records were attached, no depositions were attached. Southern Bell stated that the facts and legal argument had already been reviewed in earlier filings.

As there were no new issues of fact or law, the prehearing officer did not err in relying on the written pleadings for her review. § 120.57, Fla. Stat. (requiring a formal hearing when a substantial interest is at stake and when facts are in issue).

No violation of procedural due process has resulted from the Commission's issuance of a clarifying order without another hearing or oral argument. Traditionally, discovery motions are only argued before a court or the Commission at the tribunal's discretion. Fla. Admin. Code R. 25-22.037 (permitting memoranda with written motions); Fla. Admin. Code R. 25-22.038(4)(a) (prehearing officer may hear argument on pending motions); Fla. Admin. Code R. 25-22.058 (upon written request of a party, commission may grant oral argument in 120.57 proceeding); see U.S. Dist. Ct. N.D. R. 6(a) & (d) (requiring written memoranda with motions and permitting oral argument at court's discretion).

Generally, written motions with responses and the affidavits or depositions attached are sufficient for review of discovery matters. However, Commission rules permit parties to formal hearings to request oral argument by filing a separate request with the pleading. Fla. Admin. Code R. 25-22.058. Southern Bell did not request oral argument for any of the discovery motions filed. It has waived any right it might have had to an oral argument by not filing its request.

Procedural due process only requires a meaningful opportunity to be heard. Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (holding that an evidentiary

hearing is not required prior to termination of disability benefits as the administrative process had adequate safeguards and that requiring a hearing would overburden the administrative process); Housing Auth. of City of Tampa v. Robinson, 464 So. 2d 158, 164 (Fla. 2d DCA 1985) (informal review of employment matter within department was sufficient opportunity for hearing and department's purported failure to respond to petitioner's grievance was not prejudicial error), review denied, 475 So. 2d 695 (Fla. 1985); Millstream Corp. v. Dade County, 340 So. 2d 1276 (Fla. 3d DCA 1977) (upholding dismissal as requirement of prepayment of taxes prior to court hearing did not deny procedural due process).

The U.S. Supreme Court set forth three factors in determining whether procedural due process has been satisfied: (1) the nature of the private interests involved; (2) the risk of an incorrect decision and value of additional safeguards; and (3) the public interest and administrative burdens, including costs of additional procedures. Mathews, 424 U.S. at 335. All that is required is a hearing appropriate to the nature of the case and the capacity of a party to present their case. United States v. Raddatz, 447 U.S. 667, 677, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) (determining that a reviewing court was not required to rehear the testimony taken by a magistrate at the prehearing prior to ruling on a motion to suppress evidence).

Southern Bell is capable of presenting its arguments and factual assertions in written form as contemplated by the rules.

The company did not request oral argument. So, no error has resulted from the Commission's order being issued without oral argument. U.S. Sprint, 534 So. 2d at 700. Because discovery orders on privileged matters are immediately appealable as non-final administrative orders, an incorrect decision may be immediately corrected before any privilege is waived. Finally, the administrative burden involved in scheduling a full evidentiary hearing on every discovery motion would place too great a strain on a time-limited rate case and add substantially to the cost of the case.

Southern Bell had a meaningful opportunity to be heard; it is just dissatisfied with the decision. What it is really seeking is a second opportunity to plug the holes in its earlier arguments by having an additional opportunity to provide factual support for its earlier, inadequate conclusory claims of privilege. This would delay a final decision on appeal until past the time for Citizens to file their testimony and perhaps until after the full hearing in the rate case. Citizens' due process rights to have all the information to which they are entitled before having to file testimony and cross-examine witnesses at the hearing would then be violated.

2. No Evidentiary Hearing Was Required.

Southern Bell is incorrect in its assertion that it has a right to a formal hearing under section 120.57(1) of the Florida Statutes on a prehearing order disposing of a preliminary matter.

U.S. Sprint Comm. Co. v. Nichols, 534 So. 2d 698 (Fla. 1988) (no hearing required for clarifying order); cf. Commission on Human Rel. v. Bentley, 422 So. 2d 964 (Fla. 1st DCA 1982) (preliminary determination of no reasonable cause to believe that an unfair labor practice had been committed did not affect the substantial interest of a party). Southern Bell's interpretation would permit it to have a full blown formal hearing with witness testimony and cross-examination, a recommended order, proposed findings of fact and exceptions, and final order for every interlocutory motion. Clearly, this is not mandated by section 120.57 of the Florida Statutes. U.S. Sprint, 534 So. 2d at 699-700 (substantial interest not affected by clarifying order); see § 120.57(4), Fla. Stat. (section 120.57 does not apply to agency investigations preliminary to agency action); id. § 120.62 (investigative acts and demands).

