

IN THE SUPREME COURT OF FLORIDA

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FILED
SID J. WHITE

OCT 18 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY,

Petitioner,

vs.

Case No. 82,399

J. Terry Deason, et al., as
members of THE FLORIDA PUBLIC
SERVICE COMMISSION,

Respondent.

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

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

ROBERT A. BUTTERWORTH
Attorney General

Michael A. Gross
Assistant Attorney General
Florida Bar No. 0199461
Special Projects
Department of Legal Affairs
PL-01 The Capitol
Tallahassee, Fla. 32399-1050
(904) 488-5899

RESPONDENT

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<u>Upjohn v. U.S.</u> , 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)	1,2

STATUTES

Section 90.102, Fla. Stat.	1
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OTHER AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

The Attorney General adopts the statements of the case and facts contained in the respective Responses of the Public Counsel and the Public Service Commission.

ARGUMENT

The Attorney General adopts the arguments of Public Counsel and the Public Service Commission and joins with them in their responses to the Petition of Southern Bell Telephone and Telegraph Company (Southern Bell). To the extent that Southern Bell has attempted to relitigate the prior appeals in Case Numbers 81,487 and 81,716, the Attorney General adopts and incorporates its briefs filed in those cases. However, there is an additional argument, not mentioned in the previous briefs, which merits discussion here.

Southern Bell suggests that the modified subject matter test described in Upjohn v. U.S., 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), sheltering some communications from low level employees, is an appropriate doctrine for construing the scope of Florida's attorney-client privilege. No Florida court, to our knowledge, has adopted the Upjohn test, nor are Florida courts obliged to do so. Briggs v. Salcines, 392 So. 2d 263, 266 n. 2 (Fla. 2d DCA 1980).

The Florida Legislature abrogated common-law privileges when it adopted the Evidence Code, effective July 1, 1979. Section 90.102, Fla. Stat.; State v. Castellano, 460 So. 2d 480, 481

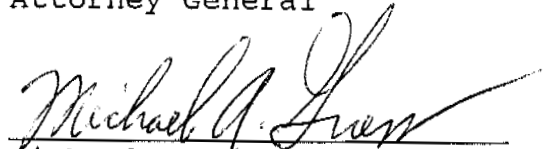
(Fla. 2d DCA 1984); Ehrhardt, Florida Evidence Section 103.4 (1993 ed). Upjohn, decided by the United States Supreme Court on January 13, 1981, a year and a half after the effective date of the Florida Evidence Code, created a federal common-law privilege. Section 90.502, Florida Statutes, adopted before Upjohn, is a statutory privilege and legislative intent controls the scope of the privilege. It is axiomatic that knowledge of Upjohn cannot be imputed to the Legislature in determining legislative intent. Rather, one is compelled to conclude that Upjohn is patently irrelevant in determining the legislative intent underlying Section 90.502, Florida Statutes.

CONCLUSION

For the foregoing reasons, the Attorney General requests this Court to deny Southern Bell's Petition, as it has not identified any departure from the essential requirements of law in the Public Service Commission's clarifying order.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



Michael A. Gross
Assistant Attorney General
Fla. Bar No. 0199461
Department of Legal Affairs
Special Projects
PL-01 The Capitol
Tallahassee, Fla. 32399-1050
(904) 488-5899

CERTIFICATE OF SERVICE

DOCKET NOS. 920260-TL, 910163-TL, 910727-TL, 900960-TL, 911034-TL

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

Charles J. Beck
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Robert Hoeynck
Assistant County Attorney
Broward County Board
of Commissioners
115 S. Andrew Avenue
Suite 423
Ft. Lauderdale, FL 33301

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Grandoff & Reeves
315 S. Calhoun Street
Suite 716
Tallahassee, FL 32301

Michael W. Tye
AT&T Communications of the
Southern States, Inc.
106 East College Avenue
Suite 1410
Tallahassee, FL 32301

Joseph P. Gillan
J.P. Gillan & Associates
P.O. Box 541038
Orlando, FL 32854-1038

Richard D. Melson
Hopping, Boyd, Green & Sams
P.O. Box 6526
Tallahassee, FL 32314

C. Everett Boyd, Jr.
Ervin, Varn, Jacobs,
Odom & Ervin
P.O. Drawer 1170
Tallahassee, FL 32302

Michael J. Henry
MCI Telecommunications Corp.
MCI Center
Three Ravinia Drive
Atlanta, GA 30346

Benjamin H. Dickens, Jr.
Blooston, Mordkofsky,
Jackson & Dickens
2120 L Street, N.W.
Washington, DC 20037

Monte Belote
Florida Consumer Action
Network
4100 W. Kennedy Blvd., #128
Tampa, FL 33609

Chanthina R. Bryant
Sprint
3065 Cumberland Circle
Atlanta, GA 30339

Douglas S. Metcalf
Communications Consultants, Inc.
P.O. Box 1148
Winter Park, FL 32790-1148

Laura L. Wilson
Florida Cable Television
Association, Inc.
P.O. Box 10383
310 North Monroe Street
Tallahassee, FL 32302

Mr. Lance C. Norris, Pres.
Florida Pay Telephone
Association, Inc.
8130 Baymeadows Circle, West
Suite 202
Jacksonville, FL 32256

CERTIFICATE OF SERVICE

DOCKET NOS. 920260-TL, 910163-TL, 910727-TL, 900960-TL, 911034-TL

Patrick K. Wiggins
Wiggins & Villacorta, P.A.
P.O. Drawer 1657
Tallahassee, FL 32302

Michael Fannon
Cellular One
2735 Capitol Circle, NE
Tallahassee, FL 32308

Cecil O. Simpson, Jr.
Peter Q. Nyce, Jr.
Regulatory Law Office
Office of The Judge
Advocate General
Department of the Army
901 North Stuart Street
Arlington, VA 22203-1837

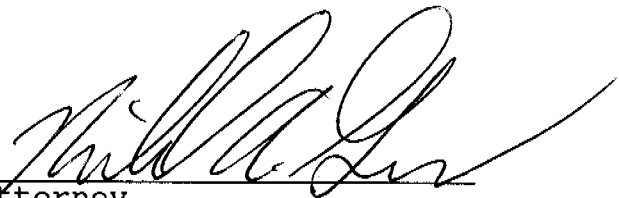
Dan B. Hendrickson
P.O. Box 1201
Tallahassee, FL 32302

Donald L. Bell
104 East Third Ave.
Tallahassee, FL 32303

Floyd R. Self
Kenneth A. Hoffman
Messer, Vickers, Caparello,
Madsen & French, P.A.
P.O. Box 1876
Tallahassee, FL 32303-1876

David M. Wells
Robert J. Winicki
William S. Graessle
Mahoney, Adams & Criser
P.O. Box 4099
Jacksonville, FL 32201

Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0863



Attorney