Southern Bell cites several cases for the proposition that it should be afforded a formal hearing on these discovery motions. The cases are not dispositive because these cases deal with final agency action rather than non-final action. Gadsden St. Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977) (grant of bank license was final agency action affecting the substantial interest of competitor so that competitor was entitled to a formal hearing); Hulmes v. Division of Retirement, Dep't of Admin., 418 So. 2d 269 (Fla. 1st DCA 1982) (affirming department's approval of prehearing officer's finding that a county attorney hired after enactment of successor retirement

system was not a full-time employee and not eligible for benefits under prior system), review denied, 426 So. 2d 26 (Fla. 1983); Central Truck Lines v. King, 146 So. 2d 370 (Fla. 1962) (requiring findings of fact and conclusions of law in all final orders issued after formal hearings). This is a non-final administrative order on preliminary discovery issues. It is not final agency action. These orders come to the supreme court on interlocutory appeal in the midst of a formal 120.57 hearing. A final order in the rate case will be rendered after a full hearing, which is scheduled in January and February, 1994.

Broad discretion vests in the Commission's determination of procedural matters. United Tel. Co. v. Mayo, 345 So. 2d 648, 653 (Fla. 1977) (finding that the Commission's refusal to permit United to introduce complex new evidence after the hearing had started did not depart from the essential requirements of the law, but admonishing the Commission to adopt specific rules for introduction of evidence).

> It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party. NLRB V. Monsanto Chemical Co., 205 F.2d 763, 764.

Id. at 653; but see § 120.68(12)(b), Fla. Stat. (requiring remand if an order is inconsistent with agency rule).

3. Southern Bell Has Not Been Harmed.

Even if it was error not to hold an oral argument, even without a request from Southern Bell, the company could not have been harmed because the facts and law were the same as those argued in earlier pleadings. See City of Pensacola v. Florida Pub. Empl. Rel. Comm'n, 358 So. 2d 589 (Fla. 1st DCA 1978) (harmless error to deny informal proceeding when issue was solely one of law); see generally, Gregory v. Indian River County, 610 So. 2d 547 (Fla. 1st DCA 1992) (harmless error to deny standing to party since party had full opportunity to participate and present evidence and prehearing officer made specific rulings on matters affecting party).

Southern Bell had a meaningful opportunity to be heard through its written responses and before the Commission. See Scharrer v. Department of Prof. Reg., Div. of Real Est., 536 So. 2d 320 (Fla. 3d DCA 1989) (refusal to allow oral argument was harmless error since party had sufficient opportunity to present written evidence); review dismissed, 542 So. 2d 1334 (Fla. 1989). Hence, it has not suffered any injury as a result of the Commission's clarifying order. State v. Seaboard Air Line Ry. Co., 93 Fla. 404, 111 So. 391 (1927) ("The law is also well settled that the railroad commission, like a court, may of its own motion or by request correct or amend any order still under its control without notice and hearing to parties interested, provided such parties cannot suffer by reason of the correction or amendment, or if the matters corrected and amended were embraced in testimony taken at a previous hearing.")

Southern Bell has not shown any departure from the essential requirements of law in the Commission's clarifying order. Its petition should be summarily denied.

D. In the Alternative, the Supreme Court May Remand for Further Findings of Fact.

If the supreme court determines that the fairness of the proceedings or the correctness of the outcome has been impaired by a material error in procedure, the proper remedy is to remand for further hearings. § 120.68(8), Fla. Stat. Remand is not required to correct errors in admitting evidence. Gadsden St. Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977).

II. STATUTORY PRIVILEGES DO NOT RESTRICT COMMISSION ACCESS TO ALL REGULATED MONOPOLY RECORDS.

The company restates its prior argument that the attorney-client privilege and work product doctrine apply to all of the documents that the company has labeled "internal investigation" documents. It cites Upjohn Company v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) as dispositive of the issue of whether these documents are exempt from the Commission's access to all company records under section 364.183 of the Florida Statutes.

Upjohn is not dispositive. Upjohn is based on the federal common-law of attorney-client privilege. Privileges in Florida, however, are statutory. A determination of whether privileges apply in Commission proceedings requires a comparison of: (1)

the Commission's records access statute; (2) the statute governing evidence in administrative procedures; and (3) the Florida Evidence Code.

In 1974, the Legislature enacted the Administrative Procedure Act. Ch. 120, Fla. Stat. The Legislature determined that the formal rules of evidence would not apply to administrative proceedings. Id. § 120.58; England & Levinson, The Florida Administrative Practice Manual, § 1.02 (1979-93). However, to remedy the loss of evidentiary privileges, the statutory privileges were adopted for administrative proceedings in executive agencies and the Department of Administrative Hearings by rule. England & Levinson, Florida Administrative Practice Manual, § 12.18(b) (1993) (citing to Fla. Admin. Code R. 28-5.304 & 60Q-2.2026(3), Fla. Admin. Code). These rules do not apply to Commission proceedings. Citizens of Fla. v. Mayo, 357 So. 2d 731, 734 (Fla. 1978) ("This Commission's procedural rules are a comprehensive body covering their subject matter; hence, the model rules are simply inapplicable to the Commission"); Fla. Admin. Code R. 25-22.034 (discovery rule).

Five years later in 1979, the Florida Legislature abrogated common-law privileges when it adopted the Evidence Code. § 90.102, Fla. Stat.; Ehrhardt, Florida Evidence § 103.4 (1993 ed.). The Evidence Code applies to all proceedings to which the general law of evidence applied before adoption of the code and to civil and criminal proceedings. § 90.103, Fla. Stat.; cf. Potashnick v. Port City Construction Co., 609 F.2d 1101, 1119 &

n.12 (5th Cir. 1980) (adopting the control-group test for definition of "client" in corporate context). Since the general law of evidence did not apply to administrative proceedings before the Evidence Code was adopted, the code does not apply to administrative proceedings. No subsequent enactment has changed this.

The Legislature also set forth a complex statutory scheme for regulating public communication service monopolies. Chs. 350 & 364, Fla. Stat. In that scheme, the Legislature carefully balanced the benefits and burdens of regulated utilities. Utilities would receive the benefits of earning a reasonable profit from operating in designated territories free from competition in exchange for the burden of comprehensive regulatory oversight. The Legislature declared this regulatory compact to be in the public interest and established the Public Service Commission, as a legislative agency, to ensure safe, reliable, and adequate service. Id. §§ 350.001 & 364.01.

In 1982, the Legislature passed a records access statute that granted the Commission access to all company records in order to effectively perform its oversight role. Ch. 82-51, 1982 Fla. Laws 122. The Legislature balanced the Commission's need for access to all company records against a public utility's right to confidentiality for privileged documents. The records access law gave the Commission access to trade secrets, but declared them to be confidential proprietary business records exempt from the public records law. § 364.183, Fla. Stat.; cf.

City of N. Miami v. Miami Herald Pub. Co., 468 So. 2d 218 (Fla. 1985) (evidentiary lawyer-client privilege does not exempt access to public records). Southern Bell's documents, by their description, fall within the presumptively proprietary categories of protected documents.

This makes sense when understood in the context of a rate-setting proceeding, which is a legislative function. The Legislature has set a time limit on rate proceedings. § 364.05, Fla. Stat. (8 months for file-and-suspend; 12 months for final action). In rate proceedings, parties follow an exacting prehearing schedule that requires testimony to be filed between one and three months in advance of the hearing date. Interjecting discovery disputes based on claims of privilege, which are appealable as non-final orders, would require extensions of time as in this case. Every rate case then will involve protracted litigation over whether documents are privileged under the accountant-client, attorney-client or trade secret privileges. In this case, Citizens filed their first motion to compel on April 4, 1992. [App. T] The first prehearing schedule required Citizens to prefile their testimony on November 2, 1992. [App. C] The Commission postponed the hearings until January 1994, in part because of the numerous discovery disputes still pending. [App. D] Subsequent to this order, Public Counsel's filing date for testimony was moved to November 8, 1993. [App. E] Even with the extension, Public Counsel may have to file testimony without a final resolution of his discovery

requests. Clearly, the Legislature considered the time constraints, the competing public policies, and the legislative nature of ratemaking, when it granted the Commission access to all utility records.

Upjohn does not fit within this regulatory scheme. Upjohn held that a client was defined as any employee within a corporation who had information within the scope of his duties and related those facts to the corporation's attorney for the purpose of seeking legal advice. Upjohn, 449 U.S. at 386, 395-397. This overturned the Fifth Circuit Court of Appeal's approval of the control-group test. Cf. Potashnick, 609 F.2d at 1119 & n.12. The Court rejected the reasoning supporting the lower court's application of the control group test: extending the privilege to lower level employees would create a broad zone of silence. Upjohn, 449 U.S. at 395. The Court also set a higher standard of need under the work product privilege for an attorney's notes of oral employee statements. Id. at 401-2.

The problem with applying the Upjohn "client" definition to regulated utilities in this state is that a broad zone of silence will be created to prevent the Commission from finding the facts it needs to protect the public from monopoly abuse. Consider the actions taken by Southern Bell. The company's legal department was placed in charge of the rate case and investigation dockets. Under Upjohn, those auditors and in-house experts selected by the legal department to assist in the internal investigation were employees/clients who had a privilege to refuse to disclose their

communication to counsel, but not the facts they learned. Under the work product rule, those same employees, now "agents of the lawyer" had a privilege to refuse to disclose the substance or facts of what they learned. This effectively silences these employees and withholds the facts from the Commission. Similar situations arising in federal courts have prompted judicial comment. Concerning cost studies produced by in-house experts, the second circuit has observed:

> To begin with it seems plain that merely by asking witnesses to conduct an analysis defense counsel may not thereby silence all the key witnesses on the cost aspects of the fox contracts under either claim of privilege. Were counsel to succeed in such a tactic, the government would never be able to conduct a full and complete investigation of an alleged crime because the critical witnesses would have been effectively silenced, nor for the same reason would the government be able to present all the evidence at trial regarding a defendant's guilt or innocence. In re Six Grand Jury Witnesses, 979 F.2d 939, 945 (2d Cir. 1992).

Concerning discovery of in-house engineering experts in a lawsuit following an air crash, a federal district court remarked:

> A second complicating factor, resulting obviously from the fact that litigation was a certainty, is that General Electric assigned attorneys overall responsibility for everything concerning the accident.
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> . . . .
>
> [I]t is hard to imagine what documents, other than the public NTSB Report, General Electric would be required to produce concerning its findings as to the cause of the accident, given the timing of the first lawsuit (and even if it had been later, the near certainty that any large air crash will result in lawsuits). In re Air Crash Disaster at Sioux

City, Iowa, 133 F.R.D. 515, 520 (N.D. Ill. 1990).

Citizens are faced with a similar situation. Southern Bell's legal department engaged its auditing department, its security department, and in-house experts in systems, programming, operational procedures, and statistics to conduct its internal investigation. [Southern Bell's initial brief in case 81,716 at 7, 9 & 12; and Citizens' initial brief 81,716, att. A to apx. L: Johnson deposition] Southern Bell has silenced their experts under both the attorney-client and work product privileges. While the Legislature may not have contemplated this exact scenario when it granted the Commission access to all company records, it must have envisioned a similar possibility.

A finding that the attorney-client privilege does not prevent Commission access to utility records would not leave utility companies without any immunity from discovery. The Commission has adopted the work product immunity by rule. Fla. Admin. Code R. 25-22.034. A utility could claim that audits conducted under the direction of the legal department were fact work product subject to discovery only on a showing of need. Work product can also be claimed for statements taken from employees by agents acting for the attorney. If the statement was oral and the only writing was the attorney's notes, then a higher standard of need would be imposed under the opinion work product. State v. Rabin, 495 So. 2d 257, 260-63 (Fla. 3d DCA 1986). If the employee statement was a verbatim statement, then the fact work product standard of need would apply. Id. Southern

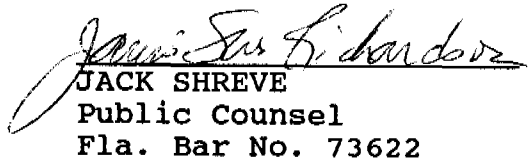
Bell's concern over its need to receive legal advice without fear of automatic disclosure is protected by the work product doctrine. The Commission's need for access to the facts contained in company documents and the memories of company experts would be satisfied. This balance of competing interests was made by the Legislature for Commission proceedings just as it was made for access to public records. Cf. City of N. Miami v. Miami Herald Pub. Co., 468 So. 2d 218 (Fla. 1985).

CONCLUSION

WHEREFORE, Citizens request the supreme court to deny Southern Bell's petition as it has not identified any departure from the essential requirements of law in the Commission's

clarifying order being issued without an evidentiary hearing or oral argument.

Respectfully submitted,



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CERTIFICATE OF SERVICE
CASE NO. 82,399

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished by U.S. Mail or *hand-delivery to the following persons on this 18th day of October, 1993.

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IN THE SUPREME COURT OF FLORIDA

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Petitioner, vs. J. Terry Deason, et al., as members of THE FLORIDA PUBLIC SERVICE COMMISSION, Respondent.	)	Case No. 82,399

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

Florida Public Service Commission Orders PSC-93-1214

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